

M/s A. V. R. and Co. and Others

Vs

Fairfield Co-Operative Housing Society Ltd. and Others

Civil Appeal No. 472 of 1985

(A. P. Sen, B. C. Ray JJ)

19.09.1988

JUDGMENT

B. C. RAY, J. –

1. This appeal by special leave is directed against the judgment and order dated August 9, 1983 passed in Writ Petition No. 1907 of 1983 by the High Court of Judicature at Bombay dismissing the writ petition and confirming the judgment and orders by the Maharashtra Co-operative Appellate Tribunal made in Appeal No. 280 of 1978 and by 2nd Co-operative Society filed under Section 91 (1) of Maharashtra Co-operative Societies Act, 1960 directing eviction of respondent 2, member of the society as well as appellants 1 and 2 who are trespassers from its flat No. 7 in the building of the disputants "Fairfield, " Churchgate Reclamation, Bombay 20. The facts giving rise to the present appeal are that the respondent "Fairfield Co-operative Housing Society" which is a "Tenant Co-partnership Housing Society" under Registration No. B-1412 of 1955 owned the suit premises. Respondent 2 Smt. Vishni J. Kalwani as a member of the society was allotted flat No. 7 in the first floor of the suit premises for residing therein with members of her family. Respondent 2 permitted appellant 1 M/s A. V. R. and Co. to possess and occupy the said flat as a licensee without the consent of the society and in breach of bye-laws and Regulation 4 of the society's regulations contained in Form No. A of the society's bye-laws. It has been alleged in the dispute application that respondent 2 obtained the flat as a member only for investment purposes and she was profiteering by letting out the flat to other persons contrary to the bye-laws and regulations of the Society. The society after coming to know of this position served a notice on March 10, 1973 on her asking her to vacate the flat. In the said notice it was alleged that respondent 2 parted with the possession of the flat without the Society's consent and in contravention of the bye-laws and regulations of the society. The society also alleged that the occupants of the flat were a source of nuisance and annoyance to the other members of the society and further that she had been a persistent defaulter in payment of society's dues which by the date of notice had come to Rs. 10,004.38. The notice sent to respondent 2 was not replied to. Thereafter the society sent another letter stating all these facts. Respondent 1 filled a dispute against respondent 2 who is a member for possession of the said flat given to her. the society also joined appellants 1 and 2, the two occupants as opposite parties and sought for possession from all the opponents. The society prayed for an award against respondent 1 as mentioned in the dispute application.

2. Respondent 2 Smt. Kalwani did not file any written statement and remained absent. Appellant 1 M/s A. V. R. & Co. who was opponent 2 in the dispute application filed a written statement contending inter alia that the dispute was barred by jurisdiction as opponent 1 Smt. Kalwani was a tenant of the society, that appellant I was in exclusive occupation of the said flat as the licensee of respondent 2 and now, their sister concern M/s. J. R. Enterprises, appellant 2, were in occupation of

the premises as licensees. It was due to this the society subsequently impleaded appellant 2 as opponent 3 in the dispute application. It was further contended that their occupation of the suit premises was under the leave and license agreement which continued even after February 1, 1973 and so appellant 2 are protected under the provisions of Bombay Rent Act as amended. They denied that they were causing any nuisance or annoyance to other members of the society. They also denied knowledge about the respondent being a defaulter in payment of society's dues. They contended that the right, title and interest of Smt. Kalwani were not determined and the society could not ask for the possession of the suit premises. Appellant 2 also filed a written statement adopting all the contentions raised by appellant 1 in their written statement.

3. The Judge, Co-operative court after hearing the parties and considering the evidence has made an award in favour of the society holding inter alia that opponent 1 is a member of the disputant society, that opponents 2 and 3 are not their members but claiming through opponent 1, that the dispute touches the business, management and constitution of the Society, thus falling within Section 91 of the Maharashtra Co-operative Societies Act. It was also held that opponent 1 committed breach of bye-laws, rules and regulations of the society by including opponents 2 and 3 in the suit premises without the consent and permission of the society. Opponents 1 to 3 have been directed to hand over possession of suit premises to the disputants. Opponent 1 was also directed to pay Rs. 10,004.38 to the society with interest thereto @ 9 per cent from the date of filing of the dispute.

4. Against this award appellants 1 and 2 filed an appeal being Appeal No. 280 of 1978 before the Maharashtra State Co-operative Appellate Court. Respondent 1 filed an appeal but she subsequently withdrew the same. The appellate court held that the claim for possession was not affected by the bye-laws and the appellants were not entitled to protection of Bombay Rent Act. the order directing giving possession was upheld with the modification that award in respect of possession shall become executable on the disputant society depositing in court or paying to Smt. Kalwani the contribution paid by her in respect of the flat in question.

5. The appellants filed a writ petition under Articles 226 and 227 of the Constitution of India before the High Court of Bombay. The Writ Petition No. 1907 of 1983 was dismissed. Hence this appeal by special leave.

6. It was firstly urged on behalf of the appellants that they have been inducted into possession of the flat as licensee on the basis of an agreement of leave and license and the said agreement of license was subsisting on February 1, 1973. So they have become deemed tenants under Section 15-A read with Section 5 (4-A) of the Bombay Rents, Hotel and Loading House Rates Control Act, as amended up-to-date. The agreement of leave and license was not filed either in the trial court or in the appellant court. It was filed in the High Court. It is a leave and license agreement executed on September 1, 1969 by the licensor respondent 2 in favour of M/s A. V. R. & Company for a period of 11 months. This agreement of license was not renewed. Moreover appellant 2 M/s J. R. Enterprises who is in occupation of suit premises has not produced any agreement of license inducting them as licensees. Section 15-A of the said Act which was inserted by Maharashtra Amendment Act 17 of 1973 enjoins that any person in occupation of any premises or any part thereof which is not less than a room as a licensee on February 1, 1973 under a subsisting agreement of license, shall on that date be deemed to have become tenant of the landlord in respect of the premises in his occupation.

The only witness examined on behalf of the appellant stated that he had no personal knowledge

about the facts of the case. No proceedings have been taken in any court to claim the status of a perfected tenant nor any leave and license agreement has been filed by appellant 2. The claim of the appellants as deemed tenants is untenable. It may be noted that the appellants did not urge this point before the appellate court. In the case of *D. H. Maniar v. Waman Laxman Kudav* it has been observed that : (SCC p. 121, para 10)

In order to get the advantage of Section 15-A of the Bombay Rent Act, the occupant must be in occupation of the premises as a licensee as defined in Section 5 (4-A) on February 1, 1973. If he be such a licensee, the non obstinate clause of Section 15-A (1) gives him the status and the protection of a tenant in spite of there being anything to the contrary in any other law or in any contract.... But if he is not a licensee under a subsisting agreement on February 1, 1973, then he does not get the advantage of the amended provision of the Bombay Rent Act.

7. It was next contended that the dispute cannot be entertained by the Co-operative court as the appellants are not claiming through respondent 2, who is a member of the society but claiming as protected licensees. The jurisdiction of Co-operative Court under Section 91 of Maharashtra co-operative Societies Act, 1947 is barred and the Small Cause Court under Section 28 of the said Bombay Rent Act is competent to entertain and decide the dispute of the disputants. We have already held above that the appellants are licensees and not statutory tenants. Section 91 of the Maharashtra Co-operative Societies Act, 1960 provides that notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, business of the society shall be referred by any of the parties to the dispute to a Co-operative court if any of the parties thereto is a member or a person claiming through a member. Respondent 2 is the member of the disputant society. Appellants 1 and 2 are not members of the society but they as licensees are claiming through respondent 2. The dispute touches the business of the society and it falls within the ambit of Section 91 of Maharashtra Co-operative Societies Act. Appellants 1 and 2 are outsiders who have been permitted to possess the suit premises as licensees of respondent 2 in contravention of the rules, bye-laws and regulations of the society. The dispute falls squarely within the provision of Section 91 (1) of the Act and the Co-operative Court has exclusive jurisdiction to entertain and decide the dispute and not the court under the Bombay Rent Act. Section 28 of the Bombay Rent Act also begins with a non obstante clause and provides that the Small Cause Court or the court of civil Judge (Junior Division) shall have exclusive jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rents or possession of any premises to which the Act applies. The scope of the provisions of the two Acts has been very succinctly stated by this court in *O. N. Bhatnagar v. Smt. Rukibai Narsindas* to which one of us (A. P. Sen, J.) was a party as follows : (SCC pp. 255-56, para 20)

In the present case, the society is a tenant co-partnership type housing society formed with the object of providing residential accommodation to its co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in an unauthorised occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and license and wants to secure possession of the premises for his own use after the termination of the license. It must, therefore, follow that a claim by the society together with such member for ejection of a person

who was permitted to occupy having become a nominal member thereof, upon revocation of license, is a dispute falling within the purview of section 91 (1) of the Act.

8. This Court further observed at p. 697 as follows : (SCC p. 256, para 21)

It seems to us that the two Acts can be best harmonised by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply. But where the parties admittedly do not stand in the jural relationship of landlord and tenant, as here, the dispute would be governed by Section 91 (1) of the Act. No doubt, the appellant acquired a right to occupy the flat as a licensee, by virtue of his being a nominal member, but in the very nature of things, his rights were inchoate. In view of these considerations, we are of the opinion that the proceedings under Section 91 (1) of the Act were not barred by the provisions of Section 28 of the Rent Act.

It has been pleaded in the dispute application that opponent 1 (respondent 2 in this appeal) inducted opponent 2 in possession of the said Act in violation of the bye-laws, and Regulation 4 of the Society's Regulations contained in Form A of society's bye-laws. On this pleading the co-operative Court has sole jurisdiction to decide the dispute under Section 91 of the said Act as the appellants are claiming as licensees through the member of the society, opponent 1 according to the provisions of sub-section (b) of Section 91 of the said Act.

9. The counsel for the appellants cited Deccan Merchants Co-operative Bank Ltd. v. M/s Dalichand Jugraj Jain and Sabharwal Brothers v. Smt. Guna Amrit Thandani of Bombay in support of the contention that dispute in question does not come within the parameter of Section 91 of the said Act. Those cases have been elaborately dealt with in Bhatnagar case and it had been observed that the ratio of the decisions of these two cases are not applicable as the facts of these cases are different from the case. In the Deccan Merchant Bank case the suit was brought by the owner who mortgaged the same to the co-operative bank on taking a loan. The tenants in question were inducted in the ground floor of the said premises after the mortgage by the owner. Subsequently the bank acquired the house in execution of mortgage decree and then filed a dispute before the Registrar under Section 91 of the said Act as the house originally belonged to owner and not to the society bank and the tenants were inducted before bank purchased the same. In Sabharwal Brother case the disputant was the owner of the flat on the second floor of Block No. 8 "Shyam Niwas" and he left it out to the tenant. The purchaser of the flat who was a member of the society filed a claim under Section 91 of the said Act to recover possession from the tenant. The society sold the flat to the disputant member and the disputant was not claiming the flat qua member of the society. The dispute was not within the ambit of Section 91 of the said Act.

10. The facts of the case in I. R. Hingorani v. P. K. Shah are different from the facts of this case and so the ratio of this decision is not applicable to the instant case. The owner of a flat entered into a leave and license agreement with the licensee. Subsequently a Housing Society was formed and the owner became its member. In 1963, the tenant applied for fixing his monthly "compensation" (rent) and in that litigation the owner moved the Registrar for referring the dispute to arbitrator.

11. It was held, that when the owner entered into the agreement with the tenant, he was not acting as a member of the society but as the owner of the flat. Hence the case did not fall within Section 91(1)(b) of Maharashtra Co-operative Societies Act.

12. It was urged that the dispute filed by respondent 1 was a collusive dispute as between respondents 1 and 2. Respondents 1 and 2 in collusion with each other wanted to evict appellants 1

and 2 from the suit premises. No issue was framed about collusion in the trial court nor any evidence was led to substantiate this allegation. The only witness examined on behalf of the appellants admitted that he did not know anything about the facts of the case. No particulars of the collusion have been pleaded in the written statement. Moreover this point was not urged either before the trial court or before the appellate court. The society filed the dispute application both against its member and the appellants who are the occupants of the flat in question to get possession of the flat as the appellants are trespassers being put in possession without consent of the society and in breach of its bye-laws, rules and regulations. The allegation of collusion has not been pleaded nor proved. there is no factual basis of this allegation. There is no merit in this contention.

13. Section 91(b) of Maharashtra Co-operative Societies Act has been assailed as ultra vires Articles 14 and 19 of the constitution. The dispute between a Co-operative Society and a non-member claiming through a member of the society as provided in Section 91 (b) of the Maharashtra Co-operative Societies Act will be decided by the Co-operative Court. This classification has got nexus to the object of the Act namely the special procedure is applicable only to those non-members claiming through a member of the society as they form a different class. This classification has a reasonable and rational nexus with the object sought to be achieved by the Act. In C. P. Khanna v. V. K. Kalghatgi it has been held that Section 91 is not ultra vires Articles 14 and 19 of the Constitution. Similar view was expressed by Gujarat High Court in Rasiklal Patel v. Kailasgauri Ramanlal Mehta which held clause (b) of Section 96 of the Gujarat Co-operative Societies Act, 1961 which corresponds to Section 91 (b) of the said Act as valid though clauses (c), (d), (e) of Section 96 were held as ultra vires. We agree with the views expressed in those judgments and hold that Section 91(b) is not ultra vires Articles 14 and 19 of the Constitution.

14. No other points have been urged before us.

15. For the reasons aforesaid we dismiss the appeal. There will be no order as to costs. The decree will not be executed for a period of six months from the date of this order subject to the appellant's filing an usual undertaking within a period of two weeks from today of the effect that the appellant will not transfer, assign or encumber the flat in question in any manner whatsoever and on undertaking that he will hand over peaceful possession of the flat in question to the respondent on or before the expiry of the aforesaid period and he will go on paying the occupation charges equivalent to the amount he had been paying for each month by the 7th of each succeeding month. In default of compliance of any of these terms, the decree shall become executable only on the disputant society paying to Smt. Vishni J. Kalwani the contribution paid by her in respect of the flat in question.

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