

# MADHYA PRADESH HIGH COURT

Jagadish Kapoor

Vs.

New Education Society through

Civil Revn. No. 759 of 1966, Decided on 26.8.1967. from order of 1st Civil J. Class

II, Jabalpur

(P.V. Dixit, C.J., P.K. Tare and R.J. Bhawe, JJ.)

06.12.1966. 26.08.1967

## JUDGMENT

**Dixit, C.J.**

1. This revision petition has come up before us for hearing and disposal on a reference made by one of us because of conflicting views expressed by this Court in some decisions on the question whether the provisions of section 13(6) of the Madhya Pradesh Accommodation Control Act, 1961 (hereinafter referred to as the Act) with regard to striking out of the defense are mandatory or whether they give discretion to the Court in the matter of striking out of the defense.

2. The petitioner-tenant's defense was struck out by the Civil Judge, Class II, Jabalpur, on his failure to deposit the arrears of rent within the specified time as required by section 13 of the Act. It is contended on behalf of the petitioner that the provisions of section 13(6) of the Act are not mandatory and even when a tenant has failed to deposit or pay any amount as required by Section 13, the Court has discretion to decide whether his defense against eviction should be struck out, and that the learned Civil Judge struck out the defense without applying his mind to the question whether in the facts and circumstances of the case the penalty of striking out of the defense should be imposed on him, that is, the petitioner.

3. In *Harnamsingh v. Babulal*, Civil <sup>1</sup> and *Chitra Kumar Tiwari v. Gangaram*, <sup>2</sup> Shiv Dayal, J. has taken the view that the provisions contained in Section 13(6) of the Act regarding striking out of the defense are directory and not mandatory. One of us (Tare, J.) expressed the same view in *Babu Bhai v. Kripashankar*, <sup>3</sup> Krishnan, J. also first

held in *Modilal v. Laxmichand*,<sup>2</sup> that Section 13(6) was a penal provision and gave to the Court discretionary power in the matter of striking out of the defense, and that in appropriate cases the Court could refuse to visit upon the defendant this penalty for non-payment or non-deposit. Krishnan, J. however took a different view in *Laxmi Kumar Baori v. Shantilal*,<sup>4</sup> In *Udhavrao v. Shivaji Rao*,<sup>5</sup> Golvalkar, J., held that the provisions of section 13(6) were mandatory and gave no discretion to the Court in the matter of striking out of the defense. Bhargava, J., was also inclined to think in *Babu Sunderlal v. Ramshankar*,<sup>6</sup> that Section 13(6) was mandatory. So also in *Swarnakar Sangh v. Trilok Chand*<sup>7</sup> Surajbhan, J., said that Section 13(6) was mandatory.

4. The material provision to consider in this case is Section 13(6) of the Act which is as follows :

"If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defense against eviction to be struck out and shall proceed with the hearing of the suit."

It will be seen that this provision says that "the Court (may) order the defense against eviction to be struck out" (underlining (bracketed herein - Ed.) is ours) and not that the Court "shall order the defense to be struck out". The use of the word "may" prima facie shows that the striking out of the defense under section 13(6) is in the discretion of the Court. It is well settled that "may" is a discretionary and enabling word, unless the subject-matter shows that the exercise of the power given by the provision using the word "may" was intended to be imperative by the person to whom the power is given. There is no indication whatsoever in the M.P. Accommodation Control Act, 1961 to show that the exercise of the power of striking out of the defense under section 13(6) was imperative whenever the tenant failed to deposit or pay any amount as required by Section 13.

5. It must be remembered that the striking out of the defense is in the nature of a penalty. Section 13(6) is not a provision intended for the benefit of any party. The provisions being penal in their nature, the rule of construction that when a power or faculty is given to the Court that may be exercised for the benefit of particular persons under certain specified circumstances and it is shown that those particular circumstances exist under which it was contemplated that the power should be exercised, then there is an obligation on the Court to exercise the power and the use of

the word "may" in such circumstances has a compulsive force, can have no applicability. In our opinion, there is no warrant whatsoever for reading the word "may" used in Section 13(6) having a compulsive force.

6. The conclusion that Section 13(6) gives discretion to the Court in the matter of striking out of the defense becomes obvious on a comparison of Section 5(2) of the Madhya Pradesh Accommodation Control Act, 1955, which was repealed by the Madhya Pradesh Accommodation Control Act, 1961, and Section 13(6) of the 1961 Act. Section 5(2) of the Act of 1955 was in the following terms :

"In case of default on the part of the tenant in depositing the rent even after the order of the Court the right of the tenant to defend shall be terminated :

Provided that the Court may, before making an order of terminating the right of defense, provide an opportunity to the tenant for depositing the rent within fifteen days or such longer period as the Court may deem fit to fix."

It will be noted that the aforesaid provision required the Court to strike out the defense if a tenant defaulted in depositing the rent after the Court had ordered him to do so. The proviso to Section 5(2) did not give to the Court any discretion in the matter of striking out of the defense. It only laid down that before making any order of terminating the right of defense, the Court may give a further opportunity to the tenant to deposit rent within 15 days or such longer period as fixed by the Court. Section 13(6) of the 1961 Act is not couched in mandatory language. It uses the word "may". The difference in the language of Section 5(2) of the Act of 1955 and Section 13(6) of the 1961 Act is significant and indicates that in the new Act there is a deliberate modification in law in favor of the tenant. In this connection it would be pertinent to refer to the observations of the Supreme Court in *V.K. Verma v. Radhe Shyam*,<sup>8</sup> In that case the Supreme Court compared Section 13(5) of the Delhi Rent Control Act, 1952, which laid down that on the failure of the tenant to deposit the arrears of rent within the prescribed time, "the Court shall order the defense against ejection to be struck out" and Section 15(7) of the Delhi Rent Control Act, 1958, providing :

"If a tenant fails to make payment or deposit as required by this section the Controller may order the defense against eviction to be struck out and proceed with the hearing of the application."

The Supreme Court pointed out :

"The change of the words from the Court shall order the defense against ejection to be struck out' to the words 'the Controller may order the defense against eviction to be struck out' is clearly a deliberate modification in law in favour of the tenant. Under the old Act the Court had no option but to strike out the defense if the failure to pay or deposit the rent is proved; under the new Act the Controller who takes the place of the Court has a discretion in the matter, so that in proper cases he may refuse to strike out the defense."

The provisions of the Delhi Rent Control Acts which the Supreme Court considered are analogous to Section 5(2) of the M.P. Accommodation Control Act of 1955 and Section 13(6) of the 1961 Act; and, in our opinion, the observations made by the Supreme Court for emphasizing the discretionary character of Section 15(7) of the Delhi Rent Control Act, 1958, fully apply here and leave no doubt that under section 13(6) of the M.P. Accommodation Control Act, 1961 it is in the discretion of the Court whether or not to strike out of the defense.

7. In C.R. No. 218 of 1965, D/-08-04-1966 (M.P.) (supra) Golvalkar, J., said that the absence in the 1961 Act of a provision similar to the proviso to Section 5(2) of the 1955 Act indicated that under section 13(6) it was mandatory to strike out the defense. He also observed that under section 5(2) of the 1955 Act the tenant's right to defend was "liable to be terminated". Section 5(2) of the 1955 Act used the expression "the right of the tenant to defend shall be terminated" and the proviso to that sub-section only afforded an opportunity to the tenant to deposit the rent and avoid the penalty of having his defense struck out. The proviso did not have the effect of converting the mandatory provision contained in the substantive Sub-Section (2) of section 5 of the 1955 Act into a discretionary provision. The use of the word "may" in Section 13(6) of the 1961 Act and the absence there from of a provision similar to the proviso to Section 5(2) of the 1955 Act only emphasize the discretionary character of the power under section 13(6).

8. The decisions in *Waryam Singh v. Amar Nath*,<sup>9</sup> *Punjalal v. Bhagwatprasad*,<sup>10</sup> and *Bishan Paul v. Mothuram*,<sup>11</sup> on which reliance has been placed by Krishnan, Golvalkar and Bhargava JJ., do not appear to us to be in point. Those are cases which dealt with the provisions of the Punjab and Bombay House Rent Control Acts giving

to the landlord the right to obtain possession of an accommodation in the event of a tenant making a default in the payment of rent and if other circumstances exist. Those provisions gave a right or benefit to the landlord and, therefore, the Supreme Court considered the expression "may make an order of ejection" as having a compulsive force.

9. In Laxmi Kumar Baori's case, C.R. No. 44 of 1966, D/-2-12-1966 (M.P.) (supra), Krishnan, J., has referred to Section 12(3) and in C.R. No. 170 of 1965, D/-31-8-1965 (M.P.) (supra) Bhargava, J., has referred to Section 12(3) and Section 13(5) for showing that under section 13(6) it is obligatory for the Court to strike out the defense. In our Judgment, Section 12(3) and Section 13(5) have no bearing whatsoever on the power given under section 13(6). Under Section 13, a tenant who fails to make a deposit as required by that section loses the benefit of avoiding a decree for eviction on the ground of default in the payment of arrears of rent and also makes himself liable to the penalty of having his defense struck out. If he makes a deposit as required by Section 13, he can avoid a decree for eviction sought on the ground of default in the payment of arrears of rent. If he defaults, then he cannot get the benefit of Section 12(3) or Section 13(5). Yet, the Court may in the circumstances of the case, not impose on him the penalty of striking out his defense. The fact that the defense is not struck out does not, however, mean that the tenant is entitled to get the benefit of Section 12(3) or 13(5). What is required for getting the benefit of Section 12(3) or 13(5) is the compliance of Section 13. Section 13(6) presupposes default. Default may be condoned and the defense may not be struck out. But the condonation of default cannot in any sense constitute a compliance of Section 13.

10. Sri Awasthy, learned counsel appearing for the plaintiff-non-applicant, referred us to the decision of the Supreme Court in *Kaluram v. Baidyanath*<sup>12</sup> in support of the view that under section 13(6) it was mandatory for the Court to strike out the defense. In that case the Supreme Court construed the provisions of Sections 17, 21 and 22 of the West Bengal Premises Tenancy Act, 1956. The question whether under the relevant provision of the West Bengal Act it was mandatory or discretionary for the Court to strike out the defense in the event of a tenant failing to deposit rent was not decided by the Supreme Court. We do not find anything in the judgment of the Supreme Court in Kaluram's case, AIR 1965 Supreme Court 1909 lending support to the view that under section 13(6) of the M.P. Accommodation Control Act, 1961, it was obligatory for the Court to strike out the defense.

11. In our judgment, under section 13(6) it is not compulsory for the Court to strike out the defense on finding that the tenant has failed to deposit or pay any amount as required by Section 13. The Court has discretion in the matter of striking out of the defense and that discretion has to be exercised judicially having regard to the facts and circumstances of each case.

12. The view expressed by Golvalkar, Bhargava and Surajbhan, JJ., in the cases referred to earlier and by Krishnan J. in Laxmi Kumar Baori's case, C.R. No. 44 of 1966, D/-02-12-1966 (M.P.) (supra) that Section 13(6) is mandatory, with all respects to the learned Judges is not correct.

13. Here, it is plain from the order under revision that the learned Civil Judge, Jabalpur, struck out the petitioner's defense simply on finding that the petitioner has failed to deposit the arrears within the specified time. Before striking out the defense, the learned trial Judge should have considered whether in the facts and circumstances of the case the petitioner's defense against eviction deserved to be struck out.

14. For these reasons, this petition is allowed. The order dated 6th December 1966 of the First Civil Judge, Class II, Jabalpur, is set aside and he is directed to decide the question of striking out the petitioner's defense in the light of this decision. In the circumstances of the case, we leave the parties to bear their own costs of this petition.

Petition allowed.

Cases Referred.

1. Revn. No. 60 of 1964, D/-28-4-1964: 1964 MPLJ (NC) No. 123
2. S.A. No. 864 of 1965, D/-17-01-1966: 1966 MPLJ (NC) No. 178
3. S.A. No. 293 of 1965, D/-19-11-1965: 1966 Jab LJ (SN) No. 71
4. C.R. No. 44 of 1966, D/-02-12-1966 (M.P)
5. 6. C.R. No. 218 of 1965, D/-08-04-1966 (M.P)
6. CR No. 170 of 1965, D/-31-08-1965 (M.P)
7. S.A. No. 218 of 1965, D/-18-08-1966 (M.P)
8. AIR 1964 SC 1317
9. AIR 1954 SC 215

10. AIR 1963 SC 120
11. AIR 1965 SC 1994
12. AIR 1965 SC 1909