

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION (ST.) NO.36321 OF 2018

Kalavati Eknath Ingali (decd) through LRs ... Applicants

Vs.

Abdul Rashid Abbas Nadiwale (decd) through LRs ... Respondents

Mr. Ajay A. Joshi for Applicants.

Mr. Vishwanath S. Talkute for Respondents.

CORAM : R. G. KETKAR, J.

DATE : MARCH 11, 2019

P.C. :

Heard Mr. Joshi, learned Counsel for applicants and Mr. Talkute, learned Counsel for respondents at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 22.04.2010 passed by the learned Joint Civil Judge, Junior Division, Pandharpur in Regular Civil Suit No.324 of 1998 as also the judgment and decree dated 29.08.2018 passed by the learned Extra Joint Additional District Judge, Pandharpur in Civil Appeal No.53 of 2010. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', invoking grounds under Sections 12 and 13(1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The Courts below directed the defendants to handover vacant and peaceful possession of premises admeasuring 8 khan out of area of 18 x 40 sq.mtrs. of City Survey No.407/A/C, Juni Peth, Pandharpur, more particularly described in paragraph 1 of the plaint (for short 'suit premises') to the plaintiffs within three months.

3. The plaintiffs instituted Suit against the defendants on or about

06.11.1998 against Kalavati Eknath Ingale (for short 'Kalavati'), since deceased through her legal representatives on the ground that she is in arrears of rent from 01.02.1979 to 30.10.1998. The monthly rent is Rs.13/-. Kalavati is in arrears of Rs.2934/- and thus, is a willful defaulter. On 21.09.1998, plaintiffs issued notice to Kalavati demanding the arrears of rent as also requesting her to handover possession of the suit premises. Kalavati failed to pay the arrears of rent also handover possession. The plaintiffs also claimed possession of the suit premises on the ground of bonafide use and occupation. The plaintiffs were, therefore, constrained to institute Suit for eviction.

4. Kalavati filed written statement at exhibit-21 and contended that the suit premises is in use for residence as also business purpose. She is using front portion for bakery business and rear portion (South North portion towards West) for residence. Kalavati denied that plaintiffs require the suit premises reasonably and bonafide. On 09.02.2004, Kalavati filed application exhibit-24 seeking permission to deposit Rs.5223/-. On 06.01.2006, the learned trial Judge framed the necessary issues. On the same day i.e. 06.01.2006, the learned trial Judge allowed the application exhibit-24 and directed the defendant Kalawati to deposit the arrears of rent with interest within 15 days from 06.01.2006. As Kalawati failed to deposit the amount within the stipulated time of 15 days, she filed application exhibit-37 on 15.02.2006. On 27.02.2006, without prejudice to the rights and contentions of the parties, the learned trial Judge allowed that application.

5. The parties adduced evidence. The learned trial Judge decreed the Suit under Sections 12 and 13(1)(g) of the Act. The said decree was confirmed by the District Court. It is against these orders, defendants, who are legal representatives of Kalawati, have instituted the present

Civil Revision Application.

6. In so far as eviction decree on the ground of arrears of rent under Section 12 of the Act is concerned, Mr. Joshi raised following contentions:

(i) Section 12(3) of the Act lays down that no decree for eviction can 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 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 the cost of the suit as directed by the Court. Thus, the Court has discretion to direct the tenant to pay or tender in Court, standard rent and permitted increases either on the first date of hearing of the Suit or **on or before such other date as the Court may fix.**

(ii) In the present case, by order dated 06.01.2006, the learned trial Judge directed the defendant to deposit the arrears of rent together with interest within 15 days from 06.01.2006. The defendant did not deposit the amount within the stipulated time, and therefore, took out application exhibit-37 on 15.02.2016 for extension of time. By order dated 27.02.2006, the trial Court, without prejudice to the rights and contentions of the parties, extended the time for depositing the arrears. Accordingly, the defendants had complied order dated 27.02.2006. The trial Court has power to enlarge / extend the time by invoking Section 148 of C.P.C. The Courts below were, therefore, not justified in passing the eviction decree under Section 12 of the Act. In support of this

submission, he relied upon the following decisions:

- a. ***Gulabchand Ramchand Jain Vs. Noorbeg Umarbeg Mirza*, AIR 1980 Bombay 307**, and in particular paragraph 13 thereof;
- b. ***Indravan Trivedi Vs. Ambaben Mohanlal Soni*, (1985) 2 Bom.C.R.41**, and in particular paragraph 10 thereof;
- c. ***Mohanlal Gokulchandji Vs. Khimraj Bhagaji*, 1978 Mh.L.J. 611**, and in particular paragraphs 10 and 11 thereof.

7. In so far as the ground of bonafide requirement is concerned, Mr.Joshi submitted that as the suit premises was let out for dual purposes, namely, residential as also commercial and the plaintiffs claimed possession on the ground for carrying on business. In view of bar of Section 25 of the Act, the Courts below were not justified in passing the eviction decree. In any case, he submitted that the suit premises was affected by road widening and the front portion where defendant was running business of bakery was acquired by Pandharpur Municipal Council thereby leaving rear portion, which is used exclusively for residential purpose. Thus, bar under Section 25 will squarely apply. In view of this subsequent development, the Courts below were not justified in passing the eviction decree.

8. On the other hand, Mr. Talkute supported the impugned orders. He submitted that in so far as the ground of eviction under Section 12 is concerned, though defendants filed application exhibit-24 on 09.02.2004, they did not invite any order for depositing the amount. The issues were framed on 06.01.2006, being the first date of hearing. On the same day, application exhibit-24 was allowed and the defendant was directed to deposit the arrears of rent together with interest within 15 days from 06.01.2006. Admittedly, defendants did not comply that order, and therefore, took out application exhibit-37 on 15.02.2006 seeking extension of time. By order dated 27.02.2006, the learned trial Judge

allowed that application without prejudice to the rights and contentions of the parties. He submitted that the provisions of Section 12(3) are mandatory and not directory and therefore, Section 148 of C.P.C. cannot be invoked for extension of time for depositing the amount. He relied upon the following decisions:

- a. ***Mranalini B. Shah Vs. B. M. Shah*, AIR 1980 SC 954;**
- b. ***Chandiram Vs. A.Z.S.W.S. Sanstha*, 2013(1) Mh.L.J.28;** and
- c. ***Babulal Fakirchand Agrawal VS. Suresh Kedarnath Malpani*, 2017(4) ALL MR 356 (F.B.).**

9. In so far as ground under Section 13(1)(g) is concerned, he relied upon the decision of ***Netram Ganpat Vs. Baliram Vyankat*, 1998 (3) Mh.L.J. 667**, and in particular paragraph 10 thereof to contend that as the suit premises were being used both for residential as well as business purposes, the bar of Section 25 of the Act will not operate. He submitted that as the Courts below have decreed the Suit after appreciating the evidence on record, no case is made out for invocation of powers under Section 115 of the C.P.C.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In so far as the ground under Section 12 of the Act is concerned, it is not in dispute and is rather a matter of record that on 09.02.2004, defendant filed application exhibit-24. The defendant did not press that application and also did not invite order on that application and waited till framing of issues on 06.01.2006. On 06.01.2006, the learned trial Judge allowed application exhibit-24 and directed the defendant to deposit arrears of rent together with interest within 15 days from 06.01.2006. Admittedly, defendant did not comply that order. On 15.02.2006, defendant filed application exhibit-37. Without prejudice to

the rights and contentions of the parties, the learned trial Judge allowed that application on 27.02.2006. Mr. Joshi submitted that Section 148 of C.P.C. can be invoked for extension of time. I do not find any merit in this submission for more than one reason. In the first place, Section 12(3) of the Act 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) ...

(2) ...

(3) No decree for eviction can 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 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 the 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.”

11. In the case of **Mranalini B. Shah** (*supra*), the Apex Court referred to its earlier decision **Ganpath Ladha VS. Sashikant Vishnu Shinde**, **AIR 1978 SC 955** and extracted observations of Hon'ble Mr. Justice Beg, the then Chief Justice in paragraph 11. Paragraphs 11 and 12 read thus,

“11. We have perused the recent Judgment of this Court in Ganpat Ladha v. Sashikant Vishnu Shinde. In our opinion, the point raised by the appellants. before us is fully covered by that Judgment. The following observation's of Beg, C.J., who spoke for the Court, are apposite:

“...We think that the problem of interpretation and application of Section 12(3)(b) need not trouble us after the decision of this Court in Shah Dhansukhlal Chagganlal's case (AIR 1968 followed by the more recent decision in Harbanslal

Jagmohandas v. Prabhudas Shivilal (AIR 1976 SC 2005), which completely cover the case before us.

It is clear to us that the Act interferes with the landlord's right to property and freedom of contract only for the limited purpose of protecting tenants from misuse of the landlord's power to evict them, in these days of scarcity of accommodation, by asserting his superior rights in property or trying to exploit his position by extracting too high rents from helpless tenants. The object was not to deprive the landlord altogether of his rights in property which have also to be respected. Another object was to make possible eviction of tenants who fail to carry out their obligation to pay rent to the landlord despite opportunities given by law in that behalf. But where the conditions of Section 12(3)(a) are not satisfied, there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the conditions set out in Section 12(3)(b) and defeat the landlord's claim for eviction. If, however, he does not fulfil those conditions, he cannot claim the protection of Section 12(3)(b) and in that event, there being no other protection available to him, a decree for eviction would have to go against him. It is difficult to see how by any Judicial valour discretion exercisable in favour of the tenant can be found in Section 12(3)(b), even where the conditions laid down by it are satisfied, to be strictly confined within the limits prescribed for their operation. We think that Chagla, C.J. was doing nothing less than legislating in Kalidas Bhavan's case, 1958-60 Bom LR 1359, in converting the provisions of Section 12(3)(b) into a sort of discretionary jurisdiction of the Court to relieve tenants from hardship. The decisions of this Court referred to above, in any case, make the position quite clear that Section 12(3)(b) does not create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the Section. If the statutory provisions do not go far enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of Courts."

12. The above enunciation, clarifies beyond doubt that the provisions of Clause (b) of Section 12(3) are mandatory, and must be strictly complied with by the tenant during the pendency of the suit or appeal if the landlord's claim for eviction on the ground of default in payment of rent is to be defeated. The word "regularly" in Clause (b) of Section 12(3) has a significance of its own. It enjoins a payment or tender characterised by reasonable punctuality, that is to say, one made

at regular times or intervals. The regularity contemplated may not be a punctuality, of clocklike precision and exactitude, but it must reasonably conform with substantial proximity to the sequence of times or intervals at which the rent falls due. Thus, where the rent is payable by the month, the tenant must, if he wants to avail of the benefit of the latter part of Clause (b), tender or pay it every month as it falls due, or at his discretion in advance. If he persistently default during the pendency of the suit or appeal in paying the rent, such as where he pays it at irregular intervals of 2 or 3 or 4 months as is the case before us the Court has no discretion to treat what were manifestly irregular payments, as substantial compliance with the mandate of this Clause irrespective of the fact that by the time the Judgment was pronounced all the arrears had been cleared by the tenant.”

12. In the case of ***Bhaskar Vs. Vasudha Madhukar, 2005(3) Mh.L.J. 428***, the learned Single Judge (Smt. Ranjana Desai, J. as her Ladyship then was) observed in paragraph 33 thus,

“33. Therefore, a tenant who does not avail of benefit under Section 12(3) cannot get its benefit at the appellate stage by contending that appeal is continuation of a suit. But on that basis a tenant who contends that he has deposited arrears in the trial Court as per Section 12(3) cannot stop depositing arrears in the Appellate Court by contending that he was obliged to pay arrears only in the trial Court and appeal is not extension of the suit and, therefore, he need not pay rent in the Appellate Court at all and if he does not deposit, the landlord has to file a fresh suit. The tenant would in effect be contending that the Appellate Court is powerless to deal with such a tenant. Such can never be the intention of the legislature. In my opinion the judgment of the Supreme Court in *Damle's* case (supra) is not applicable to the present case because, it arose out of different facts. It does not even remotely suggest that defaulting tenants should be allowed to misuse Section 12(3). In fact the Supreme Court has observed that this provision is not intended to confer a right without circumspection to be availed of by the tenant at any time according to his convenience. Therefore, the judgment of the Supreme Court in *Damle's* case (supra) does not further the petitioner's case. In this connection. I may refer to *M/s. Goodyear India Ltd. v. State of Haryana and Anr., AIR 1990 SC 781*, where the Supreme Court has held that it is well settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically

follow from it.”

13. In view thereof, it has to be held that the provisions of Section 12(3) are mandatory and must be complied with by the tenant during the pendency of the Appeal if the landlord's claim for eviction on the ground of default in payment of rent is to be defeated. Section 12(3) does not create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the Section. As the Apex Court has held that Section 12(3) is mandatory and not directory, the submission of Mr. Joshi that Section 148 can be invoked for enlarging / extending the time, cannot be accepted. The reliance placed by Mr. Joshi on the decisions in - (i) **Gulabchand Ramchand Jain**, (ii) **Indravan Trivedi**, and (iii) **Mohanlal Gokulchandji** do not advance the case of the defendants as the defendants did not comply with the requirement of Section 12(3) by depositing the arrears of rent together with interest on the first date of hearing and even within 15 days from the first date of hearing (06.01.2006). Section 148 of C.P.C., therefore, cannot be invoked for extension of time.

14. In so far as the ground of bonafide requirement is concerned, the only contention advanced was that in view of bar of Section 25 of the Act, the requirement of the plaintiffs for carrying on business cannot be accepted is concerned, I do not find merit in this submission. It is admitted position that the suit premises was let out for dual purposes, namely, residential as also commercial. In the case of **Netram Ganpat** (*supra*), the learned Single Judge observed in paragraph 10 thus,

“10. In addition the registration certificate renewed in 1979 under the Shop Act also eloquently suggests that the defendant was carrying out business of welding and carpentry from suit premises. The oral and documentary evidence brought on record clearly proves that the suit premises were being used both for residential as well as business purposes

and therefore, contention of the learned Counsel for the respondents deserves to be accepted in as much as when the premises are being used for dual purposes and not exclusively for residential purposes, the bar of section 25 of the Act will not operate. The trial Court's findings on this issue, therefore, deserve to be confirmed. Petitioners reliance on a judgment of this Court in case of Laxmibai Co-operative Bank Ltd., 1997(74) Bom.L.R. 186 (sic) does not support their claim because that case dealt with a point of change of use i.e. from commercial or business to residence and the point of dual use i.e. residential and business was not under consideration in the said case. The trial Court, therefore, rightly held that the suit premises were occupied by the defendants for residential and business purposes and there was no change in the use of the suit premises.”

15. Mr. Joshi submitted that the suit premises was affected by road widening and Pandharpur Municipal Council acquired front portion, which was used by the defendant for running business of bakery, and therefore what is left for use is rear portion, which is used exclusively for residential purpose and therefore in view of the subsequent development, bar of Section 25 will be applicable. It is not possible to accept this submission. The fact remains that the suit premises was let out for dual purposes. Merely because the Council has acquired front portion that does not mean that the suit premises was let out for residential purpose. It will be open for the plaintiffs to approach the Council for change of user from residential to commercial in view of the fact that after acquisition of front portion, the rear portion of the suit premises is now facing the road.

16. The Courts below, after appreciating the evidence on record, have decreed the Suit even under Section 13(1)(g) of the Act. Defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants are also not in a position to demonstrate that no reasonable person would have arrived at the

conclusions other than arrived by the Courts below. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

17. At this stage, Mr. Joshi orally applies for stay of eviction decree for a period of 8 weeks from today. He assures that within 2 weeks from today, defendants and all adult family members residing in / using the suit premises will file usual undertaking, with advance copy to the other side, incorporating therein that,

- (a) they are in possession and nobody else is in possession of the suit premises;
- (b) they have neither created third party interests nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interests nor part with possession of the suit premises;
- (d) they will pay arrears of rent, if any, to the plaintiffs within two weeks from today; and
- (e) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiffs;

18. In view thereof, notwithstanding dismissal of the Application, subject to the defendants and all adult family members residing in / using the suit premises filing the undertaking in the aforesaid terms as also clearing arrears of rent, if any, within two weeks from today, the eviction decree shall not be executed for the period of eight weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants commit breach of any of the conditions of the undertaking,

this interim order shall stand vacated without further reference to the Court.

19. List the Application for reporting compliance on 09.04.2019.

(R. G. KETKAR, J.)

Minal Parab