

(1988) 02 BOM CK 0046
In the Bombay High Court
Case No : Writ Petition No. 506 of 1988

Arun Keshav Gokhale

APPELLANT

Vs

Avinash Krishnaji Biniwale and Others

RESPONDENT

Date of Decision : 12-02-1988

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 13(1)(L), 15, 15A

Citation : AIR 1988 Bom 424 : (1988) 90 BOMLR 110

Hon'ble Judges : Tated, J

Bench : Single Bench

Advocate : V.S. Gokhale, for the Appellant; V.H. Gumaste and Anjali M. Desai, for the Respondent

Final Decision : Dismissed

Judgement

1. Counsel for the parties heard

2. The two Courts below have recorded a concurrent finding that the petitioner-defendant No. 1 acquired a plot of the area of 3,400 square feet and in the year 1975-76 he constructed a building with all amenities required for residing there is The constructed area is to the extent of 3,400 square feet. The petitioner is having his coal depot and offices in a portion of the building and the remaining portion of the building he has been using as a mangal karyalaya, that is, he is giving that portion of the building on hire to the persons who require the premises for marriage ceremonies. Both the Courts have found that taking into consideration the fact that the family of the petitioner consists of only five members including his mother, wife and two children, a portion of the building constructed by him can very well be used by him for residence of himself and his family members and as such the provisions of Section 13(1)(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter for the sake of brevity referred to as "the Bombay Rent Act"), are attracted and the respondents Nos. 1 to 7- plaintiffs were entitled to claim possession of the suit

premises which are occupied by the petitioner as their tenant.

3. The learned counsel for the petitioner-defendant No. 1 contends that the respondents Nos. 1 to 7- plaintiffs in their plaint pleaded acquisition of accommodation by the defendant No. 1 only to show that no hardship would be caused to him in a case a decree for eviction is passed against him. He submits that acquisition of accommodation as a suitable residence as required by Section 13(1)(1) of the Bombay Rent Act was never pleaded by the plaintiff and, therefore, both the Courts were not right in granting a decree for eviction on the ground provided in the said Section 13(1)(1). He submits that the petitioner has acquired the plot of the area of 3,400 square feet by a purchase and on that plot in some portion he has been continuing his ancestral business of charcoal and in some portion he has constructed a building for running a mangal karyalaya, and that building is being used by him for the mangal karyalaya since beginning, though it has been taxed for commercial purposes by the Municipal Corporation from the year 1980. He submits that simply because the building the petitioner has constructed can be used by him for his residence, he cannot be considered to have acquired a building suitable for residence under the said Section 13(1)(1). He submits that from the time the building is ready for use it has never been used for residential purposes and the plaintiffs or any member of their families never shifted to that building for residence and, therefore, that building cannot be taken into consideration and on the basis of construction of that building the plaintiffs could not be granted a decree for eviction of the suit premises under the said Section 13(1)(1),

4. In support of his above contention the learned counsel for the petitioner-defendant No. 1 relies on the decision of a learned single Judge of this Court in *Sakharam Keshav Yadav v. Rajaram Ranglal Sarada*, 1982 Bom RC361. He has produced a photostat copy of that judgment. In that case the petitioner was a tenant of five rooms in a building bearing City Survey No. 937/B situated at Sangli. Of the five rooms, four were situated on the first floor of the building, while one room was on the ground floor. All those five rooms were used for residence by the petitioner and the members of his family. On 12th May 1972 the petitioner purchased a building bearing City Survey No. 158, which was a multi-storeyed building. When the petitioner purchased the said building it was occupied by the Posts and Telegraphs Department and it had also come on record that one part at least of the said building was used for residence by an employee of that Department. After purchasing the said building and after making some alterations and renovations the petitioner started the business of a restaurant in the said building. On 11th April 1975 the respondent served a notice upon the petitioner asking him to vacate the premises which were in his possession as a tenant, namely, the five rooms in City Survey No. 937/B. The provocation for the respondent in that case to serve the eviction notice on the petitioner-tenant was the acquisition of City Survey No. 158 by the petitioner. The petitioner sent a reply to this notice on 13th May 1975 and in that reply he specifically stated that he purchased the said City Survey No. 158 for the purpose of starting a hotel

therein, and he accordingly started hotel business therein. Thereafter the respondent filed a suit, being Regular Civil Suit No. 283 of 1975, in the Court of the Civil Judge, Junior Division, Sangli, for possession of the five rooms in City Survey No. 937/B. The main ground urged in support of the claim for possession of the suit premises was that the petitioner had acquired a suitable residence within the meaning of Section 13(1)(1) of the Bombay Rent Act. The learned trial Judge by his judgment and order dated 29th April 1978 dismissed the suit. The respondent-landlord preferred an appeal, being Civil Appeal No. 98 of 1978, which was heard and allowed by the Extra Assistant Judge, Sangli, by his judgment and order dated 3rd Dec. 1979. The Extra Assistant Judge allowed the appeal and decreed the suit. This decision of the Extra Assistant Judge was challenged in Writ Peta No. 550 of 1980 decided on 10th Nov. 1980 by my brother Jahagirdar, J., and the view taken in that case at page 366 of the report reads thus :

" "Residence" means the place of a persons's home or habitation; the place where he abides; (see Concise Law Dictionary by Osborn, 6th Edition). It is not the case of the respondent, and it is definitely not the finding of either of the two Courts below, that after acquiring City Survey No. 158 the petitioner has at any time resided therein. The admitted fact is that the said building is being utilised by the petitioner for the purpose of conducting a restaurant under the name of Parihar. On these facts and circumstances can it be said that the petitioner has acquired residence within the meaning of Section 13(1)(1) of the Bombay Rent Act? The answer, in, my opinion, must be an emphatic "no" because the petitioner has not shifted his residence from the suit premises; the petitioner has not acquired City Survey No. 158 for the purpose of residing therein. If the petitioner has acquired accommodation which is capable of being used for residential purposes but he has acquired a residence, acquisition of residence must necessarily mean acquisition of accommodation for the purpose of residing therein."

The learned Counsel Mr. V. H. Gumaste appearing for the respondents-plaintiffs and defendants Nos. 2 to 10 wants time to see whether the view taken in the decision by the learned single Judge of this Court, relied on by the learned Counsel Mr. V. S. Gokhale appearing for the petitioner-defendant No. 1, still stands and for that purpose he requests for an adjournment of the matter for .one week.

5. P. C. : The request is granted.

The matter stands adjourned for a week.

In the meanwhile, the status quo shall be maintained.

12th February 1988

6. Mr. Gumaste, learned Counsel for the respondents-plaintiffs and defendants Nos. 2 to 10, contends that the view taken by the learned single Judge of this

Court in the decision relied on by Mr. Gokhale, learned counsel for the petitioner-defendant No. 1, in view of the decision of the Supreme Court in Ganpat Ram Sharma and Others Vs. Gayatri Devi, , is no longer a good law. In the said case the provisions of Section 13(1)(h) of the Delhi Rent Control Act, 1958, have been considered. Those provisions are in pari materia with the provisions contained in Section 13(1)(1) of the Bombay Rent Act. The said Section 13(1)(1) reads thus :

" 13. (1) Notwithstanding anything contained in this Act but subject to the provisions of Ss. 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied --

(1) that the tenant after the coming into operation of this Act (that is the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947] has built, acquired vacant possession of or been allotted a suitable residence."

(Square bracketed portion supplied.)

Similar provisions appearing in the Delhi Rent Control Act read thus :

"14(1)(h). That the tenant has, whether before or after the commencement of this Act [that is, the Delhi Rent Control Act, 1958,) built, acquired vacant possession of or been allotted a residence."

(Square bracketed portion supplied.)

Their Lordships of the Supreme Court in the case of Ganpat Ram Sharma (supra) at page 2018 of the report observe that, "Clause (h) deals with the situation where the tenant has, whether before or after the commencement of the [Act that is, the Delhi Rent Control Act, 1958 [built or acquired vacant possession of or has been allotted a residence". (Square bracketed portion supplied). While dealing with the purpose of providing Clause (h) of Sub-section (1) of Section 14 of the Delhi Rent Control Act their Lordships of the Supreme Court at page 2018 of the report observe thus : --

"The Delhi High Court noted the apparent purpose of providing Clause (h) of Sub-section (1) of Section 14 [of the Delhi Rent Control Act, 1958.] The High Court was of the opinion that on account of rapid growth of population of Delhi, landlords were tempted to terminate the tenancies of the existing tenants and ask for their eviction in order to let out the premises to the new tenants at high rents. Rent Control Legislation for Delhi and New Delhi was passed for the first time during the second world war and since then there has been Rent Control Legislation applicable to various urban areas in the Union Territory of Delhi. The Rent Control Act was enacted to provide for the control of rents and evictions. The object of Clause (h), as is apparent, is not to allow the tenant more than one residence in Delhi, Therefore, it provided that in case that tenant builds a residence, the landlord could get his house vacated. It also provided that if the tenant acquires vacant possession of any other residence, he is not protected. Lastly, it also stipulated that if a residential premises has been allotted to a tenant, he is not entitled to retain the premises taken on rent by him. In the

instant case, on the three causes on which the landlord can claim eviction were present against the tenant, the High Court held that these causes are not joint. These need not be conjointly proved or established. These were in the alternative. Therefore, if the landlord is successful in proving any one of the causes, he is entitled to an order of eviction against the tenant. Counsel for the appellants sought to urge before the High Court that if a tenant built a house, he must acquire its vacant possession before he can be evicted under Clause (h). Similarly, it was submitted that if residential accommodation was allotted to a tenant then he must obtain vacant possession of the same. The word "or" showed, according to the High Court, that these were different circumstances in which a tenant was liable to be evicted. These were (i) if the tenant had built a new residence, or (ii) if he had acquired vacant possession of it or (iii) if he had been allotted a residence."

(Square bracketed portion supplied.)

Their Lordships further dealt with the point

thus :

"The words "built" and "allotted" do not mean that after building residence or after allotment of a residence, the tenant must also acquire its possession. If a tenant builds a house and does not occupy it, he is liable to eviction, according to the High Court. Similarly, if a residence is allotted to a tenant but he does not occupy it and allows others to occupy the same, he is not protected, according to the High Court. The Act [that is, the Delhi Rent Control Act, 1958] provides that building of a house by tenant or allotment of residence to him is a ground of eviction available to the landlord against his tenant. The learned Judge of the High Court was of the view that it is not necessary for a landlord to prove either that the tenant has built and acquired vacant possession of the building or that he has been allotted and taken possession of the allotted premises."

(Square bracketed portion supplied.)

Their Lordships further observed at page 2019 of the report thus :

"According to the High Court, if once the condition stipulated in Clause (h) was fulfilled by the tenant, he was disentitled to protection under the Act [that is, the Delhi Rent Control Act, 1958.] He cannot thereafter claim that he should be protected. We are of the opinion that the High Court was right."

(Square bracketed portion supplied.)

Their Lordships of the Supreme Court at page 2020 of the report considered the words "has built", or "has acquired" or "has been allotted" used in Clause (h) of Sub-section (1) of Section 14 of the Delhi Rent Control Act thus :

"The words "has built" or "has acquired" or "has been allotted" clearly mean that the tenant has already built, acquired or been allotted the residence to which he can move and that on the date of the application for his eviction his

right to reside therein exists. It was therefore held that the words as they stood associated with each other in Clause (h) lead to the only conclusion that as on the date of the application the tenant must be possessing a clear right to reside in some other premises than the tenancy premises as a matter of his own rightful choice either because he may have built such premises or acquired vacant possession thereof or the same may have been allotted to him."

Their Lordships at page 2021 of the report enunciated the law thus :

"Before we discuss the other aspect the result of the several decisions to which reference has been made above indicate that the position in law is that the landlord in order to be entitled to evict the tenant must establish one of the alternative facts positively, either that the tenant has built, or acquired vacant possession of or has been allotted a residence. It is essential that the ingredients must be pleaded by the landlord who seeks eviction but after the landlord has proved or stated that the tenant has built, acquired vacant possession or has been allotted a residence, whether it is suitable or not, and whether the same can be really an alternative accommodation for the tenant or not, are within the special knowledge of the tenant and he must prove and establish those facts. The other aspect apart from the question of limitation to which we shall briefly refer is that the landlord must be quick in taking his action after the accrual of the cause of action, and if by his inaction the tenant allows the premises to go out of his hands then it is the landlord who is to be blamed and not the tenant."

7. The learned Counsel for the respondents-plaintiffs and defendants Nos. 2 to 10 contends that in view of the above decision of the Supreme Court on Clause (h) of Sub-section (1) of Section 14 of the Delhi Rent Control Act, 1958, which is in pari materia with the provisions of Clause (1) of Sub-section (1) of Section 13 of the Bombay Rent Act, relied on by the learned Counsel for the Petitioner-defendant No. 1, is no longer a good law. An appeal has been preferred against the decision of the learned single Judge of this Court to the Supreme Court, being Civil Appeal No. 2583 of 1981, and that appeal is still pending.

8. This Court had occasion to consider the provisions of Section 13(1)(1) of the Bombay Rent Act in Dilip Pandurang v. Ramchandra Vishnu 1981 Bom RC 84. It is a judgment of my brother Desai, J. (as he then was). In that case a tenant had built a house and thereafter let it out. The learned appellate Judge had taken the view that if a tenant built a house and thereafter let it out, he could not be evicted u/s 13(1)(1) of the Bombay Rent Act. This view of the learned appellate Judge was not found correct and it was held that the view taken by the learned appellate Judge was clearly contrary to the provisions contained in the said Section 13(1)(1). After setting aside the judgment of the appeal Court, the decree for eviction passed by the trial Court on the ground mentioned in that section was restored. In that case also the tenant had not shifted his residence to the newly built premises and instead he had let them out. Though he had not shifted his residence to the newly built house, it was considered to fall within the provisions of the said Section 13(1)(1).

9. In the present case the petitioner-defendant No. 1 has constructed a building in two parts. The front part is a hall measuring about 50" X 27" and the second part is a building behind this hall. It is R.C.C. construction and it has a basement. The area of the basement is 1,000 square feet, whereas the area of the ground floor and the first floor comes to 500 square feet each. The petitioner after constructing the above building, instead of shifting his residence to that building, has been using it as a mangal karyalaya and in the same plot by the side of the building he is having his charcoal and firewood depot. The municipal taxes for the period from 1976 till 1980 were paid on the basis that the building was being used for residential purposes. There is no prohibition in law for the petitioner to use the building for his residence and it cannot be said that the building is not suitable for the residence of the petitioner. The only contention of the petitioner is that he had constructed the building not for residence but for using it as a mangal karyalaya and, therefore, it does not fall u/s 13(1)(1) of the Bombay Rent Act. It is not the intention of the tenant that matters for deciding whether the premises built by the tenant are suitable for residence. If the matter is to be decided only by the intention of the tenant for raising up the new construction, he may construct buildings suitable for residence and may plead, as a defence in an action under the said Section 13(1)(1), that the buildings constructed by him were not intended to be used by him for his residence, but such contention cannot be accepted. If a tenant constructs his own building, the only thing to be considered for attracting the provisions of Section 13(1)(1) *ibid* is whether it is suitable for the residence of the tenant and his family members.

10. The learned Counsel for the petitioners-defendant No. 1 contends that the decision of the learned single Judge of this Court (namely, R. A. Jahagirdar, J.) is directly on the provisions of Section 13(1)(1) of the Bombay Rent Act and the facts in that case are similar to the facts of the present case. He also contends that the decision of the Supreme Court relied on by the learned Counsel for the respondents-plaintiffs and defendants Nos. 2 to 10 is on the provisions of the Delhi Rent Control Act, 1958, and as there is no direct decision of this Court on the provisions of the said Section 13(1)(1) taking a view contrary to the view taken by Jahagirdar, J., in the decision relied on by him, the matter may be referred to a Division Bench of this Court. I am unable to concur with the view taken by my brother Jahagirdar, J., and in my opinion, in view of the decision of the Supreme Court in the case of Ganpat Ram Sharma and Others Vs. Gayatri Devi, relied on by the learned counsel for the respondents, the law laid down by the learned single Judge is no longer a good law. As the ground has been fully covered by the decision of the Supreme Court, it is not necessary to refer the matter to a Division Bench.

11. There are concurrent findings of fact recorded by the two Courts below and those findings do not suffer from any legal infirmity.

12. Consequently, there is no substance in the petition and it is dismissed in *limine*. At the request of the learned Counsel for the petitioner-defendant No. 1,

the petitioner is granted three months'' time to approach the Supreme Court and in the meanwhile the decree for eviction shall not be executed.