BOMBEY HIGH COURT

Nathuji Narayanrao Udapure

Vs.

Narendra Vasanjibhai Thakkar

Writ Petition No. 1910 of 1980

(B.C. Gadgil, J.)

10.11.1980

JUDGMENT

B. C. Gadegil, J.

1. This is one of those matters where it is necessary to exercise the powers of the High Court in order to meet the ends of justice.

2. The matter is with respect to the grant of permission to the landlord to terminate the tenancy under clause 13 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as the Rent Control Order). Under that clause the landlord has to prove one of the grounds enumerated therein before the Rent Controller, and on the basis of such proof the Rent Controller grants permission to terminate the tenancy. The present petitioner (hereinafter referred to as the landlord or Nathuji) owns a house at Nagpur. Respondent No. 1 Narendra has been occupying the said house as a tenant on the monthly rent of ₹ 35. Nathuji alleged that the tenant Narendra did not pay rent from 1-12-1972 to 30-11-1975 and as such Nathuji was entitled to permission under clause 13 (3) (i) and (ii), namely, for non-payment of rent for three months and habitual default in payment of rent. Nathuji has also alleged that Narendra has sub-let the premises to respondent No. 2 Bhawarilal without written permission in contravention of clause 13 (3) (iii). Two more contentions were raised by Nathuji namely, that tenant Narendra has left the property for continuous period of four months as contemplated by clause 13 (3) (v), and that Nathuji bona fide required the suit premises for his own occupation. With these allegations, Nathuji filed Application No. 285/A-71 (2) 75-76 before the Rent Controller, Nagpur, for getting necessary permission. During the pendency of this application, he also filed another Application No. 17-/A-71 (2) 76-77 as Narendra failed to pay rent from 1-12-1975 to 31-7-1976. On account of this fact it was pleaded that there were further arrears of rent and further habitual default. Secondly, it was contended that Narendra had unlawfully sub-let the suit premises to another sub-tenant Bhawarilal who is respondent No. 2.

3. Both these applications were heard together. Narendra and Bhawarilal filed a joint written statement in the first case while in the second case Narendra alone filed a written statement. Copies of these written statements are at pages 21 and 16 respectively of the paper-book. In these written statements there was a denial of the various allegations that have been made by Nathuji in the two applications. The learned Rent Controller recorded the evidence that was led before him. As far as the landlord is concerned, he examined himself and one more witness, while none of the respondents have entered the witness-box. They have also not led evidence of any other witness. The Rent Controller, by his order dated 30-10-1978 (Annexure V), granted permission to Nathuji on the ground that Narendra had unlawfully sub-let the premises to Bhawarilal as contemplated by clause 13 (3) (iii). The rest of the contentions of Nathuji about the default, the habitual default, the non-user of the property by the tenant and the bona fide requirement of the premises by Nathuji were not accepted by the Rent Controller. Against this order, in all six appeals were filed. The appeals by Nathuji were numbered as 295 and 299/A 71 (2) of 1978-79; the appeals Nos. 336 and 348/A-71 (2) of 1978-79 were filed by Bhawarilal, while the appeals filed by Narendra were numbered as 362 and 364/A-71 (2) of 1978-79. These six appeals were heard and decided by the Additional District Magistrate, Nagpur, on 6-6-1980. A copy of that order is at Annexure VI. The appellate authority dismissed the appeals filed by the landlord and allowed the appeals filed by Narendra and Bhawarilal. In substance the appellate authority came to the conclusion that Nathuji had not made out any ground for granting permission to terminate the tenancy. Thus, his main application made to the Rent Controller was dismissed. It is this order that is being challenged before me.

4. It was contended by Shri Chandurkar for the landlord that the order passed by the Rent Controller and the appellate authority are so perverse that interference by this Court is absolutely essential, and I think that there is much substance in this contention. Under Clause 13 (3) (ii) of the Rent Control Order, a landlord is entitled to get permission to terminate the tenancy if the tenant is habitually in arrears of rent. I have already stated that when the first application was filed the tenant was in arrears for about 36 months i. e. from 1-12-1972 to 30-11-1975. He was also in arrears for a further period from 1-12-1975 to 31-7-1976 when the second application was filed. There is no dispute that the landlord filed suits against the tenant for the recovery of these arrears and in these suits, namely, Civil Suits Nos. 1804 of 1975 and 1310 of 1976, the civil Court has passed decrees against the tenant. Shri Chandurkar submitted that non-payment of rent for a continuous period from 1-12-1972 to 31-7-1976 is itself proof that the tenant was habitually in arrears of rent. The Rent Control Authorities have not accepted this contention and the appellate authority has given the following reasoning in paragraph 5 of the order :

> "The arrears of rent for a consolidated period could he only one occasion and at the most could give a right to the landlord to seek the relief under clause 13 (3) (ii) on the ground that the tenant was in arrears of rent for a period of more than 3 months. But certainly the fact that the tenant was in arrears of rent for continuous period of 45 months from 1-12-

> 1972 to 31-6-1976 cannot he deemed as a habitual default committed by the tenant. A habit on the part of the tenant could be proved if the attitude of making payments at irregular intervals is exhibited by the tenant on more than one occasion. In the instant case the arrears of rent are for one continuous period only and as such this non-payment of arrears of rent could not by any stretch of inference be treated as habitual default. As has been observed in the Ruling referred above, a landlord must prove a mental attitude on the part of the tenant to discharge his liability. The landlord has also to prove that the tenant is incapable of making the payment. It was argued on behalf of the tenant Narendra that since the suit premises were admittedly purchased by the landlord Nathuji and his brother Laxman jointly and since the tenant was not in the know that the landlord Nathuji had alone become the exclusive owner, the rent remained to be paid. But, it was contended, that as soon as decree was passed in favour of the landlord Nathuji alone, the tenant was prompt enough to deposit the arrears of rent..... There is no reason why this argument advocated on behalf of the tenant that the arrears of rent remained to be unpaid for the bona fide reasons about the exclusive ownership of the landlord Nathuji be not accepted. It is thus clear that no mental attitude on the part of tenant to make habitual defaults has been proved by the landlord Nathuji."

In my opinion, the entire reasoning mentioned above is grossly erroneous. it will be difficult to hold that non-payment of rent for about 45 months can be said to be only one consolidated default so as to take the case out of Clause 13 (3) (ii) namely, habitual default. On the contrary, a consistent attitude on the part of the tenant not to pay the rent which was due and payable every month and to continue with that attitude for a period of 45 months would itself he a proof that he was habitually in arrears of rent. To treat the non-payment of rent for 45 months as only one default would be erroneous particularly when in the case of monthly tenancy the rent is ordinarily payable by the end of the month. There would be a default for every month if the rent is not paid and thus there would in all be 45 defaults, and it is needless to say that with a case of 45 defaults the tenant has to be stamped as a habitually in arrears of rent. As far as the other reasoning is concerned, namely, that the tenant was not knowing that Nathuji alone was entitled to recover the rent, Shri Chandurkar contended that it is only at the stage of the arguments that such a submission was made and that it has no basis of evidence. I have already observed that neither the tenant nor the sub-tenant has entered the witness-box. The mental attitude of the tenant as to whether he was ready and willing to pay the rent would primarily be within the special knowledge of the tenant himself. If he had any reason to give as to why he did not pay the rent, it was necessary for him to enter the witness-box and to depose about it. In the absence of such evidence, the Rent Control Authorities had no legal jurisdiction to come to the conclusion that the tenant had made out a case for the purpose of holding that there was no habitual default. Another important circumstance is that the Rent Control Authorities have not taken into account the effect of the tenant and the sub-tenant not entering the witness-box. This question has been considered by the Privy Council in the case of *Gurbaksh Singh v. Gurdial Singh*[1], The relevant head-note is as follows:

"It is the bounden duty of a party, personally knowing the whole circumstance of the case, to give evidence on his own behalf and to submit to cross examination. His non-appearance as a witness would he the strongest possible circumstance going to discredit the truth of his case."

This Court has also taken a similar view in the case of *Pirgonda v. vashwanath*[2], The following is the material head-note :

"Normally a party to the suit is expected to step into the witness box in support of

[1] 29 Bom L R 1392

[2] A I R 1956 Bom. 251

his own case and if a party does not appear in the witness-box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons ....."

Thus, here is a case where there is non-payment of rent for a continuous period of 45 months and the tenant has not explained in the witness-box the circumstances which prevented him from paving the rent. In view of these two peculiar positions, Shri Chandurkar is right when he contends that the finding of the Rent Control Authorities about the absence of habitual default is perverse and without any material on record.

5. The case of the landlord is that the tenant Narendra has sub-let the premises to Bhawarilal. It is on record that Bhawarilal owned and possessed a telephone connection and that telephone is affixed to the suit premises. Similarly a meter for the supply of electricity is in the suit premises and that meter stands in the name of Bhawarilal. In addition to the oral testimony of Nathuji, Shri Chandurkar relied upon these two factors for the purpose of contending that there is sufficient evidence to hold the sub-tenancy proved. The Rent Control Authorities have accepted the fact that the telephone connection and the electricity supply connection of the suit premises stated in the name of Bhawarilal. But these circumstances have been ignored on the ground that they do not conclusively prove that Bhawarilal was the sub-tenant. The appellate Authority has also observed that Nathuji had not led evidence to prove that Bhawarilal was paying any rent to Narendra. It is true that the existence of such evidence about the payment of rent would have conclusively proved the case. But the absence of such evidence cannot be interpreted to mean that there is no evidence to prove the sub-tenancy. Neither Narendra nor Bhawarilal has entered the witness-box to explain as to the circumstances in which the telephone connection and the electricity supply connection in the name of Bhawarilal are on the suit premises. Whether there was sub tenancy between Narendra and Bhawarilal would again prima facie be a fact within their special knowledge, and the omission of both of them to enter the witness-box to deny the alleged subtenancy was a circumstance required to be considered by the appellate authority while deciding the question about the said sub-tenancy. The order of the appellate authority shows that

this circumstance has not at all been taken into account while considering this question. Under these circumstance, a finding recorded without taking into account a relevant circumstance, particularly when an adverse inference flows from that circumstance, cannot be said to be a good finding of fact, and, in my opinion, such a finding deserves to be set aside as it leans towards perversity.

6. It is true that Nathuji has alleged that he is entitled to permission under clause 13 (3) (v). namely, non-user of the premises &Dr a continuous period of four months. Shri Chandurkar relied upon the fact that the tenant Narendra is residing at Amravati, but there is no clear and cogent evidence as to whether the suit premises were taken on rent for residential purposes. The Rent Control Authorities have observed that a person may reside at Amravati and carry on business at Nagpur, and it is on that basis that it was held that the ground under clause 13 (3) (v) had not been proved. I do not think that this reasoning is in any way wrong so as to require interference by this Court.

7. The last ground that was urged before me is that the finding about the absence of bona fide need for personal occupation is also perverse. The landlord has stated in his evidence that he wanted the suit premises for his bona fide occupation. His cross-examination does not indicate that Narendra or Bhawarilal has challenged this position as no questions have been put in the cross-examination to controvert the statement made by the landlord. At one stage, the appellate authority has accepted the position that the tenant cannot challenge the bona fide need of the landlord only on the ground that the suit premises are at present being used for non-residential purposes. Even then, the case of the landlord was rejected with the following observations in paragraph 9 :-

> "In this context, it was correctly pointed out by the learned counsel for the tenant Narendra that since the subsequent application filed by the landlord on 6-8-1976 did not seek relief under any other provision of clause 13 (3) except (i) (ii) and (iii), the so called bonafide need expressed by the landlord under the provisions of clause 13 (3) (vi) in his earlier application dated 17-12-1975 was no more surviving and as such he could not seek relief on that ground. There is sufficient force in this argument. Admittedly the first application filed by Nathuji on 17-12-1975 was under provisions of clause 13 (3) (i), (ii), (iii), (iv), (v), (vi) and (viii) of the Rent Control Order, 1949. This application was against two non-applicants Narendra and Bhawarilal. The second application filed subsequently on 6-8-1976 is also against Narendra and Bhawarilal but in addition against M. V. Thakkar, Advocate. Thus this subsequent application in its real effect substituted earlier application dated 17-12-1975 since it was against the same parties and negatived the earlier application dated 17-12-1975. In subsequent and fresh application filed on 6-8-1976 the landlord Nathuji restricted his relief only under the provisions of clause 13 (3) (i) (ii) (iii) of the Rent Control Order, 1949. He did not claim any relief under clause 13 (3) (vi) or for that matter other sub-clauses except 13 (3) (i) (it) and (iii) as has already been

observed earlier. Thus the landlord impliedly did not press for his claim on the ground of his bona fide need subsequently and as such the Rent Controller could not grant the relief to a party which was not asked for."

It was submitted by Shri Chandurkar that all the above mentioned reasoning is so grossly erroneous that it is necessary to interfer with the order. The first application was filed under various clauses. During the pendency of that application, the tenant again fell in arrears with rent and it is alleged that he has also sublet the premises to one more person. The landlord, therefore, tiled one more application. Both the applications were heard together. In this background, it will be idle to imagine that by filing the second application under clause 13 (3) (i), (ii) and (iii) the landlord had given up his first application under the rest of the items. In my opinion, rejection of the case of the landlord under clause 13 (3) (vi) with the above: reasoning is perverse and is liable to be quashed. The net analysis is that the findings of the Rent Control Authorities against the landlord under clause 13 (3) (ii), (iii) and (vi) are liable to be quashed.

8. It was, however, urged by Shri Manohar that the jurisdiction of this Court is very limited and that findings of fact should not be set aside' while exercising jurisdiction under Articles 226 and 227 of the Constitution. It is true that ordinarily this Court will not exercise jurisdiction under these Articles to interfere with findings of fact based upon evidence. But the question is as to whether it is necessary to interfere with such findings if they are perverse. The Supreme Court, in the case of *India Pipe fitting Co. v. Fakruddin*[3], has held as follows :

"Power under Article 227 is one of judicial superintendence and cannot be exercised to upset conclusions of facts however erroneous those may be. This power of superintendence conferred by Article 227 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

Held that whether the landlord's requirement was bona fide and reasonable had been concurrently found by two courts below against the landlord by appreciating the entire evidence. After examining the reasons given by both the courts it was not possible to hold that the conclusion were 'perverse' or even that those were against the weight of evidence on record. It was a case of reasonably possible factual appreciation of the entire evidence and circumstances brought on the record.

There was thus no justification for interference in the case with the conclusions of fact by the High Court under Article 227."

As stated earlier, here is a case which shows that the findings recorded by the Rent Control Authorities were perverse and at any rate those were against the weight of evidence. It is in this background that an interference by this Court is absolutely essential.

9. The result is that the petition succeeds. Rule is made absolute. The order dated 6-6-1980 (Annexure V1) passed by the Rent Control Appellate Authority is set aside and in its place it is

directed that permission is granted to the landlord-petitioner under clause 13 (3) (ii), (iii) and (vi) of the Rent Control Order for determination of the tenancy of respondent No. 1 Narendra. The respondents to pay the costs of this petition and bear their own. Stay of Civil Suit No. 243 of 1979 granted on 6-8-1980 stands vacated.

Petition allowed.

[3] A I R 1978 S C 45