
AIR 1977 Bom 163 : (1978) 80 BOMLR 365 : (1978) MhLj 116

Bombay High Court

Case No: Second Appeal No. 1302 of 1968

Kamal Chintaman
Mithari and Others

APPELLANT

Vs

Ganpatrao
Ramchandra Powar

RESPONDENT

Date of Decision: April 28, 1976

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 "Section 5(11)#Rent and Mortgage Interest (Restrictions) Act, 1920 "Section 12(1)

Citation: AIR 1977 Bom 163 : (1978) 80 BOMLR 365 : (1978) MhLj 116

Hon'ble Judges: Kania, J

Bench: Single Bench

Advocate: V.N. Damle, for the Appellant; K.J. Abhyankar, for the Respondent

Judgement

1. This appeal raises an interesting question u/s 5(11)(c) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (hereinafter

referred to as the "said Act"), The facts necessary for appreciation of the contentions raised in this appeal lie within a narrow compass. The dispute

in the appeal relates to 3 house in E Ward, Kolhapur, bearing City Survey No. 692/1-2. This house belonged to one Suresh Vasudeo Dongarkar,

who sold the same to the plaintiff, who is the respondent herein, on 29th November 1964. One Chintamani Mithari had rented the said house,

which I propose to refer hereafter as "the said premises" from Suresh Dongarkar at a rent of Rs. 10/- p. m. He was what has come to be known

as a statutory tenant in respect of the said premises. The said Chintamani died in or about 1962. In 1965 the plaintiff instituted a suit being Regular

Civil Suit No. 310 of 1S65 in the Court of the Joint Civil Judge, Junior Division, Kolhapur, against one Muktabai Nikam, the mother of the

appellants before me. The case of the plaintiff was that Muktabai was the mistress of the said Chintamani and was living in the said premises with

Chintamani. After the death of the said Chintamani, the defendant continued to stay in the said premises with her children. It was contended by the

plaintiff that on the death of Chintamani, the possession of Muktabai. the defendant, became wrongful and that she was a trespasser. After serving

a notice on the defendant, the plaintiff filed the said suit for possession of the said premises. The defendant, Muktabai. in her written statement

raised several contentions with all of which I am not concerned here. It was, inter alia, contended by her that she was the legally married wife of the

deceased Chintamani and it was denied by her that she was a trespasser in the said premises. The learned. Joint Civil Judge held that the plaintiff

had failed to prove that the defendant was a trespasser in respect of the said premises, although he observed that there was no satisfactory

evidence on record about the marriage between the defendant and Chintamani. It was held by him that even assuming that the defendant was a

mistress of the said Chintamani, as she was staying with Chintamani in the said premises along with her children at the time of Chintamani's death,

she was a "tenant" in respect of the said premises in view of the provisions of Section 5(11)(c) of the said Act. The plaintiff preferred an appeal in

the District Court at Kolhapur being Civil Appeal No. 428 of 1966. This appeal was disposed of by the learned Extra Assistant Judge, Kolhapur.

It was held by the learned Assistant Judge that the defendant had failed to prove that she was the legally wedded wife of the said Chintamani

Mithari. It was held that she was a mistress in the exclusive keeping of the said Chintamani and could not be regarded as a tenant in respect of the

said premises within the meaning of the said term in Section 5(11)(c) of the said Act. It was, however, made clear by the learned Assistant Judge

that he did not express any opinion about the rights, if any, acquired by the illegitimate children of the said Chintamani, who were admittedly staying

in the same premises along with their mother, the defendant. This shows that the learned Assistant Judge has not made any observations regarding

the rights, if any, of the appellants, in their capacity as the illegitimate children of the deceased tenant, Chintamani, in the said premises, The learned

Assistant Judge allowed the appeal and decreed the suit filed by the plaintiff. It is against this judgment and order that the defendant came up by

way of this appeal to this Court.

2. It may be mentioned that during the pendency of this appeal, the defendant died and the appellants have come on record as her heirs and legal

representatives,

3. As the arguments in the appeal turn mainly on the provisions of Clause (c) of Sub-section (11) of Section 5 of the said Act, it might be useful to

set out the relevant provisions of Sub-section (11) as they stood at the material time. These provisions were as follows :

"tenant" means any person by whom or on whose account rent is payable for any premises and includes--

(a) xxxxx (aa) xxxxx

(b) xxxxx

(c) any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court.

4. The first question which I have to consider is whether in view of the fact that the defendant Muktabai has been found to be a mistress in the

exclusive keeping of the said Chintamani, it could be said that she was a member of his family for the purpose of clause (c) of Sub-section (11) of

Section 5 of the said Act. It may be mentioned that the facts found, about which there is no dispute here, show that at the time when the said

Chintamani died, the defendant was living with him along with their illegitimate children in the said premises.

5. Reference can usefully be made in this connection to the decision of the Court of Appeal in *Hawes v. Evenden* (1953) 2 All ER 737. In that

case the defendant had lived with the tenant of a dwelling-house to which the Rent Restrictions Act applied, as his mistress, for some twelve or

thirteen years prior to his death. They had two children, one of whom had been adopted by foster parents, while the second child was living with

her parents at the time of the tenant's death and thereafter continued to live with the defendant at the same house. After the tenant's death the

landlord claimed possession of the house from the defendant, who contended that she was entitled to the protection of Section 12(1)(g) of the

increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a member of the deceased tenant's family. The question really was whether

the defendant could be regarded as a member of the deceased tenant's family residing with him at the time of his death. It was held that since the

evidence justified a finding that the tenant, the defendant and their children all lived together as a family, the defendant was a member of the

deceased tenant's family within Section 12(1)(g) and was therefore, entitled to the protection of the Sub-section. It appears from the judgment of

the Court of Appeal delivered by Somervell, L. J., that the correct test to be applied to such a case is :

Would an ordinary man, addressing his mind to the question whether the woman (defendant) was a member of the family or not, have answered

"Yes" or "No" ?

It has been made clear in the judgment that the principle laid down therein applies to a case where it is found that the defendant was living with the

deceased tenant as his mistress along with their child or children. In view of this decision, it would appear that there is no reason why the defendant

who was living with the said Chintamani along with their children in the said premises at the time of Chintamani's death should not be regarded as a

member of his family for the purposes of Section 5(11)(c) of the said Act. It is true that the above decision is of an English Court, but I see no

reason to take a different view in this connection regarding the provisions of Clause (c) of Sub-section (11) of Section 5 of the said Act.

6. It was submitted by Mr. Abhyankar, learned counsel for the respondent that only a legally wedded wife of the deceased tenant could be

considered to be a member of the family for the purpose of Section 5(11)(c) of the said Act. The question, however, as pointed out by the Court

of Appeal, is not so much about the legal status of the wife, but whether she would have been regarded by an ordinary man or a layman as a

member of the deceased tenant's family at the time when he died. It will also be useful to bear in mind, as pointed out by the learned Civil Judge,

that under the Hindu Digest, which was in force in Kolhapur, the position is that even a mistress would be a member of a joint Hindu family. In

view of this, I fail to see why the defendant could not be regarded as a member of the family of the deceased Chintamani residing with him at the

time of his death.

7. Although in respect of the question as to whether the defendant could be regarded as a member of the family of the deceased Chintamani I have

taken the view that the decision of the learned Assistant Judge is erroneous, it was contended by Mr. Abhyankar that there were several other

grounds by reason of which the defendant could not claim the protection of Section 5(11)(c) of the said Act. It was pointed out by Mr, Abhyankar

that the facts found on the record show that apart from the defendant, who was his mistress, and his illegitimate children by the defendant,

Chintamani had left surviving him his legally wedded wife and legitimate children. It was submitted by him that in view of this, the only persons who

were entitled to claim tenancy u/s 5(11)(c) of the said Act were the lawfully wedded wife and the legitimate children of the said Chintamani and not

the defendant. It was pointed out by Mr. Abhyankar that under the opening words of Sub-section (11) of Section 5 of the said Act, a tenant

means a person by whom or on whose account rent is payable. It was submitted by him that in the case of a contractual tenancy on the death of

the tenant even the heirs of the deceased tenant who were not staying with the deceased tenant in the premises would yet be persons by whom or

on whose account rent is payable and would, therefore, be tenants under Sub-section (11) of Section 5 of the said Act, It was further urged by

him that the same position would prevail even in the case of the death of a statutory tenant viz. a tenant who was continuing in possession after the

termination of his contractual tenancy. In my view, these contentions of Mr. Abhyankar, even if they are accepted, do not make any difference in

the case before me. The question which has to be considered here is whether the defendant Muktabai, was a tenant in respect of the said premises

or a mere trespasser. It is not very material to consider as to whether the legally wedded wife and the legitimate children of Chintamani would also

be tenants in respect of the said premises. It was urged by Mr. Abhyankar that if there were any legitimate heirs of a tenant, persons claiming under

Clause (c) of Sub-section (11) of Section 5 of the said Act merely as members of the tenant's family residing with him at the time of his death

would be necessarily excluded in view of the fact that Cl. (c) occurs in the inclusive part of the definition of the term "tenant" in Sub-section, (11).

In my view, there is no substance in this contention. The provisions of Sub-section (11) show that "tenant" means a person by whom or on whose

account rent is payable for any premises; and also included in the definition of the term "tenant" is a member of the tenant's family residing with him

at the time of his death as may be decided in default of agreement by the Court.

8. Quite apart from this, in the present case, Chintamani was admittedly a statutory tenant. As appears from the decision of the Supreme Court in

Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, , it is the well settled position in law that a person remaining in occupation of

the premises let to him after the determination or expiry of the period of the tenancy is commonly though in law not accurately, called a statutory

tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute

in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the

tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or

assigned and devolves on his death only in the manner provided by the statute. A statutory tenant has no interest in the premises occupied by him

and he has no estate to assign or transfer. In the pre-, sent case, it is undisputed that the lawfully wedded wife and the legitimate children of

Chintamani were not living in the said premises at all, but in another house, Chintamani, as already pointed out, was a statutory tenant, his

contractual tenancy having been determined prior to his death. In view of this, it appears to me that the heirs and legal representatives of

Chintamani as such can claim no rights to be the tenants of the said premises u/s 5(11) of the said Act and it was only a member of Chintamani's

family residing with him at the time of his death in the said premises as may be decided in default of agreement by the Court who can claim to be

the tenant of the said premises.

9. In support of his contention that the wife and the legitimate children of Chintamani were the only persons entitled to the tenancy rights in respect

of the said premises, Mr. Abhyankar has referred to certain decision, to which I might now refer, He first drew my attention to the decision of

Bhasme, J., in Gool Rustomji Lala Vs. Jal Rustomji Lala and Others, . In that case the dispute regarding the tenancy rights was between a brother

and sister, who were the son and daughter respectively of the deceased Rustomji Lala who was the contractual tenant of the premises in question.

The daughter (petitioner) claimed that under the Will made by the deceased tenant, the tenancy rights in the suit flat were given to her. It was

submitted in that case by Mr, Abhyankar, who appealed for the daughter, that once it was held that the daughter, had become the tenant under the

first part of Section 5(11)(c) then it was not necessary to consider the various other clauses. Rejecting this submission it was observed by Bhasme,

J., that

If the expression "tenant" means only a person who acquires the tenancy rights of the deceased tenant either as a heir or under the Will, then the

other clauses will become redundant. It is true that as a person who gets the contractual tenancy rights under the Will the petitioner (daughter) can

claim to be the tenant within the meaning of the first part of Section 5(11) of the said Act. But that by itself will not take away the rights which can

be claimed by the various other persons under the clauses which follow.

In the first place, this decision relates to the case of a contractual tenancy and not a case where the deceased was a mere statutory tenant as in the

case before me. Moreover, the observations, which I have set out above, far from supporting the contention of Mr. Abhyankar, tend to negative

the same in so far as they clearly show that Bhasme, J., was of the view that even in respect of a contractual tenancy although such tenancy might

devolve on an heir or a legatee of the deceased tenant under the opening part of Section 5(11) of the said Act, the rights claimed by other persons

under the clauses which follow the opening part of Subsection (11) would not be taken away.

10. Reliance was next placed by Mr. Abhyankar on an unreported decision of K. K. Desai, J, (as he then was) in Civil Revision Application No.

1556 of 1963 in this Court Minoo, J., Patel v. Jamshedji B.J, decided on 9th February, 1966 (Bom), My attention was drawn by him to the

observations in this decision which run as follows;

..... It would be extremely difficult to hold that by reason of the provisions in Section 5(11)(c) right's of heirs of a deceased contractual tenant

were sought to be extinguished. In spite of the provisions in Section 5(11)(c), it would require to be held that the rights of heirs of a deceased

tenant must be preferred to the rights of mere members of the tenant's family as referred to in Section 5(11)(c). It is not possible that mere

members of a tenant's family would be declared to be tenants under that section so as to defeat the rights of the heirs of a deceased tenant in the

contractual tenancy. Having regard to the above situation, it appears to me that the question of tenancy as u/s 5(11)(c) in favour of mere members

of a tenant's family can arise only when the contractual tenancy is found to have been terminated before the death of a tenant and the heirs entitled

to continue in occupation are unable to settle their disputes regarding their claim to be held as tenants.

In my view, these observations, which do not constitute the ratio of the case, are not of much assistance in the case before me, because they relate

expressly to the question of a contractual tenancy and the observations themselves show that in the case of a statutory tenancy the position might

be different. Moreover, I share the hesitation expressed by Bhasme, J., in accepting the view that even when there is a contractual tenancy the

mere fact that there is an heir or a person entitled under a Will to the tenancy rights of the deceased tenant would exclude the claim of the members

of the family of the deceased tenant residing with him as members of his family at the time of his death to the tenancy rights u/s 5(11)(c).

11. My attention was next drawn by Mr. Abhyankar to the decision of Tulzapurkar, J., in First Appeal No. 164 of 1963 in this Court, decided on

19th August, 1964. It has been held there that merely because a special definition of the term "tenant" is given in Section 5(11)(c) of the said Act it

cannot be said that the rights of the heirs under the law of inheritance are abrogated. This decision, in my view, has no application to the case

before me. In the first place, it relates to the case of a contractual tenancy whereas in the case before me, the deceased tenant Chintamani was

merely a statutory tenant. Moreover, as I have already pointed out earlier, I am not concerned with the question as to whether the rights of the

heirs of Chintamani under the law of inheritance are abrogated but merely with the question as to whether the defendant had any tenancy rights in

the said premises or was a mere trespasser,

12. It was next submitted by Mr. Abhyankar that even as far as the defendant and her children are concerned, in view of the fact that there was no

determination by the competent Court under the said Act as to which of them was the tenant, it could not be said that the defendant was the tenant

in respect of the said premises and she could not claim any right as such. In the first place, such a contention has not been raised in any of the

Courts below, and, in my view, it cannot be raised at this stage. Moreover, the provisions of clause (c) show that if the members of the deceased

tenant's family residing with him at the time of his death are unable to decide by agreement as to which of them should be regarded as the tenant

within the meaning of the said term in Sub-section (11) of Section 5 of the said Act, that question has to be determined by the Court. This,

however, cannot mean that apart from the person who is determined to be the tenant, the other members of the deceased tenant's family who

were living with him at the time of his death as members of his family would become trespassers in the said premises. Although one of them may be

recognised to be the tenant, the others would be certainly entitled to stay in the said premises.

13. Finally it was pointed out by Mr. Abhyankar that it appears from the affidavit of the plaintiff filed in Civil Application No. 1349 of 1969 in this

second appeal, for stay of execution, that the plaintiff has already obtained possession of the said premises and has demolished the same in

pursuance of certain municipal notices. It was submitted by him that in view of this the appeal was futile, as possession of the said premises could

not be restored to the appellant therein. In my view, these considerations are not relevant for purposes of the decision of this appeal. What I have

really to consider is whether the plaintiff was entitled to a decree for possession in the suit filed by him against the defendant and whether the

decree passed by the learned Assistant Judge in Civil Appeal No. 428 of 1966 is justified. As I have already pointed out earlier, I have come to

the conclusion that the learned Assistant Judge was in error in having passed the said decree and the suit of the plaintiff was liable to be dismissed.

The question as to whether the appellants are entitled to have the possession restored to them is not one which I need consider at this stage. Such

a question can be considered as and when an application is made by the appellants for restoration of possession.

14. In the result, the appeal is allowed, the order and decree passed by the learned Assistant Judge are set aside and the suit filed by the plaintiff is

dismissed. Looking to all the facts and circumstances of the case, there will be no order as to costs throughout.

15. Appeal allowed.