
(2005) 09 BOM CK 0051
In the Bombay High Court
Case No : Writ Petition No. 612 of 1990

Ramdularibai Badrilal Chaurasiya and Others	APPELLANT
Vs	
Mohan Shrimal Nahar	RESPONDENT

Date of Decision : 26-09-2005

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(3), 12, 12(1), 12(2), 12(3)
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 109

Citation : (2006) 1 ALLMR 751 : (2006) 2 BomCR 130 : (2006) 1 MhLj 358

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : P.R. Katneshwarkar, instructed by R.G. Karmarkar, for the Appellant;
S.C. Bora, for the Respondent

Final Decision : Allowed

Judgement

A.B. Naik, J.—The instant writ petition is filed by the original plaintiffs challenging the judgment and order dated 26th September, 1989 passed by the learned III Addl. District Judge, Jalgaon in Civil Appeal No. 341/1983, whereby he reversed the judgment and decree dated 25th February, 1983 passed by the learned Civil Judge J. D., Bhusawal, in Regular Civil Suit No. 377/1980 dismissing the suit filed by the plaintiffs for recovery of possession of Municipal House No. 2/28 (hereinafter referred to as "the suit house") which is in the occupation of the defendant as a tenant. The parties to this judgment will be referred to as the "plaintiffs" and "defendant". Most of the facts and findings arrived at are not disputed, which can be noted to understand the controversy raised in this petition.

2. One Ramdularibai Badrilal Chaurasiya owned the suit house and the defendant was occupying the same as a tenant. As the defendant remained in arrears of rent from 6th July, 1978 till 22nd August, 1980, the plaintiff No. 1 issued notice to the defendant as required by Section 12 Sub-section (2) of the Bombay Rents

Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Act"), calling upon the defendant to pay the arrears of rent as demanded. The notice admittedly was received by the defendant on 27th August, 1980. It is also not disputed that on receipt of the notice from the plaintiff, the defendant did not comply the notice nor paid the arrears of rent u/s 12(3)(a) of the Act. As the defendant did not pay the rent nor vacated the premises, plaintiff No. 1 filed RCS No. 377/1980 on 10th October, 1980, inter alia, contending that the defendant is occupying one block in the suit house as a monthly tenant and the rent of the said premises being Rs. 8/- per month. She contended that there is no dispute regarding standard rent etc. The tenancy begins on 7th of every month. She has accepted that the defendant has paid the rent upto 6th July, 1978, but the defendant was in arrears for more than six months, hence she issued notice u/s 12(2) of the Act on 22nd August, 1980 calling upon him to pay the arrears of rent within one month and also to hand over the vacant possession of the house. She claimed in the suit the possession of the said block and also the amount the arrears of rent of Rs. 282.60/- paise and further rent during the pendency of the suit.

3. After filing the suit, the plaintiff No. 1 sold the suit house to Prabhakar Tukaram Nemade and Balkrishna Tukaram Nemade under registered sale dated 13-1-1981. After the suit house was sold to them, the purchasers filed an application at Exh. 10, with a prayer to add them as plaintiffs. Accordingly, the learned Civil Judge by his order dated 11th August, 1981 allowed the application, thereby permitted the purchasers to be added as plaintiffs in the said suit, since they are added as plaintiffs Nos. 2 and 3 and suit proceeded as such.

4. On lodging of the plaint, the learned Civil Judge, Junior Division, ordered summons to be issued to the defendant. On receipt of summons, the defendant appeared and filed his written statement on 11th December, 1981, denying all adverse contentions raised by the plaintiffs. He denied that he was in arrears of rent, as alleged by the plaintiffs. He also denied that he has received the notice. He also contended that the amount of rent as claimed in the plaint and the notice not acceptable to him. In para 6 of the Written Statement, the defendant accepted the fact that the owner of the house-Ramdularibai, by a registered sale deed dated 13-1-1981, has sold the property to the added plaintiff Nos. 2 and 3. He accepted that the original plaintiff has attorned the tenancy in favour of the purchasers. He also accepted the fact of delivery of symbolic possession of the suit house to the purchasers on 15-1-1981 and accepted that notice of attornment. He contended that added plaintiffs have paid the arrears of rent to plaintiff No. 1. He denied the relation as landlord and tenant between added plaintiff and defendant and, therefore, he contended that no relief can be granted to the plaintiff. He contended that in view of the transfer of the suit house by the plaintiff No. 1 in favour of plaintiff Nos. 2 and 3 they have no right to seek possession of the suit house on the cause of action occurred to plaintiff No. 1. With these contentions, the defendant resisted the suit and prayed for its dismissal.

5. On the basis of the pleadings of the parties, the learned Civil Judge framed the following issues :

1. Does plaintiff prove that defendant is a defaulter for more than six months has neglected to pay arrears of rent from 7-7-1978 within one month from the receipt of suit notice, served on defendant on 27-8-1980?

2. Does plaintiff prove that provisions of Section 12(2) are not attracted?

3. Does plaintiff prove that suit house is required reasonably and bona fidely for immediate purpose of demolition for electric new building?

4. Does plaintiff prove that premises have not been used without reasonable cause for the purpose for which it was let out for a continuous period of six months immediately presiding the date of the suit?

5. What is due from the defendant?

6. Whether the standard rent can be fixed in absence of application u/s 11(3) within one month from the suit notice? If yes, what is standard rent?

7. Does defendant prove that the arrears of rent ceases the character rent in view of the transfer of house to the present landlord?

8. What order and relief?

6. The parties to the suit in support of their respective contentions have examined the witnesses. The purchaser examined himself as Witness of the plaintiff No. 1. The defendant has examined himself as Witness No. 1 and examined one Motilal Chordiya as his witness, with a view to show that the defendant has tried to pay the rent to plaintiff No. 1 on the auspicious day of "Ganesh Chaturthi", which was not accepted by the landlady. The learned trial Judge having considered the contentions advanced by the parties and the evidence of witnesses, held that the plaintiffs have established that the defendant is in arrears of rent, inasmuch as he has not paid the rent, after the notice from the plaintiff and, therefore, he has committed breach of Section 12(3) (a) and 12(3)(b) of the Act. With these observations, the learned 3rd Jt. Civil Judge, J.D., Bhusawal decreed the suit of the plaintiffs by the judgment and decree dated 25th February, 1983.

7. Feeling aggrieved by the judgment and order dated 25th February, 1983 passed by the learned 3rd Joint Civil Judge, the tenant preferred an appeal being Civil Appeal No. 341/1983, It was contended before the Appellate Court that the plaintiff Nos. 2 and 3 are the purchasers of the suit house and, as such, they are not entitled to seek possession of the suit house on the ground of default that has been committed by the defendant as against the plaintiff No. 1 and as such, the plaintiffs 2 and 3 are not entitled for decree of possession. The Appellate Court has considered this aspect and confirmed the finding recorded by the trial Court qua the arrears of rent and non-deposit of rent within one month from the date of the notice. However, the learned ADJ differed with the finding recorded

by the learned Civil Judge on the ground that the rent which was in arrears and due and payable to plaintiff No. 1 being a debt, the said cannot be transferred, more particularly when the sale deed in question was not produced on record and, therefore, he came to the conclusion that there is no assignment of arrears of rent in favour of the purchasers by plaintiff No. 1 and, therefore, the plaintiff Nos. 2 and 3 cannot take benefit of the arrears of rent qua plaintiff No. 1. The learned ADJ has taken support of the judgment of this Court in the case of *Vinayak Nirgun v. Sadanand Bandekar*, 1982 Mh.L.J. 126. Relying on the judgment of this Court (*supra*), he came to the conclusion that the plaintiffs are not entitled for the decree for possession and accordingly, the learned 3rd Addl. District Judge, Jalgaon set aside the judgment and decree passed by the trial Court and allowed the appeal by dismissing the suit. Accordingly, by the judgment and order dated 26th September, 1989, the learned ADJ allowed the appeal.

8. Feeling aggrieved by the Judgment and order dated 26th September, 1989 passed by the learned ADJ, Jalgaon, the petitioners original plaintiffs approached this Court by way of this writ petition, under Article 227 of the Constitution of India.

9. Shri P.R. Katneshwarkar, learned Advocate instructed by Shri R.G. Karmarkar, learned Advocate for petitioners submitted that the view taken by the learned ADJ relying on the judgment of this Court in the case of *Vinayak Nirgun's* case (*supra*) is patently erroneous and, thus, the ADJ has committed an error appearing on the face of the record in allowing the appeal filed by the tenant. He pointed out that the judgment rendered by the learned Single Judge is no more good law in view of the Division Bench judgment of this Court in the case of *Radhabai Shelar (Dead) by LRs. Madhav Shelar and Ors. v. Trimbak Shirole and Ors.* reported in 1981 Mh.L.J. 967. The Division Bench of this Court, considering the effect of transfer of tenanted premises where the tenant was in arrears of rent and the question before the Bench was whether the transferee can take benefit of the arrears of rent which accrued to the transferor prior to date of transfer.

10. Shri Katneshwarkar, learned Advocate submitted that both the Courts below have concurrently held : (i) notice u/s 12(2) was issued by the landlady/plaintiff No. 1, which was received by the tenant; (ii) on receipt of the notice u/s 12(2) the tenant not deposited the rent as required u/s 12(3)(b) or raised any dispute to the standard rent; (iii) both the Courts below have accepted the fact that the tenant is in arrears of rent for more than six months. Thus, the learned Counsel submitted that with these concurrent findings of fact recorded by both the Courts below, the only question remains to be considered by this Court in this petition is, whether the decree can be passed by considering the arrears of rent due to the original transferor i.e. plaintiff No. 1.

11. Per contra, Shri S.C. Bora, learned Advocate for the defendant/respondent supported the judgment, inter alia, contending that the arrears of rent in the

hands of the plaintiff No. 1 before transfer of property becomes a debt and, therefore, that claim cannot be transferred and thus the plaintiff Nos. 2 and 3 are not entitled to receive the possession on the basis of the default that has occurred before the transfer. He further submitted that the plaintiffs have not brought on record the sale deed to establish that the plaintiff No. 1 has transferred the right to receive the arrears of rent from the defendant to plaintiff Nos. 2 and 3 therefore, he submitted that in the absence of sale deed on record, the view taken by the learned ADJ requires to be upheld. He, then, submitted that this petition is filed under Article 227 and, therefore, this Court is precluded from appreciating the evidence so as to come to a different conclusion than which is arrived at by the lower Appellate Court. He sought reliance on the judgment of the Apex Court in the celebrated case of Gopal Krishan Das Vs. Sailendra Nath Biswas and Another, . In my judgment, the scope and ambit of the writ jurisdiction of this Court under Article 227 is concerned, there cannot be any quarrel. The scope and ambit of the writ jurisdiction of High Court has been explained by the Apex Court right from the judgment of Waryam Singh and Another Vs. Amarnath and Another, to the recent judgment of Ranjeet Singh Vs. Ravi Prakash, wherein the view taken in Wariam Singh and Babhutmal's cases are reiterated and reinforced.

12. The question which falls for my consideration in the present petition is whether by allowing the appeal, the learned ADJ has committed any error appearing on the face of the record. To ascertain this aspect, I have to consider the submission of Shri Katneshwarkar, learned Advocate who not only relied on the judgment of Division Bench of this Court (quoted supra); but relied on the Full Bench judgment of the Gujarat High Court in the case of Champaklal Natali v. Saraswatiben and Ors. reported in AIR 1977 Guj 48 and the recent judgment of the Apex Court in Sheikh Noor and Another Vs. Sheikh G.S. Ibrahim (dead) by Lrs., .

13. Shri Bora, learned Advocate for respondent, has brought to my notice the judgment of the learned Single Judge (Khanwilkar, J.) in case of Pandurang Sambhaji Jondhale and Another Vs. Suchita Deokaran Navandhar, and contended that the view taken by the learned Judge in Pandurang's case requires reconsideration. He submitted that the learned single Judge in Pandurang Jondhale's case has referred some judgments of this Court which were not countenanced by the Apex Court. In my judgment, the criticism levelled by the learned Advocate for the respondent though merit consideration, but looking to the fact that the judgment of the Apex Court in Sk. Noor's case has concluded the point at issue, it is not for me to ponder on the second limb of contention of Shri Bora, on the basis of Pandurang's case (supra).

14. From the undisputed facts and in particular when the defendant has admitted attornment of tenancy and having received the notice of attornment the production of sale deed in such circumstances, in my judgment, is not fatal as defendant has virtually admitted the claim of the plaintiffs. With this backdrop

now I have to consider whether the learned ADJ was right placing reliance on the judgment of Vinayak Nirgun's case.

15. Vinayak Nirgun's judgment was rendered by Pratap, J. (as then he was) on 10th September, 1981 and the Division Bench has answered the reference in Radhabai's case on 5th August, 1981. Having noticed the judgment of the learned single Judge in Vinayak's case, it appears that though the Division Bench of this Court in Radhabai's case has answered the reference on 5th August, 1981, that judgment was not brought to the notice of the learned single Judge in Vinayak's case. Therefore, considering the Division Bench judgment of this Court, I venture to say that the judgment of Vinayak's case is per incuriam.

16. Coming to the judgment of the Division Bench in Radhabai's case, facts are required to be recapitulated. The writ petition was filed under Article 227 of the Constitution of India challenging the judgment and orders passed under the provisions of the Act was referred to the Division Bench by the learned single Judge vide order dated 22nd July, 1980 as the learned single Judge was of the opinion that the judgment of the learned single Judge in the case of Shantinath v. Rajmal reported in 1979 Mh.L.J. 229 requires reconsideration. Thus the entire writ petition was referred to the Division Bench. The facts of Radhabai's case reads thus.

The disputed property, a house situated at Shivaji Nagar, Pune belonging to one Anandrao Shelke the uncle of the respondent. The property was leased out was purchased by the petitioner in the year 1962 at agreed rent of Rs. 30/- per month in addition to education cess. Anandrao died on November, 5, 1965 leaving behind a Will by which he bequeathed the suit house the respondent Nos. 1 and 2. The respondent obtained probate and thereafter they issued notice of termination of tenancy vide notice dated 8th July, 1966 on the ground that the tenant has committed default in payment of rent and also guilty of creating permanent structure without prior consent of the landlord. They also claimed that tenant was guilty of damaging the property etc. The tenant, on receipt of the notice, instituted the proceeding in the Court of Small Causes at Pune for determining the standard rent as provided u/s 11(3) of the Act. The respondent filed RCS in the same Court on October 9, 1969 for recovery of possession, taking several grounds including default in payment of rent, change of user, erection of permanent structure, nuisance etc. The trial Court after recording the evidence came to the conclusion that the respondents are entitled to a decree for possession as required under the provisions of Section 13(1)(b) and (c) of the Act. The trial Court, further, held that the landlord failed to establish the claim for possession u/s 12 of the Act. Accordingly, the decree on the basis of Section 13(1)(3)(c) was granted. The tenant preferred an appeal before the District Court, Pune and by the judgment and order dated October, 10, 1975, the appeal came to be dismissed. The appeal Court concurred with the finding of the trial Court that landlords have established the requirement of Section 13(1)(b) of the Act and dismissed the appeal. Two questions were fallen for consideration before

the Division Bench. So far as the question regarding 13(1)(b) is concerned, it is not relevant for my purpose to consider the judgment on that point. The second point regarding the claim of transferor to seek possession of tenanted premises on the ground of default committed by the tenant earlier to transfer of the tenant is germane to this case. The Division Bench then proceeded to consider the effect of transfer of property by the original owner. The Division Bench then considered earlier the judgment of learned single Judge in the case of Narendra Singh v. N. M. Engineer and Ors., 1979 Mh.L.J. 851. The Division Bench in the process took support of the full Bench judgment of the Gujarat High Court in Champaklal's case and observed thus

13. Reliance was placed on behalf of the petitioners on a decision of the single Judge in the case of Narendra Singh Viridi v. N.N. Engineer and Ors., 1979 Mh.L.J. 851 where the learned Judge approved the view in Shantinath 's case to which we have referred to in the earlier paragraph. In this case, the property was owned by the plaintiff and his wife Banoobai and was leased on a monthly rent of Rs. 130. Banoobai died on October 3, 1966 and the plaintiff terminated the tenancy on May 2, 1967, in his capacity of co-owner as well as the legal representative of deceased Banoobai, together with the other legal representatives. The notice was one u/s 12(2) of the Act calling upon the tenant to pay the arrears of rent. The tenant did not pay the arrears within one month of the receipt of the notice but prior to the institution of the suit by the plaintiff on June 8, 1967, the other heirs of the deceased Banoobai released their share in favour of the plaintiff. The plaintiff accordingly filed the suit for recovery of possession and joined the other legal representatives of Banoobai as party defendants. The trial Court and the lower Appellate Court passed decree for eviction against the tenant on the ground that the case clearly attracts the provisions of Section 12(3)(a) of the Act. The tenant approached this Court in its writ jurisdiction and the learned single Judge set aside the decree on the ground that since the date of release of share by the legal representative of Banoobai in favour of the plaintiff, the arrears due lost their identity as rent and no complaint could be made by the plaintiff that there were defaults in the payment of rent as required by notice dated May 2, 1967. According to the learned Judge, the rent due changes its character as rent and becomes only a debt actionable claim after the property changes hands. The learned Judge further held that the purchaser cannot be considered as the landlord and the amount due to the original landlord which may be recoverable by the purchaser by virtue of assignment would not enable him to claim recovery of possession. To record this conclusion, the learned Judge drew strong support from the decision of the Division Bench of the Gujarat High Court in the case of Khatri Kasam Sidi v. Dostmohmed Chaus and Ors., AIR 1976 CJ 562 and the decision of the Calcutta High Court in the case of Daya Debi Vs. Chapala Debi, . The learned Judge distinguished the judgment of the Division Bench of this Court in Special Civil Application No. 410 of 1963 decided on September 18, 1964 on the ground that the decision of the Division Bench, there was no discussion whatsoever as to whether the rent due prior to

the date of transfer continued to retain its character as rent even after the transfer and whether the transferee could avail of the arrears of rent due prior to the transfer as a ground for evicting the tenant. The learned single Judge then placed reliance upon the decision in Shantinath's case and drew support from the observation that the Legislature never intended that in cases where a cause of action which was never taken advantage of by the earlier landlord, should enure for the benefit of the purchaser and the purchaser should be able to base an action for ejectment on the basis of the alleged violation of the provisions of the Act. With respect to the learned Judge, we are unable to share the view propounded in this case. There are two or three reasons which weighed with us while differing with the view of the learned Single Judge. The first ground is that the decision of the Division Bench of the Gujarat High Court from which strong support was drawn by the learned Judge stands overruled by the Full Bench decision of the Gujarat High Court in the case of Champaklal Dahyabhai Natali and Ors. v. Saraswatiben and Ors., AIR 1977 Guj. 48. The Full Bench specifically overruled the earlier decision of the Division Bench and so also disapproved the decision of the Calcutta High Court reported in Daya Debi's case on which the single judge of this Court placed reliance. Shri Justice D.A. Desai, as he then was, presiding over the Full Bench observed that when the lessor transfer the entire interest in the property including the arrears of rent due prior to the transfer, the assignee also obtained the right to such arrears of rent - it being a right relating to property. On such a transfer what vests in the transferee is all the rights of the lessor relating to the property transferred and this includes the right in respect of arrears of rent due prior to the transfer. The learned Judge further observed that the substantive part of Section 109 of TP Act read with the proviso necessarily indicates that arrears of rent due before a transfer is one of the lessor's right as to the property transferred. Such a transferee, observes the Full Bench, stands in the same position as an heir of the deceased lessor, as what is transferred to him is all rights of the lessor as to the transferred property. The question need not be looked from the point of character of the rent due prior to the transfer but must be viewed from the angle of the right to take possession of the property which arises because the tenant then remains in arrears of rent. Such right originally vested in the lessor and on transfer of all his rights, the same vests in his transferee as per the provisions of Section 109 of the TP Act. The Full Bench observe that the decision reported in Daya Debi's case did not take notice of a contrary view taken by the same High Court earlier and, in any event, the Full Bench was unable to accept the position of law laid down in Daya Debi's case (supra). We have considered the reasons given by the Full Bench in depth and we are in respectful agreement with the conclusion recorded by the Full Bench of the Gujarat High Court. In our judgment, the view taken by the learned single judge of this Court in Narendra Singh Viridi's case is incorrect and we overrule the same."

17. The above observations made by the Division Bench of this Court are binding on me and I have to follow the same as the Division Bench has placed reliance

on the Full Bench judgment of the Gujarat High Court. It will be convenient for me to refer to the judgment of Full Bench, at this juncture.

18. The Full Bench of Gujarat High Court in Champaklal's case was also dealing with the case which arose out of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and as there were two conflicting views expressed by the Division Bench of the Gujarat High Court, the matter was referred to the Full Bench, who held thus :

20. Now under the Transfer of Property Act, a landlord is entitled to possession of the demised property on termination of a monthly lease. In order to restrict the right of the landlord to recover possession in view of the scarcity of the accommodation the Act has been enacted. The provisions of Section 12 of the Act have also been enacted for that purpose and the said provisions give protection to the tenant and do not confer a new right on the landlord which he does not possess under the ordinary law of the landlord and tenant. It is not a section which to use the words of the Supreme Court in *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad*, , creates "a new right in the landlord to evict the tenant where the tenant does not pay rent", vide the Full Bench decision in *Nanalal's case* (supra). As we have held that under the ordinary law a transferee of the lessor's right can take advantage of the arrears of rent prior to the transfer the question in issue can be answered as per aforesaid statement of law enunciated in the above cases, viz. that the tenant must establish his readiness and willingness to pay the entire rent due if he wants the benefit of the provision of the Act. The provisions of Section 12 of the Act are not identical in all respects to the provisions of the sections the Courts were considering in the cases cited hereinbefore. The provisions of Section 12 of the Act are to some extent different in as much as they give more opportunities to the tenant to avoid a decree of eviction. Section 12(1) of the Act requires tenant's readiness and willingness to pay rent. Section 12(2) require the tenant to pay the rent which the landlord calls upon him to pay and this includes all the arrears of rent. If the dispute regarding the standard rent is raised, a tenant is under an obligation to pay the rent as per the provisions of Section 12(b) in order to avoid a decree of eviction. That being so the principle of law laid down in those cases is applicable to the tenant seeking protection of the Act. A transferee of the property with arrears of rent as pointed out earlier is a landlord u/s 12 of the Act. In the instant case the tenancy of the tenant is legally terminated and under the ordinary law, the transferee landlord is entitled to recover possession of the suit premises. In order to obtain protection under the Act the tenant has to show his readiness and willingness to pay rent or to pay rent as per the provisions of Section 12 of the Act. There is nothing to indicate that the tenant's default in payment of rent prior to the transfer is available only to a landlord who at the time of the default was the landlord, the tenant must be at all times ready and willing to fulfil all his conditions of tenancy including the payment of rent as per the provisions of Section 12 of the Act. The provisions of Section 12 of the Act only limit the right of the landlord to recover possession and supply

opportunities to the tenant to make good his default for non-payment of arrears of rent at the stages and in the manner provided u/s 12(1), 12(2) and 12(3)(a) of the Act. We take this view of law only because under the ordinary law of landlord and tenant a transferee can take benefit of arrears of rent prior to the transfer on assignment to him. If such is not the position in ordinary law, the question will necessarily arise that to construe Section 12 of the Act to lay down an obligation on the tenant to pay arrears of rent due prior to the transfer to the transferee will correspondingly impose a right on the landlord to recover possession which he had not under the ordinary law. The intention of legislature in enacting Section 12 of the Act is not to create a new liability in a tenant which did not exist in the common law but to protect him from the liability which falls upon him because of the liberal provisions of that law."

19. The Division Bench of this Court in Radhabai's case has followed the Full Bench judgment and held that the landlord/plaintiff can claim possession of the property on the basis of arrears of rent that accrued to the transferor landlord. It is to be noted that in all these cases the question was transfer of property was before filing of the suit. In the present case, the peculiar fact is that the plaintiff No. 1 issued notice u/s 12(2), calling upon the defendant to pay the arrears of rent; the defendant did not bother to comply and as such, the landlady/plaintiff No. 1 filed a suit and after filing of the suit, plaintiff by a registered sale deed transferred the suit house and then the purchasers were added as plaintiffs, thus, all the plaintiffs continued with the suit. Therefore, in peculiar facts of this case and looking to the judgment of the Division Bench of this Court and Full Bench judgment of the Gujarat High Court, the findings recorded by the learned ADJ on the basis of Vinayak's case being incorrect, thus, required to be interfered with.

20. The judgment of the Apex Court in Sheikh Noor's case (supra) will be referred now. Incidentally, the Apex Court has referred the judgment of the learned single Judge in Vinayak's case. The Apex Court then considered the provisions of Section 109 of the Transfer of Property Act and also the judgment of Narendra Singh v. N.N. Engineer, AIR 1995 SC 488, the original judgment of the learned single Judge which was overruled by the Division Bench in Radhabai's case. After considering all these judgments, the Apex Court approved the view taken by the Full Bench of the Gujarat High Court in Champaklal's case. The Apex Court held thus :

12. The substantive part of Section 109 of the T. P. Act read with the proviso necessarily indicates that the arrears of rent due to one of lessor's right as to the property transferred. Right to recover the arrears of rent vested with the original owner and on transfer of all his rights, the same vests in the transferee as per provision of Section 109 of the T. P. Act. Proviso to Section 109 clearly indicates that if there is an assignment of rent due then the transferee landlord would be entitled to recover the same from the tenant as arrears of rent.

13. In Ramchander Narsey and Co. v. Wamanrao Shenoy, this Court approved

the judgment of the High Court of Bombay in ordering ejectment of a tenant, in inter alia, on the ground the tenant had failed to pay to the transferee landlord arrears of rent including the arrears prior to the transfer of property in his favour. Incidentally, the provisions of the statute considered in that case and in the present case are the same, this Court noticed the ratio of the judgment of the Calcutta High Court in *Daya Debi v., Chapala Debi* wherein it was held that when the assignment of arrears of rent ceased to be rent, they became in law and therefore there was no question of paying the same or tendering them in Court for payment to the landlord in eviction proceedings. This Court did not go into the correctness of otherwise of the said view. The contention raised by the counsel for the tenant was not accepted although the view expressed by the Calcutta High Court was not specifically disapproved.

15. In *Girdhari Lal (Dead) by Lrs. Vs. Hukam Singh and Others*, the point as to whether the transferee is entitled to the rent due before the transfer of the property in his favour was considered. Interpretation put by the Rajasthan High Court of the proviso to Section 109 of the T. P. Act to the effect that usually the transferee is not entitled to the arrears unless there is a contract to the contrary was approved. If there was an assignment of arrears then certainly the transferee landlord could maintain the petition for eviction on the ground of arrears of rent including the arrears due prior to the transfer in his favour.

16. In *N.M. Engineer and Others Vs. Narendra Singh Viridi and Another*, this Court again held that in the absence of any assignment of the rent in favour of the transferee, the assignee is not entitled to the rent due before the assignment. Negatively, it means that if there was an assignment of the arrears then the same could be recovered as arrears of rent by the subsequent transferee landlord.

21. Applying the ratio laid down by the Apex Court in *Sk. Noor's* case where the Apex Court held that if the right to recover the arrears is assigned, then the transferee landlord can recover those arrears as rent and if not paid, maintain a petition for eviction under the rent laws for those arrears as well. With this ratio of the Apex Court and the fact that an assignment has been accepted by the tenant - defendant in para No. 6 of the written statement, in my judgment, the learned ADJ, Jalgaon committed an error in appearing on the face of the record, while allowing the appeal which, in my judgment, being contrary to the Division Bench judgment of this Court; so also contrary to the law declared by the Apex Court in *Sk. Noor's* case (*supra*). Therefore, the impugned judgment passed by the learned ADJ cannot be countenanced and the same will have to be interfered with, by issuing a writ of certiorari. Accordingly, the judgment and order dated 26th September, 1989 passed by the learned 3rd Addl. District Judge, Jalgaon in RCA No. 341/1983 is set aside and the judgment and decree passed by the learned 3rd Joint Civil Judge J. D., Bhusawal in RCC No. 377/1980 decided on 25th February, 1983 stands restored. The suit of the plaintiffs is decreed accordingly.

22. Rule made absolute. However, looking to the facts of this case, there will be no order as to costs.