

(1992) 12 GUJ CK 0011
In the Gujarat High Court

Purshottamdas Kuberdas Soni

APPELLANT

Vs

Gulabchand Ramjibhai Shah (Since Deed.) through his heirs
and Lrs. Himatlal G. Shah

RESPONDENT

Date of Decision : 11-12-1992

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)(k),
13(1)(k)

Citation : (1993) 1 GLR 773

Hon'ble Judges : C.K. Thakker, J

Bench : Single Bench

Judgement

C.K. Thakker, J.—This revision application is filed against the decree passed by the District Court, Bhavnagar in Regular Civil Appeal No. 42 of 1979 by which that Court allowed an appeal filed by the appellant and reversed the decree for possession passed by the trial Court.

2. To appreciate the controversy in question, few relevant facts may now be stated.

The petitioner was the original plaintiff while one Gulabchand Ramjibhai Shah (since deceased) was the original defendant. After the death of said Gulabchand, his heirs were brought on record in the present proceedings. The plaintiff filed Regular Civil Suit No. 307 of 1973 in the Court of the Civil Judge (J.D.), Bhavnagar for possession of the suit premises, inter alia, on the ground that the defendant had not used the premises for the purpose for which it was let for a period of more than six months immediately preceding the date of the suit without any reasonable cause that the defendant was in arrears of rent and was not ready and willing to pay rent and in spite of the notice of demand, he failed to pay rent. It was the case of the plaintiff in the plaint that he was the owner of the house situated at Taleti of Takhteshwar at Bhavnagar in Plot No. B/2 and the defendant was a tenant on the ground floor of the portion of Block No. C for a monthly rent of Rs. 20/- plus water and light charges and other taxes. The

defendant was not paying rent regularly and was in arrears from June 15, 1969 and event after service of demand notice, he did not pay rent to the landlord. The defendant also kept premises locked as he had permanently shifted to Bombay. The plaintiff was, therefore, entitled to a decree for possession.

3. The defendant contested the suit by filing a written statement, Ex. 13 contending, inter alia, that the suit was not maintainable at law; the averments made in the plaint were not correct and, therefore, not admitted by him. It was not true that the defendant had kept the premises closed nor he was permanently staying at Bombay. He was occupying the suit premises at Bhavnagar. It was also contended that the defendant was always ready and willing to pay rent but the plaintiff was not accepting it. The amount was, therefore, sent by money order which was also refused by the plaintiff. The plaintiff wanted to evict the defendant and/or to get rent increased and, therefore, suit was filed. The suit notice was also not legal and valid. For all those reasons, the plaintiff was not entitled to a decree for possession.

4. On the basis of the pleadings of the parties, the learned Judge framed necessary issues at Ex. 15. Only one point was pressed at the time of hearing of the matter u/s 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Act"). It was the case of the plaintiff that the defendant was residing at Bombay and he did not use the suit premises and kept it closed continuously for a period of six months immediately preceding the date of the suit without any reasonable cause. The learned trial Judge after hearing the parties and after appreciating the evidence on record, - oral and documentary, - recorded a finding that it was proved by the plaintiff that the defendant had not used the suit premises without any reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit and was, therefore, liable to be evicted u/s 13(1)(k) of the Act. In view of the said finding, the learned Judge passed a decree for possession in favour of the plaintiff on February 12, 1979.

5. Aggrieved by the decree of eviction passed by the trial Court, the defendant preferred Regular Civil Appeal No. 42 of 1979 which came to be allowed by the District Court, Bhavnagar on March 19, 1980 and the decree passed by the trial Court was reversed. It is this decree which is challenged by the present petitioner.

6. Mr. I. M. Pandya, learned Counsel for the petitioner contended that the appellate Court has committed an error of law in reversing the decree for possession passed by the trial Court and in coming to the conclusion that the case did not fall u/s 13(1)(k) of the Act. He submitted that there was ample evidence before the trial Court on the basis of which the decree for possession was passed in favour of the plaintiff. Without appreciating the evidence in its proper perspective and without considering the legal position, the appellate Court reversed the decree. Mr. Pandya also submitted that contradictory findings have been recorded by the appellate Court and from the impugned judgment itself, it is clearly proved that the defendant wanted to take undue advantage of his own

wrong by creating evidence in his favour. Mr. Pandya, therefore, submitted that the decree for possession passed by the trial Court requires to be restored by reversing the decree of appellate Court by granting eviction against the defendant.

7. As stated above, the original defendant-Gulabchand Ramjibhai expired during the pendency of the revision application in this Court and his heirs have been brought on record. All the heirs were served. They have, however, chosen not to appear and accordingly the matter is decided in their absence.

8. In my opinion, the contention of Mr. Pandya requires to be upheld and the decree for possession passed by the trial Court requires to be restored by setting aside the decree of the appellate Court. Looking to the evidence on record, it clearly appears that the defendant had permanently shifted to Bombay. He kept the suit premises locked. The said fact was established from oral as well as documentary evidence. So far as oral evidence was concerned, the trial Court believed the evidence of the plaintiff and his witnesses but that apart, looking to the documentary evidence also, it seems to me that the defendant had already settled at Bombay. It also appears to me that the defendant was permanently staying at Bombay and his son was doing business at Rajkot. That fact was equally established from various documents. Two post-cards written by the defendant to the plaintiff have been produced at Exs. 41 and 42 respectively from Rajkot and from Bombay. Two visiting cards Exs. 43 and 44 were also of Bombay and Rajkot. The suit notice was issued by the plaintiff to the defendant, Ex. 45. It was served to the defendant at Bombay. It is also pertinent to note that though it was the case of the defendant that he was staying in the suit premises, rent was paid to the plaintiff not personally but by sending money orders from Bombay. Three neighbours who were examined by the plaintiff stated that the defendant was not staying in the suit premises. The plaintiff also relied upon electricity bills Exs. 72 to 82 and certified copies of the registers maintained by Bhavnagar Electricity Co. (Exs. 69 to 71). Looking to those documents, it is clear that the electric consumption was "nil". Those documents covered the period between 1967 and 1970. It appears that only after the suit notice was served on the defendant, electric consumption was shown. The learned Judge, in my opinion, rightly relied upon the above circumstances and observed that only after the defendant received the suit notice he used to consume electricity in order to show that he was using the suit premises. Exh. 84 is Voter's list produced by the plaintiff by examining P. W. 5 Ramniklal Hathichand Shah, a clerk of Mamlatdar's Office. The name of the defendant did not appear in the list. Two pass books Ex. 97 (of Dena Bank) and Ex. 98 (of Bank of Baroda) have been produced. From the pass books also, it appears that except payment of telephone bills, there were no entries in the credit or debit side which could show that the defendant was staying in Bhavnagar. A number of documents have been shown in connection with the telephone of the defendant. Almost all the bills were sent by the department at Bombay and after receiving them at Bombay, payment was made by the defendant.

9. If in the light of the above documentary and oral evidence, the trial Court passed a decree of eviction, it cannot be said that it had committed any error of law which required interference by an appellate Court. I am constrained to observe that the appellate Court adopted a curious way in reversing the decree passed by the trial Court. In the course of the judgment, the appellate Court observed:

On the evidence on record, I feel that the plaintiffs have been able to prove that the premises have not been used for the purpose for which they were let out.

It also appears from the oral as well as documentary evidence that after receiving of the suit notice, the defendant created some evidence to show that there was no non-user of the suit premises for a continuous period of six months immediately proceeding the date of the suit.... Various bills produced by the witnesses show that defendant created evidence to show that after the receipt of the suit notice he was in Bhavnagar and was in occupation of the suit premises.

Therefore, the position of evidence is to the effect that after the receipt of the suit notice the defendant started using the suit premises by residing therein.

Defendant might be staying at Bombay as his son is carrying on business at Bombay. He might be staying with his son being the old father. He might be having business at Rajkot, but that, staying at Bombay and having business at Rajkot would not lead us to the conclusion that [here has been non-user of the suit premises without reasonable cause.

(Emphasis supplied)

10. With respect to the learned District Judge, I fail to understand the approach adopted by him. In my judgment, if the above reasoning is accepted, the underlying object of Section 13(1)(k) of the Act, would be frustrated. It would also permit a party to take undue advantage of his own wrong.

11. As held by this Court in the case of *Mohini Bhiryomal Hingorani Vs. Bhanubhai Manilal Patel*, , the principal object of the Rent Control Legislation is to keep the houses available to the tenants, who either cannot build their own houses or have no house to stay except in rented premises. If the attitude of the persons who are not staying in those houses to continue to keep them vacant even though they stay elsewhere is countenanced, the persons who are in dire need of premises would not get benefit to occupy them. It would defeat the very purpose of the legislation. If the house is not used either by the tenant or by his family members or by any person not referable to his family, it cannot be said that since it was the intention of the tenant to come back in the suit premises after a number of years, he should not be evicted. A similar view is taken by this Court in *Dalichand Virchand Shroff v. Babulal Rajmal and Ors.* reported in (1970) XI GLR 377 and in other cases.

12. In *Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikar*, reported in LXXV BLR 21, a single Judge of the High Court of Bombay held that if there is

evidence on record to show that the tenant had something more than a vague wish to return and that he had a real hope coupled with the practicable possibility of its fulfilment within a reasonable time, it cannot be said that he had no reasonable cause for not using the premises. In other words, to satisfy the Court that the case does not fall within the mischief of Section 13(1)(k), the tenant must show that there was intention to return on his part coupled with some formal, outward and visible sign of it. Mere vague wish or bare intention is not sufficient.

13. Therefore, looking to the settled legal position, it becomes clear that mere non-user of the premises for a particular period does not ipso facto entitle the landlord to get a decree for possession. Similarly, mere wish or desire on the part of the tenant to return to suit premises does not protect from eviction. Whether or not such intention is reasonable or bona fide coupled with the outward and visible sign will have to be decided in the light of the facts and circumstances of each case and no rule of universal application can be laid down by the Court. However, it has always to be remembered that the tenant cannot by "creating" evidence after the receipt of the notice avoid decree of eviction contending that he intended to use the premises if in fact it is proved that there was non-user on his part.

14. In the instant case, from documentary as well as oral evidence, the trial Court rightly recorded a finding that the defendant had not used the premises continuously for a period of more than six months immediately preceding the date of the suit and, there was no reasonable cause for such non-user. Issuance of some cheques of purchase of some articles from a city like Bhavnagar cannot be said to be a clinching circumstance that the defendant was staying in the suit premises. In my opinion, the trial Court was right in drawing inference that had the defendant staying in the suit premises, in all probability, electric consumption would not have been "nil" for a number of years; telephone bills would not have been sent by the department to the defendant at Bombay; amount of rent would not have been sent to the plaintiff by money orders; visiting cards would not have shown address of the defendant at Bombay and Rajkot and there was no necessity for the defendant to write post-cards from Bombay or from Rajkot. At reasonable intervals the Bank accounts would have been operated by him and the entries would have reflected that the defendant was occupying the premises. In these circumstances, it clearly appears that the defendant was not staying at Bhavnagar and had left the suit premises before more than six months from the date of filing of the suit. It is true that after the receipt of the suit notice the electric consumption was shown by the defendant and that fact had been highlighted by the defendant before the appellate Court. I must, however, hold that I do not approve the observations of the appellate Court that since the defendant has created some evidence after the suit notice was received by him, the plaintiff cannot succeed and the provisions of Section 13(1)(k) of the Act cannot be invoked. Once the case is covered by Clause (k) of Section 13(1), by creating evidence in his favour after the receipt of the notice, the tenant cannot

get protection under the Act. In my opinion, it would be permitting the defendant to take undue advantage of his own wrong and would amount to abuse of process of law,

15. For all these reasons, I am of the view that the decree for possession passed by the trial Court was in accordance with law and the decree passed by the appellate Court requires to be reversed.

In the result, this revision application is allowed. The decree passed by the District Court is hereby reversed and the decree for possession passed by trial Court is restored. Rule is accordingly made absolute. In the facts and circumstances, however, there is no order as to costs.