
(1993) 01 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No. 468 of 1982

The Pune Art Industries

APPELLANT

Vs

Narayan Kashinath Date

RESPONDENT

Date of Decision : 20-01-1993

Acts Referred:

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

Citation : (1994) 3 BomCR 68 : (1993) 95 BOMLR 200

Hon'ble Judges : Bhimrao N. Naik, J

Bench : Single Bench

Advocate : V.S. Gokhale and K.J. Abhyankar, for the Appellant; G.M. Khambete and J.M. Chitale, for the Respondent

Final Decision : Dismissed

Judgement

Bhimrao N. Naik, J.—This petition is filed by a petitioner - tenant challenging a decree for possession passed against him on the ground of erecting permanent construction and on the ground of non payment of rent.

2. Few facts which are relevant for the purpose of this petition are as follows:

3. The premises in dispute consist of one big room admeasuring 20 x 15 feet forming part of City Survey No. 136 and bearing plot No. 34/11/2 in the industrial Zone at Pune. The petitioner was inducted as a tenant for running a lathe machine workshop in the premises. The premises were let to the petitioner sometime in the year 1972. The agreed rent was Rs. 175/- per month and according to the landlord the education cess and other taxes were to the tune of Rs. 59.50 per month. Respondent - landlord sent a letter on 6th of July, 1977 informing the petitioner - tenant that he wants to occupy the premises himself and the tenant is in arrears of rent from 1st of December, 1976. There was not a whisper about any permanent construction carried out by the petitioner without the consent of the landlord. After receipt of the said letter, the petitioner filed an application at Exhibit-4 for fixation of standard rent on 13th July, 1977. In that

application, he prayed that the interim rent should be fixed and a direction should be issued for depositing the amount. Accordingly, on 21st of July, 1977 the Court passed the following order:

"Interim rent is fixed at Rs. 120+ education cess p.m. Applicant to deposit arrears of rent at this rate within one month from today and go on depositing the same on or before 10th of every month or whenever it becomes due."

It appears, in pursuance of this order, the petitioner-tenant deposited a sum of Rs. 1,000/- on 1st August, 1977. Not only he deposited but on 3rd of August, 1977 the tenant intimated the fact of such a deposit to the landlord by his letter which is at Exh. 45.

4. It appears that on 7th of September, 1977 the landlord issued a notice of demand as contemplated u/s 12(2) and also a notice of termination and claimed arrears of rent from 1st December, 1976 upto 30th September, 1977. In the notice, possession was claimed on the ground of (i) non payment of rent, (ii) permanent construction and (iii) bona fide requirement.

5. The trial Court by its judgment and order dated 31st of July 1979, inter alia, held that the petitioner is not a defaulter and the landlord does not require the premises bona fide and reasonably for the personal occupation and he also held that the notice is valid and further a finding was recorded that the tenant has not carried out permanent construction. It is important to note here that the Court did not go into the question whether the nature of construction alleged is of a permanent nature or not but it only went on the basis of burden of proof. It was the specific stand taken by the tenant that he accepted the premises along with the construction alleged to have been carried out. Therefore, he himself has not erected any permanent construction. For this purpose the trial Court expected the landlord to produce the original plan and since the landlord did not produce the original plan it took the view that the landlord failed to establish his case and thus ultimately failed to prove that the tenant carried out any construction. In this view of the matter, the trial Court dismissed the suit by its judgment dated 31st July, 1979.

6. Being aggrieved and dissatisfied by this judgment, the landlord filed Civil Appeal No. 587 of 1979. So far as the ground of permanent construction is concerned, the appeal Court recorded a finding that the burden of proof is wrongly put upon the landlord and the tenant failed to establish that he has not carried out the alleged construction. It is also equally important to note that even the appeal Court notwithstanding the argument did not go into the question regarding the nature of construction whether the alleged construction is a permanent construction as contemplated under the provisions of the Rent Act. But it only held that since the tenant failed to establish that he accepted the tenancy along with the said construction the tenant cannot be relied upon and thus a decree was passed on the ground of erecting permanent construction.

7. The Appellate Court also held on the question of non payment of rent that the

case is governed by section 12(3)(b) but the tenant has failed to comply with the requirement of section 12(3)(b). The Appellate Court recorded a finding that the tenant not only not cleared the arrears but he did not pay the amount and cleared off the arrears regularly. In this view of the matter, both on the ground of permanent construction and on the ground of arrears of rent the decree for possession was passed by the learned Joint Judge, Pune on 21st of November, 1981.

8. Being aggrieved and dissatisfied by this judgment and decree of the learned Joint Judge, Pune, the tenant filed the above mentioned writ petition. Mr. Gokhale, learned Counsel appearing for the petitioner, pointed out to me that none of the courts below went into the question as to whether the alleged construction amounts to really permanent construction or not. Without going into that question the Court recorded a finding that the tenant erected a permanent construction. In fact this point was specifically urged before the courts below and notwithstanding the fact no finding is recorded on this aspect. He pointed out that in the letter dated 6th of July, 1977 there is not even a whisper about so-called construction alleged to have been carried out by the tenant. Therefore, he wants me to hold that if the tenant had carried out this construction, certainly there would have been a reference regarding this in the letter dated 6th of July, 1977. Since such a reference is not there, the contention of the tenant that he accepted the premises along with the construction thereon ought to have been accepted by the Appeal Court as it is accepted by the trial Court. However, I must make it very clear that I am not inclined to interfere with the finding of the Appeal Court to the effect that the tenant failed to establish that when he accepted the premises he accepted it along with the alleged construction. Thus the only question which I am required to consider and which has not been considered by the two courts below is whether the construction is in the nature of permanent construction. For this, one is required to go to the nature of construction which are referred to. It was a case of the respondent - landlord that there was a wooden loft admeasuring 15" x 17" and the loft was extended by 3" x 15". Thus the entire area of 15" x 20" was covered by the loft. The nature of construction appears to be a wooden construction. I am not inclined to accept that the extension of a loft by 3" x 15" would ever be construed as a permanent construction, particularly in view of the case cited by Venkatlal G. Pittie and Another Vs. Bright Bros. (Pvt.) Ltd., Venkatlal G. Pittie & anr. v. Bright Bros. (Pvt.) Ltd. The Supreme Court has approved the decision of Malvankar, J., in Special Civil Application No. 121 of 1968 and on the basis of this decision I am not inclined to record a finding that this extension of 3" x 15" would ever amount to a permanent construction and that too a wooden loft.

9. Secondly, it is alleged that there was a wooden ladder in existence at one place but it was shifted to another place. By no stretch of imagination shifting of a ladder from one end to another or from one place to another can ever amount a permanent alteration.

10. Thirdly, the allegation is that the tenant constructed a big hole in one of the walls. There is also a Commissioner's report on record. But the size of that hole has not come on record. Therefore, no finding that this will amount to a permanent construction will ever be recorded.

11. A reference is made to the construction of a gallery and surprisingly a finding is recorded that the tenant carried out this construction and, therefore, he will suffer on this ground. It is important to note that neither in a notice of termination nor in the suit there is any reference whatsoever to the gallery. Therefore, one cannot assume the case for the plaintiff as it has been assumed by the Appeal Court. Therefore, I am not inclined to take into consideration the case of the landlord pertaining to the gallery.

12. Lastly, the allegation is that by demolition of the eastern wall a new door is constructed by the tenant. However, the construction of the door now in view of the explanation to section 13(1)(b) is permissible and that does not amount to any permanent construction. Thus on this ground I am not inclined to accept the finding of the Appellate Court to the effect that the tenant has erected a permanent construction. Therefore, I am inclined to accept this submission of Mr. Gokhale and hold that none of the construction referred to amounts to a permanent construction and, therefore, I set aside the finding of the Appellate Court on this question.

13. However, on the question regarding non-payment of rent what was pointed out to me by Mr. Gokhale is that the tenant was regular in making payment as is governed by section 12(3)(b). Since there was already an application for fixation of the standard rent which was pending and he has complied with the order passed in view of the decision reported in Mohan Laxman Hede Vs. Noormohamed Adam Shaikh, in the matter of Mohan Laxman Hede v. Noormohamed Adam Shaikh, the tenant should succeed and no decree should be passed on the ground of arrears of rent.

14. Mr. Gokhale first submits that the suit is based on notice of demand dated 7th of September, 1977 and the arrears are claimed from 1st December, 1976 to 30th September, 1977. However, if the payment made by the tenant in a standard rent application of Rs. 1,000/- on 1st August, 1977 is taken into consideration then the tenant was not in arrears for more than six months and he would be in arrears for less than six months and thus he relied upon the decision of Kotwal, J., reported in 1989 Maharashtra Rent Control Journal, page 405 Vasudeo Gopal Dhamankar v. Vithal Mathur Shet & others, and pointed out that the case which is not governed by section 12(3)(a) and the arrears are less than six months then equally there will be no cause of action for filing a suit u/s 12(3)(b). However, Kotwal, J.'s judgment (supra) does not help Mr. Gokhale in contending that if the arrears are less than six months then there is no cause of action for non-filing of a suit and section 12(3)(b) will not apply to such a case. Before Kotwal J., the question was on the date of notice of demand the arrears were less than six months. However, the arrears were claimed for six months and

the tenant made payment for six months within a period of one month. Thus since the arrears were less than six months which was held by Justice Kotwal then the provisions of section 12(3)(b) are not attracted and since the amount is paid there is no cause for filing a suit even u/s 12(3)(b). Reliance is placed on a Division Bench decision of this Court reported in 1984 Maharashtra Law Journal, page 313 Narhar Damodar Wani v. Narmadabai T. Nave. What is required to be noted in this matter is the finding recorded by the learned District Judge in paragraphs 20 and 21 of his judgment where he says that even if the case is governed by section 12(3)(b) there is total non-compliance of the requirement of section 12(3)(b). Since the tenant has not deposited in Court the full amount of rent even at the interim rent of Rs. 120/- per month in full and secondly the deposit of rent is not made regularly, the interim rent was fixed at Rs. 120/- per month and the only deposit made by the tenant was the sum of Rs. 8070/-. However, even at the rate of Rs. 120/- per month the amount that was required to be deposited from 1st of December, 1976 to 31st of October, 1981 was Rs. 7080/- towards the rent for a period of 59 months and Rs. 1062/- on account of education cess at the rate of Rs. 12.5% and Rs. 242/- as the past difference of education cess. Thus the tenant was required to deposit Rs. 8384/-. As against this the only deposit made was for a sum of Rs. 8070/-. The learned District Judge further pointed out that after the decision of the trial Court finally the rent determined by the trial Court was Rs. 150/- per month and there was no order obtained from the trial Court regarding the deposit of the rent at the rate of Rs. 120/- per month though the tenant was under obligation to deposit at the rate of Rs. 150/- per month. Thus till the disposal of the appeal the tenant was required to deposit a sum of Rs. 8850/- and as against this the only deposit made was of Rs. 8070/-. Thus on the first point the tenant had not even cleared off all the arrears. The question of regular payment is altogether a different aspect. It was not possible for Mr. Gokhale to satisfy me that his client i.e. the petitioner has paid all the arrears. Since there is no payment of arrears, the learned District Judge is perfectly justified in recording the finding that there is compliance of the provisions of section 12(3)(b) and in such a case there is no question of any discretion and the Court was required to pass a decree for possessions and accordingly a decree for possession is passed. I see no substance in the argument of Mr. Gokhale regarding the non-maintainability of the suit because the arrears were less than six months. Equally there is no substance in the contention that the notice dated 7th of September, 1977 is invalid because the payment is excessive. In fact it cannot be held that his demand is excessive because the landlord had not taken into consideration the deposit made on 1st of August, 1977. Notwithstanding the credit and the deposit and except such a case if the landlord were to demand in addition certain sums then it would have been a different matter. Therefore, I am not inclined to accept the contention of Mr. Gokhale that the notice of demand is invalid. Since the entire amount due and payable is not deposited either at the rate of Rs. 120/- or at the rate of Rs. 150/- per month, the Court was justified in passing a decree for possession by holding that the tenant failed to comply with the requirement of section 12(3)(b). This I

am holding notwithstanding the affidavit filed by Mr. S.K. Sapre i.e. the petitioner along with the statement of dates showing different payments made. I make it very clear that I am not confirming the decree of the Appellate Court on the ground that the tenant has not regularly made the payments. I am confirming the finding of the Appeal Court because the tenant has not cleared off all the arrears which are due and payable either at the rate of Rs.120/- or at the rate of Rs. 150/- per month and the only deposit made was of Rs. 8070/-. Thus, I see no substance in this petition notwithstanding the fact that I recorded a finding in favour of the petitioner on the question relating to permanent construction. Still I will have to dismiss this petition because the respondent - landlord gets a decree on the ground of non-payment of rent.

15. Under the circumstances, the petition is dismissed. Rule is discharged. However, there will be no order as to costs.

However, the decree for possession is not to be executed by the respondent - landlord for a period of two months since the petitioner wants to approach the Supreme Court.

Certified copy to be expedited.