

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4417 OF 1995

Hemant P.Saple	...Petitioner
<i>Versus</i>	
Kaloolal Pyyarchand Jain	
(since deceased) through L.Rs.	
Gangabai K. Jain and others	...Respondents

....
Mr. P.M. Arjunwadkar, Advocate for the Petitioner.
Mrs. P.S. Malwankar, Advocate for Respondent No.1.
....

CORAM : R. G. KETKAR, J.

DATE : 13th & 14th July, 2016

P.C.

1. Heard Mr. P.M. Arjunwadkar, learned Counsel for the petitioner and Ms. P.S. Malvankar, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and decree dated 29.9.1994 passed by the Appellate Bench of the Small Causes Court, Bandra Branch, Bombay in Appeal No.797/1994. By that order, the Appellate Court allowed the appeal preferred by the respondent, hereinafter referred to as the 'defendant', and quashed and set aside the judgment and decree dated 21.9.1984

passed by the learned Judge, presiding over Court room No.12 of the Small Causes Court at Bombay in R.A.E. Suit No.18/136 of 1977. The appellate Court dismissed the suit instituted by the petitioner, hereinafter referred to as the 'plaintiff' for recovery of possession of tenement No.12 on the 3rd floor of the building known as "Pundalik Niwas", situate on Plot No.65, Paranjape Scheme "B" Road No.1, Vile Parle (East), Mumbai – 400 057 (for short, 'suit premises').

3. The plaintiff has instituted suit on 11.1.1977 contending *inter alia* that he had issued demand notice dated 10.6.1976 to the defendant claiming arrears of rent @ Rs.68.04 paisa from 1.9.1975 to 31.5.1976. Though the notice was duly served on the defendant, he has failed and neglected to comply with the requisition and, therefore, the plaintiff is entitled to possession of the suit premises on the ground of defendant being willful defaulter as contemplated by Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act').

4. The defendant filed written statement dated 30.9.1977 *inter alia* contending that he was not served with any notice

under Section 12(2) of the Act. He was not in arrears of rent from 1.9.1975 as alleged by the plaintiff or otherwise. In fact even before issuing demand notice dated 10.6.1976, the defendant had instituted Standard Rent Application dated 16.2.1976 for fixation of the standard rent. On 17.2.1976 exparte order was passed directing the defendant to deposit arrears of rent @ Rs.97.50 paisa per moth from 1.9.1975 till 8.5.1976. Accordingly the defendant has deposited the entire arrears of rent on or about 10.3.1976. In other words even before issuing demand notice on 10.6.1976, the defendant has deposited the arrears of rent as on February, 1976 @ Rs.97.50. The defendant further contended that the demand notice was not legal and valid. The defendant never failed and neglected to pay rent of the suit premises to the plaintiff in any manner whatsoever.

5. On the basis of the pleadings of the parties, the learned trial Judge framed issues on 1.12.1981. The learned trial Judge held that the plaintiff has established that the defendant had failed and neglected to pay rent as and when it was due. Learned trial Judge further held that there was a

bonafide dispute as regards the standard rent of the suit premises. Learned trial Judge further held that the defendant failed to prove that he is ready and willing to pay the standard rent of the suit premises. As far as other grounds raised by the plaintiff, namely, the defendant having committed acts of waste as also acts of nuisance to the neighbours, were not pressed. Eventually, the learned trial Judge passed the decree only under Section 12 of the Act. Aggrieved by that decision, the defendant preferred appeal. By the impugned order, the learned Appellate Court allowed the appeal and dismissed the suit as indicated earlier. It is against this order, the plaintiff has instituted the present Petition.

6. In support of this Petition, Mr. Arjunwadkar submitted that the learned trial Judge held that the demand notice was duly served on the defendant. He has taken me through the trial Court's judgment and in particular paragraphs-15 and 16. After considering the evidence on record, the learned trial Judge held that the defendant received demand notice dated 10.6.1976 in due course. As against this, the Appellate Court came to the conclusion that the demand notice was not served on the

defendant. Mr. Arjunwadkar invited my attention to the discussion of the Appellate Court from paragraphs-22 to 30. In short, Mr. Arjunwadkar submitted that the demand notice was duly served on the defendant.

7. Mr. Arjunwadkar further submitted that the Appellate Court came to the conclusion that the present case falls under clause (a) of sub-section (3) of Section 12 of the Act. He has taken me through the proceedings instituted by the defendant for fixation of the standard rent and various orders that were passed in those proceedings from time to time.

8. In the first place, he submitted that as the defendant had instituted proceedings for fixation of standard rent, obviously the defendant has disputed the standard rent or permitted increases. The case does not fall under Section 12(3) (a) of the Act. In any case as per the defendant's case, in pursuance of the order passed on 17.2.1976, he had deposited rent as of February, 1976. In other words, the arrears of standard rent or permitted increases were not for the period of six months or more. He, therefore, submitted that the present case will not fall under Section 12(3)(a) of the Act, but, will

squarely fall in Section 12(3)(b). Once it is accepted that the case falls under Section 12(3)(b) of the Act in order to avail the protection thereunder, the defendant has to go on paying or tendering in Court regularly rent and permitted increases till the suit is finally decided. In the present case, from the material on record it cannot be said that the defendant is entitled to protection under Section 12(3)(b) of the Act.

9. On the other hand, Ms. Malvankar supported the impugned order. She submitted that the demand notice itself is bad in law as there were no arrears of rent when the demand notice was issued on 10.6.1976. She submitted that in pursuance of the order dated 17.2.1976 passed in standard rent application, the defendant had deposited the arrears of rent as of February, 1976. In short, the defendant was not in arrears of rent for more than six months. She further submitted that the demand notice was also not served upon the defendant. She has taken me through written statement filed by the defendant and in particular paragraph-2 thereof as also cross-examination of the plaintiff and defendant's witnesses. She further submitted that the suit itself was instituted *malafide* and the

Appellate Court was justified in dismissing the suit as the defendant was and is ready and willing to pay the standard rent and permitted increases. For all these reasons she submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier the only ground on which the cause of action is pressed is under Section 12 of the Act. Section 12 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 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 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.”

11. It is not in dispute and is a matter of record that on 16.2.1976 the defendant had filed application for fixation of the standard rent. On 17.2.1976, the learned trial Judge passed ex parte order directing the defendant to deposit rent @ Rs.97.50 paisa per month from 1.9.1975 till 8.5.1976. On 10.3.1976 the defendant has deposited that amount. It is also not in dispute and is a matter of record that the demand notice was issued by the plaintiff on 10.6.1976 claiming arrears of rent from 1.9.1975 to 31.5.1976 @ Rs.68.04 paisa. In view thereof, it cannot be said

that as on the date of issuing the demand notice on 10.6.1976, the defendant was in arrears of rent for a period of six months or more. It also cannot be said that there was no dispute regarding the amount of standard rent or permitted increases as the defendant had filed application for fixation of standard rent. For the order which I propose to pass in this Petition, I do not deem it appropriate to record a *prima facie* finding, least it will influence the Appellate Court.

12. In the present case, the defendant had filed application for fixation of standard rent. By prayer clause (a), the defendant prayed for fixing standard rent at Rs.16.25 inclusive of property taxes, permitted increases and water charges. It has come on record that *exparte* order was passed on 17.2.1976 and accordingly the defendant has deposited the arrears of rent @ Rs.97.50/- as of February, 1976 on 10.3.1976. It further appears that said application was dismissed in default on 14.6.1977. Defendant took out notice for restoration of the standard rent application. By order dated 17.6.1978, subject to the defendant depositing in the Court Rs.468/- towards arrears of *exparte* interim rent till end of June, 1978 on or before

5.7.1978, standard rent application was restored to file.

13. It further appears that the defendant thereafter took out notice for extension of time for depositing the amount as per the order dated 17.6.1978 by condoning the delay. By order dated 23.8.1979, the learned trial Judge allowed that notice and directed the defendant to deposit arrears of Rs.468/- and further to go on depositing rent @ Rs.68.40 paisa.

14. By order dated 4.12.1979, the learned trial Judge disposed of interim notice for fixation of the interim rent in the main standard rent application by fixing interim rent at Rs.55/- per month. As there was delay in complying with the order, the defendant took out interim notice for depositing interim rent from November, 1980 to 28.12.1981 after condoning the delay. By order dated 6.10.1981, the learned trial Judge discharged that notice. By order dated 10.2.1982, the learned trial Judge dismissed the main standard rent application. Mr. Arjunwadkar submitted that said order has attained finality.

15. In the present case, the controversy is about service of demand notice on the defendant. In paragraph-2 of the written

statement, the defendant denied that the plaintiff or his Advocate had served upon the defendant any notice of demand under Section 12(2) of the Act. Ms.Malvankar invited my attention to paragraph-18 of the cross-examination of the plaintiff and submitted that when the plaintiff visited the suit premises for effecting personal service, the defendant was not present and defendant's wife was in the suit premises at that time. She submitted that the Appellate Court considered this part of the evidence and observed that the claim made by the plaintiff that he pasted the demand notice at the door of the suit premises is not acceptable.

16. As against this, Mr. Arjunwadkar invited my attention to cross-examination of the defendant's witness and in particular paragraph-27 to contend that the defendant claimed that he was at his native place in the month of May and June, 1976 and that he did not have any evidence supporting said version. He also invited my attention to the findings recorded by the learned trial Judge in paragraph-16 to the effect that the demand notice was served on the defendants in due course of time. For the order which I propose to pass in this Petition, I do

not deem it appropriate to record a *prima facie* finding, least it will influence the Appellate Court.

17. Perusal of the impugned order shows that the Appellate Court considered decision of ***Karamsey Kanji v. Velji Virji, Vol.LVI 1954 The Bombay Law Reporter 619*** and observed that once the application 11(1) is made and the arrears are not more than six months, the suit itself based on demand notice is misconceived. The suit is premature and bad in law.

18. In the case of ***Karamsey Kanji (supra)***, this Court observed thus :

“Let us look at the scheme of the Rent Act. Sub-section (3) of Section 11 permits the Court to fix an interim rent which the tenant is liable to pay when he applies for fixation of standard rent after he has received a notice from his landlord under Section 12(2). The scheme of Section 12 is that a landlord cannot institute a suit for recovery of possession of the demised premises on the ground of nonpayment of rent until the expiration of one month next after notice in writing of the demand of the rent has been served upon the tenant. If after this notice the tenant has still failed to pay rent, he would be liable to be ejected under Section 12(1) because in that case it could be said that he was not ready and willing to pay rent. Now, in order to protect

the tenant the Legislature has enacted Sub-section (3) of Section 11 and the scheme of that sub-section is that as soon as the tenant gets notice he can go to Court and apply for fixation of standard rent, but while the application is being heard and disposed of the Court orders him to pay an interim rent. If he does not pay this interim rent, he would be liable to be ejected under Section 12(1). Therefore the scheme of the Act seems to be fairly clear, that there is an obligation upon the tenant to pay rent at all times and he is liable to be ejected if he fails to pay rent after notice has been given to him under Section 12(2). The only right he has is, in cases where he complains that the contractual rent is not the proper rent, to get an interim, rent fixed by the Court, but the obligation to pay that interim rent continues throughout, and if that obligation is not discharged, he would be liable to be ejected under Section 12(1).”

19. Perusal of the above extracted portion shows that the Court has jurisdiction to make an order for interim payment of rent where an application for fixing standard rent is made before or after the notice under Section 12(2) of the Act. In view thereof, *prima facie* I find that the Appellate Court was not justified in observing that as the defendant had complied the order dated 17.2.1976 by depositing the rent in the Court on 10.3.1976, the arrears of rent were not more than six months and therefore the demand notice was premature and the suit

was misconceived, are not correct.

20. The Appellate Court relied upon the decision in the case of ***Karamsey Kanji (supra)*** and has held that Section 12(3)(a) of the Act is applicable. The Appellate Court further held that in view of pendency of standard rent application filed under Section 11(1) and deposits made by the tenant, there was no occasion for the landlord to cause demand notice being issued on 10.6.1976. The demand notice was premature and legally infirm and, therefore, the suit was bad.

21. I have already extracted the relevant portion in the case of ***Karamsey Kanji (supra)***. In my opinion the Appellate Court has *prima facie* committed serious error in applying said decision to the facts of the present case. This Court in that case observed that when the tenant applies under Section 11(3) after notice is given to him, strictly he would have to make an application for fixing the standard rent, but, inasmuch as he has already made an application for fixing standard rent and that application is already on the file of the Small Causes Court, it would be futile for him to make a subsequent application in order to get the benefit of sub-section (3). This Court, therefore,

opined that the Court has jurisdiction to make an order of interim payment of rent where an application for standard rent is made before or after the notice under Section 12(2) of the Act is given.

22. In my opinion, this judgment does not lay down that if the application is made by the tenant under Section 11(3) of the Act even before issuance of the demand notice, the demand notice is vitiated because of tenancy of said application or that suit is also not maintainable. In my opinion there was complete misreading of the judgment of this Court in the case of ***Karamsey Kanji (supra)***.

23. Mr. Arjunwadkar submitted that the Appellate Court did not consider the various orders that were passed in the standard rent application. I find merit in this submission. The Appellate Court having hold that the case is covered under Section 12(3)(a) of the Act did not consider the applicability of Section 12(3)(b) of the Act. The Appellate Court being the last fact finding Court should have also considered whether the defendant has satisfied the condition laid-down in Section 12(3)(b) of the Act, in the event of its finding as regards applicability of

Section 12(3)(a) is set aside. In other words, the Appellate Court did not examine whether the defendant has paid or tendered in Court the standard rent and permitted increases then due on the first date of hearing or on or before such other date as the Court may fix and thereafter due to pay or tender in the Court regularly such amount and permitted increases till the suit is finally decided. In view thereof, the impugned order cannot be sustained and the same is liable to be set aside thereby restoring the appeal for *denovo* consideration of the Appellate Court. The Appellate Court will consider the contentions recorded in this order as also any other contention available to the parties including whether the demand notice was duly served on the defendant and whether the suit is governed by Section 12(3)(a) or Section 12(3)(b) of the Act and if Section 12(3)(a) is not applicable and Section 12(3)(b) is applicable whether the defendant has satisfied the conditions laid-down under Section 12(3)(b) of the Act. The learned Counsel for the parties state that they will appear before the Appellate Court on 25.7.2016 and for that purpose no fresh notice be issued to them.

24. In view thereof, the Petition is disposed of in following terms :

- [i] Impugned order dated 19.9.1994 passed by the Appellate Bench of the Small Causes Court, Bandra Branch, Bombay in Appeal No.797/1994 is quashed and set aside.
- [ii] Appeal No.797/1994 is restored to the file of the Appellate Court. R & P be forthwith remitted to the appellate Court.
- [iii] Parties agree that they will appear before the Appellate Court on 25.7.2016 and for that purpose no fresh notice be issued to them.
- [iv] Appellate Court will deal with all contentions recorded hereinabove and any other contentions that are available to the parties and record finding as to whether the demand notice was duly served on the defendant and whether the suit is governed by Section 12(3)(a) or Section 12(3)(b) of the Act and if Section 12(3)(a) is not applicable and Section 12(3)(b) is applicable whether the defendant has satisfied the conditions laid-down under Section 12(3)(b) of the Act.
- [v] All contentions of the parties are expressly kept open.
- [vi] Rule is made absolute in aforesaid terms. However, in the facts and circumstances of the case there shall be no order as to costs.

(R. G. KETKAR, J.)