

(1996) 10 BOM CK 0083

In the Bombay High Court

Case No : Writ Petition No. 3262 of 1989 and 307 of 1991

Smt. Sugarbai Mohamad Siddiq and Others

APPELLANT

Vs

Ramesh Sundar Hankare deceased by LRs.

RESPONDENT

Date of Decision : 17-10-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3), 13(1)

Citation : (1997) 3 ALLMR 44 : (1997) 2 BomCR 620 : (1997) 2 MhLj 825

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

Bench : Single Bench

Advocate : R.N. Dhorde and C.F. Deshmukh, for the Appellant; D.A. Gurusahani, for the Respondent

Final Decision : Allowed

Judgement

R.G. Deshpande, J.—These two writ petitions are being disposed of by this common judgment, as they arise out of the judgment and decree, passed by the Extra Assistant Judge, Ahmednagar, in Regular Civil Appeal No. 378/81 dated 23rd December, 1983. To understand the facts of the present case, I would refer to the facts as are given in Writ Petition No. 307/91, since the facts being common.

2. Writ Petition No. 307/91, is filed by one Ramesh Sundar, who happened to be the respondent in another petition i.e. Writ Petition No. 3262/89. The present respondents in Writ Petition No. 307/91 are the landlords of the premises in question, who have filed Writ Petition No. 3262/89.

3. Smt. Sugarbai Mohd. Sadiq with her son, Mohd. Ramjan, who are respondents 1 and 2 respectively (in W.P. No. 307/91) are the landlords who filed Civil Suit for recovery of possession of the shop premises, admeasuring 15 x 10 ft. out of the ground floor area of the house i.e. City Survey Nos. 27 and 27-A, having Municipal House No. 2573, situated in Mochi Galli, Ahmednagar. The present petitioners i.e. petitioner No. 1-A to 1-G are the legal representatives of one

Ramesh Sundar, who happened to be the original tenant in the suit premises, described above. The rent, as agreed, was Rs. 55/- per month, tenancy being monthly as per the English Calendar. There is no dispute between the parties on the point that tenant was carrying on his business in footwear. The respondent-landlord having found that the petitioner-tenant was in arrears of rent for more than six months and to be precise for the period from 1-1-1978 to 30-6-1978 and since the landlord needed the premises in question for his bona fide occupation, necessary notice dated 3rd of July, 1978 was issued calling upon the petitioner-tenant to pay the necessary arrears within the time stipulated in the notice as also to vacate the premises. This notice, which is seen at Ex. 29 on the record of the lower Court, was received by tenant on 14-7-1978 and was duly replied by the tenant by his reply dated 29-7-1978 denying the allegations made by the landlord through the said notice. Since the tenant failed to comply with the notice, naturally the landlord constrained to file Regular Civil Suit No. 756/78 on the file of Civil Judge, Junior Division, Ahmednagar. The suit was filed on three grounds, namely, that the tenant was in arrears from 1-1-1978 to 30-6-1978; that the landlord needed the premises for his bona fide personal occupation; and also on the ground of non-user. On notice, the petitioners-tenants (hereinafter referred to as "the tenants" all through) did file their written statement on 10-7-1979 denying the allegations made in the plaint on the point of arrears of rent and bona fide need of the landlord. The learned Civil Judge, Junior Division, Ahmednagar, who dealt with the matter, framed 12 issues in all. However, the relevant issues out of those 12 issues, for the purposes of the decision in the present petitions are issues 1, 2, 5, 6 and 7, since they are the issues which deal with the arrears of rent and bona fide need of the landlord. The learned Civil Judge, Junior Division, Ahmednagar, after recording the evidence and after hearing the parties, by his judgment and order dated 15-7-1981 decreed the suit of the plaintiff on two grounds. i.e. the bona fide need of the landlord and the tenant having been held to be in arrears. The learned Civil Judge, Junior Division, therefore, ordered that the respondent-landlord was entitled to recover vacant possession of the suit premises from the petitioner-tenant after one month from the date of the judgment by that Court. The respondent-plaintiff was held entitled to recover Rs. 495/- from the defendant and also future mesne profits at the rate of Rs. 55/- per month from the date of the suit till realisation of the possession by the landlord. Needless to mention, that the standard rent was fixed at the rate of Rs. 55/- per month. However, none of the parties agitated on this point in this petition.

4. Being dissatisfied with the judgment of the trial Court, the aggrieved petitioner-tenant approached the Appellate Court vide Regular Civil Appeal No. 378/81. Before the Appellate Court, it was the contention of the petitioner-tenant that the learned Judge of the trial Court erred in holding the petitioner-tenant as in arrears of rent. As also, according to the petitioner, the learned Judge of the trial Court erred in holding that the respondent-landlord did prove his case of bona fide occupation. From the judgment of the lower Appellate Court, it is clear

that the judgment of the trial Court was severely assailed by the tenant and the learned Judge of the lower Appellate Court, after due consideration of the matter and having weighed the documents and evidence on the record, thought it proper to give findings on the points; (i) as to whether Ramesh the petitioner-tenant was proved to have been in arrears of rent for more than six months at the time of notice dated 3-7-1978; and (ii) as to whether was the respondent-landlord successful in proving that he reasonably and bona fide required the suit premises for running his business of footwear and naturally the learned Judge was also required to consider the consequential point arising therefrom that is to whom it would cause greater hardship. The appeal was dealt with the IInd Extra Assistant Judge, Ahmednagar, who by his judgment and order dated 23rd December, 1983, reached to the conclusion that the respondent-landlord did fail to prove his bona fide need for running his new shop and that the learned Judge gave his negative finding on that point of bona fide need. However, the learned Judge of the Appellate Court upheld the finding of the Appellate Court on the point of tenant being a defaulter and accordingly did grant decree for possession in favour of the respondent-landlord ordering eviction of the petitioner-tenant from the premises in question. The learned Judge of the first Appellate Court did specifically order that the petitioner-tenant should deliver vacant and peaceful possession of the suit shop to the respondent-landlord on or before 23rd March, 1984, failing which the landlord was at liberty to take appropriate action against the tenant. The finding as regards future mesne profits as was given by the trial Court was also maintained, with a further consequential direction that the rent which was deposited by the petitioner-tenant and his legal representatives be appropriated towards the arrears of rent and mesne profits. It is this judgment and order of the learned Judge of the lower Appellate Court, which is under challenge before this Court by way of the present petition.

5. At this stage only, it would be necessary to mention that since the point of arrears was held against the tenant, the tenant has filed the present writ petition No. 307/91 and since the point as regards bona fide need of the landlord was concerned and which has been held against the respondent-landlords, the landlord has also challenged the same judgment and order by way of Writ Petition No. 3262/89. Needless to mention that both these petitions were initially filed at Bombay in the year 1983 itself, which have been transferred to this Bench. At the request of both the parties these petitions are heard together and are being dealt with by this common judgment.

6. First I would prefer to decide Writ Petition No. 307/91, which is the Aurangabad number of the petition, the original number being 1120/84 i.e. of Bombay. This is a petition by the tenant assailing the findings of the lower Appellate Court on the point of default and arrears.

7. The learned Counsel Shri R.N. Dhorde, appearing on behalf of the petitioner-tenant assailed the order of the Appellate Court on the grounds that the learned Judge of the lower Appellate Court totally failed to look at the matter in its

proper perspective, particularly in view of the fact that the petitioner-tenant had already tendered the rent, strictly in pursuance of the notice and Shri Dhorde, therefore, argued that if the amount of the arrears is tendered within one month's time by the tenant, which might have been refused by the landlord could be treated as a valid tender within the stipulated time of one month and hence, Shri Dhorde, the learned Counsel argued that by no stretch of imagination, the petitioner-tenant could be said to be in arrears and was not entitled to be evicted on that point. Shri Dhorde further argued that the very conduct of the petitioner-tenant in remitting the amount of arrears within the stipulated time in the notice was sufficient to demonstrate that the petitioner-tenant was ready and willing to pay the arrears and also his conduct further showed that he was ready and willing to pay the same regularly in future. Shri Dhorde, therefore, contended that the learned Judge of the Appellate Court was not justified in labelling the petitioner-tenant as a defaulter. Shri Dhorde further argued that since the money order was sent, there was in fact no occasion for the respondent-landlord to initiate the suit itself on that count.

8. Shri D.A. Gurusahani, the learned Counsel representing the respondent-landlord very efficiently tried to defuse the whole argument of Shri Dhorde and Shri Gurusahani pointed out specifically that the learned Judge of the Appellate Court was well justified in reaching to the conclusion on the point of tenant being a defaulter and in arrears of rent for the alleged period. Shri Gurusahani has specifically argued that there was no escape for the petitioner-tenant from the clutches of the provision of section 12(3)(a) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947. From the contentions of the rival parties, the point which needs decision in the present matter is, as to whether, was the petitioner-tenant entitled to be labelled as a defaulter, and could he be said to be liable for eviction in accordance with the provisions of section 12(3)(a) of the Act or, as to whether, was the petitioner-tenant entitled to have the benefit of section 12(3)(b) of the Act, and thereby could the tenant save himself from eviction. Both the learned Counsel vehemently argued on this point, however, Shri Gurusahani, the learned Counsel for the respondent, had a strong footing in the nature of judgment in his favour by the Appellate Court.

9. Shri Dhorde, the learned Counsel for the petitioners argued that the petitioner-tenant did send the money order of the arrears of rent and further till the end of July, 1978 for Rs. 385/-. However, according to him, the same was refused to accept by the landlord. In support of his contention, Shri Dhorde, invited my attention to Exhs. 66 and 67, which according to Shri Dhorde indicates that the money order was refused by the landlord.

10. The question that needs consideration is as to whether did the petitioner really send the money order and as to whether is there convincing proof for the same on the record. It is an admitted position that the landlord issued the notice on 3-7-1978 vide Exh. 30, which was duly received by the petitioner-tenant on 14-7-1978. Since the tenant was in arrears for six months on the date of issue of

notice, there is no difficulty to observe that the notice was absolutely legal. It is clear that immediately on receipt of the notice, it was for the tenant to remit the rent as claimed by the landlord within a period of one month after the service of the said notice on him or he had to apply to the Court for fixation of standard rent. In the instant case, it is seen from the record that the petitioner did not apply for fixation of standard rent u/s 11(3) of the Act, muchless within one month after the receipt of the notice by him. In short, he failed to comply with the second requirement of the section. As regards the first requirement of the provision of section 12(3)(a) of the Act, it says that whether the rent was really remitted by money order or was tendered to the landlord within the stipulated time in the notice. It is argued by Shri Dhorde, the learned Counsel for the petitioner that his client did send money order on 11/12th August, 1978 for Rs. 385/- which was refused by the landlord for no justifiable reason. According to Shri Dhorde, Exh. 67 do indicate that the said money order was sent on 12-8-1978, which the landlord refused. On the basis of this, Shri Dhorde argued that the petitioner could not be said to be a defaulter, nor did he commit any mistake in remitting the rent to the landlord within time. This is the moot point which will have to be thoroughly examined to find out as to whether the learned Judges of the courts below were right in holding the petitioner as a defaulter.

11. Notice Exh. 30 was duly replied by reply notice, Exh. 32 by the tenant, wherein, as observed by the courts below there is no reference as regards sending of money order by the tenant. Even in the written statement of the petitioner, which was filed on 10th of July, 1979, according to the courts below, there is no specific mention as regards the date of sending of the money order. Exhs. 66 and 67, according to the courts below, could not be said to be the conclusive proof to hold that the money order was sent to him or not and further, according to the landlord-respondent, the best possible evidence in the nature of examining the postal authority on the point of money order was not tendered by the petitioner-tenant. In view of this in the matter, the case of the petitioner of sending of the money order is disbelieved by the courts below. Shri Dhorde, the learned Counsel for the petitioners argued that the evidence is not properly weighed and examined by the courts below and thereby they have reached to the conclusion which is totally contrary to the record and Shri Dhorde further argued that this can be said to be perverse.

12. Shri Gurshahani, the Learned Counsel for the respondent-landlord argued that it is not open for the High Court, much less under Article 227 of the Constitution of India to reappreciate the evidence. However, Shri Gurusahani had to accept that if the findings are perverse and not in consonance with the evidence on the record in exceptional cases to avoid injustice to any party, High Court cannot be said to have been tied down in that respect. Both the Counsel, to convince the Court on this point, took me through the record of the case and the evidence recorded therein. As regards the point of non-mention of money orders in the reply notice, which is in Exh. 32, it is natural that the point of money order could not have been included in the reply notice for the very simple

reason that the reply notice is dated 29-7-1978, whereas the money order is alleged to have been sent on 11/12th August, 1978. So, reply notice would not have been of any help to find out whether the money order was sent or not.

13. As regards the written statement, which is at Exh. 11, there is a statement, which says, "the defendant has paid the complete rent. The defendant had sent the money order, which is intentionally refused by the plaintiff." It is further said that the defendant had deposited complete amount of rent in the Court. These statements are made in paragraph 8 of the written statement, which is in Marathi. The question is as to whether, could these statements be said to be sufficient to hold that the tenant did send the money order, which is refused by the landlord. Shri Gurusahani vehemently urged that this is a very vague statement and it does not even indicate the dates on which the money order was sent, nor does it, according to Shri Gurusahani, refer to the amount of money order and no other details about the same. Shri Dhorde, on the other hand, argued that the statement made in the written statement could be said to be sufficient to show that the tenant did send the money order which was refused by the landlord and according to Shri Dhorde, the rest of things as regards the particulars thereof, was a matter of evidence. According to Shri Dhorde, in support of his pleadings, necessary evidence is adduced on the record. Shri Dhorde further argued that if no particulars were given about the money order in the written statement, it was open for the landlord to have sought for the better particulars, which according to Shri Dhorde, the respondent-landlord failed to apply for the same.

14. In the light of the above-said contents in the written statement, if the evidence is read, it would be seen that it was the specific case of the petitioner-tenant in his deposition that he had sent the money order some time on 11/12th August, 1978 and further that the money order, since was refused, he received the amount back, which is evident from documents Exhs. 66, and 67 on the record, which indicate the date as 17-8-1978. Shri Dhorde further specifically pointed out that it is the case of respondent-landlord himself that in the month of August, he had received the money order, which he refused. According to Shri Dhorde, the reason for refusal, as is given by the landlord, is that the amount was not complete. It is also pertinent to note that it is in examination-in-chief itself, the landlord has referred to this refusal of money order and it is more clear from the cross-examination of the landlord Mohd. Ramzan s/o Mohd. Sadiq, wherein he has specifically stated, "defendant had sent me money order, but I refused to accept the same, as it was of lesser amount. It is s ue, in the month of August, defendant has sent the money order of Rs. 385/- and I refused the same. It is true that in the month of November, defendant has sent the money order of Rs. 550/- and I refused the same." Shri Dhorde argued that in spite of there being a clear-cut evidence to the effect that the landlord did receive the money order in August, which he refused to accept and the reason given by him that it was of less amount, do really indicate that the money order was fairly sent in August itself and which was refused. Shri Dhorde further specifically pointed

out that it is not the case of the landlord that the said money order was received by him beyond the period of one month of the receipt of the notice by the tenant. Shri Dhorde further pointed out that this amount of Rs. 385/- was the exact amount at the rate of Rs. 55/- per month, as was being paid by him earlier and the amount indicated the rent till the end of July, 1978. I do find some substance in this argument of the learned Counsel for the petitioner-tenant and merely because the details were not given in the written statement does not mean that the story of sending of the money was an after-thought on the part of the petitioner-tenant.

15. Shri Gurusahani tried to argue that it was the case of the tenant himself when he said that he had the money order receipt indicating that he sent the money order, which is issued by the postal authorities at the time of making the money order. However, according to Shri Gurusahani, the tenant did not produce the same in spite of having said to have been in his possession. Shri Gurusahani, therefore, wanted to suggest that the evidence, which could be said to be a best piece of evidence to prove the sending of money order by the tenant is not produced on the record, and therefore, the courts below were justified in holding the story of sending of money order as false or an after-thought. Shri Dhorde, the learned Counsel for the petitioners, on the other hand, pointed out that the petitioner-tenant did apply to the postal authority for a certificate to show that the money order was actually sent, but the postal department informed the tenant that the record was already destroyed. The letter issued by the postal department is on the record. According to Shri Gurusahani, the said letter is not proved and hence need not be relied upon. It is no doubt true that Shri Gurusahani is justified in this argument, however, taking into consideration, the statement by the landlord himself that he did receive in August, 1978 the money order of Rs. 385/-, but he refused because it was not of the complete or full amount, is sufficient to indicate that the tenant did actually send the money order, which is equal to the rent of seven months. When landlord is deposing on the point of refusal of that money by himself, then there could not be any hesitation to accept the story of sending of the money order on 11/12th August, 1978 by the tenant. Shri Gurusahani tried to show that the date of postal receipts Exhs. 66 and 67 do not indicate as to whether to whom they are sent and it cannot be said that the same were sent to the landlord only. This is a bit strange argument and very hard to accept. Once having come up with the story that the money order was received in August, which was refused, I do not feel that there was any further necessity for the petitioners-tenants to have an additional proof unless, of course, it would have been the case of the landlord that the money order sent was not within the period of one month from the date of the notice received by the petitioner-tenant. Looking at the matter from all angles, *prima facie*, there is sufficient evidence on the record to accept the case of the petitioner-tenant of having sent the money order some time on 11/12th August, 1978, though no reference in details is made to the same in the written statement. In fact, it was the respondent-landlord himself, who by his statement,

in examination-in-chief as well as in cross-examination, supported the case of the petitioner-tenant as regards sending of the money order within time. The courts below further tried to find out corroborative evidence from the business record of the petitioner-tenant, which, according to the courts below did not indicate anything in support of the money order. However, in fact, that was also not necessary in view of the statement of the landlord himself and particularly when it is not the case of the landlord that he did not receive the money order much less in August, 1978. The courts below, therefore, according to me, committed an error in discarding the case of the petitioner-tenant of sending of the money order and refusal of the same by the landlord.

16. This Court is aware of the fact that both the courts below have concurrently reached to the conclusion that the petitioner-tenant was in arrears of rent and a defaulter and hence was liable to be evicted from the premises in question. Shri Gurusahani tried to suggest that it is a concurrent finding of fact which in no case can be upset by this Court in the present proceedings under Article 227 of the Constitution of India. After having due consideration to the argument, as argued by Shri Dhorde for the petitioner in appropriate cases and particularly when there is a manifest error on the face of record or that finding is given ignoring the evidence on the record or that the finding is based on no evidence at all, then it is open for the High Court under Article 227 of the Constitution of India to correct the error and if necessary by setting aside the orders of the courts below. I do not feel that there would be any two opinions about the same. I have already observed that from the judgments of the courts below it is clear that there is a manifest error on the record particularly when a finding is recorded concurrently by both the courts below and the same is not based after taking into consideration the entire relevant evidence which is adduced on the record because of which the courts below have reached to the erroneous conclusion. In this respect I can derive the advantage of the ruling reported in *Damadilal and Others Vs. Parashram and Others*, in the matter of *Damadilal and others v. Parashram and others*, wherein their Lordships of the Supreme Court have observed that even in Second Appeal if it is noticed that the lower appellate Court overlooking the very material part of the evidence having bearing on the question, reaches to the finding, such a finding of fact arrived at ignoring the important and relevant evidence is bad in law and High Court could be said to be justified in setting aside such a finding. It is no doubt true that Second Appeal or Revision is not provided to the High Court from the decision of the appellate Court so as to give finality to the decision of the Appellate Authority. The High Court under Article 227 of the Constitution of India in fact could not assume any unlimited prerogative to correct all the species of hardship or wrong decisions. However, in view of the decision reported in the matter of *Laxmikant Revchand Bhojwani and another v. Pratapsingh Mohansingh Pardeshi*, reported in 1996(1) M. L.J.507, if the High Court comes to the conclusion that a possibility of grave injustice is likely to be caused to the litigant because of the non-consideration of material evidence, then in such cases the High Court may interfere. According to

me, it is one of those cases which necessarily requires interference in the matter by this Court.

17. Shri Dhorde, learned Counsel for the tenant rightly argued that it having once shown that the landlord has accepted that he refused to receive the money order which was sent in pursuance of the notice u/s 12(2) of the Act, for the reasons which are already discussed above, then it was not open for him to even initiate the suit. For this purpose, Shri Dhorde relied on the Full Bench decision of this Court in the matter of Narhar Damodar Wani v. Narmadabai T. Nave, reported in 1984 M.L.J. 313, wherein it is specifically held that, "the refusal of the landlord to receive the entire amount of rent as was demanded by the notice u/s 12(2) must be treated for purposes of sub-sections (1) and (2) of section 12 as being equivalent to payment and on this finding no suit for recovery of possession for non-payment of those arrears could have been filed by the landlord and no decree for possession could have been asked for by him in his favour." It is also observed in the said judgment that, "refusal to accept the money order which is of the amount as claimed in the notice u/s 12(2) of the Act, such a refusal is equivalent to payment and the landlord has no right to file a suit for possession and the question of invoking provisions of section 12(3)(b) of the Act does not arise." Shri Dhorde also relied on the decision in the matter of Laxmikant Revchand Bhojwani and another v. Pratapsingh Mohansingh Pardeshi, reported in 1996(1) Mh.L.J. 507 (cited supra) i.e. the Judgment given by the Supreme Court of India, wherein it is specifically observed that, "the sine qua non for eviction u/s 12(3)(a) is the "neglect to make payment" and not the actual making of the "payment". When a money order or a demand draft is sent to the landlord during the specified period, it cannot be said that the tenant has "neglected to make payment". The expression "neglect" means "to fail to give due care, attention, or time to. To fail through thoughtlessness or carelessness. To ignore or disregard." Shri Dhorde was, therefore, justified in arguing that the tenant in the present petition was not liable to any action under any of the provisions of section 12(3) or the Act, as it stood then.

17A. In view of the discussion above, I come to the conclusion that the petitioner-tenant has duly complied with the first condition regarding the payment of arrears of rent within the stipulated one month after the receipt of the notice of demand of rent u/s 12(2) and u/s 12(3)(a) of the Rent Act. I, therefore, come to the conclusion that the tenant, on receipt of the notice Exh. 30, had sent the money order within the time of one month of the receipt thereof by him. The conduct of the petitioner-tenant regarding payment well within time, also indicates that he was absolutely ready and willing to pay the rent. The courts below, therefore, were not justified in branding the petitioner-tenant as a wilful defaulter within the meaning of the Rent Act. I have, therefore, further to observe that since from the conduct of the tenant, it is clear that he was ready and willing to pay the standard rent, he is definitely in any case saved from the clutches of having a decree of eviction u/s 12(3)(b) of the Act. Not only that, it is the clear cut observation by the learned Judge of the lower appellate Court that

the facts on the record did indicate, in the nature of Exh. 77/1 that the tenant had paid the entire rent within the period before 21st July, 1979 i.e. the first date of hearing. This is sufficient, according to me, to hold that the tenant was always ready and willing to pay the rent and he could not be said to be a wilful defaulter, nor does it any way indicate that he was a habitual defaulter.

18. One important aspect in the matter, which also needs consideration, is the mode of making the payment of the rent and the acceptance thereof by the landlord for a considerable long period, to which I would like to make a passing reference in the judgment. The record indicates that the practice of accepting the rent by the landlord and the practice of payment of rent by the tenant was that the tenants have been paying rent right from the year 1968 for couple of months together at one time and the landlord has also accepted the same without any grudge or even slightest murmur in that respect, but for the present one, about which the landlord had given the notice. The following chart would clearly indicate that the landlord has been accepting the rent for months together, which could be said to be the practice of payment and its acceptance.

In paragraph 23 of the judgment of the Appellate Court, the Appellate Court has also referred to the various receipts which are at Exhs. 77/2 to 77/9, which also indicate the payment made by the petitioner-tenant in the Court is also for couple of months together.

19. Shri Dhorde, the learned Counsel for the respondent in this respect relied on the judgment reported in S.P. Deshmukh Vs. Shah Nihal Chand Waghajibai Gujarati, and he has relied on the specific observations of the Supreme Court, which is , "normally a tenant is under the obligation to pay the rent from month to month, but this obligation is subject to a contract to the contrary. Such a contract need not be reflected in a formal document and can be spelt out from the conduct of the parties spread over a fairly long period of time." In the present case also, the record indicates that the tenant has been paying the rent at an interval of couple of months which the landlord did accept and always without even so much as murmur. The record also indicates that the landlord never complained on any irregularity on the part of the tenant in paying the rent. The abovesaid chart along with the subsequent payments do indicate that though, the tenant was supposed to make the payment monthly, he has been paying the rent after regular interval of couple of months and which was accepted by the landlord without any murmur or grudge. It is, therefore, clear that the petitioner-tenant could not be termed as a defaulter and the delay, if any, in making such payment did deserve condonation. The facts of the case indicate that there was no inherent disability in the tenant in making the payment.

20. The judgment reported in Mohan Laxman Hede Vs. Noormohamed Adam Shaikh, , was relied upon by both the Counsel. Shri Gurusahani, the learned Counsel for the respondent-landlord, argued that the provision of Clause(b) of section 12(3) being mandatory and had to be strictly complied with by the tenant

and any default in the same was to invite eviction of the tenant. Shri Dhorde, the learned Counsel, also relied on the same judgment and specifically pointed out that it is the view taken by the Supreme Court that the word "regularity" in Clause(b) of section 12(3) of the Act has a significance of its own. It enjoins a payment or a tender characterised by reasonable punctuality, that is to say, one made at regular times or intervals. According to Shri Dhorde, he could take the advantage of the observations in that judgment, wherein the Supreme Court specifically observed that the regularity contemplated may not be a punctuality of clock-like precision and exactitude, but it must reasonably conform with substantial proximity to the sequence of times or intervals at which the rent falls due.

21. It is seen in the present case that the chart referred to above, as also the payments made in the Court by the tenant indicate that the petitioner has been depositing the rent in the Court for two or three months at a time and the same was the practice even prior to initiation of the litigation i.e. right from the year 1968, which is clearly evidenced from the record. In such circumstances, though the payment is not made with exactitude or mathematical punctuality, but as was the practice of payment, the tenant could be said to be entitled to take advantage of the provision of section 12(3)(b) of the Bombay Rent Act. The necessary conclusion from the observations above that can be drawn is that the judgment and decree passed by the courts below on this ground has to be set aside and the tenant cannot be evicted on this count.

22. As regards Writ Petition No. 3262/89, in which the present respondents Smt. Sugarbai and others are the petitioners have challenged the rejection of their case of seeking eviction of the tenant on the ground of bona fide personal need. In this petition, it is the case of the landlord that the landlord was doing the business of selling of footwear as a hawker and he wanted the shop premises for starting his own business. He wanted the present premises which were let out to the present respondent Ramesh Sunder Hankare (in W.P. No. 3262/89). This plea of the landlord has been negatived by the learned Judge of the lower Appellate Court by setting aside the order of the trial Court on that ground. The record indicates that there are three shops owned by the landlord, all of which were in possession of the tenants. However, it appears that the landlord has chosen the present tenant only for proceeding against him in the Court of law for securing possession on this ground. It is clear from the evidence and the record that as against other tenants, he has not sought possession of the premises on this ground. In ordinary course, he could have initiated action on this ground against any other tenant also. Shri Dhorde, the learned Counsel for the tenant has tried to suggest that the pleadings on the record do indicate that the landlord was demanding higher rent from the present tenant, that too, at the rate of Rs. 75/- per month and since the tenant refused to accede to such a request, he has been chosen for eviction. In fact, though this plea appears to be hard to believe, at the same time, there is no cogent evidence on the record to show that as to why the landlord has not asked for possession of any other shop, if he really wanted

some shop for starting his own business. To find out as to whether the landlord really needed the premises in question, the learned Judge of the lower Appellate Court has observed that there is nothing on the record to show that the landlord had at any time done the business in footwear. The learned Judge has also disbelieved the case of the landlord on the point of harassment by the police to the landlord while he was doing the business of selling of footwear as a hawker as alleged by him. The learned Judge has further observed that but for a bare statement, there is nothing on the record to show that he really wanted the shop to start the business in footwear .

23. Shri Dhorde, the learned Counsel for the tenant argued that the landlord by hook or crook and on one or the other pretext was determined to evict the present tenant and further taking the undue advantage of their condition. In this respect, Shri Dhorde tried to point out that during the pendency of the appeal, the original tenant Ramesh expired and his wife and daughters were brought on the record. During the pendency of the appeal, even the mother i.e. Smt. Nila Hankare widow of original tenant Ramesh also expired and is survived by six daughters only. Shri Dhorde pointed out that at present Kum. Harsha daughter of deceased Ramesh and Nila is looking after the business. As the eldest daughter Varsha is mentally retarded and it is Harsha only who has to look after other four younger sisters, who were then of the ages of 11, 9, 7 and the youngest one, who must have been of the age of 5 or 6 years then.

24. During the pendency of the present petition, Civil Application No. 2772/93 was filed in the High Court in Writ Petition No. 3262/89 for taking into consideration the subsequent events pertaining to bona fide need of the landlord for occupation of the suit premises. This application is filed under Order VI, Rule 17 r/w section 151 of the Civil Procedure Code, as is shown in the title clause of the application for bringing the subsequent events on the record. In fact, it was pointed out to the Counsel for the tenant that this application as regards amendment could not be allowed. However, since the matter relates to the subsequent events, they can be taken into consideration as they have direct bearing on the result of the present petition so far as the points of bona fide need and hardship are concerned. Shri Gurusahani, the learned Counsel for the landlord, during the course of argument itself, filed reply to the abovesaid application opposing the same. It is pertinent to note that by the abovesaid application of the tenant, the tenant has brought one additional aspect on the record that during the pendency of the proceedings in the year 1991 itself, another tenant of the present landlord in the same premises i.e. Prema Lachani widow of Tikamchand the original tenant did vacate the shop premises and vacant possession was handed over to the landlord from 1991 itself, which the landlord has kept locked. The abovesaid events of availability of the shop to the landlord to start his business thus definitely stand satisfied, particularly when he pretended that he was very much eager to enter in the business of footwear by starting his new shop. Surprisingly the landlord instead starting his business has kept closed the said shop. This fact is supported by various affidavits which have

been filed by the persons doing the business in the close vicinity of the suit premises. These affidavits are of Smt. Premabai Tikamdas Lachani, Chandrakant Sonu Gaikwad, Parmeshwar Kasturchand Khandelwal and Uttam Premraj Goyal, all of whom have deposed on affidavits before this Court that the landlord in spite of having in his possession a vacant shop vacated by Smt. Prema Lachani has kept the same closed. From the documents above, it is clear that during the pendency of the proceedings, the landlord got shop vacant on his own to start his business, but he appeared to have been adamant in starting his business only in the suit premises by evicting them. I have no hesitation to reach to the conclusion that the landlord has not proved his bona fide necessity or need beyond doubt and that the learned Judge of the lower Appellate Court was justified in reaching to the conclusion that the landlord has failed to prove his bona fide need and the learned Judge, therefore, was further justified in reversing the order of the trial Court and dismissing the case of the landlord on the ground of bona fide need.

25. In ordinary course, I would have thought of remanding the matter for permitting the parties to lead the evidence on the ground of bona fide need in view of the changed circumstances. However, the affidavit which is filed on the record by way of Civil Application No. 2772/93 and the same is also replied by way of counter affidavit, I do not feel it necessary to remand the matter for any additional evidence on these grounds, particularly when there is no denial of factual position in the counter affidavit by the landlord. Even in spite of having a chance to rebut the averments made in the affidavit, there is no material rebuttal on the major points as regards the availability of the shop to the landlord and also not starting of the business in the same. The only reply given by the landlord is that the shop premises which is vacated and surrendered by the another tenant Prema Lachani is of smaller in size than that of the shop which is with the present tenant i.e. respondent in Writ Petition No. 3262/89. Taking into consideration these aspects, I have no hesitation in reaching to the conclusion that the learned Judge of the lower Appellate Court was justified in rejecting the request of the landlord for eviction on the ground of bona fide need of the landlord.

26. While looking at the matter from all angles, the question then arises to find out as to whether to whom the greater hardship would cause. In the present matter, it is seen that the landlord could have started his business in another shop available to him, which he has not done. He has also himself accepted that he has a source of income by way of rent from the premises in question as also he has agricultural property. This point will have to be considered into the background of hardship which is likely to be caused to the present tenant. It is an admitted fact that during the pendency of the proceedings, the original tenant Ramesh expired and immediately thereafter his wife Nila also expired and now the present girls are only surviving members who are totally dependant on the present business of footwear shop. It is also worth to note that the petitioner No. 2 Harsha is looking after this business and maintaining the family consisting of

these sisters, It is also on the record that the eldest sister of this Harsha, whose name is Varsha is mentally retarded, who was of 17 years at the time of filing of the petition. From the record, it is seen that the responsibility of the family is on the second daughter Harsha for maintenance of these sisters. There is no counter affidavit on behalf of the landlord in this respect that the only source of their income is not the shop, but there is other income to this family. If a decree as regards eviction is to be passed, even then in that case, the hardship to the present petitioners-tenants is greater than that to the landlord. Taking into consideration this aspect also, I do not feel that the landlord is entitled to evict the tenant on any of the grounds in the petition. The judgment and order of the learned Judge of the lower Appellate Court, therefore, deserves to be maintained on this ground.

27. In the result, Writ Petition No. 307/91 filed by the tenant is allowed and Writ Petition No. 3262/89 that of the landlord is rejected. However, in the circumstances of the case, there would be no orders as to cost.