

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

WRIT PETITION NO.2566 OF 1992

Kadarkhan Samadkhan died,
through L.Rs.

- 1-A. Wali Mohd.Kadarkhan,
Age 55 years, Occu.Painter
- 1-B. Nababkhan Kadarkhan,
Age 50 years, Occu. Driver
- 1-C. Rafiqkhan Kadarkhan,
Age 45 years, Occu. Driver
- 1-D. Shabbirkhan Kadarkhan,
Age 43 years, Occu. Driver
- 1-E. Anisa Nazirkhan,
Age 40 years, Occu. Household
- 1-F. Yusufkhan Kadarkhan,
Age 38 years, Occu. Driver

All r/o House No.157, Ward No.2,
Koli Mohalla, Amer,
Jaypur, Rajasthan

..Petitioners

Versus

- 1. Sk.Ghasu Sk.Ibrahim,
since deceased by his heirs:
- 1A. Mumtajbi Shaikh Ghasu
since deceased by her heirs:
- 1A-i. Shaikh Anwar Shaikh Ghasu,
Age 35 years, Occu. Service,
R/o Railway Quarter No.1082-A,
15 Bangle, Near Railway Institute
(Fitter Grade I), Bhusawal,
District Jalgaon
- 1A-ii. Jubedabi Habibkhan,
Age Major, C/o N.A. Khan,
H.No.7/1, Subhash Nagar,
Ordnance Factory Colony,
Bhusawal, Dist. Jalgaon

1B. Jubedabi Habibkhan,
Age Major, R/o as above

..Respondents

Mr L.V. Sangit, Advocate for petitioners

Mr P.P. Kothari, Advocate h/f Mr S.S. Bora, Advocate for respondents
No.1A-i, 1A-ii and 1B

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING
THE JUDGMENT : 19th March 2015**

**DATE OF PRONOUNING
THE JUDGMENT : 2nd July 2015**

JUDGMENT

1. This petition is by tenants.
2. While admitting the present petition, this Court has passed the following order on 29th June 1993 :

“ Since common questions of fact and law are involved in this petition, common order is being passed. It is admitted fact that one Mohamad Yaya s/o Abdul Sattar was the original owner of the suit property. Fatmabi w/o Dadu was collecting rent and this is also not disputed. All these petitioners are the tenants.

2. It appears that for certain dues of the Municipal Council, Bhusawal the property came to be auctioned and in public auction, Fatmabi herself purchased the property. Therefore, in addition to her earlier right of the recovery of the rent on behalf of the real owner, she became owner by virtue of public auction on the basis of sale certificate dated 15.4.1976. Subsequently, Fatmabi transferred this property to Respondent No.1 - Orig.plaintiff Sheikh Ghasu Sk. Ibrahim. Notices were served on the tenants by the new landlord on 2.8.1976, 20.10.1976 and 7.5.1976

respectively. These notices claimed rent and contained an averment that he has purchased the property along with right to recover the rent due to previous landlord. The learned trial Judge as well as the learned appellate Judge have concurrently found this position to be true. This finding of fact need not be disturbed. It is also admitted that the fact that despite the service of the notices none of the petitioners deposited rent as was required within a period of one month from the date of service of the notice. Therefore, it was by the Courts below that they are covered by sub-section 3 (a) of Section 12 of The Bombay Rent, Hotel Lodging Rates Control Act, 1947 (as the provision was then). This position need not be disturbed so far Sk.Noor and Sk.Khurshid Ali – petitioners in Writ Petition No.2552 of 1992 and Writ Petition No.2567 of 1992 are concerned. However, the case of Kadarkhan – petitioner in Writ Petition No.2566 of 1992 stands on different footing. Admittedly, Kadarkha had filed an application for determination of the standard rent on 5.11.1976 within a period of one month from the date of the receipt of notice issued by the landlord. Therefore, the landlord will not get right to evict him by virtue of the provisions of section 3(a) of Section 12. Since the dispute about standard rent was filed well in time, non-deposit of the rent as demanded in the notice, by Kadarkhan at least prima facie, it does not appear to be a valid basis for his eviction from the suit premises. Therefore, his petition will have to be admitted. Admittedly, such an application is not given by the petitioner order :

Writ Petition No.2552 of 1992 and Writ Petition No.2567 of 1992 stand summarily dismissed. Writ Petition No.25676 of 1992 Admitted. Rule.

Shri Bora, learned Counsel for respondents Nos.1 and 2 waives service. Shri Patil craves leave to delete

respondent No.2. Request granted. Interim relief in Writ Petition No.2566 of 1992 confirmed and to continue till final disposal of the petition.

3. The petitioners in Writ Petition No.2552 of 1992 and Writ Petition No.2567 of 1992 are granted six months time from today to vacate the suit premises on condition that they file an undertaking within a period of two weeks from today in the trial Court in the form of an affidavit that they will handover the vacant possession of suit premises to Respondent 1 and 2 on or before the expiry of the said period of six months and will not create third party interest will continue to pay rent by way of deposit in the trial Court on or before 10th day of each English calendar month. If the undertaking is not filed within two weeks, the concession shall stand withdrawn.

3. The petitioner - defendant claimed to be in possession of North West block of ground floor of house bearing No.2690, City Survey No.1900, situated at Bhusawal on monthly rent of Rs.10 + education cess at the rate of Re.1 and the tenancy was to commence from 13th of each month expiring on 12th of subsequent month.

4. The respondent-landlord claiming to be owner of the property by virtue of sale deed executive in his favour by Fatimabee as is observed by this Court in the order dated 29th June 2013, cited supra. The eviction of the petitioner-tenant under the provisions of Section 13 (1) (g), 13(2) (f), 12 (3) (a) of the Bombay Rents, Hotel Lodging Rates Control Act, 1947 (hereinafter referred to as 'the Act' for the sake of brevity) is sought on the ground that petitioner-tenant had

failed to pay rent for the period from 13th July 1976 to 22nd November 1976 and *bona fide* need of the landlord.

5. In the suit, present petitioner – defendant filed his written statement at Exh.14 on 22nd April 1977 and denied the claim of the respondent – landlord. There was specific denial of title by the petitioner-defendant.

6. Having regard to the rival claims of the parties, learned trial Court framed issues and answered the same accordingly which read thus :

<u>ISSUES</u>	<u>FINDINGS</u>
1. Does plaintiff prove that the tenancy month commences from 13 th of the each month ?	
2. Does plaintiff prove that he is landlord of suit premises ?	In the affirmative
3. Does plaintiff prove that the defendant is in arrears of rent from 13.2.1976 till 12.10.1976 ?	In the affirmative
4. Whether the defendant has neglected to pay the amount of standard rent and permitted increases for the period of six months ?	In the affirmative
5. Whether the defendant is ready and willing to pay the standard rent increases ?	In the affirmative

6. Whether the defendant is a defaulter ? In the affirmative

7. Does plaintiff prove that he requires the suit house reasonable and bona fide for occupation ? In the affirmative

8. Whether the greater hardships would be caused to defendant by passing the decree than to plaintiff by refusing to pass it ? In the affirmative

9. Whether the suit notice is illegal and valid ? In the affirmative

10. Is plaintiff entitled to possession of suit premises ? In the affirmative

11. What amount if any to plaintiff ? In the affirmative

12. What relief, order and costs ? As per order below

7. It is also required to be noted that as quoted in the order of this Court while admitting the writ petition dated 29th June 1993, the petitioner had filed an application for fair rent.

8. The trial Court decreed the suit of the respondent on 3rd December 1981 directing the petitioner-defendant to pay arrears of rent and also handover the possession of the suit premises with further direction of inquiry in the mesne profit.

9. The petitioner, feeling aggrieved thereby preferred an Appeal No.40/1982 in the Court of District Judge, Jalgaon. The District Jalgaon by order dated 14th August 1982 dismissed the appeal upon considering and deciding the following points which read thus :

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether the findings recorded by the lower court on the point the plaintiff can maintain the suit having become the landlord of the suit house are proper ?	Yes
2. Whether the plaintiff is entitled to recover the possession on the ground of default in payment of rent for more than six months in spite of notice of the tenants ?	Yes
3. Whether he was entitled to the possession on the ground of reasonable bona fide and personal occupation ?	No
4. Whether the judgment and decree of the lower court calls for interference ?	No
5. What order ?	As per order below

As such, present petition by the tenants.

10. Mr Sangit, learned Counsel for the tenants submits that though the title of the plaintiff – landlord was questioned, no specific issue to that effect was framed and answered by both the Courts below. In addition to above, he has invited attention of this Court to the application for fair rent preferred within limitation of one month and as such, according to him, the petitioners cannot be termed as defaulters. In addition to above, he would urge that the notice was served on 22nd October 1976 on the petitioner – landlord whereas application was filed on 5th November 1976 within period of thirty days from the date of the notice.

11. According to Mr Sangit, the judgments and decrees passed by both the Courts below are liable to be quashed and set aside.

12. Learned Counsel for the respondents while opposing the above referred submission of the Counsel for the petitioner – tenant would urge that the landlord is fighting for his right for possession of the suit property for his bona fide need and so also for default in the payment of rent since last 40 years. In addition to above, he would urge that once there is a serious objection raised to the title of the present respondents-landlords by the tenants, the provisions of Section 116 of the Evidence Act will come into play whereby the tenant is estopped from questioning the title of the landlord and submits that it is not open for the petitioner to raise said issue. Apart from above, he would urge that both the Courts below having concurrently held in favour of the landlord, there is no question of this Court under Writ Petition to

re-appreciating the entire issue as under Articles 226 and 227 of the Constitution there is limited scope available to this Court to interfere while exercising powers of judicial review.

13. Having analysed the submissions of the respective parties, particularly in the background of the pleadings and evidence brought on record and the findings recorded by the learned Civil Judge, Junior Division, Bhusawal in his judgment dated 3rd December 1981, it is required to be noted that the suit in question was filed by the land owner who has stepped into shoes of Fatimabee, who was earlier authorised to collect the rent from the earstwhile owner Mohd. Yayakhan which property subsequently auctioned and purchased by Fatimabee.

14. Since day one i.e. 1957 the earlier owner who had shifted to Pakistan had authorised Fatimabee, as is brought on record to collect the rent from the tenant. She continued to collect the rent from the tenant, even prior to transfer of title in her. In view of above, it cannot be inferred that the petitioner has not recognised Fatimabee as land lady, particularly having regard to the provisions of Section 5 of the Bombay Rent Act. Apart from above, the respondent-plaintiff has stepped into shoes of Fatimabee and there was a joint notice issued to the present petitioner to pay the rent to the plaintiff. With this background, the petitioner has proceeded to deny the title of the landlord. The said contentions were examined by the Court below in the light of provisions of Section 116 of the Evidence Act. The said section reads thus :

“116. Estoppel of tenant; and of licensee of person in possession - No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.”

15. Upon perusal of Section 116 of the Evidence Act, it is noticed that the petitioner-tenant who was put to notice that the plaintiff has stepped into shoes of earlier land lady - Fatimabee and she was claimed to have collected rent ought not to have been denied the title of plaintiff in view of Section 116 of the Evidence Act. In view thereof, the Court below, having inferred that the present petitioner is estopped from questioning the title of the landlord was rightly inferred to. The Court below has rightly drawn inference from the judgment of this Court in the matter of **John Nadjarian vs E. F. Trist** reported in AIR 1945 Bom.399. Apart from above, learned Court below has also dealt with the aspect of the outstanding rent as against the present petitioner. It is noticed by the Court below that having regard to the provisions of Section 12(3) of the Bombay Rent Act, the petitioner was served with a notice by the plaintiff-landlord, which is at Exh.26 demanding rent from 13-2-1976 to 12-10-1976 along with education cess which amount was not paid by the petitioner. Apart from above, when the judgment delivered by the trial Court was questioned in appeal before the learned District Judge in Civil Appeal No.40/1982,

the present petitioner has raised only issue about the title of the plaintiff-landlord. According to him, the suit house in question was purchased by Fatimabee upon playing fraud on them through the Municipal Council. While analysing the evidence, the appellate Court has noted that while questioning the title of Fatimabee, no evidence is led by the present petitioner about disputed title of Fatimabee. Apart from above, once having paid the rent to Fatimabee, the lower Court held that it is not permissible in the background of Section 116 of the Evidence Act to question the title of the land lady - Fatimabee in whose shoes the plaintiff has entered into. From the record, it was also established that though the rent at earlier point of time was paid by the petitioner, however, the rent for the subsequent period was not paid.

16. Having regard to the above observations, the contention raised by learned Counsel for the petitioner that no issue about title of the plaintiff was framed by the learned trial Court and on the said count, the judgment of the learned trial Court is liable to be quashed and set aside, does not call for any interference in the second appellate jurisdiction. Non framing of issue in relation to title, in my opinion, cannot be termed as a question of law when both the Courts below have given finding as regards denial of title by present petitioner and availability of such plea to the petitioner in the background of Section 116 of the Evidence Act.

17. In view of concurrent findings recorded by the trial Court so also the lower appellate Court, it will not be appropriate for this Court to re-appreciate the evidence and set aside the impugned judgment, particularly when the landlord is fighting for his right since 1976.

18. As such, petition fails, stands dismissed.

(N.W. SAMBRE, J.)

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