

(1999) 06 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 3306 of 1982

Shivlingappa Virappa Alange since deceased by his heirs and
legal representatives

APPELLANT

Vs

Malappa Chanmallappa Shetti since deceased by his heirs
and others

RESPONDENT

Date of Decision : 30-06-1999

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3),
13(1)
Evidence Act, 1872 — Section 101, 3, 61, 8

Citation : (1999) 3 ALLMR 549 : (2000) 1 BomCR 161 : (1999) 3 MhLj 602

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Vineet B. Naik, for the Appellant; Shekhar Naphade and Ms. Kiran Gupta, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Mr. Naik for the petitioner, Mr. Naphade for the respondents.

2. The petitioner is the landlord and respondents are the tenants under the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act). The petitioner had filed a regular suit for recovering possession of the suit premises from the respondents on the ground of habitual defaults in payment of rent and for bona fide personal occupation. The suit was filed before the Joint Civil Judge, Junior Division, Solapur vide Regular Civil Suit No. 475 of 1973. The trial Court decreed the suit on the ground of bona fide personal occupation and rejected the claim of the petitioner in respect of habitual defaults in payment of rent. Both the plaintiff and defendants had filed appeals against this judgment and decree dated 31st January 1979. Both the appeals jointly heard by Extra Assistant Judge, Solapur. The Appellate Court accepted the contentions of the tenants and allowed the tenants' appeal and rejected landlord's appeal i.e. claim of the plaintiff for possession was

rejected. Claim of the landlord for rent of Rs. 4S9/- only was decreed vide its judgment dated 5-4-1982 and this present writ petition is against the said order.

3. The question involved in this case is, whether the plaintiff - landlord succeeded in proving that the defendants-respondents were the habitual defaulters in paying the rent; and whether the landlord bona fide needed the premises for his business or for the business of his son. In that regard it was contended by Counsel for the petitioner that so far as ground of habitual defaults u/s 12(3)(a) of the Bombay Rent Act is concerned, the premises were let out for business and, according to the landlord, they were let out on monthly rent. But the tenants never paid rent regularly and were always in arrears, for which sufficient proof was tendered by the landlord before the trial Court. As against this, it was contended by Mr. Naphade that according to the respondents the tenancy was yearly tenancy and the rent was also payable yearly, firstly, either according to contract, or according to practice or according to legal custom and usage. Mr. Naphade also pointed out that initial burden of proving commencement of tenancy, nature of tenancy and the agreement regarding payment of rent was on the landlord. But in his evidence the landlord had admitted in para 11 of cross-examination that the landlord did not make inquiry with the shop keepers-tenants as to whether they were yearly or monthly tenants. It was, therefore, contended by Mr. Naphade that if the landlord did not know whether the rent was payable monthly or yearly, then admittedly, the landlord did not discharge his burden, and therefore, his case was rightly rejected by the Appellate Court. So far as payment of yearly rent is concerned, Mr. Naphade has contended that respondent No. 1 examined two witnesses and had produced extract of accounts as per Exhibit 59 which were for more than 15 years showing payment of rent yearly. And therefore, according to him, in the absence of any evidence from the landlord, the evidence of tenants was liable to be accepted, and hence, findings of the Appellate Court were not liable to be interfered with.

4. So far as claim of the landlord for bona fide occupation was concerned, it was contended by Mr. Naik that the landlord had come up with his specific case that when he filed a suit for ejectment, he required the suit premises for starting business of hardware for his son who was at that time taking his education. And according to Mr. Naik, the landlord had proved his bona fide need, but the Appellate Court did not consider this aspect coupled with the fact that the tenant was having number of premises in the near vicinity and comparative hardship was on the landlord and not on the tenant, and therefore, the findings of both the courts below, being perverse and against the evidence brought on record, were liable to be set aside.

5. As against this it was contended by Mr. Naphade that the case of requirement of tenanted premises on the ground of bona fide occupation was rightly rejected by the Appellate Court and since the findings in that regard were concurrent and were not perverse, the Court should not and could not interfere in the exercise of

its jurisdiction.

6. Mr. Naphade further contended that the suit premises were leased out or tenanted out to the partnership firm and the need of the partnership firm and comparative hardship of the partnership firm were totally different from the need of the partners of the firm, and since that aspect has not been considered by any Court and since that aspect goes to the root of the matter, the judgment of both the courts below were not liable to be interfered with.

7. It is true that this Court in exercising jurisdiction under Article 227 should not generally interfere with the findings and facts unless the findings were perverse. In order to find out, whether the findings are perverse or not it is necessary to consider the objections raised by Mr. Naik regarding judgment of the Appellate Court. So far as ground of habitual defaults u/s 12(3)(a) of the Bombay Rent Act is concerned, it is the case of the landlord in his plaint that the defendant was monthly tenant and the tenancy month used to commence from 1st day of Marathi Calender and rent was payable monthly. (This is to be found in paragraph No. 10 of the plaint). The landlord has also stated that the tenant was in arrears of rent for quite some time, and therefore, the landlord gave a notice to the tenant and terminated his tenancy demanding arrears of rent as well as possession of the premises.

8. As against this it was the defence of the tenant that he was not the monthly tenant and he was paying rent annually and since this practice was going on from 1954, when the plaintiff purchased this property, the plaintiff was estopped from contending that the rent was payable by monthly.

9. The pleadings of the parties are, therefore, clear. The plaintiff/petitioner contending that the tenancy was monthly and rent was payable monthly. The respondent/tenant contending that the tenancy was yearly and rent was also payable yearly. So far as evidence of the parties is concerned, it is true, as pointed out by Mr. Naphade that, the plaintiff has in his cross-examination stated in paragraph No. 11 that he did not make inquiry with the shop keeper tenants as to whether they were yearly or monthly tenants. However, this statement of the landlord can not be taken as an admission of the landlord that the landlord was not aware of the nature of the tenancy of the defendants/respondent. If the aforesaid answer is taken as it is, it will only show that the landlord/plaintiff did not make inquiry with other shop keepers as to whether their tenancies were yearly or monthly. Alternatively for the sake of arguments even if it is accepted that the plaintiff did not know or did not give evidence regarding defendants being monthly tenant that question has to be decided by this Court from other evidence on record.

10. It is an admitted fact that both the courts below have rejected the case of the tenant that his tenancy was yearly tenancy. This was done by both the courts below firstly on the presumption that the tenancy not being for agricultural or manufacturing purposes was a monthly tenancy and secondly even in his written

statement the defendant does not specifically plead that the tenancy was yearly tenancy. Further the defendant has stated in para 3 of the written statement that the defendant was never a monthly tenant, but nowhere in the written statement there is any specific assertion by the defendant that he was the yearly tenant. What defendant has stated in para 3 of the written statement is that there was an agreement to pay rent on yearly basis and accordingly the defendant went on paying rent on yearly basis, and that the landlord had, after purchasing the property in 1954, accepted yearly rent and has recognized the defendant as a yearly tenant. There is definite difference between specific case of tenant being yearly tenant and tenant being accepted as yearly tenant by the conduct of the landlord.

11. I have already observed that both the courts below have rejected the claim of the tenant that his tenancy was yearly tenancy. Since those findings are not challenged, it has to be held that the respondent was a monthly tenant.

12. It was contended by Mr. Naphade that even if tenant is a monthly tenant, there could be an agreement between the parties regarding payment of rent annually or yearly. There could be no hesitation in accepting this proposition. But in that case burden will shift on tenant to prove firstly that he was monthly tenant, but there was specific agreement of payment of rent annually or yearly and followed with the evidence of actual payment of yearly rent or annual rent. If in this background the evidence tendered by the tenant is considered and scrutinised, then it has to be concluded that the tenant has failed to prove his case of payment of yearly rent.

13. In order to prove that the rent being yearly, the tenant has during his evidence filed Exhibit 59 the extract of his account books from 1953-54 onwards to 1971-72. These extract of accounts were produced by the tenant to prove that he was paying rent on yearly basis. I have closely scrutinised these extract of accounts and unfortunately for the defendant they do not support his case, but to the contrary the extract of accounts show that the rent was paid by tenant not annually i.e. once in a year but about 4/5 times in a year as and when tenant found it fit to pay the rent. Mr. Naphade also could not contradict this position that is brought on record by Exhibit 59. He further contended that the attention of the witness i.e. the tenant was not brought to Exhibit 59 and he was not confronted with these entries and no opportunity was given to him to explain these entries as required by the Indian Evidence Act, and therefore, the landlord can not get any advantage of the facts revealed by Exhibit 59.

14. I am unable to accept this contention of Mr. Naphade firstly because Exhibit 59 are the documents maintained by the defendant and produced by him in the Court, the entries in those documents were made by the defendant himself, they have been taken on record, proved and exhibited as Exhibit 59 and therefore, the Court can look into those documents and draw any natural inference which is available from the facts revealed by the documents. There is no question of confronting tenant with those entries. If it is consistently the case of the tenant

that he was paying rent yearly or annually then there should have been only one entry for every year regarding payment of rent in lumpsum. However, as is revealed by Exhibit 59, all these extract of accounts show that rent is paid 4/5 times in a year and not once in a year. The case of the defendant is that he was paying rent yearly either on account of practice or on account of the contract or custom or legal usage is required to be rejected and was rightly rejected by the trial Court. It appears that the Appellate Court has not gone in depth while considering Exhibit 59. The Appellate Court has in paragraph 15 of its judgment observed that the mode of payment of rent at the end of the year is in no way inconsistent with the monthly tenancy. The Appellate Court has further observed that as the rent is not payable by month, the case of the plaintiff must fall u/s 12(3)(b). These findings are not based on evidence but they are contrary to the documents Exhibit 59 wherein there is no mention of entry of payment of yearly rent, but the rent was paid intermittently and there is no regularity in paying the rent.

15. Once the courts below held that the tenancy was monthly, then burden shifted on the tenant to prove specifically the existence of an agreement between him and the landlord regarding payment of yearly rent. The tenant has miserably failed to prove that the rent was payable yearly because of any existing agreement, legal usage or custom and apart from that, document Exhibit 59 does not support the case of the tenant that he was paying rent yearly, to the contrary Exhibit 59 supports the case of the landlord that even through the tenant was a monthly tenant and he was bound to pay rent monthly, the tenant has not paid rent regularly and he was habitual defaulter which attracts section 12(3)(b) of the Bombay Rent Act.

> 16. Coming to the second ground of the landlord regarding bona fide occupation it was contended and as stated earlier by Mr. Naphade that a partnership firm was the tenant and need of the partners could not be equated with the need of the partnership firm. Such an objection can not be permitted to be raised at this juncture: Firstly because in the pleadings and evidence the defendant/tenant never raised any such plea and secondly neither the landlord nor any of the witnesses of the defendant gave any evidence regarding need of the partnership firm or made any distinction between the need of firm and need of individual tenant. The evidence that has been produced, particularly by the tenant and witnesses, is about their own need and not for need of the partnership firm. When the parties have therefore, right from the beginning i.e. right from the trial Court, produced the evidence on the basis of need of the tenant individually and not attempted to make any distinction between the need of individual tenant or need of the firm and when no issues were framed, no arguments were advanced, then at this stage of hearing of petition the tenant can not be permitted to raise such a plea.

17. So far as merits of the claim of the petitioner regarding bona fide occupation are concerned, Mr. Naphade took me through the evidence adduced by the

parties and the findings given by the trial Court as well as the Appellate Court. He contended that the landlord has failed to prove his bona fide need of occupation of the premises firstly because if according to the landlord he required the premises for starting hardware shop for his son Siddheshwar, then when the suit was filed hardware shop was already started by Shivlingappa, the original plaintiff who is the father of Siddheshwar, the petitioner newly brought on record after the death of Shivlingappa.

18. In my opinion such an argument is not available to the respondent. Shivlingappa, the original plaintiff, filed a suit in 1973 at that time Siddheshwar was taking his education. According to Shivlingappa the suit premises were required for starting hardware business and the need for bona fide occupation was based on his need of family or the need of Siddheshwar. As rightly argued by Mr. Naik if the hardware business was not started before filing of the suit, the tenant would have contended in defence that there is no immediate need in present as the business is not yet even started and need is a future need requiring capital investment and qualification of Siddheshwar to run the business and so and so forth. According to him, in order to overcome this objection Shivlingappa started hardware business before Siddheshwar could take it over from him. I find this reasoning and logic very convincing and acceptable in the facts and circumstances of the case.

19. Secondly it was contended by Mr. Naphade that from the evidence of plaintiff on record, the plaintiff had other alternative premises to start hardware business for his son Siddheshwar and the plaintiff could not have started business only at the suit premises. My attention was drawn to the relevant observations of the Appellate Court in that regard and also to the evidence of the plaintiff.

20. As against this Mr. Naik drew my attention to the evidence of the defendant which was considered by the trial Court, particularly while deciding Issue Nos. 4 and 5. There is evidence on record from which it is clear that the tenants had, apart from the suit premises, number of other premises in their possession and occupation, either as the owners or as the tenants. This aspect has been considered at length by the trial Court in paragraph No. 16 of its judgment. From this evidence it is clear that as between the premises available to the plaintiff and available to the defendants and as between the comparative hardship, the trial Court had, after scrutinising the evidence on record, given its findings in favour of the plaintiff whereas the Appellate Court had given findings against the plaintiff/landlord mainly on irrelevant circumstances, for e.g. the Appellate Court has considered annual income of the plaintiff from his all business activities and has observed as under :---

"If so, it is not possible to accept the plaintiffs contention that it was necessary for him to increase his income or earning so as to meet the growing expenditure of the family."

In my opinion a Court can not judge whether particular income is sufficient for

particular family or whether a person can aspire for increasing income of his family or for that purpose starting any new business or not. This question regarding financial need of family and their desire of prosperity can not be considered by the Court while considering the bona fide need and at any rate if a person/landlord come to a Court and says that for prosperity of the family he want to do particular business, the Court can not reject that contention on the ground that income of such person is sufficient to meet his requirement.

21. The Appellant Court had further held that element of necessity for increasing the income or earning should be pleaded and proved. This approach of the Appellate Court also does not appear to be proper, because the necessity of increasing the earning of the family is a personal one. And individual necessity for increasing earning depends on scores of factors which Court can not question, at least in the cases of between landlords and tenants. It is altogether different, that in order to find out the bona fide need of the landlord, the Court may consider the evidence in that context, but to the question propriety of a landlord for increasing his earning would be not only out of place but would be unwarranted. The Appellate Court in paragraph No. 25 of it is judgment observed as under :---

"Once it is seen that the evidence on record indicates that the plaintiff can not be having any necessity to earn more, the demand for possession of the suit premises can not be said to be bona fide."

It is clear that the Appellate Court has approached the case and assessed the facts and circumstances with this totally incorrect approach and consequently all the reasoning based on such an approach are required to be struck down as wrong.

22. For all these reasons the petition is required to be allowed and hence the following order :---

ORDER

23. The petition is allowed. Rule made absolute. The judgment of the Appellate Court dated 5-4-1982 is set aside and suit of the plaintiff for possession on both the counts is decreed with costs.

D.G. DESHPANDE, J. :---

After this order pronounced Ms. Kiran Gupta for the respondent prayed for staying the operation of this order for eight weeks.

Considering the issued involved, the operation of this order is stayed for eight weeks on the respondents giving usual undertaking to this Court within two weeks.

24. Petition allowed.