

(1984) 12 BOM CK 0013

In the Bombay High Court

Case No : Letters Patent Appeal No. 42 of 1983

Pandurang Tukaram Rajkondawar

APPELLANT

Vs

Balaram Madhaorao Chavan

RESPONDENT

Date of Decision : 05-12-1984

Acts Referred:

Transfer of Property Act, 1882 — Section 108(1)

Citation : AIR 1986 Bom 33 : (1985) MhLj 109

Hon'ble Judges : Patel, J;G.A. Paunikar, J

Bench : Division Bench

Advocate : J.N. Chandurkar, for the Appellant; D.N. Kukday, for the Respondent

Judgement

Paunikar, J.—This appeal is filed by the appellant-landlord challenging the judgment dated 1-4-1982 passed by the Hon"ble Single Judge of this Court in Special Civil Application No. 548 of 1978.

2. The landlord filed an application on 4-10-1975 against the tenant respondent for permission to terminate the tenancy of the tenant under Cl.13(3)(i), (ii) and (vi) of Rent Control Order, 1949 before the Rent Controller, Wani. His case under Cl.13(3)(i) was that the tenant had agreed to pay rent of every three months in advance at the rate of Rs.32/- p.m. On the date of the application, the tenant was in arrears of rent of Rs. 192/-. Under Cl.13(3)(ii) he has filed a schedule of payment of rent to show that rent was never paid as per agreement and submitted that the tenant was a habitual defaulter in payment of rent. Under Cl.13(3)(vi) he contended that he was 56 years old and was due to retire shortly. He has no other house to reside except the suit houses in the city of Wani and hence he wants the premises in occupation of the tenant for his bona fide occupation.

3. The tenant vide his written statement denied that every three months" rent was payable in advance. He submitted that rent was payable monthly but it was to be paid in next month. He further submitted that landlord"s brother Pundalik

alias Nanaji used to recover rent. Despite tenant's request to accept rent every month, he told the tenant that rent should be paid as and when demanded or at the end of six months. This practice of paying rent of every six months was followed till the filing of the application by the landlord. The landlord vide his letter dt. 6-7-1969 informed the tenant that he should not pay rent to Nanaji, his brother and the amount should be paid to him directly by money order or a bank draft and the tenant accordingly started remitting rent by money order without deducting money order commission. However when he started sending rent deducting money order commission, the landlord again asked him to pay rent to his brother Nanaji as before. He also filed a schedule of payment of rent with the return in LPA. The tenant denied that the landlord required the premises for his own use and occupation and contended that the landlord is in occupation of 8 big rooms of the said house and 2 rooms out of 8 big rooms in his possession were leased out by him after the filing of this application. He submitted that even 6 rooms in his possession are sufficient to meet his needs. He denied the arrears alleged on the date of the application.

4. The parties went on trial. The landlord examined himself as AW1 and the tenant examined himself as NA. The Rent Controller vide his order dt. 31-7-1976 granted permission to the landlord under Cl.13(3)(ii) and (vi) of the R.C.O., 1949. On appeal preferred by the tenant against this order, the appellate authority, Resident Deputy Collector, Yeotmal vide his order dt. 31-10-1977 confirmed the findings of the Rent Controller and dismissed the appeal. These orders were challenged in Special Civil Application preferred by the tenant before the Hon'ble Single Judge of this Court and the Hon'ble Judge vide his judgment dt.1-4-1982 set aside the concurrent findings of facts and thus quashed and set aside the orders of the Rent Controller as well as the appellate authority and dismissed the application of the landlord for permission to terminate the tenancy of the tenant on both the grounds. It is this judgment of the Hon'ble Single Judge which is challenged in this appeal.

5. The learned counsel for the appellant Shri J.N. Chandurkar restricts himself to the case of the landlord under Cl.13(3)(ii) and does not press his case under Cl.13(3)(vi) of the R.C.O. Hence we propose to deal only with respect to the issue whether the tenant is a habitual defaulter within the meaning of Cl.13(3)(ii) of the R.C.O. 1949 and if so whether the landlord is entitled to permission to terminate the tenancy of the tenant under the said clause.

6. The landlord filed application on 4-10-1975 but he filed schedule of payment of rent from the date of commencement of tenancy i.e. from 15-6-1966 to 14-3-1972. The tenant filed complete schedule with his return in Special Civil Application. The Hon'ble Single Judge observed that the landlord never called upon the tenant to be regular in payment of rent and hence it appears that the tenant went on paying rent as directed to him from time to time either by Pundalik who inducted him in the tenement or by the landlord. He held that even assuming that the tenant developed his own practice of remitting rent, this

practice which extended nearly over 9 years was clearly acquiesced in by the landlord. He held that right from 26-11-1969 to 4-10-1975 i.e. date of application, rent was remitted every six months except on one occasion as shown in the scheduled on record. He held that there was a contract to the contrary which relieved the tenant of his obligations to pay rent every month and both the revenue authorities ignored this circumstances. In this view the Hon'ble Single Judge set aside the permission granted to the landlord under Cl.13(3)(ii) of the R.C.O., 1949 by the Rent Controller and confirmed by the appellate authority.

7. The issue whether a tenant is a habitual defaulter in payment of rent will have to be decided on the basis of the agreement between him and the landlord. In this case the landlord's case is that it was agreed between him and the tenant that every time 3 months rent was agreed to be paid in advance. The tenant however contended that the rent was not payable monthly but it was to be paid in next month. He also contended that landlord's brother Pundalik leased out the premises to him and he used to recover rent. He told him that it is not necessary to pay rent monthly, as the monthly amount is small it would be frittered away on small items of expenditure and asked him that rent should be paid as and when asked or at the end of every six months so that it would be convenient for the tenant to remit the rent in lump sum. This is the practice alleged to be continued by the tenant till the date of filing of this application by the landlord.

8. The case of landlord to the effect that there was an agreement to pay every 3 months rent always in advance is disbelieved by both the Revenue Authorities below. The admitted fact is that the tenancy is monthly. The law in case of monthly tenancy is that the tenant is bound to pay rent at the close of the tenancy month in the absence of any other contract to the contrary. The contract to the contrary pleaded by the tenant is stated by us in the preceding para. In cases under Cl.13(3)(ii) of R.C.O., 1949 filed by the landlord, the tenants generally take the plea as aforesaid. In our opinion at the outset such a plea is unnatural and inconceivable. No landlord will ever agree to accept rent at the mercy of the tenant and if he has to submit to the dictates of the tenant, no landlord will ever lease out his property. Assuming that the story of practice pleaded by the tenant is acceptable, the payments made by the tenant must support the practice pleaded by him. The schedule of payments filed by the tenant at Annexure-3 to his return at page 42 of the writ petition does not support the practice alleged. Sometimes the tenant paid rent for 2 months, at times for 3 months and also for a month. The tenant also withheld rent for considerable months on the dates of payment as seen from items given below from the schedule.

Month Date of Payment. 1. 15-5-1969 to 14-9-1969 - 27-11-1969. 2. 15-3-1970 to 14-9-1970 - 23-1-1971. 3. 15-9-1970 to 14-3-1971 - 21-5-1971. 4. 15-3-1971 to 14-9-1971 - 3-11-1971. 5. 15-3-1972 to 14-9-1972 - 20-10-1972. 6. 15-9-1972 to 30-12-1972 - 25-2-1973. 7. 1-1-1974 to 30-6-1974 - 16-9-1974. 8. 1-7-1974 to 31-12-1974 - 9-3-1975. 9. 1-1-1975 to

30-6-1976 - 18-8-1975.

Thus the dates of payments aforesaid do not prove the practice pleaded by the tenant. It appears from the judgment that the Hon"ble Single Judge had in his mind the ruling of the Supreme Court in S.P. Deshmukh Vs. Shah Nihal Chand Waghajibai Gujarati, In this case the tenant was paying rent at an interval of 3 or 4 months but on the dates of payments he was paying full amount of rent due till the dates of payment and the landlord was accepting rent without protest about the mode of payment for years together and he was not at all in arrears of rent on the date of application. It was therefore, held that though normally a monthly tenant is under an obligation to pay rent from month to month but this obligation is subject to a contract to the contrary and such a contract can be spelt out from the conduct of the parties spread over a fairly long period of time. In the instant case on the dates of payment, full amount of rent of some months was withheld as will be seen from the instances above pointed out by us. It is held in Shormax Watch Co. v. Mahant Amardas, reported in 1977 MahLJ 67 that -

"the tenant could not be a habitual defaulter on the ground that he did not pay rent regularly every month in view of the landlord's admission that he used to be away but he was a habitual defaulter because on the date he made payments he did not clear all arrears and such instances were not less than eight and that he could not excuse himself by saying that he being a businessman, he was not expected to be ready with funds every time."

9. Even if the tenant does not make full payment of rent accrued due till the date of payment, the landlord has no alternative but to accept whatever amount of rent is paid to him by the tenant. It is not necessary for the landlord to give notice of default will not absolve the tenant from discharging his liabilities. This circumstance that the landlord has accepted whatever amount of rent paid by the tenant without protest cannot by any stretch of imagination be relied upon in making out the case of acquiescence as held in unreported decision of this Court in Spl. Civil Appln. No.240 of 1974, decided on 23-1-1980* in Shah Gokuldas Waghjibhai v. Standard Trading Company. The practice pleaded by the tenant obviously stands disproved. Even assuming that the practice pleaded by him is proved, no payment is made as per practice. We are aware of the fact that habitual default under Cl.13(3)(ii) of the R.C.O., 1949 is different from default under a contract in ordinary law. However, in this case the dates of payments shown in the schedule and the instances of withholding of rent due without making full payments till the dates of payment do convincingly establish and justify that the tenant has either formed a habit to commit defaults or he suffered from inherent disability to discharge his liabilities when he is expected and bound to discharge even according to the practice alleged by him. We, therefore, hold that the Hon"ble Single Judge lost sight of and ignored the aforesaid important aspect in the evidence in this case while setting aside the concurrent findings by the Rent Controller and the Rent Control Appellate Authority. The judgment of the Single Judge, therefore, cannot be sustained and

deserves to be set aside.

10. In the result, this appeal is allowed. The judgment of the Hon"ble Single Judge rejecting permission granted to the appellant under Cl.13(3)(ii) of the R.C.O., 1949 by the Rent Controller and confirmed by the Deputy Collector is set aside and instead, the order granting permission under Cl.13(3)(ii) of the R.C.O., 1949 to the appellant to terminate the tenancy of the respondent both by Rent Controller and the Resident Deputy Collector is restored. However, there will be no order as to costs. Appeal allowed.