IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 225 OF 2015
ALONGWITH
CIVIL APPLICATION NO. 349 OF 2015

Dharamvir I. Joshi .. Applicant
vs.
Jayant R. Patwardhan and anr. .. Respondents

Mr. Jayesh Bhatt for the Applicant.
Mr. Girish Godbole a/w. Mr. Ajit Kocharkar for Respondent No.1
Mr. Pranay Mangharam i/b MZD Legal Consultancy for Respondent No.2.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 19 August 2015.
Date of Pronouncing the Judgment : 21 August 2015.

JUDGMENT :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This Civil Revision Application is directed against the following orders:

(i) Order dated 14 January 2015 in Review Application No. 3 of 2014 in Appeal No. 709 of 2008 made by the Division Bench of the Small Causes Court (Appeal Court);

(ii) Order dated 23 October 2012 in Appeal No. 709 of 2008 made by the Appeal Court; and

(iii) Judgment and decree dated 8 October 2007 made in R.A.D. Suit No. 678 of 2001 by the Small Causes Court (Trial Court).

3] The aforesaid impugned orders have declared the respondent No.1, the plaintiff in R.A.D. Suit No. 678 of 2001 (Patwardhan) to be the tenant in respect of the suit premises and the applicant herein, a rival claimant to the tenancy of the suit premises has been directed by a mandatory injunction to remove his lock upon the suit premises within four months from the date of decree. The permanent injunction as also been granted against the applicant from entering and using the suit premises without taking recourse to the due process of law.

4] The suit premises, in the present case, is Room No. E-30, 3rd Floor, Tara Baug Estate, Raja Ram Mohan Roy Marg, Mumbai – 400 004, which were originally let out by the landlord, respondent No.2 (Shah) to Shri. Vishnu D. Dabak. The said Vishnu Damodar Dabak died on 28 February 1986. Thereafter, his son Janardhan continued to reside in the suit premises until the date of his demise, i.e., 20 February 1998. There is dispute between Patwardhan and the applicant (Joshi) as to the claim of tenancy in respect of suit premises.

5] The applicant (Joshi) claims tenancy to the suit premises on the basis of Will as allegedly left behind by the tenant Janardhan. On

the other hand, respondent No.1 (Patwardhan) claims tenancy on the basis that he is the member of Janardhan's family, who was residing with Janardhan in the suit premises, at the time of demise of Janardhan on 20 February 1998. Patwardhan instituted R.A.D. Suit No. 678 of 2001, which has since been decreed in his favour by the Trial Court. The Appeal and Review against the same have been dismissed by the Appeal Court. Hence, the present Civil Revision Application.

6] Mr. Jayesh Bhatt, learned counsel for the applicant, made the following two submissions in support of the Civil Revision Application:

(a) The finding that respondent No.1 (Patwardhan) was a member of deceased tenant's family and was residing with the deceased tenant in the suit premises at the time of his demise, is vitiated by perversity; and

(b) The finding that the right of tenancy cannot be bequeathed by the tenant by Will in favour of a stranger, is contrary to the ruling of the Apex Court in case of ***Gaiv Dinsha Irani & Ors. Vs. Tehmtan Irani & Ors.***[1]**.**

1 2015(2) ALL MR 456 (SC)

7] Mr. Godbole, learned counsel for respondent No.1 (Patwardhan) submitted that in this case, there are concurrent findings of fact recorded by the Trial Court and the Appeal Court that Patwardhan was indeed a member of Janardhan's family, at the time of demise of Janardhan. Such findings of fact are amply borne by the evidence on record and there is absolutely no perversity involved. Further, there is catena of decisions directly under the Bombay Rents, Hotel and Lodging Houses Rates Control, 1947 Act (1947 Act) that statutory tenancy cannot be bequeathed in favour of a stranger. The ruling in case of ***Irani (supra),*** is clearly distinguishable, as the Apex Court was not dealing with tenancy under the Rent Act, but rather with tenancy created by the Bombay Municipal Corporation under the legislation constituting it, where there was no statutory provision favouring transfer only to family members of the deceased tenant. Mr. Godbole submitted that there is absolutely no jurisdictional error in making of the impugned orders and therefore, this Court ought not to interfere with the same in exercise of jurisdiction under the Article 227 of the Constitution of India.

8] Mr. Pranay Mangharam, learned counsel counsel for the landlord, submitted that from the material on record, it is clear that

neither the applicant Joshi, nor the respondent No.1 Patwardhan can be regarded as tenants in respect of the suit premises and therefore, the suit as instituted by Patwardhan should have been dismissed, after observing that even the applicant Joshi has no rights of tenancy in respect of the suit premises.

9] The rival contentions now fall for determination.

10] There is no warrant to interfere with the concurrent findings of fact recorded by the two Courts in favour of the Patwardhan being a member of the deceased tenant's family and residing with the deceased tenant, at the time of his demise, in the suit premises. The findings of fact are based upon both oral as well as documentary evidence on record. The two Courts have relied upon Ration Card and some correspondence emanating from the suit premises in support of such finding of fact. The jurisdiction under Article 227 of the Constitution of India is not appellate jurisdiction. Therefore, it is not for this Court to assess and reassess the material on record with the view to determining whether upon reconsideration of such evidence some different view is possible or plausible. As long as the finding of fact is not vitiated by perversity, in the sense that the finding is based upon no evidence or on basis of inadmissible or

irrelevant evidence or upon exclusion of relevant evidence, there is no scope to interfere. The two Courts have held that Patwardhan is a relative of deceased Janardhan. The two Courts have further held that Patwardhan was residing with deceased Janardhan at the time of his demise in the suit premises. This finding of fact cannot be regarded as perverse.

11] Mr. Bhatt, however, made reference to decision in case of ***Haji Ismail Valid Mohmad & ors vs. Sports Club in the name of Union Sports Club and ors.***[2]***,*** in which it has been held that normally, '*family*' includes parents, spouse, brothers, sisters, sons or daughters or in some cases widow of a predeceased son or the issues of the pre-deceased sons but no stretch of imagination it can be held that the distant nephews would be the family members howsoever broad meaning is given to the word family. This was to contend that Patwardhan, being a distant relative of the deceased tenant, cannot be regarded as a member of the deceased tenant's family. At the same time, Mr. Bhatt also placed reliance upon the decision of this Court in case of ***Ramchandra G. Gharpure (since deceased, by heirs and legal representatives) and ors. vs. Madhav Dattatraya Phadke and ors.***[3] as well as another decisions, in which it has been

2 1992 Bom.R.C. 154
3

held that even a mistress can be held to be a member of the decased tenant's family. As noted earlier, in the present case, the two Courts, on basis of the material on record, have recorded the findings of fact that Patwardhan was indeed a family member of the deceased tenant and was residing with the deceased tenant at the time of his demise. In recording such finding, it cannot be said that the two Courts have not been conscious of the legal position, particularly in the context of expression '*resides*' employed in Section 7(15) of the Rent Act. The Apex Court, in the case of ***Smt. Jeewanti Pandey vs. Kishan Chandra Pandey***[4]***,*** has held that the words '*resides*' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. In the context of the Rent Act, the term '*resides*' indicates something more than a temporary stay. A character of residence must be more or less of a permanent nature. Again, as noted earlier, the finding of fact in this regard is based upon both oral as well as documentary evidence. The two Courts have taken into consideration the documents like Ration Card and some correspondences emanating from the suit premises. The circumstance that late Janardhan was living alone and was afflicted by ailments is also relevant in the context of the case set out by

4 AIR 1982 Supreme Court 3

Patwardhan in the plaint. Accordingly, there is no reason to interfere with the concurrent findings of fact recorded by the two Courts on the aspect of Patwardhan being the member of the family and residing with the deceased tenant at the time of his demises in the suit premises.

12] As regards the second contention of Mr. Bhatt, reference is required to be made to the provisions contained in Section 7 (15) of the Maharashtra Rent Control Act, 1999 (Rent Act). This section defines the expression '*tenant*' to *inter alia* include, in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of the Rent Act, any member of the tenant's family, who where they are let for residence, is residing with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the Court. This means that upon demise of the tenant, any member of the tenant's family, who is residing with the tenant at the time of his death, becomes the tenant of the suit premises. However, if there is no such member, then any heir of deceased tenant, as may be decided, in the absence of agreement, by the Court becomes the tenant of the suit premises. The legislature has not included a legatee of the deceased tenant, as one of the

persons upon whom the tenancy will devolve upon the demise of the tenant.

13] This issue, is really no longer *res integra* at least in the context of definition of the expression '*tenant*' as it appears in Section 5(11)(c) of the 1947 Act. The relevant extract of Section 5(11)(c) of the 1947 Act reads thus:-

> *5. (11) tenant means any person by whom or on whose account rent is payable for any premises and includes*
> *(a) ...*
>
> *(aa) ...*
>
> *(b) ...*
>
> *(bb) ...*
>
> *(c) (i) in relation to any premises let for residence, when the tenant dies, ... any member of the tenant's family residing with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the court;*
>
> *(ii) in relation to any premises let for the purpose of education, business, trade or storage, when the tenant dies, ... any member of the tenant's family using the premises for the purposes of education or carrying on business, trade or storage in the premises, with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the court.*

14] If the definition of expression '*tenant*' as contained in Section 7(15)(d) of the Rent Act and the definition of the same expression as

contained in Section 5(11)(c) of the 1947 Act is compared, then, insofar as the material aspects are concerned, there is no material difference.

15] The Apex Court in case of ***Vasant P. Pandit vs. Dr. Anant T. Sabnis***[5]***,*** has in terms held that bequeath of tenancy rights under the 1947 Act is impermissible. The relevant discussion is contained in paragraphs 14, 15 and 16, which read thus:

> 14. *From a plain reading of Section 5(11)(c)(i) it is obvious that the legislative prescription is first to give protection to members of the family of the tenant residing with him at the time of his death. The basis for such prescription seems to be that when a tenant is in occupation of premises the tenancy is taken by him not only for his own benefit but also for the benefit of the members of the family residing with him. Therefore, when the tenant dies, protection should be extended to the members of the family who were participants in the benefit of the tenancy and for whose needs as well the tenancy was originally taken by the tenant. It is for this avowed object, the legislature has, irrespective of the fact whether such members are 'heirs' in the strict sense of the term or not, given them the first priority to be treated as tenants. It is only when such members of the family are not there, the 'heirs' will be entitled to be treated as tenants as decided, in default of agreement, by the court. In other words, all the heirs are liable to be excluded if any other member of the family was staying with the tenant at the time of his death. When Section 15, which prohibits sub-letting, assignment or transfer, is read in juxtaposition with Section 5(11)(c)(i) it is patently clear that the legislature intends that in case no member of the family as referred to in the first part of the clause is there the 'heir', who under the ordinary mode of succession would necessarily be a relation of the deceased, should be treated as a tenant of the premises subject, however, to the decision by the court in default of*

5 (1994) 3 SCC 481

agreement. The words "as may be decided in default of agreement by the Court" as appearing in Section 5(11)(c)(i) are not without significance. These words in our view have been incorporated to meet a situation where there are more than one heirs. In such an eventuality the landlord may or may not agree to one or the other of them being recognised as a 'tenant'. In case of such disagreement the court has to decide who is to be treated as 'tenant'. Therefore, if 'heir' is to include a legatee of the will then the above-quoted words cannot be applied in case of a tenant who leaves behind more than one legatee for in that case the wishes of the testator can get supplanted, on the landlord's unwillingness to respect the same, by the ultimate decision of the court. In other words, in case of a testamentary disposition, where the wish or will of the deceased has got to be respected a decision by the court will not arise and that would necessarily mean that the words quoted above will be rendered nugatory. What we want to emphasise is it is not the heirship but the nature of claim that is determinative. In our considered view the legislature could not have intended to confer such a right on the testamentary heir. Otherwise, the right of the landlord to recover possession will stand excluded even though the original party (the tenant) with whom the landlord had contracted is dead. Besides, a statutory tenancy is personal to p-1-wp-11710-14the tenant. In certain contingencies as contemplated in Section 5(11)(c)(i) certain heirs are unable to succeed to such a tenancy. To this extent, a departure is made from the general law.

15. The matter may be viewed from another angle also. If the word 'heir' is to be interpreted to include a 'legatee' even a stranger may have to be inducted as a tenant for there is no embargo upon a stranger being a legatee. The contention of Mr Sorabjee that 'heir' under a will may be confined to only members of the family cannot be accepted for there is no scope for giving such a restrictive meaning to that word in the context in which it appears in the Act as earlier noticed, unlike in other Rent Acts.

16. Coming now to the meaning of the words 'assign' or 'transfer' as appearing in Section 15 we find that 'transfer' has been qualified by the words 'in any other manner' and we see no reason why it should be restricted to mean only

> *transfer inter vivos. As has been rightly pointed out by the High Court in the impugned judgment the Transfer of Property Act limits its operation to transfer inter vivos and, therefore, the meaning of the word 'transfer' as contained therein cannot be brought in aid for the purpose of the Act. On the contrary, the wide amplitude of the words 'in any other manner' clearly envisages that the word 'transfer' has been used therein in a generic sense so as to include transfer by testament also.* *(emphasis supplied)*

16] Mr. Bhatt, the learned counsel for the applicant, has however, placed reliance upon the decision of the Apex Court in case of ***Irani (supra),*** in which it is held that in the absence of any specific provision, general law of succession will apply and tenancy can be bequeathed by will in favour of a stranger, particularly, when there are no statutory provision favouring transfer only to family members of the deceased tenant.

17] Mr. Bhatt contends that unlike 1947 Act, the Rent Act contains no provision prohibiting the transfer or assignment of tenancy rights in the suit premises. On the contrary, Mr. Bhatt contends that the provisions contained in Section 56 of the Rent Act specifically permit or at least recognise the assignment and the transfer of tenancy rights, as long as such transfer or assignment is in writing and registered under the Registration Act, 1908. The contention of Mr. Bhatt cannot be accepted. In the first place as noted earlier, there is no appreciable difference, at least insofar as material aspects are

concerned between the definition of the expression '*tenant*' as contained in Section 5(11)(c) of the 1947 Act and Section 7(15) of the Rent Act. In the context of such definition, the Apex Court in case of ***Vasant Pandit (supra)*** as well as ***Bhavarlal L. Shah vs. Kanaiyalal N. Intawala***[6]***,*** has held that bequest of tenancy rights is impermissible. Secondly, Section 56 of the Rent Act merely provides that it shall be lawful for the tenant to claim or receive any sum or any consideration, as a condition of the relinquishment of the transfer or assignment of his tenancy of any premises. Under the 1947 Act, there was prohibition to receive any sum or any consideration, which prohibition has now been lifted under the Rent Act. Both 1947 Act as well as the Rent Act, however, provide that sub-letting , assignment, or, transfer of interest, in the suit premises without the consent of the landlord, is a ground available to the landlord to seek recovery of possession. Thus, on the basis of provisions contained in Section 56 of the Rent Act, it cannot be said that there exists no statutory provisions favouring transfer only to family members of the deceased tenant. The decision of the Apex Court, in case of ***Vasant Pandit (supra),*** will therefore, hold good even in the context of the provisions contained in Section 7(15) of the Rent Act.

6 (1986) 1 SCC 571

18] In the case of ***Irani (supra),*** the Apex Court was concerned with tenancy created by the Bombay Municipal Corporation (BMC) under the Act which constituted the Corporation. The provisions of the Rent Act, admittedly, did not apply to any premises belonging to Local Authority , which would *inter alia,* include the BMC. It is in this context, the Apex Court has held that the tenancy can be bequeathed by Will in favour of a stranger in the absence of statutory provision favouring transfer only to family members of the tenancy deceased tenant. In fact, the Apex Court, has taken note of its earlier decisions in the case of ***Bhavarlal Shah (supra)*** and ***Vasant Pandit (supra)*** and thereafter, at paragraph 26 observed thus:

> *26. The aforementioned cases indicate that in general tenancies are to be regulated by the governing legislation, which favour that tenancy be transferred only to family members of the deceased original tenant. However, in light of the majority decision of the Constitution Bench in Gian Devi vs. Jeevan Kumar (supra), the position which emerges is that in absence of any specific provisions, general laws of succession to apply, this position is further cemented by the decision of this Court in State of West Bengal Vs. Kailash Chandra Kapur (supra) which has allowed the disposal of tenancy rights of Government owned land in favour of a stranger by means of a Will in the absence of any specific clause or provisions.*
>
> *(emphasis supplied)*

19] From the aforesaid extract, it is clear that the Apex Court, far from making any dent to the decisions in cases of ***Bhavarlal Shah***

(supra) and ***Vasant Pandit (supra)*** has acknowledged that general tenancies are to be regulated by the governing legislations, which favour that the tenancy can be transferred only to the family members of the deceased original tenant. The Apex Court, in ***Irani (supra)*** has however, held that in the absence of any specific provision, general law of succession will apply and there would be no bar to disposal of tenancy rights in favour of a stranger by means of a Will. In the present case, as noted earlier, the provisions contained in Section 7(15) of the Rent Act favours the interpretation that tenancy can be transferred only to family members of the deceased tenant. Accordingly, there is no question of tenancy in respect of suit premises, being disposed in favour of the applicant by a Will allegedly made by the deceased tenant.

20] In these proceedings, there is really no scope to consider the contentions of Mr. Pranay Mangharam, learned counsel for the landlord. This is because, the landlord has not chosen to file any written statement in the suit instituted by Patwardhan. The landlord neither led any evidence nor availed of opportunity to cross-examine either Patwardhan or Joshi. The landlord had not instituted any appeal against the decree made by the Trial Court. Accordingly, it is

too late a stage to consider the landlord's contention that neither Patwardhan nor Joshi are the tenants in respect of the suit premises.

21] In the concluding stages, Mr. Bhatt did attempt to urge that the suit as instituted by Patwardhan was not at all maintainable before the Small Causes Court, because this was basically a dispute between the two persons claiming tenancy rights to the suit premises and the landlord was merely a formal party. Neither in the written statement nor in the memo of appeal, such contention, appears to have been raised by the applicant. That apart, Patwardhan, in his suit seeks declaration that he is the tenant in respect of the suit premises and it is for this purpose that the landlord has been impleaded as a defendant in the suit. If the provisions contained in Section 33 of the Rent Act are taken into consideration, there is no scope to entertain this objection raised by Mr. Bhatt to the very maintainability of the suit instituted by Patwardhan.

22] For the aforesaid reasons, there is no case made out to interfere with the impugned orders. This Civil Revision Application is, accordingly, dismissed. There shall be no order as to costs.

23] In view of disposal of Civil Revision Application No. 225 of 2015, Civil Application No. 349 of 2015 does not survive and same is disposed of accordingly.

(**M.S. SONAK, J.**)

24] At this stage, learned counsel for the applicant seeks a stay on the judgment and order now pronounced, for a period of three weeks. Considering that for the past few years, the suit premises are locked by both the applicant as well as the respondent No.1, the parties are directed to maintain *status quo* for a period of three months from today.

(**M.S. SONAK, J.**)