(1970) 04 BOM CK 0019

Bombay High Court

Case No: Special Civil Application No. 2323 of 1968 with Miscellaneous Civil Application No. 93 of 1969

Satpalsing Arora		APPELLANT
	Vs	
Santdas Prabhudas Malkani		RESPONDENT

Date of Decision: April 3, 1970

Acts Referred:

- Constitution of India, 1950 - Article 226, 227, 228

Citation: (1971) 73 BOMLR 777

Hon'ble Judges: S.P. Kotval, C.J; Palekar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

S.P. Kotval, C.J.
The Special Civil Application No. 2323 of 1968 and Miscellaneous Civil Application No. 98 of 1969 are substantially between the same parties and arise out of the same subject-matter and may therefore be conveniently disposed of together.

2. The Ishwarbhavan Cooperative Housing Society constructed a building known as Ishwarbhavan situated at Churchgate, "A" Road, Bombay. Santdas Prabhudas Malkani respondent No. 1 became a member of the society and was allotted flat No. 2A in that building on a rental of Rs. 190 per month. The flat consists of two main rooms, bath rooms and a kitchen separated by a corridor and has a verandah in front. Malkani and his wife Mrs. G.S. Malkani were living in this flat. In October 1961 Malkani advertised in the local papers announcing that paying guest accommodation was available. Pursuant to that advertisement Setpal Singh Arora the petitioner in Special C.A. No. 2328 of 1968 entered into an agreement on November 1, 1961 and took a room in flat No. 2A as a paying guest. This agreement was terminated on January 4, 1962 and within less than a month thereafter a second agreement was entered into, The second agreement was in

shape of a letter dated February 1, 1962 written by Mrs. Malkani entitled "Faying Guest Agreement". By this agreement Arora was given one room- the front room of this flat (which we are told admeasures 16 1/2 ft. X 11 ft. and has three doors) in consideration of Arora paying Rs. 200 per month in advance on or before the third of every month.

3. It appears that Arora continued to use this room for various purposes and ultimately a dancing class was started in that room to which Malkani and his wife objected because it caused them much inconvenience and harassment. Therefore, on April 28, 1964 the second agreement was terminated by a notice and immediately Arora filed a suit being Suit No. 2280 of 1964 before the City Civil Court. As we have mentioned the second agreement dated February 1, 1962 was entered into between Arora and Mrs. G.S. Malkani and it is one of the points in dispute as to who was the real contracting party, Mrs. Malkani or Mr. Malkani, Arora maintaining that it was Mrs. Malkani. We shall advert, to the contents of the agreement when we discuss that point. That is why when the Civil Suit No. 2280 of 1964 was filed it was Mrs. Malkani who was made a defendant to the suit and Arora claimed an injunction in the suit restraining her from taking possession of the suit premises without the due process of law. The suit was filed on April 29, 1964 and Arora the plaintiff therein applied for and obtained an ex-parte interim injunction restraining Mrs. Malkani from taking possession of the room given to Arora. The injunction was served on her on May 14, 1904 but it appears that nonetheless Arora was dispossessed on May 17, 1964. What probably appears to have happened is that the respondent Malkani who has always been claiming that the agreement was only a leave and licence, that Arora was his licensee and that the flat belonged to him, exercised his right as the owner of the flat. Against this dispossession Arora complained to the City Civil Court and on August 6, 1964 he was successful in obtaining an order from that Court ordering that possession of the room should be restored to him. That order dated August 6, 1964 by Judge Hattangadi is at exh. B. Against that order Mrs. Malkani filed an appeal to this Court, but the appeal was summarily dismissed and possession was restored to Arora some time in October 1964,

4. The next thing that happened in this sordid talc of litigation between the parties was that Arora filed an application for fixation of standard rent in respect of this room before the Court of Small Causes at Bombay. This application was filed in January 1965. At this stage it seems that Mr. Malkani respondent No. 1 before us decided to enforce his own rights to the flat and he along with his wife filed a suit in the Court of Small Causes for compensation amounting to Us. 1,900 against Arora for a certain period. On September 2, 1966 he also raised a dispute u/s 91 of the Maharashtra Co-operative Societies Act making Arora as defendant No. 1. In that dispute which subsequently came to be registered as a suit Malkani claimed possession from Arora on the ground that Arora was his licensee and that the licence had been validly terminated by a notice. The cooperative society was made defendant No. 2 in the suit but throughout remained ex-parte. On May 14, 1968 the Registrar"s Nominee to whom the dispute was referred for adjudication gave an award whereby he upheld the claim of Malkani the plaintiff in the suit and ordered

Arora to hand over possession. Arora went up in appeal to the Maharashtra State Co-operative Tribunal, Appeal No. 175 of 1968, but by judgment dated October 30, 1968 that appeal was also dismissed. It is against this judgment in appeal and the award dated May 14, 1968 that Special Civil Application No. 2323 of 1968 is filed. In order to complete the narration of facts it is also necessary to state here that the application for fixation of standard rent filed by Arora before the Court of Small Causes in January 1905 was disposed of by that Court on August 14, 1908. For default of appearance of Arora the application came to be dismissed. The Civil Suit No. 2280 of 1964 filed by Arora is, however, pending in the City Civil Court. These are the facts pertaining to Special Civil Application No. 2323 of 1968.

5. After Special Civil Application No. 2323 of 1968 was filed in this Court Arora the petitioner therein obtained an order of stay in his favour and Malkani moved this Court for vacating that stay. The matter came up for hearing before a Division Bench of this Court consisting of Mr. Justice K. K. Desai and Mr. Justice Vaidya on September 24, 1969 and a consent order was obtained upon undertaking being given by Arora to the Court. The undertaking was as follows :-

The Petitioner (Respondent) (Arora) undertakes not to part with the possession of the property.

In Miscellaneous Civil Application No. 93 of 1969 Malkani complains that this undertaking has been breached. He has alleged that Arora parted with possession of the room in question to one Professor Banerjee enabling the latter to start dancing classes in that room. That Professor Banerjee affixed his own sign board on the door of the said room reading "Prof. Banerjee"s Dancing Classes" and started the business of running dancing classes from about the first week of October 1969. It was also alleged that Professor Banerjee was sleeping in that room and was harassing Malkani in various ways. He fixed a cabin for dancing in the said room and many persons began to visit him for learning dancing and all this was accompanied by the playing of gramophone records. The electricity bill went up on account of the electric gramophone records being played. Malkani complained that the said business disturbed his rest and peace and that "the electric gramophone has proved as a brain washing machine for the petitioner and his family in mid-day sleeping hours as well as other hours of the day as the same records are being repeated for the practice of the dancing partners". He also alleged that advertisements appeared in the Evening News of India in the name of Professor Banerjee regarding the dancing classes and he has reproduced one such advertisement of October 21, 1969. He also alleged that at a subsequent stage the name of the dancing class was changed to "Naz Dancing Classes".

6. These allegations have been denied by Arora. He has stated that Professor Banerjee was long established in the business of conducting dancing classes and that therefore Arora has employed him as he intended to have his help and experience in holding shows and contests and that he had informed Malkani accordingly by his letter dated

October 25, 1969. He has stated that the board was of Naz Dancing Academy to which Professor Banerjee was a part time employee. He has admitted that the students who desired to learn dancing did come and gramophone records were played on the electricity in the room. He has denied that electricity bills have increased substantially but that electric current was one of the amenities provided by Malkani when giving the room to him. As regards the advertisement in the Evening News of India he has alleged that it does not show that he had parted with possession of the premises to Professor Banerjee. He reiterated that he had employed Banerjee for the Naz Dancing Academy of which he is the proprietor.

7. Before we consider the contentions raised by the petitioner in Miscellaneous Civil Application No. 93 of 1969 it will be convenient to consider and dispose of first the dispute on the merits between Arora the petitioner and Malkani the respondent No. 1 in Special Civil Application No. 2323 of 1968. Both before the Registrar''s Nominee as also before the Maharashtra Cooperative Tribunal several contentions were raised in order to defeat the suit filed by Malkani claiming possession of the room. These contentions have been substantially reiterated in the petition and have been argued before us on behalf of Arora by Mr. Mirchandani. His submissions are three in number.

(1) Firstly that the second agreement dated February 1, 1962 whereby Arora was let into possession of the room for a second time was really an agreement with Mrs. Malkani and not with the plaintiff in the suit Mr. Malkani, with the result that the proper party has not raised the dispute and therefore the suit is liable to be dismissed.

(2) The second contention is that having regard to the provisions of Section 91 of the Maharashtra Co-operative Societies Act which is only concerned with disputes touching the business of a society, the dispute raised by Malkani before the Registrar''s Nominee is not one touching the business of the society. The agreement itself is between a member and a stranger such as Arora is and is with reference to the letting or licensing of the room and that does not touch the business of the society. It was also urged incidentally that if the first point succeeds that Malkani is not a licensor of Arora then also the dispute being between Mrs. Malkani and Arora neither is a member of the society and therefore Section 91 would not apply.

(3) Thirdly, it was urged that the agreement is not an agreement to create a licence but it evidences the grant of a sub-lease and is therefore not within the jurisdiction of the Co-operative Societies Act at all but Malkani ought rightly to have applied u/s 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, and filed his claim before the Court of Small Causes at Bombay, We would first dispose of these contentions.

8. On the question whether the agreement dated February 1, 1962 was an agreement with Mrs. Malkani or Mr. Malkani, it seems to us that the point raised is a clear after-thought, as will be seen from a mere perusal of the petition itself. The petitioner is Arora and the respondents to the petition are Santdas Malkani, respondent No. 1, the

Ishwarbhavan Co-operative Housing Society Ltd., respondent No. 2 and the members of the Maharashtra State Co-operative Tribunal being respondents Nos. 3 and 4. With reference to these parties Arora has stated in the petition in para. 2 :

With a view to circumvent the provisions of law, a Paying Guest Agreement was at first entered into between the parties dated 1-11-1961; later on another agreement dated 24-1-1962 was entered into between the parties, copy whereof is hereto annexed and marked as Ex. "A".

(Italics are ours.)

Therefore, the very averment in the petition was that the first agreement as well as the second agreement were between the parties to the petition. Mrs. Malkani is not a party to the petition. There was, therefore, no occasion what-so ever for respondent No. 1 Malkani to prove that Arora was his licensee as alleged.

9. But when we turn to consider the paying guest agreement the matter is clinched. No doubt the letter is addressed to Mrs. Malkani and signed by Arora but the main paragraph in that letter, para. 2 contains the following recitals:

At my suggestion you have permitted me to stay in a furnished room with separate entrance of your husband"s flat No. 2-A, Ground floor, Ishwar Bhavan, A Road, Churchgate, Bombay as your paying guest with morning tea free, electricity for lighting, fan cleaning and conservancy of the room. I herein expressly clarify that I shall not be deemed to be in exclusive possession of the room or any portion of your husband"s flat and this agreement does not constitute or create any tenancy or sub-tenancy rights in my favour in respect of the room or any portion of your husband"s flat, and the permission as per this paying guest agreement conferred by you on me is personal which cannot be transferred or assigned by me in favour of anyone else. There will be duplicate keys of separate entrance of the room out of which one will remain with me and the other with you and I shall not change the lock of the separate entrance. I shall use the room as paying guest fundamentally for my residence but however I may do some business office work also in it and visitors coming to meet me in the said room so long the neighbours, the society of the building or any authorities do not object to it and in the event of such objection being raised I shall immediately stop my off ice work and you will be immediately at liberty to prevent other persons coming in the room through the separate entrance and I shall use the room for residence only till the remaining period of the month until the continuance of the agreement. If during the hours between 10 a.m. to 0 p.m. if your husband so desires to receive his visitors or clients in the said room in which I shall be paying guest, he shall be entitled to the same and I shall make no grievance of it and I shall not claim any reduction in the paying guest charges agreed upon by me by this agreement.

(Italics are ours.)

Thus though the transaction was entered into between Mrs. Malkani and Arora it is clear that Arora distinctly understood that the Hat belonged to Mr. Malkani and that Mrs. Malkani was merely giving it on licence to him on behalf of her husband. Otherwise Mrs. Malkani would have no locus standi whatsoever to grant any right, title or interest in this flat to Arora once the ownership of the flat vested in her husband. The fact that the husband was the owner was known to both the parties to the agreement is clear from the words we have italicised above. In the face of these clear recitals in the agreement it will be a travesty of facts to say that Mrs. Malkani gave Arora any rights in the room. She had no right in the flat and could confer none on Arora. It is clear that whatever rights she gave she gave on behalf of her husband. The society who are parties to the petition unfortunately have not filed a return and that has enabled Arora at a late stage to develop this argument. As we have shown the contention is not at all raised in the petition filed before us.

10. Moreover, it is clear that Arora in his evidence before the Registrar''s Nominee admitted that his agreement was with Mr. Malkani and not his wife. Unfortunately the evidence has not been incorporated in the paper book and we have not had the advantage of looking at it but that such evidence was given is clear from the finding of the Tribunal in para. 9 of its judgment as follows :

Another point raised by Mr. Makhijani was that his agreement in respect of the room were with respondent 1''s wife, and that consequently the dispute was between her and the appellant and not with respondent 1 and the appellant. Respondent 1 has stated that his wife acted as agent in this agreement. The same appears to have been the position accepted by the appellant himself.

It is clear therefore that Arora had admitted that when entering into the agreement Mrs. Malkani was acting as the agent of her husband. Having admitted that we are not surprised that this point Was never raised in the arguments before the Registrar''s Nominee. It was only raised before the Tribunal and we have already shown what was the answer of the Tribunal in para. 9 of its judgment. We may say also that this is an additional reason for rejecting this contention. It was not raised before the Registrar''s Nominee nor has it been raised in the petition before us. It was only in the arguments before us that Mr. Mirchandani raised it. However, in our opinion, even on the merits the contention cannot for a moment be sustained having regard to the very terms of the agreement.

11. Then we turn to the contention based upon the provisions of Section 91 of the Maharashtra Co-operative Societies Act. That gives rise to a question of jurisdiction. Section 91(1) provides as follows (We quote only the relevant portion):

91. (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office-bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to

the dispute...to the Registrar, if both the parties thereto are one or other of the following:-...

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society;...

(2) When any question arises whether for the purposes of the foregoing sub-section, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final.

The argument on the question of jurisdiction of the Registrar''s Nominee has been two-fold. The first is to emphasise the wording of Clause (b) "a member, past member or a person claiming through a member, past member..." and to urge that it was Malkani who was a member of the society and not Mrs. Malkani and that therefore if the agreement entered into by Arora was with Mrs. Malkani then it was not a dispute between a member or a person claiming through a member at all and therefore would not fall within the ambit of Section 91. That question need not detain us any longer for we have already held above that upon a fair reading of the agreement between the parties it is clear that the agreement was between Malkani and Arora and that Mrs. Malkani was merely acting for and on behalf of her husband or as his agent. That disposes of one part of the objection to the jurisdiction of the Registrar''s Nominee. The other part is based on the words used in Sub-section (1) of Section 91 "touching the business of a society" and in this connection reliance was placed upon a recent decision of the Supreme Court in D. M. Co-op. Bank v. Dalichand A.I.R.[1969] S.C. 1820 : 72 Bom. L.R. 413. It was urged that a dispute arising out of the agreement dated February 1, 1902 is a dispute regarding the letting or licensing of this flat but it has to be established what is the business of the society before it can be held that the dispute is touching the business of the society. It was urged that it has not been established in the present case that it was the business of the Ishwarbhavan Co-operative Housing Society, either to let out or control the letting out of flats which it gave on ownership basis to its members or allottees.

11. No doubt in the Deccun Merchants Cooperative Bank''s case the Supreme Court was called upon to consider what was the meaning of the expression in Section 91 of the Maharashtra Co-operative Societies Act "touching the business of the society." The Supreme Court pointed out that that clause appears in a particular context. It appears in the context of the preceding clauses namely "any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management" and then follow the words "or business of a society". The Supreme Court further pointed out that there were five kinds of disputes contemplated by this opening clause namely, (1) any dispute touching the constitution, (2) re: elections of the office-bearers of a society, (3) re: conduct of general meetings, (4) re: management of a society and lastly (5) disputes "touching the business of a society." Reading the last, clause in this juxtaposition with the preceding clauses they held that (p. 1325) :

. ..the word "business" in this context does not mean affairs of a, society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or ether similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws.

12. Applying this principle therefore it is necessary to see what was the business of this society before we decide whether the dispute between the parties to the petition was touching that business. The bye-laws of this co-operative housing society were not part of the paper book, but they have been printed in the form of a booklet and the booklet is made available to us. A reference to the following bye-laws will show that hiring or letting of a building or any part thereof or creation of leases or tenancies was an integral part of the business of the society. The very name of the society itself is eloquent. It is a co-operative housing society and it is well known that housing societies do business in letting, subletting or creating tenancies in the building which they construct and allot to their members, but the objects clause in bye-law No. 2 makes all this further clear. The objects-clause is as follows:

2. The objects of the society shall be :-

(a) To engage in the business of real estate observing principles of co-operation for the benefit of its members in particular and purchase and sale of land and/or buildings, owning, buying, selling, hiring, letting, subletting, renting, exchanging, leasing, sub-leasing... accepting lease, tenancy or sub-tenancy...

(f) To do all things necessary or expedient for the attainment of the objects specified in these bye-laws.

The committee has also power to frame by-laws and to provide forms which are necessary in consequence of the provisions of the Rules or by-laws, vide By-law No. 53(i) and (m) and pursuant to this power the managing committee of the society has prescribed a form-Form A-which is printed at the end of the booklet, in which the following regulation has been made :

Regulation No. 4: No tenant shall assign, underlet, vacate or part with the possession of tile tenement or any part thereof without the previous consent in writing of the society.

Regulation No. 5 says "each tenant will comply with and satisfy all regulations, by-laws, rules and conditions...". At the end of the Form it is prescribed that the tenant has to enter into an agreement to take the tenement subject to the Regulation which he agrees to observe and perform and by which he agrees to be bound. Therefore, it is clear that the bye-laws of this co-operative housing society become a part of the agreement between the member and the society and any breach of those bye-laws may affect the grant of the tenancy or allotment of the flat to its member. At any rate it is clear that the business of

the society is of housing and in particular the leasing or sub-leasing of its tenements and the creation of tenancies and sub-tenancies and with that end in view the Form prescribes that no tenant shall sublet without the permission of the society. Therefore the business of the society was directly concerning the letting of the premises allotted to Malkani. Since the prohibition is only against letting or sub-letting of the premises, licensing is permitted without the permission of the society and that is why the present licence was entered into between Malkani and Arora. When Arora raised the plea that Malkani had given him a tenancy the dispute thus raised became directly one touching the business of the society.

13. Incidentally a perusal of these bye-laws itself suggests that normally Malkani could not have entered into an agreement of lease which might jeopardize the very allotment of the flat to him. If he could not legally sub-lease at all without the permission of the society it is most unlikely that he would do it and incur the possible forfeiture of his own tenancy or other penalties. That consideration supports our decision on the first point with which we have already dealt. But as to this point we will presently have something more to say.

14. For these reasons we hold that the dispute which had arisen between Malkani and Arora was a dispute concerning a member of the society. It is not in doubt that Malkani is a member of the society. We have already held that the agreement was between Malkani and Arora and Mrs. Malkani was merely acting as the agent of Malkani. That it was touching the business of the society is also clear beyond any doubt from the bye-laws.

15. Apart from all this it seems to us that the question whether a dispute as contemplated in Section 91(1) of the Act exists or does not exist is not a matter which Arora the petitioner could have raised before the authorities below. That is an additional reason for rejecting the contention on this point. We have already referred to the provisions of Section 91, Sub-section (2) to the effect that where a question arises under Sub-section (1) whether a matter referred to him for decision is a dispute or not, "the question shall be considered by the Registrar whose decision shall be final." The jurisdiction therefore to decide whether a dispute of the nature contemplated by Sub-section (1) exists or not, is in terms conferred upon the Registrar and his decision is made final. It does not appear from the whole of this statute that any other authority is vested with jurisdiction to decide this particular issue whether a dispute as contemplated by Section 91(1) has arisen or not. This is further made clear by the provisions of Section 93(1) which prescribes the procedure for the settlement of the disputes which have arisen and Sub-section (1) says :

If the Registrar is satisfied that any matter referred to him or brought to his notice is a dispute within the meaning of Section 91 the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a nominee,...

The opening words of Sub-section (1) of Section 98 therefore make it absolutely clear that when a dispute arises within the meaning of Section 91 it has to be referred only to the Registrar and it is the Registrar alone who is to be satisfied that it is a dispute. This

section which is complementary to Section 91 makes the meaning of the latter section very clear. Therefore, it is only after the determination contemplated by Section 91, Sub-sections (1) and (2) that any further proceeding in the dispute can go on, but the initial issue as to jurisdiction whether there is a dispute or not as contemplated by Section 91 has to be determined and determined by the Registrar alone first. We do not think therefore that such an issue can at all be raised or be considered, before the Registrar''s Nominee, because the jurisdiction of the Registrar''s Nominee only commences after the Registrar is satisfied that a dispute within the meaning of Section 91 has arisen by virtue of Section 93, Sub-section (1). We are fortified in the view we have taken of these provisions by a decision of this Court in I.R. Hingorani Vs. Pravinchandra Kantilal Shah, . Considering the same provisions the Division Bench in that case held as follows (p. 310) :

...The jurisdiction of the Registrar or his Nominee to decide a dispute is, therefore, dependent on the Registrar being satisfied that such a dispute exists. The Registrar cannot, however, come to the conclusion that a dispute exists unless he first applies his mind to the matter. The words used in Sub-section (2) of Section 9] are; ''When any question arises'' and not ''when any question is raised''. The question whether a dispute exists will arise as soon as the Registrar applies his mind to the matter in order to satisfy himself about the existence of a dispute within the meaning of Section 01. His satisfaction on this point will, therefore, be equivalent to his decision within the meaning of Sub-section (2) of Section 91. If he decides that a dispute exists, then he will take further action under Sub-section (1) of Section 93 to decide the dispute himself or refer it for disposal to his Nominee. It has been conceded before us that the question about the existence of a dispute has to be decided by the Registrar judicially and that the proceeding before him is a quasi-judicial proceeding. This necessarily implies that the Registrar must hear the parties before he decides or satisfies himself about the existence of the dispute... It is only after the Registrar has heard the parties or given them an opportunity of being heard that he can decide or satisfy himself whether a dispute within the meaning of Section 91 exists. It is his decision so arrived at which will be final under Sub-section (2) of Section 91 of the Act.

(Italics are ours.)

16. In the present case it is clear that the Registrar did initially decide that a dispute existed and it was only upon that decision of his that the matter came to be referred to the Registrar''s Nominee and later on went in appeal to the Tribunal. Now the Registrar having decided that a dispute exists we do not think that it was open to the parties to raise that question a second time before the Registrar''s Nominee and virtually the whole question of jurisdiction and the discussion upon it in the judgment of the Registrar''s Nominee as also before the Tribunal in appeal, in our opinion, was uncalled for, because it was not the jurisdiction of the Registrar''s Nominee at all to decide that question. The decision had already been taken by the Registrar and so far as that decision was concerned it was never challenged by Arora the petitioner before us. We do not think therefore that it is open to him. now to raise that question.

17. We may add here that the Tribunal, though it has undertaken to pronounce upon this issue as to jurisdiction, was in no better position than the Registrar''s Nominee. It was after all hearing an appeal against the award of the Registrar''s Nominee and its jurisdiction was coterminous with the jurisdiction of the Registrar''s Nominee. If the Registrar''s Nominee had no jurisdiction to hear the issue as to whether a dispute as contemplated by Sub-section (I) of Section 91 had arisen at all, we do not think that the Tribunal in appeal could also have heard or decided it. For this additional reason therefore we think that this contention raised on behalf of Arora must fail.

18. Mr. Mirchandani contended that this point which he has raised is a point of fundamental importance. It is a point of jurisdiction and affects the very power of the two Tribunals below to decide at all and that therefore in a writ petition he would be entitled to raise it. The contention is based upon the general principle which no doubt Courts have accepted but we do not think that we can accept such a contention in the face of the positive provisions of the Co-operative Societies Act. Here is a special law providing a complete code for decision of all matters connected with the subject of co-operation. A special forum has been indicated for decision of disputes arising under that Act and the Legislature has also indicated that first of all the issue whether there is a dispute at all such as is contemplated by Section 91 must be determined-and be determined only by a particular officer namely the Registrar. It is only if and when that issue is first determined that even the Registrar himself will have jurisdiction to proceed further to decide it himself or to refer it for decision to his Nominee. Once this special law indicates in no uncertain terms the forum before which such issues can be taken and decided, we do not think that general considerations such as Mr. Mirchandani has relied upon, can be allowed to prevail. Therefore, We do not think that simply because a question is fundamental or a question affects the jurisdiction of the Tribunal to decide at all is being raised before us, we can allow it to be raised contrary to these specific provisions of the law. Even in the petition before us the Registrar''s order has not been impugned not that we think that it can be impugned at this late stage.

19. In deciding this question of jurisdiction we had occasion to refer to the bye-laws in order to show what was the business of the society. Mr. Mirchandani attempted to water down the effect of these bye-laws by saying that the bye-laws were not law and therefore their effect cannot be to affect the positive provisions made in the Act regarding jurisdiction. He relied upon a recent decision of the Supreme Court in Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others, , where it was held that the bye-laws of a co-operative society framed in pursuance of the provisions of the Act cannot be held to be law or to have the force of law. We accept that principle with respect but we do not see how it can affect the use which we have made of the bye-laws here. In Hingorani''s case to which we have already adverted the Division Bench quoted with approval a passage from a Full Bench decision of this Court in Farkhundali Nannhay Vs. V.B. Potdar and Another, , to the effect that "the nature of business, which a society does, is to be ascertained from the objects of the society". We referred to the bye-laws

only to ascertain what were the objects of the society. The Supreme Court has itself said in the very decision upon which counsel relied that "The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society." Even the Supreme Court in the Deccan Merchants Cooperative Bank''s case to which we have also referred said in para. 18 (p. 1326):

The question arises whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it.

It is from that point of view alone that we have made use of the bye-laws in the present case. We do not think therefore that the remark of the Supreme Court in Co-op. Cr. Bank v. Ind. Tri., Hyderabad to the effect that the bye-laws are not law comes in the way of using them for the purpose of determining what is the business of the society.

20. In connection with this point two decisions of this Court were relied on. They are Jethalal N. Shah v. S.B. Gosavi (1969) Special Civil Application No. 875 of 1967, decided by Patel and Chitale, JJ., on September 8, 1969 (Unrep.) and Bipin Zaverilal Mullaji v. Smt. Devibai Jethmal Mirpuri (1909) Special Civil Application 955 of 1967, decided by Patel and Chitale JJ., on September 8, 1969 (Unrep.). Both decisions are of Division Benches of this Court. None of these cases are applicable here. In both the cases the question of jurisdiction turned upon the finding that what was the business of the society had not been proved at all and therefore it was impossible to decide whether the dispute was touching the business of the society. That is not the case here. We have already held that in the present case what was the business of the society has been amply proved.

21. Then we turn to the third contention on behalf of the petitioner Arora and that is that the agreement entered into between Malkani (as we have held) and Arora was an agreement of tenancy and not one of leave and licence. Two consequences would flow if this contention were accepted. Firstly, that the tenancy or sub-tenancy as the case may be, cannot be terminated without an order of the Court and secondly that the jurisdiction would lie u/s ''28 only with the Rent Control Court, that is to say, the Small Causes Court at Bombay and the jurisdiction of the Tribunals under the Co-operative Societies Act to that extent would be ousted.

22. In this respect the principal reliance on behalf of Arora has been upon the order passed on August 0, 1964, by Judge Hattangadi in the interlocutory matter in Civil Suit No. 2280 of 1904. At that time Arora complained that he had been illegally dispossessed by Malkani despite an interim injunction granted by the Court. The passage relied on from the judgment of Judge Hattangadi in para. 7 was as follows :

Now the salient features of that agreement are that the agreement was for an indefinite period terminable on one calender month''s notice. The parties were obviously not related to each other nor there was any consideration or compassion or charity or friendship,

livery effort was made in the agreement to give a colour that the plaintiff was a paying guest holding the premises jointly with the defendant. Now following the decision of the Supreme Court is AIR 1950 S.C. 1020 (Associate Hotels v, Kapoor) prima facie it appears to me that in-spite of a clever phraseology used in the agreement it was merely a camouflage to avoid the provisions of the Rent Act and in so far as the monetary consideration as payable under the agreement month to month, prima facie the agreement should be construed as a grant of tenancy, though it may be that at the final hearing of the suit certain circumstances negativing that presumption might be proved by the defendant, to hold that it was bare licence there is a complete absence of considerations of friendship, generosity or relationship (see Megarry on Kent Acts, 9th Edn. L. 50).

Before we say anything as to this remarkable finding we may once again turn to the agreement. We have quoted para. 2 in extenso and we can only repeat certain passage from that paragraph to show that in the plainest possible language the agreement is an agreement of leave and licence and that Arora was inducted into that room as a paying guest and nothing else. To begin with he (Arora) admits that he has been permitted to stay in a furnished room. The use of the word "permitted" and "permission" is only consistent with a licence and not with a lease. No rights to the use and enjoyment of the premises were created which would be the hall mark of a lease. Secondly, the room was a furnished room and that is an indication more of a paying guest rather than a lessee or a sublessee. Thirdly, Arora has used the express language to indicate this "as your paying guest with morning tea free, electricity for lighting, fan cleaning and conservancy of the room". Arora who is an experienced, and we are told a successful businessman, surely understood what he was saying when he used the expression "as your paying guest". But that expression coupled with the actual amenities with which he is provided namely "tea in the morning free, electricity for lighting, fan cleaning and conservancy of the room" suggests beyond any doubt that he was a paying guest and not a tenant. He has further made it clear that "I shall not be deemed to be in exclusive possession of the room or any portion of your husband"s flat". Conversely (and fourthy) he has made it clear "This agreement does not constitute or create any tenancy or sub-tenancy rights in my favour in respect of the room or any portion of your husband"s flat". Fifthly he has stated that "the permission as per this paying guest agreement conferred by you on me is personal which cannot be transferred or assigned by me in favour of anyone else". Therefore, once again in the most categorical language possible Arora has admitted that the agreement was personal and not one attached to the property enabling him to transfer or assign it. Sixthly, he has agreed that the room itself shall be used by him only for his business or office work and for some visitors coming to meet him so long as the neighbours and the society to whom the building belonged or any of the authorities did not object, otherwise the permission could be revoked. That in itself indicates that only a licence was granted and no lease was created. Lastly, the petitioner has agreed that the room could be used by Malkani if he so desired to receive his visitors or clients in the said room in which Arora was a paying guest and that he would make no grievance of it.

23. In view of the clear provisions of the agreement we arc somewhat surprised at the findings of Judge Hattangadi in his order dated August 6, 1964. He has purported to read in between the lines something which is not so very clear to us. He has found from the language of the agreement that it was a mere camouflage without specifying what according to him is the true state of affairs and how the true facts have been hidden in the agreement. No doubt, in every transaction one has to determine what is the true nature of the transaction irrespective of the verbiage used in a document but the language of a document ordinarily binds the parties to it unless they can manifestly show that the true state of affairs was other than that indicated by the language of a document. There is absolutely nothing in this case and certainly not on the face of the document to suggest that what has been stated in the agreement was not true or did not represent the true facts that had transpired between Arora and Mtilkani, Moreover the order of Judge Hattangadi was an order passed in an interlocutory proceeding and is in no way binding upon this Court.

24. Mr. Mirchandani relied upon four circumstances and suggested that from those circumstances a lease should be inferred. Firstly, he said that the key of the room was given to Arora and that would indicate exclusive possession on the part of Arora. He further reinforced this conclusion by pointing to the situation of this room which was at one cud of the flat and had an independent entrance and exit and was in all respects a room which could be completely under the control of its occupant. The evidence shows that the room had duplicate keys one being given to Arora and the other being retained by Malkani, so that possession of one key being given to Arora is not decisive. The agreement itself recites that both could use the room and that Malkani would be entitled to receive his visitors and others in the room during the working hours. These are circumstances which are only compatible with a paying guest agreement and not with a lease. When a lease or sub-lease is granted the lessor does not normally stipulate for use of the premises for himself. The right reserved to the lessor in this case to use and enjoy the premises himself is somewhat inconsistent with the right to use and enjoy vested in the sub-lessee. It is more consistent with there being a paying guest agreement.

25. Another circumstance pointed out was that the agreement is not for any stated period. In other words, it is suggested that it is an indefinite agreement and that is not consistent with it being a paying guest agreement. By the 6th paragraph of the agreement the parties provided that the agreement shall be terminable on either side by one calendar month''s notice. The agreement, therefore, was an agreement terminable at will subject to the condition that one month''s notice should be given. In such an agreement there is no question of reservation of any time for the determination of the agreement, but the very fact that it was terminable by one mouth''s notice rather suggests that it was an agreement to keep a paying guest rather than that it was a lease.

26. Moreover a lease could never have been granted by Malkani without the sanction of the society as we have already seen when we considered the Form "A" prescribed by the bye-laws of the society and if a lease had been granted there would be no question of

making any provision for its termination because its determination would depend upon the permission being granted by the authorities under the Rent Control Act. There was a contention raised that certain articles of furniture belonging to Arora were allowed to be brought into the room and placed therein. He urged that therefore it should be inferred that a sub-lease was granted to Arora because otherwise he would not be allowed to being in articles of furniture into the premises. The fact established and found by the authorities below is that there was already furniture in the room belonging to Malkani, which Was allowed to remain there. In fact, the agreement, itself says that it was a furnished room. What appears to be the case is that at some stage after he got possession Arora removed Malkani''s furniture from the room and stored it up outside on the verandah where it was lying. The circumstance therefore that he brought in some of his own furniture into the room cannot be relevant.

27. In his evidence the petitioner himself had admitted that under the first agreement he was a paying guest, The parties have not put the evidence before us in the paper book, but in his order, the Registrar''s Nominee has found as follows :

It is pertinent to note here that opponent No. 1 (Arorat has categorically deposed that he was a paying guest only under the said agreement dated 1-11-1961 and lie terminated the same by post-card dated 4-1-1962, The learned advocate however argues that thereafter opponent No. 1 was induced by the disputant to continue as a tenant...

(Italics are ours).

It is more than likely therefore that when he made the second agreement which is in similar terms, he also agreed to an arrangement whereby he became a paying guest.

28. The Registrar''s Nominee discussed all the circumstances and came to the following conclusion :

In view of these circumstances I hold that Opponent No. 1 has failed to prove that any assurance, re: tenancy and exclusive possession as mentioned in para 2 of the written statement was given by the disputant to opponent No. 1.

In our opinion, this is a pure finding of fact and in any case upon such material as there is before us a correct finding.

29. These are all the contentions that were raised on behalf of Arora the petitioner. We are unable t6 accept these contentions. On the other hand, we think that the view taken by the two authorities below was the correct view in the circumstances, both on the question of jurisdiction and on the merits. We may also say that, in our opinion, the question of jurisdiction was not open to be canvassed before the Registrar''s Nominee for reasons we have already stated, but there were other contentions raised on behalf of Malkani by Mr. Dixit and these are, in our opinion, contentions of some substance and roust result in our dismissing the petition No. 2323 of 1968. In a number of matters Arora

has made false statements in the petition. In para. 1 he has stated that he is a tenant from November 1961 which is a completely false statement having regard to the fact that the agreement of November 1961 was put an end to by him by the post-card to which we have already referred and having regard to the fact that he himself has admitted in his evidence that he was a licensee. In para. 3 of the petition, after reciting the circumstances under which he applied for an interim injunction and obtained it from the City Civil Court he has stated that Malkani in spite of the injunction took forcible possession of the premises from the petitioner. That fact may or may not be true. We are not concerned with it here, but the petitioner has added as an embellishment. "The petitioner thereupon filed contempt proceedings against respondent No. 1 (Malkani) and the learned Judge of the City Civil Court, who heard the case held that prima facie the petitioner was a tenant of respondent No. 1 in respect of the said premises...". Now the statement that the petitioner (i.e. Arora) thereupon filed contempt proceedings against Malkani (respondent No. 1) is utterly false and counsel has conceded that he cannot support that statement. If no contempt proceedings were taken by the petitioner and yet it is so stated in the petition, obviously the petitioner alone would be responsible for such a mis-statement because without instructions no person can imagine it. These false statements show that the petitioner was not frank with the Court and misrepresented facts in the Court. On that short ground alone therefore the petition would be liable to be dismissed.

30. That the petitioner becomes disentitled to any relief from this Court on making untrue statements before the Court is now well established. Under similar circumstances this Court held that the petitioner was disentitled to any relief, in. a decision, reported in S.H. Motor Transport Co. Vs. Motilal and Others, . On finding several facts suppressed or mis-stated this Court observed (see p. 591) :

... Petitioners who invoke the extraordinary jurisdiction of the High Court under Article 226 and/or Article 227 of the Constitution are required to exercise utmost care, inform themselves fully of every stage of the proceeding that has taken place upto the date the petition is filed, give a full and true account of those proceedings, file all the necessary documents in support of their averments and then claim relief on the basis of the facts disclosed in the petition. It is not open to a petitioner under Article 228 or 227 of the Constitution to pick and choose his own facts or to determine in advance what is relevant and material, omit to mention any material facts and proceedings and orders and then claim that he has acted bona fide even though he has made untrue statements, omitted to inform the Court of all the proceedings and the orders passed at different stages in the proceedings up to date and claim indulgence.

In State of Bombay v. Morarji (1958) 61 Bom. L.R. 318 Chief Justice Chagla uttered a similar warning when he said (see p. 332) :

But it is not sufficient that a party should come to this Court and make out a case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, not only must he come with clean hands, not only must he not suppress any

material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.

In Ashoh v. Dean, Medical College, Nagpur (1960) 69 Bom. L.R. 603 (a decision to which my learned brother was a party) this Court observed :

In invoking the extraordinary jurisdiction of the Court a scrupulous regard to truthfulness of statements and averments in the petition or in the return is expected.

Having regard to the principle which is now well established, we think that we will be justified in dismissing this petition only upon the conduct of the petitioner which we have set forth above and the several mis-statements showing want of bona fides in the petition, but as we have shown it is not necessary to rest our decision merely on that.

32. But there is something much worse than all this. The stand which the petitioner has taken in para. 2 of the petition is eloquent. In order to explain the circumstances under which he entered into the agreement in dispute dated January 24, 1962 he has said :

With a view to circumvent the provisions of law, a paying guest agreement was at first entered into between the parties dated 1-11-1961; later on another agreement dated 24-1-1962 was entered into between the parties, copy whereof is hereto annexed and marked as Ex. A.

(The italics are ours).

Arora thus openly says that the parties entered into these agreements in order to circumvent the provisions of law. We cannot conceive of any petitioner inviting the Court to exercise its Constitutional powers under such circumstances. It is that very agreement whereby both the parties to the agreement intended to circumvent the law, which is the subject-matter of the dispute before us and if that agreement was admittedly entered into by the parties to circumvent the law, we think that the petitioner should ipso facto be deprived of his right to any remedy at our hands. Even if it had been an ordinary suit and it had been established that both the parties intended to play a fraud upon the law to circumvent its provisions the guiding maxim would have applied, in pari delicto, potior est conditio defendants (where both the parties are equally at fault the position of the defendant is the stronger). That would also be the position in the present case although by this statement Arora the petitioner has suggested that the respondent equally intended to play a fraud upon the law. These are additional reasons why the Special Civil Application No. 2323 of 1968 will have to be dismissed.

33. Then we turn to Miscellaneous Civil Application No. 98 of 1969. We have already mentioned in stating the facts that it was Arora''s case that even though an interim injunction was granted to him (albeit ex-parte) in Suit No. 2280 of 1964 by the City Civil Court restraining Mrs. Malkani from taking possession, Mr. Malkani dispossessed him on May 17, 1964. Consequent upon this dispossession he once again complained to the City

Civil Court and on August 6,1964 Judge Hattangadi passed a further order restoring possession to Arora. That possession he continued to hold throughout the proceedings before the Registrar''s Nominee and the appeal before the Maharashtra Co-operative Tribunal. When, however, he lost before both those authorities be filed Special Civil Application No. 2323 of 1068 which we have just disposed of. In that Special Civil Application Malkani moved this Court for vacating the stay granted by this Court maintaining Arora in the possession of the room. The matter came up before Mr. Justice K. K. Desai and Mr. Justice Vaidya on September 24, 1969 and was disposed of on a settlement being reached. Arora was allowed to keep possession of the room upon his undertaking not to part with possession of it. The precise order was "The petitioner (Respondent) (Arora) undertakes not to part with the possession of the property". Miscellaneous Civil Application No. 93 of 1969 filed at the instance of Malkani complains that Arora has parted with possession of the room in breach of the above undertaking given on September 24, 1969. We have already referred to the pleadings in this behalf. At the hearing of this Miscellaneous Civil Application counsel for Arora has urged that there had been no breach of the undertaking. He urged that the premises were let out to him for business and since he could not make use of that room for the purpose he had originally intended, he intended to arrange shows and concerts and dancing and used the premises for that business. He has in no way therefore committed a breach of his undertaking but possession of the premises throughout remained with him. Thus in answer to the allegations in the petition, the contention raised is that although Professor Banerjee did take possession of the room and conduct the dancing classes he was there only as an employee of Arora and there was nothing to prevent Arora from employing or hiring out Professor Banerjee for that purpose because Arora was given the room for business. He was only carrying on his business through Professor Banerjee.

34. It seems to us that that is not the position upon the material before us. In his application, dated November 27, 1969 para. 3 Malkani positively asserted that Arora had parted with possession of the room in question to Professor Banerjee for dancing classes. He had also asserted that Professor Banerjee had affixed a sign board on the door of the. said room reading ''Professor Banerjee''s Dancing Classes'' and started doing business of dancing classes in the room from about the first week of December 1969. Thus the allegation was that Arora had given over possession to Professor Banerjee and that the dancing classes which Professor Banerjee was running were his own as the sign board showed. These Were allegations of fact and the least that Arora could have done was to answer these allegations of fact, but when he gave his reply in para. 6 he did not admit or deny that sign board with the inscription which the petition alleged -was there. On the other hand, what Arora said in reply was

I deny emphatically that I have parted possession, of the room in question to Professor Banerjee for dancing classes who had dancing classes business in Bombay and various places. I say that Professor Banerjee is long established in the said line. Therefore I employed him as I intended to have his help and experience in holding shows and

contests and I made this clear to the petitioner''s advocate in my letter dated 25th October 1900... I have correspondence in ray possession to show that I have not parted with possession and I crave leave to refer to and rely upon the same when'' produced. I say that the board was of Naz Dancing Academy for which Professor Banerjee was a part time employee.

If there is one thing to be noticed about this reply it is that there is no denial that a board with the inscription ''Professor Banerjee''s Dancing Classes'' was on the premises. Instead, however, it was Arora''s case that the board was of Naz Dancing Academy of which Professor Banerjee was a part time employee. It was Malkani''s .case that at first Professor Banerjee had put up the board ''Prof. Banerjee''s Dancing Classes'' and then when the objection came to be raised Arora had managed to get it removed and substituted by the sign board of the Naz Dancing Academy. Therefore the admission of Arora in para. 6 of the written statement that the sign board was of Naz Dancing Academy is neither here nor there. What he should have denied was that Professor Banerjee''s board with the inscription ''Professor Banerjee''s Dancing Classes'' was there but that was never denied. In view of this we cannot but hold that such a board with the inscription ''Professor Banerjee''s Dancing Classes'' had been affixed to the room for some time.

35. This conclusion is fortified by another important circumstance. In para. 3 of the petition Malkani alleged that Professor Banerjee had given several advertisements in his own name stating that he was running- dancing classes at this address. These advertisements appeared in the ''Evening News of India'' and Malkani has quoted one such advertisement (which appeared in the Evening News of India of October 21, 1969) as follows :

Prof. Banerji Smart Teachers. Individual Lessons. Exquisite environments. Ladies separate classes. Air-conditioning shortly. Ishwar Bhawan (ground floor) ''A'' Road, Churchgate.

Arora in his reply in para. 6 does not deny the contents of the advertisement. On the other hand, all that he has to say about the advertisement is

I say that the advertisement in Evening News of India in the issue of 21st October 1969 does not show that I have parted with possession. I have stated that I had employed Benerji.

Now the least that can be said about this advertisement is that the advertisement does riot at all show any connection between the dancing classes and Arora, but, on the other hand, it clearly suggests that it is Professor Banerjee who is running the classes. The advertisement at any rate read by any normal customer would not suggest to him that they were Arora''s dancing classes and that Banerjee was only a teacher there. It would certainly suggest that they were Banerjee''s dancing classes and if that be so, it strongly

supports the other circumstances that Banerjee had put up the sign board describing those classes as his own classes.

36. Moreover it has to be mentioned that Arora was never connected with the business of dancing. On the other hand, admittedly he is a well-to-do business man and deals in motor parts and commercial contracts. With that background we very much doubt it" he could ever undertake the running of dancing classes. That subsequently the board "Naz Dancing Academy" was put up is no explanation. Such a board was put up as Malkani had by then began to allege breach of the agreement with him and in order to get out of possible action against him for contempt Arora put up the board of Naz Dancing Academy so as to enable him to assert that Naz Dancing Academy Was his business and Professor Banerjee was employed by him in that business. We are satisfied upon this material that Arora had handed over possession of the room to Professor Banerjee despite his undertaking not to part with possession of the room, given on September 24, 1909. He is therefore liable for the breach of the undertaking given by him. We accordingly hold him guilty of having committed contempt of this Court.

37. The next question is what sentence we shall impose. There has not been a word of apology on his behalf, though no doubt counsel alleged that if we were to find him guilty of contempt he would be immediately vacating the room and offering to hand over the key of it. That is no substitute for an apology to the Court which has not been forthcoming. We have already referred to his conduct in the petition itself, and his conduct in Special Civil Application No. 2323 of 1968 has not been frank and fair to the Court. On the other hand, his entire course of conduct suggests that by the gravest perversion of facts, a mis-reading of the agreement made with Malkani regarding this room he has tried to justify his conduct and despite the clear notice terminating that agreement Arora has somehow found ingenious ways and means to continue in possession of the room at any cost and when he himself was unable to use it, despite an undertaking given to this Court he handed over possession of the room to a person called Professor Banerjee.

38. At a late stage an affidavit purporting to be by this person has been produced before us on behalf of Arora. Mr. Dixit on behalf of Malkani has raised serious objection to the affidavit being allowed to go on record. If the affidavit is allowed to go on record he said he was prepared to place facts before us showing that the same Professor Banerjee has made a statement before the police in some criminal matter that he was the tenant of this room through Arora. However, we need not go into these allegations and counter-allegations. The affidavit of Banerjee was filed late and we decline to accept it,

39. We, therefore, think that in all the circumstances of this case a fine of Rs. 1,000 would meet the ends of justice. In default of payment of the fine Arora the respondent in Miscellaneous Civil Application No. 93 of 1969 shall undergo simple imprisonment for a period of six weeks. Fifteen days allowed to pay the fine.

40. In the result Special Civil Application No. 2323 of 1968 is dismissed. The petitioner Arora shall pay the costs of Malkani and of the State. Miscellaneous Civil Application No. 03 of 1969 is allowed and Arora sentenced as above. Arora shall pay the costs of Malkani and of the State.

41. At this stage Mr. Mirchandani points out that under the other part of undertaking Arora has to deposit Rs. 190 per month but because of the pendency of these proceedings he was not able to deposit that amount for the month of March 1970 which became due on April 1, 1970. He prays that the time for depositing the amount should be extended. We extend the time for payment of that amount till Monday April 6, 1970. Liberty to Malkani to withdraw the amount.