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

CIVIL REVN. APPLICATION NO.772 OF 2013

with

CIVIL APPLICATION NO. 262 OF 2015

Mrs. Manisha P. Chhadva.

... Applicant.

V/s.

Smt. Khairunissa Bilawala.

... Respondent.

Mr. S.B. Prabhavalkar a/w. Mohit Bhansali for the Applicant in CRA 772/13 and CAC 262/15.

Mr. P.S. Dani, Senior Advocate a/w. Ms. Geetika Jain i/b. Balasaheb Deshmukh for the Respondent.

CORAM : N.M. Jamdar, J.

22 December, 2016.

Oral Order :-

By this Civil Revision Application, the Applicant has challenged the concurrent judgment and Orders passed by the Small Cause Court, Mumbai and the Appellate Bench of Small Cause Court allowing the Suit filed by the Respondent – landlord for eviction of the Applicant from the suit premises. The orders have

been passed on the ground of default in payment of rent. Both the Courts have found that the Applicant, inspite of due notice served on the Applicant, did not pay the arrears of rent within time, and as per the provisions of Section 12 of the Bombay Rent Act, 1947.

2. The default in payment of rent being the sole ground for eviction. The learned Counsel for the parties have addressed the Court on this limited issue. Two main contentions were advanced by the learned Counsel for the Applicant. First, that the notice has not been duly served on the Applicant and the factum of service of notice has not been proved by the Respondent – landlord, and conjoint reading Section 12 of the Act of 1947 with Section 106 of the Transfer of Properties Act, makes due service of notice a prerequisite for institution of any suit for recovery of possession on the ground of arrears of rent. Second, that a specific application was moved by the Applicant for depositing the rent, which was granted on 27 September 2006 pursuant to which the Applicant has deposited the amount and therefore, there is a due compliance of Section 12(3) of the Act of 1947.

3. Taking up the issue of service of notice first, it is the contention of the learned Counsel for the Applicant that the notice has been addressed to one Manisha P. Chheda when the name of the Applicant is Manisha P. Chhadva and that the address includes the

words opposite Plaza Cinema, which is not the correct address. It was also contended that the notice has demanded the rent at the rate of Rs.203/- when the rent was fixed at Rs. 175/-. It was contended that there are no pleadings by the Respondent – Plaintiff as regard the service of notice and when the Applicant had disputed the factum of service of notice, the burden was on the Respondent to prove the same. He submitted that the Applicant had deposed regarding the fact that the notice was not served and the Appellate Court needlessly undertook the task of comparing the signatures which ought to have been left to a hand writing expert. The learned Counsel submitted that the decisions which were cited on the point were discarded only on the ground that they are not applicable. The learned Counsel for the Respondent submitted that the theory that the notice was not served appeared for the first time when the Applicant stepped in the witness box and no such theory was put to the Respondent – Plaintiff in the cross-examination, neither this stand was taken in the written statement. It was submitted that both the Courts were rightly taken note of this position. It was also submitted that the Applicant herself had mentioned the name differently at various places, which has also been taken note by both the Courts.

4. The factum of service of notice is a question of fact. Both the Courts have dealt with this issue at length. As far as the

argument that the surname has been wrongly recorded, the Appeal Court in extenso dealt with this point. The Appellate Court has taken note that the Applicant has stated her name in the written statement, examination-in-chief and R.A.E. & R. Suit in different fashion and therefore, did not give much importance to the slight error in the surname when the address was substantially correct. It cannot be said that this view taken by both the Courts is an impossible view to be taken, more particularly in view of the stand taken by the Applicant in the written statement. As far as the addition of the word 'opposite Plaza Cinema' in the notice is concerned, both the Courts have held that this additional word did not make much of a difference as it only specified the nearby landmark and if there was any error, the notice would have returned back, which was not so. This view also is a possible view of the matter. Most importantly, in the written statement filed by the Applicant, as observed by both the Courts, the Applicant has primarily set up a claim that the Applicant has become owner of the suit property and is not liable to pay the rent. It was also contended that the suit notice having been issued earlier which was served was beyond the scope of the Act of 1947. This was a specific stand taken by the Applicant. According to the learned Counsel for the Applicant, the written statement was filed on advice of a neighbour who acted as a constituted attorney, however the learned Counsel for the Respondent rightly pointed out that in the examination-in-chief

the Applicant has accepted the written statement as having been filed correct. Having taken a specific stand in a written statement that notice was duly served and having not cross-examined, the Respondent – Plaintiff on the factum of service of notice, instead putting up the stand that the Applicant has become owner, both the Courts were not in error in not permitting the Applicant to take up such a stand first time in her examination-in-chief denying the opportunity to the Respondent – Plaintiff. In the context of these facts and stand of the Applicant, the Appellate Bench was also not in error in holding that bare perusal of the signature shows that they were of the same person. As far as the argument of the learned Counsel for the Applicant that the burden on the Respondent – Plaintiff to show that the notice has been duly proved as a proposition of law it is correct, but is not open to the present Applicant to contend so having taken a specific stand in the written statement. The argument of non service of notice is a clear afterthought.

5. The next argument that was based was on an order passed on the application of the Applicant to deposit the rent. It is contended that as per Section 12(3) of the Act of 1947, no decree for eviction shall be passed by any Court on the ground of arrears of rent and permitted increase if the tenant pays or tenders in Court the amount on or before such date as Court may fix. It was contended

that this aspect of the matter has been lost sight by both the Courts. This order is not annexed. The Revision Application is pending since last three years for admission. The learned Counsel sought time to produce the said order on record but considering the fact that the Revision Application is pending for three years, the same was opposed. Even otherwise to find out whether the argument which is advanced in the format that is advanced today i.e. based on Section 12(3) of the Act of 1947, I have gone through the decisions of both the Courts and find that no such argument in the form that is being advanced today has been made. It is settled that if an argument is made and not reflected in the order, unless steps are taken by the litigants to get the order corrected by filing a review, one will have to go by the record and presume that it is not so made and cannot be permitted to be taken in a revision.

6. Furthermore, as pointed out by the learned Counsel for the Respondent, the factum of the application dated 2 September 2006 has been referred to the present Revision Application only for the purpose of pointing out that the Applicant was ready and willing to pay the arrears of rent and that the Respondent is estopped as per Section 12(3)(a) of the Act of 1947. However, the specific argument that an order under Section 12(3) was passed is not taken in the memo of the Revision Application. As regard deposit of the rent in the Court is concerned, this aspect of the matter is also been

considered by the Appellate Bench in detail. It is found that when the notice was served for the first time on 30 October 1993, the application for standard rent was not made within one week. R.A.E & R. Application was dismissed for want of prosecution. An order was passed by the Revisional Court on 7 April 2004 and inspite of a specific direction, rent was not paid and only when an application was moved by the Respondent for striking off the defence, that the application in question was made, that too without prejudice to right and contentions of the Applicant. This application and the order passed thereupon therefore, as rightly contended by the learned Counsel for the Respondent, cannot be considered as an order passed under Section 12(3) of the Act.

7. In every relationship of landlord and tenant, payment of rent is a basic foundation. Various statutory protections are accorded to the tenant on the premise that the tenant will keep paying the rent. Even if such basic obligation is not fulfilled by the tenant, Scheme of the Act of 1947 provides opportunities to such tenant at specific stages to remedy the default in payment of rent. If the tenant does even not avail of these opportunities, no limitless indulgence can be extended to such a tenant.

8. In these circumstances, it cannot be stated that there is any error committed by both the Courts so as to interfere limited

jurisdiction of this Court. The Revision Application is accordingly rejected. The Civil Application No. 262 of 2015 does not survive and is disposed of accordingly.

9. At this stage the learned Counsel for the Applicant seeks continuation of the ad-interim order for period of eight weeks. I am inclined to grant six weeks period however, it will take some time to get the copy of the order, the ad-interim relief is extended for period of eight weeks from today on the same terms and conditions.

(N.M. Jamdar, J.)