

*Vinita*

**IN THE HIGH COURT OF BOMBAY AT GOA.**

**WRIT PETITION NO.415 OF 2021.**

- 1 Navelkar Hotels, a partnership firm, registered under The Indian Partnership Act, with its registered Office at Hotel Rajdhani, Atmaram Borkar Road, Represented in this act by its partners.
  - 2 Mr. Harish Vinaeca Porob Navelkar, son of Vinaeca Porob Navelkar, 56 years of age, married, Indian National,
  - 3 Mr. Vijay Vinaeca Porob Navelkar, son of Vinaeca Porob Navelkar, 59 years of age, married, Indian National,
  - 4 Mrs. Kumudini Vinaeca Porob Navelkar, widow of late Vinaeca Porob Navelkar, 86 years of age, Indian National,
  - 5 Mrs. Krupa Purshottam Porob Navelkar, widow of late Purshottam Porob Navelkar, 61 years of age, married, Indian National,
  - 6 Miss Lavina Purshottam Porob Navelkar, daughter of late Purshottam Porob Navelkar, 37 years of age, unmarried, Indian National,  
All residing near Sai Service Station,  
Porvorim, Bardez Goa.
- ..... Petitioners.

Versus

Shri Anand B. Shirvoikar alias Shri Anand B. Shirvaikar, Son of late Balcrishna Shirvaikar, 72 years of age, married, Indian

National, resident at “Balkrishna” Paclo Colony, Near “Nadkarni Riveira”, Alto Bambolim, Tiswadi, Goa.

.... Respondent.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. S. Karpe, Ms. S. Vaigankar, Mr. A. Shirodkar Mr. S. Rivankar and Mr. A. Sawant, Advocates for the petitioners.

Mr. V. P. Thali and Mr. R. Prabhugaonkar, Advocates for the respondent.

**CORAM: SANDEEP K. SHINDE, J.**  
**RESERVED ON: 23<sup>rd</sup> June, 2022.**  
**PRONOUNCED ON : 27<sup>th</sup> July, 2022.**

**JUDGMENT:**

- 1.** Heard
- 2.** Rule. Rule made returnable forthwith with the consent of the learned counsel for the respective parties.
- 3.** Learned Counsel for the respondent waives notice.
- 4.** Petitioners/landlords seek tenant's eviction on the ground of default in paying the rent. Rent controller vide judgment and order dated 29.9.2016 granted eviction decree. In Rent Appeal no. 13/2016 the appellate Court vide judgment and order dated 8.7.2020 reversed the eviction decree. Thus this petition.

**Landlords case**

5. By the Deed of Sale dated 19.8.2013, landlord purchased the property more particularly described in paragraphs 2 and 3 of the eviction application, from his predecessor in title, Mr. Ramesh Agxikar and Sumitra Agxikar. The respondent is the tenant in the part of the building existing in the said property (hereafter called as suit premises). In terms of deed of sale, Mr and Mrs. Agxikar covenanted that the respondent shall attorn tenancy to the applicant with effect from the date of execution of deed and petitioners shall be entitled to recover the arrears of rent due and payable by the respondent. By letter dated 11.10.2003, petitioners formally informed the respondent(tenant) about the purchase of the said property and requested that rent due and payable, be paid to them against receipt. Afterwhich, the petitioners vide letter dated 9.12.2013 requested the respondents to pay arrears of rent for the months of August, September, October November and December, 2003 at the rate of Rs.400/-per month, within 30 days from the receipt of the letter. Again vide letter dated 19.1.2004, petitioners called upon the respondents, to arrange to pay arrears of rent within 30 days from the date of the receipt of the letter. Though the said letters were served

upon the respondent, he chose not to comply with the requisition contained therein. As such, the petitioners through their lawyer addressed a notice dated 13.3.2004 and called upon the respondent to pay the arrears of rent due and payable for the months of August to December 2003 and for January and February 2004 at the rate of Rs.400/- per month, totalling to Rs.2800/-, within the period of 30 days from the date of receipt of the notice. Though the said notice was served on the respondents, he chose not to comply with the requisition contained in the said notice. The petitioners, therefore, sought respondents' eviction under Section 22(2) (a) of the Goa Daman and Diu Buildings ( Lease, Rent and Eviction) Control Act 1968. As such, an eviction application was filed before the Rent Controller in April 2004.

### **Tenants Defence**

**6.** The suit was resisted by the respondent/tenant, by filing the Written Statement. He contended that petitioners' predecessor had executed the first lease in respect of house no.E-611 admeasuring 200 sq. mts. for residential and business use, on the monthly tenancy of Rs.125/-, for five years, expiring on 15.11.1975. During the lease

period, he repaired the suit house to make it habitable. Thereupon the second lease, was executed on 18.1.1973 with respect to the same house on monthly rent of Rs.325/- for a period of 15 years commencing from 1.1.1973 to 31.12.1988. In terms of the second lease, he was permitted to execute alterations and addition. Accordingly, he carried out alterations. The actual cost of alteration incurred was up to Rs.2,00,000/-; however, in terms of clause 5 of the second lease, the cost was agreed to be Rs.16,000/- only. On 4.2.1988, the third lease was executed with respect to a said house on a monthly rent of Rs. 400/- for a period of ten years, commencing from 31.12.1998. Vide clause no.3 of the third lease parties agreed that clauses 3 to 8 of the second contract of lease shall remain intact. That on 17.8.1995, in accordance with a mutual oral agreement, he surrendered 60 mts area of the said house no.611 to the landlords. Whereupon landlords agreed to sell remaining area of the said house to him. Thus, the area retained by him was 140 sq.mts. Therefore monthly rent payable was reduced to Rs.280/- from Rs.400/- in proportion to area in his possession. However, inspite of the reduction in the rent, i.e. Rs.280/- he was paying the agreed rent, i.e. Rs.400/- per month. Meaning thereby he was paying Rs.120/- per month in

excess. Whereafter, during the period from November 1995 to August 2003, he paid Rs.34,600/- to landlords in installments, in cheques on different occasions, as a token amount for the purchase of a said house, as was mutually agreed upon.

7. On this premise, the tenant disowned the liability, to pay arrears of rent due. Reason being, that his former landlord had received Rs.62120/- in excess of the agreed rent, in the following manner:

- i. From September 1995 to September 2003, excess rent Rs.120/- per month aggregating to Rs.11,520/-;
- ii. Rs.16,000/- being the estimated cost of alteration and addition in the house made by him, which was to be reimbursed by his former landlord, but not reimbursed and
- iii. Rs.34600/- amount received by former landlord towards a token amount for a house which he had agreed to sell to him.

Thus tenants defence was, the sum of Rs.62120/-, being paid in excess, of agreed rent, the said amount was to be adjusted against, rent due. On this premise, he, defended the suit, to contend that neither there was default to pay rent nor rents were due for August 2003 to

March, 2004.

**8.** The learned Rent Controller upon appreciating the evidence of witnesses, Mr. Navelkar-AW1 and Mr. Anand Shirvoikar-RW1, and documentary evidence, held that respondent-tenant, defaulted to pay, tender or deposit the rent, without the reasonable cause. As a result, the eviction decree, was passed. In appeal, decree was reversed by the Appellate Court, on the ground that tenant had overpaid the former landlord, in excess of fair rent and therefore, he was not in arrears of rent.

**9.** The judgment made in appeal is assailed in this petition, by the landlords.

**10.** Heard Mr. J. E. Coelho Pereira, learned Senior Counsel for the petitioner and Mr. V. P. Thali, learned Counsel for the respondent. Perused evidence.

**11.** The short question arises for consideration is “whether the statutory scheme of Goa Buildings (Lease, Rent, Eviction) Control Act, 1968, acknowledges the tenant's right to seek and claim, adjustment of rents due, against the sum paid to the landlords, in excess of the agreed rent?”.

**12.** Section 16 of the Act, prohibits landlord from claiming or recovering extra amount or other like sum, in addition to the agreed rent. However, the landlord may claim or receive an amount not exceeding one month rent, by way of advance from the tenant. To appreciate the defence of the tenant, it would be appropriate to reproduce Section 16 of the Act. It reads as under:-

- 16 Prohibition of receipt of premium.— (1) Where the fair rent of a building has not been so fixed, the landlord shall not, after the commencement of this Act, claim, receive or stipulate for the payment of an extra amount or other like sum in addition to the agreed rent:*  
*Provided that the landlord may claim, receive or stipulate for the payment of an amount not exceeding one month's rent by way of advance.*
- (2) Save as provided in sub-section (1), any sum paid in excess of the agreed rent after the commencement of this Act in consideration of the grant, continuance or renewal of the tenancy of the building after such commencement shall be refunded by the landlord to the person by whom it was paid or, at the option of such person, shall be otherwise adjusted by the landlord.*
- (3) Any stipulation in contravention of sub-section (1) or sub-section (2) shall be void.*  
*(emphasis supplied)*

Sub-section 2 explains “any sum” paid, in excess of the agreed rents, in consideration of the “grant”, “continuance” or “renewal of the

tenancy” shall be refunded by the landlord to such person or, at the option of such person, shall be 'adjusted'. Plain reading of this subsection implies, “other like sum”, received by the landlord, in addition to agreed rent, rent must be, either for grant, continuance or renewal of the tenancy and not otherwise. A proposition that follows, is that, landlord is prohibited from receiving such like sum, which was not in consideration of grant, continuance or renewal of tenancy. To put it differently, any sum paid, by the tenant to landlord, in excess of agreed rent, not in consideration of the grant, continuance or renewal of tenancy, being prohibited, tenant cannot seek or claim its 'adjustment' against the rents due. With this understanding, let me ascertain whether, the sum of Rs.62,120/- paid by the tenant to the landlord were in excess of the, 'agreed rent'; and whether it was paid for continuance or renewal of the tenancy; and, whether tenant could seek to adjust the rents due, against such excess paid sum.

**13.** The tenant claims, that he surrendered 60 sq.mts area of the suit premises, out of 200 sq.mts., to former landlord, in September, 1995 and yet he continued to pay rent @ Rs.400/- per month till 2003. On this premise, tenant claims that, he was paying Rs.120/- per

month, in excess, during September, 1995 till 2003, although agreed rent was Rs.280/-. Therefore, according to him, he overpaid Rs.11,520/- to the former landlord. For whatever reason, after ten years, for the first time in 2013 he seeks to adjust the rents due (for August, 2003 to February 2004) against the amount overpaid to former landlord. In context of this defence, it is to be stated that the tenant, had neither examined former landlord nor independent witness to establish, that after surrendering 60 sq.mts of area, the rent was scaled-down in proportion to the area retained by him and agreed rent was Rs.280/-.

**14.** In any case, assuming rent payable was Rs.280/- in proportion to the area retained by him, but to prove this fact, he ought to have examined former landlord or applied to determine the, fair rent of the suit premises, under Chapter III of the Act. He did neither of them. In fact, tenant who seeks adjustment under Section 16(2) of the Act, has to establish first, what the “agreed rent”, was. In the case at hand, without establishing the 'agreed rent', tenant sought adjustment of the rents due, against the amount allegedly paid by him to the former landlord. For all that; this defence was rightly rejected by the Rent

Controller, but incorrectly accepted by the Appellate Court.

**15.** Be that as it may, the tenant claims, in terms of second and third lease, he was entitled to recover Rs.16,000/- from the, former landlord, that he had spent on repairs of the suit premises. Because that amount was not reimbursed by the former landlord, he claims no rent was due for August, 2003 to February, 2004, as it was to be adjusted against Rs.16,000/-.

**16.** Apart from above stated two adjustment-claims, the tenant would also claim that, after surrendering part of the suit premises, former landlord, had, orally agreed to sell the suit premises to him. Accordingly, in terms of oral agreement, he paid him Rs.36,000/- by cheques during the period from 2.11.1995 to 25.08.2003, being part of agreed consideration. Tenant therefore, claims, the rent due for the months of August, 2003 to February, 2004 was to be adjusted against the said amount and as such, no rent was due.

**17.** Having considered the pleadings and evidence, I hold and conclude:-

- 1 The evidence does not admit, that alleged overpaid amount on different counts, to former landlord, was in excess of agreed. Reason being neither over paid-amount has been

proved, nor tenant had applied for or sought fixation of 'agreed/fair rent' under Chapter III of the Act. Thus having not proved amount of, 'agreed rent', 'tenants' defence of adjustment of arrears of rent against the amount overpaid to former landlord was not maintainable.

- 2 The amount allegedly overpaid to former landlord, was not in consideration of grant, continuance or renewal of the tenancy, which is a sine-qua non, for to seeks adjustment in terms of sub section 2 of Section 16 of the Act.
- 3 Assuming, tenant overpaid Rs.11520/- to the former landlord, yet he has not established, that after surrendering the part of the premises rent was scaled down to Rs.280/- from Rs.400/- in proportion to area retained by him.
- 4 The factum of surrender of part of the premises has not been proved.
- 5 The tenant has neither established that former landlord had agreed to sell, suit premises to him nor proved Rs.36,000/- were paid towards sale consideration.
- 6 Barring his evidence and few entries in the passbook no other evidence has been led by the tenant, to establish defence of adjustment.

**18.** Be that as it may, the landlord had filed an eviction application on 22.4.2004, whereafter the tenant without prejudice to his rights and contentions, moved an application on 25.8.2004 under Section 22(3)

of the Act, to deposit Rs.5,000/- by cheque, towards alleged arrears of rent for the months of August 2003 to August 2004. Later, the tenant vide application dated 15.09.2004 sought leave to withdraw the application dated 25.8.2004 with leave to deposit Rs.5200/- in cash. It appears, in the meanwhile, the landlords moved an application under Section 32(4) of the Act on 25.8.2004, to stop the further proceedings since the tenant had failed to deposit the rent during the pendency of the eviction proceedings. On that ground the landlord sought to dismiss the tenant's application seeking leave to deposit Rs.5000/- in cash. It is borne out from the records that on 19.9.2005, the tenant was permitted to deposit the rent/arrears of rent Rs.10,000/- for the period August 2003 to August 2005 under Section 32(1) of the Act, without prejudice to rights of the landlord. Furthermore, the tenant was permitted to deposit rent Rs.400/- for each month within the period specified under Rule 7(2) of the said Act. Accordingly, the tenant deposited Rs.10,000/-. Thereafter, evidence began and the landlord witness was cross-examined on 5.5.2006. After which on 10.3.2008 the tenant filed an application under section 22(4) of the Act to contend that his default to pay the rent was not without reasonable cause.

**19.** In any case, the tenant's application dated 25.8.2004 purported to have been filed under Section 22(3) of the Act was beyond 30 days from the date of service of summons of proceedings, inasmuch as it was served on his employee on 25.5.2004. To ward off the eviction, the tenant was required to pay rent arrears with cost of application, within 30 days from the service of summons on him. Thus, under the statutory scheme of the Act, the tenant gets an opportunity to avoid eviction on two levels (i) when he receives a statutory notice demanding rent and (ii) when he receives a summons in eviction proceedings. In both cases, the time limit is 30 days.

**20.** In the case at hand, the tenant neither paid rent arrears within 30 days from the statutory notice nor deposited or tendered with the controller arrears of rent together with cost of application, within 30 days from the service of summons on him. Thus, the respondent/tenant could not ward off his eviction, at both the levels.

**21.** Thus having considered the evidence on record, I conclude that;

- i. the landlord has proved, that notice was served on the tenant as required under Section 22(1)(a) of the Act.
- ii. that the tenant failed to pay or tender such arrears of rent

- within 30 days from the receipt of the notice
- iii. that the tenant failed to deposit the rent due by him together with the costs of application within 30 days from service of summons of proceedings on him.
  - iv. Respondent/tenant failed to establish, reasonable cause for not paying or tendering or depositing the arrears of rent within 30 days from the receipt of the registered notice served on him.

And thus eviction decree passed by the trial Court is upheld.

**22.** Thus to say, the appellate Court ignored the evidence, misread and misapplied the provisions of the Act, to the facts of the case and erroneously concluded that the tenant was not in arrears of rent and his default to pay the rent was not “without reasonable cause”. These findings recorded by the Appellate Court being contrary to the evidence and statutory scheme of the Act, resulted in miscarriage of justice and therefore, interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India is called for.

**23.** In the course of arguments Counsel for the parties have relied on number of judgments. I will make a quick reference to it, before

concluding this judgments.

**24.** The first judgment relied on by Mr. Coelho Pereira, learned senior Counsel was in the case of Shri *Ashok Jgannath Chdankar Vs Shri Jayram Rmachandra Sirsat, 2017 SCC online Bombay 1723.*

Mr. Pereira, relied on this judgment to contend that although the rent legislation confers certain benefits upon the tenant, subject to certain conditions, but so far as compliances are concerned normally there has to be strict compliance. In the case at hand, the application moved by the tenant under Section 22(3) of the Act was beyond 30 days from the date of service of summons of proceedings, on him and therefore, the tenant was not entitled to benefit in accordance with proviso to section 22(3) of the Act.

**25.** The Second judgment relied on was in the case of *Zainab Bee Vs Prabhakar, 2017(2) Mh. L. J. 374.* In this case, the tenant had filed a suit for specific performance of the agreement dated 10.12.1981, that was entered into with Kishanlal Algare (former landlord), wherein, he could succeed in obtaining a decree for a refund of the amount. After the said decree attained finality, Kishanlal Algare sold the property to a landlady and notice of attornment and an

intimation to that effect was given to the tenant. Though the tenant had filed a counterclaim for cancellation of said sale deed which was executed in favour of the landlady and the proceedings in that regard were still pending, it was held that same would not have the effect of any effacing the relationship of landlady or tenant or of clothing the tenant with the title as the legal owner of the suit premises. This judgment in my view does not consider the issue in the case at hand.

**26.** The next judgments relied on were in the case of *Atma Ram Vs Shakuntala Rani, (2005) 7 SCC 211* and *E. Palanisamy Vs Palanisamy, (2003) 1 SCC 123*, in which a consistent view has been taken by the Supreme Court that, in rent control legislation if a tenant wishes to take advantage of the beneficial provision of the Act, he must strictly comply with the requirements of the Act. If he fails to do so he cannot take advantage of the benefit conferred by such provision.

In the case at hand, the tenant did not pay arrears of rents within 30 days from the receipt of the notice demanding arrears of rent nor had deposited, paid, or tendered arrears with the controller, together with the cost of the application, within 30 days from the service of

summons of proceedings on him. Therefore, he could not avail opportunity to avoid eviction, at these two stages.

**27.** Mr. Thali, learned Counsel appearing for the respondent/tenant relied on the judgment in the case of *Shalini Shyam Shetty Vs Rajendra Shankar Patil (2010) 8 SCC 329*. In this case, the Apex Court has laid down the principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution of India.

According to Mr. Thali, the learned Counsel that there is no patent perversity in the order of the appellate Court and merely because another view than the view taken by the Appellate Court is possible to view, this Court in the exercise of its power in superintendence cannot interfere to correct mere errors of law or a fact. Mr. Thali would rely on clauses (g) and (h) of Paragraph 49 of the cited judgment. In my view, in the case at hand, the view taken by the appellate Court was not only contrary to the evidence on the record but also has no approval of a statutory scheme of the Act. The reason being, the amount overpaid by the tenant to the former landlord, was neither proved nor such amount was paid in consideration of the grant, continuance, or renewal of the tenancy. As such, the appellate Court

completely overlooked, the provisions of section 16 of the Act, which neither approves receipt of any such sum nor it qualifies adjustment and therefore, findings recorded and the conclusion arrived at by the Rent Controller ought not have been interfered with, in Rent Appeal.

**28.** The next judgment relied by Mr. Thali, was the case of ***R. G. Gangadharan Vs Francisco Barreto Lopes, 1995(2) Bom. C. R. 207.***

In this case, the learned Judge has examined scope of section 32 of the Act of 1968 and held that sub-section 4 of Section 32 enables the Rent Controller to stop all further proceedings and put the landlord in possession of the building, in case he is not satisfied with the cause shown by the tenant not to pay or deposit the rent due. In the context of the given facts, it was held that such a type of order cannot be deemed as a final order because it is neither an eviction order nor any order which adjudicates on its merits the substantive rights of the landlord. In my view, the ratio laid down in ***R. G. Gangadharan*** (supra) does not help the tenant.

**29.** The next judgment was in the case of ***N. K. Baslas Vs Krishnan Lal, 1973 RLR 14***, wherein the question before the Court was, whether the plea of the tenant that upon depriving the facilities for

using the rear courtyard, hand pump, and telephones, he could suspend the whole or of part of the rent payable by him to the landlord. Thus the plea that he was not liable to pay rent at the agreed rate, after deprivation of the facilities when raised, it calls for an inquiry by the controller, who must first decide the liability of the tenant to pay the rent and the rent which was to be paid after deprivation of the premises, before passing an order under Section 15(2) of the Act. In the case at hand, admittedly, the tenant had not led evidence to prove, that after surrendering part of the premises, rent was scaled down to Rs. 280/- in proportion to the area retained by him nor had applied for fixation of fair rent. In these circumstances, the trial Court has correctly held, for want of evidence, the tenant could not have unilaterally claimed that though, the rent payable was Rs. 280/- but since, he kept on paying Rs.400/- per month and therefore, the amounts paid in excess of Rs. 280/- per month were to be adjusted against the arrears of rent demanded by the landlord.

**30.** In view of the aforesaid discussion, I pass the following:-

### **ORDER**

- i. The impugned judgment and order dated 8.7.2020 in Rent

Appeal No.13 of 2016 passed by the Principal District Judge, Panaji, is quashed and set aside.

- ii. The order dated 29.9.2016 in Rent Case No.81 of 2014/C passed by the Civil Judge, Junior Division, Panaji is upheld.
- iii. Writ Petition is allowed in the aforesaid terms.
- iv. Rule is made absolute. Petition stands disposed of.

**SANDEEP K. SHINDE,J.**

**JUDGMENT CONTINUED**

**31.** At this stage, Mr. Thali, learned Counsel for the respondent seeks to stay the execution and implementation of this order for a period of six week. The request is opposed by the learned Counsel for the petitioners. However, having regard to the facts of the case, the operation of the judgment and order is stayed for a period of four weeks.

**SANDEEP K. SHINDE,J.**