

HIGH COURT OF GUJARAT

SUTHAR BUDHALAL LALLUBHAI

Versus

BHAGWANDAS K GUPTA (DECD) THROUGH HEIRS

Date of Decision: 20 April 2000

Citation: 2000 LawSuit(Guj) 301

Hon'ble Judges: [P B Majmudar](#)

Eq. Citations: 2000 4 GLR 3346, **2000 3 GLH 1**, 2000 4 GCD 2604, 2001 1 GCD 1

Case Type: Civil Revision Application

Case No: 1571 of 1980

Acts Referred:

[Bombay Rents, Hotel And Lodging House Rates Control Act, 1947 Sec 12\(3\)\(a\), Sec 29\(2\), Sec 12\(2\)](#)

Final Decision: Application allowed

Advocates: [V C Desai](#), [H S Mulia](#), [R C Jani](#)

Cases Cited in (+): 1

P. B. MAJMUDAR, J.

[1] This Civil Revision Application has been filed by the original defendant - tenant challenging the decree of eviction passed by the appellate Court in Regular Civil Appeal No. 106 of 1978.

[2] Detail facts leading to this civil revision application are as under :

[3] The petitioner is the defendant of Civil Suit No. 191 of 1973. The said suit was filed by the landlord, namely, Bhagwandas Kalichanddas Gupta who died during the pendency of this civil revision application and his heirs are brought on the record of this civil revision application. The case of the landlord in the said suit was that, he is the original owner of the suit property by purchasing the same from one Dashrathlal Jethalal by registered document dated 12-11-1970. The suit property is situated in Patan Town and the portion of the suit property was given on lease by the original

landlord Dashrathlal Jethalal on 13-5-1970 at the rate of Rs. 13/- per month. According to the plaintiff, the defendant had agreed to vacate the suit premises within six months after the plaintiff purchased the suit property after executing a fresh rent note in favour of the present plaintiff on 12-11-1970. The defendant, however, did not pay the rent since 12-10-1971. It is also the say of the plaintiff that, he required the suit premises for his bona fide personal use. Therefore, after terminating the tenancy of the defendant by giving the registered notice dated 16-11-1972 the present suit was filed for getting the decree for possession as well as for the arrears of rent from 11-10-1971 at the rate of Rs. 20/- per month.

[4] The defendant appeared in the suit by filing the written statement at Exh. 9. It was pointed out by the tenant in his written statement that, since the plaintiff-landlord has purchased the suit property after 1-1-1964, the suit for bona fide requirement is not maintainable as per the law. It was pointed out in the written statement that, he is in possession of the suit property as a tenant since long and he was paying Rs. 13/- as rent to the original landlord-Dashrathlal. He also contended that the standard rent of the suit property is Rs. 9/- per month only. He also denied that, he was in the arrears of rent from 12-10-1979 as he had sent various Money Orders, but the plaintiff refused to accept the same. Ultimately he prayed for dismissal of the suit.

[5] The learned trial Court framed various issues from the pleadings of the parties at Exh. 20. The learned trial Court found that, since the plaintiff had purchased the suit property after 1-1-1964, the suit for bona fide requirement was not maintainable. The learned trial Court found that, Rs. 20/- is the standard rent. The learned trial Court also found that the defendant was not in arrears for more than six months. The trial Court accordingly dismissed the suit for possession and decree for Rs. 430/- was passed towards the arrears of rent.

[6] The aforesaid decree of the trial Court was challenged by the unsuccessful landlord by filing Regular Civil Appeal No. 106 of 1978. So far as the ground about non-user of the suit property is concerned, the appellate Court confirmed the finding of the trial Court in the said suit to the effect that the tenant was using the suit premises and that there was no substance in the ground of non-user. The appellate Court found in para 20 of its judgment that the plaintiff has hopelessly failed to bring his case under Sec. 13(1)(k) of the Bombay Rent Act. The main point which was seriously argued before the appellate Court by the landlord was regarding the non-payment of the rent by the tenant. The appellate Court found that the tenant had not sent the rent within one month from the receipt of the suit notice to the landlord, and that, therefore, the decree for eviction under Sec. 12(3)(a) of the Bombay Rent Act is required to be passed. Alternatively, it was found that, assuming that the case would fall under Sec. 12(3)(b) of the Bombay Rent Act, then also since there is no regular deposit every

month in the Court during the pendency of the suit, he is required to be evicted even under Sec. 12(3)(b) of the Bombay Rent Act. In view of the aforesaid finding, the appellate Court allowed the appeal of the landlord by setting aside the decree of the trial Court and the suit of the plaintiff for possession of the suit premises was decreed on the aforesaid ground of arrears of rent.

[7] The aforesaid decree of the appellate Court is impugned in this civil revision by the original tenant by filing the present civil revision application.

[8] At the time of hearing of this civil revision application, Mr. V. C. Desai, learned Advocate for the petitioner argued that, since the tenant has sent various Money Orders to the present landlord, it should be presumed that, he was ready and willing to pay the rent and that he is protected under Sec. 12(1) of the Bombay Rent Act. According to him, the trial Court has rightly held that, looking to the conduct of the tenant in sending various Money Orders before issuance of the suit notice, it can be presumed that, he is ready and willing to pay the rent, and therefore, there was no question of passing the decree against the tenant on the ground of arrears of rent, and that the appellate Court has committed a grave error in reversing the decree of the trial Court by coming to the conclusion that the tenant was not ready and willing to pay the rent.

[9] It was next submitted by Mr. Desai that, in any case, assuming that the tenant may not get protection under Sec. 12(1) of the Bombay Rent Act, then also, there is no proper demand as envisaged by Sec. 12(2) of the Bombay Rent Act in the demand notice at Exh. 28, and that, therefore, the suit itself was not maintainable on the basis of such notice, and even on that count also, the decree of the appellate Court deserves to be set aside.

[10] Against the aforesaid argument, Mr. H. S. Muliya for Mr. R. C. Jani has argued that, since the tenant has not paid any rent within one month from the receipt of the suit notice, he cannot be protected under Sec. 12(1) of the Bombay Rent Act, and that, it should be presumed that the tenant was not ready and willing to pay the rent.

[11] On the second point about the demand notice, Mr. Muliya argued that, since the aforesaid point was not raised either before the trial Court or before the appellate Court, this Court for the first time cannot take the said point into consideration for non-suiting the plaintiff on the ground of validity of the demand notice. According to him, therefore, the decree of the appellate Court is required to be confirmed in this civil revision application.

[12] Insofar as the first argument of Mr. Desai regarding readiness and willingness to pay the rent is concerned, there are certain factual aspects which are not in dispute. It

is not in dispute that, before giving the notice of demand as contemplated by Sec. 12(2) of the Bombay Rent Act, the defendant-tenant had sent various Money Orders to the plaintiff. The tenant in fact had sent five Money Orders which are produced on the record at Exh. 38 to 42. The aforesaid Money Orders were sent between 11-4-1972 upto to the suit notice. Mr. Desai has relied upon the judgment of this Court reported in 1975 GLR 1002, in the case of Lilavanti Dhirajlal Boradiya v. Soni Harjivan Devjibhai. This Court has taken the view that, if a landlord refuses to accept the amount tendered by his tenant by Money Order, the tenant is not bound to repeat the remittances of the same again and again. It is held that the landlord cannot try to take advantage of his own wrong and seek the recovery of possession. The Rent Act is the measure which is intended to protect the tenants. It is not a trap for the landlord to lay in order to draw his tenant in. It is the say of Mr. Desai that the tenant having sent five money orders regularly from time to time before issuance of the suit notice, therefore, cannot be said to be negligent in payment of the rent. He has argued that, in view of the aforesaid judgment of this Court, the suit of the plaintiff deserves to be dismissed insofar as the arrears of rent is concerned. However, nodoubt it is true that the tenant did send five Money Orders before issuance of the suit notice, however, the tenant has not given any reply to the suit notice nor has sent any Money Order of the same amount in response to the suit notice given to him under Sec. 12(2) of the Bombay Rent Act to prove his bona fide fully. Therefore, there was no reason for him not to repeat the remittance of the Money Orders. In response to the suit notice, if the entire amount is paid within one month, naturally, there is no cause of action available to the landlord for filing the suit on the aforesaid ground of the arrears of rent. Not only that, even before the suit notice the amount which he has paid by Money Orders did not cover the entire arrears of rent due at that time and there was still a deficit of about two months rent on the date of the notice. Even, if all these Money Orders are taken into consideration then also the same were not sufficient to clear up the entire arrears of rent upto the date of the suit notice. In that view of the matter, it is not possible to give protection to the tenant under Sec. 12(1) of the Bombay Rent Act. In view of the aforesaid position, the finding of the appellate Court is absolutely in accordance with law insofar as arrears of rent is concerned.

[13] In view of what is stated above, I do not find any substance in the said argument of Mr. Desai insofar as the first point is concerned.

[14] So far as the second point regarding the validity of the demand notice is concerned, reference to Sec. 12(2) of the Bombay Rent Act is required to be made at this stage. Sec. 12(2) of the Bombay Rent Act provides as under :

"No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due,

until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Sec. 106 of the Transfer of Property Act, 1882."

As per the same the suit for recovery of the possession on the ground of non-payment of the standard rent or permitted increases cannot be instituted unless there is a notice in writing demanding such standard rent or permitted increases which notice is required to be served on the tenant as prescribed in the said Section. It is mandatory for the landlord, therefore, to serve the demand notice on the tenant asking him to pay the arrears of rent and if there is a default by the tenant to comply with the same, cause of action is available to the landlord for approaching the Court for getting the decree for possession on the ground of non-payment of rent. Therefore, unless there is a demand notice as contemplated by the said Section, naturally, the suit cannot be filed on the ground of arrears of rent. Keeping in mind the provision of the said Section, the suit notice at Exh. 28 is required to be seen. It has been stated in the notice that the tenant had agreed to vacate the suit premises when the landlord purchased the suit property and because of the said assurance he had purchased the suit property and in spite of the promise, the tenant is not vacating the suit property. It is stated that, he (tenant) has not given any amount of mesne profits after 11-10-1971, and in view of that the landlord is entitled to obtain the possession of the suit premises. In the operative part of the notice, it is stated that, the tenant should vacate the suit premises within one month from the receipt of the suit notice and if he fails to hand over the possession, the landlord will be compelled to file appropriate proceedings for taking the possession of the suit premises as well as for taking mesne profits of the suit premises in accordance with law. What is stated in the suit notice is, the statement of fact to the effect that, the tenant has not paid the rent from the particular date. According to Mr. Desai, Sec. 12(2) of the Bombay Rent Act clearly envisages the demand of rent by the landlord and that by no stretch of imagination, it can be said that there was a demand of the arrears of rent in the suit notice. As per the suit notice, the landlord has asked the tenant to vacate the suit premises on the ground that he has not paid the rent.

[15] Mr. Desai has further submitted that, unless there is a specific demand of the arrears of rent asking the tenant to pay the same within stipulated time, notice can never be said to be a demand notice as per the law. According to him, since the tenant had sent various money orders in the past and in the notice since there was absolutely no demand of the arrears of rent, the tenant was bound to be misguided and in view of the said notice, if no rent is sent within one month, it cannot be said that the tenant has failed to comply with the said notice of demand. According to the learned Advocate

for the petitioner, specific demand in the notice under Sec. 12(2) of the Bombay Rent Act, is the statutory requirement, and if there is no compliance of the same, no suit for possession on the ground of arrears of rent can be said to be maintainable. The petitioner has relied upon the judgment of this Court reported in 1977 GLR 77 (Bapulal Kalidas v. Kashiben). In the aforesaid decision, this Court has taken the view that the notice demanding the arrears of rent must comply with the requirement of law. Demand must be a precise demand, and if the aforesaid statutory requirement is not complied with, such notice is invalid. It is further observed by this Court that vague notice requiring the tenant to pay all arrears of rent and permitted increases without indicating the actual amount due on that account or the point of time from which the rent and permitted increases at a specified rate are, according to the landlord, in arrears, would afford no real opportunity to the tenant to avail of the facility or benefit of making payment of the arrears due by him before he is sued in ejection. In fact, such notice while apparently complying with the requirement of law might prove to be a trap to draw the tenant in by leaving the door open for a controversy to be raised later on that full amount of rent and permitted increases was not tendered within the prescribed time-limit after the service of the notice. It was further held that, notice under Sec. 12(2) of the Bombay Rent Act stating the rent at a specified rate was in arrears for a period of more than six months was ineffective in law and that the condition precedent to the filing of the suit having thus not been satisfied, no decree under Sec. 12(3)(a) could have been passed. Relying upon the aforesaid decision, it was argued by Mr. Desai that, in the present case, there is absolutely no demand at all in the notice and according to him, therefore, the suit was required to be dismissed on the basis of such notice as one which is given in the present case at Exh. 28.

[16] Mr. Desai has also further argued that, the question of validity of the demand notice can be taken for the first time in civil revision application as the aforesaid contention will be purely a submission on the question of law. It is the duty of the Court to see whether statutory requirement is complied with by the landlord by giving proper notice as contemplated by Sec. 12(2) of the Bombay Rent Act.

[17] Mr. Desai has also relied upon the judgment of this Court reported in 1969 GLR 451 (Kantilal Fogatlal v. Bai Maniben). In the said judgment, this Court has taken the view that, notice must contained the demand of the standard rent. Non-payment of the standard rent is the basis of the suit notice. If, satisfied all the requirement of sub-sec. 2 of Sec. 12 of the Bombay Rent Control Act, no decree can be passed on the ground of the arrears of rent.

[18] Mr. Desai has also further relied upon the judgment of this Court reported in 1999 (1) GLR 605 (Raghunath Gangaram Deshmukh v. Sumant Nagindas Shah). In the aforesaid judgment, this Court has taken the view that, notice of demand under Sec.

12(2) of the Bombay Rent Act must be clear and not vague. That there should be specific demand of the arrears of rent. If, notice not clearly stating the demand of rent, and if, the decree of eviction is passed, such decree would be contrary to law. It was found that, the words "notice in writing of the demand of standard rent" are significant and that there should be a clear demand and such notice should not be vague. There should be a specific demand and if there is no demand asking the tenant to pay arrears of rent within a month, it becomes invalid notice of demand. Under the aforesaid background and after considering the provisions of law, this Court in the aforesaid judgment, set aside the decree of eviction passed by both the Courts below and ultimately the suit was dismissed. Basing his argument on the aforesaid preposition of law, it was argued by Mr. Desai that, the suit notice in the instant case can never be said to be a notice in conformity with Sec. 12(2) of the Bombay Rent Act, and therefore, the suit of the plaintiff is required to be dismissed.

[19] Against the aforesaid arguments of Mr. Desai, Mr. Muliya, learned Advocate for the respondent argued that, no doubt it is true that, there is no specific demand in the suit notice, impliedly one can come to the conclusion that there is a demand of rent and, that therefore, the Court should liberally interpret such notice. According to him, therefore, once the notice was served on the tenant, the tenant should have sent the arrears of rent as he should have gathered the intention of the landlord by reading the contents of the notice. It was further submitted by him that, after the suit notice the suit was filed after a gap of sometime and that atleast during that intervening period between sending of the suit notice and filing of the suit, he should have paid the rent in order to show his bona fide. Mr. Muliya has relied upon the judgment of the Rajasthan High Court reported in AIR 1971 Raj. 232 to substantiate his argument that, by giving such notice, the intention of the plaintiff was only to put the pressure on the tenant to pay the arrears of rent. It is submitted by Mr. Muliya that, therefore, the moment the tenant had received the suit notice, he should have inferred impliedly that the landlord wants the rent, and therefore, even though there may not be any specific demand of arrears of rent, such demand should have been inferred by the tenant. I am afraid that, I am not in a position to accept the aforesaid say of Mr. Muliya that, even though, there may not be any specific demand in the suit notice, there is implied demand of arrears of rent. Serving the demand notice to the tenant is not mere idle formality or stepping stone for filing the suit for possession on the ground of the arrears of rent. In fact, the demand notice as contemplated by Sec. 12(2) of the Bombay Rent Act is the statutory requirement and the principle behind such demand notice is to see that the tenant is given an opportunity to pay up the rent within one month of the suit notice and the tenant must know the consequences, if he neglects to pay up the arrears of rent in response to the suit notice. Therefore, it is not mere formality, but it goes to the root of the case. Reading the suit notice, it is difficult to believe that there was any

indirect hint to the tenant that, if, he fails to pay up the rent within the stipulated time, he will be subjected to the eviction proceedings.

[20] In that view of the matter, I am in complete agreement with the submission of Mr. V. C. Desai, learned Advocate for the petitioner that there is no demand or there is no specific demand in the suit notice at all much less any precise demand of arrears of rent. So far as this Court is concerned, the question about the validity of notice and preciseness of demand of the arrears of rent is well settled in the judgments reported in 1977 GLR 77 and 1999 (1) GLR 605. In view of the settled position of law, it is not possible for me to believe that, even if, there may not be any specific demand, the Court should infer that there is implied demand of the arrears of rent. In that view of the matter, in my view, since there was no demand notice as contemplated by Sec. 12(2) of the Bombay Rent Act, no suit for possession could have been instituted by the landlord on the basis of such vague notice. Even, if the notice is construed most liberally, then also it is not possible to come to the conclusion that, there was any demand of arrears of rent in the suit notice. In that view of the matter, the contentions of the petitioner will have to be accepted to the effect that, there is no demand notice as contemplated by Sec. 12(2) of the Bombay Rent Act.

[21] It is further argued by the learned Advocate for the respondent that, point regarding validity of the suit notice is not taken either in the trial Court or before the appellate Court, and therefore, the aforesaid point cannot be taken for the first time in this civil revision application. Mr. Muliya has relied upon the judgment of this Court reported in 1962 GLR 182, (Allanur Rasulla v. Balchand Ramji). In the said judgment, this Court has found that, validity of the notice was examined by both the Courts below and that it was found that, notice was valid. It was found by this Court that, since the notice had been validly given, the said finding even if it is wrong cannot be interfered with in the revision. The aforesaid revision application in 1962 GLR 182 was under Sec. 115 of the Civil Procedure Code. At that point of time, the Rent Act was not amended. Section 29(2) of the Bombay Rent Act was brought on statute at later point of time. While deciding the aforesaid case in 1962 GLR 182, this Court was exercising limited jurisdiction as contemplated by Sec. 115 of the Civil Procedure Code. However, Sec. 29(2) of the Bombay Rent Act is having wider jurisdiction as compared to Sec. 115 of the Civil Procedure Code. Sec. 29(2) of the Bombay Rent Act provides as under :

"No further shall lie against any decision in appeal under sub-sec. (1), but the High Court may, for the purpose of satisfying itself that any such decision in appeal was according to law call for the case in which such decision was taken and pass such order with respect thereto as it thinks fit."

It, therefore, cannot be said that, even error of law cannot be corrected in revision application under Sec. 29(2) of the Bombay Rent Act. As stated earlier, whether the suit notice is in conformity with the provisions of Sec. 12(2) of the Bombay Rent Act or not is a pure question of law, and therefore, even if, it is not taken earlier, it can be argued in revision application. What is required to be seen is merely a glance to the suit notice and from that it can be seen whether there is any demand or not which do not require any investigation of facts.

[22] Mr. V. C. Desai, has relied upon the judgment of this Court reported in 1981 GLH 24 in the case of Usha Ramchandra Kulkarni v. Shantaram Kashiram Gotri, wherein this Court has taken the view in para 13 of its judgment that "revision under Sec. 29(2) of the Bombay Rent Act is on the plateau of a second appeal under the Civil Procedure Code and the Supreme Court has well laid down that a pure question of law like the validity of a notice can be raised for the first time even in the second appeal. All that has been pointed out on behalf of the petitioners (original defendants) in the present case is a pure question of law emanating from the facts either admitted or facts which could not be controverted".

[23] Mr. Desai has also relied upon the judgment of the Hon'ble Supreme Court reported in AIR 1971 SC 2018 in the case of State of Rajasthan v. Rao Raja Kalyan Singh. Relying upon the provisions of Order 6, Rule 2 of the Civil Procedure Code, the Hon'ble Supreme Court stated that, plea of non-maintainability of suits is a legal plea and can be accepted although no specific plea was taken or precise issue framed.

[24] In my view, therefore, the aforesaid question about valid demand is a question of law and even if it is not taken in the Courts below, it is the duty of the Court to find out whether the aforesaid demand notice is in conformity with the statutory requirement or not. The aforesaid question, therefore, being the question of law can be agitated for the first time in the revision application under Sec. 29(2) of the Bombay Rent Act. The powers of this Court under Sec. 29(2) of the Bombay Rent Act are wider than that of under Sec. 115 of the Civil Procedure Code. In revision application under Sec. 29(2) of the Bombay Rent Act this Court can correct the error of law also.

[25] In that view of the matter, I do not find any substance in the arguments of the learned Advocate for the respondent that the aforesaid point cannot be taken for the first time in the revision application.

[26] In view of the aforesaid discussion, I am of the opinion that, on the basis of the suit notice, where there is no demand of arrears of the rent and since the notice is not in conformity with Sec. 12(2) of the Bombay Rent Act, no suit for eviction could have been instituted. In that view of the matter, the suit is bad as it is not preceded valid

demand as contemplated by law. Civil Revision Application, therefore, shall have to be allowed by reversing the decree of the appellate Court and restoring the decree of the trial Court though on different ground. Civil Revision Application is accordingly allowed. The suit of the plaintiff for possession is dismissed. Rule is accordingly made absolute with no order as to costs.

Application allowed.

