IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3700 OF 1996

1. Gorakh Rambhau Chothve
2. Jalinder Rambhau Chothve } ....***Petitioners***

: Versus :

1. Vilas Eknath Kadam
2. Satish Eknath Kadam } ....***Respondents***

Mr. P.N. Joshi *with Ms. Rukmini Khairnar, for the Petitioners.*
Mr. Lalit Jain, *for the Respondents.*

CORAM : SANDEEP V. MARNE, J.

Judgment Resd. On : 6 September 2024.
Judgment Pron. On : 13 September 2024.

JUDGMENT :

1) Petitioners have filed this petition challenging the judgment and decree dated 31 January 1996 passed by the District Court, Nashik allowing Regular Civil Appeal No.325 of 1989 and setting aside the judgment and decree dated 6 March 1987 passed by the Trial Court in Regular Civil Suit No.76 of 1983. The Appellate Court has decreed Regular Civil Suit No.76 of 1983 directing the Petitioners/Defendants to deliver possession of the suit premises to the Plaintiffs with further direction to pay arrears of rent of Rs.115.50/- and Rs.4.62/- towards education cess together with future

damages at the rate of Rs.15.60/- per month from the date of suit till delivery of possession. Enquiry into damages under Order 20 Rule 20 is also directed.

2) A brief factual narration for deciding the issues involved in the petition would be necessary. Municipal House No.24 bearing City Survey No.529 in Ward 3 of Igatpuri, Taluka-Igatpuri, Dist. Nashik is owned by the Plaintiffs. Plaintiffs No. 1 and 2 are brothers. One room at the rear portion of the said house property are the '**suit premises**'. Defendant No.1 was inducted as tenant in respect of the suit premises on monthly rent of Rs.15/- and education cess of 60 paise (total Rs.15.60/-). It is Plaintiffs' case that the First Defendant did not pay rent in respect of the suit premises from 1 January 1983. That the First Defendant was not residing in the suit premises and had sublet the same to Defendant No.2. On 14 July 1983, Plaintiff terminated the tenancy w.e.f. 31 July 1983 and demanded possession together with arrears of rent. Copy of the notice was also dispatched to Defendant No.2. It is Plaintiffs' case that both the Defendants refused to accept the notice dated 15 July 1983 and the same was returned to them. Plaintiffs accordingly filed Regular Civil Suit No. 76 of 1983 in the Court of Civil Judge Junior Division, Igatpuri for recovery of possession of the suit premises from both the Defendants and for recovery of arrears of rent. The suit was resisted by Defendants by filing common written statement contesting Plaintiffs' claims. It was denied by them that Defendant No.1 had sublet the suit premises to Defendant No.2. Defendants contended that rent upto 1

January 1983 was paid, but Plaintiff did not issue rent receipts to Defendant No.1. That the Defendant No. 1 was willing to pay the rent and could not be termed as defaulter. Without prejudice to their rights, Defendants deposited the entire amount of rent upto October 1984 in the Court. Defendants denied receipt of demand notice and prayed for dismissal of the suit.

3) Both the parties led evidence in support of their respective claims. Plaintiffs examined Plaintiff No.1-Vilas Eknath Kadam as PW1. They also examined Vishwanath Chintaman More, the Clerk working in Igatpuri Municipal Council and Vasant Punjaji Salvi, Postman working at Igatpuri. Defendants examined Gorakh Rambhau Chawate (Defendant No.1), as well as Jalinder Rambhau Chawate (Defendant No.2) as witnesses. After considering the pleadings, documentary and oral evidence on record, Trial Court proceeded to dismiss the suit by judgment and decree dated 6 March 1987. The Trial Court rejected both the grounds of arrears of rent as well as subletting. The Trial Court held that the demand notice was not legal and proper.

4) Plaintiffs filed Regular Civil Appeal No.325 of 1989 before the District Court, Nashik challenging the Trial Court's decree dated 6 March 1987. The Appellate Court has allowed the Appeal filed by Plaintiffs by setting aside the decree dated 6 March 1987. The Appellate Court has decreed Regular Civil Suit No.76 of 1983 by directing Defendants to handover possession of the suit premises

with further direction to pay arrears of rent as well as future damages at the rate of Rs.15.60/- per month from the date of the suit till realization of possession. An enquiry into mesne profits is also directed to be conducted.

5) Petitioners/Defendants have filed this petition challenging the decree of the Appellate Court dated 31 January 1996. When the petition came up before this Court on 12 September 1996, an opportunity was sought for mutual settlement and accordingly while adjourning the petition, this Court protected the Petitioner from being dispossessed. By order dated 28 January 1997, this Court admitted the petition and continued the interim order.

6) Mr. Joshi, the learned counsel appearing for the Petitioners would submit that the Appellate Court has erroneously reversed well-reasoned order of the Trial Court in absence of any infirmity in the same. That the demand notice was not validly served on Defendant No.1 and that therefore the suit on the ground of default in payment of rent was clearly not maintainable. That the envelope containing the notice was admittedly not addressed at the suit premises but the same was addressed at an altogether different address of Shaikh Abdul Rajak Ghulam Mohd. That for maintaining a suit for eviction on the ground of arrears of rent, it was necessary for Plaintiffs to address and serve demand notice at the suit premises. That the ground of subletting has ultimately been rejected even by the Appellate Court and that therefore the whole theory of First

Defendant staying at a different place by putting the Second Defendant in exclusive possession is rejected and the said finding has attained finality. In such circumstances, residence of the First Defendant in the suit premises is conclusively proved. Therefore, the demand notice ought to have been dispatched at the address of the suit premises. Mr. Joshi would criticize the Appellate Court for having accepted the evidence of postman. That Postman had no business to look for Defendants in the market as alleged. That the relevant rules and procedure required that if the addressee is not found at the given address, an endorsement to that effect needs to be made on the envelope. That if the addressee is not found at the address, it is not for the Postman to go to other places looking for them and then record their refusal. Relying on judgment of the Gujarat High Court in ***Vadhere Devabhai Govindji Versus. Rameshwarpuri Ratanpuri***[1], Mr. Joshi would contend that postman cannot be expected to have computerized memory to give evidence in respect of an event after considerable lapse of time. That in the present case, postman has given evidence after gap of four years and was not expected to recall happenings of the year 1983. Mr. Joshi would rely upon judgment of this Court in ***Ramavtar Ramasahaya Khatod Versus. Baban Gurunath Pathar***[2] in support of his contention that in absence of valid service of notice, suit for eviction on the ground of arrears of rent is not maintainable.

1 1983 SCC OnLine Guj 98
2 (2005) 1 Mh.L.J. 932

7) Mr. Joshi would further submit that the Trial Court has rightly applied the provisions of Section 12(3)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 **(Bombay Rent Act)** while observing that the Defendants deposited the entire arrears of rent in the Court. That in the present case, demand was made by the Plaintiffs for education cess, which is undoubtedly payable on yearly basis. That therefore the demand cannot be treated as monthly tenancy for the purpose of application of Section 12(3)(a) of the Bombay Rent Act. In support of his contentions, he would rely upon judgment of the Apex Court in ***Raju Kakare Shetty Versus. Ramesh Prataprao Shirole and another***[3] and of this Court in ***Madhavsingh Tulshidas and another Versus. Bhaktiben Narandas Paleja and others***[4]. He would submit that the Appellate Court has erred in applying the provisions of Section 12(3)(a) of the Bombay Rent Act. He would therefore submit that the decree passed by the Appellate Court deserves to be set aside and the suit filed by the Plaintiff deserves to be dismissed.

8) The petition is opposed by Mr. Jain, the learned counsel appearing for the Respondents/Plaintiffs. He would submit that the Appellate Court has rightly appreciated the evidence on record for decreeing the suit and that the said findings do not warrant interference in exercise of writ jurisdiction of this Court. He would submit that Plaintiffs came up with specific case that the First

3 (1991) 1 SCC 570

4 2006 (6) Mh.L.J. 353

Defendant-tenant was not residing in the suit premises and was residing in the house property of Shaikh Abdul Rajak Ghulam Mohd. That therefore, the Plaintiff rightly dispatched the demand notice at the said address. That refusal of Defendants to accept the demand notice has been witnessed by the Postman, who has been examined by the Plaintiffs. That since direct evidence of refusal of notice by the Defendants is available on record, the demand notice is required to be treated as having been proved. That the case now sought to be canvassed by Petitioners/Defendants about yearly tenancy was neither pleaded nor proved. That this Court cannot record a finding of fact about the tenancy being yearly, in absence of foundational pleading. He would submit that the Plaintiffs on the contrary not only pleaded but proved that the tenancy of the Defendants is monthly and that the Defendants did not dispute the said position in their written statement. Now Defendants cannot be permitted to turn around and raise a claim contrary to the pleadings and evidence on record. He would therefore submit that the Appellate Court has rightly applied the provisions of Section 12(3)(a) of the Bombay Rent Act. He would also submit that the provisions of Section 12(3)(b) apply only where none of the three conditions of monthly tenancy, absence of dispute regarding amount of standard rent and arrears in excess of six months, exists. That in the present case, there is no dispute about standard rent between the parties and the arrears of rent are also in excess of six months. That therefore creation of dispute about monthly tenancy at this belated stage would otherwise not enure to

the benefit of the Defendants. He would pray for dismissal of the petition.

9) Records and proceedings of the case have been called for and are available for my perusal.

10) Rival contentions of the parties now fall for my consideration.

11) Plaintiffs had sought eviction of Defendants on twin grounds of default in payment of rent and unauthorized subletting. However, the Trial Court rejected the ground of default in payment of rent by holding that the Defendants deposited the entire amount of rent in the Court and thereafter continued to pay the rent in the Court. The Appellate Court has maintained the finding of the Trial Court regarding unauthorized subletting and has decreed the suit on the solitary ground of default in payment of rent. Therefore, the limited issue that arises for consideration is whether the Plaintiffs have proved default on the part of Defendant No.1-Tenant to pay the rent within the meaning of Section 12 of the Bombay Rent Act.

12) Since the since the suit was instituted in the year 1983, the provisions of the Bombay Rent Act, before its amendment in the year 1987, are applicable. Section 12, before amendment of 1987, read thus :

12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.

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

(2)No suit for recovery of possession shall be instituted by a landlord against a 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.

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

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

(4)Pending the disposal of any such suit, the Court may out of any amount paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increase due to him as the Court thinks fit.

> *Explanation I* - In any case where there is a dispute as to the amount of standard rent of permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court.
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> *Explanation II* .- For the purposes of sub-section (2), reference to "standard rent" and "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of section 11.

13) Under sub-section (2) of Section 12 it is mandatory for the landlord to serve on the tenant demand notice and wait for period of one month before institution of the suit. In the present case, there is serious dispute amongst parties about the service of notice on the First Defendant-Tenant. There is no dispute to the position that notice dated 14 July 1983 has been dispatched by Plaintiffs to both the Defendants. Perusal of Records and proceedings of the case shows presence of original office copy of the notice dated 14 July 1983 alongwith postal receipts. On the said notice, address of the First Defendant-Tenant was shown as '*House of Razak Gul Mohd, Loya Road, Behind Bajrang Wada, Igatpuri*'. The address of Defendant No.2 was mentioned as '*Municipal Ward No.3, House No.24, Loya Road, Igatpuri*'. Thus, the notice was dispatched to Defendant No.2 at the address of the suit premises whereas the notice was dispatched to Defendant No.1 at a different address. The Plaintiff specifically pleaded in the plaint that the First Defendant-tenant was not

residing in the suit premises and had allowed the Second Defendant to reside in the same. It is further pleaded in the plaint that the First Defendant-tenant was residing in the house property of Razak Gul Mohd. This is the reason why the notice was apparently dispatched to the First Defendant-tenant at the address, where Plaintiff pleaded that he was residing.

14) According to Mr. Joshi, the notice under Section 12(2) of the Bombay Rent Act must be mandatorily dispatched and served on the tenant at the address of the suit premises. I am unable to agree. There is nothing in Section 12(2) which mandates that the notice must be dispatched or served at any particular address on the tenant. The only requirement is the service of notice. In a given case, like the present one, if the tenant does not reside in the suit premises, Plaintiff cannot take the risk of addressing the notice at the suit premises, where is the notice is not likely to be served. Since service of notice under Section 12(23) is a *sine qua non* for filing the suit on the ground of default in payment of rent, it is for the Plaintiff to decide the exact address where the notice is likely to be served. In the present case, the Defendant-Plaintiff has always maintained the position that the First Defendant was not residing in the suit premises. In fact, in the notice dated 14 July 1983 also, Plaintiffs specifically stated that the First Defendant-tenant residing in the house of Razak Gul Mohammed. Once Plaintiffs adopt this plea, it would be foolish on their part to address the notice at the suit premises, which would not only have been retuned unserved, but

return of notice would have rendered Plaintiff's suit as not maintainable. In my view therefore, the Plaintiff rightly addressed notice at the house where he believed the First Defendant-Tenant could be found.

15) The assumption and belief of Plaintiffs of likelihood of First Defendant being found at the house of Razak Gul Mohd is ultimately proved to be correct on the basis of evidence of the Postman. Plaintiff examined Vasant P. Salve, the Postman working in Igatpuri, who specifically deposed that when he approached the address mentioned in the notice, he could not find Defendant No.1 and learnt that he was in the market. Same is the position with regard to Defendant No.2, who was also not found at the suit property and was at the market. It is an admitted position that Defendants were conducting business in the vegetable market at Igatpuri. The Postman accordingly went to the market for service of the envelops on Defendants. However, both the Defendants refused to accept the same. Accordingly, endorsement was made by the Postman on the envelopes about refusal and the same were returned to the sender. The endorsement of the Postman is proved in his deposition. Thus, there is direct evidence available on record about Postman attempting to serve the notice on Defendants and they refusing to accept the same.

16) Mr. Joshi has relied upon judgment of the Gujarat High Court in ***Vadhere Devabhai Govindji*** (supra) in support of his

contention that the Postman cannot remember the events after long gap of four years and that he is not expected to have computerized memory. However, what needs to be appreciated is the fact that we are dealing with a situation of a small place like Igatpuri pertaining to the year 1983. At that time, Igatpuri being a very small establishment, it is unlikely that the Postman might personally know most of the residents of Igatpuri. There is nothing in evidence to indicate that the Postman worked at Igatpuri for a short duration or that at the time of his deposition, he was no longer working in Igatpuri. It was not uncommon in India during eighties that Postmen in rural and semi urban areas remained posted for long duration at one place and virtually knew all the residents in a particular locality. In the present case also, the Postman apparently personally knew the First Defendant, whom he identified in the Court during the course of cross-examination. It must also be borne in mind that a Postman is an independent witness, not concerned with the dispute between the parties. If he was interested witness, he could have simply made remark of refusal on the envelops. There was no necessity for him to depose about his visit to market to serve the notices on Defendants. He has personally deposed before the Court that the First Defendant-tenant refused to accept service of notice. He has also identified the First Defendant in the Court. There is therefore no reason to disbelieve or discredit his evidence. Since direct evidence of Postman is available on record, the Appellate Court has rightly assumed that the notice was validly served. In my view, Plaintiffs have proved valid service of notice on the First Defendant-Tenant, who was in arrears

of rent. Therefore, reliance by Mr. Joshi on judgment of Single Judge of this Court in ***Ramavtar Ramasahaya Khatod*** (supra) does not cut any ice.

17) The next point for consideration is applicability of Clause (a) or Clause (b) of sub-section (3) of Section 12 to the present case. Section 12(3)(a) becomes applicable where the rent is payable by month and where there is no dispute about standard rent or permitted increases and where the arrears of rent are for a period of six months or more. Once these three conditions are fulfilled, the act of tenant in neglecting to pay rent within one month after receipt of demand notice mandates the Court to pass a decree for eviction. It appears that prior to 28 March 1963, the words used in Section 12(3)(a) were '*the Court may pass a decree*' which are substituted by the words '*the Court shall pass a decree*' by amending Act of 1963. Thus, once the conditions of Section 12(3)(a) are satisfied, no discretion is left to the Court but to pass a decree for eviction.

18) In cases other than the one covered by Section 12 (3)(a), decree for eviction cannot be passed if on the first date of hearing of the suit or before such date as the Court may fix, the tenant deposits the arrears of standard rent and permitted increases. Use of the words '*in any other* case' would obviously mean a case where (i)the rent is not payable by a month, (ii)the dispute exists regarding standard rent or permitted increases, (iii)the arrears of rent are in respect of the period not exceeding period of six months. This is the

reason why Mr. Joshi has attempted to suggest that the rent was not payable by month in the present case. His contention is premised on demand made by Plaintiffs for education cess of 60 paise in the notice. He has relied upon judgment of the Apex Court in ***Raju Kakare Shetty*** (supra) in which it is held in para-13 as under :

> 13. The only submission which Dr. Chitale made for taking the case out of the purview of section 12(3)(a) was that the entire rent was not payable by the month which was the first condition to be satisfied for invoking the said provision. According to him, since the tenant was bound to pay education cess and other taxes in respect of the demised premises which were payable from year to year, a part of the rent was not payable by the month and therefore the first condition of section 12(3)(a) was not satisfied. Hence, submitted Dr. Chitale, the case fell within the phrase 'in any other case', by which clause (b) of section 12(3) opens. Before we answer the submission of Dr. Chitale it may be advantageous to refer to the relevant provisions of the Maharashtra Education (Cess) Act (Maharashta Act XXVII of 1962). Section 4(a) of the said Act provides for the levy and collection of tax (cess) on lands and buildings at the rates specified in Schedule A on the annual letting value of such lands or buildings. The primary responsibility to pay this tax is cast by section 8 on the owner of the land or building irrespective of whether or not he is in actual occupation thereof. Section 13 next provides that on payment of the amount of the tax in respect of such land or building the owner shall be entitled to receive that amount from the person in actual occupation of such land or building during the period for which the tax was paid. Under section 15 any person entitled to receive any sum under section 13 is conferred for the recovery thereof the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to receive the same. It thus seems clear that education cess is a tax and the owner is primarily responsible to pay the same to the local authority

and on such payment a right is conferred on him to recover the same from the actual occupant in addition to the standard rent in respect of the demised premises. Sub-section (3) of section 13 in terms states that the recovery of any amount of tax from an occupier under this provision shall not be deemed to be an increase for the purposes of section 7 of the Act. It is, therefore, obvious that the landlord has a statutory right to recover the amount of education cess paid by him in respect of the demised premises from the tenant-occupant and such recovery shall not be an unlawful increase under of section 7 of the Act but would squarely fall within the expression 'permitted increases' as defined by section 5(7) of the Act. This statutory right to recover the amount of education cess in respect of the demised premises from the occupant-tenant can be quantified by agreement of parties so long as the amount quantified does not exceed the total amount actually paid by the owner by way of education cess. In the present case, it is nobody's contention that the amount of Rs. 120 per month payable by way of education cess and other taxes was in excess of the amount actually payable under the relevant statues to the local authority. The Gujarat High Court has taken a consistent view that where the tenant is obliged under the terms of the tenancy or by virtue of the statute to pay the tax dues to the landlord, since such taxes which form part of the rent are payable annually the case ceases to the governed by section 12(3)(a) and falls within the purview of section 12(3)(b) of the Act. In Maheshwari Mills Ltd., under the terms of the tenancy the tenant was obliged to pay the municipal taxes and property taxes in respect of the demised premises. The Court took the view that such payment was by way of rent and since the municipal taxes and property taxes were payable on year to year basis, a part of the rent was admittedly not payable by the month and, therefore, section 12(3)(a) was not attracted. In Prakash Surya the tenant had agreed to pay the municipal tax and education cess. The amount payable towards these taxes constituted rent and since the same was payable at the end of the year the Court held that the rent had ceased to be payable by the month and hence section 12(3)(a) had no application. The same view was reiterated in Vanlila's case where education cess was payable by the tenant by virtue of section 21 of the

Gujarat Education Cess Act, 1962. Since it constituted a part of the rent, to be precise permitted increase under section 5(7) of the Act, it was held that it took the case outside the scope of section 12(3)(a) of the Act. In the case of Vishwambhar Hemendas also since the rent was inclusive of taxes the Court held that the case was governed by section 12(3)(b) of the Rent Act. The Bombay High Court has expressed the same view in Muktabai's case. This Court in the Bombay Municipal Corporation's case held that while section 7 of the Act prohibits increase above the standard rent it does not prohibit the recovery of increase to which a landlord is entitled under the other provisions of the said statue, namely, increase by way of 'permitted increases'. Education cess is specifically recoverable as rent by virtue of section 13 and as sub- section (3) thereof provides that it shall not be treated as increase in rent under section 7 of the Act, there can be no doubt that such an increase falls with the definition of 'permitted increases under section 5(7) of the Act. It, therefore, seems to be well-settled that education cess is a part of 'rent' within the meaning of the Act and when the same is claimed in addition to the contractual or standard rent in respect of the demised premises it constitutes a permitted increase within the meaning of section 5(7) of the Act and being payable on a year to year basis, the rent ceases to be payable by the month within the meaning of section 12(3)(a) of the Act. **But the question still survives whether the parties can be agreement quantity the said amount and make it payable on a month to month basis** provided of course the said amount does not exceed the tax liability of the landlord; if it exceeds that liability it would infringe section 7 of the Act and the excess would not be allowed as permitted increase within the meaning of section 5(7) of the Act. A right to recover a certain tax amount from the tenant-occupant under the provisions of a statute can be waived by the owner or quantified by agreement at a figure not exceeding the total liability under the statue. If by agreement the amount is so quantified and is made payable by the month not withstanding the owner's liability to pay the same annually to the local authority, the question is whether is such circumstances the 'rent' can be said to be payable by the month within the meaning of section 12(3)(a) of the Act? **We**

> **see no reason why we should take the view that even where the parties mutually agree and quantify the tax amount payable by the tenant to the landlord on monthly basis, the rent should not be taken to be payable by the month within the meaning of section 12(3)(a) of the Act.** A statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the recovery can be regulated in the manner mutually arranged or agreed upon by the concerned parties so also as it is not in violation of statute. If for convenience and to facilitate payment, the parties by mutual consent work out an arrangement for the enforcement of the owner's statutory right to recover the tax amount and for discharging the tenant-occupant's statutory obligation to reimburse the owner, we see no reason for refusing to uphold such a contract and if thereunder the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability. The said monthly payment would constitute 'rent' payable by the month within the meaning of section 12(3) (a) of the Act. The view expressed by the Gujarat High Court in Vishwambar Hemandas does not, with respect, state the law correctly if it holds that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent of Rs. 19.50 p.m . the mere recital in the lease that the rent is inclusive of taxes the case outside the purview of section 12(3)(a) of the Act. We are, therefore, in respectful agreement with the view taken by the Appellate Court and the High Court in that behalf. We, therefore, hold that as the tenant had failed to comply with the requirement of section 12(3)(a) to seek protection from eviction, the Courts below were justified in ordering his eviction.
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> *(emphasis added)*

19) Thus, the ratio of the judgment in ***Rahul Kakare Shetty*** is that though education cess is payable by the landlord annually, the parties by agreement can quantify the amount of cess to be paid on month to month basis by the tenant.

20) Mr. Joshi has also relied upon judgment of Single Judge of this Court in ***Madhavsingh Tulsidas*** (supra) in which it is held in paras-9 and 10 as under:

> 9. On behalf of the Petitioners, it has been submitted that the entire approach of the Appellate Bench is flawed inasmuch as the Appellate Bench proceeded on the basis that it was Section 12(3)(a) of the Act that would be the governing provision. There is merit in the submission that the judgment of the Appellate Bench of the Court of Small Causes is unsustainable on the issue of default. The Appellate Bench of the Court of Small Causes, it is to be noted, does not disturb the finding of the Trial Judge that the permitted increases in the present case included the education cess and that since the cess was not payable monthly, it could not be said that the rent was payable by the month. This finding of the Trial Court was borne out by the evidence on the record and is consistent with the law enunciated by the Supreme Court in Shetty's case. The judgment of the Supreme Court in *Shetty*'s case recognises that it would be open to the landlord and the tenant by an agreement between them to quantify the liability of the tenant towards the education cess on a monthly basis in which case, the education cess together with the rent would continue to be payable monthly. In the event that there is such an agreement it has to be pleaded and proved. In the present case, the Appellate Bench does not find the existence of any such agreement in the evidence. On the contrary, the Appellate Court proceeds on the assumption that no such separate agreement was necessary, once it was established that the rent was to be paid on a six monthly basis by the Third Defendant. The entire approach of the Appellate Bench is to my mind completely flawed because in the absence of an agreement of the nature referred to in Shetty'scase, the inevitable conclusion is that the rent is not payable monthly since the education cess which is a part of the rent was not payable by the month. In the present case, it is of course to be noted that the suit has been instituted by the tenant against his sub-tenant, but that would not make

any difference because even in such a case, it is necessary for the Plaintiff to plead and prove the existence of an agreement by which the education cess was liable to be paid together with the rent on a monthly basis. That admittedly is not the case here. The landlord's evidence does not show any reference to an agreement by which the liability towards education cess was quantified on a monthly basis, to be payable with the rent. The distinction made by Counsel between what is payable and what is paid does not carry the case any further, the ingenuity of the submission notwithstanding. It was for the landlord to establish the existence of an agreement as held by the Supreme Court. That was not done.

10. The Appellate Bench was clearly, therefore, in error in proceeding on the basis that it was Section 12(3)(a) that applies. The Trial Court was correct in coming to the conclusion that the case was governed by Section 12(3)(b). The Trial Court held that the tenant was entitled to the benefit of Section 12(3)(b). The finding of fact that was arrived at by the Trial Court was that the tenant had on or before the first date of hearing deposited the entire arrears of rent and that he had thereafter been regularly depositing the rent as and when it fell due. There is no finding in that regard in the impugned judgment of the Appellate Bench. This position was not disputed by Counsel. That is essentially a matter which must be considered by the Appellate Bench of the Court of Small Causes. The question of compliance with Section 12(3)(b) involves several factual determinations. The Appellate Bench of the Small Causes Court exercises an appellate jurisdiction on the judgments of Trial Judges in that Court. Since the issue relating to Section 12(3)(b) has not been considered by the Appellate Bench, it would be necessary to remand the case for a determination thereon. I am, therefore, of the considered view that it would be necessary to remit the matter back to the Appellate Bench for determining the question as to whether there was compliance of Section 12(3)(b).

21) Thus, if the Plaintiff pleads and proves existence of agreement under which education cess was liable to be paid

alongwith rent on monthly basis, provisions of Section 12(3)(a) become applicable. In the present case, Plaintiff pleaded in the plaint as under:

> 2. वर कलम १ यांत वर्णन केलेल्या मिळकत-घरांतील मागील बाजूची शेवटची एक खोली दरमहा १५ रु. भाडे व भाड्याचे रकमेवर दरमहा ५२ रुपयास ' ०४ पैसे प्रमाणे सरकारी शिक्षण कराचे ' ६० पैसे असे मिळून दरमहा १५ रु. ६० पैसे प्रमाणे दरमहाचे दरमहा नियमितपणे भांडे देण्याचे कराराने वादींचा मासिक भाडेकरी म्हणून प्रतिवादी नं.१ कडेस भाड्याने आहे. भाड्याचा महिना इंग्रजी कॅलेंडर प्रमाणे तारीख १ पासून सूरु होऊन त्या महिनाचे अखेरीस संपतो. प्रतिवादी नं.१ कडेंस सदरील जागेचे ता. १/१/११९३ पासूनच भाडे येणे बाकी आहे.

22) **Far from disputing the above pleadings in the plaint, Defendants virtually admitted the same in para-3 of their Written Statement in which it was pleaded as under:**

> 3. दावा कलम १ व २ मधील मजकूर काही अशी बरोबर आहे . परंतू प्रतिवादी नं १ कडेस सदरील जागेचे ता. १/१/१९८३ पासूनचे भाडे येणे बाकी आहे व प्रतिवादी नं . १ सहा महिन्यापेक्षा जास्त महिन्याचे भाडे थकविले असल्याने तो थकभाडेकरी (डिफॉलटर) झाला आहे. व घेणे निधन असलेल्या रकमेची वादीनी प्रतिवादी नं. १ कडे अनेक वेळ मागणी केली असता प्रतिवादी नं. १ ने टाळाटाळ केली व उडवाउडवीचे उत्तरे देत असे हे वादीचे म्हणणे बरोबर नसून ते प्रतिवादी नं . १ ला कबूल नाही.

23) **Thus, Plaintiff specifically pleaded existence of agreement to pay Rs.15/- towards standard rent and 60 paise towards education cess on monthly basis. Defendant did not dispute this position. The Defendants thus agreed that the education cess was agreed to be paid on monthly basis. Therefore, the judgments of the**

Apex Court in ***Ashok Shetty*** (supra) and of this Court in ***Madhavsingh Tulsidas*** (supra), far from assisting the case of the Petitioners, actually militates against them. In my view, agreement for payment of rent as well as education cess on monthly basis is pleaded and proved in the present case. The Appellate Court has rightly applied provisions of Section 12(3)(a). Since the Defendants admittedly did not pay rent to the landlords within a period of one month after the refusal of notice, the Court was left with no other discretion but to decree the suit on account of language employed in Section 12(3)(a) of the Bombay Rent Act.

24) Considering the overall conspectus of the case, I do not find any valid ground to interfere in the decree passed by the Appellate Bench, which, to my mind, appears to be indefensible. The Writ Petition must fail and is accordingly dismissed. Rule is discharged. There shall be no order as to costs.

25) After the order is pronounced, the learned counsel appearing for the Petitioner seeks continuation of stay for a period of 12 weeks. Instead of continuing the order of stay, Petitioners are granted time of three months for vacating the suit premises subject to filing their usual Undertaking in this Court within a period of 2 weeks from today.

[SANDEEP V. MARNE, J.]