
(2001) 01 GUJ CK 0038

In the Gujarat High Court

Case No : Civil Revision Application No. 1046 of 1989

Shantaben Harilal Brahmhatt

APPELLANT

Vs

Hasmukhlal Maneklal Chokshi

RESPONDENT

Date of Decision : 12-01-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12, 12(1), 12(2), 29(2)

Transfer of Property Act, 1882 — Section 106, 111

Citation : (2001) 2 GLR 1615

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Advocate : R.N. Shah, for the Appellant; Y.M. Thakkar, for the Respondent

Final Decision : Allowed

Judgement

Y.B. Bhatt, J.—This is a revision u/s 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 at the instance of the petitioner-tenant original defendant, who was sued by the respondent plaintiff-landlord for a decree of eviction under the provisions of the Bombay Rent Act.

2. The landlord had filed a suit for eviction of the tenant on the ground that the tenant was in arrears of rent for more than six months, that he had failed to comply with the demand made in the statutory notice issued u/s 12(2) of the Bombay Rent Act, and that therefore, the landlord is entitled to a decree of eviction.

3. The defendant-tenant contested the suit and also raised a contention in the written statement as to standard rent. It was also contended by the defendant-tenant that the suit notice is illegal, and therefore, the suit is not maintainable. The trial Court, after appreciating the evidence on record, dismissed the suit of the landlord dealing with the various aspects of the matter. The only aspect which is relevant for the purpose of the present revision is that the trial Court also found that the notice is illegal, since the same does not meet with the

requirements of Section 12(2) of the Bombay Rent Act. The trial Court also found on the facts proved on record that the tenant was ready and willing to pay the contractual rent, which is also the standard rent.

4. Being aggrieved by the dismissal of the suit the landlord preferred an appeal. The lower appellate Court on a reappreciation of the evidence on record set aside the judgment of the trial Court and allowing the landlord's suit, passed a decree for eviction against the tenant. It is relevant to note at this stage that the lower appellate Court has not dealt with the legality of the suit notice, specifically on the point of termination of tenancy. It has, however, discussed the validity of the suit notice in general, on other factual aspects, as to whether the tenant was in arrears of rent of more than six months, whether the tenant has raised a dispute as to standard rent within one month of the receipt of the notice, etc.

5. Suffice it to say that the question of validity of the suit notice has been discussed in paragraph 17 of the judgment of the lower appellate Court. In the said paragraph the lower appellate Court has sought to rely upon decision of the Supreme Court reported at *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad*, , and according to the lower appellate Court, "there is no need to terminate the tenancy in the case of statutory tenancy when the suit is filed for recovery of possession on the ground of arrears of rent". The lower appellate Court then proceeded to apply the principle laid down by the Supreme Court in the said decision, on the assumption that the tenant was a statutory tenant, and not a contractual tenant.

6. The distinction between a contractual tenant and a statutory tenant is well understood and dealt with by a plethora of judicial decisions. However, in any given case, the question as to whether a particular defendant is a contractual or a statutory tenant is a mixed question of fact and law, and in case there is any controversy, this is required to be pleaded and proved by the party who sets up the contention. In the instant case, the landlord has from the very inception of the controversy, starting from the statutory notice at Exh. 16, treated the defendant-tenant as a contractual tenant. The defendant on his part has not set up any contrary plea that he is a statutory tenant. Thus, in absence of any controversy, the Court could only have proceeded on the basis that the relationship between the parties was that of a contractual tenant. It was both unjustified and unwarranted on the part of the lower appellate Court to proceed on the assumption that the defendant-tenant was a statutory tenant.

7. It may be noted here that I do not propose to deal with other incidental and factual controversies in the matter inasmuch as the jurisdiction of this Court in a revision u/s 29(2) is limited. This Court can only examine substantial questions of law, and would be justified in interfering only where it is found that the illegality committed by the lower appellate Court is of such a nature as would hit a fundamental question, such as the jurisdiction of the Court. In the instant case, I find that the question of the validity of the suit notice has been examined by the lower appellate Court in a most casual manner and without application of

mind. It has, furthermore, misconstrued the decision of the Supreme Court (referred to hereinabove) and has misinterpreted the same by applying the principle laid down therein in favour of the landlord. As discussed hereinafter the said decision leads to an entirely different conclusion.

8. The principal contentions raised by learned Counsel for the petitioner-tenant challenge the legality and validity of the suit notice on a number of grounds. It is contended that the suit notice at Exh. 16 is invalid since (i) it does not terminate the tenancy i.e., it does not bring an end to the contractual relationship between the landlord and the tenant, (ii) it does not give 30 days time to the tenant to pay up the demand made in the said notice, and (iii) the demand made in the notice is in respect of monthly rent which exceeds the contractual rent.

8.1 In the context of the grounds of challenge to the legality and validity of the statutory notice, learned Counsel for the respondent-landlord contended that fresh grounds could not be urged in revision. In my opinion, this contention cannot be sustained since the legality and validity of the notice was challenged even before the trial Court and has been dealt with by the trial Court in favour of the tenant. Even the lower appellate Court was addressed on this issue and that Court has also dealt with the same. Thus, the mere fact that additional grounds have been raised in this revision on an issue on which the parties were ad diem before the two Courts below would not amount to raising a fresh point in revision. This is particularly so since the additional grounds raised in this revision do not require any additional evidence and do not involve anything except a question of law which can be decided on a mere interpretation of the suit notice which is already on record.

9. I have carefully perused the suit notice at Exh. 16 dated 11th June 1984, and have heard the learned Counsel for the respective parties on the interpretation of the contents thereof.

9.1 On a plain reading of the said notice it becomes apparent that the suit notice does not terminate the tenancy of the tenant. Learned Counsel for the landlord does not dispute this position. The suit notice also does not grant the tenant one month's time to meet with the mandatory demand made in the suit notice. Again there is no controversy on this aspect.

9.2 There is also no controversy that the demand made by the landlord is at the rate of Rs. 16/- per month, whereas the concurrent findings of the two Courts below establish that the contractual rent payable by the tenant was Rs. 11/- per month. Thus, the demand made in the suit notice is in respect of an amount which exceeds the contractual rent.

10. The only question, therefore, which requires to be considered is whether such a notice could be said to be a valid notice within the meaning of Section 12(2) of the Bombay Rent Act.

11. In the case of *Abdulgani v. Chimanlal Maneklal*, decided by a Division Bench

of this Court and reported at 1979 GLR 107, it has been clearly laid down and explained inter alia that a valid notice u/s 12(2) is required to be served in the manner provided in Section 106 of the Transfer of Property Act, but does not exclude the termination of tenancy as one of the requirements. It is, therefore, necessary for the landlord not only to terminate the tenancy, but also to give the tenant one month's time to pay the arrears of rent. The relevant portion of the judgment in para 3 thereof reads as under :

"What sub-section (2) of Section 12 provides is that a notice of demand contemplated by sub-section (2) shall be served in the manner provided in Section 106 of the Transfer of Property Act, 1882. It does not lay down that the statutory notice under Sec. 106 of the Transfer of Property Act, 1882, terminating the tenancy of the tenant need not be given or that it is not necessary. Sub-section (2) of Section 12 does not open with any non obstante clause and does not provide that notwithstanding anything contained in Section 106 of the Transfer of Property Act, 1882, a landlord shall be entitled to file a suit for possession only upon serving the notice of demand of arrears of rent upon the tenant. Sub-section (2) of Section 12 affords an additional protection to the tenant inasmuch as where a tenant has fallen into arrears of rent and the landlord seeks to recover possession of the premises on that ground from him, it is necessary for the landlord to serve upon him notice of demand and give him one month's time to pay the arrears of rent besides terminating his tenancy u/s 106 of the Transfer of Property Act, 1882. By no canon of construction it can ever be said that sub-section (2) of Section 12 dispenses with the statutory notice required to be served by the landlord upon his tenant u/s 106 of the T. P. Act before he seeks to recover possession of the premises from the tenant. We have no doubt in our mind that a suit by a landlord to recover possession of the suit premises from his tenant must be preceded by two valid notices, one u/s 106 of the Transfer of Property Act, 1882, and another notice of demand under sub-section (2) of Section 12. They may be incorporated in one document. Therefore, the finding recorded by the learned Judge that it was not necessary for the plaintiff to serve upon the defendant statutory notice as required by Section 106 of the Transfer of Property Act, 1882, cannot be sustained and, is therefore, set aside.

The said decision while dealing with the nature and character of the notice u/s 106 of the Transfer of Property Act (which would also apply to the notice u/s 12(2) of the Bombay Rent Act as discussed in the decision referred to above), found that where the notice to quit, besides terminating the tenancy according to the month of tenancy, mentioned two additional dates on which the tenant if he so chose, could determine the tenancy, only gave an option to the tenant to apply such date of termination of tenancy as the tenant may consider appropriate on the facts of the case. This did not have effect of invalidating the notice on the ground of vagueness or uncertainty. However, the substance of the decision goes to indicate that the termination of the tenancy was one of the fundamentals before a suit for possession could be filed.

12. As observed hereinabove, the lower appellate Court has completely misconstrued the observations of the Supreme Court in the case of *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad*, . This decision by a three Judges Bench extensively deals with the principles of determination of tenancy, and also a suit for recovery of possession under the Bombay Rent Act based upon the statutory notice issued u/s 12 of the Bombay Rent Act. This decision unequivocally lays down the principle that Section 12 operates against the landlord only after the contractual tenancy is determined in accordance with Section 111 of the Transfer of Property Act, and that the suit for recovery of possession u/s 12 of the Bombay Rent Act would not be maintainable unless the tenancy is determined and a notice u/s 12(2) is served. Obviously, Section 12(2) in itself does not explicitly contemplate the termination of tenancy. However, as this decision clearly lays down, a suit would be maintainable [on the foundation of Section 12(2) only if that notice or any other notice has determined the tenancy. The basic principle is that without determination of the tenancy no suit for eviction is maintainable. As observed hereinabove, the notice at Exh. 16 is the only notice given by the landlord to the tenant, and although the said notice does not contain any averment that it is a statutory notice u/s 12(2) of the Act, learned counsel for the respondent tenant has no option but to rely upon it as if it were a statutory notice u/s 12(2) of the Bombay Rent Act. Since, it is relied upon as the statutory notice u/s 12(2), and admittedly no other notice determining the tenancy has been issued or served, it is this notice at Exh. 16 which must pass all the tests before it can be said that it is a valid notice u/s 12(2) of the said Act.

12.1 Learned Counsel for the respondent-landlord sought to rely upon a decision of the Supreme Court in the case of *V. Dhanapal Chettiar Vs. Yesodai Ammal*, . This decision has been considered and discussed at length by learned Counsel for the respondent-landlord. According to him this decision lays down the principle that a notice of termination of tenancy need not be issued u/s 106 or Section 111 of the Transfer of Property Act for the purpose of eviction suit against the tenant under any State Rent Control Act. In my opinion, this decision does not lay down any such proposition in such broad terms as canvassed by learned Counsel for the landlord. In para 6 of the said decision the Supreme Court had occasion to observe that : "Only in those State Acts where a specific provision has been made for the giving of any notice requiring the tenant either to pay the arrears of rent within the specified period or to do any other thing, such as the Bombay Rent Act or the West Bengal Rent Act, no notice in accordance with Clause (g) is necessary." In other words, the general proposition is qualified by the observation that certain State Acts require a statutory notice as a foundation for a suit for eviction, and in those cases, including the Bombay Rent Act, the conditions set out must be satisfied. Thus, the conditions necessary for a notice to meet the requirements of Section 12(2) of the Bombay Rent Act have to be considered in the light of this specific provision, and these essential requirements have been discussed by a number of decisions of this Court including the case of

Abdulgani v. Chimanlal Maneklal (supra), and including the decision of the Supreme Court in the case of Punjalal v. Bhagawatiprasad (supra). In paragraph 9 of the said decision the Supreme Court had occasion to observe that : "It will bear repetition to say that under the Transfer of Property Act in order to entitle the landlord to recover possession determination of the lease is necessary as during its continuance he could not recover possession, while under the State Rent Act the landlord becomes entitled to recover possession only on the fulfilment of the rigour of law provided therein. Otherwise not. He cannot recover possession merely by determination of tenancy. Nor can he be stopped from doing so on the ground that he has not terminated the contractual tenancy." The crux of the matter is that a condition precedent to the filing of a suit for eviction (on the ground of arrears) is the issuance and service of a statutory notice,

12.2 The summary of the conclusions drawn by the Supreme Court, are found in the latter part of paragraph 18 of the said decision, which reads as under :

"... But on the first assumption we have taken a different view of the matter and have come to the conclusion that determination of a lease in accordance with the Transfer of Property Act is unnecessary and a mere surplusage because the landlord cannot get eviction of the tenant even after such determination. The tenant continues to be so, even thereafter. That being so, making out a case under the Rent Act for eviction of the tenant by itself is sufficient and it is not obligatory to found the proceeding on the basis of the determination of the lease by issue of notice in accordance with Section 106 of the Transfer of Property Act."

In my opinion, the sum and substance of the decision is that the determination of the lease is unnecessary, (since it is considered to be superfluous by the Supreme Court), in accordance with Section 106 of the Transfer of Property Act, if terminated according to the State Act. The crucial distinction in the instant case is that Section 12(2) of the Bombay Rent Act does not contemplate determination of the lease in accordance with Section 106 of the Transfer of Property Act. It merely contemplates that the notice issued u/s 12(2) must be served in accordance with Section 106 of the Transfer of Property Act. In my opinion, therefore, this decision cannot be read so as to mean that the statutory notice u/s 12(2) of the Bombay Rent Act does not contemplate the termination of tenancy under any law, or even under the Rent Act. It also requires to be noted that the Transfer of Property Act is a Central Act, whereas the Bombay Rent Act is a State Act. In any concurrent field of legislation, the provisions of a State Act cannot override the provisions of a Central Act, in case of conflict or inconsistency. Thus, the termination of tenancy under the Transfer of Property Act can only be considered superfluous if such termination of tenancy is necessary under any State Act. This presupposes that the State Act contemplates termination of tenancy, otherwise there is no redundancy. As already observed hereinabove. Section 12(2) of the Bombay Rent Act does not contemplate a notice u/s 106 of the Transfer of Property Act, but only service in the manner laid down in Section 106. If this interpretation of the landlord in respect of this

decision were to be accepted, it would mean that no termination of tenancy is necessary, neither under the Transfer of Property Act nor under the Bombay Rent Act. Such an interpretation of this decision is just not possible.

12.3 It may be noted here that the learned Counsel for the respondent-landlord conceded that if the relationship of the landlord and tenant were not governed by the Bombay Rent Act, but were governed by the Transfer of Property Act, no suit would lie for eviction unless the tenancy was terminated u/s 106 of the Transfer of Property Act. Since admittedly the relations are governed by the Bombay Rent Act, it does not ipso facto follow that since a notice u/s 106 of the Transfer of Property Act is not a condition precedent for an eviction suit u/s 12(2), the same is also superfluous or redundant under the Bombay Rent Act.

12.4 Even otherwise, even if the view canvassed by the learned Counsel for the landlord on the interpretation of the aforesaid decision is accepted, the statutory notice in the instant case is vulnerable on other grounds as well.

13. Learned Counsel for the respondent-landlord sought to rely upon a decision of the Supreme Court in the case of N.M. Engineer and Others Vs. Narendra Singh Viridi and Another, . As a result of a discussion on this decision, it is apparent that the same does not lay down any principle which would be of utility to learned Counsel for the landlord.

13.1 In paragraph 15 of this decision, an earlier decision is referred to viz., the case of Chimanlal Vs. Mishrilal, . Referring to that decision the Supreme Court has quoted from para 8 thereof as under :

"The notice referred to in Section 12(1)(a) must be a notice demanding the rental arrears in respect of accommodation actually let to the tenant. It must be a notice (a) demanding the arrears of rent in respect of the accommodation let to the tenant and (b) the arrears of rent must be legally recoverable from the tenant. There can be no admission by a tenant that arrears of rent are due unless they relate to the accommodation let to him. A valid notice demanding arrears of rent relatable to the accommodation let to the tenant from which he is sought to be evicted is a vital ingredient of the conditions, which govern the maintainability of the suit, for unless a valid demand is made no complaint can be laid of non-compliance with it, and consequently no suit for ejectment of the tenant in respect of the accommodation will lie on that ground."

It, therefore, goes without saying that in order to enable the landlord to make a justifiable grievance as to non-compliance with the statutory notice, the demand made therein itself must be justifiable and valid. The question is not of strict legality of the demand, but the broad viability and justifiability. As observed hereinabove, it is not that the demand is invalid because it exceeds the standard rent. It is obvious that the standard rent is determined by the Court during the course of proceedings of the eviction suit (at least on the facts of the present case) and, that therefore, the landlord could not be placed in a position where he could be asked to restrict his demand to standard rent. However, the landlord

could only make the highest justifiable demand which would be the contractual rent. Any demand higher than the contractual rent would certainly be unjustifiable and invalid. As found on the facts of the case the demand made in the suit notice is certainly higher than the contractual rent, and it is for this reason that the suit notice in the instant case does not meet the test of its validity.

13.2 It further requires to be noted that the suit notice in the instant case at Exh. 16 on the face of it does not grant any particular period to the tenant to meet the demand. It is an open-ended demand. It is not being suggested that a minimum period of time must be given to the tenant to meet the demand. However, if it is found that the landlord has merely demanded the specified arrears of rent without specifying an outer time-limit for compliance with the demand, it could very well be urged that the tenant could meet with the demand as and when he chooses to do so or as and when it is convenient for him to meet the demand. In my opinion, such a demand would not confer any cause of action u/s 12(2) of the Bombay Rent Act. To meet with this contention learned counsel for the respondent-landlord sought to urge that the suit notice at Exh. 16 is also being capable of interpreted so as to mean that it makes an instant demand of payment of arrears. Firstly, in my opinion, the suit notice is not being capable of such interpretation. Secondly, even if such an interpretation were possible, it would fall foul of the Division Bench decision of this Court in the case of *Abdulgani v. Chimanlal Maneklal* (supra). Therefore, this contention on behalf of the landlord is of no avail.

13.3 Learned Counsel for the respondent-landlord sought to rely upon a decision of the Supreme Court in the case of *JOSHI BHURARAM DATTARAM v. JIVIBAI D. MULCHAND (MRS.)*, and particularly the observations in paragraph 4 thereof. It must be appreciated that this decision mainly deals with a dispute as to the demand made by the landlord as to the standard rent applicable to the premises, and it was in this context that the Supreme Court held that : "Rate of standard rent mentioned in the notice u/s 12(2) of the Bombay Rent Act not challenged u/s 11(3) - held - could not be challenged in the written statement in the eviction suit u/s 12(1)". The Supreme Court while dealing with the contention (in para 4 of the said decision) negated the contention of the tenant that since the standard rent was only Rs. 9/-, the tenant was not liable to be ejected on the basis of a notice u/s 12(2) which demanded arrears at the rate of Rs. 20/- per month. In my opinion, this decision would be of no assistance to the landlord for the simple reason that the controversy in this case is entirely on different facts. The tenant does not assert that the notice is invalid because the demand exceeds the standard rent (although the dispute as to standard rent was in fact raised in the written statement). The dispute is only to the extent that when the demand made in the suit notice exceeds the contractual rent, such an invalid demand would not lay the foundation or furnish any cause of action to the landlord for filing a suit for eviction. On the facts of the case both the Courts have found that the standard rent is the same as the contractual rent and that the demand made

in the suit notice exceeds the contractual rent. On [his ground, therefore it must be found that where the demand in the suit notice is not justifiable on any ground, the same cannot be said to be a valid demand and therefore such a demand would not meet the test laid down by the Supreme Court in the case of *N. M. Engineer v. Narendra Singh Virdi* (supra).

13.4 Learned Counsel for the respondent-landlord also sought to rely upon a decision of this Court in the case of *Ashokkumar Manilal Vs. Gandhi Vrajilal Gabrrulal Dessa*, . In my opinion, this decision would be of no assistance to the landlord since it is on an entirely different issue altogether. This decision lays down that the statutory notice u/s 12 must contain a demand of the arrears which must be precise and not vague, but found (on the facts of the case) that where the notice clearly specifies the date from which the rent was due, it could not be said to be a demand which is vague and imprecise particularly where the tenant has not pleaded that he was misled by the amount set out in the notice. It was under those circumstances that the notice was found to be valid. In the instant case, it is not the vagueness of the demand on which the validity of the suit notice is questioned.

13.5 Learned Counsel for the respondent-landlord also sought to rely upon a decision of this Court in the case of *Labhabhai v. Laxmidas*, reported at 1963 GLR 567. In this decision the principle has been laid down to the effect that when a notice u/s 12(2) of the Bombay Rent Act makes a demand in respect of the arrears of rent, not at the rate of contractual rent, but a rate higher than the standard rent, the notice itself does not become invalid so as to take away the right of the landlord to institute the suit on the basis of the suit notice. The entire basis of this decision is based on the interpretation of Section 7 of the Act, whereby it is found that the recovery of rent in excess of standard rent and permitted increases is illegal. The Court found that it is the recovery in excess of standard rent which is illegal, and merely because the demand is made in excess of the standard rent would not make the notice illegal. It is obvious as noted by the Court in the said decision itself, that the dispute as to standard rent can arise only after the tenant receives the notice u/s 12(2), (in most of the cases). It is, therefore, neither reasonable, nor an obligation cast upon the landlord by statute that he must first assess or obtain a determination through the Court as to what the standard rent is or should be, and then issue a statutory notice. It was under those circumstances that the Court held that merely because the demand made in the statutory notice is ultimately found to be higher than the standard rent which is later on determined by the Court, would not affect the validity of the suit notice. In my opinion, this decision has no application to the facts of the case inasmuch as this is not the controversy in the instant case. Here the suit notice is challenged only on the ground that the demand is in excess of the contractual rent, and is therefore a demand which is neither tenable nor legal nor justifiable, even on the date when the demand is issued.

14. It is, therefore, obvious that the suit notice is invalid for a number of

reasons. In my opinion, it is invalid because it does not terminate the tenancy of the tenant. However, even if it is considered not to be invalid on this ground, there are other infirmities which cannot make it valid. It is also invalid because the said notice does not specify the outer limit of compliance with the demand, and in fact no period is prescribed at all for compliance, and therefore, the landlord could not complain in the suit that the demand made by him has not been met. Under the circumstances, this would not confer any cause of action upon the landlord to file the suit for eviction. Lastly, it is invalid because it makes a demand in respect of rent which is not recoverable nor justifiable i.e. the demand is at the rate which is in excess of the contractual rent.

15. In the premises aforesaid, the statutory notice at Exh. 16 does not meet the requirements of Section 12(2) of the Bombay Rent Act, as explained by the number of decisions referred to hereinabove and the same is therefore incapable of conferring any cause of action upon the landlord. Consequently, in the absence of a legal and valid notice u/s 12(2) of the Bombay Rent Act, the Rent Court lacks jurisdiction to entertain and decide the suit. The suit of the landlord, therefore, must fail. Consequently, it must be found that the judgment and decree of the lower appellate Court are illegal, contrary to law, and are therefore, required to be quashed and set aside. It is so held and directed.

16. Accordingly, this revision is allowed. Rule is made absolute with costs throughout.

17. Application allowed.