
(1993) 02 GUJ CK 0040
In the Gujarat High Court

Thakorlal Mohanlal Tankaria and Another	APPELLANT
Vs	
Saraswatiben	RESPONDENT

Date of Decision : 18-02-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15(i),
29(2), 29(2)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1993) 2 GLR 1047

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—This Revision Application is filed by the original-defendants of H.R.P. Suit No. 2111 of 1976 of the Small Causes Court at Ahmedabad. The Suit was filed on various grounds for obtaining vacant possession of the premises consisting of a Dehla portion of a House bearing M.C. No. 1635 situated at Raipur, Kapadiwad, Soni's Khancha, Ahmedabad. The principal ground seems to be that of sub-letting and along with that the other grounds pressed in service were personal bona fide requirement. So far as the latter ground is concerned, from the plaint itself it could be gathered that there is no substance in it. The only reason advanced is that if the premises are vacated, the landlady - plaintiff can keep her car at the place where the suit premises are situated. In other words, the personal bona fide requirement is in respect of parking of vehicle.

2. The learned trial Judge, by his judgment dated 31-7-1980 was pleased to pass a decree of eviction. The defendant - tenant carried the matter by way of Civil Appeal No. 381 of 1980 before the Appellate Bench of the Small Causes Court at Ahmedabad and agreeing with the learned trial Judge, the learned Appellate Judges by their Judgment dated 23-1-1986 dismissed the appeal with costs.

3. The learned Advocate Mr. P.B. Majmudar appearing for Miss Valikarimwala on behalf of the landlady, the original plaintiff-present respondent had a preliminary objection in the sense that this being a Revision Application, if there is concurrent

finding of facts by two Courts, below, This Court should not enter into the factual controversy and should not upset the finding given by the two Courts below.

4. However, as it will be seen presently, it is not the factual point but the law that has been applied to the facts that has been brought on record and if on examination it is found that incorrect law has been applied, then, possibly perhaps, in its revisional jurisdiction, This Court can interfere u/s 115 of the CPC and much more so, when the Revision is u/s 29(2) of the Bombay Rent Act, the Court can certainly go into it. Applicant No. 1 along with two others, had entered into a partnership in the year 1957 as per Exh. 48. This partnership came to be dissolved in the year 1972 as per Exh. 49. The two persons taken in partnership by applicant No. 1, had as one of the partners, the present applicant No. 2. The position that emerges as per Exh. 49 whereby dissolution came to be effected, is that applicant No. 2 came to be dealt with the entire running business with stock, goodwill, name of the firm, etc., from the year 1972.

5. The question, therefore, is whether this could be a sub-letting. At first blush, it might appear to be so, provided the tenancy rights had remained all throughout with the tenant, which is applicant No. 1. So far as the details of the tenancy is concerned, it may briefly be mentioned that applicant No. 1 has been the tenant of the premises since 1949. But that should not detain us.

6. If Exh. 48 were to be interpreted that applicant No. 1 had brought his tenancy rights into a partnership, then there could be a question of his having lost his tenancy rights in favour of the partnership and therefore, a case of sub-letting can be based thereon. The plaintiff has not done it and had she done it, she would have failed. The reason is that the act of sub-letting would be prior to the year 1959, in which year, an ordinance came to be promulgated which subsequently, came to be given the shape of an Act and accordingly, all transactions of subletting prior to 1959 came to be regularised.

7. The case pleaded specifically in the plaint Exh. 1, is to the effect that the act of sub-letting has occurred after the year 1970 when the landlady became the owner of the suit premises. To That extent, the pleading is correct and it is borne out from document Exh. 49, the deed of dissolution, produced by the defendant-applicants themselves.

8. However, when the allegation is that defendant No. 1 has assigned his tenancy rights to defendant No. 2, i.e., applicant No. 2, it would necessarily mean that during the subsistence of the partnership, the tenancy rights remained with defendant No. 1 and there was no transfer or assignment thereof in favour of the partnership. At first sight, therefore, it would appear that the subtenancy was created or assignment took place after the year 1959 and as such, it will not be protected by the said ordinance which subsequently turned into an Act, as a result of which Section 15 of the Rent Act came to be amended.

9. However, the difficulty faced by the landlady is that there is a proviso to Section 15(i) of the Rent Act under which Notification has been issued by the

State Government and in Clause 2 of the Schedule to the Notification, it has been specifically provided that if there is a transfer or assignment of a running business with stock in trade and goodwill and as an incident to it, if tenancy rights are given then that is permitted.

10. Now, if we turn to the plaint again, it is clearly mentioned in para 6 that defendant No. 1 has handed over the running business to defendant No. 2 and the portion which was with defendant No. 1, as a tenant, has also been assigned by defendant No. 1 to defendant No. 2 exclusively. In para 7 of the plaint, it has been further stated that this act is wholly unauthorised on the part of defendant No. 1. When this activity, which is not in dispute at all so far as the defendants are concerned, is viewed in light of the said Notification u/s 15 of the Rent Act and evaluated in view of the recitals in Exh. 49, the dissolution of the year 1972, clearly it would fall under the exception. Learned Jayaprakash Shamsundar Mandare Vs. Laxminarayan Mulidhar Mundade and Others, where it has been clearly laid down and I fully agree with at that the burden of proof would be on the person who pleads exception. However, in the matter before the learned Judges of the Bombay High Court, the position was not as clear as is to be found in the instant case more particularly in the plaint and dissolution deed Exh. 49. There is therefore, no question of any burden of proof left to be discharged on either side. Same is the position with regard to 1973 RCJ 247 Thankker Keshavlal Mohanlal v. Parekh Amratlal Hernial where even the dissolution deed was not produced and in absence of any material whatsoever, sort of last ditch effort was made before the Supreme Court on behalf of the tenant to bring the case within the exception by virtue of the Notification u/s 15 of the Bombay Rent Act. Very rightly, the attempt failed. As against that, in the instant case, the reading of plaint and Exh. 49 dissolution deed of 1972 would make clear that the material is very much on record and therefore, the property thereof would go to the tenant.

11. Incidentally, it may be mentioned that in the written statement Exh. 11 it is averred that defendant No. 2 was working in the partnership firm as a servant right from its inception in the year 1951 and in the year 1957, by reconstituting the partnership he was admitted as a partner of the newly constituted firm. All through out, according to the defendants, the tenancy was that of the partnership and not that of that of the individuals connected with the firm either as a partner or in any other capacity. Moreover, as per Exh. 48, partnership deed of the year 1957, the firm continued to pay the rent, as usual. On its dissolution, therefore, if one of the partners gets the business, it would not be an act of sub-letting.

12. However, the Courts below have proceeded on the basis that the tenancy was never that of the partnership firm, but partnership was none-the-less genuine and the effect of its dissolution, as disclosed by the deed Exh. 49, has been considered by the Courts below. To that, the reply of learned Advocate Mr. Shelat is that if the case, as pleaded in the written statement, is accepted, it being an act of sub-tenancy prior to the years 1959, it would have a protected sub-

tenancy. If the case was accepted, no doubt, the situation would have emerged as Mr. Shelat has submitted. However, the trial Court has not so done and hence the situation does not arise any more for This Court to enter into that part.

12A. Learned Advocate Mr. Majmudar on behalf of the respondent-landlady submitted that in order to get the benefit of the Notification, the defendants ought to have established that there was a stock in trade in fact, transferred and in that regard, according to Mr. Majmudar, there is no evidence whatsoever. To this answer of learned Advocate Mr. Shelat is reference to Exh. 49 and in my opinion, further to the plaint itself, when there is a mention of defendant No. 2 continuing the business in that very name and as such, this objection will not survive.

13. Once the aforesaid aspect in light of the averments made in the plaint and Exh. 49, dissolution deed of the year 1972, is considered side by side with the said Notification u/s 15(1) proviso, it is quite clear that the set of facts, as disclosed by the evidence, has been fully misled by the Courts below and that has resulted into wrong application of law. This error is required to be corrected in exercise, of the revisional jurisdiction of This Court and accordingly, it is corrected.

14. The Revision Application is therefore, allowed. The judgment and decree passed by the Courts below are set aside. The suit is dismissed. Under the circumstances, the parties are left to bear their own costs. Rule is made absolute.