

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 124 OF 1997

Mukti Coop. Housing Society Ltd.	..	Petitioner
vs.		
Smt. Manakbai Vithal Bhoosharath (since deceased through her legal heirs and representatives 1A. Ms Asha Atmaram Andyal & ors.) and others	..	Respondents

AND
CIVIL APPLICATION NO. 1164 OF 2015

Smt. Vimal M. Bhoosharath	..	Applicant
In the matter between		
Mukti Coop. Housing Society Ltd.	..	Petitioner
vs.		
Smt. Manekbai Vithal Bhoosharath (since deceased through her legal heirs and representatives 1A Ms Asha Atmaram Andyal & ors.) and others	..	Respondents

Mr. Rajesh Patil a/w. Ms Rachana Khan for the Petitioner.
Mr. Rakesh Pathak for Respondent No.1D-Intervener-Applicant.
Mr. M.M Vashi a/w. Mr. Prantik Majumdar i/b M/s. M.P. Sarla & Co.
for Respondent Nos. 2 and 3.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment	:	14 August 2015.
Date of Pronouncing the Judgment	:	21 August 2015.

JUDGMENT :-

1] This petition challenges the judgments and decrees dated 1 March 1989 and 27 September 1996 made by the Trial Court and the Appeal Court respectively, decreeing R.A.E. & R. Suit No.

1230/6425 of 1975 thereby directing the eviction of the petitioner from the suit premises and for recovery of rents and certain other amounts.

2] By Indenture of Lease dated 17 January 1964, the respondent-landlords had leased to one Shri. S.M. Bafna plot of land ad-measuring about 2000 sq. yards from out of the larger plot bearing Survey No. 423, Hissa No. 23 and 25, Vakola, Santacruz, Mumbai (suit premises) for a term of 99 years against payment of yearly rent of Rs.2400/-. By Deed of Assignment dated 18 October 1968, the said Bafna assigned his leasehold rights in the suit premises to the petitioner, i.e., Mukti Cooperative Housing Society Limited, so as to enable the petitioner to construct thereon a building for residential purposes. In pursuance of the assignment, the petitioner has indeed erected upon the suit premises a building, and the tenements therein have been allotted to several persons. The original landlords, i.e., Bhoosharath (respondent Nos.1 and 2) are alleged to have conveyed their rights in the suit premises to Romell Real Estate Pvt. Ltd. (respondent No.3). There is some dispute between some of the legal representatives of Vithal Bhoosharath and respondent No.3, *inter alia*, with regard to such conveyance. The dispute is pending

adjudication and it is made clear that in this petition, this Court, is not required to go into such dispute. Accordingly, Civil Application No. 1164 of 2015 taken out by one of the legal representatives of late Shri. Vithal Bhoosharath which basically seeks to pursue such dispute in the present petition, is disposed of. Even otherwise, the estate of Bhoosharath is sufficiently represented in these proceedings.

3] By notices dated 17 July 1974, the Bhoosharath purported to terminate the lease on the ground that agreed rents for the period between 16 May 1971 and 16 July 1974 in an amount of Rs.7800/- were in arrears. In the notice, the suit premises were described as plot of land admeasuring 1500 sq.yds. The petitioner society responded through its advocate on 29 July 1974, broadly stating that since the suit premises were under acquisition, there was no liability to pay rents and since Bafna had already paid rents in excess of what was due, the petitioner society was entitled to credit in respect of the same. Further correspondence ensued on the subject, which ultimately resulted in Bhoosharath instituting R.A.E.& R. Suit No. 1230/6425 of 1975 in the Court of Small Causes Court at Mumbai (Trial Court) seeking *inter alia* eviction of the petitioner society.

4] The petitioner society filed its written statement in November 1976, substantially reiterating its position as reflected in its reply dated 29 July 1974 to Bhoosharath's notice dated 17 July 1974. In addition, it was urged that the notice of termination was not valid or proper notice. The Trial Court, on 25 March 1983, cast the following issues:

	ISSUES	FINDINGS
1	Whether the defendants prove that the Plaintiff's Advocate's notice dated 30-4-1975 does not terminate the lease dated 17-1-1964 validly and properly as contended by the defendants in para-1 of the written statement ?	.. No.
2	Whether the defendants prove that the demand contained in the said notice is not valid and proper as the Plaintiff is not entitled to recover the rent from the date of the lease until July, 1973 ?	..No.
3	Whether the defendants prove that the present suit is bad as the plaintiff has not given a notice as required under Section 164 of the Maharashtra Co-operative Societies Act, 1969 ?	..No.

4	Whether the defendants prove that the plaintiff is entitled to recover the possession of the suit land because the plaintiff did not disclose to the defendants, a material defect in the property namely that the suit land was notified for acquisition under the Land Acquisition Act 1894, as alleged by the defendants or otherwise ?	... No.
5	Whether the Plaintiff is entitled to recover the possession of the suit land ?	... Yes.
6	Whether the Plaintiff is entitled to recover any amount by way of arrears of rent, and if so, what amount ?	... Yes.
7	To what other relief or reliefs, if any, the plaintiff is entitled to ?	} .. As per the } final order. } }
8	What order ? What decree ?	

5] The petitioner examined its Chairman and two other witnesses. The Bhoosharat, i.e., the plaintiff in the suit did not step into the witness box. The Trial Court by judgment and decree dated 1 March 1989 decreed the suit. The petitioner' Appeal No. 268 of 1989 was dismissed by the Division Bench of the Small Causes Court (Appeal Court) on 27 September 1996. Hence, the present petition.

6] Mr. Patil, learned counsel for the petitioner-tenant society made the following submissions in support of the petition.

A] That the notice of purported termination of tenancy was invalid, inasmuch as the same was in respect of only portion of the suit premises, i.e., 1500 sq.yards, when the suit premises leased to the petitioner society by virtue of Deed of Assignment dated 18 October 1968 read with Deed of Lease dated 17 January 1964 was admeasuring 2000 sq.yards. Reliance was placed upon the decision in case of ***Chimanlal vs. Mishrilal***¹, to submit that a suit based on the notice in respect of only part of the tenanted premises, is not maintainable;

B] The onus of establishing that there was no default in payment of rent was incorrectly cast upon the petitioner society. In any case, consequent upon the petitioner society having led evidence in the matter, such onus was duly discharged or in any case, the same shifted upon the landlord Bhoosharath. Inasmuch as no evidence was led by the landlord Bhoosharath, the suit had to be dismissed;

C] The material on record establishes that this was a case of 'yearly tenancy' and therefore, the provisions contained in

1 (1985) 1 SCC 14

Section 12(3)(a) of the Bombay Rents, Hotel and Lodging Houses Rates Control, 1947 Act (Rent Act) were not at all attracted. Inasmuch as the Appeal Court as non-suited the petitioner by relying upon the provisions contained in Section 12(3)(a) of the Rent Act, there is error apparent on face of record.

7] Mr. M.M. Vashi, learned counsel for respondent Nos. 2 & 3, submitted that the notice of termination was by no means defective. The obvious error in indication of correct area was corrected by amending plaint. In fact, it is the petitioner society which pointed out the correct area leased to it and the notice was in respect of the entire suit premises. Relying upon the decision of this Court in case of *Anandrao G. Sable vs. Madhavrao Ramrao Kanase and anr.*², Mr. Vashi submitted that the decision in case of *Chimanlal (supra)*, was clearly distinguishable and did not apply to the fact situation of the present case.

8] Mr. Vashi further submitted that the issues were rightly cast and the onus was rightly placed upon the petitioner society. The two Courts, upon consideration of the material on record have rightly

2 1989 (1) Bom.C.R. 256

held that the petitioner failed to discharge such onus. The suit was accordingly, correctly decreed.

9] Mr. Vashi submitted that the provisions contained in Section 12(3)(a) of the Rent Act have employed the phrase '*rent payable by the month*' , which is different and distinct from the concept of a yearly tenancy. In this case, even if it is held that the tenancy was yearly, there was a specific agreement recorded both in the Deed of Lease dated 17 January 1964 and Deed of Assignment dated 18 October 1968 that yearly rent of Rs.2400/- was payable by installments of Rs.200/- per month. Therefore, relying upon the decision of the Apex Court in case of ***Raju Kakara Shetty vs. Ramesh prataprao Shirole and anr***³, Mr. Vashi contended that this was a case, where rent was '*payable by the month*' and therefore, the provisions of Section 12 (3)(a) of the Rent Act were rightly invoked. Mr. Vashi also contended that consequent upon termination of tenancy the petitioner society was a tenant holding over. In terms of provisions contained in Section 116 of the Transfer of Property Act, such tenancy is from month to month basis. For this reason also the provisions contained in Section 12(3)(a) of the Rent Act were rightly invoked.

3 (1991) 1 SCC 570

10] Mr. Vashi finally contended that even after it is assumed that the provisions contained in Section 12(3)(b) of the Rent Act were attracted in this case, the material on record makes it clear that there is no compliance with predicates thereof. Accordingly, decree of eviction, cannot be avoided.

11] The rival contentions now fall for my determination.

12] There is no merit in the contention of Mr. Patil that the notice dated 17 July 1974 was a defective notice, because it referred to the area of the suit premises as 1500 sq. yards, when in fact, the suit premises ad-measure 2000 sq. yards. Such contention was not even raised by the petitioner in the written statement. Rather, in the written statement, the petitioner proceeded to state the correct area of the suit premises, pursuant to which the plaint was amended by the plaintiff. This is clearly not a case where notice under Section 12(2) of the Rent Act was in respect of only part of the tenanted premises.

13] In case of *Chimanlal (supra)*, the suit premises comprised an entire shop, verandah and kotha. The termination notice, however,

demanded arrears of rent in respect of only portion of the shop and the verandah. There was substantial difference between the accommodation mentioned in the notice and the accommodation actually let out to the tenant. In these circumstances, the Apex Court held that the notice relates to accommodation which cannot be effectively identified with the accommodation constituting the tenancy. The Apex Court specifically added that this was not a case of a mere mis-description of the accommodation where both parties knew perfectly well that the notice referred to accommodation let to the tenant. Nor was it a case where the discrepancy between the accommodation alleged by the landlord and that actually let to the tenant was marginal or insubstantial. The proceedings before the Supreme Court clearly indicate that there was a serious dispute between the parties as to the material extent of the accommodation let by the one to the other and no congruency between the two versions was possible.

14] Unlike in the case of *Chimanlal (supra)*, this is the case of mere mis-description. The petitioner, was not in the least prejudiced by such mis-description. The petitioner, in fact, stated correct area of the suit premises, pursuant to which the plaint was amended. At no

stage, even the amendment was challenged. There was really no dispute, much less any serious dispute between the parties as to the material extent of the suit premises let out by one to the other. Accordingly, the decision in case of **Chimanlal (supra)**, is clearly distinguishable and in fact, inapplicable to the fact situation in the present case.

15] This Court, in case of **Anandrao Sable (supra)**, in similar circumstances, rejected a similar contention based upon **Chimanlal (supra)**, by observing thus:-

8. The submission of the learned Counsel for the tenant that the notice was bad as it did not properly describe the tenanted premises and also no deduction of Rs. 376.73 which was paid by the tenant towards the municipal taxes, was made cannot be accepted. The learned Counsel in support of the his contention relied on the decision in (Chimmanlal v. Mishrilal), (1985) 1 SCC 14. In that case there was a substantial difference between the accommodation mentioned in the notice and the accommodation actually let to the appellant-tenant. It was not a case of mere misdescription of accommodation where both the parties knew perfectly well that the notice referred to accommodation let to the tenant. Nor it was a case where the discrepancy between the accommodation alleged by the landlord and that actually let to the tenant is marginal or insubstantial. The proceedings showed that there was a serious dispute between the parties as to the material extent of the accommodation let by the one to the other. Therefore, the notice in that case was held invalid. The decision relied on by the learned Counsel does not apply to the facts of the present case. There is no serious dispute in the present case regarding the premises let out by the plaintiffs to the

defendant. No contention has been raised on the point of accommodation let out by the plaintiffs to the defendant. From the mere fact that in the notice mention is made only to the C.T.S. No. 9A and 9B, it cannot be said that there was a substantial difference between the accommodation mentioned in the notice and the accommodation actually let out to the tenant. It is not dispute that the premises bearing C.T.S. Nos. 9A and 9B were let out and were occupied by the tenant. Consequently, the notice in the present case cannot be held on the invalid on the ground that in the notice only C.T.S. numbers of the premises were mentioned.

16] The Apex Court in case of **Bhagabandas Agarwalla vs. Bhagwandas Kanu and ors.**⁴, has held that a notice to quit under Section 106 of the Transfer of Property Act, 1882 must be construed not with a desire to find faults in it, which would render it defective, but must be construed *ut res magis valeat quam pereat*. In paragraph 3, the Apex Court has observed thus:

“3. Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat*. "The validity of a notice to quit", as pointed out by Lord Justice Lindley, L.J. in *Sidebotham v. Holland*, (1895) 1 QB 378, "ought not to turn on the splitting of a straw". It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or overrefined subtlety, but it must be construed in a common sense way. See *Harihar Banerji v. Ramsashi Roy*, 45 Ind APP 222 = (AIR 1918 PC 102). The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation.”

4 AIR 1977 SC 1120

17] Accordingly, it is not possible to accept the contention of Mr. Patil that the notice of termination of tenancy was defective and that the suit as instituted, was required to be dismissed on this ground alone.

18] In this case, the petitioner society neither pleaded nor adduced any evidence that it had in fact paid the rents between 16 May 1971 and 16 July 1974. Rather, it was the defence of the petitioner society that on account of the suit premises being involved in acquisition proceedings, no rents were payable during the said period. In the light of such defence, the onus was rightly cast upon the petitioner society to make good the justification pleaded. However, upon perusal of the impugned judgments and decrees, it does appear that the two Courts have not even adverted to the evidence placed on record by the petitioner society in the context of acquisition proceedings affecting the suit premises. Such exercise was necessary, particularly as the plaintiff has not even stepped into witness box to lead any evidence in the matter. The material on record makes reference to notifications in the context of acquisition proceedings. The material on record also indicates that during the relevant period, no construction could be undertaken upon the suit

premises, which was precisely the purpose which the suit premises were taken on lease by the petitioner society. The petitioner had also raised the defence of certain payments made by their predecessor-in-title Bafna and claimed credits in respect of such payment. All this material does not appear to have been considered by the two Courts. The two Courts have only adverted to certain provisions in the Deed of Lease dated 17 January 1964 and Deed of Assignment dated 18 October 1968 and held that there is nothing in the two documents which entitled any exemption in the matter of payment of rents. This is clearly not a satisfactory approach considering the circumstance that the petitioner society, in pursuance of the Deed of Assignment, has already erected a building upon the suit premises and the tenements in the building are occupied by the several persons since last several years. There is no application of mind whatsoever to the issue as to whether the onus had indeed shifted upon the plaintiff-Bhoosharath, consequent upon the petitioner leading evidence in the matter. A remand, in the circumstances, would therefore be in order.

19] The Appeal Court has almost entirely based its decision upon non-compliance by the petitioner society with the provisions

contained in Section 12(3)(a) of the Rent Act. Section 12 of the Rent Act reads thus:

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 perform 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 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 the tenant in the manner provided in section 106 of the Transfer of Property Act, 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.

(4) Pending the disposal of any such suit, the Court may out of any amount paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increases due to him as the Court thinks fit.

Explanation [I] - In any case where there is a dispute as to the amount of standard rent or

permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court.

Explanation [II] - For the purposes of sub-section (2), reference to "standard rent" and to "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of section 11.

20] The Appeal Court has virtually proceeded on the basis that there was no dispute whatsoever as to the applicability of the provisions contained in Section 12(3)(a) of the Rent Act. The provisions contained in Section 12(3)(a) of the Rent Act are applicable where '*rent is payable by the month*'. Mr. Patil, learned counsel for the petitioner, contends that this provision was not applicable because in this case, the tenancy created by the Deed of Lease dated 17 January 1964 and Deed of Assignment dated 18 October 1968 was '*yearly tenancy*'. On the other hand, Mr. Vashi submitted that consequent upon notice of termination, the petitioner was a tenant holding over and therefore, the tenancy was monthly. In any case, Mr. Vashi relying upon the decision in case of ***Raju Kakar Shetty (supra)***, submitted that in this case, the yearly rent of

Rs.2400/- was agreed by the parties to be paid by way of monthly installment of Rs.200/- each. Accordingly, Mr. Vashi submitted that this was a case where, '*rent is payable by the month*' and therefore, the provisions contained in Section 12(3)(a) of the Rent Act were clearly attracted.

21] Again it must be noticed that neither the Trial Court nor the Appeal Court have even addressed themselves to the aforesaid contentious issue. This was, in the facts and circumstances of the present case, clearly necessary. Besides, the material on record, at least *prima-facie*, does not appear to be conclusive in the context of compliance with the predicates of Section 12(3)(b) of the Rent Act. In any case, since the Appeal Court proceeded upon the firm basis that it is the provisions of Section 12(3)(a) of the Rent Act, which are attracted in the matter, there was no consideration whatsoever of the aspect of the compliance with predicates of Section 12(3)(b) of the Rent Act.

22] For the aforesaid reasons, it would be appropriate if the impugned judgment and decree dated 27 September 1996 made by the Appeal Court is set aside and the matter remanded to the

Appeal Court for reconsideration of appeal against the judgment and decree dated 1 March 1989. Except for the issue of defective notice under Section 12(2) of Rent Act, the rest of the issues are specifically kept open for determination by the Appeal Court on their own merits and in accordance with law. The remand is basically on the ground that the Appeal Court has not adverted to the evidence/material produced on record by the petitioner society, in the context of its defence and further, not considered the issue as to whether or not the provisions of Section 12(3)(a) were indeed attracted to the facts and circumstances of the case and if not, whether there is compliance with the provisions contained in Section 12(3)(b) of the Rent Act. The Appeal Court is directed to dispose of the appeal within a period of one year from the date of production of an authenticated copy of this order. There shall be a stay on execution of eviction decree in the meantime.

23] However, the respondents shall be at liberty to apply the Appeal Court for determination and directions to deposit reasonable compensation in accordance with the law laid down by the Apex Court in cases of *Atma Ram Properties (Private) Limited Vs. Federal Motors Private Limited*⁵ and *State of Maharashtra & anr.*

5 2005(1) SCC 705

Vs. M/s. Super Max International Pvt. Ltd. & Ors.⁶ Such application, if made, shall be disposed of by the Appeal Court as expeditiously as possible and in any case within a period of three months from the date of making of the same.

24] For the aforesaid purpose, parties are directed to appear before the Appeal Court on 14 September 2015 and produce the authenticated copy of this order.

25] Rule is, accordingly, made partly absolute to the aforesaid extent. There shall be no order as to costs.

(M.S. SONAK, J.)

⁶ 2009(5)ALL MR 1001