

(1977) 04 GUJ CK 0005
In the Gujarat High Court

Dolatrai Harjivan Bibodi and Another

APPELLANT

Vs

Dr. Kantilal Sukhlal Shah

RESPONDENT

Date of Decision : 22-04-1977

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)(1),
13(1)(1)
Transfer of Property Act, 1882 — Section 106

Citation : (1977) 18 GLR 848

Hon'ble Judges : J.B. Mehta, Acting C.J.

Bench : Single Bench

Judgement

J.B. Mehta, Ag. C.J.

1. The plaintiffs-landlords have come in this Revision-Application as both the Courts have refused to pass the decree of eviction from the suit block after the defendant-tenant had shifted to his newly constructed bungalow on October 20, 1969.

2. The short facts which have given rise to this litigation are as under. The defendant, Dr. Kantilal Shah has been a tenant in the suit house of the plaintiffs. There is a dispute as to whether the first block was given in 1946 as stated by the defendant or in 1948 as stated by the plaintiffs or whether this suit block which has been almost for all the time used as residential block was first let or after some short time as contended by the defendant. The defendant, however, had also got from time to time three other blocks in this very building. Thereafter, when in 1958 the defendant shifted to the hospital premises near Dandia Hanuman, where he had got four blocks out of which one he occupied for his residence and three for his hospital, the defendant gave up possession of two ground-floor blocks to the plaintiff in 1958 and even the third block possession was given to the plaintiff in 1964. Thereafter the defendant constructed his residential bungalow in about 1967 where admittedly there are four bed-rooms, one dining-cum-living room, one kitchen store room, 3000 square feet built

constructed area with rooms for Chowkidar quarter and garage. The defendant Doctor has a family of five persons. He shifted to these new premises on October 20, 1969 but still he did not vacate this residential block of the plaintiffs. Therefore, the plaintiffs gave a notice, Exhibit 31, on April 5, 1970 to which the defendant having given an evasive reply, Ex. 28, on April 29, 1970, the plaintiffs filed the present suit for eviction.

3. The defendant Doctor raised a plea both in his correspondence and in the written statement that the entire house had been taken on lease by the defendant for running his hospital, Nursing Home and for the residence of his family members, Doctors and staff members. He also stated in terms in his written statement in paragraph 5 that in addition to the suit block in the other three blocks which he had taken on lease from the plaintiffs, the defendant was running his hospital and when in 1958 he got space for hospital near Dandia Hanuman, the three blocks had been handed over to the plaintiffs. He also stated in the written statement that the present suit block was, however, needed for the residence of his brother, Dr. D.S. Shah, who was a member of his staff and so the suit block was utilised for the purpose for which it was let. In the newly constructed premises there was not sufficient space for staff quarters. Both the Courts also gave a finding that the plaintiffs had failed to prove that the suit premises were let to the defendant only for residence and not for Nursing Home and staff quarters and, therefore, the original letting being not only for residential purpose of the suit premises, the ground u/s 13(1)(1) of the Bombay Rent Act was held not to be applicable. That is how the plaintiffs have come in this revision.

4. The grievance of Mr. D.U. Shah for the plaintiffs is that the finding has been arrived at by ignoring the material facts which would have a fundamental effect on the whole conclusion and on a complete misconception of the underlying scheme of this present legislation. It is true that we are construing a tenancy legislation where the benevolent legislation would have to be construed in favour of the tenant by accepting a construction helpful to the tenant when a doubt has to be resolved. In the present context, however, the dispute is as regards those provisions where the landlord is given a right to eject the tenant on the specific ground enacted u/s 13(1)(1) that the tenant after the coming into operation of the Act has built, acquired vacant possession of or been allotted a suitable residence. The tenant's protection was, therefore, deemed to come to an end because he no longer required the original premises for his residential purpose and, therefore, the Legislature accommodated this limited right of the landlord to get back his property, once it is proved that the tenant after the coming into operation of the Act had built, acquired vacant possession of or been allotted a suitable residence. The tenant could never be expected to sit tight on his premises even after he has acquired vacant possession of or has been allotted other suitable residence. A just balance of the competing rights is achieved by the Legislature by enacting this right of the landlord when this necessary statutory condition is fulfilled of acquisition of vacant possession or allotment of

suitable residence by the tenant by his own building the same or otherwise after the Act has come into operation. In that context it is equally implicit that the premises from which the tenant loses his right must be those comparable premises which were premises let for the purpose of residence. That is why the whole inquiry in such a context has to be concentrated on what is the purpose of the original letting because this ground u/s 13(1)(1) would be applicable if the original letting was for residence because in that context alone it could be urged that the tenant having acquired now other suitable residence, he cannot sit tight on the original tenanted residential premises. Therefore, in such a context the controversy has to be resolved only on the test of dominant or substantial purpose of letting.

5. In *C. Mackertich Vs. Steuart and Co., Ltd*, a similar question had arisen before Their Lordships as to what was the purpose of the lease, whether it was exclusively or even dominantly for a manufacturing purpose or not because if the dominant purpose of the lease is manufacture, fifteen day's notice ending with the month of the tenancy would become insufficient in view of the mandate of Section 106 of the Transfer of Property Act. After considering the settled legal position, even of English law, Their Lordships answered the question by holding that such cases have to be resolved not on the test of exclusiveness of purpose but on the test of main or substantial or dominant purpose of the lease.

6. Therefore both the Courts would have to approach the present question only by applying the test of dominant, main or substantial purpose of the lease to find out whether the original lease of the suit premises was for residential purpose or not. The test of exclusive purpose was clearly misconceived as per the settled legal position. Various cases may arise as, of such Doctors, lawyers or other professional men including even washer men, barbers, tailors etc. who at the beginning of their career may have leases of residential premises where for earning their livelihood, they would make the incidental use of those premises in case of a lawyer, for maintaining his office in case of a Doctor for keeping his dispensary and for similar purposes" by other persons like tailors, barbers, washer men etc. They are not affluent enough to have separate premises for earning their livelihood at that stage of the career. Therefore, even though the premises are let obviously for residential purposes where the person resides with his family members and also incidentally carries on his business or profession, the dominant purpose lest would clearly show that the premises do remain residential. In such a case if such a person like a lawyer. Doctor or other businessman, at the far end of his career is able to build suitable residence or acquire by purchase the same, he cannot sit tight on the original tenanted premises. There would be no justice to the landlord in such cases if the tenant is allowed to retain his tenancy premises after he has built up, purchased or acquired other suitable residence. The whole legislative purpose of accommodating such a limited right of the landlord would be frustrated if we apply the test of exclusiveness which has appealed to the two lower Courts. If the test was of dominant, main or substantial purpose, there could be no other

answer in the present controversy. Even Dr. K.S. Shah, the defendant himself, admits that except for a very short period in the beginning of a few months, six months or a year as the witness deposes, the said block has always been used, even on the defendant's case, only for residential purpose either of Dr. K.S. Shah himself or he and his brother jointly. Even when he left these premises first in 1958 when he got possession of the hospital premises with four blocks or when he left to occupy his own bungalow on October 20, 1969 the suit premises have always been used for residential purposes. These were the very suggestions made in the cross-examination of the plaintiff Daulatrai, Exhibit 29 that the brother of defendant, Mr. D.S. Shah, was residing in the suit house. It was suggested to the plaintiff and he denied that till 1964 one Dr. Madhukar, staff Doctor of the Doctor was residing in one block on the ground floor. Further suggestion was that even the mother of the defendant was residing in the suit house with Dr. D.S. Shah.

7. Even though in the present case the premises being in Saurashtra area where although the Saurashtra Rent Act contained the corresponding provision to Section 13(1)(1), it did not contain the interdict in Section 25, the scheme of Section 25 would however throw a good deal of light so far as to understand the entire scheme of the present legislation. Section 25 in the Saurashtra area has come into force on repeal of the Saurashtra Rent Act on December 31, 1963, while the Bombay Rent Act as applicable to Gujarat did contain Section 25 when it came into operation on February 13, 1948. This scheme is interpreted in *Bapubhai Mohanbhai Vs. Mahila Sahakari Udyog Mandir*, where Their Lordships held that by Section 25, a landlord could not use nor could he permit to be used for a non-residential purpose any premises which on the date when the Act came into force were used for a residential purpose and under Sub-section (2) of Section 25, a landlord who contravened the provisions of Section 25(1) was punishable with imprisonment for a term which may extend to three months or with fine or with both. The question which had arisen in that case was as to whether the scheme of Section 25 could be kept in mind for considering the reasonableness of the requirement of the landlord for making out a ground of eviction u/s 13(1)(g) under which the landlord has to establish that the premises were required by him and the requirement was both reasonable and bona fide. Therefore, Their Lordships held that if the very statute under which the relief was sought contained an injunction that the landlord shall not use residential premises for a non-residential purpose, the requirement could never be called reasonable. Not only did the statute contain an injunction against the user of residential premises for a nonresidential premises but it made penal for a landlord to use it for a nonresidential purpose any premises which are used for a residential purpose on the date when the Act came into force. In the light of Section 25(1) granting a decree to the landlord for possession of the residential premises on the ground that he required those premises for a non-residential purpose would be to pave the way for his prosecution and punishment u/s 25 (2). Such a decree would be self-defeating as the landlord could not be able to

use those premises for the purpose for which the decree was granted, save on pain of prosecution. Therefore, it was held that the Courts ought not to consider statute in a manner which would encourage breach of any of the provisions.

8. If such is the setting and context of our tenancy law, the question as to whether premises are used for residential purpose or not could never be decided on such an exclusion test but only on the test of dominant main or substantial purpose because otherwise the whole purpose of the legislature in accommodating this limited right of the landlord to get possession of his premises after the tenant had acquired other suitable residence would be defeated even when the letting was for residential purpose dominantly and incidentally the other user was made by the person residing in those premises to earn his livelihood while staying on the residential premises in question. In fact the tenant himself who resides on the premises would be said to be guilty of contravention of Section 25 by changing the user of the premises. Besides, no letting would be possible to such lawyers or doctors or washermen, barbers, tailors etc. who both reside and earn their livelihood by working on the same residential premises, which every one must do in the beginning of his career, as that would convert residential premises to non-residential purposes. Therefore, that exclusion test would be wholly unworkable under our Act and would defeat the whole object of the Act with such penal restrictions unless we apply the dominant purpose test. That also indicates what is the correct test to be applied in such cases.

9. Mr. S.A. Shah had in this context vehemently relied upon the decision in *Dr. Gopal Dass Verma Vs. Dr. S.K. Bhardwaj and Another*, . That decision was in the context of Delhi and Ajmer Rent Control Act, 1952. In that case the ground u/s 13(1)(e) for bona fide requirement was differently worded by enacting that a decree for ejectment would be passed if the Court was satisfied that the premises let for residential purposes were required bona fide by the landlord who was the owner of such premises for occupation as a residence for himself or his family and that he had no other suitable accommodation. The explanation provided that for the purpose of that clause "residential premises" include any premises which having been let for use as a residence are without the consent of the landlord, used incidentally for commercial or other purposes. Therefore, Their Lordships held at page 336 that when there was a finding of fact that the suit premises had been used by the tenant incidentally for professional purposes and the use was also further established by him with the consent of the landlord, the case clearly went outside the purview of Section 13(1)(e) Substantial part of the premises had been used by the tenant from the commencement for his professional purpose with the consent of the landlord. Therefore, in the context of Section 13(1)(e) read with the Explanation, it was held by Their Lordships that such incidental user for professional purpose with the consent of the landlord took the case outside the purview of Section 13(1)(e) because even if the landlord proved his bona fide requirement for personal use, the premises had by their user ceased to be premises let for residential purpose alone. Therefore, in

that context exclusion test had assumed importance because of the particular language of that statute. Another ground was also relied upon in that decision u/s 13(1)(h) which was similar to our Section 13(1)(1) providing for ejectment if the Court was satisfied that the tenant had, whether before or after the commencement of the Act, built, acquired vacant possession or had been allotted suitable residence. In that context at page 340 Their Lordships held that the requirement of the relevant provision was that the tenant must have suitable residence. Section 13(1)(h) of that Act applied to tenancies which were created for residential purposes and in such tenancies the tenant could be evicted u/s 13(1)(e) once it was shown that the tenant had acquired another suitable residence. The words of the requirement of the statute of suitable residence were held to be significant because what the tenant had acquired must be residence, that is, the premises which could be used for residence and that the said premises must be suitable for that purpose. If the premises from which ejectment was sought were used not only for residence but also for profession, Section 13(1)(h) could not come into operation. One of the purposes for which the tenancy was acquired was professional use, and that could not be satisfied by the acquisition of premises which were suitable for residence alone, and it was the suitability for residence alone which was postulated by Section 13(1)(h). Therefore, it was held that it would be unreasonable to hold that tenancy which had been created or used both for residence and profession could be successfully terminated merely by showing that the tenant had acquired a suitable residence. Therefore, Section 13(1)(h) was given this interpretation in the context of particular scheme of the Delhi legislation where Section 13(1)(e) contained the aforesaid Explanation which took out the premises from the purview of Section 13(1)(e) when the incidental professional use was made with the consent of the landlord. That is why in the context of the scheme of that Act exclusion test had assumed importance.

10. Mr. D.U. Shah, however, rightly relied upon the decision in Prem Chand Vs. The District Judge, Dehradun and Another, in the context of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. At page 366 Their Lordships in terms held that where the tenant had only two small rooms in which he resides with his wife, sons and a daughter and although he had a tailoring shop in one of his rooms, it was not unlikely that very room was utilised as bed-room for one or two members of his family at night. The fact that he ran a tailoring shop in one of the rooms was not sufficient to convert what otherwise to all intents and purposes was a residential building into a non-residential building. The Explanation in that case, Explanation (iv) provided as follows:

- (1) The building should be a residential building; and
- (2) The landlord must be in occupation of a part of the building for residential purposes, the other part being in the occupation of the tenant.

If those two tests were fulfilled, it would then furnish conclusive proof that the building was, bona fide, required by the landlord and there was no need for the

landlord to establish any other requirement. Those two tests were held to be fulfilled. Therefore, it would depend on the context of every legislation whether the exclusion test is material or the dominant substantial purpose test.

11. If, therefore, as per the aforesaid settled legal position the dominant purpose test was to be applied, the very evidence of the tenant, Dr. Shah, clinches the entire issue because throughout the whole period, except for a few month at least, the said block was admittedly used for residential purposes. Even Dr. Shah in his evidence at Exhibit 36 makes no secret of his intention as he in terms deposes that he required the suit block for accommodating Dinubhai as he was his staff Doctor. Even at the end he stated that he required the suit premises for this staff Doctor, his brother, even though there was no writing that he had to provide residence to the staff Doctor. Therefore, residential requirement and the residential use of the suit block all these years has never been challenged and on that basis alone the suggestions were made in the cross-examination to the plaintiff that even after the new bungalow was built by the defendant and he had got his new hospital at a different place, with all the four blocks, he required these premises for the residence of his brother and the mother, the brother of course being on his staff as a staff Doctor as well.

12. Mr. S.A. Shah, however, vehemently argued that this Court could not interfere with a pure finding of fact in revisional jurisdiction. The finding of fact could never be arrived at unless first the correct test to be applied was understood and unless all the evidence had been taken into account which made a fundamental departure on the ultimate result. Otherwise, as per the settled legal position in *Hind Trading Company Vs. Union of India (UOI)* and *Another*, , such a finding would be clearly perverse disclosing a patent error of law so as to be interfered with in such revisional jurisdiction. In the present case the issue raised and the finding given was as to the tenancy of the defendant having been for the purpose of hospital, nursing home and staff quarters as contended by the defendant or for residence. If the issue was to be resolved on the dominant, substantial or main purpose test, there was not an iota of evidence to suggest to the contrary, because so far as the suit block was concerned, it was always used for residential purpose. So far as the letting is concerned, there being admittedly no rent note, the finding could be rested only if there was some talk as to purpose for which the letting had been done. Not a single word is asked to the plaintiff and even the defendant does not depose about any such talk as to the terms when letting took place. The whole case right from the correspondence stage was that the entire house was kept for hospital, nursing home and the residence of the Doctor, his family members and the staff doctors. Both the Courts, on facts, ignored the admitted position that this was not a case of a single tenancy. Four blocks were let in four different tenancies at different times. The Doctor in the initial stage of the career only tries to depose that first he took up one block; then, within a few months the other block; thereafter again within a few months the third block and the fourth block was taken in about 1955-56. The first block was in March 1946. According to the defendant's evidence, first

he had taken the two ground floor blocks and it was the third block which was the suit block on the first floor. That block he was using for keeping cots of patients and x-ray machines but as patients found difficulties in climbing within six months he occupied the said block for his residence and cots and x-ray machines were shifted to the ground floor. It was for that purpose that he examined the so-called independent witness Dr. Chatterji, Exhibit 49, who has been relied upon by both the Courts. That Doctor deposed that he was an associate of Doctor Shah for giving treatment to his patients for fracture cases. Although he had no documentary evidence for showing such association, it was his case that first the x-ray machine was put in the first room of the block on the first floor. He had his necessary and exercise table in the lobby. In one room there were beds for the patients of Doctor Shah. For about a year the x-ray machine was kept in that block of first floor and then it was shifted on the ground floor. He deposed that Doctor Shah started staying in that block of first floor. In cross-examination he had to admit that he could not give the date when x-ray machine had been installed on the first floor and when it was shifted. Therefore, this evidence was hardly conclusive, hardly throwing any light on the question as to on what terms this residential block had been taken. There being no documentary evidence by way of rent-note or indenture of lease and there being no oral evidence as to the terms on which the lease took place, admittedly there was not an iota of evidence to find out what was the purpose of the original letting. Besides there were four different tenancies in question and if the said block had all along been used for residential purpose there can be no controversy even if the Doctor had taken for his hospital purpose the other blocks. The Doctor's evidence is also eloquent that till 1957-58 his brother was staying with him and when he got the other block, he was staying as a family member. Till he shifted in 1957-58 this brother was staying as a member of the family in the suit building. He also admitted that one block was used for residence and three blocks for hospital even in the Dandia Hanuman premises which he took in 1957 and that is why out of the four blocks in the said building, three blocks which were for hospital, he immediately handed over. It is only the residential block which had been retained by this Doctor. The plaintiff could not file the suit because the defendant had shifted to the hospital premises in 1957-58 and he could file a suit only when the defendant built such a huge bungalow of 3000 square feet construction with four bed-rooms, one dining cum living room, kitchen, store-room with rooms for Chowkidar and garage. After such spacious accommodation was available for his residence, the defendant could never sit tight on his original residential block, by seeking to use the same for his brother also on the ground that he was his staff Doctor. The ground of eviction in Section 13(1)(1) as per the legislative intent must operate in such a case.

13. Mr. S.A. Shah further argued that the plaintiff had neither in the notice correspondence or in the plaint alleged this ground that the suit block was only let or used for residential purposes. The plaintiff had to allege the necessary ground of eviction u/s 13(1)(1). It was the defendant who came out with this

plea of letting being not for residential purpose alone but for the aforesaid hospital purpose of the whole house. Defendant was clearly confusing the whole issue because there were admittedly four separate tenancies and at time one complete house was ever let to this defendant. This material fact had made a fundamental difference, in the result. If the correct test was understood by the lower Courts of dominant substantial purpose, the finding is inevitable that the defendant had been "let and he was using the suit block mainly for residential purpose although incidentally the Doctor might have kept his x-ray machine there for some time. Admittedly the Doctor had kept this suit block including two ground floor blocks at the very beginning of his career round about 1946 to 1948 and at that time there could be no other intention that the dominant use was for residential purpose where of course the Doctor would both reside and carry on his medical profession work. That is why the plaintiff had stated in his evidence that the hospital idea came up at the time of the last block which according to him took place after some four or five years or in 1955-56 as per the defendant's version. It was then that the Doctor might have become prosperous and was going on expanding as seen from the subsequent events. Therefore, what was originally the incidental use afterwards assumed larger proportions. It made the Doctor shift his premises but then the Doctor had no right to sit tight on the tenanted premises of this landlord. Therefore, there is no substance in the plea of Mr. S.A. Shah that this was a pure finding of fact which could not be said to be suffering from such an error of law so as to be interfered with in revisional jurisdiction, even though such wrong tests have been applied, which would completely defeat the whole object of this legislation. In that view of the matter the decision of both the lower Courts must be set aside and the landlord's suit must be decreed by evicting this defendant-tenant from the suit premises. Mr. S.A. Shah, however, asked for some time and Mr. D.U. Shah has no objection to give some reasonable time so that this brother of the defendant could vacate the suit premises.

14. The eviction decree is passed in favour of the plaintiff against the defendant directing the defendant to hand over the vacant possession of the suit block on or before July 31, 1977. It is, however, clarified that if the defendant gives an undertaking to hand over vacant possession on or before April 30, 1978 and meanwhile further undertakes to go on regularly paying the mesne profits equivalent to the rental amount and also undertakes not to part with possession in any manner whatsoever, the time limit as aforesaid shall stand extended till April 30, 1978. If the defendant wants to exercise the choice of availing of the undertaking, the said undertaking duly signed shall be filed before this Court within a period of one month from to-day.

15. The Revision Petition is accordingly allowed by making the rule absolute with costs all throughout.