IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 163 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PANCHAL RATILAL K

Versus

HEIRS OF U V JADAV- RAJESHBHAI U JADAV

Appearance:

MR MANISH R BHATT for Petitioners

MR DU SHAH for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 30/06/2000

C.A.V. JUDGEMENT

This is tenant's revision under section 29(2) of the Bombay Rent Act (for short `the Act') against the judgement and decree of the lower appellate court reversing the judgement and decree of the trial court and decreeing the suit for possession of the suit premises in favour of the landlord respondent. The brief facts giving rise to this revision are as under:-

2. The disputed accommodation was let out by the

deceased plaintiff to the defendant No. 1 on monthly rent of Rs. 10/-. Rent for five months fell due from the defendant. It was alleged that the defendant No. 1 was not residing in the suit premises since last three years and has not been using the suit premises since last two and half years continuously and it remained closed during this period. It was also alleged that the defendant No. 1 has sub-let the suit premises to the defendant No. 2. It was also pleaded that the defendant No. 1 is residing in bungalow No. 11 at Mill society for the last three years and is owner of the said house. Notice was served on the defendants. They did not give any reply. It was also alleged that the plaintiff needed the accommodation reasonably and bona fide for his family members. On these grounds suit for eviction was filed.

3. The defendants resisted the suit on the ground that the plaintiff is owner of another house in Limbdi hence his need for the disputed accommodation is neither bona fide nor reasonable. Arrears of rent for five months were admitted by the defendant No. 1. It was also denied by them that the suit premises remained closed for two and half years or it was not used for three years before the institution of the suit. It was the case of the defendants that the premises was occupied by their mother Takhuben from the plaintiff since last 15 years. It was denied that the defendant No. 1 is the tenant of the suit premises. The allegation of sub-letting against the defendant No. 1 was also denied and it was pleaded that the premises was not sub-let to the defendant No. 2. On the other hand it was pleaded that the defendants are real brothers and they were residing with their mother Takhuben. It was also pleaded that total number of members in the family of the defendants is 17 and they are residing in the suit premises hence they will suffer greater inconvenience in case decree for eviction is passed against them. It is admitted that the defendant No. 1 and his family members are residing in bungalow No. 11 at Mill society. It is further pleaded that it was jointly constructed by them but the disputed premises is occupied by the defendant No. 2 and his family members.

4. The trial court found that the plaintiff failed to establish that the defendants were not using the suit premises for the last two and a half years. It further found that the plaintiff does not require the said accommodation bona fide and reasonably for his use. With these findings, the suit for eviction was dismissed. Since there was no dispute regarding arrears of rent, decree for arrears of rent was passed by the trial court.

5. An appeal was preferred against the judgement and decree which was allowed by the appellate court. Hence this revision.

6. The learned counsel for the revisionist contended that since the suit was dismissed by the trial court considering the entire evidence on record, the lower appellate court was not justified in disturbing and setting aside the said decree unless some additional evidence was placed before the lower appellate court. I am not impressed with this contention. It was not necessary for the lower appellate court to accept or call for additional evidence before setting aside the judgement and decree of the trial court. On the other hand, the lower appellate court was justified in examining the evidence on record and if from examination of evidence, the lower appellate court was of the view that the material evidence was not discussed and judgement was given in a casual manner it was justified in setting aside the judgement and decree of the trial court. Further on examining the judgement of the lower appellate court, I find that it was justified in observing that material points were not considered and decided by the trial court. The lower appellate court observed that the trial court did not deem it proper to determine as to who was the real tenant in the suit premises. This observation is perfectly justified. In the written statement it is stated that the defendant Nos. 1 was not the tenant but the defendants being real brothers were residing with their mother and their mother was tenant of the plaintiff since last 15 years. The plaintiff on the other hand alleged that the suit premises was let out to the defendant No. 1 on monthly rent of Rs. 10/-. Consequently, one of the material points for determination was whether the defendant No. 1 was the tenant or his mother. This point has not been answered by the trial court. Admittedly, there is no rent note between the parties. There is no satisfactory evidence from the side of the defendants to show that their mother was the tenant. No rent receipt was ever issued in favour of or in the name of the mother of the defendants. The mother of the defendants was alive when the suit was pending. She did not enter the witness box to state that she obtained the suit premises on rent from the plaintiff. As against this, the plaintiff has stated that the suit premises was let out to the defendant No. 1. The denial of the defendant No. 1, in these circumstances, was rightly disbelieved by the lower appellate court. The best witness would have been the mother of the defendants but she being alive was not

examined, hence adverse inference can safely be drawn that if she would have been examined, she would not have supported the defendants. The documentary evidence also indicates that the defendant No. 1 was the tenant. In the notice Exh. 20 addressed to the defendant No. 1, it was mentioned that he was the tenant of the suit premises. Another notice Exh. 22 was sent to the defendant No. 1. But these notices remained unreplied. The defendant No. 1 should have, on receipt of these notices, replied immediately asserting that he was not the tenant but his mother was the tenant. Silence of the defendant No. 1 at the earliest opportunity is therefore a circumstance which goes heavily against him.

7. Exh. 18 is a rent receipt dated 7.11.1980. In this the defendant No. 1 has been shown as tenant. In Exh. 30 another rent receipt dated 30.4.1982 the defendant No. 1 is shown as tenant. Exh. 30 is the counterfoil of rent receipt book wherein the signature of the defendant No. 1 as tenant has been obtained on Exhs. 31 and 32. If the defendant No. 1 was not the tenant, he should not have signed the counterfoil as the tenant nor he should have accepted the rent receipts showing him as tenant. Exh. 26 is account book of rent maintained by the plaintiff where also the defendant No. 1 is shown as tenant. There was, thus, enough evidence oral as well as documentary from the side of the plaintiff to establish that the defendant No. 1 was the tenant. The finding of the lower appellate court on this point, therefore, cannot be disturbed. I do not agree with the submission of the learned counsel for the revisionist that the mother of the defendants was the tenant. There can be no presumption that simply because mother was alive she would have taken the premises on rent. This presumption is not available in law. On the other hand there is evidence to the contrary that the mother of the defendants was not the tenant. As such it is established that the defendant No. 1 alone was the tenant of the plaintiff in the suit premises.

8. Since only five months rent was due from the defendant No. 1, decree for eviction cannot be passed on the ground of non-payment of rent.

9. The next point to be considered is bona fide and reasonable requirement of the accommodation by the plaintiff landlord. On this point the lower appellate court found that no doubt, the plaintiff has got another house in Limbdi but it also considered the question whether the requirement of the landlord is reasonable and bona fide. The lower appellate court, from the evidence

on record, found that there is nothing to show that the landlord has got any other vacant building in his possession. Simply because he is owner of another building is not enough to say that the requirement of the landlord is neither reasonable nor bona fide. The lower appellate court considered the accommodation in possession of the plaintiff. It comprises of two rooms and a osari. Family of the landlord comprises of himself, his wife, three sons, one daughter-in-law and a grand-child. His one son is marred. Naturally, when such is the strength of the family of the landlord, he would require one more room separately for him. The evidence also shows that his one son runs a shop in a portion of the osari of the house. Thus, the evidence clearly shows that the landlord has no sufficient accommodation in his possession to accommodate all of his family members. The requirement of the landlord, in these circumstances, was rightly held by the lower appellate court to be reasonable and bona fide.

10. On the question of comparative hardship the lower appellate court has observed from the evidence on record that the defendant No. 1 has acquired a suitable residential accommodation for himself and he has shifted to the new bungalow along with his family members. The question of greater hardship to the defendant No. 1 therefore does not arise. The defendant No. 2 could not be proved to be the tenant or joint tenant of the plaintiff. Since the mother of the defendants was not found to be the tenant, it cannot be held that defendants would become statutory tenants after the death of their mother. Consequently, the hardship of the defendant No. 2 is not to be considered. As such, the lower appellate court was justified in holding that greater hardship would result to the plaintiff landlord in case the decree for eviction is refused. This finding also requires no interference.

11 On the point of non-user of suit accommodation, the appellate court found that the defendant No. 1 has abandoned the suit premises and has transferred its possession to the defendant No. 2. As such, it cannot be said that the defendant No. 1 is using the suit premises. It is clear stand of the defendant No. 2 that he and his family members are residing in the suit premises. It is also his stand that the defendant No. 1 along with his family has shifted to the new residential accommodation in Mill society. Obviously, there is evidence that the defendant No. 1 has not used the suit accommodation continuously for more than six months before the institution of the suit and as such the lower

appellate court was justified in holding that the defendant No. 1 did not use the suit accommodation since last two and half years.

12 The lower appellate court, from the evidence on record, also came to the conclusion that the defendant No. 1 had acquired alternative suitable accommodation for himself and his family in Mill society. It has come in evidence that he has constructed a new house in Mill society as bungalow No. 11 and has shifted along with his family in that house. His brother defendant No. 2 along with his family members is residing in the suit premises. Consequently, it is established that the defendant No. 1 has acquired a suitable accommodation for the purpose of himself and his family members. Consequently, this is also a ground for decree for eviction.

13. So far as the allegation of sub-letting is concerned, the lower appellate court has rightly observed that the trial court had made totally perverse and erroneous approach while negativing the plaintiff's case of transfer or assignment in any manner of the suit premises by the defendant No. 1 to the defendant No. 2. It was justified in observing that the trial court has overlooked the material evidence oral as well as documentary. Both the defendants have admitted that they got separate ration cards for their families. This indicates that both used to reside separately. If they were residing together as members of the same family, there would have been only one ration card. Initially, they might have been residing together, namely, the defendant No. 1 and the defendant No. 2 but subsequently the defendant No. 1 had shifted along with his family members to the new house in Mill society since two and half years before the institution of the suit. This follows that he had no control or possession over the suit premises. It is also admitted in evidence that after the defendant No. 1 shifted to the new house in Mill society, the defendant No. 2 along with his family members is residing in the suit accommodation. Thus transfer of exclusive possession by the defendant No. 1 in favour of defendant No. 2 is established. The lower appellate court rightly found from the evidence on record that the two defendants were not residing together. From Exh. 42 and Exh. 43 the lower appellate court found that the defendants used to reside separately in separate premises. Exh. 27 is the copy of house tax register of Limbdi municipality which shows that the defendant No. 2 is a tenant in the building of one Jayantilal Valjibhai Mistry and the portion consisted of a room, kitchen,

osari etc. Exh. 47 shows that previously defendant No. 2 was residing as a tenant in the building of one Jayantilal and that he did not reside with the defendant No. 1 or with his mother right from the beginning in the suit accommodation. The defendant No. 2 had to admit in evidence that when the defendant No. 1 was residing in the suit premises he was residing in the building of Jayantilal and that he had shifted his residence to the suit premises after the defendant No. 1 has shifted his residence to his new bungalow in Mill society. From his admission it is clear that the defendant No. 2 was not initially residing in the suit premises along with his mother or his brother defendant No. 1. On the other had, he occupied the disputed accommodation only after the defendant No. 1 shifted to his new house in Mill society along with his family members. There is, thus, clear and cogent evidence that the defendant No. 1 had transferred or assigned exclusive possession of the suit premises to the defendant No. 2 who was never tenant or joint tenant along with the defendant No. 1. As such, the allegation of transfer or assignment of possession otherwise was established by the landlord and this was also a ground on which the decree for eviction could be passed.

14 In the result, I find that the lower appellate court was justified in reversing the judgement and decree of the trial court. No illegality is found in the judgement and decree of the lower appellate court. The revision has therefore no merit and is found fail. The revision is accordingly dismissed with no order as to costs.

(D.C. SRIVASTAVA, J)
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