

(2000) 04 GUJ CK 0082

In the Gujarat High Court

Case No : Civil Revision Application No. 1030 of 1985

Bhagwandas Trilokchand

APPELLANT

Vs

Bhungodomal Zamatmal, through his heirs

RESPONDENT

Date of Decision : 06-04-2000

Acts Referred:

Citation : (2001) GLR 216

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Advocate : Suresh M. Shah, for the Appellant; Nirav C. Thakkar, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—The petitioner herein is the original plaintiff of Regular Civil Suit No. 34 of 1975. Aforesaid suit was filed in the Court of the learned Civil Judge (J.D.), Kutiyana, against one Shirumal Zamatmal and four others. Said Shirumal Zamatmal died during the pendency of the suit and, therefore, his heir Bhungdomal Zamatmal was brought on record, but during the pendency of the appeal, he also died and, therefore, heirs of Bhungdomal were also brought on record before the appellate court, who are present respondent Nos. 1/1 to 1/6 herein.

2. It is the case of the plaintiff in the suit that the property in Kutiyana town at M.G. Road was an evacuee property. Part of the suit premises was purchased by the plaintiff by registered sale deed dated 7.1.1975 from the power-of-attorney holder of original owner Bhagwandas Vatmal and Reemandas Chuhdmal and from the date of the said purchase, the plaintiff has become the owner of the suit property. According to the plaintiff, shop No. 1 of the suit premises as well as one small room on the back side of the suit premises was initially allotted to said Shirumal by the Custodian at the rate of Rs.1.50 Ps. p.m. According to the plaintiff, said Shirumal, i.e. defendant No. 1, was the only allottee and, therefore, except occupying tenancy right, he had no other right in the suit property. Still,

however, the shop in question as well as the small room is transferred by the defendant No. 1 to defendant No. 2, Bhungdomal illegally and accordingly, he has transferred the suit property illegally to defendant No. 2 and, thereafter, defendant No. 2 left the aforesaid place Kutiyana and had gone to another town Girgadhada and at that time, defendant No. 2 has further sub-let the suit premises to defendant Nos. 3, 4 and 5. Defendant Nos. 3, 4 and 5 are the real brothers and they are occupying the suit premises and they are doing business jointly in the name of Maheshkumar and that they are doing the business of milk and curd in the suit premises. It is also the case of the plaintiff that they have made some alteration in the suit premises and has made certain constructions. Therefore, they decided to evict the defendants from the suit premises. For that purpose, he gave registered notice dated 31.3.1975. Since the defendant failed to comply with the said notice, aforesaid suit was filed for getting possession from the defendants.

3. Aforesaid suit was resisted by the defendant Nos. 1, 4 and 5 by filing written statement at Exhibit 10. Defendant No. 2 filed his written statement at Exhibit 11 and defendant No. 3 has filed his written statement at Exhibit 12. The original defendant No. 1 died during the pendency of the suit and, therefore, his younger brother was brought on record. It was admitted by the defendants that the original defendant No. 1 Shirumal was allotted the premises by the Custodian. However, they denied that he had no tenancy right in the suit premises. It was further stated that the defendant No. 1 was doing business in partnership with defendant No. 2 and at that time, Rent Act was not applicable to the premises as the same was of the ownership of Government. According to the defendants, the partnership between the defendant Nos. 1 and 2 continued upto 1966. Thereafter, the said firm was dissolved and the defendant No. 2 left Kutiyana. But all throughout, the defendant No. 1 continued with the possession of the suit premises. It was also the say of the defendants that the defendant No. 1 Shirumal started his partnership business on 13.1.1966 in the name of "Maheshkumar Sugnomal" and that said business is a partnership business with defendant Nos. 4 and 5. It was also the say of the defendants that defendant No. 3 has nothing to do with the said business as he was serving as a teacher at the relevant time and he used to merely help his brothers in the said partnership business. It is also stated that the defendant No. 1 has never parted with possession of the suit property. Aforesaid suit was accordingly resisted by the defendant Nos. 1, 4 and 5. So far as defendant No. 2 is concerned, he also denied the suit of the plaintiff by filing written statement at Exhibit 11. According to him, he entered into partnership with defendant No. 1, initially, but, thereafter, sometime in the year 1966, the said business was dissolved and thereafter, he was not concerned with the aforesaid business in any manner. He also pointed out that defendant No. 1 Shirumal had never given him possession of the suit property and that the tenancy rights had all throughout remained with the defendant No. 1. According to him, he was wrongly joined as party to the suit. Defendant No. 3 also denied the suit of the plaintiff.

4. The trial court framed various issues at Exhibit 24 and after recording the evidence of the parties, came to the conclusion that the plaintiff has succeeded in proving the case of sub-letting and the defendant No. 1 was found to have transferred or assigned his interest in the suit property firstly to defendant No. 2 and, thereafter, to defendant Nos. 3, 4 and 5. The trial court accordingly decreed the suit of the plaintiff. Aforesaid decree was challenged by the heirs of defendant No. 1 Shirumal as well as original defendant Nos. 3, 4 and 5 by way of filing Regular Civil Appeal No. 43 of 1980. Said Appeal was allowed and the decree of the trial court was set aside by the appellate court. The appellate court came to the conclusion that there was a genuine partnership between defendant No. 1 and defendant Nos. 4 and 5. The appellate court also found that at the relevant time, the property was managed by the Custodian under the Displaced Persons (Compensation & Rehabilitation) Act, 1954 and, therefore, at that time, the Rent Act was not applicable as Rent Act is not applicable to the premises belonging to the Government. The appellate court dismissed the suit of the plaintiff by allowing the appeal of the defendants. The original plaintiff has challenged the aforesaid order of the appellate court by filing the present Revision Application u/s 29(2) of the Bombay Rent Act.

5. At the time of hearing of this Revision Application, Mr. S.M. Shah, learned Advocate for the petitioner, has argued following points :-

(1) That the Rent Act was applicable to the premises in question and, therefore, the landlord was entitled to file the aforesaid suit on the ground of sub-letting by invoking Section 13(1)(e) of the Rent Act;

(2) That the partnership document was merely a camouflage document and that the defendant No. 1 had sub-let the suit premises to defendant Nos. 2, 4 and 5; and

(3) In any case, after filing of the suit, original tenant Shirumal had died. So at least, after his death, the premises is in possession of strangers and that on subsequent event also, the decree for possession is required to be passed.

6. Mr. Nirav Thakkar, learned Advocate for the respondents, however, supported the decree of the appellate court. He argued that even if it is presumed that there is a sub-letting, the same is prior to 1965 and at that time, the Bombay Rent Act was not applicable to the suit premises and, therefore, there was no question of passing the decree on the aforesaid ground of sub-letting. He also argued that the original heir of defendant No. 1 has continued with the partnership business and, therefore, there is no question of considering the aforesaid subsequent event regarding death of defendant No. 1

possession. He also submitted that in view of the partnership agreement, in case of death of a partner, his heir can continue the business.

7. So far as the first point of Mr. Shah is concerned, it is not in dispute that the premises in question was with the Custodian under the provisions of the

Displaced Persons (Compensation and Rehabilitation) Act, 1954. Section 13(1)(e) of the Bombay Rent Act reads as under :-

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

... ..

(e) that the tenant has, since the coming into operation of this Act, unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest thereon; or

... .. "

The premises in question was purchased by the predecessor-in-title of the plaintiff in the year 1975 and upto that period, the property was with the Administrator / Custodian and the Central Government was the owner of the same and in view of the provisions of Section 4 of the Bombay Rent Act, the provisions of the said A....

upto that date, the said property was owned by the Central Government. Section 4 of the Rent Act reads as under :-

" 4. Exemptions.-(1) This Act shall not apply to any premises belonging to the Government or a local authority or apply as against the Government to any tenancy or other like relationship created by a grant from the Government in respect of premises taken on leases or requisitioned by the Government; but it shall apply in respect of premises to the Government or a local authority.

(2) The State Government may, by a notification in the Official Gazette, direct that all or any of the provisions of this Act shall not subject to such conditions and terms, as it may specify, apply,-

(a) generally-

(i) to premises used for a public purpose of a charitable nature or to any class of premises used for such purpose;

(ii) to premises held by a public trust for religious or charitable purpose; and

(iii) to premises held by a public trust for a religious or charitable purpose and administered by a local authority; or

(iv) to premises vested by or under the Charitable Endowments Act, 1890 (VI of 1890) in the Treasurer of Charitable Endowments for India or any State, or

(v) to premises constructed or purchased out of the Public Trusts Administration Fund established u/s 57 of the Bombay Public Trusts Act, 1950 (Bombay Act XXIX of 1950) and vesting in the Charity Commissioner, or

(b) for special reasons to be recorded, to any particular premises of the nature

referred to in sub-clause (i), (ii) or (iii) of clause (a)."

In view of the exemptions, therefore, Section 13(1)(e) of the Rent Act was not applicable to the premises upto a particular period. It is not in dispute that when the predecessor-in-title of the plaintiff purchased the suit property, present defendants were already doing their business in the premises. It is not the case of the plaintiff that defendant No. 1 sub-let the premises to defendant No. 2 or to other defendants after the purchase of the premises by the predecessor-in-title of the plaintiff. So upto that period, there was no question of invoking Section 13(1)(e) of the Rent Act and Shirumal was the tenant of the Government till the predecessor-in-title of the plaintiff purchased the property. After the said purchase, the defendant No. 1 became tenant of the purchaser and the purchaser, therefore, was entitled to invoke the provisions of the Bombay Rent Act thereafter. The appellate court has given cogent reasons in paragraph 13 of his judgment, in which the appellate court has pointed out that the plaintiff had purchased the property from Government and on the sale becoming complete, the possession was given to the plaintiff on 4.7.1974, and subsequently, sale u/s 20 out of compensation pool u/s 14 took place. It is pertinent to note that the plaintiff, after purchasing the suit property, filed this suit within two months from the date of said purchase. Mr. Shah has relied upon the judgment of this Court, reported in 8 G.L.R. 202, wherein this Court has taken the view that no decree for eviction can be executed against the tenant for a period of two years from the date of transfer of the property. It is no doubt true that it is open for the plaintiff to resort to the provisions of the Rent Act if statutory ground is available as per the Act and, there is no bar for filing a suit. However, in the instant case, at the relevant time, i.e. prior to the plaintiff's purchasing the property, provisions of Section 13(1)(e) of the Rent Act were not applicable in view of exemption under the Act. The view of the appellate court cannot be said to be in any way bad in law. It is, therefore, not possible to accept the submission of Mr. Shah on the first point.

8. However, assuming that the provisions of the Act were applicable to the suit premises at the time when it was under the administration of the Custodian, then also, the evidence on record is clear about the genuineness of the partnership business. Looking to the evidence on record, it is not possible to believe that there was any sub-tenancy created by the defendant No. 1 in favour of the other defendants. As back as in 1976, the rent was paid by Maheshkumar Sugnomal, son of the defendant No. 4. Exhibit 63 is a receipt, showing the presence of son of Shirumal in the premises and the rent was accepted by the Custodian on behalf of the aforesaid persons. Mr. Shah, however, argued that when the property was purchased by the predecessor-in-title of the plaintiff, a letter at Exhibit 11 was given to him by the Custodian, wherein the names of the different tenants occupying premises were mentioned. In that letter, name of defendant No. 1 Shirumal was shown occupying the rented premises as tenant and the name of the defendant No. 2 was shown as occupying the premises unauthorisedly. However, from the aforesaid letter, one cannot jump to the

conclusion that there was a sub-letting by the defendant No. 1 to defendant No. 2. The Custodian was not concerned to examine the question about partnership between the defendant No. 1 and the defendant No. 2. There are series of documents, showing the partnership between the defendant No. 1 and other defendants. Exhibit 169 is the partnership deed, which was registered subsequently. In the aforesaid deed, names of the defendants Nos. 1, 4 and 5 are shown as partners. In the document, proper explanation is given as to why the share of the defendant No. 1 was restricted only to 10%. It has come in evidence that the defendant No. 1 was not keeping good health and since he was not in a position to take active part in the business, he was given 10% share. Nonetheless, he continued to receive the profit as per his share and was taking part in the business. The learned appellate Judge has given very cogent reasons for coming to the conclusion that the partnership is a genuine partnership and is not a camouflage to avoid sub-letting. There is an evidence in the form of extract of accounts, wherein as back as on 3.2.1967 and, thereafter, the name of defendant No. 1 as well as defendant Nos. 4 and 5 are shown as partners, earning profit regularly as per their share in the business. The person, who has written these accounts, is also examined to prove the said extract of said books. His evidence is at Exhibit 249. It was found by the appellate court that he was a person of credit and he has stated the facts truly and on appreciation of the aforesaid documentary evidence as well as oral evidence on record, the appellate court found that the partnership was a genuine partnership. The present plaintiff, who purchased the suit property subsequently, naturally cannot have any personal knowledge about the aforesaid facts. It is not in dispute that before the plaintiff purchased the suit property, the defendant Nos. 1, 4 and 5 were already doing their business in the suit premises. Mr. Shah for the petitioner, however, argued that in the registration of shops, the name of defendant No. 1 Shirumal was not mentioned. However, the aforesaid fact cannot be taken into consideration in isolation and the same is required to be considered with other evidence on record. It has come in evidence that said Shirumal was an old man and was not taking very active part in the business and was practically a sleeping partner. In view of the voluminous documentary evidence on record, it is not possible to believe that the partnership was not a genuine partnership between defendant No. 1 and defendant Nos. 4 and 5. The aforesaid finding of fact arrived at by the appellate Judge, therefore, is not required to be disturbed by this Court while exercising revisional jurisdiction.

9. Mr. Shah, however, argued that even if it is presumed that there was a genuine partnership previously, subsequently, during the pendency of the suit, defendant No. 1 died, and at least from that date, rest of the defendants can be said to be occupying the premises unauthorisedly and can be considered as sub-tenants. He, therefore, argued that because of the aforesaid event, i.e. the death of defendant No. 1, decree for possession is required to be passed. The aforesaid point was neither argued before the trial court nor before the appellate court. No application, bringing in such subsequent event, is placed on record, pointing out

whether any heir of the defendant No. 1 has continued the business or not and except the aforesaid argument, no material is placed on record to substantiate this say. The partnership deed provides that in case of death of any partner, the heir of that partner can continue the business with other partners. Mr. Thakkar for the respondent has argued that if the aforesaid point was taken at the earliest, by proper application, they could have led the evidence that the heir of deceased defendant No. 1 has continued the partnership business with other partners. In view of absence of any material on this point, and especially when no such point was canvassed at the relevant time before the trial court, or the appellate court, it is not possible to accept the aforesaid submission of Mr. Shah. The aforesaid argument, therefore, is required to be rejected. In the instant case, it can never be said that the defendant No. 1, who was the original tenant, has already left the premises or has walked out from the rented premises. Mr. Thakkar for the respondent has relied upon the judgment of the Honourable Supreme Court, reported in 28(2) G.L.R. 960, wherein the Supreme Court has taken the view that where the tenant takes a partner, he does not part with the possession and that the said act cannot be branded as sub-letting. As stated earlier, there is an overwhelming evidence on record for coming to the conclusion that the partnership agreement is a genuine agreement and there was a genuine partnership between defendant No. 1 and defendant Nos. 4 and 5. The appellate court has given detailed reasoning for coming to the conclusion about the genuineness of the partnership business. The appellate court applied correct principles for setting aside the decree of the trial court. It was found that the trial court had not considered the evidence in its proper perspective and certain documentary evidence was also not properly considered. Mr. Shah, however, argued that the appellate court should not have disturbed the finding of the trial court and even if two views are possible, the appellate court should not disturb or set aside the view taken by the trial court. Mr. Shah has relied upon the judgment reported in 23(1) G.L.R. 728 to substantiate his say on the aforesaid point. In the aforesaid decision, this Court has taken the view that, ordinarily, factual conclusions would not be interfered with by the appellate court unless there are misreadings, or wrong principles are applied. The aforesaid case was under the Motor Vehicles Act and in the facts and circumstances of that case, it was found that the appellate court should not interfere with the finding of fact. However, it cannot be said that the power of the first appellate court is restricted in any manner. The first appellate court has got very wide power to appreciate the evidence on record and the first appellate court is the final court in so far as appreciation of evidence is concerned. It is the duty of the appellate court, therefore, to consider both oral and documentary evidence minutely and to re-appreciate the entire evidence. The powers of the first appellate court cannot be equated with the power of the revisional court or that of the High Court in second appeal. The appellate court, therefore, was entitled to re-appreciate the evidence on record and was also entitled to come to its own conclusion by appreciating the evidence on record. I, therefore, do not find any substance in the aforesaid argument of Mr. Shah that the first appellate court should not have interfered

with the findings of the trial court on the question of sub-letting. In this view of the matter, I do not find any substance in this revision application. The view taken by the appellate court cannot be said to be contrary to law and this Court, while deciding Revision u/s 29(2) of the Bombay Rent Act, is required to consider whether the appellate court has committed any error of law or whether the appellate court has misread the evidence on record while deciding the appeal. I do not find any such error of law or any misreading of evidence by the appellate court while deciding the appeal. On the contrary, the learned appellate court has given very cogent reasons for coming to the conclusion that the partnership was a genuine partnership and there was no sub-letting by the defendant No. 1, who was the original tenant of the suit premises.

The Revision Application is required to be dismissed and is accordingly dismissed. Rule is discharged. No order as to costs.