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DURATION : Y M D
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BEFORE THE APPELLATE BENCH NO.2 OF
SMALL CAUSES COURT AT AHMEDABAD
REGULAR CIVIL APPEAL No.109 OF 2010

Exh._22_

Appellant:-

1. Ambalal Chhanabhai Parmar,
Age: 60 years, Occupation: Retired,
Residing at: Raipur Millni Hozwali Chali,
Ghar No.102, Rakhial, Ahmedabad.

V E R S U S

Respondent:-

1. Heir of deceased Mangubahen Surtanath
Manilal Surtanath, Adult, Occupation –

Residing at: Manji Bhilni Chali,
Beside Vikram Mill, Saraspur, Ahmedabad.

Appearance:

Mr. H. K. Parmar, learned advocate for Appellant.

Mr. S. B. Dave, learned advocate for Respondent.

Coram: Arvindkumar Shivprasad Pande, Judge and Ganpatsinh Pravatsinh Sodhaparmar, Judge.

Judgment: (Per:- A. S. Pande, Judge).

:- J U D G M E N T :-

1) The present appellant has filed this appeal under Section-29 of Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 (Rent Act in short) against the decree passed by the learned Small Cause Court No.5 in H.R.P. Suit No.861/2006 dated 30.04.2010 vide Exh.72.

2) For the sake of convenience of this appeal, the present appellant will be referred as “plaintiff” and the present respondent will be referred as “defendant”.

3) The short facts of the plaintiff’s suit is that the plaintiff is landlord and owner of M.C. No.26-10, M.C. No.521-4-B-2625 and Survey No.71-B, Saraspur, behind Vikram Mill in Manjibhil Chawl, district sub-district, Ahmedabad. In such property the defendant is the tenant of 10 sq. ft. x 5 sq. ft. room which is known as Ordi. Originally tenant of the tenanted property was Surtanath and after

the death of him, defendant become the tenant of tenanted property as a inheritance right. In the beginning the monthly rent of tenancy was fixed Rs.20/- and it is the standard rent. The municipal tax, education cess and light bill is to be borned by defendant. The month of tenancy commence from 1st day of each English Calender month and ends on the last day of the same month. The tenanted property would be used by tenant only for own use and it is decided that tenanted property would not be rented or sublet to any person in the tenant property. No permanent alteration will be made without the consent of landlord and such type of oral agreement has made between the parties. From the beginning, the defendant was irregular to pay the rent. The defendant has paid the rent till March, 1993 in irregular manner. Plaintiff is ready and willing to give the rent receipt to defendant, but defendant has not accepted the rent receipt, so whichever rent has paid by defendant, it is noted in the personal diary of plaintiff. From April 1993 to February 2006 total 155 months (per month Rs.20/- rent) Rs.3,100/- is outstanding amount of rent. The defendant has breached the condition of tenancy right and the defendant had made the permanent alterations in the tenanted property and whichever construction is made by tenant is permanent nature construction.

4) The arrears of rent of tenant is more than six months. So, tenant becomes the tenant in arrears as per the

Bombay Rent Act and she is not entitled to get protection of the Bombay Rent Act. Plaintiff had demanded the outstanding rent amount from the defendant, although defendant has not paid the amount of rent. Plaintiff has given notice through registered post A.D., as on date 20.03.2006. In such notice, the defendant's tenancy is terminated by plaintiff. Notice is received by tenant, but tenant has not given any reply of the notice. After receipt of notice, no amount of the rent paid by defendant.

5) Plaintiff further stated that Plaintiff is the retired person. The family of plaintiff is very broad and plaintiff has bonafide need to the tenanted property and plaintiff has need to acquired the possession of tenanted property. Plaintiff has prayed that the defendant will be removed the household articles in the tenanted property and defendant has handed over the peaceful and vacant possession to plaintiff.

6) On serving the summons, the defendant has filed written statement vide Exh.60. The most of the averments have denied by defendants in the reply and stated that he plaintiff's suit is false, fabricated and vexatious. The liability of paying municipal tax, education cess is to be borned by the plaintiff. The tenant occupied property is not obtained the electric connection. The plaintiff has made the suppression of material facts before the Court. There is no

outstanding amount is due for the rent amount. After accepting the rent amount, plaintiff has not given the rent receipt, so defendant has deposited the rent amount in the court. Defendant has not done any breached of terms of tenancy and defendant has not made any permanent structure. Defendant has not alerted or changed the identity of tenanted property and defendant has not erected construction in the tenanted property.

7) Defendant has a dispute regarding standard rent for the personal bonafide requirement and for spending the retired life. There is need to the tenanted property and defendant has bonafide requirement of tenanted property, If the possession of tenanted property snatched by plaintiff, defendant would be put into greater hardship. Under these circumstances, suit of plaintiff is not maintainability and hence plaintiff's suit deserves to be dismissed with costs.

8) As per the pleadings the learned Small Cause Court has framed issues vide Exh.20, which are as under:-

- 1) Whether the plaintiff proves that the defendant is in arrears of rent for more than six months ?
- 2) If so, whether the defendant is ready and willing to pay the rent and is protected from eviction decree under Sec. 12 of the Bombay Rent Act ?
- 3) Whether the plaintiff proves that he has issued notice u/s. 12(2) of the Bombay Rent Act ?

- 4) Whether the plaintiff proves that the defendant has without his consent or knowledge, made construction of permanent nature in the suit premises which cannot be removed without causing serious damages to the property, therefore, eviction decree is required to be passed u/s. 13(1)(b) of the Act ?
 - 5) Whether the plaintiff proves that he reasonable and bonafide requires the suit premises for his own use and occupation as alleged ?
 - 6) Whether the defendant would be put to greater hardship by passing the decree than by refusing to pass in favour of the plaintiff ?
 - 7) What order and decree ?
- 9) Findings of the learned trial Court for the above issues are as under:-
1. In the negative.
 2. In the affirmative.
 3. In the negative.
 4. In the affirmative.
 5. In the negative.
 6. In the negative.
 7. As per final order.
- 10) The plaintiff has produced following evidence to prove

the contention of the plaintiff:-

<u>Oral Evidence</u>	
Exh.14.	Affidavit of Examination-in-chief of the plaintiff namely, Ambalal Chhanabhai.
Exh.45.	Affidavit of Examination-in-chief of the plaintiff's witness namely, Vimalkumar Ambalal.
<u>Documentary Evidence</u>	
Exh.15.	Notice given by plaintiff to defendant.
Exhs.16 and 17.	White receipt of post department and acknowledgment slip of receipt of notice.

The deposition right of plaintiff is closed by order of court.

11) The defendant has produced following evidence for his defence:-

<u>Order Evidence</u>	
Exh.63.	Affidavit of Examination-in-chief of the defendant namely, Manilal Surtanath Bhagat.
<u>Documentary Evidence</u>	
Exh.64.	Municipal tax bill.
Exh.65.	Copy of ration card.
Exhs.66 and 67.	The rent deposited in the court as on dtd. 2.3.2007 and 1.8.2007.

Except above defendant has not produced any oral as well as documentary evidence and passed closing pursis vide Exh.69.

12) As per evidence and after hearing of both the sides, learned Small Cause Court has partly allowed the plaintiff's suit.

13) On dissatisfied of the decree passed by the learned Small Cause Court No.5, the original plaintiff has filed this Appeal.

14) On serving notice, the respondent has appeared before the Court through his advocate but not filed any reply.

15) Learned advocate of the appellant has filed written arguments vide Exh.21. As per the arguments, learned advocate has stated that the rent of suit premises decided Rs.20/- and the liability for payment of education cess, electricity burning charges on the head of the defendant but the defendant has not paid rent of the suit premises for the period of 155 months and breached the terms of tenancy of rent and changed the identity of suit premises and made illegal construction, on that circumstances, terminating tenancy through registered A.D notice and the said contention has been proved by the plaintiff before the learned Small Cause Court and as per the regular practice,

the plaintiff has not issued receipt inspite of that fact, the Trial Court has illegally passed order against the plaintiff and hence, the appeal required to be allowed and also prayed for eviction decree against the defendant.

16) Learned advocate of the respondent orally argued that the decree passed by the learned Small Cause Court is settled principle of law and there is no any requirement to interfere. So, the Appeal is required to be dismissed with cost.

17) *In the case of **Anilkumar Ishwarlal Modi vs Kalpeshkumar Laxmanbhai Patel**¹ wherein the Hon'ble Gujarat High Court has held that in the first appeal framing of the point of determination is required under Order 41 Rule 31 mandatory. The Hon'ble High Court has held that First Appellate Court has committed serious error in not deciding appeal in accordance with the provision of Order 41 of Civil Procedure Code 1908. In First Appeal it is required to substantially comply with the provision of Order 41 Rule 31 of Civil Procedure Code. First Appellate Court has failed to discharge obligation placed on it as a First Appellate Court and therefore, judgment and order of the lower appellate court deserves to be quashed as same is required to be remanded to First Appellate Court for considering the same afresh on merit and in accordance*

with law after framing point of determination in accordance with Order 41 Rule 11, 14, 15, 31 and 33 of the Code. The Hon'ble High Court also held that First Appellate Court has to apply its mind independently and frame the issue appropriately and independently. The provision of Order 41 of C.P.C. provides that how the Appellate Court has to deal with the appeal under Section 96 of the Code and the procedure is to be followed as per Order 41 of C.P.C. and hence in present suit, as per the pleadings of the plaintiff as well as defendant, framed the following issue for determination.

1. Whether the appellant proves that the defendant is tenant in arrears of rent for more than six months ?
2. Whether the appellant proves that appellant has issued legal notice under Section-12(2) of the Bombay Rent Act ?
3. Whether the respondent proves that he is ready and willing to pay the rent and is protected from eviction decree under Sec. 12 of the Bombay Rent Act ?
4. Whether the appellant proves that respondent has without his consent or knowledge, made construction of permanent nature in the suit premises which cannot be removed without causing serious damages to the property, therefore, eviction decree is required to be

passed under Section-13(1)(b) of the Act ?

- 5 Whether appellant proves that the appellant has reasonable and bonafide requirement of the suit premises ?
6. Whether the appellant proves that the decree passed by the learned Small Cause Court No.5 in H.R.P. Suit No.861/2006 is against the settled principle of law, illegal perverse and required to be interfered ?
7. What order ?

18) Our findings to the above issues are as under:-

1. In the negative.
2. In the negative.
3. In the affirmative.
4. In the negative.
5. In the negative.
6. In the negative.
7. As per final order.

Our reasons for the above findings of points are as under:-

R E A S O N S

Issue Nos.1, 2 and 3:-

19) *As per the judgment of the **Hon'ble Supreme Court H. Siddiqui (D) By Lr vs A. Ramalingam dated 04-03-2011.***² In

²Civil Appeal No.6956 of 2004

Hon'ble Supreme Court has held in para no.18 relating Order 41, Rule 31 of Code of Civil Procedure, 1908 that

Para 18 "The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts / evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., AIR 1963 SC 146; Girijanandini Devi & Ors. v. Bijendra Narain Choudhary, AIR 1967 SC 1124

20) Learned advocate of the appellant has argued that the plaintiff has proved that the defendant is tenant in arrears for more than six months inspite of that the learned Small Cause Court has wrongly passed the order. Perusing the record of H.R.P. Suit No.861/2006 vide Exh.14, the plaintiff has stated that the defendant is irregular in the payment of rent and paid rent up to 31.03.1993 and the rent of the suit premises is due from April 1993 to February 2006, total 155 months, on that circumstances, the plaintiff has issued notice to the defendant on dated 20.03.2006 through R.P.A.D which served to the defendant and inspite of served notice, the defendant has not paid rent.

21) Perusing the record, it is found that as per Exh.15, notice issued in the name of Manguben Surtanath (Bhagat) Harnath and as per Exh.16, it is found that notice served on 22.03.2006. On cross-examination, plaintiff has stated that it is true that there is no dispute regarding the rent between my father and Surtanath Harnath. The rent of the suit premises was Rs.11/- thenafter, it will increase up to Rs.20/- and at present, the monthly rent of suit premises Rs.20/-. There is no written agreement made for increasing of the rent from Rs.11/- to Rs.20/-.

22) The plaintiff has admitted that since 1986-87, the rent of the suit premises is running of Rs.20/- per month. My address is room no.102, Raipur Millni Chali. It is not true that Manguben was come for the payment of rent but I have

denied to accept. I have not remember from when the rent of the suit premises was due. Then after, the plaintiff has stated that the amount of the outstanding rent noted in my notebook but it is required to trace out, whether it will trace out, or not possible trace out. It is not true that Manguben has paid rent up to 2006. It is true that before Manguben, her husband Surtanath Harnath had paid rent. It is true that whenever Manguben has paid rent to him then I have accepted the rent but I have not issued the rent receipt. Thenafter, the plaintiff has also admitted that the amount whatever paid for the rent is noted in my notebook.

23) As per the chief-examination and cross-examination of the plaintiff it is found that Manguben was always paid rent of the suit premises and whenever Manguben had paid rent, the plaintiff landlord has not issued rent receipt, on that circumstances, the contention which has been raised by the plaintiff that the amount of rent is due for 155 months is not acceptable.

24) It is the duty of the landlord i.e. plaintiff, to issue the rent receipt and the rent receipt is evidence for the payment of rent, but when the landlord intentionally not issued rent receipt, then why the tenant will suffer?

25) As per the deposition of plaintiff, it is found that the tenant has paid rent but the landlord has not issued rent

receipt for the payment of the rent. The plaintiff landlord make one contention, that each and every entry made in his notebook for the payment of rent will be recorded in his notebook but in the present case, the plaintiff has not produced the said notebook, on that circumstances, the adverse inference gone in the plaintiff. On that circumstances, the plaintiff has not proved the contention that the defendant has not paid rent more than 155 months.

26) The plaintiff has examined another witness vide Exh.45 Parmar Vinodbhai Ambalal who has stated that the defendant has paid rent up to 15th March 1993. On cross-examination, the said witness has stated that I live in joint family. I do not know the rent of the suit premises paid up to 31.08.2006. it is true that the fact for the payment of rent which mentioned in chief-examination is not in my own knowledge. The said witness also stated that the entry for the reveiving rent and outstanding rent noted in the notebook. Thenafter, the said witness has stated that same will produce on the next adjournment date but the plaintiff has not produced such type of document. The said witness further stated that it is true that the chief-examination praperd by my father.

27) As per the said evidence of the plaintiff as well as witness of the plaintiff, the plaintiff has not proved that the

defendant is tenant in arrears for more than six months.

28) As per Exh.15, notice issued to the defendant and demanded rent for the period of 155 months up to February 2006, the said notice issued on 20.03.2006 and served on 22.03.2006 but as per the contention of the notice, the plaintiff has not proved that the defendant is tenant in arrears for more than six months, even the plaintiff has not produced any evidence to show that the defendant has not paid rent up to 31.03.2006.

29) As per the deposition of the plaintiff, it is found that whenever the defendant pays amount of rent, the plaintiff makes such entry on his notebook, and the said notebook is the best evidence for conclusion of due rent.

30) The plaintiff has admitted that he has not issued rent receipt, on that circumstances, the contention which raised by the plaintiff that he has make entry iin notebook so as per the said notebook trace out what is due rent ? but unfortunately, the plaintiff has not produced the said document to show that what is due rent of the suit premises?

31) As per the document vide Exh.66 on dated 02.03.2007 and as per Exh.67 on dated 01.08.2007, the defendant has deposited the amount of rent.

32) Perusing the record, it is found that the learned Small Cause Court has framed issued vide Exh.20 on dated 21.11.2006 and if the plaintiff proved that the defendant is tenant in arrears for more than six months then the arrears amount require to be deposited before the Court on or before 21.11.2006 for the protection under Section-12(3) (b) of the Rent Act.

33) In the present case, as per the evidence of the plaintiff, it is found that the rent of the suit premises fixed Rs.20/- per month and as per the written statement of the defendant in para no.12, the defendant has raised the contention of the standard rent, on that circumstances, the present suit fall under Section-12(3)(b) of the Rent Act but it is also required to note down that the plaintiff has not proved that the defendant is tenant in arrears for more than six months, on that circumstances, it is the duty of the defendant to deposit rent of the suit premises from the date of filing of the suit during the pendency of the suit. As per the contention of the written statement and chief-examination, the defendant has stated that the monthly rent of the suit premises Rs.11/- per month, on that circumstances, as per the calculation of Rs.11/- per month, the defendant has deposited Rs.77/- on 02.03. and Rs.132/- on 01.08.2007.

34) On cross-examination of the defendant, the defendant has stated that actual rent of the suit premises Rs.11/-.

35) As per the evidence of the plaintiff as well as defendant, it is found that the plaintiff has not proved that the defendant is tenant in arrears for more than six months, on that circumstances, demand notice which has been given by the plaintiff vide Exh.15 also not found legal one.

36) As per the above discussion for which the plaintiff has not proved that the defendant is tenant in arrears of rent fore more than six months so, we conclude **Issue No.1 as Negative.**

37) As per the evidence, the plaintiff has not proved that the defendant is tenant in arrears more than six months, on that circumstances, the notice issued by the plaintiff vide Exh.15 is not found legal one and hence , we conclude **Issue No.2 as “Negative”.**

38) As per the evidence, it is also found that the defendant has deposited the rent of the suit premises during the pendency of the suit ,so, the defendant is entitled to get protection under Section-12(3)(b) of the Bombay Rent Act. So we conclude **Issue No.3 as “Affirmative”.**

Issue No.4:-

39) Learned advocate of the plaintiff has filed written arguments and also make oral argued that he is also entitled for eviction decree as per the Section13(1)(b) of the Bombay Rent Act, and in the case of the case of **Ramchandra Dattatraya Gandhi v/s. Pushpabai Manohar Sheth**³ and argued that it is the duty of the plaintiff to prove that the defendant has made material alterations and permanent constructions in the suit house without written consent and knowledge of the plaintiff but in this case, original plaintiff has not proved any contention relating to Section 13(1)(b) of the Rent Act.

40) In the case of **Hari Thakurdas Laungani (Decd.) & Anr. V/s. Hemu Fatehchand Jivrajani and Anr**⁴ Hon'ble Gujarat High Court has held that "*under The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - in Eviction suit - Tenant admitted alterations made but with sweet will of Landlord - Word "Sweet will" has no place in Section 13(1)(b) of the Act - Section obliges tenant to obtain Landlord's consent in writing before making alterations or structure of permanent nature*

41) As per the chief-examination of plaintiff in para-3 to 8, the plaintiff has narrated the contention of permanent

³1989 LawSuit (Bom) 272

⁴ II GLR 1999(1) 184

construction, on that circumstances, perusing the chief-examination of Exh.14, it is found that the plaintiff has stated in para-6 that the defendant has without consent of the landlord, breached the condition of rent. In chief-examination of the para number 3, 4, 5, 7 and 8, the plaintiff has stated that which type of permanent construction made by the defendant.

42) It is also required to note down that the plaintiff has filed further chief-examination on dated 09.03.2007 and on further chief-examination, the plaintiff has stated that in para no17, the defendant has illegally constructed RCC slab and made illegal construction but the plaintiff has not produced any evidence to show that which type of permanent construction made by the defendant, even the plaintiff has not produced any document to show that which type of construction made by the defendant on that circumstances, the plaintiff has failed to prove the contention of the permanent nature in the suit premises. So, we conclude **Issue No.4 as “Negative”**.

Issue No.5:-

43) As per the discussion of the evidence of the plaintiff as well as defendant, the plaintiff has not proved that the defendant is tenant in arrears for more than six months, even the plaintiff has not proved that without consent of

the landlord, the defendant has made permanent construction in the suit premises which cannot be removed without causing serious damage to the property, on that circumstances, the plaintiff is not entitled to get eviction decree under Section-12(3) or Section-13(1)(b) of the Bombay Rent Act.

44) The plaintiff has also not produced any evidence to prove the contention that he has required the suit premises for his personal use or bonafide requirement. In cross-examination, the plaintiff has stated that the present premises of the plaintiff is ownership of Raipur Mill and it is rented premises, it consists of one room and kitchen and Raipur Mill closed with that reason, the plaintiff has not issued rent receipt. The bonafide requirement is something more desire to what have something and much less than absolute or dire necessity but in the present case, the plaintiff has not produced any such evidence to show that he has personal and bonafide requirement, if prima facie plaintiff produced any evidence to show that he has personal and bonafide requirement of the suit premises, on that circumstances, it is the duty of the Court to find out who will suffer greater hardship but in the present case, the plaintiff has not proved such bonafide requirement as mentioned in Section-13(1)(g) of the Rent Act and hence, we conclude **Issue No.5 as also “Negative”**.

Issue No.6 and 7:-

45) As per the discussion, the appellant has miserably failed to prove the **Issue No.1, 2, 4 and 5** and thereby, the the appellant has not succeeded to prove that the learned Small Cause Court No.5 in H.R.P. Suit No.861/2006 is against the settled principle of law, illegal perverse and required to be interfered. So in view of our above discussion, the learned Small Cause Court No.5 has rightly passed the judgment and decree in H.R.P. Suit No.861/2006 and hence, we conclude **Issue No.6 as “Negative”**

46) As per above reason we pass following final order in terms of **Issue No.7:-**

∴ FINAL ORDER ∴

- (1) The present Civil Appeal filed by the appellant (original plaintiff) is hereby dismissed.
- (2) The decree and Judgment passed by the learned Small Cause Court No.5 in H.R.P. Suit No.861/2006 dated 30.04.2010 vide Exh.72 is hereby confirmed and upheld.
- (3) Cost of this Appeal of the respondent as well as appellant will bear by the appellant.
- (5) Record and proceedings of H.R.P. Suit No.861/2006

send back to the Small Cause Court No.5 along with the copy of the decree and judgment of the Appeal.

(6) Decree be drawn accordingly.

Pronounced and signed in the open Court to-day i.e. 29th day of December, 2023.

(Arvindkumar Shivprasad Pande)
Judge,
Code GJ00854
Small Causes Court
Ahmedabad.

(Ganpatsinh P. Sodhaparmar)
Judge,
Code GJ00923,
Small Causes Court
Ahmedabad.

RATHOD.