

Sayali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5549 OF 2019

Jack Rosario Fernandes ... Petitioner
V/s.
Anthony Fernandes and Others ... Respondents

**WITH
WRIT PETITION NO. 5076 OF 2024**

Jack Rosario Fernandes ... Petitioner
V/s.
West Avenue Realtors Pvt Ltd and
Others ... Respondents

Mr. Harish R. Pawar, with Mr. Shivam Gawde, for
Petitioner in both petitions.

Ms. Lipika Biswas, for respondent no. 3 in both
petitions.

Ms. Supriya Petkar, for respondent no. 2 in WP
5549/2019.

Ms. Disha Jain i/b Chinmaya Acharya, for respondent
no. 1 in WP NO.5076/2024 and respondent no. 2 in
WP No. 5549/2019.

Mr. Rudresh Jagdale with MR. Rajdeep Singh N., for
respondent no. 1 in WP/5549/2019.

CORAM : AMIT BORKAR, J.

DATED : MARCH 24, 2026

ORAL JUDGMENT:

1. Rule. Rule is made returnable forthwith.
2. Both the present writ petitions arise from a common judgment and award. However, for the sake of convenience and to avoid repetition, Writ Petition No. 5549 of 2019 is treated as the lead matter. The parties are accordingly referred to by their respective designations as assigned in the said writ petition.
3. The challenge in the present proceedings is directed against the judgment and award passed by the Appellate Court in Appeal No. 87 of 2017. By the said judgment, the Appellate Court has allowed the appeal preferred by respondent No. 1, thereby setting aside the judgment and award rendered by the Co-operative Court in Dispute No. 395 of 2007 and consequently dismissing the dispute filed by the present petitioners.
4. The factual background giving rise to the present petitions, briefly stated, is as follows. The petitioner instituted a dispute seeking declaration, possession, and injunction in respect of the suit premises, namely Flat No. 703, admeasuring approximately 301 sq. ft. carpet area, situated on the 7th floor of A-wing of respondent No. 3 society. It is the case of the petitioner that he was originally a monthly tenant of the Municipal Corporation and was in occupation and possession of one room admeasuring about 650 sq. ft. in Chawl No. 4-A, situated at Staney Fernandes Wadi, Final Plot No. 746, TPS IV, Mahim Division, bearing C.S. No. 1115, D.S. Babrekar Marg, Dadar, Mumbai, which is

hereinafter referred to as the suit premises for convenience. Respondent No. 1 in Writ Petition No. 5549 of 2019 is the son of the petitioner. According to the petitioner, respondent Nos. 2 and 3, namely West Avenue Realtors Pvt. Ltd., who is respondent No. 1 in Writ Petition No. 5076 of 2024, and Staney Fernandes Co-operative Housing Society Ltd., respectively, have wrongfully handed over possession of the suit premises to the said respondent No. 1, though the premises were allotted to the petitioner. Respondent No. 1 in Writ Petition No. 5076 of 2024 is a company engaged in the business of building and development and had undertaken redevelopment of Staney Fernandes Wadi in accordance with the applicable rules and regulations of the Municipal Corporation. Upon redevelopment, the developer allotted permanent alternate accommodation in the newly constructed building to the existing tenants and occupants in lieu of their original premises. Respondent No. 3 is a co-operative housing society registered under the provisions of the Maharashtra Co-operative Societies Act, formed by the tenants and occupants of the said locality.

5. In the year 2004, the Municipal Corporation decided to redevelop Staney Fernandes Wadi by demolishing the existing structures and constructing a new building. Pursuant thereto, the tenants and occupants formed and registered a co-operative housing society and appointed respondent No. 1 in Writ Petition No. 5076 of 2024 as the developer for carrying out the redevelopment project. The terms of redevelopment

contemplated that the existing tenants and occupants would be provided permanent alternate accommodation on ownership basis, free of cost, in the newly constructed building in lieu of their respective old premises. In the course of the survey conducted for the purpose of redevelopment, the petitioner was declared eligible for allotment of permanent alternate accommodation, free of cost on ownership basis, as reflected in Annexure II issued by the Municipal Corporation. In pursuance thereof, an agreement dated 17 February 2005 was executed between respondent No. 1 in Writ Petition No. 5076 of 2024 as promoter, respondent No. 3 society as confirming party, and the petitioner as tenant. Under the said agreement, a flat admeasuring 301 sq. ft. carpet area in the newly constructed building was agreed to be allotted to the petitioner on ownership basis without any monetary consideration. It is the petitioner's case that in April 2006 he came to know that the construction of the building had been completed and that the flats were ready for occupation. Accordingly, through his advocate, he addressed a letter dated 18 April 2006 to the developer and the society calling upon them to furnish particulars of the flat allotted to him. Despite receipt of the said communication, no reply was furnished. The petitioner thereafter learnt that possession of flats had been handed over to several tenants and occupants, and that one such flat had been handed over to respondent No. 1 in Writ Petition No. 5549 of 2019. The petitioner therefore issued a notice dated 19 June 2006 calling upon the developer and the

society to disclose the details of the flat allotted to him and to pay transit rent at the agreed rate of Rs. 4,500 per month till possession was handed over.

6. The petitioner was thereafter orally informed by the office bearers of respondent No. 3 society that Flat No. 703 had been allotted to him as permanent alternate accommodation. Upon verification, the petitioner found that respondent No. 1 in Writ Petition No. 5549 of 2019 was in actual occupation and possession of the said flat. On further enquiry, the petitioner was informed that possession of the said flat had been handed over to respondent No. 1 by the developer and the society.

7. Upon receipt of notice dated 30 August 2006, respondent No. 3 society, by its reply dated 16 September 2006, admitted for the first time that the suit premises stood allotted to the petitioner and that the same was recorded in his name in the society records. The society further assured that it would take steps to secure recognition of the petitioner's rights. It was also stated that the keys and possession of the flat were with respondent No. 1 in Writ Petition No. 5549 of 2019 and that upon the said respondent vacating the premises, possession would be handed over to the petitioner. However, the society did not offer any satisfactory explanation with regard to the alleged occupation and possession of the flat by respondent No. 1.

8. The petitioner thereafter instituted L.C. Suit No. 2587 of 2007 before the Civil Court seeking possession and consequential

reliefs of mandatory and permanent injunction against the respondents and the Municipal Corporation. At the stage of ad-interim relief, the Civil Court, by order dated 17 July 2007, prima facie held that the petitioner was entitled to the accommodation in question and not respondent No. 1. The parties were accordingly directed to maintain status quo, subject to the petitioner approaching the Co-operative Court for appropriate relief within a reasonable time. The Civil Court further held that the dispute fell within the ambit of Section 91 of the Maharashtra Co-operative Societies Act and that it lacked jurisdiction to entertain the suit. Consequently, the plaint was returned for presentation before the appropriate forum, giving rise to the present dispute.

9. Respondent No. 1 in Writ Petition No. 5549 of 2019 resisted the dispute by filing a written statement raising both preliminary and substantive objections. It was contended that the dispute, in its present form, was not maintainable under Section 91 of the Act, as the dispute was essentially a family dispute between the petitioner and his son and did not pertain to the business of the society. It was further contended that he had been in occupation and possession of the premises even prior to redevelopment and continued to remain in settled possession thereafter. The allegations of illegality against the developer and the society were denied, and the petitioner was put to strict proof of his claims. It was further contended that issues relating to redevelopment undertaken by the Municipal Corporation and the

developer could not be made the subject matter of adjudication under Section 91 of the Act. According to respondent No. 1, the dispute pertained essentially to tenancy rights, which fall outside the scope of Section 91. It was also contended that neither the developer nor the society could be directed to hand over possession, particularly when respondent No. 1 himself did not fall within the category of persons contemplated under Section 91. On these grounds, dismissal of the dispute was sought.

10. Respondent No. 1 in Writ Petition No. 5076 of 2024, namely the developer, also filed its written statement opposing the dispute. It was contended that no cause of action had arisen against it. Reliance was placed on Clause 7 of the agreement dated 17 February 2005, under which, upon completion of construction, possession of the building was to be handed over to the society for allotment of flats to its members. It was submitted that once possession of the building was handed over, the developer had no role in the allotment of individual flats. Further reliance was placed on Clause 16 of the agreement, which provided that disputes between family members regarding ownership or possession were to be resolved inter se without recourse to the developer. The allegation that possession had been wrongfully handed over to respondent No. 1 was specifically denied. Respondent No. 3 society, in its written statement dated 21 April 2008, contended that no cause of action was disclosed against it. It was submitted that at the relevant time, the building had not received an occupation certificate,

which was subsequently issued on 22 November 2007. The building was thereafter handed over to the society on 23 November 2007, whereupon the members shifted to the newly constructed premises. The society further contended that the dispute entailed civil consequences involving parties who were not members of the society, and therefore did not fall within the jurisdiction of the Co-operative Court under Section 91. It was also contended that the cause of action, if any, had arisen prior to the society taking over the building. The society denied knowledge of the particulars sought by the petitioner and denied having handed over possession of the suit premises either to the petitioner or to respondent No. 1. It was further stated that the agreement dated 17 February 2005 was primarily between the petitioner and the developer, and the society was only a confirming party thereto. The society relied upon Resolution No. 6 passed in the Annual General Body Meeting dated 13 August 2006, wherein it was recorded that Flat No. A-703 was in the custody of the developer and that the keys had not been handed over to the society. It was further recorded that upon the developer securing vacant possession, the premises would be handed over to the petitioner. The society denied that possession of flats had been handed over to all tenants and occupants as alleged. It was further contended by the society that it was being unnecessarily dragged into a dispute which was essentially between the petitioner and his son. According to the society, the dispute was in the nature of a family dispute and therefore did

not fall within the ambit of Section 91 of the Act. On this basis, dismissal of the dispute with costs was sought.

11. The Co-operative Court, by its judgment and award dated 05 July 2017, allowed the dispute. It held that the act of the developer and the society in handing over possession of the suit premises to respondent No. 1 was illegal and not binding on the petitioner. Respondent No. 1 was declared to be a trespasser having no right, title or interest in the suit premises. The Court further held that the petitioner was entitled to allotment of the suit premises in lieu of his original premises and issued a mandatory injunction directing delivery of vacant and peaceful possession. Aggrieved thereby, the matter was carried in appeal, wherein the Appellate Court framed points for determination on the basis of the rival contentions.

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| 1. Whether the dispute filed by the disputant is maintainable under Section 91 of the MCS Act and whether Cooperative Court has jurisdiction to try and entertain the same. | In the negative |
| 2. Whether the disputant proves that in lieu of old premises, he is entitled for allotment of suit flat i.e. flat No.703 ad measuring 301 sq. ft. carpet area on 7th floor of A Wing in the society? | In the affirmative |
| 3. Whether disputant proves that opponent No.1 is trespasser? | In the affirmative. |
| 4. Whether the Judge, Coop Court was justified in allowing the dispute with cost? | In the negative |

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| 5. | Whether interference of this in the judgment
impugned is warranted? | In the
affirmative. |
| 6. | What order and relief? | As per final
order. |

12. The Appellate Court has, in fact, answered Point Nos. 2 to 5 in favour of the petitioner. This means the Appellate Court accepted that the petitioner is entitled to the flat and also accepted that Opponent No. 1 has no lawful right over the premises. However, despite recording such findings, the Appellate Court proceeded to hold that the dispute itself is not maintainable. The main reason given appears to be that the relationship between the petitioner and Opponent No. 1 is that of father and son. According to the Appellate Court, looking at the pleadings, the dispute was essentially between these two individuals. Since Opponent No. 1 is not a member of the society, the Appellate Court concluded that the dispute does not fall within the scope of Section 91 of the Act. It further observed that the petitioner was not claiming through a member in respect of Opponent No. 1, and therefore the Co-operative Court would have no jurisdiction. This reasoning shows that the Appellate Court treated the matter as a private family dispute and not as a dispute connected with the business of the society.

13. The learned Advocate appearing for the developer submitted that the developer had already completed its part of

the work and handed over possession of the building. According to him, once such possession was handed over, the role and responsibility of the developer came to an end. It was therefore argued that no relief can now be claimed against the developer, as its obligations stood discharged on the date of handing over possession.

14. For the purpose of deciding the issue involved in the present matter, it becomes necessary to refer to and reproduce the provisions of Section 91 of the Maharashtra Co-operative Societies Act, 1960, which read as under.

“91. Disputes. (1) Notwithstanding anything contained] in any other law for the time being in force, any dispute touching the constitution, elections of the committee or its officers conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated or by a creditor of the society, [to the co-operative Court] if both the parties thereto are one or other of the following:-

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society [or the official Assignee of a deregistered society.

(b) a member, past member of a person

claiming through a member, past member of a deceased member of society, or a society which is a member of the society [or a person who claims to be a member of the society;

(c) a person other than a member of the society, with whom the society, has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed under sections 43, 44 or 45, and any person claiming through such person;

(d) a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society;

(e) any other society, or the Liquidator of such a society [or-de-registered society or the official Assignee of such a de-registered society.”

Provided that, an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947, or rejection of nomination paper at the election to a committee of any society, or refusal of admission to membership by a society to any person qualified therefor or any proceeding for the recovery of the amount as arrear of land revenue on a certificate granted by the Registrar under sub-section (1) or (2) of section 101 or sub-section (1) of section 137 or the recovery proceeding of the Registrar or any officer subordinate to him or an officer of society notified by the State Government,

who is empowered by the Registrar under sub-section (1) of section 156, or any orders, decisions, awards and actions of the Registrar against which an appeal under section 152 or 152A and revision under section 154 of the Act have been provided. shall not be deemed to be a dispute for the purposes of this section.

(3) Save as otherwise provided under [sub-section (2) to section 93], no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1).

Explanation 1. - A dispute between the Liquidator of a society or an official Assignee of a de-registered society and the members (including past members, or nominees, heirs or legal representative or deceased members) of the same society shall not be referred to the co-operative Court] under the provisions of sub-section (1).

Explanation 2. - For the purposes of this sub-section, a dispute shall include-

(i) a claim by or against a society for any debt or demand due to it from a member or due from it to a member, past member or the nominee, heir or legal representative of a deceased member, or servant for employee whether such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not;

(iv) a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of condition as the assignment.”

15. Section 91 of the Maharashtra Co-operative Societies Act lays down a special rule for deciding disputes connected with a co-operative society. The section begins with a clear overriding effect. It says that even if any other law says something different, still if a dispute falls within this section, it must be decided only in the manner provided under this Act. In other words, this section gives exclusive power to the Co-operative Court to decide certain types of disputes. The intention of the law is to ensure that disputes relating to co-operative societies are decided in one specialised forum, instead of parties going to different courts and creating confusion. The important part of Section 91 is that the dispute must be one which is “touching” the constitution, elections, management, or business of the society. The word “touching” is of wide meaning. It does not mean only direct or immediate disputes. Even if the dispute has a close connection with the business or working of the society, it will fall under this

section. The business of a housing society is not limited to accounts or meetings. Its main function is to allot premises, manage the property, and ensure that members get possession and enjoyment of their flats. Therefore, any dispute where a member is claiming his right to a flat or complaining that he has been denied possession clearly touches the business of the society.

16. The section further provides that such dispute must be between certain categories of persons. These include the society, its committee, its officers, and importantly, its members or persons claiming through members. A member is directly covered under clause (b). Even a person who claims through a member is also covered. Therefore, the law is not narrow. It covers a wide range of relationships connected with the society. The purpose is to ensure that disputes arising out of membership or transactions with the society are decided within the co-operative Act.

17. At the same time, the section also mentions certain disputes which are not to be treated under Section 91. These include industrial disputes, election matters of a particular nature, and certain recovery proceedings. This shows that the Legislature has carefully excluded specific types of disputes. However, a dispute relating to possession of a flat by a member is not excluded. On the contrary, it is one of the most common disputes which this section intends to cover.

18. Sub-section (3) of Section 91 further strengthens this position. It clearly states that once a dispute falls within sub-section (1), no other Court shall have jurisdiction to entertain such dispute. This means that the jurisdiction of Civil Courts is barred in such cases. The law wants such disputes to be decided only by the Co-operative Court.

19. The explanations attached to Section 91 also make the position clearer. Explanation 2 gives examples of disputes which are included within the section. It includes claims between a society and its members regarding any demand, loss, or obligation. It also includes disputes relating to possession of property. For instance, if a member refuses to hand over possession to the society, that dispute is covered. From this, it can be understood that disputes relating to possession of premises are well within the scope of Section 91.

20. If the entire section is read as a whole, the scheme becomes clear. First, the dispute must be connected with the working or business of the society. Second, the parties must fall within the categories mentioned. If both these conditions are satisfied, then the dispute must be decided by the Co-operative Court and not by any other Court.

21. Applying this understanding to the present case, the petitioner is a member of the society. His grievance is that though he is entitled to a flat after redevelopment, possession has not been given to him. Instead, another person is occupying the flat.

This grievance directly relates to his rights as a member. It also relates to the obligation of the society to allot and deliver possession of the premises. Therefore, this dispute clearly touches the business of the society. The fact that the person in possession is the son of the petitioner does not change the nature of the dispute. The Act does not say that if there is a family relationship, the dispute automatically goes outside Section 91. What is important is the real issue. Here, the real issue is whether the society has fulfilled its obligation to give possession to its member. The presence of a family member in possession is only a factual aspect. It does not take away the jurisdiction of the Co-operative Court. Further, even if respondent No. 1 is not a member of the society, the dispute still involves the society and its member. The society cannot avoid its responsibility by saying that a third person is in possession. The member is entitled to look to the society for enforcement of his rights. Therefore, the dispute continues to remain one between the member and the society, which squarely falls within Section 91.

22. Thus, when the provisions of Section 91 are properly understood, it becomes clear that the present dispute is maintainable before the Co-operative Court. The approach of treating it as a simple family dispute overlooks the real nature of the claim. The law requires the Court to see the substance of the dispute and not merely the relationship between the parties. In this view of the matter, the reasoning adopted by the Appellate Court in holding that the dispute is not maintainable cannot be

sustained. The dispute satisfies both the essential conditions under Section 91. It is a dispute touching the business of the society, and it is between a member and the society along with connected parties. Therefore, the Co-operative Court had full jurisdiction to entertain and decide the same.

23. In my view, the entire approach adopted by the Appellate Court in holding that the dispute is not maintainable is not correct. The reasoning appears to proceed on a misunderstanding of the legal provisions governing such disputes. The Court has focused only on the relationship between the parties and has not properly examined the nature of the rights claimed and the obligations arising under law.

24. On careful reading of the dispute, it becomes clear that the petitioner was seeking to enforce his rights as a member of the housing society. There is no dispute that the petitioner was a member of respondent No. 3 society. It is also not in dispute that during redevelopment, the petitioner handed over possession of his old premises for the purpose of reconstruction. Such handing over was not unconditional. It was done under an arrangement where the developer and the society were required to reconstruct the building and then return possession of the new premises to the member. In such a situation, once a member gives up possession for redevelopment, both the developer and the society become bound to return the corresponding premises to that member. This obligation arises from the agreement as well as

from the nature of redevelopment itself.

25. Further, under the scheme of co-operative housing law, once a person is admitted as a member of a housing society, he is entitled to occupy the premises allotted to him. A member without possession is not a normal or acceptable situation in co-operative law. A housing society exists for the benefit of its members, and its main function is to provide and maintain premises for them. If a member is kept out of possession, it directly affects his rights as a member. This legal position has been clearly recognized in judicial decisions, including the case of *Atomica Co-operative Housing Society Ltd. Vs. B. R. Ballal* (1988) 2 Bom CR 104, where it has been held that a member is entitled to the premises and cannot be denied possession.

26. This principle has been further affirmed in later decisions. In the case of *Siddharth Holding Pvt. Ltd. and another Versus Saidale Co-operative Housing Society Ltd. and others*, (2003) 6 Bom CR 857, this Court has followed the same reasoning and held that a member cannot continue only on paper without being given actual possession of the premises. The right to membership carries with it a corresponding right to occupy the allotted premises. Therefore, the society cannot avoid its obligation by merely recognizing a person as a member while denying possession.

27. Apart from the statutory position, in the present case, the rights of the petitioner also arise from the agreement executed

between the petitioner, the developer, and the society. This agreement clearly provides for allotment and delivery of the newly constructed premises to the petitioner. The learned Advocate for respondent No. 1 argued that possession had been given to respondent No. 1 even before the society was registered, and therefore the dispute is only between the petitioner and respondent No. 1. However, this submission does not take into account the entire sequence of events and the legal obligations arising thereafter.

28. The material on record shows that the society came to be registered in the year 2004. The agreement executed thereafter clearly records that possession of the reconstructed premises is to be handed over to the member. This creates a binding obligation on the society as well as the developer. Such obligation is not only statutory but also contractual in nature. Even if it is assumed that respondent No. 1 was in possession at some earlier point of time, that by itself does not defeat the rights of the petitioner. The society cannot avoid its responsibility by stating that possession was with someone else before it took over the building.

29. Both the Co-operative Court and the Appellate Court have recorded a clear finding that respondent No. 1 has no right, title, or interest in the suit premises. Once such a finding is recorded, the possession of respondent No. 1 cannot be treated as lawful. It must be treated as unauthorised possession. In simple terms, he

is in the position of a trespasser. If a trespasser is occupying the premises, the responsibility still lies on the society and the developer to ensure that possession is delivered to the rightful member. The presence of a trespasser does not change the nature of the dispute.

30. Therefore, when the matter is looked at properly, the real dispute is between the petitioner, who is a member of the society, and the society itself. The petitioner is asserting his right to receive possession of the flat which is allotted to him. This directly concerns the business of the society, because the primary function of a housing society is to allot and deliver premises to its members. The developer is also connected with this obligation due to the agreement and redevelopment arrangement. Thus, the dispute clearly touches the business of the society.

31. The reasoning of the Appellate Court, therefore, does not align with the settled legal position. The Appellate Court appears to have viewed the matter only from the angle of possession of respondent No. 1. It assumed that since respondent No. 1 is in unauthorised possession and is a trespasser, the dispute does not concern the society. This approach is not correct. The presence of an unauthorised occupant does not take the dispute outside the scope of co-operative jurisdiction.

32. In my view, the core issue in the present case is whether the petitioner, as a member of the society, is entitled to get back possession of the premises after redevelopment. This right flows

from the statute, the bye-laws, and the agreement executed between the parties. The relief of possession is only a consequence of this main right. It is well settled that for deciding jurisdiction, the Court must look at the main relief and the real nature of the dispute, and not merely at incidental aspects. The Appellate Court itself has accepted that the petitioner is entitled to the flat and that respondent No. 1 has no right to remain in possession. Once these findings are recorded, it necessarily follows that the dispute is maintainable.

33. The Appellate Court has thus accepted the case of the petitioner on merits but has still dismissed the dispute on the ground of maintainability. This results in a clear inconsistency. Having held that the petitioner is entitled to the flat and that respondent No. 1 is a trespasser, the Appellate Court could not have allowed the appeal and dismissed the dispute. Such a conclusion does not logically follow from its own findings.

34. Hence, for the reasons stated above, the petitions deserves to be allowed.

35. Hence, the Rule is made absolute in terms of prayer clause (a).

(AMIT BORKAR, J.)