

(1998) 06 BOM CK 0032
In the Bombay High Court
Case No : Writ Petition No. 243 of 1996

Shri A.G. Keni (since deceased) by his legal representatives	APPELLANT
Vs	
Prasad Co-operative Housing Society Ltd. and others	RESPONDENT

Date of Decision : 16-06-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 105

Citation : (1998) 4 BomCR 367 : (1999) 1 MhLj 530

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; G.G. Kamat and D. Pangam, for the Respondent

Judgement

J.A. Patil, J.—The legal heirs of one deceased A.G. Keni, a member tenant of respondent No. 1 Society has filed this petition under Articles 226 and 227 of the Constitution of India and prayed for setting aside the Order dated 31-8-95, passed by the Co-operative Tribunal, Panaji in Co-operative Appeal No. 25/88 confirming the Order dated 28-7-88 passed by the Registrar of the Society in Case No. 44/122/84/ARN/ARCS on the application filed by the respondent No. 1 Society u/s 91 of the Maharashtra Co-operative Societies Act as applicable to Goa (herein referred to as the "Act") and directing A.G. Keni and respondent No. 2 to deliver possession of shop No. 4 to the Society.

2. The relevant facts necessary for the disposal of this writ petition lie in a narrow compass. Respondent No. 1 is a Co-operative Housing Society registered under the Act as applicable to Goa. It constructed a building having residential flats and shops. The deceased A.G. Keni was one of the members of the said Society and he was allotted a flat as well as shop No. 4 in the same building. The said A.G. Keni wanted to transfer shop No. 4 to the respondent No. 2 who was not a member of the Society. He made an application to the Society for registering respondent No. 2 as its member and allot the said shop to him. The

application was granted by the Managing Committee but eventually it was rejected by the General Body of the Society. It was later on found by the Society that A.G. Keni had, without the permission of the Society transferred the said shop to respondent No. 2. It was also found that respondent No. 2 started carrying on the business of steel fabrications in the said shop and the same caused nuisance and annoyance to the members of the Society occupying the said building. According to the Society, the act of A.G. Keni of transferring the shop No. 4 to respondent No. 2 was in breach of bye-laws and rules framed by it. The Society therefore, terminated the tenancy of A.G. Keni in respect of shop No. 4 by giving him a notice. However, as the said A.G. Keni and respondent No. 2 did not hand over the possession of shop No. 4 to the Society, it was constrained to raise the dispute in the Court of Registrar of Co-operative Society by filing an application u/s 91 of the Maharashtra Co-operative Societies Act.

3. The said deceased A.G. Keni resisted the application by filing his written statement. Although he did not dispute the fact of transfer of shop No. 4 in favour of respondent No. 2, he denied that he was a tenant member of the Society. According to him, respondent No. 2 was in possession of shop No. 4 in his own right as owner thereof. Alternatively, the said A.G. Keni submitted that in case respondent No. 2 was ordered to be evicted then shop No. 4 be restored to his possession. Respondent No. 2 also filed his written statement contending that he was in possession of shop No. 4 as owner thereof and that prior to the purchase of the said shop he had become the member of the said Society. Both A.G. Keni and respondent No. 2 denied the allegation of nuisance and annoyance.

4. The learned Nominee of the Registrar after hearing both the sides came to the conclusion that it was proved that respondent No. 2 was in possession of shop No. 4 through A.G. Keni and that the latter had committed breach of Bye laws and Rules of the Society. The learned Nominee of the Registrar further held that the Society has proved that respondent No. 2 was causing nuisance and annoyance to the occupants of the building by using shop No. 4 for steel fabrication works. The alternative plea raised by the deceased A.G. Keni for restoration of possession in case of eviction of respondent No. 2 was rejected. In view of the matter, the learned Nominee of the Registrar proceeded to allow the application filed by the Society and directed both A.G. Keni and respondent No. 2 to vacate shop No. 4 and deliver possession thereof to the Society. He further directed that the Society shall pay to A.G. Keni the price of the shop No. 4. Feeling aggrieved by this order, A.G. Keni as well as respondent No. 2 filed their respective appeals in Co-operative Tribunal, Panaji. The Tribunal by its common judgment dated 31-8-95 dismissed both the appeals and confirmed the order of eviction passed by the learned Nominee of the Registrar.

5. It would not be out of place to mention that respondent No. 2 thereafter filed Writ Petition No. 365/95 in this Court challenging the said order. However, the learned Single Judge of this Court by his Order dated 15-3-96 rejected his writ petition. Respondent No. 2 filed Letters Patent Appeal No. 21/1996 which was

dismissed by the Divisional Bench of this High Court on 10-11-97. It is thus obvious that so far as the Order of eviction of the respondent No. 2 from shop No. 4 is concerned, the same has become conclusive and final. The only question which is therefore required to be considered in this writ petition is whether the legal representatives of the deceased A.G. Keni are entitled to have restoration of shop No. 4 as claimed by them.

6. Shri A.F. Diniz, learned Advocate for the petitioners pointed out that the Registrar's Nominee decided issue No. 7 relating to the alternative plea raised by the petitioners against them. He however, pointed out that the Co-operative Tribunal did not reconsider the finding inspite of specific grounds raised by A.G. Keni in his appeal memo. Shri Diniz therefore submitted that the proper course would be to remand the matter to the Tribunal with a direction to record finding on issue No. 7. Shri Diniz further contended that in any event the reversion of shop No. 4 to the Society is not proper and correct. He pointed out that A.G. Keni continued to be the owner of shop No. 4 and as such, it was he who, in the event of eviction of respondent No. 2, was entitled to the restoration of shop No. 4. Shri G.G. Kamat, learned Advocate for the respondent No. 1 Society supported the orders passed by both the Nominee of the Registrar as well as the Co-operative Tribunal and pointed out that in view of the specific finding on issues No. 1, 2 and 3 in favour of the Society, issue No. 7 does not survive. Shri Kamat further submitted that A.G. Keni had committed breach of the Bye-laws and regulations of the Society with the result the Society had terminated his tenancy. Hence according to him, it was the Society who became entitled to get the possession of shop No. 4.

7. It is not in dispute that the deceased A.G. Keni was a member tenant of respondent No. 1, Society and he was allotted shop No. 4 subject to the terms and conditions stated in the Bye laws and rules framed by the Society. I have gone through the said Bye laws and rules wherein the member of the Society is also referred to as a tenant. There is also reference to the word "rent". It is however, necessary to note that the use of the words "tenant" and "rent" are not to be given the same meanings which are given under Rent Control Act and Transfer of Property Act. In *Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others*, , it was pointed out that the relationship between the Co-operative Housing Society and its members is of a special type which is governed by special laws made for that purpose i.e. Co-operative Societies Act, the rules, bye-laws and regulations made thereunder. It was further observed that :

".....Even though, therefore a member to whom the tenement is given for occupation is described in the bye-laws and the regulations as a tenant, he is not a tenant in the sense in which this term is used in the Transfer of Property Act or in the Bombay Rents Control Act nor is the Society his landlord."

In *Suresh K. Mehta Vs. S.B. Chincholikar and Another*, , the learned Single Judge R.M. Lodha, J., of this Court posed the following question and replied it as

follows :

"By the use of the words "tenant" and "rent" in the bye-laws and regulations can it be said that co-partner member is a tenant of the society as is understood in Transfer of Property Act or Rent Control Act? No, simple no is my answer."

The learned Judge further observed that the use of the words "tenant" and "rent" in the Bye-laws and regulations is of a totally different character and nature and would not be indicative of the fact that these terms have been used the manner in which they are used in the Transfer of Property Act and the Rent Control Act. The allotment of tenement in Co-operative Housing Society including a co-partnership housing society is not a lease as defined u/s 105 of the Transfer of Property Act. Tenement is allotted to a member not because he agrees to pay any money or render any service, but because he is member of that Society and holds certain number of shares. It will thus be clear that the description of deceased A.G. Keni as a tenant of the Society, in fact means that he is a member or a co-partner of the Society.

8. Shri Kamat drew my attention to bye-law No. 77 which in substance states that a member tenant shall abide by the rules in Schedule IV and V. Rule 4 in Schedule IV states that no tenant shall assign, underlet, vacate or part with the possession of the tenement or any part thereof without previous consent in writing of the Society. Rule 20 of Schedule IV inter alia deals with the consequences in case a member tenant, in contravention of Rule 4 sublets or transfers the tenement allotted to him. It empowers the Society to determine tenancy of the defaulting tenant by giving him one month's notice. In the instant case respondent No. 1 Society terminated the tenancy of A.G. Keni on two grounds, the first being that he had without previous consent in writing of the Society transferred shop No. 4 to respondent No. 2 and the second being both A.G. Keni and respondent No. 2 were guilty of the conduct of nuisance and annoyance to the other occupants of the same building. The deceased A.G. Keni being the member of the Society was bound by the Bye-laws and rules framed by the Society and he was supposed to abide by them. It was pointed out to me that A.G. Keni was not merely a member but also the Chairman of the Society. In that event it was all the more necessary for him to have abided by the Bye-laws and rules framed by the Society. However, as found by both the lower Courts, the said A.G. Keni committed breach of Bye-laws and rules and thereby rendered his tenancy liable to be terminated. The finding recorded by both the lower Courts in this respect cannot be disturbed since the same is based on evidence led before the first lower Court. The same is the case with regard to the finding recorded on issue regarding the annoyance and nuisance.

9. As pointed out above, the order of eviction of respondent No. 2 who was obviously in unauthorised possession of shop No. 4 has become final and conclusive. The possession of the shop has been directed to be handed over to the Society. It is this part of the impugned order which offends the petitioners who pray that the deceased A.G. Keni being the owner of shop No. 4 was entitled

to get back the same. The learned Nominee of the Registrar has considered the alternative prayer of A.G. Keni and pointed out that it is inconsistent with his first claim. It is a matter of record that in the first instance A.G. Keni contended in the written statement that the ownership of shop No. 4 vested with respondent No. 2. He denied that he was the owner thereof. That being the contention there is no wonder if the learned Nominee of the Registrar found the alternative prayer of A.G. Keni to be inconsistent with his earlier contention. On that ground he rejected the alternative prayer of A.G. Keni of restoration of shop No. 4 to him. It is true that the Co-operative Tribunal has not in its judgment specifically dealt with the alternative plea of A.G. Keni of restoration of possession of shop No. 4. However, the appeal filed by him has been dismissed. It is true that A.G. Keni was the owner of shop No. 4 and as such normally he would have been entitled to be put in possession thereof. However, it cannot be ignored that he committed breach of Bye-laws and rules of the Society as pointed out above and rendered himself liable for ejection. The ejection of A.G. Keni has been found to be legal and as per the rules and Bye-laws of the Society. It was therefore, futile for him to claim the restoration of possession of shop No. 4 even after having committed breach of the Bye-laws and rules. It is material to note that the learned Nominee of the Registrar has directed the respondent No. 1 Society to pay the price of shop No. 4 to the said A.G. Keni. Therefore, he does not lose anything and gets the refund of the money paid by him towards the purchase of the shop No. 4. This being the position, I do not think there is hardly any good reason to interfere with the order passed by the Co-operative Tribunal confirming the order of the learned Nominee of the Registrar.

10. Shri Diniz referred to the decision in *Sabharwal Brothers and Another Vs. Smt. Guna Amrit Thandani of Bombay*, to point out that the dispute in question does not fall within the scope of section 91 of the Act and as such, the Registrar does not have any jurisdiction to pass any order in that respect. In the said case the dispute was between two members of the Society in connection with letting of a flat by one member to the other and the question was whether the said dispute was one which affected the Society's business. The Supreme Court answered the question in the negative by holding that the dispute in question was not one which was touching the business of the Society. This authority is of no use to Shri Diniz for the reason that in our case, the dispute is not between two members of the Society but between the Society and one of its members namely; A.G. Keni: It is therefore obvious that the dispute which arises out of unauthorised transfer of shop No. 4 by A.G. Keni in contravention of the Bye-laws and rules of the Society obviously certainly touches the business of the Society. The Bye-laws of the Society show that one of the objects of the Society is to make constructions for the use of its members.

11. Shri Diniz submits that if A.G. Keni has committed breach of the Bye-laws and rules then the proper action which the Society should have taken was to expel him. It is true that the Bye-law No. 17 (1) (g) provides for expulsion of a tenant member if he sublets his tenement without obtaining prior sanction in

writing of the Managing Committee for doing so. However, it is for the Society to consider and choose which action would be effective to protect its interest. A mere-expulsion of the deceased A.G. Keni from the Society would not have solved the question regarding the unauthorised transfer of shop No. 4 in favour of respondent No. 2, because despite such expulsion, respondent No. 2 would have continued to be in occupation of the said shop. Therefore, the only effective remedy which was available to the Society and to which it resorted was seeking the ejectment of A.G. Keni and respondent No. 2 from shop No. 4. Neither A.G. Keni nor the petitioners can have any say in the matter as to what action the Society ought to have taken. There is therefore, no substance in the submissions made by Shri Diniz.

12. In the result the writ petition is dismissed with costs.

13. Petition dismissed.