Sharangdhar Purshottam Kanhere Vs Sitaram Mahadeo Dabholkar

Court: Bombay High Court

Date of Decision: June 14, 1978

Acts Referred: Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 â€" Section 12, 13, 17A, 17B Transfer of Property Act, 1882 â€" Section 106, 17C

Citation: (1978) 80 BOMLR 695 : (1979) MhLj 236

Hon'ble Judges: Kanade, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Kanade, J.
In these three petitions a common point is raised as to the interpretation of the provisions of Sub-section (3A) and (1)(hh) of

Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act").

2. A few facts leading to this litigation are as under:

The petitioner in all the three Special Civil Applications mentioned above, is S.P. Kanhere, who is the owner of a house, bearing House No.

759/52, Deccan Gymkhana, Pune. The petitioner wanted to demolish the house and build in its place a new building. He, therefore, got prepared

necessary plans of the proposed building and got the same sanctioned from the Municipal Corporation, Pune, on or about August 21, 1971. He

then approached the Tribunal constituted under Sub-section (3B) Section 13 of the Bombay Rent Act and obtained from the Tribunal the

necessary certificate on December 14, 1971. He then gave notices to all the other tenants of the said building on January 3, 1972 terminating their

tenancies alleging therein that he reasonably and bona fide required the said premises in dispute for the immediate purpose of demolishing them and

that such a demolition was to be made for the purpose of erecting a new building on the premises sought to be demolished. All the tenancies were

terminated by the end of January 31, 1972.

3. The petitioner then instituted suits against all the tenants under the Bombay Rent Act claiming possession of the premises from the tenants u/s

13(1)(hh) of the Bombay Rent Act as required by Sub-sections (3A) and (3B) of Section 13. He has also given an undertaking to the Court and

produced the certificate as required under the said sub-section. Accordingly as many as nine suits were filed against the tenants on February 25,

1972. It is necessary to state here that the original certificate obtained by the petitioner was filed in Civil Suit No. 612 of 1972 and merely a list of

documents was filed in other suits. It is not disputed by the learned advocate appearing for the petitioner that the original certificate or a true copy

thereof was never filed in the rest of the suits, till the evidence was recorded. The petitioner produced the true copies of the certificate under Sub-

section (3A) on November 27, 1972 after the whole evidence was recorded.

4. The petitioner''s suit was resisted by the tenants by raising several defences in their written-statement, and inter alia, it was contended by the

tenants that the certificate obtained by the petitioner from the Tribunal was not produced in the Court on the date of the institution of the suit, in

their respective suits, and therefore, no decree can be passed for eviction or possession of the suit premises in their suits. The tenants also

challenged that the petitioner has not given an undertaking as contemplated by Section 13(1)(hh) of the Rent Act on the date of the institution of the

suit. It was further contended that the certificate produced by the petitioner is not in accordance with the rules laid down by the Government for

granting such certificates. They also challenged the validity of the certificate in the proceedings. It was further contended by the tenants that the

plans, as submitted, do not satisfy the requirement of Section 13(3B)(a) of the Rent Act.

5. On the pleadings in the suit the learned trial Judge framed as many as seven issues. After recording the evidence of the parties the learned trial

Judge held that the petitioner has proved his requirement as reasonable and bona fide for the immediate purposes of demolition of the existing

building and such demolition is to be made for the purposes of erecting a new building on the premises sought to be demolished. The trial Court

further held that the petitioner has produced, at the time of the institution of the suit the Tribunal''s Certificate and has given the necessary

undertaking as required by law. All the issues framed by the trial Court were held proved, and in the result, by the judgment and decree passed on

November 30, 1972, the trial Court decreed the petitioner''s suits and directed the tenants to hand over possession of the suit premises to the

petitioner-plaintiff.

6. At this stage, it is necessary to state that the original Suit No. 612 of 1972 is not as yet disposed of, because in that suit the defendant has died

during the pendency of the suit and further proceedings hereafter are delayed, and therefore, the suit has not been disposed of. Similarly, Civil Suit

No. 620 of 1972 is also not disposed of by the trial Court. The other seven suits have been disposed of by separate judgments, by the trial Court,

and all the seven tenants feeling aggrieved by the judgment and decree passed by the trial Court have preferred appeals to the District Judge, Pune.

Those appeals although heard together, separate judgment has been delivered by the learned Second Extra Assistant Judge in each appeal. The

learned appellate Court was pleased to allow all the appeals filed by the tenants, and the decrees for possession passed by the trial Court were set

aside, by the judgment and order dated November 30, 1972. Against the said decrees passed by the learned Second Extra Assistant Judge, Pune,

the petitioner, who is the original plaintiff in all the suits, filed as many as seven Special Civil Applications in this Court challenging the correctness of

the said order passed by the learned Second Extra Assistant Judge, Pune. It appears that the Special Civil Application filed by the petitioner,

bearing Special Civil Application No. 890 of 1974, has been dismissed by this Court on an earlier occasion and the rest of the six special civil

applications have been placed before me. Out of these six, Special Civil Application No. 891 of 1974 is allowed to be withdrawn at the request of

the petitioner. Similarly, Special Civil Application No. 892 of 1974 is also dismissed by me as the same has abated and the heirs of the deceased

were not brought on the record for a period of two years. The other Special Civil Application No. 895 of 1974 is also allowed to be withdrawn at

the request of the petitioner. Now, only three Special Civil Applications remain to be decided and they are Special Civil Applications Nos. 893 of

1974, 894 of 1974 and 896 of 1974. As there is common question involved in all the three petitions, with the consent of the parties all the three

special civil applications are disposed of by a common judgment.

7. Mr. Sharad Dighe, who appears on behalf of the petitioner, submitted that having regard to the language used in Sub-section (3A) of Section 13

of the Bombay Rent Act, it should be held that the said provision is directory and not mandatory, and the non-production of a certificate and/or an

undertaking at the time of the institution of the suit is not fatal to the maintainability of the suit. He pointed out that although Sub-section (3A) of

Section 13 starts with a negative wording, viz., "No decree for eviction shall be passed on the ground specified in Clause (hh) of Sub-section (1)",

it clearly expresses the intention of the Legislature not to make that sub-clause as imperative or mandatory. He submits that the intention of the

Legislature in unequivocal words expresses that the Court shall not pass a decree if the certificate is not produced and/or the undertaking is not

given. It prohibits a Court to pass a decree of eviction for the non-compliance of the said provision. He further submitted that if the Legislature had

intended to make the said provision mandatory, a different language would have been used in the said place. He further submitted that the wording

of the Sub-section (3A) would have been ""No suit is maintainable for eviction if the landlord fails to produce at the time of the institution of the suit

a Certificate granted by the Tribunal under Sub-section (3B) and fails to give an undertaking as enumerated in Sub-clauses (a), (b) and (c).

8. Mr. Dighe pointed out the provisions of Sub-section (2) of Section 12 of the Bombay Rent Act and contended that the language used in Sub-

section (2) of Section 12 is indicative of the intention of the Legislature in enacting that provision. Sub-section (2) of Section 12 lays down as

under:

12. (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.

Undoubtedly, there is difference in the languages used in both the sections, viz., Sub-section (2) of Section 12 and Sub-section (3A) of Section 13

of the Rent Act. In support of his contention, Mr. Dighe relied upon an authority of the Supreme Court in The Collector of Monghyr and Others

Vs. Keshav Prasad Goenka and Others, , and contended that in view of the ratio laid down in the said authority, the provisions of Sub-section

(3A) of Section 13 should be held as directory and not mandatory.

9. Mr. Khare, who appears on behalf of the respondents, in Special Civil Application No. 893 of 1974, Mr. S.G. Page, who appears on behalf of

the respondent in Special Civil Application No. 894 of 1974, and Mr. Mohan Pungalia, appearing on behalf of the respondent in Special Civil

Application No. 896 of 1974, submitted that the provisions of Sub-section (3A) of Section 13 are mandatory and the non-compliance of the said

provisions are fatal to the maintainability of the suit. The learned Counsel, appearing on behalf of the respondents, further submitted that it is a

special statute and the provisions of which give protection to tenants under various sections of the Act and Section 13(3A) is one of those

protections given by the statute. It is further submitted that having regard to the scheme of Section 13(1)(hh) and Sub-sections (3A) and (3B), a

limitation or a restriction is imposed on the landlord to file a suit u/s 13(1)(hh) and that at the time of the institution of the suit it is mandatory to

comply with the requirement of the said provision viz., to produce the certificate obtained from the Tribunal and also to give an undertaking as

provided by the said Sub-section (3A). If the landlord disregards the said provision or does not comply with the said provision on| the date of the

institution of the suit, a duty is cast upon the Court not to pass a decree of eviction against the tenant. It is further submitted by the learned Counsel

appearing on behalf of the respondents that the wording of the section debars a Court to use any judicial discretion to allow the party to produce

certificate after the institution of the suit. It is further submitted that the word ""produce"" employed in the sub-section is in the present tense, and

therefore, no discretion is left to the Court to allow the party to produce a certificate or undertaking at the subsequent stage of the proceedings of

the trial of the suit. It is further submitted that the production of certificate and the undertaking is a condition precedent for the institution of a suit,

and if the said documents are not produced at the time of the institution of the suit, the Court is prohibited from passing a decree. In other words, it

is submitted that the entire proceedings would be void or illegal and that when a statute provides a consequence of non-compliance of a certain

provision, then the said provision should be considered as mandatory and not directory.

10. Having given my anxious thought to the arguments and the respective submissions made by counsel on both sides, I feel that the provision

contained in Sub-section (3A) is not mandatory, but directory. Whether a statute is mandatory or directory depends upon the intent of the

Legislature and not upon the language in which the intent is clothed. The meaning and intentions of the Legislature must govern, and these are to be

ascertained not only from the phraseology of the provision but also by considering its nature, its designs and the consequences which would follow

from construing it one way or the other. In determination of the question whether a provision of law is directory or mandatory, the prime object

must be to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object and the consequences that would result

from construing it in one way or the other, or from such statute in connection with other related statutes, and the determination does not depend on

the form of the statute. When a statute requires that something shall be done or done in a particular manner or form without expressly declaring

what shall be the consequence of non-compliance, the question often arises what intention is to be attributed by inference to the Legislature. In

order to determine whether a particular provision is mandatory or directory, it would be necessary to ascertain whether the omission to comply

with the requirement affects the very foundation or authority for the proceedings so as to make it void and incapable of being validated. The

Supreme Court has in the case of Collector of Monghyr v. Keshav Prasad, laid down as under:

The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for

instance, sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted,

particularly in the context of the other provisions of the Act and the general scheme thereof. It would, inter alia, depend on whether the requirement

is insisted on as a protection for the safeguarding of the right of liberty of person or of property which the action might involve. The employment of

the auxiliary verb "shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either.

11. Keeping in view these tests laid1 down by the Supreme Court, it is necessary to see the scheme of the enactment, similar provisions in other

enactments and the plain language used in the said Sub-section (3A) of Section 13. Mr. Dighe rightly pointed out that the language used in Sub-

section (2) of Section 12 and the one used in Sub-section (3A) of Section 13 are different. The words used in Sub-section (3A) are in the nature

of imperative or an injunction that "No decree for eviction shall be passed." It means that the proceedings in the suit can go on, the defendants are

allowed to file written-statements, parties are allowed to lead evidence and at the fag end of the suit it is realised by the parties to the proceedings

that there is non-compliance with the provisions of Sub-section (3A), viz., the petitioner-landlord had not produced at the time of the institution of

the suit a certificate and had not given an undertaking as contemplated by Clauses (a), (b) and (c) of the said sub-section. If really the Legislature

intended that the requirement of the said provision was mandatory, the language used would have been that "no suit shall be maintainable without

the production of the certificate granted by the Tribunal under Sub-section (3B) and the undertaking." It appears that that the Legislature intended

not to pass a decree unless compliance with the provisions of the said section is made. It is possible that the petitioner had obtained certificate,

before the institution of the suit and still is not in a position to produce the same for some valid reason or the other. Because he is not able to

produce the certificate on the date of the institution of the suit, will that mean that the very institution of the suit is bad? The language used in Sub-

section (3A) does not indicate such a result.

12. Having regard to the scheme of the said provision, it is clear that a landlord who desires to seek relief u/s 13(1)(hh) of the Rent Act, must

approach a Tribunal for a certificate. The landlord must satisfy the Tribunal which is appointed under Sub-section (3B) of the Act, the requirement

of that Sub-section (3B) and having obtained that certificate he must terminate the tenancy of the tenant, indicating that he intended to demolish the

existing building for the purposes of erecting a new building as per the requirement laid down in Sub-section (3A), and thereafter file a suit against

the tenant. Unless all these compliances are made the landlord is not entitled to file a suit. There may be a case where the landlord has obtained a

certificate under Sub-section (3B), has also given required notice to quit and entrusted all the papers to his advocate or the clerk of the advocate,

and still on the date of the institution of the suit, those documents referred to in Sub-section (3A) have not been produced. It may be a mere

technical failure on the part of the landlord or his agent. In such circumstances, the question is whether the suit which has been filed without the

necessary accompaniments of those documents would be valid or would not be maintainable. The language used in Sub-section (3A) does not

indicate that the suit is not maintainable. In the present case, the petitioner-landlord has filed the original certificate in Civil Suit No. 612 of 1972.

As there were nine suits, merely a list of documents, which in each case is at exh. ""3"", was filed indicating that the original certificate has been filed

in original Suit No. 612 of 1972. The petitioner failed to file the true copy of the certificate or the certified copy of the certificate in the rest of the

suits although he possessed the said certificate. The learned District Judge was right in holding that a true copy or a certified copy could have

served the purpose of Sub-section (3A) in the rest of the suits. Having regard to these technical defects in the suit, is it advisable to nullify the entire

proceeding which has been started right from 1972 to the disposal of the suit on November 30, 1972 wherein the evidence of the parties has been

recorded, arguments have been heard and decree has been passed. In my view, the Legislature never intended while enacting the provisions in

Sub-section (3A) to nullify the entire proceedings or to consider all the proceedings at the institution of the suit as void or illegal.

13. It is necessary and worthwhile at this stage to refer to the provisions of Order VII, Rule 14 of the Code of Civil Procedure. Rule 14 lays down

that where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the

same time deliver the document or a copy thereof to be filed with the plaint. This rule makes it imperative that the plaintiff who sues upon a

document in his possession or power, should produce it when the plaint is presented. This rule does not mention the consequence of non-

production of such a document when the plaint is presented. However, we find in Order VII, Rule 18 of the Code, discretion is given to the Court

to allow the production of such document with the leave of the Court and if the Court refuses the leave to produce subsequent to the presentation

of the plaint, such document shall not be received in evidence on behalf of the plaintiff at the hearing of the suit. The object of Rules 14 and 18 is to

provide against false documents being set up after the institution of a suit. In those cases, therefore, where there is no doubt of the existence of a

document at the date of the suit, the Court should, as a general rule admit the document in evidence though it was not produced with the plaint or

entered in the list of documents annexed to the plaint as required by Rule 14. But the Court even in certain cases may refuse to receive it in

evidence if it is produced at a very late stage of the proceeding or the Court may allow the production of a document which ought to have been

produced at the time of the presentation of the plaint on showing good reason or sufficient cause for non-production. Rule 18 of Order VII of the

Code gives the discretion to the Court to allow the production of a document after the presentation of the plaint. Similarly, in my opinion, the

provisions of Sub-section (3A) of Section 13 of the Bombay Rent Act cast a duty on the landlord-plaintiff to produce the certificate granted by the

Tribunal under Sub-section (3B) of Section 13 of the Act at the time of the institution of the suit. But if he fails to produce the document and the

undertaking, the Court will have a discretion, either to allow him to produce the document or to refuse the production of the same. Needless to

say, the discretion should be judicious discretion. The negative words ""No decree for eviction shall be passed..."" indicate that the suit or the

proceedings will not be illegal or void. That would only amount to an irregularity in the conduct of the proceedings and such irregularity or illegality

could be validated by allowing the parties to produce documents contemplated by Sub-section (3A) of Section 13 on showing sufficient cause or

reasonable ground. Undoubtedly, the Legislature intended to safeguard the rights of the tenants from mala fide actions on the part of the landlords

in demolishing existing buildings. Unless a decree is passed for eviction on the grounds in Section 13(1)(hh), the existing building cannot be

demolished having regard to the undertaking and the provisions of Sections 17A, 17B and 17C of the Bombay Rent Act. Thus, having regard to

the scheme of the Act, the provisions thereof, language used in Sub-section (3A) and the provisions of Order VII, Rule 14 and Order VII, Rule 18

of the Code of Civil Procedure, I am of the opinion that the non-production of these documents at the time of the institution of suit will not be fatal

to the maintainability of the suit and the Court will be justified in allowing the parties to produce such documents during the period of the pendency

of the suit on showing sufficient ground or reason for non-production of the documents, and the Court will exercise the discretion judiciously, and if

such an application is refused by the Court the suit must stand dismissed.

14. If the submissions made on behalf of the respondent in respect of the non-production of the said documents, viz., certificate and the

undertaking on the date of the presentation of the suit, are accepted, then the suit itself cannot be registered by the Court, because it will be a

defective suit and if it is held to be a defective suit, then there cannot be a summons to the defendants as provided by the CPC and there cannot be

a hearing of the suit. This is a submission which is contrary to what is provided in Sub-section (3A) of Section 13 of the Rent Act. As stated

above, there is a prohibition or bar or an injunction, that no decree for eviction shall be passed. In other words, it is not contemplated by the said

provision that the suit cannot be registered as a suit. It does not prohibit to issue a notice to the defendant. It does not bar to record evidence of

the parties. In view of all these reasons. I am of the opinion that the provision of Sub-section (3A) of Section 13 is directory and not mandatory,

and therefore, the finding recorded by the learned Second Extra Assistant Judge, Pune is not correct and will have to be set aside.

15. The learned Second Extra Assistant Judge has found, as a matter of fact, that the petitioner did not file a certificate and the undertaking not

only on the date of the institution of the suit but even thereafter. In paragraph 9 of the judgment, in Special Civil Application No. 893 of 1974 the

lower appellate Court observed:

It may, however, be noted at this stage that the plaintiff produced on 27.11.1972, after the whole evidence was recorded, the copy of Tribunal''s

certificate and the copies of plaintiff''s letter dated 11.8.1971....

With regard to the undertaking, the learned Judge observed that:

...the undertaking given by the plaintiff in para. 4 of the plaint is only partial. He has given an undertaking only as per Clause (a) of Sub-section

(3A) to the effect that the new proposed building shall contain not less than two times the number of residential tenements and not less than two

times the floor area contained in the premises sought to be demolished. No undertaking was at all given as per Clauses (b) and (c). Only at a later

stage on 22.11.1972 that is, after whole evidence in suit was recorded, that the plaintiff gave an undertaking as per the provisions of Clauses (a),

(b) and (c). It is at exh. 21.

16. From these observations, it is clear that the certificate and the undertaking are filed after the closing of the evidence of the parties, thus, not

providing an opportunity to the tenant to challenge the legality or otherwise of the said certificate and the undertaking. It is not disputed by Mr.

Dighe before me that the certificate issued by the Tribunal constituted under Sub-section (3B) of Section 13 is not conclusive. The tenants will have

a right to challenge the legality or otherwise of the said certificate. The tenants admittedly have no opportunity to contest the proceedings before the

Tribunal under Sub-section (3B), and as stated above, the satisfaction of the Tribunal in respect of matters covered by the provisions of Sub-

section (3B) can be gone into in the civil Court and if such a certificate is produced during the trial of the suit giving opportunity to the defendant to

contest the legality or otherwise of the said certificate, it may be deemed that the certificate and the undertaking is not produced in the suit and the

imperative direction will have to be observed by the Court by not passing a decree for eviction or dismissal of the suit. In the present proceedings,

the petitioners-plaintiffs have failed to comply with the provisions of Sub-section (3A) of Section 13, and therefore, there is no alternative except to

dismiss the petitioners'' suit.

17. In the result, the judgment and decree passed by the learned Second Extra Assistant Judge, dated November 30, 1973, in Civil Appeal No.

134 of 1973, Civil Appeal No. 79 of 1973 and Civil Appeal No. 91 of 1973 are confirmed and the plaintiffs'' suits are dismissed.

18. Rule discharged with costs in all the three petitions.