

(1993) 02 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 1420 of 1982

Kanti Bhattacharya and Others

APPELLANT

Vs

K.S. Parmeshwaran, Another

RESPONDENT

Date of Decision : 23-02-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3), 5(11)

Citation : (1994) 3 BomCR 100

Hon'ble Judges : Bhimrao N. Naik, J

Bench : Single Bench

Advocate : M.D. Angal, for the Appellant; K.C. Nichani and P.L. Nain for respondents 1 and 2, for the Respondent

Judgement

Bhimrao N. Naik, J.

1. This is a petition under Article 227 of the Constitution of India which seeks to challenge the judgment and decree passed against the petitioners on the ground of non-payment of rent under the provisions of the Bombay Rent Act.

2. Few facts which are relevant for the purpose of this petition are as follows:

3. One K.K. Bhattacharya the father of the present petitioners and the husband of original defendant - Smt. Usha Rani Devi, was admittedly the tenant of Block No. 1, Bhaskar Bhuvan, Plot No. 222, Sir Bhalchandra Road, Matunga, Bombay 19. Respondents Nos. 1 and 2 are the landlords. K.K. Bhattacharya died on 21st December, 1966, leaving behind his wife Usha Rani Devi and the present petitioners and one deceased Geeta. It appears that at the time of the death of K.K. Bhattacharya all the petitioners including deceased Usha Rani Devi was residing in the suit house as the members of his family. It is not in dispute that the rent was paid by Usha Rani Devi and on some occasions by petitioner No. 3. It is also not in dispute that the rent receipts which was issued in the name of K.K. Bhattacharya was not transferred in the name of any of the members of the

tenant's family but continued to be in the name of deceased K.K. Bhattacharya.

4. Since no rent was received from 1st September, 1969 on 19th August, 1970 the respondents sent notice of demand both under registered A.D. and under certificate of posting, to Smt. Usha Rani Devi. The notice was a composite notice, one of terminating the tenancy and the notice of demand of arrears. The notice clearly pointed out that Smt. Usha Rani Devi was a tenant of block No. 1 and she was most irregular in payment of rent and she was in arrears of rent from September, 1969 to July, 1970, amounting to Rs. 464.20. In the last but one paragraph of the said notice they demanded arrears of rent amounting to Rs. 426.20, Rs. 35.42 for building repair cess and Rs. 138.85 for electricity charges and Rs. 80/- for operating the pump. It is not in dispute that this notice of demand and notice of termination was received by deceased Usha Rani Devi.

5. Since as per the demand the possession was not handed over, the respondents filed R.A.E. Suit No. 5153 of 1970 for possession against the deceased Usha Rani Devi. It is important to note that even in the suit, it was specifically the case of the respondent that plaintiffs are the landlords and the deceased - defendant - Usha Rani Devi was the tenant, until the termination of her tenancy. It is mentioned in the said plaint that though deceased Usha Rani Devi received the said notice of demand on 21st August, 1970, the amount was not sent by her. Thus it was their case that they are entitled to get possession under the provisions of section 12(3)(a) of the Rent Act. The suit was filed on 8th October, 1970.

6. The suit was contested by deceased - defendant Usha Rani Devi who filed her points of defence on 17th February, 1971. She denied the proper termination of the tenancy. She also denied proper service of notice to quit. She pointed out that the rent demanded in the suit is excessive and unreasonable and is more than the standard rent. She pointed out that there is a dispute about the standard rent and permitted increases. She denied that she ever agreed to pay for operating the Booster pump which the plaintiffs put up when they constructed a third floor to the building at the rate of Rs. 10/- per month from 1-12-1969. In paragraph 7 of the points of defence it was deceased Usha Rani Devi's specific case that on receipt of the notice to quit she approached plaintiff No. 1 through her son and complained about the excessive and illegal demand and charges and raised a dispute regarding the rent and other charges and offered to pay the standard rent together with permitted increases, which the plaintiffs denied to accept. It is important to note that in the points of defences filed by deceased Smt. Usha Rani Devi she showed her readiness and willingness to pay the standard rent.

7. After these points of defences were filed the case went for trial. It is also clear from the facts that subsequent to the filing of this suit in the year 1970 one more suit bearing Suit No. 6030 of 1972 was filed for recovery of certain dues against the deceased Usha Rani Devi which was subsequently withdrawn. In that suit petitioner No. 3 signed on behalf of deceased Usha Rani Devi in the consent

terms which were filed.

8. Subsequently on 15th May, 1975 Usha Rani Devi died. After her death the plaint was amended and the present petitioners were brought on record as her heirs and legal representatives. It appears that heirs were brought on record on 5th December, 1975. Thereafter the case proceeded on 14th June, 1978 and 15th June, 1978. Both the plaintiffs and defendant No. 3 were examined. Additional defence was filed on 21st June, 1978. The additional defence is as follows:

"Say that the tenancy of the defendants have not been duly terminated, in as much as no notice to quit has been addressed to them as the heirs of the deceased, K.K. Bhattacharya. Hence say that the notice to quit dated 18-8-1970 addressed to deceased defendant is bad in law and does not operate to terminate the tenancy of these defendants."

In view of this additional defence issues were framed and one of the issue framed is issue No. 5a., which is to the following effect:

"Whether the quit notice addressed to deceased defendant is bad in law and does not operate to terminate the tenancy of the present defendants ?"

9. The learned Judge Small Cause Court framed as many as 7 issues and inter alia, it was held that the deceased defendant was in arrears of rent from 1st September, 1969 to 30th September 1970, for more than 6 months at the time of notice of demand. It was also held that deceased - defendant was in arrears of repair cess from 1st January, 1970 to 30th September, 1970 and thirdly it was also held that deceased defendant was in arrears agreed water pump dues from 1-12-1969 to 30-9-1970. It was also held that the deceased defendant was also in arrears of electricity charges from 1-9-1969 to 30-9-1970. Further on issue No. 5 a finding was recorded that the tenancy of deceased defendant was properly and validly terminated by notice to quit dated 13-8-1970 and the said notice was properly served on deceased - defendant. On additional issue No. 5a the finding was recorded that the quit notice addressed to deceased defendant is valid and the same is binding on the present defendants and it does operate to terminate the tenancy of the defendants. In view of this it was held that the respondents were entitled to get a decree for possession.

10. Being aggrieved dissatisfied by the aforesaid order the petitioners filed Appeal No. 447 of 1978 before the Division Bench of the Small Causes Court. The learned Counsel appearing for the petitioners did not argue on the question of validity of the notice to quit inasmuch as in accordance with the law laid down by the Supreme Court, no notice to quit was necessary. However, he argued and pointed out that notice of demand u/s 12(2) of the Bombay Rent Act is not legal and valid. It was argued by the learned Counsel that after the death of K.K. Bhattacharya on 21st December, 1966, all the defendants including deceased Usha Rani Devi became the tenants of the plaintiffs in respect of the suit premises and the rent receipt continued to be in the name of deceased K.K.

Bhattacharya and, therefore, it was argued that the plaintiff had no right to choose only one heir according to their wish and file a suit against deceased Usha Rani Devi at the exclusion of other heirs and legal representatives of K.K. Bhattacharya. In effect it was the main contention of learned Counsel before the Small Causes Court that after the death of K.K. Bhattacharya all the seven defendants who were subsequently made parties to the suit as also Usha Rani Devi (deceased) has also become the heirs and legal representatives of said K.K. Bhattacharya and they were entitled to inherit the right of tenancy. Since the plaintiffs chose to address the notice of demand to deceased Usha Rani Devi who was the widow of K.K. Bhattacharya alone the notice was invalid qua the other heirs and it cannot bind the other heirs. However, the Division Bench refused to accept this submission made by the learned Counsel on behalf of the plaintiffs and confirmed the finding recorded by the trial Court and thus dismissed appeal by judgment and order dated 27th April, 1982.

11. Being aggrieved and dissatisfied by the aforesaid judgment and decree the petitioners have filed the present petition under Article 227 of the Constitution of India.

12. Shri M.D. Angal, learned Counsel for the petitioners submitted that the courts below have fully misconstrued the provisions of section 5(11)(c). He pointed out that section 5(11)(c) as unamended stood as follows :

Section 5(11)(c) : "any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court."

It was argued by Shri Angal that in view of the provisions of section 5(11)(c), as unamended, all the members of the tenant's family, residing with him at the time of his death get a right to become the tenant. All the members get potentiality to acquire the tenancy right and such acquisition of the tenancy right is subject to following two conditions; firstly, if there is an agreement amongst the members of the tenant's family, then as per the agreement the person concerned becomes the tenant and secondly, in the absence of such an adjudication the Court has to exercise its power u/s 5(11)(c) and give a declaration about the tenancy in favour of one of the members of the tenant's family, taking into consideration several factors. It is contended on the basis of this plain reading of section 5(11)(c) that K.K. Bhattacharya died on 21st December, 1966, and at the time of his death, it is not in dispute, that all the defendants, joined as legal representatives, including the present petitioners were residing in the suit property as members of the tenant's family at the time of his death. Therefore, according to Shri Angal, each one of them had acquired the potentiality of becoming a tenant and in the present matter there is no agreement arrived at between the members of the tenant's family and neither Court has adjudicated upon the rival claims of the members of the tenant's family and even the rent receipts continued to be in the name of deceased K.K. Bhattacharya. In view of this it is difficult to hold that Usha Rani Devi was alone the tenant, and a notice of demand served upon her is binding upon the other

members of the tenant's family. Thus he pointed out that no decree can be passed against the other members of the tenant's family in the absence of any agreement or adjudication and thus the decrees passed by the courts below are contrary to the provisions of section 5(11)(c) and they deserve to be quashed and set aside and the plaintiffs' suit ultimately is required to be dismissed.

13. Mr. Angal, in addition to this pointed out the inference of an agreement drawn by the courts is not borne out by the evidence on record. In fact the evidence is otherwise. He tried to rely upon the amended written statement and pointed out that as per the amended written statement it was the contention of the petitioners that notice of termination which is addressed only to deceased - Usha Rani Devi is not binding upon them and hence it is bad in law and the decree passed on such notice ultimately deserves to be set aside.

14. As against this Miss Nichani, learned Counsel appearing for the respondents contended that since the two courts below have inferred an agreement amongst the members of the tenant's family and there are quite a few circumstances which are brought on the record which are consistent with the case of an agreement as contemplated u/s 5(11)(c), notice of demand served on deceased Usha Rani Devi was fully justified. She contended that no doubt it is true that rent receipt continued in the name of deceased tenant K.K. Bhattacharya. It is also no doubt true that there was no communication of any agreement by the members of the tenant's family. However, she pointed out that an agreement which is required u/s 5(11)(c) need not be in writing. It can be inferred on the basis of the conduct of the parties and it can also be inferred on the basis of several other circumstances. She pointed out that it is not in dispute that after the death of original tenant K.K. Bhattacharya the rent was paid by Usha Rani Devi. Alongwith Usha Rani Devi all the members of the tenant's family, including the present petitioners were residing in the suit house and to their knowledge rent was tendered by Usha Rani Devi. She received the notice of demand and notice of termination at the suit premises where everybody was residing. In the notice landlord has addressed her as a tenant. This notice though it was received by Usha Rani Devi, she had not replied to the same. Secondly, Miss Nichani pointed out that it would be reasonable to presume that the contents of this notice is known to all the members of the tenants family who were residing in the said suit premises. She further contends that after the receipt of the notice since the possession was not delivered suit was filed against deceased Usha Rani Devi and the summons was also served on the address at the suit premises, where every member of the tenants' family was residing, including the present petitioners. So she argues that everybody would have a knowledge that a suit is filed against their mother who was widow of K.K. Bhattacharya. The written statement filed to the suit by deceased Usha Rani Devi makes this position quite clear. There is no denial of the fact in the said written statement filed by Usha Rani Devi that she is not alone the tenant. In fact she has denied any agreement regarding tenancy and she contended that she is ready and willing to pay rent and in fact in paragraph 7 it was pointed out by Usha Rani Devi that on her

behalf her son approached the plaintiff No. 1 and complaint about the excessive and illegal demand and charges and the dispute regarding the rent and other charges was raised. This clearly goes to show that even the son of Usha Rani Devi acted on behalf of her.

15. Miss Nichani further pointed out that after this the trial proceeded, evidence of the plaintiff was over and subsequently on 21st June an additional written statement is filed in which the only contention that is raised is that, since the notice to quit is addressed only to Usha Rani Devi and since it has not been addressed to them the said notice is bad. She emphasised the fact that nowhere it is contended in the additional written statement that since there is no agreement as contemplated u/s 5(11)(c) the suit filed against Usha Rani Devi and the notice of demand served on her is not binding upon them. Such a specific plea is not raised at all. In view of this she argues and points out that in any event this Court should not interfere with the concurrent finding recorded by the courts below to the effect that Usha Rani Devi was the tenant within the meaning of section 5(11)(c) and the notice of demand served upon her is binding upon the legal representatives and thus this Court cannot interfere under Article 227 of the Constitution of India.

16. Miss Nichani relied upon the decision in the case of Ramabai v. Jayaram Sharma, reported in 65 Bom. L.R. 647 and contended that the position of the members of the tenants family who were residing at the time of the death of the tenant is that it is a joint occupancy tenancy. She contended that notice to one tenant is notice to all and hence notice given to Usha Rani Devi is notice to the other members of the tenant's family, since it was a joint occupancy tenancy and the concept of tenancy, whether it is common or joint tenancy is wholly irrelevant for the purpose of understanding tenancy covered by the provisions of Rent Legislation. She also relied upon the decision in the case of H.C. Pandey Vs. G.C. Paul, , and pointed out that service of notice u/s 106 on one of the joint tenant who acted on behalf of others is sufficient.

17. As against this Shri Angal placed reliance upon the decision in the case of Textile Association (India) Bombay Unit Vs. Balmohan Gopal Kurup and another, , and he pointed out that in this case the Supreme Court refused to rely upon AIR 1898 S.C. 1470 (supra) as also in the case of Kanji Manji Vs. The Trustees of The Port of Bombay, , and pointed out that as a matter of fact the Supreme Court has held that every member of the tenant's family in the absence of an agreement is required to be joined as party defendant to the suit. He also pointed out that the two decisions cited by Miss Nichani are not applicable in the present matter because they were only considering the provisions of section 106 of the Transfer of Property Act and they were not considering the provisions of section 5(11)(c).

18. After hearing the rival contentions of the parties I am inclined to accept the submission of Miss Nichani. I am inclined to hold that u/s 5(11)(c) an agreement need not be in writing. An agreement amongst members of the tenant's family can be inferred on the basis of the conduct of the parties and in this matter Miss

Nichani was justified in contending that after the death of K.K. Bhattacharya for a period of almost 4 years Usha Rani Devi who was his widow went on paying rent, the suit notice was served on the address where all the members of the tenants family were residing and therefore it was reasonably presumed they would know that their mother has received a notice of demand, so also it is reasonable to hold that when the suit notice was served upon the suit premises where every member of the tenant's family was residing was aware of the filing of the suit against their mother. Notwithstanding this nobody raised any objection till they were brought on record as legal heirs or legal representatives. Even the objections raised is so cryptic that nowhere it is contended by them that there were no agreements arrived at by them amongst the members of the tenant's family.

19. The emphasis laid by Miss Nichani in the written statement filed by deceased Usha Rani Devi is worth noting. She had not denied that after the death of her husband she was paying the rent. She had not denied that after the receipt of the suit notice she had sent defendant No. 3, the present petitioner No. 3 to inform the landlords that they are not agreeing with the increased charges regarding the standard rent and pump house charges etc. She did also not dispute that petitioner No. 3 acted on her behalf. Thus Miss Nichani points out that from the evidence as well as from the defence taken in the written statement by Usha Rani Devi it can be inferred that an agreement was entered into in the tenant's family and it was agreed by all the members of the tenant's family that after the death of her husband Usha Rani Devi as the widow was agreed to be treated as tenant of the suit premises to the knowledge of everybody else. The emphasis placed by Shri Angal on the rent receipt being continued in the name of the deceased K.K. Bhattacharya help the petitioners, in as much as it is not even the landlords case that any agreement was communicated by the members of the tenants family but the landlord's inferred an agreement, since for a period of 4 years, the evidence discloses, that Usha Rani Devi went on paying rent. Even on some occasion defendant No. 3 tendered rent on her behalf. This necessitated the plaintiffs to file suit against Usha Rani Devi and since these circumstances are clinching circumstances which are relied upon by the two courts below, I am also inclined to accept the same and on the face of the discussions above I intent to hold that from the various circumstances narrated above there was an agreement between the members of the tenant's family and Usha Rani Devi was treated as the members of the tenant's family and therefore the notice served upon her is binding on all the members, because every members of the tenant's family cannot be a tenant and only member of the tenant's family, either by an agreement or by a declaration by a Court of law can be a tenant.

20. In view of the findings recorded by the two courts below which is accepted by me, I need not go to the other question raised by the petitioners and the respondents regarding the concept of tenancy in common and the joint tenancy. Though Shri Angal tried to rely upon Textile Association (India) Bombay Unit Vs.

Balmohan Gopal Kurup and another, , since all the facts were not stated in the judgment, I called for the original copy of the petition in the Court and from the petition I could verify and find out that the person against whom the suit was instituted was not residing in the suit premises as a member of the tenant's family at the suit address. In fact he was residing somewhere else. The landlord filed the suit for eviction on the ground of bona fide requirement and default in payment of rent. The suit was decreed *ex parte* against the son and decree was put into execution and the possession was recovered by the landlord. The matter went to Supreme Court which arose as a result of the dispute raised by the other members of the tenant's family, viz., the widow and son who were not only the heirs of the tenant but who were members of the tenant's family residing at the suit address at the time of death of tenant who were not joined as party defendants and therefore in fact under the circumstances the suit was not instituted or filed against the tenant. Thus it was held that u/s 5(11)(c) the landlord cannot choose amongst the members of the tenant's family who is not residing at the time of the death along with the tenant. Therefore in the facts of that case the decree and order passed by the Supreme Court appears to be correct. The question that arose before me is totally different. I see no substance in this petition. I therefore reject the petition, discharge the rule. In the circumstances there will be no order as to costs.

At this stage Shri Angal for the petitioners applies for 8 weeks time. The petitioners are granted 8 weeks time to approach the higher Court. However, this is on the condition that they shall not transfer or create any third party interest in the property and will furnish a list of persons in occupation as of today to the respondents within a week from today.

Certified copy expedited.