MAJORITY CANNOT PASS ARBITRARY AND UNREASONABLE RESOLUTIONS IN GENERAL BODY

IN THE HIGH COURT OF BOMBAY
WRIT PETITION NO.1948 OF 1997
30-7-2002

(JUSTICE R.J. KOCHAR)

Venus Co-op. Housing Society and Anr
Vs.
Dr. J.Y. Detwani & Ors

Appearances:

Mr. G.R. Rege with Ms. Shakuntala Mudbidri i/b. Little & Company for Petitioners
Mr. Y.S. Jahagirdar with Mr. Sanjay Udeshi for Respondent No.21
Mr. D.A. Nalawade with Mr. S.G. Bane for Respondent No.2

Maharashtra Co-operative Societies Act, 1960 _ Section 72 _ Co-operative Housing Society _ Maintenance charges _ Basis of computation of _ High Court Original Side Rules, 1980 _ Rule 641 _ Failure to serve rule nisi _ Constitution of India, 1950 _ Article 226 _ Writ jurisdiction.

1) Service of rule nisi along with a copy of the petition _ twelve respondents not served properly and legally _ one of the respondents had expired but still petition was filed against him _ Cause of action against the society was common and indivisible _ Petition stands abated against all.

2) Petitioner society having flats of different sizes _ Resolution passed for charging the maintenance charges on the basis of area of the flat _ Mandatory for general body meeting to have considered whether the large flat holders were drawing more benefits or facilities by virtue of the big size of the flats _ Services are enjoyed by all the members equally _ No rational basis for the society to charge for services on the

basis of size of the flats _ Courts below rightly held the said resolutions as invalid and inoperative.

3) Resolution passed by General Body _ Though general body is supreme for the administration of the society it cannot pass arbitrary and unreasonable resolutions merely because it has a large majority in favour of one of the issues on the agenda. (See Para: 12).

Held: a) "The declaration was indivisible and was not severable and, therefore, I accept the submissions of Shri Jahagirdar that even if one respondent is not to be served in that contingency also the petition would have abated. Here in this case twelve respondents have not been served. The packets of service were not in accordance with the rules prescribed and therefore, it cannot be said to be a good service of rule nisi in accordance with the rules. Further one of the respondents i.e. respondent No.2 had expired but still the petition was filed against him and for that reason also the writ petition stands abated against all."

b) "I agree with the submissions of Shri Jahagirdar that it cannot be said that the big flat holders are getting higher or more services to make them liable to pay more on the basis of the area of the flat. Aforesaid services are enjoyed by all the members equally and therefore, there was no reason for the society to have made the large flat holders to pay more on the basis of the area of the flat. There is absolutely no rational or any reason to require the large flat owners to pay more for the aforesaid service charges."

c) "The supremacy of the general body cannot be disputed but even the supreme general body has to be reasonable and has to pass rational resolution considering all the facts and circumstances of the matter. The general body cannot pass arbitrary and unreasonable resolutions merely because it is supreme and it has a large majority in favour of one of the issues on the agenda." (Para: 12).

d) "It is clarified here that the payment of municipal taxes is on the basis of the area of the flat and there is no dispute over that issue. Whatever bill is sent by municipal authorities is accordingly paid by all the flat owners small or big."

e) "The reliance by the society on its old obsolete Byelaw No.24(c) is misplaced as the source of the authority to levy the maintenance charges. It is an admitted position that the said bye laws were framed under the old Act of 1925 which has stood repealed by the present Maharashtra Cooperative Societies Act, 1960. If the old Act itself stood repealed in the year 1960, I fail to understand how the bye laws framed under that Act can be said to be the source of the power for the managing committee or for the society to levy any maintenance charges under that Byelaw which is no more in existence. In any case, we cannot read Byelaw 24(c) in isolation. There are other sub-laws of Byelaw No.24 viz., (a) and (b). In my opinion, the aforesaid bye-laws have become obsolete and outdated as repealed and the same are deemed to have been substituted by the model bye-laws. The concept of rent is no more available for a cooperative society. The reliance placed on this archaic bye-law is totally misplaced." (Para: 10).

Result: Petition dismissed.

Case Law Referred:
State of Punjab vs. Nathu Ram A.I.R. 1962 SC 89 (Para 4)

JUDGMENT

The Resolution dated 30th November, 1980 is still hanging to await the decision in respect of its legality and validity. On that date the special general meeting of the petitioner cooperative housing society passed the said resolution to be effective from 1st December, 1980 to switch over from the system of flat-wise monthly maintenance charge to the system of charging maintenance as per the area of the flat as specified in the said resolution. The petitioner society has flats of different sizes i.e. 284 flats of two bed room, kitchen and hall and about 39 flats are of larger size viz., 4 bed rooms, kitchen and hall. The said resolution gave rise to a controversy between the smaller flat holders who are in large majority and larger flat holders who are in minority. The purpose of passing of such resolution was said to be to make up the losses sustained by the society on account of various reasons including defaults in making payment of the maintenance charges by some of the members of the society. The minority of the large flat holders challenged the said resolution and refused to make payment of maintenance charges as per

the area of the flat. They were, however, ready and willing to abide by the earlier resolution of flat wise payment. It appears that the managing committee passed its resolution revising the general maintenance charges for all the flats on the basis of area of the flats. The aforesaid resolution of the Managing Committee was finally ratified by the subsequent general body meeting held on 31st May, 1981. By a circular dated 1st March, 1981, the managing committee, however, informed the members the rise in the maintenances charges as computed on the area of the flats.

2. The disputants who are the respondents in the present petition filed a dispute under section 91 of the Maharashtra Co-operative Societies Act, 1960 before the Cooperative Court, giving challenge to the circular dated 1st March, 1981 of the managing committee and also to the resolution dated 30th November, 1980 passed by the special general meeting of the society. The cooperative court by its order dated 29 February, 1996 declared that the disputants were entitled to pay general maintenance charges to the society for the flats held by them not on area wise basis but as on flat wise basis. It also declared the resolution dated 30th November, 1980 passed at the special general meeting as invalid and not at all binding on the disputants. It also declared that the resolution of the managing committee dated 10th February, 1981 as invalid and not binding on the disputants. The Cooperative Court consequently restrained the petitioners and their servants and agents from implementing the resolution dated 30th November, 1980 and from recovering general maintenance charges at the rate of more than the rate that was prevalent prior to 30th November, 1980. The Cooperative Court allowed the dispute as aforesaid with costs. The Cooperative Court made an award accordingly on 29th February, 1996. The petitioner society was aggrieved by the said decision of the cooperative court and therefore, it filed an appeal before the Maharashtra State Cooperative Appellate Tribunal, to challenge the said decision. The learned member of the appellate tribunal by its judgment and order dated 26th February, 1997 confirmed the said decision. The appellate tribunal also held that the society had delayed in adopting the model bye-laws and finally it adopted the same in the year 1996. Under the said model bye laws a minute provision is made in respect of the recovery of maintenance and service charges and other charges payable by the members. It also

observed that the society had acted in a high handed manner against the bigger flat holders whereby the minorities of bigger flat holders were discriminated against by the smaller flat owners and, therefore, they had an absolute right to come before the court of law, which has power and jurisdiction to interfere with the impugned resolution which was rightly held by the cooperative court as invalid. In the opinion of the appellate tribunal, if the members were given equal amenities, they should be charged equal maintenance charges as per the model bye laws and directed the society to refund the excess amount collected from the bigger flat holders with interest. The petitioners have approached this court under Article 226 of the Constitution of India to challenge the said decision of the appellate court.

3. According to Shri Rege, the learned Counsel appearing for the petitioner society, the general body of the society being the supreme for the administration of the society had absolute power and right to decide the question of maintenance payable by the members. In the meeting held on 30th November, 1980, it was resolved that the maintenance charges should be levied in accordance with the area of a flat and not in accordance with the flat. The Managing Committee had by its circular dated 10th February, 1981 performed ministerial job of fixing the rates and the said decision of the managing committee was finally ratified and approved in the general body meeting held on 31st May, 1981. Shri Rege, further pointed out that the dispute was filed before the court on 24th May, 1981 before the general body approved and ratified the decision on 31st May, 1981. He has, therefore, emphasized the fact that the disputants have not challenged the said resolution dated 31-5-1981 passed by the General Body. Shri Rege further relied upon the Byelaw No.24(C) of the bye laws governing the working of the society to fix the rent/rate and according to him under the said the law the managing committee is empowered to fix the rates. He relied upon section 72 of the Maharashtra Cooperative Societies Act to submit that the general body was the supreme and final authority in the working of every co-operative society. Shri Rege, therefore, pointed out that the second resolution passed by the general body on 31-5-1981 was not challenged and the question whether the resolution dated 30th November, 1980 was arbitrary or unreasonable, cannot be gone into by the cooperative court as the general body being the final and supreme authority had taken that decision, not only once but twice. He also justified the

enhancement of the maintenance charges area-wise as according to him, the owners of the bigger flats were getting better and more amenities and facilities than those available to the small flat owners. Shri Rege pointed out that the appeal court has not at all dealt with the points urged before him and has merely concluded the issue in last two paragraphs. Shri Rege further submitted that many members from the larger flats have made payment on the area wise basis and that it was only the present disputants who are challenging the said resolution.

4. Shri Jahagirdar, the learned Counsel for the disputants/ respondents has raised a very serious substantive objection to the hearing of the present petition on the ground that the respondent Nos.1, 15, 16, 18, 19, 22, 23, 26, 27 and 29 have not been served with rule nisi. Shri Jahagirdar pointed out from the report of the Sheriff that they were either not found or premises were found locked or had gone out or had left, as indicated in the remarks on the packets Shri Jahagirdar submitted that after the appeal court's order dated 20th March, 2002 to serve the respondent as reflected in the affidavit of service, out of twelve respondents three were served and seven packets were returned with the postal remark "not claimed" and one packet with the postal remark "left" while in the case of respondent No.25 (Punjabi), the packet has not come back. Shri Jahagirdar vehemently submitted that the cause of action against the society was common and indivisible for a declaration that the resolution passed by the petitioner society was illegal and invalid and such declaration was granted and, therefore, according to the learned Counsel, even if one respondent is not served, the writ petition must abate in these circumstances.

5. The learned Counsel has cited the judgment of the Supreme Court in the case of State of Punjab vs. Nathu Ram reported in A.I.R. 1962 SC 89 in support of the said contention urged by him. Shri Jahagirdar has very seriously urged that the petitioners have taken the court for granted and for a ride. Shri Jahagirdar has drawn my attention to the order dated 3rd August, 2001 passed by this Court (Dr. Chandrachud, J) wherein he issued an ultimatum that on the expiry of the period of three weeks from 3rd August, 2001, the writ petition shall stand dismissed in the event no steps were taken and parties were not served with the nisi. Shri Jahagirdar emphasized the fact that the writ petition was of 1997 and at the time of admission of the said petition on 16th

December, 1997, the petitioner had obtained interim relief in terms of prayer clause (b) i.e. stay of the order passed by the appellate tribunal. Since then, the petitioners have failed to serve the rule nisi on the majority of the respondents. When this fact was brought to the notice of this court this Court gave the aforesaid ultimatum as the petition was called out time and again and was adjourned since rule nisi was not served on all the contesting respondents. The learned Judge has noted several dates of adjournment only on that ground as no steps were taken by the petitioners to serve the rule nisi on the concerned respondents. Shri Jahagirdar further submitted that by his order dated 12th September, 2001, again this Court (P.V. Kakade, J.) had held that the petition had already and automatically stood dismissed by virtue of the self-operative order dated 3rd August, 2001 passed by Chandrachud, J. due to inaction on the part of the petitioners and that no further indulgence was granted. The learned Judge, therefore, passed the order that the petition stood disposed of as dismissed by virtue of the order dated 3rd August, 2001.

6. Shri Jahagirdar further submitted that since the petitioners were aggrieved by the aforesaid orders they filed an appeal before the appeal court. The appeal court took a lenient view and restored the writ petition to file and granted time to the petitioners up to 30th April, 2002 to serve the respondents. The appeal court had also given an ultimatum and ordered that in case the petitioners (appellants) fail to serve the respondents, the writ petition will stand dismissed. Shri Jahagirdar, therefore, submitted that the respondents were not served even by the deadline fixed by the appeal court i.e. 30th April, 2002 and, therefore, by virtue of the said order the writ petition already stood dismissed and, therefore Shri Jahagirdar submits that this court should not hear the petition at all as it had already stood dismissed. Shri Nalawade, the learned Advocate for the respondent No.2 submits that the original respondent No.2 had expired even before the petition was filed. The petition was filed against the dead person and, therefore, the whole petition must fail say both Shri Jahagirdar and Shri Nalawade.

7. Shri Jahagirdar further submitted that under High Court Original Side Rule 641 rule nisi has to be served along with true copies of the

petitions and all annexure. For ready reference the Rule 641 is reproduced herein below:

"The rule nisi granted as above, shall, along with a copy of the petition and of the order, if any, made under the last preceding rule, be served on the respondent in the manner prescribed for service of a writ of summons upon a defendant in a suit." (Emphasis is given by me).

8. Shri Jahagirdar pointed out from the packets that they did not contain the copies of the petition and the order. The learned Counsel, therefore, requested me to open the packets which were returned un-served by the office of the Sheriff to find out whether the said packets contained the contents as mandatorily prescribed in the said rule. Accordingly, I opened one of the several packets to find out whether the said packet contained the content as prescribed in the said rule. To my surprise the said packet did not contain a copy of the writ petition and the annexure of the writ petition. The said packet had only a copy of the rule nisi and nothing more. Shri Jahagirdar, therefore, seriously attacked the petitioners for being cavalier and very negligent in the matter of service of rule nisi in accordance with the rules. Shri Rege the learned Counsel for the petitioner society had to accept the fact of basic defect and deficiency in the service of the Rule nisi on the respondents. I agree with the serious grievance made by Shri Jahagirdar that the petitioners have failed to comply with the mandatory conditions prescribed in the said rule to serve the rule nisi on the respondents. In the affidavit of service filed by Shri Rege on behalf of the petitioners, though it is mentioned that twelve respondents were issued rule nisi, in fact it appears that there are only eleven respondents who were tried to be served with rule nisi. Three have already been served and their acknowledgements are found along with the affidavit of service. There are eight packets with the affidavit of service. One packet is not yet received. It is, therefore, clear that at least eight packets which were returned by the postal authorities to the office of the sheriff did not contain the contents as prescribed in rule 641 and, therefore, it cannot be said that it was a good service in accordance with the rules. The matter, therefore, boils down to this position that at least eight respondents have not been properly served rule nisi in accordance with the rules. To the aforesaid eight, we will have to add even the other four respondents as even they were sent the similar packets which did not

contain the contents in accordance with the said rule. It is, therefore, clear that twelve respondents have not been properly and legally served with the rule nisi under Rule 641 at all. The petitioners have, therefore, failed to serve rule nisi in accordance with law and even in accordance with the appeal court's ultimatum and, therefore, the petition must fail on that ground alone. I cannot travel beyond the orders passed by either Justice Chandrachud or Justice Kakade and never beyond the appeal court, which also mandate that the petition shall stand dismissed if the respondents were not served by 30th April, 2002. In the aforesaid circumstances, the writ petition must abate and has already abated and the same, therefore, deserves to be dismissed for the reasons aforesaid.

9. The declaration was indivisible and was not severable and, therefore, I accept the submissions of Shri Jahagirdar that even if one respondent is not to be served in that contingency also the petition would have abated. Here in this case twelve respondents have not been served. The packets of service were not in accordance with the rules prescribed and therefore, it cannot be said to be a good service of rule nisi in accordance with the rules. Further one of the respondents i.e. respondent No.2 had expired but still the petition was filed against him and for that reason also the writ petition stands abated against all.

10. In spite of the longest rope given by the learned Single Judge and the appeal court, the petitioners have proved that they did not deserve the sympathetic and lenient view taken by the appeal court to give them one more opportunity. The petition, therefore, having abated pursuant to the order passed by the appeal court and the petition having stood dismissed as aforesaid, it was not necessary for me to enter into merits of the case. I have, however, entered into the merits of the case to put an end to this petition at this stage itself even on merits.

11. According to Shri Jahagirdar, the society had, as members small flat holders who comprise 86.4% of the total membership. They were and are in brute majority in the society and they are always oppressing the minority of the large flat holders. Shri Jahagirdar pointed out that even in the past on the strength of the brute majority the small flat owners had increased the rates of maintenance which the large flat owners accepted to maintain the spirit of cooperation and cordial

relations. Shri Jahagirdar pointed out that on this occasion, the large flat holders thought it proper to put an end to this oppressive decision of the majority small flat owners. Shri Jahagirdar pointed out that an amount of Rs.16 lakhs was due to the small flat holders who were defaulters. He pointed out that to make up the said loss they were oppressing and coercing the large flat holders by enhancing the maintenance charges. The majority flat holders, therefore, resorted to the device of charging the maintenance charges on the basis of area of the flat. Shri Jahagirdar pointed out that the said decision was totally unreasonable, arbitrary and oppressive as the amenities, facilities and services rendered to all of them were the same and it was not that the large or big flat holders were getting more or higher or greater benefits so that they should be coerced to pay more. Shri Jahagirdar submitted that the general maintenance comprises of the following common factors such as salary of staff, expenses for the security of the society, lift maintenance, common electricity charges, internal road lighting, common passage maintenance, charges for lifting water from the tank and expenses for postage.

12. I agree with the submissions of Shri Jahagirdar that it cannot be said that the big flat holders are getting higher or more services to make them liable to pay more on the basis of the area of the flat. Aforesaid services are enjoyed by all the members equally and therefore, there was no reason for the society to have made the large flat holders to pay more on the basis of the area of the flat. There is absolutely no rational or any reason to require the large flat owners to pay more for the aforesaid service charges. The supremacy of the general body cannot be disputed but even the supreme general body has to be reasonable and has to pass rational resolution considering all the facts and circumstances of the matter. The general body cannot pass arbitrary and unreasonable resolutions merely because it is supreme and it has a large majority in favour of one of the issues on the agenda. In the present case, the resolution dated 30th November, 1980 passed by the general body is totally unreasonable and arbitrary regardless of the amenities; facilities availed of by the members. It is clarified here that the payment of municipal taxes is on the basis of the area of the flat and there is no dispute over that issue. Whatever bill is sent by municipal authorities is accordingly paid by all the flat owners' small or big. It was, however, mandatory for the general body meeting to have

considered whether the large flat holders were drawing more benefits or facilities by virtue of the big size of the flats. It is not the case of the society that by virtue of the large size of the flat, the flat holder gets more or higher security or more common road or common passage light than that of the small flat holders. There is absolutely no rational basis for the society to charge for the aforesaid services on the basis of the size of the flats.

13. The present model bye laws which came in force and which ought to have been accepted by the petitioner society as long back as in the year 1986, but for the reasons best known to the society, it had accepted the same only in the year 1996. The present model Bye Laws have neatly stipulated and provided for as to how the maintenance charges are payable by the members. The reliance by the society on its old obsolete Byelaw No.24(c) is misplaced as the source of the authority to levy the maintenance charges. It is an admitted position that the said bye laws were framed under the old Act of 1925 which has stood repealed by the present Maharashtra Cooperative Societies Act, 1960. If the old Act itself stood repealed in the year 1960, I fail to understand how the bye laws framed under that Act can be said to be the source of the power for the managing committee or for the society to levy any maintenance charges under that Byelaw which is no more in existence. In any case, we cannot read Byelaw 24(c) in isolation. There are other sub-laws of Byelaw No.24 viz., (a) and (b). In my opinion, the aforesaid bye-laws have become obsolete and outdated as repealed and the same are deemed to have been substituted by the model bye-laws. The concept of rent is no more available for a cooperative society. The reliance placed on these archaic bye-laws is totally misplaced. The source of power to levy maintenance charges in accordance with the said bye-law 24(c) had dried up long back in the year 1960 and is dead as on today.

14. In my opinion, the resolution dated 30th November, 1980 is totally arbitrary, unreasonable and without any rationale and without any source of power. Both the courts, therefore, have rightly held the said resolution and the subsequent resolution dated 10th February, 1981 as invalid and inoperative. The declaration granted by both the courts cannot be interfered with as there is absolutely no illegality or infirmity in the said concurrent decisions of the courts below. There is, therefore,

absolutely no merits in the petition which deserves to be dismissed and the same is dismissed with no orders as to costs. It is needless to mention that the orders passed by the courts below are confirmed and would be in force in every respect.

All concerned including the petitioner society to act on a copy of this order duly authenticated by the Associate.

(JUSTICE R.J. KOCHAR)

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