

(2015) 08 BOM CK 0086

In the Bombay High Court

Case No : Writ Petition No. 1668 of 1996

Chhaya Sakharam Rane

APPELLANT

Vs

Shrikrishna D. Purandare and Others

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 12, 12(2), 12(2)(2), 12(3)(a)
Transfer of Property Act, 1882 — Section 106

Citation : (2015) 08 BOM CK 0086

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : Rajesh S. Patil, for the Appellant; G.S. Godbole instructed by Parag Tilak and Jai Kanade, Advocates for the Respondent

Judgement

M.S. Sonak, J—This petition is directed against decrees dated 6 August 1985 and 11 December 1995 made by the trial and the appeal Court respectively ordering the eviction of the petitioner from the suit premises on the ground of default in payment of rents.

2. The petitioner, since the year 1968 was the tenant of Block No. 5 Vithal Kripa Building, Dadar, Mumbai ("suit premises") against payment of standard rent of Rs. 83/- per month. The respondents landlords, by notice dated 27 October 1971 alleged and thereafter called upon the petitioner to pay arrears of rent between the period 1 June 1970 and 30 September 1971 (16 months) at the rate of Rs. 78/- per month; arrears towards electricity charges for the period between 1 June 1970 and 13 January 1971 at the rate of Rs. 5/- per month; and arrears towards payment of water charges for the period between 1 October 1969 to 31 March 1971. The notice dated 27 October 1971 was duly received by the petitioner, but by way of response, the petitioner merely replied that her Advocate is out of station and the matter be kept pending till the arrival of the Advocate, 15 days later. Respondent landlords instituted suit for eviction on 3 August 1973, invoking inter alia the ground contained in section 12 of the

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("Rent Act"). The suit was decreed by the trial Court on 6 August 1985 and the appeal against the same was dismissed by the appeal Court on 11 December 1995. Hence, the present petition.

3. Mr. Rajesh Patil, the learned counsel for the petitioner submitted that as per the terms of tenancy and the demand in the notice dated 27 October 1971, it is clear that in the present case rent, including in particular its component relating to water charges was not payable by the month. Accordingly, the provisions of section 12(3)(a) of the Rent Act were not at all attracted. Rather, the provisions contained in section 12(3)(b) were applicable and there is no serious dispute that the petitioner has complied with the same. In such circumstances, Mr. Patil contended that the eviction decrees made are in patent excess of jurisdiction.

4. Mr. G.S. Godbole, the learned counsel for the respondents landlords made the following submissions in support of the impugned decrees:

"(A) That concurrent findings of fact as to default in payment of rent have been recorded by the two Courts and there is no perversity in the record of the same;

(B) That liability towards payment to water charges, was not at all a component of "rent"; and in any case, even the water charges were to be paid by the month along with rent and electricity charges. The provisions of section 12(3)(a) were therefore rightly invoked by the two Courts;

(C) In any case, there is no clear evidence with regard to compliance with the conditions under section 12(3)(b) of the Rent Act."

5. The rival contentions now fall for determination.

6. At the stage when the respondents landlords instituted RAE & R Suit No. 1065/6054 of 1971 seeking eviction of the petitioner, the provisions contained in section 12 of the Rent Act, reads as follows:

"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) (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 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 increases 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 a 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 purposes of sub-section (2), reference to "standard rent" and to "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of section 11."

(Emphasis supplied)

7. Under section 12(3)(a), where the rent is payable by the month, and there is no dispute regarding the amount of standard rent and for 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 period of one month after the notice referred to in sub section (2), the Courts shall pass a decree for eviction in any such suit for recovery of possession.

8. The provisions contained in section 12(3)(b) apply to the case where rent is not payable by the month. In such a case, no decree for eviction shall be passed in any such suit for eviction, if on the first day of the hearing of the suit or on or before such other date as the Courts may fix, the tenant pays or tenders in Court, the standard rent and permitted increases then due and thereafter continue to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.

9. Thus, jurisdictional fact which determines whether the provisions under section 12(3)(a) or 12(3)(b) of the Rent Act shall apply as the fact is whether "rent is payable by the month". In the present case, there is no dispute regarding the service of notice under section 12(2). There are concurrent

findings of fact as to arrears of rent for a period of six months or more and the tenants neglect to clear the same within a period of one month from the date of receipt of notice under section 12(2)(2). Therefore, the crucial issue to be determined is whether, in the present case, rent was "payable by the month"? If rent was payable by the month, then no case is made out to interfere with the concurrent decrees for eviction. If not, the further question would arise about compliance with the conditions prescribed under section 12(3)(b) of the Rent Act.

10. There is no tenancy agreement produced on record, from which the terms of tenancy can be easily discerned. 1947 Act, as it then applied, had not defined the term "rent". However, section 5(10) had defined the term "standard rent" to mean the standard rent as may be fixed by the Court and the Controller under the previous rent legislation; or when standard rent is not fixed, subject to the provisions of section 11, the rents at which the premises were let out on the dates specified in sub clause (b) and in any other case, the rent fixed by the Court under section 11 of the Rent Act. Section 11 of the Rent Act empowers the Courts to fix the standard rent and the permitted increases in certain specified cases. All these provisions, do not directly assist in the determination of the various components which may constitute rent and the circumstances in which it can be said that the rent is payable by the month.

11. Mr. Patil, in the present case, by placing a considerable emphasis upon the respondents landlords notice dated 27 October 1971 has contended that "rent" in the present case included monthly rent of Rs. 78/-; electricity charges at the rate of Rs. 5/- per month and water charges, which were never payable on monthly basis. In such circumstances, Mr. Patil submitted that since one of the components of "rent" i.e. water charges were not payable on monthly basis, this is not a case where "rent" was "payable by the month" and therefore the provisions contained in section 12(3)(a) were not at all attracted. In this regard, Mr. Patil placed reliance upon the judgment of the learned Single Judge of the Gujarat High Court in the case of Hasmukhbhai Shanabhai Patel v. Manjulaben Ambalal Shah 1996 Bom. R.C. 125, Sidramappa Basappa Atnure v. Jayanarayan Motilal Bhattad 1992 Bom. R.C. 25 , Smt. Hanjabi Ratanchand Solanki and Others Vs. Smt. Kanugabai Hansraj Jain and Others, (2011) 2 ALLMR 20 : (2011) 2 BomCR 10 and Awabai Muncharji Cama and Others Vs. M.N. Kaka, (1987) 3 BomCR 338 .

12. In the case of Sidramappa (supra) notice dated 31 July 1979 under section 12(2) of the Rent Act, made following demands upon the tenant

- "(a) Standard rent at the rate of Rs. 91/- per month;
- (b) Education cess at the rate of Rs. 10/- per month;
- (c) Projection fees at Rs. 6.25 per annum."

As the defendant tenant did not comply, suit was instituted on 17 October 1979 claiming possession on the ground of default in payment of rent. The trial Court

as well as the appeal Court issued decrees for eviction. In the petition instituted by the tenant however, this Court noted that the demands towards education cess and projection fees in the notice under section 12(2) of the Rent Act, were obviously not towards amounts "payable by the month". Therefore, it was held that the case would fall under section 12(3)(b) and not section 12(3)(a) of the Rent Act which were in applicable. This Court, on the basis of material on record further held that there was failure on the part of the tenant to comply with the conditions prescribed under section 12(3)(b) of the Rent Act and therefore, although the case did attract the provisions of section 12(3)(b), in the absence of compliance with the conditions prescribed therein, the tenant could get no benefit and the eviction decrees warranted no interference. What is crucial in this ruling however is that the amounts towards education cess and projection fees were regarded as components of "rent" and since such components were not payable by the month, it was held that rent was not payable by the month so as to attract the provisions contained in section 12(3)(a) of the Rent Act.

13. In the case of *Awabai Cama (supra)*, the learned Single Judge of this Court held that education cess is a part of rent and since education cess is not payable every month, rent would not be deemed to be payable "by the month" irrespective of the fact that the amount of cess, in proportion to the rent was quite insignificant. On these basis, it was held that provisions of section 12(3)(a) of the Rent Act would not be attracted to a case where demand was made for standard rent and education cess particularly when it was established that education cess was not payable on monthly basis. In this case, the Court noted that neither in the demand notice nor in the pleadings was any case made out or plea raised that though the education cess component was payable by yearly basis by the landlord to the authorities, there was some agreement between the landlord and the tenant that such component be paid by the tenant to the landlord in equal monthly instalments. This decision, is an authority for the proposition that the pleadings are necessary, if the landlord seeks to urge such a plea, where expressly one of the components of the rent is not payable on monthly basis.

14. In the case of *Raju Kakara Shetty Vs. Ramesh Prataprao Shirole and Another*, (1991) 1 JT 128 : (1991) 1 SCALE 26 : (1991) 1 SCC 570 : (1991) 1 SCR 51 : (1991) 1 UJ 356 , upon which reliance was placed by Mr. Godbole, the Supreme Court, in the context of the Rent Act (as applicable to the State of Gujarat) has held that education cess could be covered by the definition of "permitted increase" in section 5(7) of the Rent Act and therefore, can be regarded as a component of "rent" for the purposes of section 12 of the Rent Act. The Apex Court also held that though the education cess is generally payable by the landlord annually under the Maharashtra Education (Cess) Act 1962, the parties by agreement can quantify the amount of cess to be paid on month to month basis by the tenant, provided that the amount is not exceed to the cess liability of the landlord. Thus, where parties mutually quantify the cess amount payable by the tenant to the landlord on monthly basis, the rent can be taken as

"payable by the month" within meaning of section 12(3)(a) of the Rent Act.

15. In order that the decision in the case of Raju Shetty (supra) is of assistance to Mr. Godbole, there should have been some pleading to the effect that there was some agreement between the parties to pay the water charges on monthly basis. There are no such pleadings in the plaint. Even the demand notice under section 12(2) does not suggest any such case. On the contrary, both in the demand notice as well as in the plaint, the respondents landlords have treated the components of standard rent and electricity charges as payable by the month and there is no such reference when it comes to payment of water charges. This Court, in the case of Hanjabai Solanki (supra), has distinguished the decision of the Apex Court in the case of Raju Shetty (supra) by observing that the demand notice inter alia contained demand for education cess and there were no pleadings as to existence of any agreement to pay the education cess monthly along with the rent, then the provisions of section 12(3)(a) would not be attracted. Similarly, in the case of Hasmukhbhai Patel (supra), notice under section 12(2) of the Rent Act (as applicable in the State of Gujarat) made demands for standard rents as well as taxes. It was held that since the amount of tax was not payable by the month, the provisions of section 12(3)(a) were not attracted.

16. Mr. Godbole, however attempted to defend the impugned orders by urging that the component water charges was not a part of the rent. The demands for the amounts of electricity charges and water charges were not composite, rather, the same were separately demanded. In any case, Mr. Godbole submitted that there are certain admissions in the course of the evidence, which suggest that there was an agreement between the parties that even water charges are payable by the month along with rent. Mr. Godbole submitted that the appeal Court has rightly taken cognizance of such admissions and on the said basis applied the law laid down by the Apex Court in the case of Raju Shetty (supra).

17. The trial Court, in the present case has merely recorded a conclusion that case is covered under section 12(3)(a) without any discussion on the jurisdictional issue as to whether the rent in the present case was payable by the month. The appeal Court, on the other hand, whilst saying that it is not necessary to go into finer aspect as to whether rent was indeed payable by the month or not, has in paragraph 22 of the judgment and decree dated 11 December 1995 conceded that municipal Taxes (by which the appeal Court, according to the submission of the learned counsel for both the parties, refers to water charges) are not payable by the month. The appeal Court, however, proceeds to hold that as per the oral evidence and the rent receipts, even the amount towards municipal taxes (sic) was agreed to be paid every month and there was prolonged practice in this regard. The reasoning of the appeal Court as contained in paragraph 22 reads thus:

"22. In our opinion, however, it is not necessary for us to go into the finer aspect of this matter here. In so far as the matter at hand is

concerned, in dealing with the ground of actionable rental arrears, it will have to be said that the municipal taxes are not payable per month. But than this is not at all in so far as the parties are concerned. This is because as already mentioned above in oral evidence as well as in the rent receipts, it quite clearly appears that a particular amount was agreed to be paid every month and by the prolonged practice that cannot seem to have happened in so far as the matters between the parties are concerned. As already noted above, the demand notice, the reply did not elicit any effective reply as such except what was mentioned in Ex. B, Hari there has been anything else to be said by the tenant in this regard one should have expected the response to the effect that there was an agreement in the nature of separate payment of rent and municipal taxes. In the written statement also, no such averment was initially made. Taking there factors into account, in our view it can be safely concluded that in so far as the present facts are concerned, they had arrived into an agreement whereby the municipal taxes and rent were to be paid very month, by the tenant."

18. It is not possible to sustain the aforesaid reasoning or finding, particularly as neither in the demand notice under section 12(2) nor in the plaint, was any case set out with regard to any agreement or arrangement between the parties for the payment of water charges on monthly basis. As has been held by this Court in the case of Awabai Cama (supra), it is necessary for a landlord to at least plead that there was some agreement between the parties for payment of taxes or cess, which is normally payable annually, on monthly basis. In the absence of any pleadings, there is no question of reference to any evidence on this aspect. Further, even the evidence is by no means categorical. The evidence on the aspect of any such agreement or arrangement is quite confusing and in the absence of any pleadings, no finding could have ever been recorded as to the existence of such prolonged practice or arrangement. Besides, such finding recorded that appellate Court is not concurrent, because the trial Court had not adverted to the issue as to whether rent in this case was indeed payable by the month.

19. Although, in the exercise of writ jurisdiction, there is no question of re-appreciation of the evidence on record, since, Mr. Godbole made reference to some portions of the depositions, in order to justify the finding/reasoning of the appeal Court, it is necessary to advert to the same, howsoever briefly.

20. Mr. Godbole, in particular, emphasised upon the deposition of Mrs. Chhaya Sakharam Rane (petitioner), in which, she has stated that the electricity and water charges were to be paid along with the rent. This is too slender premise to conclude that there was some agreement or arrangement between the parties to pay the water charges on monthly basis. Soon after the statement that electricity and water charges were to be paid along with rent, Mrs. Rane has deposed that water charges were to be paid to the landlords as per the water bill given by the BMC. Then again, the respondent -landlords in his deposition has stated that there were two water meters for supply of water in the suit premises. The water charges were distributed amongst all the tenants in proportion of their rent. After

the water bills were received from the BMC, the landlord would work out the share of each tenant and inform them. Significantly, the landlords deposed that the water bills were sometimes received quarterly and sometimes half yearly. The bills for the period from 1 October 1969 and 31 March 1971 (is the period referred to in the demand notice as well as in the plaint) were received quarterly. If therefore, the evidence is read and appreciated in its entirety, no such agreement or arrangement for payment of water charges on monthly basis can at all be curled out. Rather, from the deposition of the landlord, it does appear that water bills were received from the BMC quarterly or half yearly basis. Thereafter, the landlord would determine the proportionate share of each tenant and recover such share at the time of collection of the rent. From the questions posed on behalf of the landlord during the course of cross-examination, it further appears that it was the case of the landlords that water charges and electricity charges constitute the components of the rent. Clearly therefore, the finding recorded for the first time by the appeal Court and that too, without there being any pleadings as to the existence of any agreement or arrangement for payment of water charges on monthly basis, is based on no evidence or in any case contrary to the weight of evidence on record.

21. The trial Court, has not at all adverted to the jurisdictional fact as to whether or not the petitioners were tenants required to pay the rent by the month. The appeal Court, whilst conceding that water charges were included in the component of rent and further such water charges were not payable by the month has, nevertheless, invoked the provisions in section 12(3)(a) on the basis that there was some agreement or arrangement between the parties that even water charges were payable by the month. Such findings are perverse. There were no pleadings whatsoever to this effect. The evidence on record also does not sustain the existence of any such agreement or arrangement. In any case, the finding is totally contrary to the weight of evidence on record. The expression "no evidence" is not to be interpreted in a literal or pedantic manner. Where the material on record is not reasonably capable of sustaining a finding or where the finding is contrary to the weight of evidence on record, or where relevant and vital material has been totally excluded from consideration, case of "no evidence" is made out. Accordingly, in the absence of any material that this was a case where rent, which includes the water charges, were payable by the month, no eviction orders could have been made by resort to the provisions contained in section 12(3)(a) of the Rent Act.

22. Mr. Rajesh Patil submitted that in the present case the petitioners have deposited the standard rent and permitted increases then due and have thereafter continued to pay in the Court regularly the rent and permitted increases during the pendency of the suit. The deposit was made before the first hearing in the suit and therefore, in terms of section 12(3)(b) no decree of eviction could ever have been made. On the other hand, Mr. Godbole submitted that though rents may have been deposited by the petitioners, the material with regard to the precise date of first deposit and likelihood of further deposits, is by

means clear. Mr. Godbole submitted, quite rightly, that the two Courts having not adverted to the provisions contained in section 12(3)(b), there is no discussion in the two orders on the aspect of compliance with the conditions under section 12(3)(b). In these circumstances, it will be appropriate if the matter is remanded to the appeal Court for determining whether or not there has been compliance on the part of the petitioner with the conditions in section 12(3)(b) of the Rent Act. If there is compliance, then obviously, decree for default in payment of rent may not be competent. If however, there is no compliance, then a decree for eviction shall have to be made.

23. Accordingly, the impugned decrees are set aside. The matter is however remanded to the appeal Court for determination as to whether the petitioner in the present case has complied with the conditions prescribed under section 12(3)(b) of the Rent Act. If the appeal Court is satisfied that there has been compliance, then the appeal Court shall dismiss the suit for eviction instituted by the respondents landlords. If however, the appeal Court is satisfied that there has been no compliance with the conditions prescribed under section 12(3)(b) of the Rent Act, the appeal Court shall make a decree for eviction of the petitioner from the suit premises. The appeal Court is directed to dispose of the proceedings expeditiously and in any case within a period of six months from the date of production of authenticated copy of this order. The parties to appear before the appeal Court on 12 August 2015 at 11.00 a.m. and produce authenticated copy of this order.

24. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

25. All concerned to act on basis of authenticated copy of this order.