

(2013) 09 GUJ CK 0004

In the Gujarat High Court

Case No : Civil Revision Application No. 361 of 2003

Heirs of Decd. Lalchanddas Gopaldas

APPELLANT

Vs

Heirs of Decd. Shivkumar Ramparad Dave

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 2 GLH 168

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

N.V. Anjaria, J.—Original plaintiff - the landlord filed H.R.P. Suit No. 241 of 1986 before the Small Cause Court No. 10 at Ahmedabad against the applicants-tenants for possession of the suit premises on the grounds of breach of terms of tenancy, availability of alternative suitable accommodation to the tenant, change of user, unlawful subletting as well as reasonable and bona fide requirement of the landlord. The Small Cause Court passed judgment and decree on 31st December 1999 directing the defendants-tenants to handover vacant and peaceful possession of the suit premises within two months. The said decree and judgment was passed on the ground of breach of terms of tenancy, acquisition of suitable residence by the tenant and change of user. The rest of the grounds came to be rejected. The tenants preferred Civil Appeal No. 25 of 2000 against the aforesaid judgment and decree. The said appeal came to be dismissed by appellate Bench of Small Cause Court, Ahmedabad on 15th October 2008. Against the said judgment and order, the original tenants have filed the present Revision Application invoking Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Bombay Rent Act" for sake of brevity).

2. The relevant facts may be set out. Respondent landlord had rented the suit premises to the applicant-tenant as per the conditions mentioned in the rent-note (Exh. 78). The suit premises consisted of a room, bathroom and latrine and

an obtain the front. It was rented on monthly rent of Rs. 27/- plus taxes to be paid by the tenant. According to the case of landlord, the premises was let out from residential purpose, but the tenant later on converted its use and started using the same exclusively for business. The plaintiff, therefore, on the ground of change of user, sought eviction of the tenant. Before the Courts below, it was the contention of the tenant that the suit premises was given to be used for business purpose right from the creation of tenancy and it was so used from the beginning. It was contended that the respondent had applied to the Collector for permission to let the premises for non-residential purpose, and such permission was granted. The second ground pleaded for seeking eviction was that the tenant had acquired suitable alternative accommodation.

2.2 The defendant-tenant filed two written statements contesting the plaintiff's suit. First Written Statement was filed at Exh. 8, in which the case put forth was that the suit premises was taken on rent by the predecessor for the purpose of business as well as for residence. It was denied that it was only for residence. Thereafter, another Written Statement (Exh. 107) was filed. In that the case regarding dual-use was given up and it was sought to be contended that they were tenant since 45 years using the premises for their business right from the time the premises was rented and a further defence was raised that it was rented for the purpose of business also.

2.3 The trial Court framed issues at Exh. 9. It held that the tenant had committed breach of tenancy and had illegally converted the user of the premises, regarding which Issue No. 1 and Issue No. 3 were framed. The Court also held on evidence the other ground acquisition of alternative premises was held proved. The eviction decree passed on the said grounds by the trial Court came to be confirmed by the lower appellate Court which reinforced and affirmed the findings and conclusions.

2.4 The original tenant having died during the pendency of H.R.P, in the suit, his heirs and legal representatives were joined as defendants. Landlord died during the pendency of the civil appeal before the lower appellate Bench and his heirs were also joined in the proceedings of appeal as per order below Exh. 14. Accordingly, the applicants herein are the legal heirs of the deceased tenant whereas respondents are the heirs of the deceased landlord.

3. Heard learned Advocate Mr. Vimal A. Purohit for the applicant-tenant and learned Advocate Mr. M.B. Gandhi for the respondent landlord.

3.1 Learned Advocate for the applicant submitted that it was established from ample evidence on record that the suit premises was used for business purpose only. He submitted that the suit premises consisted of a single room and it was not fit for residence, and it was a shop and was so described. He further submitted that eventhough in the rent-note (Exh. 78), it was agreed by the tenant that the premises would be used for the purpose of residence, the landlord permitted the tenant to use it for business purpose also. It was

submitted in that context that subsequently the landlord applied for permission before the Collector to use the premises for non-residential purpose, and the same was granted on 5th May 1993. Learned Advocate further submitted that the landlord by his conduct permitted the use of the premises for business purpose. Another argument was advanced by learned Advocate for the applicant was that the tenant had filed standard rent application wherein the standard rent was fixed at the rate of Rs. 27/- per month. It was submitted that at that time also the landlord did not raise the contention that the premises was for residential use only. It was submitted that the landlord accepted that the use of the rented premises was for business purpose. It was submitted that by his very conduct the landlord permitted the tenant to change the user of the premises. About the ground of acquisition of alternative premises, it was submitted that the Courts below erred in holding the same as proved in the facts of the case.

3.2 Learned Advocate for the applicant relied on decision of this Court in Gujarat University v. Arun Sushilkumar Kakkad [2010 (1) GLR 712] on the basis of which he highlighted the principles of estoppel to contend that the landlord having permitted the tenant to use the premises for business purpose he was estopped from raising the ground of non-user. Another decision in Heirs of Badarmal H. Jain and Gautamchand B. Jain Vs. Heirs of Ratanben V. and Sushilaben, was pressed into service for the proposition that when the premise was used for long time for a particular purpose, the tenancy ought to have been treated as accepted for that purpose and the landlord would be required to establish otherwise. He further relied on decision in Smt. Shakuntala S. Tiwari Vs. Hem Chand M. Singhania, . Yet another decision in Khanji v. Hemlataben Indukumar Rajaria was relied on to contend that the word "residence" denotes the place where an individual eats, drinks, sleeps or where his family resides permanently treating it as a dwelling house. However, it was submitted by learned Advocate for the applicant that in the instant case the premises was one room or a shop and could not have been used for residential purpose, given the true meaning of residence.

3.3 On the other hand, learned Advocate for the respondent submitted that the rent-note mentioned that the purpose of tenancy was only residential. He submitted that merely because the landlord for some reason obtained permission for non-residential use, it by itself could not change the agreement between the landlord and tenant regarding purpose of tenancy which was incorporated in the rent-note. Nor the standard rent proceedings could determine the purpose of tenancy, it was submitted. He further referred to the conditions in the rent-note to submit that the purpose of tenancy was clear. It was next submitted that both the Courts below reached concurrent findings on the aspects of non-user as well as acquisition of alternative accommodation by the tenant. It was submitted that u/s 29(2) of the Bombay Rent Act, the revisional powers of this Court being limited, this Court may not interfere.

4. From the facts on record, it was seen that the tenancy was commenced

between the parties in the year 1953 and the conditions of tenancy was reduced into black and white in the form of rent-note (Exh. 78). In the rent-note it was expressly undertaken by the tenant that he would use the premises rented to him only for residential purpose. Condition No. 10 of the rent-note so mentioned in clear terms. In condition No. 12 it was further stated that if the landlord required the rented premises at any time for his residence, he would vacate it without any delay and without any objection. Having regard to the above express conditions agreed by the tenant in the rent-note, the residential purpose for use of premises was not only specifically mentioned, but the fact that it was the premises for residence was a fact stood buttressed by the condition wherein, in the event of landlord requiring the same for his residence, it was to be handed over back to him. It was a one room premises having bathroom and latrine in it. The size of the premises or its description cannot be the factors which would determine the purpose of tenancy. The intention of the parties to use the premise for residential purpose is material, which was evident. It is the intention of the parties which would govern the purpose of tenancy.

4.1 Referring to the facts as regards the user of the premises, from the evidence of PW-1 (Exh. 36) it was suggested that the suit premises was rented for residential purpose only and initially while residing there, the tenant used to sell the fruits and faraliitems and such business was being done using the otta of the suit premises. The kind of business so done by the tenant was a fact substantiated by evidence of D.W. -1 Rajeshkumar (Exh. 148), who admitted the rent-note (Exh. 78) also. The lower appellate Court on consideration of relevant evidence observed that the premises was in Jethabhai's Khadki and till death of original tenant, the plaintiffs were so using the premises. Thereafter, they left it to live elsewhere and the suit premises was started to be using for business only. A clear finding was recorded by the Court that defendant had at that time seven members in his family and was in dire need of the residence. All the members of the family were residing and occupying the room as they were in need of residential accommodation. It was also recorded that their financial condition was not good, and they were earning by doing the business without any shop. The Courts below concurrently found that there was nothing on record to believe and accept that they were using or permitted for using the rented premises exclusively for business purpose. The premises had in its the essential facilities like bathroom and latrine. The contention that the kind of the premises it was that the same was not fit for residence, is stated to be rejected.

4.2 In the landlord-tenant relationship the primary document is rent-note. The terms of the tenancy flow from the rent-note. Those conditions govern and determine the rights and obligations of both the landlord and the tenant. In the instant case when the rent-note (Exh. 78) itself mentioned that the premises was to be used for residential purpose, would remain predominant purpose and other use, to which the premises was put to, would remain incidental. It would not change the agreed purpose of the residence for which contract of tenancy was created and reduced in the rent-note. Even if it is assumed on demurer that the

tenant had used the premises for business purpose also it would not unmake the residential purpose for which the tenancy existed. The dominant purpose remained to be residential. The landlord had cause of action to institute the suit when the tenant was found to be using the premises exclusively for business purposes only totally forsaking the purpose of residence agreed in the rent-note. It could not be said that merely because the landlord applied for nonresidential use in the premises, that by itself and alone amounted to conversion of the purpose of tenancy to be one of business, to substitute what was mentioned in the rent-note.

4.3 Given the express conditions as regards the residential use agreed by the tenant, and facts considered in totality, use of the premises for business could not be a sole, singular or exclusive test for seeing the purpose of tenancy. It was at the best incidental use permitted without changing the dominant purpose. It is relevant to notice in this connection that at the starting of tenancy, the tenant had been using the premises for residence. He was having seven members in the family. Their source of livelihood appeared to be grocery business they were carrying on the otta while residing in the premises. It could also not have been validly and legitimately contended as was sought to be, that since the tenant was using the premises for business purpose for long time, the purpose of tenancy got changed from residence to business.

4.4 The decision in *Badarmal H. Jain (supra)* relied on by the learned Advocate for the applicant had different set of facts. In that case, the rent-note was silent on the purpose for which the premises was let. That was a decisive and distinguishing factor to the facts of the present case which would make the said decision inapplicable. It was observed that the original purpose of letting is not a question of presumption, nor can be derived from the probabilities of the case. Nor it was a matter of deduction based only upon the conduct of the parties. In the present case, all these criteria were not required to be employed as the rent-note itself was expressive of the purpose.

4.5 In *Dolatrai Harjivan Bibodi and Another Vs. Dr. Kantilal Sukhlal Shah*, it was held that once the tenant acquires vacant alternative accommodation, he could not be expected to sit tight on his premises. In that case, the tenant was a doctor by profession who made the house taken on rent suitable for residence as well as dispensary. The purpose of lease was not specified in terms of tenancy. The Court observed that Section 13(1)(1) would be applicable if the original use was for residence and if the tenant was using the premise for business or professional purpose, in such context the controversy has to be resolved only on the test of dominant or substantial purpose of letting. The Court then held,

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 test would clearly show that the premises do remain residential..... 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.

4.5.1 It was further stated,

The question as to whether premises are used for residential purpose or not could never be decided in 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.

4.6 Adverting to the second ground u/s 13(1)(1) of the Act, the said ground of tenant having acquired alternative accommodation is emphatically established. Both the Courts below recorded that each of the defendants had their own residence available and they were residing there. It was recorded that they were staying at Paarth Apartment, Vallabhwadi. The said factum of acquisition of alternative house was admitted by defendant No. 1 himself in his evidence (Exh. 138) and was further substantiated and strengthened by evidence of P.W. 2 (Exh. 96). The tenants having accepted about acquiring the alternative accommodation, the said finding was unimpeachable. The Courts also concluded that the alternative accommodation acquired by the tenants was suitable and having more area than the rented one.

5. In view of the above discussion, it was not possible to countenance the contention of the applicant that the premises was let or meant for use of doing business. The purpose was clearly discernible from the rent-note which was residential. In any case, the residential purpose was the dominant purpose and even if the tenant had carried some business in the premises at a subsequent point of time, the purpose of tenancy would not change and it is to be treated as one intended by the parties and incorporated in the rent-note. The conclusions and findings of both the Courts below on the count of change of user was based on evidence and appreciation thereof. They were the findings reached having regard to the evidence and material on record. Both the Courts rightly concluded that at the time of entering into the relationship of landlord and tenant, the premises was taken for residence. The tenant's family had seven members, who all were residing in the premises, and they took the premises on rent as they were in pressing need of residence.

5.1 The Courts below arrived at concurrent findings in respect of ground of non-user as well as on the ground of acquisition of alternative accommodation by the tenant and concluded that those grounds were proved in evidence. Both these

grounds are essentially and basically the fact based grounds. They were reached on the basis of evidence on record and were proper and plausible findings. While dealing with the challenge to the impugned order, the scope of revisional jurisdiction and ambit of powers of this Court has to be necessarily kept in view. Therefore, at this stage the principles relating to exercise of this jurisdiction may be recapitulated.

5.2 In *Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others*, the Supreme Court was explaining the scope and ambit of powers of the High Court u/s 29(2) of the Act. It stated,

We must take note of a decision in the case of *Kasturbhai Ramchand Panchal and Brothers and Others Vs. Firm of Mohanlal Nathubhai and Others*, upon which the High Court had placed great reliance in the judgment under appeal. There the learned Judge relying on S. 29(2) of the said Act held that the revisional power with which the High Court was vested under S. 29(2) was not merely in the nature of jurisdictional control. It extended to corrections of all errors which would make the decision contrary to law. The legislature, the learned Judge felt, further empowered High Court in its revisional jurisdiction to pass Such order with respect thereto as it thought fit. The power according to the learned Judge was of the widest amplitude to pass such orders as the Court thought fit in order to do complete justice. He dealt with the human problem under S. 13(2) of Bombay Rent Act considering the relative hardships of the landlord and the tenant and to arrive at a just solution he was of the opinion that the Court should have such wide field. The jurisdiction of the High Court is to correct all errors of law going to the root of the decision which would, in such cases, include even perverse findings of facts, perverse in the sense that no reasonable person, acting judicially and properly instructed in the relevant law could arrive at such a finding on the evidence on the record. In this view in our opinion the ambit of the power was expressed in rather wide amplitude.

5.2.1 Then the Apex Court observed,

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. We must, however, guard ourselves against permitting in the guise of revision substitution of one view where two views are possible and the Court of Small Causes has taken a particular view. If a possible view has been taken, the High Court would be exceeding its jurisdiction to substitute its own view with that of the Courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant. Judged by that standard, we are of the opinion that the High Court in this case had exceeded its jurisdiction.

5.3 In *Tohelram Raval Das Gidwani v. Parshottam Das Chhaganlal Shah* [1995 (2)

G.L.H. 1019] the same principles were reiterated by this Court observing,

The power of this Court in a revision u/s 29(2) of the Bombay Rent Act is very much limited. The questions of fact cannot be reappraised and re-examined unless there is illegality or miscarriage of justice. Although powers of this Court in a revision u/s 29(2) are little wider than one under the provisions of Section 115 of the Civil Procedure Code, it is narrower than the appellate powers. The revisional powers of the High Court u/s 29(2) is limited in terms of Section itself and is necessarily narrower.

5.4 In *Bhaichand Ratanshi Vs. Laxmishanker Tribhoyan*, , the Supreme Court held that u/s 29(2) of the Bombay Rent Act, although the High Court has wider jurisdiction than the one exercisable u/s 115 of the CPC 1908, its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision was according to law. Again in *Irene v. V.S. Venkataraman*, [2010 (15) SCC 711], the Apex Court stated,

While exercising the revisional jurisdiction u/s 25 of the Act, the High Court may call for and examine the record of the appellate Authority and satisfy itself as to the regularity of such proceedings or the correctness, legality and propriety of any decision or order passed therein. It has been the consistent view of this Court that the power of revision conferred on the High Court is not so limited in its scope as it is u/s 115 CPC, but it is also not as wide as the power of an appellate Bench.

5.5 Thus, it is a settled position of law that in a revision u/s 29(2) of the Bombay Rent Act, the concurrent findings of facts recorded by the Courts below could not be reexamined and reconsidered unless it is, successfully, shown to be perverse or illegal. Keeping the aforesaid parameters settled judicially by the Apex Court in mind, when the view taken by the two Courts below could not be said to be irregular or illegal in any way, much less perverse, this Court is disinclined to exercise its jurisdiction. It is expressed by the Apex Court, as noted above, that the High Court even u/s 29(2) of the said Act should not exercise its jurisdiction simply because on facts it could have taken a different view.

For the foregoing discussion and reasons, judgment and order/decreedated 15.10.2003 in Civil Appeal No. 25 of 2000 of the appellate Bench of the Small Cause Court, Ahmedabad, confirming the judgment and decree of eviction passed by the trial Court in H.R.P. Suit No. 241 of 1986 requires no interference. The Revision Application, accordingly, stands dismissed.