

A.V.R. & Co. & Ors vs Fairfield Cooperative Housing ... on 19 September, 1988

Equivalent citations: 1989 AIR 81, 1988 SCR SUPL. (3) 84, AIR 1989 SUPREME COURT 81, 1988 (4) SCC 408, 1988 HRR 225, (1988) 2 RENTLR 650, 1988 SCFBRC 557, (1989) 25 COOPLJ 59, 1988 BOMRC 225, 1988 BOM LR 90 512, (1989) MAHLR 82, (1988) 2 RENCRC 427, (1988) 2 CURLJ(CCR) 613, (1988) 3 JT 780 (SC), (1989) 1 BOM CR 325

Author: B.C. Ray

Bench: B.C. Ray, A.P. Sen

PETITIONER:

A.V.R. & CO. & ORS.

Vs.

RESPONDENT:

FAIRFIELD COOPERATIVE HOUSING SOCIETY LTD. & ORS

DATE OF JUDGMENT 19/09/1988

BENCH:

RAY, B.C. (J)

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RAY, B.C. (J)

SEN, A.P. (J)

CITATION:

1989 AIR 81 1988 SCR Supl. (3) 84

1988 SCC (4) 408 JT 1988 (3) 780

1988 SCALE (2) 813

CITATOR INFO :

R 1989 SC 86 (2,3)

R 1989 SC 87 (2)

D 1990 SC 1563 (14)

ACT:

Maharashtra Cooperative Societies Act, 1960-Section 91-Whether Dispute filed by Fairfield, Co-operative Housing Society seeking possession flat from licencees fell within section 91--Whether section 91 is ultra vires of the Articles 14 and 19 of the Constitution.

HEADNOTE:

Respondent No. 2, a member of the Fairfield Co-operative Housing Society, a Tenant Co-partnership Housing Society--respondent No. 1--permitted appellant No. 1 to possess and occupy as licensee the flat allotted to the respondent No. 2 as a member of the society, without the consent of the society and in breach of the bye-laws and Regulations of the Society. The Society filed a dispute against the respondent No. 2, joining appellants Nos. 1 and 2, the two occupants of the flat as opposite parties, seeking possession of the flat from all the opponents. The appellants Nos. 1 and 2 filed written statements contesting the dispute, stating that they were in exclusive occupation of the flat as licensees.

The Judge, Co-operative Court made an award in favour of the Society, holding that the respondent No. 2 was a member of the disputant Society and the appellants Nos. 1 & 2 were not the members but were claiming through respondent No. 2 and that the dispute, touching the business, management and constitution of the society, fell within Sec-91 of the Maharashtra Co-operative Societies Act, and that the respondent No. 2 committed breach of the Bye-laws. Rules and Regulations of the Society.

On appeal by the appellants Nos. 1 and 2 against the award, the Maharashtra State Co-operative Appellate Court held that the claim for-possession was not affected by the Bye-laws and the appellants were not entitled to the protection of the Bombay Rent Act. The appellants filed a writ petition before the High Court which dismissed the same.

Dismissing the appeal. the Court,

HELD: The claim of the appellants as deemed tenants on

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the basis of an agreement of leave and licence was untenable. This agreement had been executed by the licensor respondent No. 2 in favour of Appellant No. 1 for 11 months. It was not renewed. [88E. G-H]

The appellants 1 & 2 were licensees and not statutory tenants. They were outsiders permitted to possess the suit premises as licensees of respondent No. 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. [89E-F]

There was no factual basis of the allegation of collusion between respondents Nos. 1 and 2 and no merit in the contention. The Society filed the dispute application both against its member and the appellants who were the occupants of the flat to get possession of the flat as the appellants were trespassers put in possession without the consent of the Society and in breach of its bye-laws, rules and Regulations. [92D-E]

Section 91(b) is not ultra vires of Articles 14 and 19 of the Constitution. [92F.]

D.H. Maniar & Ors. v. Waman Laxman Kudav, [1977] 1 SCR 403; O.P. Bhatnagar v. Smt. Rukibai Narsindas & Ors., [1982] 3 SCR 681 at 696, referred to.

Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain & Ors., [1969] 1 SCR 887; Sabharwal Brothers & Anr. v. Smt. Cuna Amrit Thandani of Bombay, [1973] 1SCR 53 and I. R. Hingorani v. P.K. Shah & Ors., AIR 1972 SC 2161, distinguished.

C.P. Khanna v. V.K. Kalghatgi & Ors., AIR 1970 Bombay 201 and Rasiklal Patel & Ors. v. Kailasgauri Ramanlal Mehta
JUDGMENT:

& CIVIL APPELLATE JURISDICTION: Civil Appeal No. 472 of From the Judgment and Order dated 9.8.1983 of the Bombay High Court in Writ Petition No. 1907 of 1983. V.M. Tarkunde, S.K. Dholakia, Y.R. Naik, K. Rajendra Choudhary, K. Shivraj Choudhary, A.M. Khanwilkar and A.S. Bhasme for the Appellants.

PG NO 86 U.R. Lalit, Girish Chandra and M.N. Shroff for the Respondents.

The Judgment of the Court was delivered by B.C. RAY, J. This Appeal by special leave is directed against the judgment and order dated 9th August 1983 passed in Writ Petition No. 1907 of 1983 by the High Court of Judicature at Bombay dismissing the writ petition and confirming the judgments and orders by the Maharashtra Co-operative Appellate Tribunal made in Appeal No. 280 of 1978 and by and Co-operative Court, Greater Bombay allowing the application of respondent Co-operative Society filed under Sec. 91(1) of Maharashtra Co-operative Societies Act, 1960 directing eviction of the respondent No. 2 member of the Society as well as the appellants nos. 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. The respondent No. 2 Smt. Vishni J. Kalwani as a member of the Society was allotted Flat No. 7 in the 1st Floor of the suit premises for residing therein with members of her family. The respondent No. 2 permitted the appellant No. 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 No. 4 of the Society's Regulations contained in Farm No. A of the Society's bye-laws. It has been alleged in the dispute application that the respondent No. 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 the respondent No 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 other members of the society and further that she had been a persistent defaulter in payment of Societies dues which by the date of notice had come to Rs.10,004.38 Paise. The notice sent to Respondent No. 2 was not replied to. Thereafter the Society sent another letter

stating all these facts. The respondent No. 2 did not comply with the request. The Co-operative Society, respondent No. 1, filed a dispute against the respondent No. 2 who is a member for possession PG NO 87 of the said flat given to her. The Society also joined the appellant Nos. 1 and 2. the two occupants as opposite parties and sought for possession from all the opponents. The Society prayed for an award against the respondent No. 1 Smt. Kalwani for a sum of Rs. 10,004.38 with future interest thereon as mentioned in the dispute application. The respondent No. 2 Smt. Kalwani did not file any written statement and remained absent. The appellant No. 1 M/s. A.V.R. & Co. who was opponent No. 2 in the dispute application filed a written statement contending inter alia that the dispute was barred by jurisdiction as the opponent No. 1 Smt. Kalwani was a tenant of the Society, that the appellant No. 1 was in exclusive occupation of the said flat as the licensee of the respondent No. 2 and now, their sister concern M/s. J.R. Enterprises, the appellant No. 2, were in occupation of the premises as licensees. It was due to this the Society subsequently impleaded the appellant No. 2 as opponent No. 3 in the dispute application. It was further contended that their occupation of the suit premises was under the leave and licence agreement which continued even after 1st February, 1973 and so the appellant No. 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. The appellant No. 2 also filed a written statement adopting all the contentions raised by the appellant No. 1 in their written statement.

The Judge, Co-operative Court after hearing the parties and considering the evidences has made an award in favour of the Society holding inter alia that the opponent No. 1 is a member of the disputant society, that the opponent nos. 2 and 3 are not their members but claiming through the opponent No. 1, that the dispute touches the business, management and Constitution of the Society, thus falling within Sec. 91 of the Maharashtra Co-operative Societies Act. It was also held that the opponent No. 1 committed breach of Bye-laws, Rules and Regulations of the Society by inducting opponent Nos. 2 and 3 in the suit premises without the consent and permission of the society. The opponents Nos. 1 to 3 have been directed to hand over possession of suit premises to the disputants. The opponent No. 1 was also directed to pay Rs. 10,004.38 p. to the society with interest thereto @ 9% from the date of filing of the dispute.

PG NO 88 Against this award the appellants nos. 1 and 2 filed an appeal being Appeal No. 280 of 1978 before the Maharashtra State Co-operative Appellate Court. The respondent No. 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.

The appellants filed a Writ Petition under Articles 226 and 227 of the Constitution of India before the High Court at Bombay. The Writ Petition No. 1907 of 1983 was dismissed. Hence this appeal by special leave. 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 licence and the said agreement of licence is subsisting on 1.2.197-. so they have become deemed tenants under Sec. 15A read with Sec. 5(4A) of the Bombay Rents Hotel and Lodging House Rates Control Act, as amended up-to-date. The agreement of leave and licence was not filed either in the trial court or in the appellate court. It was filed in the High Court It is a leave and licence agreement executed on 1.9.1969 by the licensee or respondent No. 2 in favour of M/s. A.V.R. & Company for a period of 11 months. This agreement of licence was not renewed. Moreover the appellant No.2 M/s. J.R. Enterprises who is in occupation of Suit Premises has not produced any agreement of Licence inducting them as licensees. Sec. 15A of the said Act which was inserted by Maharashtra Amendment Act No. 17 of 1973 enjoins that any person in occupation of and premises or any part thereof which is not less than a room as a licence on the 1st day of February, 1973 under a subsisting agreement of licence, 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 licence agreement has been filed by the appellant No. 2. The claim of the appellants as deemed tenants is untenable It may be noted that the appellants did not urge this point therefore the appellate Court. In the case of D. H. Maniar & Ors. v Waman Laxman Kudav, [1977] 1 SCR 403 it has been observed that:

PG NO 89 In order to get the advantage of section 15A of the Bombay Rent Act, the occupant must be in occupation of the premises as a licensee as defined in section 5(4A) on the 1st of February 1973. If he be such a licensee, the non- obstante clause of section 15A(1) gives him the status and 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 the 1st of February 1973, then he does not get the advantage of the amended provision of the Bombay Rent Act."

It was next contended that the dispute cannot be entertained by the Co-operative Court as the appellants are not claiming through the respondent No. 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 Causes 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. Sec. 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. The respondent No. 2 is the member of the Disputant Society. The appellants Nos. 1 and 2 are not members of the Society but they as licensees are claiming through the respondent No. 2. The dispute touches the business of the Society and it falls within the ambit of Section 91 of Maharashtra Co-operative Societies Act. The appellant Nos. 1 and 2 are outsiders who have been permitted to possess the suit premises as licensees of respondent No. 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 causes 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.P. Bhatnagar v. Smt. Rukibai Narsindas & Ors.*, [1982] 3 SCR 681 at 696 PG NO 90 to which one of us (A.P. Sen, J.) was a party as follows:

"In the present case, the society is a tenant of 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 licence and wants 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 together with such member for ejectment 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 s. 91(1) of the Act."

This Court further observed at p. 697 as follows:

"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 s. 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 s. 91(1) of the Act were not barred by the provisions of S. 28 of the Rent Act."

It has been pleaded in the dispute application that the PG NO 91 (Respondent No. 2 in this appeal) inducted opponent No. 2 in possession of the said Act in violation of the Bye-laws, and Regulation No. 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 sec. 91 of the said Act as the appellants are claiming as licencees through the member of the Society, the opponent No. 1 according to the provisions of Sub-section (b) of Section 91 of the said Act.

The Counsel for the appellants cited Deccan Merchants Cooperative Bank Ltd. v. M/s. Dalichand Jugraj Jain and Ors., [1969] 1 SCR 887 and Sabharwal Brothers and another v. Smt. Guna Amrit Thandani of Bombay, [1973] 1 SCR 53 in support of the contention that dispute in question does not come within the parameter of sec. 91 of the said Act. Those cases have been elaborately dealt with in Bhatnagar's case (supra) 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 question. The same observation is applicable to the instant case. In the Deccan Merchant Bank's case the suit house belonged to 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 u/section 91 of the Bombay Co-operative Society's Act to evict the tenant and to take possession. It was held that this dispute is not within Sec. 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's case the disputant was the owner of the flat on the second floor of Block No. 8 "Shyam Niwas" and he let it out to the tenant. The purchaser of the flat who is a member of the Society filed a claim under Sec. 91 of the said Act to recover possession from the tenant. The Society sold the flat to the disputant member and the disputant is not claiming the flat qua member of the Society. The dispute is not within the ambit of Sec. 91 of the said Act.

The facts of the case in 1. R. Hingorani v. P. K. Shah & Ors., AIR 1972 SC 2161 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 licence 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 PG NO 92 'compensation' (Rent) and in that litigation the owner moved the Registrar for referring the dispute to arbitrator. 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.

It was urged that the dispute filed by Respondent No. 1 was a collusive dispute as between respondents Nos. 1 and 2. The respondent Nos. 1 and 2 in collusion with each other wanted to evict the appellants Nos. 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.

Sec. 91(b) of Maharashtra Co-operative Societies Act has been assailed as ultra vires of 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 & Ors., AIR 1970 (Bombay) 201 it has been held that section 91 is not ultra vires of Articles 14 and 19 of the Constitution. Similar view was expressed by Gujarat High Court in Rasiklal Patel & Ors, v. Kailasgauri Ramanlal Mehta & Ors., [1971] Vol. XII G.L.R. 355 which held clause (b) of sec. 96 of the Gujarat Co-operative Societies Act, 1961 which corresponds to Sec. 91(b) of the said Act as valid though clauses (c)(d)(e) of the section 96 were held as ultra vires. We agree with the views expressed in those judgments and hold that Section 9 PG NO 93 1(b) is not ultra vires of Articles 14 and 19 of the Constitution.

No other points have been urged before us.

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 to 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 succeeding month. In default of compliance of any of these terms, the decree shall become executable only on the disputant Society paying to Smt. Vishin J. Kalwani the contribution paid by her in respect of the flat in question.

S.L.

Appeal dismissed.