

(1970) 03 GUJ CK 0005

In the Gujarat High Court

Case No : Civil Revision Application No's. 371 and 392 of 1966

Isha Valimahmad and Another

APPELLANT

Vs

Haji Gulam Mohmad Haji Dada and Another

RESPONDENT

Date of Decision : 03-03-1970

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 51

Citation : AIR 1971 Guj 208 : (1971) 12 GLR 201

Hon'ble Judges : S.N. Patel, J;J.M. Shelat, J

Bench : Division Bench

Advocate : C.T. Daru, in C.R.A. No. 371 of 1966, for the Appellant; K.M. Chhaya and C.T. Daru in C.R.A. No. 371 of 1966, for the Respondent

Judgement

Patel, J.—Civil Revision Application Nos. 392 of 1966 and 371 of 1966 have been referred to the Division Bench. The same question is involved in both the Revisions and, therefore, they are heard together.

2. Civil Revision Application No. 371 of 1966 came up for hearing before our learned brother Vakil J. Vakil J. held that there was no bar of res judicata. The suit was brought by the landlord for possession of leased premises on the ground that tenancy was terminated as the tenant had subject the premises before 1-1-1964. The Saurashtra Rent Control Act was in force at the time of subletting, however, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Gujarat Extension Amendment Act, 1963, Act No. 57 of 1963) came into force on 1-1-1964. By the said Act, the Saurashtra Rent Control Act, 1951 (Saurashtra Act XXII of 1951) was repealed. The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 with amendments was applied to the Saurashtra area. The contractual tenancy was terminated by a notice dated 13th July 1964. The suit was filed on 19th September 1964. Vakil J. Considered the question as to whether the landlord was entitled to file a suit for possession on the ground of subletting, where subletting took place before 1-1-64 after the Saurashtra Rent Control Act was repealed and the Bombay Rent Act, 1947 with amendments

came into force in Saurashtra area. He was of the opinion that the landlord was entitled to file a suit for possession on the ground of subletting before 1-1-64 after the Saurashtra Rent Control Act was repealed as the right to obtain possession of the landlord was saved u/s 51 of the Bombay Rent Act. The said Section 51 was added in the Bombay Rent Act by Act No. 57 of 1963 and the said section provided for repealing of the Saurashtra Rent Control Act and also provided for certain savings. However, our learned brother V.R. Shah J. has taken a different view in Civil Revision Application No. 72 of 1967, decided on 12 August, 1969. In the said Revision Application V.R. Shah J. has held that where subletting took place before 1-1-1964, and no notice was served terminating the tenancy before 1-1-1964, the landlord has not acquired any right to file a suit for possession on the ground of subletting and, therefore, no suit is maintainable on the ground of subletting before 1-1-1964 after the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 with amendments was applied to the Saurashtra area. Vakil J. did not agree to the view taken by V.R. Shah J. and, therefore, he referred the following question to the Division Bench:

"Whether the landlord is entitled to maintain a suit for recovery of possession from the tenant, on the ground of subletting u/s 13(1)(e) of the Bombay Rent Act (57 of 1947), as applied to Gujarat State on 31st December 1963, where the subletting was made during the pendency of the Saurashtra Rent Control Act, and neither the notice to terminate the contract was given nor the suit was filed before the date on which the Saurashtra Rent Control Act was repealed?"

xx xx xx xx 3. In order to appreciate the question referred to the Division Bench, it is necessary to refer to relevant provisions of law and admitted facts. In both the cases the suit premises are situated in the area where Saurashtra Rent Control Act applied before 1-1-64. Under Saurashtra Rent Control Act, 1951, subletting was prohibited u/s 15. u/s 13 (1) (e) of the Saurashtra Rent Act, the landlord was entitled to recover possession of any premises if the Court was satisfied that after coming into operation of the Saurashtra Rent Control Act the tenant had sublet the whole or part of the premises or assigned or transferred in any other manner his interest therein. After formation of the State of Gujarat, Saurashtra Rent Act, 1951 was continued into force in the Saurashtra area of the Gujarat State and the Bombay Rent Act, 1947 continued to apply to that area of the Gujarat State which formed part of the old Bombay State. By Act No. 57 of 1963, the Bombay Rents, Hotel and Lodging House Rents Control Act (Gujarat Extension Amendment Act 1963), 1947 with certain amendments was applied to the Saurashtra area. By Section 4 of the Act No. 57 of 1947, Section 3 of the Principal Act was amended. By the said amendment of Section 3, it is provided that in the areas to which the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 is extended, the said Act shall come into force on the date on which the amending Act No. 57 of 1963 came into force. Amending Act came into force on 1-1-1964. Sub-section (2) of Section 15 of the Bombay Rent Act, 1947 was also amended by Section 14 of the Amending Act. The amended sub-section (2) of Section 15 provides that sub-letting validated by ordinance No.3 of 1959

shall have effect only in the area in which the Bombay Rent Act applied before 1-1-64 and it shall not apply to the area in which the Bombay Rent Act was not in force before 1-1-64. By Section 21 of the Amending Act, Section 51 is added to the Bombay Rent Act, 1947. Section 51 provides for repeal of the Saurashtra Rent Control Act and the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as extended to the Kutch area of the State of Gujarat by the Government of India, Ministry of States, Notification No. 215 J, dated the 19th September 1951. The proviso to Section 51 reads as follows:

"(1) Such repeal shall not -

(i) affect the previous operation of any law so repealed or anything duly done or suffered thereunder;

(ii) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any law so repealed;

(iii) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed; or

(iv) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and

(2) any such investigation, legal proceeding or remedy may be continued, instituted or enforced and any such penalty, forfeiture and punishment may be imposed, as if the aforesaid law had not been repealed."

It further provides that,

"subject to the preceding proviso, anything done or any action taken under any such law, including any notification, order, notice or receipt issued or agreement made, shall be deemed to have been done, taken, issued or made under the corresponding provisions of this Act and shall continue in force accordingly, unless and until superseded by anything done or any action taken under this Act."

The effect of the amended Act is that the Bombay Rent Act as amended by Act No. 57 of 1963 is applied to the Saurashtra area from 1-1-1964. The bar against subletting, assigning or transferring premises contained in sub-section (1) of Section 15 shall be deemed not to have had any effect before commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 (Bombay Ordinance III of 1959), in any area in which the Bombay Rent Act was in operation before 1-1-64. In other words sub-tenancy which was validated in the Bombay area remained unaffected. However, the subletting which was illegal under the Saurashtra Rent Act was not affected even after the Bombay Rent Act came into force on 1-1-64.

4. Section 51 provides for repealing and saving. Sub-clause (ii) of Clause 1 of the proviso to Section 51 provides that the repeal of the Saurashtra Rent Control Act, 1951 shall not affect any right, privilege, obligation, liability acquired or accrued

or incurred under any law so repealed. Sub-clause (iv) of Clause 1 provides that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment. Clause (2) provided that any such investigation, legal proceeding or remedy may be continued. Instituted or enforced and any such penalty, forfeiture and punishment may be imposed, as if the aforesaid law had not been repealed. There is proviso to the aforesaid proviso. But in the second proviso it is provided that second proviso was subject to the provisions of the first proviso. Therefore, the first proviso prevails over the second proviso. From the above provisions of Section 51, it is clear that for all the rights and liabilities of the parties before 1-1-64, the provisions of the Saurashtra Rent Act are to be deemed to be in force and the legal proceedings and remedy in respect of the said rights and liabilities may be continued, instituted or enforced as if the Saurashtra Rent Control Act had not been repealed. From the above provisions of the proviso to Section 51, it is clear that repeal of Saurashtra Rent Act does not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the Saurashtra Rent Control Act before it was repealed on 31-12-63. The repeal also does not affect the legal proceeding or remedy in respect of the said matters. The proviso further provides that legal proceedings or remedy in respect of the said matters may be continued, enforced or instituted as if the Saurashtra Rent Control Act had not been repealed.

5. When the Saurashtra Act was repealed by Act. No. 57 of 1963, Section 7 of the Bombay General Clauses Act, would have applied if there was no saving provision like Section 51 of the Rent Act. Section 7 of the Bombay General Clauses Act reads as follows:

"Where this Act, or any Bombay Act or Gujarat Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not....."

Now the provisions of Section 7 of the Bombay General Clauses Act are to be applied when an Act is repealed if a different intention does not appear from the repealing Act. In Act No. 57 of 1963 by Section 21, Section 51 is added in the Bombay Act. The said section provides for repealing of the Saurashtra Act. From the proviso to Section 51 it is clear that the intention of legislature is very clear that the rights and liabilities are to be governed by the said proviso and not by Section 7 of the Bombay General Clauses Act.

6. Our learned brother V.R. Shah J. in Civil Revision Application No. 72 of 1967 first considered Section 13(1)(e) of the Bombay Rent Act. He referred to the opening words of Section 13(1)(e) "since the coming into operation of the Bombay Rent Act 1947" and held that those words would mean "since 1-1-1964" as the Bombay Rent Act came into force in Saurashtra area on 1-1-64 and a suit could be filed for possession on the ground of subletting only if subletting was after 1-1-64 when the Bombay Rent Act 1947 as amended by Act No. 57 of 1963

came into force. However, the suit for possession on the ground of subletting u/s 13 (1) (e) of the Saurashtra Rent Control Act, could be instituted and decided even after repeal of the Saurashtra Rent Control Act, in view of the saving provisions in Section 51 added by the Amending Act 57 of 1963. With respect we do not agree that suit for possession on ground of subletting before 1-1-64 is not maintainable after the Saurashtra Rent Act is repealed and the amended Bombay Rent Act came into force on 1-1-64.

7. Our learned brother V.R. Shah J. held that such a suit was not maintainable on another ground also.

"So long as a contractual tenancy subsists between the landlord and the tenant, the rights and liabilities between the parties are governed by the contract between them. Apart from the contract or the general law, there is no right in the plaintiff and no liability in the defendant-tenant. Particularly the right to recover possession of the premises from the tenant can be gathered from the terms of the contract between the two. It is only when the contractual tenancy is terminated in a valid manner that the plaintiff would acquire a right to possession of the premises."

V.R. Shah J. held that by creating subtenancy which was contrary to the provisions of Section 13 (1) (e) of Saurashtra Rent Control Act, no right accrued to the landlord to recover the possession of the premises from the tenant. The right to recover the possession could accrue only when the tenancy is terminated and not earlier. The learned Judge held that the effect of creating of sub-tenancy contrary to the provisions of Section 13 (1) (e) of the Saurashtra Rent Control Act was that the protection given by Section 12 of the Saurashtra Rent Act was taken away and the landlord was entitled to file a suit for possession after terminating the contractual tenancy. The learned Judge held that by subletting in contravention of the provisions of the Saurashtra Rent Act, no right accrued to the landlord and no liability was incurred by the tenant within the meaning of sub-clause (ii) of clause (1) of the proviso to Section 51. We shall proceed to examine the above objection. Section 12 of the Saurashtra Rent Control Act did not create new right or liability as between a landlord and his tenant. Section 12 clearly protected the tenant by creating an impediment on the right of the landlord to evict the tenant. However, the tenant loses the protection of Section 12 when he does any of the acts mentioned in Section 13. The landlord can file a suit for possession on the ground of subletting u/s 13 (1) (e) of the Saurashtra Rent Control Act after terminating the contractual tenancy. Section 12 of the Saurashtra Rent Control Act protected the possession of the tenant and created impediment on the right of the landlord to get the possession under the General Law. However, Section 13 provided that if the tenant did any of the acts mentioned therein, the impediment created u/s 12 was lifted and the landlord was entitled to file a suit for possession on the ground of subletting after terminating the contractual tenancy. The right of the landlord under the General Law to terminate the contractual tenancy is not in any way controlled by the

provisions of the Saurashtra Rent Control Act. The landlord could terminate the contractual tenancy either during the pendency of the Saurashtra Rent Act or after the amended Bombay Rent Act came into force. Section 15 of the Saurashtra Rent Act put a restriction on subletting by the tenant. It made illegal subletting by the tenant and the tenant became liable to be evicted u/s 13 (1) (e). The tenant was deprived of the protection of Section 12 when he sublet the premises. The landlord was entitled to recover the possession as the impediment put by Section 12 was lifted by subletting. The expression "right" in sub-clause (ii) of clause (1) in proviso to Section 51 must be construed to include the right to evict as contemplated by Section 13 (1) (e). Under the Amending Act 57 of 1963, the subletting in contravention of provisions of Section 15 of the Saurashtra Rent Act, is not validated. We are of the opinion that the landlord, who could always put an end to the contractual tenancy with out any impediment, had the right to enforce the remedy of ejectment for the liability incurred by the tenant by his illegal act of subletting. With respect we are unable to agree with the view of our learned brother V.R. Shah J. In the referring judgment our learned brother Vakil J observes that landlord has under the General Law a right to recover the possession after terminating contractual tenancy. Section 12 of the Rent Act protected the possession of the tenant. However, the protection given by Section 12 of the Rent Act was taken away if the tenant sublet the premises. When the tenant sublet premises, the tenant incurred liability to be evicted and the landlord was entitled to evict the tenant u/ s 13 (1) (e) of the Saurashtra Rent Act. In other words the tenant incurred liability to be evicted and the landlord became entitled to get possession from the tenant. We are in agreement with above observations of our learned brother Vakil J.

8. Mr. D.U. Shah appearing for the tenant in Revision Application No. 371 of 1966 and Mr. Daru appearing for the tenant in Civil Revision Application No. 392 of 1966 contended that by mere subletting, no right would accrue to the landlord u/ s 13 (1) (e) of the Saurashtra Rent Control Act within meaning of sub-clause (ii) of clause 1 in proviso to Section 51 unless the landlord had terminated the contractual tenancy by a valid notice. Reliance was placed on 1895 AC 425. Abott v. The Minister for Lands. It was contended that mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause. Relying on the said decision it was contended that without some acts done by an individual, no right could accrue to a party and if no further act was done, no right had accrued to the landlord. This contention, ingenious as it is, cannot, in our view, be accepted as correct and 1895 AC 425, which has been distinguished in every subsequent case in which it has been considered, can be distinguished in the present case as well. The distinction is clear. It is important to remember that the decision of the Privy Council is really a decision on the right conferred by Section 13 of the Act of 1861 and the effect of the repeal of that section, for their Lordships held that holders of fee simple grants had no special right to make

conditional purchases given to them by Section 22 and whatever right they had was to be sought for in Section 13. In the Act of 1861, Section 13 stands at the threshold of the sections dealing with conditional and additional conditional purchases and it is addressed to the first stage at which the statute starts by declaring every person in the world to be eligible for making applications for conditional purchases of Crown lands. Till an application under the section is made, the statute does not begin to operate on Crown lands at all in the matter of their purchase by any one. It is with regard to such a section that the Privy Council said that it merely gave a right, if right, it was, to take advantage of a statute. With regard to Section 13 (1) (e) of the Rent Control Act and Section 51 of the amended Bombay Rent Act, the position is quite different. Section 13 (1) (e) gives a right to a landlord to obtain possession on the ground of subletting by the tenant. It is impossible to say that it is a mere right to take advantage of the statute. Observations in 1895 AC 425, were made in view of Section 13 of 1861 where the statute required some initial step to be taken in order to attract it at all and, but for the taking of that step, one would remain outside the statute altogether. However, in the present case u/s 13 (1) (e) in our view a right for possession accrued immediately. Therefore, 1895 AC 425, has no application to the present case.

9. Next a decision in 1969 All ER 121 in *Ogden Industries Ptv. Ltd. v. Lucas*, was relied upon. At page 125 it is observed "Under the Act of 1958 the widow did not have to prove that she was in fact dependent on the earnings of her husband though under the Amendment Act she has to do so. Nevertheless, it is quite clear as a matter of law that no single person can say under either Act, the moment before the death "I shall be a person dependent at the death if I so long live." First, it must be established that the death was caused or contributed to by the accident; secondly, that the widow will be the deceased's widow at the date of death and not deed or married to some other man, and the children must show that they are under sixteen. None of these things can be ascertained (let alone proved until after the moment of death of the worker). Accordingly, it seems to their Lordships that the dependants at the death cannot before the death be described as a matter of legal phraseology, or with strict accuracy, as a class having a contingent right to succeed to certain benefits from the employer on the death of the injured work-man. Such potential dependants have no more than a mere expectancy or, as it is sometimes called, a mere spes successions and such a hope or expectancy gives rise to no rights in law at all. It is mere possibility. This is well established as, for example, in the case of those entitled on an intestacy, or what is perhaps more important, in the case of those who are entitled to succeed under limitations dependent on an intestacy". In the aforesaid decision it is clear that dependants get some right on the death of the workman. Till the workman dies the dependants have got contingent rights to succeed to certain benefits from the employer. However, the above rights are no more than a mere expectancy. Obviously such contingent right could not give rise to any rights in law. The above case does not help the tenants.

10. Mr. D.U. Shah contended that no rights were acquired in the present case as no legal proceedings were filed before the Amending Act came into force. He also further submitted that rights accrued or acquired referred to in sub-clause (ii) of clause (1) to the proviso referred to only those rights in respect of which proceedings were taken and were pending in the Court on the date when the Act was repealed. There is no force in this submission of Mr. D. U. Shah. The scheme of the proviso to Section 51 shows that the remedies are saved and also proceedings could be taken for enforcing the rights under the Saurashtra Rent Act as if the Saurashtra Rent Act was not repealed. The scheme of the proviso leaves no doubt that it is not necessary that a proceeding should be pending in respect of a right in order that right could be saved, acquired or accrued within the meaning of sub-clause (ii) of clause (1) of the proviso to Section 51. Mr. Daru submitted that common law doctrine is that when a statute is repealed, it is deleted from the statute book for all purposes except for transactions past and closed. However, in order to relax the rigour of the common law doctrine. Section 7 of the Bombay General Clauses Act is enacted. Mr. Daru further submitted that clause 2 of proviso to Section 51 of the Rent Act was similar to Section 7 of the Bombay General Clauses Act, 1904. Mr. Daru further submitted in clause 2 of proviso to S. 51 words were "as if the aforesaid law had not been repealed" and u/s 7 of the Bombay General Clauses Act, 1904, the words were "as if the repealing Act had not been passed." Mr. Daru submitted that while construing clause 2 of the proviso to Section 51, we have to bear in mind that as if the old Act has not been repealed and not that a new Act has not been passed. For all practical purposes, old Act will govern the rights, liabilities and remedy of the parties subject to the exception that if any provision of the new Act is to be inconsistent with old Act, new Act will prevail. In the opening words of Section 7 of the Bombay General Clauses Act, it is made clear that unless a different intention appears from the provisions of the Act, the result of the repeal will be as provided in Section 7. Now if we refer to the first proviso to Section 51, the intention of the legislature is very clear that the rights and liabilities of the parties which arose under the Saurashtra Rent Act, 1951 before 1-1-1964, are to be governed by the provisions of the Saurashtra Rent Control Act, 1951. In the opening words also in the second proviso it is made clear that second proviso was controlled by the first proviso. Therefore, from the first proviso and the second proviso it is clear that rights and liabilities of the landlord and the tenant arising under the provisions of the Saurashtra Rent Control Act before 1-1-1964 are to be governed by the provisions of the Saurashtra Act. Thus the Saurashtra Rent Control Act 1951 and the Bombay Rent Act as amended by Act No. 57 of 1963 operated in different fields and there is no question of any inconsistency between the provisions of the Old Act and the New Act. Mr. Daru submitted that a landlord is not entitled to file a suit for possession on the ground of subletting u/s 13 (1) (e) of the Saurashtra Act. He submitted that a suit could be filed only if contractual tenancy was terminated. Section 13 (1) (e) of the Saurashtra Act merely gave a ground to terminate the tenancy of the landlord. But Section 13 (1) (e) did not give him a right to file a suit without terminating the contractual

tenancy. He submitted that right must be such that it could be enforced immediately in a Court of law without doing anything more. He submitted that existence of a right does not depend upon happening of any further event. In order to file a suit for possession on the ground of subletting the landlord was required to fulfil two conditions:

(1) that the tenant had sublet the rented premises, and

(2) the contractual tenancy was terminated. If the second condition is not satisfied, the landlord could not file a suit and, therefore, subletting by a tenant could not be said to be a right accrued or acquired by the landlord. As discussed hereinbefore the provisions of the Saurashtra Rent Act do not deal with the termination of the contractual tenancy. The provision for terminating the contractual tenancy is under the Transfer of Property Act, a different Act. In some cases contractual tenancy might have come to an end by efflux of time and a notice may not be required. A suit of the landlord for eviction may be defeated on the ground that contractual tenancy is not terminated. But from this it could not be said that no liability was incurred by a tenant within the meaning of sub-clause (ii) of clause (1) by subletting the rented premises and that no right was acquired by the landlord by subletting by the tenant the rented premises under the sub-clause (ii) of clause 1 of the proviso to Section 51. With respect we are unable to agree with the view taken by our learned brother V.R. Shah J. that mere subletting before serving a notice before the Saurashtra Rent Act was repealed on 1-1-1964 could not be said to be a right accrued or acquired by the landlord. We hold that subletting by a tenant in the Saurashtra area before 1-1-1964 even though no notice is served terminating the contractual tenancy before 1-1-64 was a right accrued or acquired by the landlord and liability incurred by the tenant within the meaning of sub-clause (ii) of clause 1 of the proviso to Section 51 and the landlord can file a suit after 1-1-64 on the said ground for evicting the tenant on the ground of subletting.

11. We hold that where subletting is made during the pendency of the Saurashtra Rent Control Act and, neither notice to terminate the contract is given nor the suit is filed before the date on which the Saurashtra Rent Control Act was repealed, the landlord is entitled to maintain the suit for recovery of possession from the tenant on the ground of subletting u/s 13 (1) (e) of the Saurashtra Rent Control Act, 1951.

12. In the question that is referred to the Division Bench in the first part - it is mentioned whether the landlord was entitled to maintain the suit for recovery of possession from the tenant on the ground of subletting u/s 13 (1) (e) of the Bombay Rent Act No. 57 of 1947 as applied to the Gujarat State on 31st December, 1963. We have held that a suit for possession of the rented premises on the ground of subletting when the Saurashtra Rent Act was in force could be filed under the provisions of the Saurashtra Rent Act and proviso to Section 51 has provided that rights and liabilities of the landlord and the tenant are to be decided as if the Saurashtra Rent Act had not been repealed.

13. Order accordingly.