

Krishnaraj Jamnadas Modi Vs. Colaba Land Co-operative Housing Society Ltd. and anr.

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Court : Mumbai

Decided On : Jan-30-1979

Reported in : (1979)81BOMLR307; 1979MhLJ841

Judge : P.B. Sawant, J.

Acts : Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Sections 13(1); Maharashtra Co-operative Societies Rules, 1961 - Rule 10

Appeal No. : Special Civil Application No. 270 of 1977 with Civil Application No. 4295 of 1978

Appellant : Krishnaraj Jamnadas Modi

Respondent : Colaba Land Co-operative Housing Society Ltd. and anr.

Advocate for Def. : R.D. Chadha, Adv. for respondent Nos. 1 and 2 (original plaintiffs 1 and 2)

Advocate for Pet/Ap. : J.C. Bhat, ; H.C. Tumara and ; A.G. Parikh, Advs.

Disposition : Petition dismissed

Judgement :

P.B. Sawant, J.

1. By this petition filed under Article 227 of the Constitution, the petitioners seeks to challenged under the order dated 12-10-1976 passed by the Appeal Court of the Small Causes Court, Bombay in proceedings under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Rent Act). This petition raises some important questions which are likely to affect a large number of persons, and the questions briefly stated are as follows :

(1) What are rights which a member gets in a tenant co-partnership housing society when the society allots to him premises which are not vacant on the date of allotment?

(2) Can it be said that the society holds such premises for the benefit of the member within the meaning of sub-clause (g) of sub-section (1) of section 13 of the Rent Act ?

(3) Can the society adopt proceedings for recovery of possession of such premises under the aforesaid provision on the ground that the premises are reasonably and bona fide required by the member to whom such premises are allotted

2. In order to appreciate the rival contentions put forward on the aforesaid points, it will be necessary to narrate briefly the facts leading to the present petition. Respondent No. 1 Colaba Land Co-operative Housing Society Ltd., is admittedly a tenant co-partnership housing society within the meaning of Rule 10 of the Maharashtra Co-operative Societies Rules, 1961 made under the Maharashtra Co-operative Societies Act, 1960. Respondent No. 1 society was formed some time prior to 29-6-1967, and on 29-6-1967 it purchased the property consisting of 10 buildings situated at Sohrab Bharucha Road, Colaba, Bombay. The ten buildings together had about 80 residential flats out of which 57 were occupied by tenants and 23 were in possession of the Defence Services having been requisitioned by them for the members of the services. Out of the 57 tenants, 54 joined the society as members thereof. The result was that, after the society purchased the said property on 29-6-67, 54 of the flats were occupied by member

tenants, three of the flats were occupied by the tenants of the society and 23 continued to remain with the defence services. The petitioner is one of the three tenants of the society. He has been in use and occupation of the premises as such tenant right from the year 1948 when the property was owned by the predecessor-in-title of the society. The suit premises in his occupation are Flat No. 5 in building No. 9 (which is called Block No. 9) and it is these premises which are the subject matter of dispute of the present petition. Respondent No. 2 who was formerly in the defence service and who was occupying one of the 23 flats with the defence services became member of the society on 21-2-1967. On 4-11-1967, the society, terminated the tenancy of the petitioner by a notice in writing. On 5-5-1968, by a resolution of the society, the suit premises were allotted to respondent No. 2. This was communicated to respondent No. 2 by the society's letter dated 22-5-1968. It is not disputed that this allotment was made in favour of respondent No. 2 on his complying with all the requirements of the society. The present suit was thereafter filed on 24-1-1969 for evicting the petitioner from the suit premises on the ground that the suit premises were reasonably and bona fide required by plaintiff No. 2 for whose benefit the same were held by the society. The suit was filed by respondent No. 1 and respondent No. 2 as plaintiffs Nos. 1 and 2. It is also not disputed that respondent No. 2 retired from service in November 1969 i.e. after the filing of the suit but before the decision in the said and therefore, had to vacate his premises.

3. The suit was dismissed by the trial Court on 30-4-1975 holding that the society was not entitled to recover possession on the ground that the premises were required bona fide and reasonably for respondent No. 2. The Trial Court held that plaintiff No. 2 in his capacity as a member of the society had a right of occupation, but that he was not a beneficiary under a trust and as such part two of Clause (g) of sub-section (1) of section 13 of the Rent Act was not applicable to the facts of the present case. The trial Court further held that the society had not proved its bona fide requirements because it had in the meanwhile disposed of its office premises which were similar in nature to the suit premises. Against this decision of the trial Court, respondent Nos. 1 and 2 preferred an appeal to the Appeal Court, and the Appeal Court by its impugned decision allowed the appeal, reversed the finding of the trial Court and held that the case squarely fell within the second part of the Clause (g) of sub-section (1) of section 13 of the Rent Act. It also held that

since the society was holding only the suit premises for the benefit of respondent No. 2, the disposal by it of the other premises did not affect the merits of the case with regard to the bona fide and reasonable requirements of respondent No. 2. It also answered the issue of hardship in favour of respondent No. 2. The result was that the Appeal Court by its impugned decision decreed the suit and granted a direction for recovery of possession of the suit premises from the petitioner.

4. It may be stated here that after the appeal was filed by respondent Nos. 1 and 2 on 15-7-1975, respondent No. 2, gave a notice to quit to the petitioner on 28-11-1975. Respondent No. 1 by its letter dated 7-2-1976 asked the petitioner to attorn as tenant to respondent No. 2 and thereafter on 1-4-1976 respondent No. 2 filed a separate suit for eviction the petitioner on the ground mentioned in section 13-A1 of the Rent Act. This section enables a member or ex-member of the armed force of the Union to recover possession of the premises on the ground of his bona fide requirement for personal occupation or for the occupation of the relations mentioned therein. In view of this development, the petitioner had made an application before the Appeal Court on 6-7-1976 for dismissing the appeal. That application was contested by respondent No. 2 and the Appeal Court decided the said application holding that neither the notice given by the society asking the petitioner to attorn tenancy to respondent No. 2 nor the suit filed by respondent No. 2 made any difference to the merits of the present suit filed by the society and respondent No. 2 against the petitioner. The said decision on the application was given along with the decision in the appeal and forms part of the judgment assailed in this petition.

5. It may be mentioned at this stage that the suit filed by respondent No. 2 was dismissed by the trial Court on 7-6-1977 on the ground that respondent No. 2 was not the landlord of the suit premises. Respondent No. 2's appeal against the said decision is at present pending in the Appeal Court.

6. As stated earlier, it is on these facts that the these questions stated at the outset fall for consideration in this petition. Several decisions were cited on both sides. It will, however, not be necessary to refer to all the said decisions in detail. The relevant provisions of the Rent Act under which the present suit has been filed by

the society and respondent No. 2 for recovery of the suit premises, read as follows
:---

'13(1) Notwithstanding anything contained in this Act a landlord shall be entitled to recover possession of any premises if the Court is satisfied---

.....

(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purpose of the trust.'

Admittedly, the society has filed the present suit for recovery of possession on the ground stated in the second part of Clause (g) above viz. that the premises are reasonably and bona fide required by the society for occupation by respondent No. 2 for whose benefit the premises are held by it. What therefore, fails for consideration in the present case is whether it can be said that the suit premises are held by the society for the benefit of respondent No. 2, and whether in the circumstances of the case it can be said that the society has proved its case that they are reasonably and bona fide required by it for occupation of respondent No. 2. Hence the three questions.

7. Coming now to the first question viz. the rights of a member in a tenant co-partnership housing society, the Supreme Court in a decision reported in *Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi*, 77 Bom LR 549 has held that in a tenant co-partnership housing society, legal ownership of the premises vests in the society, that the member possesses a right to occupy the premises and that this right to occupy is a species of property. This right is attachable in an execution of a decree and can be sold in auction. This right further, acquired under the law, has a stamp of transferability, and there is no fetter under any law against such a conclusion. It was therefore, held in that case that the attachment and sale of the said right to occupy, in execution of the decree, was valid under the law. It may be mentioned, however, that in that case it appears, the member concerned was in occupation of the premises in question, although through his brother and his wife,

as Benamidars. There is, therefore, no doubt that as the law stands, to-day a member who is in occupation of the premises is a tenant co-partnership housing society, holds a species of a property, which is the right to occupy the premises and this right is transferable although with the permission of such society. This proposition was not disputed before me. What was, however, vehemently urged on behalf of the petitioner was that a member who is allotted premises which are not vacant on the date of the allotment, possesses no such right to occupy and hence the decision in the aforesaid Supreme Court case will be of no avail to hold that in the present case, respondent No. 2 had a right to occupy the suit premises. It was contended on behalf of the petitioner that on the date of the allotment, the petitioner was a statutory tenant of the suit premises, since the contractual tenancy had come to an end by virtue of the notice dated 4-11-1967. The petitioner's possession of the suit premises was protected under the Rent Act. The society itself had no possession of the suit premises, but had only a right to recover possession thereof, from the petitioner. Therefore, on the date of allotment, it could not create any right to occupy in favour of respondent No. 2. It could only transfer what it had, namely, the right to sue and a mere right to sue cannot be transferred under the law. It was, therefore, urged that no right or interest in the suit premises as such was transferred to respondent No. 2 on the date of allotment and therefore, it cannot be said that the society was holding the suit premises on behalf of respondent No. 2. Hence, argued Mr. Bhatt, the suit filed for recovery of possession on the ground mentioned in the second part of the said Clause (g) was not maintainable. There is no doubt that if it is held that the society had not even a right to occupy the suit premises and therefore, could not have transferred the same on the date of allotment, then it cannot be said that the society was holding the suit premises on behalf of respondent No. 2. However, I find myself unable to accept the proposition that on the date of allotment, the society did not possess the right to occupy the suit premises and therefore, could not transfer or allot to respondent No. 2 the said right, merely because the suit premises were not vacant on the date. As has been laid down in detail in the aforesaid decision of the Supreme Court, a member of a tenant co-partnership housing society, by virtue of his complying with all the requirements of the society, gets a right to occupy the premises allotted to him. (It is not disputed before me

that the bye-laws of the society which fell for consideration in the decision of the Supreme Court are *pari materia* with the bye-laws of the present society and the rules, regulations and the provisions of the Act as they stood then have not undergone any change and the legal position of a member of the society will be the same in both the cases). According to me, the right to occupy specific premises vests in the member as soon as the same are allotted to him. It makes no difference to the nature of the said right whether it is exercisable immediately or in future. As happens generally in housing societies, the premises may be allotted to the members on a paper plan and they may actually come into existence after a lapse of time. It may also happen, as in the present case that the allotted premises though in exercise may not be vacant for one of the other reason on the date of allotment, and may become available for occupation only after some time. However, the mere fact that the premises so allotted are not available for occupation in *presenti* will make no difference to the nature of the right which is the right to occupy. This right to occupy which comes to be vested in a member the moment the premises are allotted to him, can be enforced by the member against the society as soon as the premises become available for occupation. The society cannot deal with or dispose of the premises without the consent of the member and cannot refuse to give possession of the premises when they are available for occupation. In the event of the society making an attempt to deal with or dispose of the property or denying the right of the member to occupy the same, the member can enforce this right through a Court of law. This being the nature of the right the member possesses, it will be difficult to accept the proposition that merely because the premises are not available for occupation in *praesenti* it should be held that the member has no such right to occupy. If I am right in this view, then it will have to be held that on and from the date the society allots the premises to a member, the society creates in him one of the rights which go with the rights of ownership viz. the right to occupy, which is species of property. I am, therefore, of the view that in a tenant co-partnership housing society, a member gets a right to occupy the suit premises irrespective of whether the premises are vacant or not.

8. If this is the answer to the first question then the contention advanced on behalf of the petitioner that the society itself had no right to occupy on the date of allotment in the present case and therefore, had not transferred such a right to

respondent No. 2 cannot be accepted. It must be remembered that in a tenant co-partnership housing society the legal ownership of the property vests in the society. The society therefore, always has a right of property in the premises whether they are tenanted by third parties or allotted to the members of the society. On the date of allotment in favour of respondent No. 2 in the present case, the society undoubtedly had property in the suit premises. On the admitted facts, the petitioner's possession of the suit premises was merely protected by virtue of the provisions of the Rent Act, since his contractual tenancy had already come to an end. He had therefore, no right or interest in the suit premises as such and all the rights and interest in the suit premises were vested in the society. The right of ownership consists of a bundle rights and a right to occupy is one of them. The society, undoubtedly therefore, could transfer the right to occupy which is one of the rights of ownership. In the present case it had done so when the member had complied with all its requirements as per its bye-laws and the rules and regulations governing it. It is not therefore, correct to say that merely because the premises were in the possession of the statutory tenant like the petitioner, the society had no right to occupy the premises. The fact that to enforce such a right to occupy the society has to adopt appropriate proceedings under the Rent Act does not negative the right to occupy itself. The Rent Act merely places a restriction on the enforcement of the right to occupy. It does not negative or nullify the said right to occupy which can be exercised in appropriate cases even while the Rent Act is in operation. It is incorrect to say that when the premises are not vacant, the landlord has only a right to sue for possession. The right to occupy is a foundation of the right to sue. Without the former, the latter cannot exist. I am therefore, of the view that in the present case on the date of allotment the society had a right to occupy the premises in spite of the fact that the premises were in possession of the petitioner as a statutory tenant. On allotment therefore, what was transferred by the society to respondent No. 2 was the right to occupy the suit premises. This will be the position in law in view of the special relationship which exists between the society and its members, as has been held in the aforesaid decision of the Supreme Court.

9. Once it is held that a member gets a right to occupy the premises the moment the same are allotted to him notwithstanding the fact that the premises are not

vacant, there is not much of a difficulty in answering the second question viz. whether it can be said that the society holds such premises for the benefit of the member within the meaning of the second part of Clause (bg) of sub-section (1) of the said section 13. All that the said second part requires is that the plaintiff must hold the suit premises for the benefit of another person. If I am right in holding that on the date of allotment the member gets a right to occupy the premises as against the society and he can enforce the same against the society as soon as the premises are vacant and further that the society cannot deal with the said premises otherwise than in accordance with the desire of the member, then it will have to be held that on and from the date of allotment, the society continues to hold such premises for the benefit of the member. I see therefore, no difficulty in holding in the present case then on and from the date of allotment in May 1968, the suit premises were held by respondent No. 1 society for the benefit of respondent No. 2 member. The second question therefore, will have to be answered accordingly.

10. It was sought to be argued, by relying on three decisions of this Court, that beneficiary under a trust is not a person for whose benefit the trustee holds the property. I find all the said three decisions totally inapplicable to the facts of the present case. The first is a decision of the single Judge reported in 71 Bom LR 337 *Nawab Sardar Meer Sultan Sahad Alia Khan Saheb v. R.R. Gibson*. In that case also the expression 'person for whose benefit the premises are held' in the said Clause (g) fell for consideration. The facts in that case were that the premises in dispute were situated in a building. The owner of the building by a settlement deed had created a trust in respect of the same. On the construction of the terms of the trust deed, the Court came to the conclusion that what was sought to be given to the beneficiary under the trust was only the income from the property of the trust and the trust deed did not require the trustee to hand over to the beneficiaries any part of the property for their use and occupation. It is on this construction of the trust deed that the Court came to the conclusion that no part of the property including the premises involved in the suit could be said to be held by the trustees for the benefit of the beneficiaries.

11. In 79 Bom LR 9 *Framroze Maneckji Bilimori v. M/s. Suhrid Gmigy Trading Ltd.*, the very same expression came for consideration more or less in similar situation as that obtained in the case reported in 71 Bom LR 357 . An important clause in the trust deed provided that the trustees would be at liberty to demise the buildings or other structures on the land and premises which were the trust property in such separate portions or as a whole and at such rents to such person or persons including the trustees as they might think fit in their absolute discretion. On the basis of this clause it was sought to be argued that the beneficiaries were entitled to occupy the premises as of right and therefore, the premises would be deemed to have been held by the trustees for the benefit of the trustees as well as the beneficiaries. This contention was negatived and with respect rightly, by the Court by holding that this clause did not create a right to occupy the premises. On the other hand by the said clause a discretion was given to the trustees to demise the premises in favour of any persons including these other than the trustee.

12. The third decision which was relied upon is reported in 23 Bom LR 972 *Atmaram Babaji Cowgole v. Narayan Arjun Dere*. It was a case of a community which was an unregistered and unorganised body, trying to evict the tenants from its premises on the ground that the premises were required or bona fide requirements of the members of the said community. It appears from this judgment that although there was a clause similar to the present part two of Clause (g), in the then Bombay Rent Act (Bombay Act II of 1918) the proceedings were not failed for recovery of possession on the said ground. On the other hand, the proceedings were taken on the ground that the community itself required the premises bona fide for its purpose viz. for allotment to its members. Therefore, there is no discussion in that case with regard to whether it could be said that the community was holding the premises for the benefit of its members. Mr. Tunara wanted to urge, by relying upon this decision that although the then Rent Act also made a provision similar to the present part two of Clause (g), the Court had negatived the plea of the community for possession of the premises by holding that it could not be said that the community required the premises for its own purpose reasonably and bona fide As stated above, this decision is of no avail to the petitioner because the community had filed the suit on the ground that the community itself required the premises reasonably and bona fide. For its purpose

and it is this contention of the community which was negative there. There was no plea and therefore, there is no discussion whatsoever with regard to the provisions similar to the present second part of Clause (g) as it stood then. Trust I find that neither of the three decisions advances the case of the petitioner.

13. Since the answer to the second question is in the affirmative, I see no impediment in the way of the society to file the present suit as it has done for recovery of the suit premises on the ground that the premises are reasonably and bona fide required by respondent No. 2. It is the need of respondent No. 2 which will have to be proved, and on the fact of the present case, it cannot be said that the society has not done so. In the premises, I am of the view that the suit as filed is maintainable and the third question will have also to be answered in the affirmative.

14. I am aware that this view which I am taking will in a given case enable a co-operative housing society composed of members who are rank outsiders to purchase a fully tenanted building, and oust the tenants for the benefit of its members. Such a possibility though very remote cannot altogether be ruled out. In a small measure this happens even to-day when an individual purchases a tenanted building and requires one or more tenants to vacate the same on the ground that he requires the premises bona fide and reasonably for his occupation. That is the consequences of the law as it stands to-day. The remedy lies in changing the law and not in placing an artificial and expedient interpretation on the provisions of the law.

15. Turning next to the question whether the society has succeeded in proving that it needs the suit premises reasonably and bona fide for the occupation of respondent No. 2, it is not disputed before me that respondent No. 2 who has since retired from the defence services is in need of accommodation. The only point that was vehemently canvassed in this connection and which has also important bearing in the context of the co-operative housing society, was that while the suit was pending, the society had disposed of similar premises in its occupation to a third person at a fabulous sum of over Rs. 1,00,000/-. It was therefore, contended that this showed that the society did not require the suit

premises reasonably and bona fide for the occupation of respondent No. 2. For thus ran the argument, if the need of respondent No. 2 was so urgent, it could as well have handed over the possession of the said premises to him. According to me, in view of the special relationship between the society and its members, the said fact which might otherwise having been available for negating the case of a plaintiff, would not prove an obstacle in the present case. In a society, a member gets right to occupy only the particular premises allotted to him and it is only in respect of such premises that he can enforce his said right against the society. It is, therefore, only such premises which can be said to be held by the society, for the benefit of the member. A member cannot require the society to allot to him other premises even if they fall vacant. As is generally the case, the premises in a society may not all be of the same description and the contribution of the members towards the cost of the premises may vary according to the nature of the premises. A member, therefore, cannot be forced to take nor can he require the society to give him, any premises belonging to the society. He has a claim only to the specific premises allotted to him. Therefore, the fact that in the present case, the society disposed of its other vacant premises will not negate the case of the society that the suit premises are required reasonably and bona fide for the occupation of respondent No. 2. I am, therefore, of the view that for this reason, this contention advanced on behalf of the petitioner must also be negated.

16. What remains now are the two additional grounds attaching the decree, which were also agitated before the Appeal Court viz. that during the pendency of the appeal, the society had asked the petitioner to attorn as tenant to respondent No. 2 and that respondent No. 2 had himself filed a suit against the petitioner in his own right which proceedings are pending in appeal. As far as the letter of the society asking the petitioner to attorn as tenant to respondent No. 2 is concerned, admittedly the petitioner has not pursuant to the said letter, attorned himself as tenant to respondent No. 2. It appears that this letter was written by the society under a mistaken notion of law that respondent No. 2 in his capacity as a member, was the owner of the suit premises. This misconception of law was induced probably by the decision of the trial Court dismissing the suit of the society. However, it will not affect the maintainability of the present suit, since as the law stands to-day, it is the society alone which is the legal owner of the suit

premises and the member does not become an owner thereof by virtue of his membership. According to me, therefore, the mere fact that the society had asked the petitioner to attorn as tenant to respondent No. 2 will not be sufficient to hold that in fact the legal ownership of the suit premises had come to be vested in respondent No. 2 and therefore the suit filed by the society in its capacity as the owner of the suit premises was liable to be dismissed. As regards the suit filed by respondent No. 2, it appears that the same has also been filed under the impression that respondent No. 2 is the legal owner, and therefore, the landlord of the suit premises. As has been stated earlier, the suit has been dismissed on the ground that respondent No. 2 is not the owner and the petitioner had not attorned as a tenant to him. It does appear that by an arrangement made with respondent No. 2, the society has been recovering the rent from the petitioner and after deducting the maintenance charges therefrom handing over the balance of the amount to respondent No. 2 from the date of allotment. It appears to be the contention of respondent No. 2 in the suit filed by him that since the society is recovering rent for and on his behalf from the petitioner from the date of allotment, he is the landlord within the meaning of section 5(3) of the Rent Act. I express no opinion on the said contention in this petition nor is it necessary for me to do so. Suffice it to say that the said proceedings adopted by respondent No. 2 do not come in the way of the present proceedings.

17. In the result, I find that it is not necessary to interfere with the decisions of the Appeal Court on any ground whatsoever. The petition is accordingly dismissed and the rule is discharged with costs.

18. Since the petitioner has been living and occupying the suit premises as a tenant from 1948 and since it is reasonable to presume that were it not for the formation of the society, he would not have been required to vacate the same, I am of the view that some reasonable time should be given to him to vacate the premises. It is therefore, directed that the execution and operation of the decree for possession should be stayed for a period of two and a half years from today. The petitioner through his Advocate Mr. Tunara undertakes to quite, vacate and deliver vacant and peaceful possession of the suit premises at the end of the said period. He also agrees that will continue to pay regularly the monthly compensation. In default of

any three monthly payments respondent No. 2 will be at liberty to execute the decree.

19. The undertaking to vacate the premises given by the petitioner as above is subject to the result of the proceedings that the petitioner may file in the Supreme Court against this decision and without prejudice to his rights and contentions in the said proceeding.

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