

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 6833 OF 1998****Mahadeo Anant Nalavade****..... Petitioner****VERSUS****Shankarrao Vyankatrao Taware & Anr.****..... Respondents**

Mr.Rahul Kate for the Petitioner.

None for the Respondents.

**CORAM : R.D. DHANUKA, J.****DATE : 28<sup>th</sup> JULY, 2017****P.C.**

None appeared for the respondents though served.

2. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has impugned the order and judgment dated 18<sup>th</sup> June, 1998 passed by the learned Additional District Judge, Baramati, in Regular Civil Appeal No.55 of 1993 thereby confirming the judgment and decree dated 28<sup>th</sup> January, 1993 passed by the learned Joint Civil Judge, Junior Division, Baramati in Regular Civil Suit No.337 of 1984 and decreeing the Regular Civil Suit No.337 of 1984 filed by the respondent no.1. Some of the relevant facts for the purpose of deciding this writ petition are as under :-

3. The petitioner was a monthly tenant of the respondent no.1 in respect of the suit property bearing house no.406, City Survey Nos. 817 and 818, Ward No.3 situated at Baramati. The petitioner was inducted in the suit premises in the year 1959 on monthly rent basis of Rs.6/-. Thereafter the rent was increased to Rs.8/-

inclusive of such taxes. It was the case of the respondent no.1 that the petitioner had not paid rent of the suit premises from 1<sup>st</sup> May, 1983 to 30<sup>th</sup> April, 1984 and has not paid education cess and other taxes from 1<sup>st</sup> May, 1972 to 30<sup>th</sup> April, 1984. On 26<sup>th</sup> March, 1984 the respondent no.1 issued a notice upon the petitioner demanding arrears of rent and other taxes and also terminating his tenancy by the end of 30<sup>th</sup> April, 1984. The said notice was received by the petitioner on 2<sup>nd</sup> April, 1984.

4. It is the case of the petitioner that within 30 days from the date of receipt of the said notice demanding the arrears of rent, the respondent sent money order to the respondent no.1 remitting the payment of rent and other taxes. The said money order was however refused by the respondent no.1 on 30<sup>th</sup> April, 1984 i.e. within 30 days from the date of receipt of the notice of demand from the respondent no.1.

5. The respondent no.1 filed a suit in the Court of Joint Civil Judge, Junior Division, Baramati (Regular Civil Suit No.337 of 1984) against the petitioner inter alia praying for eviction of various grounds including on the ground of arrears of rent under section 12(3)(a). The respondent no.1 himself did not enter the witness box and examined his constituted attorney to prove his case. The petitioner examined himself and produced various documents including money order receipt containing an endorsement by the post master recording that the landlord had not claimed the said money order on 30<sup>th</sup> April, 1984.

6. The learned Trial Judge framed nine issues including the issue whether the petitioner herein was a willful defaulter in payment of rent of the suit premises for more than 6 months. By a judgment and decree dated 28<sup>th</sup> January, 1993 the learned Joint Civil Judge, Junior Division, Baramati decreed the said suit and

directed the petitioner to deliver vacant possession of the suit premises to the respondent no.1(original petitioner) within a period of six months from the date of the said decree and also to pay Rs.150.80 ps. and also mesne profit. The learned trial judge rejected the other grounds raised by the respondent no.1 including bonafide requirement, subletting, greater hardship etc. However the learned Trial Judge rendered a finding that the petitioner herein was a willful defaulter in payment of rent and accordingly passed a decree against the petitioner.

7. Being aggrieved by the said judgment and decree, the petitioner herein preferred an appeal (Regular Civil Appeal No. 55 of 1993) before the learned Additional District Judge, Baramati. The learned Judge formulated four points for determination including the point whether the petitioner herein was a willful defaulter. By an judgment and decree dated 18<sup>th</sup> June, 1998, the Additional District Judge, Baramati negated the contention of the respondent no.1 that the premises were reasonably and bonafidely required by the respondent no.1 for his own use and occupation and also negated the contention that the petitioner herein has willful sublet the suit premises. The learned Additional District Judge however confirming the finding that the petitioner was a willful defaulter of payment of rent and taxes. The petitioner has impugned both these judgments and decree before this court under Articles 226 and 227 of the Constitution of India.

8. Mr.Kate, learned counsel appearing for the petitioner invited my attention to the findings recorded by the two courts below and also few paragraphs of the oral evidence led by his client before the learned Trial Judge. It is submitted by the learned counsel that both the courts below have decreed the suit mainly on the ground that the petitioner had not examined the postman to prove that the respondent no.1 had refused to accept the money order sent by the petitioner

within 30 days from the date of the receipt of the notice of demand dated 26<sup>th</sup> March, 1984. He submits that though the petitioner had made attempts to produce the other records of the post office, since such records were destroyed by the post office, the same could not be produced. He submits that the petitioner however entered the witness box and produced the money order receipt containing the endorsement by the post office that the said money order was not claimed by the landlord. It is submitted that the respondent no.1 did not enter the witness box and had examined his constituted attorney who had no personal knowledge about the fact whether the money order sent by the petitioner was not claimed by the respondent no.1 or not.

9. It is submitted by the learned counsel that the only suggestion put to the petitioner who had entered the witness box by the respondent no.1 was that there was a collusion between the petitioner and the postman and accordingly such endorsement came to be made on the money order receipt. There was no independent evidence led by the respondent no.1 on that issue though such case was suggested to the witness.

10. Learned counsel placed reliance on the judgment of Supreme Court in case of ***Laxmikant Revchand Bhojwani and another vs. Pratapsing Mohansingh Pardeshi, deceased through his heirs and L.R.s., 1996(1) Mh.L.J. 507*** and in particular paragraphs 6 and 7 thereof and would submit that under section 12(3)(a) of the Bombay Rent Act, sine qua non for eviction of a tenant under Section 12(3)(a) is "the neglect to make payment". He submits that admittedly the money order was received by the respondent no.1 on 30<sup>th</sup> April, 1984 which was within the period of 30 days from the date of notice of the demand which was not claimed by the respondent no.1. He submits that it was thus clear that the petitioner had not

neglected to make payment of the arrears of rent under section 12(3)(a) of the Bombay Rent Act and thus no decree of eviction could be passed by the two courts below.

11. In support of his submission that the evidence of the constituted attorney of the respondent no.1 could not be considered by the two courts below, on the ground that he had no personal knowledge of the fact whether the respondent no.1 landlord had refused to accept the money order within 30 days from the date of notice or not, learned counsel placed reliance on the judgment of Supreme Court in case of ***Janki Vasudeo Bhojwani and another vs. Indusind Bank Ltd. and others, (2005) 2 SCC 217.***

12. A perusal of the judgment of the two courts below clearly indicates that the other grounds of eviction raised by the respondent no.1 landlord have been rejected by the two courts below and a decree came to be passed only on the ground of alleged willful default made by the petitioner in making payment of rent and taxes for more than 6 months. Both the courts below have rendered a finding that there was collusion between the petitioner and the postman and thus endorsement came to be made on the money order receipt to the fact that the respondent no.1 had not claimed the said money order. The courts below have also held that since the petitioner had not examined the postman, the court could not believe the case of the petitioner that the respondent no.1 had refused to accept the money order. It is not in dispute that money order receipt which was marked as Exs. 53 and 54 were tendered by the petitioner who had examined himself as one of the witness. The only suggestion given to the petitioner in witness box by the respondent no.1 was that such endorsement was made in collusion with the postmaster by the petitioner. There was no positive evidence led by the respondent

no.1 though this suggestion put to the witness.

13. It was placed on record by the petitioner that though the petitioner had made an attempt to produce the other records maintained by the post office, the same could not be produced since the same was destroyed by the Post Office being old. In these circumstances, the two courts below ought to have considered the evidence produced by the petitioner i.e. money order receipt containing the endorsement made by the postman that the respondent no.1 had not claimed the money order. In my view, both the courts below have rendered a perverse finding in the judgment and decree rendered by the two courts below.

14. Supreme Court in case of ***Laxmikant Revchand Bhojwani and another*** (supra) has construed section 12(3)(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and has held that the sine qua non for eviction of a tenant under Section 12(3)(a) is "the neglect to make payment" and not the actual making of the "payment". When a money order or a demand draft is sent to the landlord, during the specified period, it cannot be said that the tenant has "neglected to make payment". In my view, the petitioner having sent the money order towards it payment of rent and taxes within 30 days from the date of the receipt of notice, she received on 2<sup>nd</sup> April, 1984, the two courts below could not have rendered a finding that the petitioner was a willful defaulter. In my view in such circumstances, the petitioner has not neglected to make payment of rent and taxes within the time prescribed under section 12(3)(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The judgment of Supreme Court in case of ***Laxmikant Revchand Bhojwani and another*** (supra) applies to the facts of this case. I am respectfully bound by the said judgment.

15. In my view, the petitioner is right in his submission that the respondent no.1 having himself not entered the witness box and having examined his constituted attorney, who had no personal knowledge in respect of the fact whether the money order sent by the petitioner within 30 days from the date of the receipt of this notice demand was actually reused or not by the respondent no.1, the evidence of the constituted attorney could not have been considered by the two courts below. Such fact could be deposed only by the respondent no.1 himself and not by the constituted attorney. The principles laid down by the Supreme Court in case of ***Janki Vasudeo Bhojwani and another*** (supra) that the evidence of the constituted attorney can be considered only to the extent to his personal knowledge about the subject matter applies to the facts of this case. I am respectfully bound by the said judgment. In my view, the findings rendered by the two courts below are totally perverse and contrary to law laid down by the Supreme Court, thus deserves to be set aside. I, therefore, pass the following order :-

- (a) Writ petition is made absolute in terms of prayer clause
- (b).
- (b) Regular Civil Suit No.337 of 1984 filed by the respondent no.1 is dismissed.
- (c) Rule is made absolute in the aforesaid terms.
- (d) No order as to costs.

**(R.D.DHANUKA, J.)**