CASE NO.:
Appeal (civil) 5162 of 2002

PETITIONER:
M.M.Bilaney & Anr.

RESPONDENT:
Fali Rustomji Kumana

DATE OF JUDGMENT: 27/09/2005

BENCH:
ARUN KUMAR & A.K. MATHUR

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against the judgment and order passed by the learned Single Judge of the High Court of Bombay in WP No.1247 of 1997 whereby the learned Single Judge has dismissed the writ petition filed by the appellants.

Brief facts which are necessary for the disposal of this appeal are as under.

The appellants filed a suit being R. A. E. Suit No.371/3169 of 1976 for eviction against the original defendant, Rustom D.Kumana (now deceased). In the course of the proceedings, during the life time of original defendant, the respondent Fali Rustamji Kumana (son of original defendant) applied that he be joined as a party defendant on the ground that he was a tenant in respect of the suit premises in his own right or at least a deemed tenant as on 1.2.1973 under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Initially, the defendant Rustom D.Kumana, the father of the respondent was sole party defendant in the suit filed by the appellants/ plaintiffs. That application was allowed and respondent was added as a party defendant No.2 in that suit. The suit was filed by the appellants on the ground that the premises were bona fide required by the appellant No.1 for the residence of his widowed daughter who was also the sister of appellant No.2. The original defendant i.e. Rustom D. Kumana filed a written statement on 5.11.1976. Therein he submitted that he was willing to submit to the orders of the Court. It was pointed out that his wife and son (the present respondent) are residing in the suit premises. The defendant No.2 i.e. the present respondent filed a written statement on 5.4.1979 and contended that he was the tenant in his own right or deemed to be a tenant as per 1973 amendment to the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter to be referred to as "the Act"). On 30.9.1980 the appellants moved the Court for a decree on admission against the original defendant No.1. On 20.6.1981 a decree came to be passed against the original defendant No.1. The original defendant did not challenge the decree and it became final. Thereafter, the defendant No.2 filed an appeal against the said order passed against defendant No.1, the father of respondent. He also filed suit for declaration of his tenancy right qua appellants. Meanwhile, the original defendant No.1 expired on 3.10.1984. On 27.5.1985 the appellants executed a gift deed in favour of one Manavi Pravin Thakkar who accepted the gift of the premises in question. In gift deed the fact of pending litigation was mentioned. Pursuant to the execution of the gift deed the respondent amended the appeal and contended that the appellants had ceased to be the landlord of the suit premises, hence the appellants could

not maintain the suit against the respondent nor could they execute the decree of eviction passed against the original defendant No.1. By the order dated 9.12.1986 the Appellate Bench of the Small Causes Court allowed the appeal on the ground that the decree of eviction passed by the trial court against the tenant was not legal. Aggrieved against the said order the present appellants preferred a writ petition before the High Court of Bombay which came to be registered as Writ Petition No.187 of 1987. By order dated 6.2.1987 the High Court set aside the order of the Appellate Bench of the Small Causes Court and remanded the matter to be tried by the trial court. However, the apprehension of the respondent was allayed by the High Court that if the decree against the original defendant No.1 was executed, then the respondent would take out proceedings under Order XXI Rule 97 of the Code of Civil Procedure and in that context the High Court observed that undertaking be given by the appellants that they would not execute the decree obtained against original defendant No.1 till such time that the present suit against the present respondent and the appeal, if any, are disposed of. The undertaking to this effect was given by the appellants. The High Court observed that the appellate Bench of the Small Causes Court ought not to have considered the appeal filed by the present respondent against the decree passed against the original defendant No.1 as the suit was being proceeded against the defendant No.2. In this background, the matter was sent back to the trial court. The relevant portion of order dated 6th February, 1987 passed by in the High Court of Judicature at Bombay reads as under:-

"

Heard both parties. Rule heard forthwith. It appears that on satisfaction of the existence of the ground for eviction for bonafide requirement of the landlord and on admission by original defendant no. 1 to that effect, a decree of eviction as against defendant no. 1 is passed by the trial court. He challenged the decree passed against defendant no. 1. The defendant no. 1 did not challenge the decree.

The Appeal Court set-aside the decree passed against defendant no. 1 hence this petition by plaintiffs landlord.

The only apprehension of defendant no. 2 is that if the decree against defendant no. 1 is executed he will have to obstruct it. That apprehension can be taken care of by recording the undertaking of the plaintiff that they shall not execute the decree obtained against defendant no. 1 till such time that the suit against defendant no. 2 and appeal, if any, are disposed of. The plaintiff \026petitioner does give that undertaking before this court.

Moreover, the Appellate Court ought not to have considered the defendant no. 2's appeal against decree passed against defendant no. 1,

While the suit is yet to proceed against defendant no. 2. Hence impugned order of Appellate Court is quashed and set-aside. Trial Court to proceed with suit against defendant no. 2. Plaintiff shall not execute decree already passed against defendant no. 1, against no. 2 until disposal of the suit and appeal if any. With above directions, the Rule is made partly absolute."

On 16.7.1987 the respondent amended the written statement and by that amendment he averred that he has been occupying the suit premises in his own right as a tenant of the appellants or a deemed tenant under the 1973 amendment to the Act. It was also pointed out that he was always ready and willing to pay the rent and he has been continuously paying the rent to the appellants and the same has been accepted by the appellants. Then another amendment was made by the respondent in 1990 to the written statement and it was contended that he was the only child to the original defendant No.1 \026 his father, Rustom D.Kumana. The issues were framed in the suit. On 30.9.1994 the trial court decreed the suit in favour of the appellants. The trial court held that the respondent had failed to prove his tenancy right and as such he was a mere trespasser. Therefore, there was no need to render any finding on other issues. It was also held that the appellants have proved their bona fide requirement. It was further held that greater hardship would be caused to the appellants if the decree of eviction was not passed. The trial court further held that the suit as filed by the appellants was maintainable and the appellants were the landlords within the meaning of the Act for getting possession of the premises under Section 13(1)(g) of the Act. Relevant portion of order dated 29.9.1994 passed by the Trial Court in RAE Suit No. 571/3169 of 1978 reads as under:

" In view of reasons which re-discussed above, I came to the conclusion that the defendant No. 2 has failed to prove that he has any independent tenancy right in the suit premises."

Aggrieved against this order the respondent preferred an appeal before the Appellate Bench of the Small Causes Court. The Appellate Bench allowed the appeal of the respondent by order dated 10.9.1996 on the ground that the appellants had ceased to be the owners after execution of the gift deed in 1985 and as such were not landlords entitled to seek eviction under Section 13(1)(g) of the Act. However, at the same time, the Appellate Bench held that the respondent was not a tenant. It was observed in para 64 of the order dated 10.9.1996 by the Appellate Court in Appeal No. 409/1994 in RAE Suit No. 571/3169 of 1978 which reads as under:

"The question as to whether the appellant has been able to prove his independent entitlement to the suit premises save and except the son of the tenant has also been dealt with above. Although he has not been able to do so, but the above features need to be recalled. For the sake of record points 6 and 7 are answered accordingly."

Aggrieved against this order, a writ petition was filed by the appellants and in this background, the High Court after considering the matters dismissed the writ petition holding that the appellants having gifted the premises in question therefore they ceased to be landlords and as such the decree of eviction cannot be passed in favour of the appellants. Aggrieved against this order passed by the learned Single Judge of the High Court of Bombay, the present appeal has been filed on grant of special leave.

In this background, the short question which falls for our determination is what is the effect of the finding given by the courts below that the respondent - Fali Rustomji Kumana who was defendant No.2 was not a tenant and in that case, whether he could defeat the suit filed by the appellants after they have gifted away the suit premises to a third person as they ceased to be landlords.

It is the admitted position that Rustom D. Kumana was

the original tenant and the suit was filed by the plaintiffs and in that suit, he did not contest and a decree of eviction was passed. Therefore, so far as the tenancy rights of the original tenant/defendant no. 1 were concerned, the same came to an end. But the son who was residing in the premises moved an application and sought to be impleaded as a respondent and he claimed that he was a tenant in the premises in question. Therefore, the question came up for determination whether he was a tenant or not. The trial court and the first appellate court as well as the High Court in writ petition did not disturb this finding that the respondent- Fali Reustomji Kumana was not a tenant in the premises in question. In fact, when the tenancy came into existence the respondent was 9 years old. All the courts below have categorically found that there was no subsisting tenancy between the appellants and the respondent- Fali Rustomji Kumana. High Court did not dispute this fact however proceeded to decide the matter on the basis that appellants ceased to be the landlord because of gift deed. If it is accepted that he was not a tenant, then can a decree of eviction be passed against a trespasser challenging the ownership of the appellants because the premises in the meanwhile was gifted out by them to a third party.

It was contended by learned counsel for the appellants that once the tenancy of the original landlord had been determined and the respondent has not been found to be a tenant, there was no relationship of landlord and tenant between the respondent and the original landlords, then the respondent is rank trespasser and if he is rank trespasser he cannot claim tenancy right against another person who has stepped into the shoes of the original landlord. In the present case, in fact the original tenant’s son \026 the present respondent was only residing in the premises through his father as his father was a tenant and the tenancy having come to an end, his position remained as a trespasser, because finding was given by all the courts below that there was no tenancy subsisting between the appellants and the respondent- Fali Rustomji Kumana. The tenancy was not hereditary. Once the decree of eviction was passed against his father and father expired in 1984 he has become trespasser. Secondly a declaration has been given against him that there exists no relationship of landlord and tenant.

Learned counsel for the appellants also submitted that an extended meaning should be given to Section 14 of the Act. Learned counsel also pressed into service some of the provisions of the gift deed to show that despite the fact that the appellants have gifted away the premises in question to the new landlord, the respondent has reserved right for himself to be a deemed tenant in the premises. Learned counsel in this connection referred to a decision of this Court in the case of P.V.Papanna & Ors. v. K.Padmanabhaiah reported in AIR 1994 SC 1577. Another decision of the High Court of Bombay in the case of Homi Jamshedji Khansaheb & Ors. v. Chandrakant Atmaram Lamage & Ors. reported in 1984 Mh.L.J. 719 was also cited.

Against this, learned counsel for the respondent seriously contended that when the landlord has gifted away the premises, how can this suit be maintainable as he has ceased to be the landlord. Therefore, he is not entitled to a decree for eviction. In this connection learned counsel for the respondent referred to a decision of this Court in the case of M.M.Quasim v. Manohar Lal Sharma & Ors. reported in AIR 1981 SC 1113.

We have considered the rival submissions of the parties. After weighing both the situations we are of opinion that once the respondent has been declared as trespasser by the Courts below because there was no subsisting tenancy with the original landlord then there was no need of going into the matter of gift of the

premises in question. In fact, at the time when the suit was filed the appellants were the owner of the premises in question and the decree of eviction was passed in their favour as the father of the respondent, the original defendant No.1 did not contest the matter and did not prefer appeal. But respondent preferred the appeal which was allowed by appellate court. Aggrieved against that oder the appellants filed writ petition. The High Court affirmed the decree of eviction qua the appellants and Rustom D. Kumanna, the original defendant No.1. But since the respondent was also impleaded as a party and the case had not gone for trial the High Court remanded the matter to the trial court to decide the question whether Fali Rustomji Kumana, the present respondent was a tenant or not.
When the High Court remanded the matter to the trial court, the trial court recorded a finding that there was no relationship of landlord and tenant between the appellants and the respondent and that order was affirmed by the appellate court and the High Court did not differ with finding in second round. Once the decree of eviction has already been granted against the original tenant and the finding has been recorded that the respondent is not a tenant then gifting away of the property by the original landlords to a third party becomes secondary issue. Since on remand by High Court the trial court has determined his right qua the appellants and same being affirmed by the appellate court and the High Court in second round, we are of opinion that the question of gift which was raised before Appellate court and the High Court was a secondary issue. If there was no relationship between the landlords and the tenant then what is the right of the tenant to challenge the ownership of the appellants? More so in peculiar facts of this case that in same suit a decree of eviction has been passed against his father and it has become final because his father did not challenge the same and subsequently he died in 1984. Then in same suit a contrary decree was passed in favour of son who in these very proceedings was found to be not tenant. In peculiar facts of this case, we cannot sustain inconsistent decrees in same suit. It would be mockery of law. As a general proposition of law if one has ceased to be landlord how can he seek a decree of eviction on ground of personal bona fide need is correct. But in peculiar facts of this case, we cannot invoke this proposition when son in same suit was not found to be tenant and father has been evicted.

Thus having taken the above view of the matter we need not go into the extended meaning of Section 14 of the Act or whether the respondent was a licensee or whether a licensee can have a right to continue in the premises by virtue of 1973 amendment to the Act. Once it is held that there was no relationship of landlord and tenant between the appellants and the respondent, all other questions are of secondary issue. The primary issue was whether respondent can be deemed as a tenant or not. Once it is found that the respondent is not a tenant, then he has no right to challenge ownership of the appellants as the appellants were already armed with a decree for eviction against the original tenant \026 Rustom D. Kumana (father of respondent).
This is a sad commentary on the tenant -landlord relationship. The premises in question was leased out to the father of the respondent in 1939 and the suit was filed for eviction in 1976. But it has not seen the successful end till this date. For the last 30 years the parties have been litigating. More than one generation has passed but still the matter has been locked in the courts. Therefore, in order to put to an end to this litigation specially when the courts below have already taken a view that there is no subsisting tenancy between the appellants and the respondent, we cannot deny the legitimate right of landlord or his successor to the possession of these premises. The respondent is in possession of the premises even after the death of his father in 1984, he shall pay a sum of Rs.50,000/- as compensation to the appellants/ their successor for use and occupation of the premises in question

In view of the above discussions, we are of opinion the view taken by learned Single Judge of the High Court of Bombay cannot be sustained. We allow this appeal, set aside the order of the learned Single Judge of the High Court and hold that respondent \026 Fali Rustomji Kumana was not a tenant of the landlords and he was a trespasser and as such, decree of eviction is granted against the respondent \026 Fali Rustomji Kumana. The respondent is granted six months time to vacate the premises in question as he has been occupying the premises in question for a long time. In case, the respondent fails to vacate the premises in question on the expiry of the period of six months from today, then the appellants/ their successor shall be at liberty to get him evicted from the premises in question by executing this decree. No order as to costs.