
(2003) 09 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition No. 1763 of 2003

Mahadev Mahantappa Patil

APPELLANT

Vs

Ahmed Usman Sayyed

RESPONDENT

Date of Decision : 23-09-2003

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 13(2)
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 108

Citation : (2004) 2 ALLMR 91 : (2004) 2 BomCR 612

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : G.S. Godbole, for the Appellant; Sunil Pature, instructed by I.S. Thakur, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Rule, returnable forthwith. Learned Counsel for the Respondent waives service. By consent taken up for hearing and final disposal.

2. In a suit instituted in 1984, a decree for eviction was passed by the Civil Judge, Senior Division at Solapur on 30th April 1997 u/s 13(1)(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The ground for eviction was that the tenant had committed an act contrary to the provisions of Section 108(o) of the Transfer of Property Act, 1882, by not utilising the premises for the purpose for which they have been let out. The judgment and order of the Learned Trial Judge has been affirmed by the Additional District Judge at Solapur on 2nd January 2003.

3. The admitted fact is that under a rent note executed on 20th July, 1982, the premises were let out for being used for residential purposes. The suit was instituted in 1984 and in paragraph 6 of the Complaint, the landlord pleaded that approximately one year prior thereto, the tenant had commenced holding classes

of a Montessori School described as a "Balwadi" in which 75 children had been admitted. According to him, the school had been commenced by the tenant and his wife and was being conducted by a body known as the "Shishu Sanskar Shikshan Prasarak Mandal" at Solapur. In this manner, it was pleaded that the premises which had been taken on rent for the purposes of residence were being used for another purpose without the permission of the landlord. In reply to the averment contained in the plaint, the tenant admitted that the premises had been taken on rent for the purpose of residence, but contended that they were being utilised for that purpose. The tenant admitted that he was conducting a Balwadi, but then stated that the institute was not for profiteering as alleged, but for imparting education to students.

3. In support of this ground for eviction, the Respondent stepped into the witness box and stated that the school was being conducted in the premises since June 1983. He stated that the school was being conducted from 10 a.m. to 5 p.m.; and that there are three classes. The landlord deposed that when the suit was instituted, 75 students were enrolled in the school which number had increased in September 1993 when the deposition was recorded to 180 students. Then it was stated that the wife of the tenant and three teachers look after the work of the school. The school was stated to be in receipt of a yearly grant of Rs. 23,000/- from the Government. The landlord stated, both in his Examination-in-Chief as well as in the cross-examination that the tenant was also residing in the suit premises.

4. In the course of his examination, the tenant admitted that the school was in fact, being conducted in the premises and that apart from his wife, two other teachers had been engaged. He stated that there were 40 children who had been enrolled in the school and denied the suggestion that a total 120 students, divided into two classes of 60 students each, had been enrolled. The tenant stated that no register of students who had been enrolled had been maintained though an attendance register was being maintained. The tenant then admitted that the school was in receipt of aid to the extent of Rs. 23,124/- from the Central Government from the year 1986-87 and that the grant has been received thereafter for every year. The tenant admitted that the written permission of the landlord had not been obtained before conducting the school. The tenant stated that for the purpose of the students, four rooms in the premises as well as the verandah had been utilised. The tenant was specifically asked as to why, despite a specific direction of the Court at Exh.29, he had failed to produce the records relating to the school, including the school register. To this, the answer was that he did not wish to disclose as to why he had not produced the record despite a direction of the Court.

5. The Learned Trial Judge on these facts came to the conclusion that a regular Montessori School had been conducted in the premises which had been let out for residential purposes. The Trial Court noted, part from the evidence which has already been adverted to hereinabove, that a Court Commissioner had been

appointed and though the Commissioner had demanded the Register of the School, the tenant had failed to produce it. An adverse inference was, therefore, drawn. The suit for eviction came to be decreed. In appeal, the Additional District Judge dealt inter alia with the submission that the premises had also been utilised for residential purposes which was the purpose of the letting. The Appellate Court held that the premises in the present case had been let out for residential purpose and the use thereof for running a school would establish a ground for eviction u/s 13(1)(a) since there was a change of user.

6. Counsel appearing on behalf of the Petitioner urges that this is a fit and proper case for a remand. Counsel urged that a remand was being prayed essentially on the basis of two circumstances: (i) The landlord in the course of his deposition had admitted that the premises had also been used for the purpose of residence which was the purpose for which they were let; and (ii) The premises had been used since 1978 for the purpose of a Montessori School even prior to the rent note dated 28th July 1982. Counsel submitted that a suit had been filed by the Respondent against the Petitioner for possession on the ground that the Petitioner was a trespasser and in that suit consent terms were arrived at in pursuance of which the Petitioner and the Respondent agreed that the premises should be let out to the Petitioner for the purpose of residence. The rent note was executed on 20th July 1982. Counsel contended that the premises had been used for the school even prior to the execution of the rent note.

7. There is no merit in the submissions which have been urged and I am of the view that no case for remand has been made out. The premises in the present case, were let out specifically for the purpose of residence. On this, there is no dispute. Undoubtedly, where premises have been let out for being used as residence, the incidental use of a small part of the premises otherwise than for residence may not implicate a ground for eviction u/s 13(1)(a). In *Prem Chand Vs. The District Judge, Dehradun and Another*, a case which arose under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, the tenancy was in respect of two rooms where the tenant was residing with his wife, two sons and a daughter. The Supreme Court held that the fact that in one of the rooms, he was running a tailoring shop was not sufficient to convert what otherwise to all intents and purposes was a residential building into a non-residential building. *Gurdial Batra Vs. Raj Kumar Jain*, was a case where the tenant had taken premises under a rent note which provided that the premises would be used for running a cycle and rickshaw repairing shop. The tenant had continued the business of repairing cycles and rickshaws, but for a period of seven months had together with the said business also sold televisions in the premises. The case arose under East Punjab Urban Rent Restriction Act, 1949. The Supreme Court set aside the decree for eviction which had been passed by the High Court confirming the order of the Controller. The Court noted, however, that the restriction which had been provided in Section 13(2)(ii)(b) was intended to protect the interest of the landlord and was intended to restrict the use of the landlord's premises taken by the tenant under lease. The restriction, noted the

Supreme Court, was akin to the provisions of Section 108(o) of the Transfer of Property act. Consequently, it was held that "a house let for residential purpose would not be available for being used as a shop even without structural alteration". The Supreme Court held that ordinarily as long as the interest of the landlord has not been prejudiced, a small change in the user would not be actionable. More recently a Bench of two Learned Judge of the Supreme Court in *M/s. Atul Castings Ltd. Vs. Bawa Gurvachan Singh*, , dealt with a case where premises had been let out for residence. The Managing Director of the Company who was living therein together with his family had used one room as an office room for the disposal of office work at home. The room was being used as a study room by the members of his family and the premises had been continued to be used for residential purposes and for no other purpose. The Supreme Court noted that there was no evidence to show that the office of the Company was functioning in the room or that members of the public used to visit the building as an office of the Company. Consequently, the Court held that in residential buildings where persons live with the members of their family, a room may be used as a study by the tenant or by his children.

8. These decisions would not advance the case of the tenant any further. In fact, the judgment of the Supreme Court in the *Atul Castings* case (*supra*) deals with a situation where in a small portion of the premises which were let out for residence, the tenant had setup his study either for himself or for his children. Such use is permissible because it does not detract from the predominant use of the premises for residential purposes. However, what emerges from the evidence in the present case is that premises which were let out for the purpose of residence are being used for conducting a full fledged Montessori School where a large number of children are enrolled. The predominant nature of the premises as residential premises is substantially changed. In the present case, it was an admitted position that a Montessori School was conducted by the tenant in the premises. The landlord in the course of his deposition stated that the school was being conducted from 10 a.m. to 5 p.m. and that there were three class therein. The landlord claimed that the number of students enrolled which was 75 on the date of the institution of the suit, had increased to 180 on 23rd June 1994, the date of his deposition. The tenant in the course of his deposition claimed that the total number of students enrolled was 40. Even here, despite a specific direction by the Trial Court to produce the registers of the school, the tenant declined to do so and when he was confronted with his refusal in the course of cross-examination, he stated that he did not want to disclose the reason why he had not complied with the order of the Court for the production of the registers. In these circumstances, on the basis of the refusal of the tenant, an adverse inference had to be drawn against him and the reason why he failed to produce the records of the school, despite orders of the Court, was that they would have established beyond doubt the substantial nature of the activity which was being carried out by him of conducting the school. Be that as it may, even if the tenant was correct, that 40 students were enrolled in the school, the facts are sufficient

to indicate a substantial and regular course of non-residential activity being carried on by the tenant in the premises. The school was in receipt of a yearly grant and was an aided school. The Court Commissioner appointed by the Trial Court had taken inspection. The tenant himself admitted in the course of his cross-examination that the school children were being housed in four rooms as well as the verandah of the premises. In fact, the suit premises consist of four rooms and a verandah. This shows beyond doubt that the entire premises had been utilised for the purposes of the school.

9. Therefore, the mere fact that the tenant had continued to reside in the premises would not protect him against a decree for eviction, in a case such as the present, where the evidence on the record has established that a substantial and regular non-residential activity was being carried on by the tenant by conducting a Montessori School in the premises. This is not a case where there has been a small non-residential use apart from the use of the premises for residence. For instance, a tenant or his wife may conduct in residential premises tuitions for a few students and this would not transform the residential use into non-residential user. This case is not akin to the use of one room for conducting a tailoring shop as was the case before the Supreme Court in Prem Chand's case (supra); or a small change in user as contemplated by the judgment in Gurdial Batra's case (supra).

10. The contention of Counsel for the Petitioner that the premises had been used for conducting a school even prior to the rent note dated 22nd July 1982 is directly contrary to the admission in paragraph 7 of the written statement. In paragraph 7 of the plaint, the landlord specifically averred that a Montessori School had been conducted about one year prior to the institution of the suit. The suit was instituted on 1st September 1984. In paragraph 7 of the written statement this averment was not denied. Therefore, it is not open to the tenant now to contend that the premises had been used for the purpose of a school since 1978, particularly when despite a specific direction of the Trial Court, the records and registers relating to the suit were not produced by the tenant.

11. In the circumstances, both the Courts below were justified in coming to the conclusion that a decree for eviction had to be passed. The concurrent findings do not suffer from any infirmity and do not call for interference under Article 227 of the Constitution. The Writ petition is dismissed.

12. On the request of Learned Counsel appearing on behalf of the Petitioner, the execution of the decree is stayed for a period of six weeks.