

## **B. Mohan Lal Sowcar vs Hameedia Hardware Store Represented By ... on 25 January, 1988**

**Equivalent citations: (1988)2MLJ270**

ORDER

Srinivasan, J.

1. The questions which arise for consideration are whether the petition for eviction is maintainable as such and whether the claim of the petitioner is bona fide. It is not in dispute that the petitioner is the owner of house and premises No. 157, Kutchery Road, Mylapore, Madras-4. He entered into an 'Agreement of Rental' on 9-6-1982 with the respondent leasing out the 'Downstair portion' of the said house and premises on a monthly rent of Rs. one thousand for a period of eleven months i.e., from 10-6-1982 to 9-5-1983. After the expiry of the lease, the petitioner filed the petition out of which this revision arises Under Section 10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, hereinafter called the Act, for a direction to the respondent to quit and deliver vacant possession of the ground floor of the aforesaid premises before the Court of Small Causes, Madras. The said petition was taken on file as R.C.O.P. 2962 of 1983 on the file of the XIIIth Judge, Court of Small Causes, Madras functioning as Rent Controller under the Act. In that petition the petitioner stated that he bona fide required the demised premises for the purpose of his wife's business as pawn broker which was being conducted in a rented premises in another street as she did not own any premises of her own.

2. In the counter statement the respondent contended as follows: Originally the respondent entered into an agreement of tenancy on 5-7-1974 with Sri Sagarmull, brother of the petitioner in respect of two shops and a room on a rent of Rs. 450 per mensem for non-residential purposes and on 5-10-1974 took the back portion on a rent of Rs. 175 per mensem for residential purposes. From the inception the tenancy was both residential and non-residential with reference to separate and distinct portions. The rent was later increased to a consolidated sum of Rs. 750 per mensem. The petitioner entered into an agreement on 5-9-1981 for an enhanced rent of Rs. 1,000 per mensem for both residential and non-residential purposes. The tenancy was renewed for a further period of eleven months on 9-6-1982 on a rent of Rs. 1,000 per mensem for both residential and non-residential purposes. The allegations that the petitioner's wife was doing pawn broker business in a rented premises and that the ground-floor was needed for the same were false. The claim was not bona fide and it was made only to coerce the respondent to agree to a further enhancement of rent and to get fresh advance of more than Rs. 15,000. The petition was not maintainable as framed as the tenant occupied the premises for residential and non-residential purposes.

3. After trial, the Rent Controller dismissed the petition holding that the petition was not maintainable as the tenancy was for both residential and non-residential purposes. He found that

the petitioner's wife was carrying on pawn broker business in a rented premises but the petitioner could not seek eviction of the respondent as a major portion of the demised premises was residential in character. On appeal by the petitioner, the order of the Rent Controller was confirmed. The Appellate Authority also accepted the claim that the petitioner's wife was doing business in rented premises but found against the bona fides of the petitioner seeking eviction. The appellate authority confirmed the finding that the building in question was both residential and non-residential.

4. The aggrieved landlord is the petitioner herein. Learned Counsel for the petitioner urged that the tenancy being evidenced by a document dated 9-6-1982 marked as Ex.P-8, the Court has to ascertain the purpose of the tenancy or the character of the demised building only from the terms of the document and that a perusal of Ex.P-8 places the matter beyond doubt that the tenancy was for non-residential purpose only and there was no question of two tenancies or one tenancy for both purposes. It is further argued that in any event the dominant purpose of the letting was non-residential and the petition Under Section 10(3)(a)(iii) of the Act was maintainable. Learned Counsel submitted that the authorities below having found that the petitioner's wife was doing business in rented premises were in error in holding that the claim was not bona fide by relying on irrelevant matters. As against this, learned Counsel for the respondent argued vehemently that the nature of the tenancy and the character of the building could not be decided by merely looking into Ex.P-8 but the entire history of the tenancy since its inception in 1974 should be taken into account by the Court for arriving at a proper conclusion. According to him, the authorities below had decided the matter correctly and the petition for eviction was not maintainable. It was also argued that the claim of the petitioner was not bona fide at all.

5. Section 10(3)(a)(iii) of the Act enables a landlord to apply to the Controller for an order directing the tenant to put him in possession of the building in case it is a non-residential building other than one used or adopted for the purpose of keeping a vehicle, if the landlord or his son is not occupying a non-residential building for purposes of a business, which he is carrying on. The Act does not define a 'non-residential building' though it defines a 'building'. A Full Bench of this Court has in *Dakshinamoorthy v. Thulja Bai* (1952) 1 M.L.J. 390, discussed the matter there about and laid down the relevant principles on which the Court could decide whether a building is residential or non-residential. That was a case which arose Under Section 7(3) of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), which corresponds to present Section 10(3). It will be useful to extract the following passage from that Judgment:

For the purpose of determining whether a building is residential or non-residential according to the view expressed above of what a "residential building" means we have to bear in mind a few salient considerations, which was proposed to indicate.

(1) Where there is an instrument of tenancy specifically and explicitly declaring the purpose of the letting as residential or non-residential, no difficulty generally arises.

(2) Where there is no such instrument of tenancy, the question will have to be considered on the basis of direct evidence aliunde concerning the purpose of the letting, which may be adduced in a case. (3) If no such evidence too is forthcoming,

the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction as acquiesced in by the landlord. For, such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting. (4) Where there is evidence of such user, but there is no evidence of such acquiescence, the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances, if any, will also have to enter into the determination of the question whether the building is or is not residential. (5) Difficulty may sometimes still remain, i.e., even after applying the tests above indicated if the building is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case it seems to us, that what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?

6. It was also observed in that case that It is true that the test of dominant purpose and principal user is act always easy of application. Applied certainly it can be, speaking generally, though with some difficulty in some cases. Such difficulty in the actual application of the test in such cases will only mean that a margin of judicial discretion in the matter of the determination of the question of the character of the building as question of fact has necessarily to be allowed for. Instances of transactions inspired by mixed motives and intents in which the question of the main, real and dominant motive and intent has to be canvassed for validating or invalidating them are not uncommon in other branches of law. There can in our judgment be no reason of principle why a canvass of the main, real and dominant purpose should be regarded as not legitimate in this branch of law in cases where the letting is actuated by mixed purposes.

7. It is clear from the above passages that when there is an instrument of tenancy specifically and explicitly declaring the purpose of the letting as residential or non-residential, that should govern the situation. It is only in the absence of such an instrument, evidence aliunde has to be considered. In the present case, there is admittedly an instrument of tenancy dated 9-6-1982. While according to learned Counsel for the petitioner the purpose of the letting could be gathered from the instrument as non-residential, learned Counsel for the respondent urged that as there is no explicit declaration of the purpose in the instrument, the prior history of the tenancy should be taken into account. There are certain features which appear on the face of the instrument and they would clearly indicate that the purpose of the tenancy is non-residential. The name of the tenant is Hameodia Hardware Stores and it is represented by its partner and manager S. Peer Mohammed. While describing the tenant, the document reads thus:

AND HAMEEDIYA HARDWARE STORES represented herein by its Partner and Manager S. Peer Mohammed son of Haji S. Shahul Hameed carrying on business as Hardware and Paint Merchants at No. 157, Kutchery Road, Mylapore, Madras - 600 004, hereinafter called the Tenant' of the Other Part.

(Italics ours) It is seen that it is the firm which is the tenant and the parties have taken care to refer in the description to the fact that the firm was carrying on business in the demised premises. There is no reference whatever to any portion of the premises being used for residential purposes. The document does not state anywhere that one portion of the ground-floor let out to the tenant under the document was intended for residential purpose. The rent is one lump sum of Rs. 1,000 per month. There is no indication that a part of the rent is for residential portion and another part is for non-residential portion. The description of the property in the schedule is as follows:

Downstairs portion of house and premises bearing door No. 157, Kutchery Road, Mylapore, Madras - 600 004, of an extent of 1871 sq.ft. or thereabouts, except the open space in the middle of the premises, which is being used as common place to the tenant, Landlord and the other tenants also where the pump set and corporation water tap is situated.

The Schedule does not divide the property into two portions. The subject matter of the demise is the entire extent of 1871 sq.ft., in the ground floor of the house. Significantly, there is no reference whatever to the prior tenancies or even the history of the tenancy on which considerable reliance is placed by learned Counsel for the respondent. There is no indication in the document that it is only a renewal or continuation of an old tenancy. On the other hand, Clause (4) of the terms and conditions refers to the payment of a sum of Rs. 7,500 on the date of the document as advance which should be repaid by the landlord to the tenant at the time of vacating the premises. This indicates sufficiently that the tenancy is a fresh one and the parties intended to start with a clean slate. In view of the aforesaid circumstances, there can be no doubt that the purpose of the tenancy as could be gathered from the terms of the instrument of the tenancy was non-residential.

8. Learned Counsel for the petitioner draws my attention to the deposition of R.W.1 wherein he has admitted that it is only the firm which took the property on lease. In another place R.W.1 had deposed that as the petition building was not sufficient for the firm, the partners have taken a godown on rent situated just opposite to the petition building. The petitioner had filed before the appellate authority copies of electoral rolls of the year 1984. It is seen therefrom that none of the partners of the respondent firm is shown to be residing in the petition premises viz., 157 Kutchery Road and on the other hand, they are shown as residents of No. 31, Arundale Street, Mylapore, Madras - 600 004. R.W.1 had himself filed an affidavit before the Rent Controller in support of an application to set aside an ex parte order dated 25-8-1983 in which he had given his residential address as 30, Adanja Mudaly Street, Mandaveli, Madras - 600 028. In addition to the evidence afforded by the instrument of tenancy, the other documents and the oral evidence of R.W.1 referred to above prove beyond doubt that the tenancy was only for non-residential purposes and that the demised building has been used only for non-residential purposes.

9. The contention of learned Counsel for the respondent that originally there were two tenancies of different portions, one for residential purpose and another for non-residential purpose and that position continued to be in existence even after the rental agreement dated 9-6-1982, cannot be accepted. I have already stated that the rental agreement is not a renewal of an earlier tenancy. Learned Counsel for the respondent repeatedly relied upon the documents prior to 9-6-1982 for contending that two portions of the demised building were let out for two different purposes. Once the rental agreement dated 9-6-1982 came into existence, all the prior document relied on by learned Counsel for the respondent are irrelevant and of no use. Some of the answers by P.W.I in the course of the deposition that the petition building consisted of two shops only, that he was not aware of the measurements of the shops and that he did not know whether there was a tenant by name Janaki Ammal in the residential portion are caught hold of by learned Counsel for the respondent in support of his contention that the petitioner did not speak the truth before the Court and his claim should not, therefore, be entertained. I do not think that the deposition of P.W.1 would alter the situation in any manner. When the instrument of tenancy is available, there is no necessity to consider any other evidence. Learned Counsel for the respondent drew my attention to the evidence of R.W.1 that the non-residential portion was of an area of 520 sq.ft., and the residential portion of an extent of 1300 sq.ft. and, therefore, the dominant purpose could only be residential and not non-residential. I have already found that the entire building was let out only for non-residential purpose and the evidence indicated that it was used only for such a purpose. The evidence of R.W.1 as regards the areas of the portions of the building cannot be accepted. On the facts, I hold that the petition building was let out for non-residential purpose and the petition for eviction Under Section 10(3)(a)(iii) of the Act is maintainable.

10. Learned Counsel for the respondent relied on the decision of Sengottuvelan, J. in T.N. Lakshmanan v. S.P. Hajee Alavudeen Saheb Sons . In that case, a petition for eviction was filed on the ground that it was required for landlord's own occupation. Though the Rent Controller found that the requirement was bona fide, dismissed the application as there was no notice to quit Under Section 106 of the Transfer of Property Act. On appeal, the Appellate Authority held that the building was a non-residential building and the petition for eviction on the ground of requirement for own occupation was not maintainable. In the revision petition, Sengottuvelan, J. confirmed the finding that the building was non-residential and dismissed the revision petition holding that eviction could not be sought on the ground of requirement for own occupation. That decision turned on the facts of the case and cannot in any way help the present respondent.

11. Learned Counsel next placed reliance on T.N. Unnamalai Achi v. Saminatha Pathar 93 L.W. 404, wherein Nainar Sundaram, J. held that the landlord could not seek eviction of the tenant from a non-residential premises by clubbing the same with two other premises which were residential. In that case, there were three different premises, two of which were residential and the other being non-residential. The landlord filed a petition for eviction on the ground of requirement for own occupation. Both the Rent Controller and the Appellate Authority ordered eviction. While reversing the orders of the Courts below and dismissing the petition for eviction, the learned Judge observed thus:

When relief respect of a single premises which could be used for purpose residential and non-residential cannot be the subject matter of proceedings for eviction on the ground of residential requirement, the bar would be much more stringent where the case involves different premises used for different purposes. The action of the landlord seeking remedies Under Section 10(3)(a)(i) of the Act in respects of a premises used for non-residential purpose is not only a misconception but is also absolutely unsustainable.

That decision does not apply to the facts of the present case.

12. Learned Counsel for the respondent invited my attention to the judgment of Sengottuvelan, J. in *P. Kandaswamy v. Hajee K.S. Mohamed Mohideen Rowther* (1962) 1 M.L.J. 179 in which it is held that when there is a single tenancy agreement, even if the premises concerned consists of more than one portion, a rent control application in respect of the entire premises can be maintained. Far from helping the respondent, the judgment could be used against him.

13. Learned Counsel for the respondent relied on the ruling of the Supreme Court in *Miss. S. Senyal v. Gian Chand*. In that case, which arose Under Section 13(1)(e) of the Delhi and Ajmer Rent Control Act (38 of 1952), the action was commenced in the Court of the Subordinate Judge, 1st Class, Delhi for a decree in enactment, one of the grounds being bona fide requirement for own residence. The trial Court dismissed the suit and an appeal met with the same fate. It was found in the appeal that the building was let for non-residential purposes as well as residential and a decree in enactment could not be granted Under Section 13(1)(e). On a revision to the High Court, it was held that a decree in enactment limited to that portion of the house which was used for residential purposes by the tenant could be granted and the matter was remanded to the Rent Controller for demarcating those portions which were used for residence. The Supreme Court held that the jurisdiction of the Court could be exercised Under Section 13(1)(e) of the Delhi Act only when the premises was lot for residential purpose and not when the premises was let for composite purposes. It was further held that the contract of tenancy was single and indivisible and in the absence of any statutory provision, it was not open to the Court to divide it into two contracts - one of letting for residential purposes and the other for non-residential purposes and to grant relief Under Section 13(1)(e) of the Delhi Act limited to the portion of the demised property which was being used for residential purpose. In that view, the Supreme Court allowed the appeal and restored the order of the Appellate Authority.

14. As I have found on the facts that the purpose of the letting was only non-residential and that the building was used only for non-residential purposes, the ratio of the decision of the Supreme Court will not apply.

15. My attention was drawn to another decision of the Supreme Court in *Satwant Kaur v. Dhund Singh*, which arose under Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). In that case, the High Court considered the nature of the landlord's business and the necessity of godown for tenant's business and decreed partial eviction from the backside of the shop and the Supreme Court upheld the said decree, after finding that the entire demised building was not

necessary for purposes of the landlord. Learned Counsel for the respondent submitted that if an order of eviction is to be passed in the present case, it should be confined to a portion of the petition building and not the entirety thereof. It is not proved in this case that one portion of the building would be sufficient for the petitioner's wife's business for the purpose of which the eviction proceeding has been initiated. A pawn broker may require a large space for the purpose of keeping the pawned articles in iron safes and steel almirahs. Without any definite evidence that the entire extent of 1871 sq.ft will be unnecessary for the purposes of the petitioner's wife's business, the request of the respondent's counsel cannot be countenanced.

16. The next question which has to be decided is whether the claim of the landlord is bona fide. Both the Courts below have found that the petitioner's wife is carrying on business in rented premises. On that finding, it has to be held that the claim of the landlord is bona fide. The requirements of Section 10(3)(a)(iii) have been considered by this Court on more than one occasion. In *Maha-lakshmi Metal Industries v. K. Suseela Devi*, Mohan, J. pointed out that the word 'requirement' is not used anywhere in Section 10(3)(a)(iii) of the Act or in Section 10(3)(e) of the Act which deals with the power of the Rent Controller and that it is not the function of the Courts to equate 'claim' occurring in Section 10(3)(e) with 'require' and when the Legislature has avowedly used the word 'claim' in contradistinction to the word 'require', the cases Under Section 10(3)(a)(iii) of the Act cannot receive the same treatment from the Rent Controller as the cases arising Under Section 10(3)(a)(i) of the Act. It was held by the Court that if the conditions stated in Section 10(3)(a)(i) are fulfilled, an order for eviction would normally ensue. In other words, it was laid down that in cases arising Under Section 10(3)(a)(i) of the Act, the Rent Controller had to decide the bona fides of the requirements of the landlord while in cases arising Under Section 10(3)(a)(iii) of the Act, what is to be decided by the Rent Controller is whether the claim of the landlord is bona fide.

17. The said decision of Mohan, J. was referred to and followed by Ramanujan, J. in *M. Abdul Rahman v. S. Sadasivam* 97 L. W. 516. Taking the same view as in the earlier case, the learned Judge held that if the conditions set out in Section 10(3)(a)(iii) of the Act were found to be satisfied on enquiry by the Rent Controller, then unless the application filed by the landlord under that section was found to be for any oblique purpose, the Rent Controller cannot reject that application. This view was reiterated by Ramaswami, J. in *Khan Mohammed A. v. P. Narayanan Nambiar* 99 L.W. 966. The learned Judge observed that "The question of bona fides does not enter into the picture when we consider a case falling Under Section 10(3)(a)(iii) of the Act".

18. Agreeing with the aforesaid view expressed by three Judges of this Court, I hold that the bona fide of the claim of the petitioner in the present case has been made out as the landlord has satisfied the conditions mentioned in Section 10(3)(a)(iii) of the Act.

The conditions are as follows:

- (1) The building is a non-residential building.
- (2) The landlord or his son is carrying on a business.

(3) The landlord or his son is not occupying a non-residential building of his own for purposes of that business.

All the three conditions are satisfied in the present case as found by both authorities below.

19. However, the appellate Authority held that the claim of the landlord was not bona fide for the following reasons:

(1) The petitioner's father had issued a notice in the year 1980 to the respondent stating that the building was required for purposes of the petitioner's business. After the tenant had sent a reply thereto, no steps were taken by the petitioners father for evicting the tenant. There is no explanation for the failure to take steps for the eviction of the tenant.

(2) The petitioner did not inform the tenant that he had become the owner of the building under a deed of exchange (marked as Ex.P.-7).

(3) The petitioner refused to accept the rent tendered in June, 1983 and when it was sent by post, he filed the petition for eviction.

(4) When the building was let out in two portions, one for residential and another for non-residential, the petitioner has chosen to file the petition for eviction that it is required for non-residential purposes.

There is no need to point out that none of the aforesaid four reasons is relevant or sustainable to support the finding of the Appellate Authority that the claim of the landlord was not bona fide. To say the least, the reasoning of the Appellate Authority on this aspect of the matter is wholly perverse.

20. Towards the end of the arguments, learned Counsel for the respondent hesitantly raised on objection as to the maintainability of the petition for eviction on the ground that all the partners of the respondents firm have not been made parties to the proceedings. Reliance was placed on the decision of Sivasubramaniam, J. in N.S. Doshi and Co., v. P. Ganesan 1987 T.L.N.J. 305. In that case, the learned Judge allowed on application for impleading the partners as parties to the petition in this Court and remanded the matter for fresh disposal by the Appellate Authority. The learned Judge relied upon the decision of the Supreme Court in Chhotelal Pyarelal v. Shikharchand , wherein it was held that a proceeding for eviction under the Rent Control Acts should be instituted against all the partners as a partnership firm is not a legal entity and could not be sued in its name. The Supreme Court had clearly laid down that all the partners were really before the Court, but in a wrong name and that it was only a case of mis description of the parties. It is seen from the facts of that case that an objection as to the maintainability of the eviction petition was raised at the earliest stage before the Rent Controller and the matter went to the Supreme Court even at that stage. After directing the partners to be impleaded, the Supreme Court sent the matter back to be decided on merits.



21. That is not the case here. At no stage of the proceedings any objection was raised by the respondent that the other partners should be impleaded as parties. The judgment of the Supreme Court was reported even in 1984 when the proceeding was pending before the Rent Controller in the present case. The respondent could have raised an objection before the Rent Controller based on the decision of the Supreme Court. He did not do so. Nor such an objection was raised before Appellate Authority or before this Court until the fig end of the arguments in the revision petition. I do not think that the respondent should be permitted to raise the objection at this stage in the present proceedings. I find that the partners of the respondent firm are all brothers belonging to the same family. The cause title describes the firm as represented by its partner and manager Peer Mohammed while another partner Sheik Hussain has given evidence as R.W.I. Nothing has been placed before the Court to show that the other partners are in any way prejudiced. As the Supreme Court has clearly pointed out that it is only a case of misdescription and that all the partners are already before the Court, though in a wrong name, it cannot be held that the petition for eviction is not maintainable without imploding the other partners.

22. In the result, the revision petition is allowed. The orders of the Rent Controller and the Appellate Authority are set aside. There will be an order for eviction as prayed for by the petitioner in R.C.O.P. No. 2692 of 1983 directing the respondent to quit and deliver vacant possession of the petition premises. There will be no order as to costs.