
(2008) 03 GUJ CK 0037

In the Gujarat High Court

Case No : Civil Revision Application No. 1232 of 2002

Merajbibi and Others

APPELLANT

Vs

Gulammahmad Musabhai and Others

RESPONDENT

Date of Decision : 26-03-2008

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2),
29(2), 5(11)

Transfer of Property Act, 1882 — Section 10

Citation : (2008) 03 GUJ CK 0037

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Ankit Bachani, for Harin P. Raval, s 1-3, for the Appellant; Party-In-Person for Respondents 1-4 and 6-7 and Laxmi C. Nainani, for Respondent 5, for the Respondent

Judgement

S.R. Brahmbhatt, J.—The petitioners-original defendant Nos. 2 and 3 in H.R.P. Suit No. 512 of 1993 have approached this Court u/s 29(2) of The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act" for short) assailing the judgment and order dated 4.10.2002 passed by the Appellate Bench of the Small Causes Court of Ahmedabad in Civil Appeal No. 154 of 2000 confirming the judgment and order of small Causes Court rendered on 21.7.2000 in H.R.P.Suit No. 512 of 1993.

2. Facts in brief deserve to be set out as under.

3. The plaintiff filed HRP suit No. 512 of 1993 in the Small Causes Court for eviction of the present petitioners from the suit premises i.e. Municipal Census (MC) No. 2724/1 on the ground of non-payment of rent for more than 6 months and on the ground of subletting. The plaintiff No. 1 and his daughters had to file a suit as the plaintiff purchased the suit property from original owner on 3.1.1983. The plaintiff became the owner of two properties namely M.C. No. 2724/1 and 2724/2. Both these properties are having a common wall. Both these

properties were originally rented by two real brothers namely Mohmad Yasin and Amir Yasin respectively. Mohmad Yasin was tenant in property bearing MC No. 2724/1 i.e the suit premises in question, whereas, Amir Yasin was tenant of MC No. 2724/2. After demise of both the brothers, their widows and family members continuing residing in the respectively premises as tenants. The widow of Mohmad Yasin - tenant of MCS No. 2724/1 died on 29.1.1992 leaving behind her married daughter, who resided in a separate premises and who is joined as defendant No. 1 in the HRP Suit No. 512 of 1993. The widow of Amir Yasin - a tenant of MC No. 2724/2 namely Husenabibi with her daughter Hajibibi have been joined as defendant Nos. 2 and 3 respectively as they resided in the premises and claimed tenancy right by virtue of provisions of Section 5(11)(e)(i) of the Act on the ground that after demise of male members, all the respective tenants namely Mohmad Yasin and Amir Yasin, there was no male members left in the family of deceased and therefore, family started residing jointly and Hajibibi's husband Ajmadullakhan started taking care of the family. The family's were closely related as widows of two brothers were said to have been residing together occupying the two premises i.e. MC Nos. 2724/1 and 2724/2, the plaintiff issued statutory notice upon defendant No. 1, service whereof is duly proved as per the finding recorded by the trial Court. The trial Court has recorded that requisite statutory notice u/s 12(2) of the Act read with Section 10 of the Transfer of Property Act had been served upon defendant No. 1 Mehrajibi. Despite this notice, no compliance with regard to payment of rent was made when the statutory notice gave, rise in favour of the plaintiffs to file suit for eviction decree and accordingly, the suit was filed as it is stated hereinabove on the ground of non-payment of rent within stipulated time limit and subletting the premises by inducting Husenabibi and Hajibibi-defendant Nos. 2 and 3 respectively. The said suit was resisted by the defendants and the defendants filed written statement jointly through their power of attorney holder Shri Ajmadullahkhan, who happens to be the husband of Hajibibi, defendant No. 3 and son-in-law of Husenabibi-defendant No. 2. Said Ajmadullakhan was given power of attorney by Mehrajibi, Hussanabibi and Hajibibi for defending their stand in the suit. The defendants have in the written statement stated that there was no statutory notice to defendant Nos. 2 and 3 for terminating the tenancy. The defendant Nos. 2 and 3 were residing as family members with Ayeshabibi widow of Mohmad Yasin, who was original tenant of MC No. 2724/1 and thus, they became statutory tenants by operation of provisions of Section 5(11)(e)(i) of the Act and Ayeshabibi permitted them to occupy the premises under written agreement with her. It is further submitted that Mehrajibi has submitted that she was no more tenant and she was not claiming any right as tenant in the suit premises. It is important to note here that joint reply i.e written statement was filed on behalf of all the defendants and in this joint written statement defendant No. 1 daughter of Ayeshabibi - deceased tenant has expressly stated that she did not claim any tenancy right nor is she claimed any tenancy right in the suit premises. It was further alleged in the written statement on behalf of defendant Nos. 2 and 3 that they were ready and willing to pay the rent and they sent

money order which was not accepted by landlord. The trial Court after elaborate discussion and evidence on record, decreed the suit in favour of the plaintiffs vide judgment and order dated 21.7.2000. The said judgment and order of the trial Court was assailed by the defendants by preferring Civil Appeal No. 154 of 2000 before the Appellate Bench of the Small Causes Court at Ahmedabad and Appellate Bench of the Small Causes Court also after elaborate reasoning dismissed the Appeal confirming the decree of the trial Court by judgment and order dated 4.10.2002. The present revision application is filed challenging the said judgment and order of the Appellate Bench of the Small Causes Court under the provision of Section 29(2) of the Bombay Rent Act.

4. This Court (Coram: Kundan Singh, J.)(as he then was) vide order dated 8.4.2003 issued Rule and ordered continuing the interim relief till further orders.

5. Shri Bachani for Shri Raval for the petitioners submitted that the order of the Appellate Court suffers from error apparent on the face of it, which rendered the same liable to be quashed and set aside. Shri Bachani has submitted that the trial Court as well as Appellate Court did not appreciate the fact that suit premises was in fact accessible by occupants of property bearing MC No. 2424/2 also. The trial Court as well as Appellate Court did not appreciate the fact that both the properties were rented by two brothers, though there was a separate rent not, after demise of both the brothers, as there was no male member, to fend for family, the widows of deceased brothers started residing together and son-in-law of defendant No. 3 and husband of defendant No. 2 was fending for the family. This facts would go to show that the defendant Nos. 2 and 3 had became statutory tenants by operation of provisions of Section 5(11)(e)(i) of the Act. Shri Bachani has further submitted that the trial Court as well as Appellate Court ought to have appreciated the fact that the widow of Mohmad Yasin tenant of premises MC No. 2724/1 by written agreement permitted Husenabibi and Hajibibi - defendant Nos. 2 and 3 to reside together in the said premises, which cannot be said to be subletting and therefore, on this count also, it can be said that Husenabibi and Hajibibi had became tenant and as they were ready and willing to pay rent, which was not accepted by the landlord, would not in itself be a ground for eviction decree against them. Shri Bachani has submitted that the trial Court as well as Appellate Court ought to have appreciated the fact that there was no notice for eviction served upon Husenabibi and Hajibibi calling upon them to make payment of rent and/or also evicting the premises and therefore, the suit was not competent be filed against them. Shri Bachani has further submitted that order of the trial Court as well as Appellate Court suffer from patent illegality and therefore, the same deserve to be quashed and set aside and the Civil Revision Application be allowed.

6. Party-in-person Shri Gulammahmad Musabhai and Ms. Nainani for respondent No. 5 submitted that evidence on record as reflected in the judgment of the trial Court as well as that of Appellate Court go to show that two premises namely MC Nos. 2724/1 and 2724/2 were separate premises for all purposes and the rent in

respect of both the premises was also different. The rent for suit premises i.e. MC No. 2724/1 was Rs. 8/- p.m, whereas, the rent in respect of MC No. 2724/2 was Rs. 35/- p.m as it is emerging from the evidence on record. It is also discussed at length by the trial Court and appreciated by the Appellate Court that Mohmad Yasin had rented premises bearing MC No. 2724/1, whereas, Amir Yasin had rented premises bearing MC No. 2724/2. Family members of Amir Yasin i.e widow and daughter even though on account of their being closely related to Ayeshabibi, cannot be said to be a family of Ayeshabibi or Mohmad Yasin so as to claim tenancy right by inheritance by operation of Section 5(11)(e)(i) of the Act. The respondents have relied upon the decision of the Apex Court in case of Kailasbhai Shukaram Tiwari Vs. Jostna Laxmidas Pujara and Another, wherein, the Apex Court in Paras 12 and 14 of the judgment in unequivocal terms negated the proposition of forming family on account of near relationship with the deceased. Party-in-person has also relied upon the decision of the Apex Court reported in case of Samiben Suleman v. Bharvad Bail Khinuben Nanubhai and Ors. reported in 2004(1) GLH (U.J.) 5 and in case of Special Recovery Officer, Land Development Bank Ltd., v. Koli Ramshi Bhikha reported in 1983 GLH. 146 in support of his submission with regard to liability of tenant to evict premises in case of arrears of rent and non-payment of rent thereof. It is submitted that on both the counts namely arrears of rent as well as subletting the premises, the defendants were liable to be evicted and they have rightly been ordered to be evicted by the courts below and submitted that u/s 29(2) of the Act, this Court has limited jurisdiction to examine the controversy in question. Looking to the facts, this Court may not interfere with the decision of the Appellate Court assailed in the present case and revision application be dismissed.

7. This Court has heard Shri Bachani, learned Counsel for the petitioner, Party-in-person-respondent No. 1 and Ms. Nainani, for respondent No. 5 at length.

8. The record and proceedings and evidence adduced by the parties lead to indicate that following indisputable facts:

The suit premises in question i.e. MC No. 2724/1 and another property being MC No. 2724/2 have a common wall. The suit premises namely MC No. 2724/1 had been rented by Mohmad Yasin, whose real brother was tenant in premises bearing MC No. 2724/2. Both these premises came to be purchased by the plaintiff No. 1 on 3.1.1983. Since then, he became owner of the suit property and landlord qua tenants respectively.

9. The original tenant Mohmad Yasin so far as suit premises being MC No. 2724/1 is concerned, and Amir Yashin tenant of MC No. 2724/2, leaving no male member behind them and therefore, Husenabibi defendant No. 2 and Hajibibi defendant No. 3 were permitted to use the premises being MC No. 2724/1 by written agreement as claimed by them in written statement by Ayeshabibi, widow of Mohmad Yasin. The defendant No. 1 Mehrajibi has in unequivocal terms in written statement given up her right whatsoever in the suit premises and this became all the more significant in view of the fact that joint written statement is

filed on behalf of all the three defendants and the testimony was given on behalf of all the three defendants by their power of attorney namely Ajmadullahkhan, who happens to be the husband of defendant No. 3 and son-in-law of defendant No. 2.

10. The statutory notice as required is said to have been served and despite this notice Mehrabibi, who was recipient of the notice did not bother to make payment of rent, naturally as she did not claim any tenancy right, even by virtue of provisions of Section 5(11)(e)(i) of the Act.

11. Against these backdrop of indisputable facts, this Court is called upon to examine the plea of original defendants that by virtue of their close relationship with deceased Ayeshabibi widow of Mohmad Yasin, who was original tenant of MC No. 2724/1, they became tenant, as Ayeshabibi by written agreement permitted them to use the premises in question. The reliance placed by the respondents of the Apex Court decision in case of Kailashbhai (Supra) deserves to be appreciated which in unequivocal terms go to show that no right of tenancy u/s 5(11)(e)(i) of the Act could be claimed merely on the basis of close relationship with the deceased. The language of Section 5(11)(e)(i) in unequivocal terms go to show that in order to claim benefit thereunder, the ingredients of Section namely, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant are required to be fulfilled. Assuming for the sake of examining the submission without accepting for a minute that the defendant Nos. 2 and 3 were closely related and in fact family members, then also, they were not absolved of proving second ingredient of residing together with the deceased at the time or three months proceeding the death. In the instant case, not only that the defendant No. 2 and 3 cannot claim to be a family members of Ayeshabibi, they have also not led any evidence whatsoever to indicate that they residing in the premises i.e. in MC No. 2724/1 with Ayeshabibi at the time of her death or preceding three months thereof. In fact broad submission is canvassed to indicate that there was no difference in said two premises and on that broad ground, a case was projected as if Husenabibi and Hajibibi defendant Nos. 2 and 3 were said to have been family members as well as residing together. In absence of any evidence on the record, the plea cannot be accepted as it merits out rate rejection.

12. The trial court as well as Appellate Court have rightly held that not only that Mehrabibi who could be said to be having some right or could be said to have been capable of claiming some right u/s 5(11)(e)(i) as heirs of Ayeshabibi being daughter of Mohmad Yasin-original tenant, but as submitted above, she has given up her claim of tenancy. The court hastion to add here that assuming for the sake of plea that Meherabibi did have tenancy right, as she happened to be daughter of Ayeshabibi, even she was required to be proved that she was residing with Ayeshabibi at the relevant time when Ayeshabibi died on 29.1.1992. There is enough documentary evidence as well as ocular evidence which has remained undisputed to show that Mehrabibi was married woman and

residing with her husband at different premises, which was altogether different having MC No. 1414. In view of this, even Maherajbibi in absence any cogent evidence cannot be claimed any tenancy right over MC No. 2724/1 is concerned.

13. The trial Court's decision and finding confirmed by the Appellate Court therefore, does not call for any interference of this Court u/s 29(2) of the Act. The revision application therefore deserves to be rejected and is hereby rejected. Rule discharged. No costs.

14. Shri Bachani, learned Counsel appearing for the petitioners makes a request for granting sometime for vacating the premises in question and submits that the interim relief granted earlier may be continued for sometime till 30.6.2008 as the petitioners intent to approach the Apex Court assailing this judgment. The request for time upto 30.6.2008 is strongly opposed by learned Counsel for respondent No. 5 and party-in-person on the ground that they have been deprived of the premises since years and even the stay order was obtained by making incorrect statement in the memo of Revision Application. Looking to the fact that stay is operating since 2003, the request of Shri Bachani is accepted and it is ordered that the interim relief granted earlier shall remained in operation till 30.6.2008.