

(2002) 03 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 3720 of 2001

Shamshadbegam Unus Inamdar

APPELLANT

Vs

Aminasaheb Bandgisaheb Mokashi

RESPONDENT

Date of Decision : 16-03-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3)

Citation : (2002) 5 BomCR 780 : (2002) 4 MhLj 499

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : G.S. Godbole, for the Appellant; Vineet B. Naik, for the Respondent

Judgement

F.I. Rebello, J.—Rule. Respondent waives service. Heard forthwith.

2. Respondent-landlord had filed a suit for eviction against the petitioner tenant. The only ground on which eviction was sought was non-payment of rent. Proceedings were initiated under the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947. The trial Court by its order dated 17th September, 1997 was pleased to dismiss the suit. Aggrieved the petitioner preferred an Appeal. The learned Appellate Court by its order dated 5th May, 2001 was pleased to reverse the judgment of the trial Court and allowed the Appeal. The point for determination and the finding recorded therein by the Appellate Court was whether the plaintiff proves that the defendant is a wilful defaulter in payment of rent amount in respect of the suit premises since 14th December, 1991. It answered the point in the affirmative. The Appellate Court had recorded a finding that the notice dated 22nd April, 1993 Exh. 17 as required was served on the petitioner which the petitioner tenant had received on 25th March, 1994 (Exh. 18). The Appellate Court considered the requirement of Section 12 of the Act and held that the petitioner factually had not disputed that rent had not been paid to the respondent landlord since 14th December, 1991. It has further come on record that the petitioner did not file any application for standard rent. The landlord had proved his case u/s 12(3) of the

Act. The petitioner filed written statement on 21st January, 1995. The issues were framed at Exh. 14 on 4th September, 1995. The Appellate Court held that the first date of hearing was 4th September, 1995. On that date or even prior to that date the petitioner had made no attempt to pay the rent amount. The evidence of the plaintiff was recorded on 7th March, 1997. The matter was adjourned to 12th August, 1997. It is only then that an application was moved by the petitioner to deposit the rent amount for a period of 72 months. The application was allowed on the same day and the amount was deposited only on 28th August, 1997. Based on these findings of fact the Court held that the respondent was entitled for a decree in his favour. The petitioner had failed to show readiness and willingness to pay the rent and consequently ordered eviction of the petitioner. Aggrieved by the order the petitioner has filed the present petition.

3. At the hearing of the petition the issue is limited to a pure question of law which according to the petitioner must be answered in his favour and result in the order of the Appellate Court being set aside. The question for determination can be formulated as under :--

"Whether u/s 12(3) as amended by the Act of 1987 the tenant can deposit or apply to deposit even after framing of the issues but before judgment the arrears of rent and if so done whether the tenant would be entitled to the benefit of Section 12(3) of the Act."

It is contended that this issue has not been decided by any judgment of this Court and in that light of the matter requires determination. We may gainfully reproduce the relevant portion of Section 12 :--

"12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases. -- (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy insofar as they are inconsistent with the provisions of this Act.

(2) No suit for recovery of possession shall be instituted by a landlord against tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882.

(3) No decree for eviction shall be passed by the Court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine per cent

per annum; and thereafter continues to pay or tender in Court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court, Provided that, the relief provided under this Sub-section shall not be available to a tenant to whom relief against forfeiture was given in any two suits previously instituted by the landlord against such tenant.

....."

Sub-section (3) was substituted by Maharashtra Act 18 of 1987.

A reading of the section would contemplate that no decree for eviction in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases would be passed if (a) on the first date of hearing of the suit or on or before such other date as the Court may fix the tenant pays or renders in Court the standard rent and permitted increases then due and (b) together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine per cent and (c) thereafter continues to pay or tenders in Court regularly such standard rent and permitted increases till the suit is finally decided and (d) also pays cost of the suit as directed by the Court.

4. We have, therefore, to firstly consider the meaning of the words first day of the hearing of the suit and the expression or on or before such other date as the Court may fix. Insofar as the expression first day of hearing of the suit is concerned, it has been construed to mean that at the time of framing of the issues. The contention, however, is that even after the first day of the hearing of the suit is over and till judgment is pronounced the tenant can still pay or tender in Court the standard rent. Stress is laid on the expression "on or before such other date as the Court may fix". In support of the contention learned Counsel has sought to rely on the judgment in the case of Gulam Hussein Kalumia v. Mohamed Umar Azizulla (1958) Bom. L.R. 972. The Division Bench of this Court held that in a case where trial Court failed to exercise discretion vested in it the Appellate Court to which Appeal lies against the exercise of discretion has equal power to exercise that discretion itself. It was also argued, there considering the language of Section 12(3)(b) as it stood that the tenant must pay the arrears of rent and costs on the first day of hearing or he must apply on the first date of hearing to the Court to fix some other date by which the payment should be made. This contention was answered as under :--

"I am unable to accept this view of the section. The two conditions laid down by this Sub-section are that the arrears of rent and cost must be paid on the first day of hearing on or before such other date as the Court may fix. Section does not lay down that the Court must fix such other date on the first day of hearing. There is no restriction on the power of the Court to fix such other day at any time before the decree is passed and in as much as in this case, the application was made before the hearing was completed, the Court was competent to

exercise its discretion in favour of the tenant."

In *Vora Abbasbhai Alimohomed v. Haji Gulamnabi Haji Safibhai* (1964) 5 Guj L.R. 55 the Apex Court was considering Section 12(3) before its amendment. In my opinion that judgment really would be of no assistance considering the language of the amended Section 12(3) and the subsequent judgment of the Apex Court which I will refer to. *hi Harnamsing Lalsing v. Gangaram Itchharam*, (1968) 9 Guj L.R. 323 a Single Judge of the Gujarat High Court was again "considering the provisions of Section 12(3)(b). The Court held that it was a mandatory duty of the Court to exercise the power suo motu so that the benefit of that section is not rendered illusory. In *Lalchand Jematmal v. Nanabhai Ranchhoddas and Ors.* (1976) 15 Guj L.R. 1 what was again being considered was Section 12(3)(b). A Full Bench of the Gujarat High Court took the view that the expression till the suit is finally decided would contemplate and include appeal before the Appellate Court and the tenant must continue to pay or tender the rent regularly even in Appeal and the expression as directed by the Court apply only to continue.

5. On the other hand, on behalf of the respondent their learned Counsel contends, that the issue is no longer *res integra* having been covered by the judgments of the Apex Court. It is contended that any construction should not defeat the object of the Act. The provision of the Rent Act a beneficial Legislation, creates an embargo on the right of the landlord to evict a tenant, at the same time it permits the landlord to file a suit for eviction on grounds set out under the Act. If Section 12(3) is read carefully it avoids rigour of eviction on the ground of non-payment of rent on two occasions if the tenant complies with the requirement of Section 12(3). The proviso makes it clear that if the tenant has availed of the benefit on two occasions then relief against forfeiture would not be available on the third occasion by paying or depositing the rent on or before the first date of hearing or such other date as the Court may fix. In other words once the landlord fulfils the requirement of Section 12(2) and if there is no other legal impediment eviction is a matter of course.

It is then next contended, that the words "or on or before such other date as the Court may fix" would only mean that if the tenant applies on or before the first day of hearing of the suit to tender in the Court the amount in arrears together with interest then the Court could extend the time to pay or deposit there could be a situation where it would be possible to pay on the same date and, therefore , to give the benefit to the tenant the Act has given discretion to the Court to extend the time to deposit. One thing, however, is clear that the option must be exercised on or before first day of hearing of the suit. In support of the contention learned Counsel has relied upon the judgment of the Apex Court in *Arjun Khiamal Makhijani Vs. Jamnadas C. Tuliani and Others*, . The declaration of law insofar as Section 12(3) in my opinion is set out in para 14. It would, therefore, be necessary to reproduce the said para :--

"14. Lastly, it was argued by the learned counsel for the tenants that after Clauses (a) and (b) of Sub-section (3) of Section 12 were substituted by the

consolidated Sub-section (3) of the Amendment Act 18 of 1987, the tenants should have been given the benefit of the deposit of arrears of rent on the first day of hearing in pursuance of the order of the trial Court dated November 14, 1967, and of the deposits of future rent thereafter and at all events they were entitled to make the necessary deposit after the commencement of the Amendment Act 18 of 1987. In our opinion, the tenants are not entitled even to the benefit of the amended Sub-section (3) of Section 12 of the Act inasmuch as on a plain reading of the subsection it is not possible to give it a retrospective operation. In this connection, it will be useful to notice that while amending Sub-section (2) of Section 15 of the Act, it was provided by the Amendment Act 18 of 1987 that the provisions which were substituted in said Sub-section, shall be deemed to have been substituted on February 1, 1973, No such provision was made with regard to the substitution of Sub-section (3) of Section 12 of the Act. Sub-section (3) uses the words "on the first day of the hearing of the suit or on or before such other day as the court may fix". If the deposit of arrears of rent on January 9, 1968 is pleaded as compliance of the deposit contemplated by the amended Sub-section (3) and even if for the sake of argument this plea is accepted, the said deposit would still not confer on the tenants the benefit of Sub-section (3) for the obvious reason that the said Sub-section contemplates not only the deposit of standard rent and permitted increased then due but also of simple interest on the amount of arrears of such rent and permitted increased at the rate of nine per cent per annum. Such amount of interest was admittedly not deposited by the tenants either on January 9, 1968 or on any date thereafter. We now turn to the submission of the learned counsel for the tenants that the tenants were entitled to make the deposit contemplated by Sub-section (3) "on the first day of the hearing of the suit or on such other day as the court may fix" after Sub-section (3) being substituted by the Amendment Act 18 of 1987. This argument ignores the difference between the terms "at the hearing of the suit" as used in Section 114 of the Transfer of Property Act and the term "on the first day of hearing of the suit". In the case of former, it may be possible to argue that the deposit can be made at any hearing of the suit either in the trial court or the Appellate Court, an appeal being a continuation of the suit but the said argument is not available in the latter case where the words used are "on the first day of the hearing of the suit". In the very nature of things it is not possible to contemplate numerous dates all of which may fulfil the requirement of being "the first day of the hearing of the suit." In this connection, it would be useful to notice that the words "on the first day of the hearing of the suit or on or before such other day as the court may fix" occurring in Sub-section (3) of Section 12 of the Act after its amendment by the Amendment Act 18 of 1987 occurred in Clause (b) of the unamended Sub-section (3) also. In *S. D. Chaganlal v. Dalichand Virchand Shroff* while dealing with the Clauses (a) and (b) of the unamended Sub-section (3) of Section 12 of the Act, it was held that the date fixed for settlement of issues was September 3, 1956 which can be taken to be the date of the first hearing of the suit for the purpose of the Act. The same meaning obviously has to be given to the aforesaid words when they have been

repeated in the amended Sub-section (3) of Section 12 of the Act. The date fixed for settlement of issues in a suit cannot be equated with any other date or dates which may be fixed in the suit or the appeal. The words "on or before such other date as the court may fix" occurring after the words : "on the first day of the hearing of the suit" in Sub-section (3) of Section 12 of the Act were obviously meant to meet a situation where for some inevitable reason the necessary deposit could not be made on the day of the hearing of the suit and the court extended the time to make such deposit. A deposit made on or before such extended date would also meet the requirement of the Sub-section. Even Section 25 of the Amendment Act 18 of 1987 would be of no assistance insofar as the interpretation of Section 12(3) of the Act is concerned. The said section provides for certain exceptions in which a suit or proceeding for the eviction of any person may be reopened. A provision containing exceptions cannot be interpreted so as to enlarge the scope of Sub-section (3) of Section 12 of the Act. The said Section 25 may be applicable to Sub-section (2) of Section 15 as amended by the Amendment Act 18 of 1987, the amendments whereunder were given retrospective effect as indicated earlier or also to a similar provision. Clause (a) of the unamended Sub-section (3) of Section 12 of the Act conferred a substantive right on the landlord to have a decree for eviction in his favour as held by this Court in the case of Ganpat Ladha and such a right could be taken away only by a provision which either expressly took away that right or could be interpreted to have taken away that right by necessary intendment. We do not find any such indication either in the amended Sub-section (3) of Section 12 of the Act or even in Section 25 of the Amendment Act 18 of 1987. By taking recourse to the process of reopening of proceedings one cannot put the hands of the clock back and create an artificial date as the "first day of the hearing of the suit". No other point has been urged by learned counsel for the tenants and consequently we find no merit in the appeal filed on behalf of the tenants."

7. Next is the judgment of the Apex Court in Vasant Ganesh Damle v. Shrikant Trimbak Datar and Anr. in Civil Appeal No. 1338 of 2002 an unreported judgment of the Apex Court which was decided on March 5, 2002. In that matter the tenant had filed an application to deposit the arrears of rent. The trial Court allowed the said application and directed the tenant to deposit the arrears of rent mentioned in the application within one month from the date of the order and further deposit the monthly rent of Rs. 92/- regularly on or before 10th of next month in the Court. The tenant complied with that order. In the alternative it was contended that even if the order of the trial Court was assumed not to be in terms of Section 12(3) of the Act, the tenant had filed an application before the Appellate Court which was allowed and which directions were complied with. On consideration of the contentions and the language of the section the Apex Court noted that firstly the order of the trial Court was not in terms of Sub-section (3) of Section 12, as the order was not passed on the request of the tenant, but passed on the application of the landlord who had prayed for payment of the rent. The order was passed not on the first day of hearing or on or before any

date fixed by the Court. The Court then considered the question whether powers conferred upon the trial Court could be exercised also in Appeal. The Court observed that if the powers conferred upon the trial Court are under a specified statute and not under the Code it has to be ascertained as to whether such a power was intended to be exercised by the Appellate Court as well. The Court noted that the beneficial provisions under the Act can be availed of in the suit and that too on the first day of hearing of the suit or on or before such other date as the Court may fix. The Court noted that the provision is not intended to confer a right without circumspection to be availed of by the tenant at any time according to his convenience. The Court rejected the contention that the date would also be the date fixed by the Appellate Court.

It may be noted that what is contemplated is the exercise of an option by the tenant to deposit the rent to avail of the benefit u/s 12(3). The tenant when he applies must not only pay the arrears and permitted increases but simple interest on account of arrears on such standard rent and permitted increases at the rate of 9% per annum and also to pay cost of the suit as directed by the Court. In the case of eviction on the ground of non-payment of rent if the tenant avails of this opportunity the Court then must pass an order permitting the tenant to deposit arrears of rent, the interest and cost of the suit. If the petitioner's contention is accepted it would mean that it would be in the discretion of the Court to permit an application to deposit to be made even after the first date of hearing. Two things are possible from the said language of Section 12(3). If the Legislature intended to provide time until judgment there was no need to make a provision to exercise the option on or before the first date of hearing. Therefore, that construction must be rejected. The second construction which has been argued is that between the first date of the hearing of the suit and before judgment it is within the discretion of the Court to allow the tenant to make an application. If that be so then also the language ought to have provided for the exercise of such discretion at any time between the two periods. It is not so. The language is to pay or tender in Court along with the interest on the first date of hearing of the suit or on such other date the Court may fix. What that means though the tenant was willing to tender or deposit on or before the first day of hearing of the suit for some reason it was not possible to pay or tender in Court the arrears of rent together with interest the Court then can direct payment on such other date as it may fix. What can be extended, therefore, is the date for payment of the arrears along with the interest. The second contention on the words such extended date must be construed based on the construction placed on those words by the Apex Court in *Arjun Khiamal Makhijani* (supra). To my mind, therefore, the application by the petitioner or his intent to pay or tender admittedly was not before or on the date of the first hearing of the suit. It was after evidence had been partly recorded. That would not be compliance with the requirement of Section 12(3). It would therefore not be possible to give the tenant the benefit of the said provision. The judgment of the Division Bench of this Court in *Gulam Hussein Kalumia* (supra) on the construction of the first day of hearing is no longer good

law after the judgment of the Apex Court in Arjun Khiamal Makhijani (supra). At any rate the construction given to Section 12(3)(b) cannot be applied to Section 12(3) as amended as now explained.

In the light of that Rule discharged. There will be no order as to costs.

Learned Counsel for the petitioner seeks leave to Appeal. The judgment is based on the judgment of the Apex Court in Arjun Khiamal Makhijani (supra) and in the case of Vasant Ganesh Damle (supra). Considering that leave to appeal rejected as no substantial question of law of general importance arises in the matter.

In the event the petitioner files usual undertaking in this Court within four weeks from today. Respondent not to execute the decree for the period upto 31st March, 2003.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Personal Assistant of this Court.