

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1141 OF 2000
WITH
CIVIL APPLICATION NO. 2187 OF 2008

Ambashankar Jaduram
Trivedi & Company
a partnership firm, having its place of
business at 173, Samuel Street, Khoja Gully,
Bombay 400 009.

...Petitioner.

vs.

1. Kartar Singh Gulab Singh
2. Hardip Singh Gulab Singh
(since deceased through his L.R.s)
- 2a. Randip Singh,
Adult, Hindu Inhabitant,
residing at Hotel Blue Moon,
The Mall Road, Amritsar, Punjab.
- 2b. Pradip Singh,
Adult, Hindu Inhabitant,
residing at 1st floor, Singh Mansion,
22, Vaccha Gandhi Road,
Gamdevi, Mumbai 400007.
- 2c. Simrat Gurmit Singh Arora,
Adult, Hindu Inhabitant,
residing at 85, Ashoka,
Napwean Sea Road, Mumbai 400 006.
3. Gulzar Singh Gulab Singh
The Plaintiff Nos. 1 and 3 through the
Plaintiff No.2 being the duly constituted
attorney, residing at Flat No.30
on the 7th floor of the building
known as Poonam, 67, Napeansea
Road, Bombay 400006.

...Respondents.

Mr. Vishal Thaker with Anjali Trivedi, Nandita Shah and Ankit Ojha I/by Vinod Thaker for the petitioner.

Mr. Mohan Bir Singh with Rahul Jalan for Respondent No.2.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 18th September 2019

ORAL JUDGMENT:

Introduction:

A tenant claims his right of occupancy in a reconstructed building; he gets back his possession under a compromise decree. That decree contains a clause for rent. Despite that, he applies for standard-rent fixation. Soon, the landlord sues the tenant for possession on the grounds of rent default and illegal subletting. Both the courts below return concurrent findings against the tenant. Now, in this writ petition under Article 227 of the Constitution of India, has this Court any scope to revise, what seem to be, findings of fact?

Facts:

2. Petitioner-firm is the tenant, and the respondents are the co-owners. Before 1967, the firm was inducted as a tenant, and it continued to be so. In the course of time, as the building was dilapidated, it had to be demolished and reconstructed. When it was being reconstructed, the firm sued the landlords, seeking a declaration that it was a tenant and it should be reinducted as a tenant once the building was reconstructed. That RAD Suit No.225/1764 of 1967 ended in a compromise in 1969. Based on the consent terms, the trial Court decreed the firm's suit. One of the consent terms concerns the rent; both the parties agreed that it was Rs.1043.75ps per month.

3. Two years later, in 1971, despite the consent decree, the firm applied under Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("Bombay Rent Act") for having the standard rent fixed. When that Application No.650/2071 was pending, within a month or so, the owners, too,

filed RAE & R Suit No.982/5569 of 1971 for eviction. They sought eviction on the grounds of illegal subletting and the firm's unwillingness to pay the agreed rent.

4. On 22nd December 1974, the trial Court dismissed the firm's suit for fixation of standard rent. Aggrieved, the firm filed Revision Application No.35 of 1075. The Revision Court dismissed it. Then, the firm filed Special Civil Application No.2315/1078. This court, by its judgment dated 4.9.1981, rejected that Special Civil Application.

5. Indeed, about the standard rent, the trial Court ruled that the parties have already compromised the matter and that one of the consent terms governs the rent. And that rent must be treated as standard rent. Eventually, on 14th March 1991, the owner's suit for eviction was decreed. Then, the firm filed Appeal No.118/1991; the appeal was dismissed on 29.11.1999. It has finally filed this writ petition, and it has been pending for the last two decades.

Submissions:

Petitioner's:

6. Shri Vishal Thaker, the learned counsel for the tenant firm, has raised three issues. According to him, they are essentially questions of law. To begin with, Shri Thaker has contended there is no illegal subletting. The finding entered by the courts below, he stresses, has no legal basis. In this context, Shri Thaker has referred to Section 15(2) of the Bombay Rent Act. To elaborate, Shri Thaker has submitted that any subletting before 1st February 1972 stood statutorily legitimized. In other words, a subtenant found in possession by that date becomes a deemed tenant—as if he were a regular tenant. As the suit was filed in 1971, the subletting, if any, before that time, stood statutorily sanctified.

7. At any rate, Shri Thaker has fairly submitted that this issue of subletting and the impact of Section 15(2) on this subletting have not been raised earlier. But he maintains that the plea now taken is a pure question of law and can be taken at any stage.

8. About the second issue—that is, the tenant's unwillingness to pay the rent—Shri Thaker has submitted that the tenant did have benefit of Section 12(2) and (3) of the Bombay Rent Act. According to him, once the owners sue for eviction and the tenant applies under Section 11(3) of the Act, and then if the trial Court directs the tenant to pay a certain sum as rent or compensation, the defect of rent default no longer exists. To elaborate, Shri Thaker has submitted that here the trial Court directed the tenant to pay Rs.650/- monthly, and that amount had been paid regularly.

9. Shri Thaker has tried to distinguish the judgment in *South Eastern Coalfields Ltd. vs. State of M.P.*^[1]. He has contended that the judgment turns entirely on the facts of the case and does not affect the tenant's claim or contention.

10. On the third issue—that is, whether the tenant is entitled to fixation of standard rent despite the dismissal of his earlier application—Shri Thaker has submitted that the consent terms do not estop the tenant from insisting on standard rent fixation because it is an independent statutory right. To begin with, he has relied on this Court's judgment in *Vasant Ramchandra Sharma v. Narayanibai Mulchand Agarwal*^[2]. According to him, this precedent applies on all fours to the case before us. He has also maintained that the trial Court has simply recorded the consent terms but has not fixed the rent. Therefore, the statutory facility of standard-rent fixation cannot be made subject to what has been agreed to between the parties under different circumstances.

Respondents':

11. Shri Mohan Bir Singh, the learned counsel for the owners, has submitted that the parties negotiated and consented to the terms of tenancy, including rent, voluntarily—conscious of the consequences. According to him, there is no allegation that the consent has been vitiated by threat, coercion, or fraud. Shri

¹[1] 2003(8) SCC 648

²[2] AIR 1973 Bombay 214

Singh submits that the consent terms bind both the parties. In other words, the firm cannot disown the consent terms and reagitate the issue of rent either.

12. In this context, Shri Singh reminds me that when the trial Court dismissed the firm's application for fixation of standard rent, the firm has failed in its challenge against the dismissal. And it failed all the way up to this Court, at that. He has especially drawn my attention to this Court's judgment in Special Civil Application No.2315 of 1978.

13. Shri Singh has submitted that the firm has been a habitual defaulter. To elaborate, he has submitted that the owners notified the firm about its default. It did not respond. Again, the owners sent a second notice. Yet again, the firm remained recalcitrant. Only under those compelling circumstances did the owners sue the firm. In this context, Shri Singh has contended that even pending the suit, the firm continued his default on paying even the paltry rent fixed by the trial Court. He has relied on the Supreme Court's dictum in *Mohan Laxman Hede v. Bapalal Mohanlal Shah*³. According to him, the firm had fallen in arrears of at least seven months when the trial Court decreed the suit.

14. On the question of how Section 15 affects the case, Shri Singh has submitted that the firm has never raised that plea. Even in this writ petition, there is no ground on that. In the alternative, Shri Singh has also contended that the illegal subletting continued even after the suit. He has maintained that the firm cannot take advantage of Section 15 (2) of the Act. For that, he has drawn my attention to the proviso to Section 15 (2).

15. Shri Singh has urged this Court to reject all the firm's contentions for, according to him, the findings of fact require no interference.

16. Heard Shri Vishal Thaker, the learned counsel for the petitioner, and Mr. Mohan Singh, the learned counsel for the respondents.

Issues:

³[1978 (2) SCC 481]

(I) Will it suffice if the tenant has regularly paid the interim rent or compensation the trial Court has fixed, instead of the rent mentioned in the consent terms, to avoid the tag of default? Then, has the tenant regularly paid the rent, whichever is the quantum?

(II) Does the rent mentioned in the consent terms bar the tenant from invoking Section 11 of the Bombay Rent Act for having the standard rent fixed?

(III) Does Section 15(2) of the Bombay Rent Act cure the malady of illegal subletting?

Discussion:

The Scope of Adjudication:

17. Before I address the issues the parties have raised, I must remind myself that this is a writ petition under Article 227 of the Constitution of India. And this writ petition aims against the concurrent findings. That said, I hasten to add that if either party has raised any questions of law, I must consider them. Besides, if there are any perverse findings, based on no evidence and leading to failure of justice, I may interfere with them, too.

18. The Court's revisional powers have statutory approval under Section 115 of C.P.C. Article 227 confers supervisory jurisdiction on the High Courts over the courts and tribunals in its territorial jurisdiction. It was thought to be administrative. And that supervisory jurisdiction, now, stands judicially interpreted as to include the powers judicial review or revision—not mere administrative powers. A constitutional replica of Section 115 of CPC, perhaps!

The Backdrop:

19. The tenant firm has been occupying the leased property for decades. In the late sixties, the landlords had to reconstruct the building. Pending that reconstruction, the firm filed RAD Suit No.225/1764 of 1967. It sought, among other things, a declaration that it continued to be the firm despite the reconstruction. The suit ended in a compromise. Based on the consent terms, the trial Court disposed of the firm's suit in 1969. One of the consent terms concerns

the rent; it was fixed at Rs.1043.75ps per month. Two years later, in 1971, despite the consent decree, the firm applied under Section 12(2) of the Bombay Rent Act, for having the standard rent fixed. Pending that application, the landlords filed RAE & R Suit No.982/5569 of 2071 for eviction. The courts have rejected the firm's application for having the standard rent fixed; that rejection has become final. Besides, in the landlords' suit, the trial Court and the appellate Bench have returned concurrent findings in the landlords' favour. The courts below have held that

(a) the rent fixed in the consent terms is the standard rent and that issue cannot be reagitated;

(b) the firm was not "ready and willing to pay the arrears of rent and permitted increases;"

(c) the firm is "still not ready and willing" to pay the rent;

(d) the firm has illegally sublet the property;

(e) the landlords may recover from the firm rent and arrears of the rent at the rate agreed to in the consent terms.

Issue No.I:

20. In the above factual backdrop, we will examine the first issue: Which is the rent the firm had to pay—is it the rent under the consent terms or that the trial Court fixed? The fact remains that the firm paid only the rent or compensation the trial Court fixed as an interim measure. Then, has the firm paid that amount regularly? If it has defaulted, as the landlords have contended, the larger question about the quantum—the actual amount to have been paid—assumes no importance. So let us focus on the question of default.

21. Indeed, the landlords sued on the allegation that the firm had defaulted on paying the rent, and maintained that the default continued pending the suit, too. That means, there ought to have been a default post- and pending suit. Default, in either event, will disentitle the firm to any protection under the law from eviction. Let us examine the statutory provision.

22. Section 12, as it stood when the landlords sued, mandated, among other things, the landlord cannot sue the firm on the ground of non-payment of the standard rent or permitted increases due, until one month after his issuing a notice to the firm demanding the standard rent or permitted increases. The notice must be served on the firm in the manner provided in Section 106 of the Transfer of Property Act, 1882. Sub-Section (3) (a) of Section 12 declares that the court can pass a decree of eviction if the admitted rent or permitted increases are in arrears for six months or more, but the firm neglects to pay them in one month after notice from the landlord.

23. But no court can pass a decree, as sub-section (3) (b) of Section 12 holds, if the firm pays in Court, on the first day of hearing of the suit or on the date the court fixed, the standard rent and the permitted increases. Besides, until the suit is decided, the firm should “[continue] to pay or tender in Court regularly such rent and permitted increases”.

24. Here the question is, has the firm complied with sub-section (3) (b) of Section 12 of the Act? The courts below have concurrently held that he has not. Indeed, the default post- or pending suit is a question of fact.

25. The firm has maintained that it has paid the rent regularly; it has even stressed that on occasions, it paid the rent in advance. That said, the firm also maintains that it may not have paid the rent with mathematical accuracy, and minor lapses are condonable. The firm has relied on *Mohan Laxman Hede*.

26. In *Mohan Laxman Hede*, the appellant had been depositing rents in court for two or three months at a time. In some months, there were undoubtedly a few defaults. That is, he deposited the rents a few days later than the actual due date. The maximum delay was 23 days. But, on occasions, the appellant paid the rent in advance. Balancing the occasional delays with the frequent advance payments, the Supreme Court has held that the appellant had complied with the condition under Section 12 (3) (b) of the Bombay Rent Act “with reasonable punctuality.”

27. The firm has contended that the owners have failed to establish before the courts below that it had not paid the rent regularly. Paying the rent, I may note, is a positive act. The firm had the statutory obligation, and it claims to have discharged that obligation. Then, it is for the firm to prove it has paid the rent regularly. It is not paying the rent, if at all, is a negative act; and the landowners have no obligation to prove that negative fact. After all, the burden of proof on a person “who would fail if no evidence at all were given on either side.” Here, the firm is the tenant; it has the obligation of paying the rent. It has faced an allegation that it has not been paying the rent. Then, it must establish that it has been paying the rent—regularly, at that. Lest it should fail.

28. At any rate, the trial court has recorded this issue thus:

“[A]s per calculations the arrears of rent come to Rs.1,24,800/- up to February 1991. As against this, the defendants have deposited an amount of Rs.1,20,250/- as on 1.2.1991. The last payment was made on 12.11.1990. The payment made on 12.11.1990, as per the statement of withdrawal of amounts, come to the rent of February and March 1990. The deposit order was passed on 6.2.1976. The defendant deposited the arrears on 5.3.1976. That arrears comes to the period of March 1976 to December 1975. Thereafter the defendant went on depositing Rs.1300/-, sometimes Rs.650/- and sometimes Rs.1950/- at a time. Admittedly, he has not deposited the rent every month. . .”

29. The trial Court has further held that the firm has never paid the rent in advance. Nor has it substantially complied with Section 12 (3) (b) of the Bombay Rent Act. The trial Court has eventually observed:

“[N]ow as per the calculations the defendant is in arrears for a period of seven months. The defendant is not prepared to deposit the arrears of rent and the costs of the suit. So even if the first default by the defendant from 1.2.1975 till 6.2.1976 is not considered, the defendant has not complied with the provisions of Section 12 (3) (b) of the Bombay Rent Act.”

30. The Appellant Bench has affirmed those findings.

31. The agreed rent is Rs.1043.75ps per month; the interim compensation the trial Court directed is Rs.650/-. The firm claims to have paid Rs.650/- regularly. As the trial Court observed, by February 1991, the arrears of rent was

Rs.1,24,800/-. This would show how many months the firm did not pay the rent. Even by the day the trial Court decreed the suit, the firm owed seven months' rent to the landlords. It was at the rate the trial Court prescribed—not the rent as per the consent terms, though.

32. So even without reference to the ratio of *South Eastern Coalfields Ltd.*, I hold that the firm has violated Section 12 (3) (b) of the Bombay Rent Act. And the concurrent findings need no interference.

Issue No.II:

Does the rent mentioned in the consent terms bar the firm to invoke Section 11 of the Bombay Rent Act for having the standard rent fixed?

33. Indeed, the firm's declaration suit has resulted in a compromise. The parties have filed before the court 'consent terms.' One of those consent terms concerns the rent, and the rent was fixed at Rs.1043.75ps per month. Despite the consent, the firm applied under Section 11 of the Bombay Rent Act for having the standard rent fixed. That Application No.650/2071 was dismissed. The trial Court has held that the application is not maintainable. What was agreed to in the consent terms is the standard rent, and that issue cannot be reagitated. The firm's revision before the Appellate Bench of the Small Cause Court, too, proved futile. Then it filed Special Civil Application No.2315 of 1978 before this Court. A learned Single Judge has considered the issue threadbare.

34. Through judgment, dated 4th September 1981, the learned Single Judge has held:

“[I]n any case, the terms on which a person claimed certain premises as a tenant were clearly ancillary or incidental to the main claim for possession and no decree for possession could have been passed in favour of the tenants in their suits unless the essential term of tenancy, namely rent payable by the tenants was fixed by the Court. It is, therefore, not possible to accept the argument of the learned counsel that the quantum of rent or standard rent was not the subject matter of the suit”.

...

“One of the issues in the earlier suit being an issue relating to standard rent and that issue having been decided, the decision in that suit would be a decision on the

merits of the case. *The earlier decision in the consent decree was thus clearly binding on the parties and consequently the bar created by section 11A would come into operation. The tenants were, therefore, clearly estopped from making an application for fixation of standard rent in view of the binding nature of the consent decree.*"

(italics supplied)

35. In the light of the above judicial pronouncement, I may note that the issue of fixing the standard rent was directly in issue in Application No.650/2071. That application was dismissed. After concurrent refusal by the courts below, the firm approached this Court. A learned Single Judge, a co-equal Bench, has considered the issue and has emphatically held that the issue of standard rent stands concluded in the firm's earlier suit, which ended in the compromise. That judgment binds the firm and the landlords as it is the judgment inter-partes; it binds me, too, as a matter of horizontal precedent, if not anything else.

36. Let me examine an earlier Division Bench decision under a somewhat similar set of facts. A tenant applied for fixation of standard rent. The landlord filed a cross-suit for eviction. The trial Court, in the tenant's application, fixed the standard rent at Rs.40 per month. It also decreed the landlord's suit for possession. Both parties appealed. Pending those appeals, the parties compromised. And, as per the terms of compromise, the tenant agreed to pay rent at Rs.91/- per month. Then, the landlord gave up his claim to recover possession from the tenant. Thereafter the landlord sued the firm to recover possession of the premises from the tenant alleging that the tenant had failed to pay rent and was in arrears of it. The tenant contended that he was not in arrears of rent, as the standard rent for the premises was Rs.40/- per month.

37. In *Popatlal Ratansey v. Kalidas Bhavan*^[4], a Division Bench of this Court has cited with approval certain authorities and held that a party at the same time cannot blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another say it is void for securing some further

⁴[] 1959 Bom. LR., 688

advantage. *Popatlal Ratansey* has also observed that there is nothing in the Bombay Rent Act to show that the Legislature intended that if a dispute about the standard rent between landlord and tenant was settled by agreement between the parties, the settlement could not form the basis of a decree.

38. *Popatlal Ratansey* has eventually held that it is always open under the law to the parties at dispute to settle the dispute by an agreement. If they do so, and if it appears to the Court that the settlement is fair and just, and not against the law nor against a statute; the Court accepts the settlement and passes a decree upon it.

39. Now, I may refer to *Vasant Ramchandra Sharma*, this Court's decision the firm has heavily relied on. This case debated on whether the tenant could raise a fresh dispute about the standard rent after his agreeing to a consent decree on the same issue. A learned Single Judge has held that the agreement to have a consent decree for the standard rent could not bar the tenant from raising a dispute under Section 11(1)(e) and 11(2) of the Bombay Rent Act. Indeed, *Vasant Ramchandra Sharma* could have bound me but for two factors: (a) This decision has not noted the Division Bench decision in *Popatlal Ratansey*; (b) here the firm suffered an adverse order on the same issue earlier. That decision was inter-partes and has attained finality. So it falls within the mischief of *res judicata*. In *Vasant Ramchandra Sharma*, there was no earlier decision between the same parties, on the same issue.

40. Under these circumstances, I hold that the second issue, too, resolves itself in the landlords' favour. That is, the courts below have committed no error in refusing to entertain the firm's plea for fixation of standard rent.

Issue No.III:

Does Section 15(2) of the Bombay Rent Act cure the malady of illegal subletting?

41. Section 15 prohibits a tenant from subletting, transferring, or licencing the leased property. But subsection (2) carves out an exception, a limited one

though. This prohibition does not affect the subletting, transfer, or licensing before the 1st day of February 1973. The suit was filed in 1971. Indeed, this exception does not govern the subletting after that date: 1st February 1973. Here, once again, I remind myself that a finding on this question is a finding of fact.

42. The landlords asserted that in 1971, the firm sublet the building to Reliance Corporation. Later, in July of the same year, it inducted Haryana Trading Company, too. But, on the landlords' protest, the second company vacated. Then, it was the turn of M/s. Naji Shantilal & Co., to occupy the property, as another subtenant. In 1984, that is after 1st February 1973, M/s. Thakkar Holdall and Bags Centre became the subtenant. And the firm's witnesses—DW1 to DW3—admitted this fact.

43. I may note that pending the suit many developments took place. And the parties consciously led evidence on the *lis pendens* developments, too. So nobody was taken by surprise; on the contrary, the parties were aware of what was in issue. Indeed, a person may incur disqualification before the *lis* has commenced, and that disqualification may provide the cause of action. Then, the disqualification will continue pending the suit. At times, fresh instances of disqualification may get repeated pending the proceedings. These *lis pendens* developments either supplement the already-existing disqualification or, even, supplant it if, for any reason, the first one disappears or gets cured.

44. Here, the landlords have alleged that the firm sublet the property before 1971. Apparently, this saga of subletting continued. A few entities came in and went out. Both the courts below have found that M/s. Thakkar Holdall became the latest subtenant in 1984. And that was after 1st February 1973. This subletting, on evidence, stands admitted. Para 35 of the Appellate Bench's judgment elaborates on this question of fact.

45. That said, the firm has fairly conceded that it raised this issue of its enjoying protection under Section 15 (2) of Bombay Rent Act before neither the trial Court nor the Appellate Bench. But it has maintained that it is a question of

law. I reckon the subletting is a question of fact, and the putative protection under Section 15 (2) is a question of law—or, at least, a mixed question of law and fact. Nevertheless, the courts below have held there was a series of sub-tenancies, the last of these being in 1984. This was based on the admissions made by the firm's witnesses, among others.

46. Thus, even on this count, the firm has failed to establish its contentions.

Conclusion:

47. I find no merit in the writ petition. I accordingly dismiss the petition with costs.

48. As this writ petition now stands dismissed, respondent No.2B, for himself and for the other respondents, may apply to the Registry to withdraw the rent or compensation, with accrued interest, if any, so far the firm has deposited. This withdrawal of the amount is without prejudice to the rights and contentions of the parties.

At this stage, the learned counsel for the petitioner-firm wants the Court to stay the operation of the Judgment and Order for 10 weeks, for the firm desires to approach the Apex Court. The landlords' counsel has opposed the prayer, though. Nevertheless, in the interest of justice, I suspend the Judgment and order for 10 weeks from today on the firm's filing the usual undertaking with the Registry in two weeks.

(DAMA SESHADRI NAIDU, J.)