Raju Kakara Shetty

Vs

Ramesh Prataprao Shirole and Another

Civil Appeal No. 5020 of 1989

(K. Jagannatha Shetty, R. M. Sahai, A. M. Ahmadi JJ)

15.01.1991

JUDGMENT

AHMADI, J. –

1. This is a tenant's appeal by special leave directed against the judgment of the High Court of Maharashtra at Bombay whereby it confirmed the eviction order passed by the 6th Additional District Judge, Pune, in Civil Appeal No. 662 of 1988 in reversal of the order of dismissal of the suit passed by the learned Additional Judge of the Court of Small Causes, Pune, in Civil Suit No. 348 of 1985 on April 30, 1988. The brief facts giving rise to this appeal are as under :

> On February 5, 1976 the appellant executed a lease agreement in respect of a part of the ground floor of property bearing City Survey No. 1205/2/9 situate at Shivaji Nagar, Pune city, more particularly described in paragraph 1 of the said agreement. The said premises were taken on rent for the purposes of restaurant business on monthly rental basis. By clause 3 of the agreement the appellant undertook to pay a total rent of Rs. 1000 per month for the demised premises (Rs. 900 for the hotel portion and Rs. 100 for the garage); the said rent being payable every month in advance. Clause 5 of the agreement prohibited sub-letting of the premises or parting with the possession thereof in any other manner. As the appellant committed a default in the payment of rent from June 1983 to December 1984 in respect of hotel portion and from November 1979 to December 1984 in respect of the garage, respondent 1 despatched a notice dated December 31, 1984 terminating the appellant's tenancy as required by Section 106 of the Transfer of Property Act. The appellant failed to respond to the said notice and neglected to pay the amount of arrears to rent claimed therein within one month from the date of receipt of the notice. Consequently, respondent 1 filed the suit which has given rise to this appeal on February 26, 1985, being Civil Suit No. 348 of 1985, seeking eviction on four grounds, namely, (i) the tenant was in arrears of rent for more than six months and has failed and neglected to pay the amount due within one month from the date of receipt of the eviction notice, (ii) the tenant had raised a permanent structure in the suit premises in breach of Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called 'the Act'), (iii) the tenant was guilty of causing nuisance and annoyance to the neighbours, and (iv) the tenant had sublet the premises to respondent 2 without his consent.

2. The suit was contested by the appellant-tenant by his written statement Ex. 25 and the supplementary written statements Exs. 56 and 60 filed after the amendments in the plaint.

Respondent 2, the alleged sub-tenant, adopted the written statement of the appellant by his purshis Ex. 30. During the pendency of the suit Section 12(3) of the Act was amended by Section 25 of the Amendment Act 18 of 1987 whereby clauses (a) and (b) of sub-section (3) of Section 12 were deleted and instead a new sub-section (3) was substituted which restricted the court's right to pass a decree for eviction on the ground of arrears of standard rent and permitted increases, if on the first date of the hearing of the suit or on such other date as the court may fix, the tenant paid or tendered in court the standard rent and permitted increases then due together with simple interest on the amount of arrears at the rate of 9 per cent per annum and thereafter continued to pay or tender in court regularly such standard rent and permitted increases till the final decision of the suit and also paid the cost of the suit as directed by the court. The appellant contended that the said amendment had retrospective effect and he was entitled to the benefit thereof. In the alternative he also contended that he had paid the rent to respondent 1 but the latter had failed to issue rent receipts. He also questioned the validity of the notice terminating his tenancy. He denied the allegation that he had sub-let the premises or has parted with the possession thereof in favour of respondent 2 or that he was guilty of causing nuisance and annoyance to the neighbours. The allegation that he had raised a structure of a permanent nature in the hotel premises without the permission of respondent 1 was also disputed. He, therefore, contended that the suit was liable to fail.

3. The learned Additional Small Causes Judge, Pune raised issues at Ex. 36 and came to the conclusion that the agreed rent for the hotel and the garage was Rs. 900 per month and in addition thereto the tenant had agreed to pay Rs. 120 per month for education cess and other taxes. He had concluded that the tenant had failed to pay the rent in respect of the garage from November 1979 and in respect of hotel from June 1983. Since the tenant had failed to pay or deposit the arrears claimed by the eviction notice dated December 31, 1984 within one month from the receipt thereof, the court held he was liable to be evicted under Section 12(3)(a) of the Act but in view of the substituted Section 12(3), he was entitled to protection as he had paid the entire arrears together with interest and costs before the passing of the decree. He also held that there was no reliable evidence to show that the tenant has sub-let the premises or had made any alteration of a permanent nature without the consent of respondent 1. The allegation of nuisance and annoyance was held not proved on facts and was even otherwise found to relate to a post-suit incident of 1986. On these findings the learned trial Judge dismissed the suit with no order as to costs.

4. Respondent 1, feeling aggrieved by the order of dismissal of his suit, preferred an appeal being Civil Appeal No. 662 of 1988. The appellant court reversed the decree of the trial court holding that the rent was payable by the month and there being no dispute regarding standard rent and permitted increases and the tenant having failed to pay the arrears within one month from the date of receipt of a valid eviction notice dated December 31, 1984, he was liable to be evicted under Section 12(3)(a) of the Act since the amended Section 12(3) introduced by Amending Act 18 of 1987 was prospective in nature. It also took the view that since the premises was sub-let by the appellant to respondent 2 on a rental of Rs. 2000 per month, the former was guilty of profiteering. So far as the other two contentions regarding raising of a permanent structure and allegation of nuisance and annoyance were concerned, the appellate court concurred with the findings recorded by the trial court. In this view that the appellate court took it allowed the appeal and ordered both the tenant and sub-tenant to deliver vacant possession of the demised premises within two months from the date of the order with costs throughout.

5. The appellant-tenant, feeling aggrieved by the order of eviction passed by the learned 6th Additional District Judge, Pune, preferred a Writ Petition No. 5021 of 1989 to the High Court. The writ petition was rejected at the admission stage by a short speaking order. The High Court observed

that the eviction notice was legal and proper and the lower appellate court was right in concluding that the appellant had sub-let the premises to respondent 2 as alleged. The request for extension of time to vacate was rejected as the tenant was unwilling to file an undertaking in the usual form. Feeling aggrieved by the said order the tenant has preferred the present appeal after obtaining special leave.

6. The standard rent in respect of the demised premises has been found by all the three courts to be Rs. 900 per month (Rs. 750 in respect of the hotel premises and Rs. 150 in respect of the garage). In addition thereto the tenant had undertaken to pay a lump sum of Rs. 120 per month by way of education cess and other taxes in respect of the demised premises. Thus the tenant was required to pay a consolidated sum of Rs. 1020 per month as rent to respondent 1. By December 31, 1984 the appellant-tenant had failed to pay the rent in respect of the hotel premises from June 1, 1983 and in respect of the garage area from November 1, 1979; thus the arrears of rent in respect of hotel premises came to Rs. 16,530 and in respect of the garage premises Rs. 9300 aggregating to Rs. 25,830. Respondent 1, therefore, served the appellant with a notice terminating the tenancy by the end of January 31, 1985 and called upon the appellant to pay the arrears to rent and vacate and hand over peaceful possession of the demised premises by that date. Even after the receipt of this notice, the appellant neither paid the amount due within one month of the receipt of the notice not filed any application for fixation of standard rent and/or the permitted increases under Section 11 of the Act. On the failure of the appellant to comply with the requirements of the eviction notice, respondent 1 filed a suit for eviction on February 26, 1985 on the grounds stated earlier. In the said eviction suit respondent 1 claimed the arrears of rent up to the end of December 1984 as set out in the eviction notice and damages of Rs. 1020 for the month of January 1985 together with Rs. 250 by way of notice charges. The total claim made came to Rs. 27,100. The appellate court and the High Court came to the conclusion that the newly substituted Section 12(3) had no application and the case was governed by Section 12(3)(a) as it stood before the amendment.

7. Dr. Chitale, the learned counsel for the appellant frankly conceded that in view of the decision of this Court in Arjun Khiamal Makhijani v. Jamnadas C. Tuliani ((1989) 4 SCC 612) the case would be governed by Section 12(3) as it stood before its amendment by Amending Act 18 of 1987, since the substituted Section 12(3) was found to be prospective in nature. This Court in paragraph 14 of the judgment at page 624 repelled the submission that it was retrospective in operation in the following words : (SCC p. 624, para 14)

> "In our opinion, the tenants are not entitled even to the benefit of the amended sub-section (3) of Section 12 of the Act inasmuch as on a plain reading of the sub-section it is not possible to give it a retrospective operation."

Dr. Chitale was, therefore, justified in submitting that the decision of this case must rest on the question whether it attracted Section 12(3)(a) or Section 12(3)(b) as it stood prior to the amendment. According to Dr. Chitale since the tenant was obliged to pay the education cess and other taxes by way of permitted increases which were payable at the end of the year, the case would not attract Section 12(3)(a) as a part of the rent became payable annually and not monthly. He further contended that there was nothing on the record to show that the landlord had paid the amount of education cess and other taxes and unless payment of the taxes to the local authority was established the landlord had no right to claim the same from the tenant. According to him, the landlord's right to recover the taxes arises not at the end of the financial year but on the date on which he makes the payment to the local authority. Dr. Chitale, therefore, submitted that the case attracted Section 12(3)(b) and when the tenant deposited a sum of Rs. 37,740 on January 18, 1986

before the issues were settled on February 13, 1986 he could be said to have made the full payment of the rent then due and therefore the courts below were not justified in granting an eviction decree for arrears of rent under Section 12(3)(a) of the Act. In support of his contention he invited our attention to four decisions of the Gujarat High Court, namely, (1) Panchal Mohanlal Ishwardas v. Maheshwari Mills Ltd. ((1962) 3 Guj LR 574); (2) Prakash Surya v. Rasiklal Ishverlal Mehta ((1978) 1 RCR 10); (3) Vanlila Vadilal Shah v. Mahendrakumar J. Shah (AIR 1975 Guj 163 : 16 Guj LR 71); and (4) Vishwambhar Hemandas v. Narendra Jethalal Gajjar (AIR 1986 Guj 153 : (1986) 2 Ren CR 268). He also placed reliance on a Bombay High Court decision in Muktabai Gangadas Kadam v. Muktabai Laxman Palwankar ((1969) 71 Bom LR 752) and the decision of this Court in Bombay Municipal Corporation v. Life Insurance Corporation of India ((1970) 1 SCC 791 : (1971) 1 SCR 335). On the question of sub-letting he stated that the trial court has rightly pointed out that the evidence falls far short of proof of sub-tenancy and the appellate court as well as the High Court were in error in reversing that view of the trial court.

8. Mr. Tarkunde, the learned advocate for the landlord, on the other hand submitted that once the four ingredients of Section 12(3)(a) were shown to be satisfied, the court had no alternative but to decree the suit. According to him, the standard rent in respect of the demised premises was shown to be Rs. 900 per month and in addition thereto the tenant had agreed to pay a quantified sum of Rs. 120 per month by way of education cess and other taxes. It was proved as a fact that the tenant had failed to pay the rent in respect of the garage from November 1, 1979 and the rent in respect of the hotel from June 1, 1983. The tenant had also failed to pay the tax amount at the rate of Rs. 120 per month from June 1, 1983. Since there was no dispute in regard to standard rent or permitted increases in this case, the tenant was under an obligation to pay the entire amount due from him by way of rent and taxes within one month of the receipt of the eviction notice dated December 31, 1984. Under Section 12(1) of the Act a landlord is not entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, insofar as they are consistent with the provisions of the Act. Section 12(2) places a restriction on the landlord's right to sue his tenant for recovery of possession on the ground of non-payment of the standard rent and/or permitted increases due from him. According to that section no suit for recovery of possession can be instituted on the aforesaid ground until the expiration of one month next after notice in writing of the demand of the standard rent and/or permitted increases has been served upon the tenant in the manner set out in Section 106 of the Transfer of Property Act. To comply with this requirement the landlord had issued a notice on December 31, 1984 calling upon the tenant to pay the standard rent which was in arrears along with the quantified tax amount in arrears up to that date as detailed in the notice. The tenancy was terminated w.e.f. January 31, 1985. Admittedly, the tenant did not respond to this notice nor did he pay or deposit the amount of arrears as claimed in the notice within one month of the receipt thereof. He also did not file any application for fixation of standard rent and/or permitted increases under Section 11 of the Act. There was, therefore, no question of the court specifying the amount of interim rent or permitted increases under sub-section (3) of Section 11 during the pendency of such an application. Mr. Tarkunde, therefore, submitted that the case was clearly governed by the provisions of Section 12(3)(a) since indisputably the rent inclusive of the quantified tax amount was payable by the month; there was no dispute as regards the standard rent/permitted increases; the tenant was found to be in arrears of rent for more than six months and he had failed to pay or deposit the rent within one month after the receipt of the notice under Section 12(2) of the Act. According to Mr. Tarkunde the submission that because the education cess was payable by the year, a part of the rent was not payable by the month and therefore Section 12(3)(a) had no application is clearly misconceived for the simple reason that in

the present case the landlord as well as the tenant has by agreement quantified the amount of education cess and other taxes at Rs. 120 per month and had not left the determination of the amount to fluctuations in the tax amount from time to time. Once the quantum in respect of the tax liability is determined by agreement between the parties, the same forms part of the rent and it is not open to contend that notwithstanding the agreement the tax amount remains payable by the year and the tenant is obliged to pay the same only after the landlord has paid the taxes to the local authority. He, therefore, contended that the case law on which Dr. Chitale had placed reliance can have no application to the special facts and circumstances of the present case.

9. On the second question regarding sub-letting Mr. Tarkunde submitted that this Court should not interfere with a finding of fact recorded by the appellate court and affirmed by the High Court since it is nobody's case that finding is perverse and not based on evidence. In this connection, he took us through the relevant part of the pleadings and the evidence to support his contention that the conclusion reached by the appellate court and the High Court was based on evidence and was not perverse or against the weight of evidence. He submitted that even if two views are possible this Court in exercise of its powers under Article 136 of the Constitution should refrain from disturbing a possible and plausible view.

10. We have given out anxious consideration to the rival views propounded by the learned counsel for the appellant-tenant as well as the respondent-landlord. On a consideration of the submissions made at the bar and having regard to the provisions of law we are inclined to think that the view taken by the appellate court and the High Court does not demand interference. There is no dispute regarding the standard rent of the demised premises. Under clause 3 of the lease agreement the rent was fixed at Rs. 1000 per month but subsequently it seems to have been revised by consent of parties to Rs. 1020 per month (Rs. 900 for the demised premises and Rs. 120 for education cess and taxes). The rent was payable 'every month regularly in advance' under clause 3 of the agreement. Clause 2 of the agreement states that the premises have been hired for restaurant business 'on monthly rental basis'. It is, therefore, clear from the terms of the lease agreement that the parties intended the tenancy to be monthly tenancy.

11. The two clauses of Section 12(3) as they stood before the Amendment Act 18 of 1987 provided as under :

> "12. (3)(a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period or one month after notice referred to in sub-section (2), the court shall pass a decree for eviction in any such suit recovery of possession.
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> (b) In any other case no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the court may fix, the tenant pays or tenders in court the standard rent and permitted increases then due and thereafter continues to pay or tender in court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit directed by the court."

Explanation I states that if there is any dispute regarding standard rent or permitted increases the tenant shall be deemed to be ready and willing to pay if, before the expiry of the period of one

month after notice referred to in sub-section (2), he makes an application to the court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the court.

12. Mr. Tarkunde, therefore, argued that even if the case is covered by Section 12(3)(b) since the tenant had failed to pay or deposit the full amount due to the landlord as claimed in the eviction notice by the first date of hearing of the suit, i.e. February 13, 1986, and has also failed to make an application under Section 11(3) of the Act, the tenant was not entitled to the protection of that provision also. Mr. Tarkunde further submitted that the tenant was not regular in the payment of rent and permitted increases for the subsequent period also and there were long intervals between two payments made during the pendency of the litigation. He, therefore, submitted that even if Section 12(3)(b) was invoked the tenant had failed to comply with the requirement of that provision and was, therefore, not entitled to its protection. Since we are of the opinion that the case is covered by Section 12(3)(a) we do not consider it necessary to examine this submission based on the true interpretation of Section 12(3)(b) of the Act.

13. The only submission which Dr. Chitale made for taking the case out of the purview of Section 12(3)(a) was that the entire rent was not payable by the month which was the first condition to be satisfied for invoking the said provision. According to him, since the tenant was bound to pay education cess and other taxes in respect of the demised premises which were payable from year to year, a part of the rent was not payable by the month and therefore the first condition of Section 12(3)(a) was not satisfied. Hence, submitted Dr. Chitale, the case fell within the phrase 'in any other case', by which clause (b) of Section 12(3) opens. Before we answer the submission of Dr. Chitale it may be advantageous to refer to the relevant provisions of the Maharashtra Education (Cess) Act (Maharashtra Act 27 or 1962). Section 4(a) of the said Act provides for the levy and collection of tax (cess) on lands buildings at the rates specified in Schedule A on the annual letting value of such lands or buildings. The primary responsibility to pay this tax is cast by Section 8 on the owner of the land or building irrespective of whether or not he is in actual occupation thereof. Section 13 next provides that on payment of the amount of the tax in respect of such land or building the owner shall be entitled to receive that amount from the person in actual occupation of such land or building during the period for which the tax was paid. Under Section 15 any person entitled to receive any sum under Section 13 is conferred for the recovery thereof the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to receive the same. It thus seems clear that education cess is a tax and the owner is primarily responsible to pay the same to the local authority and on such payment a right is conferred on him to recover the same from the actual occupant in addition to the standard rent in respect of the demised premises. Sub-section (3) of Section 13 in terms states that the recovery of any amount of tax from an occupier under this provision shall not be deemed to be an increase for the purposes of Section 7 of the Act. It is, therefore, obvious that the landlord has a statutory right to recover the amount of education cess paid by him in respect of the demised premises from the tenant-occupant and such recovery shall not be an unlawful increase under of Section 7 of the Act but would squarely fall within the expression 'permitted increases' as defined by Section 5(7) of the Act. This statutory right to recover the amount of education cess in respect of the demised premises from the occupant-tenant can be quantified by agreement of parties so long as the amount quantified does not exceed the total amount actually paid by the owner by way of education cess. In the present case, it is nobody's contention that the amount of Rs. 120 per month payable by way of education cess and other taxes was in excess of the amount actually payable under the relevant statutes to the local authority. The Gujarat High Court has taken a consistent view that where the tenant is obliged under the terms of the tenancy or by virtue of the statute to pay the tax dues to the landlord, since such taxes which

form part of the rent are payable annually the case ceases to be governed by Section 12(3)(a) and falls within the purview of Section 12(3)(b) of the Act. In Maheshwari Mills Ltd. ((1962) 2 Guj LR 574) under the terms of the tenancy the tenant was obliged to pay the municipal taxes and property taxes in respect of the demised premises. The court took the view that such payment was by way of rent and since the municipal taxes and property taxes were payable on year to year basis, a part of the rent was admittedly not payable by the month and, therefore, Section 12(3)(a) was not attracted. In Prakash Surya ((1978) 1 RCR 10) the tenant had agreed to pay the municipal tax and education cess. The amount payable towards these taxes constituted rent and since the same was payable at the end of the year the court held that the rent had ceased to be payable by the month and hence Section 12(3)(a) had no application. The same view was reiterated in Vanlila case (AIR 1975 Guj 163 : 16 Guj LR 71) where education cess was payable by the tenant by virtue of Section 21 of the Gujarat Education Cess Act, 1962. Since it constituted a part of the rent, to be precise permitted increase under Section 5(7) of the Act, it was held that it took the case outside the scope of Section 12(3)(a) of the Act. In the case of Vishwambhar Hemandas (AIR 1986 Guj 153 : (1986) 2 Ren CR 268) also since the rent was inclusive of taxes the court held that the case was governed by Section 12(3)(b) of the Rent Act. The Bombay High Court has expressed the same view in Muktabai case ((1969) 71 Bom LR 752). This Court in the Bombay Municipal Corporation case ((1970) 1 SCC 791 : (1971) 1 SCR 335) held that while Section 7 of the Act prohibits increase above the standard rent it does not prohibit the recovery of increase to which a landlord is entitled under the other provisions of the said statute, namely, increase by way of 'permitted increases'. Education cess is specifically recoverable as rent by virtue of Section 13 and as sub-section (3) thereof provides that it shall not be treated as increase in rent under Section 7 of the Act, there can be no doubt that such an increase falls within the definition of 'permitted increases' under Section 5(7) of the Act. It, therefore, seems to be well settled that education cess is a part of 'rent' within the meaning of the Act and when the same is claimed in addition to the contractual or standard rent in respect of the demised premises it constitutes a permitted increase within the meaning of Section 5(7) of the Act and being payable on a year to year basis, the rent ceases to be payable by the month within the meaning of Section 12(3)(a) of the Act. But the question still survives whether the parties can by agreement quantify the said amount and make it payable on a month to month basis provided of course the said amount does not exceed the tax liability of the landlord; if it exceeds that liability it would infringe Section 7 of the Act and the excess would not be allowed as permitted increase within the meaning of Section 5(7) of the Act. A right to recover a certain tax amount from the tenant-occupant under the provisions of a statute can be waived by the owner or qualified by agreement at a figure not exceeding the total liability under the statute. If by agreement the amount is so quantified and is made payable by the month notwithstanding the owner's liability to pay the same annually to the local authority, the question is whether in such circumstances the 'rent' can be said to be payable by the month within the meaning of Section 12(3)(a) of the Act ? We see no reason why we should take the view that even where the parties mutually agree and quantify the tax amount payable by the tenant to the landlord on monthly basis, the rent should not be taken to be payable by the month within the meaning of Section 12(3)(a) of the Act. A statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the recovery can be regulated in the manner mutually arranged or agreed upon by the concerned parties so long as it is not in violation of statute. If for convenience and to facilitate payment, the parties by mutual consent work out an arrangement for the enforcement of the owner's statutory right to recover the tax amount and for discharging the tenant-occupant's statutory obligation to reimburse the owner, we see no reason for refusing to uphold such a contract and if thereunder the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability, the said monthly payment would constitute 'rent' payable by the month within the meaning

of Section 12(3)(a) of the Act. The view expressed by the Gujarat High Court in Vishwambhar Hemandas (AIR 1986 Guj 153 : (1986) 2 Ren CR 268) does not, with respect, state the law correctly if it holds that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent of Rs. 19.50 p.m. the mere recital in the lease that the rent is inclusive of taxes the case outside the purview of Section 12(3)(a) of the Act. We are, therefore, in respectful agreement with the view taken by the appellate court and the High Court in that behalf. We, therefore, hold that as the tenant had failed to comply with the requirement of Section 12(3)(a) to seek protection from eviction, the courts below were justified in ordering his eviction.

14. In the view that we take on the first point discussed above, it is unnecessary for us to examine the second point regarding sub-tenancy.

15. In the result we see no merit in this appeal and dismiss the same with costs. We, however, grant time up to December 31, 1991 to the tenant to vacate.

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