

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

WRIT PETITION NO. 1597 OF 2001

1] Subhash Narsopant Saundankar,
age 43 years, occ. Service,
At and as Additional District Judge,
Ahmednagar at District Court premises,
Ahmednagar,

2] Mangilal Laxman Saundankar,
age 65 years, occ. Business,
r/o Lane No.7, Parola Road,
Dhule

...Petitioners

VERSUS

1] Chandrakant Babanrao Salunke,
age 55 years, occ. Business,
r/o Lane No. 7, Near Nalla,
Dhule, Tq. And Dist. Dhule,

AND

Babanrao Khemji Salunke,
(Deceased) died on 24.10.1991
legal representative
respondent no.1 and

2] Anant Babanrao Salunke
age 55 years, occ. Business,
r/o Lane No. 7, Near Parola Road,
Dhule, Tq. And Dist. Dhule,

3] Smt. Kamalbai w/o Trambak Salunke,
age 45 years, occ. Household,

- 4] Bharat Trambak Salunke,
age 25 years, occ. Labourer,
- 5] Rajendra Trambak Salunke,
age 23 years, occ. Education,

Respondent nos. 3 to 5
R/o Navjeevan Nagar, Dhule,
Tq. And Dist. Dhule

...Respondents

.....
Shri S.P.Shah, advocate for petitioners
Shri N.B.Suryawanshi, advocate for respondents
.....

CORAM : V.M.DESHPANDE, J.

DATED : 8th January, 2015

ORAL JUDGMENT : -

1] Unsuccessful landlord before the appellate court, who reversed the decree in favour of the landlord for possession is before this court.

2] A suit was filed in the court of 5th Joint Civil Judge, Junior Division, Dhule. The said suit was registered as Regular Civil Suit No. 458 of 1985. The said suit was contested by the present respondent no.1 and the predecessor-in-title of respondent nos. 2 to 5. The said suit was decreed by the learned trial court and the defendants in the suit were directed

to hand over vacant possession of the suit premises and they were also directed to pay Rs.152.50 Ps. as arrears of rent, Rs.35/- towards damages and Rs.65/- by way of notice charges by judgment and decree dated 16.11.1991.

3] Appeal was carried. The said appeal was registered as Regular Civil Appeal No.2 of 1992 and was on the file of Extra Joint District Judge, Dhule. The learned lower appellate court vide judgment, dated 2.2.2000 allowed the appeal and thereby reversed the judgment and decree of the trial court granting possession. It is against this reversal of judgment, the present Writ Petition is filed by the landlord.

4] Facts giving rise to the present Writ Petition are stated hereunder.

On 16.7.1985 Shantabai w/o Narsopant Saundankar, the mother of the present petitioner filed a suit against the defendants (1) Chandrakant Babanrao Salunke and (2) Babanrao Khemaji Salunke.

The said suit was filed for recovery of vacant possession of the suit property admeasuring 30 x 8 ft. consisting of two rooms standing on sheet No. 2209/2 at Lane No.7 within the limits of municipal council, Dhule.

It was stated in the plaint that Chandrakant Salunke defendant no.1 was tenant and his tenancy was a monthly tenancy commencing on each 10th day of calendar month, which expires on 9th day of next calendar moth. It was further stated that the agreed rent was Rs.15.25 Ps. Plaint discloses that the house in question was taken by the defendant no.1 for his own residence.

It was stated that defendant no.1 is a habitual defaulter in making the payment of agreed rent. He was in arrears of rent from the month of 10th July, 1984. Plaintiff was required to issue a registered notice on 15.4.1985 by which arrears of rent were demanded and also possession was claimed. The said notice was served on the defendant on 16.4.1985. Instead of complying with the said notice, the defendant only sent Rs.43.20 Ps. by money order towards educational cess. The said money order was claimed under protest. It was further stated in the plaint that since the tenant was in arrears of rent from 10.7.1984, till filing of the plaint he was not entitled to claim any protection under the Bombay Rent Act. The plaint further discloses that the tenant has damaged the tenanted premises.

Further it was stated in the plaint that defendant no.1 has constructed a house about 1½ years back on Plot No.30

and is residing there. Further, he has also constructed another house at Navjeevan locality at Dhule. The said house is also in possession of the defendant. Therefore, it was pointed out that since last 1½ years the tenants are not using the tenanted premises for their residence.

It was further alleged that the defendant no.1 after shifting his residence to his own house without the consent of the landlord illegally sub-let it to the defendant no.2 Babanrao Salunke and he is using the same as godown.

With these allegations and statements of fact, the plaintiff claimed vacant possession of the tenanted premises.

5] On being summoned, both the defendants filed their joint written statement. Same is on record at Exh.11 of the court below. Sum and substance of the written statement shows that the rent is being paid up to 9.8.1984 and receipts are given by the landlord. It was further stated in the written statement that amount of Rs.110/- was given to Narsopant Saundankar in the month of July 1985. Considering the said amount of Rs.110/-, at the most there are arrears of rent from 10.3.1985 and the said amount is deposited by the tenant in the court.

6] During the pendency of the suit, an application (Exh.15) was filed by the plaintiff Shantabai Saundankar on 13.1.1988. By the said application Shantabai submitted that in view of the family partition and since the suit property was allotted to the share of her son Subhash Saundankar in the said family partition, her name may be deleted and name of Subhash Narsopant Saundankar may be substituted as the plaintiff.

Subhash Saundankar also submitted an application on the said date, which is at Exh.16 and prayed before the court that his name be substituted in view of the fact that now he is owner. The said application was contested by the defendants. However, on 2.9.1988 the learned trial court allowed both these applications and name of original plaintiff Shantabai Narsopant Saundankar was substituted by incorporating the name of Subhash Narsopant Saundankar as the plaintiff. The said order was not challenged by the defendants. Subsequent to his substitution, the suit was further contested by Subhash Saundankar.

7] As observed, the decree was reversed by the appellate court. The learned lower appellate court reversed the decree on the ground that, in view of the provisions of Section

109 of the Transfer of Property Act for arrears of rent Subhash will not be entitled to obtain decree on that count because the said claim will be an actionable claim. Further, the appellate court was of the view that it cannot be held that Rs.15.25 ps. was not a standard rent with permitted increases.

8] It is pertinent to note that in appeal the tenant raised a plea that the substitution of Subhash in place of original plaintiff was not legal. The learned lower appellate court has framed a point that :-

“ Whether substitution of original plaintiff Shantabai by the present plaintiff Subhash can be challenged in the present appeal ?”

However, the learned lower appellate court correctly reached to the conclusion that it was not open for the tenant to challenge the substitution in the appeal, and accordingly, the appellate court found that the substitution of Subhash Saundankar was proper.

The said issue of substitution is not challenged by the original defendants in the present Writ Petition and thus the said point has attained finality.

9] The learned counsel for the petitioner Shri S.P.Shah submitted that though in the plaint on various grounds the

decree is claimed, the landlord is pressing for revival of the decree of the trial court only on the ground of arrears of rent. He submitted that even from the pleadings of the tenant in the written statement, it is clear that the tenant was in arrears of rent and was not entitled for protection.

He further submitted that at no point of time any dispute was raised by the tenant about the rent and at no point of time any application for fixation of interim standard rent was filed by him. He, therefore, submitted that there is no doubt that the tenant is in arrears of rent.

He submitted that the appellate court has incorrectly applied the provisions of Section 109 of the Transfer of Property Act. He further submitted that the ratio in the case of **N.M.Engineer and others vs Narendra SinghVirdi [AIR 1995 SC 448]** was incorrectly applied by the learned lower appellate court.

10] Per contra, the learned counsel Shri N.B.Suryawanshi strenuously urged before me that an amount of Rs.110/- was already paid to Narsopant Saundankar, and therefore, it could not be said that the tenant was in arrears of rent. He supported the reasoning given by the learned lower appellate court and argued that the appellate court has correctly

reached to the conclusion that the claim of rent in arrears, if any, may be an actionable claim in so far as present plaintiff Subhash is concerned.

11] Since there is no dispute and in view of the fact that the finding given by the appellate court regarding substitution of Subhash as plaintiff, this court will not dilate on the said issue.

12] Notice, dated 15.4.1985 (Exh.48) was given to Chandrakant Salunke, defendant no.1. In the said notice, it has been specifically asserted that he was in arrears of rent from 10th July, 1984. It was also pointed out in the notice that monthly rent was Rs.15.25 Ps. It was further stated in the notice that education cess was also not given by the tenant from beginning.

13] Postal receipt (Exh.49) shows that the said notice was sent. Exh. 50 is the acknowledgement of Chandrakant. In view of the acknowledgement (Exh.50), it is clear that the notice was duly received by Chandrakant. In fact, there is no dispute about the receipt of the notice on the part of tenant Chandrakant.

Though notice Exh.48 was duly received by Chandrakant, the said notice was not replied by him.

If we examine the pleadings, it is clear that according to the plaintiff the rent was paid till 9.7.1984; whereas as per the written statement the rent was paid up to 9.8.1984.

If the pleadings in the written statement are read correctly, then it is clear that there is no whisper in the written statement about the payment of rent from 9.8.1984 till 15.4.1985 when the notice was issued. Thus, it is clear that the tenant has admitted in the written statement that he was in arrears of rent for more than six months.

14] Section 12 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 (for short, "the Bombay Rent Act") states that there cannot be any ejectment for the tenant who pays or is ready and willing to pay the standard rent and permitted increases.

Section 12 of the Bombay Rent Act reads as under :-

" 12 (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) No suit for recovery of possession shall be

instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon tenant in the manner provided in section 106 of the Transfer of Property Act, 1882 (IV of 1882).

(3)(a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the [Court shall pass a decree] for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.
”

15] Admittedly, after receipt of the notice (Exh.48), the tenant did not reply the notice nor paid the rent as claimed in such notice, however, he sent money order for Rs.43.20 ps. towards the education cess.

16] In view of the remittance of Rs.43.20 ps. towards education cess in pursuance to the notice (Exh.48), it is crystal

clear that the contents of the notice were admitted by the tenant since in the notice (Exh.48) it has been specifically averred that the tenant is in arrears of education cess.

17] In the notice (Exh.48), the rent was claimed at the rate of Rs.15.25 Ps. Since the said notice was not replied and in the light of remittance of the education cess, there is no other option but to reach to the conclusion that agreed rent was Rs.15.25 Ps.

18] Further, clause (a) of Sub-section (3) of Section 12 of the Bombay Rent Act, 1947 shows that the tenant is entitled to pay the arrears within a period of one month from the receipt of the notice. Even if we accept the version made in the written statement about the payment of Rs.110/- to Narsopant Saundankar, who died prior to filing of the written statement, it is clear that even the written statement shows that the said amount was given to deceased Narsopant in the month of July, 1985, which is clearly outside the one month of receipt of the notice (Exh.48), since Exh.50 shows that notice (Exh.48) was received by Chandrakant on 16.4.1985.

Further, if there was any dispute about the agreed rent it was open for the tenant to raise the dispute about the

same. In absence of raising such dispute, it is impermissible to take the different view about the agreed rent.

The learned lower appellate court, in my view, has misdirected himself. According to the learned lower appellate court, plaintiff Subhash in the examination-in-chief has admitted that in the year 1975 another room was let out and previously rent was Rs.7/- only. Reliance is also placed on three receipts Exhs. 43, 44 and 45, which show that rent was Rs.7/- and Rs.8/-. The said receipts pertain to the year 1969 and 1974, however Exh.46 receipt for the month of August, 1984 clearly shows that the rent was Rs.15.25 Ps. With this and in absence of anything contrary, the learned lower appellate court, in my view, has incorrectly reached to the conclusion that Rs.15.25 Ps. was not agreed standard rent. In that view of the matter, the finding recorded by the learned lower appellate court that the tenant was not in arrears of rent for more than six months needs to be set aside.

19] Another ground, which weighed in the mind of the learned Judge of the appellate court to upset the decree is Section 109 of the Transfer of Property Act, which reads as under :-

“ **109. Rights of lessor's transferee.** — If the lessor transfers the property leased, or any part thereof, or any

part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased. ”

According to the learned lower appellate court and which is the submission of the learned counsel for the respondent, in view of the provisions of Section 109 of the Transfer of Property Act, present petitioner will not be entitled to the decree on the basis of arrears of rent which were there prior to allotment of suit house to his share.

The learned lower appellate court placed reliance on the reported case of **N.M.Engineer and others vs Narendra Singh Viridi [AIR 1995 SC 448]**; and **Smt.Champabai Manilal Shah and anr. Vs Anandrao Ramchandra and another [1993 Bombay Rent Cases Pg. 351]**. According to the learned lower appellate court, therefore, at the most the arrears of rent was

mere an actionable claim, since according to the learned lower appellate court if some of the co-landlords relinquished their right in favour of other landlords, it operates a transfer within the meaning of Section 109 of the Transfer of Property Act.

20] The Apex court has dealt with such issue in detail in the case of **Sk. Sattar Sk. Mohd. Choudhari vs Gundappa Amabadas Bukate [1997 (2) Bom.C.R.690]**. Section 5 of the Transfer of Property Act reads as under :-

“ **5. “Transfer of property” defined.** — In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and “to transfer property” is to perform such act.

In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. ”

While dealing with the said Section, the Apex Court in para 22 of the said judgment has observed as under :-

“ 22. This Section contemplates transfer of property by a person who has a title in the said property to another person who has no title. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an

antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a "conveyance of property" from a person who has title to it to a person who has no title. "

Thus, the Apex Court has held that the family arrangement, by which party takes share in the property, will not amount to a conveyance of the property.

21] There is no dispute that the suit house was allotted to the sahare of present petitioner and his name is mutated in relevant revenue record on 24.7.1986. Thus, n view of the dictum in the case of **Sk.Sattar Sk.Mohd. Choudhari** by the Apex Court, the lower appellate court ought to have seen that the facts in the case of **N.N.Engineer** are clearly distinguishable and the ratio laid down by the Apex Court in said case is not applicable to the case I hand.

22] Since the landlord has successfully pointed out that the tenant was in arrears of rent for more than six months, he was not entitled for the protection, and therefore, the lower appellate court, in my view, has committed a mistake in upsetting the well reasoned judgment and decree passed by the learned trial court.

23] In that view of the matter, the Writ Petitioner succeeds in the present Writ Petition. The petition is allowed. The judgment and decree passed by the Extra Joint District Judge, Dhule in Regular

Civil Appeal No.2 of 1992, dated 2.2.2000 is hereby set aside. Instead the judgment and decree passed by the 5th Joint Civil Judge, Junior Division, Dhule on 16.11.1991 in Regular Civil Suit No. 458 of 1985 is hereby restored. Rule is made absolute accordingly. In the circumstances of the case, there shall be no order as to costs.

[V.M.DESHPANDE, J.]

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