

(2009) 03 GUJ CK 0027

In the Gujarat High Court

Case No : Civil Revision Application No. 1267 of 1994

Urvashiben Kanubhai Joshi

APPELLANT

Vs

Bakshisinh Ishwarsinh

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Bombay Rent Act, 1947 — Section 12, 12(1), 12(2), 12(3), 29(2)

Citation : (2009) 2 GLR 1078

Hon'ble Judges : Mohit S. Shah, J

Bench : Single Bench

Advocate : K.J. Brahmbhatt, Nos. 1, 1.2.1 and 1.2.2, for the Appellant; N.S. Sheth, for the Respondent

Judgement

Mohit S. Shah, J.—This Revision Application u/s 29(2) of the Bombay Rent Act, 1947 is directed against the judgment and order dated 30-12-1993 passed by the learned Extra Assistant Judge, Panchmahals at Godhra dismissing Regular Civil Appeal No. 68 of 1990 of the petitioner-landlord, by which the lower appellate Court confirmed the judgment and decree dated 30-4-1990 of the learned Civil Judge (J.D.), Godhra dismissing Regular Civil Suit No. 708 of 1987 for eviction of the respondent for the suit premises at Godhra.

2. The plaintiff had filed the above-numbered suit for eviction of the respondent-defendant on the ground of arrears of rent for more than six months and on the ground of nuisance.

3. In the suit filed on 13-10-1987, the plaintiff contended that the plaintiff had given suit notice dated 8-9-1987 demanding arrears of rent for the period from 1-3-1987 to 31-8-1987. The notice was received by the defendant-tenant on 9-9-1987. The defendant gave reply dated 12-9-1987, Exh. 22, wherein the defendant stated that he had sent rent of Rs. 500/- for the period from 1-3-1987 upto 31-7-1987 by money order on 20-8-1987, but the money order was refused. The defendant, however, did not pay any rent after receiving the notice. The plaintiff contended that since the arrears of rent for six months were not

paid within one month from the date of receipt of the notice, the plaintiff was entitled to a decree u/s 12(3)(a) of the Act.

4. The defendant resisted the suit and pointed out that apart from sending the money order on 20-8-1987 which was refused by the plaintiff, the defendant had deposited the arrears on the date of filing of the written statement, Exh. 14 and on the same date, the defendant also deposited all the arrears upto October, 1987. Evidence was led by the petitioner-landlord at Exh. 19 and by the defendant-tenant at Exh. 37.

5. After hearing the parties, the trial Court held that since the defendant had sent rent by money order on 20-8-1987 which was refused by the plaintiff, the defendant was ready and willing to pay the rent, and therefore, entitled to get protection of Section 12(1) of the Act, and therefore, the provisions of Section 12(3)(a) were not attracted.

As regards the ground of nuisance, the trial Court specifically recorded in Para 9 of the judgment that the learned Advocate for the plaintiff did not press the ground of nuisance.

The trial Court accordingly dismissed the suit for eviction but confirmed the interim injunction granted below the application Exh. 5 and permanently restrained the defendant from creating any obstruction on the passage in the suit premises.

6. Aggrieved by the above judgment and decree, the plaintiff-landlord went in appeal. The learned Extra Assistant Judge, Panchmahals at Godhra dismissed Regular Civil Appeal No. 68 of 1990. Hence, this Revision Application.

7. At the hearing of this Revision Application, Ms. Kalpana Brahmabhatt, learned Advocate for the petitioner-landlord has vehemently submitted that the respondent-tenant did not comply with the statutory notice dated 8-9-1987 at Exh. 21 which was received by him on 9-9-1987. Since, arrears of rent demanded as per the statutory notice for the period from 1-3-1987 to 31-8-1987 were not paid by the defendant to the plaintiff within one month from the date of receipt of the notice (i.e. by 9-10-1987), the plaintiff was entitled to get the decree of eviction u/s 12(3)(a) of the Act as the Court has no discretion not to pass such a decree when all the conditions of Section 12(3)(a) were fulfilled. It is submitted that for whatever reason, the plaintiff might have refused to accept the money order sent by the tenant on 20-8-1987, as on the date of receiving the notice dated 9-9-1987 and for a period of one month thereafter, the defendant was in arrears of rent for more than six months, and therefore, the question whether the defendant neglected to pay the rent is to be determined only on the basis of his conduct after receipt of the statutory notice u/s 12(2) of the Act and not his conduct prior thereto. Ms. Brahmabhatt has also submitted that the respondent-tenant has not paid/deposited all the amounts of rent due and payable during pendency of this Revision Application.

In support of the above contentions, Ms. Brahmbhatt for the petitioner has placed strong reliance on the decisions of three different learned single Judges of this Court in (i) Gaznafrali Fatehali Hakim Vs. Ratilal Maganlal Panchal, , (ii) Bhalchandra N. Vakil v. Chandulal Mohanlal Darji 1983 GLH 5, and (iii) Decision dated 7-7-2008 in Civil Revision Application No. 1253 of 1983.

8. Ms. Brahmbhatt has further submitted that the lower appellate Court erred in not considering the ground of nuisance. It is submitted that the very fact that the plaintiff had given a purshis for early hearing of the suit on the ground of nuisance being created by the defendant-tenant was sufficient to show that the landlord would not give up such a ground at the hearing of the suit. It is also submitted that the very fact that at the time of disposal of the suit, the trial Court confirmed the interim injunction restraining the defendant from creating any obstruction on the passage near the suit premises as permanent injunction also supported the plaintiff's case that the defendant was creating nuisance.

9. On the other hand, Mr. N. S. Sheth, learned Advocate for the respondent-tenant has relied on the decision of another learned single Judge of this Court rendered in Lilavanti Dhirajlal Boradiya v. Soni Harjivan Devjibhai 1975 GLR 1002 in support of his submission that when a landlord refuses to accept the amount tendered by the tenant without any justifiable cause, the tenant is not bound, nor he is under any obligation to go on repeating remittances of the same amount over and over again. He has vehemently submitted that a landlord cannot try to take advantage of his own wrong and on that basis seek the recovery of possession of the premises from the tenant.

Mr. Sheth further submitted that since the ground of nuisance was not pressed before the trial Court, the lower appellate Court rightly did not permit the petitioner-landlord to raise that ground at the hearing of the appeal.

10. Having heard the learned Counsel for the parties, the Court proposes to take up the second ground first. It is clearly recorded in Para 9 of the judgment of the trial Court that the learned Advocate for the plaintiff did not seriously press the nuisance as the ground of eviction, and therefore, the lower appellate Court was justified in not permitting the appellant-landlord to raise the said ground at the hearing of the appeal. The lower appellate Court has rightly held that as to what transpired before the trial Court, only version of the trial Court should be accepted.

11. Coming to the ground of arrears of rent for more than six months, the following observations made by this Court in Lilavanti Dhirajlal Boradiya, (1975 GLR 1002), are pertinent:

8. If a landlord refuses to accept the amount tendered by his tenant either by money order or in any other recognized mode of payment without any justifiable cause the tenant is not bound nor is he under an obligation to go on repeating the remittances of the same amount over and over again. A landlord cannot try to take advantage of his own wrong and seek the recovery of possession of the

premises from his tenant. The argument advanced by Mr. S. M. Shah highlights the proposition that the Rent Act is the measure which is intended to protect the tenants. It is not a trap for the landlord to lay in order to draw his tenant in. There cannot be, in my opinion, more absurd behaviour on the part of the landlord than one of which the plaintiff in the instant case is guilty.

12. It would also be necessary to refer to the decision of another learned single Judge of this Court in *Gaznafrali Fatehali Hakim Vs. Ratilal Maganlal Panchal*, . In that case while sending the money order, the tenant had mentioned that he was sending rent and water charges while he was in arrears of rent and electricity charges, and therefore, the Court held that the landlord was justified in refusing to accept the money order. The learned single Judge also went on to observe that in any case, if money orders were not accepted for any reason, the tenant had an opportunity to deposit the same or to pay the same when he received the notice dated 6-4-1997 and that refusal of money order will not absolve the tenant from his obligation to give a reply to the notice u/s 12(2), if he wants protection u/s 12(1).

In the above case, the tenant had received first notice from the landlord on 3-10-1975, and thereafter, he had sent the rent for the period from 1-7-1975 to 30-11-1975 by three separate money orders. The said money orders were refused. Thereafter, the landlord gave the second notice dated 6-4-1977. The tenant neither gave reply to the said notice, nor paid the arrears of rent. It was in this factual background that in *G. F. Hakim's* case, the Court observed that the tenant was bound to pay the arrears at least after receipt of the second notice dated 6-4-1977.

13. The decision of another learned single Judge of this Court in *Bhalchandra N. Vakil v. Chandulal Mohanlal Darji* 1983 GLH (UJ-8) 5, also requires some consideration. In that case, the tenant had sent the last money order on 13-9-1974. That amount covered rent for the period from 16-2-1974 to 15-9-1974. It was an admitted position that rent was due from 16-9-1974. In view of the remittances made by the tenant till September, 1974 it cannot be said that he was not ready and willing to pay rent till that date. Thereafter, the landlord by a notice dated 19-10-1974, called upon the tenant to pay up the arrears within one month from the date of receipt of the notice. Arrears were not tendered by the tenant within time.

The Court then formulated the following question:

The question which arises for consideration is whether a tenant can be said to be ready and willing to pay rent even if he does not offer to pay the arrears after receiving a notice from his landlord calling upon him to pay the same only on the ground that prior to receiving the notice, he had remitted the rent, then due.

The Court then answered the question in the negative by highlighting the following facts:

Important fact to be borne in mind is that when the notice was given by the landlord, the rent which had become due was for the period from 16-2-1974 to 15-10-1974. Admittedly, no rent for the period from 16-9-1974 to 15-10-1974 was tendered by the tenant at any point of time. Therefore, this is not a case where after receiving a notice, the tenant had offered to pay all the arrears of rent and the landlord had refused to accept the same. Nor is this a case where prior to the date of the notice, full amount of rent due upto date i.e. up to the date of the notice was tendered by the tenant.

The learned single Judge accordingly held that the tenant could not be said to be ready and willing to pay the rent as contemplated by Sub-section (1) of Section 12, and therefore, eviction suit on the ground of arrears of rent was maintainable. However, the learned single Judge did not pass the decree of eviction u/s 12(3)(a), but the learned single Judge appears to have passed the decree u/s 12(3)(b) on the ground that the tenant did not go on depositing the rent regularly during pendency of the appeal/cross-objections. It was held that the tenant ought to have gone on depositing the rent and that by merely filing the appeal or cross-objections, the decree or finding under challenge did not automatically get stayed. The Court specifically observed as under:

...the obligation to go on paying rent regularly had arisen not because of any decree of the Court, but it was an obligation arising out of the provisions of the Act itself, which gives protection against eviction under certain specified circumstances. The tenant having failed to discharge that obligation cannot now claim any protection against eviction.

14. In the present case, after the tenant sent on 20-8-1987 the money order of Rs. 500/- for rent at the rate of Rs. 100/- per month for the period from 1-3-1987 upto 31-7-1987, the landlord refused to accept the money order, and immediately thereafter, sent notice dated 8-9-1987. The tenant replied to the same on 12-9-1987 and pointed out that he had already sent Rs. 500/- by money order being rent upto 31-7-1987, but the money order was refused. The tenant further stated in the notice that the tenant was ready and willing to pay the rent at the rate of Rs. 100/- per month, but receipts may be given for the same. Within one month from receiving the tenant's reply dated 12-9-1987, the landlord filed the present suit on 13-10-1987 for eviction of the defendant-tenant on the ground of arrears of rent for a period of six months and nuisance. Once, the tenant had sent the money order for the rent upto 31-7-1987, the tenant cannot be considered as in arrears for six months either on the date of notice i.e. 8-9-1987 or on the date of filing of the suit i.e. 13-10-1987. Hence, the case did not fall u/s 12(3)(a) of the Act. As rightly observed by the learned single Judge in the case of *Lilavanti Dhirajlal Boradiya (supra)*, the Rent Act is a measure intended to protect the tenants and not a trap for the landlord to lay in order to draw his tenant in.

15. In view of the above discussion, it has to be held that the case on hand did not fall u/s 12(3)(a) of the Act, and therefore, the Courts below were justified in

refusing to pass a decree of eviction on the ground of non-compliance with the provisions of Section 12(3)(a) of the Act.

16. What is the consequence of the finding that the case did not fall u/s 12(3)(a) of the Act? Mr. Sheth for the respondent-tenant would contend that once the landlord had prayed for eviction u/s 12(3)(a) of the Act, and the Court finds that the case did not fall u/s 12(3)(a), the suit must be dismissed without making any further inquiry. However, it is not possible to accept this contention because a Division Bench of this Court (to which I was a party), has held in *Monghiba Lakhaji v. Hira Kunvar Mulji* 2005 (3) GCD 2034 that even where the landlord has prayed for decree of eviction u/s 12(3)(a) and the Court holds that the case is not covered by the provisions of Section 12(3)(a), the Court is bound to consider the next question whether the case would fall u/s 12(3)(b) of the Act.

17. In view of the aforesaid decision of the Division Bench, it will be necessary to consider whether the respondent-tenant had complied with the provisions of Section 12(3)(b) of the Act. Both the learned Counsel, however, state that the Courts below have not given any finding on this aspect. Mr. Sheth has submitted that the Courts below were justified in not giving any such finding because such a contention about the applicability of Section 12(3)(b) was not raised at all. However, Ms. Brahmbhatt for the petitioner-landlord is justified in submitting that in view of the aforesaid decision of the Division Bench rendered during pendency of this Revision Application, the question does remain whether the tenant had complied with the provisions of Section 12(3)(b) of the Act.

18. In view of the aforesaid Division Bench judgment, the question will have to be considered whether the tenant had complied with the provisions of Section 12(3)(b) of the Act. In absence of any finding on this question, it is not possible for this Court to examine this question in the present Revision Application, and therefore, the matter will have to be remanded to the lower appellate Court for deciding this question.

19. At this stage, Ms. Brahmbhatt for the petitioner-landlord submits that the lower appellate Court may be required to consider whether the tenant had deposited the rent regularly not merely during pendency of the suit and pendency of the appeal before the District Court, but also during pendency of the Revision Application before this Court.

Reliance is placed on the decision of the Bombay High Court in *Sd. Umar Sd. Ahmed Vs. Dedamiya Husenbhai and Others*, taking the view that the tenant must comply with the provisions of Section 12(3)(b) during pendency of the Revision Application before the High Court also, otherwise he will lose the protection of Section 12(3)(b).

Reliance is also placed on the decision of another learned single Judge of this Court in *Ravjibhai Gigabhai v. Virjibhai Ravjibhai* rendered on 7-7-2008 in Civil Revision Application No. 1253 of 1983.

20. On the other hand, Mr. Sheth for the respondent-tenant submits that this Court has already held in a number of decisions that the provisions of Section 12(3)(b) would apply only during pendency of the suit and pendency of the appeal, but not during the pendency of the Revision Application. In support of the said submission, reliance is placed on the decision in *Bai Revaben Wd/o. Sitaram Gangaram v. Sindhi Meghnath Enshiram* 1980 GLR 560 and also in *Vasudev Gordhan Adhyaru v. Bhagwandas Kevalram & Sons*, (Civil Revision Application No. 103 of 1969 decided on 28-3-1977) 1977 (14) GLT 138.

21. In Civil Revision Application No. 1053 of 1973 decided on 18-3-1976, a learned single Judge of this Court rejected the contention of the landlord that the requirement to deposit the rent regularly was applicable during pendency of the Revision Application also. While rejecting such a contention, the learned single Judge observed as under:

In *Lalchand Jematmal v. Nanabhai Ranchhoddas and Ors.* 1976 GLR 1, a Full Bench of this Court has held that the expression:

"till the suit is finally decided" refers to the decision of the suit in appeal by the appellate Court, and that therefore, the tenant must continue to pay or tender in Court regularly the standard rent till the decision of the appeal. No Court has taken the view that the expression "till the suit is finally decided" used in Section 12(3)(b) also applies to revisional proceedings in the High Court. I do not propose to take such a rigid view of law.

Following the above view, it was held in *Bai Revaben's* case 1980 GLR 560 that even if the tenant has not paid rent regularly during pendency of the Revision Application u/s 29(2) of the Act, it cannot be said that he has not complied with the conditions laid down by Section 12(3)(b) of the Act and that he is deprived of the benefit of that Section. The same view was taken by still another learned single Judge in Civil Revision Application No. 103 of 1969.

22. Since, this Court has consistently taken the view in favour of the tenant that the provisions of Section 12(3)(b) are not applicable during pendency of the Revision Application, I am bound by the said decisions taking the view that the expression "till the suit is finally decided" covers the period during which the appeal was pending, as appeal is a continuation of the suit, but the expression would not cover the period during which the Revision Application u/s 29(2) of the Rent Act has remained pending before this Court.

23. The decision of the Bombay High Court in *Sd. Umar Sd. Ahmed* (supra) was rendered in the context of the fact that the lower appellate Court had confirmed the decree of eviction passed against the tenant on the ground of arrears of rent and the Revision Application before the High Court was filed by the tenant. The learned single Judge of the Bombay High Court held that so long as the appellate Court or the High Court is seized of the matter, it would be abundant duty of the tenant to comply with the lower Court's decree on the point of standard rent, otherwise he will not get the protection u/s 12(3)(b) of the Rent Act. These

observations were made in the context of the liability to pay/deposit the standard rent when the dispute about standard rent was live throughout and came to be finally decided only in the Revision Application. The High Court, therefore, observed that during pendency of the revision, the tenant was bound to pay/deposit the standard rent determined by the lower appellate Court.

24. It is true that in the decision dated 7-7-2008 in Civil Revision Application No. 1253 of 1983 (Ravjibhai Gigabhai's case), the learned single Judge proceeded on the basis that the requirement to pay/deposit the rent regularly as required by Section 12(3)(b) would apply not only during pendency of the appeal but also during pendency of the Revision Application. Prima facie, such a view appears to be inconsistent with the view expressed by three other learned single Judges of this Court in the past. I am, however, not inclined to accept the submission of Ms. Brahmbhatt for the petitioner-landlord that the controversy is required to be referred to a Larger Bench because the observations made by the learned single Judge in Ravjibhai Gigabhai's case (supra), were in a Revision Application filed by the tenant challenging the decree of eviction on the ground of arrears of rent.

25. At this stage, it may not be out of place to make a distinction between the Revision Application filed by the tenant against the decree of eviction passed u/s 12(3)(a) or 12(3)(b) passed by the lower appellate Court u/s 12(3)(a) or 12(3)(b) of the Act on the one hand and Revision Application filed by the landlord against refusal of the lower appellate Court to pass a decree of eviction u/s 12(3)(a) or 12(3)(b) of the Act. In the tenant's Revision Application against the decree of eviction, the tenant is granted interim stay against the decree for possession on the usual conditions, one of which is that the tenant shall deposit all the arrears of rent within the time-limit to be specified in the interim order and the tenant continues to pay/deposit the rent regularly. Hence, when the tenant does not comply with such a condition, he would certainly be not entitled to claim any interim protection.

On the other hand, when, as in the instant case, the lower Appellate Court has refused to pass a decree of eviction on the ground of arrears of rent and the landlord has filed the Revision Application before this Court u/s 29(2) of the Act for challenging such a decision, there is no question of the Revisional Court imposing any condition for payment/deposit of the rent during pendency of the Revision Application, and therefore, the decisions of this Court taking the view that the provisions of Section 12(3)(b) are not applicable during pendency of the Revision Application would apply with full vigor to Revision Applications filed by landlords.

26. The question whether the Revisional Court can, after vacating the interim stay, dismiss the Revision Application only on the ground of non-compliance with such a condition is not required to be decided in the facts of the present case, which is a revision filed by the landlord and not by the tenant.

Since, the present Revision Application is filed by the landlord, it is not necessary

to examine the above question at any further length as I am simply following the decisions of three learned single Judges of this Court taking the view that the expression "till the suit is finally decided" does not include the period when the Revision Application was pending before this Court.

27. In the result, the Revision Application is partly allowed by setting aside the order of the lower appellate Court. The matter is remanded back to the lower appellate Court only for the limited purpose of deciding whether the defendant had complied with the provisions of Section 12(3)(b) of the Bombay Rent Act during pendency of the suit and during pendency of the appeal. If the lower appellate Court finds that the defendant-tenant did not pay or tender in Court the rent at the rate of Rs. 100/- per month in accordance with the provisions of Section 12(3)(b), the lower appellate Court will pass the decree of eviction u/s 12(3)(b). On the other hand, if the lower appellate Court finds that the conditions of Section 12(3)(b) were complied with by the tenant, then, the lower Appellate Court shall refuse to grant any relief u/s 12(3)(b) of the Act.

28. After giving the parties reasonable opportunity of being heard, the lower appellate Court shall hear and decide the appeal as expeditiously as possible and in any case, within three months from the date of receipt of writ of this Court.

29. The Revision Application is disposed of in the aforesaid terms.