

(2011) 01 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 1063 of 1990

Shivnath Mundada and Others

APPELLANT

Vs

Ramdayal Surajmal Rathi and Others

RESPONDENT

Date of Decision : 06-01-2011

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 11(3), 12(1), 12(2), 12(3)
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 106

Citation : (2011) 3 ALLMR 84 : (2011) 2 BomCR 21 : (2011) 3 MhLj 860

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : C.V. Korhalkar, for the Appellant; S.D. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—Mr. C.V. Korhalkar, learned Counsel v. appearing for the Petitioners, states that some amendment in cause title of the petition is already permitted and inadvertently, he could not carry out the same. He, therefore, seeks leave to carry out the amendment immediately. Mr. S.D. Kulkarni, learned Counsel appearing for Respondent Nos. 1/1 to 1/5, has no objection. Hence, leave granted. Necessary amendment be effected immediately.

2. By this petition filed under 227 of the Constitution of India, the Petitioners / tenants are assailing the judgment dated 2nd January 1990, delivered by the learned 3rd Additional District Judge, Ahmednagar, in Regular Civil Appeal No. 144 of 1986. That appeal was filed by the Petitioner, challenging the judgment and decree dated 23-9-1985, passed by the learned I Ind Joint Civil Judge (Junior Division) & J.M.F.C., Kopergaon, in Civil Suit No. 457 of 1979. The present Respondent Nos. 1, 2 and 3 instituted that suit for possession of suit premises on account of arrears in payment of rent, as per provisions of Section 12(1) and (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (For

short, hereinafter referred to as "Bombay Rent Act").

3. In view of precise contentions raised before this Court, it is not necessary to go into factual details. Mr. C.V. Korhalkar, learned Counsel appearing for the Petitioners, has contended that service of notice contemplated by Section 12(2) of the Bombay Rent Act has not been established by the Respondent / landlord and hence, institution of suit itself is bad in law. The judgment and decree delivered therein is, therefore, unsustainable. His second contention is that the law permits the Petitioner / tenant to file proceedings for determination of fair rent within a period of one month after such notice is served upon him. In the present case, on 31-8-1976, such proceedings were filed before the competent authority as per Section 11 of the Bombay Rent Act. In those proceedings, the Petitioner / tenant continued to deposit the agreed rent of Rs. 30/- per month and though those proceedings were unfortunately dismissed in default, the Petitioner has continued to deposit that amount till date. He, in fact, wanted to produce on record, a chart to demonstrate that at every interval of six months, till date, the rent arrears have been deposited in those rent proceedings by the Petitioner / tenant. He has further urged that there was also some dispute between the co-owners (landlords) and it resulted into filing of Regular Civil Suit No. 840/1975 amongst themselves. The Petitioner was also joined as party Defendant in that suit and he had a direction not to pay the rent and, therefore, the amount was not paid.

4. The learned Counsel appearing for the Petitioners has invited my attention to the discussion, in this respect, as contained in appellate court judgment, particularly, in paragraphs 9, 10 and 11, to show that the appellate court has, in fact, found that the acknowledgment proving service of notice at Exhibit 34 has not been placed on record. Its finding of service of such notice, according to the learned Counsel for the Petitioner, is based upon assumptions and presumptions only.

5. The learned Counsel appearing for the Petitioners has also invited my attention to the provisions of Section 11 and Section 12 of the Bombay Rent Act, in so far as the same are relevant for adjudication of the present controversy. By inviting attention to Section 11(3) of the Bombay Rent Act, the learned Counsel appearing for the Petitioners states that the filing of fair rent proceedings and deposit of rent during the pendency of those proceedings results in exoneration of the Petitioner and the suit could not have been decreed.

6. The learned Counsel appearing for the Petitioners has also invited my attention to a judgment of the learned Single Judge of this Court, in the case of Shamrao Abaji Jadhav Vs. Chaturbai Sidheshwar Javeri, , to urge that in the said case also, this Court has found that in view of such payment, the tenant therein could not have been declared in arrears of rent. He also points out that the fair rent proceedings were also dismissed in default in the aforesaid case but then intention and attitude of the tenant has been looked into as a governing factor.

7. Mr. S.D. Kulkarni, learned Counsel appearing for Respondent Nos. 1/1 to 1/5, on the other hand, has contended that the ground of non-service of notice has been raised for the first time before this Court. He attempts to demonstrate that before the trial court and the appellate court, the Petitioner urged that the notice dated 4-8-1976 at Exhibit 34 was not issued by all joint owners together and, in any case, the notice was not valid in the eye of law. He has also invited my attention to the fact, that the appellate court has specifically found that the first payment was made vide receipt at Exhibit 40 on 12-4-1977. According to the learned Counsel for Respondent Nos. 1/1 to 1/5, thus, on 4-8-1976 i.e. on the date on which notice, as required u/s 12(2) of the Bombay Rent Act was issued, the Petitioner / tenant was found to be in arrears for more than six months. He contends that in view of this finding, decree for eviction has been rightly granted.

8. In the alternative and without prejudice, the learned Counsel appearing for Respondent Nos. 1/1 to 1/5, has also urged that the chart sought to be produced does not show payment regularly as contemplated by Section 12(3)(b) of the Bombay Rent Act. According to him, payment at intervals of six months on each occasion is not pleaded and that payment cannot be looked into. He contends that the case is squarely covered by Section 12(3)(a) and the courts below have rightly granted the necessary decree. He has also urged that in the notice dated 4-8-1976, tenancy was sought to be terminated with effect from 31-8-1976 as per provisions of Section 106 of the Transfer of Property Act, 1882. However, a fair offer was given to the Petitioner / tenant of further time. He urges that there was never any dispute about quantum of rent and filing of proceedings u/s 11 of the Bombay Rent Act, in the present situation, is not, therefore, bona fide. He has further contended that because of this only, those proceedings had come to its logical end and no steps were taken to restore it.

9. The facts on record show that the notice, as required by Section 12(2) of the Bombay Rent Act, was sent on 4-8-1976 and that notice is at Exhibit 34 on record. Perusal of the judgment of the appellate court reveals that in paragraph 9, it has considered the question of legality and validity of that notice. The consideration in paragraph 10 shows that the notice was challenged before it on two grounds. The first contention was that the notice ought to have been issued by all the owners jointly, and the second contention was that the suit notice was not shown to have been served on the Defendants 15 days prior to the date of termination of tenancy i.e. 31st August 1976. In so far as consideration by the appellate court, in paragraph 10 of its judgment is concerned, in the light of the arguments advanced before this Court, it is not necessary to comment upon the said findings.

10. The consideration in paragraph 11 of the appellate court judgment shows that the courts have found that the notice was admittedly served upon the Petitioner / tenant. The appellate court has found that the Defendant did not come up with specific contention that after service of that notice, he did not get 15 days time till 31st August 1976 and because of absence of such plea, the

inference, that notice must have been served within time, has been drawn. It is to be noted that the burden, to show that it was not a notice of clear 15 days, was upon the Petitioner / tenant. He accepts the service of notice and hence it was obligatory on him to come up with specific defence giving its date of receipt and also proving it by some other means. Admittedly, it has not been done. Therefore, I do not find substance in the contention of the Petitioners, that the notice was not received by the Petitioner 15 days before 31-8-1976.

11. Even otherwise, perusal of Section 12(1) of the Bombay Rent Act shows that a landlord is prohibited and declared not 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. Sub-Section 2 of Section 12 carves out an exception thereto and states that no suit for recovery of possession can 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. The later part of Sub-Section 2 of Section 12 deals with the manner in which notice is required to be served and it states that the said notice u/s 12 Sub-Section 2 must be served in the manner provided in Section 106 of the Transfer of Property Act, 1882. It is, therefore, obvious that the time given in notice u/s 12(2) need not coincide with a tenancy month or expiry of tenancy month.

12. In the present case, the record shows that the notice at Exhibit 34 is dated 4-8-1976 and the suit on the strength of that notice has been instituted by the Respondents on 11-7-1979 i.e. just before expiry of three years from the date of notice. The Petitioner / tenant, therefore, got time, as contemplated by Section 12(2) to show his bona fides by offering to pay the arrears, as demanded in that notice.

13. Again, there is no question about the arrears in the present matter. The fact of arrears is admitted. The defence is, because the Petitioner / tenant filed proceedings for determination of fair rent, provisions of Section 12(2) could not have operated further and the landlord could not have been given a decree for possession. The proceedings for determination of fair rent are filed on 31-8-1976. The payment of rent or any amount towards rent thereafter, had taken place for the first time, on 12-4-1977 vide receipt Exhibit 40. The receipt Exhibit 40 is for a sum of Rs. 810/-. It covers the period from January 1976 to March 1977. This payment, therefore, itself shows that on 4-8-1976, rent from January 1976 till 4-8-1976 or, in any case, till 31-8-1976 was not paid. Thus, on 4-8-1976, arrears of more than six months are impliedly accepted by the Petitioner / tenant.

14. The appellate court has, in paragraph 9 of the judgment, found that the Petitioner has been residing in the suit premises as a tenant since about 30 years prior to 1935. The learned Counsel appearing for the Petitioners states that the sentence is required to be understood to mean, that the Petitioner / tenant is

residing since 1935. Since 1935, there is nothing on record to show that the rent amount was disputed at any point of time. During the pendency of so called fair rent proceedings, the Petitioner has continued to pay amount of Rs. 30/- per month, which in fact, is agreed rate of rent between the parties.

15. Paragraph 10 of the appellate court judgment shows that the Petitioner was paying rent till 1973 to the father of Plaintiffs and after death of father of Plaintiffs, Ramdayal started recovery of the rent. Respondent No. 1 Ramdayal was also issuing rent receipts to the Petitioner. He had issued rent receipts till December 1974. All this evidence and material clearly shows that the rent of Rs. 30/- per month was agreed between the parties. Why there was any dispute about rent and why the Petitioner / tenant was required to file fair rent proceedings is not brought on record. Though the learned Counsel appearing for the Petitioners has attempted to show that Regular Civil Suit No. 840/1975 was filed by landlords amongst themselves, the so called direction issued in it, asking him not to pay rent, has not been produced anywhere. There is no such contention ever before this Court. I, therefore, find substance in the contention of Mr. S.D. Kulkarni, learned Counsel appearing for Respondent Nos. 1/1 to 1/5, that there was no dispute really about the rate of rent. In this situation, I find that filing of such proceedings u/s 11(3) of the Bombay Rent Act, at least, in the present facts, cannot be the answer to a suit filed by the Plaintiffs / Respondents.

16. Reliance upon the provisions of Section 12(3)(b) of the Bombay Rent Act is equally misconceived. The said provision gives tenant, further opportunity to pay arrears on the first day of hearing of the suit or on some other date as the court may fix. But then, the tenant has to pay standard rent and permitted increases then due and thereafter continue to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided. The Petitioner has not come up with defence that he has offered or paid the amount of arrears in court on the first date of appearance or he has continued thereafter to pay the rent amount of Rs. 30/- per month regularly. There is no attempt before trial court or appellate court to demonstrate that there were no arrears on the date of institution of Suit or such arrears were cleared on date of appearance. Even if his payment u/s 11(3) of the Bombay Rent Act is to be presumed, as compliance with Section 12(3)(b), still that payment is not regular i.e. payment has not been deposited every month. The learned Counsel appearing for the Petitioners has stated that the payment has been made after a gap of every six months. When tenancy is monthly, obligation to pay rent arises every month and said provision obliges Petitioner to discharge that obligation regularly i.e. every month. Said provision gives a concession to tenant in arrears and permits him to make amends by his conduct of honouring the obligation regularly during pendency of Suit. It curtails the right of landlord if tenant exhibits his readiness and willingness to regularly honour that obligation. Hence payment every month which proves a conscious and responsible attitude on part of such delinquent tenant is sine qua non under that provision. Here, Petitioner tenant by alleged deposit after every 6 months has not shown his readiness and willingness to

honour monthly obligation. Hence alleged payment after each gap of six months cannot be presumed to be an indication of improvement or desire to improve. It is not "regular", as required by the scheme of Section 12(3)(b) of the Bombay Rent Act.

17. In the light of the above, the ratio laid down in the judgment of the learned Single Judge of this Court, in the case of Shamrao Abaji Jadhav v. Smt. Chaturbai (supra), as sought to be relied by the learned Counsel appearing for the Petitioners, is not applicable to the facts of the present case. In the said judgment, in paragraph 6, the finding recorded shows that the claim in suit was of Rs. 210/- and the tenant had already deposited amount of Rs. 232/- long back in two standard rent proceedings. This Court has, therefore, found that there was no question of the tenant being in any arrears as such of rent either on the date of notice or on the date of the suit. This finding in paragraph 6 clearly shows that the said judgment has no application to the facts of the present case.

18. In this view of the matter, I do not find any perversity with the concurrent findings recorded by the courts below. No case is made out for interference in exercise of jurisdiction of this Court under Article 227 of the Constitution of India.

19. In the result, Petition is dismissed. Rule is discharged. Needless to mention, that the ad interim relief, granted earlier, stands vacated. In the circumstances of the case, there shall be no order as to costs.