IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1816 of 1984

WITH

CIVIL REVISION APPLICATION NO. 1956 OF 1984

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

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

JIVIBEN HARILAL

Versus

HASMUKHRAI JUGATRAM RAWAL

Appearance:

MR SURESH M SHAH for Petitioner

MR DIVETIA for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 31/03/2000

ORAL COMMON JUDGEMENT

1. These are two revision applications u/s 29[2] of the Bombay Rent Act, at the instance of the original defendant - tenant challenging the judgement and decree

passed by the lower appellate Court in two appeals.

2. The respondent - landlord had sued the tenant under the provisions of the Rent Act for a decree of eviction on the ground of arrears of rent for more than six months. The trial Court dismissed the suit of the landlord firstly by holding that the case is not covered u/s 12[3][a] of the Rent Act, and so far as the section 12[3][b] of the said Act is concerned, the tenant has complied with the terms and conditions imposed by the said section, and therefore, no decree of eviction can be passed. However, the trial Court granted a monetary decree in favour of the landlord and against the tenant in respect of the actual arrears found [in respect of less than six months' rent]. This decree led to the filing of two appeals, one by the landlord challenging the dismissal of the suit for eviction, and the other by the tenant challenging the monetary decree in respect of arrears of rent.

3. The lower appellate Court, after hearing the respective parties in the two appeals, allowed the appeal of the landlord and passed a decree for eviction u/s 12[3][a] of the said Act, and dismissed the appeal of tenant by upholding monetary decree in respect of arrears of rent. The tenant has therefore challenged the judgement and decree in both the appeals by filing the present two revision applications u/s 29[2] of the Bombay Rent Act.

4. The present revision arises u/s 29[2] of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, wherein the jurisdiction of this Court is extremely limited. The Supreme Court has laid down the scope and powers of the High Court while entertaining such revisions u/s 29[2] of the Bombay Rent Act. The Supreme Court in the case of Patel Valmik Himatlal & Ors. v/s Patel Mohanlal Muljibhai [1998(2) GLH 736] = AIR 1988 SC 3325, while approving and reiterating the principles laid down in its earlier decision in the case of Helper Girdharbhai v/s Saiyad Mohmad Mirasaheb Kadri [AIR 1987 SC 1782], held that High Court cannot function as a court of appeal, cannot reappreciate the evidence on record, cannot discard findings of fact based on evidence recorded by the courts below, and cannot interfere on grounds of inadequacy or insufficiency of evidence, and cannot interfere, except in cases where conclusions drawn by the courts below are on the basis of no evidence at all, or are perverse. A different interpretation on facts is also not possible merely because another view on the same set of facts may just be possible.

5. The lower appellate Court first observed that section 12[3][b] of the Rent Act could be made applicable only in cases where section 12[3][a] would not apply. This is obviously the correct legal position.

5.1 The lower appellate Court then on the appreciation of evidence before him came to a conclusion that section 12[3][a] of the Rent Act would apply to the facts of the case.

5.2 This finding leads to different submissions made on behalf of the tenant on different aspects of the matter. Firstly, it is contended that the rent is not payable by the month, secondly it is contended that there was a dispute of the standard rent, thirdly it was contended that the arrears were not in respect of a period of six months or more, and that the tenant had neglected to make payment in respect thereof within one month after the service of statutory notice contemplated by section 12[2] of the said Act.

6. It was contended that, under rent note exh.41, the tenant was under an obligation to pay education cess, and admittedly this is one of the terms and conditions of tenancy. Since education cess is an annual event, and forming part of the obligation of the tenant imposed by the terms and conditions of the tenancy, it could not possibly be said that rent was payable by the month.

6.1 It must first be noticed, in order to maintain a clear focus upon the controversy, that the rent note exh.41 in para 3 thereof contemplates only education cess and does not contemplate municipal tax. There is no controversy that the provisions of the Education Cess Act impose the primary liability upon the landlord to pay the said cess to the local body, and that (subject to a contract to the contrary), one-half is recoverable from the tenant. In view of the specific provision made in the rent note in the instant case, the entire education cess could be recovered by the landlord from the tenant. However, we must not lose sight of the fact that this only creates a right in favour of the landlord to effect the recovery, if and when he chooses to do so. On the facts of the case, there cannot be any controversy that the suit of the plaintiff was based on the ground that the tenant was in arrears of rent [only] and not that he was in arrears of rent plus education cess. Secondly, it is equally clear that it was not a suit for arrears of rent together with the education cess. It is equally clear that the suit plaint refers only to the obligation

of the tenant to pay up the arrears of rent, and the plaint does not in any manner whatsoever even refer to the obligation of the tenant to pay education cess, let alone make a demand in respect thereof.

6.2 Even when the statutory notice u/s 12[2] (exh.44) is examined from this perspective, it is found that the same does not make any reference whatsoever to education cess or even to "permanent increases" and in fact does not even mention the obligation of the tenant to pay education cess. The cause of action clearly set out in the suit notice at exh.44 is completely dehorse any mention or obligation in respect of education cess.

6.3 In my view, therefore, the lower appellate Court was justified in coming to the conclusion that this was a suit simpliciter for eviction on the ground of arrears, that it could not be said that education cess form part of the rent, and that therefore, the rent was not payable by the month.

6.4 In this context, learned counsel for the petitioner seeks to place reliance upon a decision of this Court in the case of Prakash Surya, reported in 18 GLR 1024. No doubt, the proposition laid down therein is, as per the submission made by the learned counsel for the tenant, as discussed hereinabove. In my opinion, however, the observations made in para 13 of the said decision to the effect that, "The obligation (to pay education cess) arose out of an agreement between the landlord and the tenant and it forms part of the lease, meaning thereby that it was a condition on which the tenant can continue to occupy the premises as a tenant. It would therefore form an integral part of the rent." would not be of an universal application, and justifiable exceptions would arise depending on the facts of each case. On the facts of the present case, as discussed hereinabove, looking to the suit plaint and also the suit notice, the obligation to pay education cess has no nexus with the actual demand made in the suit notice, nor with the cause of action for the suit.

7. It was then sought to be contended on behalf of the tenant that there was a dispute as to the standard rent, and that therefore, section 12[3][a] would not apply. On the facts of the case, there is no controversy that the tenant has not raised any dispute as to standard rent within one month of the receipt of the statutory notice u/s 12, and the fact that such a dispute has been raised in the written statement is of no consequence, since it is by now well settled that a dispute raised in

the written statement for the first time would not take the case out of section 12[3][a] of the Rent Act. However, this finding is no doubt also subject to the contention of the tenant that he was not served with the statutory notice at all and that therefore, the tenant had no opportunity of raising a dispute within one month thereof. This aspect has been discussed hereinafter. For the present, it is sufficient to observe the facts as they appear from the irrefutable evidence on record. The fact remains as found by the lower appellate Court that the tenant was in arrears of more than six months on the date of the statutory notice, and that he has failed to make a deposit of the amount in Court or to pay the landlord within 30 days of the notice.

8. One of the contentions also raised on behalf of the tenant was to the effect that the suit notice was not valid on the ground of vagueness and similar reasons. It may be noted that this contention was raised by the tenant before the trial Court, which was negatived by the trial Court. The tenant though he had preferred an appeal, had not raised this contention in appeal. Thus, this contention is not seriously pressed in the present revisions.

9. This takes us to the main contention raised on behalf of the tenant to the effect that the statutory notice required u/s 12[2] of the Act was not served upon the tenant at all and that therefore, the suit is incompetent. It may be noted here that this contention was negatived by both the Courts below and is therefore to that extent a concurrent finding of fact recorded by both the Courts below, and cannot be interfered with in the present revision u/s 29[2] of the Rent Act.

9.1 However, the contention is based on the submission that the two Courts below have come to a finding that the plaintiff was served with a notice, but this finding is based only on a presumption of service and not on evidence of service. This submission when carefully examined, does not bear scrutiny.

9.2 The oral evidence of the landlord is explicit and beyond doubt as to one fact, that he had dispatched the notice by Registered Post A.D. to the proper address of the tenant. Exh.42 is the registration receipt pertaining to the dispatch of the said notice.

9.3 Apparently because the landlord failed to receive the acknowledgment slip bearing the signature of the addressee - tenant, the landlord applied to the postal

authorities, and the postal authorities issued the requisite certificate on his application which is at exh.43 on record. A scrutiny of exh.43 clearly indicates that so far as the postal authorities are concerned, it is in the nature of a certificate issued by the postal authorities. However, it is not a certificate in general terms attesting merely to the fact of delivery to the addressee. In my opinion, it is something more than that. Exh.43 is obviously a proforma of an A.D. Slip itself and this copy has been supplied by the postal department to the landlord in the form of a certificate. What is relevant and material is that exh.43 discloses that the registered letter [at the time of dispatch] bore registration No.5496, and that it was received on 23rd February 1979 by one Divaliben Himmatlal for and on behalf of Jiviben Harilal (the tenant). From this endorsement, it would appear that Divaliben Himmatlal has received the registered letter for and on behalf of Jiviben Harilal [the tenant]. Admittedly, Himmatlal is the son of the tenant Jiviben. However, Himmatlal in his deposition denies that his wife is named Diwaliben. However, if a person residing in the premises of the tenant, whether she is daughter-in-law or grand-daughter of the tenant, receives the said letter, and signs for and on behalf of tenant, as per the certificate issued by the postal authorities, I do not see how the same can be said to be a presumptive evidence rather than a direct evidence. Learned counsel for the tenant is correct in his submission only in one limited aspect that there is no A.D. Slip in the original bearing the signature of the tenant on record. However, what we are required to consider is whether the evidence on record, whatever it may be, is sufficient to establish good service or not. On the facts of the present case, I agree with the line of reasoning adopted by the lower appellate Court, both on the aspect of interpretation of the documentary evidence on record, and also on the basis of the presumption available u/s 114 of the Evidence Act, that the tenant was served with the statutory notice.

9.4 Once it is found that the tenant was in fact served with the statutory notice, it makes relevant the other fact that no dispute as to standard rent was raised nor was the amount paid within one month of the receipt of the said notice, and that therefore, the dispute as to standard rent raised in the written statement would be of no consequence. This would therefore not be sufficient to take the case out of the operation of section 12[[3][a] of the Act.

10. Learned counsel for the petitioner - tenant then

sought to submit that, on the facts and evidence on record, it is not established that the tenant was in arrears of rent for more than six months on the date of the statutory notice. Suffice it to say that the lower appellate Court has discussed the evidence in great detail and has recorded a finding of fact that he was in fact in arrears of rent for more than six months. I agree with the appreciation of evidence on this point as recorded by the lower appellate Court.

10.1 Even otherwise, on an independent appreciation of the evidence, I am inclined to record the same finding. In this context, it was sought to be contended by learned counsel for the tenant that the receipt at exh.29 dated 5th of May 1978 completely negatives the claim of the landlord in respect of the period of arrears. However, it is clearly apparent from the evidence on record that the said receipt at exh.29 was a provisional receipt, which is made clear by the final receipt at exh.38. The lower appellate Court has clearly examined both these two receipts, in the context of each other and in my opinion, has rightly come to the conclusion that exh.38 reflects the correct financial transaction between the parties and the same would therefore override the earlier provisional receipt at exh.29. More over, exh.38 is obviously the final receipt because it specifically mentions that the same is in settlement of accounts till the date and that the kuchcha receipt [earlier] has been cancelled. Obviously therefore, exh.38 supersedes exh.29. This exh.38 is further strengthened by the document executed by Himmatlal, the son of the defendant - tenant at exh.39, which is in the form of a letter. The same contains a specific admission that the rent is due from 1st April 1977, and that he would pay up in the month of May 1980. This is an admission not only in respect of the period of arrears, but is also an admission that on the date of the statutory notice, the defendant was in arrears of rent for more than six months. This letter by the son of the defendant to the plaintiff is sought to be explained away by the deposition of Himmatlal [exh.50] wherein he has deposed that the said letter was taken from him under pressure and coercion. However, this is a mere explanation offered by the said Himmatlal during the course of deposition. What is significant is that there is no plea or contention taken in the written statement that such or similar writing has been taken from him under coercion or pressure. Further more, no questions have been put to the plaintiff in his cross examination by the defendant even to suggest that exh.39 was taken by coercion or pressure. Thus, the positive evidence led by the landlord coupled with the various admissions on part

of the defendant justifiably lead to the conclusion that the tenant was in arrears of more than six months on the date of the statutory notice, and admittedly has neither made payment, nor deposited in Court the amount within 30 days of the statutory notice. Therefore, a decree for eviction would be entirely justified.

11. So far as Civil Revision Application No.1956/84 is concerned, the petitioner - tenant challenges the money decree passed by the trial Court and confirmed by the lower appellate Court as being the amount due to the landlord.

12. In this context, both the Courts have recorded concurrent findings of fact and have determined the amount being payable to the landlord, on the evidence on record. I see no reason in the present revision u/s 29[2] of the Bombay Rent Act to interfere with this finding of fact based on the appreciation of evidence. The same is therefore liable to be dismissed also for this reason.

13. I therefore see no substance in these two revision applications and the same are accordingly dismissed with no orders as to costs. Rule is discharged. Ad interim relief stands vacated.

14. At this stage, learned counsel for the petitioner - tenant seeks a stay of operation of the present judgement and extension of the ad interim relief granted in the present revisions with a view to approach the Supreme Court. For this purpose, ad interim relief operative till today shall be extended upto 16th June 2000 on the same terms and conditions.

*****

parmar*