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SUGARBAI M. SIDDIQ AND ORS.

v.

RAMESH S. HANKARE (D) BY LRS.

SEPTEMBER 27, 2001

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[SYED SHAH MOHAMMED QUADRI AND S.N. PHUKAN, JJ.]

*Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947:*

S.12(3)(a)—*Suit for eviction of tenant on ground of non-payment of rent within prescribed period after service of notice—Trial Court decreed the suit recording a finding that amount was not paid within permissible period—Order maintained by appellate court—High Court exercising jurisdiction under Article 227 of the Constitution in writ petition filed by tenant set aside order of appellate court—Held, rent in dispute relates to the period from 1.1.1978 to 30.6.1978—Notice of demand sent on 14.7.1978—Period permissible to pay rent expired on 14.8.1978—Defence of tenant that money order was received back on 17.7.1978 as refused not substantiated—Tenant did not file receipt of sending money order—Trial Court rightly drew adverse inference against him—Money order coupon containing endorsement “refused” was examined by trial Court and found that postal stamp was dated 27.8.1978—These findings were confirmed by appellate Court—High Court misread the money order coupon as containing the date August 17, 1978—Adverse inference drawn by trial court and appellate court remains unrebutted—Finding recorded by High Court cannot be sustained—Order of High Court set aside and that of appellate court restored—Constitution of India, 1950—Article 227.*

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*Constitution of India, 1950 :*

*Article 227—Held, in an application under Article 227 High Court is concerned not with decision but with decision making process—It has to see whether the lower court/tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity.*

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**CIVIL APPELLATE JURISDICTION :** Civil Appeal Nos. 4756-4757 of 1997.

From the Judgment and Order dated 17.10.96 of the Bombay High Court in W.P. Nos. 3262/89 and 307 of 1991.

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N.N. Keshwani and Ramlal Roy for the Appellants.

Bhim Rao, Vijay Nagar, S.K. Verma and S.M. Jadhav for the respondents.

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The following Order of the Court was delivered :

These appeals, by special leave, are directed against the common order of the High Court of Judicature of Bombay, Bench at Aurangabad, passed in Writ Petition No. 307 of 1991 and in Writ petition No. 3262 of 1989 on October 17, 1996. The appeal arising out of order in Writ Petition No. 3262 of 1989 is not pressed. The facts in the appeal arising out of order in Writ Petition No. 307 of 1991 which are relevant for our purposes, may be noticed here.

The appellants are the landlords of premises bearing Municipal No. 2573 (City Survey Nos. 27 & 27-A) in Mochi Lane Ahmednagar (for short 'the premises') and the respondents are the legal representatives of the original tenant (hereinafter referred to as, 'the respondents'). The appellants filed suit No. 756 of 1978 in the court of the Joint Civil Judge, Junior Division at Ahmednagar against the respondents seeking their eviction on two grounds - the first is non-payment of rent for more than six months even after notice of demand under Section 12(3)(a) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short, 'the Act') and the second is reasonable and *bona fide* requirement of the appellants, under Section 13(g) of the Act. The only ground which now survives is the first ground, namely, default in payment of rent for the period exceeding six months from January 1, 1978 to June 30, 1978. A notice demanding the rent was sent to the respondents on July 3, 1978 which was served on July 14, 1978; the demand in the notice was not fulfilled within the statutory period of one month. The respondents contested the suit stating that they did not receive the notice; that rent was sent by money order but the appellants refused to accept the same; that they had already paid the rent and, therefore, the ground was not available to the appellants.

On consideration of the evidence on record, oral and documentary, the trial court found that the amount was not paid within the permissible period and decreed the suit for eviction on July 15, 1981. On appeal by the respondents herein the order of eviction was maintained and the appeal was dismissed by the appellate court on December 23, 1983. That order was assailed by the respondents herein before the High Court in Writ Petition No. 307 of 1991 which was allowed on October 17, 1996 by setting aside the order of the appellate court confirming the order of the trial court. It is against that order

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A that the present appeal is preferred.

Mr. N.N. Keshwani, learned counsel for the appellants, contends that non-payment of rent by the respondents within the statutory period is a question of fact and both the trial court as well as the first appellate court found it against the respondents, therefore, the High Court in exercise of the jurisdiction under Article 227 of the Constitution ought not to have disturbed the finding of fact. The High Court, submits the learned counsel, reappreciated the evidence and recorded the finding which is unsustainable on merits.

C Shri Bhimrao Naik learned senior counsel for the respondents, on the other hand, submits that inasmuch as the findings recorded by the trial court as well as the appellate court are contrary to the evidence, the High Court has rightly gone into the question of default and recorded the correct finding which does not require interference by this Court.

D There can be little doubt that in an application under Article 227 of the Constitution, the High Court has to see whether the lower courts/tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity; in other words, the court is concerned not with decision but with decision making process. On this ground alone the order of the High Court is liable to be set aside.

E Since the order impugned before the High Court was passed under Section 12(3)(a) of the Act, it will be apt to quote the relevant provisions of Section 12 here :

F "12(1). A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, insofar as they are consistent with the provisions of this Act.

G (2). No suit for recovery of possession shall be instituted by a landlord against 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 section 106 of the Transfer of Property Act, 1882.

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(3). (a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the court.

(4)   xxx                   xxx                   xxx                   xxx

A perusal of the provisions of Section 12 discloses that it incorporates the legislative scheme in regard to eviction of a tenant by a landlord for default in payment of rent by the tenant. We shall now advert to each of the sub-sections of Section 12. Sub-section (1) of Section 12 places an embargo on the right of a landlord to recover possession of any premises so long as the tenant : (i) pays or is ready and willing to pay the amount of the standard rent and where applicable the permitted increases; and (ii) observes and performs the other conditions of the tenancy not inconsistent with the provisions of the Act. The mandate of sub-section (2) is that a landlord shall not file a suit for recovery of possession against the tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month of service of notice of demand for the amount due by him in the manner provided in Section 106 of the Transfer of Property Act. The directions contained in sub-sections (3) and (4) are addressed to the court. Clause (a) of sub-section (3) postulates passing a decree for eviction in a suit for recovery of possession by the court where : (i) the rent payable is month by month; (ii) there is no dispute regarding the amount of standard rent or permitted increases; (iii) rent or increases are in arrears for a period of six months or more; and (iv) the tenant has neglected to make payment of arrears until the expiration of one month after the service of the notice of demand. Clause (b) of sub-section (3) prohibits the court from passing a decree for eviction of a tenant in such a suit in a case

- A not covered by clause (a) if on the first date of hearing of the suit or on or before such other date as the court may fix, the tenant pays or tenders in court the standard rent and permitted increases due and thereafter continues to pay or tender in court regularly such rent and permitted increases till the final decision of the suit and also pays costs of the suit as directed by the court. Sub-section (4) is not relevant for the present discussion.

In the instant case, as noted above, the rent in dispute relates to the period of six months - from January 1, 1978 to June 30, 1976. Notice of demand in respect of the rent in arrears was sent by the appellants (Exh. 29) which was received by the respondents on July 14, 1978. The period of one month

- C contemplated in the provision within which the original tenant was entitled to pay the rent expired on August 14, 1978. The defence of the appellants is that on July 11, 1978, a money order for the amount in demand was sent which was received back on July 17, 1978 and, therefore, there has been substantial compliance of clause (a) of sub-section (3) of Section 12. Admittedly, the
- D respondents did not file receipt of sending the money order which is direct evidence of the fact of sending the money order to the appellants. In his deposition in the trial court the original tenant admitted that the receipt of sending the money order issued by the postal authorities was with him; however, he did not choose to file the same. The trial court drew adverse inference against him, in our view rightly. The money order coupon containing the endorsements of the postal authorities "refused" which was returned by the postal authorities (Exh. 67) was examined by the trial court and it was found that the postal stamp was dated August 27, 1978, if that be so there was no material to show that the amount in demand was sent within one month. These findings were confirmed by the appellate court. The High Court misread Exh.67 as containing the date August 17, 1978 and from that inferred that the money order might have been sent on August 12/13, 1978 and upset the concurrent findings of courts below. In view of the divergence of opinion on this aspect we ourselves looked into the record and with the help of magnifying glass perused Exh.67. The same was also placed before the learned counsel for the parties. We are unable to agree with the High Court that the postal stamp is of August 17, 1978. The adverse inference drawn by the trial court and the appellate court remains unrebutted. There was no other material to justify interference by the High Court. Therfore, the finding recorded by the High Court cannot be sustained.

- H For the aforesaid reasons, the order under challenge is set aside, the order

of the appellate authority confirming the order of the trial court is restored. The appeal against Writ Petition No. 307 of 1991 is thus allowed. There shall be no order as to costs.

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In view of the order passed in this appeal I.As. 3 to 6 are dismissed.

The appeal arising out of the order in Writ Petition No. 3262 of 1989 is dismissed as not pressed. No costs.

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R.P.

Appeals allowed/dismissed.