

(1998) 09 GUJ CK 0010
In the Gujarat High Court

Narbheram Ambalal (Decd.) by his Heirs and LRs.

APPELLANT

Vs

Jayantilal Dahyabhai Kharva

RESPONDENT

Date of Decision : 01-09-1998

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 11(i), 12, 12(1), 12(2)

Citation : (1999) 1 GLR 825

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Judgement

D.C. Srivastava, J.—This is tenant's revision u/s 29(2) of the Bombay Rent Act (for short "the Rent Act").

2. Brief facts are that the revisionist was tenant of the respondent in the disputed premises on monthly rent of Rs. 5/-. The property was purchased by the plaintiff-respondent. He filed Suit No. 554 of 1963 against the revisionist for his eviction which was dismissed. Appeal was also dismissed. Legality of transfer in favour of the respondent was challenged. Therefore, a Deed of Relinquishment was obtained whereafter another Suit No. 1151 of 1967 was filed for declaration that the plaintiff-respondent is owner of the property and the defendant was a tenant. The said suit was decreed. Thereafter, the defendant-revisionist fell in arrears of rent from 3-12-1962. Notice of demand was served, but the rent was not paid nor the premises was vacated. Eviction was sought on the ground that the tenant remained in arrears of rent for more than six months which he failed to pay within a month of service of notice of demand. Eviction was also sought on the ground that the premises was reasonably and bona fide required by the landlord-respondent for his personal use. Eviction was also sought on the ground that the revisionist had acquired suitable residence for his use.

3. The suit was contested on the ground that the suit is barred by res judicata because of dismissal of earlier Suit No. 554 of 1963. It was denied that the premises was reasonably and bona fide required by the landlord. It was also

denied that the revisionist acquired suitable alternative accommodation for his residence. Dispute of standard rent was raised by the revisionist in his reply to the notice of demand.

4. The trial Court dismissed the suit whereafter an Appeal was preferred by the landlord-respondent. The Appellate Court reversed the decree of the trial Court and granted decree for eviction on the ground that the tenant did not make compliance of Section 12(3)(b) of the Rent Act, hence he was liable to be evicted. It is, therefore, this revision by the tenant.

5. The finding of the trial Court regarding bona fide requirement of the landlord and acquisition of alternative accommodation by the tenant was confirmed by the lower appellate Court and these two findings were not challenged in this revision.

6. The only ground of challenge is that the lower appellate Court was in error in granting decree for possession on the ground that the tenant did not make strict compliance of Section 12(3)(b) of the Act.

7. From the judgment of the lower appellate Court and also from the arguments advanced by Shri N.K. Majmudar, learned Counsel for the respondent it is clear that the respondent-landlord wanted decree for eviction u/s 12(3)(b) of the Bombay Rent Act. It is further to be seen whether the suit was filed claiming decree for eviction under 12(3)(a) of the Act or u/s 12(3)(b) of the Act. For this, plaint was examined. From Para 3 of the plaint it is clear that the decree for eviction was not sought nor it could be sought u/s 12(3)(b) of the Act. Shri Majmudar contended that it was not mentioned in Para 3 that eviction was sought under 12(3)(a) of the Act and only facts were pleaded on the basis of which eviction could be sought u/s 12(3)(b) of the Act.

8. Perusal of Para 3 of the plaint shows that there was clear averments that more than six months' rent was due from the tenant. The rate of rent, according to the landlord, was Rs. 5/- p.m. It fell due from 3-12-1962. There was thus clear averment that more than six months' rent was due. Notice of demand Ex. 47 dated 9-3-1972 was issued which was served on 16-3-1972. In this notice rent was demanded, tenancy was determined and delivery of possession was also demanded. The notice of the landlord was replied by the tenant in which he raised dispute of standard rent. In the written statement also he raised dispute of standard rent. The landlord did not allege in the plaint that there was any dispute regarding standard rent. The plaint further shows that the tenancy was monthly and agreed rent was payable every month. The plaint did not show that the taxes were to be paid by the tenant. On these averments in the plaint it can safely be said that the landlord wanted decree for eviction under 12(3)(a) of the Rent Act. The basic principle of law of pleading is that only facts are to be pleaded and not the law. If 12(3)(a) of the Rent Act was not mentioned in Para 3 of the plaint it cannot be said that the landlord wanted decree for eviction u/s 12(3)(b) of the Rent Act.

9. It is now to be seen what is the scope of Sections 12(3)(a) and 12(3)(b) of

the Rent Act. At the same time, it is also desirable to see the scope of entire Section 12 of the Act.

10. Section 12(1) of the Act contains prohibition against the landlord that he shall not be entitled to recover possession of the premises from the tenant so long as the tenant pays or is ready and willing to pay the standard rent or permitted increase and observes and performs the other conditions of the tenancy insofar as they are consistent with the provisions of this Act.

11. The above general prohibition will apply provided the tenant pays or is ready to pay standard rent and permitted increase and also observes and performs other conditions of the tenancy which are consistent with the provisions of the Act. The word "and" used in this section cannot be interpreted as word "or". If the tenant pays rent or is ready and willing to pay rent, but fails to observe other conditions of the tenancy it cannot be said that the landlord cannot claim recovery of possession. The converse is also true, viz., if the tenant observes other conditions of tenancy, but fails to pay rent or remains unwilling to pay rent he can be evicted. If, however, both the conditions are satisfied by the tenant he cannot be evicted by the landlord.

12. Section 12(2) of the Act deals with the situation how the suit for eviction is to be filed on ground of non-payment of standard rent or permitted increase. Under this section the requirement is that a notice of demand of rent in writing is to be served on the tenant and the landlord has to wait for one month after service of notice of demand. If during this period the rent is not paid the landlord can file suit for eviction. If such suit is filed it has to be dealt with in one of the modes provided under 12(3)(a) or Section 12(3)(b) of the Act.

13. 12(3)(a) of the Act provides that where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increase, if such rent or permitted increase is in arrears for a period of six months. or more and the tenant neglects to make payment thereof on the expiration of period of one month after notice referred to in Sub-sections (2) the Court may pass decree for eviction in any such suit for recovery of possession.

14. The decree for recovery of possession under 12(3)(a) can be passed when the following conditions are fulfilled:

- (i) The rent should be payable monthly;
- (ii) There should be no dispute regarding the amount of standard rent or permitted increase;
- (iii) Such rent or increase should be in arrears for a period of six months or more;
- (iv) The tenant neglects to make payment of such arrears until expiration of period of one month from service of such notice.

If the above conditions on the plaint allegations are made out then the landlord cannot switch over to Section 12(3)(b) of the Act.

15. Section 12(3)(b) of the Act provides that 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 day as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increase then due and continue, thereafter to pay or tender in Court such rent till the suit is finally decided and pays cost of the suit as directed by the Court.

16. The words "in any other case" used in Section 12(3)(b) of the Act have to be interpreted with reference to 12(3)(a). The word "in any other case" used in Section 12(3)(b) means to be a case which is not covered by 12(3)(a). No other interpretation to these words "in any other case" is possible. The Apex Court in N.M. Engineer and Others Vs. Narendra Singh Viridi and Another, had an occasion to consider this aspect of the matter and observed as under:

In other cases, Section 12(3)(b) is applicable. The cases covered thereunder are for arrears of rent of less than six months.

Thus, from this observation of the Apex Court it is clear that if the landlord wants to evict the tenant and the tenant is in arrears of rent for less than six months he can come u/s 12(3)(b) and if it is so and the suit is instituted under this section then the tenant can save his eviction by paying rent or tendering the same in the Court on the first day of hearing and further that the tenant continues to pay or tender in Court such rent till the suit is finally decided and also pays cost of the suit. Previously the word "regularly" was used in the section, but it was subsequently deleted. It was, however, argued that when the suit was decided the word "regularly" was in existence u/s 12(3)(b)(i) of the Act and since the tenant did not regularly pay or deposit in Court the rent till final disposal of the suit he could not save his eviction. In my opinion this contention is of no importance because if suit was filed under 12(3)(a) of the Act, the landlord cannot fall back u/s 12(3)(b) of the Act. For this, the verdict of the Apex Court in N.M. Engineer's case (supra) can be cited. It was laid down by the Apex Court that the appellant having failed in his case under 12(3)(a) cannot switch to rely on Section 12(3)(b). Under 12(3)(a) there was a dispute about the amount of rent. There were no arrears for six months outstanding and there was no negligence on the part of the tenant in making payment. The notice was bad on that count. The notice referred to u/s 12(3)(b) is entirely different.

17. From this observation of the Apex Court it is clear that the notice under 12(3)(a) will in substance be different from the notice u/s 12(3)(b) of the Act. In a notice under 12(3)(a) the landlord has to allege that the arrears of rent exceeding six months were due from the tenant, whereas in a notice in case u/s 12(3)(b), the landlord has to come out with a case that rent not exceeding six months was due from the tenant.

18. Shri N.K. Majmudar, learned Advocate orally argued that there is contrary verdict of the Apex Court, hence sufficient time for two days was granted to him but he was unable to cite any contrary view of the Apex Court than what was

expressed in N.M. Engineer's case (supra).

19. It is now to be seen whether the landlord could establish a case for decree for eviction under 12(3)(a) of the Act. In the instant case before me no doubt more than six months' rent was due from the tenant. The said rent was payable monthly, but there was dispute regarding the standard rent which was raised by the tenant at the earliest opportunity in his reply to the notice which was given within a month of service of notice of demand. The said dispute was not resolved. Dispute regarding the standard rent was also raised in the written statement. The said dispute was resolved by the trial Court only at the time of final disposal of the suit in its judgment. Thus, the dispute regarding the standard rent remained unresolved till the judgment was delivered by the trial Court. In these circumstances, the tenant could not have known whether he was to deposit the rent at the rate claimed in the notice and in the suit or at the rate asserted by him to be the standard rent. If there was a bona fide dispute of the standard rent no decree for eviction could be passed under 12(3)(a) of the Act. If, however, there was a bona fide dispute of the standard rent and the same was not resolved till the disposal of the suit the decree for eviction could not be passed. The trial Court has not observed that the dispute of standard rent raised by the tenant was not bona fide or was mala fide. The said dispute cannot be said to be mala fide simply because the trial Court accepted the version of the landlord. If there was bona fide dispute of standard rent and the same was not resolved till disposal of the suit the decree for eviction under 12(3)(a) could not be passed. If the decree for eviction under 12(3)(a) could not be passed the same could not be passed u/s 12(3)(b) of the Act inasmuch as the cases covered u/s 12(3)(b) are different from the cases covered under 12(3)(a) of the Act.

20. The landlord cannot be permitted to say that because there was dispute regarding standard rent the case is covered u/s 12(3)(b) of the Act. The landlord never alleged in the plaint that there ever existed any dispute regarding the standard rent. As such the decree for eviction u/s 12(3)(b) of the Act passed by the lower Appellate Court is contrary to law.

21. The learned Counsel for the respondent argued that it was the duty of the tenant to move an application for fixation of standard rent and it was not enough that the tenant raised such dispute in reply to the notice of demand or in the written statement. According to Mr. Majmudar it was obligatory for the tenant to move an application for fixation of standard rent. However, this contention cannot be accepted in view of Section 11(i) of the Rent Act which provides that in any of the following cases the Court may upon an application made to it for that purpose or in any suit or proceeding fix the standard rent at such amount as having regard to the provisions of this Act and the circumstances of the case the Court deems it just. The cases in which the standard rent is to be fixed are incorporated in Sub-clauses (a) to (e) of Clause (i) of Section 11.

22. Thus, the scheme of Section 11 is that the Court can fix the standard rent upon an application. Such application can be moved by the landlord or by the

tenant. Likewise fixation of rent can be done in any suit also and thirdly such fixation can be done in any other proceeding as well. Thus, u/s 11 the standard rent can be fixed upon an application and also in a suit as well as in some proceeding. It is then difficult to accept the contention that the standard rent could be fixed only on an application u/s 11 moved by the tenant. If the tenant raised dispute of standard rent in the written statement it can be determined in the suit also. It was not a case where this dispute of standard rent was not raised in the reply notice.

23. The trial Court should have determined the standard rent before finally disposing of the suit. The trial Court after fixing the standard rent or interim standard rent should have afforded opportunity to the tenant to deposit the rent at the rate so fixed by the trial Court and if the tenant failed to pay or deposit the standard rent or interim standard rent within the time granted by the trial Court he could be said to have neglected to pay outstanding arrears of rent. Since this was not followed by the trial Court it cannot be said that the tenant neglected to make payment of the rent to the landlord or neglected to deposit the same in Court. For this reason no decree for eviction could be passed under 12(3)(a) of the Act. As a corollary to this, no decree could be passed u/s 12(3)(b) of the Act.

24. The question of tenant's readiness and willingness to pay or deposit the rent was argued from both the sides. The learned Counsel for the revisionist Mr. S.D. Patel, contended that the tenant was ready and willing to pay the rent. However, readiness and willingness of the tenant to pay the rent is a matter of consideration u/s 12(1) of the Act which has to be read along with explanation to Section 12 of the Act. Readiness and willingness of the tenant has no place in 12(3)(a) of the Act. On the other hand under this section, viz., 12(3)(a) of the Act it is obligatory for the tenant to pay arrears of rent exceeding six months within a period of one month of service of notice of demand. If he neglected or failed to pay the same he rendered himself liable for eviction. He cannot be permitted to say after receipt of summons of the suit that he is ready and willing to pay the rent in Court or is ready and willing to pay the same to the landlord. The date of filing of the suit and the date of filing of written statement is immaterial and irrelevant for the purpose of 12(3)(a) of the Act. It is only actual payment of rent which is relevant under this section.

Explanation to Section 12 of the Act is also not applicable in the instant case. This explanation is to be read along with Section 12(1) of the Act and not along with 12(3)(a) of the Act.

25. Since it was not a case where the landlord alleged that the tenant was in arrears of rent for less than six months" the decree for eviction u/s 12(3)(b) could not be passed simply by observing that the tenant failed to make strict compliance of the provision contained in the said section. Several authorities were cited by Shri Majmudar in support of his contention that since the tenant did not regularly deposit the rent in trial Court as well as in Appeal, he could not

avail of the statutory protection u/s 12(3)(b) of the Act. The detailed discussion of these judgment is not necessary and only reference to those cases will be sufficient. To my mind, if the decree itself could not be passed u/s 12(3)(b) of the Act the tenant was hardly obliged to save his eviction by making compliance of the provisions contained in Section 12(3)(b) of the Act. The failure of the tenant to make strict compliance of Section 12(3)(b) of the Act under the aforesaid circumstances will not render him liable for eviction.

26. The case of Mranalini B. Shah and Another Vs. Bapalal Mohanlal Shah, is the Apex Court's verdict in which expression "regularly" as it stood before amendment of Section 12(3)(b) was considered and it was held that payment made at interval of 2, 3 or 4 months cannot be considered as regular payment and no discretion is left with the Court to save eviction of the tenant if the provisions of Section 12(3)(b) are not complied with. For the reasons given above that since decree for eviction could not be passed u/s 12(3)(b) of the Act this case cannot be applied in favour of the landlord and against the tenant-revisionist. On the same ground the pronouncement in Taraben v. Jethalal reported in (1974) 15 GLR 567 and Rasiklal Narmadashanker Trivedi Vs. Dilipkumar Vasantbhai Kotak and Another, , Ambalal v. Babaldas reported in (1962) 3 GLR 625 also cannot be applied in favour of the respondent.

27. It is not a case where the revisionist neglected to pay or tender the rent in Court. Since he raised dispute regarding the standard rent and the said dispute was resolved only on the conclusion of trial in the judgment of the trial Court, the tenant could not have known how much amount was to be tendered in Court, still he deposited Rs. 915/- upto the date of judgment in the trial Court. Initially, he deposited Rs. 765/- on 13-8-1975 and subsequently also he deposited the rent totalling Rs. 915/-. As such it cannot be said that the tenant neglected to tender rent in Court.

28. For the reasons given above, the judgment and decree of the lower appellate Court is contrary to law. Hence, it has to be set aside. The revision, therefore, succeeds and is allowed. The judgment and decree of the lower appellate Court dated 24-3-1982 are set aside and that of the trial Court dated 10-4-1978 are restored. In the facts and circumstances of the case there shall be no order as to costs.