

(1995) 06 GUJ CK 0011
In the Gujarat High Court
Case No : Civil Revision Application No. 881/92

Praful Harirai Munshi and Another

APPELLANT

Vs

Kanakben Chandrakant Desai

RESPONDENT

Date of Decision : 16-06-1995

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 2(1A), 2(53)
Presidency Small Cause Courts Act, 1882 — Section 41

Citation : AIR 1996 Guj 142 : (1995) 2 GLR 914

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Advocate : M.B. Buch, for the Appellant; J.C. Sheth, for the Respondent

Judgement

Y.B. Bhatt, J.—The present petitioners were the original opponents, whereas the present respondent was the original applicant in PSRP No. 16-85 filed in the Small Causes Court, Ahmedabad under the provisions of Section 41 of the Presidency Small Causes Court Act, 1882 ("the Act" for short).

2. The relevant and pertinent facts, in brief, are as under :

2.1 The original applicant is a widow of Dr. C. H. Desai, who expired on 30th August 1989, and the original applicant, therefore, inherited all the properties as the sole heir including the tenancy rights of the property in question. The deceased husband of the original applicant had taken the premises on lease on a monthly rent of Rs. 200/- in the month of August 1951 from the then owner one Jasubhai Lallubhai Sheth. After taking the said property on lease, late Dr. C. H. Desai had entered into a partnership with the original opponent No. 1 effective from September, 1951. The said partnership continued with the business of running a maternity and nursing home as a licensee of the late Dr. C. H. Desai, but even after the partnership commenced its business, the tenancy rights in respect of the premises continued in the name of Dr. C. H. Desai and the said partnership firm continued its business only as a licensee of Dr. C. H. Desai. On the death of the said Dr. C. H. Desai, the tenancy right was inherited by the

original applicant, and the present owner of the property (the present landlord) has accepted the original applicant as a tenant. Since the original applicant did not desire to continue the licence in favour of the partnership, she gave notice in that regard dated 10th April 1985 and ultimately filed the application to obtain vacant possession of the premises. For the purpose of this application, the value as stated in para 10 of the application is Rs. 4000/-. The original opponent filed the reply Exh. 10 which was amended vide Exh. 30. It was contended by them that the "rack rent" of the premises is more than Rs. 3000/- per year since the actual rent is Rs. 200/- per month, and that there is also municipal tax and education cess. After referring to the various amounts paid by them in various years as municipal tax and education cess, it was contended that the "rack rent" therefore exceeds Rs. 3000/- and that therefore the trial Court had no jurisdiction to entertain the application.

2.2 It may be noted that Section 41 of the Presidency Small Cause Courts Act, 1882 (hereinafter referred to as "the Act") was amended by Gujarat Act 20 of 1979 with effect from 1-1-1980, and the phrase "Rs. 2000/-" was substituted by the phrase "Rs. 5000/-".

2.3 Thereafter the original opponents (present petitioners) gave an application Exh. 39/A contending that "rack rent" is more than Rs. 5000/-, inasmuch as the actual annual rent of the premises is Rs. 2400/-, that the municipal tax and education cess is Rs. 2090.36, the electric consumption charges is about Rs. 3500/-, and that therefore the "rack rent" exceeds Rs. 5000/-, and consequently the Small Cause Court would not have jurisdiction to entertain the application. The prayer made in the said application Exh. 39/A was that the issue as to jurisdiction should be heard as a preliminary issue, and the application suggests that the preliminary issue be framed as stated in the said application. The suggested preliminary issue was as under :

"Whether applicant proves that the Rack rent of suit premises is RS. 5000.00 or below Rs. 5000.00? If not, whether the application u/s 41 of the Presidency Small Cause Courts Act, 1882 is maintainable against the present opponents ?

2.4. The original applicant filed a reply at Exh. 40. It was contended therein that the aforesaid application was given by the opponents therein only with a view to delay the proceedings, that the "rack rent" would only mean the rent actually received by the landlord, and that the municipal tax and education cess payable to the Municipal Corporation cannot be included, and similarly the electric consumption charges also cannot be included within the meaning of the phrase "rack rent", that the consumption of the electricity is entirely by and on the part of the original opponents and that it is entirely within his discretion and control, and that therefore such electricity consumption charges have no nexus with the "rack rent". The objections, therefore, suggested that there is no need to frame the preliminary issue as suggested by the original opponents.

2.5 The trial Court took up the hearing of the application Exh. 39/A. During the

course of the hearing the specific and substantive prayer to the effect that the question of jurisdiction to decide as preliminary issue, was not independently considered and decided. In other words, the trial Court did not decide whether the suggested preliminary issue should in fact be raised as a preliminary issue, and that if the same may be raised, what would be the wording thereof, What the trial Court in fact and in substance did was to hear the suggested issue on merits, and ultimately came to the conclusion that it had jurisdiction to entertain the original application. Therefore the application Exh. 39/A was decided accordingly. In fact in the operative part of the order the trial Court has observed that "the preliminary point raised in application Exh. 39/A is hereby decided in the affirmative. The rack-rent of the premises is less than Rs. 5000/- and this Court has jurisdiction to entertain P.S.R.P. No. 16/85". It is, therefore, obvious that the contentions, or at least some of them, raised in the present revision to the effect that the trial Court ought to have raised the preliminary issue and then ought to have decided the same as a preliminary issue, are in fact without any substance or at any rate such contentions do not survive. In fact and substance the trial Court has treated the suggested issue as a preliminary issue and has decided the same on merits.

3. It may also be noted that the objections to Exh. 39/A raised by the original applicant (Exh. 40) contend that the rent received by the landlord is the only figure which can be considered to be "rack rent" and that the amount of municipal tax, education cess and electricity consumption charges cannot be included in such "rack rent". However, during the course of hearing of Exh. 39/A, the controversy was narrowed down. The trial Court has specifically observed in para 10 of its order that the controversy upon which the matter rests is only on the question of inclusion or exclusion of electricity consumption charges. The trial Court has specifically noted the statement made by learned advocates for the respective parties that even if the municipal tax and education cess were added to actual rent, the figure would still be less than Rs. 5000/- and consequently the Court would have jurisdiction to entertain the main application. This figure would exceed Rupees 5000/-only if electricity consumption charges were also added, in which case the Court would not have jurisdiction to entertain the application u/s 41 of the said Act. Thus, the only controversy raised and now surviving, would be in respect of inclusion or otherwise, of electricity consumption charges. I have been taken through the relevant case law on the subject viz. the case of Lakhamshi Hiralal and Co. Vs. Damji Khimji and Co., , the decision in Swastik Bearing Co. and Another Vs. Dashrathlal Chhotalal Panchal and Another, , the decision in Panchal Mohanlal Ishwardas v. Maheswari Mill Ltd., (1962) 3 GLR 507) and the decision in Khemchand Dayalji and Co. Vs. Mohmadbhai Chandbhai, .

4. I do not propose to discuss each of these decisions at length, inasmuch as I am in general agreement with the interpretation of these decisions by the trial Court. I shall, therefore, only refer to the relevant portions from the said decisions as and when necessary.

5. The application before the trial Court was filed u/s 41 of the Act. The relevant portion of Section 41 reads as under :

"Section 41:-- Summons against person occupying property without leave :-- When any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack rent does not exceed two thousand rupees, as the tenant or by permission or another person, or of some person through whom such other person claims."

It is to be noted that the phrase "rack rent" is not defined by the Act, nor by the Bombay Rent Act. However, to ascertain the true and correct meaning of the phrase "rack rent" in the context in which it is used in Section 41, various Courts have relied upon the definitions of various phrases, including the definition of this phrase, as provided by the Bombay Provincial Municipal Corporation Act, 1941 (BPMC Act), Section 2(1A) of the said BPMC Act defines "annual letting value" which reads as under :

Section 2(1 A) "Annual letting value" means :

(1) in relation to any period prior to 1st April 1970 the annual rent for which any building or land or premises, exclusive furniture or machinery contained or situate therein or thereon, might if the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947) were not in force, reasonably be expected to let from year to year with reference to its use ;

(ii) in relation to any other period, the annual rent for which any building or land or premises, exclusive of furniture or machinery contained or situate therein or thereon, might reasonably be expected to let from year to year with reference to its use;

and shall include all payments made or agreed to be made to the owner by a person (other than the owner) occupying the building or land or premises on account of occupation, taxes, insurance or other charges incidental thereto:"

Similarly Section 2(53) of the BPMC Act defines "rack rent", which reads as under :

"2(53) "Rack Rent" means the amount of the annual rent for which the premises with reference to which the term is used might reasonably be expected to let from year to year ascertained for the purpose of fixing the rateable value of such premises."

6. Relying particularly upon the definition of "Annual letting value" and the definition of "rack rent" under the BPMC Act, the question has been considered in the decisions stated hereinabove.

7. Referring first to the Bombay decision in the case of Lakhamshi Hiralal and Co. Vs. Damji Khimji and Co., , I am of the opinion that the said decision does not assist the case of the present petitioners (original opponents) in any substantial

manner; however it gives a very substantial clue as to the intention of the Legislature in using the phrase "rack rent" in Section 41 of the Act. Without going into any unnecessary discussion of the other aspects of the facts of the case dealt with by this decision, only the relevant portion and the ratio of the said decision needs to be noted. This decision lays down the principle that the annual value of the premises at a "rack rent" would be the gross rent payable in respect of the premises by the tenant to their landlord, in consideration of the letting and use and occupation of the premises in question, that (on the facts of that case) the amount actually paid by the tenant to the landlord as licence fees was neither "rent" nor "rack rent", that the annual value at "rack rent" must be based on "rent" even if the rent is controlled by Legislature, and not on licence fees. The "rack rent" has to be "rent" first before it becomes "rack rent". It can only mean gross rent and not net rent.

8. While appreciating and interpreting the scope and applicability of this decision to the facts of the present case I, am of the opinion that the trial Court has correctly applied the basic principles laid down therein and adopted and applied the ratio thereof to the facts of the instant case. In other words the "rack rent" can only be the gross rent in respect of the premises in question, which the tenant is obliged to pay to its own landlord for the letting, use and occupation of the leased premises. Any other payment, sum, or financial obligation which the tenant may incur by way of liability would be irrelevant and would not form part of "rack rent", if such liability or obligation does not flow from the tenant to the landlord, either under the contract of lease (rent note) or by operation of any statute. In this context I do not propose to enter into a discussion of the obligation in respect of municipal taxes and/or education cess, although the same is an obligation fastened on the owner of the property by the Statute in respect of the premises let out. I do not propose to discuss this aspect for the simple reasons that although the primary legal liability to pay such amounts is fastened on the landlord by Statute, it may, on the facts of a given case, and in view of the term of the tenancy, amount to an obligation flowing from the tenant to the landlord. Thus, if the terms of the tenancy require the tenant to bear the municipal tax and education cess, the same may be includible along with the actual rent within the phrase "rack rent". However as already stated hereinabove this is not a controversy between the parties in the instant case. Learned counsel for the parties contest only the inclusion of electricity consumption charges.

9. On a consideration of the other decisions of this Court, in my opinion, the trial Court has rightly come to a conclusion that the same do not in any manner take a different view of the matter.

10. The principle remains that rent must be "rent" first, but in this context the rent to be considered is "gross rent" and not "net rent". However while considering this question one must not lose sight of the fact that "rent" remains an amount payable by the tenant to the landlord under the terms of the tenancy as consideration for the letting, use and occupation of the premises.

11. On the facts of the present case, it may be noted that the rent note specifically contemplates "the various obligations imposed upon the tenant. Clause (2) of the rent note specifically contemplates that the tenant shall pay all taxes, municipal tax, water tax, drainage tax, property tax and any other and all the taxes now payable or payable in future to the Government or municipality or any other local body". In other words, the obligation to pay all taxes is fastened on the tenant as part of the consideration of letting the premises to him.

12. However, Clause (3) of the rent note specifically contemplates "that the tenant shall pay all electricity bills for the electricity consumed by him or through his electric meter, and will be liable to pay all charges payable to the Electricity Company due to the said Electric service no...." . In other words, although the supply of the electricity is provided by the Electricity Company and not by the landlord, the said Clause (3) states, merely by way of abundant caution and by way of clarification, that such obligation shall be that of the tenant. In this context, there can be no controversy that the payment of electricity consumption charges on the part of the tenant to the Electricity Company does not constitute any obligation flowing from the tenant to the landlord and forming part of the consideration for letting out the premises to the tenant.

13. It may be noted here that so far as the decision in (1962) 3.GLR 549 is concerned, the controversy there was limited to the question as to whether electricity charges would be included in the Distress Warrant. It was held that the same would be included in the Distress Warrant and would form part of the rent, inasmuch as on the specific facts of that case, the electricity charges were payable to the landlord by the tenant, and that such charges were quantified as between the landlord and tenant, and the same were not electricity consumption charges. In other words, the tenant was not under an obligation to pay the landlord the same amount as the Electricity Company would charge the landlord, for the consumption of electrical energy consumed through the meter supplying electricity to the tenant. It appears that on the facts of that case the amount was quantified, and was not dependent upon the actual consumption of the tenant. It was on such specific facts that the Court found that the electric charges are includible in and form part of the rent recoverable by Distress" Warrant. Thus, this decision would not assist the present petitioners.

14. There are further numerous reasons apart from the conclusions to be drawn from the basic principles discussed hereinabove, as to why electricity consumption charges cannot be included in the term "rack rent".

A. The rent note between the parties does not provide for any specific payment of electricity charges by the tenant to the landlord. In other words there is no quantified and fixed payment on a monthly basis contemplated between the parties. On the contrary, the tenant is expected and obliged, under the terms of the tenancy, to pay for the actual consumption of electricity and this payment is to be made by him to the supplier of electricity, and not to the landlord.

B. Obviously and admittedly, the consumption of electricity is by and on the part of the tenant, and the electricity so consumed is charged for and recovered by the supplier of electricity. This supply of energy by a third party and payment thereof by the tenant for the actual energy consumed has in fact no nexus with the landlord, nor does it form any consideration for letting out the premises to the tenant.

C. When the tenant pays the supplier of electricity the actual consumption charges, such payment is on the basis of an independent and statutory contract between the consumer and the supplier of electricity, in terms of the Indian Electricity Act and Electricity (Supply) Act. It is further to be noted that such payment for actual energy consumed is at the volition of the tenant, the quantum of consumption is at the discretion of the tenant and is moreover controllable by the tenant. Thus the tenant pays for something actually obtained and enjoyed by him, irrespective of the volition, and outside the control of the landlord. The landlord is not liable to pay such consumption charges even under law unless the service is in the name of the landlord. Non-payment of such consumption charges would bring about the legal consequences not upon the landlord, but upon the tenant, as a consumer. Thus, it cannot be said that payment of electricity consumption charges has any nexus with the act of letting the premises to the tenant for the use and occupation nor can it be said that such payment would form part of the consideration for letting out the premises to the tenant.

D. It is also obvious that such consumption charges would vary from month to month and from one bill to another. If the same were to be regarded as includible within the meaning of phrase "rack rent", the obvious result would be that the "rack rent" would fluctuate from month to month and from year to year, and such fluctuation would not be a result of the contract between the landlord and the tenant, but would be dependent entirely upon the actual consumption of electricity on the part of the tenant. This would, therefore mean that the "rack rent" would then go up or down and fluctuate from year to year, depending upon the discretionary control of the tenant. Obviously such a ridiculous situation could not be the intention of the Legislature, nor can any reasonable judicial interpretation lend support to such a view.

15. In the premises aforesaid the electricity consumption charges payable by the tenant to the supplier of electricity cannot be included within the phrase "rack rent". Admittedly, on the facts of the case, if such electricity consumption charges are excluded from consideration, the figure would not exceed Rs. 5000/- and the trial Court would, therefore, have jurisdiction to entertain the main application. This is precisely what the trial Court has found. Therefore, this finding is eminently justified and cannot be interfered with.

16. This revision is, therefore, required to be rejected. Accordingly, rule is discharged with no order as to costs. Interim relief vacated. Yadi to be sent to the trial Court forthwith.