

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 128 OF 2016

Smt. Yamunabai Bhikan Patil ...Applicant

Versus

Akil Ahmed Bashir Ahmed

And Anr

...Respondents

WITH

CIVIL APPLICATION NO.534 OF 2016

IN

CIVIL REVISION APPLICATION NO. 128 OF 2016

....

Mr.Milind M. Sathaye, Advocate for the Applicant.

Mr. Rajesh S. Patil, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 09th AUGUST, 2016

P.C.

1. Heard Mr. Milind M. Sathaye, learned Counsel for the applicant and Mr. Rajesh Patil, learned Counsel for the respondents, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as the 'defendant' has challenged the judgment and decree dated 7.9.2015 passed by the learned District Judge-1, Malegaon in Regular Civil Appeal No.45 of 2008 and Civil Revision No.4 of 2008. By

that order, the learned District Judge dismissed Revision preferred by the defendant against fixation of standard rent of Rs.600/- per month from 16.2.1996 and allowed the appeal preferred by the respondents, hereinafter referred to as the 'plaintiffs'. The learned District Judge quashed and set aside the judgment and decree dated 30.4.2008 passed by the learned 4th Jt. Civil Judge, Junior Division at Malegaon in Regular Civil Suit No.156/1996 except to the extent of determination of standard rent of the suit property in M.A. No.19/1996 and decreed the suit. The defendant is directed to vacate the suit premises within a month from the date of the judgment. The defendant is directed to pay

- (a) the arrears of rent of Rs.14,450/- to the plaintiffs along with interest @ 9% per annum till recovery of the same;
- (b) the difference of the standard rent of Rs.300/- per month from 16.2.1996 till vacation of premises along with interest @ 9% p.a. till the realization thereof;
- (c) the Municipal taxes @ Rs.1200/- per year from 1993-1994 till vacation of premises along with interest @ 9% per annum till realization of the amount.

3. The plaintiffs have instituted Suit for recovery of

possession of shop admeasuring 30 ft. X 7 ½ ft. and open space admeasuring 32 ft X 17 ft in City Survey No.1184/A, within the municipal limits of Malegaon Municipal Corporation, as more particularly described in paragraphs-(1A) and (1B) of the plaint (for short, 'suit property') from the defendant by invoking Sections 12, 13(1)(b), 13(1)(c) and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948 (for short, 'Act').

4. As far as ground of default under Section 12 is concerned, the plaintiffs issued demand notice dated 5.2.1996 claiming arrears of contractual rent of Rs.400/- from 1.7.1988 to 21.1.1996. On 16.2.1996 the defendant filed application for fixation of standard rent. By order dated 7.3.1996, the learned trial Judge fixed the interim standard rent of Rs.300/- per month. On 18.3.1996, the defendant deposited Rs.30,300/- in the trial Court. By the judgment and decree dated 30.4.2008, the learned trial Judge dismissed the suit. As far as application for fixation of standard rent is concerned, the learned trial Judge fixed the standard rent of Rs.600/- per month from 16.2.1996. The learned trial Judge did not accept any of the grounds invoked by the plaintiffs under the Act and dismissed the suit.

5. Aggrieved by this decision, the plaintiffs

preferred appeal. On 12.8.2008 the defendant filed Civil Revision and took out application for stay at Exhibit-5 challenging the clause-(2) of the operative part of the trial Court's order. By the impugned order, the learned District Judge decreed the suit under Sections 12, 13(1)(b), 13(1)(c) and 13(1)(g) of the Act. It is against this decision, the defendant has instituted the present Civil Revision Application. Along with Civil Revision Application, the defendant has filed Civil Application No.534/2016 under Order XLI Rule 27 of C.P.C. for bringing on record the fact of the plaintiffs obtaining possession of the commercial premises adjoining the suit premises admeasuring 20 ft. X 7.5 ft. By this application, the defendant has contended that as the plaintiffs have obtained possession of commercial premises admeasuring 20 ft. X 7.5 ft., the requirement set out under Section 13(1)(g) no longer subsists. Upon taking instructions, Mr.Patil states that the plaintiffs do not intend to file reply to this application and also are not pressing the ground under Section 13(1)(g) of the Act. Statements of Mr.Patil are recorded.

6. In support of this application, Mr.Sathaye strenuously contended that the learned District Judge was not justified in passing the decree under Section 12 of the Act. He submitted that by demand notice dated 5.2.1996, the plaintiffs called upon the defendant to pay

arrears of rent for the period from 1.7.1988 to 21.1.1996 @ Rs.400/- per month. The defendant had filed application for fixation of standard rent on 16.2.1996. By order dated 7.3.1996, the learned trial Judge fixed interim standard rent @ Rs.300/- per month. On 18.3.1996 the defendant has deposited Rs.30,300/- in the trial Court. He further submitted that during pendency of the suit, the defendant was regularly depositing Rs.300/- per month being the interim standard rent fixed by order dated 7.3.1996. He submitted that the defendant cannot be treated as a wilful defaulter.

7. Mr. Sathye further submitted that while dismissing the suit and deciding the application for fixation of standard rent, the learned trial Judge fixed standard rent @ Rs.600/- per month from 16.2.1996. Aggrieved by that order, the defendant had instituted Civil Revision No.4/2008 on 12.8.2008. During pendency of that revision, the defendant also filed stay application at Exhibit-5 on 12.8.2008. As the defendant has challenged the fixation of standard rent by filing Civil Revision before the District Court, he cannot be termed as a willful defaulter. In any case, the plaintiffs did not demand Rs.600/- per month from the defendant. The defendant was, therefore, justified in depositing rent @ Rs.300/- per month during pendency of the appeal in the District

Court. He also relied upon Section 12 as also explanations 1 and 2 thereof in support of his contention that the defendant cannot be termed as a willful defaulter.

8. He submitted that by demand notice, the plaintiffs claimed arrears of rent @ Rs.400/- per month being the contractual rent. While deciding the suit, the learned trial Judge fixed standard rent @ Rs.600/- per month. By not depositing the rent @ Rs.600/- per month during the pendency of the appeal, the defendant cannot be said to be willful defaulter as basically demand was made @ Rs.400/- per month.

9. As far as the ground of nuisance under Section 13(1)(c) of the Act is concerned, he submitted that in support of this ground, the plaintiffs did not examine any neighbour or adjoining occupier. The learned trial Judge had declined to pass the decree on this ground. Section 13(1)(c) of the Act contemplates that nuisance or annoyance to the adjoining or neighbouring occupiers and not the landlord himself. As the plaintiffs did not examine any of the adjoining or neighbouring occupiers, the learned District Judge was not justified in passing the decree under Section 13(1)(c) of the Act.

10. As far as the ground of permanent additions and alterations is concerned, he submitted that on 26.10.2001 there were communal riots in Malegaon city. During that

period, the suit premises was gutted in fire. The defendant carried out necessary repairs for restoration of the tenanted premises to its original shape as it was not possible to carry out business in an open space. He submitted that in view of the peculiar circumstances obtaining in Malegaon city during that period, the learned District Judge was not justified in passing the decree under Section 13(1)(b) of the Act. The learned District Judge passed the decree on the ground that the defendant did not issue notice under Section 23(2) before carrying out repairs as also did not obtain necessary permission from the Planning Authority. In view of the peculiar circumstances, it was not possible for the defendant to issue notice to the plaintiffs under Section 23(2) as also obtain permission of the Planning Authority before carrying out repairs. In any case, the learned District Judge did not record any finding about carrying out construction warranting decree under the Act. He, therefore, submitted that the application requires consideration.

11. On the other hand Mr.Patil supported the impugned order. He submitted that though the defendant has challenged the fixation of standard rent at Rs.600/- by the trial Court, by filing Civil Revision on 12.8.2008 as also stay application in that Revision Application, the

defendant did not obtain stay to clause (2) of the operative part of the trial Court's order. As the defendant did not obtain stay, she was obliged to deposit rent @ Rs.600/- per month during pendency of the appeal. He relied upon Section 12(3) of the Act to contend that during pendency of the appeal, the defendant did not pay or tender in the District Court regularly the standard rent fixed by the trial Court. Section 12(3) will also apply to the pending appeal as the appeal is continuation of the suit. He has taken me through the impugned order and submitted that the learned District Judge was justified in decreeing the suit under Section 12 of the Act.

12. As far as the ground of nuisance under Section 13(1)(c) of the Act is concerned, he has taken me through the evidence of the plaintiffs witness as also DW-1 as also the impugned order. He further submitted that the plaintiff is also occupying the neighbouring premises. He, therefore, submits that no case is made out for invocation of powers under Section 115 of C.P.C..

13. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The following facts are not in dispute:

- (I) Plaintiffs issued demand notice dated 5.2.1996 demanding arrears of rent for the period from

1.7.1988 to 21.1.1996 @ Rs.400/- per month;

- (II) Demand notice was duly served on the defendant. On 16.2.1996, she filed application for fixation of standard rent;
- (III) By order dated 7.3.1996, the learned trial Judge fixed interim standard rent @ Rs.300/- per month. On 18.3.1996, the defendant deposited Rs.30,300/- in the trial Court;
- (IV) On 30.4.2008, the learned trial Judge dismissed the suit. As far as application filed by the defendant for fixation of standard rent, the learned trial Judge fixed standard rent @ Rs.600/- per month from 16.2.1996.
- (V) On 12.8.2008 the defendant preferred Civil Revision No.4/2008 as also took out stay application Exhibit-5.
- (VI) On 27.4.2009, the plaintiffs filed reply to the stay application;
- (VII) During pendency of Civil Revision, the defendant did not press for stay of clause (2) of operative part of the trial Court's judgment. In view thereof, in the absence of any stay order, the defendant was obliged to deposit rent @ Rs.600/- per month.

14. Mr. Sathaye relied upon explanations (I) and (II)

of Section 12 of the Act and also Section 12 of the Act to contend that as the defendant was regularly depositing Rs.300/- per month rent during pendency of the appeal, he cannot be termed as a willful defaulter. Section 12, so far as relevant for deciding present controversy is concerned, reads thus :

“12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.-- (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) No decree for eviction shall be passed by the Court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases 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 together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine per cent, per annum; and thereafter continues to pay or tenders in Court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court.

Provided that, the relief provided under this sub-section shall not be available to a tenant to whom relief against forfeiture was given in any two suits previously instituted by the landlord against such tenant.

(4)

Explanation [I].- In any case where there is a dispute as to the amount of standard rent of 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 subsection (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 "permitted increase" shall include reference to "interim standard rent" and "interim

permitted increase" specified under sub-section (3) or (4) of section 11.

Explanation III.-”

15. Section 12(1) lays down that 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. Section 12(2) lays down that 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. Section 12(3) lays down that No decree for eviction shall be passed by the Court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases 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 together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine per cent, per annum; **and thereafter continues to pay or tenders in**

Court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court. In view of Explanation I as the defendant was depositing interim standard rent during the pendency of the suit, he cannot said to be a willful defaulter. The moot question is whether the defendant satisfied that condition after disposal of the suit and during the pendency of the appeal.

[Emphasis supplied]

16. As noted earlier, it is not in dispute that while dismissing the suit, the learned trial Judge decided the application filed by the tenant for fixation of standard rent. The learned trial Judge fixed the standard rent at Rs.600/- from 16.2.1996. It is not in dispute that though the defendant challenged that part of the order passed by the trial Court, by instituting Civil Revision on 12.8.2008 as also by filing stay application, the defendant did not obtain stay to directions contained in clause (2) of the operative part of the trial Court's order. The learned District Judge has considered this aspect in paragraph-22 of the impugned order. The learned District Judge noted that instead of depositing rent @ Rs.600/- per month, the defendant continued to pay rent of Rs.300/-. The defendant failed to pay standard rent as decided by the trial Court. He also did not pay simple interest @ 9% per

annum.

17. Mr. Sathaye submitted that the learned District Judge was not justified in decreeing the suit under Section 12 of the Act as basically the demand made by the plaintiffs was Rs.400/- per month. In other words, the demand was not @ Rs.600/- per month and non payment of rent @ Rs.600/- per month will not enure to the benefit of the plaintiffs for passing decree under Section 12 of the Act. I have already extracted Section 12 as also Explanations I and II thereof. While deciding the suit and application for fixation of standard rent, the learned trial Judge had fixed the standard rent @ Rs.600/- per month. Perusal of language employed in Section 12 of the Act shows that the tenant is under obligation to pay standard rent and permitted increases. In the instant case, while deciding the suit the standard rent was fixed by the trial Court at Rs.600/- per month. The defendant was, therefore, under obligation to pay rent @ Rs.600/- per month. In view of Section 12 of the Act, extracted hereinabove, it has to be held that the defendant was not ready and willing to pay the standard rent as determined by the trial Court. I, therefore, do not find that the learned District Judge committed any error in decreeing the suit under Section 12 of the Act.

18. As far as the ground of erection of permanent

construction contemplated under Section 13(1)(b) of the Act is concerned, the learned District Judge has considered this ground from paragraphs-23 to 31. In paragraphs-26 and 27, after noting that there was communal riots in the city of Malegaon, the learned District Judge observed that the defendant did not issue notice under Section 23(2) of the Act. It was also observed that the defendant did not apply to the Local Authority seeking permission to carry out repairs. She had filed application in the trial Court below Exhibit-19 on 22.6.1998 seeking permission to carry out repairs. That application was rejected by the trial Court by order dated 23.9.1998. Ultimately in paragraph-31, learned District Judge recorded a categoric finding that the photographs produced on record clearly establish that inspite of existence of restraining orders from the trial Court to continue with the construction, permanent construction was carried out by the defendant. Said finding is based upon the evidence on record. It is not the case of the defendant that she had issued notice under Section 23(2) of the Act to the landlord calling upon him to carry out repairs and on account of his failure she has carried out the repairs. Equally it is not her case that she had obtained permission from the Local Authority.

19. Mr.Sathaye has invited my attention to

paragraphs-32 and 33 of the trial Court's judgment. In paragraph-32, learned trial Judge referred to the decision of this Court in ***Laxman Khot v. Anusayabai and others, AIR 1967 Bombay 264*** wherein guidelines are laid down about how to prove the photographic evidence. It was observed that it is only when the person who takes the photograph and develops it into a negative, himself comes into the box and deposes to both these facts that the negative becomes admissible in evidence. In paragraph-33, learned trial Judge observed that PW-1 did not come with the case that he developed those negatives. The learned trial Judge accordingly held that the photographs are not proved.

20. As against this, Mr.Patil invited my attention to paragraphs-30 and 31 of the impugned order. He submitted that the defendant's witness was confronted with the photographs-64 and 70. He admitted that in photograph Exhibit-70, the board of his shop appears. As far as photograph at Exhibit-69 is concerned, he however expressed his inability to answer. The learned District Judge observed that when a party gives evasive answers, no other inference than of suppression of fact can be drawn. In paragraph-31, the learned District Judge observed that after taking into account voluminous proof in the photographs taken by the plaintiff himself and

which are proved before the Court, there is no other option for the defendant to admit the construction. It is more so considering the defence of the defendant that the shop was totally burnt and was inhabitable.

21. I, therefore, find that the learned District Judge has rightly decreed the suit under Section 13(1)(b) of the Act.

22. As far as the ground of nuisance under Section 13(1)(c) of the Act is concerned, with the assistance of learned Counsel appearing for the parties, I have perused the oral evidence adduced by the parties. In paragraphs-3 and 4 of the examination-in-chief, the plaintiff's witness Ashpaq Ahmed Bashir Ahmed specifically deposed about the customers of the defendant causing nuisance as also the defendant has not constructed toilet. The defendant did not cross-examine the plaintiff's witness in respect of statements made in paragraphs-2 and 3. As far as the defendant's witness is concerned, he admitted that he has not constructed toilet in the suit premises. It is in that context, learned District Judge considered the evidence on record in paragraphs-38 of the impugned order and observed that considering the fact that the defendant had availed the suit shop alongwith open space adjoining the same, creation of nuisance by the customers of the defendant appeals to preponderance of probability.

Though the plaintiffs did not bring on record any particular complaint of any other tenant or residents nearby, there is no reason to disbelieve the testimony of plaintiff No.1, which is un-shattered.

23. In the light of above discussion, it has to be held that the view taken by the learned District Judge is a plausible view. Merely because on the basis of the evidence on record another view is possible as far as the ground under Section 13(1)(c) of the Act is concerned, that itself is no ground for taking different view. The defendant was not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that they are contrary to evidence on record. The defendant was not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed with no order as to costs. As the plaintiffs have not pressed ground under Section 13(1)(g) of the Act, Civil Application No.534/2016 stands allowed and is also disposed of.

(R. G. KETKAR, J.)