

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1992 OF 1997

Smt.Satyabhamabai Jagannath Shelar)
since deceased through her heirs and)
legal representatives-)
1.Chandrakant Jagannath Shelar,)
resident of V.D.Savarkar, Road, Pen,)
Taluka Pen, Dist. Raigad.)
2. Sulochana Sopan Waghchore,)
resident of Chaw No.241, Laxminagar,)
Opp.Dr.Ambedkar School, Pune)...Petitioner

vs

Shri.Narayan Pandurang Dhamale,)
resident of Gurao Ali, Pen, Taluka Pen,)
District Raigad.)...Respondent

Mr.S.S.Patwardhan, for the Petitioners.

Mr.Sunil Kadam, for the Respondent.

CORAM : G.S. KULKARNI, J.**DATED : 11th JULY, 2017**

Judgment.:

1. The landlord is before the Court, in this petition under Article 227 of the Constitution, being aggrieved by the dismissal of his eviction and possession suit instituted against the respondent/tenant as confirmed

by the learned appellate judge. The judgment of the learned trial judge dated 27 March 1992 in Regular Civil Suit No.39 of 1989 is confirmed by the learned appellate judge in Regular Civil Appeal No.48 of 1992 by judgment dated 13 December 1996.

2. It is not in dispute that the respondent is the petitioner's tenant in respect of open space admeasuring 6 ft X 6 ft at Survey no.553 at Pen, District Raigad (for short 'the suit premises'). The respondent was permitted to install a wooden cabin/box on the said open space, to conduct business of a hair cutting saloon. Initially the case of the petitioner was of granting the suit premises to the respondent on payment of a royalty of Rs.100/- per month. However, subsequently in a notice dated 25 August 1988 addressed to the respondent, the petitioner accepted the respondent as a monthly tenant of the suit premises on a rent of Rs.100/- per month. By the said notice, the petitioner terminated the tenancy of the respondent on the ground of arrears of rent for the period November,1986 to July,1988 totaling to Rs.2100/- and being a defaulter the petitioner asserted that the respondent had no legal right to occupy the suit premises. Another ground to seek eviction as stated in the suit notice was illegal construction of a cement platform undertaken by the respondent on the suit premises on which wooden stall was installed.

The respondent by his Advocate's letter dated 3 September 1988 replied to the suit notice. There is vague reference sans details that the arrears of rent were forwarded by a money order at the rate of Rs.60/- per month and that money order was refused by the petitioner.

3. At this stage, it may be pointed out that after the receipt of the suit notice dated 25 August 1988, on 5 November 1988 the respondent filed an application before the Civil Court under Section 11(2) of the Bombay Rent Act praying for fixing of the standard rent for the suit premises.

4. Five months thereafter that is on 6 May 1989 the petitioner approached the Court of Civil Judge, Junior Division by instituting the suit in question against the respondent, seeking a decree of eviction and possession of the suit premises, interalia on the ground that the respondent was in arrears of rent of Rs.3100/- and was guilty of undertaking permanent construction on the suit premises without the petitioner's consent. These causes falling under Section 12 and 13(1)(b) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'the Bombay Rent Act'). A further prayer for cost of Rs.200/- per month from the date of filing of the suit as penal rent was also made.

5. The respondent appeared and contested the suit by filing his written statement. It can be noted that there is no specific denial of the case of the petitioner that the respondent was in arrears of rent for the period November,1986 to July,1988, albeit a contention that rent of Rs.60/- was forwarded by a money order to the petitioner, and that the money order was returned. The respondent disputed that the amount of rent was Rs.100/- per month as alleged by the petitioner in the suit notice and in the plaint.

6. The learned Trial Judge by the impugned judgment and order dated 27 March 1992 dismissed the petitioner's suit. The learned trial Judge repelled the petitioner's contention, that the respondent was a defaulter and in arrears of rent, in accepting the case of the respondent that the respondent had forwarded the rent to the petitioner by money order which was not accepted by the petitioner. The learned Trial Judge held that the respondent had also moved an application for fixing standard rent of the suit premises and therefore, it cannot be said that the respondent was not ready and willing to pay the rent. As regards the issue of illegal construction, the learned Trial Judge was of the opinion, that the respondent had undertaken construction only to facilitate the

entry of the customers into the wooden stall, as during rainy season at the entry of the stall there used to be a pool of water, and if the height of wooden stall was not raised it was causing difficulties to the respondent in conducting the business of a hair cutting saloon. The learned trial Judge also allowed the miscellaneous application of the respondent for fixing standard rent, fixing the same at Rs.100/- per month which was the rent amount as demanded by the petitioner.

7. Dissatisfied by the dismissal of the suit, the petitioner approached the Court of learned District Judge at Raigad, who confirmed the findings of the learned Trial Judge and dismissed the petitioner's appeal, confirming the judgment of the learned Trial Judge.

8. In assailing the judgments of the courts below, Mr.Patwardhan, learned Counsel for the petitioners has principally raised two fold contentions. He firstly submits that there is an apparent perversity in the order passed by the Courts below inasmuch as there is a breach at the hands of the respondent of the provisions of sub-section (3) of Section 12 read with 'Explanation I' of the Bombay Rent Act, under which, the respondent was under a mandatory obligation to make an application to the Court for fixing standard rent '*within a period of one*

month', after receipt of notice under sub-section (2) of Section 12. Mr.Patwardhan submits that admittedly in the present case, the suit notice is dated 25 August 1988 which was received by the respondent on 29 August 1988. The respondent disputed the rent as demanded by the petitioners and approached the trial Court by filing an application for fixing standard rent on 5 November 1988, which is admittedly beyond the period of one month as Explanation I to Section 12 would postulate. Mr.Patwardhan, submits that the respondent, having not approached the Civil Court within the time statutorily prescribed by Explanation I, apparently showed that there was no readiness and willingness on the part of the respondent to pay rent to the petitioner landlord and the respondent thus was a defaulter. He submits that both the courts below have completely overlooked this requirement of law, as sub-section (3) of Section 12 read with Explanation I would stipulate. Mr.Patwardhan then submits that even on the evidence which has come on record, it can be certainly ascertained that there is perversity in the findings as recorded by the learned trial judge inasmuch as there is firstly no denial on the part of the respondent that he was in arrears of rent for the period November,1986 to July,1988, inasmuch as in the reply to the suit notice as also the written statement of the respondent was completely silent on the same. This in fact amounted to admission on the part of the respondent

that he was in arrears of rent. Mr.Patwardhan has drawn my attention to the specific averment made in the plaint in regard to the period of November,1986 to July,1988 for which the petitioner claimed the respondent to be in arrears of rent. Mr.Patwardhan submits in the written statement there is no denial by the respondent of these specific averments as made in the plaint. The second contention of Mr.Patwardhan is of the respondent undertaking construction of a permanent nature on the suit premises namely of a cement platform without the consent of the petitioner or obtaining permission from the municipal authority. He submits that the courts below have failed to take into consideration the clear provision of Section 13(1)(b) of the Bombay Rent Act which would entitle the petitioner for a decree of possession on this ground. In support of his submission on the first issue of arrears of rent and the mandatory requirement of law under Section 12(3) read with explanation I, Mr.Patwardhan has placed reliance on the decision of the Supreme Court in the case “*Joshi Bhuraram Dattaram Vs. Jivibai D.Mulchand (Mrs.)*”¹ . Mr.Patwardhan relies on a decision of the learned Single Judge of this Court in the case “*Sudha Sumant Barve Vs. vs. Ranjana Ramesh Padhye*”² on the issue of illegal construction

1 1995 Supp (3) SCC 416

2 2013(4) Mh.L.J. 735

9. On the other hand Mr.Kadam, learned Counsel for the respondent countering the submissions as made on behalf of the petitioner would submit that it was sufficient for the respondent to file an application for fixing standard rent and the moment such an application is filed, it is required to be presumed that there was readiness and willingness on the part of the respondent to pay the standard rent. Additionally, he would submit that both the courts below have noted that the respondent had forwarded rent of Rs.60/- by money order and the money order was refused by the petitioners and thus, it could be said that there was readiness and willingness on the part of the respondent to pay the rent of the suit premises. In support of his submission, the learned Counsel for the respondent has placed reliance on the decision of the learned Single Judge of this Court in the case “***Sugarbaj Mohamad Siddiq & Ors. Vs. Ramesh Sundar Hankare deceased by L.Rs.***”³ and more particularly the observations of the Court in paragraph 10 of the said decision, where the Court referring to the facts of the said case noted that after receipt of the demand notice dated 3.7.1978 which was received by the petitioner-tenant on 14.7.1978, the petitioner-tenant on 12.8.1978 had forwarded the amount to the landlord which was refused by the landlord. In this context, the Court accepted the contention of the petitioner-tenant that it cannot be presumed that he was not ready and

3 1997(2) Mh.L.J. 825

willing to make payment of the rent. As regards the second contention of the petitioner in regard to the illegal construction of the cement platform by the respondent, Mr.Kadam submits that the courts below have appropriately considered that the construction of the platform was not of a permanent nature attracting section 13(1)(b) of the Bombay Rent Act. He submits that the same was constructed outside the suit area to enable the customers to enter the suit premises/shop.

10. With the assistance of the learned Counsel for the parties, I have gone through the judgment of the learned trial Judge and that of the appellate Court. I have also perused the pleadings, the evidence and the relevant documents in the record of the case.

11. Having given due consideration to the first submission of Mr.Patwardhan, I am of the opinion, that Mr.Patwardhan would be correct in his contention that there is an apparent perversity in the orders passed by the Courts below on the basic aspect of application of the legal provisions to the facts in hand. This inasmuch as the clear requirement of law as envisaged by sub-section (3) of Section 12(2) read with the 'Explanation' has completely missed the attention of the Courts below. Section 12 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) 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 increase 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 "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.- For the purpose of this section where, a tenant has deducted any amount from the rent due to the landlord under section 173C of the Bombay Municipal Corporation Act for recovery of any water tax or charges paid by him to the Commissioner, the tenant shall be deemed to have paid the rent to the extent of deductions so made by him.]

(emphasis supplied)

12. A bare reading of Explanation I to Section 12 would make it clear that when there is dispute as to the amount of standard rent or permitted increase recoverable under the Act, the tenant shall be deemed to be ready and willing to pay such amount “if before the expiry of period of one month”, after the notice referred to in *sub-section (2) of Section 12* (the suit notice in the present case), makes an application to the Court for fixing standard rent as permissible under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increase as specified in the order made by the Court. There is no dispute on the dates in question, in the present case. The suit notice is dated 25 August 1988, whereby the respondent was informed of the default and arrears of rent. This is a notice as sub-section (2) of Section 12 would contemplate. The notice is admittedly received by the respondent on 29 August 1988. As noted above Section 12 read with Explanation I mandates an obligation on the respondent to approach the court and make an application under sub-section (3) of Section 11 for fixing standard rent within one month of

the receipt of such notice. The respondent, however, approached the Civil Court beyond the period of one month contrary to what Explanation I below Section 12 would provide, by an application filed on 5 November 1988, which was admittedly beyond the prescribed period of one month. Surprisingly the mandatory requirement of law as sub-section (2) of Section 12 read with Explanation I has completely been overlooked by the courts below. There is not even a whisper /reference of the mandate of the said provision in both the judgments. Further the Civil Court appears to have totally forgotten the requirement of law as no order fixing any interim rent was either passed or insisted on the said application by the respondent, nor there was a deposit of any rent before the Civil Court at the relevant time. This is sufficient to reach a conclusion that the respondent was not ready and willing to pay the rent much less the arrears, when tested on the touchstone of Section 12. A perusal of the findings as recorded by the learned Trial Judge on issue no.3 which pertains to the default in making payment of rent is quite disheartening as also painful inasmuch as the basic facet which was required to be considered by the learned Trial Judge namely the above requirement of law, in its application to the facts of the case, consideration of which was absolutely germane, has been discarded by the learned Judge in answering issue no.3, to hold that the respondent was not in default in

payment of rent. The observation that the respondent had approached the Court by making an application under Section 11 to fix the standard rent was surely not sufficient as Explanation I of Section 12 would provide. The law in this context is well settled. In “*Shah Dhansukhlal Chhaganlal V. Dalichand Virchand Shroff*”⁴ the Supreme Court held that Section 12(1) must be read with the explanation and accordingly would mean that a tenant can only be considered to be ready and willing to pay if before the expiry of period of one month after the notice referred to in sub-section (2), he makes an application to the court under sub-section (3) of section 11 and thereafter pays and tenders all amount or rent or permitted increase specified by the court. In a subsequent decision in “*Harbanslal Jagmohandas & Anr. Vs. Prabhudas Shivlal*”⁵ the Supreme Court in considering a conflict of decision of the Gujarat and the Bombay High Court held that the tenant can claim protection from the provisions of Section 12(3)(a) of the Bombay Rent Act only if the tenant makes an application within one month of the service of the notice terminating the tenancy, by raising dispute as to standard rent. Chief Justice A.N.Ray speaking for the court observed thus:-

23. The question as to when a dispute is to be raised came up for consideration in *Dhansukhlal Chhaganlal v. Dalichand Virchand*, (1968)3 SCR 346 = (AIR 1968 SC 1109). The appellant fell into arrears of rent in that case.

4 AIR 1968 SC 1109

5 AIR 1976 SC 2005

The landlord gave a notice to the tenant on 18 April, 1955 demanding the arrears of rent and also terminating the tenancy of the defendant with effect from 31 May, 1955. The notice was received by the defendant on 21 April, 1955. The suit for ejectment was filed on 15 March, 1956 on the ground that the defendant was in arrears of payment of rent and permitted increases and as such not entitled to the protection of the Act. This Court held that section 12 (1) of the Act must be read with Explanation and so read it means that the tenant can only be considered to be ready and willing to pay 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 by the Court. This Court found in Chhaganlal's case (AIR 1968 SC 1109)(SUPRA) that the tenant made no payment within the period of one month of the notice of ejectment and further that although in his written statement he raised a dispute about the standard rent he made no application in terms of section 11(3) of the Act. The tenant can claim protection from the operation of section 12(3) (a) of the Act only if the tenant makes an application within one month of the service of the notice terminating the tenancy by raising a dispute as to standard rent.

24. The view of the Bombay High Court overlooks the limitation of time within which a dispute is to be raised as to standard rent. The view of the Bombay High Court is that disputing within one month of the service of the notice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at any stage of the suit. The view of the Bombay High Court nullifies the provisions contained in section 12 and Explanation thereto and confers a right on the tenant where the legislation does not contemplate such a right.

The law laid down in “*Harbanslal Jagmohandas & Anr. Vs. Prabhudas Shivlal*” (supra) was re-affirmed in the decision of the Supreme Court in and “*Jaywant S.Kulkarni & Ors. vs. Minochar Dosabhai Shroff & Ors.*”⁶

6 AIR 1988 SC 1817

and in a recent decision of the Supreme Court as relied on behalf of the petitioner in the case of **Joshi Bhuraram Dattaram Vs. Jivibai**

D.Mulchand (Mrs.) (supra). The Supreme Court held as under:-

“4. Admittedly the appellant had not availed of the remedy provided under Section 11(3) of the Act, nor disputed the demand in the notice under Section 12(2). so it is not open to him to raise the plea in the written statement. It has been rightly contended by Shri.Dave that it is not open to the court to go into the question as to what was the standard rent in this case. But the finding of the courts below that the standard rent is Rs.9 as claimed by the appellate became final. He did not avail of the remedy under Section 12(3). In *Shah Dhansukhlal Chhaganlal V. Dalichand Virchand Shroff* (1968)3 SCR 346; AIR 1968 SC 1109) this Court held that Section 12(1) must be read with an explanation and so it means that a tenant can only be considered to be ready and willing to pay if before the expiry of period of one month after the 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 all amount or rent or permitted increase specified by the court. The readiness and willingness to pay thereafter is not relevant. In that case, since the tenant was in arrears for 6 months and he did not pay the amount and he did not avail of the remedy under Section 11(3) his subsequent willingness to pay the amount shall not be considered to be his readiness and willingness to pay the arrears. Accordingly decree of ejectment was confirmed by this court. A faint attempt was also made in that case to argue the validity of the notice under Section 12(2) and this Court pointed out that it is only a procedural part and the substantive remedy would be under Section 11(3) of the Act. In these circumstances, this Court did not permit to raise the validity of the notice under Section 12(2) though it was found that the standard rent therein was Rs.27 and the rent being paid was Rs.40/-. The same ratio applies to facts in this case. We have no hesitation to hold that since the appellant had not raised dispute as regards the standard rent nor availed of the remedy under Section 11(3) of the Act, it is not permissible for him to raise the plea for the first time in the written statement. Equally the contention that the standard rent is only Rs.9 and that the tenant is not liable to ejectment on the basis of the notice under Section

12(2) that he is to pay arrears at the rate of Rs.20 per mensem. Since the appellate court has given the finding that the standard rent is only Rs.9 and as its correctness was not canvassed, we affirm it and on that footing the arrears were at the rate of Rs.9 but as found by the appellate court that his plea of payment was not proved, he was in default for 72 months in payment of rent. It is a finding of fact. There is no error of law. So we are not inclined to interfere with the decree of ejectment passed by the courts below.”

13. Now on merits, the perversity in the observations can also be noticed when the learned trial Judge observed that the petitioner had refused to accept the money order as forwarded by the respondent when there were no details whatsoever as to what was the date on which the money order was sent, as to when it was refused and the amount under the money order, pertained to what period. Both judgments of the courts below are bereft of any details or discussion on this aspect. Nor could the learned counsel for the respondent justify the respondent's case on this issue. Such casual approach of the learned trial Judge leads to a glaring perversity in adjudication of the proceedings. The observations of the appellate Court / District Judge on this count are also not too enlightening and the approach clearly appears to be mechanical in nature. A perusal of paragraph 15 of the judgment of the learned appellate Judge is nothing but repetition of the apparent perversity as made by the learned trial Judge.

14. Considering the facts of the present case, the reliance of the respondent on the decision of the learned Single Judge in the case ***“Sugarbaj Mohamad Siddiq & Ors. Vs. Ramesh Sundar Hankare deceased by L.Rs.”*** (supra) would not assist the respondents. As already noted above in the said case the demand notice was issued by the landlord was dated 3 July 1978 which was received by the tenant on 14 July 1978 and the tenant on 12 August 1978 forwarded the amount to the landlord which was refused by the landlord. It is in these facts, the Court had accepted the tenant's case that he was not a defaulter.

15. As a result of the aforesaid discussion it can certainly be concluded that on the ground of arrears of rent, the petitioner was entitled to a decree of eviction in the suit in question.

16. The next contention as urged by Mr.Patwardhan is with regard to illegal construction of a cement platform. A perusal of the averments as made in paragraph 2 of the plaint would indicate that the construction as referred is specifically on the “extended portion” of the suit premises. It is thus clear that the construction as complained by the respondent is not of any construction on the suit plot and therefore, the second ground on which the petitioner sought eviction namely of the

respondent undertaken illegal construction without consent of the petitioner landlord, itself was defective. Such construction in any manner cannot damage the petitioner's suit plot, as it was made, only to raise the height of the wooden box, used as a hair cutting saloon and considering the difficulty faced by the respondent of pooling of the water at the entrance. Such construction was for the better utilization of the suit premises. In any case construction of a platform cannot be said to be something which would structurally alter the nature of the suit premises. I have perused the finding of the courts below on this issue. I do not find any perversity in the findings in answering the issue against the petitioner on this count. Accordingly, the submissions of Mr.Patwardhan assailing the finding in this regard are required to be rejected.

17. In view of the above deliberation, the petition will have to be partly allowed to the extent that the petitioners' suit for eviction and possession would be required to be decreed on the ground of arrears of rent. Accordingly, the following order:-

ORDER

(1) Writ petition is partly allowed. The judgment and decree dated 27 March 1992 in Regular Civil Suit No.39 of 1989 and the

judgment and order dated 13 December 1996 of the District Judge, Raigad in Regular Civil Appeal No.48 of 1992 are set aside. Regular Civil suit No.39 of 1989 is partly decreed. The petitioner-landlord is entitled to recover possession of the suit premises and the respondent-tenant is directed to hand over the possession of the suit premises to the petitioner within a period of twelve weeks from today.

No order as to costs.

(G.S.KULKARNI, J.)