SUPREME COURT OF INDIA

V.Sumatiben Maganlal Manani

Vs.

Uttamchand Kashiprasad Shah

C.A.No.6685 of 1999

(Aftab Alam and R.M.Lodha,JJ.,)

04.07.2011

JUDGMENT

Aftab Alam,J.,

1. This appeal at the instance of the landlady is directed against the judgment and order dated July 23, 1999 passed by a learned single judge of the Gujarat High Court in Civil Revision Application No.1692/1998. By the impugned order, the High Court allowed the revision application filed by defendant no.1, the tenant (respondent no.1 before this Court), set aside the judgments and orders passed by the trial judge and a division bench of the Small Causes Court and dismissed the appellant's application claiming eviction of defendant No.1 from the suit premises, besides arrears of rent.

2. The trial judge had allowed the appellant's application and granted a decree of eviction in her favour on the ground that the suit premises had not been used by the tenant, without reasonable cause, for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit. In appeal against the judgment of the trial judge preferred by defendant no. 1 and the cross-objection filed by the plaintiff- appellant, the division bench of the Small Causes Court not only affirmed the finding of the trial court on non-user of the suit premises for a period of six months preceding the filing of the suit but also held the tenant liable for eviction on the ground that he had inducted in the suit premises defendant no.2 as a sub-tenant. In the revision filed by defendant no.1, however, the High Court held that both the findings arrived at by the trial court and the appeal court were bad and erroneous. It, accordingly, set aside the decree of eviction passed by the trial court and affirmed by the appeal court against defendant no.1 and dismissed the suit of the appellant-plaintiff.

3. The plaintiff-appellant is the owner of bungalow No.6 situated in Pathik Society, Naranpura, Ahmedabad. A part of the property, being the middle garage, bearing M.C. No.145-6-1, and F.P. No.11-11-A-6-1 was let out to defendant no.1 on June 1, 1974 for carrying on grocery business on a monthly rent of Rs.100/- plus municipal taxes, education cess etc. On June 9, 1977, a notice (Exh.68) was given to defendant No.1 on behalf of the

appellant stating that he was in default in payment of the monthly rent and the demised shop was not in use since one year prior to the date of the notice. He was, accordingly, asked to vacate the shop and hand over its possession to the plaintiff. The notice did not have the desired result and, consequently, on July 18, 1977, the appellant filed the suit (H.R.P. Suit No.2866/1977) seeking a decree of eviction and for payment of arrears of rent and mesne profits against defendant no.1 on grounds of default in payment of rent, bonafide personal need and non-user of the suit shop by defendant no.1, without any reasonable cause, for a period of six months immediately preceding the filing of the suit. It was after the filing of the suit but before the summons was served on defendant no.1 that, he gave his reply (Exh.67) to the plaintiff's notice on August 23, 1977. In the reply, he did not expressly controvert the allegation that the suit premises were not in use since one year before the date of the notice.

4. Later on, after the service of summons of the suit, defendant no.1 filed a written statement controverting all the allegations made by the plaintiff in the plaint. He denied any default on his part in payment of rent and also denied that the plaintiff-appellant was in bonafide personal need of the suit shop. He also denied the allegation of non-user and asserted that he carried on his business from the suit shop. Here, it may be noted that, in the plaint as it was originally filed, there was no allegation of any subletting of the shop by defendant no.1 but during the pendency of the suit, the plaintiff made an application stating that defendant no.1 had acquired a shop in Sardar Patel Colony, where he carried on his grocery business under the name and style of "Mahavir Provision Stores". He had acquired, yet another shop in Chandlodia area. The suit shop that was not in use by him was sublet by him to one Kishanchand Chandansingh Rao who was carrying on his milk business under the name and style of "Chandrika Dudh Ghar" in the shop adjoining the suit shop. Defendant no.1 was realising rental of the plaintiff's shop from him. After being inducted in the suit shop, the sub-tenant was using it for carrying on his business and was keeping his articles there. The application seeking amendment in the plaint was allowed by the trial judge by order dated December 11, 1981, following which necessary amendments were carried out in the original plaint and the aforementioned Kishanchand Chandansingh Rao was impleaded in the suit as defendant no.2. On notice being issued, defendant no.2 filed a written statement denying the allegation of being inducted in the suit shop as a sub-tenant and stating that he was dragged in the suit unnecessarily only with a view to harass him. Defendant no.1 filed additional written statement, denying the allegation that he had inducted defendant no.2 in the suit shop as sub-tenant or that he was realising any rent from him.

5. On the basis of the pleadings of the parties, the trial judge framed a large number of issues of which issue numbers (3), (4) and (4)(A) are of relevance for the present. Those are as under:

> "(3) Whether the plaintiff proves that the defendant has acquired a suitable alternative accommodation as alleged? "4) Whether the defendant keeps the suit premises closed and does not use for more than six months prior to the suit as alleged?
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> "(4)(A) Whether the plaintiff proves that defendant No.1 has sublet, assigned or transferred the suit premises to the defendant No.2 and is profiteering thereby?"

6. On issue No.3, the trial judge gave a finding in the negative. On issue no.(4)(A) he held that though there appeared some substance in the plaintiff's case that the suit premises were in the use and occupation of defendant no.2, there was no evidence that it was in his exclusive possession and that he paid some consideration or any monthly rent to defendant no.1 for being inducted in the suit premises and, hence, the plea of subletting could not be a ground for eviction. On issue No.(4), however, he held in favour of the plaintiff and found that defendant no.1 had kept the suit premises closed, without any reasonable cause for more than six months preceding the date of the filing of the suit. It, accordingly, gave a decree of eviction against defendant No.1 on that basis.

7. Against the judgment and decree passed by the trial judge, defendant no.1 preferred an appeal before the division bench of the Small Causes Court. The appellant-plaintiff too filed her cross-objections. The appellate court examined the evidences adduced by the two sides in support of their respective cases with great care and thoroughness and it is to the appellate order that we propose to refer here in some detail. The appellate court noted that the ground of subletting was raised on behalf of the plaintiff at a later stage through an amendment in the plaint. It referred to the evidence of Maganbhai Rambhai Manani, the husband and power of attorney holder of the plaintiff who was examined at Exh. 101 and who fully supported the plaintiff's case in all particulars. It also referred to the evidence of defendant no. 1 at Exh.344. Defendant no. 1 denied all the allegations made in the plaint, including the allegation of subletting. He maintained that he was carrying on his business from the suit shop through an employee, Damodar. The appellate court found that the plaintiff's case of subletting of the shop by defendant no.1 to defendant no.2 was greatly supported by the report prepared by the Court Commissioner who was appointed in another suit being H.R.P. Suit No.3291/81 and who visited the suit premises on September 22, 1981. The Court Commissioner did not find there any grocery items but he found lying in the suit shop six empty milk cans and some glass show-cases containing small card-board boxes used for packaging sweets, bearing the name "Chandrika Dudh Ghar". In the loft of the shop there were five more milk cans and some 150 to 250 empty sweet boxes were also lying there. Interestingly, the Court Commissioner also found there certain books of accounts but before he could examine those books of accounts the inspecting party was attacked by four or five people coming from the adjoining shop of defendant no.2. The intruders assaulted Maganbhai Manani and disrupted the inspection being held by the Court Commissioner. The inspection, thus, came to an abrupt end.

8. In regard to the incident Maganbhai, the husband and power of attorney holder of the plaintiff who had faced the main brunt of the assault, filed a criminal complaint against Kishanchand, defendant no.2. It is admitted that in the criminal case, Kishanchand was sentenced by the Metropolitan Magistrate to undergo imprisonment for a certain period. Against the judgment and order passed by the Magistrate, he preferred an appeal before the Sessions Court. In the appeal his conviction was maintained though the sentence was reduced to imprisonment till the rising of the court. Against the order passed by the Sessions Court, Kishanchand did not prefer any revision before the High Court and the order of conviction, thus, attained finality. In those circumstances there is no reason to doubt that the inspection by the Court Commissioner was obstructed at the instance of Kishanchand, defendant no.2

and the persons who came to the suit shop, the site of inspection, and assaulted Maganbhai, had come at his behest.

9. On behalf of defendant no.1 a rather lame plea was taken to try to explain away the findings of the Court Commissioner. It was stated on his behalf that the marriage of his nephew Ashokbhai was to take place in August or September, 1981 and he had given an order for sweets to defendant No.2. It was put to the plaintiff's witness Maganbhai Rambhai Manani that the sweet boxes found at the suit premises by the Court Commissioner in course of his visit there on September 22, 1981 would be bearing the inscription, "On the marriage of Ashok". The witness, of course, denied the suggestion. But the defendant did not stop there. He, later on, filed another suit being H.R.P. Suit No.70/83 in which a Court Commissioner was appointed who visited the suit premises on February 24, 1983. The Court Commissioner conveniently found at the suit premises sweet boxes with the inscription "At the occasion of the marriage of nephew Shri Ashok Kumar". The appellate court rightly rejected the explanation furnished by defendant no.1 relying on the report of the Court Commissioner observing that there should be no reason for empty sweet boxes to be lying at the shop after two years of the marriage. But, we see something more in the conduct of defendant no.1. He not only fabricated evidence by later on keeping in the suit shop the sweet boxes with the inscription about his nephew's wedding but also abused the process of the court for his purpose by filing a separate suit and getting a Court Commissioner appointed in that suit for the discovery of the fake sweet boxes.

10. On a detailed consideration of the materials on record, the appellate court came to find and hold that the suit premises were in fact in the use and occupation of defendant no.2 and in the facts of the case it was not necessary for the landlady to prove the monetary consideration between the tenant and the sub-tenant. In support of the view taken by it, the appellate court relied upon a decision of this Court in Bharat Sales Limited v. Life Insurance Corporation of India, AIR 1998 SC 1240 and in paragraph 38 of the judgment observed as follows:-

"38. In view of our earlier discussion and even in view of the finding of the learned trial Judge, it can be safely said that defendant No.2 is found in use and occupation of the suit premises. In that case, according to our view, it is not necessary for the landlord to prove the monetary consideration by sub-tenant to the tenant. We are also of the opinion that in case of subletting or in case of illegal transfer, such consideration can be presumed. In this connection, our attention is drawn by Mr. Pandya, learned advocate who appears on behalf of the appellant, to a decision of M/s. Bharat Sales Limited v. Life Insurance Corporation of India, reported in A.I.R. 1998, Supreme Court, page-1240. In this decision, it has been observed by Their Lordships that:

".. To prove subletting production of affirmative evidence showing payment of monetary consideration by sub-tenant to the tenant is not necessary. Inference as to subletting can be drawn from proof of delivery of exclusive possession of the premises by tenant to sub-tenant. Sub-tenancy or subletting comes into existence when tenant gives up possession of the tenanted accommodation wholly or in part and

> puts another person in exclusive possession thereof. This arrangement comes about mutual agreement or understanding between the tenant and person to whom possession is so delivered. In this process, landlord is kept out of the scene. Rather scene is enacted behind the back of the landlord, concealing overact and transferring possession to a person who is utter stranger to the landlord...."

11. Coming to the issue of non-user of the suit shop for the purpose it was let out, the appellate court noted that according to the plaintiff the suit premises were rented out to defendant no.1 in June, 1974 for grocery business. But the business of grocery evidently did not succeed and since a few months after it was taken on rent, the shop was kept closed. Then, in the amendment petition filed on behalf of the plaintiff, it was expressly alleged that defendant no.1 was carrying on his grocery business under the name and style of "Mahavir Provision Stores" from another shop in Sardar Patel Colony and later on he had set up yet another shop in Chandlodia area and the suit premises were sublet to defendant no.2.

12. Maganbhai Manani, the husband and the power of attorney holder of the plaintiff in his deposition before the court fully supported the case of the plaintiff on the question of non-user as well. Apart from the evidence of the plaintiff, there were two sets of photographs, one taken on January 4, 1977 and the other on January 3, 1981 in which the suit shop appeared closed. The photographs taken on January 4, 1977, at exhibits 301 to 304, were formally proved by one Mr. Narendrabhai Madhavlal Gajjar at (Exh.300) who is a professional photographer and has a shop under the name and style of Gajjar Studio. He stated before the court that he had taken the photographs on the instructions of the husband of the landlady on January 4, 1977 at about 10 to 11 in the morning and had issued the bill, Exh.201. The other set of photographs, dated January 3, 1981, were taken by Vinodbhai Boria, who is also a professional photographer. In regard to the two sets of photographs the appellate court rightly said that those would, at best, show that the shop was closed on the dates on which the photographs were taken. The photographs, therefore, could not form conclusive evidence of non-user of the shop over a period of six months and, at best, they could be used as a piece of corroborative evidence.

13. Apart from the photographs, there was the report of the Court Commissioner who visited the suit shop on July 23, 1977 and found it closed. The explanation of defendant no.1 was that on that date his maternal uncle had died and the shop was not opened for that reason. His witness Maheshkumar Trivedi, at Exh. 404, who was writing the accounts of business of defendant no.1, however, had a different explanation. According to him, the shop was not opened on July 23, 1977 because that was a holiday. The court has observed that grocery shops are not known to be closed on holidays. But the matter does not end there. After finding the suit shop closed, the Court Commissioner proceeded to visit the shop of defendant no.1 called `Mahavir Provision Stores' at Sardar Patel Colony. There the shop was not only open but defendant no.1 was himself present in the shop. The court has observed, and rightly so, that on account of the death of the maternal uncle it cannot be that one shop would open and the other would remain closed.

14. The most clinching evidence on the issue of non-user of the suit premises, however, comes in the form of the electricity bills. Electricity bills, Exhs. 172 to 177, are dated 10.1.1977, 23.2.1977, 25.3.1977, 2.5.1977, 2.6.1977 and 2.9.1977 respectively. These electricity bills clearly show that in the suit shop there was no consumption of electricity for the period of six months before the filing of the suit. In order to prove non-consumption of any electricity at the suit shop, the plaintiff also examined Rameshbhai Patel, at Exh.332, who was an employee of the Ahmedabad Electricity Company, as a Senior Clerk, for 12 years before his examination in court. He produced before the court statement of electric service number 149090 (of the suit shop) with his list Exh.74/1. He also produced other statements with lists, Exh.74/2 and Exh.74/3, containing record of metre readings of the suit premises showing electric consumption for different periods. He also referred to an application submitted by defendant no.1 for transfer of electric service in his name and for resuming electric supply in the suit premises.

15. The explanation of defendant no.1 for non-consumption of electricity was that being a devout Jain he closed the shop at 5:30 P.M. before the day getting dark. He, therefore, did not need any electric light (or for that matter any electric fan) and hence, there was no consumption of electricity in his shop. The falsehood of the explanation, however, was exposed by the fact that the electric supply to the demised shop was disconnected for non-payment of the minimum charges. Defendant no.1 then made an application, Exh.198, for resumption of the supply and transfer of the service from the name of the landlady to his own name. On his application, the electric supply was restored in the year 1979 and then the monthly bills, Exh.199 and Exh.200, dated December, 2, 1980 and January 2, 1981 showed normal consumption of electricity in the suit shop. There was no explanation by defendant No.1 how and why the suit shop that showed no electric consumption in earlier years started showing normal electric consumption from December 1979. The resumption of electric consumption in the suit shop also lends credence to the case of the plaintiff that after remaining closed for two-three years, the shop was sublet by defendant no. 1 to defendant no. 2 who used it for his milk business.

16. The appellate court also referred to the book of account, in the form of "Rojmel" produced by defendant no.1 in support of his claim that the suit shop was in his occupation and he carried on his grocery business from there. The appellate court on a detailed examination of the entries made in the "Rojmel" found that it was a crude and clumsy fabrication made for the purpose of the suit.

17. Thus, in addition to its own finding on the question of subletting, the appellate court, on a careful consideration of all the materials on record, affirmed the finding recorded by the trial judge that the suit premises were not used by the appellant-tenant for the purpose for which it was let for a continuous period of more than six months immediately preceding the date of the suit. It, accordingly, confirmed the decree of eviction passed by the trial court.

18. Against the order passed by the appellate court defendant no.1 filed a revision before the High Court and the High Court, we are sorry to say, taking a rather perfunctory view of the matter interfered with and set aside the findings of fact arrived at by the appellate court in a

very well reasoned judgment. On the issue of non-user of the suit premises, the High Court made the following observations:

> "....It appears that the Trial Court as well as the Appellate Bench of the Small Causes Court have taken the pieces of the fact which are segregated and placed them in the juxtaposition, and from that the Appellate Bench inferred and presumed that the suit shop was closed for continuous period of six months prior to the filing of the suit; and this is the error of law apparent on the face of the record, and it goes to the root of the cause. It is a celebrated principle of law that the word "continuous" applied in Section 13(1)(k) of the Bombay Rent Act clearly denotes that the premises must not have been opened for a day even, and what is found from the evidence is that the day on which the Commissioner visited the suit shop was found closed. The photographs taken by the photographer on a stray day shows that the suit shop was found closed and the oral evidence of the plaintiff was believed."

19. In our view, the criticism by the High Court of the appellate court judgment is unwarranted. The appellate court did not arrive at its finding on a juxtaposition of segregated pieces of fact but it took into consideration the overall picture emerging from all the material facts and circumstances relating to the case. The appellate court expressly said that the two sets of photographs would only show that the shop was closed on the dates the pictures were taken and those pictures alone were not sufficient to prove non-user of the suit premises over a period of six months and they could, at best, be used as corroborative evidence. It, however, took into consideration the circumstance that apart from the suit premises defendant No.1 had set up another shop called "Mahavir Provision Stores" at Sardar Patel Colony and yet another shop in Chandlodia area. It also took into consideration that when the Court Commissioner visited the suit shop on July 23, 1977 it was found closed. What is of greater significance in that regard, however, is that defendant no.1 gave a false explanation for not opening the shop, stating that it was not opened due to the death of his maternal uncle even though the other shop at Sardar Patel Colony was not only open but he was also personally present there on that date. The court also took into consideration the false "Rojmel" filed by defendant No.1 in support of the plea that he continued to run the grocery business at the suit premises through an employee. The court also noticed that another Court Commissioner had gone to the suit premises on September 22, 1981. He did not find in the shop any grocery articles but found there articles belonging to defendant no.2 who carried on his milk business from the adjoining shop. Besides all this, the appellate court had taken into consideration the electricity bills that showed that there was no consumption of electricity over a period of six months immediately preceding the filing of the suit.

20. As regards the electricity bills, the High Court had to make the following comments:

> "Defendant No.1 has offered his explanation for this that he being a Jain, before the sun set, he closes his shop. The defendant No.1 has also produced electric bills of six months prior to the six months prior to the date of the filing of the suit. These bills have not been considered by any of the courts below properly. In those six months bills, which the defendant No.1 has produced, the charges of the electricity are

minimum and there is no consumption. On the contrary, from this explanation of the defendant No.1 that he is not using the electricity......".

21. Here again, the High Court failed to appreciate all the material facts and circumstances. The High Court thought that the electricity bills showing no consumption of electricity for the period of six months immediately preceding the filing of the suit were of no consequence because the bills for even the period prior to the period of six months preceding the suit showed no consumption of electricity. The High Court overlooked the fact that even though in terms of Section 13(1)(k) of the Bombay Rent Act, the plaintiff was required to prove non-user of the shop premises for a period of six months immediately preceding the filing of the suit, as a matter of fact, the case of the plaintiff was that defendant No.1 was not using the shop and keeping it closed for a much longer period starting from or about June, 1976. Thus, the bills produced by defendant no.1 showing no consumption of electricity in fact supported the case of the plaintiff. The High Court also overlooked that later on in the year 1979 defendant no.1 had got the electricity connection to the suit shop restored and thereafter the electricity bills were showing normal consumption of electricity. The High Court also overlooked that defendant no.1 had resorted to many falsehoods in his attempt to wriggle out of facts and circumstances established by the plaintiff's evidence.

22. In the same way on the issue of subletting the High Court was dismissive of the finding of the appellate court observing as follows:-

> "On scrutinizing the record, it is clearly found that reliance has been placed on the testimony of the plaintiff's power of attorney holder and panchnama prepared by the Court Commissioner. What is found by the Court Commissioner is only some milk cans in the suit premises. Some of the milk cans carried the name of defendant No.2 and also some sweet boxes. From this mere fact, a very serious presumption of the exclusive possession of the defendant No.2 has been drawn by both the courts below. The finding of the exclusive possession must be based on evidence and that factum of possession must be proved. From this only, no prudent man can infer the presence of a third party."

23. We are unable to subscribe to the view taken by the High Court. On the basis of the materials available on record, as discussed in detail in the judgment of the appellate court, it was perfectly justified in arriving at the finding of subletting against defendant no.1. On a careful consideration of the matter, we find that the High Court, in exercise of its revisional jurisdiction, committed a mistake in interfering with and setting aside the findings of fact properly arrived at by the courts below. The judgment and order passed by the High Court is unsustainable by any reckoning. We, accordingly, set aside the judgment of the High Court and restore the decree passed by the trial court as affirmed by the appellate court.

24. In the result, the appeal is allowed with costs throughout.