

(1984) 01 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No's. 1540 and 1975 of 1983

Shabir Hussain Rajaballi Shaikh

APPELLANT

Vs

Abdul Wahid Abdul Gafur (deceased)
 Abdul Wahid
Abdul Gafur (dec.) Vs Shabir Hussain Rajaballi Shaikh

RESPONDENT

Date of Decision : 21-01-1984

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1),
12(2), 12(3), 13(1)
Constitution of India, 1950 — Article 227

Citation : (1984) 2 BomCR 396

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : C.R. Delvi, for N.B. Shah, in W.P. No. 1975 of 1983 and K.J. Abhyankar, in W.P. No. 1540 of 1983, for the Appellant; C.R. Delvi, for N.B. Shah in 1540 of 1983 and K.J. Abhyankar in W.P. No. 1975 of 1983, for the Respondent

Judgement

V.S. Kotwal, J.—This is yet another but usual dispute between the landlord and tenant, which has generated quite a substantial degree of contest. The peculiarity of this proceeding is that some of the important features, which logically flow out of the controversy and which have been canvassed, do not reflect in the appellate judgment even inferentially, which has necessitated a little deeper probe in the matter in the wake of the controversy.

2. The premises around which revolves the entire dispute are located in Sarjapura area within the city limits of Ahmednagar district, being House No. 146 and are the shop premises. The property is claimed to be exclusively owned by the original landlord Abdul Gafur, who unfortunately is no more and who has been replaced by his heirs in the capacity as co-owners and have also joined the category of plaintiffs. Original defendant No. 1 was inducted as tenant in the suit premises in the year 1970 at the monthly rental of Rs. 125/- where he is conducting a restaurant. It is claimed that the tenant has been in rental arrears for more than six months commencing from 1st June, 1974 and it is also claimed

that he had sublet the restaurant in favour of defendant No. 2 and has also sub-let a small portion in favour of defendant No. 3 where he claims to be conducting a Pan stall and which sub-letting is claimed to be contrary to law and without the consent of the landlords. It was further indicated that the premises are required by the landlords for bona fide and reasonable use and occupation as one of the members of the family intended to start some business therein. It is, also claimed that the first defendant has effected permanent construction without the written consent of the landlords and he was also guilty of damaging the property. It is, therefore, a combination of these items that was placed on the forefront by the plaintiff to seek eviction of the first defendant from the said premises. Accordingly suit notice was issued on 9th February, 1976 terminating the tenancy, demanding the rental arrears commencing from 1st June, 1974 and also demanding vacant possession of the suit premises. Non-compliance of the said notice entailed into filing Regular Civil Suit No. 459 of 1976 by these plaintiffs in the Court of the Civil Judge (Junior Division), Ahmednagar. In effect, therefore, it is contended therein that the suit premises are bona fide and reasonably required by the landlord for starting business and greater hardship would be caused if a decree for eviction is refused. As such the first count was u/s 13(1) (g) of the Act read with section 13(2). The second count pertains to the allegations of sub-letting in favour of defendant Nos. 2 and 3 with a liability u/s 13(1)(e) of the Act. The third count was on the ground of rental arrears which mounted for more than six months and inasmuch as those were not transmitted to the landlord nor deposited in the Court within one month from the date of receipt of the notice nor application for fixation of standard rent having been made within the said stipulated time, the consequences u/s 12(3)(a) of the Act are pressed into service for eviction.

3. The first defendant, who is main contesting party, resisted the suit on all counts denying all the adverse allegations. The claim of bona fide and reasonable requirement of the landlord for the intended commencing of the business for one of the members of the family was stoutly denied. The allegations of sub-letting were also equally denied when it was contended that defendant No. 2 who used to sit in the restaurant did so in the capacity as manager which was more so because for quite some time the first defendant was away from Ahmednagar and also that defendant No. 3 is no higher than his savant. As regards the count of rental arrears, a multifold contention was raised. Thus it was contended that with the consent of the first plaintiff the premises had undergone repairs for which it was the first defendant who spent an amount to the tune of nearly Rs. 12,000/- with a clear agreement between the parties that this amount was to be adjusted towards rent. It was also suggested that the notice of demand u/s 12(2) of the Act was illegal for apparent reasons and as such it could not entail into the penal consequence of suffering a decree for eviction u/s 12(3)(a). The applicability of section 12(3)(b) was also made an issue. The allegations of permanent alterations and causing damage to the property are also denied. Defendants Nos. 2 and 3 remained ex parte.

4. The learned trial Judge on the basis of the material placed before him recorded negative finding against the landlord on the ground of permanent alterations and damage to the property within the meaning of section 13(1)(b) of the Act. As regards the ground u/s 13(1)(g), finding was recorded that the landlord's need may be bona fide but it was certainly not reasonable and, therefore, issue of comparative hardship was left undecided. Thus left in the field were only two issues which were decided in favour of the landlord. In effect the allegations of subletting in favour of defendants Nos. 2 and 3 were upheld. Similarly it was held that as regards the rental arrears the case would fall u/s 12(3)(a) since the tenant was in the arrears of rent for more than six months and since there was on dispute raised about the standard rent nor the amount was deposited or remitted within the stipulated period of one month. The penal consequences were to follow. Thus it is on these two counts that the decree for eviction came to be recorded.

5. The forum was then changed when the first defendant preferred Civil Appeal No. 469 of 1980 in the District Court of Ahmednagar. In the said appeal the issues vis-a-vis rental arrears and consequences thereof and question of subletting were the only aspects that were pressed into service meaning thereby that the other issues were abandoned. The learned District Judge disagreed with the trial Court vis-a-vis the issue of subletting and held it in favour of the tenant recording a finding that there was no subletting as such while the second defendant was manager and the third defendant was merely a servant. As regards the issue u/s 12(2), a finding was recorded in favour of the landlord that he was entitled to decree both u/s 12(3)(a) as also section 12(3)(b) since the rental arrears were for more than six months and there has been non-compliance with the stipulation u/s 12(3)(a) as also u/s 12(3)(b) since there was no regular payments even after filing of the suit. It is on that count that the decree was confirmed.

6. The defendant tenant aggrieved by the said decree has filed Writ Petition No. 1540 of 1983 placing the same under challenge in its entirety while the landlord did not lag behind when he preferred Writ Petition No. 1975 of 1983 though restricting his challenge only to the finding of the lower Appellate Court as regards the issue u/s 13(1)(e) of the Act. For obvious reasons, both the petitions, having been heard together can be conveniently disposed of by common judgment.

7. Shri Abhyankar, the learned Counsel for the tenant, has assailed the decree on several counts. According to him, the provisions of section 12(3)(a) are not attracted at all. This flows from the submission that in the first instance the notice u/s 12(2) is out and out illegal for various reasons, one such being that not only excessive but thoroughly untenable demand has been made as regards the rental arrears as well as permitted increases. A further grievance was made that the defendant's claim about the agreement under which costs of repairs were to be adjusted towards rent have not been even inferentially considered by

the lower appellate Court whereas the trial Court has misread the evidence in that behalf and if that is to be accepted then the tenant was obviously not in rental arrears for any period much less for a period comprising even six months. A grievance is further made that a deposit of Rs. 1500/- was still lying with the landlord which situation arose at the inception of the tenancy and as per one of the clauses of the agreement this amount should have been appropriated towards the rent by the landlord in which event even on his own calculations the rental arrears would have been much below the six months period. As regards the provisions u/s 12(3)(b), it is submitted that having regard to the said plea of adjustment the tenant being not in rental arrears at all not only on the date of the suit but for quite some time thereafter also, since large amount is held by the landlord to his credit, the consequence would not follow. This apart, all the rental arrears have been now wiped out even as per the demand of the landlord as each time the amounts were deposited in the Court after getting orders in that behalf. A generalised contention was raised that notice u/s 12(2) is invalid and its impact would embrace both the provisions of section 12(3)(a) as also 12(3)(b). It is further submitted that yet another person claimed interest in the property and directed all the tenants not to pay rental amount to the plaintiffs. According to the learned Counsel, defendant tenant immediately on receipt of the notice asked the plaintiffs to clarify the position in all respects including as to how the amounts claimed therein were justified and still the plaintiffs did not bother to reply but straight-way filed the suit. Shri Abhyankar, therefore, submits that the amalgam of all those features would destroy the plaintiffs' claim that the defendant-tenant was not ready and willing to pay the rent.

8. Shri Dalvi the learned Counsel for the landlord submits that question of adjustment is one of fact and, therefore, it cannot be reopened. Even otherwise there is no satisfactory evidence to substantiate that claim. According to the learned Counsel, de hors of any such plea, the moment the amount demanded in the notice is not paid or deposited nor any application for standard rent is made within the stipulated period of one month, the consequence u/s 12(3)(a) must follow and further when the amounts are not deposited in the Court even after the filing of the suit those u/s 12(3)(b) must follow. According to him, the so-called deficiency in the demand notice cannot be styled as unlawful demand and in any event it cannot invalidate the notice. Furthermore, despite thereof the tenant was under obligation to transmit at least that much amount which the tenant did not do. It was further submitted that there have been erratic payments and that too only in appeal Court and in trial Court. This entailed into the consequence u/s 12(3)(b). The finding u/s 13(1)(e) was assailed on the ground that the documents would justify the landlord's plea of subletting in favour of defendants Nos. 2 and 3.

9. Some of the features for which there is no controversy can be catalogued at the threshold. The first defendant was inducted as tenant by father of the plaintiffs as and from September 2, 1971 under a rent note Exhibit 33, which thus contains a clause under which an amount of Rs. 1500/- was paid as a

deposit on the same day by the first defendant for the proper retention of the property without causing any damage as also as a security for regular payment of rent and which was refundable, if necessary at the termination of tenancy. The plaintiffs' father, who claims to be the original landlord died on 1st August, 1973. The notice as also the plaint made a demand of rent commencing from 1st June, 1974 for a period of about 18 months turning to Rs. 2,000/- and also claimed additional amount of Rs. 415/- as education cess and permitted increases. Both the courts below have found on evidence that in fact the rent for the period of three months between July and September 1974 was actually paid by the first defendant to the original first plaintiff on October 4, 1974, which is evidenced by receipt Exhibit 54 and, therefore, the said demand was obviously untenable. Both the courts have also held on evidence that there is not an iota of evidence to substantiate the demand of Rs. 415/- towards education cess and permitted increases. One Abdul Sattar, who claimed vital interest as also title to the property issued a notice to the first defendant on 2nd April, 1975 as per Exhibit 55 asking him not to pay rent to the plaintiff as he was staking claim in that behalf. The petitioner-first defendant, replied to Abdul Sattar's notice by Exhibit 56 on 18th July, 1975 of which a copy was forwarded to the first plaintiff under which he sought for clarification from both of them about the correct state of affairs so that he could make payment accordingly. The petitioner had been detained under MISA on 7th September, 1975 and was released from the detention on 23rd February, 1976. The suit notice Exhibit 34 was issued by the plaintiffs on 9th February, 1976, as per Exhibit 34 which was replied to by the petitioner-tenant on 24th February, 1976 by Exhibit 57 on the very next day of his releases. The suit was filed on 24th June, 1976. It is against the back drop of these features that the controversy has to be resolved.

10. It would be proper to address to the main controversy vis-a-vis rental arrears and consequences u/s 12(3)(a) and 12(3)(b) of the Act. The nature of rival contentions is already indicated. No doubt there are obviously limitations when jurisdiction under Article 227 of the Constitution of India is involved especially when reassessment of the evidence on facts may not be permissible. However, in the first instance the trial Court has ignored several material features, which would bearing on the issues involved whereas the lower Appellate Court very have surprisingly has not even referred to some of the important features, which were canvassed on behalf of the tenants, which mainly pertained to the contention about the repairs having been carried out by the tenant, consequential agreement to adjust to the said amount of Rs. 12,000/- towards rent and the evidence of two witnesses led in that behalf as also the impact of the notice issued by Abdul Sattar and the reply sent by the petitioner thereto. This utter absence of consideration by the lower Appellate Court is conceded. The parties agree that there is no propriety for sending back the matter since the said can be considered by this Court when it is seized of the matter and it is in the context of the situation that some of the features of evidence have been examined on merits with consent of both the parties. It would, therefore, be necessary to

consider the relevant features in respect of issues u/s 12(3)(a) and 12(3)(b) of the Act.

11. The validity of the notice is very much placed under challenge on which basis it is further submitted that the insurance of valid and legal notice u/s 12(2) of the Act would be a condition precedent and said necessity cannot be dispensed with or condoned on any specious ground especially since severe consequences entailing into the decree for possession are likely to follow against the tenant. The notice as stated was issued on 9th February, 1976. The notice in the substantive portion calls upon the tenant to pay rental arrears as commencing from 1st June, 1974 though there is an obvious inconsistency regarding some portion in the latter stage about the exact demand. However, this demand commencing from 1st June, 1974 is reiterated by the first plaintiff in his substantive evidence at the trial when he maintained that it was a correct demand commencing from 1st June, 1974. He was, however, confronted with he receipt at Exhibit 54 dated 4th October, 1974 under which the rent for three months between July and September 1974 under which the rent for three months between July and September 1974 has been fully paid up. On being confronted with this situation, this position has been ultimately accepted by the plaintiff as a reality. The result, therefore, would be that though to his knowledge the rent for the said period was already paid since the receipt is executed by the first plaintiff himself, still in the notice a demand was made for the rental arrears commencing from 1st June, 1974 and an unsuccessful attempt was made to reiterate the same demand even in evidence, which however, had to be abandoned not by way of choice but only when he was confronted with the document. This position has been accepted by the courts below, on which basis it is further accepted that there is an obvious inconsistency in the said demand which has been styled as a mere inaccuracy. The second item is of equal importance and it consists of educational cess and permitted increases amounting to Rs. 415/-. Apart from making a vague statement that this amount was due, absolutely no particular were reflected in the said notice and what is of more importance is that in the evidence also the plaintiff could not explain as to how this amount was due or as to whether this amount or any such amount on that count was ever due from the tenant. There is a concurrent finding by both the courts below that the plaintiff has absolutely failed in that behalf and, therefore, this demand was also unjustified. However, the courts below felt that this also would be a mere inaccuracy. It is on that basis that the courts below and in particular the lower appellate Court have refused to hold that the notice was bad or invalid. The amount of Rs. 415/- under a claim which was wholly untenable and unsustainable would have its own dimensions, since the amount cannot be said to be marginal or negligible. Without any basis whatsoever the said demand has been made almost in a casual manner and which is exposed when despite an opportunity no material was placed during the trial and the plaintiff failed to substantiates in that behalf.

12. This feature has got to be examined in the context and clubbed together with

some other features so as to properly appreciate the impact thereof. The notice was issued on 9th February, 1976 and its reply was sent by the first defendant on 24th February, 1976 on the very next day of his release from detention. The said reply is at Exhibit 57 while the notice is at Exhibit 34. The said reply assumes some importance in the wake of the controversy. In the first instance, the first defendant has categorically denied that he has been in rental arrears as claimed in the said notice or any other amount. As regards the permitted increases and education cess a specific statement is made in the said reply that no such amount was ever due from him and in fact the plaintiff was called upon to give the particulars and clarify the position as to how and under what circumstances this amount is being demanded from the defendant. It is very significant to note that in spite of this positive statement in the said reply the plaintiff did not bother to send any rejoinder to reply to that notice, who had admittedly, received the same and instead he filed the suit on 24th June, 1976.

13. There is yet another important feature enveloped in this aspect which has also its own relevance. In between, one Abdul Sattar issued a notice to all the tenants including the defendant on 2nd April, 1975 at Exhibit 55 in which he raised a dispute about the plaintiff's exclusive title to the property and he claimed that he had a share and he is entitled to receive the rent and he directed the defendant not to transmit rent any more to the plaintiff. The reaction of the defendant is very eloquent. Soon after he received the said notice the first defendant on 18th July, 1975 sent a reply Exhibit 56 to the said Abdul Sattar asking for clarification from him as to how he was staking his claim over the suit property and how he was entitled to claim rent so that the position would be more clear rather than obscure. What is of more importance is that copy of this reply was forwarded by the tenant to the plaintiff on the same day. This would thus make it very clear that the plaintiff were aware of the claims stated by Abdul Sattar, who had then directed the defendant not to remit rent to the plaintiffs, in response to which defendant No. 1 asked for clarification from the said Abdul Sattar so that he could know where he stands in the matter of remitting the amount as according to him obviously the plaintiff and Abdul Sattar were staking their individual claims even in the right of collecting the rent. It was also indicated in the said reply that it would be better if the parties approach the Court and get their inter se dispute settled and get the appropriate orders from the Court in that behalf so that the defendant can follow the orders. This reply was admittedly received by the plaintiffs as long back as in July 1975. What assumes importance is the fact that admittedly in spite of this reply, copy of which was forwarded to the plaintiffs and which was received by them, the plaintiffs observed utter inaction though they were enjoined even in their own interest to clarify the position and did not issue any reply containing any such clarification of the reality for quite some time. The record reveals that the plaintiffs issued suit notice on 9th February, 1976. It is true that there is some reference indicating that the plaintiffs had sent other communication to the defendant on 16th or 17th January, 1976. Shri Dalvi, the learned Counsel,

submits that the defendant admits receiving of such communication and the acknowledgement is produced on record and it is suggested that an attempt was made to place on record the said reply. However, no such argument has been advanced in two courts below. Further more, the defendant was confronted only with the acknowledgement receipt of some communication but he stated that he did not remember as to whether it pertains to any such specific communication from the plaintiffs. This could well be understood since only on the basis of the acknowledgement the defendant's memory could not be revived pertaining to the precise communication. Significantly the matter was not pursued and in spite of such reply by the defendant no further questions have been asked and more surprisingly neither a copy of the said reply was shown to the defendant confronting about the situation nor was the defendant called upon to produced the said communication purported to have been received from the plaintiffs. Both the courts below have rightly not referred to that aspect and it would not be proper to peruse the same at this stage though I may hasten to add that even for that purpose no proper foundation has been made nor the said communication or copy has been tendered. It is also not clarified through the documents, as they stand, as to what was the nature of the said communication and as to whether it really pertains to the purported clarification about the claim of Abdul Sattar. The net result, therefore, is that in spite of the defendant informing the plaintiffs about the claim of Abdul Sattar as long back as in July 1975 nothing has been done by the plaintiffs for months together who issued the suit notice for the first time as late as in February 1976.

14. The further aspect is also quite material. In the reply to the said notice issued by the defendant on 24th February, 1976 all these points have been placed on the forefront including the claim propagated by Abdul Sattar as also about the absolutely untenable demand vis-a-vis the amount of rental arrears and the amount pertaining to education cess and permitted increases and through which an opportunity was given to the plaintiff to clarify the position about the validity of this demand on all the counts, suggesting thereby that the chapter was not closed nor was the tenant absolutely adamant not to transmit any amount if he was satisfied about the legitimate dues and in fact he expected the clarification giving further details and particulars so that he could move in the matter. Despite this, the plaintiffs straight-away filed the suit in June 1976.

15. The defendant thus faced a situation which was peculiar itself. At one end Abdul Sattar was staking his claim and directing the defendant not to pay any rental to the plaintiffs. This notice was issued by Abdul Sattar through an Advocate. At the other end the plaintiffs had asked for the rental arrears though for the first time in February 1976, whereas Abdul Sattar's claim was much prior to that. In between, Abdul Sattar and plaintiffs were intimated by the defendant to clarify the position though eloquent silence was observed by both. Added to this, in the notice there is obviously an unsustainable demand in respect of some amount towards rent, as also in respect of entire amount pertaining to the education cess and permitted increases.

16. It is in that behalf worth noting that the defendant had examined Abdul Sattar as his witness and thus an opportunity was given to the plaintiff to cross-examine. The said witness reiterated his claim as reflected in the notice. It is true that he had not filed any suit thereafter. However, some of his statement do indicate that resting his claim may not have been entirely on imaginary ground. It is however, made clear that the validity of that claim in law will not be that germane whereas the bare fact that one person ostensibly concerned with the property was staking his claim with which the defendant was conformed is more relevant vis-a-vis the liability of the defendant to pay the rental amount either to the plaintiffs or to Abdul Sattar. It does appear that Abdul Sattar is not an utter stranger. Plaintiff No. 1 is his cousin brother. According to him, his father and original plaintiff were brothers. They were joint and had various properties in Ahmednagar including the suit property. He has further stated that taxes of the property were paid by this father and brother. The rent was collected jointly. His father and other uncles have died. According to him, it is only after the death of his father that the first plaintiff issued the notice. This witness claimed share in the property and accepts on oath of issuing a notice to all the tenants directing them to remit the rent only to him and not to any one and this was the notice issued to the plaintiff. According to him the partition suit was pending between him and plaintiff. In cross examination he accepted that there was no partition amongst his father and uncles. A suggestion is made to him that his father had made a gift of his property to grand-sons. A suit was filed against this witness by his son which was, however, settled. It is then suggested that in the partition the suit property was allotted to the share of the father of the plaintiffs. He has accepted that. He has no document in his possession to show that all of them were staying jointly. The rest of the cross examination is not that material. In fact this cross-examination also may not be that relevant to clinch the issue since his right was not being adjudicated in this proceeding. However, it does appear from his evidence that some disputes were raised by him and they were pending between the parties and in fact as per the suggestion either there was some partition earlier or that under the gift deed the suit property was allotted or there was a gift regarding the suit property. Even the plaintiff's cross-examination suggests that there was some concern claimed by this branch in the property at some point of time. It cannot be underestimated that the claim about any partition can be legally upheld or not as also whether the claim of gift is factually sustainable or not are not the relevant features, since those details occurred in evidence and not in detail in the notice. The striking feature is that there is absolutely no suggestion made to the witness that he had issued a notice at the behest of the defendant in order to get over the difficult situation and also to get additional factor to stall the issue of payment of rent and to avoid a decree for eviction. In fact the dispute was actually raised by Abdul Sattar much earlier without having been prompted by the defendant though his claim may not be tenable under the facts with which, however, the defendant was not concerned. The defendant was put to knowledge about the claim made by a person who is cousin of the plaintiff and, therefore, the defendant might have thought that

there might be some substance and that is why clarification was sought for. The fact that the copy of that reply was also forwarded to the plaintiffs coupled with the further fact that it was not replied to by the plaintiffs assumes importance in the context of this situation.

17. It would be proper to consider the other fact at this juncture itself via-a-via the dependent's claim about the agreement entered into between him and the first plaintiff under which certain repairs were undertaken by him at his own costs and it was stipulated that the amount spent was to be adjusted towards the rental arrears. It is true that this is essentially engulfed as the question of fact based on evidence. However, as stated at the outset there is hardly any elaborate discussion of that evidence by the trial Court whereas there is not even a whisper by the Appellate Court, which has completely skipped over. Shri Dalvi, the learned Counsel, endeavoured to submit that this aspect could not be considered because this was not argued before the District Court and it was also suggested that there is no direct or specific reference to this aspect in the memo of this petition. Both these things do not appear to be factually correct since the petition itself refers to the same. As regards the first point it is amply clear from the memo of appeal in the District Court which is now examined that this point was specifically taken and what is of more importance is that the notes of argument of the learned appellate Judge which are retained on the file, unequivocally make a reference to this aspect including the evidence of witnesses led in that behalf. This is a contemporaneous document, which unmistakably indicates that this point was actually argued in the District Court. On the provability basis also this conclusion is unquestionable and this has been propagated by the defendant not only at the trial but even on the first and earliest opportunity when he replied the notice and this is reiterated in the written statement as also in the evidence and further more, he led the evidence of two witnesses to substantiate that claim. There is thus no justification for the District Court to completely skip over this matter. As stated it is at the instance and by consent of both the parties that the evidence had been examined side both of them indicate that it will not be proper to send back the matter and the same can be agitated and assessed in this Court. This is an agreed position.

18. The defendant contends in that behalf that at that time also the condition of the premises was not proper as those required repairs. He has been insisting on the father of the plaintiffs to do the needful, whereas the father was stalling the issue mainly on the ground that he was financially not sound. However, it was in the year 1974 that the situation had gone from bad to worse and the premises required immediate repairs especially when the restaurant was being conducted, which obviously required the premises in proper state not only to attract the customers, but also to ensure their safety. The defendant has been insisting on the first plaintiff that the latter had agreed to do so though there is no step in the matter and it was ultimately agreed that the defendant can undertake the repairs by spending out of his pocket and the said amount would be appropriated and adjusted towards rent by which his building could get further stability and

also he will not be required to shell out the money immediately. The estimated cost was suggested in the vicinity of Rs. 10 to 12 thousand and it is claimed by the defendants that in fact he spent about Rs. 12,000/- over the said repairs. The defendant's evidence did not find favour with the trial Court whereas it was completely ignored by the Appellate Court. One Mohammad Rashikhan was officiating as Imam in Masjid at Ahmednagar and was also undertaking the function of religious teacher for which purpose he used to visit the houses of some persons from Muslim community to read Holi "Quran". He used to visit first defendant for that purpose. According to him, on one such occasion he heard the talk between the defendant and plaintiff over the repairs of the house and when he was casually consulted by the defendant about the probable expenses he estimated in the vicinity of about Rs. 10,000/- to 12,000/- and he also referred to the conversation about the proposed adjustment to be made about the said amount vis-a-vis rent. This witness does not claim to be an expert so as to give exact prospective cost and expenses of repairs. He admits that he is not expert in that behalf. He clarifies that it was just a rough calculation and it was wholly approximate, which did not require any expert's opinion as such. However, even leaving aside this aspect about the exact amount which he has indicated as the probable expenses, still evidence deserves to be rejected wholesale. Actually the quantum of the proposed expenses is not so important than the basis of the conversation. His presence at the spot cannot be said to be accidental as he was a regular visitor, which fact is not seriously challenged. He is also a religious teacher and Imam of Masjid and this would have its own relevance. Several suggestions have been made to him, one such being that he had to go out of town because of certain disputes. There is hardly any material to substantiate any such suggestion which has been just hurled at him without any foundation just to condemn him. Obviously he is a respectable person. The first plaintiff visiting the restaurant at that time also cannot be seriously doubted. Secondly, if at all there was any such talk it is not improbable for this witness to hear it and it is equally not improbable that the talk could ensue in his presence. It is further not improbable or unusual for the parties to ask this witness who is elderly person of about 80 years of age about the said repairs and the approximate expenses. Reading the evidence closely it is difficult to discard the same as being unacceptable. Unfortunately, the trial Court has not considered all these facets. In addition the defendant has examined one Madhav Pandit, who was working as season, and who had stated that he carried out certain repairs for nearly four months with the approximate cost of about Rs. 12,000/-. It is true that he has not maintained any accounts though one does not expect a mason in that city to maintain a detailed account. He himself is not a contractor but was engaged by other persons and may be that he could not give all the other details as to from where the material was gathered. However, he has given the details about the repairs including the flooring work, walls, construction of fire place, water tank etc. He has stated that he was paid the amount by one Sikh person and Shri Dalvi submits that there is no such person concerned with the said restaurant. However, this has not been pursued nor any question was asked by the plaintiff

to the defendant as may be it was only physical act of paying the amount, however, was given by the defendant. This witness has been working as a mason for nearly 40 years. Beyond these features, there is really nothing much in this aspect to discredit him. The substantive evidence, therefore, led by the defendant is not of such an inferior quality which could be rejected whereas the same appears to be thoroughly acceptable. Pandit can be a natural witness being a mason for 40 years whereas the religious teacher, who is an old person aged about 80 years and whose presence is natural and his version about the talk between the parties is rather difficult to be viewed with serious doubt.

19. However, the matter does not rest there since this evidence gets enough support from various other circumstances including the conduct of the parties. The foremost is that in the reply issued by the defendant there is positive statement about the repairs having been carried out by the defendant in the said premises spending nearly about Rs. 12,000/- with an agreement under which this amount was to be adjusted towards the rent. Therefore, at the first and earliest opportunity this aspect has been clearly indicated without any reservation. As stated, in spite of that the plaintiff did not bother to send any reply or rejoinder denying these allegations. In the written statement also there is a specific plea in that behalf. The first defendant in his evidence has referred to that aspect and looking to the evidence of the said witness the same cannot be said to be unacceptable. He is supported by two witnesses whose evidence has already been indicated and which was not even inferentially considered by lower Appellate Court. The plaintiff could have immediately repelled the said allegations the moment he received the reply and this inaction on his part has also its own relevance.

20. Further more, there also appears to have been enough basis, though the claim of the plaintiff that the premises required no repairs to be utterly untenable. The plaintiff has admitted that the said property is built in brickbats and earth and it is quite an old construction, though he has denied that it is nearly about 80 years" old. He has then admitted that the rear portion of the side property had fallen down. According to him, the property was constructed in the year 1947 and that too in brick-bats and earth. He has then admitted that the suit premises were not in such a condition as to take the measurement, which condition indicates the real nature and situation of the property. A suggestion was made that there was heavy rainfall in the year 1970, which further dilapidated the said structure. It was also suggested that one Haji Saheb who owns the building adjoining the suit property had issued a notice to the plaintiff that due to the falling of certain walls of the suit premises and the back portion, his own property has been damaged. This evidence read in the context of this circumstance would obviously indicate that left portion as also rear portion were in bad shape and were either in a dilapidated condition or atleast required immediate repairs. Some portion in the rear side had actually fallen. This is an old building constructed in brick-bats and earth and due to passage of time including heavy rain-fall on occasion must have added to the damage. This

evidence, therefore, notwithstanding the anxiety of the plaintiff to deny the said fact does support the defendant's case to large extent that the property was either in a dilapidated condition or atleast it required substantial repairs and this is borne out by the material adduced by the defendant as also by some of the statements made by the plaintiff in his evidence. This, therefore, would be a further circumstance in favour of the defendant in addition to those which are indicated hereinabove.

21. Against the backdrop of all these features it is very significant to note that there is a clear finding recorded by the trial Court that in all probability the first defendant did carry out certain repairs, may be to make the restaurant decent. However, implicit in the said observation is the further statement of acceptance of the defendant's case to a large extent atleast on the question of repairs required to the building and which has been carried out by the first defendant. Two things co-exist in the said observation, which read as :---

".... It is not unlikely that defendant No. 1 might have carried out some repairs to the said property in order to make it decent for his business."

Some repairs were carried out and secondly it was so done by the first defendant and it is not even whispered that it was so done by the plaintiffs. The splitting does not show that all the repairs were done only to lift the view of the restaurant and make it appear more decent, though read in the context of the evidence about the condition of the premises, it does appear clear enough that it required some essential repairs. The trial Court, therefore, had substantially accepted though no doubt it has rejected second part about the agreement of adjustment and exact amount spent over the said repairs. As stated, for the reasons already assigned all these aspects are blended and integrated and acceptance of one must have necessary impact over the other and those read in the context of evidence, as it stands, coupled with the conduct of the parties when there is consistency in the defendant's version right from the stage of replying the notice, there is much substance in the contention raised by the learned Counsel that agreement of adjustment thus deserves to be upheld and which aspect was not even inferentially considered by both the courts below as stated earlier. It may be reiterated that the exact amount of the expenditure is not that crucial so as to negative the whole issue and equally the said quantum also would not put any problem with reference to the provisions of Rent Act about the tenant's right to incur certain limited expenses towards repairs and to deduct those from rent only for a certain period, more so as the aspect flows out of an agreement between the parties for expenditure as also for the adjustment. Since both the parties read the evidence and are desirous to decide the same on this forum accepting the utter deficiency in the lower Appellate Court judgment in that behalf, the said plea of the first defendant deserves to be upheld on merits.

22. It will be thus an additional circumstance while examining the validity of the notice in the context of the conduct of the parties. The plaintiff was thus

obviously interested in denying this aspect whereas the defendant in the reply to that notice made this situation very clear in spite of which there is no rejoinder or denial of allegations by the plaintiff, who ultimately filed a suit wherein also the defendant has raised the said plea. It would, therefore, be thoroughly unjustified to discard these items as being an after thought since those have deep roots in several features right from the beginning and it is substantiated by the material on record. In that context, therefore, it would follow that when a specific plea has been raised by the defendant in the reply to the notice then it was for the plaintiff to either clarify the same or to deny the same. Further more, this plea having been consistently raised, has been fully substantiated on merits. This, therefore, adds to the wholly untenable demand made in the notice.

23. It is also worth noting another circumstance, though incidentally. As already stated, rent from July to September 1974 was admittedly paid by the first defendant on 4th October, 1974 to the first plaintiff himself, which is evidenced by receipt Exhibit 54, which has been proved. In spite of that an untrue statement was made that even rent for this period also was due. The defendant claims that he had requested the father of the plaintiffs to make repairs, which he had avoided on the ground of financial stringency. It is relevant to note that the plaintiffs' father died on 19th August, 1974. The rent was paid on 4th October, 1974 up to the period ending September 1974 to the first plaintiff. Significantly even on the showing of the plaintiff the rent has not been paid after October 1974 and equally significantly in spite of inaction or lapse of the tenant to pay rent commencing from 1st October, 1974, the notice demanding rental arrears has been issued for the first time on 9th February, 1976. This utter inaction on the part of the plaintiff, as rightly submitted by Shri Abhyankar, the learned Counsel, cannot be said to be accidental. This fits in with the circumstances in support of the defendant's case, inasmuch as it is only after October 1974 that the repairs were actually effected, and therefore, it is only in the fact of the agreement for adjustment of the said amount towards rent that the plaintiff knowingly and deliberately did not ask for the rent till 9th February, 1976. It is also submitted that the defendant was detained under MISA on 7th September, 1975. The suit notice was issued on 9th February, 1976 and which was served on the defendant while he was still under detention and on the very next day of his release on 23rd February, 1976 that the reply was sent by him on 24th February and in that reply all these aspects prominently find place, which again have own relevance and significance as there was hardly any time to think over invent a case. It is suggested that this synchronising of time in making demand of rent by issuing notice when the first defendant was detained raised in the context of the utter inaction from October 1974 to demand any rent read in the further context of a false claim of demanding rent for at least three months between July and September 1974 have their own impact adverse to the case of the plaintiffs.

24. The cumulative effect and the amalgum of all these features fully justify the submission made by Shri Abhyankar, the learned Counsel, that demand in the

notice under the facts and circumstances of the case can be said to be obviously illegal. One is tempted to observe that even independently of the item of agreement of adjustment over the repairs, the conclusion about the notice on the basis of the material would not change. It is in the context of all these features, catalogued hereinabove that it can be legitimately held that there cannot be said to be a valid and legal notice u/s 12(2) of the Act and if that be so since valid and legal notice is a condition precedent, which would govern both the provisions of section 12(3)(a) and 12(3)(b) that no penal consequence can follow against the defendant. The other side of the coin would be that it would be difficult to endorse the finding that the defendant was not ready and willing to pay the rent since the concept of neglect has its own peculiarity as has been settled and under the facts and circumstances of the case at hand restricting to the material as it stands, the tenant does not incur that disqualification, which conclusion would not get any dent even on the principle that a demand notice should be liberally construed so as not to frustrate the legitimate claim in the suit.

25. Reliance has been placed by Shri Dalvi, the learned Counsel, on some of the ratios to substantiate his proposition which in my opinion, with due respect to the learned Counsel, is too spacious to be accepted and which would be obviously incorrect reading of the provisions under the Act. The sum and substance of the contention that moment a notice containing any demand whatsoever about the rental arrears and arrears about the permitted increases is made by the landlord and if the entire amount as reflected in the said demand is not paid directly to the landlord within a period of one month nor any application for fixation of standard rent is made within the said stipulated time then notwithstanding any deficiency in the claim in the notice which may be found ultimately at the trial, a decree for eviction must follow as a matter of course. The further fact of the contention is that such a consequence would follow even in a case where in reality the rental arrears for more than six months are not due. The third aspect canvassed is that on the first day of hearing the entire amount has got to be deposited in Court if the tenant wants to avoid the consequences u/s 2(3)(b). When questioned specifically the learned Counsel submits that the penal consequence will follow de hors of utterly untenable demand in the claim and equally de hors of arrears being in reality for a period less than six months. According to the learned Counsel, the tenant has no choice or option but first to comply with the demand howsoever illegal the claim and then to agitate at the trial.

26. Reliance is sought on the ratio in Harbanslal Jagmohandas v. Prabhudas Shivlal and Rev. Evertt M. Rasanacht v. West End Works 78 Bom.L.R. 213 in support of the said propositions by the learned Counsel Shri Dalvi. However, this ratio does not go that far in supporting the validity of the proposition made by Shri Dalvi which for obvious reasons is too broad and generalised. The principle question raised, considered and answered in the said ratio relates as to whether the tenant can be permitted to raise a dispute regarding standard rent at a latter point of time after the period of one month after the receipt of the suit notice is

exhausted and if not whether he can avoid the rigour of Clause 12(3)(a) or has to face decree for possession and it is in that context that it has been enunciated that having regard to the terminology used in section 12(3)(a) if a tenant wants to raise some dispute and thereby wants to avoid the rigour of prospective decree, he must do so within the stipulated period of one month after receipt of the notice by filing an application for fixation of standard rent and his failure to do so within that period will not condone lapse and wipe out the rigour; if he does so at any subsequent point of time. The enunciation of this ratio was found necessary because of variance in view taken by different courts. This ratio, therefore, on the facts of the instant case would not clinch the issue since not only no dispute for standard rent was raised by filing an application within the stipulated period of one month but in fact no such dispute was ever raised subsequently, whereas the reflection or readiness and willingness to pay the rent and not to neglect to do so by the tenant has been moot question resting on the peculiar facts regarding the validity of the notice u/s 12(2) and the tenant being not in rental arrears at all much less for more than six months.

27. Reliance is pinned on the ratio in *Chaganlal Mulchand Jain v. Narayan Jagannath Bangh* 1983 Mh.L.J. 254 by the learned Counsel Shri Dalvi deriving support to his submission indicated hereinabove, which mainly include the submission, as per the learned Counsel, that the moment a demand notice is issued u/s 12(2) of the Act the tenant is enjoined to act swiftly within the stipulated period of one month to remit the entire amount under the said demand or to lodge an application for fixation of standard rent within that period if he raises a dispute in that behalf, and thereby leaving no choice even to consider the correctness of the demand or otherwise to suffer a decree for eviction and equally leaving no choice to the Court to deny such a decree in favour of the landlord. I am afraid, the proposition sought to be canvassed by the learned Counsel is too spacious and generalised and even the ratio of the judgment of the Division Bench in the said case when analysed properly also does not fully support the said proposition. In the first instant, the said decision is to be examined in the context of the facts of the said case when the facts establish that the dispute regarding the standard rent was raised by the petitioner though not within the stipulated period of one month by observing the mandatory formalities by filing an application but he remitted the rental arrears on the basis of certain monthly amount, which according to the tenant was the standard rent and which was found to be the correct amount, though subsequently, and this was done by him within one month from the receipt of the notice. This Court on the basis of the said facts thus was predominantly concerned with the procedure adopted by the tenant in remitting the lesser amount though within the stipulated period of one month without filing an application for fixation of standard rent, which he did subsequently wherein he succeeded and thus it was a past event. Relying on the ratio of the Supreme Court in *Harbanslal's* case (*supra*) and other decisions it was felt that the dispute regarding the standard rent could be raised only through one channel by filing

an application within one month and since that has not been done non-compliance with the demand in the notice would entail into a decree for eviction. It would thus be clear that apparently there was no dispute that the tenant was in fact in arrears for a period of more than six months as stated in the notice and that he had not offered to pay the same in time earlier, not had he raised a dispute about the standard rent. The observations in the said ratio, therefore, will have to be examined against the backdrop of these peculiar features.

28. The Division Bench took exception to some observations in the decision recorded by the learned Single Judge in Ganpat Vs. Motilal Champalal Lunawat and Another, wherein the learned Single Judge has taken a view against the validity of the demand notice on the ground that it contained an excessive and untenable demand as the said amount was really not due, which included the amount pertaining to permitted increases in which context it was observed that the demand notice u/s 12(2) out of which flow penal consequences must be construed strictly. It is this latter part that did not find favour with the Division Bench. However, the correctness of the conclusion drawn by the learned Single Judge on the facts of the said case was not seriously disputed inasmuch as the Division Bench also observed that the claim of Rs. 500/- towards permitted increases as made in the demand notice was "grossly untenable" which inherently stipulates that in a given case if it can be said with full justification that the demand is grossly untenable then the notice may be bad. This thus runs counter to the generalised proposition canvassed by Shri Dalvi, the learned Counsel. It is true that it is observed thereafter that a tenant on receipt of such a notice normally would be enjoined to remit the entire amount demanded thereunder though it is qualified by further observations envisaging certain contingencies where the tenant disputed the correctness of the amount as the tenant if decides to remit atleast that much amount, which according to him is legitimately due and not the entire amount which is demanded, then he would be running a risk at the trial in the sense that if he fails to substantiate his plea in support of remission of a lesser amount than the one demanded, he would suffer a decree for eviction since admittedly he had not remitted the amount under the demand notice within one month or otherwise if he succeeds to establish that plea on facts then he can avoid the said decree. These observations thus by themselves clarify the general observations made earlier that the tenant either must transmit the entire amount or atleast that much amount, which according to him is legitimately due. Thus by implications such a course is not completely closed down, which again hedges a qualification to the generalised proposition of the learned Counsel. Implicit therein is a visualisation of certain other contingencies, such as, the tenant contending that in fact he has not been in rental arrears at all much less for more than six months in which event if he elects not to comply with the demand in the notice with the confidence of establishing this plea at the trial and if he does so actually then same consequence would follow of avoiding the decree. All these features even in the context of the observations are to be considered in entirety against the backdrop

of the facts in each case and those observations cannot be confused to mean that the principle plea have been placed in rigid form in a strait-jacket. The flexibility is manifestly available as per facts of each case even on the observation in the said case when it has been not only stated but reiterated that all these questions depend on the facts of each case. The only undercurrent which logically flow out of the said observation is that a notice of demand u/s 12(2) should be liberally construed indicating that the landlord's right should not be frustrated by the mode of artificially and rigidly construing notice as also a tenant cannot artificially take shelter behind an unreal object with the oblique motive to avoid payment as also the prospective decree even though he fully knows the amounts legitimately due from him and when he has not been misled in any manner by the demand in the notice. The move of a tenant under such situation obviously cannot be countenanced and it would be proper to lean in favour of upholding the validity of the notice rather than to frustrate it. Similarly in every case as an universal one the blame cannot be fastened on the tenant for not transmitting atleast that much amount which to his knowledge was legitimately due. The validity or otherwise of the notice, however, has to be decided on the basis of the facts of each case which is also made apparent by the contingences contemplated therein that in the given case a demand may reflect a mere error in calculations which may be inconsequential so far as the validity is concerned whereas in some cases it would be grossly untenable. Several contingencies can well be visualised not in a fanciful manner but in rational one, such as, a notice may contain some recitals vis-a-vis the amount due or even an inconsequential mistake about the period of arrears which may have crept in without any oblique motive whereas the circumstances may indicate that the tenant fully know the precise period of the amount as his liability since the impact thereof will depend on facts of each case leading to the main question as to whether it would make the notice illegal, implicit wherein is the other aspect that in a given case such a deficiency ipso facto would not make the notice bad whereas in another set of circumstances even the knowledge of the tenant about his precise liability equally would not ipso facto make the notice valid. As against this in some cases there may not be an untenable but almost a dishonest demand with an oblique motive while in other there may be a grossly excessive and untenable demand which may not necessarily be with any oblique motive. In some situation several things including the period and amount may remain obscure requiring much clarification in the absence of which it is difficult for the tenant to remit the amount while in some cases in respect of permitted increases and eduction cess the amount demanded in the notice may not be due at all. These are only illustrative contingencies and not exhaustive one. Whether deficiency is inconsequential amounting to mere error in calculations or where it is grossly excessive and untenable would obviously depend on facts of each case. In some such cases the validity of the notice in spite of the apparent deficiency may not be capable of being successfully challenged whereas in others it can be obviously struck down and in this latter contingency that the non-compliance by the tenant even within stipulated period may not entail into penal consequence

of recording a decree for eviction. This latter part in effect would annex to the notice a label that it is not in consonance with the provisions of section 12(2) of the Rent Act and thereby not attracting the provisions of both the Clauses (a) and (b) of section 12(3) since its non-compliance flows out of it being unlawful demand, since section 12(2) which is pivot of issuance of notice cannot be outweighed by the other features. These principles can well be implemented even while executing the ratio of the Division Bench in the said case that the demand notice should be construed liberally, which depends on the facts of each case. This would be the process of harmonious blending of all these features.

29. It may be incidentally observed that the scheme u/s 12 of the Act reflects a certain pattern serving as a self-contained unit and its operation would depend on the fulfilment of the requirement therein. Under sub-clause (1) so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases and also observes the condition of tenancy there is no entitlement in favour of the landlord about the recovery of possession of the premises. Sub-clause (2) which is more relevant clarifies and governs sub-clause (3) which has a break up of sub-clauses (a) and (b). It stipulates issuance of notice demanding possession on the ground of non-payment of standard rent and permitted increases, though he would not be entitled to file a suit atleast for a period of one month next after the said demand notice being served on the tenant. Sub-clause (3)(a) which is carved out as a separate category contemplates certain eventuality running against the tenant making him to suffer a decree for eviction provided three things co-exist viz., that the rent is payable by month, there is no dispute regarding the amount of standard rent and permitted increases and such arrears amount for a period of six months or more and one such even quality comes into existence then an obligation is cast on the tenant in order to avoid the penal consequence of a decree by remitting the said amount of arrears as demanded in the notice to the landlord within a period of one month from the receipt of the notice or if he intends to raise a genuine dispute about the standard rent then by making such an application for fixation of standard rent in Court within the same period of one month. The rigour is that if he neglects to perform any of his obligation then decree for eviction would follow. Sub-clause (3)(b) carves out the other category not covered by sub-clause (a) wherein yet another obligation is cast on the tenant to deposit all the rental arrears as per the said demand in the notice on the first day of the hearing of the suit in Court or on the day as fixed by the Court and make regular payments thereafter throughout, the neglect of which would again entail into decree for eviction. The scheme would thus manifestly indicate that by observation of terms of the tenancy and making regular payment or even readiness and willingness to make such regular payments there is no entitlement in favour of the landlord to ask for possession. If this is not so, there is a lapse on the part of the tenant, then entitlement accrues in favour of the landlord with the qualification that it can be implemented by issuance of notice though filing of the suit has to be postponed atleast for a period of one month after its receipt by

the tenant. However, this only creates entitlement whereafter other feature come on the forefront wherein the tenant figures prominently. In the first category three things must co-exist viz., about rent being payable monthly, there being arrears for six months or more and there has been neglect on the part of the tenant to pay the same, within stipulated period of one month. It is after establishing all these three features together that the landlord is entitled to succeed. It would thus be clear that one of the requirement to be fulfilled is that in reality the tenant is held to be in arrears for six months or more and this predominately depend on the facts of each case and if this basis aspect is negated then entitlement of the landlord u/s 12(3)(a) would be frustrated. The only mode to avoid the decree by establishing the readiness and willingness and negating neglect on the part of the tenant running in two channels is to the effect that the tenant has to remit the said amount as per the demand to the landlord. In case there is no dispute about the standard rent, or otherwise to file an application in Court for fixation of standard rent, when both of those required to be executed within statutory period of one month after receipt of the notice whereas any belated attempt beyond the said scheduled period would be inconsequential. It may be incidentally observed that transmitting of amount can be avoided or postponed if there is a genuine dispute about the standard rent when an application in that behalf can be filed within one month whereas in other case transmitting cannot be avoided and, therefore, rigour of the demand in the notice has to be examined in that context. The other category under sub-clause 3(b) governs the situation which is not covered by section 12(3) with a different type of obligation cast on the tenant for depositing the arrears in the Court on the first day of the hearing or as directed by the Court after the filing of the suit and to make the regular payments thereafter. Thus the first clause about the obligation comes into operation prior to the filing of the suit while the second subsequent to the suit. The undercurrent of the entire scheme obviously would be that there is no readiness or willingness and utter neglect on the part of the tenant to pay the rental amounts and this can be manifested or negated by different ways indicated therein as stated. The demand notice u/s 12(2) is a pre-requisite at the threshold and if the validity of the said notice is capable of challenge successfully then the consequences as contemplated by both the Clauses (a) and (b) of Clause (3) would obviously evaporate. This would be the harmonious reading of the provisions.

30. Read in the context of facts and circumstances of the case and equally restricting to these facts without making any generalised proposition and accepting the ratio in Chaganlal's case it can be safely said that in view of the various items indicated hereinabove the notice issued u/s 12(2) cannot be said to be legal and valid one and, therefore, no consequence can follow either u/s 12(3) (a) or 12(3)(b). It is under these circumstances that accepting the notice should be construed liberally and some errors in the calculation and inaccuracy should not be over magnified, still the facts of the instant case as found to be glaring, the validity of the notice is difficult to be upheld as also it cannot be said that the

defendant-tenant was not ready and willing to pay or had neglected to pay the rent.

31. It was submitted by Shri Dalvi, the learned Counsel, that the case would at least fall u/s 12(3)(b) of the Act inasmuch as no payments were made regularly and actually no payment was made in the trial Court after filing of the suit but the payment was made for the first time in Appeal Court when conditional stay of executing the decree was granted. Ratios in some decisions were cited in support of this plea that the tenant would not be permitted to avoid the decree u/s 12(3)(b). Since the proposition is not disputed it is unnecessary to refer to all these pronouncements. However, once it is accepted on facts about the agreement of adjustment then the complexion is entirely changed. This would be an additional factor as the notice being u/s 12(2) which is pre-requirement being invalid or illegal and Shri Abhyankar submits that still a further amount is held by the landlord to the credit. All this apart, and even otherwise then as per the agreement, it is substantiated by the record, as rightly contended by Shri Abhyankar, the learned Counsel, that not only at the time of first deposit but at the time of subsequent deposits every time defendant used to apply to the District Court for permission to deposit the said amount and to condone the delay, if the payment was not made regularly every month. What is of significance is that on every occasion there is an order by the Court condoning the delay being satisfied by the grounds advanced and allowing the defendant to deposit the rental arrears and it is thereafter that the amounts have been paid and accepted by the Court under its own order against which no exception has been taken by the plaintiff. Under the circumstances, therefore, these payments cannot entail into consequence u/s 12(3)(b) and those also cannot be said to be so erratic as to attract the provisions. The fact that those have been made under orders of the Court and its effect has been emphasised in some decisions of this Court in *Indravan Trivedi v. Mrs. Ambaben Mohanlal Soni*, Writ Petition No. 1898 of 1979, decided on September 15, 1983 and *Eknath Radhkisan Bajaj Vs. Madhav Bhagwan Bhole*, Writ Petition No. 2529 of 1979 decided on November 30, 1983. The ratio thereunder wholly supports Shri Abhyankar, the learned Counsel in that behalf, which would not entail into attracting the provisions u/s 12(3)(b) as additional circumstance.

32. In view of this situation it is unnecessary to refer to some other features though incidental reference may not be out of place. Relying on the decision of the learned Single Judge in *Bablu alias Jagdishsingh v. Ladharam M. Mirchandani*, 80 Bom.L.R. 310 it was contended that in respect of amount of education cess the provisions of section 12(3)(a) would not apply, though it is the rent within the meaning of said provision not payable by month though it may constitute as permitted increases and the education cess which is recoverable by the landlord, pursuant to the provisions of Maharashtra Education Cess Act, which is obviously not the payment of rent, the learned Single Judge relied on an earlier decision of this Court as also the decision of Gujrat High Court in support of this proposition. This is pressed in to service vis-a-vis the amount of Rs. 415/- pertaining to the

education cess and permitted increases demanded in the notice which could be thus unsustainable. According to Shri Abhyankar, the learned Counsel, this would be additional point in favour of the tenant. In view of the finding on the main aspect it is unnecessary to consider this aspect one way or the other or to express any opinion since even if this is excluded the complexion will not change.

33. Reliance is placed by Shri Abhyankar, the learned Counsel, on the fact that at the inception of tenancy an amount of Rs. 1500/- was kept as deposit by the tenant with the landlord, which is reflected in the rent note Exhibit 33 executed on 2nd September, 1970, which stipulates that it was so accepted as a security for preservation of the suit premises in good condition and for regular payment of rent and that the tenant would be entitled to refund at the time of termination if any such amount remains due. According to Shri Abhyankar this amount could be appropriated towards rental arrears and if that is done then even on the calculation of plaintiff the defendant would be in rental arrears for less than six months Shri Dalvi, the learned Counsel, countered this contention. This obviously pertains to the provisions contained in section 18(2) of the Act. No doubt Shri Abhyankar the learned Counsel, sought support from ratio in *Ramchandra Dattatraya Vs. Vaidhyachand Manikchand and Others*, and *Lachmandas Bansilal Rathod Vs. Zumberlal Surajmal Gandhi and Others*, in support of his plea that notwithstanding the said provision the amount exceeding six months could be adjusted. Shri Dalvi, the learned Counsel, placed reliance on the ratio of a decision of this Court reported in *Karamsey Kanji v. Velji-Virji* 56 Bom.L.R. 619 and which has been upheld by the Supreme Court, in *Maganlal Chhotabhai Desai Vs. Chandrakant Motilal*, as also the ratio in *Sohrab N. Tavaria v. Jafferli G. Padamsey* 58 Bom Law Rep 680 in support of his contention that the plain reading of section 18(2) would admit of no such adjustment since it has got to be either recovered or even deducted from the rent only within a period of six months. The Supreme Court no doubt dealt with the provisions contained in section 20 which, however, are not *para materia* though the distinction was sought to be made as section 18(2) embraces a case of a tenant, who can deduct the amount from the rent and a question is posed that if such deposit is not recovered within six months then to say that it is to be forfeited would crack the spirit of the Act. However, in view of the observations and the dictum of the Supreme Court it would not be proper or even permissible to enter into this arena and furthermore, excluding this item also the situation remains intact. Consequently this also would not detain us.

34. Having regard to all these features, the decree record u/s 12(3)(a) and 12(3)(b) is absolutely vulnerable and unsustainable and deserves to be upset even under Article 227 of the Constitution.

35. Then thus remains to be considered a challenge to the validity of the finding of the lower Appellate Court u/s 13(1)(e) on the ground of sub-letting. The trial Court decided that issue in favour of the landlord holding that the restaurant was sublet to the second defendant while the pan stall to third defendant by the first

defendant tenant and which was unlawful one. As against that the lower Appellate Court recorded a clear finding against the landlord disagreeing the view expressed by the trial Court and it was observed that there was absolutely no satisfactory material to substantiate the plea of sub-letting. The learned District Judge also held on evidence that the second defendant, who might have been found on the restaurant premises was entirely in the capacity of manger while the third defendant is servant of the first defendant. This is the subject matter of companion Writ Petition No. 1975 of 1983. Shri Dalvi, the learned Counsel, assails this finding and for that purpose manly relies on the certified copies of the licence of the said restaurant which are at Exhibits 36 and 37. In the licence issued in August 1972 the names of first and second defendant have been entered whereas in the other one, which is issued in August 1978 it makes reference only to the name of second defendant. The lower Appellate Court felt that the second one appears to be the continuation of the first and there was apparently no reason for such a change being made. However, it is apparent that these are the extracts of the forms of the Register maintained by the Municipal Council under the Shops and Establishment Act. It is, however, significant to note that the description about the capacity of the defendant is not specifically clear. Thus, for instance in both the items the persons mentioned therein are described as proprietor and conductor or manager. It is true that in the second extract the name of the first defendant has not been entered. This Ipso facto does not establish that the second defendant's name was incorporated as proprietor. Furthermore, the application forms which are required to be filled in by the party concerned applying for licence nor any other documents have been produced on record. It is also rightly observed by the lower Appellate Court and canvassed by Shri Abhyankar, that these are essentially for the purpose of the provisions under the Shops and Establishments Act, which would not tend to declare rights of the owners of manager but the dominant purpose is to give protection to the working of the establishment in various respects. As suggested the first entry itself is capable reasonably to be construed as styling the first defendant as the owner while second defendant as manager. But for these two extracts there is absolutely no material worth the name that has been tendered on record on behalf of the landlord and which deficiency has been rightly commented upon by the lower Appellate Court, who has addressed himself to this aspect correctly when he observed that for several reasons the business may be run by a person not necessarily by the owner but by appointing a manager who may have all attributes of an owner while conducting the business such as keeping the accounts of the business, etc. However, when it comes to the distinction to be made between the tenant and sub-tenant, the landlord is enjoined to show that the alleged sub-tenant is not a mere manager but he is whole and sole in charge as an owner of the business. Exclusive possession, full control over the business and transfer of interest for consideration are some of the instances of creating a sub-tenancy and as rightly observed none of these items have been established even inferentially by the plaintiff. Conducting of a pan shop which is normally annexed to a restaurant is not an unusual phenomena and which can be run

through a servant, as has been deposed to by the first defendant and there is nothing to show that the defendant No. 3 has been doing it independently. Non-examination of defendants Nos. 2 and 3 under the circumstances will not be of any serious consequence, especially in the face of utter deficiency on the part of the plaintiff to lead proper material and positive statement on oath made by the defendants, which deserve acceptance. Shri Abhyankar, the learned Counsel also indicate that defendant No. 2 came in the picture hardly two months prior to the detention of the first defendant under MISA and it is suggested that it is not improbable that the first defendant may have an inkling about the events that are likely to happen and, therefore, it is in that context that he might have appointed defendant No. 2 as manager of the restaurant as he was likely to be away. This submission also cannot be said to be unjustified under the circumstances.

36. It is rather interesting to note that the third defendant, who did not bother to contest the suit much less to enter the witness box, has for the first time in this petition tried to support the plaintiff about the sub-tenancy vis-a-vis the pan stall as submitted by Shri R.M. Agarwal, the learned Counsel, appearing on his behalf. For obvious reasons, which hardly required any comments, such a belated claim must topple and there is enough justification in the submission of Shri Abhyankar, the learned Counsel, that he has been now set up the plaintiff joining hands with him. This on the contrary reflects on the credibility of the plaintiff's claim and his anxiety to indulge in such exercise.

37. Having regard to all these features, the said finding is unassailable which is an addition to the fact that it is based on the process of appreciation of evidence and it is also justified on merits. The petition filed by the plaintiff, therefore, directing a challenge to that finding must fail.

38. In the result, rule in Writ Petition No. 1543 of 1983 is made absolute whereas the rule in Writ Petition No. 1975 of 1983 is discharged with no order as to costs in both petitions. Consequently the decree for eviction recorded by the lower Appellate Court confirming that of the trial Court is set aside and the original plaintiff's suit stands dismissed.