

(1999) 09 GUJ CK 0010

In the Gujarat High Court

Case No : Civil Revision Application No. 877 of 1980

Maganlal Chimnaji

APPELLANT

Vs

Prajapati Samiji Himatji, Decd thro: His Heris and L.R.

RESPONDENT

Date of Decision : 09-09-1999

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 29(2)

Citation : (2000) 1 GLR 336

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Advocate : M.C. Bhatt, for the Appellant; K.B. Padia, for the Respondent

Judgement

Y.B. Bhatt, J.—This is a revision u/s 29(2) of the Bombay Rent Act at the instance of the original defendant-tenant.

2. The respondent-landlord as plaintiff sued the defendant-tenant under the provisions of the Bombay Rent Act for a decree of eviction on a number of grounds, inter alia that the tenant had made permanent alteration in the premises let out to him, that the tenant had illegally sublet the premises in question, and that the tenant was in arrears of rent for 6 months and more.

3. The trial court after recording evidence and hearing the parties, dismissed the suit on the first two grounds, found that the case of the landlord was covered u/s 12(3)(b) of the Rent Act, that the landlord-plaintiff had proved that the tenant was in arrears of rent for 6 months, and that he had not been reasonably regular in depositing the rent and had furthermore not deposited the amount then due and payable on the date of the first hearing of the suit (the date of framing of issues) and therefore, passed a decree for eviction.

4. The defendant-tenant thereupon preferred an appeal u/s 29(1) of the Bombay Rent Act. The lower appellate court obviously was only required to consider the validity of the decree passed against the tenant on the ground of arrears of rent, u/s 12(3)(b) of the Rent Act. The lower appellate court after appreciating the

evidence on record, confirmed the decree of eviction.

5. Hence the present revision.

6. Learned counsel for the petitioner-tenant in the first instance challenged the validity of the suit notice u/s 12(2) of the Rent Act which is at exh. 60. It may be noted here that although this was a specific contention raised by the tenant in the suit resulting in a specific issue being framed by the trial court, and after appreciating the contentions of the tenant, the trial court came to a conclusion that the suit notice was legal and valid.

7. It appears that this contention was either not raised or not pressed in appeal, but is sought to be urged in the present revision.

8. I am not inclined to dismiss this contention on the ground that the same was not raised or pressed in appeal, inasmuch as the same goes to the root of the matter namely the basic jurisdiction of the court to entertain the suit. Obviously, the court would not have jurisdiction to entertain the suit unless the suit notice complied with the requirements of section 12(2). For this reason, I have heard the learned counsel for the petitioner on this contention.

9. Learned counsel for the petitioner challenges the validity of the suit notice on a number of grounds, which are in the nature of mixed grounds and cannot conveniently be dealt with independently or separately. In this context however, it is urged that the suit notice at exh.60 is vague, not precise, that the same does not contain any specific and quantified demand of rent, that the same also contains the demand for future rent after termination of the tenancy, that on true and correct interpretation of the suit notice, the landlord has himself granted time to the tenant to pay the rent demanded by 31st August, 1971, and that therefore, the tenancy would be deemed to have terminated on 31st August, 1971 and consequently, the claim for possession on 31st August, 1971 would invalidate the suit notice.

10. In the context of the aforesaid submissions, certain facts require to be noted as found from the record. (i) The suit notice is at exh. 60 and is issued on 15th July, 1971. (ii) The assertion in the notice is that the tenant has paid rent upto 31st January, 1971 and is in arrears of rent from 1st February, 1971 onwards and (iii) That the month of tenancy commenced on the 1st day of every English calendar month and ended on the last day of the month.

11. There is no doubt that there is ample case law on the subject as to what is vagueness in a statutory notice and what material particulars ought to have been provided by the landlord in order that the tenant has reasonable opportunity of meeting the demand.

12. It is not necessary to enter into the lengthy discussion as to the case law on this subject except to state that the notice should not be so vague as to deprive the tenant of an opportunity to comply with the same should he chose to do so. On the facts of the case, there is a clear recital in the notice that the tenant has

paid the rent upto 31st January, 1971, and that the rent is in arrears from 1st February, 1971. Thus, the tenant was made aware of his obligation to pay up the arrears of rent to be paid from 1st February, 1971 and onwards.

13. The notice was issued on 15th July, 1971, and it is the specific case of the tenant that he attempted to meet with the demand made in the notice by sending the money order in response thereto. Whether in fact, he sent the money order in compliance with the demand made in the suit notice or not is an issue which will be discussed in greater detail hereafter. For the moment, I am only discussing the case sought to be made out by the tenant in the pleadings, in his own deposition and in the case propounded by the tenant while cross-examining the landlord.

14. The tenant has put up his case firstly in his reply to the suit notice, and subsequently in his written statement, in his own deposition and in the cross examination of the landlord. In each mode of presentation of his case, the tenant has consistently averred that he had sent the money order for Rs. 131/-, being 6 months' rent at the rate of Rs. 20/- per month + Rs. 11/- being the Panchayat taxes. Thus, there cannot be any dispute, atleast as regards the case sought to be made out by the tenant, that he had sent or tried to send 6 months' rent. It would therefore appear that atleast in the mind of the tenant, even prior to the suit, there was no confusion or ambiguity as to the rent due and payable. It is for this reason, that the tenant pleaded that the rent forwarded was for 6 months i.e. from 1st February, 1971 upto 31st July, 1971. Thus, there is no vagueness or ambiguity so far as the period of rent due and payable which was understood by the tenant from the notice of demand. The mere fact that the rent had not been quantified in terms of rupees nor was it specifically mentioned in the suit notice would not make it so vague so as to become incapable of compliance. As already demonstrated above, the conduct of the tenant, as it appears from the case sought to be made out by him, did not suffer from any such alleged vagueness.

15. A further contention is to the effect that the notice is outside the scope of section 12(2) of the Rent Act because it demands future rent in respect of the month of August, 1971 and/or July and August, 1971. This contention is also not sustainable and is not based on reasonable interpretation of the suit notice. First of all, the suit notice does not demand "rent" for any specific period with reference to the date, but merely alleges that the rent is due from 1st February, 1971. Thus, when the tenant decides to comply with the same or intends to comply with the same, it was open to him to comply with only a part of the demand which according to him was reasonable and justifiable and to ignore the rest. Since the landlord has not chosen to quantify the demand in terms of rupees, it is not possible to hold in favour of the tenant by interpreting this demand to mean that the demand includes the rent for the month of July, 1971. So far as the month of August, 1971 is concerned, the word "rent" is only loosely attributable to this month inasmuch as the same would in law amount to mesne profits for use and occupation of the premises after the tenancy had been

terminated. It is pertinent to note that 31st August, 1971 is the only other date specified by the landlord in the suit notice and this too is for the limited purpose of demanding possession on the said day.

16. According to learned counsel for the petitioner, when the landlord, in the suit notice demanded possession on 31st August, 1971, and demanded that the rent due and payable on that date also be paid, it would amount to giving time to the tenant to pay up the entire rent due and payable on 31st August, 1971, and that therefore in consequence, the tenancy would in law and fact terminate only on 31st August, 1971. If this is so, the demand for possession on the same day would clearly render the notice invalid. This again is a contention without substance. As already discussed hereinabove, the reasonable interpretation on the suit notice issued by the landlord could not possibly lead to such inference. It is not possible to construe the suit notice as suggested by learned counsel for the petitioner. It is not possible to construe the suit notice to mean that the tenancy is intended to be terminated on 31st August, 1971, merely because possession is demanded on the said day, and arrears of rent together with one month's mesne profits are cumulatively demanded on the day and date on which the possession is sought. For the aforesaid reasons, I am of the opinion that the suit notice is within the parameters of law and meets the requirements of section 12(2) of the Bombay Rent Act, and the suit of the landlord therefore cannot be dismissed on the ground of an invalid notice.

17. This takes me to the next substantial contention raised by learned counsel for the petitioner. Before advertng to this contention on merits, certain facts which are not in dispute or which cannot be disputed, require to be noted.

18. The tenant as defendant in the suit had produced certain documents on record by list exh. 14, out of which we are directly concerned with mark 14/3 and mark 14/4. Mark 14/3 professes to be a written counterfoil of a money order, allegedly refused by the plaintiff-landlord. Mark 14/4 professes to be a money order receipt (the issuance receipt) which is normally issued at the time of acceptance of a money order by the post office where the same is accepted for transmission to the addressee.

19. There is no doubt that the tenant in his reply (exh. 70) to the suit notice has specifically raised a contention that he had sent the money order to the landlord which had been refused by the landlord.

20. There is also no dispute that the tenant had also raised this contention in the written statement to the effect that the rent and the taxes as demanded by the landlord in the suit notice had been sent by money order for Rs. 131/-, and that this had been refused by the landlord.

21. Furthermore, this case which has been propounded by the tenant in his reply to the suit notice as also in the written statement was consistently adhered to by the tenant in his own deposition and in the cross examination of the landlord.

22. Thus, there cannot be any controversy that both the parties were conscious of the cases put up by the other side, and particularly that the tenant's substantial defence rested on his assertion that he had attempted to meet the demands of the suit notice by tendering the amount then due and payable by way of sending a money order.

23. It is in this context that I am required to deal with mark 14/3 and mark 14/4 as documents sought to be relied upon by the tenant to prove his case. As the documents stand i.e. being merely mark 14/3 and mark 14/4, they are merely documents produced by the tenant on the record of the case, but not proved according to the rules of evidence by oral or by any other appropriate evidence. It is for this reason that they remained mark 14/3 and mark 14/4 and were not given pakka exhibit numbers.

24. It was under such circumstances that the tenant as appellant in appeal filed an application exh. 35 for tendering additional evidence, under Order 41 Rule 27 CPC. The lower appellate court for the reasons discussed mainly in para 8 of the judgment rejected the application. As a consequence of the rejection of this application, mark 14/3 and mark 14/4 could not be looked upon as evidence in the case, and the lower appellate court confirmed the decree passed by the trial court, simply by holding that the tenant had not proved his case.

25. The substantial question which is required to be considered in the present revision would be as to whether this application exh. 35 given by the tenant in appeal was rightly or wrongly rejected.

26. First of all, it must be noted that the lower appellate court did not apply its mind to Order 41 Rule 27 or to the principles which would govern such application, but has chosen to decide the application merely on its own personal perspective.

27. The lower appellate court has not considered any other factor except one, and that is that, according to the appellate court, the documents in question did not appear to be genuine. No doubt, this observation or finding cannot be regarded to be anything except on a prima facie basis because while dealing with mark 14/3 and mark 14/4, the lower appellate court was not in fact appreciating the evidence on record but was merely dealing with these documents which were merely produced on the record and in respect of which application at exh. 35 was given. Thus, when the lower appellate court is aware that mark 14/3 and mark 14/4 is not really substantive evidence on record, and then proceeds to deal with the same as if the genuineness thereof would determine whether the same should be permitted to be proved by appropriate evidence or not, is to say the least, putting the cart before the horse. However, looking at the same thing from a different perspective, even if the observations of the lower appellate court are regarded to be mere observations on a prima facie basis and are not regarded to be findings on appreciation of evidence, even so, to judge the quality and veracity of the evidence even on a prima facie basis for the purpose of

determining whether such documents should be permitted to be proved in accordance with the laws of evidence or not, would still be illegal, or highly irregular at the very least.

28. The lower appellate court ought to have appreciated that Order 41 Rule 27, sub rule 1 contemplates that the appellate court may allow additional evidence to be produced, or witness to be examined, if the facts and circumstances contemplated by either of the three clauses are met and/or satisfied. Obviously, looking to the facts of the case and the averments, clauses (a) & (aa) have no application whatsoever. However, clause (b) enables the production of documents or witnesses to be examined to enable the court to pronounce judgment or for any other substantial cause . On the facts and circumstances of the case, I firstly find that the lower appellate court has rejected the defendant's application exh. 35 (in appeal) on irrelevant grounds, and such rejection is obviously without reference to the provisions of Rule 27.

29. It must also be kept in mind that Order 41 Rule 27 contemplates "additional evidence". What is required to be kept in mind here is that the additional evidence, by the very nature of Rule 27, be of any kind. It may be mere production of evidence, where the evidence is such that mere production of a document would entitle it to exhibited and be read in evidence. Another case may require evidence to prove a document which is already produced on record, which has not been proved according to the rules of evidence. Such additional evidence may also be by examination of any witness, and it goes without saying that such examination of witness could be for either production of a document, or for proof of a document which is already produced, or examination of a witness for both the purposes.

30. I cannot for the moment overlook the fact that the documents in question were already produced on the record of the trial court, but have escaped being treated as substantial evidence due to a mistake, error or inadvertence of the counsel for the defendant, inasmuch as the same have not been proved according to the rules of evidence. Thus, the application exh. 35 given in the appeal for additional evidence has to be seen in the specific context of the facts of the case, to the effect that the documents are already produced on the record, but an opportunity is sought by the concerned party for proving the same.

31. In my opinion, there cannot be any dispute that the crux of the entire suit is whether the tenant had complied with the requirements of the statutory notice or not. If the tenant succeeds in proving the averments to the effect that he had sent a money order as per the demand made in the suit notice, it would obviously follow that there was no cause of action for the suit and that therefore, the suit must fail. What distinguishes this case from other cases is that the documents mark 14/3 and mark 14/4 go to the root of the matter, and go to the basic jurisdiction of the Rent Court to pass a decree of eviction in the face of section 12 sub section 1 of the said Act. Section 12 sub-section 1 creates a jurisdictional bar against the Rent Court passing any decree for possession "so

long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases"

32. Thus, in my opinion, the documents at mark 14/3 and mark 14/4 not only address the genesis of the cause of action, but also affect one way or the other, the jurisdiction of the Rent Court. This aspect has clearly been lost sight of by the lower appellate court.

33. Another aspect which requires to be considered and which obviously has escaped the attention of the lower court are two significant phrases which appear in clause (b) of Order 41 Rule 27. These two phrases are (i) "to enable it to pronounce judgment" and (ii) "for any other substantial cause".

34. Obviously, any court can pronounce judgment one way or the other on the basis of whatever evidentiary material is on record. The court is not concerned directly with whether the plaintiff succeeds in proving his case or whether the defendant succeeds in proving his version of the case. It may appear that the court is only concerned with deciding the case on such material which is on the record of the case before it. Thus, it is a simple matter for the court to look at whatever evidence is on the record and to decide the relevant issues in light of such evidence. However, if such an over-simplistic view is taken, the phrase "to enable it to pronounce judgment" would not necessarily have been incorporated in clause (b). Taking into consideration the wider and broader aspects of the matter and the intention behind clause (b), it would in my opinion require to be held that in a given set of circumstances, the appellate court may require additional evidence by way of documentary evidence or oral evidence, not merely to decide the issues, not merely to pronounce judgment, not merely to dispose off the case, but to effectively deal with the controversy between the parties, and to deliver an effective judgment whereby the root of the controversy between the parties is addressed and dealt with on the basis of appropriate evidence on record. It is thus obvious that in a given set of circumstances, the appellate court may not be able to pronounce an effective judgment which addresses itself to the root of the controversy between the parties in the absence of appropriate evidence on record. As already discussed hereinabove, the factual controversy on the facts of the case is as to whether mark 14/3 and mark 14/4 ought to be permitted to be proved or not. Having looked at the two documents, and reading them on prima facie basis and only as documents of what they purport to be (rather than evidence on record), it becomes obvious (and it was obvious to the lower appellate court as well) that the documents addressed themselves to the readiness and willingness of the tenant to comply with the terms of the tenancy. As discussed hereinabove, inspite of various clauses of section 13 of the Bombay Rent Act, permitting the Rent Court to pass a decree for eviction, section 12(1) has an overriding effect, and if the tenant is successful in establishing that the tenant was and is ready and willing to pay the amount of the standard rent and permitted increases and observes and performs the other conditions of tenancy, the landlord would not be entitled to a decree for possession. In other words

therefore, the lower appellate court was well aware that the controversy as to whether the tenant was ready and willing to pay the rent was the root of the matter, was the centre of the controversy between the parties, and the documents at mark 14/3 and mark 14/4 directly addressed this controversy. Under these circumstances, the lower appellate court ought not to have failed to appreciate that if mark 14/3 and mark 14/4 were proved by the rules of evidence, and could be read as evidence on record, it would have directly affected the jurisdiction of the court by virtue of section 12(1) of the Rent Act. The lower appellate court ought to have appreciated that the jurisdiction of the court is the core of all judicial decisions. If a court does not consider it appropriate and addresses itself to this central question, how can it possibly be said that (while ignoring potential effect of such documents) the court would be able to pronounce judgment which would be an effective one and would also encompass the core of the controversy between the parties? At least on the facts of the case, I am of the opinion that the lower appellate court ought to have found that the defendant is required to be given an opportunity of proving mark 14/3 and 14/4 (which were already produced on record) in order that the court should be able to deliver an effective and complete judgment which would deal with the core of the controversy, rather than merely dispose off the suit.

35. The impact, scope and ambit of other phrase "for any other substantial cause" is also required to be considered both in the above context and also outside such context. It may also be noted that this phrase "for any other substantial cause" is preceded by a word "or". Thus, even if the conditions contemplated by clauses (a), (aa) and the former part of clause (b) are not attracted, the appellate court can nevertheless "for any other substantial cause" permit such evidence to be led. This phrase therefore reads as or introduces something in the nature of a residuary clause, and this residuary clause is for the purpose of investing the court with discretionary powers which may be utilized in fit cases.

36. Obviously, such discretion can only be interpreted to be judicial discretion which necessarily means that the same must be exercised within the well defined parameters within which such expression is to be interpreted. However, the fact remains that if the presence and existence of "substantial cause" is established, that by itself would be sufficient to permit additional evidence to be led, even if the provisions of clauses (a), (aa) or the first part of clause (b) did not apply.

37. On the facts of the case, I have no hesitation in holding that the instant case cannot be held to be anything other than "substantial cause", inasmuch as the documents address themselves to the core of the controversy between the parties and address themselves to the basic question of jurisdiction of the trial court to pass a decree for eviction.

38. Learned counsel for the respondent has sought to rely upon a decision of this Court in the case of Patel Nanji Bhovan v. Patel Naran Mitha reported at 1998 (1) GLR P. 788.

39. It may be noted that this is a decision of a learned Single Judge of this Court and therefore has only persuasive value.

40. However, this is not to mean that the judgment does not reflect the correct legal interpretation of Order 41 Rule 27, so far as the decision goes. In my opinion, it would not apply to the facts of the case simply because the said decision does not address itself to a detailed examination of the two phrases occurring in clause (b) of Rule 27 as discussed by me hereinabove, and also because the facts of the present case indicate that the documents at mark 14/3 and mark 14/4 go to the root of the court's jurisdiction.

41. In this context, another decision of this Court is referred to by learned counsel for the appellant in the case of Saiyed S. Sulemanmiya v. Abdul Razak Isabhai Memon, reported at 1999 (2) GLH P. 188. In the latter decision, a view similar to the view expressed by me hereinabove has been taken, with emphasis on the fact that additional evidence at the appellate stage can be permitted when the documents help in adjudicating the real dispute between the parties, and such production cannot be termed as an action to fill up the lacuna in evidence. Here, the High Court held that the lower appellate court was justified in permitting the additional evidence to be recorded in the appeal basically on the ground that the production of such evidence was necessary in adjudicating the real dispute between the parties and the High Court therefore upheld the judgment of the lower appellate court wherein such additional evidence was permitted.

42. I may however interject a note of caution as to what matters may pertain to "adjudicating the real dispute between the parties" as against matters which pertain to "an action or an attempt to fill up the lacuna in evidence". By the very nature of things, this would require to be decided on the facts and circumstances of each case. I am of the opinion that there cannot be any universal rule or principle, or a rigid and binding guideline, which would enable the appellate courts to merely look at such rules or guidelines and decide in a facile manner whether the evidence sought to be tendered in appeal is necessary for effective adjudication of the dispute on merits or whether it is merely an attempt to fill in the lacuna in the evidence. These are two opposing sides of the balance, and in which direction the balance would or should tilt, depends upon the facts of each case.

43. However, as discussed by me hereinabove, I am satisfied that the lower appellate court was in error in shutting out the formal proof of mark 14/3 and mark 14/4 as against the defendant, and this has resulted in a decision which has only abandoned judicial discretion, by adopting the larger principle of rendering a decision on "such evidence as is available". This has not resulted in a decision which addresses itself to the core of the controversy, which as discussed hereinabove, also affects the basic jurisdiction of the Rent Court.

44. The judgment and decree of the lower appellate court is therefore quashed

and set aside. The appeal is remanded back to the lower appellate court with a direction that the defendant be permitted to prove mark 14/3 and mark 14/3 by leading appropriate evidence. The lower appellate court shall then appreciate such evidence which may result, and shall decide the appeal afresh in light of such evidence.

45. This revision is accordingly partly allowed to the aforesaid extent with no order as to costs.