
(1997) 02 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 5279 of 1996

Shri Gian Singh Nagi

APPELLANT

Vs

Ramani Steel Industries

RESPONDENT

Date of Decision : 18-02-1997

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12, 5, 7

Citation : (1997) 99 BOMLR 626

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.K. Deshmukh, J.—This is a landlord's petition challenging the order dated 24.7.1996 passed by the Appellate Bench of the Small Causes Court at Bombay, allowing the appeal filed by the respondent-tenant, being Appeal No. 90/1996. The tenant filed the appeal challenging the decree passed by the Judge of the Small Causes Court dated 22.12.1995 in R.A.E. & R. Suit No. 1117/3525/1981.

2. R.A.E. & R. Suit No. 1 117/3525/1981 was filed by the present petitioner-landlord seeking a decree of eviction against the respondent-tenant on the ground that he had committed default in payment of rent. The trial Court decreed the suit holding that the tenant had committed default in payment of the monthly rent. However, the Appellate Court reversed the judgment. The petitioner-plaintiff in the plaint contended that the respondent is his tenant in relation to the suit premises which is Shop No. 4. The plaintiff averred that the tenancy was monthly and the monthly rent was Rs. 145.72. It was further stated that as the tenant was in arrears of rent from 1st October to March 1979. The notice was issued on 7th April 1979 and it was received by the tenant on 14th April, 1979. The tenant neither replied the said notice disputing his liability to pay the amount claimed, nor did he make an application for fixation of standard rent within a period of one month from the date of receipt of the notice. The respondent-tenant filed his written statement. In the written statement, he

admitted that the monthly rent agreed was Rs. 145.72. The tenant also admitted that he received the notice on 14th April, 1979. It was the case of the tenant that as an amount of Rs. 5,450.73 towards rent and an amount of Rs. 496.25 towards cost were paid to the landlord on 24th September, 1981, the suit is not maintainable. The trial Court accepted the case of the plaintiff and passed the decree in his favour. The Appellate Court, however, reversed the decree, holding that as the arrears were claimed for the period from 1.10.1978 to 31.3.1979 and as the notice demanding the arrears was issued on 7.4.1979, the notice was premature and on this point the appeal was allowed and the decree was set aside.

3. Shri Thorat, the learned Counsel appearing for the petitioner, urged that the finding recorded by the Appellate Court that the notice was premature is erroneous. He submitted that it is an admitted fact that the rent was payable in the beginning of the next month and, therefore, the rent for the month of March 1979 became payable on the 1st of April, 1979 and, therefore, the petitioner was perfectly justified in issuing the notice on 7.4.1979 demanding the amount of rent for the period from 1.10.1978 to 31.3.1979. He further urged that the reliance placed by the Appellate Court on a judgment of this Court in Civil Revision Application No. 1424 of 1962, decided on 5th October 1964 is totally misplaced. Relying on a judgment of this Court in Special Civil Application No. 1146/72, decided on 15.1.1976 1976 MLJ 43, Shri Thorat urged that the rent becomes due at the close of the period in respect which the rent is to be paid and therefore the landlord becomes entitled to the payment on the first day after the period for which the rent becomes due closes. Shri Jahagirdar, learned Counsel for the respondent-tenant urged that the rent for the month of March 1979 could have been paid by the tenant during the entire month of April 1979 and therefore it cannot be said that the tenant had become a defaulter and therefore, as the rent for the month of six months has not become due, the landlord could not have issued notice and the case of the landlord would not fall within the parameters of Section 12(3)(a) of the Bombay Rent Act.

4. Now, it is to be seen that perusal of the provisions of Sub-section (2) of Section 12 of the Bombay Rent Act shows that a suit for eviction of a tenant cannot be instituted by the landlord unless he issues a notice in writing demanding from the tenant the amount of rent. Perusal of the provisions of Section 12(3)(a) further shows that in order to attract application of that provision, the tenant should be in arrears for a period of six months or more. In the present case, admittedly, the tenant had not paid rent from 1.10.1978. On 31.3.1979, when the month of March 1979 closed, the tenant was in arrears of rent for six months. The rent for the month of March 1979 became payable on 1.4.1979 and therefore the landlord became entitled to demand the rent. In so far as the judgment of this Court in Civil Revision Application No. 1424 of 1962, which has been relied by the Appellate Court, is concerned, the observation of this Court that in that case rent was payable until the expiry of the month of September 1961, was made in the facts and circumstances of that case. It appears from the Judgment that there was a contract of tenancy between the

tenant and the landlord and, though the Court does not specifically observe in the Judgment, it appears that, according to that contract the rent for the closing month was payable during the entire succeeding month and, therefore, the Court has observed that the rent could have been paid by the tenant during the entire subsequent month and therefore the landlord was not justified in demanding the rent before the close of the succeeding month. The Judgment of this Court in Special Civil Application No. 1146/72 referred to above, is a Judgment clearly in point. It is clearly laid down that the rent becomes due at the close of the period in respect of which rent is to be paid. It is further observed that the notice could not be challenged as premature if on the date on which the notice is received, the rent has become due to the landlord. I am in respectful agreement with the law laid down by this Court in Special Civil Application No. 1146/72. In this view of the matter, the order of the Appellate Court, allowing the appeal on this point is clearly illegal.

5. Shri Jahagirdar, learned Counsel appearing for the petitioner, urged before me that though the appeal has been allowed only on one point that the notice was premature, the order of the Appellate Court can be justified on another ground. In his submission in order that a decree can be passed against tenant u/s 12(3) (a) of the Act, the rent must be payable by the month. In his submission, the landlord has stated in his deposition that the amount of rent, namely Rs. 145.72, also included the amount of taxes payable by the landlord to the local and other authorities, which in his submission, are not payable by the month and therefore, according to him, the entire amount demanded by the landlord was not payable by the month and hence the suit was not tenable u/s 12(3)(a) of the Act. Now, it is to be seen that in so far as this aspect is concerned in paragraph 2 of the plaint, the landlord has clearly stated that the premises were given to the tenant on monthly rent of Rs. 145.72. In reply to the said paragraph 2, in the written statement the tenant has stated thus:-

The Defendants further submit that they are the monthly tenants of the plaintiff in respect of Shop No. 4, on the ground floor in the plaintiff's said building on the monthly rent of Rs. 145.72 per month.

Thus it is clear that the parties were not at all at issue that the agreed monthly rent was Rs. 145.72. May be, the amount of Rs. 145.72 also included part of the taxes which may be payable by the year but it is clear from the allegations in the plaint and the reply in the written statement that the parties had agreed to quantify the amount of taxes and rent at Rs. 145.72 and therefore the parties were not at all at issue as to whether the amount of Rs. 145.72 included any amount which was not payable by the month. Whether the amount of Rs. 145.72 included any amount which was not payable by the month or not, was a question of fact which has to be raised in the written statement as a defence by the tenant because it is only on the defendant raising such a defence that an issue can be raised by the trial Court and it is only after an issue is framed that evidence can be led by the parties. It is clear from the provisions of Rule. 3 of Order XV of the

CPC that the Court has to admit evidence only on those questions on which the parties are at issue. So far as the question that the amount of rent was agreed at Rs. 145.72 and that the entire amount was payable by the month is concerned, there, was no dispute between the parties and therefore the parties were not at issue. Therefore, there could have been no evidence on this question. It is further to be seen that the Supreme Court in its judgment in the case of Raju Kakara Shetty Vs. Ramesh Prataprao Shirole and Another, has observed that the parties can by agreement quantify the amount of rent and the taxes and such quantified amount can be made payable by agreement of parties monthly. If so done, the quantified amount becomes the amount of rent payable by the month. The observations of the Supreme Court in the last paragraph of the Judgment read thus:

But the question still survives whether the parties can by agreement quantify the said amount and make it payable on a month to month basis provided of course the said amount does not exceed the tax liability of the landlord; if it exceeds that liability it would infringe Section 7 of the Act and the excess would not be allowed as permitted increase within the meaning of Section 5(7) of the Act. A right to recover a certain tax amount from the tenant-occupant under the provisions of a statute can be waived by the owner or quantified by agreement at a figure not exceeding the total liability under the statute. If by agreement the amount is so quantified and is made payable by month notwithstanding the owner's liability to pay the same annually to the local authority, the question is whether in such circumstances the "rent" can be said to be payable by the month within the meaning of Section 12(3)(a) of the Act? We see no reason why we should take the view that even where the parties mutually agree and quantify the tax amount payable by the tenant to the landlord on monthly basis, the rent should not be taken to be payable by the month within the meaning of Section 12(3)(a) of the Act. A statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the recovery can be regulated in the manner mutually arranged or agreed upon by the concerned parties so long as it is not in violation of statute. If for convenience and to facilitate payment, the parties by mutual consent, work out arrangement for the enforcement of the owner's statutory right to recover the tax amount and for discharging the tenant-occupant's statutory obligation to reimburse the owners, we see no reason for refusing to uphold such a contract and if there under the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability, the said monthly payment would constitute "rent" payable by the month within the meaning of Section 12(3)(a) of the Act. The view expressed by the Gujarat High Court in Vishwambar Hemandas (supra) does not, with respect, state the law correctly if it holds that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent of Rs. 19.50 p.m., the mere recital in the lease that the rent is inclusive of taxes takes the case outside the purview of Section 12(3)(a) of the Act. We are, therefore, in respectful

agreement with the view taken by the Appellate Court and the High Court in that behalf. We therefore, hold that as the tenant had failed to comply with the requirement of Section 12(3)(a) to seek protection from eviction, the Courts below were justified in ordering his eviction.

Thus there is no substance in the contention urged by Shri Jahagirdar. The Appellate Court has also considered this aspect of the matter and has recorded a finding against the tenant.

6. In the result, therefore, the petition succeeds and is allowed. Rule made absolute in terms of prayer Clause (b) with no order as to costs.

7. At this stage, Shri Jahagirdar, learned Counsel appearing for the respondent requests that the execution of the decree of eviction against the tenant-respondent should be stayed for a period of 8 weeks from today, obviously to enable him to approach the higher Court. Shri Thorat, the learned Counsel for the petitioner, does not oppose the request. In view of this, it is directed that the decree of eviction passed against the tenant shall not be executed for a period of 8 weeks from today. It is, however, directed that during this period, the respondent shall not part with possession of the suit premises in favour of anybody but the petitioner and shall not create any third party interests therein.