
(1992) 03 GUJ CK 0028
In the Gujarat High Court

Dr. Popatlal Premchand Sheth (since decd.) through his heirs APPELLANT
Dinesh Popatlal Sheth and Others

Vs

Dhanjibhai and Sons RESPONDENT

Date of Decision : 26-03-1992

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 29(2),
29(2)

Citation : (1994) 1 GLR 71

Hon'ble Judges : A.N. Divecha, J

Bench : Single Bench

Judgement

A.N. Divecha, J.—The original defendants have invoked the revisional jurisdiction of this Court u/s 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (the "Rent Act" for brief) for challenging the legality and validity of the decree of eviction passed by the learned Judge of Court No. 6 of the Small Causes Court at Ahmedabad on 1st May, 1975 in H.R.P. Suit No. 3013 of 1970 as affirmed in appeal by the Appellate Bench of that Court on 1st July, 1978 in Civil Appeal No. 242 of 1975.

2. The facts giving rise to this revisional application may be summarised thus: The respondent herein is the landlord and the predecessor-in-title of petitioners Nos. 1/1 to 1/3 was the tenant of the premises involved in the litigation giving rise to the present revisional application. It appears that the landlord had filed one suit against the tenant for recovery of possession of the rented premises on the grounds of bona fide and reasonable personal requirement and sub-letting. That suit was filed in the Small Causes Court at Ahmedabad. It was registered as H.R.P. Suit No. 334 of 1964. It came to be dismissed. The landlord unsuccessfully carried the matter in appeal. It was registered as Civil Appeal No. 24 of 1966, It came to be dismissed on 25th July, 1969. It may be noted that the original tenant was a Surgeon. He was pursuing his medical profession in the rented premises. It is the case of the landlord that one sign-board of Saurin & Co. was found displayed on the rented premises. Thereupon the landlord caused to serve

to the original tenant one notice of eviction on 5th December, 1969 calling upon the tenant to vacate the suit premises on the ground of sub-letting. Its copy is at Exh. 52 on the record of the trial Court. It was served to the tenant on 10th December, 1969 as transpiring from its postal acknowledgement at Exh. 53 on the record of the trial Court. The tenant caused to give his reply on 29th December, 1969 at Exh. 66 on the record of the trial Court to the landlord's notice of eviction at Exh. 52 thereon. In the reply it was inter alia stated that the said Saurin & Co. was a partnership firm in which the tenant himself was a partner. Thereupon the landlord caused to serve another notice to the tenant on 21st January, 1970 calling upon the tenant to give a copy of the Partnership Deed or document carrying on the partnership business in the name and style of the said Saurin & Co. Its copy is at Exh. 54 on the record of the trial Court. It appears that no reply was caused by or on behalf of the tenant to the notice at Exh. 54 on the record of the trial Court. Thereupon the landlord caused to serve its reminder on 12th February, 1970. Its copy is at Exh. 55 on the record of the trial Court. It appears that no reply was caused by or on behalf of the tenant to the reminder at Exh. 55 on the record of the trial Court either. The landlord thereupon instituted on: suit against the tenant in the Court of the Small Causes Court at Ahmedabad for possession of the rented premises on the ground of sub-letting. Therein the said Saurin & Co. was also impleaded as defendant No. 2 in its capacity as the sub-tenant in the rented premises. That suit came to be registered as H.R.P. Suit No. 3013 of 1970. It appears to have been assigned to Court No. 6. The original tenant filed his written statement at Exh. 12 on the record of the trial Court and resisted ah; suit on various grounds. He inter alia contended that he did not part with any portion of the rented premises in favour of anyone including the said Saurin & Co. According to him, he was a partner in the said firm of Saurin & Co. for carrying on the business as building contractor. Defendant No. 2 also filed its written statement at Exh. 20 on the record of the trial Court and resisted the suit on various grounds. It more or less adopted the contentions raised by and on behalf of the original tenant in his written statement at Exh. 12 on the record of the trial Court. The case of sub-letting was denied by defendant No. 2 as well in its written statement. During the pendency of the suit, the original tenant breathed his last on 12th July, 1971. Thereupon his heirs and legal representatives were brought on record in his place as defendants Nos. 1/1 to 1/3. It appears that they adopted the written statement submitted by the original tenant by the purshis at Exh. 44 on the record of the trial Court. It appears that they filed their additional written statement at Exh. 32 on the record of the suit. On the pleadings of the parties, the learned trial Judge framed the necessary issues at Exh. 50 on the record of the trial Court. After recording evidence and hearing the parties, by his judgment and decree passed on 1st May, 1975 in H.R.P. Suit No. 3013 of 1970, the learned Judge of Court No. 6 of the Small Causes Court at Ahmedabad was pleased to decree the suit for possession. The aggrieved defendants carried the matter in appeal before the Appellate Bench of that Court. It came to be registered as Civil Appeal No. 242 of 1975. By its judgment and decree passed on 1st July, 1978 in Civil Appeal No.

242 of 1975, the Appellate Bench of the Small Causes Court at Ahmedabad was pleased to dismiss the appeal and to affirm the decree of eviction passed by the trial Court. The original defendants have thereupon invoked the revisional jurisdiction of this Court u/s 29(2) of the Rent Act for questioning the correctness of the decree of eviction passed by the trial Court as affirmed in appeal as aforesaid.

3. It may be mentioned that the Courts below have come to the conclusion that the partnership in the name and style of Saurin & Co. was sham, nominal and bogus. The Appellate Court has given cogent and convincing reasons for reaching its conclusion in that regard. It has relied on several circumstances on record for the purpose. According to it, the Partnership Deed at Exh. 72 on the record of the trial Court indicated that the partnership business in the name and style of Saurin & Co. commenced with effect from 1st July, 1969, and yet nothing was brought on record to show that it actually commenced its business from 1st July, 1969. Again, the Appellate Court has noted the circumstance that the partnership deed at Exh. 72 came to be executed on 26th December, 1969 only after the notice of eviction at Exh. 52 on the record of the trial Court came to be served to the tenant on 10th December, 1969 as transpiring from the postal acknowledgement at Exh. 53 on the record of the trial Court. It is also on record that the stamp paper for execution of the partnership deed at Exh. 72 on the record of the trial Court was purchased on 20th December, 1969, again after service of the notice at Exh. 52 on the record of the trial Court. The partnership was registered under the Indian Partnership Act, 1932 on 7th January, 1970 as transpiring from a certified extract from the Register of Firms at Exh. 74/1 on the record of the trial Court. It transpires therefrom that the stamp paper for the purpose was purchased on 31st December, 1969. These circumstances also weighed heavily with the trial Court in coming to the conclusion that the original tenant maneuvered to make a show of creation of some partnership business showing himself as a partner therein. Then, it has been stated by petitioner No. 1/1 herein in his oral testimony at Exh. 70 on the record of the trial Court that petitioner No. 2 herein used to maintain its accounts right from its inception. No books of accounts were produced by or on behalf of the defendants or either of them at trial. The witness at Exh. 70 on the record of the trial Court has also stated that petitioner No. 2 herein used to pay its due Income Tax. No attempt was however made by or on behalf of the petitioners herein or either of them to produce the Income Tax returns or the assessment orders showing payment of Income Tax by and on behalf of petitioner No. 2 herein. Petitioner No. 1/1 herein has also stated in his oral testimony at Exh. 70 recorded by the trial Court that petitioner No. 2 herein opened certain bank accounts also. No particulars were however given about such bank accounts opened and/or operated by or on behalf of defendant No. 2 at trial. No attempt was made to bring on record the applications made to the concerned bank or banks for opening bank account or accounts to show that the original tenant was also shown as a partner for the purpose of opening of such bank account or accounts. No attempt was made to

show that the firm in the name and style of petitioner No. 2 herein was registered as an establishment under the Bombay Shops and Establishments Act, 1948. Even if it was registered, no certificate of registration thereof was brought on record. Non-production of all these relevant materials on record prompted the Appellate Court to draw an adverse inference against the petitioners herein to the effect that the partnership in the name and style of petitioner No. 2 was a camouflage. This conclusion reached by the lower Appellate Court on appreciation of the evidence on record cannot be said to be perverse. Kum. Shah for the petitioners, even after taking me through the entire record, has failed to convince me to come to the conclusion that the conclusion reached by the Appellate Court in that regard can be branded as perverse. I have found no perversity therein. No other view is possible on reappreciation of the evidence on record. It would not be possible for me to upset that conclusion reached by the Appellate Court in exercise of my limited powers u/s 29(2) of the Rent Act.

4. Kum. Shah for the petitioner has however submitted that it was not open to the lower Appellate Court to jump to the conclusion that one room (the "suit room" for convenience) in the rented premises was sub-let to petitioner No. 2 herein simply on the ground that the partnership in that name was found to be sham, nominal and bogus. According to her, the essential ingredients constituting sub-letting have not been proved by or on behalf of the landlord in the instant case, and as such the Courts below were in error in coming to the conclusion that the suit room in the rented premises was sub-let to petitioner No. 2 herein. As against this, Shri Shah for the respondent has submitted that both the Courts below have concurrently found that the suit room in the rented premises was sub-let to petitioner No. 2 herein, and as such it would not be open to this Court to upset that concurrent finding of fact in exercise of its limited revisional powers u/s 29(2) of the Rent Act. According to Shri Shah for the respondent, once the landlord successfully establishes that the rented premises or some part thereof is in possession of some person other than the original tenant, it would be for the tenant to show how that other person has come to occupy the rented premises or that part of it. In the instant case, runs the submission of Shri Shah for the respondent, the landlord has been able to establish that petitioner No. 2 herein was in exclusive possession of the suit room in the rented premises and that it was for valuable consideration. In that view of the matter, according to Shri Shah for the respondent, there is no reason for this Court to interfere with the decree of eviction concurrently passed by the Courts below in the present case.

5. It may be mentioned that the landlord in his plaint has challenged the genuineness or the existence of the partnership in the name and style of petitioner No. 2 herein. If the partnership is found to be a camouflage or sham, bogus and nominal, the question remains as to who is in possession of the suit room in the rented premises. Petitioner No. 2 herein was found not to have any existence in fact or in law. It is true that petitioner No. 1/1 herein, in his oral testimony at Exh. 70 on the record of the trial Court, has admitted that petitioner No. 2 herein has been in possession of the suit room in the rented premises since

the time of its inception. In that case, once the existence of petitioner No. 2 herein itself becomes doubtful it would be necessary for the landlord to show specifically and in no uncertain terms as to who was or is or has been in possession of the suit room in the rented premises. If the landlord does not choose to do so, he will have to suffer consequences in that regard. The Court, at his instance, cannot jump to the conclusion that there was sub-letting of the suit room in the rented premises without showing by or on behalf of the landlord who actually was or is or has been in possession thereof after establishing that petitioner No. 2 herein had no existence in fact or in law. It is true that the partnership deed at Exh. 72 shows one Rasiklal Mistry as a partner in the firm in the name and style of petitioner No. 2 herein along with the original tenant and petitioner No. 1/1 herein. It further shows that the original tenant and his son together had 50 per cent share in the profit or the loss in partnership business and the remaining 50 per cent in the profit or loss was of the third partner. Simply on the basis of this covenant in the Partnership Deed at Exh. 72, it would not be possible for the Court to jump to the conclusion that the suit room in the rented premises was sub-let after holding that the partnership in the name and style of petitioner No. 2 herein was a camouflage. It cannot be inferred simply on that basis that the third partner, that is, said Rasiklal Mistry, was in exclusive possession of the suit room in absence of any specific averment in that regard in the plaint or any such evidence given by or on behalf of the landlord at trial. It may be mentioned that, in his oral testimony at Exh. 60 by the witness for the landlord, not a word has been stated to the effect that said Rasiklal Mistry was or is or has been in exclusive possession of the suit room in the rented premises. In that view of the matter, in my humble opinion, the Courts below were not right in coming to the conclusion that the suit room in the rented premises was sub-let simply on the ground that the partnership in the name and style of petitioner No. 2 herein was found to be a camouflage or sham, nominal and bogus.

6. It is not possible for me to accept the submission urged before me by Shri Shah for the respondent to the effect that, once it is found that someone else is keeping the premises under the guise of some partnership which is found to be a camouflage, the burden to show as to who is in actual possession of the suit room in the rented premises would be on the tenant. The reason therefore is quite simple. In order to prove sub-letting the landlord has to establish two vital facts namely transfer of exclusive possession of the rented premises or any part thereof and valuable consideration for such transfer. Mere permissive user by someone of the rented premises or any part thereof would not amount to transfer thereof for the purpose of sub-letting. I am fortified in my view by the binding ruling of the Supreme Court in the case of Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, . In that case the original tenant was carrying on his business in the rented premises. He practically transferred his business to his two sons and practically retired from business. A suit for eviction was filed inter alia on the ground of sub-letting. It was, however, held by the first authority that the original tenant had unlawfully parted with the possession of

the suit premises in favour of his sons without the consent in writing of the landlord. In that context it has been held by the Supreme Court:

It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of Clause (b) of Section 14(1) of the Act Even though the father had retired from the business and the sons had been looking after the business in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession This Court in *Smt. Krishnawati Vs. Shri Hans Raj*, had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises allowed the other to carry on business in a part of it The question was whether it amounted to sub-letting and attracted the provisions of Sub-section (4) of Section 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence a rash inference to draw that the owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Act.

The aforesaid ruling of the Supreme Court is binding to this Court. By analogy, it would be applicable in the present case.

7. Even if it is assumed that the original tenant was not a partner in the firm in the name and style of petitioner No. 2 herein, it cannot be said that he had divested himself of all his interests in the suit room in the rented premises. The partnership deed at Exh. 72 on the record of the trial Court would not be binding to the landlord. But the persons executing the same would be bound by the terms thereof.

Clause 14 thereof clearly covenants that the tenancy rights in respect of the rented premises including the suit room were reserved to the original tenant and no partner named therein could have claimed any right whatsoever therein. In view of this clear covenant in the document at Exh. 72 on the record of the trial Court, it cannot, for a moment, be said that the original tenant had transferred his interests in the suit room in the rented premises in favour of anyone. At the most, some persons including the original tenant's son were permitted to make use of the suit room in the rented premises for some business. That by itself

would not mean that the tenant had transferred his interest, in the suit room in their favour.

8. Again, the persons in possession of the suit room in the rented premises would be one son of the original tenant and said Rasiklal Mistry if the partnership of the original tenant is found to be sham, bogus and nominal. It has come on record through the oral testimony of petitioner No. 1/1 herein at Exh. 70 on the record of the trial Court that, during the life time of the original tenant, they were residing as a Joint Hindu Family. If the father of such joint Hindu family permits his son to use some part of the rented premises for his individual and separate business, it cannot be said that the father is guilty of transferring his interest, in that portion of the rented premises in favor of his son. The position would not be different if the father permits his son to carry on his business in some portion of the rented premises along with some other person without in any way transferring any interest in that portion of the rented premises in favour of anyone.

9. Shri Shah for the respondent has then urged that the partnership deed at Exh. 72 on the record of the trial Court clearly shows that the management of the so-called partnership business was put in the hands of petitioner No. 1/1 herein and said Rasiklal Mistry and the original tenant was not supposed to take any part in the management of the so-called partnership business. Shri Shah for the respondent has invited my attention to the fact that petitioner No. 1/1 herein has clearly deposed in his oral testimony at Exh. 72 on the record of the trial Court that petitioner No. 2 herein was and is and has been in possession of the suit room in the rented premises. Relying on this factual position emerging from the record, Shri Shah for the respondent has submitted that it should be for the tenant to show how defendant No. 2 came to be in possession of the suit room in the rented premises. According to Shri Shah for the respondent, in what capacity petitioner No. 2 herein was and is and has been in possession of the suit room in the rented premises would be within the special knowledge of the original defendants, and as such it will be for them to show how petitioner No. 2 herein came to be in possession thereof and in what capacity. I think the burden would shift on the tenant to establish how a particular person is in possession of a part of the rented premises only when the landlord is able to establish that the exclusive possession of the rented premises or any part thereof has been transferred to some other person for valuable consideration. If the landlord fails to establish these two important ingredients constituting sub-letting, no burden shifts on the tenant. In the instant case, the landlord has failed to establish as to who, by or on behalf of petitioner No. 2 herein, was in exclusive possession of the suit room in the rented premises. As aforesaid, even if it is believed that petitioner No. 1/2 and said Rasiklal Mistry were, are and have been in possession of the suit room in the rented premises by and on behalf of petitioner No. 2 herein to the exclusion of the original tenant in their partnership business, it cannot be said that the original tenant had lost control over or the legal possession of the suit room. Even at the cost of repetition, I reiterate that Clause

14 of the Partnership Deed at Exh. 72 on the record of the trial Court clearly shows that the tenancy rights in the rented premises including the suit room remained with the original tenant and no right whatsoever came to be transferred in favour of any of the other two persons named as partners therein.

10. The landlord in the instant case has also not been able to establish that the so-called transfer of exclusive possession of the suit room by the original tenant in favour of petitioner No. 2 herein was for some valuable consideration. The Appellate Court has read the covenant regarding 25 per cent share in profit to the original tenant to be a valuable consideration for transfer of the suit room in the rented premises in favour of petitioner No. 2 herein. The relevant covenant in the Partnership Deed at Exh. 72 on the record of the trial Court is found in Clause 9 thereof. Therein is specified that the original tenant will have 25 per cent share in profit or loss in the partnership business. If the original tenant was entitled to his share only in profits of the partnership business, there might have been some justification in holding that such share in the profits of the partnership business would amount to valuable consideration. If the original tenant is also made liable for the loss in the partnership business to the extent of 25 per cent, by no stretch of imagination it can be said that he would receive valuable consideration. If it is to be treated as valuable consideration, it would be a negative valuable consideration. A negative valuable consideration is a contradiction in terms. In that view of the matter, I am of the opinion that the Appellate Court was not right in holding that 25 per cent share in profits to be given to the original tenant under the partnership agreement at Exh. 72 on the record of the trial Court amounted to valuable consideration for transfer of the suit room in the rented premises in favour of petitioner No. 2 herein.

10.1 In view of my aforesaid discussion, I am of the opinion that the Courts below were wrong in coming to the conclusion that the original tenant was guilty of sub-letting the suit room in the rented premises to petitioner No. 2 herein. No decree of eviction could have been passed against the tenant.

11. It is not possible for me to accept the submission urged before me by Shri Shah for the respondent to the effect that it would not be open to this Court to upset the concurrent finding of fact recorded by the Courts below with respect to sub-letting of the suit room by the original tenant to petitioner No. 2 herein. It may be mentioned that a finding of fact is different from a conclusion reached on the basis of proved facts. As indicated hereinabove, the Courts below have found that the partnership in the name and style of petitioner No. 2 herein is a camouflage or sham, nominal and bogus. This could constitute a finding of fact. This Court cannot upset it in exercise of its limited revisional powers u/s 29(2) of the Rent Act. Whether or not this finding of fact that the partnership in the name and style of petitioner No. 2 herein was camouflage sham, nominal and bogus should lead to the conclusion that the original tenant was guilty of sub-letting the suit room in the rented premises is the moot question. The conclusion in that regard would be arrived at by applying law to the proved facts. If this conclusion

is reached on misapplication of law, Section 29(2) of the Rent Act does not come in the way of this Court in correcting such erroneous conclusion.

12. In this connection a reference deserves to be made to the binding ruling of the Supreme Court in the case of *Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others*, . Interpreting the revisional powers u/s 29(2) of the Rent Act, it has been held in para 16 at page 1789 of the reported ruling:

As we read the power, the High Court must ensure that the principles of law have been correctly borne in mind. Secondly the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. It must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice.

The aforesaid observations of the Supreme Court in the case of *Helper Girdharbhai* (supra) clearly go to show that it would be open to this Court to interfere with the conclusion reached by the Courts below if it is found that the principles of law have not been correctly borne in mind by the Courts below and more particularly by the lower Appellate Court. This Court can also interfere if the conclusion arrived at by the Courts below, and more particularly by the lower Appellate Court, is such as no reasonable man could have arrived at. This Court can also interfere with the decision of the Courts below if it is found that it leads to miscarriage of justice. As pointed out hereinabove, the Appellate Court has jumped to the conclusion that the suit room in the rented premises was sub-let by the original tenant simply on the ground that the partnership in the name and style of petitioner No. 2 herein was found to be a camouflage or sham, nominal and bogus. It is also found that the Appellate Court did not apply the correct principle in such case to the effect that it is for the landlord to establish by cogent and convincing evidence the two important ingredients constituting sub-letting, namely, transfer of exclusive possession and valuable consideration therefor. By not applying the correct principle of law, no room for doubt is left that the decision has resulted into miscarriage of justice. In this view of the matter, there is no escape from the conclusion that this is a fit case to interfere with the decree of eviction passed by the trial Court as affirmed in appeal in exercise of the revisional powers of this Court u/s 29(2) of the Rent Act.

13. In the result, this revisional application is accepted. The decree of eviction passed by the learned Judge of Court No. 6 of the Small Causes Court at Ahmedabad on 1st May, 1975 in H.R.P. Suit No. 3013 of 1970 as affirmed in appeal by the Appellate Bench of that Court on 1st July, 1978 in Civil Appeal No. 242 of 1975 are hereby quashed and set aside. Rule is accordingly made absolute however with no order as to costs on the facts and in the circumstances of the case.