

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.1195 OF 1999

Mahadeo Gangadhar Kulkarni	]	
(since deceased)	]	
Ashabai Mahadeo Kulkarni	]	
(since deceased)	]	
Ravinra M. Kulkarni	]	
(since deceased)	]	
through his Heirs and Legal Representatives	]	
Aarti Ravindra Kulkarni and others.	]	Petitioners

Vs.

Vasant Deoram Gawate	]	
(since deceased)	]	
through the Heirs and Legal Representatives	]	
Rohini V. Gawte and others.	]	Respondents

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Mr. Nitin P. Deshpande i/b Suhasini Mutalik, learned Counsel for petitioners No.2,3A, 3B and 4 to 6.

Mr. Rahul S. Kadam, learned Counsel for the Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 8th MARCH, 2019.

JUDGMENT:

Heard Mr. Deshpande, learned Counsel for the petitioners and Mr. Kadam, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'plaintiffs' have challenged the judgment

and decree dated 30th June, 1998 passed by the learned 6th Additional District Judge, Pune in Civil Appeal No.601 of 1996. By that order, the learned District Judge allowed the appeal preferred by the respondents, hereinafter referred to as “defendants” and set aside the judgment and decree dated 27th March, 1996 passed by the learned Additional Judge, Small Causes Court, Pune in Civil Suit No.339 of 1994. The learned District Judge dismissed the suit instituted by the plaintiff. The relevant and material facts giving rise to filing of the present Petition, briefly stated, are as under.

3. The plaintiff instituted the suit against Vasant Deoram Gawate, Proprietor of M/s. Gawate Brothers for recovery of possession of premises admeasuring 26'x11 ½ in House No.346 situate at Shaniwar Peth, Pune, more particularly described in paragraph 1 of the plaint (for short 'suit premises'), *inter alia*, contending that the defendant is monthly tenant of the suit premises. Rent is Rs.120+education cess of Rs.4.50 per month. The defendant is not ready and willing to pay rent. He is in arrears of rent from 1st November, 1989. The plaintiff issued demand notice dated 29th April, 1994. The plaintiff further alleged that the defendant has kept the suit premises locked. It was being used for godown purpose though it was let out for residential purpose. Because of non user as also defendant is using it for godown purpose, the suit premises is damaged by rats and rabbits. The defendant has acquired alternate spacious premises for his business. The plaintiff also alleged that he and his wife are aged. There are 15 members in his family. The sons are of marriageable age. Presently, they are occupying two rooms on the third floor which is insufficient accommodation for them. The plaintiff, therefore, contended that he requires the suit premises reasonably and bona fide for personal use and occupation. Thus, the plaintiff invoked grounds under section 12, 13 (1) (g), 13 (1) (l) and 13 (1) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') r/w section 108 (o) of the Transfer of Property Act,

1882 (for short 'T.P. Act') By order dated 27th March, 1996, the learned trial Judge decreed the suit only under section 12 of the Act and declined to pass decree under section 13 (1) (g), 13 (1) (l) and 13 (1) (a) of the Act r/w section 108 (o) of the T.P. Act.

4. Aggrieved by the eviction decree passed by the learned trial Judge, the defendant preferred Civil Appeal No.601 of 1996 before the learned District Judge. The plaintiff filed Cross Objections challenging the findings recorded by the learned trial Judge against grounds under section 13 (1) (g), 13(1) (a) and 13 (1) (l) of the Act. By the impugned order, the learned District Judge has allowed the appeal and dismissed the cross objections. The learned District Judge has dismissed the suit. It is against this order, the plaintiff has instituted the present Petition.

5. Mr. Deshpande has restricted his challenge in the present Petition in respect of ground of arrears of rent under section 12 of the Act. In support of this Petition, Mr. Deshpande submitted that the learned District Judge has not properly interpreted and applied section 12 of the Act. He submitted that section 12 (1) of the Act lays down that the 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. Sub-section (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 manner provided in section 106 of the T.P. Act. Sub-section (3) thereof 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 on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases at the rate of nine percent, 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.

6. Mr. Deshpande submitted that if the tenant pays rent when legal notice is served upon him or Court summons is issued against him, the landlord is not helpless because sub-section (1) of section 12 enables the landlord to insist upon the tenant to pay rent and perform the conditions of tenancy. The tenant who disobeys legal provisions under section 12 (1) of the Act can be evicted independently, though such tenant may not necessarily be in arrears of rent on the date of institution of the suit. A tenant who is prompted or induced to pay only after service of legal notice or after service of Court summons cannot be viewed as a tenant who either pays or is ready and willing to pay standard rent and permitted increases. In support of this proposition, he relied on the decision of **Chandiram Dariyanumal Ahuja Vs. Akola Zilla Shram Wahtuk Sahakari Sanstha, Akola, 2013 (1) Mh.L. J. 28** and in particular paragraph 18 thereof.

7. Mr. Deshpande submitted that the decision of **Chandiram Dariyanumal Ahuja** (supra) is approved by the Full Bench in **Babulal Fakirchand Agrawal Vs. Suresh Kedarnath Malpani, 2017 (4) ALL MR 356**. In paragraph 24, the Full Bench held that the view expressed by Division Bench in the matter of **Chandiram Ahuja** (supra) lays down correct proposition and Full Bench agreed with the view expressed by the Division Bench.

8. Mr. Deshpande also relied on the decision of **Mranalini B. Shah Vs. Bapalal Mohanlal Shah, AIR 1980 Supreme Court 354** to contend that section 12 (3) is mandatory and not directory. He also relied on the decision of this Court in the case of **Bhaskar Bhagwant Shinde Vs. Vasudha Madhukar Kadam, 2005 (3) Mh.L.J 428** to contend that even during pendency of the appeal, tenant has to regularly deposit rent in the Appellate Court. He has taken me through the finding recorded by the learned trial Judge dealing with ground of default under section 12 as also the impugned order. He submitted that the learned District Judge has committed serious error in declining to pass eviction decree under section 12 (2) of the Act. He submitted that, therefore, the Petition requires consideration.

9. On the other hand, Mr. Kadam has supported the impugned order. He submitted that the defendant in fact has paid excess payment. He submitted that demand notice dated 29th April, 1994 was served on the defendant on 2nd May, 1994. Notice was replied on 27th May, 1994 at Exhibit 26. In the reply, the defendant disputed the amount claimed in the demand notice. The defendant remitted the amount through Money Order dated 28th May, 1994. Thus, within one month from the receipt of the demand notice, the defendant has remitted entire amount claimed in the notice by Money Order. The defendant, therefore, cannot be termed as a defaulter. He further submitted that from 5th August, 1994 to 11th February, 1998, the defendant has deposited in all Rs.6112/-. He submitted that the suit was instituted on 15th June, 1994. In pursuance of summons, the defendant appeared in the trial Court on 1st August, 1994. As on 5th August, 1994, he had deposited Rs.756.25 paise which is higher than the amount that was due and payable as on that date. He submitted that the learned District Judge has observed in paragraph 15 that merely because there is postal delay, the plaintiff did not receive amount within one month, the defendant cannot be blamed. The learned

District Judge observed in paragraph 15 that conduct of the defendant in paying rent in toto before the suit and subsequent to the suit is sufficient to hold that he is not the defaulter. He, therefore, submitted that no case is made out for interfering the impugned order.

10. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the controversy in this Petition is restricted only in respect of ground of arrears of rent as contemplated by section 12 of the Act. It appears from the record that demand notice was issued by the plaintiff on 29th April, 1994. The notice was received by the defendant on 2nd May, 1994. On 27th May, 1994, the defendant gave reply to the notice. On 28th May, 1994, the defendant remitted the amount by Money Orders. It has come on record that on 4th June, 1994, the plaintiff received Rs.6503/- remitted by Money Order. The learned trial Judge has considered ground of arrears of rent in paragraphs 5 and 6. In paragraph 5, the learned trial Judge observed that the defendant did not pay the rent within 30 days from the date of receipt of the demand notice. In paragraph 6, the learned trial Judge observed that the defendant deposited five months rent in the Court on 5th August, 1994. It means that he did not pay amount of rent from month to month. He also did not show having paid the rent continuously from month to month thereafter as required under section 12 (3) of the Act. The learned trial Judge decreed the suit under section 12 of the Act.

11. In so far as the District Judge's judgment is concerned, the learned District Judge has considered this ground from paragraphs 11 to 15 of the impugned order. In paragraphs 14 and 15 the learned District Judge has observed thus;

“14.The money order coupons reveals that the money orders were sent on 28.05.1994. The date of notice is dt. 29.4.1994 would mean that within a month the rent as demanded was tendered. Therefore, the question of default does not arise. Merely because the said money order was received on 4.6.1994 by the landlord, the tenant cannot be considered as a defaulter. Exh. 26 is the reply notice and therein the tenant has contended that he is sending the money order and requested the landlord to accept the rent and to issue the receipt. That would indicate and sufficient to hold that the tenant was and is ready and willing to pay the rent and he has paid the entire dues as demanded, despite the dispute. Therefore, such a tenant in law cannot be called as a defaulter. Moreover, it is admitted fact that from 5.8.1994 upto 11.2.1998, the tenant has deposited in all Rs.6112/- as informed by the office. Out of that Rs.2612/- were withdrawn and Rs.3500/- are in balance. So deposit of such rent upto 11.2.1998 right from 5.8.1994 is sufficient to hold that the tenant was and is ready and willing to pay rent and he was not negligent. The suit was raised on 15.6.1994 and from 5.8.1994 when the rent is deposited, then such a person cannot be called as a defaulter.

15.When the suit for possession was raised on the ground of default, then unless and until the default is substantiated, proved the suit would not lie. When on the date of the suit or before the suit, within 30 days from the receipt of notice the rent was tendered, merely because due to postal delay the amount was not received by the landlord, the tenant cannot be blamed. The conduct of the tenant in paying the rent in toto before the suit and subsequent to the suit till today is sufficient to hold that he is not the defaulter and from such a person the possession cannot be claimed on the ground of default. But if the judgment of the lower Court is perused, it is evident that the Lower Court has observed that as the rent was received on 4.6.1994 i.e after 30 days, the Lower Court has observed that tenant became defaulter. The Lower Court has not considered the date of tendering of the rent, the effect of acceptance of the rent by the landlord before the suit, which amounts to acquiescence and on acceptance. Even if it is assumed that the tenant was defaulter, he becomes the statutory tenant and such a person cannot be evicted on the ground of default. All those aspects were lost sight by the

learned Judge and there only he has erred. Suffice it to say that the finding recorded by the learned Judge on the ground of default being erroneous, that will have to be reversed. As far as hardship is concerned, when sec. 13 (1) (g) of the Rent Act is not proved, the question of hardship does not survive for consideration. Therefore, taking into consideration the facts and circumstances of the case, it is evident that the landlord is not entitled for possession on any ground. So the appeal will have to be allowed and at the same time, the cross-objections will have to be dismissed”.

12. In my opinion, the learned District Judge has not discussed the ground of default satisfactorily. When the learned District Judge is reversing the decree of the trial Court, it must record findings in conformity with section 96 r/w Order-XLI of the C.P.C. In the case of **C. Venkata Swamy Vs/ H.N. Shivanna, (2018) 1 Supreme Court Cases 604**, the Apex Court has considered various decisions, namely,

- (i) **Kurian Chacko v. Varkey Ouseph , AIR 1969 Ker 316**
- (ii) **Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179**
- (iii) **Madhukar v. Sangram, (2001) 4 SCC 756**
- (iv) **H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243**
- (v) **Jagannath v. Arulappa, (2005) 12 SCC 303**
- (vi) **B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530**
- (vii) **SBI v. Emmsons International Ltd., (2011) 12 SCC 174**
- (viii) **Union of India v. K.V. Lakshman, (2016) 13 SCC 124.**

In paragraph-11, Apex Court observed thus :

- “11. It is a settled principle of law that a right to file first appeal against the decree Under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the Appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first Appellate Court to

appreciate the entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmance or difference.”

13. In case of **Chandiram Dariyanumal Ahuja** (supra), the Division Bench has observed in paragraph 18 thus;

“18....

To put it otherwise, when tenant does not pay rent as agreed or pays rent only when legal notice is served upon him or Court summons is issued against him, the landlord is not helpless because sub-section (1) of section 15 enables the landlord to insist upon the tenant to pay rent and perform the conditions of tenancy. The tenant who disobeys legal provision under section 15(1) of the Act can be evicted independently, though such tenant may not necessarily be in arrears of rent on the date of institution of the suit. A tenant who is prompted or induced to pay only after service of legal notice or after service of Court summons cannot be viewed as a tenant who either pays or is ready and willing to pay standard rent and permitted increases.....”.

The decision of **Chandiram Dariyanumal Ahuja** (supra) is approved by the Full Bench in **Babulal Fakirchand Agrawal** (supra)'s case.

14. A perusal of paragraphs 14 and 15 of the District Court's judgment reproduced hereinabove does not indicate that the learned District Judge has considered whether the defendant was regularly paying rent in the trial Court during pendency of the suit as also during pendency of the appeal. In paragraph 14, the leaned District Judge observed thus;

“Moreover, it is admitted fact that from 5.8.1994 upto 11.2.1998, the tenant has deposited in all Rs.6112/- as informed by the office”.

The learned District Judge should have verified record to find out whether the defendant was regularly depositing rent during pendency of the appeal and

not merely rely on the information furnished by the Office. That apart, even what information was furnished by the Office is not discussed in paragraph 14 of the impugned order. The learned District Judge in the light of the decision in **C. Venkata Swamy** (supra) should have verified from the original record about deposits made by the defendants during pendency of the appeal. In paragraph 15, the learned District Judge has observed thus;

“The conduct of the tenant in paying the rent in toto before the suit and subsequent to the suit till today is sufficient to hold that he is not the defaulter”.

The learned District Judge has recorded this finding without verifying the record. Applying the tests laid down by the Apex Court in **C. Venkata Swamy** (supra), it is to be concluded that the judgment of the learned District Judge is far from satisfactory. It is, therefore, necessary to set aside the impugned order and direct the learned District Judge to decide the appeal afresh on its own merits and in accordance with law.

15. Mr. Kadam submits that after disposal of the appeal, the plaintiff was not accepting the rent. He submits that without prejudice to the rights and contentions of the defendant, the defendant will deposit arrears of rent within two months. Mr. Deshpande disputes this position.

16. In view thereof, without prejudice to the rights and contentions of the parties, the defendant will deposit arrears of rent within two weeks from today in the District Court under intimation in writing to the learned Counsel for the plaintiff as also to the plaintiff.

17. In view thereof, the Petition succeeds. The impugned order dated 30th June, 1998 is set aside. Civil Appeal No.601 of 1996 along with Cross Objection is restored to the file of the District Court, Pune. The defendant will

deposit arrears of rent within two months from today in the District Court under intimation in writing to the learned Counsel for the plaintiff as also plaintiff which shall also be without prejudice to the rights and contentions of the plaintiff. All contentions of the parties on merits are expressly kept open. Rule is made absolute accordingly with no order as to costs. Office to transmit Record and Proceeding to the District Court, Pune forthwith. The learned District Judge will decide the appeal and Cross Objections on their own merits and on the basis of the evidence on record and in accordance with law and uninfluenced by the observations made in this order. Order accordingly.

[R.G. KETKAR, J.]