CASE NO.:
Appeal (civil) 7161 of 2003

PETITIONER:
Kailasbhai Shukaram Tiwari

RESPONDENT:
Jostna Laxmidas Pujara and anr.

DATE OF JUDGMENT: 01/12/2005

BENCH:
B.P. SINGH & P.K. BALASUBRAMANYAN

JUDGMENT:
JUDGMENT

B.P. Singh, J.

This appeal by special leave impugns the judgment and order dated 29th August, 2001, of the High Court of Judicature at Bombay passed in writ petition No. 306 of 1990. The aforesaid writ petition under Article 227 of the Constitution of India was filed at the instance of the tenant-respondent No. 1 herein against the order dated September 14, 1989, of the 3rd Additional District Judge, Thane, in Civil Appeal No. 186/1987, affirming the judgment and order of the Joint Civil Judge, Kalyan dated 10th March, 1987 in RCS No. 137/1982. The trial Court and the First Appellate Court recording concurrent findings of fact allowed the eviction petition filed by the landlord-appellant, holding that the landlord had made out a case for eviction of the tenant under Sections 13(1)(e) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (for short 'the Act'). The respondent No. 1 before us is the tenant while the respondent No. 2 is the person to whom the premises is alleged to have been sublet. The High Court in exercise of its jurisdiction under Article 227 of the Constitution set aside the concurrent findings of fact, and dismissed the suit for eviction filed by the appellant-landlord.

Before adverting to the issues that arise for our consideration in this appeal, we may briefly notice the factual background in which the controversy arose. Shorn of unnecessary details, it may be noticed that the premises in question, located at Kalyan, is an apartment measuring about 375 sq. feet. The case of the appellant is that the said premises was let out to respondent No. 1 herein sometime in the year 1975 and she was residing in the premises along with her husband. The agreed rent was Rs. 92 per month. According to the landlord, the tenant-respondent No. 1 shifted to another premises in Borivili in the year 1981. However, respondent No. 2 continued in the premises as a sub-tenant. According to the appellant, this amounted to sub-letting of the premises to respondent No. 2 Some other grounds were also raised in the eviction petition, such as default in payment of rent etc. but we are not concerned with those grounds since the findings on those grounds is in favour of the tenant-respondent No. 1.

The plea of the tenant-respondent No. 1 was that she was residing in the premises since 1975 and respondent No. 2, who happened to be the son of the brother of the father of her husband, came to reside with them in the same premises since he was a member of their family. In the written statement it was denied that the tenant-respondent No. 1 along with her husband had shifted to another premises at Borivili. It was also denied that the premises had been sublet to respondent No. 2. It was stated in the written statement that her husband was carrying on business at Kalyan and therefore needed the suit premises. It was also denied that tenant-respondent No. 1 had ever received any notice from the landlord.

Respondent No. 2 adopted the written statement filed by respondent No. 1.

The landlord examined three witnesses while the tenant examined two witnesses in support of their respective claims.

On an appreciation of the evidence on record, the trial Court came to the conclusion that notice sent to respondent No. 1 on Kalyan address could not be served, but the notice sent to her, including the registered notice, on the Borivili address, was served and the acknowledgement due card contained the signature of respondent No. 1, which was exhibited as Ext. 30 in the suit. No doubt the husband of tenant-respondent No. 1, who was examined as a witness, denied her signature appearing on the acknowledgement due card but the tenant-respondent No. 1 herself did not enter the witness box to deny her signature, nor was nay one examined from the postal department to depose on the subject. The trial Court was of the view that mere denial by the husband was not sufficient in the facts and circumstances of the case. However, the trial Court came to the conclusion that the landlord had failed to produce evidence to prove that the premises occupied by the tenant at Borivili was sufficient and suitable for her needs. The landlord had failed to discharge his burden in this regard, and therefore it was not possible for the Court to record a finding that the premises to which the tenant-respondent No. 1 had shifted was suitable and sufficient for her needs. However, on the question of subletting, the trial Court held that respondent No. 2 cannot be said to be a family member of respondent No. 1. The assertion that they were continuing to reside together in the premises at Kalyan, was not supported by the evidence on record. They could neither produce the ration card nor any other documentary evidence to prove that they continued to reside together at Kalyan. The husband of the tenant-respondent No. 1, who was examined as a witness, admitted that their names did not find place in the voters' list. He also admitted that in the income-tax return, his address had been disclosed but the income-tax return was not exhibited at the trial. Though he claimed to carry on his business at Kalyan, no material was produced to show that it was so. He did not even produce his invoices, bills or such other documents to establish that he was carrying on his business at Kalyan. On the contrary, there was evidence in the form of Ext. 43, to show that he had closed down his business at Kalyan on 30.7.1970. He also failed to produce the registration certificate that may have been issued to him under the Shops and Establishments Act. Considering the evidence produced by the parties the trial Court came to a definite conclusion that there was no evidence to support the plea of the tenant-respondent No. 1 that she continued to reside in the suit premises at Kalyan after 1980.

The trial Court also found that respondent No. 2 was not a member of the family of respondent No. 1, in the context of rent control legislation. It was admitted that the father of respondent No. 2 had a separate business at Indore and respondent No. 2 also had its own independent transport business at Kalyan. His business was separate from the business of the husband of the tenant-respondent No. 1. Respondent No. 2 admitted that he came to Kalyan in the year 1980 and had been residing in the premises for 10-12 years. The trial Court therefore concluded that he had not been residing with the tenant-respondent No. 1 from the very beginning. In fact, it is the admitted case of the parties that respondent No. 2 joined the tenant-respondent No.1 four or five years after the commencement of the tenancy in question. In this view of the matter, the trial Court allowed the eviction petition filed by the appellant on the ground of subletting and also on the ground envisaged under Section 13(1)(k) of the Act, namely the ground of non-user. We may at this stage observe that we are not going into the question as to whether the ground under Section 13(1)(k) of the Act is made out, because it would be sufficient for the disposal of this appeal if it is found that ground under Section 13(1)(e) i.e. the ground of subletting is made out.

The Appellate Court on reappraisal of the evidence on record, agreed with the findings recorded by the trial Court and dismissed the appeal.

The respondents then invoked the jurisdiction of the High Court under

Article 227 of the Constitution and impugned the judgments and orders of the courts below before it. In the writ petition filed before the High Court it was averred that respondent No. 1 had been a tenant of the premises in question for the year 1973, on a monthly rental of Rs. 92 and that sometime in or about the year 1979, respondent No. 2 - the cousin of her husband came to reside with them in the premises. It was averred that respondent No. 2 did reside with them with a view to assist her husband in carrying on his business at Kalyan, Thane, etc. Ground K of the writ petition reads as follows:

"(k) That both the Courts failed to appreciate that the evidence on record clearly established that petitioner No. 1 continued here right, titled and interest in the suit premises even after acquiring another residential premises at Borivili inasmuch as the husband of Petitioner No. 1 continued to have his business interest in Kalyan and its periphery and had been looking after the said interests through Petitioner No. 2 who was a member of his family by allowing him to reside in the suit premises."

It will thus be apparent that the tenant-respondent No. 1 admitted the fact that she had acquired another residential premises at Borivili and that the premises in question was in the occupation of respondent No. 2. The reason given therefor was that since her husband had business interest at Kalyan and its periphery, he had been looking after his business through respondent No. 2 who was a member of his family by allowing him to reside in the said premises. We must therefore proceed on the basis that it is no longer in dispute that the tenant-respondent No. 1 along with her husband acquired another residential premises at Borivili and that they have been residing in the said premises. We must also proceed on the basis that the premises is now in the occupation of respondent No. 2.

The High Court found fault with the reasoning of the trial Court and the Appellate Court, observing that in the instant case, the appellant had failed to discharge the initial burden of establishing the fact that the tenant-respondent No. 1 was not residing in the demised premises or had permanently surrendered possession to respondent No. 2 and that she had no intention of reoccupying the portion leased out to her. In view of the specific plea of respondent No. 1 in her writ petition before the High Court, the observation of the learned Judge is not justified.

The question still arises as to whether respondent No. 2 can be considered to be a member of the family of respondent No. 1. It is not in dispute that respondent No. 2 is the cousin of the husband of respondent No. 1. It also cannot be disputed that he came to reside with tenant-respondent No. 1 and her husband in the year 1980, and was not residing with them since the commencement of the tenancy some time in the year 1973 or 1975, (the precise year when the tenancy commenced is not clear from the record). It is also admitted by respondent No. 2 that he had his own separate and independent business and that he was not looking after the business of the husband of respondent No. 1. The husband of respondent No. 1 has a trading business in coal, whereas respondent No. 2 claims to have a transport business and he owned a truck which he was plying for gain.

It was sought to be argued before us that since the father of the husband of the tenant-respondent No. 1 and the father of respondent No. 2 are real brothers, there is blood relationship between the two and therefore it must be held that respondent No. 2 is a member of the family of respondent No. 1. This submission overlooks the fact that the tenant in question is not the husband of respondent No. 1 but the respondent No. 1 herself. It cannot be said that respondent No. 1 and respondent No. 2 are blood relations. That apart, the question still remains as to whether in the facts and circumstances of the case it can be held that respondent No. 2 is a member of the family of respondent No. 1. It is futile to attempt to lay down a strait jacket formula as to who can be considered to be the member of the family of the tenant, particularly in the absence of definition of ‘family’ in the Act. Having regard to relevant considerations, the question must be

decided on the facts and circumstances of each case. The High Court has relied upon some decisions of this Court wherein the question raised was whether the brother was a member of the family, or a case where the tenant had to go to a foreign country on business, leaving behind his parents and family members, including brothers and sisters. In such a factual situation, this Court held that the persons who occupied the premises were the members of the family of the tenant. Such is not the case here.

It is not the case of the respondent No. 2 that the family of the husband of respondent No. 1, including his uncles and cousins, always resided together. In fact the evidence on record discloses that respondent No. 1 resided in the premises with her husband only. Respondent No. 2 joined them sometime in the year 1980, and he had his own separate business. There is nothing to show that they ever resided together at any earlier point to time or that their fathers ever lived together. In fact the evidence on record is to the contrary. After he came to reside with respondent No. 1 in the year 1980, an alternate premises was acquired by the tenant and she shifted to those premises sometime in the year 1981. Soon thereafter this dispute arose, because the tenant having shifted to another premises at Borivili, the premises in question continued to be occupied by respondent No. 2. In the facts and circumstances, it is difficult to hold that respondent No. 2 is a member of the family of respondent No. 1, the tenant.

The question as to whether a person is a member of the family of the tenant must be decide on the facts and circumstances of the case. Apart from the parents, spouse, brothers, sisters, sons and daughters, if any other relative claims to be a member of the tenants family, some more evidence is necessary to prove that they have always resided together as member of one family over a period of time. The mere fact that a relative has chosen to reside with the tenant for the sake of convenience, will not make him a member of the family of the tenant in the context of rent control legislation.

We are, therefore, satisfied that the courts below were justified in holding, on the basis of the evidence on record, that the premises in question was let out to respondent No. 1 which was occupied by her and her husband. She acquired another premises at Borivili where she shifted in the year 1981. Before that, in the year 1980 itself, respondent No. 2 had come to reside with them and he continued to occupy the demised premises even after respondent No. 1 and her husband shifted to another accommodation at Borivili. Respondent No. 2 cannot be said to be a member of the family of respondent No. 1, in the facts and circumstances of the case, and in the context of rent control legislation, with which we are concerned in the instant case.

We are of the view that the High Court was not justified in setting aside the concurrent findings of fact recorded by the courts below. This appeal is therefore allowed. The Judgment and order of the High Court is set aside and those of the trial Court and First Appellate Court are restored. We make no order as to costs.

We have noticed that in paragraph 30 of its judgment, the learned Judge of the High Court has expressed its displeasure against the Joint Civil Judge, Kalyan and 3rd Additional District Judge, Thane, i.e. the trial Court and the First Appellate Court. We must observe that the observations made by the learned Judge of the High Court are not justified. This part of the order should therefore be communicated to the Registrar General of the Bombay High Court, so that the observations made in the Judgment of the High Court do not adversely affect the service career of the judicial officers concerned.

Learned counsel for respondent No. 2 submitted that some time may be granted to respondent No. 2 to find out an alternate accommodation and then to vacate the premises. With the consent of the learned counsel appearing on behalf of the appellant, we grant six months' time to the respondent No.

2 to vacate the premises, subject to furnishing usual undertaking before the Registrar General of this Court within four weeks from today.