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(2011) 05 GUJ CK 0052

In the Gujarat High Court

Case No : Civil Revision Application No. 611 of 1998

Bhudarbhai Chhaganbhai Luhar and Another — APPELLANT

Vs

Manjulaben Shivlal — RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3)
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5

Citation : (2011) 05 GUJ CK 0052

Hon'ble Judges : K. S. Jhaveri, J

Bench : Single Bench

Advocate : Purvish J. Malkan, s 2, for the Appellant; Sanjay M. Amin, for Opponents 1.2.1, 1.2.2, 1.2.3, 1.2.4 and 1.2.5, for the Respondent

Judgement

K.S. Jhaveri, J.—By way of this appeal the applicants have challenged the judgment and decree dated 15.01.1998, passed by the learned Assistant Judge, Surendranagar, in Regular Civil Appeal No. 23 of 1993, whereby the learned Judge has dismissed the appeal and confirmed the order of the Trial Court.

2. The short facts of this case are that the Plaintiff owns a house situated at Sanghvi Bhavan, Joravarnagar, consisting of two rooms having opening facing south, on an Osari, one kitchen and a Court yard with a Deli. The Defendant No. 1 is a tenant of the said building and the rent of the building was Rs. 12/- per month. The Plaintiff has got this suit building and other properties by way of partition amongst his brothers. The month of tenancy begins from the first day of the English calender month and ends on the last day. It is stated that Defendant No. 1 has never paid rent regularly; that a rent of Rs. 1,965/- is due and payable by the Defendant No. 1 for last 164 months.

2.1. The Plaintiff through his advocate served a Notice by registered post with A.D. The Defendant No. 1 replied to the said notice, stating that the rent is due from 1.4.1976. The Defendant No. 1 has not paid all the rent due within one month of the Notice of demand served upon him, whereas the Notice to

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Defendant No. 2 is received back unserved.

2.2. Thereafter the Plaintiff has filed Civil Suit No. 174 of 1989 for recovery of Rs. 1,980/- from the Defendant No. 1 as also other reliefs. Vide order dated 31st March, 1993 the learned Judge has allowed the suit of the Plaintiff and directed the Defendants to hand over Khas and vacant possession of the suit premises on or before 30.04.1993. The Defendant No. 1 further directed to pay Rs. 569/- and mesne profits for the user of the suit-premises at the rate of Rs. 12/- per month from the date of the suit till the handing over of the vacant possession of the suit-premises to the Plaintiff. Against the said order the Defendants filed Regular Civil Appeal No. 23 of 1993 before the learned Assistant Judge, Surendrangar. Vide order dated 15.01.1998 the learned Judge has dismissed the aforesaid appeal. Hence, this petition.

3. Heard Mr. J.M. Malkan with Mr. P.J. Malkan, learned Advocates for the applicants and Mr. M.J. Amin, learned Advocate for the Respondents.

4. Learned Advocate for the applicants has submitted that formerly the Defendant Nos. 1 and 2 were the tenant and the notice of demand of the landlord was only served to Defendant No. 1. The original Plaintiff has failed to serve the Notice for demand to the Defendant No. 2. Therefore, the suit against the Defendant No. 2 is bad in law and deserves to be dismissed.

5. Learned Advocate for the applicants has contended that both the Courts below have failed to consider the fact that the applicants were residing in the suit premises. Even the issues Nos. 3, 4 and 5, were held in favour of the applicants inasmuch sub tenants. He also contended that the both the Courts below erred in their findings that the applicants were in arrears of rent.

6. Learned Advocate for the Respondents supported the order of the Courts below and contended that the Trial Court while deciding the suit has framed following issues.

1. Whether the Plaintiff proves that the Defendant is in arrears of rent for more than six months?

2. Whether the Plaintiff proves that the Defendant failed to comply with the Notice of demand of arrears of rent as required by law?

3. whether the Plaintiff proves that the Defendant has without any just cause not used the suit-premises for the purpose for which it was let, for more than six months prior to the filing of the suit?

4. Whether the Plaintiff proves that the Defendant has constructed a suitable house, after the Rent Act came into force?

5. Whether the Plaintiff proves that the Defendant has sub-let or otherwise transferred his interest in the suit-premises to any one, after the Rent Act came into force?

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6. Whether the Plaintiff is entitled to a decree of possession as prayed for in para 14(A) of the plaint?

7. Whether the Plaintiff is entitled to a decree for the amount as prayed for in para 14(2) of the plaint?

8. Whether the Plaintiff is entitled to the relief as prayed for in para 14(3) of the plaint?

9. Whether the Plaintiff is entitled to any other relief?

10. What order and decree.

7. The issue Nos. 1, 2, 6, 7, 8 and 10 were held in favour of the original Plaintiff. Whereas issue Nos. 3, 4, 5 and 9 were held against the original Plaintiff.

8. Before proceeding, the fact which is required to be noted is that originally the father of the Defendants paid rent to the landlord gradually, out of four brothers only two brothers were residing in the rented premises and Defendant Nos. 1 and 2 were residing together. Therefore original landlord has given notice to both the Defendants. It is an admitted fact that notice was not served to the Defendant No. 2 but rent was not demanded. The only consideration is that the notice of demand is only for Defendant No. 1. There was no notice by the original Plaintiff to Defendant No. 2 nonetheless the Notice was served to Defendant No. 2. He has not replied to the same nor has he made payment in compliance of the notice issued by the landlord as required under the Act.

9. The Trial Court has discussed the matter in greater detail. Issues Nos. 5 and 6 read as under:

17. It is the case of the Plaintiff that the Defendant No. 1 has without the permission of the landlord either sub-let or otherwise transferred in any manner whatever the suit-premises to the Defendant No. 2 and earns a large rent. Or else, the Defendant No. 1 has illegally assigned or transferred his interest in the suit- premises to the Defendant No. 2 and hence the Plaintiff is entitled to the possession of the suit-premises. In order to prove this fact the Plaintiff has in his evidence on oath stated that the Defendant No. 2 lives in the suit-premises at present. Save and except this, the Plaintiff has not adduced any evidence as to when and on what condition the Defendant No. 1 has sub-let the suit premises to the Defendant No. 2. On the other hand, the Defendant No. 2 in his deposition at Exh.50 denying the fact unequivocally stated "it is not true that the Defendant No. 1 has sub-let the suit premises to me. Though the Defendants have not submitted their Written statement, but as per their evidence on oath the suit-premises was taken on lease by their father. Both the Defendants and their other two brothers were living with their father when the suit-premises was taken on lease. As per the evidence of the Defendants the suit-premises has been taken on lease about forth to forty-five years ago. As per the deposition of the Defendant No. 2 his age is forty-five years at present. From this it is evidence that the Defendant No. 2 was living with his father when the suit premises was

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taken on lease. Moreover, the Defendant No. 2 says in his cross-examination page 3 that he was young at the time of writing in book Exh. 51 was made. In cross-examination by the Plaintiff it has been asked that the book containing pages Exhs. 51 and 52 is produced to create an evidence. Therefore, it could not be admitted in evidence. It is also argued that the Plaintiff has not been asked any question about Exhs. 512 and 52 by the Defendant. Hence, the Exhs. 51, 52 could not be looked into. It is also contended that as the Defendants have not submitted their Written statement, their evidence could not be looked into, in view of the provision under Order 8 Rule 5 of the Code of Civil Produre: this would deprive the Plaintiff of opportunity to know the case of the Defendant and challenge the same in appropriate manner. In this suit the Defendants have produced their reply to the suit Notice given by the Plaintiff, though no Written statement is submitted. In these circumstances, the case of the Defendants and the evidence is required to be carefully evaluated with circumspection. Accordingly, the evidence adduced by the Plaintiff do not prove that the suit premises was let to the Defendant No. 1. From the above discussion, I decide that the Defendant No. 2 is not a sub-tenant and that the Defendant No. 1 has not sub-let or transferred his in interest in the suit-premises in any manner whatever to the Defendant No. 2, and that the Defendant No. 2 is not a sub-tenant in the suit-premises. Thus, this issue is replied and decided in negative.

18. The Plaintiff has filed the present suit on several grounds to recover possession of the suit-premises. Out of these, the grounds as discussed hereinabove under Issue Nos. 1 and 2, the Defendants are tenants in arrears of rent and that the Defendants having failed to comply with the legal Notice served upon them, the Defendants are held liable to hand over possession of the suit premises u/s 12(3)(a) of the Bombay Rent Act. It is settled law that a decree should be passed in case when the rent is not paid during the Notice period; the Court is bound to pass a decree when the requirements of Section 12(3)(a) are satisfied. The Defendants'' advocate has submitted his written argument wherein he contends that the Plaintiff is not entitled to demand the arrears of rent for more than three years and when the Plaintiff refused the Money Order for the rent of three years sent by the Defendant, it is proved that the Defendants were ready and willing to pay the rent and they are entitled to the benefit of the provision u/s 12(3)(b). I do not agree with the contention of the Defendants. The Defendants have to pay all the arrears including the time-barred one in order to show their readiness and willingness to pay the rent, as per the settled law on this point. It can not be considered that the tenant is ready and willing to pay all the rent demanded by the Notice. The tenant has to deposit even the time-barred debt in order to get the protection under the law. In this way the Plaintiff''s suit is covered u/s 12(3)(a) and as such the Defendants are liable to give possession of the suit-premises, as per the provision of the law. Under Issue No. 6 it is held that the Plaintiff is entitled to Khas and vacant possession of the suit premises, and thus the Issue No. 6 is decided in affirmative.

10. The appellate Court has also dismissed the appeal and has observed that the

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Notice says specifically and clearly all the facts, namely, the amount of rent, the amount of rent due, demand of the same, the date and the consequences that would follow for non-compliance. Hence, the Notice is unequivocally legal. It does not make any difference in the legality of the Notice, even if the payment is made up to March 1976 and not up to November 1975, except thereby the period of 6 months is reduced. The appellate Court also observed that the period is quite large. Formerly, the payment of rent was not made every month, it was irregular. Therefore, when one of such payment was made years before, it does not effect the legality of the Notice and therefore, the dispute raised on this count by the Defendant is not tenable.

11. In view of the concurrent findings of both the Courts , I am in complete agreement with the findings arrived at and conclusion reached by the Courts below. The Petitioners are rightly held by both the Courts below as tenant in arrears. No substantial question of law involved in this application.

12. Learned Advocate for the applicants states that arrears were paid. However, he has paid arrears as on the date of filing of suit and if the arrears are paid, then the land lord will not execute the decree for collection of arrears against the Defendant No. 2, but if there is arrears of Rent or mense profit either Petitioners will deposit or it will be open for the landlord to execute.

13. The Respondents are restrained from executing the decree till 31st December 2011, on the following conditions.

(I) They will file usual undertaking within 2 weeks from today.

(II) They will undertake that he will not transfer the property in question in any manner whatsoever.

(III) Further they will undertake that he will not damage the property in any manner whatsoever and try to protect the property and will hand over peaceful possession on 1st January, 2012, to the landlord without any demand.

14. With the above observations and directions, this application stands disposed of accordingly. Interim relief, if any, stands vacated.

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