

BOMBAY HIGH COURT

Shishir Hari Mahajan

Vs.

Banarasibai Rodmal Sharma

Spl. Civil Appln. No. 984 of 1975

(B.C. Gadgil, J.)

02.12.1980

JUDGMENT

B.C. Gadgil, J.

1. The petitioner who is the owner of a House at Chikhali has filed this writ petition challenging the orders of the appellate authority under the C.P. and Berar Letting of Houses and Rent Control Order, 1949, (hereinafter referred to as Rent Control Order), whereby the order granting permission by the Rent Controller to terminate the tenancy of the respondent, (the original respondent Rodmal is dead and his legal representatives have been brought on record. However, for the sake of convenience, I would refer to Rodmal as respondent), under clauses 13 (3)(i) and 13 (3)(ii) of the Rent Control Order was set aside.

2. Rodmal was occupying the tenement in the old house. The landlord wanted to effect construction and alterations. Hence Revenue Case No. BRA-20/71/Chikhali/62-63 was filed against the tenant. That application ended in compromise order. The terms of the compromise can be seen from the compromise application dated 4-6-1963 (Annexure-D). The tenant was to vacate the premises temporarily so as to enable the landlord to make new construction and thereafter the present tenement was to be let out to the tenant on the monthly rent of ₹ 30 according to the Hindu Calendar and the rent was to be paid in advance on the first of every month. There are certain other terms incorporated in the compromise, but they are not relevant. The landlord constructed a new house and thereafter the tenement in question was let out by the landlord to the respondent as per the terms of the above compromise. The landlord contended that the tenant has been habitually in default in payment of rent though the landlord has directed all the tenants to deposit the rents regularly in the bank account in the name of the landlord. Along with the application (which was numbered as Revenue Case No. BRA-20/Chikhali/73-74), the landlord has filed Schedule as to how the tenant Rodmal had paid the rent from 1964 onwards. It is not necessary to give the details of the mode of payment, but suffice it to say that

the rent had been paid not regularly but at intervals of 2, 4, 5, 6, 10 or 19 months. In addition on the date when the application before the Rent Controller was filed, the tenant was in arrears for more than 30 months.

3. The tenant resisted the application by his written statement. He admitted that he had been the tenant of the premises at the rate of ₹ 30 per month. He, however, contended that though the rent was payable in advance, there was a practice, which had been acquiesced by the landlord, that the rent was payable according to the tenant's convenience and whenever demanded by the landlord.

4. The Rent Controller after recording evidence that was led before him came to the conclusion that the tenant has formed a habit of being in arrears of rent and as such he was habitually in arrears. Permission under clause 13(3)(i) and (ii) was accordingly granted. The tenant took the matter in appeal No. BRA/Chikhali-31/74-75. The appellate authority by its order dated 30-6-1975 (Annexure-A) took a different view and came to the conclusion that there was no habitual default on the part of the tenant. The appeal was, therefore, allowed and the permission granted by the Rent Controller was revoked and hence this petition.

5. The main grievance of Sri Kalele for the landlord is that the entire approach of the appellate authority is so perverse that an interference at the hands of this Court is absolutely essential and I think that there is much substance in this contention. For example in paragraph 3, the appellate authority has observed that the landlord in his application did not state since when the appellant is his tenant nor he has gone in witness box to depose in support of his contention. In my opinion the question as to when the relationship of landlord and tenant came into existence was absolutely irrelevant in the background of the pleadings that were made by the parties. As far as the landlord not entering into the witness-box is concerned, it cannot be disputed that up to 1975 the landlord was minor and his property was being managed by his father Hari. It is this Hari who was examined as a witness before the Rent Controller. It is surprising that in this background a comment was made that the landlord did not enter the witness-box.

6. I have already observed that the compromise in the previous litigation does specifically mention that the rent was to be regularly paid every month and that too in advance. Such a payment has not been made by the tenant after the house was reconstructed. The landlord has produced the counterfoil book of the rent receipts showing as to when the tenant has made payments from time to time. It is material to note that practically every counterfoil of the rent receipt that was issued by the landlord to the tenant from 1964 onwards till the date of the application bears an endorsement that irregular payment of real is being accepted without prejudice to the rights of the landlord. Thus, the payment of rent made at the erratic intervals of 2, 4, 5, 6, 10 or 19 months has not been accepted by the landlord as regular and the usual mode of payment of rent. On the contrary, the landlord has made it very clear while receiving the rent that the acceptance was without prejudice to the fact that the rent was being irregularly paid. The care taken by the landlord in making the above endorsement in every receipt gives an indication

that the landlord never agreed to accept any lump sum payment in place of monthly payment. The appellate authority has not at all taken into account the evidentiary value of these endorsements in the rent receipts. In my opinion, this has resulted in miscarriage of justice and to a certain extent perversity of a finding.

7. Sri Deshpande for the tenant, however, urged that endorsements from 1964 to 1972 may be treated as formal endorsements made by the landlord and that they needed to be safely ignored. I do not think that the positive conduct on the part of the landlord to show his protest against irregular payment can be ignored by saying that the endorsements on the rent receipts were a mere formality.

8. The tenant was in arrears of rent for a long period of 30 months even at the time when the application was made before the Rent Controller. The accumulation of rent for this much period of 30 months would again constitute habitual default in payment of rent and it cannot be got over by saying that the amount was to be paid in lump sum as and when demanded. This is more so when it is in the evidence of the tenant that the landlord has given instructions to the tenant to deposit the amount in the bank. The tenant has further stated that he had not deposited the amount of rent in the bank every month. This conduct has not been considered by the appellate authority. The position, therefore, is that the appellate authority's decision that there was any practice to pay the rent amount in lump sum and as and when demanded by the landlord was not based on any evidence and was arrived at after ignoring the material circumstances of the case.

9. The appellate authority has looked into the payments made by the tenant before 1963. The mode of payment for this period has been interpreted to mean that prior to the construction of the new house, there was a practice, an understanding or a contract to accept the rent in lump sum.' It was then observed by the appellate authority that the tenement in the new construction was to be taken by the tenant on the same old terms and conditions and that, therefore, the clause in the compromise to pay the rent regularly would be in derogation to the previous practice of paying the rent in lump sum. It may be noted that the tenant has not pleaded that the clause in the compromise of 1963 to pay the rent every month regularly was inconsistent with the previous alleged contract to pay the rent in lump sum. There is not a whisper in the written statement of the existence of such practice which was inconsistent to the terms in the compromise. The alleged practice, even if it is assumed to exist, would be a sort of concession which can be revoked by the landlord. In this case the endorsements on the subsequent rent receipts would be a clear indication of the revocation of the alleged concession.

10. The position would not improve even if the matter is considered on the basis that the alleged practice of lump sum payment was a sort of agreement in substitution of the original agreement to pay the rent monthly. After all such a contract must be certain. An agreement, meaning of which is not certain or capable of being certain, would be a void agreement. It may be possible that the parties may agree that instead of monthly payment, there would be a bimonthly payment.

They may also agree that the rent may be paid every six months. There may as well be an agreement to pay the rent annually. However, an agreement to pay the amount in lump sum without any fixity of time would prima facie be so vague that its meaning cannot be certain or cannot be made certain. For example, if such an agreement to pay lump sum is treated to be a good agreement, the tenant may refuse to pay rent for 19 months or 30 months as is the case here. Not only that but he may also with impunity withhold payment for 60 months and then plead before the Rent Controller that he is not habitually in arrears as the amount is to be paid in lump sum which includes lump sum payment of 60 months' rent. Such an agreement would be too vague. Hence erratic payment made at the intervals of 3 months, 4 months, 6 months, 10 months, 14 months and 19 months cannot be construed to mean that there exists any valid contract to pay the amount in lump sum.

11. Taking into account all the relevant factors available in the case, I am satisfied that the appellate authority has arrived at a finding after ignoring the relevant circumstances and without considering all the material before it is, therefore, necessary to quash that order and to restore the one that was passed by the Rent Controller.

12. The result is that rule is made absolute. The order dated 30-6-1975 (Annexure-A) passed by the Resident Deputy Collector in Revenue Appeal No. BRA/Chikhali-31/74-75 is set aside and the order dated 4-1-1975 (Annexure-B) passed by the Rent Controller in Revenue Case No. BRA-20/Chikhali/73-74 is restored. No order as to costs of this petition.

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