

(2002) 09 GUJ CK 0058
In the Gujarat High Court

Case No : Civil Revision Application No. 1921 of 1983

Mrudalsingh Murubha

APPELLANT

Vs

Ishwarlal Laxmidas Khakhar

RESPONDENT

Date of Decision : 12-09-2002

Acts Referred:

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

Citation : (2002) 09 GUJ CK 0058

Hon'ble Judges : R.M. Doshit, J

Bench : Single Bench

Advocate : Suresh M. Shah, for the Petitioner, for the Appellant; Laxmidas Khakhar, Person through the Constituted Attorney, for the Respondent

Final Decision : Allowed

Judgement

R.M. Doshit, J.—This Revision Application preferred u/s 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Rent Act") arises from the judgment and order dated 30th September, 1983 passed by the learned Joint District Judge, Rajkot in Civil Appeal No.401/1980. The petitioner before this Court is the respondent - defendant.

2. The petitioner (hereinafter referred to as "the defendant") is the tenant of the suit premises comprising of a room in a building "Ramnath Krupa" situated at Laxminagar, Rajkot, of which the respondent (hereinafter referred to as "the plaintiff") is the owner. The suit premises was given to the defendant on monthly rent of Rs.43=00 (Rs.34=00 + Rs.9=00 taxes). The defendant was in arrears of rent since 22nd January, 1977. The plaintiff gave notice of demand (Ex.29) of arrears of rent as envisaged under sub section (2) of Section 12 of the Rent Act on 6th January, 1979. The plaintiff also terminated the tenancy of the defendant. The said notice was not responded to by the defendant. The plaintiff, therefore, filed Rent Suit No.735/1979 (old no.293/1979) in the Court of Small Causes, Rajkot. The plaintiff prayed, inter alia, for a decree for possession of the suit premises and for a sum of Rs.1,090=0 being the amount of arrears of rent.

3. The suit was contested by the defendant by filing written statement (Ex.16). Under the said written statement the defendant also questioned the rent charged from him and raised dispute as regards the standard rent. Pending the trial the plaintiff made application (Ex.10) u/s 11(4) of the Rent Act for recovery of the amount of arrears of rent and for mesne profits at the rate of Rs.43=00 per month. The said application was partially allowed i.e. on 4th July, 1982, the learned trial Judge directed the defendant to pay interim standard rent at the rate of Rs.30=00 per month.

4. After framing of issues, in course of trial, the learned advocate representing the defendant filed purshis (Ex.27) stating that the learned advocate had no instruction from the defendant. The trial proceeded further in absence of the defendant. The learned trial Judge, under his judgment and order dated 23rd September, 1980, dismissed the suit for possession of the suit premises, however, passed decree for arrears of rent at the rate of Rs.34=00 per month and also determined the standard rent at Rs.43=00 per month inclusive of all taxes. Feeling aggrieved, the plaintiff preferred Civil Appeal No.401/1980 before the District Court, Rajkot.

5. Pending the appeal, the defendant moved application (Ex.16) seeking leave to lead additional evidence. The said application was allowed on 30th September, 1983. The defendant was permitted to produce documents Ex.12 to Ex.34. The appellate Court, under the impugned judgment and order dated 30th September, 1983, allowed the appeal and passed the decree for possession of the suit premises and for mesne profits at the rate of Rs.43=00 per month from the date of the suit till the date of the delivery of possession of the suit premises. Feeling aggrieved, the defendant has preferred the present Revision Application.

6. Mr.Shah has submitted that the learned advocate engaged by the defendant had given purshis (Ex.27) of having received no instructions. Pursuant to the said purshis a fresh summons ought to have been served upon the defendant. By having not done so, the defendant is deprived of the opportunity of defence or of leading evidence on the issue of standard rent. Hence, the matter is required to be remanded to the trial Court for retrial after affording opportunity to the defendant to put forth his case. In support of his argument, Mr.Shah has relied upon the judgment of this Court in the matter of Patel Maganlal Dhanjibhai v. Patel laxmandas Naranbhai [1987 (1) G.L.H. 402] and of the Hon'ble Supreme Court in the matter of Malkiat Singh and Anr. V/S. Joginder Singh and Ors. [A.I.R. 1998 S.C. 258].

7. In the matter of Patel Maganlal Dhanjibhai (supra), the advocate concerned had filed a purshis declaring that he had no instructions and he be permitted to withdraw appearance. On advocate's filing such purshis, the Court, without further inquiry, allowed the advocate to withdraw appearance and proceeded further with the matter. In the circumstances, this Court has observed that "before permitting an advocate to retire from the case, the court must examine that (1) there is sufficient cause, and (2) reasonable and sufficient notice is given

by the advocate to his client.... Before accepting "no-instruction" purshis, the court must have examined the aforesaid aspects. Not doing so would certainly amount to failure to exercise the jurisdiction vested in it." Similarly, in the matter of Malkiat Singh (supra), in a suit for damages, the learned advocate who had been engaged by the defendants for defending them in the suit, pleaded "no instructions" before the Court. The trial proceeded ex-parte and decree was passed against the defendants. In the appeal arising from the application made by the defendants to set aside the ex-parte decree, the Hon"ble Supreme Court observed that, "the said defendants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial Court, which had admittedly not issued any notice to the appellants after their counsel had reported "no instructions", should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported "no instructions". The appellants can not, in the facts and circumstances of the case, be said to be at fault and they should not suffer."

8. On the facts of the present case, I am of the opinion that neither of the above judgments can be invoked. In the present case, the learned advocate engaged by the defendant had not applied for withdrawal from the suit nor had he be permitted to withdraw his appearance. However, he did file a purshis and pleaded "no instructions". At that stage, the trial Court could have and should have issued fresh summons to the defendant, but that was not done. However, that is not sufficient to remand the matter for retrial now after 23 years from the date of the suit. The reason is that such a contention was not raised by the defendant before the appellate Court. Had the defendant felt that his defence was prejudiced on account of trial having proceeded in his absence he should have prayed for an order of remand and retrial at the first possible opportunity. That having not been done, the matter need not be remanded at this belated stage. More particularly the defendant was vigilant enough to bring additional evidence before the appellate Court. Further, the defendant did not challenge the decree for arrears of rent passed by the trial Court or the order fixing the standard rent made by it. I, therefore, reject the contention that the matter needs to be remanded to the trial Court.

9. Mr.Shah has next contended that notice (Ex.29) suffers from infirmities which has rendered it invalid. The suit based on such invalid notice is not maintainable and requires to be dismissed. He has relied upon the judgment of this Court in the matter of Khimji Bhimji Majithia v. Taraben Lalji Soni [(2) G.L.R. 114]. In the said notice (Ex.29), it is mentioned that the defendant was in arrears of rent for 23 months commencing from 22nd January, 1976. The amount of arrears of rent demanded was Rs.989=00. The arrears of rent is calculated at the rate of Rs.43=00 per month (Rs.35=00 + Rs.8=00 taxes). What Mr.Shah contends is that in fact the defendant was found to be in arrears of rent for the period commencing from 22nd January, 1977. The notice of demand from the period 22nd January, 1976 was illegal and bad. He has also contended that under the

said notice the defendant was not informed that it was the last opportunity. As regards the demand for arrears for the period from 22nd January, 1976 it must be mentioned that what was typed in the suit notice was 22-1-1977 and was corrected in hand as 22-1-1976. This correction has been explained by the witness of the plaintiff to be the mistake committed by the learned advocate. There was one more mistake committed i.e. the rent demanded was at the rate of Rs.43=00 (Rs.35=00 + Rs.8=00 taxes) whereas the contractual rent was Rs.43=00 (Rs.34=00 + Rs.9=00 taxes). However, neither of these errors would, in my view, render the notice illegal or invalid. So far as the material particulars are concerned the notice is precise i.e. on the date of the notice the defendant was in arrears of rent for 23 months and that the rent was Rs.43=00 per month. The Division Bench of this Court in the matter of Khimji Bhimji Majithia (supra) has held that notice of demand should also mention that it was the last opportunity for the tenant to meet the demand for arrears of rent. However, the said judgment has been explained in the later judgment in the matter of Rambhai Jhenidas Panchal V/S. Lalitaben Wd/O Ramanlal Panchal [(2) G.L.R. 545]. It is held that "But it can never be said that the intention of the Division Bench was to say that the notice must mention in so many words that this is the last opportunity afforded to the tenant to pay the arrears. Even if such words are not stated, it can well be said that if the tenant would not pay the amount of arrears, etc., the landlord would file a suit for eviction and that action would definitely show that was the opportunity given to the tenant. So, what the decision of the Division Bench in (2) G.L.R. 114 requires is that for giving a valid notice u/s 12(2) of the Act, there should be a specific demand in writing of the amount of standard rent or permitted increases, and that the notice should be served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, and nothing more." Keeping in view this observation, I hold that in the present case the suit notice can not be said to be illegal or invalid as contended by Mr.Shah.

Mr.Shah has next contended that the appellate Court has fallen in error in holding that the decree for possession was required to be passed as the provisions of Section 12(3)(a) of the Rent Act were attracted. He has contended that over and above the amount of rent the defendant was also liable to pay taxes. Taxes being not recoverable every month the rent can not be said to be payable by month. Hence all the conditions enumerated in Section 12(3)(a) of the Rent Act can not be said to have been satisfied. No decree for possession, therefore, could have been passed by invoking the provisions contained in Section 12(3)(a) of the Rent Act. In support of this contention, Mr.Shah has relied upon the judgment of this Court in the matter of Dayalal Gangaram v. Bhimani Bhupatrai Chunilal and Anr. [18 G.L.R. 349]. In the said judgment, the question "In the absence of a contract between the landlord and the tenant as regards payment of the education cess by the tenant, would the amount of education cess form part of the rent payable by the tenant to the landlord so as to enable the Court to decide in a case governed by Section 12 of the Bombay

Rents, Hotel and Lodging House Rates Control Act, 1947, whether the said rent is payable by the month or otherwise ?" was referred to the Division Bench. The said question was answered by the Court as under :

"We would, therefore, answer the question referred by holding that even in the absence of a contract between the landlord and tenant as regards payment of education cess, the education cess would form part of the rent payable by the tenant to the landlord so as to enable the Court to decide u/s 12(3)(a) that the said rent was not payable by the month and, therefore, in the facts of the present case Section 12(3)(a) would not be attracted and the case would fall into any other case u/s 12(3)(b). it is on this footing that the matter shall go back to the learned Single Judge for further disposal. The Reference is accordingly disposed of with no order as to costs in the circumstances of the case."

10. I am afraid even this case shall not lend support to the defendant. As it is, in the present case the defendant was required to pay a fixed sum of Rs.9=00 every month towards the taxes i.e. the defendant was charged a composite sum of Rs.43=00 by way of monthly rent including rent and taxes. Hence, there was no additional liability upon the defendant to pay taxes or education cess every year as may be demanded by the concerned authority. The appellate Court has, therefore, rightly held that the rent payable was by month.

Mr.Shah has next contended that the defendant did raise dispute as regards the standard rent and therefore also Section 12(3)(a) of the Rent Act can not be attracted. In support thereof, he has relied upon the judgments of this Court in the matters of Naranbhai Nathabhai Koli V/S. Modhia Panalal Maganlal [(2) G.L.R. 98] and of Rupaben Wd/O. Kaththu Dhanji & Anr. V/S. Babubhai Deojibhai [(1) G.L.R. 263]. In both these judgments, this Court has held that the raising of dispute as regards the standard rent by raising necessary plea in the written statement would be sufficient to take out a case from out of the purview of Section 12(3)(a) of the Rent Act. However, be it noted that in view of the earlier judgments of this Court in the matters of Shah Ambalal Chottalal v. Shah Babaldas Dahyabhai [3 G.L.R. 625]; of Ramniklal Dwarkadas Modi V/S. Mohanlal Laxmichand & Ors. [18 G.L.R. 32]; of Rafikbhai Husainbhai Chauhan V/S. Soni Ghanshayambhai Popatlal [2001 (2) G.L.H. 3] and of the Hon''ble Supreme Court in the matter of Shah Dhansukhlal Chhaganlal Vs. Dalichand Virchand Shroff and Others, , I have, in the matter of Edward Washing Company V/S. Bai Ammbaben Suleman [Civil Revision Application No.1670 of 1983, decided on 5th September, 2002] held that the above referred judgments in the matters of Naranbhai Nathabhai Koli V/S. Modhia Panalal Maganlal [(2) G.L.R. 98] and of Rupaben Wd/O Kaththu Dhanji and Anr. V/S. Babubhai Deojibhai [(1) G.L.R. 263] in so far as they lay down that a valid dispute as regards the standard rent can be raised by raising necessary plea in the written statement so as to attract the protection of Section 12(3)(b) of the Rent Act are per incurium.

11. Hence, for taking the matter out of the purview of Section 12(3)(a) of the Rent Act, it is essential that the dispute as regards the standard rent either shall

exist on the date of the suit notice or such dispute shall be raised within one month from the date of the receipt of such notice. In the present case, admittedly the defendant raised dispute as regards the standard rent for the first time in the written statement after the expiry of one month from the date of the receipt of the suit notice. Raising of such dispute is of no consequence i.e. the matter would still be governed by the provisions contained in Section 12(3)(a) of the Rent Act provided that other conditions are satisfied.

12. In my view, on the facts of the present case all the conditions enumerated in Section 12(3)(a) of the Rent Act are satisfied i.e. (1) the rent was payable by month; (2) the defendant was in arrears of rent for six months and more; (3) the defendant neglected to pay such arrears of rent within one month from the date of receipt of the notice (Ex.29); and (4) the defendant did not raise dispute as regards the standard rent within one month from the date of the said notice. The appellate Court has, therefore, rightly held that the defendant was liable to be evicted from the suit premises and has rightly passed the decree for possession.

As I have held that the case is covered by Section 12(3)(a) of the Rent Act, I am not required to examine whether the defendant was entitled to protection u/s 12(3)(b) of the Rent Act or not. Since Mr.Shah has relied upon the statement Ex.15 filed before the appellate Court, I must refer to it. Pending the appeal the defendant has filed statement Ex.15 showing the rent tendered by the defendant. Apparently, it appears that the defendant had, pending the appeal, tendered the rent regularly in the Court. But it should be noted that such payment had been made pursuant to the summons issued by the Court. On the perusal of the additional evidence produced by the defendant before the appellate Court, it is more than evident that the defendant had neglected to pay standard rent as determined by the trial Court. Practically, every month the plaintiff had to file suit for recovery of the rent due in the Court of Small Causes, Rajkot. Such rent due had been tendered to the Court only in answer to the summons issued by the Court. Thus, even pending the appeal defendant has neglected to tender the rent regularly.

13. In the result, the petitioner fails. The Revision Application is dismissed with costs. Rule is discharged. Interim stay is vacated.

Mr.Shah requests that the stay operating pending the Revision Application be continued for a further period so that the petitioner may prefer further appeal. The request is granted. The interim stay operated pending this Revision Application shall continue to operate till 31st October, 2002, on the same terms and conditions.