
(2001) 07 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 1548 of 1984

Suresh Vasant Malegaonkar

APPELLANT

Vs

Ramabai Keshav Gokhale and Others

RESPONDENT

Date of Decision : 10-07-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Transfer of Property Act, 1882 — Section 108

Citation : (2002) 1 MhLj 933

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : P.B. Shah, for the Appellant; R.G. Ketkar, for the Respondent

Final Decision : Partly Allowed

Judgement

1. This petition is directed against the judgment and decree dated 20th September, 1983 passed by the Second Extra Assistant Judge, Pune in Civil Appeal No. 291 of 1981, whereby the appeal filed by the petitioner was dismissed and there under the decree of eviction under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("Bombay Rent Act" for short) passed against the petitioner, by Second Additional Judge, Small Causes Court, Pune dated 20th December, 1980 in Civil Suit No. 2150 of 1977 was confirmed.

THE FACTS

2. The facts giving rise to the present petition, in nut shell, are as under ;

The petitioner herein is a tenant. He was defendant; whereas the respondents were plaintiffs in the suit. The plaintiffs are landlords of the suit premises located on the first floor of the suit building. The parties herein are referred to in their original capacity for the sake of clarity.

3. The suit premises were let out to defendant No. 1 for running typewriting institute and shorthand classes. The defendant No. 1 carried on these activities

for sometime. In order to supplement his income, he entered into partnership with defendant No. 2 and started running Photo Studio in the part of the said suit premises under the name and style "Raghuvir Art Studio, Pune".

4. The plaintiffs, based on the above pleadings had claimed eviction of the tenant - defendant No. 1 on two grounds, namely, (i) that the tenant defendant No. 1 had changed the purpose of the user and (ii) parted with possession of the part of the suit premises and thereby sublet the suit premises to defendant No. 2, making himself liable for eviction u/s 13(I)(a) and (e) of the Bombay Rent Act. Both the Courts below concurrently held that the tenant had committed breach of Section 13(I)(a) and (e) of the said Act and, as such, was liable for eviction. This judgment and decree is a subject matter of challenge in this petition, filed under Article 227 of the Constitution of India.

5. The eviction suit was resisted by defendant No. 1, who filed his written statement (Exh. 30); wherein he had denied the allegations with regard to the change of user. Similarly, he had also denied the allegations in respect of creation of sub-tenancy in favour of defendant No. 2. In order to justify the entry of defendant No. 2 in the suit premises, it was pleaded that defendant No. 2 was admitted as a partner in new business venture run under the name and style "Raghuvir Art Studio, Pune". The said business arrangement by no stretch of imagination could be said to be an act of creation of sub-tenancy or for that purpose an act of parting with possession of the suit premises in favour of some other person.

6. The defendant Nos. 2 and 3 by their written statement (Exh. 24) had also denied that they were occupying the suit premises as sub-tenants. The defendant No. 2 claimed to be a partner in the business of photography run under the name and style of defendant No. 3. All the defendants had pleaded that the suit premises were being used for the purposes of running business for which it was let out and, as such, it was contended that none of the provisions of the Bombay Rent Act were breached.

7. The trial Court framed issues relevant to the pleadings with regard to creation of sub-tenancy and change of user of the premises for the purpose other than the for which it was let out. The issues were put to trial. The parties were permitted to lead oral as well as documentary evidence. The plaintiff No. 2, one Mr. Dattatraya Gokhale entered into the witness box on behalf, of the plaintiffs. In his evidence, he deposed that defendant No. 2, at the relevant time was carrying on business of photography in the suit premises under the name and style "Raghuvir Art Studio, Pune". He further deposed that the premises were not being used for the purpose for which it was let out. He further deposed record that bathroom in the building was meant for all the tenants of the building, however, in breach of the terms of tenancy, it was being used as dark room. The lease deed was produced on record; wherein it was mentioned that the premises was given on rent for running shorthand and typewriting classes and in that light it was sought to be proved through evidence that the user of the suit premises

has been changed.

8. The defendant No. 1 in defence entered into the witness box and deposed that in the part of the premises, after the death of his father i.e. original tenant, various business activities, such as, shorthand and typewriting classes and repairs of typewriters were being run in the suit premises. He further deposed that he was required to open photo studio in the suit premises in order to supplement his income, and as such, respondent No. 2 was taken as partner for running the photo studio, under the deed of partnership dated 26th September, 1976. The original deed of partnership was produced on record. The defendant No. 1 further deposed that defendant No. 2 had no tenancy rights in the suit premises. He further deposed that his investment in the business of photography was in the sum of Rs. 1,000/- only and that he was getting return between Rs. 507- to Rs. 100/- p.m. from the said partnership business. It was thus denied that the premises were sub-let in favour of defendant No. 2. In the cross-examination, defendant No. 1 had to admit that he did not work as photographer and did not have any knowledge about the business of photography and that defendant No. 2 alone knows about photography. He was also made to admit, that he did not know what sort of papers were require to be used for printing photographs. The defendant No. 2 also entered into the witness box in the capacity of partner of M7s Raghuvir Art Studio, Pune. He also admitted, to have entered into an agreement of partnership. He deposed that part of the premises was being used for running business of photography and part thereof was being used for conducting typewriting and shorthand classes.

9. With the aforesaid evidence on record, both the Courts below held that defendant No. 1 had unlawfully sublet the suit premises to defendant No. 2 for running photo studio in the name of defendant No. 3 for consideration and also found that defendant No. 1 was guilty of change of user of the suit premises. Consequently, the petitioner was held to be guilty of the breach of Section 13(1) (a) and (e) of the Bombay Rent Act. Thus the defendants suffered decree for eviction and possession.

SUBMISSIONS

10. The learned counsel appearing for the petitioner, firstly, contended that there being a partnership between the defendant Nos. 1 and 2 to run the photo studio under the name and style of defendant No. 3, the same could not be said to be an act of creation of sub-tenancy. He further tried to contend that even if it is assumed that he failed to prove the legal partnership or for that purpose any type of partnership arrangement with defendant No. 2 even then, no case can be said to have been made out by the plaintiffs against defendant No. 1, so as to prove that the possession of the suit premises was parted with, in favour of defendant No. 2. In his submission, all along defendant No. 1 was exercising the right of possession over the suit premises, as such, no subtenancy can be said to have been proved by the plaintiffs. So far as change of user of the premises is concerned, the learned counsel for the petitioner urged that the findings

recorded by the lower Appellate Court being based on the judgment of this Court in the case of Bright Brothers vs. Venkatla 1979 Mh.L.J. 894, can no longer be said to be good in view of subsequent judgment of the Apex Court, referred to hereinafter in detail. Consequently, the submission was that the findings based on the judgment of Bright Brothers need to be reversed.

THE ISSUES

11. In the aforesaid backdrop, two issues arise for my consideration ;

(1) Whether there has been a violation of the terms of tenancy by using the premises for the purpose other than for which it had been leased and whether the petitioner (tenant) has been guilty of committing breach of Section 13(1)(a) of the Bombay Rent Act?

(2) Whether the alleged sub-tenant was in exclusive possession of the part of the premises and whether the tenant had retained no control over that part of the premises and that the petitioner/defendant No. 1 has been guilty of committing breach of Section 13(l)(e) of the Bombay Rent Act?

CONSIDERATION Issue No. 1 : (change of user)

12. The first issue relates to the ground that tenant having changed the purpose of user of the suit premises has rendered himself liable for eviction u/s 13(1)(a) of the Bombay Rent Act. Both the Courts below concurrently found that the premises were predominantly and mainly used for some other commercial purpose and held that by change of user of the premises, the defendant No. 1 had committed breach of the provisions of Clause (o) of Section 108 of the Transfer of Property Act and, had rendered himself liable for eviction. It was further held that it was not at all necessary to prove whether by changing user of the premises, certain damages were caused to the premises and/or building. In other words, it was held that mere change of user was sufficient for eviction. It need not be destructive or permanently injurious to the premises or prejudicial to the interest of the landlord.

13. The learned, counsel for the petitioner contended that mere change of the purpose of user does not amount to breach of Clause (o) of Section 108 of the Transfer of Property Act so as to attract liability for eviction u/s 13(1)(a) of the Bombay Rent Act unless change is found to be destructive or injurious to the property or shown to be prejudicial to the interest of the landlord.

14. In order to support his contention, he relied upon the judgment of the Supreme Court in the case of Gurdial Batra Vs. Raj Kumar Jain, , wherein law laid down by this Court in the case of Dattatraya v. Gulabrao 1978 Mh.LJ. 545 was affirmed by the Supreme Court; wherein it was held that where the lease deed provided for business in plastic goods, change in the nature of the said business did not bring about change of user as contemplated u/s 108(c) of the Transfer of Property Act.

15. The learned counsel has also borrowed support from the subsequent judgment of the Apex Court in the case of *Kisan Dnyanu Mano v. Vithal Vishnu* , wherein the law laid down by the Apex Court in the case of *Mohan Lal Vs. Jai Bhagwan*, has been affirmed.

16. The learned counsel appearing for the plaintiffs-landlords relied upon the judgment of the Division Bench of this Court in the case of *Bright Brothers* (supra) and contended that this Court while interpreting Section 108(o) of the Transfer of Property Act held that the five categories of the prohibited acts under the second part of Clause (o) of Section 108, Transfer of Property Act are distinct in nature and independent of each other. The concluding words "or commit any other act which is destructive or permanently injurious thereto" in Clause (o) of Section 108, Transfer of Property Act have reference and governing or qualifying effect on the residuary prohibitory category just preceding the said words. The prohibited act of using the property for some other purpose than for which it was leased out, by itself will constitute breach of Clause (o) of Section 108 without being destructive or injurious thereto. The mere act of change of purpose of user even if it does not happen to be destructive or permanently injurious to the leased property would amount to breach of Clause (o) of Section 108 of Transfer of Property Act and actionable u/s 13(1)(a), Bombay Rent Act.

17. It is not in dispute from the narration of facts and the findings recorded by both the Courts below, that the suit premises were and are being continued to be used for the purposes of running business, even though, subsequent to the creation of tenancy the defendant No. 1 entered into some arrangement like alleged partnership for running business of photography. The Supreme Court in *Gurdial Batra Vs. Raj Kumar Jain*, has observed :

"6. Letting of a premises can broadly be for residential or commercial purpose. The restriction which is statutorily provided in Section 13(2)(ii)(b) of the Act is obviously one to protect the interest of the landlord and is intended to restrict the use of the landlord's premises taken by the tenant under lease. It is akin to the provision contained in Section 108(o) of the Transfer of Property Act dealing with the obligations of a lessee. That clause provides:

The lessee may use the property and its products, if any, as a person of ordinary prudence would use them if they were of his own; but he must not use or permit another to use the property for a purpose other than that for which it was leased....

A house let for residential purpose would not be available for being used as a shop even without structural alteration. The concept of injury to the premises which forms the foundation of Clause (o) is the main basis for providing Clause (o) in Section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in AIR 1929 108 (Privy Council) adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or

permanently injurious to the leased property 1977 K LT417. Similarly, the Bombay High Court has held that when the lease deed provided for user work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(o) of the Transfer of Property Act 1978 Mh.LJ 545.

1. The landlord parts with possession of the premises by giving a lease of the property to the tenant for a consideration. Ordinarily, as long as the interest of the landlord is not prejudiced, a small change in the user would not be actionable."

Similarly, in paragraph 7 of the judgment in the case of Mohan Lal v. Jai Bhagwan the Supreme Court has observed :

"7. Our attention was drawn to a decision of this Court in Maharaj Kishan Keshav v. Milkha Singh, Civil Appeal No. 1086 of 1964 decided on 10th of November, 1965. That was a decision under the East Punjab Urban Rent Restriction Act, 1949. There on the facts the Court found that selling petrol was an allied business of the workshop and as such it is a part of the business. The Court held that there is no evidence to show that in the trade a petrol pump is not regarded as a part of motor workshop business. The sale of petrol is an allied business and would not amount to conversion to a different business or change of user. There is nothing in the said decision which would give any assistance to the respondent in the case- The business purposes must be adjudged in the light of the purposes of the Rent Act in question which is to control the eviction of tenants therefrom. In the expanding concept of business now-a-days and the growing concept of departmental stores. We are of the opinion that it cannot be said that there was any change of user in the facts of this case which, would attract the mischief of the provisions of Section 13(2)(ii)(b) the Act. The building was rented for purpose of carrying on a business, using it for another business, it will not in any way impair the utility of damage the building and this business can be conveniently carried on in the said premises. There was no nuisance created."

It is clear from the above judgments of the Supreme Court that the law laid down by this Court in the case of Bright Brothers v. Venkatlal (supra) has undergone sea change.

18. In the case of Bright Brothers v. Venkatlal (supra), this Court while interpreting provisions of Section 108(o) of the Transfer of Property Act was of the view that five categories of the prohibited acts under the second part of Clause (o) are distinct in nature and independent of each other. Secondly, it was held that first four categories mentioned therein being self descriptive. The concluding words were intended to furnish identity of the fifth category of undescribed "any other act". Thirdly, it was noticed that all the five categories of these acts being separated by cases and disjunctive "or" restricting the application of the descriptive concluding wording to the last category and disconnecting it from the earlier other four categories. While dealing with and

interpreting this part of the section, the Division Bench came to the conclusion that the concluding portion of the Clause (o) was not applicable to the first four categories of the prohibited acts mentioned therein. In other words, it was applicable only to the fifth category alone. This view of the Division Bench of this Court was subsequently followed by this Court in *Kasturchand Panachand Doshi and Others Vs. Yeshwant Vinayak Sainkar and Another*, . The learned counsel appearing for the respondent Nos. 2 to 7 placed reliance on these two judgments of this Court,

19. The Apex Court in the case of *Gurdial Batra v. Raj Kumar Jain* (supra) while dealing with the above part of the submission, which was also made before it, held as under:

".....The concept of injury to the premises which forms the foundation of Clause (b) is the main basis for providing Clause (b) in Section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in AIR 1929 108 (Privy Council) adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property 1977 K LT 417. Similarly, the Bombay High Court has held that when the lease deed provided for user work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(o) of the Transfer of Property Act."

In view of the law laid down by the Apex Court in *Gurdial Batra v. Raj Kumar Jain* (supra), the judgment of this Court in the case of *Bright Brother and/or Kasturchand Panachand* (both cited supra) cannot be said to be a good law. Thus the findings recorded by the lower Appellate Court, that the premises were used for the purpose other than that for which it was let out, cannot stand to the scrutiny of law. In view of this, the findings recorded by the lower Appellate Court with regard to breach of Section 13(1)(a) of the Bombay Rent Act will have to be set aside. The plaintiff did not make out any case falling within the sweep of Section 108(o) of the Transfer of Property Act. Consequently, no evidence was led to the effect that the change of business was destructive of the purpose for which the premises was leased, the adverse findings on this issue recorded by the Courts below are thus set aside.

Issue No. 2 : (Sub-tenancy)

20. In order to meet the second attack, the tenant - defendant No. 1 has taken a bold stand that that defendant Nos. 1 and 2 were the partners in the business of photography. Both claimed to have entered into partnership to run photo studio in the part of the suit premises, under the name and style of defendant No. 3. In the wake of this bold stand taken by the defendants, the question which needs consideration is as to; whether the partnership has been established and, if established, whether it was a genuine and bona fide partnership and, whether

tenant had retained control over the part of the premises. In order to ascertain the legality of the partnership it is necessary to go into oral and documentary evidence. So far as documentary evidence is concerned, the petitioner tenant no doubt produced on record the original deed of partnership but failed to prove the same. Consequently, the contents thereof cannot be read in evidence. So far as accounts books are concerned, no doubt, an attempt was made to prove the same but the same were not proved for the reasons best known to the defendants. Therefore, even the accounts books of the business or of the firm cannot be relied upon. During the cross-examination of defendant No. 1, it was brought on record that he did not know anything about running photo studio. His investment in the business was only in the sum of Rs. 1,000/-, and as against this investment, he was getting Rs. 50/- to Rs. 100/- per month by way of return. It was also brought on record that every month partners take stock of the profit earned by them. However, no evidence on record was produced to show as to in what ratio the profit was being shared by the said defendants alleged to be the partners. Under these circumstances, there is absolutely no material, on record to establish any partnership much less genuine partnership between defendant Nos. 1 and 2. The defendant No. 1 claimed to have invested Rs. 1,000/- only. Nobody would admit any person as a partner only for the investment of Rs. 1,000/-. The premises and its availability for running business was the prime and basic consideration. As stated, no account books were produced to establish genuine partnership. No evidence is on record to show joint operation of business. Even partnership deed was not proved. Partnership deed has not been registered under the Indian Partnership Act. The defendant No. 1 has no knowledge of photography. He has no control over the said business. The fact that defendant No. 1 has admitted defendant No. 2 as his partner in the business, by itself is sufficient admission, on the part of defendant No. 1, that he has parted with possession in favour of defendant No. 2. No evidence is on record to show that defendant No. 1 has been exercising control over the part of the suit premises. On the contrary, ample circumstances and sufficient evidence are on record to prove that the parting of possession was for the consideration. The defendant No. 1 himself has admitted that he is getting Rs. 50/- to Rs. 100/- per month from the business of photography. As a matter of fact, the investment of Rs. 1,000/- cannot fetch or yield income from Rs. 50/- to Rs. 100/- per month i.e. between Rs. 600/- to Rs. 1,200/- per annum. Only by way of rent one can get such a huge return, not out of small investment of Rs. 1,000/-. Therefore, parting of possession of the suit premises for consideration is clearly established.

21. In the light of the above finding, if one turns to law laid down by the Apex Court in the case of Shama Prasad Raje v. Ganpatrao, AIR 2000 SCW 3493, it is obligatory on the part of the landlord to prove that the tenant has parted with possession of the tenanted premises and such parting of possession must be backed by for some consideration. In the instant case, it has been proved that the possession is with defendant No. 2. The admission given by defendant No. 1

that defendant No. 2 is his partner in the business run under the name and style of respondent No. 3, itself goes a long way to establish the case pleaded by the plaintiffs. Assuming that there was partnership between defendant Nos. 1 and 2 brought into existence of on 23 September, 1976 the terms and conditions thereof cannot be read for want of proof of document. Assuming that the contents thereof can be read in evidence, even then as already found, no genuine partnership could be said to have been established. It was brought into existence only to defeat the provisions of rent legislation. This Court in case of Gangaram v. Ashok Kumar 1969 Mh.L.J. 43 has held as under :

".....that the question whether relationship between the petitioners amount to a partnership or not could not be decided merely on the basis of a deed which they had filed and the Court is entitled to examine all the incidents of the relationship between the parties as shown by the written agreement together with the surrounded circumstances at the time when the contract was entered into, conduct of the parties as well as other facts that may be relevant, such for instance, as the right to control the property, the manner in which the accounts of the business are kept, the right to receive profits and the liability to share the losses and from these deduce the real intention of the parties. Existence of any written or verbal agreement, between the parties, conduct of the parties towards one another, the mode in which they have dealt with one another, the mode in which each has with the knowledge of the other dealt with other people, are all Indicia which may help the Court in finding whether partnership does or does not exist. The Court must consider all the facts and circumstances of the cases and draw an inference from them as a whole without attributing undue weight to any one of them. It will have to be found in each case whether a plea of partnership which is put forth as a defence to an application by the landlord under Clause 13(3)(iii) of the Rent Control Order is intended to be a mere cloak to cover up the use of the premises by a person other than the tenant or whether the tenant is himself carrying on the partnership business. Thus, the failure to produce account books, the conduct of the tenant in not taking part in the business which was carried on only in the name of the stranger and the earlier conduct in subletting the premises for a period of 5 years to another person indicated that the document of partnership was merely a cloak brought into being in order to defeat the application of the landlord under Clause 13(3)(iii) of the Rent Control Order. (Order of the Rent Control authorities holding that the tenant had sublet the premises upheld)."

The above test laid down by this Court, if applied to the facts of the present case at hand, one has to reach to the conclusion that defendant No. 1 has failed to establish legal and genuine partnership between defendant Nos. 1 and 2. The concurrent findings of fact recorded by both the Courts below are correct. The findings are based on proper appreciation of evidence. The lower Appellate Court being final fact finding Court, the findings have to be respected. The detailed reasons are not necessary when the Appellate Court concurs with the trial Court. The lower Appellate Court, which is a final fact finding Court, was perfectly

justified in confirming the judgment and decree passed by the trial Court; whereby the suit was decreed on merits. The lower Appellate Court has carefully scrutinised the evidence in the light of the law laid down by the Apex Court. In this view of the matter, I have no hesitation to reach to the conclusion that the plaintiffs have proved that defendant No. 1 has parted with possession of the suit premises for consideration in favour of defendant No. 2, for running photo studio in the name and style of defendant No. 3 and, had retained no control over the part of the suit premises.

22 Under the above circumstances, petition is partly allowed. The order of the lower Appellate Court is maintained so far as decree for eviction based on the ground of creation of sub-tenancy and parting of possession by defendant No. 1 in favour of defendant No. 2 is concerned; whereas the decree passed on the ground of change of user is concerned, the same is set aside.

23. Accordingly, petition is partly allowed. Rule is partly made absolute with no order as to costs.