GUJARAT HIGH COURT

Duabhai

Vs.

Ramniklal

Civil Revn. Appln. No. 719 of 1971

(S.H. Sheth, J.)

24.06.1974

ORDER

S.H. Sheth, J.

1. The plaintiff-landlord filed the present suit for possession of the suit premises which consist of a room, an Osri and a kitchen. They are situate in the City of Rajkot and have been let out to the defendant-tenant at a monthly rent of Rs. 5/-. The plaintiff alleged against the defendant the following three grounds of eviction:

> (1) The defendant had been in arrears of rent for more than six months.
> (2) The defendant had erected a permanent structure in the suit premises and was, therefore, liable to be evicted.
> (3) The defendant had been causing nuisance and annoyance to the neighboring occupiers by working a furnace or Bhatthi.

2. The defendant denied the plaintiff's case and in his turn alleged that the notice to quit served upon him was invalid.
3. The learned Trial Judge found that the notice served by the plaintiff upon the defendant was valid and legal. He next found that the defendant had been in arrears of rent for more than six months and was, therefore, liable to be evicted. He also held that the defendant had been causing nuisance and annoyance to the neighboring occupiers and was also, therefore, liable to be evicted on that ground. He, however, held that the defendant had constructed no permanent structure alleged by the plaintiff. In view of his findings on two of the three grounds of eviction he passed in favor of the plaintiff decree for possession.

4. The defendant appealed to the District Court against that decree. The learned District Judge upheld all the three grounds of eviction against the defendant. He held that the defendant had

been in arrears of rent for more than six months and was, therefore, liable to be evicted from the suit premises. He also held that he had been causing nuisance and annoyance to the neighboring occupiers and had constructed a permanent structure. He, however, negatived the contention raised by the defendant that the notice to quit served upon him by the plaintiff was invalid. He therefore dismissed the appeal and confirmed the decree which is challenged by the defendant in this revision application.

5. Mr. D. U. Shah, who appears for the defendant, has challenged the findings recorded by the learned District Judge on all the four aspects. His first contention is that the notice to quit, Ex. 21, served by the plaintiff upon the defendant was invalid. The only point which he has tried to make out is that by the said notice the plaintiff terminated the tenancy of the defendant in respect of a room, Kitchen and an Osri. According to him, the tenancy in respect of Fali which formed a part of the same transaction ought to have been terminated. Since, according to Mr. D. U. Shah, the plaintiff had terminated the tenancy of the defendant in respect of a part of the leased premises the notice to quit was invalid. I find no substance in this argument raised by Mr. D. U. Shah because Fali which touches the suit premises is an open piece of land appurtenant to the suit premises. The reference to the suit premises, in my opinion, must necessarily include reference to any land appurtenant to it whether it is called Fali or is described in any other manner. The first contention raised by Mr. D. U. Shah, therefore, fails and is rejected.

6. The second contention which Mr D. U. Shah has raised is that the learned District Judge was in error in recording the finding that the defendant was liable to be evicted from the suit premises on the ground of arrears of rent. The plaintiff alleged in his notice of demand, Ex. 21, that the defendant had been in arrears of rent for a period of 29 months from 1st June, 1966 to 31st October 1968. The total arrears of rent at that point of time amounted to Rs. 145/- at the rate of Rs. 5/- per month. Before the expiry of one month from the service of notice of demand upon him the defendant remitted to the plaintiff a sum of Rupees 100.80 p. by money order on 25th Dec. 1968. The plaintiff refused to accept the money order because according to him it was a part payment which he was under no obligation to accept. The refusal of the money order is evidenced by Exs. 55 and 56. The defendant explained the position in the reply, Ex. 24, which he sent on 25th December, 1968, to the plaintiff. In order to show that the amount of Rs. 100.80 which he remitted to the plaintiff was in full payment of the arrears of rent he has relied upon two facts. The first fact is that in Regular Civil Suit No. 413 of 1966 which the plaintiff had filed against him at an earlier stage the plaintiff owed to him a sum of Rs. 41.70 which represented the costs of litigation awarded by the Court to him. He deducted that amount from the arrears of rent which he owed to the plaintiff. The second fact upon which he has relied is that in the earlier suit - Regular Civil Suit No. 413 of 1966 - arrears from 1st June, 1966 to 15th August, 1966, constituted the subject-matter of litigation between the parties. The claim in respect of those arrears of rent had been adjudicated upon in that suit. Mr. D. U. Shah, therefore, contends that those arrears of rent could not have formed the basis of the plaintiff's claim for possession in the present suit. I am in complete agreement with the submission made by Mr. D. U. Shah on this aspect. Since the arrears of rent from 1st June, 1966 to 15th August, 1966, formed the subject-

matter of litigation between the parties in the earlier suit - Regular Civil Suit No. 413 of 1966 - they could not have formed the subject-matter of the present litigation. If the plaintiff in the earlier litigation claimed possession of the suit premises from the defendant, *inter alia*, on the ground of arrears of rent which covered the period from 1st June, 1966 to 15th August, 1966, and if he failed in that attempt of his, he cannot on the same ground again claim possession of the suit premises from the defendant. Alternatively if he did not claim possession of the suit premises, *inter alia*, on the ground of those arrears of rent on which he could have founded his claim for possession, then obviously he gave up in the earlier suit his claim to possession on that ground. Any claim for possession which he would now make on the ground of arrears of rent for the aforesaid period would be hit by Order 2, Rule 2 of the Code of Civil Procedure. Therefore, the arrears of rent from 16th August, 1966, and not from 1st June, 1966, could form the ground of eviction. He, therefore, calculated the arrears of rent from 16th August. 1966 to 31st December, 1968, at the rate of Rs. 5/- p. m. and arrived at a figure of Rs. 142,50 paise, deducted from it the aforesaid sum of Rs. 41.70 and remitted to the plaintiff by money order the balance of Rs. 100.80. He calculated, the arrears of rent upto 31st December, 1968, because he remitted the amount by money order during that month. He did not only remit what the plaintiff had demanded but he remitted more with the object of paying up all arrears of rent due until the date of remittance. So far as the sum of Rs. 41.70 paise which the defendant deducted from the arrears of rent is concerned, it was an amount which had already been adjudicated upon. There could not be any dispute about it. The defendant was entitled to recover it from the plaintiff. He *bonafide* believed that he could deduct it from the arrears of rent and remit the balance. It cannot therefore be said that he was not ready and willing to pay the arrears of rent. There is no evidence to show that the defendant had *mala fide* deducted it.

7. Mr. S. M. Shah has tried to argue that if the defendant was entitled to deduct the aforesaid sum of Rs. 41.70 paise from the arrears of rent which the plaintiff owed to him, he ought to have reduced that amount of Rs. 41.70 by a sum of Rs. 17.50 which he owed to the plaintiff as and by way of decretal costs awarded to the plaintiff from the defendant by the Court in the same earlier litigation. It is true that the defendant did not do so. But failure on the part of the defendant to do so would not render him liable to be evicted from the suit premises on the ground of arrears of rent merely because he remitted to the plaintiff arrears of rent which was short by Rs. 41.70 which he was otherwise entitled to recover from the plaintiff. If the plaintiff had to recover from the defendant anything, it was a matter of mutual accounting between them. He, in my opinion, ought to have accepted the money order and called upon the defendant to pay him Rs. 17.50 which the defendant owed to him as and by way of decretal costs. In a situation of this type the defendant cannot be required to subject himself to the precarious condition of walking on the edge of a sword. Mr. S. M. Shah has further tried to argue that there was no agreement between the plaintiff and the defendant that the defendant should deduct from the arrears of rent the decretal costs awarded to him by the Court in the earlier litigation. So far as the factual aspect is concerned, Mr. S. M. Shah is quite right. But even if there was no agreement between the parties under which the defendant could deduct from the arrears of rent the aforesaid amount of Rs.

41.70 and yet if he *bonafide* did so, it cannot be said that he was not ready and willing to pay the arrears of rent to the plaintiff. To take any other view is to place premium on the obstinacy and obduracy of the plaintiff. That is not the object of the Rent Act.

8. Mr. S. M. Shah has tried to rely upon three decisions two of which have been rendered by this Court and the third has been rendered by the Allahabad High Court.

9. In *Nathubhai Gulabdas v. Dhakhibhai Muljibhai*[1], it has been held by Mr. Justice Raju that willingness to pay a part of the rent is not readiness and willingness to pay rent. The principle laid down by Mr. Justice Raju could have been very appropriately applied to the facts of this case if, without any justifiable cause, the defendant had remitted to the plaintiff a part of the arrears of rent. That is not the situation here. The defendant had a

[1] AIR 1963 Guj 305

very sound and cogent reason to remit to the plaintiff a lesser amount. Recovery of decretal costs awarded to him by the Court in the earlier litigation was a very sound reason to enable him to deduct from the arrears of rent the aforesaid amount of decretal costs. If he did so, he cannot be held to be guilty of having remitted to the plaintiff a part of the arrears of rent because the plaintiff in any case was bound to pay to the defendant the aforesaid amount.

10. The next decision upon which Mr. S. M. Shah has relied is in *Jagmohan Ratilal Sheth v. Jayantilal Laxmishanker*[2], It has been laid down by Mr. Justice D. P. Desai in that decision that once a tenant is in arrears of rent for six months or more and rent is payable by a month and there is no dispute about the standard rent, it can be said that a tenant has made himself subject to the risk of being evicted under Section 12 (3) (a) of the Rent Act. He has further observed that such a tenant cannot obliterate that risk by sending a part of the arrears so as to reduce the balance to less than six months' arrears prior to issue of the notice under Section 12 (2) of the Rent Act. If a part of arrears is sent, it has been observed by the learned Judge, in such circumstances, the landlord would be justified in refusing to accept them and the tender of a part of arrears would not be treated by the Court as equivalent to payment of a part of the arrears so as to reduce the default to a period of less than six months. Finally he has observed that such a refusal does not come in the way of the landlord in enforcing his right under Section 12 (3) (a) of the Rent Act if other conditions of that clause are satisfied. The principle laid down in the aforesaid decision is not applicable to the facts of the instant case firstly because what the defendant did in the instant case was not to remit a part of the arrears of rent but to remit within the time contemplated by Section 12 of the Bombay Rent Act all arrears of rent minus the amount which he under any circumstances was entitled to recover from the plaintiff. Secondly, the amount which he deducted from the arrears of rent was pot strange to the claim which the plaintiff had been making upon him nor was it foreign to the relationship of landlord and tenant existing between them. Thirdly, deducting the aforesaid amount he had sent the entire arrears of rent within one month of the service of notice of demand upon him. In my opinion, therefore, the principle laid down by the

learned Judge in the aforesaid decision cannot be extended to the facts of this case and it cannot be held that the defendant had subjected himself to the risk of being evicted under Section 12 (3) (a) of the Rent Act.

11. The last decision upon which reliance has been placed by Mr. S. M. Shah is in *Chotey Lal v. L. Chhakkilal*[3], It has been held by Mr. Justice Desai in that decision that under Section 3 (a) of U. P. (Temporary) Control of Rent and Eviction Act, 1947 the words "arrears of rent" not only included undecreed arrears but also decreed arrears of rent. He has observed that the expression "arrears of rent" has no technical meaning. It means rent not paid on the date on which it falls due. It remains so even though a suit is brought for the recovery and decreed. The only effect of the decree, it has been further observed in that decision, is that the cause of action is merged in the decree and that the landlord can realize the decreed amount in a certain manner but it does not have the effect of changing the arrears of rent into something other than arrears of rent. Assuming that the principle laid down by the learned Judge is applicable to a case under the Bombay Rent Act, it is

[2](1973) 14 Guj LR 161

[3] AIR 1953 All 113

quite clear that though the arrears of rent which formed the
subject- matter of adjudication between the parties - that is to say, the arrears of rent from 1st June, 1966 to 15th August, 1966, would remain the arrears of rent they would not furnish a fresh ground to the plaintiff to evict the defendant from the suit premises. That is not what the learned Judge has laid down in that aforesaid decision. Under the aforesaid circumstances. I am unable to uphold the finding recorded by the Courts below on the question of arrears of rent. In my opinion, the defendant was ready and willing to pay the arrears of rent and was, therefore, not liable to be evicted on this ground.

12. Mr. Shah has tried to argue that if the case falls under Section 12 (3) (a) the two points of defense which the defendant has raised would not be available to him. In the facts and circumstances of this case I do not think that the case attracts Section 12 (3) (a). Remittance by the defendant had made this ground of the plaintiff non-existent.

13. The next contention which Mr. D. U. Shah has raised is that the learned District Judge was in error in holding that the defendant had constructed a permanent structure in the suit premises and was, therefore, liable to be evicted. The facts found are that the defendant has constructed outside the room, Osri and the kitchen a water tank (a kundi) for storage of water and a Bhatti (furnace) in order that he may carry on his business as a washerman. It has also been found that these structures have been constructed with bricks and cement. The test which this Court has adopted in order to determine whether a structure is a permanent structure or not is an objective test. If a structure is such in quality that it is not easily removable, then it is a permanent structure. Mr. S. M. Shah has relied upon the decision of this Court in *Ishwarbhai v. Parshottam, (1967) 8 Guj LR*

665. It has been held by Mr. Justice M. U. Shah in that decision that the intention of the tenant to make use of the structure during the entire period of his tenancy is not absolutely material for the purpose of determining whether a particular structure is a permanent structure or not. It may be one of the circumstances which may be taken into account along with other things. He has further observed that removability of a structure cannot *per se* be a test in the matter. The expression "permanent structure" used in Section 13 (1) (b) of the Rent Act has been used to denote, as held by the learned Judge, some work which is not of a temporary nature. What the Court has to take into account is the nature of construction, the nature of materials used, the manner in which the structure is erected and the purpose thereof in order to arrive at a proper conclusion in the matter. The contention raised by Mr. D. U. Shah has to be judged in light of the Explanation to Section 13 (1) (b). The Explanation reads thus:-

> "For the purposes of clause (b), no permanent structure shall be deemed to be erected on any premises merely by reason of the construction of a partition wall, door or lattice work or the filling of kitchen-stand or such other alterations made in the premises as can be removed without serious damage to the premises."

Within the meaning of the Explanation a partition wall is not a permanent structure if it can be removed without serious damage to the premises. Similarly, if a tenant constructs a door or a new lattice work it is also not a permanent structure if it can be removed without serious damage to the premises even though such construction necessarily means breaking of a part of the wall. Similarly, if he fills the kitchen-stand even then it is not a permanent structure if it can be removed without serious damage to the premises. The Explanation goes further and states that if a tenant makes any other alteration and if it is removable without serious damage to the premises, it is not a permanent structure within the meaning of Section 13 (1) (b). The water-tank (Kundi) and Bhatti have been constructed on the open space. It is difficult for me to think that when they are removed, they will cause any serious damage to the open land on which they have been constructed. After removing them the land can be levelled up as it was earlier and can be put to any use. In my opinion, therefore, the defendant has not constructed any permanent structure which can render him liable to be evicted from the suit premises.

14. Mr. D. U. Shah has invited my attention to an unreported decision of Mr. Justice A. D. Desai in Civil Revn. Appln. No. 81 of 1970, decided on 21-9-1973, (Guj). In that case the tenant had constructed a new wall of bricks with an iron-jali in it and had covered it with iron-sheets which constituted its roof. The learned Judge held that such a structure which the tenant in that case constructed was not a permanent structure. If a wall of this type with roof over it and Jali in it can be constructed so as to make available to the tenant additional space for being used either as a kitchen or for some other purpose, it is extremely difficult for me to think that the construction of a Bhatthi (furnace) and a Kundi (water-tank) by the defendant in the instant case which will enable him to earn his livelihood as a washerman can be said to be permanent structures.

15. The last contention which Mr. D. U. Shah has raised before me is that the finding recorded by the Courts below that the conduct of the defendant had been causing nuisance and annoyance to the neighboring occupiers was erroneous in law. The only ground on which the finding has been recorded by the Courts below is that the defendant has been using for the purpose of carrying on his business as a washerman chemicals which produce pungent smell. According to the plaintiff and the witnesses examined by him, the pungent smell produced by the chemicals causes nuisance and annoyance to the neighboring occupiers. What really the defendant has been doing in the suit premises is to carry on a productive activity of earning his livelihood. The plaintiff cannot prevent him from doing so. The question is: Has he been doing anything while trying to earn his livelihood by which he has been causing nuisance and annoyance to the neighboring occupiers ? It is nobody's case that the defendant is not required to use any chemicals for the purpose of washing clothes. If he is required to use chemicals for the aforesaid purpose, the further question which arises is whether these chemicals produce a pungent smell as alleged by the plaintiff and his witnesses and whether such a pungent smell is so intolerable or irritable that it must be stopped by evicting the defendant from the suit premises. What sort of chemicals the defendant uses, what sort of smell they produce and whether the smell, if any, which they produce is so intolerable as to be nuisance and annoyance to the neighboring occupiers are matters which, in my opinion, cannot ordinarily be decided merely on the strength of evidence of neighboring occupiers. Besides examining the neighboring occupiers it was necessary for the plaintiff, when he alleged such a ground against the defendant, to produce expert evidence so as to enable the Court to come to a correct conclusion as to what chemicals the defendant has been using for washing clothes, what sort of smell they have been producing and whether such a smell is a normal smell or an intolerable smell. In absence of any such expert evidence on the point, to rely upon the evidence of neighboring occupiers who are laymen is very risky. In my opinion, in absence of any satisfactory evidence on the point the Courts below were in error in recording the conclusion on this aspect against the defendant. I, therefore, set aside the finding recorded by the Courts below on this aspect. In my opinion, the plaintiff is not entitled to succeed on any of the three grounds of eviction alleged by him against the defendant. All of them fail.

16. In the result, therefore, I allow the Revision Application, set aside the decree for possession passed by the Courts below and dismiss the plaintiff's suit. Rule is made absolute with no order as to costs in the circumstances of the case.
Revision allowed