

(1996) 06 MP CK 0020
In the Madhya Pradesh High Court
Case No : S.A. No. 455 of 1995 (J)

Mohd. Mahmood Hussain

APPELLANT

Vs

Asad Ulla Usmani

RESPONDENT

Date of Decision : 25-06-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12(1)(a),
12(1)(f), 12(1)(h)

Citation : (1997) 2 MPJR 145

Hon'ble Judges : S.C. Pandey, J

Bench : Single Bench

Advocate : Alok Aradhe, for the Appellant; A Usmani, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Pandey, J.

This is an appeal u/s 100 of the CPC against the judgment and decree dated 11.7.1995, in Civil Appeal No. 6-A of 1995, passed by IXth Additional Judge to the Court of District Judge. Jabalpur, arising out of judgment and decree dated 4.1.1995, passed by Xth Civil Judge Class-II. Jabalpur in Civil Suit No. 54-A of 1994.

The essential facts necessary for determination of the appeal are as follows-

The respondent instituted a Civil Suit No. 54-A of 1994 against the appellant for ejectment from the suit shop on the grounds mentioned in Section 12 (1) (a), 12 (1) (f) and 12 (1) (h) of the M.P. Accommodation Control Act, 1961 (Hence forth "the Act") The respondent claimed that he was the owner and the landlord of the suit-shop and the appellant was his tenant. The suit-shop, which formed the part of larger construction is numbered as 849, 850 and 850/1 by the Municipal Corporation. Jabalpur. This construction bears new number as 693 and situate as Badi Ukli. Jabalpur. The respondent stated in his plaint that appellant occupied

one of the shops in the ground floor as a tenant and carried on the business of making rubber stamps. Thus, the suit-shop was let out for non-residential purposes. The rent of the suit shop was alleged to be Rs. 125/- per month. It was the case of the respondent that he became the owner and landlord of the suit-shop by operation of law as he had purchased the suit-shop by a registered sale-deed dated 18.8. 1990. It was alleged that the appellant was liable to be ejected u/s 12 (1) (a) of "the Act" as he had neither tendered nor paid the rent within two months of service of notice of demand dated 21.8.1990 for the period 15.8.1990 to 14.11.1991. The respondent also sought eviction u/s 12 (1) (f) of the Act" on the ground that the suit-shop was bonafide required for starting the office of his son who was carrying on the profession of an advocate. It was stated by the respondent in his plaint that he had no alternative accommodation of his own. The respondent further sought a decree u/s 12(1) (h) of the Act It was claimed that the respondent required the suit-shop bonafide for substantial repairs, additions and alterations: and for this purpose the respondent wanted vacant possession as the aforesaid repairs, additions and alterations could not be carried out without getting the house vacated.

The appellant inter alia pleaded that the respondent was neither the owner nor the landlord of the suit premises as claimed by him. The appellant claimed that he had not paid any rent to him and, therefore, relationship of landlord and tenant between respondent and the appellant was never established. It was submitted that the son of the appellant had entered into a contract of sale dated 19.10.1989 with the previous landlord who in part performance of the contract received Rs. 40,000/- from the son of the appellant. The contract of sale was in respect of the suit -shop. The previous landlord instead of executing a registered sale-deed in favour of the son of the appellant sold the suit-shop to the respondent. Therefore, a suit for specific performance of contract was filed against the previous landlord and it was registered as Civil Suit No. 78-A of 1990. The appellant also took the plea that an accommodation measuring 50" x 50" was still available with the respondent and it was sufficient for fulfilling the requirement of the respondent. The appellant denied that respondent needed the suit-shop for additions and alterations as alleged in the plaint.

The trial Court decreed the claim of the respondent only on the ground of Section 12(1) (a) of "the Act". It declined to grant decree u/s 12(1) (f) of the Act" as it held that the respondent had an alternative accommodation of 50" x 50" apart from the suit-shop and it was sufficient for the need of the son of respondent for opening his office of an advocate. The trial Court held that ground u/s 12(1) (h) of the Act" was not made out.

The appellant filed an appeal against the judgment and decree of the trial Court and the respondent preferred a cross-objection challenging the findings of trial Court recorded against him. In appeal, the lower appellate Court not only maintained the decree of the trial Court u/s 12 (1) (e) of "the Act" but also granted the decree under Sections 12 (1) (f) and 12(1) (h) of "the Act".

This Court admitted the appeal on the following substantial questions of law by order dated 26.7.1995:-

Whether the word "business" used in section 12 (1) (f) of the M.P. Accommodation Control Act. 1961 includes the profession of an Advocate and therefore, for such need whether a decree u/s 12 (1) (1) can be passed.

The learned counsel for the respondent contended that the question of law framed by this Court is covered by the decision of Supreme Court in the case of S. Mohan Lal Vs. R. Kondiah, and a judgment of a learned single Judge of this Court in the case of Taramal Vs. Laxman Sewak Surey and others, 1971 M.P.L.J. 888. Thus, looking to the scheme of the Act" and the aforesaid authorities cited before me, this Court comes to the conclusion that word "business" used in section 12 (1) (f) of "the Act" is wide enough to include the practice of a profession. It is not necessary to give reasons for the conclusion as this Court adopts reasoning given in Taramal's case, (supra). This case was approved by Supreme Court in P. Mohanlal's case, (supra).

Faced with this conclusive opinion on this point, the learned counsel for the appellant required this Court to frame additional questions of law. The learned counsel pointed out that the lower appellate Court has granted a decree under Sections 12 (1) (a), 12 (1) (1) and 12 (i) (h) of the Act" solely on the ground that the defence of the appellant was struck off. The Court below had treated the result of striking out defence u/s 13 (5) of "the Act" as if the appellant was exparte. According to learned counsel for the appellant, the consequence of striking out defence did not absolve the respondent from proving his case, and even though, the appellant may not be permitted to raise a positive defence, he was still entitled to negative the case of appellant. There is substance in the argument of learned counsel for the appellant and therefore, this Court in exercise of its powers under proviso to section 100(5) of the Code of Civil Procedure, frames the following additional substantial questions of law :-

2. Whether the Court below rightly treated the appellant exparte for the reason that the defence of the appellant was struck off ?

Whether this court is entitled to re-examine the evidence afresh in view of the error aforesaid made by the lower appellate Court ?

The parties have argued the case on the assumption that the aforesaid questions of law shall be framed. It is well established that so far as this Court is concerned, when defence is struck off u/s 13 (6) of "the Act" the striking out is limited to those grounds mentioned in Section 12 (1) of "the act" Premdas Vs. Laxmi Narayan, 1964 M.P.L.J. 190. However, what is the effect of striking out defence Is the defendant totally deprived of participation as if he was absent during the proceedings though physically present.

It appears that view of Division Bench of this Court in the case of Smt. Krishnabai Babulal Mishra Vs. Smt. Laxmibai, has been impliedly overruled in

part by the case of Modula India Vs. Kamakshya Singh Deo, . In Krishna Bai Vs. Laxmi Bai. (supra) a Division Bench of this Court, referred to an earlier Division Bench decision of this Court Premdas Vs. Laxmi Narayan (supra) and came to the conclusion that u/s 13 (6) "the Act" only defence u/s 12 of "the Act" is struck out and not the defence under General law. This part of the decision of this Court has not been overruled by Supreme Court in Modula India Vs. Kaniakshya Singh Deo. (supra). In fact, the Supreme Court was not concerned with the point decided by Division Bench in Premdas Vs. Laxmi Narayan (supra). However, the conclusion of the Division Bench is Krishna Bai Vs. Laxmi Bai (supra) that the defendant has to be treated *exparte*, so far as grounds u/s 12 of "the Act" are concerned, have been overruled. It appears to this Court the effect of decision of the Supreme Court in Modula India Vs. Kaniakshya Singh Deo, (supra) is that the consequence of striking out defence would be as follows :-

(i) That part of Written statement which has been struck out, has to be overlooked:

(ii) The defendant would not be allowed to lead his evidence on the point:

(iii) There shall be no right of cross-examination in respect of the parties struck off from the written statement which was raised by way of defence u/s 12 of "the Act" and

(iv) However, defendant shall have a right of cross examination to a limited extent and right of addressing the argument. He may be permitted to demolish, if he can by way of cross examination on the points in the case which the plaintiff is bound to establish in order to prove his case. Thus, there is no right of attacking the case of plaintiff for the purpose of defending his own case, but there is vestige of right negative in character of destroying the case of plaintiff by cross examination. The view appears to be based on theory that no evidence is complete unless tested by cross examination.

The conclusion of Supreme Court in Modula India Vs. Komakshya Singh Deo, (supra) is as follows :-

For the above reasons, we agree with the view of Ramendra Mohan Datta, A.C.J. that, even in case where the defence against delivery of possession of a tenant is struck off u/s 17 (4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the Court on the fact of a particular case, would generally be entitled:

(a) to cross-examine the plaintiffs witnesses, and

(b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted

to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.

The decision of Supreme Court could create practical difficulties in cases where the defence is struck out at a late stage after the cross-examination is over or when it is struck out at appellate stage. In both these contingencies the Court will have to judge the cross-examination and answers given by the witnesses for the plaintiffs from the point of view of demolition of the case of the plaintiff. The presiding judge is required to sift the wheat from the chaff. The Court will have no occasion to observe the safe-guards mentioned at pages 175 and 176 in the case of *Modula India Vs. Kamakshya Singh Deo* (supra). However, in this case no such difficulty arises.

The counsel for the appellant, in view of additional substantial questions of law framed by this Court, was permitted to argue the case of the appellant. The counsel submitted that none of the grounds were made out. He submitted that ground u/s 12 (1) (a) of "the Act" is not made out because the appellant had deposited all the arrears of rent after the defence was struck out and he was entitled to benefit of Section 12(3) of "the Act." It is clear that respondent was not paid any rent after the appellant purchased the suit-shop. It is not in dispute that appellant did not pay or tender the arrears of rent within two months despite service of notice of demand and did not deposit arrears of rent with one month of service of summons. This is also clear from the findings of the court below. Actually, the defendant himself has admitted non payment of arrears of rent because he set up a title in suit properly in favour of his son u/s 53-A of Transfer of Property Act.

The question that has to be answered now is whether this Court can give to the appellant benefit of Section 12(3) of "the Act" despite his defence having been struck out. In the case of *Shyamacharan Sharnia Vs. Dharmdas*, AIR 1980 S.C. 589 it was held that non-deposit of rent may not automatically give right of eviction in favour of landlord. There is still discretion left with the Court to give benefit of Section 12 (3) of "the Act" It was observed in that case at page 589 :-

.....We think that S. 13 quite clearly confers a discretion, on the court, to strike out or not to strike out the defence, if default is made in deposit or payment of rent as required by S. 13(1) If the court has the discretion not to strike out the defence of a tenant committing default in payment or deposit as required by S. 13 (1) the Court surely has the further discretion to condone the default and extend the time for payment or deposit. Such a discretion is a necessary application of the discretion not to strike out the defence.....

Now, since the defence of the appellant was struck off and no cogent ground appears to have been urged to change the view taken by the Court below this Court refuses to exercise its discretion in favour of the appellant. No substantial question of law is involved in this matter. The appellant deliberately did not

deposit the rent because he was claiming the title in his son. Thus, non-deposit of rent was an act of defiance of the landlord. The appellant had taken the award of particular defence against the respondent and because of that very sword he is perishing. In view of this matter it is held that grounds u/s 12(1) (a) of "the Act" is proved. The attention of this Court was drawn to the case of Bhagwandas Pawaiya Vs. Registered Firm Kailash Narayan and Bros., , in this case a learned single Judge of this Court has taken view that the tenant can avoid eviction by depositing rent of execution stage. This power is subject to section 12 (3) of "the Act." Even if, we accept that this view of learned single Judge is correct, then also the discretionary power u/s 12 (3) of "the Act" has already been exercised against the appellant. The case is not an authority for the proposition that, that Court is bound to condone the delay whenever the rent is deposited late. Moreover, the execution stage has not yet arrived. The view taken by the learned single Judge in Bhagwandas Vs. Kailash Narayan and Bros. (Firm) (supra) appears to be of doubtful import.

The next contention of the appellant is that this Court must examine the evidence on record led by the respondent in support of the ground taken by him u/s 12(1) (f) of "the Act". The attention of this Court was drawn to cross examination of P.W. 6 Sadulla Usmani, the son of the respondent as Asadulla Usmani. His examination-in-chief shows that his father required the suit premises for opening the office of the witnesses, who is an advocate by profession as his father is. The office occupied by his father is very small for his four juniors. This father has no alternative accommodation of his own. The cross examination in para 3 on which learned counsel for the appellant relied does not establish that there was alternative suitable accommodation for the office. Another shop which was near the residence of the respondent was occupied. Other alternative accommodation must be equally suitable for the office of the witness. The cross examination shows that one of the room was being used by the witness as a Garage. The evidence of A. Usmani, P.W. 6, the respondent shows that he was having his office in the rented premises. Shri A. Usmani P.W. 6, in his examination-in-chief in paragraph 3 has asserted that the vacant portion of his residential part of the premises as being used as a garage for his car and other vehicles. No question appears to have been put to him for demolition of his case that he had no alternative accommodation suitable for the office of his son. This Court has examined the evidence of these two witnesses in detail because the learned counsel for the appellant urged this court to go through them. It is found that respondent has proved his bonafide requirement u/s 12 (1) (f) of "the Act" The decision cited by the learned counsel for the appellant, in the case of Ramrichhpal and another Vs. Jugalkishore and another, (1), is not applicable to the facts of this case on the finding recorded by this Court.

The learned counsel for the appellant has urged that no decree u/s 12(1) (h) of "the Act" can be granted in this case. He required this Court to examine the pleadings of the parties. According to him, there was no specific plea raised by the respondent in the plaint regarding the ground covered by Section 12(1) (h)

of the Act. It is true that the respondent has not pleaded all the ingredients required to be pleaded for eviction u/s 12 (1) (h) of "the Act". It is a garbled plea. It appears that the respondent required the vacant house dominantly for the purpose of repairing it rather than for re-construction. However, the trial Court did not frame an issue u/s 12(1) (g) of "the Act". This latter course would have been more appropriate. Nevertheless, it is not necessary dwell upon the matter any further for the simple reason that the appellant is liable to be evicted u/s 12(1) (a) and Section 12 (1) (f) of "the Act". This Court holds that the respondent was unable to plead and prove his requirement u/s 12 (1) (h) of "the Act".

Before parting with the case this Court makes it clear that this court has re-considered the evidence on record because the lower appellate court had treated the appellant as if he was an exparte. This error on the part of the lower appellate Court, entitled this Court to re-consider the findings in exercise of its powers u/s 103 (h) of the Code of Civil Procedure. But, for the substantial error of law on the part of the Court below, it was not open to this court to interfere with the finding of fact in exercise of its power u/s 100 of Code of Civil Procedure. This Court would not have considered the findings of facts for its re-appraisal under ordinary circumstances. Apart from the error of law this Court finds that the learned judge deciding the first appeal has dealt with the evidence in a slipshod manner. The learned Judge should take more pains while exercising her appellate jurisdiction. Even so, this Court on independent examination of evidence in the matter confirms the finding recorded u/s 12 (1) (a) and 12 (1) (1) of "the Act". It, however, reverses the finding of the Court below u/s 12 (1) (h) mainly, on the ground that the case u/s 12 (1) (h) of "the Act" has not been pleaded, in accordance with law.

No other point was argued by the counsel for the appellant.

As a consequence of the discussion in the foregoing paragraphs, this appeal fails and is dismissed with costs. Counsel fee Rs. 200/- (Rupees two hundred), if certified.