

(2010) 12 GUJ CK 0282
In the Gujarat High Court

Case No : Civil Revision Application No. 1645 of 1999 and C.A. No. 4315 of 2002

Sandhi Abu Ahmad

APPELLANT

Vs

Pyarali Jesa (Decd.) through his heirs Dolatbanu and Others

RESPONDENT

Date of Decision : 01-12-2010

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2), 13, 13(1), 29(1), 29(2)
Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 59
Transfer of Property Act, 1882 — Section 106

Citation : (2011) 2 GLH 95 : (2011) 52 GLR 809

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Nirav C. Thakkar, for the Appellant; Mehul S. Shah and Suresh M. Shah for Opponent Nos. 1-2-1 and 1-2-3, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. N.C. Thakkar for Petitioner-original Defendant No. 2 and learned Advocate Mr. Suresh M. Shah for Respondents.

2. Present Civil Revision Application is filed by tenant. The H.R.P. suit filed by Plaintiff for eviction on the ground of sub-letting and tenant is in arrears of rent. The suit has been decreed in favour of landlord. Thereafter, appeal preferred by tenant which also dismissed. The contention raised by Petitioner is that he is a tenant and not sub-tenant. The suit was decreed in favour of landlord on 30-4-1986 and appeal preferred by tenant has been dismissed on 31-7-1999.

3. Learned Advocate Mr. N.C. Thakkar has raised contention before this Court that in fact, suit was filed by landlord on two grounds; one is sub-letting and second is that tenant is in arrears of rent. He also submitted that in fact, there was no sub-letting and Petitioner is not sub-tenant but, Petitioner is tenant. The Respondent No. 8 (Orig. Defendant No. 1) - Hasanali Badruddin was original

tenant. The mother of Defendant No. 2 was working with Defendant No. 1, who stood as guarantor of Petitioner for payment of rent. The sale-deed executed between Pyarali Jesa and previous owner wherein it was not mentioned about sitting tenant. The Municipal record shows that Petitioner is tenant. The father of Petitioner was working in police department, who died in year 1972. Even in death certificate of father of Petitioner produced on record before trial Court where residential address has been given of suit premises. The Respondent No. 8 (Defendant No. 1) was not examined before trial Court. He also submitted that according to Section 13(1)(e) of Bombay Rent Act, if sub-tenancy is to be proved, then exclusive possession of sub-tenant and transfer of suit premises after receiving valuable consideration is must have to be proved by Plaintiff which has not been proved by Plaintiff before trial Court, even not pleaded by Plaintiff. The rent note of 1961 has been wrongly considered at Exh. 52 which was not found on the stamp, even though it believed say of Plaintiff, then suit is filed after a period of 8 years from the knowledge of Plaintiff. Therefore, conduct of Plaintiff not to immediately file suit for possession from Petitioner and meanwhile, accepting rent from Petitioner which amounts to accepting Petitioner as a tenant by Plaintiff and no notice has been served to Petitioner before filing suit by Plaintiff against present Petitioner.

4. Learned Advocate Mr. N.C. Thakkar has relied upon decision of this Court in the case of Bhagwati Spinning and Weaving Works Vs. The Ahmedabad New Cotton Mills Co. Ltd., Relevant Head Note of aforesaid decision is quoted as under:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (57 of 1947) - Section 13(1)(e) - Evidence Act (1 of 1872) - Section 59 - Question of sub-tenancy - Valuable consideration has to be proved - Such facts about valuable consideration can be proved expressly or can be inferred from other facts - Extremely difficult for landlord to show that there was valuable consideration in case of sub-letting - Therefore, valuable consideration can be inferred from other circumstances - Tenant sub-leasing to a stranger-Valuable consideration can be inferred in such circumstances.

4.1. Learned Advocate Mr. Thakkar also relied upon a decision of this Court in the case of Dahiben Lakhabhai v. Administrative Officer reported in 1980 GLR 90. Relevant Head Note of aforesaid decision is quoted as under:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (57 of 1947) - Section 13(1)(e) - In order to prove act of unlawful sub-letting it must be proved that transfer was for valuable consideration - Transfer of premises by Panchayat to Municipality not accompanied by valuable consideration - Section 13(1)(e) therefore not applicable.

4.2. Learned Advocate Mr. Thakkar also relied upon a decision of this Court in the case of Rameshchandra K. Patwa and Others Vs. Vithaldas Chimanlal and Others, Relevant Head Note of aforesaid decision is quoted as under:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (57 of 1947) - Section 13(1)(e)- To constitute sub-letting, parting of possession is a sine-qua-non or condition precedent - If possession is not proved it is not open to draw any inference or make any conjecture regarding nature of possession. If possession is admitted, it is open to infer the nature of possession in absence of any explanation from tenant or the party in possession - Factum of possession is required to be established.

Before landlord is entitled to a decree for possession on the ground of sub-letting, he will have to satisfy the Court that the tenant has parted with possession of the entire suit property or part thereof in favour of a third party who is in exclusive possession thereof and there is monetary consideration.

4.3. Learned Advocate Mr. Thakkar relied upon aforesaid decisions to establish the fact that while proving sub-tenancy, exclusive possession of sub-tenancy is necessary to be proved and also transfer made by tenant to sub-tenant on valuable consideration. These facts neither pleaded nor proved by Plaintiff before trial Court. Therefore, judgment and decree passed by trial Court as well as confirmed by appellate Court is required to be set aside.

5. Learned Advocate Mr. S.M. Shah for Respondent submitted that there is no need to give notice to sub-tenant means present Petitioner u/s 12(2) of Bombay Rent Act as well as Section 106 of Transfer of Property Act because sub-tenant is not a tenant. He further submitted that rent note at Exh. 52 is on stamp paper and also exhibited before trial Court and now, such dispute cannot be allowed to be raised by Petitioner that Exh. 52 is unstamped document. He also submitted that delay in filing suit after a period of 8 years which cannot debar landlord for filing suit for possession from sub-tenant. In fact, according to him, there is no delay at all in filing civil suit against present Petitioner. He also submitted that merely accepting rent from present Petitioner, it cannot be considered to be a tenant of landlord. The original tenant was considered to be a surety and guarantor, even that contention was not established by present Petitioner before below Courts. He also submitted that it is necessary u/s 13(1)(e) of Bombay Rent Act that landlord must have to prove exclusive possession of sub-tenant whole or part of premises was assigned or transferred, in any manner his interest but, valuable consideration in monetary terms is not required to be proved by landlord. He submitted that exclusive possession of suit premises has been proved by landlord before trial Court and tenant has transferred his interest of suit premises to present Petitioner. Therefore, he submitted that ingredients of Section 13(1)(e) of Bombay Rent Act has been fully established and satisfied by landlord before trial Court. Therefore, according to him, trial Court as well as appellate Court has not committed any error of law, therefore, this Court cannot interfere while exercising power u/s 29(2) of Bombay Rent Act. He submitted that this Court is having very limited jurisdiction, cannot re-appreciate evidence which are on record and according to him, unless finding is given by both below Courts if it is found to be perverse, then only this Court can interfere in such

revision application. But he submitted that Petitioner has not established before this Court that finding given by Courts below is perverse in any manner.

6. I have considered submissions made by both learned Advocates appearing for respective parties and also perused judgment and decree passed by both below Courts.

7. Brief facts of present Civil Revision Application are that the Plaintiff is landlord of suit premises which was rented to Defendant No. 1 for his personal use by preparing rent note dated 29-11-1961 while fixing rent at Rs. 30/- per month. Thereafter, on the basis of relation, monthly rent has been reduced from Rs. 30/- to Rs. 22-50. This property was rented to Defendant No. 1 by Pyarali Jesa. But subsequently, the suit premises has been sub-let or handed over to Defendant No. 2 (present Petitioner) as a sub-tenant by Defendant No. 1. Therefore, notice has been served to Defendant No. 1 dated 23-2-1981 which was replied by Defendant No. 1. The arrears of rent due from Defendant No. 1. w.e.f. 1-7-1981 to 31-3-1983 which total amount comes to Rs. 472-50 ps. Therefore, tenant was in arrears of rent. The right of tenancy has been transferred and assigned in favour of Respondent No. 2. Therefore, suit has been filed by landlord against Defendant Nos. 1 and 2. The Defendant No. 1 has filed written statement before trial Court vide Exh. 9 and Defendant No. 2 has filed written statement vide Exh. 17. According to case of Defendant No. 2-present Petitioner that Defendant No. 1 was never be a tenant and this suit has been filed by landlord with a collusion of Defendant No. 1. Therefore, it was a specific case or defence of present Petitioner before trial Court that Defendant No. 1 was not at all tenant in suit premises. Therefore, question of transferring or assigning rights of tenancy in favour of present Petitioner does not arise. According to Defendant No. 2-present Petitioner, he was residing in the suit premises since his father was residing in the year 1950-1951. At that occasion, this suit premises was in the control and administration of custodian. The father of present Petitioner-Defendant No. 2 was working in police department and on that basis, he was residing in suit premises and rent was deducted by landlord from salary of father of present Petitioner. This suit premises was purchased by Chandumal from custodian. Therefore, present Petitioner-Defendant No. 2 become legal tenant of landlord Chandumal. This suit premises/property was sold to present Plaintiffs father Pyarali Jesa by Chandumal in the year 1960-1961. According to Defendant No. 2, Defendant No. 1 was a guarantor or surety for giving regular rent to landlord.

8. The issues have been framed by trial Court vide Exh. 18 where it has been proved before trial Court that suit property has been given on rent to Defendant No. 1 means Defendant No. 1 was tenant of suit premises. That fact has been proved by Plaintiff before trial Court and Defendant No. 1 was tenant in arrears and rent has been found to be due of more than 6 months and after receiving notice from landlord, this due rent has not been paid by Defendant No. 1. The issue in respect of sub-letting has also been proved by Plaintiff while leading proper evidence on record as well as producing evidence on record. The finding

given by trial Court that rent note was executed between landlord and Defendant No. 1. Therefore, Defendant No. 1 is considered to be legal tenant of suit premises. But at the time of filing suit, Defendant No. 2 is having exclusive possession of suit premises. The trial Court has considered rent note which was proved before trial Court at Exh. 52, and on that basis, trial Court has come to conclusion that Defendant No. 1 is only tenant of suit premises. At the time when property was purchased by Plaintiff from erstwhile owner of the property, there was no mention about tenant in suit premises. Thereafter, vide Exh. 52 a rent note was executed between landlord and Defendant No. 1. Therefore, after appreciating evidence on record, the trial Court has come to conclusion that Defendant No. 1 is tenant of suit premises. The Defendant No. 2-present Petitioner has not proved the fact before trial Court that he was a tenant of suit premises. On the basis of record and evidence, it has been clearly proved and established by Plaintiff that suit premises is now in exclusive possession of Defendant No. 2. The real reason is that mother of Defendant No. 2 was working in the suit premises for serving to Defendant No. 1. Therefore, suit premises was given for some accommodation to mother of Defendant No. 2. But, thereafter mother of Defendant No. 2 has stopped working with Defendant No. 1. Therefore, possession of suit premises of present Petitioner-Defendant No. 2 is considered to be a sub-letting and not as a right of tenant. The Plaintiff has proved his case on the basis of Exh. 52 where rent note has been executed between Plaintiff-Defendant No. 1 and there is no document which has been executed by landlord in favour of Defendant No. 2. Therefore, exclusive possession of suit premises of Defendant No. 2 it amounts to transferring and assigning tenancy right by Defendant No. 1 in favour of Defendant No. 2. Therefore, question of valuable consideration in terms of money does not arise in each case because transfer and assign must be based on some social obligation, relation and for any other reasons which considered to be valuable consideration. The social consideration for accommodation for possession of suit premises to the mother of Defendant No. 2 has been established by Plaintiff. The mother of Defendant No. 2 was working in the house of tenant -Defendant No. 1. For that some time during that period, accommodation has been given to mother of Defendant No. 2 in suit premises. Therefore, trial Court has rightly considered evidence on record and rightly appreciated rent note at Exh. 52 and tenant was remained in arrears after receiving notice. No due rent has been paid to landlord by Defendant No. 1. Therefore, trial Court has not committed any error of law or finding which has been given by trial Court is not contrary to law and perverse.

9. The appeal preferred by Petitioner has been examined by appellate Court and appellate Court has re-appreciated evidence on record and come to conclusion that on the contrary, on the basis of evidence it goes to show that Defendant No. 2 was not residing in the suit premises as a tenant of the Plaintiff. If the Defendant No. 2 was residing in the suit premises since last 1950-1951, he would have in possession of rent note or rent receipts, but nothing has been produced by him to establish his tenancy rights over the suit premises. Merely

producing documentary evidence to establish tenancy rights, assessment made by Municipality for the year 1980 at Exh. 52, but on that basis no tenancy rights in favour of Defendant No. 2 can be created. From the sale-deed which was produced by Plaintiff vide Exh. 26, it transpires that seller had handed over peaceful and vacant possession to the purchaser-deceased Plaintiff (Pyarali Jesa). Therefore, on 27-11-1961, there was no tenants in the suit premises. If the defence of Defendant No. 2 is to be believed, then it must have been mentioned in sale-deed at Exh. 26 the presence of Defendant No. 2, who was residing in suit premises on 27-11-1961. In sale-deed at Exh. 26, this fact was not mentioned. Therefore, it falsified the claim of Defendant No. 2 as a tenant of the suit premises. In result, Defendant No. 2 is not able to establish his tenancy rights over the suit premises. It is a clear finding of fact found from records considering documentary evidence as well as admission of Defendant No. 1 himself that Defendant No. 1 was the tenant of Plaintiff and he had hired the suit premises for the purpose of residence of mother of Defendant No. 2 because she was working with Defendant No. 1. Thus, it is clearly proved that Defendant No. 1 was tenant of the suit premises. Merely because Defendant No. 1 had hired the suit premises for the residence of mother of Defendant No. 2, it cannot be said that Defendant No. 2 becomes tenant of suit premises. Considering admission made by Defendant No. 1 that he has assigned possession of suit premises to Defendant No. 2 without consent of Plaintiff. The Defendant No. 1 has sublet or assigned or transferred the suit premises to Defendant No. 2. Therefore, Defendant No. 1 has committed breach of terms of agreement and Defendant No. 2 has no tenancy rights over suit premises.

10. In view of aforesaid reasoning given by appellate Court after re-appreciating oral as well as documentary evidence and admission made by Defendant No. 1, the finding of fact has been recorded by both below Courts and entire matter has been examined by Courts below on the basis of facts. No question of law has arisen and involved while deciding suit by trial Court as well as appeal by appellate Court. No contention has been raised by Defendant No. 2 before trial Court that valuable consideration was not there while transferring or assigning right of tenancy in favour of Defendant No. 2 by Defendant No. 1. The ingredients of Section 13(1)(e) of Bombay Rent Act has been fully established and justified on the basis of records produced before trial Court by Plaintiff. The decisions which have been relied upon by learned Advocate Mr. Thakkar are not applicable to peculiar undisputed exclusive possession of present Petitioner as facts of this case because facts have been found from record, is otherwise. Therefore, contentions which have been raised by learned Advocate Mr. Thakkar cannot be accepted. In this case, there is concurrent finding of facts from Courts below. After considering reasoning given by Courts below as well as appreciation of evidence by both below Courts, according to my opinion, both Courts below have not committed any error of law or view taken by Courts below is not contrary to law. This Court is having a limited jurisdiction u/s 29(2) of Rent Act, cannot re-appreciate the evidence which was already appreciated by Courts

below. The concurrent finding of fact, this Court cannot disturb in revision application. Therefore, in such circumstances, the view taken by Apex Court in case of Patel Valmik Himatlal and Others Vs. Patel Mohanlal Muljibhai (Dead) Through L.Rs., in Paras 4, 5 and 6 are relevant, which is quoted as under:

4. Section 29(2) of the Bombay Rents Act as applicable to Gujarat amendment reads as follows:

29(2). No further appeal shall lie against any decision in appeal under Sub-section (1) but the High Court may, for the purpose of satisfying itself that any such decision in appeal was according to law, call for the case, pass such order with respect thereto as it thinks fit.

5. The ambit and scope of the said Section came up for consideration before this Court in Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, and after referring to a catena of authorities, Sabyasachi Mukharji, J. drew a distinction between the appellate and the revisional jurisdictions of the Courts and opined that the distinction was a real one. It was held that the right to appeal carries with it the right of rehearing both on questions of law and fact, unless the statute conferring the right to appeal itself limits the rehearing in some way, while the power to hear a revision is generally given to a particular case is decided according to law. The Bench opined that although the High Court had wider powers than that which could be exercised u/s 115 of the Code of Civil Procedure, yet its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on re-appraisal of evidence. Did the High Court exceed its jurisdiction?

6. The powers u/s 29(2) are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to rehear the matter and re-appreciate the evidence. The mere fact that a different view is possible on re-appreciation of evidence cannot be a ground for exercise of the revisional jurisdiction.

10.1. This Court, in the case of Manjibhai Shamjibhai, owner of Maheshkumar and Co. v. Natraj Theatre, reported in 1999 (1) GLH 749, examined aforesaid aspect. Relevant observations of aforesaid judgment are in Paras 8, 9, 12 and 13, which are quoted as under:

8. This Court in Kusumben Wd/o. Vasantlal v. Shrenikbhai Kasturbhai 1998 (2) GLH 426 also took similar view. In view of the Apex Court's verdict interference by the High Court in revision of this nature can be done only for a limited purpose of correcting errors of law in the judgments of the two Courts below. It has, therefore, to be seen whether the judgments and decrees of the Courts below are in accordance with law or not. Finding of fact howsoever erroneous

cannot be corrected in revision of this nature. At the same time, it is also difficult to accept the contention that the revisional Court is debarred from perusing the evidence adduced by the parties. Perusal of evidence of the parties is permissible for a limited purpose for satisfying whether it is a case of misreading of evidence or that the finding is based on evidence which is totally inadmissible. To this extent, perusal of evidence is possible. Likewise, perusal of evidence is possible if conjectural findings have been recorded by the two Courts below, otherwise, normally interference in revision on concurrent findings of fact and law is not permissible.

9. So far as the question of arrears of rent is concerned, decree on this point has not been challenged by the learned Counsel for the revisionist. If the decree for eviction on this ground is to be confirmed, more particularly, when the tenant-in-chief has not contested this revision and further in case the revisionist is found to be sub-tenant he has to go along with the tenant-in-chief and his independent rights cannot be entertained at this stage.

12. For establishing sub-tenancy, the landlord has to establish two things. The first is transfer of exclusive possession to the alleged sub-tenant and the second is that such transfer should be for valuable consideration. Valuable consideration need not necessarily mean cash consideration in the shape of rent. Once, transfer of exclusive possession is established the Court can, on the facts and circumstances of the case, draw inference that such transfer was for valuable consideration. Reason for drawing such inference is that it is almost impossible for the landlord to establish by direct evidence payment of rent by sub-tenant to the tenant-in-chief in as much as such contract is always secret and the landlord remains unaware of such contract. However, the question of establishing valuable consideration does not arise in the remaining two contingencies as contemplated in Section 13 viz. transfer or assignment otherwise. But even in these contingencies the landlord has to prove that exclusive possession of the demised premises was transferred by the tenant-in-chief to the sub-tenant.

13. Mr. V.C. Desai has rightly argued that in this case, on the basis of evidence on record and the circumstances emerging from the evidence on record it is established that it was a case of transfer of exclusive possession and payment of rent by sub-tenant to the tenant-in-chief is also established. As referred to above in the pursish. Exh. 20 filed by the tenant-in-chief he admitted that the revisionist was his sub-tenant. Mr. Shah has argued that this is collusive transaction between the parties, but rightly the two Courts below have repelled this contention. The revisional Court will be reluctant in substituting its own findings abruptly without any evidence that this transaction was collusive transaction. Admission of the tenant-in-chief in pursish is best evidence against the maker viz. the Defendant No. 1 that he had illegally sub-let the suit accommodation without consent or permission of the landlord to the revisionist. Admission is the best piece of evidence against its maker unless it is explained to be erroneous or mistaken. Since, the tenant-in-chief did not contest the suit his

offering any explanation that his admission was either erroneous or mistaken did not arise. In addition to this, the rent receipts were issued in the name of the Defendant No. 1 who was said to be paying rent to the landlord. There is categorical finding recorded by the two Courts below that the relationship of landlord and tenant between the Plaintiff and the Defendant No. 1 is established and the Defendant No. 1 committed default in payment of six months rent on the date of service of notice. If this is so, then the question of revisionist being licensee stands ruled out. If the revisionist alleges to be in possession then it is for him not only to disclose but to establish by cogent evidence in what capacity he is in possession. The payment of rent at the rate of Rs. 250/- p.m. by the Defendant No. 2 to the Defendant No. 1 is also borne out from the concurrent findings on record. This, therefore, establishes the second ingredient viz. transfer or exclusive possession for valuable consideration. There is also indication from the evidence on record that the revisionist admitted that he is carrying on exclusive business in the demised premises and that the tenant-in-chief had absolutely no interest in the business. It therefore, implies that the tenant-in-chief had parted with exclusive possession of the demised premises and he had no control over the business and had lost his interest in the disputed accommodation. This also amounts to transfer of exclusive possession in favour of the revisionist.

11. In view of above observations made by Apex Court as well as this Court and considering reasoning and finding given by Courts below which found according to law and no error of law committed by Courts below which requires interference by this Court while exercising power u/s 29(2) of Rent Act. Therefore, there is no substance in present Civil Revision Application. Accordingly, present Civil Revision Application is dismissed. Rule is discharged. Interim relief, if any, granted earlier stands vacated. No order as to costs. R. and P. to be sent back forthwith to Courts below.

12. However, time is hereby granted in favour of Petitioner for vacating suit premises for a period of three months from date of receiving copy of present judgment and order.

13. In view of aforesaid order, Civil Application No. 4315 of 2002 does not survive and disposed of accordingly. Rule is discharged.