

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5950 OF 1991

Smt. Fizabai Sarafalli Badshah & Anr. .. Petitioners

Vs.

Krishna Kushtappa Shetty
Since deceased by his LRs.

Smt. Sushmita Krishna Shetty & Ors. .. Respondents

Mr. Vankatesh A. Shastry for Petitioners.

Mr. Sanjay Kshirsagar for Respondents.

**CORAM : K.R.SHRIRAM, J.
DATED : 9TH JANUARY, 2015**

P.C.

1 This Writ Petition under Article 227 of the Constitution of India arises out of a suit for eviction filed by the petitioner under the provisions of Bombay Rents, Hotel and Lodging, Housing Rates Control Act, 1947.

2 The respondent who is the legal heir of the defendant in the suit, is the tenant of the plaintiff in respect of the suit premises. Plaintiff had issued a notice of demand to the defendant calling upon him to pay arrears of rent, taxes, education cess and other taxes. It was the case of the petitioner/plaintiff that the demand notice was not complied with and, therefore, respondent/defendant

was required to be evicted. The defendant contested the suit. The Trial Court recorded a finding that the defendant was a defaulter. An appeal was preferred by the defendant.

3 The appeal was allowed by setting aside the decree passed in favour of the plaintiff and that judgment and decree of the appellate Court is impugned in this petition. The appellate Court came to the conclusion that Section 12(3)(b) will apply to the present case and Section 12(3)(a) will have no application.

4 This Writ Petition was admitted some time on or before about 20th January 1992. It came up for final hearing and this Court by judgment dated 7th November 2009 confirmed that Section 12(3)(b) is applicable and Section 12(3)(a) is not applicable. Para 12 of the said judgment reads as under :-

“On this aspect, it will be necessary to go back to the findings recorded by the Courts below. The appellate Court has rightly come to the conclusion that Section 12(3)(b) will apply, as a part of the rent demanded is not payable by month. A reference will have to be made to the last part of the impugned order of the appellate court. The appellate court has observed that the suit was filed on 29th June, 1982 and the summons was served to the defendant on 10th October, 1982. Thereafter, the appellate Court noted that it appears that a sum of Rs.2460/-

was deposited by the tenant in the trial court on 18th December, 1982. The only finding on this aspect recorded by the appellate court is that the advocate for the plaintiffs has not challenged the contention of the defendant that he deposited the entire amount demanded by the landlord before the trial Court before the first date of the hearing. The last part of paragraph 14 only notes that before the first date of hearing, the tenant deposited the entire amount demanded by the landlord. That is the only ground on which the decree under Section 12(3)(b) has been denied to the plaintiff. On plain reading of clause “b” of sub-Section 3 of Section 12 it is seen that the appellate court has completely misdirected itself. The first requirement of clause “b” is that the tenant must tender in the court the standard rent and permitted increases due and payable on the date of deposit. The deposit of the entire amount of arrears of rent and permitted increases has to be made on or before the first date of hearing or before such other date as the court may fix. In this case, the court has not fixed any other date. Therefore, the first aspect which was required to be considered by the appellate court was that what was the first date of hearing. The second aspect required to be considered was that when the first deposit was made by the tenant on 18th December, 1982 of a sum of Rs.2560/-, what was the amount of rent and permitted increases then due. The third aspect was whether the amount was regularly deposited till the suit was decided. All these requirements of Clause “b” of sub-section 3 of Section 12 have been completely glossed over by the learned appellate court. This Court cannot embark upon an enquiry on the aforesaid factual aspects in writ jurisdiction. The

said exercise has to be done by the fact finding court so that the Writ Court can have benefit of the finding fact recorded by the fact finding Court. The suit is of year 1982 and the appeal filed before the District Court is of year 1986. No purpose will be served by remanding the matter to the appellate court. Therefore, by keeping this petition pending, a finding will have to be called for from the appellate court as regards the compliance by the tenant with clause “b” of Sub-Section 3 of Section 12 of the said Act. The finding recorded by the appellate court will have to be considered by this Court. It must be clarified that the only question which remains to be decided is whether there is compliance made with the requirement of Clause “b” of Sub-Section 3 of Section 12 by the tenant. It is obvious that if the compliance has not been made, the decree for possession must follow. ”

Therefore, the only point that was required to be looked into was whether the respondent complied with the requirement of clause “b” of Sub-Section 3 of Section 12. The appeal Court by judgment dated 7th April 2010 gave a finding that the respondent did not deposit the amount of rent regularly between the date of first hearing till the suit was decided.

5 Against the judgment dated 7th November 2009, the respondent had preferred a special Leave Petition which by an order dated 18th March 2013 came to be dismissed. While dismissing the

Special Leave Petition, the Apex Court granted liberty to the petitioners viz; respondent herein, to assail the final judgment and order, if ultimately it goes adverse to them and in that further liberty was granted to raise all those contentions which the respondent had raised in the Special Leave Petition.

6 The counsel for the respondent submitted that if Section 12(3)(a) is not applicable follow up of that should be that Section 12(3)(b) also will not be applicable. He also submitted that the suit itself was filed by the plaintiff under section 12(3)(a) and, therefore, when this Court in its judgment on 7th November 2009 came to a conclusion that Section 12(3)(a) was not applicable, the Court should have dismissed the suit. He further submitted that this Court should also consider whether the defendant has neglected to make payment or deliberately refused to make payment.

7 In my view, what the counsel for respondent wanted to do in effect was to assail the judgment dated 7th November 2009 of this Court. This cannot be done. In support of his submissions, Shri Kshirsagar also wanted to rely on certain judgments. In my view, none of that will be of any help because the matter has already been

concluded and what was required to be examined was only on the issue of limited point of compliance.

8 If one reads the judgment of 7th November 2009 in entirety, the Court has in effect given its final decision in the matter and what was left to be done was only to find out whether there has been compliance by the defendant or not. Now, that the appellate Court has given its findings stating that the defendant had not complied with the requirements of clause “b” of sub-section 3 of Section 12, as concluded by this Court the decree for possession must follow.

9 In the circumstances, the rule is made absolute. At this stage, counsel for the respondent seeks stay of this order. Stay of 4 weeks is granted.

(K.R. SHRIRAM, J.)