
(1988) 11 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No's. 3617 and 3692 of 1988

Anandrao Ganpatrao Sable

APPELLANT

Vs

Madhavrao Ramrao Kanase and Another

RESPONDENT

Date of Decision : 28-11-1988

Acts Referred:

Bombay General Clauses Act, 1904 — Section 7
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2),
12(3), 13(2)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : (1989) 1 BomCR 256

Hon'ble Judges : A.D. Tated, J

Bench : Single Bench

Advocate : P.S. Patankar, in W.P. 3617, for the Appellant; P.S. Patankar in W.P. 3692/88 and J.J. Thakkar, for Respondent Nos. 1 and 2 in W.P. 3617 and 3692/88, for the Respondent

Judgement

A.D. Tated, J.

1 Both the writ petitions arise out of the judgment and decree passed by the learned Additional District Judge, Satara on 26th April, 1988 in Regular Civil Appeal No. 257 of 1987 whereby he has dismissed the appeal preferred against the judgment and decree passed by the III Joint Civil Judge, Junior Division, Satara, in Regular Civil Suit No. 167 of 1986 whereby he had decreed the plaintiffs-"landlords" suit for ejectment of the defendant-defendant-tenant. Writ Petition No. 3617 of 1988 has been filed by the original defendant-tenant while Writ Petition No. 3692 of 1988 has been filed by the original plaintiffs-landlords.

2. The facts necessary for the decision of those writ petitions may be briefly stated thus : The suit premises bearing C.T.S Nos. 9-A and 9-B situate in Guruwar Peth of Satara City. They were occupied by the tenant Anandrao Ganpatrao Sable on monthly rent of Rs. 50 and education cess of Rs. 1.25 Those premises were purchased by the original plaintiffs i.e. Madhavrao Ramrao Kanase

and the brother Shivaraj Ramrao Kanase in the year 1982 and since then they became the landlords in respect of those premises. The plaintiffs issued a notice dated 10th December, 1986 alleging that the tenant was in arrears of rent from August 1983 to November 1985 and thus he was a defaulter in payment of rent under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as "the Bombay Rent Act". The plaintiffs, on the averments that the defendant did not pay the arrears of rent though demanded by the plaintiffs by the said notice, claimed possession of the suit premises under Clause 3(a) of section 12 of the Bombay Rent Act. They also claimed possession of the suit premises on the ground that they required the suit premises for their occupation u/s 13(1)(g) of the Bombay Rent Act. The defendant by his "written statement opposing the claim of the plaintiffs denied that he defaulted any payment of rent for a period of six months and as such was liable to be evicted u/s 12(3)(a) of the Bombay rent Act. He also denied that he refused to receive the notice allegedly sent by the plaintiffs. He also denied that the suit premises were bona fide required by the plaintiffs for their occupation and they could claim possession thereof on that ground. He submitted that he had paid municipal taxes amounting to Rs. 376.73 on 23rd January, 1985 and that the plaintiff did not deduct that amount out of their claim for arrears of rent and as such their demand for the arrears of rent was not legal. Thus, according to him, there was no valid notice of demand as required by section 12(2) of the Bombay Rent Act. With those averments the defendant denied the plaintiffs' claim. On the pleadings of the parties the learned Civil Judge, (Junior Division), Satara, raised also the following issues:-

1. Do plaintiffs prove that the defendant is a wilful defaulter?
2. Do plaintiffs prove that they require the suit property bona fide for their personal use and occupation?
3. If yes, to whom greater hardship would be caused by passing a decree or refusing to pass it?
4. Whether plaintiffs are entitled to possession of the suit property?
5. What is due to the plaintiffs?
6. What decree or order?

The learned trial Judge recorded the following findings :-

1. Yes.
2. Yes.
3. Partial decree of eviction would not put any party to hardship.
4. Yes.
5. Rs. 1585. 75 ps.

6. As per final order.

On the above findings the learned trial Judge decreed the plaintiffs' suit.

3. Feeling aggrieved by the judgment and decree passed by the learned trial Judge, the defendant preferred an appeal to the District Court, Satara and the learned Additional District Judge, Satara, by his judgment and order dated 26th April, 1988 confirmed all the findings recorded by the trial Judge and dismissed the appeal. Feeling aggrieved, have filed Writ Petition No. 3617 of 1988 and the plaintiffs have filed Writ Petition No. 3692 of 1988. The writ petition of the plaintiffs is directed against the finding that only a portion of the suit premises should be delivered in their possession. According to them, even on the ground of bona fide occupation they are entitled to possession of the whole of the premises and not only part of the premises as held by the Courts below.

4. The learned Counsel for the petitioner in Writ Petition No. 3617 of 1988 Shri Patankar contends that the learned Additional District Judge, Satara was not right in finding that the provisions of sections 12(3) substituted in the Bombay Rent Act in place of old section 12(3) as per the Amending Act. No. 18 of 1987 are prospective in operation and as such the defendant-tenant cannot avail of the provisions of section 12(3) and cannot claim to deposit the arrears of rent in order to defeat the plaintiffs' claim for ejectment of the defendant on the ground of default in payment of arrears of rent and as such incur the liability to be ejected as per the provision of old section 12(3)(a). According to the learned Counsel, the provisions of the new section 12(3) substituted by the Amending Act 18 of 1987 are retrospective in operation and the tenant is entitled to the facility of paying the arrears of rent during the pendency of the appeal and thus avoid ejectment on the ground of non-payment of rent for 6 months or more. The provisions of new section 12(3) of the Bombay Rent Act as amended by Act 18/87 were considered by the this Court in Piroja M. Mehtra v. Dr. Hambai Jamshedji Cama and others, in Writ Petition No. 5141 of 1987 decided on 11th July, 1988 ; Piroja M. Mehta Vs. Hambai Jamshedji Cama (Dr.) and Others, . My learned brother Jahagirdar J. after considering the various authorities reached the conclusion that the provisions of section 12(3) substituted by the Amending Act are not retrospective in operation. The learned Counsel Shri Patankar contends that the legal question regarding the prospective or retrospective operation of section 12(3) of the Bombay Rent Act has not been correctly decided by the Single Judge of this Court in Piroja M. Mehta Dr. v. Hambai Jamsedji cama and others and the matter requires to be referred to the Division Bench of this Court. The learned Counsel mainly relies on the decision in H. Shiva Rao and Another Vs. Cecilia Pereira and Others, in support of his contention that the provisions of new section 12(3) should be held to be retrospective in operation, In that case judgment in R.S.A. No. 835 of 1965 was passed on 27th August, 1970 for possession of the premises situated in Pandava village. A decree for possession was passed therein on 30th June, 1972. On 15th February, 1980 execution application was filed by the respondents in that case in the Court

of Munsif, Mangalore Karnataka. On 6th December, 1980 objections to the execution petition were filed. At that time Pandavu village where the suit premises was situated was not within the Mangalore Municipality and as such Karnataka Rent Control Act, 1961 was not applicable to Pandavu village,. On 18th July, 1983 the said Act was amended by Karnataka Act 17 of 1983 whereby all areas within the limits of the cities under the Karnataka Municipal Corporation Act and an area of 3 Kilometres therefrom were brought under the purview of the Rent Control Act, that is to say Parts IV and V of the Rent Act were applicable to the area in question. A notification was issued on 27th October, 1980 u/s 4(1) read with section 501-A of Karnataka Municipal Corporation Act, according to which the whole area comprising Pandavu Town Municipality was included in Mangalore City Corporation. On 23rd June, 1984 an order was passed by the Munsiff, Mangalore for issue of delivery of warrant. Thereafter on 20th July, 1984 Revisions Petition was filed in the High Court of Karnataka. In the said petition an order was passed on 4th June, 1985. A Review Petition filed against that order was dismissed by the High Court on 16th July, 1985. Against that the appellant approached the Supreme Court.

5. The short question which arose before the Supreme Court was whether in view of sub-section (1) of section 21 of the Karnataka Rent Control Act the decree was executable because subsequent to the decree for possession the Act has been made applicable to the area in question. The provisions of sub-section (1) of section 21 of the Karnataka Rent Control Act are as follows :-

"Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or other authority in favour of the landlord against the tenant."

Their Lordships of the Supreme Court while interpreting the provisions of section 21 and their retrospective application at page 250 of the report observed thus :-

"It has to be borne in mind that Rent Control legislations are beneficial to the tenant and restrictive of the rights of the landlords-these legislations were passed to meet the problem of-shortage of accommodation in cities and towns. Whether that is the best way to meet the problem of finding habitats for growing number of people is another issue. Whether or not the problem could not be met by another way is also another-question courts must find out the literal meaning of the expression in the task of construction. In doing so if the expressions are ambiguous then the construction that fulfils the object of the legislation must provide the key to the meaning. Courts must not make a mockery of legislation and should take a constructive approach to fulfil the purpose and for that purpose, if necessary iron out the ereases."

Again on the same page Their Lordships observed thus :-

".....Where in a society of acute shortage of accommodation adjustment of rights between the parties is the purpose, we must ask ourselves two question does the argument of the appellant on the construction of the section further the purpose

of the legislation, and secondly, whether the construction canvassed by the appellant does violence to the language or is contrary to the literal meaning. In our opinion the answers to the first question is in the affirmative and to the second in the negative. If so, in our opinion, it must be so read and the appeal must succeed."

Strong reliance was placed on this decision before my brother, Jahagirdar J. and he has considered this decision in his judgment. In that case the provisions of section 21(1) of the Karnataka Rent Control Act reproduced above were made applicable to the village Pandavu on 30th June, 1972. The judgment in R.S.A. No. 835 of 1965 for possession of the premises situated in Pandavu village was passed on 27th August, 1970. The date of the decree for possession as mentioned in that judgment appears to be 30th June 1972. Pandavu town was included in Mangalore city Corporation by a notification issued on 27th October, 1983. Thereafter on 23rd June, 1984 the learned Munsiff Magistrate passed an order for delivery of warrant. On that day in view of the provisions of section 21(1) of the Karnataka Rent Control Act possession of the suit premises could not be delivered without following the provisions contained in the Karnataka Rent Control Act and as the provisions the Rent Control Act were beneficial to the tenant and restrictive of the rights of the landlords and on the principle that if the expression are ambiguous, the construction that fulfils the object of the legislation must provide the key to the meaning, it was held that the provisions of section 21 of the Karnataka Rent Control Act did apply and that the decree which was passed before the Karnataka Rent Control Act was applied to the town of Pandavu, could not be executed. In the present case on the reading of the provisions of the new section 12(3) of the amended Bombay Rent Act it cannot be said that on the literal meaning of the said section it is retrospective. On the contrary, the reading of the new section 12(3) shows that it is prospective. It cannot be held to be retrospective without doing violence to the language used therein. It is necessary to reproduce the provisions of section 12 before amendment and subsequent to amendment of 1986. Section 12 before amendment of 1986 reads thus :-

"12. (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 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 and Property Act, 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 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 shall pass a decree for eviction in any such 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 increase till the suit is finally decided and also pays 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.

Explanation I---In any case where there is dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court.

Explanation II---For the purpose of sub-section (2), reference to "Standard rent" and "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of section 11.

Explanation III---For the purpose of this section, where a tenant has deducted any amount from the rent due to the landlord "under section 173-C of the Bombay Municipal Corporation Act for recovery of any water tax charges paid by him to the Commissioner, the tenant shall be deemed to have paid the rent to the extent of deductions so made by him."

After amendment of section 12 by Maharashtra Act 18 of 1987, section 12 reads thus :-

"12(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 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.

(3) 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 heading 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 per cent 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 :

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.

(4) Pending the disposal of any such suit, the Court may order 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.

Explanation I---In any case where there is dispute as to the amount of standard rent or permitted increase recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub section (2), he makes an application to (the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court).

Explanation II---For the purpose of sub-section (2), reference to "Standard rent" and "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of section 11.

Explanation III---For the purpose of this section, where a tenant has deducted any amount from the rent due to the landlord "under section 173-C of the Bombay Municipal Corporation Act for recovery of any water tax charges or charges paid by him to the Commissioner, the tenant shall be deemed to have paid the rent to the extent of deductions so made by him."

In the suits for eviction filed before the Amending Act 18/87 came into force on 1st October, 1987 and in which the trial Court framed issues and after recording evidence of the parties decided the suit on merits, there cannot be any first day of hearing of the suit in order to enable the tenant to pay the arrears of rent on or before 1st day of hearing of the suit. The learned Counsel Shri Patankar for the defendant-tenant contends that in place of first day of hearing of the suit, the first day of the hearing of the appeal should be read when the appeal is pending against the judgment of the trial Court. He also submits that as long as the appeal and any other proceeding is pending, the tenant could apply to the Court and the Court can allow the tenant to make payment of the arrears of rent and permitted increases and that will satisfy the requirement of new section 12(3) of

the Bombay Rent Act. I am unable to agree with the learned Counsel for the simple reason that it cannot be done without doing violence to the language used in the new sub-section (3) of section 12 of the Bombay Rent Act.

6. Reading of the Maharashtra Amendment Act, 1987 shows that wherever the Legislature intended the provisions to be retrospective they have made so by using the necessary expression. The provisions of sections 13(1)(b), 14 and 15(2) have been specifically made retrospective. However, there is nothing in section 12(3) reproduced above to indicate that the Legislature intended it to be retrospective. On the Contrary, as stated earlier the reading of the section shows that it was intended to be prospective. The learned Counsel Shri Patankar submitted that the provisions contained in saving clause appearing in section 25 of the Amending Act clearly indicate that the provisions of section 12(3) were intended to be retrospective. The saving clause appearing in the amending section 25 of the Amendment Act reads thus:-

"Nothing contained in the principal Act, as amended by this Act, shall be deemed to authorise the re-opening of any suit or proceeding for the eviction of any person from any premises to which principal Act applies as if such proceeding had been finally disposed of before the commencement of this Act.

Explanation---For the purpose of this section, suit or proceeding, as the case may be, shall not be deemed to have been finally disposed of, if in relation to that suit or proceeding any appeal or proceeding is pending, or, if the period of limitation for preferring an appeal or proceeding, as the case may be, had not expired before the commencement of this Act."

The above provisions of the saving clause be used to decide as to whether the provisions of new section 12(3) of the Bombay Rent Act are prospective or retrospective in operation. It is well settled that the enactments which affect the vested rights should be construed prospective in operation unless they have been made by express provision or by necessary intendment retrospective in operation. Where the provisions are not made retrospective either by express provision to that effect or by necessary intendment, the suits instituted before those amending provisions came into force, have to be decided on the law as it stood on the day the suits were instituted as has been provided in section 7 of the Bombay General Clauses Act. Section 7 of the Bombay General Clauses Act deals with the effect of the repeal of the Bombay Act and it provides that unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid so that no pending legal proceedings can be affected by a repeal unless there is a different intention in the statute itself. On going through the Amending Act 18/87 and considering the same in the context of the provisions of the Bombay Rent Act which have been repealed or amended it is not possible to construe that the provisions of the amended Bombay Rent Act are retrospective

in operation. I agree with the view taken by my brother Jahagirdar, J., in *Pooja M. Mehta v. Dr. Hambai Jamshedji Cama and others* and see no reason to refer the matter to the Division Bench as has been contended by the learned Counsel Mr. Patankar.

7. The learned Counsel Shri Patankar contends that the demand notice dated 10th December, 1985 was never served on the defendant-tenant and secondly the notice is defective inasmuch as it does not give full description of the property and that no credit was given by the landlord for the amount of Rs. 376.73 paid by the tenant on 23rd January, 1985 towards the taxes. Therefore, according to the learned Counsel, the claim of the plaintiffs could not be decreed by the trial Court on the ground of default in payment of rent as provided in old section 12(3)(a) of the Bombay Rent Act. The learned Counsel for the landlords Shri Thakkar, on the other hand, submits that the two courts below have held that the notice was properly served on the tenant and that the notice was not in any way defective and as such a decree for eviction could be passed under the old section 12(3)(a) of the Bombay Rent Act. The plaintiffs produced the envelope containing the notice on record which was sent by registered post and was received back as unclaimed. The plaintiffs have also examined the postman who tried to effect service of the said notice on the defendant. On considering the evidence of the postman and also the notice placed on record by the plaintiffs both the courts have held that the said notice was sent by the plaintiffs by registered post and intimation was given by the postman to the defendant to receive the notice but the defendant did not receive that notice and as such it was returned as unclaimed. When both the courts below on considering the evidence on record have held that the postman had given intimation of the said notice sent by registered post to the defendant and that the defendant did not claim that notice, it would not be proper for this Court in writ jurisdiction to enter into the question of fact regarding the valid service of notice on the defendant. Consequently, I am unable to agree with the learned Counsel for the tenant that the notice was not duly served on the defendant.

8. The submission of the learned Counsel for the tenant that the notice was bad as it did not properly describe the tenanted premises and also no deduction of Rs. 376 73 which was paid by the tenant towards the municipal taxes, was made cannot be accepted. The learned Counsel in support of his contention relied on the decision in *Chimanlal Vs. Mishrilal*, . In that case there was a substantial difference between the accommodation mentioned in the notice and the accommodation actually let to the appellant-tenant. It was not a case of mere misdescription of accommodation where both the parties knew perfectly well that the notice referred to accommodation let to the tenant. Nor it was a case where the discrepancy between the accommodation alleged by the landlord and that actually let to the tenant is marginal or insubstantial. The proceedings showed that there was a serious dispute between the parties as to the material extent of the accommodation let by the one to the other. Therefore, the notice in that case was held invalid. The decision relied on by the learned Counsel does not apply to

the facts of the present case. There is no serious dispute in the present case regarding the premises let out by the plaintiffs to the defendant. No contention has been raised on the point of accommodation let out by the plaintiffs to the defendant. From the mere fact that in the notice mention is made only to the C.T.S. No. 9-A and 9-B, it cannot be said that there was a substantial difference between the accommodation mentioned in the notice and the accommodation actually let out to the tenant. It is not dispute that the premises bearing C.T.S. Nos. 9-A and 9-B were let out and were occupied by the tenant. Consequently, the notice in the present case cannot be held on the invalid on the ground that in the notice only C.T.S. numbers of the premises were mentioned.

9. As regards the second contention that the landlords should have given credit to the tenant for the amount of Rs. 376.73 which the tenant paid towards municipal taxes and as much as such credit was not given while making claim in the notice such notice is bad, the learned Counsel for the plaintiffs submits that the tenant should have paid the remaining amount after deduction the amount of taxes of Rs. 376.73 paid by him towards the municipal taxes and as he did not make any payment he cannot claim notice to be bad because no credit was given towards the municipal taxes paid by the tenant. The plaintiffs had demanded the arrears of rent in their notice dated 10th December, 1985 for the period from August 1983 to November 1985. The agreed rent was Rs. 50/- per month and education cess Rs. 1.25 p.m. After receiving the notice the defendant did not pay any amount towards the arrears of rent. The defendant had paid municipal taxes levied on the premises occupied by him amounting to Rs. 376.73 on 23rd January, 1985. He was entitled to receive that much amount from the plaintiffs as primary duty to pay municipal taxes was that on the plaintiffs. Therefore, when the plaintiffs demanded the arrears of rent for the period from August 1983 to November 1985, the defendant could have paid those arrears after deduction the amount of Rs. 376.73 which he was entitled to receive from the plaintiffs. He having not done so, he now cannot contend that the demand notice was bad because the plaintiffs-landlords had not given credit to him for Rs. 376.73 which he had paid towards municipal taxes. I am unable to agree with the learned Counsel for the defendant-tenant that the demand notice dated 10-12-1985 was bad in law on the grounds urged by him and indicated above.

10. Both the courts have held that the suit premises are required bona fide by the plaintiffs-landlords for their personal occupation and that finding is not in any way challenged before me. The learned trial Judge, taking into consideration the comparative hardship of the landlords and the tenant, held that the delivery of part of the premises to the plaintiffs will meet the requirements of both the parties. In the appeal Court the said finding of the learned trial Judge was sought to be assailed by the landlords. At the appellate stage it was pointed out that the landlord of the plaintiffs instituted a suit against them for eviction and as they were likely to lose those premises, they required whole of the suit premises for their occupation. It was also submitted before the Appellate Court that the tenant owned a factory where cement pipes were being manufactured and in the

front portion of the suit premises he was having office of the said factory and that he could shift his office to the premises of the factory. Both the Courts have accepted this position and held that a part of the premises can be delivered in possession of the plaintiffs to meet their requirements. The learned Counsel for the plaintiffs-landlords Mr. Thakkar contends that the defendant-tenant is rich and is in affluent circumstances and in the year 1982 he had given an advertisement which is placed on record that he was ready to purchase the whole building and that no other person should purchase the same. The learned Counsel for the plaintiffs contends that as the plaintiffs are threatened with eviction in Regular Civil Suit No. 51 of 1988, they are likely to lose their present tenanted premises and in that case they will be thrown on the streets. According to him, whenever there is eviction decree against the tenant there is bound to be some hardship but the hardship in the present case which is likely to be caused to the the defendant cannot be said to be greater than the hardship that could be caused to the plaintiffs. He submitted that the family of the plaintiffs consists of two brothers, their old parents, their wives and their two children. According to him, whole of their family cannot be accommodated in part of the suit premises, which the two courts below thought fit to deliver possession to the plaintiffs. He also submits that it will not be possible for the plaintiffs to use the portion of the premises without passing through the premises in the occupation of the defendant and similarly the defendant also will not be able to use his premises without passing through the premises of the plaintiffs for approaching the latrines. Therefore, the learned Counsel Shri Thakkar contends that in the circumstances of the present case it must be held that greater hardship would be caused to the plaintiffs than to the defendant in case the decree for ejectment for the whole premises is not passed in their favour.

11. The learned Counsel Shri Patankar contends that the plaintiffs did not prefer any cross-objections as required by Order 41, R. 22 C.P.C. before the Appellate Court against the finding of the trial Court regarding division of the premises to meet their requirement of personal occupation and, therefore, he could not maintain the writ petition filed by him against the decision of the appeal Court, which dismissed the appeal filed by the tenant. The learned Counsel for the plaintiffs-landlords Shri Thakkar on the other hand contends that the decree of the trial Court was entirely in his favour and though there was adverse finding against him on the question of decree for possession of the entire premises he could not prefer an appeal and that he could support the decree of the trial Court and while supporting he could have challenged the adverse finding against him. According to the learned Counsel, the provisions contained in the amended Rule 22 of Order 41 C.P.C are enabling provisions which enable the successful party to prefer cross-objections against the adverse finding, but those provisions do not in any way preclude the successful party from challenging the adverse finding and to support the decree passed by the Court in his favour. The provisions of Rule 22 of Order 41 C.P.C. read thus :-

"22. (1) Any respondent, though he may not have appealed from any part of the

decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Explanation---A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of the respondent.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection on such party or his pleader at the expenses of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

Reading of the provisions of Rule 22 of Order 41 C.P.C. shows that by the amendment made to that section by Act 104 of 1976 the successful party has been allowed to file cross-objections against the finding recorded by the Court against him. Those provisions do not in any way preclude the successful party from supporting the decree by showing that the adverse finding on certain issue against him has been wrongly recorded by the Court below, without preferring cross-objections. Consequently, I am unable to agree with the learned Counsel for the defendant tenant that the plaintiffs-landlords who had not preferred cross-objection in the appeal Court below could not maintain the writ petition against the finding of the appeal Court which is adverse to him on the point of the premises to be delivered in possession of the plaintiffs to meet their bona fide requirement of personal occupation.

12. Today the learned Counsel Shri Patankar brought to my notice the Division Bench decision of this Court in Padmadevi Shankarrao Jadhav and Others Vs. Kabalsing Garmilsing Sardarji and Others, and contended that the landlord

having failed to file cross-objections in the appeal Court against the finding regarding the comparative hardship and for that purpose division of the suit property, could not agitate the finding on that point in the Court and they could not maintain write petition on the same point under Article 227 of the Constitution of India. The learned Counsel for the landlords Shri Thakkar, on the other hand, referred to my decision in *Punamchand Dayelal Nanwati v. Ramanlal Balubhai and others* 1988 M R C J 58 wherein I have considered the same question and after considering the Division Bench judgment in *Smt. Padmadevi Sahnkarro Jadhav v. Kabalsing Garmilsing Sardarji* relied on by the learned Counsel Shri Patankar and the Supreme Court decision in *Choudhary Sahu (Dead) by Lrs. v. State of Bihar* AIR 1982 S.C. 96 and the decision in *Sri Chandre Prabhuji Jain Temple and Others Vs. Harikrishna and Another*, indicated the law on the point at page 68 of the report thus :-

"The learned Counsel for the petitioner defendant No. 2 contends that O. XLI, Rule 22 C.P.C. was amended in the year 1976 and after the amendment of the said Rule in 1976 the position is quite different, as in view of the Explanation added to Clause (1) of Rule 22, a respondent, aggrieved by the finding of the Court in the judgment on which the decree appealed against is based, could file cross-objection against the finding recorded against him, though the ultimate decree is in his favour. The reading O. XLI Rule 22(1) C.P.C., even after the amendment, clearly shows that a respondent, though he has not appealed from any part of the decree could support the decree even on the ground which was found against him by the trial Court by showing that the trial Court should have decided that ground in his favour. The Explanation appearing after O. XLI, Rule 22(2) C.P.C. makes an enabling provision and thereby the respondent may file cross-objection against the finding recorded by the trial Court, though the ultimate decree may be in his favour. The Explanation does not in any way adversely affect the right of the respondent to support the decree on any of the grounds held against him by the trial Court by showing that the trial Court should have recorded a finding on that point in his favour. The opening sentence of O. XLI, Rule 22(1) C.P.C. clearly confers this right on the respondent. I am, therefore, unable to accept the contention of the learned Counsel for the petitioner-defendant No. 2 that the learned appellate Judge was not right, without there being cross-objection by the respondent No. 1-plaintiff, in reversing the findings on issues Nos. 2 and 3 recorded by the trial Court against the plaintiff. The plaintiff was entitled to support the decree for eviction even on the ground of bona fide and reasonable requirement of the suit premises for his personal occupation by showing that the finding on that point recorded by the trial Court was not correct. This he could do, in view of the provisions of O. XLI, Rule 22(1) C.P.C."

I see no reason to differ from the view that I have already taken in the case of *Smt. Padmadevi Shankarrao Jadhav v. Kabalsingh Garmelsing Sardarji*. The learned Counsel for the landlords-plaintiffs contends that the trial Court did not pass the decree for possession of the whole of the suit premises though he

recorded a finding in favour of the plaintiffs that the plaintiffs required the suit premises bona fide and reasonably for their occupation because at that time the learned trial Judge took into consideration that the plaintiffs were in possession of the tenanted premises and by giving him a portion of the suit premises their needs for additional premises would be fully met. The learned Counsel Shri Thakkar submits that the learned trial Judge did not take into consideration that the plaintiffs are faced with eviction from the tenanted premise because by that time the suit for eviction was not filed. He points out that the plaintiffs-landlords filed eviction suit against the plaintiffs and this fact was brought to the notice of the appeal Court and the appeal Court did take notice of the fact but the appeal Court failed to take into consideration the consequences of the plaintiffs being evicted from the tenanted premise on their requirement of the whole the suit premises. He also submits that the division of the premises by the learned trial Judge on the basis of the Commissioner's report and the map, is not at all feasible. He points out that the learned trial Judge divided the suit premises into two and granted decree for possession to the plaintiffs in respect of the northern portion shown by diagonal lines in the Commissioner's map on record page 99. According to him, the latrines for the use of the occupants of the suit premise are on the backside. i.e. to the north and in case the southern portion, by dividing the premises east-west is allowed to occupied by the defendant and the northern portion shown by diagonal lines in the Commissioner's map is given to the landlords, the defendant will have to pass through the premises of the plaintiffs for approaching the latrines and the plaintiffs will have to pass through the premises occupied by the defendant for reaching the main road on the west. He points out that the area of the room portion marked by diagonal lines in the map of the Commissioner is 10" x 11" and Padvi adjoining the said room on the north is 8" x 11". Similarly, the dimensions of the front verandah is 5" x 13", first room 10" x 10" and the second room 11"-3" x 11". He submits that if those two rooms and the front verandah are allotted to the defendant-tenant and the rear portion shown by diagonal lines in the Commissioner's map is allotted to the plaintiffs, both the plaintiffs and the defendant will be handicapped inasmuch as the plaintiffs and the defendant will be handicapped inasmuch as the plaintiffs will not be able to approach the main road without passing through the portion occupied by the defendant and the defendant will not be able to use the latrines at the back without passing through the third room and the back verandah which is proposed to be given in possession of the plaintiffs. Thus, according to him, neither of the parties will be able to use the premise without seriously jeopardising the privacy and the use of the premise of the other party. He also submits that the defendant's two sons are employed and on account of employment they are away from the defendant. He also points out that the two daughters of the defendant are also married and they are residing with their husbands. He submits that they may be visiting their father on occasions but it cannot be taken into consideration that the defendant requires premises for their occupation also. He submits that as stated by the defendant, besides himself there are with him, his old father aged more than 84 years and wife. Thus, the

family of the defendant consists of three members only. As against this, according to the learned Counsel, the family of the plaintiffs consists of two brothers (plaintiffs), their aged parents, their wives and two children. He submits that the plaintiffs are threatened with eviction from their tenanted premises and the suit premises which are proposed to be given in possession of the plaintiffs to meet their bona fide requirement of personal occupation are of the size of a room 10" x 11" and back verandah of the size 8" x 11". According to him, the members of the plaintiffs' family cannot accommodate themselves in such a small accommodation of one room and a verandah. Dimensions of the room are so small that it cannot be divided into two rooms by effecting partition and again the defendant and his family members will be passing through the premises proposed to be given in possession of the plaintiffs for reaching the latrines at the back of the premises. The learned Counsel contends that the learned appellate Judge have accepted the fact that the plaintiffs are threatened with eviction from the tenanted premise by their landlord by filing eviction suit should have considered whether the premises, proposed to be delivered to the plaintiffs by the trial Court were reasonably sufficient to accommodate the family members of the plaintiffs and whether it was possible for the plaintiffs to occupy those premises reserving the right way to the defendant to approach laterines through their premises. He submits that the failure of the learned appellate Judge to take into consideration all those the failure into the miscarriage of justice. He referred to paragraph 26 of the judgment of the Appeal Court which reads thus:-

"The evidence on record shows that the plaintiffs' claim for possession is genuine and honest. At the same time, the defendant-tenant requires the front portion of the premises. Because, front portion of the premises is being used for office purpose. The defendant-tenant has got pipe factory and the office of the said factory is in front portion of the suit premises. Therefore, taking into consideration his need and the need of the plaintiffs and having regard to the comparative hardship, the partial eviction decree passed by the learned trial Judge is perfectly legal and correct which does not require any change. The learned trial Judge has taken into account, the question of-comparative hardship having regard to the family size of both the parties and their genuine needs and has struck a balance in a proper manner. Under the circumstance, the partial eviction decree passed by the learned trial Judge, cannot be interferred with."

13. The learned trial Judge on Issue No. 3 at para 21 of his judgment observed thus :-

"It is brought on record that the defendant is running an office in the suit property of course, he has not kept the goods for-exhibition in his office. But the office is only for the correspondence and booking the orders. It is the case of the defendant that the customer book the orders and he has produced the documentary evidence on record to show that the correspondence was made him on that address. It is the case that he is staying with his wife and two daughters

and the father. His sons are well placed and are in service. It was submitted that his daughters are married always visit his house and it will be very difficult for him to vacate the suit property. He has stated that he made enquiry with different persons and the alternative accommodation is not-available at Satara. He is manufacture of cement pipe at Pathkal Matha. He has examined Prakash Chavan who happens to be a lecturer in the Medical College. He has stated out of courtesy. He treated the father of the defendant. It is, therefore, clear that if the defendant is totally evicted from the suit property, he will be put to hardship."

14. Regarding division of the property the learned Judge at para 22 at the judgment observed thus :-

"Pending hearing of the suit, Commissioner was appointed to inspect the property and the Commissioner has filed his report on record along with rough sketch of the suit property. It appears that the suit property faces south and Vharanda (sic) of 13 x 5ft. Adjacent thereto, there is a room admeasures 10 x 10 ft. and adjacent to the said room, there is another room on the northern side which admeasures 11 x 11.3 inches. Adjacent to the said room, on the northern side, there is another room, including Vharanda (sic) which admeasures 18 x 11 ft. This particular room is shown by the cross lines in the map produced by the Commissioner. In this context, the plaintiffs are already in possession of the 4 khans as the tenant. Therefore, in my opinion, if partial decree of eviction is passed, it would meet the ends of justice. On this count, if the rear room shown in the map produced by the Commissioner, by cross lines is given in possession of the plaintiffs, it would serve the purpose of the plaintiffs as well as the purpose of the defendant. In my opinion, if such partial decree on eviction is passed, no hardship is going to be caused either of the parties. Therefore, on this count. I purpose to pass a partial decree of eviction against the defendant....."

15. Reading the reasons given by the two courts below for partitioning the property, it is apparent on the face of the record that they have not taken into consideration whether such a partition is feasible and whether on such division being made, a portion allotted to the parties will meet their requirements. It is also not taken into consideration that if the plaintiffs are evicted from their tenanted premises in an eviction suit filed against them by their landlord whether the premises proposed to be allotted to them out of the suit premises will meet their requirements and whether it is feasible for the members of the family of the plaintiffs to reside with reasonable comfort in a room of the size of 10" x 11" with a verandah of the size of 8" x 11". Both the courts below have also lost sight of the fact that the defendant who is having a pipe and tiles factory and who is in affluent circumstances could afford to purchase the whole of the house and he given an advertisement to that effect. Whether such a person cannot afford to acquire another premises for his accommodation at Satara? As stated earlier, he has with him his wife and an aged father. His two sons are well placed, One is in the Army and the other is in the Customs Department and he has got departmental quarters for his residence at Bombay. Taking into consideration all

those fact which are borne out on the record. I find that there has been a serious miscarriage of justice by ordering the plaintiffs to be given possession of only a part of the premises which is of no use to them to meet their bona fide requirement of personal occupation. I am aware that in the writ jurisdiction it is not open for this Court to reappreciate the evidence and reach a different finding than the finding reached by the courts below. At the same time, it is open for the Court to pass a proper decree in case this Court finds that there has been a grave miscarriage of justice as the courts below have not taken in to consideration all the facts necessary for deciding a particular aspect of the matter. On giving anxious consideration to all the relevant facts referred to above, in my opinion, greater hardship would be caused to the plaintiffs in case a decree for eviction is denied to them and taking into consideration the requirements of the parties and the situation of the suit premises it is not feasible to divide the property and allot a portion of the same to the plaintiffs to meet their requirements of personal occupation. In this view of the matter Writ Petition No. 3692 of 1988 filed by the plaintiffs will have to be allowed.

16. I have found that the two courts below were right in decreeing the plaintiffs' claim on the ground of default in payment of rent u/s 12(3)(a) of the Bombay Rent Act. They are also right in finding that the plaintiffs require the premises reasonably for their personal occupation but they were not right in finding that part of the premises could be separated and that part if allotted to the plaintiffs would meet their requirements.

In the result, Writ Petition No. 3617 of 1988 is dismissed with costs and the rule is discharged and Writ Petition No. 3692 of 1988 is allowed with costs and the rule is made absolute.

At this stage learned Counsel for the defendant Shri Patankar applies for time for two months in orders to enable him to prefer an appeal to the Supreme Court. Shri Thakkar has no objection subject to the defendant giving an undertaking to this Court that he shall not create any third party interest and in case he does not obtain stay order from the Supreme Court within two months, he shall hand over vacant possession of the suit premises within four months from today. At the request of Shri Patankar he is granted two weeks time to file the undertaking, as proposed by Mr. Thakkar. In case the undertaking is not filed within the stipulated time, the stay shall stand vacated automatically.