

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

CIVIL REVISION APPLICATION NO.29 OF 2022

Shri Kalulal P. Jain since deceased by
his legal heirs Mrs Gangadevi Kalulal Jain & Ors. Applicants.
V/s
Hemant Sapale Respondent.

Mr. Hemant Ghadigaonkar for the Applicants.
Mr. Sachin Dhakephalkar for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATED : 05th AUGUST, 2022

P.C.:

1. Respondent/Plaintiff initiated R.A.E. & R. Suit No. 18/136 of 1977 before the Small Causes Court, Mumbai with a prayer for decree against the present applicants/defendants to vacate and hand over peaceful possession of the tenement no. 12 on the third floor of the building known as Pundlik Niwas, situated on Plot No. 65, Paranjpe B Scheme, Road No. 1, Vile Parle (E), Mumbai-400057. The claim in the said suit based on the fact that the applicants were in arrears of rent from 01/09/1975 and as such was served with the notice of demand dated 10/06/1976 under sub-section 2 of section 12 of the old Rent Act. The arrears were to the tune of Rs.68.04 paise. The suit claim was resisted by the applicants by filing his written submissions.

2. The suit was initially decreed on 21/09/1984. The applicants feeling aggrieved preferred in Appeal No. 797 of 1994, which appears to have been allowed on 19/09/1994.

3. The respondent landlord's Writ Petition No. 4417 of 1995 questioning the appellate order was allowed. However, I am informed that since the said order passed in Writ Petition was without hearing the applicants the said order passed by this Court was recalled i.e. 02/07/2013 and the petition of respondent landlord was heard afresh. Again on 13 and 14/07/2016 the petition of the respondent-landlord was allowed wherein the order of remand was passed with directions to consider the claim of the applicants/ tenants in accordance with the provisions of sub section 2 of section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

4. As a sequel of above, the appeal preferred by the applicants being Appeal No. 797 of 1984 came to be rejected vide impugned order dated 01/10/2021, as such this petition.

5. The counsel for the applicants would urge that the applicants are tenant in the suit property since long. He would invite attention of this Court to the fact that the eviction is sought on the basis of non-payment of the rent for a period from 01/09/1975 to 31/05/1976. He would invite my attention to the notice dated 10/06/1976 alleged to have been issued by the non-applicant / landlord.

According to him such notice was returned with endorsement "not claimed" as - (a) the applicants was not available at the tenanted premises & (b) the applicant was at his native place. As such according to him the difference between "not claimed" and "refused to accept" are all together different and as such the claim ought not have been entertained for want of appropriate notice demanding arrears. So as to substantiate the said contentions, he has drawn support from the judgement of this Court in the matter of *Lalmani Ramnath Tiwari vs Bhimrao Govind Pawar* reported in 2001 (2) Mh.L.J 342, particularly paragraph no. 7 which reads thus:

"7. In view of the rival submissions, I would first proceed to deal with the service of notice sent by registered post. The packet sent by registered post, undisputedly, has been received back by the petitioner with postal endorsement "not claimed". The contention raised on behalf of the petitioner that endorsement not claimed should be treated to be one of refusal by the respondent is totally misplaced. There is marked distinction between expression "not claimed" and "refused". In case of endorsement of "refused" there can be no dispute that the Court can legally presume that service has been duly effected on the addressee. However, the said legal presumption cannot apply to a case where the envelope has been returned with postal endorsement "not claimed". In this situation the non-delivery of the envelope can be due to variety of reasons, but surely other than refusal. The service can be said to be effected only when there is positive evidence that it is actually served through the modes permissible in law or even when the addressee refuses to accept the same; but in no case, if the packet is returned with postal endorsement "not claimed", can the Court presume that service has been effected on the addressee.

6. His next contention is the applicants have initiated the proceedings based on the notice dated 01/09/1975 for fixation of standard rent by moving an application on 16/02/1976. The said application was moved pursuant to the provisions of section 12 and in view of the provisions of sub-section 2 & section 3 of section 12. The application for eviction ought not to have been entertained as there exist a dispute between the landlord and the tenant as regards the standard rent or permitted increased. According to him, the Court below has failed to consider the very substance of the provisions of sub-section 2 of section 12 of the aforesaid order. As such the order impugned is not sustainable.

7. The counsel for the respondent Mr. Dhakephalkar would support the order impugned. At the outset, he would invite attention of this Court to long standing litigation as the suit has not attained finality for the last more than 45 years. According to him, at each stage of the proceedings the applicants have avoided not only to clear the arrears but has also not paid the rent. He would invite attention of this Court the very conduct of the applicants viz. dismissal of his standard rent application on the ground of non-clearance of the arrears.

8. Apart from above, he would urge that it was open for the applicants to deposit the arrears for a period from 01/09/1975 to 31/05/1976 once the suit was initiated. By inviting attention of this Court to the provisions of sub-section 2 & section 3 of section 12 of the Rent Control order, he would urge that the suit

proceedings cannot be said to be hit by the said provisions as even if the notice was returned "not claimed" by the present applicants, it was open for him to clear the arrears in the pending proceedings.

9. I have appreciated the said submissions.

10. The provisions of section 12 which provides for - no ejectment ordinarily to be made if the tenant pays or is ready and willing to pay the standard rent and permitted increase, 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) A 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.

2) No suit for recovery of possession shall be instituted by a landlord against a 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 the manner provided in Section 106 of the Transfer of Property Act, 1882 (IV of 1882).

[(3)(a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit 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 thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided; and also pay costs of the suit], as directed by the Court.]

[(4) Pending the disposal of any such suit, the Court may out of any amount paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increases due to him as the Court thinks fit.]"

11. What can be noticed from the provisions of sub-section 2 is it starts with an embargo on the right of the party like the present non-applicant to initiate a suit for possession against the applicant/tenant on the ground of non-payment of standard rent or permitted increased dues until the expiration of one month next after the notice in writing of the demand of standard rent or permitted increase, has been served on the tenant. The service of notice is to be effected by the virtue of said provision, having regard to section 106 of the Transfer of Property Act. Admittedly in case in hand, the notice was sought to be served on the applicant through Registered Post AD. In cross examination of Applicant it has come on record that on relevant date he was not available. As a sequel of above, notice was returned unclaimed. There is also evidence on record that the said notice was affixed on the conspicuous part of the premises which are occupied by the applicants.

12. As such, it can be inferred that the applicants had every opportunity to meet with such notice of demand for payment of arrears of rent. The fact remains

that the applicants appear to be in arrears of rent even prior to the aforesaid period i.e. from 01/09/1975 to 31/05/1976. So as to avoid the payment of standard rent, he has initiated proceedings for fixation of standard rent by moving an application on 16/02/1976. The contentions that as long as the application for fixation of standard rent was pending pursuant to sub-section 2 of section 12 of the Rent Control Act the applicants ought not to have been asked to pay the standard rent or arrears goes completely contrary to the very object of the said provision. The protection extended by sub-section 2 is only to the extent of period of one month from the date of service which in this case notice is dated 10/06/1976.

13. Apart from above, as observed herein above, it was open for the applicants pursuant to the statutory provisions to offer the arrears of rent in the pending proceedings. Rather the applicants have taken shelter of the pendency of his standard rent application for non- payment of arrears of rent.

14. This does not appears to the very object of the statue i.e provisions of section 12, to extend the protection in favour of the tenant like the applicants who have acted completely in disregard to the statutory obligations.

15. If we accept the submissions made by the counsel for the applicants that, in view of the pendency of the standard rent application at his behest, the dispute was pending *inter se* between the landlord and tenant, and he was not liable to

pay the rent till said application is decided, then it will be virtually amounting to permitting violence to the said provisions as it will be a routine for the tenant to file application for standard rent and move out of the liability of payment of rent or clear the arrears.

16. In the aforesaid background, the claim put forth by the applicants that the suit proceedings are hit by the provisions of sub-section 2 of section 12 of the Rent Control Order cannot be accepted and is accordingly rejected

17. The contentions that the notice dated 10/06/1976 should have been inferred to have been not served on the applicants, based on the observations in matter of *Lalmani Ramnath Tiwari* cited (supra), what is to be noticed is applicants thereafter appeared in the proceeding and was having an opportunity to clear the arrears.

18. The entire history of the litigation i.e. from 1976 the conduct of the applicants remained of not committed to the obligations under the provisions of Rent Control Order as his standard rent application was also rejected on the ground of non-payment of rent or clearing arrears of rent.

19. It appears that throughout the pendency of the litigation, the applicants have tried to enjoy the property at the cost of the landlord.

20. In view of the aforesaid conduct of the applicants of enjoying the property of the non-applicant/landlord free of costs and making the non-applicant/landlord

to litigate for last more than 45 years, it would have been appropriate to impose costs of Rs.50,000/-.

21. In the aforesaid background, in my opinion, no case for interference is made out as the impugned judgment does not contain any error of jurisdiction. Revision as such fails with cost of Rs.25,000/- to be recovered from the applicants.

22. The counsel for the applicants submits that in view of the operation of interim relief, the same be continued for a period of six weeks. Mr. Dhakepalkar, counsel appearing for the decree holder opposes the prayer. However in the interest of justice, interim relief ordered by this Court is continued for a period of six weeks from today.

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(NITIN W. SAMBRE, J.)