

(1969) 02 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No"s. 256 and 257 of 1967

Vazirboo and Others

APPELLANT

Vs

Keshavlal Narshidas and Another

RESPONDENT

Date of Decision : 25-02-1969

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 11(3), 11(4), 12(2), 12(4)
Civil Procedure Code, 1908 (CPC) — Section 27, 96
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1970 Bom 242 : (1969) 71 BOMLR 745 : (1970) ILR (Bom) 704

Hon'ble Judges : Bal, J

Bench : Single Bench

Advocate : H.C. Tunara, for the Appellant; Y.S. Chitale and J.S. Mukadam, for the Respondent

Judgement

1. These two petitions arise out of the same order of the Court of first instance and raise an interesting question of law for decision.

2. One Kurban Hussein Rahamatalli owned a building called Tayeb Building" at Nagdevi Cross Lane, Bombay. Shop premises in that building were let out by him to a firm doing business under the name and style of Messrs. Keshavlal Narsidas. The agreed rent of the premises was Rs. 245.54 per month. As the firm fell in arrears of rent, Kurban Hussein gave notice to it on 16-11-1961 demanding the arrears of rent from 1-11-1959 and purporting to terminate the tenancy on the ground of non-payment of rent. To that notice Kurban Hussein received a reply dated 15-1-1962 wherein the firm asked for time to pay the arrears. No payment was, however, made even thereafter and on 15-2-1962 Kurban Hussein filed the suit for eviction and recovery of arrears of rent, leading to the present petitions.

3. In answer to the summons of the suit one Ramanlal Shah claiming to be the sole proprietor of the concern, put in appearance on behalf of the firm and filed his written, statement on 26-7-1962. He did not raise any contention regarding

standard rent or regarding the amount of arrears claimed in the suit but stated that the rent had remained in arrears on account of some dispute with the landlord about repairs to the premises and that he was ready and willing to pay the same. He contended that the firm had been, dissolved and all the former partners were therefore, necessary parties to the suit.

4. In November, 1962 Kurban Hussein moved the Court for expediting the suit but was unsuccessful in his attempt. He died on 25-12-1963 while the suit was still pending and the seven petitioners who are his legal representatives were brought on record in his place.

5. On 1-6-1966 two persona named Parmanand M. Shah and Priyakant M. Shah made an application in the suit alleging that they were also partners of the firm along with Ramanlal and praying that they should be joined as defendants to the suit as Ramanlal was not likely to safeguard their interest. That application came to be granted and Parmanand and Priyakant were joined as defendants Nos. 2 and 3 on 22-7-1966. They filed separate written statements on 3-8-1968 but the contentions raised by them were common, One of the contentions was that the agreed rent was excessive and hence the standard rent should be fixed.

6. In the meantime on 26-7-1968 the petitioners had made an application to the trial Court u/s 11(4) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Rent Act"), praying for an order directing the defendants to deposit the arrears of rent. The application was opposed by all the defendants and after considering the contentions urged on behalf of the parties, the trial Court passed an order on 7-10-1968 in the following terms:

"9 (a) Defendants Nos. 1 to 3 do deposit in the Court Rs. 8225.08 on or before December 8, 1966, and further regularly deposit in Court Rs. 245.54 every month first of such payment being on January 8, 1967.

(b) If the defendants fail to comply with any part of the above order, they shall not be entitled to appear in or defend the suit except with leave of the Court."

7. Against the said order of the trial Court, Ramanlal filed a revision application on behalf of the firm before the Appellate Bench of the Court of Small Causes, while Parmanand and Priyakant filed a similar but separate application before the same Bench, The two applications were heard separately and decided on different dates. The application of Ramanlal was decided on 11-1-1967 while that of Parmanand and Priyakant was decided on 27-1-1967, The Appellate Bench of the Court of Small Causes came to the conclusion that Section 11(4) of the Rent Act which was introduced in the Act by an amendment on 28th March, 1963 was not retrospective in operation. It had no application to a suit filed before that date and the defendants to such a suit cannot be deprived of their right to defend which accrued to them on the filing of the suit. In both the revision applications the Appellate Bench accordingly passed orders setting aside Clause (b) of the order of the trial Court. It is against those decisions of the Appellate

Bench that the present petitions have been filed.

8. Two petitions were filed because although the original order of the trial Court was a single one, the orders passed in the two revision applications were separate. Spl. C. A. 256/67 has been filed against the order passed in the revision application filed by Ramanlal on behalf of the firm, while Spl. C. A. 257/67 has been filed against the order passed in the revision application filed by Parmanand and Priyakant. In the latter Spl. C. A. all the three defendants are made parties while in the former only the firm has been joined as an opponent because to the Revision Application from which it arises, Parmanand and Priyakant were not parties.

9. As both the petitions arise out of the same order of the Court of first instance, I have heard them together. No one appeared on behalf of the firm at the hearing. Mr. Chitale appeared on behalf of Parmanand and Mr. Mukadam appeared on behalf of Priyakant. The case was however, argued on behalf of the opponents by Mr. Chitale alone and his arguments were adopted by Mr. Mukadam.

10. On behalf of the petitioners Mr. Tunara contends that the Appellate Bench of the Court of Small Causes was in error in holding that Section 11(4) of the Rent Act is not retrospective in operation and does not apply to suits which were filed before the date on which it came into force. He bases his argument on two grounds. He contends in the first place that the right of a defendant to appear in the suit and to file defences, is merely a procedural right and the amendment of the Rent Act by the introduction of Section 11(4) therein being a procedural amendment is necessarily retrospective. Secondly, according to him, even if the new provisions of Section 11(4) of the Rent Act are not merely procedural and hence retrospective for that reason, the legislature has made them retrospective by necessary intendment.

11. Mr. Chitale does not dispute that if the provisions of Section 11(4) are merely procedural, they must be taken to be retrospective. He, however, contends that they are not merely procedural but affect the defendants' right to appear in and defend the suit which is a substantive right vesting in them at the institution of the suit. Mr. Chitale does not also dispute that Legislature is competent to enact provisions retrospectively restricting and controlling the vested right of a defendant to appear in and defend the suit but contends that the Legislature has not made the provisions of Section 11(4) of the Rent Act retrospective either expressly or by necessary intendment,

12. Mr. Tunara's first contention need not detain us long. It is a fundamental principle of our legal system that no person should be condemned unheard, no decision affecting him should be reached behind his back, no proceeding which is likely to affect his life and/or property should go on in his absence and no person should be precluded from participating in such proceedings. That principle is a principle of natural justice. The right to appear in and defend the suit cannot, therefore, be said to be merely a procedural right, It is a substantive right which

vests in the defendant at the institution of the suit against him. The right thus conferred on the defendant can no doubt be restricted or controlled by legislation but in order to have that effect the legislation in question must say so expressly or by necessary intendment.

13. Even the right of appeal which is a creature of law, is not a matter of procedure but is a substantive right vesting in a litigant at the institution of the proceedings, In Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, , their Lordships of the Supreme Court observed:

".a right of appeal is not

merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given, by, the inferior Court. In the language of Jenkins, C. J., in Nana v. Sheku to disturb an existing right of appeal is not a mere alteration in procedure, Such a vested right cannot be taken away except by express enactment or necessary intendment." The following principles regarding the nature of the right or appeal, were laid down by the Supreme Court in Garikapatti Veeraya Vs. N. Subbiah Choudhury, .

"(i) That the legal pursuit of a remedy, a suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This a vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise".

14. There is stronger reason for holding that the right to appear in and defend the suit is a substantive right which vests in the defendant at the institution of the suit against him and it cannot be restricted, impaired or imperilled thereafter, except by legislation which does so expressly or by necessary intendment.

15. The decision in Keshavlal Parbhudas Chokshi Firm and Others Vs. Manubhai

I. Vyas, on which strong reliance is placed by Mr. Tunara does not in fact support his contention but supports the contrary conclusion. It was argued in that case that the expression "a summons may be issued to the defendant" appearing in Section 27 of the CPC shows that there is no absolute right in the defendant to appear and answer the claim made against him. Rejecting that contention, the Division Bench which decided the case observed:

"Section 27 appears to be intended to give effect to the principle audi alteram partem. When it says that on the institution of a suit a summons may be issued to the defendant to appear and answer the claim, it does postulate that the defendant should have an opportunity to appear and answer the claim and provides that a summons may be issued to the defendant for such purpose. We may, therefore, proceed on the Basis that Section 27 postulates a right in the defendant to appear and answer the claim".

The vested right of the defendant to appear and answer the claim made against him was thus recognised by the Gujarat High Court in the above case.

16. The position is so clear that I do not think it necessary to refer to the other provisions of the CPC and some rulings to which a reference was made by Mr. Tunara. Most of those rulings relate to certain specific statutory provisions materially different from the one with which we are concerned in the present case while the others only state that a statute altering procedure, is ordinarily retrospective. This last proposition is unexceptionable and is not disputed by Mr. Chitale also.

17. Turning to the second contention of Mr. Tunara there is nothing in Section 11(4) or in the amending Act (Maharashtra Act No. 14 of 1963) by which it was introduced in the Rent Act, to make it expressly retrospective and the question which has therefore to be considered is whether it can be said to be retrospective by necessary intendment.

18. Mr. Tunara argued that Section 11(4) is a "remedial" measure and hence must be presumed to be retrospective. He relied for fills proposition on the decision in Seth Rajmal Vs. Dr. Krishan Swaroop, . This is a decision of a single Judge of the Rajasthan High Court and although, it is observed therein that an amending statute which is remedial in its nature has to be construed as being retrospective and applicable to pending suits, no reasons are given for that conclusion. On the other hand we have the decision of the Supreme Court in The Central Bank of India Vs. Their Workmen, wherein, after discussing the position relating to "Declaratory Acts", it has been observed:

A remedial Act, on the contrary, is not necessarily retrospective, it may be either enlarging or restraining and it takes effect prospectively, unless it has a retrospective effect by express terms or necessary intendment."

No presumption about retrospective opera-ion can, therefore, be drawn from the mere fact that a provision is a remedial one. This does not, however, mean that

the fact that a provision is a remedial one has no significance at all. It certainly is an important factor to be taken into account while arriving at a conclusion as to whether the particular provision is intended to be retrospective. The problem always is to find out the real intention of the Legislature in enacting the particular provision and the answer can generally be found by considering the legislative history of the enactment, the nature of the particular provision, the context in which it occurs and the object which the Legislature in all probability wanted to achieve by enacting it,

19. In *Rustomji v. Bai Moti*, AIR 1940 Bom 90, a Division Bench of this High Court had to consider the question of the retrospective operation of Section 53-A of the Transfer or Property Act. Delivering the judgment of the Bench in that case. Beaumont, C. J, observed:

"No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions ".

20. In *Shreekant Pandurang v. Emperor*, AIR 1943 Bom 169 the same learned Chief Justice quoted with approval the following observations from Halsbury's Laws of England:

"The fact of a statute being remedial, or designed to protect the public interest, is matter to which great weight is to be attached, and a different principle prevails where the statute is one that introduces a new remedy".

That case related to the interpretation of an Ordinance but the following observations of the learned Chief Justice are pertinent:

"In my opinion the normal presumption that a statute is not intended to interfere with vested rights has no application to the construction of this Ordinance. "I may also observe that this rule as to the construction of statutes does not apply even to statutes passed for the protection of the public.""

(The underlining (here in single " ") is mine) The learned Chief Justice went on to observe:

"I would further hold that even if the presumption in question is to apply to this Ordinance, "it is clear from the circumstances in which the Ordinance was passed that such Ordinance was intended to apply retrospectively". (The underlining (here in single " ") is mine).

21. In *Rafiquennessa Vs. Lal Bahadur Chetri (Dead) through his Representatives and Others*, , the Supreme Court had to consider the question of the

retrospective operation of certain provisions of Assam Non-Agricultural Urban Areas Tenancy Act, 1955, and the argument urged was that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision or a statute should be given retrospective operation if by such operation vested rights are likely to be affected. After referring to this argument their Lordships observed:

"In order to make the statement of the law relating to the rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retrospective operation appears to be clearly implicit in the provision construed in the context where it occurs".

22. Coming now to the provisions of Subsection (4) of Section 11 of the Rent Act over which the controversy has arisen in the present case, it will be convenient to set out here not only Sub-section (4) but also Sub-section (3) of that section (as it now stands) which was introduced in the Act at the same time and by the same amending Act These sub-sections read as follows:

"(3) If any application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under Sub-section (2) of Section 12, the Court shall forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant, and make an order directing the tenant to deposit such amount in Court, or at the option of the tenant make an order to pay to the landlord such amount thereof as the Court may specify, pending the final decision of the application. A copy of the order shall be served upon the landlord. Out of any amount deposited in Court, the Court may make an order for payment of such reasonable sum to the landlord towards payment of rent or increases due to him, as it thinks fit. If the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed,

(4) Where at any stage of a suit for recovery of rent, whether with or without a claim of possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant an order to pay to the landlord such amount thereof as the Court may specify during the pendency of the suit The Court may also direct that if the tenant fails to comply with any order made as aforesaid within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be

granted subject to such terms and conditions as the Court may specify."

A little previous history will show the reason why these two sub-sections had to be introduced in the Rent Act. It is well known that the Rent Act was enacted for the benefit mainly of the tenants and in order to protect them against eviction and against being made subject to payment of exorbitant rents. The Act therefore naturally imposes restrictions on the right of landlords to charge rent as well as to evict the tenants. The Legislature had, however, to see that no injustice was done to the landlords beyond what was absolutely necessary for securing the protection which was being given to the tenants. The protection against eviction which is embodied in section 12 is available to a tenant who pays or is ready and willing to pay and observes and performs the other conditions of tenancy which are not inconsistent with the provisions of the Rent Act. It can hardly be disputed that it is the first and foremost duty of a tenant to go on paying the standard rent and permitted increases regularly. A tenant who is not prepared to do this should have no protection under the Rent Act. However, as the Act stood before its amendment in 1963, there was no way of compelling the tenant to pay or deposit in Court any amount towards rent during the pendency of a suit for recovery of rent with or without a claim for possession of the premises filed against him by the landlord. It is common experience that such a suit under the Rent Act takes several years for its final decision and if during all that period the tenant could withhold the rent on the excuse that it was excessive and standard rent should be fixed, it would cause great injustice and hardship to the landlord. The explanation to Section 13 which is now numbered as Explanation I, provided for a presumption of readiness and willingness to pay in favour of the tenant if within one month of the receipt of the notice u/s 12(2) from the landlord he made an application for fixation of standard rent and thereafter paid or tendered the amount of rent or permitted increases specified in an order which the Court was required to make on such an application u/s 11(3) as it then stood. There was, however, no obligation on him to deposit any amount in Court nor had the Court any power to pay out to the landlord such amount, if any, as the tenant chose to deposit during the pendency of his application or of the suit filed by the landlord. The power to pay to the landlord part or whole of the amount which the tenant may have voluntarily deposited, was for the first time given to the Court by an amendment to 1953. By that amendment which was effected by Bombay Act 61 of 1953, Sub-section (4) was added to Section 12. Even then there was no power in the Court to compel the tenant to make any payment to the landlord or to deposit any amount in Court. This was pointed out by Chief Justice Chagla in *Karamsey Kanji v. Valji Virji* (1054) 56 Bom LR 619, The learned Chief Justice had to hold in that case that the Court had no jurisdiction under the law as it then stood, to order the tenant to deposit any amount in Court. That being the position, the tenant could withhold the rent during the pendency of an application u/s 11 filed by himself as well as if a suit filed by the landlord, without any immediate penal consequences following to him on that account.

23. Sub-section (3) of Section 11 as it stood before 28th March, 1963 was in the following terms:

"If an application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under Subsection (2) of Section 12, the Court shall forthwith make an order specifying the amount of rent or permitted increases to be paid by the tenant pending the final decision of the application, and a copy of such order shall be served upon the landlord".

Sub-section (4) of Section 11 as it now stands, is a wholly new provision while the original Sub-section (3) has been substituted by the present Sub-section (3) which I have already set out. It will be seen that these new "provisions now empower the Court to order the tenant to deposit certain amounts in an application for fixation of standard rent made by him, as well as in a suit filed against him by his landlord and to direct that if he fails to deposit those amounts, his application shall stand dismissed and he shall not be entitled to appear in and defend the landlord's suit except with the leave of the Court. This new power is given to the Court evidently for the protection of the landlords and in order to prevent the tenants taking undue advantage of the protection afforded to them by the Rent Act.

24. The Legislature had realised the injustice and hardship which was likely to be caused to the landlords by the tenants unreasonably withholding the rent on the ground that it was excessive and standard rent should be fixed or on other grounds and wanted to avoid that result by enacting Sub-section (4) of Section 11 of the Rent Act, Provision of this nature has to be interpreted in such a way as to advance the remedy and suppress the mischief. I may quote here the following observations of Chief Justice Chagla in *Syedna Taher Saifuddin Vs. Tyebbhaji Moosaji Koicha and Another*, in connection with the interpretation of another statute:

"The real question that we have to consider is what was the mischief that the Legislature intended to suppress, because it is clear that the Act we are considering is a remedial measure, and it is well settled that the Court should give full effect to a remedial measure to the extent that the language used by the Legislature is capable of extending the remedy to the mischief which the Legislature had in mind".

As the provisions of Sub-section (4) of Section 11 of the Rent Act are intended to protect the landlords against the mischief which might result by the tenants unreasonably withholding the rent, it would be reasonable to suppose that the Legislature intended to extend that protection to all landlords including those whose proceedings were already pending in the Court at the time when the amendment was made. The provision which is made for the benefit of file landlords will have to be interpreted in such a way that the maximum number of that class gets the benefit of it, In that view of the matter it must be held that

the provisions of Sub-section (4) of Section 11 are retrospective and apply to proceedings pending at the time when the amending Act came into force.

25. Mr. Chitale mainly relied on the presumption against giving retrospective operation to statutes which affect vested rights. No doubt that presumption has generally to be drawn but as I have already pointed out, it is not an absolute rule and where as here the intention of the Legislature to give retrospective operation to the provisions of the statute in question can be clearly seen, the presumption against retrospective operation cannot arise.

26. Mr. Chitale pointed out that Section 11(4) empowers the Court to pass the orders contemplated therein, even in cases Other than those where the tenant is withholding the rent on the ground that it is excessive and standard rent should be fixed. He argued that the tenant may have a good defence unrelated to the question of rent or may have a genuine dispute regarding the amount claimed by the landlord as arrears of rent; he may, for instance, have a good defence of satisfaction. If in such a case the tenant is unable to comply with the order of the Court, the suit would be decreed against him without his defence being considered and grave injustice would be caused to him. I do not think there is any reason to apprehend such a result. The power to make the orders contemplated by Section 11(4) of the Rent Act in cases other than those where the tenant is withholding the rent on the ground that it is excessive, is discretionary and there is no reason to suppose that in arriving at the conclusion that it is "just and proper to make such an order the Court will not take into consideration all the circumstances of the case. In any event the position would be the same whether the order is made in a suit pending at the date when Section 11(4) was enacted or in a suit filed thereafter,

27. The result of the above discussion is that the provisions of Section 11(4) of the Kent Act must be taken to be retrospective in their operation and applicable to pending suits. The orders of the Appellate Bench of the Court of Small Causes cannot therefore be sustained.

28. The rule is accordingly made absolute, the orders impugned in both the petitions are quashed and set aside and the order of the trial Court is restored. The petitioners shall get their costs in both the petitions.

29. Rule made absolute.