

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO.2615 OF 1993

1. Chindhu Sakharam Palve,
since deceased by his heirs :
- 1-A. Shantabai w/o Chindhu Palve,
Age 60 years,
- 1-B. Ashok Chindhu Palve,
Age 45 years,
- 1-C. Sunil Chindhu Palve,
Age 30 years
- 1-D. Indubai w/o Mitharam Patil,
Age 40 years, Occu. Household,
Residing at Bodwad, Taluka
Jamner, District Jalgaon
- 1-E. Usha w/o Vasant Varhade,
Age 38 years, Occu. Household,
Residing at Yevala, Taluka Yevala,
District Nashik
- 1-F. Rajubai w/o Tanaji Patil,
Age 30 years, Occu. Household,
Residing at Nashik
- No.1-A to 1-C residing at
48, Polan Peth, Jalgaon
2. Kashiram s/o Sakharam Palve,
since deceased, by heirs :
- 2-A Godavari w/o Kashiram Palve,
Age 55 years, Occu. Nil
- 2-B Baburao Kashiram Palve,
Age 40 years, Occu. Service
- 2-C. Suresh Kashiram Palve
since deceased by his heirs
and legal representatives :
- 2C-i. Kalabai Suresh Palve,
Age 42 years, Occu. Household
- 2C-ii Pravin Suresh Palve,
Age 20 years, Occu. Labour

2C-iii Sunita Suresh Palve,
Age 21 years, Occu. Household

2C-iv Lata Suresh Palve,
Age 17 years, minor
Occu. Education

2C-v Akash Suresh Palve,
Age 13 years, minor,
Occu. Education

2-D Ramesh Kashiram Palve,
Age 24 years, Occu. Labour

All residing at 48, Polan Peth,
Jalgaon

.. Petitioners
(Original defendants)

Versus

1. Satish s/o Soma Bhole,
Age 35 years, Occu. Agri.,
Residing at 197, Bhavani
Peth, Jalgaon
2. Omprakash Sitaram Agarwal,
Aged 40 years, Occu. Business,
Residing at 122, Navi Peth,
Jalgaon
3. Shrikant s/o Sitaram Maniyar,
Age 38 years, Occu. Business,
Residing at Vishnunagar,
Jalgaon
4. Sajjan s/o Ghevarchand Salecha,
since deceased, by his heirs :
- 4-A Leeladevi Sajjan Salecha,
age 32 years, Occu. Household,
Residing at 55, M.I.D.C., Jalgaon
- 4-B Abhijit Sajjan Salecha,
Aged 16 years, Occu. Education
minor by his guardian
Smt. Leeladevi Sajjan
- 4-C Jetidevi Ghewarchand Salecha,
Aged 70 years, Occu. Household,
Residing at 55, M.I.D.C. Jalgaon

5. Indravandan Shivilal Shah,
Age 38 years, Occu. Trade,
Residinat at Tijorigalli,
Jalgaon
6. ABM Properties Pvt. Ltd., } Added as per Court's
122, Navi Peth, Jalgaon, } order dated 10.12.2015
Through its Director, } passed in this petition.
Omprakash Sitaram Agarwal, }
Age 63 years, Occu. Business, }
R/o 122, Navi Peth, Jalgaon .. Respondents
(Original Plaintiffs)

Mr S.V. Dixit, Advocate for petitioners
Mr A.S. Bajaj, Advocate for respondents 1 to 6

- WITH -

CIVIL APPLICATION NO.2569 OF 2012
IN
WRIT PETITION NO.2615 OF 1993

ABM Properties Pvt.Ltd.,
122, Navi Peth, Jalgaon
through its Director,
Omprakash Sitaram Agarwal,
Age 63 years, Occu. Business
R/o 122, Navi Peth, Jalgaon ..Applicant

Versus

Satish s/o Soma Bhole and ors. ..Respondents

Mr A.S. Bajaj, Advocate for applicant
Mr S.V. Dixit, Advocate for petitioners in Writ Petition

CORAM : N.W. SAMBRE, J.

DATE : 10th December 2015

ORAL JUDGMENT

Heard Counsel for respective parties.

2. The present petition is by the tenants who have suffered the concurrent findings of eviction pursuant to a decree passed by the learned Civil Judge, Senior Division, Jalgaon on 24th September 1984 in

Regular Civil Suit No.75 of 1980, directing the petitioners to handover the vacant possession of suit premises to the respondents and to pay arrears of rent of Rs.195/-.

3. It was also ordered by the learned Court to pay mesne profit at the same rate from the date of termination of tenancy till handing over the vacant possession.

4. Learned 4th Additional District Jalgaon, vide order dated 15th February 1993, dismissed the appeal preferred by the petitioners bearing Civil Appeal No.74 of 1985, as such present petition.

5. Mr Dixit, learned Counsel for the petitioners, while trying to assail the judgment and decree of Court below and the lower appellate Court would urge that the petition of the petitioners - tenants is liable to be allowed on the ground that all the legal representatives of petitioners-tenants, particularly daughters were not added as party-defendants to the suit and as such, the suit was bad for non-joinder of necessary parties and stood abated and should have been declared as dismissed on that count.

6. The second limb of submission of Mr Dixit is that the petitioners have already paid the amount of arrears towards the rent by money order. According to him, once the money order was sent, there is hardly anything in the control of the present petitioners to ensure the service of such money order on the respondents-landlords. By relying upon the judgment of Allahabad High Court in the matter of **Bhkha Lal and ors., V. Munna Lal**, reported in **AIR 1974 ALLAHABAD**

366, he would submit that sending of money order within one month from the date of receipt of notice is sufficient to infer the intention of the present petitioners-tenants not to commit any default in the payment of arrears of rent.

7. The next submission of learned Counsel for the petitioners – tenants is that it is during pendency of the appeal before the appellate Court, the landlords have transferred the suit property to one stranger who has sought to be impleaded in the present petition by moving an application so as to substitute him as one of the respondents. He would submit that such substitution or inheritance of right is not maintainable in the petition at the behest of subsequent purchaser. He would also submit that in the background of above, so far as the claim of respondents of non-payment of arrears is concerned, the same has been extinguished and accordingly, present petition needs to be allowed.

8. Mr Bajaj, learned Counsel for the respondents-landlords would urge that initially, notices were served on the daughters of the tenant, however, they are not impleaded as party-defendants to the suit, as the daughters were not residing with the present petitioners in the suit premises. He would then urge that it is also not brought on record by the petitioners' witness namely Suresh that the daughters are residing together. According to him, in absence of right of daughters to the tenancy premises, the claim as is put forth is liable to be rejected, as the suit would not abate in such eventuality. Mr Bajaj would add that no prejudice is canvassed by the petitioners to such

daughters who are not before the Court, either at the behest of petitioners or otherwise. According to him, the same cannot be termed to be fatal to the interest and rights of the present respondents-landlords who are fighting for the possession of the suit premises since last about 35 years.

9. The next submission of Mr Bajaj is that it is claimed that money order was sent to the landlords, however, no evidence whatsoever in support of the said claim is brought on record. According to him, the tenants by way of after thought have come out with a case that they have personally visited the landlords and offered rent, which was refused by the landlords and which prompted the petitioners-tenants to send the same by money order. According to him, the tenants have not replied the notice of eviction and demanding arrears of rent issued by the landlords and as such, they were away from there. His next submission is that after the suit came to be decreed, the landlords since were in need of money and the petitioners were not ready and willing to vacate the premises and the premises were also in a dilapidated condition, that has prompted them to sell the premises during pendency of the appeal. He would submit that the copy of the sale-deed is placed on record, which depict that the new landlord has purchased the premises with all rights including the right to claim arrears of rent and the other rights recognisable under the Bombay Rents, Hotel and Lodging House Rates Control Act (hereinafter referred to as the 'Rent Act' for brevity) and the Transfer of Property Act. He would then invited attention of this Court to the fact that even as on date, the petitioners are defaulters and have not

paid the arrears of rent as is apparent from the affidavit filed by the petitioner No.1-C – Sunil in the present petition admitting that they have not paid the rent and are ready and willing to pay the same before this Court. Mr Bajaj, as such submits that the petition is not tenable.

10. Having considered the rival submissions of the parties, it is required to be noted that after the suit came to be filed by the original plaintiff for vacant possession of the suit premises and recovery of arrears of rent, the present petitioners filed their written statement vide Exh.33 to the said plaint though initially they proceeded ex parte.

11. In the plaint, it is claimed that two rooms on the first floor were let out to the defendants. It is further claimed that the tenancy was from first day of English calendar month and was to expire on last day of such month. It is claimed that from 1st September 1977 to 31st October 1979 the payment of rent was not made, which has prompted the respondents to issue notice on 25th October 1979 by Registered Post terminating tenancy by the end of 30th November 1979, which was received by defendant No.1 on 27th October 1979, defendant No.2 on 10th November 1979, notices of defendants No.3, 4 and 5 were returned unserved.

12. The defendants, while resisting the above referred contentions, denied the case of the plaintiffs-landlords in its entirety. Amongst other, the defence raised was that the monthly rent was Rs.7.50 ps and the legal representatives i.e. daughters of Kashiram though are

served with notice, they are not joined as defendants. The arrears of rent was also denied.

13. The present petitioners – defendants thereafter deposited the rent in Misc. Application No.162 of 1982 up to 30th June 1983. It is claimed in the written statement that the amount though offered was not accepted and as such, money order for an amount of Rs.195/- was sent by the petitioners to the respondents-landlords on 11th December 1979.

14. Considering the pleadings, following issues were framed by the learned Joint Civil Judge, Junior Division, Jalgaon at Exh.41 and were answered against the present petitioners learned Court below :

<u>ISSUES</u>	<u>FINDINGS</u>
1. Does plff prove that the suit preuises described in para no.1 of the plaint was given on rent to defendant No.1 and late Kashiram Palve ?	No.
2. Does plff prove that deft. no.1 and late Kashiram Palve formed Hindu Joint Family and deft No.1 was residing as tenant with Kashiram Palve ?	No.
3. Does deft prove that Sawitribai, d/o Kashiram and Kasturabai d/o Kashiram are also legal heirs of Kashiram and were residing in the suit premises ?	No.
4. Does plaintiff prove that deft No.1 is the karta of joint family of defendants ?	No.

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| 5. | Does defendant prove that the suit is bad for non joinder of necessary parties and misjoinder ? | Suit is bad for misjoinder of parties |
| 6. | Does plfff prove that the tenancy of defendants begins on the 1 st day of each month and expires on the last day of the same month ? | Yes. |
| 7. | Does plff prove that defts are in arrears of rent from 1.9.77 to 31.10.1979 Rs.195/- ? | Yes. |
| 8. | Does plff prove that suit premises has become dilapidated and the same is required to be dismantled ? | No. |
| 9. | Does plff prove that deft No.1 has secured suitable alternate accommodation for all the defendants ? | No. |
| 10. | Whether the notice dt. 25.10.79 has the effect to terminate the tenancy of defendants from 30.11.1979 ? | Yes. |
| 11. | Is the plff entitled for mesne profits and arrears of rent ? | Yes |
| 12. | Do defts prove that within one month from the date of service of notice, the rent demanded was sent by money order was refused by the plaintiffs ? | No |
| 13. | To whom greater hardship will be caused if decree of eviction will be passed ? | Does not survive |
| 14. | What relief, order and costs ? | As per final order |

15. While dealing with the rival contentions of the parties, as are noted in the foregoing paragraphs and the pleadings as brought before the learned trial Court, as reproduced herein above, it is required to be noted that the original plaintiff Tulsabai expired on 4th

September 1983 after execution of registered will in favour of the present respondents. It is required to be noted that the original defendants No.3, 4 and 5 are the sons of one Kashiram Palve who was tenant. Though the daughters were not joined, however, the fact remains that they were not joined, as it was noticed that they were not residing in the suit house. It is required to be noted that the defendants' witness Suresh has also not come out with a specific case that the daughters of the original defendant are not impleaded as party, as they are residing in the suit block. It is to be noted that the present petitioners were unable to demonstrate as to why the daughters were necessary parties to the proceedings for eviction though they were not residing in the suit premises. Apart from above, it is required to be noted that for last 35 years of the litigation, the daughters have not come forward to object the claim of present respondents for eviction. As such, it appears that the daughters are not interested in the suit house. Though Mr Dixit has placed reliance upon the judgment of Allahabad High Court in the matter of Bhkha Lal and ors., V. Munna Lal (cited supra), so as to substantiate his contention, however, provisions of Order XXII, Rule 3, 4 and 11 of Code of Civil Procedure are required to be taken into account.

16. In my opinion, it is required to be noted that the daughters are not necessary parties in the present proceedings, particularly having regard to the exceptional circumstances, such as the notice though served on them, they have not bothered to reply the said notice, which was issued prior to filing of the suit. In the suit, till date the daughters have not raised any objection to the present proceedings

and it has not brought on record by the witness of the defendants-petitioners that the daughters are residing in the suit premises. In view thereof, in my opinion, the claim as sought to be put forth that the daughters should have been added as party and for want of same, the present petition is liable to be allowed, is liable to be rejected.

17. The next submission of learned Counsel as regards the offer for arrears, the money order of same is concerned, it is to be noted that it was very much established that the tenancy was to begin from first day of English calander month and the same was to expire at the end of such month and the amount of rent was required to be paid and since the amount was not paid for the period 1st September 1977 to 31st October 1979, i.e. total period of twenty-six months which was calculated as Rs.195/-, the notice at Exh.47 came to be issued which was served on the present petitioners by registered post vide Exhs.48 and 49. It is required to be noted that the said notice was never replied by the petitioners, however, it is claimed by the petitioners that money order was sent on 11th December 1979 towards the arrears of rent i.e. Rs.195/-. It is also required to be noted that the defendants have not produced any documentary evidence so as to infer that the money order was sent by the defendants-petitioners to the original plaintiff towards the payment of arrears of rent and same was duly paid to the original plaintiff. Rather, the defendants' witness Suresh was unable to give any convincing answer or defence in order to support the said claim. Though claim was made that the mother of the petitioners went to pay the amount, however, she was also not examined.

18. In view of above, the claim as was put forth that the rent amount was duly paid by money order, is also required to be declared as failed, as is sought to be raised by the petitioners. Learned Courts below, in my opinion, were right in considering that the amount of arrears of rent was not sent within the period of one month, as contemplated in Section 12 (3) (a) of the Rent Act. Though reliance is sought to be placed by learned Counsel for the petitioners on the judgment of Allahabad High Court in the matter of Bkhha Lal and ors., V. Munna Lal (cited supra), so as to convince this Court to draw presumption that the money order was sent, however, in my opinion, in the factual matrix of the present case, the least that was expected of the petitioners, was to establish the fact of sending money order. In the present case, it is not established by the petitioners that the money order towards the payment of arrears of rent was sent. In the judgment of Allahabad High Court (cited supra), it was well established before the Court that the money order was sent and that has prompted the Court to take view in the said judgment that the money order was sent well within time. As such, the same is having hardly any applicability to the facts of the present case.

19. The last limb of submission of learned Counsel for the petitioners is as regards transfer of tenanted premises during pendency of present proceedings. Though Mr Dixit, learned Counsel for the petitioners has relied upon the judgment of this Court in the matter of **Vinayak Mahadeo Nirgun Vs. Sadanand Shantaram Bandekar**, reported in **1982 Mh.L.J. 126**, so as to canvass that the transfer of property, which is subject matter of proceedings and under

the provisions of Rent Act, the suit property, during the pendency of the suit shall not result in transfer of complete right including that of right to claim arrears of rent and to seek eviction and also relied upon the judgment of Apex Court in the matter of **N.M. Engineer and ors., Vs. Narendra Singh Virdi and anr.**, reported in **AIR 1995 SC 448**, so as to canvass that the arrears of rent in the hands of transferee as like in the present case will become debt and could be actionable claim. So far as above referred submission is concerned, it is required to be noted that the notice to the tenant demanding arrears of rent and the termination of tenancy was served on 25th October 1979. The suit for arrears of rent and possession came to be initiated before the trial Court on 29th January 1980 and came to be decreed on 24th September 1984. It is thereafter, the present petitioners – tenants filed Civil Appeal No.74 of 1985 on 4th March 1985, which was decided on 15th February 1993. In the present case, the original plaintiff transferred the suit premises to the present petitioners whose substitution is permitted by registered sale-deed dated 8th April 1987, i.e. after the suit came to be decreed and the appeal at the behest of present petitioners was pending. If in the background of above referred facts, the law as relied upon by learned Counsel for the petitioners is appreciated, in my opinion, the claim as sought to be raised on the basis of abovesaid judgments, is wholly misplaced, particularly in the factual background of the present case. In the matter of Vinayak Mahadeo Nirgun Vs. Sadanand Shantaram Bandekar (cited supra), this Court was dealing with the eventuality that the owner in the said case on 21st April 1972 sold the premises

and thereafter, on 5th July 1972, assigned the pre-transfer arrears of rent due to him to the purchaser, based on the same, the purchaser issued notice to the tenant. In the facts of the present case, it is after the suit was decreed and during pendency of the appeal at the behest of present petitioners, the premises came to be transferred. As such, the said judgment in the matter of Vinayak Vs. Sadanand (cited supra) has hardly any applicability to the facts of present case. As such, in the above background, so far as the law laid down by the Apex Court in the matter of N.M. Engineer and ors. Vs. Narendra Singh Viridi and anr. (cited supra) is concerned, it is required to be noted that the Honourable Apex Court, while dealing with the claim therein and upon taking into account the provisions of Section 3 of the Transfer of Property Act in the matter of actionable claim, has noted that nowhere in the said case any assignment of rent was made and the assignee was not entitled to rent before the assignment and the amount due prior to the deed could not constitute arrears of rent as it was merely an actionable claim. This Court had an occasion to consider the said law laid down in the matter of N.M. Engineer and ors. Vs. Narendra Singh Viridi and anr. (cited supra), in the judgment reported in 1997 VLJ 612 in the matter of **Kunjiram Bhesoram Bhayya Vs. Nirmalabai Vinayak Kelkar & Ors.**, decided in Writ Petition No.4330 of 1984 on 2nd July 1997. This Court, while dealing with the said observations, in paragraph 6 has observed thus :

“6. So far as the third submission made by Shri Gokhale is concerned, it is to be seen here that the Supreme Court in its judgment in N.M. Engineer's case,

relying on the provisions of section 109 of the Transfer of Property Act had held that a transferee is not entitled to arrears of rent due before the date of transfer and in that case the transfer was effected after giving the demand notice but before instituting the suit. In the present case, what has been transferred along with the house is the right of the landlady to institute the suit. In the present case as a result of the demand notice issued by the previous landlady and failure of the tenant to comply with the demand notice, a right to claim a decree of eviction against the tenant under section 12 (3) (a) of the Act had vested in the landlady and it is this right which was transferred by the landlady to the transferee-landlord after she instituted the suit for enforcement of that right. In my opinion, the ratio of the judgment of the Supreme Court in N.M. Engineer's case is not in anyway attracted in the present case. The question that fell for consideration before the Supreme Court was that in that case the landlord had issued a demand notice dated 2.5.1967 and after issuing the notice and before instituting the suit, the landlord had transferred the property. It is further to be seen here that the demand notice in that case was issued on 2.5.1967 and the arrears of rent were to be paid within a period of one month from the date on which the tenant received the notice. It is not clear from the judgment of the Supreme Court as to on which date the notice was received by the tenant. However, it is clear from the judgment of the Supreme Court that on 8.6.1967 the transfer took place. Thus, the transfer was effected before filing the suit. In the present case, however, the transfer has been effected after filing the suit and therefore, in my opinion, the ratio of the judgment of the Supreme Court in N.M. Engineer's case would not be attracted in the present case. It is further to be seen here that it is clear from the

judgment of the Supreme Court that while transferring the property, the right to recover rent for the period anterior to the transfer was not assigned. In the present case, however, in the sale deed it is clearly stated that a civil suit has already been filed against the tenant for recovery of possession as also for recovery of rent and all the rights of the transferor are transferred to the transferee. Therefore, the right to recover arrears of rent was also specifically transferred in the present case. In any case, in my opinion, in the present case what has been effected by the transfer is apart from transferring the property, the transfer of the right accrued to the landlady to institute the suit for a decree of eviction against the tenant. Thus, I find no error of law in the judgment of the appellate court so as to merit interference at the hands of this court in its jurisdiction under Article 227 of the Constitution of India.”

20. This Court, while applying the law laid down by the Apex Court in the matter of N.M. Inamdar's Vs. Narendra Singh Viridi (cites supra), has already held that the suit at the behest of subsequent purchaser is maintainable, particularly while transferring the property right to recover the rent for the period anterior to the transfer is not assigned. The facts of the present case are almost similar to the judgment of this Court (cited supra). Reliance can also be placed on the judgment of this Court in the matter of **Shankarrao Rangnath Ghodke Vs. Ramchandra Bapu Koparde**, reported in **2004 (6) LJSOFT 20**, so as to infer that action at the behest of subsequent purchaser is very much tenable.

21. In the present case, it is required to be noted that the landlord has not transferred the suit property, either before issuance of notice seeking arrears of rent or before the suit came to be initiated. It is only after the suit came to be decreed, which was for eviction and payment of arrears of rent, the present petitioners preferred appeal, the property in question came to be transferred by the respondents-landlords. The fact remains that the contents of the sale deed, if are perused, it would be *ex facie* clear that all the rights are transferred by the original plaintiffs in favour of present petitioners, who are permitted to be substituted in the petition.

22. In this background, in my opinion, the submission as sought to be put forth by the learned Counsel for the petitioners that in view of transfer of property during pendency of the proceedings, the right of the original petitioner, so also the present petitioners gets extinguished, is required to be rejected.

23. One more aspect about which this Court must take note is about the affidavit, filed by the petitioner No.3-C Sunil before this Court on 28th January 2015 stating that in view of order dated 22nd January 2015, the petitioner is ready to deposit the arrears of rent for the year 2013-2014. On 22nd January 2015, after it was brought to the notice of this Court that up-to-date rent is not paid, this Court has called upon the petitioners to make a statement and the petitioner has accordingly deposited the rent till 2012.

24. The fact remains that the rent during the pendency of present petition is as such, not paid by the petitioners, i.e. after 2012. This

Court must take judicial note of the same qua the conduct of the petitioners.

25. In this background, for the reasons stated here above, the petition preferred by the petitioners is dismissed and the Civil Application No.2569 of 2012 preferred by the applicant ABM Properties Pvt.Ltd., Jalgaon through its Director, Omprakash Sitaram Agarwal, the purchaser of the suit property stands allowed, for the reasons stated therein.

26. Rule discharged. In the circumstances, there shall be no order as to costs.

27. Having pronounced the judgment of dismissal of the petition, Mr Dixit, learned Counsel for the petitioners submits that the interim order operating in the writ petition be continued for a period of six weeks. The prayer is opposed by Mr Bajaj on the ground that the subject-matter of the petition, i.e. tenanted premises is already demolished and the petitioners are no more in possession of the suit premises.

28. The above referred fact is not disputed by Mr Dixit. In view thereof, the prayer for continuation of interim relief stands rejected.

(N.W. SAMBRE, J.)