

(2010) 07 MP CK 0004
In the Madhya Pradesh High Court
Case No : S.A. No. 623 of 2005

Sushma Jaiswal

APPELLANT

Vs

Late Gulabchandra (dead) thr. L.Rs. Smt. Kamal and Others

RESPONDENT

Date of Decision : 16-07-2010

Acts Referred:

Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 100, 12(1), 12(3), 12(6), 13(1)

Citation : (2011) 2 MPLJ 39

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Judgement

N.K. Mody, J.

Being aggrieved by the judgment dated 11-2-2005 passed by District Judge, Ujjain in Civil Appeal No. 23-A/03 whereby the judgment dated 10-7-2003 passed by IV Civil Judge, Class-I, Ujjain in Civil Suit No. 75-A/02 whereby the suit filed by the Appellant u/s 12(1)(a) and (f) of the M.P. Accommodation Control Act (which shall be referred hereinafter as an "Act") was dismissed, was maintained, the present appeal has been filed.

The appeal was admitted by this Court for final hearing vide order dated 16-2-2006 on the following substantial questions of law:

Whether the Courts below have acted illegally and contrary to law in holding that grounds u/s 12(1)(a) of M. P. Accommodation Control Act, 1961 is not made out against the Respondents and further acted illegally in not passing the eviction decree on the ground of Section 12(1)(a) of M. P. Accommodation Control Act, 1961 against the Respondents?

Whether the learned Courts below have acted illegally and contrary to law in not passing the eviction decree on the ground of Section 12(1)(f) of M. P. Accommodation Control Act, 1961, in favour of Appellant/Plaintiff against the Respondent/Defendants?

Short facts of the case are that the Appellant filed a suit for eviction against the Respondents on 5-12-1994 alleging that the Appellant is owner of a house bearing Municipal House No. 27/02 situated at Ujjain. It was alleged that in the shop situated at ground floor Respondents are tenant of the Appellant @ Rs. 200/- per month and the tenancy of the Respondents is month to month. It was alleged that Respondents have paid the rent to the Appellant up to 28-2-1994 and the Respondents are in arrears of rent w.e.f. 1-3-1994, which has not been paid by the Respondents in spite of notice of demand dated 21-6-1994. Further case of Appellant was that the Appellant is an educated woman and does not want to sit idle. It was alleged that Appellant intends to start the business of readymade garments from the suit accommodation, which is adjoining to the residential portion of the Appellant. It was alleged that Appellant requires the suit accommodation bona fidely for which Appellant is having no other alternative suitable accommodation. It was prayed that decree of eviction be passed against the Respondents u/s 12(1)(a) and (f) of the Act.

The suit was contested by the Respondents by filing written statement wherein it was not disputed that Respondents are in occupation of the suit shop as tenant @ Rs. 200/- per month. So far as arrears of rent is concerned, it was alleged that after 1-3-1994 also the rent was paid, but receipts have not been issued. It was alleged that after the notice the rent was sent to the Appellant by money order, which was refused by the Appellant. It was also alleged that on 10-11-1994 compromise took place between the parties and the rent was paid for the period w.e.f. 1-3-1994 to 31-12-1994 in presence of witnesses. It was alleged that after filing of the suit, rent has been deposited by the Respondents. So far as genuine requirement is concerned, it was denied that Appellant requires the suit accommodation bona fidely for carrying on the business. It was alleged that husband of the Appellant is carrying on the business in a shop situated at Daulatganj, Ujjain in the name and style M/s Satish Medical Stores. It was alleged that no ground for eviction is made out. It was alleged that Appellant intends to enhance the rent from Rs. 200/- per month to Rs. 400/- per month for which Respondents did not agree, hence the suit was filed. It was prayed that the suit be dismissed.

After framing of issues and recording of evidence, learned trial Court dismissed the suit filed by the Appellant, against which an appeal was filed, which was also dismissed, hence the present appeal.

Learned Counsel for the Appellant argued at length and submits that the impugned judgment passed by the learned Courts below are illegal, incorrect and deserves to be set aside. It is submitted that the learned trial Court dismissed the suit u/s 12(1)(a) of the Act on the ground that the rent was tendered to the Appellant by money order, which was refused by the Appellant. It is submitted that the findings of the learned trial Court are perverse. It is submitted that Appellant has specifically stated in her statement that she never refused money order. It is submitted that in the circumstances it was the duty of the

Respondents to prove that Appellant refused to accept money order tendered by the Respondents by examining concerned Postman. It is submitted that since the Postman was not examined, therefore, learned Courts below committed error in holding that the Appellant has refused to accept the money order. It is submitted that in the statement of Respondent who was examined as DW/1 it is nowhere stated by him that the rent was tendered in his presence. It is submitted that DW/1 has also shown his ignorance about the remark of refusal. It is submitted that in the facts and circumstances of the case, since the Respondents were in arrears of rent and the alleged money-order was never refused by the Appellant, ground u/s 12(1)(a) of the Act was made out against the Respondents. It is further submitted that the Respondents were required to deposit the arrears of rent within a period of one month as per Section 13(1) of the Act and was also required to comply with the later part of Section 13(1) of the Act by depositing the rent month to month. It is submitted that Respondents did not comply any part of Section 13(1) of the Act as neither arrears of rent was deposited within a period of one month, nor the rent was deposited month to month. It is submitted that on 1-9-1997 an application was filed by the Appellant u/s 13(6) of the Act wherein it was prayed that defence of the Respondents be struck off. It is submitted that reply of the application was submitted by the Respondents on 14-10-1997 wherein details of depositing the rent are mentioned, which is as under:

9-3-1995

-Rs. 600/-

3-4-1995

- Rs. 400/-

19-4-1994

- Rs. 600/-

23-9-1995

- Rs. 600/-

Learned Counsel further submits that on 14-10-1997 when the reply of the application was filed, the rent was due up to September, 1997 which comes to Rs. 8,400/- while the rent deposited by the Respondents was only Rs. 6,600/-, that too not deposited in accordance with Section 13(1) of the Act. It is submitted that thereafter on 7-11-1997 an application for condonation of delay was filed, wherein reason for not depositing the rent within time was shown as sickness. It is submitted that the application was opposed by the Appellant by filing reply and also supported with an affidavit alleging that the Respondent was never sick, but in spite of that learned Court below allowed the application and condoned all the delays. It is submitted that it is true that the trial Court is having jurisdiction to entertain the application to condone the delay, but the

delay can be condoned for one or two delay and not for repeated mistake. It is submitted that in the facts and circumstances of the case, learned trial Court committed error in not granting the decree against the Appellant u/s 12(1)(a) of the Act.

So far as decree u/s 12(1)(f) of the Act is concerned, learned Counsel submits that to prove the case Appellant has examined herself and also adduced cogent evidence in support of her statement. It is submitted that the suit for genuine requirement has been rejected by the learned Courts below on the ground that the Appellant is carrying on the business of garments from upper floor of the shop. It is submitted that it is no more in dispute that the upper portion of the accommodation is residential where the Appellant is residing with her family. It is submitted that even if it is assumed that the Appellant is carrying on the business of garments from first floor, then too, ground floor is more suitable for carrying on the business. It is submitted that this fact is also not in dispute that the Respondent himself has stated in his statement that the ground floor is better place for commercial activities. Learned Counsel placed reliance on a decision of Hon''ble Apex Court in the matter of Dhannalal Vs. Kalawatibai and Others, in a suit for eviction u/s 12(1)(f) of the Act for carrying on the business of garment was filed and alternative accommodation was suggested on the first floor, Hon''ble Apex Court observed that the subjective choice of the landlord shall be respected. For the business, which the landlord propose to start or continue respectively, an accommodation situated on the first floor cannot be said to be an alternative suitable accommodation in comparison with the shops situated on the ground floor. A shop on the first floor cannot attract the same number of customers and earn the same business as a shop situated on the ground floor would do. Further reliance is placed on a decision of Hon''ble Apex Court in the matter of Uday Shankar Upadhyay v. Naveen Maheshwari 2010(2) MPLJ 242 wherein Hon''ble Apex Court observed that the view that the sons of the Plaintiff landlord should do business on the first floor in the hall used for residential purpose was wholly arbitrary and cannot be sustained. It was further observed that it is well known that shops and businesses are usually (though not invariably) conducted on the ground floor, because the customers can reach there easily. The Court cannot dictate to the landlord which floor he should use for his business, that is for the landlord himself to decide. On the strength of aforesaid position of law and the facts and circumstances of the case, it is submitted that the appeal filed by the Appellant be allowed and the impugned judgment passed by the learned Courts below be set aside.

Learned Counsel for Respondents submit that since arrears of rent was duly rendered by the Respondents to the Appellant before filing of the suit by sending money order which was refused by the Appellant, therefore, no ground u/s 12(1)(a) of the Act is made out. It is submitted that in the facts and circumstances of the case, no illegality has been committed by the learned Courts below in dismissing the suit u/s 12(1)(a) of the Act. Apart from this learned Counsel submits that the entire rent was duly deposited by the Respondents. It is

submitted that since the rent could not be deposited by the Respondents in time, therefore, application for condonation of delay was filed on the ground of sickness, which was allowed by the learned trial Court. It is submitted that since the discretion has been exercised by the learned trial Court in favour of Respondents, therefore, validity of that order cannot be looked into by this Court while exercising powers u/s 100 of the Act. So far as genuine requirement is concerned, learned Counsel submits that right from beginning case of the Appellant was that the Appellant intends to start business of garments from the suit accommodation, while in evidence it was found that the Appellant is carrying on the business of garments from first floor. It is submitted that Brijmohan PW/2 was examined by the Appellant, who has admitted the fact that the Appellant is carrying on the business from first floor of the suit accommodation. It is submitted that Brijmohan is none else but the father-in-law of the Appellant. It is submitted that since the Appellant did not come with clean hands and Appellant is carrying on the business from the first floor, therefore, learned Courts below committed no error in passing the impugned judgment, whereby suit filed by the Appellant has been dismissed it is submitted that the appeal filed by the Appellant be dismissed.

From perusal of the record it is evident that to prove the case Appellant has filed the documents Ex.P/1 to Ex.P/6. Ex.P/1 is counter-foil of rent receipt, which goes to show that the rent was paid up to 28-2-1994, Ex.P/2 is the notice which was sent by registered post vide Ex.P/3 and Ex.P/4 is the acknowledgment. Ex.P/5 is the will which has been executed by Late Smt. Sushila Jaiswal, Mother-in-law of the Appellant. Apart from this Appellant has examined herself as PW/1, Brijmohan Jaiswal PW/2 and Subodh Shankar Rawat PW/3. Respondents have produced documents Ex.D/1 and Ex.D/2. Ex.D/1 is the receipt of sending the money order for Rs. 1,000/- and Ex.D/2 is the counter-foil of the same. Apart from this Respondent has examined himself as DW/1.

Ex.D/2 (Money Order receipt) bears remark of "refusal". DW/1 Pranay Kumar has stated that money order was refused by the Appellant. In his cross-examination he has stated that there is no remark on Ex.D/2, which goes to show that the money order was sent to the Appellant. He has also admitted that Ex.D/2 does not bear any postal seal. He has further stated that the money order was sent by the father of the Respondents. The fact that the money order was sent by the father of Respondents was refused by the Appellant, was denied by the Appellant.

In the facts and circumstances of the case, it was incumbent upon the Respondents to prove the endorsement of Ex.D/2 by calling the concerned Postman and also the record of Post Office. No effort has been made by the Respondents in that regard. Apart from this it was alleged by the Appellant that Respondents are in arrears of rent w.e.f. 1-3-1995. Notice was sent on 21-6-1994 while alleged money order of which coupon is Ex.D/2 was sent on 22-7-1994 as is evident from the receipt of Post Office Ex.D/1. Thus on 27-7-1994 the rent was due from 1-3-1994 to 30-6-1994 i.e. rent of four months

which copies to Rs. 800/-, while the alleged money order is for Rs. 1,000/-. Even if for the sake of argument it is assumed that the arrears of rent was sent by the Respondents to the Appellant, then too, Appellant is obliged to accept the rent which was due. Appellant cannot be compel to accept the rent which was not due on the date when the money order was sent. Since due rent was only Rs. 800/-, therefore, even if it is assumed that the money order was sent by the Respondents which was duly tendered to the Appellant, then too, Appellant was justified in refusing the same as it was for excess amount, which was not due. In the facts and circumstances of the case learned Courts below committed error in holding that no ground of eviction was available to the Appellant u/s 12(1)(a) of the Act.

So far as compliance of Section 13(1) of the Act is concerned, admittedly the arrears was not deposited within a period of one month and also the rent due from month to month was also not deposit regularly. On 1-9-1997 the application was filed by the Appellant u/s 13(6) of the Act. Consequently an application for condonation of delay was filed by the Respondents on 7-11-1997, wherein it was alleged that Respondent is suffering with diabetes and if inadvertently there is any default in the payment of rent, then the same be condoned. This application was opposed by the Appellant. Vide order dated 5-3-1998 the application filed by the Appellant u/s 13(6) of the Act was dismissed.

Since the ground was made out u/s 12(1)(a) of the Act and the arrears of rent was claimed w.e.f. 1-3-1994, therefore after filing of suit on 5-12-1994 and also after making appearance by the Respondents on 4-2-1995 Respondents were obliged to deposit the entire arrears of rent from 1-3-1994 within a period of one month and were further liable to deposit the rent month to month. The rent deposited by the Respondents from time to time are as under:

Sr. No.

Receipt No.

Date

Rent (in Rs.)

1

2894

9-3-1995

600/-

2

3

3-4-1995

400/-
3
466
16-6-1995
600/-
4
1446
23-9-1995
600/-
5
2126
15-12-1995
600/-
6
2967
21-3-1996
600/-
7
560
24-6-1996
600/-
8
1435
3-10-1996
800/-
9
2431
12-2-1997
600/-
10

571
1-7-1997
600/-
11
1346
14-10-1997
600/-
12
1734
15-12-1997
600/-
13
2464
16-3-1998
600/-
14
1020
24-8-1998
800/-
15
1195
15-9-1998
600/-
16
1623
16-11-1998
600/-
17
156
16-4-1999

600/-
18
1267
14-8-1999
800/-
19
1788
15-12-1999
800/-
20
351
11-5-2000
1000/-
21
2214
15-2-2001
2000/-
22
523
26-6-2001
1000/-
23
1337
13-10-2001
1000/-
24
2031
25-1-2002
600/-
25

267
9-5-2002
600/-
26
660
24-7-2002
400/-
27
818
4-9-2002
400/-
28
1454
14-1-2003
600/-
29
32
5-4-2003
600/-
30
367
23-6-2003
400/-
Total
20,600/-

From perusal of the chart it is evident that within one month no amount was deposited by the Respondents and on 9-3-1995 it is only Rs. 600/- which was deposited by the Respondents, while the rent which was due was from 1-3-1994. Similarly up to 7-8-1998 when the application filed by the Respondent for condonation of delay was allowed, the rent was payable from 1-3-1994 which comes to Rs. 10,600/-, while the rent deposited comes to Rs. 7,800/-. Thus, on that day also Respondents were in default. The default committed by the

Respondents is not one time default, but the default was committed all the time. From perusal of the order dated 7-8-1998 it appears that by this order the application filed by the Appellant u/s 13(6) of the Act for striking out of the defence was dismissed and simultaneously the application filed by the Respondents was allowed. In the order itself learned Court below has observed that the Respondents has not deposited the rent as per the law, however, the delay was condoned.

From perusal of the application filed by Respondents for condonation of delay it is evident that in the application itself it is mentioned that the Respondents are not in arrears of rent and if there is any default, then it is based on bona fides and deserves to be condoned as the Respondent is suffering with diabetes. It is true that power to condone the delay was vested with the learned trial Court, but the same ought to have been exercised judiciously. If minutely the application is examined, then from perusal of the application it is evident that Respondents have not accepted that there is default. On the contrary it is mentioned in the application that there is no default. It is further stated that if there is default, then it should be condoned as the Respondent is suffering with diabetes. Diabetes is not such a disease which can prevent the Respondent to deposit the rent. It is true that substantial amount of rent was deposited by the Respondent though not in accordance with Section 13(1) of the Act, therefore, learned trial Court was justified in dismissing the application filed by the Appellant u/s 13(6) of the Act wherein prayer was to struck out the defence of the Respondent. But at the same time upon such a vague application learned trial Court committed error in condoning all the delays committed by the Respondents.

Even if for the sake of arguments it is assumed that no illegality has been committed by the learned trial Court in allowing the application filed by Respondent for condonation of delay up to the date of order which is 7-8-1998, then too, it appears that subsequently also Respondent could not deposit the rent in time. Rent was due w.e.f. 1-3-1994 and the total amount of rent deposited as is evident from the chart submitted by the Respondents themselves comes to Rs. 20,600/- up to 10-7-2003 when the suit was decided. While up to that date the rent which was due was Rs. 22,400/- for which neither there is any explanation nor any subsequent application for condonation of delay. In view of this this Court is of the view that the learned Courts below committed error in not passing decree against the Respondents u/s 12(1)(a) of the Act by giving benefit of Sections 12(3) and 13(5) of the Act. In fact benefit of Sections 12(3) and 13(5) of the Act can be given to a tenant that too once only when the tenant deposits the entire arrears of rent and also continues to deposit the rent month to month as per Section 13(1) of the Act. Since the Respondents were in default in spite of the fact that delay was condoned, therefore, no benefit of Sections 12(3) and 13(5) of the Act could have been given to the Respondents. In the matter of Sayeda Akhtar Vs. Abdul Ahad, wherein tenant committed two defaults in depositing the rent for the month of November, 1985 and June, 1988, Hon''ble Apex Court observed that the application could not have been entertained for

commission of default in depositing the rent.

In view of this, this Court is of the view that the learned Courts below acted illegally and contrary to law in holding that the ground u/s 12(1)(a) of the Act is not made out and also committed error in not passing decree of eviction against the Respondents u/s 12(1)(a) of the Act.

So far as bona fide requirement is concerned, Appellant is a young lady aged 36 years filed the suit for carrying on the business of readymade garments. She was examined on 28-2-1996 and she has stated in her examination-in-chief that she is possessing degree of Bachelor of Arts and she wants to carry on the business of garments from the shop which is in occupation of Respondents and she has no alternative accommodation of her own. Appellant was thoroughly cross-examined on 28-2-1996 itself and thereafter on 4-8-1997 and again on 13-5-2003. In her cross-examination it has also come that Appellant is also having experience of business of readymade garments as she has completed her course from Kanpur in the year 1975-76. The decree u/s 12(1)(f) of the Act has been refused on two grounds, firstly Appellant has not come with clean hands as the Appellant does not want to start the business, but is doing the business of garments as is evident from the statement of PW/2, who is none else but the father-in-law of the Appellant. Secondly, the business is being carried out by the Appellant from the first floor of the house. So far as Appellant is concerned, she has not been cross-examined that the Appellant is carrying on the business from the first floor of the house, however, she was cross-examined even after the statement of her father-in-law. So far as statement of PW/2 Brijmohan is concerned, in para-3 of his examination-in-chief he has stated that his daughter-in-law is doing business of garments. He has further stated that the suit accommodation is required bona fide because the Appellant is residing on the upper floor of the suit house, while ground floor will be more convenient for carrying on the business. There is nothing on record on the basis of which it can be said that the Appellant should be disbelieved. For the sake of arguments even if it is assumed that the Appellant is carrying on the business of garments, then it shows that the need of the Appellant is fair need. Undisputedly the first floor of the house is residential accommodation where Appellant is residing with her family. If the Appellant is carrying on the business from her house and asking for eviction of tenant from the non-residential accommodation, then as per settled law it will not be denied and since the alleged accommodation from where Appellant is carrying on garment business is on first floor, therefore, again the ground floor is more convenient for commercial activities. Respondents themselves have admitted that the accommodation situated on the ground floor is more convenient. In the facts and circumstances of the case, this Court is of the view that the learned Courts below committed error in not passing decree of eviction against the Respondents u/s 12(1)(f) of the Act. Since the findings recorded are contrary to the settled position of law, therefore, this Court is of the view that the learned Courts below committed error in dismissing the suit filed by the Appellant u/s 12(1)(a) and (f). In view of this, appeal filed by the Appellant is allowed and the

impugned judgment passed by the learned Courts below are set aside and decree of eviction is passed against the Respondents.

Since the decree of eviction is also passed against the Respondents u/s 12(1)(a) of the Act, therefore, Respondents are not entitled for any amount of compensation u/s 12(6) of the Act. Since in consequence the Respondents have to vacate the suit accommodation, therefore, to save the Respondents from the peril of eviction, six months' time is granted to the Respondents to vacate the suit accommodation, provided Respondents furnish an undertaking within four weeks to the effect that Respondent shall handover the vacant possession of the suit accommodation peacefully on or before 31-12-2010 to the Appellant and shall also deposit the entire arrears of rent and cost, if any, within the period of four weeks and shall pay the rent regularly to the Appellant as per law. In case of failure on the part of Respondents in submitting the undertaking or in complying the other conditions, Appellant shall be at liberty to get the suit accommodation vacated forthwith.

With the aforesaid observations, appeal stands disposed of. No order as to costs.