

Smt. Krishna Rajpal Bhatia and Others

Vs

Miss Leela H. Advani and Others

Civil Appeal No. 1945 of 1984

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

19.09.1988

JUDGMENT

SEN, J. –

1. This appeal by special leave is directed against the judgment and order of the High Court of Bombay date December 16, 1983 declining to interfere with the judgment and order of the Maharashtra State Cooperative Appellate Court, Bombay dated October 31, 1983. By the Impugned judgment the appellate court upheld the judgment and order passed by the Judge, First Cooperative Court, Bombay dated August 28, 1981 directing the appellants to vacate and hand over possession of Flat No. 16 on First Floor of Block No. 8 in the housing colony known as Shyam Niwas, situate at warden Road, now called Bhulabhai Desai Road, Bombay and to pay mesne profits @ Rs. 450 per month and a further amount of Rs. 42.50 towards maintenance, car parking and water charges w.e.f. August 1, 1981.

2. The facts of the case are as follows. By an agreement in writing dated January 1, 1964, the disputant the late Smt. Devibai H. Advani, who was a tenant co-partner member, permitted the appellants' Father Rajpal Bhatia, user of her Flat No. 16 for a period of 11 months as from that date on the terms and conditions stated in the said agreement. Both the parties made a joint application for admission of the said Rajpal Bhatia as a nominal member of the society and the society granted the requisite permission for his occupying the flat in dispute on terms of leave and licence. At the request of Rajpal Bhatia, the said agreement for leave and licence was renewed for 11 months each by two further agreements and thereafter the period was further extended for 11 months by an endorsement. The late Smt. Devibai Advani by her lawyer's notice dated May 21, 1969 terminated the agreement for leave and licence. On June 30, 1969 she made a claim under Section 91 of the Maharashtra Cooperative Societies Act, 1960 (for short 'the Act') before the District Deputy Registrar for the eviction of the said Rajpal Bhatia alleging him to be in unauthorised occupation of her flat. The claim as laid by her was that she was a 'tenant member' of the society and that Rajpal Bhatia was in unauthorised occupation. Her claim for eviction was however resisted by Rajpal Bhatia inter alia on the ground that the transaction between the parties was one of lease and not of licence and therefore the Registrar had no jurisdiction to enter upon the reference under Section 91 of the Act inasmuch as his jurisdiction to enter upon such claim was barred under Section 28 of the Bombay Rents, hotel and Lodging House Rated Control Act, 1947 (Bombay Rent Act for short). That objection of his was sustained by the Officer on Special Duty by his judgment and award dated November 16, 1972. The learned Officer on Special Duty held that the parties stood in the rural relationship of landlord and tenant and further that the dispute in question did not touch upon the business of the society within the meaning of Section 91 of the Act.

3. Aggrieved, the disputant the late Smt. Devibai Advani carried an appeal to the Maharashtra State Cooperative Appellate Tribunal. The Tribunal by its judgment and order dated February 8, 1974 allowed the appeal and remanded the case for a decision afresh on the question whether the disputant the late Smt. Devibai Advani was a tenant co-partner member or a tenant owner member. It is however necessary to mention that the Tribunal held that the society was a mixed type of society having both tenant co-partner members and tenant owner members but since the disputant described herself as a tenant member, and particularly having regard to the fact that Rajpal Bhatia got himself admitted as a nominal member queried : If she was an owner member where was the necessity of taking permission of the society for letting the flat ? Nor was there any necessity for Rajpal Bhatia to seek admission as a nominal member which made him subject to the bye-laws of the society. According to the Tribunal, these circumstances were more in consonance with status of the disputant being a tenant member. It went on to say that there was no evidence led to establish that the flat in question was sold to the disputant and accordingly remitted the aforesaid issue for decision afresh. During the pendency of the appeal, the late Smt. Devibai Advani made an application praying that the society be transposed as disputant 2. Despite the opposition of Rajpal Bhatia, the application for transposition was ultimately allowed.

4. Initially when the society was registered, it was really governed by the regulation in Form 'A'. It however appears that by mistake, as is evident from the affidavit sworn by Atmaram Jhangiani, Chairman of the society, regulation in Form 'B' which relates to tenant owner members was adopted. This mistake was detected in the year 1949 and accordingly at the Annual General Meeting of the society held on September 3, 1949 it was declared that Form 'B' was inapplicable and therefore the mistake was rectified by a unanimously carried resolution that regulation in Form 'A' be adopted instead of regulation in Form 'B'. The District Deputy Registrar, Cooperative Societies, Surat by order dated July 10, 1950 approved of the amendment and accordingly Form 'A' was adopted and Form 'B' deleted. The modification in the bye-laws was approved by a resolution carried at the General Body Meeting of the society held on November 26, 1950 and forwarded to the District Deputy Registrar for approval. After the adoption of Form 'A', bye-law 10(a) pro tanto stood amended. Due to sheer inadvertence, however, bye-law 10(a) remained in the form it was framed and this has given rise to an endless argument before us. In the certificate of incorporation issued by the Registrar, Cooperative Societies the society is classified as a tenant co-partnership society consisting of tenant co-partner members. The mistake in allowing the bye-law 10(a) as originally framed making reference to tenant owner members, came to the notice of the society in 1974 when the said bye-law was deleted and substituted by a fresh bye-law 10(a) which made no reference to the admission of membership of any owner member to the society or to the regulation in Form 'B'.

5. On remand, the only contention advanced before the Judge, First Cooperative Court, Bombay was that the society was a tenant co-ownership type of society and not tenant co-partnership type. The learned judge by his order dated September 8, 1976 recorded a finding that the society, in fact, was a tenant co-partnership type of society and therefore the disputant was only a tenant co-partner member. Against his order Rajpal Bhatia went up in revision to the Maharashtra State Cooperative Appellate Court which by its order dated July 1, 1977 dismissed the revision as not pressed. Thereafter, the dispute came up for adjudication before the learned Judge, First Cooperative Court, Bombay who framed five issues in all. The learned Judge allowed the parties to adduce their evidence thereon. After considering the evidence on record, the learned Judge by his judgment dated August 28, 1981 came to a definitive finding that the claim of the disputant was a claim touching the business of the society under Section 91 of the Act; that the society is a co-partnership type of society and not of co-ownership; that the real nature of the transaction between the parties was that embodied in the formal agreement for leave and licence dated January 1, 1969 and further that after

termination of the licence the possession of the said Rajpal Bhatia was wrongful. Accordingly, the learned Judge rendered an award directing the said Rajpal Bhatia to vacate and hand over possession of the flat in question.

6. The appellants' father Rajpal Bhatia went up in appeal before the Maharashtra State Cooperative Appellate Court but without any avail. It held *inter alia* that in view of the letter addressed by the District Deputy Registrar, Cooperative Societies, Bombay dated November 22, 1978 intimating the court that Form 'B' had been deleted after the resolution passed at the Annual General Meeting held on September 3, 1949 and the amendment of the bye-laws effected by order of the District Deputy Registrar dated July 10, 1950, and particularly in view of the fact that in the latest copy of the bye-laws there is no reference to Form 'B', the conclusion was inescapable that the society is a tenant co-partnership housing society and Form 'B' as was originally appended to the bye-laws was no longer applicable. It observed that in view of its earlier judgment in Appeal No. 236 of 1978 - *M/s. Bharat Sales Service v. Smt. Rukibai Naraindas Bhavnani* decided on January 12, 1979 - taking that view upon investigation into the facts, which was upheld by the High Court in *O. N. Bhatnagar v. Smt. Rukibai Naraindas* in Miscellaneous Petition No. 271 of 1979, decided on April 21, 1981, and later by this Court in *O. N. Bhatnagar v. Smt. Rukibai Narsindas* ((1982) 2 SCC 244 : (1982) 3 SCR 681), it was no longer possible to contend that Shyam Cooperative Housing Society Limited was a tenant ownership housing society and not a tenant co-partnership housing society. It further observed that in view of the decision of this Court in *O. N. Bhatnagar* case ((1982) 2 SCC 244 : (1982) 3 SCR 681), learned counsel appearing for the appellants conceded the legal position but contended that the decision in *O. N. Bhatnagar* ((1982) 2 SCC 244 : (1982) 3 SCR 681) was distinguishable on facts. It observed :

It has to be noted that Form 'A' was made applicable to all the buildings of the society and not to a particular block or building. No doubt, the bye-laws of the society were amended much later i.e., in the year 1976 though the resolution proposing the amendment was passed in the meeting held on December 25, 1974. It appears that, though Form 'A' was made applicable in the year 1950 to the society corresponding amendment was made on December 25, 1974 and thereafter it was approved on April 28, 1976. That will not make any difference because once Form 'A' is made applicable and once Form 'B' is deleted from the bye-laws the intention of the society was to convert the society to a tenant co-partnership type of society. Moreover, it has to be noted that the present appellant was inducted in the said premises on January 1, 1964, i.e. much after the Form 'A' was adopted. As mentioned above, it is not open to the present appellant to challenge the status of respondent 1 Devibai because, as mentioned above, respondent 1 had surrendered her status as tenant owner and had become tenant co-partner member of the society. Under these circumstances, there is no other alternative but to hold that the] society is not a mixed type of society but it is a tenant co-partnership type of society.

Further, the appellate court held that merely because the disputant described herself as the owner of the flat was not decisive of the question as to whether she was a tenant co-partner member or a tenant owner member, and added :

Even though respondent 1 described herself as the owner of the flat, we feel that as she has purchased the flat from the society she might have described herself as the owner. In common parlance the flats which are purchased from the society or from the builders are called as ownership flats and very often we find that even a member

in a tenant co-partnership type of society describes himself or herself as owner of the flat, either because he has purchased the flat or he has contributed towards the cost of the construction.

In the light of the principles laid down by this Court in *Associated Hotels of India Ltd. v. R. N. Kapoor* ((1960) 1 SCR 368 : AIR 1959 SC 1262) the appellate court further held on a consideration of the evidence adduced by the parties that the parties intended by the agreement to create a licence and not a lease. It also held that the dispute was a dispute touching the business of the society.

7. Shri R. F. Nariman, learned counsel for the appellants argued the appeal with great clarity, much resource and learning and we heard him with considerable interest. It was contended, firstly, that the intention of the disputant the late Smt. Devibai Advani was to demise the flat in question and therefore the real transaction was one of lease though camouflaged in the form of an agreement for leave and licence and therefore the jurisdiction of the Registrar under Section 91 of the Act to adjudicate upon the reference was barred by Section 28 of the Bombay Rent Act; and secondly, that neither of the two resolutions subsequently adopted by the Annual General Meeting or the Central Body Meeting nor the order of the District Deputy Registrar could change the intrinsic character or the real status of the disputant who was admittedly a tenant owner member, and the finding of the appellate court that she must be deemed to have relinquished her status as tenant owner member and became a tenant co-partner member of the society is patently erroneous. Learned counsel very candidly accepted that he does not rely upon Section 15-A of the Bombay Rent Act. That had to be so because in the first place his entire submission proceeds on the basis that the transaction between the parties was one of lease and not of licence and secondly, even otherwise, the licence having admittedly been terminated by the disputant's notice dated May 21, 1969, there was no subsisting licence existing as on February 1, 1973 and Section 15-A in terms would be inapplicable. We are afraid, in view of the decision of this Court in *O. N. Bhatnagar case* ((1982) 2 SCC 244 : (1982) 3 SCR 681), the contentions advanced by the learned counsel cannot prevail.

8. There can be no doubt whatever from the terms of the agreement dated January 1, 1964 as well as the overwhelming evidence on record taken in conjunction with the facts and circumstances appearing, coupled with the course of conduct of the parties that the real transaction was one of lease (sic licence) and not of licence (sic lease). The agreement between the parties is embodied in the usual standard form of an agreement for leave and licence. The parties being executants thereof are bound by the terms of the agreement. There is nothing to suggest that the agreement for leave and licence was merely a device to camouflage the real nature of the transaction viz. creation of a tenancy, which would clearly be against the bye-laws of the society. The disputant the late Smt. Devibai Advani, the licensor, was only a tenant co-partner member and all that she could do under the terms of the bye-laws was to create a licence with the permission of the society by making the licence to be a nominal member thereof. The evidence adduced by the disputant clearly shows that that flat in question was taken on a licence for a term of 11 months which was renewed from time to time at the request of the late Rajpal Bhatia till the disputant terminated the licence by notice dated May 21, 1969, we also find no merit in the contention that the jurisdiction of the Cooperative Courts to adjudicate upon the dispute under Section 91 of the Act was barred by Section 28 of the Bombay Rent Act.

9. The matter is directly covered by the decision of this Court in *O. N. Bhatnagar case*. In rejecting the contention that a dispute of this nature was not a dispute touching the business of the society within the meaning of Section 91(1) of the Maharashtra Cooperative Societies Act, it was observed : (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 is 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 type 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-law as 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 licence and want to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society to eject such member for ejection of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a dispute falling within the purview of Section 91(1) of the Act.

In dealing with the interrelation between the non obstante clause in Section 91(1) of the Act and that in Section 28 of the Rent Act, it was observed : (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 provision of the Act, should apply. But where the parties admittedly do not stand in the rural 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 his 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.

10. It is quite evident from the affidavit sworn by Atmaram Jhangiani, Chairman of the Shyam Cooperative Housing Society Limited, that the society is purely a tenant co-partnership type of housing society consisting only of tenant co-partner members and there are no tenant owner members in the society; nor are there any tenant owner members in Block No. 8 where the flat in question is located. As already stated, while framing the bye-laws regulation in Form 'B' was by mistake adopted. This mistake was realised in 1949 and at the Annual General Meeting of the society held on September 3, 1949 it was decided that the regulation in Form 'B' was inapplicable and therefore the mistake was rectified by deleting Form 'B' and substituting Form 'A'. This amendment was duly approved by the District Deputy Registrar, Bombay by his order dated July 10, 1950. The aforesaid resolution was duly ratified at the General Body Meeting of the society. That being so, bye-law 10(a) making a reference to tenant owner members became a mere superfluity and was wholly redundant. The rights of the parties cannot be spelled out from the terms of the bye-law 10(a) as originally framed. Nor would the mere description by the disputant the late Smt. Devibai Advani describing herself to be the owner of the society, affect the classification of the society because she was, in fact and in law, nothing but a tenant co-partner member. It also appears from the certificate of registration issued by the Registrar, Cooperative Societies that the society was classified as a tenant co-partnership housing society. The erroneous description in bye-law 10(a) of the society having tenant owner members came to be rectified when the said bye-law was replaced in 1974 by a new bye-law 10(a). In view of the subsequent change brought about by the amendment of the bye-laws, there was no question of the disputant being regarded as a tenant owner member. The appellate court as well as the learned Judge of the First Cooperative Court have rightly held here to be a tenant co-partner member. The appellants' father Rajpal Bhatia having been inducted into the premises under the terms of the agreement for leave and licence dated January 1, 1964, cannot be

heard to say that disputant was a tenant owner member and not a tenant co-partner member or that the transaction was one of lease and not of licence. These aspects are concluded by the concurrent findings of fact based on appreciation of evidence recorded by the courts below. There is no reason for us to come to a contrary conclusion.

11. We cannot but briefly refer to a few of the decisions cited. As explained in the affidavit sworn by Atmaram Jhangiani, Chairman of the society, the decision in *Sabharwal Brothers v. Smt. Guna Amrit Thandani* ((1973) 3 SCC 750 : (1973) 1 SCR 53) proceeds on the assumption that Smt. Guna Amrit Thandani was an owner member. It appears that the true and correct factual position was not placed before the court that under the changed bye-laws of the society, particularly after the deletion of Form 'B', she could only be a tenant co-partner member. It follows that the ultimate conclusion arrived at was based upon inaccurate facts. Be that as it may, a decision based upon a statement of inaccurate facts which has no resemblance of reality would not change the actual legal status of the society as a tenant co-partnership type of housing society, nor the classification made by the Registrar, Cooperative societies in his certificate of incorporation issued by him, classify in the society as a tenant co-partnership society consisting only of tenant co-partner members. In view of the real factual position now brought out, it is difficult to come to the conclusion that the society was a mixed type of society or that the building in question where that flat in dispute is situated, was a multi-storeyed building consisting of residential flats of both types viz. tenant owner flats and tenant co-partnership flats. In any event, the decision in *Sabharwal Brother case* ((1973) 3 SCC 750 : (1973) 1 SCR 53) is clearly distinguishable on facts. The contention of Shri Nariman that the society was a mixed type of society must therefore fail.

12. The decision of this Court in *Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi* ((1975) 2 SCC 105 : 1975 Supp SCR 270) is also distinguishable. In that case, the question was whether a flat in a tenant co-partnership housing society was liable to attachment and sale in execution of a decree. The court laid down that the right to occupy the flat owned by cooperatives housing society is a species of property. It was further held that there was nothing in the language of Section 31 of the Maharashtra co-operative Societies Act to indicate that the right to occupation of such a flat which was the right sought to be sold by auction, was not attachable in execution of the decree. Nor was there anything in the section to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. The only restrictions under Section 29(2) of the Act are that the member may not transfer his interest in the property prior to one year and the transfer is made to an existing member of the society or to a person whose application for membership has been accepted by the society. As regards bye-law 71-D the court observed that any contravention of the bye-law would not make the assignment invalid under the Act unlike in the case of a transfer being void under Section 47(3). Further, that Section 29 read with Rule 24 shows that there is no prohibition as such against transfer of share to a member or even to a non-member if he consents to be a member and makes an application for membership, by purchasing five shares as provided under bye-law 9. The ultimate decision of the court was that the right to occupation of a flat is property both attachable and saleable, inasmuch as Section 60 of the Code of Civil Procedure, 1908 is not exhaustive as such. It also refers to any other saleable property, movable or immovable, whether same be held in the name of the judgment-debtor or by another person on his behalf. The right to occupation of a flat is property both attachable and saleable. Specific non-inclusion of a particular species of property under Section 60 is therefore not of any consequence if it is saleable otherwise. The decision in *Ramesh Himmatlal Shah case* ((1975) 2 SCC 105 : 1975 Supp SCR 270) is therefore of little or no assistance.

13. Chainani, C.J. speaking for himself and V. M. Tarkunde, J. in *Dr. Manohar Ramchandra Sarfare*

v. Konkan Co-operative Housing Society Ltd. (AIR 1962 Bom 154 : 63 bom LR 1001 : 162 Nag LJ 668) brought out the true concept of a tenant co-partner housing at p. 157 in these words :

(T)he property in the whole estate remains absolutely with the society as whole. The member contributes in the first instance by shares and then pays rent so calculated as to cover not only the economic rent of his tenant or house, but also an amortization or sinking fund payment, which at the end of 25 years or 40 years, as the case may be, repays the whole value of the building. At the end of that period, he is credited with further shares in the society equivalent to the value that he has paid up and the normal interest on these shares is equal to he economic rent which he has to pay. At the end of the period he is therefore in the position of occupying the building free of rent or merely so as a tenant of the society of which he is himself a member and therefore a controlling authority.

See also I. R. Hingorani v. Pravinchandra ((1965) 67 Bom LR 306), Contessa Knit wear v. Udyog Mandir Cooperative Housing Society (AIR 1980 Bom 374 : 1980 Mah LJ 539 : (1980) 2 Ren CJ 329), Bandra Green Park Co-operative Housing Society Ltd. v. Mrs. Dayadasi Kalia (AIR 1982 Bom 428 : (1982) 84 Bom LR 177). These cases more or less reflect the different views that have prevailed in the High Court but the law is now governed by the principles laid down by this Court in O. N. Bhatnagar case ((1982) 2 SCC 244 : (1982) 3 SCR 681).

14. The result therefore is that the appeal must fail and is dismissed with costs. The appellants are however given six months' time to vacate the disputed premises on their furnishing the usual undertaking to the Registrar of this Court within four weeks from today in the form of affidavits sworn by each one of them that they shall deliver vacant and peaceful possession to respondents 1 and 2 on or after March 31, 1989 and shall not in the meanwhile part with, assign or otherwise encumber the premises in any manner.

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