
(1986) 10 BOM CK 0019
In the Bombay High Court
Case No : Writ petition No. 417 of 1983

Swami Ratanbabu Banne

APPELLANT

Vs

Wamanrako Shankarrao Deshmukh

RESPONDENT

Date of Decision : 15-10-1986

Acts Referred:

Citation : (1987) 1 BomCR 98

Hon'ble Judges : M.S. Deshpande, J

Bench : Single Bench

Advocate : S.C. Mahadia, for the Appellant; B.N. Mohta, for the Respondent

Judgement

M.S. Deshpande, J

1. The challenge by the petitioner-tenant to the order granting permission to the landlord to give a notice determining the lease under Clause 13(3)(i) and 13(3)(ii) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 (for short the Rent Control Order) is two-fold. It is firstly on merits, inasmuch as it is urged that there was an arrangement or a practice of paying rent whenever demanded by the landlord and, therefore, there was no default and secondly, on the constitutional validity of Clause 13(3)(ii) on the ground that the provision is vague and uncertain and does not provide adequate guidelines to the authority, who is to discharge the duties of applying the provisions.

2. The respondent-landlord sought permission of the Rent Controller for determining the lease of the petitioner who occupied shop premises admeasuring 10 X 12 feet, situated on Nazul Plot No. 14, Sheet No. 38-C at Akola at Rs. 80/- per month on the ground that the petitioner was in arrears to rent for a period exceeding three months and that he was a habitual defaulter in paying rent as the rent was payable by month. The petitioner denied that he was in arrears and contended that the rent was not payable at the end of the month, but was paid and was payable as and when the respondent came for demanding it and this practice was going on since many years. The two authorities below held that the

petitioner was in arrears of rent amounting to Rs. 960/- from March 1979 to March 1980 and directed payment to be made by certain date, failing which permission under Clause 13(3)(i) was to be deemed to have been granted. Since the payment of Rs. 960/- has been made, the ground taken under Clause 13(3)(i) does not now survive.

3. With regard to the other ground, namely, the petitioner being habitually in arrears with rent, the Rent Controller took the view that no notice was issued by the respondent in respect of the alleged irregular payment of rents; that he never objected to the payment of rent at intervals from the beginning and had failed to establish the mental attitude to pay the rent irregularly. In this view of the matter, he refused to grant permission under Clause 13(3)(ii) of the Rent Control Order. The Resident Deputy Collector, who heard the matter, while reversing the finding of the Rent Controller, was impressed by the circumstance that the alleged arrangement had not been established and since the rent was payable by month and the shop of the petitioner was located near the office of the respondent the alleged arrangement to pay the rent whenever demanded could not be accepted. Holding on the basis of the schedule that was framed by the respondent in support of his allegations that the petitioner was habitually in arrears with rent, the Resident Deputy Collector granted permission under Clause 13(3)(ii) of the Rent Control Order.

4. The tenant applied for review of this order, but the reviewing authority pointed out from the schedule that the rent was paid on 8 occasions for a period of 2 months each and there was no reason for withholding the rent. It, therefore, affirmed the finding that the petitioner was habitually in arrears with rent.

5. The petitioner's first challenge on the merits of the case may first be considered. The orders passed by the Appellate Authority and the reviewing authority are based on findings of fact that the petitioner was habitually in arrears with rent and it would not be open for this Court in exercise of its writ jurisdiction to interfere with a finding of fact, which is based on evidence. Shri Mehadia; learned Counsel for the petitioner, however, referred to the evidence in order to show that the findings were not based on evidence. Both the petitioner and the respondent had entered into the witness-box and while the respondent stated that the rent was payable at the end of the month on the basis of an oral agreement and there was no arrangement with the petitioner to pay the rent at convenience, the petitioner stated that the rent was paid whenever it was demanded by the respondent. In his cross-examination, he admitted that the tenancy month begins from 1st of every month, but stated that there was no agreement about the payment of rent and that there was no agreement also about the time when the rent should be paid, nor was there any agreement that unless the landlord asks for rent, it should not be paid. He stated that he had paid the rent on various occasions of his own accord. Apart from this oral evidence, the respondent relied on the schedule regarding the payment of rent which had been filed before the Rent controller. The rent was paid on some

occasions from May 1977 to April 1979. The first payment of rent on 3-11-1976 was for the rent of four months from May to August 1976, but while this rent was paid, the rent for September and October was left in arrears. On the second occasion on 9-2-1977 when rent for four months was paid, the rent for January 1977 remained unpaid. On third occasion i.e. on 7-3-1978 the rent from January 1977 to October 1977 was paid and rent from November 1977 to February 1978 remained in arrears. On the fourth occasion also three months rent remained in arrears, when two months" rent was paid and the payments on the later occasions also were made only of the part of the rent due and that was paid only for 2 months and on one occasion the rent for one or two months was not paid.

6. The appellate authority, as well as the reviewing authority took into consideration this manner of making the payment and leaving arrears while reaching the finding about the petitioner being habitually in arrears. Even if the version of the petitioner about the payment of rent at convenience were to be accepted, the payment should have been for the whole of amount which had become due on the date of the payment and not only of the part of the amount. The two authorities below were, therefore, right in not accepting the practice set up by the petitioner and in accepting the version of the respondent. As I have already indicated, these are the findings of fact with which no interference by this Court would be warranted as there was sufficient evidence to justify these findings.

7. The contention of Shri Mehadia next was that the provisions of Item (ii) of sub-clause (3) of Clause 13 of the Rent Control Order must receive its colour from Item No. (i) and the habit of remaining in arrears of rent as contemplated by Item No. (ii) must be inferred on the basis of the provisions of Item No. (i) where the default that is contemplated is of being in arrears of rent for any aggregate period of 3 months and failure to pay the rent for that period. It is difficult to accept this submission since the nine items enumerated in sub-clause (3) of Clause 13 of the Rent Control Order are all disjunctive and afford separate grounds for obtaining the permission of the Rent Controller for giving a notice determining the lease. The tenant may have deposited all the outstanding arrears, but still he may be liable to ejectment on the ground that he has been a habitual defaulter. This view has been holding the field since the decision in *Mathurprasad Manaklal Samaiya Jain v. S.S. Sharma*, AIR 1955 N.U.C. 1185 and it, is therefore, too late in the day to accept the contention of Shri Mehadia that the provisions of Item No. (ii) must receive its colour from the provisions of Item No. (i) of sub-clause (3) of Clause 13 of the Rent Control Order.

8. With regard to the objection that no guidelines have been prescribed for construing the phrase "habitually in arrears with the rent" Shri Mehadia urged that the words "habitual defaults" have not been defined any where in the Rent Control Order and the different views taken with regard to the applicability of this phrase in the several decisions of this Court would show that the provisions were uncertain and vague. He lamented that even an assignee from the landlord

would get the benefits of defaults made prior to the assignment and the provisions of Item No. (ii) would, therefore, be arbitrary.

9. The meaning and scope of the words "habitual default" came for consideration of the Division Bench of this Court in *Bahirumal v. Deputy Collector, Akola*, 1965 Mh.L.J. Note No. 49 and this Court had no difficulty in pointing out as follows :

"A default under a contract" and "habitual default" within the meaning of the Rent Control Order have to be distinguished. The default on the part of the tenant for the Rent Control Order must indicate a habit or mental attitude to commit defaults in satisfying a liability against him in respect of rent. If there is no such habit or mental attitude on the part of a tenant, and if he pays the rent under a particular practice which is recognised, accepted and acquiesced in by the landlord, it could not be said that the tenant has a mental attitude to avoid his liability, to pay rent due on the expiry of each month."

It is apparent that the phrase was understood in the context of what the contract was and there was a contract to the contrary showing a particular practice and the liability was to pay the rent at the end of the month. *Shri Mehadia* referred to the observations in *A.P. Deshmukh v. Shah Nihakchand Waghijibhai*, 1977 Mh.L.J. 710, but it is difficult to see how that case helps him, because there it was held that the obligation of monthly tenant to pay rent from month to month was subject to the contract to the contrary which need not be reflected in document, but can be spelt out from the conduct of parties spread over a fairly long period of time. There the finding in favour of the tenant recorded by the two authorities below came to be set aside by the High Court and this, the Supreme Court pointed out could not be done within the narrow limits of the High Court's jurisdiction under Article 227 of the Constitution.

10. As the instances of the uncertainty, *Shri Mehadia* pointed out the decision of the High Court in *Abdul Salem v. Mohammad Murtazakhan*, 1961 N.L.J. 30, where the Division Bench of this Court pointed out that it is not the amount which determines the question of default. There the money order commission of 45 NP was deducted in remitting the rent ever time. As this Court pointed out unless the tenant pays rent in full, he was in default and if he does not pay for several months, permission shall be granted for terminating the tenancy. It is difficult to see how this could be an instance pointing out-the uncertainty of the provision. It would only be indication of how the provision came to be applied.

11. In *Shridhar v. M.R. Khar*, 1962 N.L.J. 6, another Division Bench of this Court in a case where from January 1958 to September 1958 the tenant paid rent at his will several days after the due date and paid the rent for the month of March 1958 on 19-5-1958, it was held that the tenant was a habitual defaulter. That also does not point out the uncertainty of the provision, but the manner in which the provisions could be applied. In *Nathuji Narayanrao Udupure v. Narendra Wasanjibhai Thakkar*, 1981 Mh.L.J. 446, the learned Single Judge of this Court took the view that the tenant remaining in arrears for a continuous period of

several months, commits such defaults as would make him a habitual defaulter under Clause 13(3)(ii) and similar view was taken by the Division Bench of this Court in Pandurang Tukaram Rajkondawar v. Balaram Madhav Chavan, 1985 Mh.L.J. 109 and it was pointed out that the issue whether the tenant is a habitual defaulter will have to be decided on the basis of the agreement between him and the landlord and where the tenancy is monthly, the law is that the tenant is bound to pay rent at the close of the tenancy month in the absence of any other contract to the contrary. There also the dates of payment placed on record established that the tenant withheld rent due without making full payment till the date of payment which convincingly established and justified that the tenant had either formed a habit to commit default or he suffered from inherent disability to discharge his liability when he was expected and bound to discharge it even according to the practice alleged by him.

12. Shri B.N. Mohta, learned Counsel for the respondent, pointed out that the view taken by this Court in the aforesaid ruling was consistent with the one taken by the Supreme Court in Dhansingh v. Laxminarayan, 1975 Mh.L.J. 22. While considering the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (Act No. 67 of 1948) sections 14 and 25(2) in that case it was stated that "failures or defaults are synonymous terms. "Failure" in the Dictionary sense, means "a failing short", "a deficiency" or "lack". Default means omission of that which a man ought to do. Therefore, a partial default or failure to pay the whole of the rent due for the year will also be a failure within the meaning of this sub-section, more so, if these part payments had been made beyond the specified period". The Supreme Court endorsed the meaning given to "arrears" in Earl Jowitt's Dictionary of English Law that "arrears" means money unpaid at the due time as rent behind." Considering these authorities, it is difficult to accept the contention that the phrase "habitually in arrears with rent" in Item No. (ii) aforesaid is either vague or uncertain or that it was left to be applied by the authorities concerned without providing adequate guidelines for ascertaining what the habitual default was.

13. Shri Mehadia pointed out that provision was not made regarding the date by which the payment should be made. Once the term "default" was left to be understood in the context of the contract in pursuance of which the payment was to be made, it is difficult to see what more guidance could be expected in the provisions of the Rent Control Order. The fact that an assignee also was held by this Court to be entitled to the benefit of defaults in Zafar Hasan v. Jatiram, 1977 Mh.L.J. 84 and Arjundas Jamnadas Udasi v. Pyarelal Bhujwas, 1984 Mh.L.J. 1001 and could bring a suit for ejectment on the basis of the defaults made prior to the purchase or assignment cannot affect the efficacy of the provision, because items (i) and (ii) of sub-clause (3) of Clause 13 are calculated only to take away the protection which the tenant would otherwise have been entitled to and once that protection is taken away, it is immaterial whether it is the original landlord, assignee, or purchaser gives the notice. That cannot have any bearing on the validity of Item No. (ii). It is, therefore impossible to accept the contention of

Shri Mehadia that the provisions of Item No. (ii) of sub-clause (3) of Clause 13 of the Rent Control Order should be struck down for the reasons advanced by him.

14. Another challenge which had been initially raised was on the ground of continuance of separate rent control legislation prevailing in the different parts of the State of Maharashtra and thus the citizens in different parts of the State were rendered discriminatory treatment. The challenges on this ground were considered by a Division Bench of this Court in Writ Petition No. 1670 of 1985. Vidarbha (Rent Control), Bhadekaru Sangh, Akola v. State of Maharashtra, decided on 29th August, 1986, where this Court observed:

"This being the position of law and laid down by the Supreme Court in a series of decisions and as finally explained in the Motor General Traders" case, merely by reference to the different provisions of the three enactments prevailing in the different parts of this State, in the absence of proper pleading and relevant material before this Court, it is impossible to hold that the Rent Control Order, 1949, merely because of the existence of the two other enactments, is discriminatory, and the challenge on this count cannot be sustained."

15. A learned Single Judge of this Court in Mukesh Sawadia Vs. Vinod Gupta, observed that when the schemes of the two Acts are different, it may be that some provisions in one Act are more beneficial or less onerous as compared to the other Act and some other provisions in the other Act may be more beneficial or less onerous as compared to the former but that cannot be a ground to strike down the less beneficial or more onerous provisions in either of the two enactments and when the schemes of the two Acts are different, they belong to different classes and there cannot be any comparison with any individual provisions of the two Acts. The other challenges raised by Shri Mehadia do not, therefore, survive in the light of these two rulings.

16. In the result, I see no merit in the writ petition. The rule is discharged with costs.