

(1976) 02 BOM CK 0045

In the Bombay High Court

Case No : Special Civil Application No. 3047 of 1975

Bhaskar Digambar Choudhary

APPELLANT

Vs

Bhagwan Vishwanath Fadnis

RESPONDENT

Date of Decision : 12-02-1976

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13
Constitution of India, 1950 — Article 227

Citation : (1976) 78 BOMLR 454

Hon'ble Judges : Sawant, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sawant, J.—[After narrating the facts, His Lordship said.] It must be noted in this connection that the provisions of the second part of Sub-section (2) of Section 13 of the said Act cast a duty on the Court, before passing a decree of eviction in respect of the entire premises, to satisfy itself that no hardship will be caused either to the tenant or to the landlord by passing a decree in respect of a part of the premises only, and if it comes to the conclusion that no such hardship would be caused, then the Court has to pass a decree for eviction in respect of such part of the premises only. In other words, it is only if the Court comes to the conclusion that hardship would be caused either to the tenant or to the landlord by passing a decree in respect of a part of the premises that the Court under the provisions of Section 13(7)(g) should proceed to pass a decree in eviction in respect of the entire premises, and not otherwise. This being a, statutory enjoinder upon the Court, it is necessary for the trial Court in each case to raise an issue in terms of the said provisions, even if the parties to the proceedings have not raised the said issue. Neither the plaintiff who comes to the Court for recovery of the entire premises nor the defendant who is interested in defending the possession of the entire premises is expected to take such a plea of partial eviction for fear that that may prejudice his claim in respect of the entire premises. It therefore becomes the duty of the Court itself to raise the

issue notwithstanding that there is no such plea taken by the parties. That is the clear requirement of the said provisions of Section 13(2) of the said Act. Admittedly, the trial Court had failed to discharge its said duty and had not only not raised an issue to that effect, but had not even referred to the said provisions before passing the decree of eviction in respect of the entire suit premises....

2. As regards the reliance of Mr. Panse on the decision reported in AIR 1975 1297 (SC) in support of his opposition to the said amendment application, I may only point out that the said decision does not relate to the granting or non-granting of an amendment application to the petition filed under Article 227 of the Constitution of India. On the other hand, the said decision merely restates the principles which should govern while exercising jurisdiction under Article 227 of the Constitution of India. It was Mr. Panse's contention based on the said decision that since the power of superintendence of this Court was limited, this Court should not entertain an application for amendment which will have the effect of going into the findings of fact recorded by the Courts below. As has been, pointed out earlier, in the first instance, the provisions of Section 13(2) of the said Act relating to partial eviction are mandatory. Both the Courts below had failed in their duty to take the said provisions into account. Secondly, the appellate Court had completely ignored the application made by the petitioner on September 6, 1975 as well as the arguments advanced before it on the basis of the said provisions relating to partial eviction contained in the said Act. It is therefore not a question of the appreciation of the findings of fact recorded by the Courts below, but a question relating to an error apparent on the face of the record which has resulted in injustice to the petitioner-tenant. The principles laid down in the decision referred to by Mr. Panse will therefore be of no avail to him when he seeks to oppose the said application for amendment made by the petitioner. In the result, I find that there is no substance in the arguments advanced on behalf of the respondents for opposing the said application for amendment. On the other hand, I am of the view that in the circumstances of the case, and in the interests of justice, the said application for amendment deserves to be allowed and hence I grant the said application....

3. His Lordship then proceeded: Mr. Dhanuka's contention was that the appellate Court while giving its finding on the comparative hardship of the petitioner and the respondents, had observed that the petitioner as well as respondent No. 2 for whose occupation the suit premises were required were placed in the same degree of hardship, but since respondent No. 2 was one of the owners of the suit premises, the balance tilted in his favour. Mr. Dhanuka submitted that it was an error to hold that the ownership tilted the balance in favour of respondent No. 2. What must be proved is that the landlord would be put to greater hardship, if a decree was not passed in his favour. According to him, if both the landlord and the tenant are placed in equal hardship then under the provisions of the Bent Act, no decree for eviction can be passed in favour of the landlord. In this connection he relied upon a decision of the Gujarat High Court reported in *Ratilal Motiram v. Nathubhai* (1969) 12 Guj. L.R. 127....

4. His Lordship continued: The contention advanced on behalf of the petitioner is that the appellate Court has recorded a finding in para. 14 of its judgment that both respondent No. 2 and the petitioner were placed in almost identical circumstances but since respondent No. 2 was one of the owners of the suit premises the said fact tilted the balance in favour of the respondents. It was submitted that this finding given by the appellate Court on the point of comparative hardship was vitiated in law. It was argued that what is contemplated under the Act is that a decree for possession should be passed in favour of the landlord only if it was found that he would be subjected to & greater hardship. In other words, the contention was that if the Court came to the conclusion that both the landlord and the tenant would be subject to equal hardship, no decree for possession should be passed in favour of the landlord. The relevant provision contained in Sub-section (2) in the first part of Section 13 of the said Act is as follows:

No decree for eviction shall be passed on the ground specified in Clause (g) of Sub-section (1) if the Court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it.

5. The aforesaid provision is in the nature of a restriction on the landlord's right to get possession of the premises even when he proves his reasonable and bona fide requirements of the same under Clause (g) of Sub-section (1). It is also in the nature of a fetter on the Court's power to pass a decree of eviction against the tenant. It has therefore to be construed accordingly. So construed the said provision means that where a Court comes to the conclusion that greater hardship will be caused to the tenant by losing the premises than to the landlord by not securing them, the Court shall not evict the tenant. In all other cases the Court has power to evict the tenant. It therefore follows that where the Court finds that hardship is equal on both sides, the said restriction or fetter does not operate. For this reason, I am unable to accept the contention that the appellate Court, having come to the conclusion that the tenant and the landlord were put to equal hardship, should not have passed the decree of eviction. It is true that the appellate Court has observed that the ownership of the landlord tilted the balance in his favour, when the hardship was equal. But if I am right in my construction of the said provisions of the Act, then once equal hardship is proved on both sides, it is not necessary to tilt the balance in favour of the landlord. The decision reported in *Ratilal Motiram v. Nathubai* relied upon by Mr. Dhanuka no doubt supports his contention that in a case where the hardship is equal on both sides no decree for eviction should be passed against the tenant and the factum of ownership does not make the hardship greater on the part of the landlord. In that case the finding recorded by the Courts below was that hardship on both sides was equal but the fact that the plaintiff was the owner of the suit premises had aggravated his hardship and a decree for possession was passed in favour of the landlord. The Court observed that in the circumstances the Court had no

jurisdiction to pass a decree for eviction having regard to the provisions of Sub-section (2) of Section 13 of the said Act quoted above. With respect to the learned Judge, for the reasons stated earlier, I am unable to agree with the proposition of law stated therein. I am therefore of the view that in the circumstances, the appellate Court was not wrong in proceeding to pass the decree of eviction, although the reasons given by it for doing so, were not strictly according to the provisions of the Act. This is of course different from the enjoinder on the Court to pass a decree of eviction, only in respect of a part of the premises, in certain circumstances....

6. His Lordship concluded: For all these reasons, I am of the view that the impugned order of the appellate Court decreeing the suit of the plaintiffs in respect of the entire premises deserves to be set aside, and the matter should be remanded for reconsidering the case in the light of what has been observed above and in particular for giving effect to the provisions of the second part of Sub-section (2) of Section 13 of the said Act. Ordinarily, the matter would have been remanded to the trial Court itself for the aforesaid purpose. In view of the fact that this is likely to entail unnecessary prolongation of the proceedings, I feel that it will serve the purpose if the matter is remanded to the appellate Court. If necessary, the appellate Court may, itself record fresh evidence.

7. In the result, the petition is allowed. The impugned order of the appellate Court dated September 22, 1975 is set aside and the matter is remanded to the appellate Court for deciding the appeal in the light of what has been stated hereinabove. The rule is made absolute accordingly. In the circumstances of the case, the parties will bear their own costs.