
(1996) 11 BOM CK 0007

In the Bombay High Court

Case No : Writ Petition No. 1511 of 1983

Deepchand Venichand Shah (Deceased) By His Legal Heirs	APPELLANT
Vs	
Sukhdevi Naneram Pardeshi	RESPONDENT

Date of Decision : 05-11-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13, 15, 5
Constitution of India, 1950 — Article 227

Citation : (1997) 99 BOMLR 199

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V.P. Tipnis, J.—This is a petition by the original defendants. The plaintiffs/landlords filed Suit No. 853 of 1977 in the Court of Small Causes at Pune against the defendant-tenants one Deepchand Venichand Shah for possession under the provisions of the Bombay Rent Act on the ground that they require the suit premises reasonably and bona fide and refusal to grant decree would result in greater hardship to them than the hardship to which the defendant would be subjected, if the decree is passed against him. It appears that after the death of the original defendant, defendant 1(a) Vatsalabai Ganpatbai Shah and defendant No. 1(b) Sau Indubai Narayandas Shah were brought on record as the heirs being the married daughters of the original defendant-tenant and defendant No. 2 and defendant No. 3 who are the grandchildren of the original defendant-tenant, defendant No. 2 Prakash Ganpatdas Gujar being the son of Vatsalabai and defendant No. 3 being the son of Indabai, were impleaded as party-defendants on the ground that they are since in possession of the premises which means that the premises were unlawfully transferred and further to avoid any obstruction from defendants Nos. 2 & 3.

2. Defendants Nos. 1(a) and 1(b) i.e. the married daughters of the original defendant tenant filed written statement contending that the deceased

Deepchand Shah had entered into a partnership deed and all the partners were conducting the business and under the deed, the business as well as lease-hold rights were given to the partners. Alternatively, they contended that by registered will, deceased Deepchand Shah had bequeathed the leasehold rights to, added defendants Nos. 2 & 3. As such, defendant Nos. 1 (a) and 1 (b) had nothing to do with the suit premises. Defendants Nos. 2 & 3 contended that the suit premises are in possession of these defendants. They were conducting the business alongwith the original tenant as partners and they are grandchildren. The original tenant and they were conducting the running business in the suit premises. Despite knowledge of these facts, the plaintiffs had deliberately attempted to mislead the Court. It was further contended that, according to the partnership deed, all the rights of conducting business, leasehold rights, goodwill, stock in-trade and all other properties have come in the hands of these defendants. It is further categorically contended that these defendants are tenants and should be declared as such, as per the provisions of the Bombay Rent Act. Without prejudice to the said contentions, defendants Nos. 2 & 3 contended that defendants 1(a) and 1(b) are daughters of deceased tenant Deepchand and defendants Nos. 2 & 3 are the sons of these two daughters. They are all partners and doing the business in partnership and even if defendants Nos. 1 (a) and 1(b) are treated as heirs, all the defendants have right to conduct the business under the partnership. It was specifically contended that the defendants do not have any other place for conducting the business. In para 10 of the written statement, it is categorically contended that at the time of death of the said Deepchand and even prior to that, these defendants were doing the business as grandchildren of the defendant and they have been in possession of the business and the suit premises right from 1972-73 and, therefore, they are also tenants, according to law. It was specifically contended that deceased Deepchand was staying at the: back side of the suit premises and to look after deceased Deepchand, defendants Nos. 2 and 3 were residing with him and, as such, these defendants are statutory tenants.

3. It is extremely relevant to notice that, in fact, defendants Nos. 2 and 3 had made an application to become parties on the ground that they are in possession of the suit premises as tenants. However, that application was not decided and it was opposed by the plaintiff's. However, they were made parties after the plaintiffs applied for amendment to the plaint.

4. In his evidence before the Court, witness Ramavatar stated that the defendant died pending the suit. Defendants Nos. 1(a) and 1(b) are daughters of the deceased defendant. Defendant No. 1(a) resides at Indapur and defendant No. 1(b) resides at Lonand. Defendant No. 2 is the son of defendant No. 1(a) and defendant No. 3 is the son of defendant No. 1(b). Defendant No. 2 resides at Indapur and defendant No. 3 is running the suit shop. He has further stated that when the suit was filed, deceased defendant was ailing and was bedridden and was not in a position to run his business. That there was no necessity for the defendant to do the business. Defendants Nos. 1(a) and 1(b) did not do any

business and defendant Nos. 2 and 3 have no right to conduct any business in the suit premises. In cross-examination, he has admitted that when Deepchand was ill, defendant No. 3 started dealing in maida, aata and rava. He has stated that he has no idea that the deceased defendant took defendants Nos. 2 and 3 as partners and that in 1974 the defendant's firm was registered before the Sub-Registrar at Haveli. He further stated that whenever Deepchand was ill, defendant No. 3 used to come and do business and as soon as he used to recover from health, defendant No. 3 used to go back to his native place. He further admitted that defendants Nos. 2 & 3 are grandsons of Deepchand and that Deepchand had no son, but only two daughters, viz., defendants Nos. 1(a) and 1(b). He further stated that he has no idea if the defendants are in possession of the shop of Deepchand in the capacity of heirs as well as partners. The witness has further stated that it is not correct to say that from the time of death of Deepchand, defendants Nos. 2 and 3 were in possession of the shop, but it was only defendant No. 3 who was in possession of the same and that he does not know as to under what right defendant No. 3 is in possession of the shop. But he is not in possession as a sub-tenant. In cross-examination, the witness admitted that the suit building was purchased from out of joint family funds in December 1964 and that the joint family dissolved in 1977-78. Plaintiffs Nos. 3 & 5 are now separated from the joint family. They have taken the shop premises as also residential premises. With reference to the Shop Act licence for shop at 14, Ganesh Peth, it is run in the name and style of M/s. Nanheram Gangadin & Sons. The witness admitted that all the members of their family have interest and plaintiffs Nos. 4 and 6 look after the shop. He has further categorically stated that they three are having their own business and the aforesaid two brothers have their own business going on. The witness further admitted that cellar constructed in the suit building is in their possession. Above the cellars, two godowns are constructed which are rented out and out of these two godowns, one tenant has vacated. The defendant's witness No. 1 Vinodkumar Shah, viz., defendant No. 3, examined himself on oath. He has stated the deceased defendant Deepchand was his grandfather, being the father of his mother. Since 40 years prior to his death, he was doing business in the said premises. While he was alive, it was this witness who was looking after his business as a partner. When Deepchand died, it was this witness who was looking after his business. Referring to the partnership deed, the witness has stated that as per the deed of partnership, Deepchand transferred his entire interest, including his goodwill and lease-hold rights in his favour. He has further stated that as heirs of Deepchand, they have all the rights in the suit premises. He further stated that deceased Deepchand executed a will and bequeathed all lease-hold interest in the suit premises to defendants Nos. 2 and 3. He has stated that if evicted, they will have no premises to do the business and the business turn-over is of Rs. 40 lakhs. There are five Diwanjis and ten hamals working in the shop. In cross-examination, he has stated that it is true that Deepchand had only two daughters who are defendants 1(a) and 1(b) and defendant No. 1(b) is his mother. The witness has stated that he was at Lonand

prior to 1968 and, thereafter, in Pune. However, he admitted that from the ration-card, it appears that his name was deleted on 30.9.1978. The witness explains that may be because they had forgotten to get him deleted till then. Novembers, 1996.

5. On the basis of the aforesaid evidence, the learned trial Judge held that the plaintiffs have failed to prove that they need the suit premises reasonably and bona fide and that hardship would be caused to the defendants. Referring to the provisions of Section 5(11)(c)(ii) and referring to the evidence on record, the learned Judge came to the conclusion that at the time of the death of Deepchand, it was defendant No. 3 who was in possession of the suit premises and was doing the business. The plaintiff has further admitted that defendant No. 3's possession was not of a sub-tenant and though defendant No. 2 was not on the scene, defendant No. 3 was certainly doing the business when Deepchand was ill and he was actually in possession of the business in the suit premises of deceased defendant Deepchand when he died. The learned Judge also referred to the evidence of the plaintiff wherein the plaintiff was not in a position to deny that defendants Nos. 2 and 3 are in possession of the shop of Deepchand in the capacity of his heirs as well as partners. The learned Judge observed that the admission of the plaintiff shows that Deepchand who had no sons and had only two daughters who were happily married and staying at some different place used to take the help of defendant No. 3 if not of defendant No. 2 in his business whenever he was ill and that defendant No. 3 was in possession of the suit premises and was doing the business at the time of his death in the suit premises. In the facts and circumstances, the learned Judge held that though defendants No. 1(a) and 1(b) are daughters of Deepchand, by virtue of the provisions of Section 5(11)(c)(ii), defendants Nos. 2 and 3 would be the tenants. Referring to the partnership deed, the learned Judge accepted the argument on behalf of the defendant; that the partnership deed transfers entire stock-in-trade, good-will as also lease-hold rights in favour of defendants Nos. 2 & 3. The learned Judge also held that the tenancy rights are bequeathed in favour of defendants Nos. 2 & 3 by registered deed. However, ultimately, the learned Judge held that from the evidence and as per the provisions of Section 5(11)(c)(ii) of the Bombay Rent Act, persons doing the business alongwith the deceased tenant are the members of the family and, therefore, defendants Nos. 2 & 3 have acquired right of tenancy and they are lawful tenants in possession of the suit premises. Coming to the issue of reasonable and bona fide need of the plaintiffs, the learned Judge referred to the case of the plaintiffs that the premises are needed for the business of plaintiffs Nos. 3, 4 and 5 as they have no premises. Referring to the evidence, the learned Judge felt that it is amply clear that three brothers are having three premises to run their business and that each brother is having separate accommodation for his residence. The evidence also shows that cellar of a bigger dimension is in their possession. All the plaintiffs are residing at 11, Ganesh Peth, Pune, in a three-storeyed building. The plaintiffs' witness Ramavatar admitted that plaintiffs Nos. 3 and 5 have taken shop premises as

also residential premises. Thereafter, referring to the evidence of Ramavatar to the effect that at 14, Ganesh Peth business, all the members of the family are having interest. The learned Judge felt that there was no disruption or dissolution of the partnership of the plaintiffs and that they are doing business together. As against that, excepting the suit shop, defendants Nos. 2 and 3 have no other shop premises. On the basis of evidence, the learned Judge held that the prayer of the plaintiff that they need the suit premises reasonably and bona fide for the purpose of business of some of the plaintiffs is not bona fide and further that defendants Nos. 2 & 3 would suffer greater hardship if decree is passed. Ultimately, by his judgment and decree dated 2.3.1983, the learned Judge dismissed the suit with no order as to costs.

6. Being aggrieved, the landlords-plaintiffs preferred Civil Appeal No. 501 of 1982 at the District Court at Pune. The learned 6th Extra Assistant Judge, Pune, who heard the appeal held that the original suit against the deceased tenant Deepchand alone was on two grounds, viz., bona fide requirement and default in payment of arrears of rent. After his death, new grounds, viz., unauthorised possession by defendants Nos. 2 and 3 and they have caused damage to the suit premises were added. The learned Judge observed that the landlords could not seek possession on the ground of Section 13(1)(e) of the Bombay Rent Act during the life-time of deceased Deepchand and, therefore, they have raised the ground after the death contending that defendants No. 2 and 3 had no authority to conduct the business. The learned Judge observed that Deepchand i.e. the deceased-tenant gave reply to the suit notice in which he stated that he has become pretty old and, therefore, had taken his grandsons as partners in his business, but did not make it clear whether tenancy rights were thrown into the partnership business. The learned Advocate for the plaintiffs argued that Deepchand executed will and bequeathed the tenancy rights alongwith the business to defendants Nos. 2 and 3. The said assignment is void u/s 15 of the Bombay Rent Act, and, therefore the plaintiffs would be entitled to recover possession of the premises u/s 13(1)(e) of the Bombay Rent Act. The learned Judge held that bequest of tenancy rights under a will is against the provisions of Section 15 and, therefore, the plaintiffs are entitled to recover the possession of the suit premises from the defendants. Coming to the claim of defendants Nos. 2 & 3 that they would be tenants as per the provisions of Section 5(11)(c)(ii) of the Bombay Rent Act, the learned Judge of the appellate Court felt that the admissions of the plaintiffs on which reliance is placed by the trial Court show that defendant No. 3 used to visit the suit premises to look after his aged and ailing grandfather Deepchand and to help him in the business and that this admission shows that there was never a household or domestic establishment in the suit premises and he never lived with the deceased Deepchand as a member of the family but stayed casually to help Deepchand during his illness. These visits do not constitute residence. The defendant was staying with his parents at Indapur and his occasional visits would not constitute residence. The learned Judge held that the evidence shows that defendant No. 3 never resided with the

deceased Deepchand within the meaning of Section 5(11)(c) of the Bombay Rent Act and, therefore, the trial Court was wrong in holding that defendants Nos. 2 and 3 were tenants under the provisions of Section 5(11)(c). The learned Judge of the appellate Court felt that the evidence shows that Deepchand admitted defendants Nos. 2 and 3 as partners in the business and bequeathed his business and good-will alongwith the tenancy rights to defendants Nos. 2 and 3. The daughters of Deepchand, viz., defendants Nos. 1(a) and 1(b) have disclaimed any right, title or interest in the business and defendants Nos. 1(a) and 1(b) who are legal heirs of deceased Deepchand was not in occupation of the suit premises. In view of this, the learned Judge felt that it is not necessary to consider other grounds. Even then the learned Judge pointed out that when legal heirs, viz., two daughters did not use the suit premises for their business and defendants Nos. 2 and 3 have no right to conduct the business and when plaintiffs Nos. 3, 4 and 5 wanted to start a new business, there was no reason to disbelieve the evidence of the plaintiffs and it is in these few words that the learned Judge of the appellate Court has held that the plaintiffs bona fide require the suit premises. The learned appellate Judge confirmed the finding of the trial Court as far as case of damaging the suit premises and arrears of rent was concerned. Ultimately, by his judgment and decree dated 14.2.1983, the learned Judge allowed the appeal with costs throughout and set aside the judgment and decree of the lower appellate Court and in effect decreed the suit.

7. Being aggrieved by the said judgment and decree of the lower appellate Court, the defendants/tenants have preferred this petition under Article 227 of the Constitution of India. I have heard Mr. Dalvi, learned Counsel appearing for the petitioners/tenants and Mr. Naik, learned Counsel/appearing for the respondents/landlords. With the assistance of the learned Counsel, I have gone through the entire evidence on record as well as the pleadings of the parties and the judgments of both the lower Courts. Mr. Dalvi submitted that on the basis of the facts and circumstances of the case, the learned Judge of the appellate Court was wrong in decreeing the suit. Mr. Dalvi contended that on the basis of evidence on record, defendant No. 3 is clearly protected under the provisions of Section 5(11)(c)(ii) of the Bombay Rent Act. Mr. Naik, on the other hand, contended that the learned Judge of the appellate Court was right in holding that there was illegal transfer by deceased Deepchand in favour of defendants Nos. 2 and 3 by bequeathing the tenancy rights by will and such a bequeath can never be valid and lawful.

8. After having heard the learned Counsel and after having gone through the entire record, it is clear that so far as the partnership deed is concerned, in fact, there is no such transfer or assignment of tenancy rights in favour of defendants Nos. 2 & 3, though they are admitted as partners. Secondly, so far as the alleged bequest by the deceased tenant in favour of defendants Nos. 2 and 3 is concerned, the matter is concluded in view of the ruling of the apex Court in Bhavarlal Labhchand Shah Vs. Kanaiyalal Nathalal Intawala, . The apex Court in the aforesaid ruling referred to the provisions of Section 5(11)(c)(i) of the

Bombay Rent Act and held that when the statute has imposed restrictions, it is not possible to say that the tenant can bequeath the right to such tenancy in the case of premises let for business, trade or storage in favour of a person not possessing the qualification referred to in Section 5(11)(c)(ii) of the Act. This ruling clearly shows that any bequest by the tenant of his lease-hold rights in a person not answering the description of the provisions of Section 5(11)(c)(ii) is bad in law.

9. The crux of the matter in this case is, therefore, whether defendants No. 2 or 3 or any one of them, on the basis of material on record, can claim the status of a lawful tenant under the provisions of Section 5(11)(c)(ii) of the Bombay Rent Act. Before touching the issue, I must immediately deal with the judgment of the lower appellate Court wherein the learned Judge has held that the plaintiffs have made out ground u/s 13(1)(e) of the Bombay Rent Act. It is impossible to accept the reasoning of the learned Judge that the ground was not available during the life time of Deepchand and it became available after the demise of Deepchand. If illegal transfer and assignment was not available during the life of the tenant, I find it difficult to appreciate how the said ground will become available after his death. That part of the reasoning of the learned Judge is obviously absolutely erroneous. So far as the claim of defendant No. 3 that he has become a tenant under the provisions of Section 5(11)(c)(ii) is concerned, the learned Judge of the appellate Court has obviously mixed up "legal heirs" with "member of the tenant's family" as also the requirement of residence with the tenant which is a requirement of the provisions of Section 5(11)(c)(i) which deals with residential premises whereas u/s 5(1)(c)(ii), what is relevant is that any member of the tenant's family using the premises for the purposes of carrying on business with the tenant at the time of his death. It is extremely relevant to notice that Deepchand had no son and he had only two daughters who were married. Defendants Nos. 2 and 3 were sons of those two daughters. As a matter of fact, Deepchand had taken these grandsons in his business as partners. It is further clear that defendant No. 3 Vinodkumar was helping Deepchand whenever Deepchand was ill. Admittedly, defendant No. 3 who is the grandson of the tenant Deepchand was not only helping him in the business, he was not only a partner in the business, but also, as a matter of fact, running the business alongwith Deepchand at the time of death of Deepchand. The learned Judge of the appellate Court has confused the phrase "Member of the family" with "legal heirs." It is well-settled that the concept of member of the family, as far as the Bombay Rent Act is concerned, is extremely wide. The material on record clearly shows that Deepchand treated Vinodkumar as a member of his family, so far as the business is concerned in fact, Vinodkumar was admitted as a partner of Deepchand and not only Vinodkumar was helping Deepchand, but in fact, was running the business alongwith Deepchand at the time of death of Deepchand. There is no ground at all why in the peculiar facts and circumstances of this case, Vinodkumar cannot be a person answering the description as laid down in Section 5(11)(c)(ii), viz., any member of the tenant's family using the premises

for the purpose of carrying on business with the tenant at the time of his death. In my opinion, defendant No. 3 Vinodkumar is clearly such a person.

10. The learned Judge of the trial Court, after assessing the evidence, has categorically and correctly held that the plaintiffs have failed to prove the reasonable bona fide requirement of the suit premises for some of the members of their family. The learned Judge of the trial Court has also correctly held that the defendants would suffer greater hardship. As already pointed out, the learned Judge of the appellate Court has disposed of these two most important issues by few words in para 26 of his judgment. This is possibly because after holding that defendants Nos. 2 and 3 cannot claim protection under the provisions of Section 5(11)(c)(ii), the learned Judge found it unnecessary to deal with these issues in greater details. As such, on this issue, in fact, the lower appellate Court has not said anything.

11. In the aforesaid circumstances, it is not possible to uphold the judgment and decree of the lower appellate Court. The petition succeeds. The judgment and decree dated 14.2.1983 passed by the 6th Extra Asstt. Judge, Pune, in Civil Appeal No. 501 of 1982 is quashed and set aside and it is directed that Suit No. 853 of 1977 filed by the plaintiffs in the Court of Small Causes, Pune, is dismissed. In the facts and circumstances of the case, there shall be no order as to costs all throughout.