

**(2001) 03 BOM CK 0143**

**Bombay High Court**

**Case No:** Writ Petition No. 507 of 1998

Shri Balkrishna Daulati Bansode

APPELLANT

Vs

Shri Taher Mahmud Sutar

RESPONDENT

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**Date of Decision:** March 27, 2001

**Acts Referred:**

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 12(1), 12(3), 13(1), 5(3)
- Evidence Act, 1872 - Section 22, 64, 65, 66
- Hindu Succession Act, 1956 - Section 15

**Citation:** (2001) 4 BomCR 451 : (2001) 3 BOMLR 54 : (2001) 2 MhLj 931

**Hon'ble Judges:** V.C. Daga, J

**Bench:** Single Bench

**Advocate:** R.A. Thorat and V.A. Thorat, for the Appellant; D.K. Ghaisas, for the Respondent

**Final Decision:** Allowed

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**Judgement**

V.C. Daga J.

**INTRODUCTION**

1. This petition is directed against the judgment and decree dated 25th November, 1988 passed by the Additional District Judge, Satara in Regular Civil Appeal No. 277 of 1987 confirming the judgment and decree for eviction dated 31st March, 1987 passed by the Second Joint Civil Judge. Junior Division, Satara in Regular Civil Suit No. 454 of 1984.

**THE FACTS**

2. The facts necessary to appreciate the rival contentions may be stated briefly :

The petitioner is the original defendant/tenant occupying the premises being part of the property bearing C.T.S. No. 93-A purchased under the sale deed dated 4th May,

1983 from Smt. Krishnabai Jadhav, Mahadeo Salunkhe and Smt. Bhagirati Dalavi who claimed to have inherited the same as heirs of Sonubai and Banubai, both daughters of Mhasu Babaji Dubal. Both Sonubai and Banubai died issueless.

3. Smt. Sonubai had let out part of the house bearing C.T.S. No. 93-A to the petitioner, some time in the year 1967, on receipt of rent of Rs. 25/- per month.

4. The respondent/original plaintiff, after purchase of the house in suit, filed suit for possession of the suit premises occupied by the defendant tenant, contending therein that he had acquired all rights of ownership including right to recover the arrears of rent prior to date of his purchase. He further claimed right to recover rent from the date of purchase of the property i.e. from 4th May, 1983. Thus, based on his ownership right, he claimed to have issued notice on 22nd September, 1983 to the petitioner/ defendant calling upon him to pay arrears of rent right from April 1978 till the date of notice and tried to carve out a case that the petitioner/defendant was in arrears of rent for more than six months prior to the date of issue of notice. The said notice was returned back by the postal authorities with postal endorsement "refused". The plaintiff treated it as good service. The respondent/plaintiff contended in the plaint that the said notice and service thereof was good and in accordance with law. It was also alleged in the plaint that the plaintiff was in need of the suit premises to satisfy his reasonable and bona fide residential need.

5. On being summoned, the petitioner/defendant had appeared and filed his written statement denying each and every allegations made in the plaint- He contended that the vendors of the plaintiff had no saleable title or interest in the suit property, as such, he did not acquire legal title to the suit property and that he was never recognized by him as his landlord. He pleaded that right from the inception/purchase of the house he has been contending absence of title in favour of the respondent/plaintiff.

6. It was also denied by the defendant in the written statement that he was in arrears of rent. The petitioner/defendant has contended that the amount of Rs. 15/- was initially fixed as rent; gradually the said amount was increased and the defendant started paying rent at the rate of Rs. 20/- per month. After death of Sonubai, one Mahadeo Salunkhe, his sister Krishnabai Jadhav and Bhagiratibai claimed the ownership to the suit house from whom the plaintiff claimed to have purchased it. The plaintiffs vendors Krishnabai Jadhav, Mahadeo Salunkhe and Bhagiratibai appeared to have got the suit property mutated in their name and all of them started claiming arrears of rent from the defendant. The petitioner/defendant refused to make payment to the plaintiffs vendors and called upon them to establish their title to the suit house.

7. The petitioner/defendant had also denied reasonable and bona fide requirement of the respondent /plaintiff contending that no hardship was likely to be caused to

the plaintiff in the event no eviction decree was passed. He had further contended that he was not in possession of any alternative premises and if decree of eviction is drawn against him, he would be left with no option but to be on the street. For all these reasons, he resisted the suit and prayed for dismissal thereof,

#### THE TRIAL COURT RULING

8. The Trial Court framed as many as four issues and, after full trial, the plaintiff was held to be the owner of the suit house and, consequently, landlord of suit premises entitled to claim arrears of rent. The Trial Court further recorded finding that the defendant was in arrears of rent for more than six months with effect from April 1978, as, such, he was a defaulter under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Bombay Rent Act" for short). The Trial Court also held that the plaintiff has proved his reasonable and bona fide requirement and that the plaintiff will suffer hardship, if decree for eviction is not passed in his favour. Thus, the suit for eviction and possession with arrears of rent in the sum of Rs. 972/- was decreed in favour of the plaintiff.

#### THE APPELLATE COURT RULING

9. Aggrieved by the aforesaid judgment and decree, the petitioner/ defendant invoked appellate jurisdiction of the District Court, Satara. The Additional District Judge, Satara after hearing both the sides set aside the finding of the Trial Court holding reasonable and bona fide requirement in favour of the plaintiff/landlord and held that the petitioner/defendant alone shall suffer greater hardship in the event of decree for eviction. However, the Lower Appellate Court confirmed the finding of the Trial Court holding that the defendant was in arrears of rent and further held that the decree for eviction was liable to be passed u/s 12(3)(a) of the Bombay Rent Act.

10. The aforesaid judgment and decree suffered by the petitioner/ defendant is the subject matter of challenge in this petition filed under Article 227 of the Constitution of India.

#### THE ARGUMENTS

11. The learned counsel appearing for the petitioner contended that both the Courts below have committed serious error of law in holding that the respondent/plaintiff had acquired right, title and interest in the suit house by virtue of sale-deed dated 4th May, 1983. In order to substantiate this submission he placed reliance on the following genealogy.

12. It was contended that the suit property was originally owned by one Mhasu Babji Dubal. He died leaving behind three daughters, namely, Sonubai, Anubai and Banubai. Mhasu Dubal had one sister by name Tanubai. Tanubai died leaving behind her son by name Kisan. According to the petitioner/defendant, the daughter

Sonubai, Anubai and Banubai had become owners of the suit property immediately after the death of Mhasu Dubal. Out of these three daughters, Anubai died during her childhood and remaining two daughters, namely, Sonubai and Banubai both died in the year 1977 leaving behind no issues. After the death of these three daughters, the suit property was to devolve according to the provisions of section 15 of the Hindu Succession Act, 1956 i.e. upon the heirs of the father. Thus, according to the defendant, the property devolved on Kisan via Tanubai, being the only surviving heir of Mhasu Babaji Dubal. Thus, in substance, as per the petitioner/defendant, the suit house devolved upon Kisan after the death of Mhasu. The petitioner/defendant, in the above backdrop, disputed basic right, title and interest of the respondent/plaintiff and challenged his very right to claim ownership in the suit premises and contended that the vendors of the present plaintiff, namely, Smt. Krishnabai Jadhav, Mahadeo Salunkhe and Smt. Bhagirati Dalavi, who were claiming through Balutai, widow of Mhasu Babaji Dubal, had no right, title and interest much less saleable interest in the suit house, so as to effect transfer thereof, in favour of the present respondent/ plaintiff.

13. The learned counsel for the petitioner on the above canvass contended that the respondent/plaintiff has no right to claim arrears of rent, that too, for the period prior to the date of the alleged sale-deed and that the petitioner/defendant was not in arrears of rent at any point of time. He further contended that the vendors of the plaintiff had no saleable interest in the property in question, as such, the respondent/plaintiff could not have purchased the suit house and, at any rate, such purchase has not created any right, title and interest in the suit property in favour of the respondent plaintiff. As such, the respondent/plaintiff was not entitled to claim arrears of rent. The suit at his instance was therefore not tenable.

14. He further contended that the plaintiff failed to prove that his alleged vendors had at any time transferred or assigned any right to recover alleged arrears of rent for the period prior to the date of execution of sale-deed. In order to bolster up his contention, he further urged that it was obligatory on the part of the plaintiff to produce original registered sale-deed or at any rate certified copy thereof, so as to establish his right to recover arrears of rent for the, period prior to the date of sale-deed.

15. He further argued that the oral evidence could not have been allowed to be used as a substitute for documentary evidence, as such, the case sought to be made out by the plaintiff should not have been accepted by the Courts below.

16. He further argued that the written documents, namely, the alleged sale-deed would have been the best piece of evidence to throw light on the controversy and to solve the question involved in this case. In his submission, this is a fit case for drawing an adverse inference against the plaintiff. In this behalf he sought to rely upon the judgment of the Supreme Court in the matter of Hiralal v. Badkulal, and Khushalbhai Mahijibhai Patel v. A Firm of Mohamadhusain Rahimbux, and prayed

for setting aside the impugned judgment.

17. The learned counsel appearing for the petitioner urged that the successor-in-title has not been included in the definition of "landlord" u/s 5(3) of the Bombay Rent Act, as such, such person cannot claim eviction of the tenant on the ground of default in respect of arrears of rent for the period prior to the purchase of the property and sought to place reliance on *Shantinath S. Ghogade v. Rajmal U. Gugale*,, *Narendra Singh Viridi v. N.N. Engineer*, *Sukhalal Chunilal Ghagani v. Harish Suvarne*, and *N. N. Engineer v. Narendra. Singh Viridi*. He further contended that composite notice of demand was not legal and valid in view of section 12(3)(b) of the Bombay Rent Act (unamended) and sought to place reliance on two judgments of this Court in the matter of *Awabai Muncharji Cama v. M.N. Kaka*, and *Vijaya Anantraj Modi v. Banumati Tulsidas*,.

18. The learned counsel for the petitioner, in the aforesaid backdrop, contended that the purchaser of the property in possession of tenant is not entitled to invoke clauses (a) and (b) of sub-section (1) of section 13 of the Bombay Rent Act, if the alleged breach has taken place before he became the owner of the property by virtue of sale-deed in his favour. In his submission, admittedly, the suit house was let out to the petitioner/ defendant by Sonubai d/o Mhasu Babaji Dubal during her life time; the respondent/plaintiff had obtained sale-deed on 4th May, 1983 i.e. after the death of Sonubai and simultaneously issued notice dated 22nd September, 1983, to the petitioner, demanding arrears of rent for the period prior to the date of purchase and terminated his tenancy. He sought to place reliance on sub-section 3 of section 5 of the Bombay Rent Act. In his submission, the said definition uses the words "for the time being". He urged that in order to bring a person within the definition of the "landlord" at a particular point of time, he must be a landlord, who must be receiving or entitled to receive rent in respect of the premises. The definition of a landlord speaks of a landlord with reference to the point of time when the rights under the Bombay Rent Act are sought to be exercised. Thus, on the date when he is exercising his rights he must be the landlord. Consequently, when section 13(1)(a) or (b) of the Bombay Rent Act used the word "tenant", it means any person by whom or on whose account rent is payable for any premises. In his submission, the intention of the Legislature was that the landlord who could be entitled to sue for possession would be only that landlord, whose tenant had committed a breach during the time when he was the tenant of that landlord. In other words, the breaches in respect of which the plaintiff makes grievances and on the basis of which right to recover possession is sought to be founded must be committed by a tenant in the capacity of a tenant of that landlord alone. There is nothing in the Bombay Rent Act, which would indicate that the Legislature intended that in cases where a cause of action, which was never taken advantage of, by the landlord, could ensure for the benefit of the purchaser and the purchase would be able to base an action for ejectment on the basis of the alleged violation of the provisions of section 13(1) before the premises were transferred by the original

landlord to the purchaser. In his submission, the aforesaid interpretation has found favour with the learned single Judge of this Court in Shantinath S. Ghogade v. Rajmal U. Gugale (supra). The same view appears to have been taken by another learned single Judge of this Court in Narendra Singh Viridi v. N. N. Engineer (supra) wherein it was held as under :

"Rent due changes its character as rent and becomes only a debt or actionable claim after the property changes hands. The purchaser cannot be considered as the landlord and the amount due to the original landlord which may be recoverable by the purchaser by virtue of assignment cannot be considered as rent due to him. The purchaser cannot take advantage of the defaults committed by the tenant in payment of rent prior to date of transfer."

19. The learned counsel appearing for the petitioner pointed out that the aforesaid view has been confirmed by the Apex Court in appeal taken at the instance of respondent therein in N. N. Engineer v. Narendra Singh Viridi (supra); wherein the Apex Court held as under :

"Where in a deed by which the right, title and interest in the property in dispute was released in favour of one of the co-owners nowhere any assignment of rent was made, the assignee was not entitled to rent before assignment and the amount due prior to the deed could not constitute arrears of rent as it was merely an actionable claim. Consequently, notice demanding rent sent before the relinquishment deed by the co-owners was not valid."

20. Per contra, submissions were made by the learned counsel appearing for the respondent in support of and justifying the impugned judgment and decree. He contended that the names of his vendors were already mutated in the municipal and revenue records and, consequently, they had saleable interest in the suit property and, that, the plaintiff was perfectly justified purchasing the suit property from his vendors under the registered sale-deed dated 4th May, 1983. He further contended that both the Courts below have recognised ownership of the plaintiff and have held that the petitioner/defendant was in arrears of rent for a period of more than six months prior to the date of notice. He, therefore, prayed for dismissal of the petition with costs.

#### THE ISSUES

21. Having heard the rival contentions, following issues arise for my consideration :

(1) Whether the respondent/plaintiff was entitled to claim arrears of rent for the period prior to the purchase of the property?

(2) Whether the respondent/plaintiff can be said to be the legal owner of the suit property under sale-deed dated 4th May, 1983?

#### CONSIDERATION

22. In order to answer the first issue, let me turn to the facts of the instant case along with evidence produced by the parties. There is absolutely no documentary evidence on record to suggest that at any point of time the right and interest in arrears of rent were assigned by the vendors in favour of the vendee/purchaser, namely, the present respondent/plaintiff. Under the circumstances, in absence of any such evidence on record, the findings recorded by both the Courts below, based on oral evidence, need to be examined.

23. At this juncture, it will not be out of place to mention that frequently, a litigated issue turns upon the contents or terms of writing, making it important that the evidence of a writing be reliable. It was thus obligatory on the part of the plaintiff to have produced the original sale-deed or certified copy thereof during the course of trial of the suit. The oral evidence cannot be a substitute for the documentary evidence. It was necessary for the respondent/plaintiff to prove that he was authorised to recover arrears of rent under the sale-deed executed by his vendors. The said document would have been the best piece of evidence. The plaintiff relied only upon the oral evidence to prove the contents of the written document when there was no apparent reason for non-production of the said written document itself. The law on evidence imposes a rule of preference: the original document is preferred whenever a party seeks to prove the terms of the writing; secondary evidence is inadmissible if the original document is available. The contents of the documents, which are capable of being produced, must be proved by the instrument itself and not by parole evidence. Oral admission as to contents of a document is excluded u/s 22 of the Evidence Act. Parties are, however, entitled to lead secondary evidence in support of a document under sections 65 and 66 of the Evidence Act. However, in the present case, no such attempt was made to produce and prove facts by leading secondary evidence nor the rules thereof were followed by the respondent/plaintiff.

24. It has not been the case of the respondent/plaintiff that he was not in possession of the sale-deed or that he lost the same. Even the loss of document has to be proved in accordance with law. In absence of any such case being made out, the law presumes that the document must be in custody of the plaintiff and that he failed to produce the same without any reasonable cause. Thus, the fact remains that the best piece of documentary evidence has not been produced on record.

25. The learned counsel for the petitioner, on the above backdrop, rightly placed reliance on the decision of the Apex Court in *Hiralal v. Badkulal* (supra) and rightly urged that this is a fit case for drawing an adverse inference against the plaintiff for setting aside the findings recorded by both the Courts below. He sought to place reliance on the following observations of the Apex Court:

"Suit for recovery of amount due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be

ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so."

26. The learned counsel appearing for the petitioner also pressed in service the case in *Khushalbai Mahijibhai Patel v. A Firm of Mohamadhusain Rahimbux* (supra): wherein the Apex Court ruled as under ;

"..... The non-production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and a presumption has therefore to be raised against it that if such evidence had been produced, the same would have gone against the case propounded by it. ...."

27. The learned counsel appearing for the petitioner further contended that the failure on the part of the plaintiff to produce his vendors in the witness box and the fact that he made no attempt to examine them must be similarly construed and a presumption should be drawn that the evidence of his vendors also would have gone against the plaintiff, had they been examined.

28. The production of document, namely, sale-deed on record was not only desirable but it was necessary for one more reason, that is, if anybody wants to claim right to recover the arrears of rent for the period prior to the date of sale-deed, then, in view of the judgment of the Apex Court in the case of *N. N Engineer v. Narendra Singh Viridi* (supra), it was necessary to prove assignment under a sale-deed or document by which the property was transferred. The Supreme Court ruled that where in a deed by which right, title and interest in the property in dispute were released in favour of one of the co-owners; nowhere any assignment of rent was made, the assignee was not entitled to rent before assignment, and the amount due prior to the deed could not constitute arrears of rent as it was merely an actionable claim.

29. A similar view taken by the Division Bench of this Court in *Radhabai v. Trimbak Madhavrao* (supra) is also holding the field wherein it has been ruled that the right to recover rent must be given under the registered sale-deed or covenant because right to recover possession for the breach committed in respect of the property is not the right which is a personal right but which goes with the property and as such the transferee is entitled to exercise that right.

30. Considering the law laid down by this Court as well as by the Apex Court, the production and proof of the original sale-deed or certified copy thereof was very much necessary to find out whether right given u/s 13(1)(a) and/or (b) had really accrued from the erstwhile landlord and whether it was subsisting on the date of sale deed. If so, whether it was transferred in favour of the successor-in-title. In case, the right accrued, because of the breach committed by the lessee, is waived by the original landlord, then such right did not vest in the transferor on the date of



transfer and, consequently, it could not pass over to the transferee. The rights which a person can validly transfer are those which are subsisting in favour of the transferor at the time of transfer. If the original landlord has waived the right to recover possession, then surely the purchaser would not get that right because it was not available to his transferor. Thus, in order to consider all these sheds of the controversy, it was absolutely necessary on the part of the plaintiff to produce original sale-deed in the suit. In absence of registered sale deed being on record, the Courts below could not have relied upon the oral evidence and could not have proceeded to decree the suit for possession. Non-production of registered sale-deed must lead to an adverse inference against the plaintiff that had it been produced it would not have supported the case of the plaintiff. The failure on the part of the plaintiff to examine his vendors is also a circumstance which is sufficient to draw adverse inference against the plaintiff. Therefore, the findings recorded by both the Courts below ignoring all these important aspects of the matter suffer, not only from the error apparent on record but also from perversity. The finding that the petitioner/defendant/ tenant has committed breach of section 12(1) of the Bombay Rent Act is, therefore, absolutely unsustainable.

31. The submission advanced by the learned counsel appearing for the petitioner, in the above premises, deserves acceptance. In the result, the finding recorded by both the Courts below that the plaintiff was entitled to recover arrears of rent for the period prior to the date of sale-deed is liable to be quashed and set aside and the decree for eviction based on this solitary ground is liable to be reversed.

32. Having recorded finding in favour of the petitioner on the first issue and having reversed the decree for eviction and possession. I do not think it necessary to dwell upon second issue relating to the absence of saleable interest of the vendors of the plaintiff and legality of the transfer thereof and its effect on the title of the property vis-a-vis plaintiff is concerned. Even the other incidental questions also need no consideration in the wake of conclusion reached on the issue dealt hereinabove.

33. The impugned Judgment and decree is, therefore, quashed and set aside. Writ petition is allowed. Rule is made absolute in terms of the above order with no order as to costs.