

(2011) 07 GUJ CK 0095

In the Gujarat High Court

Case No : Civil Revision Application No. 337 of 1999

Smt. Maheshwari

APPELLANT

Vs

Ambalal Fakirchand Chauhan

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 29(3)
Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 108

Citation : (2011) 07 GUJ CK 0095

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : Bharat T. Rao, for the Appellant; Vibhuti Nanavati, for the Respondent

Judgement

K.S. Jhaveri, J.—This is a revision u/s 29(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Act") at the instance of the original Defendant challenging the judgment and decree dated 27.04.1994 passed by the Small Causes Court, Ahmedabad in H.R.P. Suit No. 3017 of 1985 and against the order dated 04.01.1999 passed by the Appellate Bench of Small Cause Court, Ahmedabad in Civil Appeal No. 73 of 1994.

2. The applicant is the legal heir of the Appellant-original-Defendant and the Respondents are the Plaintiff-trust and trustees. The Respondents who are the trustees of the Ahmedabad Gujarati Dhobi Panch ni Wadi were the Plaintiffs in H.R.P. Suit No. 3017 of 1985 before the Small Causes Court, Ahmedabad. They are the owners of the property known as "Dhobi ni wadi". In the said property two "padalis" on the ground floor facing northern and eastern direction and two rooms on the first floor facing eastern and northern direction were let out to the applicant-Defendant.

2.1 The Respondent-Plaintiff-trust and trustees of the trust filed suit in the Court of the Small Causes Judge, Ahmedabad u/s 13(1)(b) of the Bombay Rent

Control, Act for recovery of possession of the suit premises on the ground of material alteration by the tenant. It is alleged by the Plaintiffs that the suit premises was let out to the applicant-original Defendant by the previous trustee, viz., Jesingbhai Fakirchand Dhobi on and from 01.04.1978 to run primary school and tuition classes only, at a monthly rent of Rs. 180/-. The standard rent has been fixed in the Standard Rent Application No. 1550 of 1978.

2.2 The Plaintiffs have served suit notice dated 21.08.1985 to the Defendant but the present Defendant had deposited the rent in H.R. P. Suit No. 1076 of 1985 and the said suit was withdrawn by the Plaintiff. The Plaintiffs have received rent upto 31.12.1985. It is alleged by the Plaintiffs that on the first floor, the Defendant has extended the northern room and had covered the gallery by making permanent construction and has changed the identity of the premises and therefore, the Plaintiffs are entitled to recover possession of the premises from the Defendant. It is also alleged by the Plaintiffs that they required the suit premises for personal use of Plaintiff- trust and for that reason also they are entitled to recover possession of the premises from the Defendant. Hence, the Plaintiffs filed suit being H.R.P. Suit No. 3017 of 1985 for recovery of vacant and peaceful possession of the suit premises and for mesne profit for the period from 01.01.1986 at the rate of Rs. 180/- p.m. plus taxes plus education cess and electricity till the recovery of the suit premises from the Defendant.

2.3 The trial Court after framing the issues and after considering the evidence on record partly allowed the suit by judgment and decree dated 27.04.1994 in H.R.P. Suit No. 3017 of 1985. The suit filed by the Plaintiffs was decreed by the trial Court on the ground of converting gallery portion into a room and thereby changing identity of the premises. The trial Court directed the applicant-Defendant to hand over the peaceful and vacant possession of the suit premises bearing M.C. No. 2268-1-1 more particularly described in para 2 of the plaint to the Plaintiffs within three months from that day failing which the Plaintiffs will be entitled to recover possession of the suit premises from the Defendant by executing the decree. It was further directed that the Plaintiffs shall recover Rs. 12/- p.m. as mesne profit from 01.01.1986 till the date of recovery of vacant and peaceful possession of the suit premises from the Defendant.

3. Being aggrieved and dissatisfied with the judgment and decree dated 27.04.1994 passed in H.R.P. Suit No. 3017 of 1985, the applicant-Defendant preferred appeal being Civil Appeal No. 73 of 1994 before the Appellate Bench of Small Cause Court, Ahmedabad wherein the appeal came to be dismissed by the learned Judge by confirming the judgment and decree passed by the Small Causes Court, Ahmedabad in H.R.P. Suit No. 3017 of 1985. Hence, this Civil Revision Application.

4. Learned advocate appearing for the Petitioner has raised contention that both the Courts below had not appreciated the evidence on record and have misread the evidence of the Defendant and have wrongly held in favour of the original Plaintiffs. According to him, both the courts have committed error in relying on

rent note at Exh. 26 which was prepared in the previous suit between the parties and the same is not proved. Learned advocate appearing for the Petitioner further submitted that the permanent structure which is made is not proved by the original Plaintiffs.

5. Learned Advocate for the Petitioner contended that the lower appellate Court has wrongly interpreted Exh. 27- Commissioner Report and Exh. 128- deposition of the original Defendant. He relied on the decision in case of Ramji Virji v. Kadarbhai Esufali reported in 1972 (13) GLR 81. He further relied on the decision in the case of (Smt.) Laxmiben Mavjibhai and Ors. v. Shankarbhai Mulabhai reported in 1995 (2) GLH 13 wherein in paragraph No. 6, 9 and 10 held as under:

6. Miss. V.P. Shah, learned Counsel for Petitioners-landlords very strenuously urged before this Court that the nature of alterations made or structures erected by the tenant in the suit premises would amount to erecting permanent structures within the meaning of Section 13(1)(b) of the Bombay Rent Act. She has in this connection invited the attention of this Court to the extensive nature of alterations made by the tenant in the suit premises. The tenant has removed the front door and has instead got fixed a rolling shutter. For this purpose the front side walls and bricks and cement were required to be scrapped and very heavy iron rolling shutter was fitted in the walls. In the said process the wooden planks of the door were destroyed and putting up of such a heavy rolling shutter in substance would amount to putting permanent structure. The second alteration attributed to the tenant is that he has inserted nails of very big size in the weather shed with a view to displaying tyres and lubes and that has damaged the property. The third act attributed to the tenant is that the tenant has fixed wooden loft in the front room by inserting wooden beam in the big walls and thereby he has damaged the premises.

9. From the aforesaid explanation it becomes clear that merely by reason of construction of partition wall, door or lattice work of the filling of kitchen stand or such other alterations made in the premises which can be removed without serious damage to the premises it would not amount to making of a permanent structure. Resolvability of structure without seriously damaging the premises is the test provided by the Legislature which is well accepted by this Court in the case of Patel Ishwarbhai Lallubhai v. Parshottam Ranchhodbhai reported in 8 GLR 665 the learned Single Judge of this Court held that explanation to Section 13(1) has reference to minor alteration in an existing structure for more beneficial enjoyment thereof and not to major alterations. It gives liberty to the tenant merely to put up a partition wall, a door or lattice or to fill in the kitchen stand or such other alterations. Such minor alterations which could be removed without serious damage to the premises are permissible and cannot be considered to be erection of a permanent structure within the meaning of Clause (b).

10. Keeping the aforesaid position of law in mind it shall have to be examined whether the alterations made by the tenant can be said to be permanent structure or not and whether they were of merely temporary nature. Removal of

door and placing of rolling shutter prima facie may involve some alteration in the walls and insertion of hinges or two ends of shutters in the wall. However, such shutter can be removed and premises can be restored to its original position by placing door. This type of alteration is solely made with a view to have better security and more beneficial use of the premises. This type of minor alteration does not cause damage to the premises. It enhances the beneficial use of the premises. Secondly, placing of loft by inserting beams in the two walls also cannot be said to be permanent construction. Wooden loft is always removable. It can be removed from the two walls by removing the wooden beams and the holes made in the walls can be filled by bricks and wall can re-plastered. This may not seriously damage the property and this type of construction may not amount to permanent alteration. The trial Court has after weighing evidence of witnesses found that the alterations made by the tenant were of temporary nature and were not permanent alterations. In my opinion, such finding of the trial Court is consistent with law and facts and the lower appellate Court has also confirmed such finding. I do not see any flaw in the reasoning of the two Courts below calling for any interference of this Court on this ground. In the case of Ramji Virji v. Kadarbhai Esuf Ali reported in 13 GLR 81 putting up a wooden loft was held temporary structure so as not to attract liability of eviction. In the present case, from the nature of alterations made by the tenant it cannot be said that he has put up permanent construction so as to invite liability of eviction.

6. Learned advocate for the Petitioner further invited attention to the decision reported in Venkatlal G. Pittie and Another Vs. Bright Bros. (Pvt.) Ltd., Paragraph Nos. 26, 27 31 and 32 of the said decision read as under:

26. Therefore, in view of the fact that large sum had been spent and considering the standard and the nature of the construction and lack of easy removability and the degree of an annexation to the enjoyment for the original purpose we are of the opinion that the learned judge as well as Appellate Bench of the Court of Small Causes had applied the correct principles and came to a plausible conclusion. About the removability of the structure the High Court was bound by the finding of the appellate authority which appears at pages 341 to 344 of the Paper Book. In a case of this nature the High Court found that they had to enter into this question to find the real Book. In a case of this nature the High Court found that they had to enter into this question to find the real position whether the proper principles had been correctly borne in mind. It is indisputable that the finding that has to be arrived at by the Court in this case is a mixed question of law and fact. Therefore, if the basic factors for example, there was not proper appreciation of the evidence if the assumption that lofts per se were not permanent structure, then the courts below might be said to have committed error apparent on record and no court instructed in law could take such a view. But if all the relevant factors have been borne in mind and correct legal principles applied then right or wrong if a view has been taken by the appellate Court in our opinion interference under Article 227 of the Constitution was unwarranted.

27. Interference by the High Courts under Article 227 of the Constitution must be within limits. This question has been considered by this Court from time to time and principles laid down. This Court in *Ganpat Ladha Vs. Sashikant Vishnu Shinde*, expressed the view that the High Court commits a gross error in interfering with what was a just and proper exercise of discretion by the Court of Small Causes, in exercise of its power under Article 227 of the Constitution. This was unwarranted. The High Court under Article 227 has a limited jurisdiction. It was held in that case that a finding as to whether circumstances justified the exercise of discretion or not, unless clearly perverse and patently unreasonable, was, after all a finding of fact and it could not be interfered with either under Article 226 or 227 of the Constitution. If a proper Court has come to the conclusion on the examination of the nature of the structure, the nature of the duration of structure, the annexation and other relevant factors that the structures were permanent in nature which were violative of Section 13(1)(b) of the Rent Act as well as Section 108 Clause (p) of Transfer of Property Act and such a finding is possible it cannot be considered to be perverse. In such a situation, the High Court would not have and should not have interfered.

31. This Court in *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, held that in exercise of jurisdiction under Article 227 of the Constitution, the High Court can go into the questions of facts or look into the evidence if justice so requires it. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the facts the absence of clear cut down reasons where the question depends upon the appreciation of evidence. The High Court should not interfere with a finding within the jurisdiction of the inferior tribunal or court except where the finding is perverse in law in the sense that no reasonable person properly instructed in law could have come to such a finding or there is misdirection in law or view or fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it resulted in manifest injustice. Except to the limited extent indicated above, the High Court has no jurisdiction.

32. In this instant case the tests laid down have not been transgressed by the Court of Small Causes both trial Court as well as the appellate bench. The view it took was a possible view. A different view might have been taken but that is no ground which would justify the High Court to interfere with the findings.

7. Learned advocate for the Petitioner has contended that there is no evidence to prove on the part of the Plaintiffs as to when the permanent construction was made by the Defendant.

8. Learned advocate for the Respondent Mr. Nanavati contended that in view of concurrent findings of both the Courts below, it would not be appropriate for this Court to disturb the findings in view of the decision reported in *Patel Valmik Himatlal and Ors. v. Patel Mohanlal Muljibhai* AIR 1998 GLH 736, more particularly paragraph 6 thereof wherein it is held that 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 reappreciate the evidence. The mere fact that a different view is possible on reappreciation of evidence cannot be a ground for exercise of the revisional jurisdiction.

9. Learned advocate for the Respondent further submitted that Standard Rent Application No. 1550 of 1979 at Exh. 19 was filed by the present Defendant-tenant on 29.04.1978 and the standard rent in that application was also determined at Rs. 180/- + taxes etc. on the same day i.e. 29.04.1978 i.e. on the date of filing of Standard Rent Application No. 1550 of 1978.

9.1 He further submitted that it is also an admitted fact that the compromise arrived at by the parties in H.R P. Suit No. 3152 of 1977 in which Suryaprasad Vyas (deceased) was Defendant No. 2 and the decree is also passed on the same day in pursuance of the compromise pursis filed by the parties in that suit. So, Exh. 26 rent note, Exh. 19 Standard Rent Application and Exh. 21 the decree in H.R. P. Suit No. 3157 of 1977 all have taken place on the same day i.e. 29.04.1978.

10. Learned advocate for the Respondent contended that the Defendant has committed breach of the terms of tenancy regarding change in the condition of the premises by removing the southern wall of northern room situated on first floor and including the gallery which was situated to the south from the northern room which is described in Exh. 27 map as room No. 2. The map at Exh. 27 is prepared by the Commissioner of the court on 03.08.1977. It is clear from the map Exh. 27 dated 03.08.1977 that there was a gallery which was going from west to east and of 2 feet width and it was long as per the southern wall of the room No. 2 of Exh 27. The explanation Exh. 27 also indicates that there is a passage to the east to go to room Nos. 2 and 1. So it is clear from the map Exh. 27 that there was a gallery on 03.08.1977 to south direction from room No. 2 of Exh. 27.

11. Learned advocate appearing for the Respondent further contended that on the first floor, the Defendant has extended the northern room and had covered the gallery by making permanent construction and has changed the identity of the premises and therefore, the Plaintiffs are entitled to recover possession of the premises from the Defendant.

12. Heard learned advocates for the respective parties. The facts which have emerged on record are that originally the suit premises was given by the trust to the Defendant. The lobbies situated in front and behind the suit rooms are not rented to the Defendant and therefore the Defendant has no right to put any obstruction to the Plaintiffs and the men of the community making use of the lobbies and he has also agreed to that effect by executing the rent note. From the record it is clear that the Defendant is creating obstruction to the Plaintiffs and thereby he has committed breach of the condition of rent-note. The

Defendant is doing other business in the suit premises and he has also sublet the suit premises to third persons and also used the premises as kitchen which is not meant for that. Therefore, the Plaintiffs have filed suit for possession of the suit premises which came to be allowed by the trial Court and the same is also confirmed by the lower Appellate Court by dismissing the appeal preferred by the Defendant.

13. The lower appellate Court after considering the evidence on record held that from rent note at Exh. 26, which is executed by the original Defendant Suryaprasad Dinbandhu Vyas (deceased), it is clear that the suit premises was given on rent. So far as the first floor is concerned, the Defendant is given one room on the eastern side and one room on the northern side bearing M.C. No. 2268/1/1. It is taken on rent on 01.04.1978. Further, it is also clearly stated in the rent note that tenant shall not make any alteration without permission of the landlord in writing. There are also terms so regarding ground floor and making construction on the first floor. As per the rent note at Exh. 26 and map at Exh.27, it is very clear that there are two rooms bearing room No. 1 and also room No. 2. There is also chowk which is open to sky.

13.1 It is further clear that room No. 2 and the portion which is shown as open to sky is separated by the lobby of 2 feet in width which connects room No. 1 and a room in possession of the Plaintiff-landlord. It is also clear that room No. 2 has a wall abutting the said 2 feet wide lobby having two doors and two windows marked D.W.W.D. In other words as on 03.08.1977 the room was admeasuring 18.8"x8".10" and after that room, there was 2 feet wide gallery and thereafter the portion is shown as open to sky. That portion is obviously portion described as chowk on the ground floor. It is therefore proved that there was gallery of 2 feet and Defendant-tenant was given two rooms i.e room No. 1 and 2. It is important to take note of the fact that portion open to sky is not rented and entire gallery is abutting the said portion which is open to sky. Further in Exh. 159 defence witness No. 2 Kanailayal Jethalal Pathak deposed that he removed the gallery and entire room was extended by covering the gallery. According to him, this alteration was made in 1977. In the cross-examination he deposed that this change was made prior to the previous suit filed by the landlord. Therefore, there is contradiction as to when this alteration was made and therefore, it is not reliable. The map at Exh. 27 clearly shows that the said passage or gallery was in existence on 03.08.1977 when the commissioner visited the premises. In the earlier suit brother of the Defendant was a party which was disposed of on the basis of compromise. It is therefore, clear that alteration on the suit premises was made by the Defendant after the decree is passed.

14. Further, Exh. 128 which is deposition of the original Defendant (deceased) specifically states that when he took the management of the school from Kanubhai, there was no share left in favour of Kanubhai. In other words the entire right, title and interest in the school was that of original Defendant. So this is again a piece of evidence which confirms that if there is any alteration it could

not have been made by the person other than original Defendant Suryaprasadad Exh. 128. The Commissioner was appointed and original Defendant was present when the Commissioner came to prepare the panchnama of the suit premises and his signature was also obtained but so far as contents are concerned, he has tried to plead ignorance. Hence, from the evidence and facts on record, it was proved that on 03.08.1977 there was a passage between the room No. 2 rented to the Defendant and space open to sky.

14.1 It is also evident that Defendant is in the management of the said school and in possession of the premises of the said school since 1976 or at least when the previous suit was filed. As stated in Exh. 128, there is no such gallery on the Northern side of the room towards chowk. The map Exh. 27 shows that the passage which is encroached upon and merged in room No. 2 which is a passage connecting room No. 1 rented to the Defendant and another room in possession of the Plaintiffs. It is passing between room No. 2 and space open to sky. It is also important to note that rent note contains a clear term to the effect that if Defendant-tenant wants to make any alteration he cannot do so without permission of the landlord in writing. No such permission in writing was obtained by the Defendant. The tenant cannot encroach upon the portion which is not rented to him and merge it in the premises under the guise of such a plea.

15. The Defendant is bound by the conditions of the rent note Exh. 26 and in my opinion, the Plaintiffs have proved the terms of tenancy with the Defendant and the execution of rent note Exh. 26 is also proved and it is also proved that the suit premises has been let to the Defendant with right of parties. It is also held that the Defendant is using the suit premises for rehearsal of drama and is residing with his family. But except the bear words of P.W. No. 1 Mr. Pravinkumar there is no other independent evidence to show that the Defendant is using the suit premises for other purpose than described in rent note i.e to run the school and for tuition classes.

16. It is also found that the Defendant has committed breach of the terms of tenancy regarding change in the condition of the premises by removing the southern wall of northern room situated on first floor including the gallery which was situated to the south from the northern room which is described in Exh. 27 map as room No. 2. The map Exh. 27 is prepared by the Commissioner of the court on 03.08.1977. It is clear from the map Exh. 27 dated 03.08.1977 that there was a gallery which was going from west to east and of 2 feet width and it was long as per the southern wall of the room No. 2 of Exh 27. The map at Exh. 27 also indicates that there is a passage to the east to go in room Nos. 2 and 1. So it is clear from the map at Exh. 27 that there was a gallery on 03.08.1977 to south direction from the room No. 2 of Exh. 27. In his deposition at Exh. 128, the Defendant Suryaprasad Vyas also admitted that the gallery which was situated facing to the chowk to the northern room on first floor is not in existence today. Moreover, it is also clear from Defendant's witness No. 2, Kanaiyalal Pathak Exh. 159 that the gallery in dispute has been removed. The

P.W. No. 1, Pravinkumar Chauhan has also deposed in his deposition at Exh. 18 that the Defendant has removed the gallery which was facing to the chowk and situated on first floor to the south from room No. 2 and adjacent to it has been removed by the Defendant without their permission and has made permanent structural alteration. The said version has not been challenged by the Defendant during the cross-examination of P.W. 1 Pravinkumar at Exh. 18. Thus, it has remained unchallenged. It is therefore, clear from the evidence on record that the gallery in dispute which is situated to southern direction from room No. 2 has been removed after 3.8.1977 i.e. the date of map Exh. 27.

17. There is no cross-examination on the part of the Defendant. Hence, on relying upon the evidence of Exh. 27, it is believed that there is permanent structure contrary to Clause (a) of the rent note at Exh. 26.

18. It is required to be noted that Respondents filed the suit being Civil Suit No. 5388 of 1985 in City Civil Court, Ahmedabad for the suit premises alleging that though only two rooms on the first floor had been let to the Appellant, he had trespassed in one more room. They, therefore, prayed for decree for possession of the said room. On appreciation of the evidence led by the parties, the learned City Civil Judge found that the Plaintiffs had proved that the Defendant had taken illegal possession of the disputed room on or about 09.04.1985. He, therefore, by his judgment and order dated 31.03.2003 decreed the suit for possession in favour of the Respondents and directed an inquiry under Order 20 Rule 12(c) for determination of mesne profits. The Appellant has, therefore, filed First Appeal No. 915 of 2003 before this Court which came to be dismissed on 04.07.2003. Paragraphs 4 and 5 of the order reads as under:

4. On appreciation of the evidence led by the parties, the learned City Civil Judge found that the Plaintiffs had proved that the Defendant had taken illegal possession of the disputed room on or about 09.04.1985. He, therefore, by his judgment and order dated 31st March, 2003 decreed the suit for possession in favour of the Respondents and directed an inquiry under Order 20 Rule 12(c) for determination of mesne profits. The Appellant has, therefore, filed this appeal challenging the said judgment and decree.

5. The learned Counsel for the Appellant took me through the oral evidence of the parties. He submitted that the Defendant had filed HRP suit No. 1076/1985 for injunction in the Small Causes Court and a Commissioner was appointed to draw the panchnama and when the Commissioner appointed by the Court made local inspection on 11.04.1985, Appellant's belongings were found in the room. The Respondents say was that the room was used as an office room by the trustees. The Defendant had placed his belongings before the Commissioner came for inspection. However, it is significant to note that the Appellant subsequently withdrew that suit. The learned Counsel for the Appellant submitted that he had signed the rent-note without reading it, since it was in Gujarati. However, it appears that the Appellant is running a school in the two rooms which were let to him under the rent-note. In the circumstances, it is not

possible that he had signed the rent- note without knowing its contents. The learned Counsel for the Appellant submitted that the Appellant had paid Rs. 5,000=00 to one Keshavlal, who was the trustee previously. However, there is no such plea in the written statement. Even in the examination-in-chief there is no reference to any such payment. It was only in cross-examination that he made such a statement, but there is no other evidence to support it. In the written statement and in the examination-in-chief the Appellant simply stated that he was the tenant of the suit property. However, in the rent-note only two rooms and two "padalis" were given on rent to the Appellant and there is no explanation as to how the Appellant came into possession of the third room and what rent was fixed.

19. It is found that there is no cross-examination on the part of the Defendant that when the permanent construction was made. Learned advocate for the applicant relied on the decision of Hon"ble Supreme Court in case of (Smt.) Laxmiben Mavjibhaai and Ors. v. Shankarbhai Mulabhai reported in 1995 (2) G.L.H. 13. In that case, the Plaintiff has successfully proved that permanent structure was done during the tenancy period and hence, this case law will not apply in the present case.

20. In view of the fact that pucca construction has been made by the Defendant, the decisions relied upon are not applicable to the facts of the present case.

21. Consequently the judgment and decree passed by the trial court and confirmed by the appellate court are eminently sustainable and there is no justification for interference by way of the present revision. This revision is, therefore, dismissed. Rule is discharged with costs. Interim relief stands vacated.

22. At this stage learned Counsel for the Petitioner requests that the interim relief which is operative so far be extended in order to challenge the same before the higher forum. The suit was filed in the year 1985 and the applicant has enjoyed the possession till this date and, there are concurrent findings of both the Courts below. Hence, it will not be appropriate for this Court to extend the interim relief granted by this Court by depriving the Plaintiffs of their right to get possession. Hence, the request is rejected.

23. The amount which is deposited by the applicant pursuant to the order of this Court will be allowed to be withdrawn by the Respondents-Plaintiffs.