

# **BOMBAY HIGH COURT**

Contesan Knit Wear

Vs.

Udyog Mandir Co-operative Housing Society

Civil Application No. 900 of 1976 and 3965 of 1978

(Deshpande and Mody, JJ.)

05.02.1980

## **JUDGMENT**

### **Deshpande, J.**

1. (oral) - Respondent No. 1 is a Co-operative Housing Society and as such owner of a building 'Udyog Mandir' at Pitambar Lane, Mahim, Bombay 400016. It is registered in 1968. Respondent No. 2 is its member as a co-partner tenant and as such a holder of three units, viz. Unit Nos. 11 and 12 on the ground floor and Unit No. 3 on the second floor. The member appears to have purchased the units from a builder after he had already formed the society of which he became member in the year 1971 on purchase of units. The petitioner was inducted in the unit 3 on the second floor by the member under a leave and license agreement dated 23.7.1972 for a period of 11 months on payment of compensation of Rs. 1,000/- per month.

2. The Society appears to have objected in writing to the petitioner's such possession on 4.9.1972 on the ground that it secured such possession without (1) its being a nominal member, and (2) obtaining prior permission as required under its bye-laws. Some civil and criminal proceedings were initiated by the petitioner initially. The petitioner then instituted a declaratory suit being suit No. 771/2858 of 1975 on 11th June, 1973, in the Court of Small Causes under the Rent Act claiming itself to be the tenant of the premises from the member. This suit was dismissed for default on 14.2.1975. Mr. Gursahani, the learned Advocate for the petitioner, informed us at the Bar that a motion for its restoration is now made on 8th January, 1980, and the same is pending. The petitioner also then instituted standard rent fixation proceedings being No. 1844/SR of 1973 on or about 24.9.1973 on which an interim rent of Rs. 700/- per month has been fixed which the petitioner claims to have been depositing in the said Court.

3. After some correspondence with the member and the petitioner, the society terminated the tenancy of the member in regard to this Unit No. 3 by a notice dated 26.5.1973 and instituted the

present proceedings for possession against the member and the petitioner on 29.8.1973 pursuant to the Managing Committee Resolution dated 7.7.1973 to that effect. The dispute was referred to the officer on special Duty by the Registrar under Section 91 of the Maharashtra Co-operative Societies Act hereinafter referred to as 'the C.S.Act'. The petitioner alone contested the proceedings and claimed to have become the tenant under the Bombay Rents, Hotel and Lodging House Rates control Act, 1947 hereinafter referred to as 'the Rent Act' as amended under Act No. 17 of 1973 on the basis of its being possession as a license on 1.2.1973 on the basis of its being in possession as a license on 1.2.1973, other grounds being not relevant herein. The petitioner and the Society examined one witness each in support of their respective claims.

4. The officer on special duty (OSD) decree the claim of the Society on 9.1.1975. On appeal by the petitioner to the Co-operative Tribunal, the same was dismissed on 29th January, 1976. Validity of these orders is challenged in this Special Civil Application.

5. Mr. Gursahani contends that the petitioner having become the tenants of the premises under the amended Rent Act, the claim for possession of the premises against it is triable exclusively by the Court under the Rent Act and the jurisdiction of any other Court including that of any authority under Section 91 of the Co-operative Societies Act is barred under Section 28 of the Rent Act.

6. It is, however, well settled that the question of jurisdiction has to be decided by reference to the averments in the plaint or the application raising the dispute in the present case. The Society claims possession of the premises, as its owner, from its member, on the ground of his having let in the petitioner therein, in breach of the Bye-laws. The claim against the petitioner is incidental to the claim against the member because of his being privy to the said breaches. Though the member is loosely referred to as 'the tenant', member's right to possession of the premises in such a housing Society is the incident of his membership of the Society and not based on any contract of lease with it. These averments, as to the cause of action and status of the parties clearly attract the provisions of Section 91 of the C.S. Act and the jurisdiction of the registrar or his nominee thereunder.

7. No question of attracting the provisions of Section 28 of the Rent Act can arise unless the dispute as to possession is shown to be between a landlord and his tenant. The petitioner, no doubt claims to have become tenant of the premises with effect from 1.2.1973 as licensee in possession under Section 5 (4A) read with Section 5(1)(b) and Section 15A of the Rent Act. The petitioner has not, however, indicated whose tenant it claims to be. It may be best claim to be the tenant of the member, as the licensee of a building or part thereof vested in any Co-operative Housing Society is expressly included in the amended definition of 'Licensee' under Section 5(3) of the Rent Act. Even if mere defense of it being the tenant cannot go to determine the issue of the jurisdiction, the same shall have to be upheld if such conclusion flows, on application of the law to the averments in the plaint itself, or facts found on evidence. However, no such finding

can be justified on the material on the record of this case.

8. The definition of "landlord" in Section 5(3) of the Rent Act reads as follows :

"'landlord' means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or who would so receive the rent or be entitled to receive the rent of premises were let in a tenant, and includes any person not being a tenant who from time to time derives title under landlord, and further includes in respect of his sub-tenant a tenant who has sub-let any premises; and also includes in respect of the licenses deemed to be a tenant by Section 15A, the licensor who has given such license."

This wide definition consists in all of four parts. Entitlement to receive rent or actual receipt thereof on some account or the other specified therein is the main test under its first part. The petitioner does not claim to be the tenant of the society on account of any contract of lease with it. There is no allegation that the Society is entitled to or in fact collects rent from the member or the petitioner. It is well known that the Society such as the plaintiff's only collects contribution from the member towards common expenses and in some cases loan instalments with interest. It is not known to receive any rent from its members as such. The first part is, therefore, liable to be eliminated from consideration. The second inclusive part is intended to meet the case of any successor of the original landlord as an heir, or transferee on any account. The petitioner became the licensee of the member in 1972 long after the member had joined the Society and surrendered his interest in the premises to the Society in 1971. This part is also not applicable. We have seen how the member in such Society gets right to possession as an incident of his membership and not as its tenant. Such member cannot be covered by any of the clauses of Section 5(11) of the Act. The petitioner, therefore, cannot claim to be his sub-tenant to be covered by third part. The member, and not the Society, being his Licensor, even the fourth part introduced under amendment Act No. 7 of 1974 can have no application. The society thus cannot be said to be the "landlord" of the member or the petitioner by any stretch of imagination and Section 28 of the Rent Act can have no application to the claim of the Society against the member or the petitioner.

9. Both the authorities have found this society to be a "tenants" Co-partnership Society." The Society's claim to that effect is not disputed by the petitioner in its written statement. In terms of Rule 10(5)(b) of the Rules framed under the Co-operative Societies Act, such Societies hold land and buildings both, and allot the same or parts thereof to its members, who are loosely referred to as tenants. There is nothing, to restrict the conception of such 'holding' to the title based on the registered conveyance deed and exclude the limited one based on the agreements of sale and protected by Section 53A of the Transfer of Property Act.

10. The occupation of flats (or blocks as the case may be) by several holders in one building held by such societies raise some problems of such "Co-existence" inevitably giving rise to certain

mutual rights and obligations requiring a machinery to regulate and enforce the same. Bye-laws to the above effect, involving some mechanism for enforcement are framed as a part of the process of the registration of such Societies. This necessarily involves an abridgement of their property rights in such flats. One such incidence of such "co-existence" is the indispensable dual ownership, management and authority to enforce the obligation being vested in the Society, while right of occupation subject to the Bye-laws being vested in the member. Another incidence is the indispensability of restricting the right of occupation to the member himself, for whose occupation it is intended from its very inception and who alone is liable to comply with such obligation and as a corollary thereto, his disability to induct any third person therein, excepting with the permission of the Society, in case of any temporary urgency. Yet another incidence is the restriction of his right of transfer of his interest in the Society, including the incidental right of occupation.

10A. At the inception of the Co-operative Housing Schemes, promoters used to get the Society registered with the Bye-laws dealing with all such contingencies and enlist needy houseless members therein, even before the construction of the buildings. When the professional builders started constructing building and selling flats therein to such needy persons, as part of their business. Legislature had to set up in and enact the "Maharashtra Ownership flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963' making it obligatory on the builder to form a housing society or a company of such occupants and sell the flats to purchasers only on their agreeing to become members thereof. This only goes to high light the inevitability of some such mechanism to deal with the problems of common interest and enforce mutual obligations and consequential restrictions on the rights of the holder in their flats.

11. Such Housing schemes do not admit of permanent occupation of the flats by persons other than the members themselves who supposed to join the Society for securing dwelling house for themselves. This is what even the definition of the Housing Society in Section 2(16) of the Co-operative Societies Act contemplates. A provision imposing such restriction is necessarily made in the bye-laws. These, however, provide for letting in third person with the prior permission of the Society due to some inevitable temporary contingency. Third person is contemplated to be made in that case a nominal member to ensure compliance of his obligation as temporary occupant as also eventual eviction. Immunity against eviction of any such Licensee of the Member, available to any tenant under Section 12 of the Rent Act is simply incompatible with such a Housing Society Scheme in such flats are intended for the needy members themselves. Such immunity is destructive of the very basis of the scheme evolved to solve the housing problems of the needy members.

12. It is presumably due to these consideration that the legislature appears to have advisedly not made the Society "the landlord" of such licensee-tenant under its amended definition under Section 5(3). Section 14 of the Rent Act enabled a sub-tenant to become landlord's direct tenant in spite of absence of any privity in between them. Though sub-section (2) of Section 14 is also

amended under the Amendment Act 17 of 1973, the licensee-tenant is not enabled to acquire the rights of its licensor-member on termination of his interest in the flat in the buildings of such Societies. We have already seen how such a "member" cannot be held to be tenant under Section 105 of the Transfer of property Act and Section 5(11) of the Rent Act. These omissions do not appear to us to be accidental or unintentional. These omissions clearly demonstrate legislative intent to exclude the eviction proceedings of the Society, against its members and their licensee-tenants, from the application of the Rent Act, and leave the society free to enforce its bye-laws or breach thereof by recourse to remedies under Section 91 of the Co-operative societies Act. The question of application of Section 28 of the Rent Act to such eviction proceedings and in application of Section 91 of the Co-operative Society Act thus does not arise at all even after the amendment of Rent Act in 1973. The Appellate Court has referred to different categories of Societies under the Co-operative Societies Act, in which any occupant, according to its view, can conveniently claim the Society to be his landlord. According to Mr. Gursahani, licensee-tenant inducted with the Society's permission, by a member possessing unrestricted "letting in rights" under its bye-laws also can claim the society to be its landlord. It is unnecessary to go into any such question in the present case as the member in this society do not possess any unrestricted rights of letting in the units or the flats its building intended essentially for the occupation of the members.

13. It is true that some members have started acquiring flats even in such Housing Societies not for their occupation but for making money by virtually letting it out to third persons as licensees in breach of the prohibition under the bye-laws. Permission obtained under the pretence of some temporary need is abused by such greedy members. This abuse of the bye-laws and the protection from the Rent Act is facilitated by the indifference, lack of vigilance or even the pliability of the Managing Committee members. The plight of their victim licensees-tenants is in no way different from the tenants of any other premises. This makes one wonder how they could be denied the protection of the Rent Act. The legislature, however, could not have yielded to the rhetoric involved in their causes and extended the Rent Act to the buildings of the Society in their causes and extended the Rent Act to the buildings of the Society indiscriminately (1) without withdrawing protection of the C.S. Act from the needy members, who are driven to induct third persons temporarily to meet their genuine needs and (2) without destroying the very basis of such Housing Society Schemes.

14. We have seen how extension of Rent Act on a limited scale under amended Sections 5(3), 5(4A) and 5(11)(bb) can relieve such licensee tenants against any exorbitant rental claims of such greedy members. This may have the effect of discouraging such tribe from abusing this process and eradicating the evil. The legislature may consider amending the law further if this measure is found to be inadequate to eliminate this tribe altogether. The licensee-tenants enter the premises with their eyes open this legal position and can have no grievance to make on that count.

15. One of us (i.e. myself sitting singly) has taken the same view earlier in *Sardar Ajitsingh*

*Matheru v. Saibaba Co-operative Housing Society Ltd<sup>1</sup>.*

16. Both the Courts below assumed the title of the building is not conveyed in favour of Society so far Mr. Gursahani challenges the Society's authority to claim possession on this ground also. We have already seen how the Society was registered in 1968 and the member joined the Society in 1971. This point not being raised in the written statement or at the stage of evidence, the Society was never called upon to explain the source of its authority and control over the flats. The member, like others, appears to have been put in possession of the premises under an agreement of sale by the builders and he in turn on joining the Society appears to have agreed to hold the said premises under the bye-laws of the said Society. The member and the society both are entitled to defend their possession under Section 53A of the Transfer of Property Act. The member's right to possession was subject to the bye-laws on the date when the petitioner got possession from the member. The petitioner, of any state, is estopped from challenging either the title of the member or the Society, having entered therein with its licensor's defective title.

17. Mr. Gursahani then contends that the eviction proceedings initiated by the Society are

<sup>1</sup>1978 Mah. Law Journal 404

collusive and intend to oblige the member who cannot himself claim possession without recourse to proceedings under the Rent Act. No such point is raised in the written statement. It appears to have been raised at the stage of arguments. No finding as to collusion can be recorded without any foundation in pleading and evidence. Society indisputedly can evict the member and any person unauthorized inducted by him in breach of the bye-laws. That it may benefit the member by itself is not relevant nor can furnish proof of collusion. Written-statement shows that first objection was raised by the Society in September, 1972 within two months of the petitioner's entry in July, 1972. It must also be noted that, at the initial stage of hearing before us, Mr. Shastri, the learned Advocate for the Society, told us in reply to one query that the society would not allot the premises to the member again. He, however, withdrew the statement later presumably for want of authority from the Society. It is hazardous to draw an adverse inference from this alone in support of the plea of collusion in the absence of a plea in the written statement and evidence in support thereof.

18. The contention that the petitioner can claim protection against eviction by the society independently of the member is equally misconceived. We have already seen how the petitioner can claim some protection under Rent Act against the member to the extent of his interest in the flat, the contract with whom enabled it to enter the Unit initially. But the Society not being party to this contract nor the statutory protection of the Rent Act flowing therefrom. The dual ownership or interest of the society and the member, is relevant precisely in this context. The possession of the petitioner, without the required prior permission of the Society, becomes unauthorized, as against the society. The Rent Act does not extend its protection to such unauthorized occupant, who is no better than trespasser as against the Society. The question thus

of the petitioner having any independent statutory right cannot raise in such a situation.

19. Mr. Gursahani, however, strongly relied on the judgment of the Supreme Court dated 3.1.1979 in Civil Appeal No. 2239 of 1978. A Co-operative Society and its members together initiated proceedings for possession of the premises from the licensees of the said member. A declaratory suit under the Rent Act filed by the licensee claiming to have become tenant also was pending in the Small Causes Court. On behalf of the licensee, who had lost the case throughout, several points as indicated in the judgment, appears to have been raised before the Supreme Court, correctness of which was disputed by the respondents. Without deciding these points the Supreme Court directed the Court of Small Causes to try two issues indicated in the judgment and certify finding thereon to it, with the consent of the parties. The following observations are relevant on this point :

"However, having heard arguments in part and pursuant to suggestions made by the Court, Counsel have narrowed down the area of controversy *and have agreed further to certain concrete directions* which we propose to give."

(underlining supplied)

20. Mr. Gursahani is justified in contending that this judgment impliedly up holds the licensee's contention as to the protection of the Rent Act, and exclusive jurisdiction of the Court there under. The law laid down by the Supreme Court is binding on us. It would have been necessary to give effect to it in this case notwithstanding our above findings. It is however, well settled that a case is an authority for what it actually decides, and not for what it implies or assumes. It will be enough to refer to the of quoted judgment of the House of *Lords in Quinn v. Deathen*,<sup>2</sup> Secondly, the directions are based on the concession of the parties and thirdly, the learned Judges themselves have made the following observations in their judgment :

"We do not therefore feel called upon to pronouncer upon the important points raised before us and earlier enunciated by us."

It is clear to us that this judgment does not lay down any law whatsoever. Mr. Shastri and Mr. Keshavdas Dalpatrai the learned Advocates for the respondents tried to distinguish the present case on facts contending that concession of the respondents could have been based on the nature of the Society, bye-laws and specific pleadings in the case. We do not think it necessary to go into the same in view of the clear position indicated above.

21. We do not see any merit in the petition.

22. Rule is accordingly discharged with costs.

23. Respondents, however, will not execute the eviction order against the petitioner for four

weeks from today.

24. No orders on Civil Application.

25. Mr. Gursahani orally applied for leave to appeal to the Supreme Court. Leave refused.

<sup>2</sup>901 AC 495