

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 830 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF JIVRAJ KHIMJI-LAXMIBEN JIVRAJ KHIMJI

Versus

NARANDAS UDHAVDAS

Appearance:

MR SURESH M SHAH for Petitioners
MR KV SHELAT for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 31/07/2000

ORAL JUDGEMENT

C.A.V.JUDGMENT :-

This Civil Revision Application under Sec.29(2) of the Bombay Rents Hotel & Lodging House Rates Control Act, 1947 (in short "the Act") is filed by the heirs and legal representatives of original defendant/tenant challenging the correctness, legality and propriety of judgment Ex.40 dt. 23rd April, 1986 rendered by the District Judge, Kuchchh at Bhuj (who will be hereinafter

referred to as " the Appellate Judge") in Regular Civil Appeal No.23 of 1982, whereby the appeal preferred by the present revision petitioners who were appellants in Regular Civil Appeal No.23 of 1982, dismissed the said appeal and confirmed the judgment Ex.75 dt. 22/1/1982 rendered by the learned Civil Judge (J.D.), Gandhidham Kuchchh (who will be hereinafter referred to as " the learned Judge of the trial Court) in Regular Civil Suit No. 242 of 1979.

2. Here in this Civil Revision Application, revision -petitioners are the heirs and legal representatives of original defendant/tenant Jivraj Khimji and present revision opponent no.1 was the plaintiff/landlord in Regular Civil Suit No. 242 of 1979 pending before the learned Judge of the trial court.

3. Present revision -opponent Nos. 2 and 3 were the respondent nos. 2 and 3 in Regular Civil Appeal No. 23 of 1982 which was pending before the learned Appellate Judge. As per the case of the revision -petitioners, before the heirs and legal representatives of original defendant/tenant could file Regular Civil Appeal No.23 of 1982, the suit house was sold by present revision -opponent No.1 to present revision opponent nos. 2 and 3, and therefore, present revision opponent nos. 2 and 3 were joined as respondent nos. 2 and 3 respectively in aforesaid appeal, and they are also joined as revision -opponent nos. 2 and 3 in this present Civil Revision Application. Therefore, for the sake of convenience, parties will be referred to hereinafter as the plaintiff and defendant respectively.

4. The facts leading to the present Civil Revision Application in a nutshell are as follows :-

Plaintiff is landlord/owner of a house No. D.B.Z.N.47 situated at Gandhidham- Kuchchh. That suit house is consisting of two floors. Said house was let to original defendant Jivraj Khimji for a monthly rent of Rs.25/inclusive of all taxes in respect of House No. D.B.Z.N. 47. Tenancy month commences from 1st day of every English Calendar Month and it expires on last day of the said month.

Plaintiff, through his advocate under notice dt. 23rd July, 1979 called upon defendant to let the plaintiff/landlord know as to whether he (defendant/tenant) has any dispute with regard to rent and tenancy month. Defendant did not reply that notice, and therefore, as per case of plaintiff, defendant has no

dispute with regard to rent and tenancy month. It is the case of the plaintiff that defendant is very much irregular in making payment of rent and defendant has failed and neglected to make payment of rent to the plaintiff for the period on and from 11th January, 1967. Therefore, plaintiff addressed a suit notice dt. 6th October, 1978 to the defendant calling upon him to pay the rent due for the period from 1st November, 1967 to 30th September, 1978 (for the period of about ten years and two months). Defendant replied that suit notice dt. 6th October, 1978 by his reply dt. 2nd November, 1978 requesting plaintiff to furnish him certain information with regard to tenancy. Plaintiff by his another notice dt. 23rd July, 1979 furnished the information which had been called for by the defendant, from him, to the defendant. By that another notice dt. 23rd July, 1979, the plaintiff called upon the defendant to make payment of rent which had already become due from and payable by defendant. It is the case of the plaintiff that defendant neither remitted the amount of rent which had become due, nor did he reply the said notice. He also took no care to take inspection of documents of plaintiff.

Thereafter, on or about 14th September, 1979, the plaintiff filed the suit against the defendant for decree of eviction of the suit premises and an amount of rent for a period of last three years preceding the date of plaint on following grounds :-

- (1) Defendant/tenant is a tenant in arrears of rent for more than six months and that he has neglected to make payment of such rent for more than six months within one month from the date of service of notice. That is under the ground falling under Sec.12(3)(a) of the Act.
- (2) Defendant/tenant has without the landlord's consent in writing, erected permanent structure on the premises. That is under the ground falling under Sec.12(3)(b) of the Act.

5. After receiving summons of the court, defendant appeared before the learned trial Judge and contested the plaintiff's suit by filing his written statement Ex.22, wherein the defendant denied practically all the pleadings of the plaintiff pleaded in the plaint. Defendant denied that plaintiff is landlord/owner of the suit house. Defendant also denied that he is a tenant of plaintiff, because the suit house has been let out to the defendant by the Sindhu Resettlement Corporation Limited

in the year 1957-58. Initially, the suit house was let out to M/s. Kalyanji Dhanji, but after closure of the business of the said firm, the M/s. S.R.C. Limited was accepting rent from defendant and issuing rent receipts and in this way, the said M/s. S.R.C. Limited had recovered rent from defendant upto the year 1959. Thereafter defendant has come to know that the suit house had already been sold to one Shri Narandas U.(Address: Champakali of Bombay). Defendant however did not receive any intimation from said person to whom the suit house was allotted at any point of time during last 22 years. Narandas of Champakali of Bombay had expired and present plaintiff as a fictitious person has filed the suit. In short, he (defendant) has denied the title of the landlord.

5.1 It is also the case of the defendant that he is/was always ready and willing to pay rent to a true and bonafide owner of the suit house. He has specifically denied that he is not a tenant-in-arrears of rent for the period with effect from 1st November, 1967 and onwards. He has contended that fresh notice dt. 23rd July, 1979 is not legal and valid. He has also denied that he has carried out any addition and/or alteration in the suit house. Lastly he pleaded that plaintiff is not entitled to recover rent as well as vacant possession of the suit house and requested the learned Judge of the trial court to dismiss the suit of the plaintiff.

6. From pleadings of both the parties, learned Trial Judge framed necessary issues at Ex.24.

7. Both the parties led their oral as well as documentary evidence on respective issues. After hearing the learned advocates of both the parties and after appreciating the evidence on record, the learned Judge of the trial Court was pleased to come to a conclusion that present plaintiff is a landlord and owner of the suit house and that suit notice is legal and valid. For case of plaintiff that defendant has become tenant in arrears of rent for more than six months and defendant has neglected to make payment of said arrears of rent within one month from the date of the suit, he was pleased to answer Issue No.3 in affirmative and Issue No.2 in negative i.e. against the defendant. The learned Judge of the trial Court did not accept the defence of the defendant falling under Sec. 12(3)(b) of the Act. Therefore, he, by rendering his judgment Exh. 75 dt. 22nd January, 1982, decreed the suit of the plaintiff directing the defendant to hand over the possession of the said house to the plaintiff on or before 1st August,

`1982. He was also pleased to pass a money decree to recover Rs.900/- from the defendant. He was also pleased to fix the mesne profits at the rate of Rs.25/- per month.

7. Being aggrieved against and dissatisfied with the said judgment Ex. 75 dt. 22nd January, 1982, the heirs and legal representatives of original defendant/tenant filed Regular Civil Appeal No.23 of 1982 in the District Court, Kuchchh at Bhuj. As per case of the heirs and legal representatives of original defendant/tenant before they could file an appeal against the judgment of the trial court, the original plaintiff/landlord sold the suit house to the respondent nos. 2 and 3 and that purchasers of the suit property were first joined as respondent nos. 2 and 3 in appeal, and therefore, they are also joined as revision -opponent nos. 2 and 3 in this present Civil Revision Application.

8. After hearing learned advocates for both the parties, and on perusal of the record and proceedings of the case, and after appreciating evidence led by both the parties in the suit before the learned Judge of the trial court, the learned Appellate Judge was pleased to dismiss the appeal preferred by the heirs and legal representatives of original defendant/tenant and thereby he was pleased to confirm the decree passed in favour of original plaintiff/landlord in Regular Civil Suit No. 242 of 1979 passed by learned Judge of the trial court.

9. Being aggrieved against and dissatisfied with said judgment Ex.40 dt. 23rd April, 1986 rendered by the learned Appellate Judge in Regular Civil Appeal No. 23 of 1982, the heirs and legal representative of original defendant/tenant have preferred this present Civil Revision Application challenging the correctness, legality and propriety of the said judgment.

10. Here in this present matter, Shri S.M.Shah, the learned advocate for revision petitioners has argued that the judgment of the Appellate Judge is " not according to law". He has further argued that from the very beginning, the plaintiff has filed a suit for eviction of suit premises on the ground that defendant/tenant has become a tenant-in-arrears of rent for more than six months, and that defendant/tenant has neglected to make payment of said rent which had become due within one month from the date of service of notice, and therefore, as per his arguments, the plaintiff has come with a specific case that his case is falling under Sec.12(3)(a) of the Act. He has drawn attention of this court to Para

12 of the Judgment of the trial court and argued that case of the plaintiff falls under sec.12(3)(a) of the Act. Simultaneously, he has come to a conclusion that defendant/tenant has not deposited any rent, and therefore, defendant is not protected under Sec.12(3)(b) of the Act. In view of discussion under the heading " Issue No. 6 " in Para 12 of the judgment rendered by the learned Judge of the Trial Court, he accepted the case of the plaintiff falling under Sec.12(3)(a) of the Act, and he accordingly passed a decree for eviction of the suit premises in favour of the plaintiff.

11. Shri S.M.Shah has further argued that as the learned Judge of the trial court passed a decree of eviction in favour of plaintiff, the heirs and legal representatives of original defendant/tenant preferred Regular Civil Appeal No. 23 of 1982 in the District Court, Kuchchh at Bhuj. As per his arguments, judgment of the trial Court is now merged into the judgment of the Appellate Judge. The learned Appellate Judge, has after hearing the arguments of the learned advocates of both the parties, by observing in Para 22 of his judgment, come to a conclusion that the case of the plaintiff/landlord does not fall under Section 12(3)(a) of the Act, but the case of the plaintiff/landlord falls under Section 12(3)(b) of the Act, and therefore, he dismissed the appeal and confirmed the judgment of the trial court on the ground that plaintiffs' case which falls under Sec.12(3)(b) of the Act, is proved. Shri S.M.Shah has also argued that once a decree is passed for eviction of suit premises on the ground falling under Sec.12(3)(a) of the Act and which is challenged in the appellate court, the appellate court cannot convert the findings of the trial court from the case being one under Sec.12(3)(a) to case falling under Sec.12(3)(b), and therefore, judgment of the Appellate Court is " not according to law". He has further argued that this Civil Revision Application, therefore, deserves to be allowed and the judgment of the Appellate Court is required to be set aside mainly on the ground that Appellate Court has no jurisdiction to convert the decree passed from ground under Sec.12(3)(a) of the Act to ground under Sec.12(3)(b) of the Act. In support of this contention, Shri S.M.Shah has cited following authorities :

(1) Unreported judgment of Civil Revision Application No. 868 of 1981 decided on 24th January, 1995 (Coram: Mr.Justice M.S.Parikh). In that cited case, the plaintiff had filed the suit against defendant/tenant for decree of eviction on the ground of defendant having

become tenant in arrears of rent for more than six months, claiming possession under Section 12(3)(a) of the Act. Lateron, the defendant preferred appeal in the Court of the District Judge at Rajkot. The District Court found that case was not falling under Section 12(3)(a) of the Act, but in fact, the case was falling under Section 12(3)(b) of the Act. The plaintiff/landlord insisted for passing a decree of eviction on the ground of case falling under Section 12(3)(b) of the Act. This court, by following a decision in a case of N.M.Engineer & Ors Vs. Narendra Singh Virdi and another, reported in 1994 (2) All India Rent Control Journal 113, held that there is no question of taking matter any further when case does not fall under Section 12(3)(a) of the Act. The case of the Hon'ble Supreme Court reported in this cited judgment is discussed lateron.

(2) Judgment rendered in Civil Revision Application No. 123 of 1981 on 30th March, 1995 (Coram: S.D.Dave, J.). In this cited case also, the plaintiff/landlord had filed a suit for eviction under Section 12(3)(a) of the Rent Act. In that case, suit notice dated 2nd December, 1976 was received by the defendant/tenant on 3rd December, 1976. The facts were such that it was not in dispute that on 4th December, 1976, there was a payment of Rs.200/- in cash, and therefore, on the date of filing of the suit, there was no arrears of rent of six months or more than six months, but rent was due from the defendant to plaintiff for less than six months, and therefore, this court found that case was not falling under Section 12(3)(a) of the Act, but it was falling under Section 12(3)(b) of the Act. The plaintiff insisted to pass a decree under Section 12(3)(b) of the Act. In that case also, this Court, by following a decision of N.M.Engineers (supra), held that thought it was contended that when the suit under Section 12(3)(a) of the Act fails, there cannot be a reference to Section 12(3)(b) of the Act. This court accepted the contentions by relying on the aforesaid decision of the Hon'ble Supreme Court.

(3) Narbheram Ambalal and Ors Vs. Jayantibhai Dahyabhai Kharva, reported in 1998(2) GLH 550. In that case, suit was filed under Section 12(3)(a) of the Act. This court held that once the case is filed under Section 12(3)(a) of the Act, the landlord cannot fall back under Section 12(3)(b) of the Act. This court by relying on the aforesaid case of N.M.Engineer (Supra) observed that it was laid down by Apex Court that appellant having failed in his case under Section 12(3)(a) cannot switch

to rely on Section 12(3)(b) of the Act. It was further observed that the notice under Section 12(3)(a) will in substance be different from notice under Sec. 12(3)(b) of the Act. In a notice under Sec.12(3)(a), the landlord has to allege that the arrears of rent exceeding six months were due from the tenant, whereas in a notice in case under Sec.12(3)(b) the landlord has to come out with a case that rent not exceeding six months was due from the tenant.

(4) N.M.Engineer and others Vs. Narendra Singh Virdi and another, AIR 1995 SUPREME COURT 448. In that cited case, landlord had filed a suit No. 2267/64 for possession of the premises under Sec. 12(3)(a) of the Act. Respondent/tenant contested suit. The learned trial Judge, by his order dt. 26th July, 1965, fixed standard rent at Rs.130/per month and decreed the suit. Thereafter on appeal by the respondent, the same was allowed by the learned District Judge by his order dt. 16/4/1966. Thereafter, Special Civil Application No. 46 of 1967 was preferred in the High Court and that was dismissed on 6/10/1970. Thereafter, matter was carried by original plaintiff/landlord to the Hon'ble Supreme Court. In that case, the Apex Court held that the appellant having failed in his case under Sec.12(3)(a) cannot seek to rely on Sec.12(3)(b). Under Sec.12(3)(a), there was a dispute about the amount of the amount of rent and there was no arrears of rent for six months outstanding and there is no negligence on the part of the respondent-tenant in making the payment thereof. The notice was bad on that count. It was specifically held that notice referred to Sec.12(3)(b) is entirely different. Ultimately, Hon'ble Supreme Court held that the suit notice was not satisfying requirements of Sec.12(3)(a). The arrears of rent Rs.87/- had been deposited and therefore it was not open to the appellant to take up case of Sec.12(3)(b). Thus, legal position is very much settled that when landlord files a suit for decree of eviction on the ground that his case falls under Sec.12(3)(a) of the Act, and ultimately, if it is found that his case does not fall under Sec.12(3)(a), but it actually falls under Sec.12(3)(b) of the Act, then the court cannot pass a decree of eviction under Sec.12(3)(b) of the Act.

12. Keeping in mind the aforesaid legal position, now we will examine the facts of this case. Here in this case, plaint of the plaintiff was drafted by the Advocate. In Para 9, it is specifically stated as follows:-

" That the plaintiff submits that he is entitled

to recover vacant possession of the suit premises on the grounds of (i) Non-payment of rent (under Section 12(3)(a)), carrying out the work of additions and alterations in the suit house of the permanent nature and which cannot be removed without serious damage to the property originally constructed, without obtaining prior permission in writing from the plaintiff (under sec.13(1)(b)) of Bombay Rent act".

The learned Judge of the trial Court, by answering Issue No.3 in negative held that plaintiff has proved that defendant is a tenant-in-arrears as averred in the plaint. By answering Issue No.4 in the negative, it is held by the learned Judge of the trial Court that defendant is/was not ready and willing to pay rent regularly. By answering Issue No.5 in negative, learned Judge of the trial Court did not accept the case of the plaintiff with regard to making of work of additions and alterations of permanent nature in the suit house, and therefore, he did not pass the decree on the ground of case falling under Sect.12(3)(b) of the Act, but ultimately, he passed a decree for eviction of suit premises under Sec.12(3)(a) of the Bombay Rent Act. He also specifically observed that defendant was not protected by Sec. 12(3)(b) of the Bombay Rent Act. This decree in the trial court was passed on a ground of the case falling under Sec.12(3)(a) of the Act. Thereafter, heirs and legal representatives of original tenant Jivraj Khimji filed Regular Civil Appeal No.23 of 1982. The learned Judge of the Appellate court did not accept the case of plaintiff for his case falling under Sec.12(3)(a) of the Act, but he observed that case is falling under Sec.12(3)(b) of the Act and he passed a decree for eviction of suit premises on the ground that in fact, his case falls under Sec.12(3)(b) of the Act.

13. It is well settled legal position that appeal proceeding is a continuous proceeding of the suit. When the appeal was taken up for hearing before the learned Judge of the Appellate Court, learned advocate for the defendant-tenant also argued that case of plaintiff falls under Sec. 12(3)(a) of the Act. Relevant portion of such submission made by learned advocate for defendant before the learned Appellate Judge is found in Para 22 of his Judgment. It reads as follows :-

" According to the learned advocate for the respondents, the case falls under Section 12(3)(a) of the Bombay Rent Control Act, but as per statutory notice, the defendant was liable to

pay the municipal taxes over and above the contractual rent of Rs.25/- per month and hence because part of the amount of the rent is not payable on monthly basis, the case does not fall under Section 12(3)(a) and hence falls under Section 12(3)(b) of the Bombay Rent Control Act.....

Thus even before Appellate Judge, original plaintiff-landlord adhered to his case that his case falls under Section 12(3)(a) of the Act. Now he cannot argue before this court that from the very beginning his case was falling under Sec. 12(3)(b) of the Act.

14. Shri K.V.Shelat, learned advocate for revision-opponents has argued that plaintiff had filed his case under Sec. 12(3)(b) of the Act because plaintiff was in know of the fact that monthly rent of Rs.25/- was excluding municipal taxes. What was within the knowledge of plaintiff when suit notice was given is reflected in the plaint. As discussed earlier, in the plaint, plaintiff has very much advanced his case that his case falls under Section 12(3)(a) of the Act. Learned Judge of the trial Court passed the decree of eviction under Section 12(3)(a) of the Act. If really, plaintiff-landlord was believing that his case falls under Section 12(3)(b) of the Act, naturally he would have filed his cross-objections under O. 41 R. 22(1) of the Code of Civil Procedure. As per explanation below sub-rule (1) of Rule 22 of Order 41 of the Civil Procedure Code, a respondent aggrieved by finding of the court in the judgment on which the decree appealed against is based, may under this rule file cross-objections in respect of the decree so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding, which is sufficient for the decision of the suit, the decree is wholly or in part in favour of that respondent.

15. Looking to the above legal position, if really plaintiff had his case under Sec. 12(3)(b) of the Act, from the very beginning, he would have certainly filed his cross-objections under explanation to Order 41 R. 22(1) of the Code of Civil Procedure in Regular Civil Appeal No. 23 of 1982. In spite of the fact that decree was passed in his favour not according to his case under Sec.12(3)(b) of the Act, but under Sec.12(3)(a) of the Act, he could have filed cross-objections as stated above. Thus, it appears that when plaintiffs-landlords have found that learned Appellate Judge has passed the decree under Sec.12(3)(b) of the Act, they have started to advance their case that since the beginning, their

case was falling under Sec. 12(3)(b) of the Act.

16. Looking to Para 9 of the plaint, and Para 22 of the Judgment of the learned Appellate Judge, it was never in the mind of the plaintiff that his case was under Sec.12(3)(b) of the Act. When the learned Judge passed a decree under Sec.12(3)(b) of the Act, he started to canvass his case under Sec. 12(3)(b) of the Act, and therefore, this revision application is devoid of merits.

17. Shri S.M.Shah, the learned advocate for revision-petitioners has submitted that notice for the case falling under Sec.12(3)(a) of the Act is totally different than notice which is required to be given for case under Sec. 12(3)(b) of the Act. In support of his arguments, Shri S.M.Shah has cited a decision in case of TARABEN SAKARLAL SHAH Vs. SHAH JETHALAL MAGANLAL reported in (1974) 15 GLR 567, wherein this court has set out three conditions which are required to be satisfied by the landlord, if case is pleaded under Sec.12(3)(b) of the Act. Those three conditions are as follows :

- (i) the tenant has to deposit the standard rent and permitted increases then due in court on the first day of the hearing of the suit, or on or before such other day as the court may fix; and
- (ii) thereafter continues to pay or tender in court regularly such rent or permitted increases till the suit is finally decided; and
- (iii) also pays costs of the suit as directed by the court.

Above three conditions are also reiterated by this court in case of CHHOTUBHAI (since deceased), THROUGH HIS HEIRS AND LEGAL REPRESENTATIVES, Vs. GUNVANTBHAI reported in 2000 (1) 41(1) GLR 115.

18. One of the ingredients to bring the case under Sec. 12(3)(b) is to fix a date by appellate court for depositing the arrears of rent or costs of the suit. In case of NANIBEN D/O DAYALBHAI MORARBHAI VS. VIDYABEN AMBALA MISTRY reported in 1987 (2) GLR 352, the facts were such that in the appellate court also, there was no order under Sec.12(3)(b) fixing any interim standard rent or giving any direction fixing any date of payment of arrears of rent or costs. In absence of any such fixing of date, the tenant would not be in a position to comply with the requirement. Fixing the date under Sec.12(3)(b) would focus the contention of the tenant that if he does not comply with such expressed direction

under Sec.12(3)(b), he may incur a liability to eviction. In that case, admittedly, appellate court had not fixed any date or passed any order under Sec.12(3)(b) passing a decree by which the tenant should deposit all arrears of rent or costs of the suit. In absence of any order under Sec.12(3)(b) of the Act passed by the appellate court, the tenant was not under any obligation to pay the same by particular date.

19. Here in this case on hand, the learned appellate Judge did not pass any order under Sec.12(3)(b) of the Act fixing the date by which the defendant-tenant should deposit all arrears of rent or costs of the suit. Thus one of the ingredients to satisfy the case falling under Sec.12(3)(b) of the Act is missing in this case, and therefore, the judgment of the learned Appellate Judge in no case can be said to be a judgment in accordance with law. As discussed earlier, when plaintiff has come with a specific case that his case falls under Sec.12(3)(a) of the Act, the appellate Judge cannot pass a decree of eviction under Sec.12(3)(b) of the Act, without passing order fixing the date for depositing the arrears of rent etc. and thus learned Appellate Judge has exceeded his jurisdiction.

20. For the foregoing reasons, and discussions and observations made hereinabove, this court finds that the judgment which is challenged in this Civil Revision Application is erroneous and it goes to the root of the case and on the face of it, said judgment is not in accordance to law. This Civil Revision Application, therefore, deserves to be allowed, and it is accordingly allowed. The judgment Ex.40 dated 23rd April, 1986 rendered by the learned District Judge, Kachchh at Bhuj in Regular Civil Appeal No. 23 of 1982 is set aside. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

Date: 31-7-2000 (H.H.MEHTA,J.)
ccshah