

(1986) 03 GUJ CK 0019

In the Gujarat High Court

Case No : Civil Revision Application No. 1341 of 1978

Panchal Manilal Chhaganlal and Another	APPELLANT
Vs	
Mulshanker Chhotelal	RESPONDENT

Date of Decision : 21-03-1986

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(I)

Citation : AIR 1988 Guj 177 : (1987) 1 GLR 397

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Advocate : S.K. Zaveri, for the Appellant; P.V. Nanavati, for S.M. Shah, for the Respondent

Judgement

1. This Revision Application by the original defendants is directed against the judgment and decree for possession passed by both the courts below.

2. The trial court held that the plaintiff alone is the owner and landlord of the suit property having proved the partition in the year 1970 and also held that the suit premises were let to the defendants only for the purpose of residence and defendant No. 1 had changed the user. The trial court also held that the plaintiff failed to prove that defendant No. 1 had sub-let the suit premises to defendant No. 2. The trial court also held that the plaintiff proved that defendant No. 1 had discontinued the use of the suit premises for the purpose for which the premises were let. The trial court also held that the plaintiff required the suit premises for reasonable and personal use and occupation and greater hardship would be caused to the plaintiff. While holding that the premises were let only for residence and the user was changed from residential to business, the decree for possession was not passed on that ground as the trial court held that by conduct the plaintiff had waived the breach and given implied consent to the change of the user of the suit premises because the objection was taken very late for the first time in the year 1973 even though the change of user was since many years and certainly prior to 1965. The trial court therefore decreed the suit only on the

question of reasonable and bona fide personal requirement.

3. The lower appellate court has confirmed the decree for possession on the ground of reasonable and bona fide personal requirement. The lower appellate court has confirmed the findings and conclusions of the trial court on the question of change of user and sub-letting but refused decree for possession on that ground, because of waiver as done by the trial court.

4. The learned counsel for the petitioners has submitted that there is no requirement of the opponent landlord and the decree for possession could not have been passed on the ground of such alleged requirement. On behalf of the respondent it is contended that both the courts have given concurrent findings regarding the personal and bona fide requirement of the landlord and therefore there is no reason for disturbing those concurrent findings of facts which are based on evidence and on correct appreciation of evidence. On behalf of the opponent-landlord the decree for possession is also sought to be supported on the ground of change of user as well as on the ground of sub-letting, on which the findings are against him in both the courts. Therefore the following questions arise for my determination :

a. Whether the lower courts have erred in passing the decree for possession under S. 13(1)(g) of the Rent Act ?

b. Whether the lower courts have erred in not passing the decree for possession on the ground of sub-letting by defendant No. 1 to defendant No. 2 ?

c. Whether the lower courts have erred in not passing any decree for possession on the ground of change of user from residential to business use ?

d. Whether the plaintiff alone is the landlord and is entitled to decree for possession ?

5. In para 15 of the judgment of the lower appellate court the question of reasonable requirement is considered. The plaintiff Mulshanker Chhotalal has deposed as Ex. 74 that his personal residential premises have gone to the share of his brother Ratilal and he is residing in those premises at the mercy and will of Ratilal, and his brother Ratilal who is also a visitor to this town of Santrampur. He has not stated that whether he is occupying those premises as tenant or as licensee of his brother. The fact of partition amongst the brothers of the plaintiff is admitted by the defendant and he had even agreed to the fact the plaintiff cannot occupy the same because of partition (vide letter Ex. 34). The learned Judge of the lower appellate court, therefore, came to the conclusion that "the landlord who is possessing premises which he can be asked to leave even without a notice, certainly needs and requires those premises reasonably and bona fide for his personal requirements. This finding becomes fortified by the admissions recorded in Ex. 34. " In ex. 34 the defendant has written to his elder brother Ishwarbhai as follows :

(Vernacular matter omitted)

6. From the evidence of the landlord and the findings of the lower courts, it appears that the plaintiff is in occupation of the premises of his brother Ratilal. In fact the brothers were joint and the plaintiff was occupying his own premises as one of the co-owners. As a result of the partition amongst the brothers the plaintiff agreed to give the premises in his own occupation to the share of his brother Ratilal and he agreed to take in his share the property in possession of the tenant. If really his requirement was of residential premises (and he was actually in occupation of residential premises of co-ownership) he would not have agreed to take in his share the premises in possession of the tenant and to give to the share of his brother Ratilal the premises in his own possession. Secondly even though he says that his occupation of residential premises belonging to his brother is at the mercy and will of his brother, there is not an iota of evidence that his brother Ratilal has directed him to vacate the premises. His brother Ratilal is not examined. The oral evidence of the plaintiff consists of himself only. Thus in absence of any evidence of real need and requirement of the plaintiff who is already in occupation of residential premises belonging to his own brother, the courts could not have come to the conclusion that he requires the suit premises reasonably and bona fide for personal use. The reasoning of the lower courts that the landlord who is possessing the premises which he can be asked to leave even without notice certainly needs and requires those premises reasonably and bona fide for personal requirement is clearly erroneous. It has to be borne in mind that the plaintiff is in occupation of premises which were originally of the joint family of which he was one of the members and a co-owner and he had voluntarily agreed to allow the premises in his occupation to be given to the share of his brother and the brother has continued the occupation of the plaintiff in the same premises. Therefore whatever be the (relationship (where that of tenant or licensee) the relationship of being brothers is not in dispute and in absence of any evidence that the plaintiff was under any threat of eviction the court could not have come to the conclusion that the plaintiff required the suit premises reasonably and bona fide. The word "require" has a stronger connotation than mere "desire" and this requirement has to be both reasonable and bona fide. In absence of any evidence that the alleged requirement is a real pressing requirement, it cannot be said to be reasonable and bona fide requirement. The lower courts have clearly not appreciated the legal perspective of reasonable and bona fide requirement and, therefore, the finding is clearly erroneous and is required to be quashed and reversed. In view of the finding that the landlord does not require the suit premises reasonably and bona fide for personal requirement, it is not necessary to go into the question of comparative hardship.

7. On the question of sub-letting the decree for possession is sought to be supported by the opponent. It is to be appreciated that the petitioners-defendants are brothers and not strangers; they have entered into partnership and the partnership deed is produced at Ex. 78. It is not stated therein that the tenancy rights have been transferred to the partnership business. The learned counsel for

the plaintiff-opponent has strongly relied on one line admission made by the defendant in his cross-examination that the tenancy right have been transferred to the partnership. However the lower appellate court has not attached such value to that one line statement in view of the documentary evidence of the partnership deed as discussed in para 17 of his judgment. It cannot be said that the finding of fact is perverse especially when the partnership deed is relied and the relationship is that of brothers and the brother has also entered into the box and deposed that he does not claim any interest in the suit premises as tenant or sub-tenant. Therefore, this contention of the landlord also fails. It has again to be noted that both these brothers have been carrying on their business activity together from the very beginning.

8. The learned counsel for the opponent-landlord has also tried to seek decree for possession on the ground of change of user and it is submitted that the premises were originally let for residence only and the defendant has changed the user to business premises. It is not in dispute that the premises have been used for the purpose of business since several years prior to the filing of the suit. Ex. 38 shows that gold and silver business was there in 1965. From oral evidence it clearly appears that the business was being run for many years prior to 1965 and his registration in 1965 was of the existing and running business. Thus it has been well established that the business use of the premises has been going on since decades prior to the filing of the suit and without any objection and with the apparent consent of the landlord. The case of the defendants is that right from the beginning the premises were used both for the purpose of residence as well as business. This question has not been examined by the lower courts but the lower courts have come to the conclusion that the premises have been used for business purpose for a very long period and the breach has been waived by the landlord.

9. The learned counsel for the landlord has submitted that there is a total prohibition u/s 25 of the Rent Act. S. 25 reads as under :

"25(1) A landlord shall not use or permit to be used for a non-residential purpose any premises which on the date of the coming into operation of this Act were used for a residential purpose.

(2) Any landlord who contravenes the provisions of sub-section (1) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both."

A bare reading of the aforesaid section clearly shows that the prohibition is against the landlord using or permitting to be used for a non-residential purpose any premises which were used for residential purpose. Thus the prohibition is against the landlord and the landlord cannot take advantage of his own wrong. He may be penalised for his wrong but not the tenant who is not prohibited u/s 25. The tenant may be liable to eviction u/s 13(1)(k) but a landlord cannot invoke S. 25 to evict a tenant by taking advantage of his own wrong. u/s 13(1)

(k) a tenant may be liable to eviction on the ground being established but when the landlord has waived that ground for evidence by his manifest conduct and implied consent, he cannot get a decree for eviction u/s 13(1)(k). If the landlord were to be entitled to eviction on the ground in which he himself has consented or connived, it would be amounting to allowing him to take advantage of his own wrong and that would be both illegal and inequitable. The lower courts have therefore rightly come to the conclusion that the landlord is not entitled to decree for possession on the ground of change of user.

10. Thus all the three grounds on which the decree for eviction is sought fail.

11. On behalf of the petitioners it was also contended that the plaintiff alone could not have filed the present suit as the premises belong to a joint family. It has been found that there was a partition amongst the members of the joint family in 1970 and the suit premises have come to the share of the plaintiff and thereafter the plaintiff has filed the suit in 1973. It is contended by the petitioners that even though a partition is alleged to have taken place in Oct. 1970 there is no writing produced to prove partition in 1970. Even after the alleged partition in 1970 the rent receipts have been issued in the name of Ishwarbhai. Ex. 67 is dt. 30th July 1970 and letters have been exchanged between the tenants and Ishwarbhai ex. 34 and ex. 69 and 70 in 1970 and 1971. If there was already a partition in 1970 and Ishwarbhai had no interest in the suit premises, Ishwarbhai would not have carried on the correspondence and accepted rent. On the other hand on behalf of the plaintiff it is submitted that the defendant himself has accepted the fact of partition in the letter ex. 34 and not disputed that there is partition amongst the members of joint family. The lower courts have given findings of fact based on the admission of the defendant in letter ex. 34. That finding cannot be said to be perverse or not based on evidence and, therefore, that finding cannot be disturbed in Revision Application.

12. In the result all the grounds for seeking decree for possession fail and this Revision Application succeeds and the decree for possession passed by the lower courts is set aside and the suit for possession is dismissed; with no order as to costs.

13. It may also be mentioned that the petitioners were willing to give possession of part of the premises to the opponents-plaintiff, retaining part facing the road. The plaintiff, was, however, not agreeable to accept part possession of the premises and insisted on decree for total possession. However, as he has failed to make out any of the three grounds the decree for partial possession also cannot be passed.

14. Revision allowed.