(2000) 02 GUJ CK 0030

Gujarat High Court

Case No: Civil Revision Application No. 926 of 1983

Heirs of Sunderlal S. Bhaiya		APPELLANT
	Vs	
Gujarati Mochi Niat Panch Samsta Dabhoi		RESPONDENT

Date of Decision: Feb. 2, 2000

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 12(3)(a)

Citation: (2000) 2 GLR 463

Hon'ble Judges: P.B. Majmudar, J

Bench: Single Bench

Advocate: K.C. Shah, for the Appellant; D.T. Shah, for the Respondent

Final Decision: Dismissed

Judgement

P.B. Majmudar, J.
Unsuccessful defendant original tenant has knocked the doors of this court by invoking revisional jurisdiction u/s 29(2) of the Bombay Rent Act (hereinafter referred to as the Act).

2. The facts of the present revision application are as under:

Present petitioner is the original defendant against whom the opponent plaintiff had filed Regular Civil Suit No.. 54 of 1979 in the court of the learned Civil Judge (JD), Dabhoi. The plaintiff had filed the said suit for getting a decree for possession of the rented premises which was let out to the defendant-tenant on the ground that the defendant has failed to pay up the arrears of rent in spite of notice of demand. It is the case of the plaintiff that the plaintiff is the owner of a house bearing Municipal Census No.58 situated at Dabhoi Kasaba. On 25.11.1961 the southern portion of the suit premises was let out to the defendant at a monthly rent of Rs. 7/-. Subsequently the second room of the house was also let out to the defendant and at that time the rent was increased to Rs.13/- per month. Since the defendant was in arrears of rent

for more than six months, a notice of demand as contemplated u/s 12(2) of the Act was served on the defendant. It is not in dispute that the suit notice was received by the defendant but the defendant did not comply with the said notice. Therefore, aforesaid suit was filed for getting decree for arrears of rent as well as for a decree for getting possession of the suit premises on the ground that the defendant has failed to pay the arrears of rent and therefore he has neglected to pay the rent and was liable to be evicted having lost the statutory protection given under the said Act.

3. The defendant tenant in response to the summons received from the court has appeared in the suit and filed his written statement at exh.14. It was contended in the written statement that the rent of Rs.13/- p.m. which is claimed by the plaintiff is not the standard rent. That on 18.7.79 he had deposited the rent in the court and therefore, the suit deserves to be dismissed. From the pleadings of the parties the learned Trial Judge framed various issues at exh.16. The Trial Court came to the conclusion that the plaintiff has failed to prove that the defendant is in arrears of rent for more than six months. The Trial Court gave a finding about the standard rent and the finding was that the standard rent of the premises is Rs. 13/- per month. However, on the basis of the finding on issue no.1 to the effect that the defendant was not in arrears of rent for more than 6 months the Trial Court by its judgment and decree dated 26.3.81 dismissed the suit of the plaintiff with costs.

4. Aforesaid decree of the Trial Court was challenged by the plaintiff by way of filing Regular Civil Appeal No.152 of 1981 before the District Court, Vadodara. Aforesaid appeal was heard by the learned 2nd Extra Assistant Judge, Vadodara who allowed the appeal by reversing the judgment and decree of the Trial Court and the learned Appellate Judge, decreed the suit of the plaintiff for possession. Aforesaid order of the learned Appellate Judge, Vadodara has been challenged by the defendant in the present Revision Application.

5. At the time of hearing of this Revision Application it was contended by Mr. K.C. Shah learned advocate for the petitioner that during the pendency of this revision application original tenant Sunderlal Shivprasad Bhaiya had died and therefore, his heirs and legal representatives are brought on record. It was contended by Mr.K.C. Shah for the petitioner that the the learned Appellate Judge has committed an error of law as well as of facts by reversing the decree of the Trial Court, as the defendant tenant had already paid the rent before the suit was filed. Therefore, he was not in arrears of rent for more than 6 months on the date when the suit was filed and therefore, the judgment and decree of the Appellate Court is required to be set aside in this Revision Application. It was contended that the standard rent of the suit premises cannot be more than Rs. 7/-. and that he was not allowed to canvass the point regarding standard rent before the Appellate Court on the ground that he had not filed cross objections against the finding of the standard rent given by the Trial Court. It was also submitted by him that if the standard rent is considered as Rs.7/- then naturally at that rate the entire amount was cleared up and therefore, he was

not in arrears of rent on the date of filing of the suit.

6. Against the aforesaid argument Mrs.. D.T. Shah learned advocate for the respondent landlord has stated that in spite of demand notice, the tenant had not deposited the amount of rent nor gave any reply to the suit notice. That the defendant-tenant was in arrears of rent for more than six months and after deducting the amount which he had paid, the notice of demand was given for the rest of the amount which was due and that fact is clearly stated in the suit notice and therefore, the defendant was required to pay up the rent in response to the notice but he had not paid any amount nor gave any reply to the notice and therefore, the defence taken for the first time in the written statement is absolutely after thought. The learned Appellate Judge therefore, according to her submission has given detailed reasoning in this connection and therefore the aforesaid finding of fact about the non payment of rent by the tenant is not required to be interfered with by this court while exercising revisional jurisdiction.

7. It is further submitted by Ms. D.T. Shah that the contractual rent of Rs.7/- p.m. was increased to Rs.13/p.m. and the aforesaid amount of Rs.13/was fixed when the defendant-tenant was given additional accommodation of one more room and all through-out the tenant went on depositing the rent at the rate of Rs.13/- per month. Therefore, Rs.13/- was the agreed rent between the parties . It is therefore not open for the defendant now to contend that the actual rent of the suit property was Rs. 7/- and not Rs.13/-.

8. I have heard the learned advocates for both the sides and have gone through the notice given by the landlord as well as the averments made in the written statement. On scrutiny, it has been found that there is absolutely no substance in the contention of Mr. K.C. Shah to the effect that he was not in arrears of rent for more than six months on the date of filing of the suit. It is not in dispute that initially the tenant was occupying one room and he was paying Rs. 7/- per month as rent for the said premises. Subsequently another room was given to him and the rent was subsequently fixed at Rs.13/- p.m. In the notice given by the landlord at exh.. 36 he has clearly mentioned that initially a part of the premises was given to the tenant at a monthly rent of Rs.7/- on 25.11.1961. Subsequently, the tenant was given additional portion of the premises. At that time the rent was increased to Rs.13/- p.m. which is the standard rent. Earlier also the landlord had given notice for arrears of rent as he was in arrears of rent of Rs.. 235/- as on 1.10.77 and in response to the said notice the tenant had paid Rs. 226/- . So the assertion of the petitioner is that he was in arrears for Rs.9/- only Thereafter from 1.10.1977 to 31.7.1978 he has not paid rent and the above arrears comes to Rs.130/and therefore, clear cut averments have been made in the suit notice and he has demanded the arrears of rent due. There was no reply to the notice and therefore, aforesaid suit was filed by the plaintiff for possession. It is not in dispute that no reply to the suit notice was given nor any dispute about standard rent was taken within a period of one month from the date

of receipt of the suit notice. There are also no tax liability on the tenant by which it can be said that the rent was not payable monthly by the tenant as tax is to be paid yearly. In that view of the matter present case would clearly falls within the provisions of section 12(3)(a) of the said Act and not u/s 12(3)(b) of the said Act. In the case of Arjun Khaimal Makhijani vs. Jamnadas c. Tuliani & ors. (1) GLR 209 the Honourable Supreme Court has taken a view that if the dispute about the standard rent is not taken within one month from the date of receipt of the notice, the case would squarely fall u/s 12(3)(a) of the said Act. The Supreme Court has observed in para 6 of the said judgment as under:

" It has been urged by the learned Counsel for the tenants that November 14,1967 was the first day of hearing of the suit and since in pursuance of an order passed by the trial Court on that day, the tenants had deposited the entire arrears of rent on January 9,1968 within the time granted by the Court and continued to deposit the monthly rent thereafter they could not be treated as defaulters in payment of rent even if the amendment made in sub-sec.. (3) of Sec. 12 by the Amendment Act 18 of 1987 was ignored. We, however, find it difficult to agree with this submission. It is not denied that the arrears of rent which were for a period of more than six months and in respect of which a notice of demand had been served on the tenants under sub-sec. (2) of Sec 12 of the Act had no been paid by the tenants to the landlord within one month of the service of the notice. It is also not denied that during the said period of one month, no dispute regarding the amount of standard rent or permitted increases was raised by the tenants. On a plain reading of clause (a) of sub-sec. (3) of Sec. 12 of the Act as it stood at the relevant time, the said clause was clearly attracted and the consequence provided therein had to follow namely a decree for eviction against the tenants had to be passed. Clause (b) of sub-sec.(3) on the face of it was not attracted inasmuch as the said clause applied only to a case not covered by clause (a). This is amply borne out by the use of the opening words "In any other case" of clause (b). In Harbanslal Jagmohandas & anor. vs. Prabhudas Shivlal 1977(1) SCC 576 these clauses (a) and (b) of sub-sec.(3) of Sec. 12 of the Act came up for consideration and it was held that the tenant can claim protection from the operation of Sec. 12(3)(a) of the Act only if he makes an application raising a dispute as to standard rent within one month of the service of the notice terminating the tenancy. In the instant case this had not admittedly been done by the tenants. The consequence of non payment of arrears of rent claimed in the notice of demand was, therefore inevitable. In Jaywant S. Kulkarni and others Vs. Minochar Dosabhai Shroff and others, clauses (a) and (b) of sub-sec. (3) of Sec. 12 again came up for consideration. It was held:

Sub.sec. 3(a) of Sec. 12 categorically provided that where the rent was payable by the month and there was no dispute regarding the amount of standard rent or permitted increases, if such rent or increases were in arrears for a period of six months or more and the tenant neglected to make payment thereof until the expiration of the period of one month after notice referred to in sub-sec.(2), the

Court shall pass a decree for eviction in any such suit for recovery of possession. In the instant case, as has been found by the Court, the rent is payable month by month. There is no dispute regarding the amount of standard rent or permitted increases. Such rent or increases are in arrears for a period of six months or more. The tenant had neglected to make payment until the expiration of the period of one month after notice referred to in sub-sec.. (2) . The Court was bound to pass a decree for eviction in any such suit for recovery of possession."

9. Similarly, there is no substance in the argument of Mr. K.C. Shah that he had cleared up the rent and when the notice was given he was not in arrears for more than six months . As stated earlier whatever amount of rent which was paid earlier has already been credited as stated in the suit notice exh.36. It seems that the tenant was a habitual defaulter in payment of rent and he was served with a notice for different periods where he was in arrears of Rs. 235/- as on 1.10.77 which he has subsequently paid with deficit of Rs. 9/-. Again subsequently, when the tenant fell in arrears of rent, the notice exh.36 was given. Mr. Shah tried to argue that though the receipts were given by the landlord, there is no date mentioned on the same . However, simply, no date has been mentioned on the receipts which were given by the landlord when the rent was paid by the tenant in the past, it cannot be presumed that aforesaid payment for which receipt was given was covering the period of suit notice. The defendant therefore, cannot take advantage of non mentioning of the date in the receipts by the landlord. If really he had paid the amount, he would not have missed to give prompt reply to the said notice. The learned Appellate Judge has also considered the oral evidence of the plaintiff in this behalf and a clear cut finding of fact has been given in para 8 of the judgment by the learned Appellate Judge. The defendant has not led any evidence to show that he has paid the rent for the period in question for which the suit notice was given. In view of the aforesaid position I see no force in the aforesaid contention of Mr. Shah that when the suit notice was given he was not in arrears for more than 6 months. I also see no reason to disturb the finding given by the learned Appellate Judge in para 8 of the judgment. Aforesaid contention is accordingly rejected and it is proved that on the date of filing of the suit the petitioner was in arrears of rent for more than six months and since no dispute has been raised about the standard rent within one month of the suit notice, the case would squarely fall u/s 12(3)(a) of the said Act.

10. It was next contended by Mr. Shah that in the written statement, he had raised the dispute about the standard rent and an issue was framed by the Trial Court about the quantum of standard rent by way of framing issue no.2. The Trial Court has given a finding on that issue that the standard rent is Rs.13/-per month. But since the suit of the plaintiff was dismissed, he had not filed any cross objection regarding that finding. The learned Appellate Judge should have allowed him to argue on that finding but he was prevented from arguing that the standard rent is not Rs.13/- p.m., before the learned Appellate Judge on the ground that on the

aforesaid finding, cross objections were not been filed by the tenant before the leaned Appellate Judge. He therefore, argued that the matter may be remanded back to the leaned Appellate Judge for deciding the question of standard rent. At this stage it is necessary to refer to para 10 of the judgment of the learned Appellate Judge. The learned Appellate Judge has observed in para 10 of the judgment that so far as the amount of standard rent of Rs.13/- p.m. which was fixed by the Trial Court is concerned, the Trial Court virtually passed a money decree in favour of the landlord for the aforesaid amount and accordingly there is a money decree against the defendant and in favour of the plaintiff. Therefore, as regards the standard rent, the defendant has to file cross objection to challenge the finding in respect of the standard rent. As he has not done so, he should not be permitted to raise the dispute of standard rent and accordingly the defendant-tenant was not allowed to argue on the question of standard rent before the learned Appellate Judge as according to the learned Appellate Judge, for want of cross objections against the said finding, it was not open for the tenant to raise the said contention.

11. It is argued by Mr. Shah learned advocate for the petitioner that without cross objections also he can point out to the court that the decree of the Trial Court dismissing the suit can be sustained and he can point out that Rs.13/- was not the standard rent. At this stage a reference is required to be made to the provisions of Order 41 Rule 22 of Civil Proc. Code. Order 41 Rule 22 CPC reads as under:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow"

The Trial Court while dismissing the suit of the plaintiff in the operative part of the order has not fixed the standard rent. and therefore, naturally aforesaid fact does not find place in the decree drawn by the Trial Court and therefore, there was no occasion to file any cross objection against that part of the decree which is against the defendant-tenant. However, the learned Trial Judge has given a definite finding on the aforesaid issue of fixing of standard rent in the reasoning and therefore, there is also a finding given by the learned Appellate Judge regarding Rs.13/which is the standard rent. Therefore, the tenant could have filed cross objections against that finding as after the amendment of the CPC even cross objections can be filed against a particular finding.

12. Still however, in my view the defendant can attack the adverse part of the finding of the Trial Court to that extent. Since standard rent of Rs.13/- is not the part of the decree of the Trial Court, it remained as a finding of the Trial Court and without

filing cross objections against the said finding the petitioner-defendant herein was entitled to argue before the learned Appellate Judge that the decree of the Trial Court can be sustained even on the aforesaid ground. At this stage a reference is required to be made to the judgment of the Supreme Court dated September 14,1999 rendered in Civil Appeal No. 6036 of 1990 in the case of Ravinder Kumar Sharma vs. State of Assam & ors. In this judgment the Supreme Court has held in para 14 as under:

"In our view, the opinion expressed by Mookerjee. J Calcutta High Court on behalf of the Division Bench in Nishambhu Jena''s case and the view expressed by U.N. Bachawat, J in Tej Kumar''s case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 amendment. We hold that the respondent-defendant in an appeal can, without filing cross objections attach and adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross objection, after the 1976 amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao''s case by the Madras Full Bench and Chandre Prabhuji''s case by this court is merely clarified by the 1976 amendment and there is no change in the law after the Amendment.

The respondents before us are, therefore, entitled to contend that the finding of the High court in regard to absence of reasonable and probable cause or malice (upon which the decree for pecuniary damages in B & C schedules was based) can be attacked by the respondents for the purpose of sustaining the decree of the High Court refusing to pass a decree for non-pecuniary damages as per the A schedule. The filing of cross objections against the adverse finding was not obligatory. There is no res judicata. Point 1 is decided accordingly in favour of respondent defendants."

Since no decree is passed by the Trial Court in its operative part of the judgment and merely a finding on the issue has been recorded, that finding remains as a finding on a particular issue and not beyond that. I therefore, agree with the contention of Mr. Shah that since there was no decree passed against him, he could not have filed cross objections or cross appeal and in absence of cross objections against a particular finding he could have argued for sustaining the decree of the Trial Court for dismissing the suit . However, as stated earlier, since the case clearly falls within the provisions of section 12(3)(a) of the said Act, raising a dispute for the first time in the written statement will not save the tenant from the clutches of a decree u/s 12(3)(a) of the said Act and since the dispute of standard rent is not taken within one month of the suit notice and raising the dispute of standard rent for the first time in the written statement will not in any way save the tenant from the provisions of section 12(3)(a) of the Act. Therefore, no purpose will be served in remanding the matter back to the learned Appellate Judge.

13. It is also pertinent to note that the tenant had not given any reply to the suit notice wherein there was a clear assertion of the plaintiff-landlord that the rent of the suit premises is Rs.13/- per month and not Rs. 7/- p.m.. The defendant has not taken any dispute of standard rent within one month of the receipt of the suit notice. The landlord has stated in the notice as well as in the plaint that the rent of Rs. 13/- p.m. is fixed between the parties and the same is the standard rent. But looking to the averments in the written statement the say of the tenant was that the rent is not Rs. 13/- but Rs. 7/- per month and in that context the dispute is taken. Therefore, the dispute in reality is a dispute of contractual rent and not of standard rent. He has not stated a word about this in his deposition or in his written statement that the rent of Rs.13/- is excessive and that proper rent should be fixed. He is disputing only contractual rent and there is no averments in the pleadings or even in the evidence that standard rent should be fixed. The dispute regarding contractual rent raised by the tenant was considered as standard rent dispute by the Trial Court at the time of framing issues and has given finding accordingly. Even otherwise, assuming that it was a dispute of standard rent, then also since it was taken for the first time in the written statement in view of the settled legal position i.e taking the dispute as regards the standard rent for the first time in the written statement would not save the deft from the clutches of section 12(3)(a) of the said Act. Therefore, also present case would clearly fall u/s 12(3)(a) of the said Act. In the circumstances, there is no option available with the court but to pass a decree for eviction on the said ground. The Revision Application therefore, deserves to be dismissed.

14. At this stage Mr. K.C. Shah learned advocate for the petitioner-tenant has requested that he may be given sometime for vacating the suit premises . But Mrs.. D.T. Shah learned advocate for the respondent landlord has pointed out that the original tenant has died since long during the pendency of the Revision Application and this Revision Application has been proceeded further by three heirs of the deceased tenant viz. Rameshchandra and Punit kumar the sons of the deceased tenant and Baratiben daughger of the deceased tenant. According to Ms. D.T. Shah Rameshchandra is residing in his own house and Bharatiben is also residing separately having married and only Punit kumar is making casual use of the suit premises. Mr. Shah learned advocate for the petitioner pointed out that it is not possible for Punit kumar to acquire suitable residence in near future as he is serving as a driver. Considering the facts and circumstances of the case I deem it proper to grant two years time to the petitioners for vacating the suit premises on giving usual undertaking to this court. In the undertaking the petitioners should clearly mention that they are in exclusive possession of the suit premises and that they will not transfer alienate or dispose of the suit premises to any one and without obstructing in any manner they will hand over the vacant and peaceful possession to the respondent landlord on or before 31.1.2002. The petitioners should also pay mesne profit at the rate of Rs. 13/- p.m. regularly every month. Said undertaking

should be filed before this court on or before 1.5.2000. If no such undertaking is filed on or before the aforesaid date, it would be open for the respondent-landlord to execute the decree for possession. It is also clarified that if there is any breach of the aforesaid undertaking by the petitioners it will be open to the respondent-landlord to execute the decree for possession forthwith. The revision application is accordingly dismissed. Rule discharged. Interim relief granted earlier shall stand vacated. No order as to costs.