
(1993) 08 BOM CK 0064

In the Bombay High Court

Case No : Writ Petition No. 2323 of 1982

Digambar Hari Sonpatki

APPELLANT

Vs

Kishnichand Nerumal Parwani

RESPONDENT

Date of Decision : 27-08-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3)
Civil Procedure Code, 1908 (CPC) — Order 42 Rule 2, 100, 151
Constitution of India, 1950 — Article 227
Contempt of Courts Act, 1971 — Section 10

Citation : (1994) 2 BomCR 202 : (1994) 96 BOMLR 443 : (1994) MhLj 290

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : M.D. Angal, for the Appellant; B.J. Mulchandani and B.B. Dhanwani, for the Respondent

Judgement

M.F. Saldanha, J.—A curious position has arisen in this case which requires to be resolved in an equally unusual manner. The petitioner before me Digambar Hari Sonpatki is a resident of Barrack No. 1292 at Ulhasnagar. A suit was filed against him by the respondent-Landlord u/s 12(3)(a) of the Rent Act on the ground that he is in arrears of payment of rent and that he had not paid up the arrears inspite of service of notice dated 5-11-1974. The suit in question was filed on 10-12-1974. The defendant-tenant defended the proceeding and contended that the rent was excessive etc. The learned trial Judge after hearing the parties dismissed the suit, on the ground that the material before him did not disclose a default u/s 12(3)(a) of the Rent Act. The matter was thereafter carried in Appeal by the respondent-Landlord and the Appeal Court set aside the trial Court's order, held that the respondent-tenant was a clear defaulter and decreed the suit against him. Thereafter the tenant approached this Court under Article 227 of the Constitution by way of the present petition. It is material for me to record that at the stage of admission this Court passed an order granting interim stay of the execution of the decree on usual terms thereby requiring the petitioner to

deposit the arrears in the trial Court and to continue to pay rent from month to month. This last aspect of the matter assumes some significance.

2. At the hearing of the petition today before Mr. Angal, the learned Counsel appearing on behalf of petitioner could advance his submissions, a grievance was projected by Mr. Mulchandani, learned Counsel appearing on behalf of the respondent-landlord whereby he has pointed out through an affidavit that the petitioner had not only committed default in payment during the conduct of the proceeding before the trial Court and the Appeal Court but that his defence had been struck off and that further in breach of the terms of the interim order, of this Court the petitioner has not deposited the rent due from him from month to month before the trial Court. He points out to me that this affidavit was served on the petitioner's learned Counsel six months back, that the statements contained therein are not refuted and that consequently the respondent would be entitled to execute the decree. Mr. Mulchandani advanced the contention that in so far as the petitioner is in breach of the terms of the interim order, that he is dis-entitled to a hearing and that the Court should adjourn the matter so that the decree may be executed and the consequences would follow.

3. Mr. Angal, learned Counsel appearing on behalf of the petitioner, pointed out to me that the interim order passed was a conditional one meaning thereby that the trial Court was not obliged to stay its hands unless the petitioner complied with the terms of the interim order. In these circumstances, the moment a default had been committed by the petitioner it was open to the respondent without even obtaining any further orders of this Court to have executed the decree. Today the petition which is 11 years old has been called out for final hearing and Mr. Angal submits that it would be down-right wrong to delay the final hearing any longer on the technical plea that the respondent desires to execute the decree first and thereafter to leave it to the Court to restore the possession if necessary and that this would be in accordance with propriety and Mr. Angal is right in so far as if the respondent has not chosen to execute the decree all this time, he cannot request the Court to adjourn the final hearing to enable him to do that.

4. Mr. Angal has pointed out to me that this is not a mere request that he is making to the Court but that he has on a very strong legal ground when he makes the statement because he will be able to demonstrate that the suit itself was not maintainable in law and if that is the position, a decree passed in those proceedings would be of no legal value. It was for this reason that I have declined the application for adjournment and heard learned Counsel. Mr. Angal, straightway pointed out to me that without going into anything else and assuming that the petitioner was in default that the scheme of the Rent Act requires that a notice be served on him affording him a period of 30 days time to pay up the arrears. In order to avoid any ambiguity, Mr. Angal, has invited my attention to the provisions of section 12(2) of the Act which reads as follows :

"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."

Mr. Angal contends that the wording of section 12(2) of the Act does not prescribe a mere obligation on the part of the party serving the notice to wait for a period of one month after the date of service, but that the implications are even wider. It is Mr. Angal's contention that the wording of section 12(2) very clearly indicates that no suit shall be instituted unless the period of one month from the date of service of notice has elapsed. He straightway points out to me that in this case, the notice dated 5-11-1974 was admittedly not served on the defendant at least until 12-11-1974, when the intimation was sent at his office address. Even assuming it was served or received by him after that date which the defendant-tenant has denied, the period of one month from the date of service had not elapsed. Mr. Angal goes to the extent of stating that the record would even indicate that there is no proof of service of notice at all. I do not need to go into the last aspect of the matter because the lower courts have proceeded on the footing that the notice was ultimately served on the defendant some date after 12-11-1974.

5. Mr. Mulchandani states that it is a requirement of law that all defences must be set out in the written statement and that the same must be pleaded before the trial Court. He submits that this is an issue of fact and not a point of law, namely the question as to whether the notice was served or when it was served etc. and further more, that on the facts of the present case the petitioner is precluded from raising this issue for the first time before the High Court if it was never raised before the trial Court and the Appeal Court. Mr. Mulchandani places heavy reliance on a decision of the Supreme Court, reported in 1969 Rent Control Reports, page 217, in the case of Maganlal Chhotalat Desai v. Chandrakant Motilal, wherein for the first time while the proceedings were before the High Court, the validity of the notice u/s 12(2) was called into question. Mr. Mulchandani points out to me that the facts of the case before the Supreme Court and the present one are identical in so far as here also the validity of the notice u/s 12(2) is questioned for the first time before the High Court. In Maganlal's case, the High Court had refused to permit any challenge on the ground of validity and the Supreme Court upheld this objection principally because it was canvassed for the first time before the High Court. On an analogy, Mr. Mulchandani, therefore submits that Mr. Angal is precluded from raising this point in the present proceeding.

6. The position in law is abundantly clear and one does not require to make a reference to any elaborate set of decisions for the purposes of holding that the bar to raise a point for the first time at a subsequent stage of the proceedings is confined essentially to a question of fact. It would certainly disentitle a party to raise such a plea howsoever valid it may be as an afterthought at the second or

third or subsequent stage of the proceedings. This position gets drastically altered when the objection that is canvassed happens to be a pure point of law or a point that is so fundamental in law that it affects the very validity and maintainability of the proceedings. I do concede that the learned Counsel on behalf of the respondent is right in his initial submission that it is obligatory that all pleas and defences be taken up at the initial stage. A situation may however arise as has happened in the present case, where at a subsequent stage of the proceedings a legal impediment affecting the validity of the proceedings becomes apparent to the learned Counsel handling the matter and it is impermissible to argue in these circumstances that such a point cannot be raised at the subsequent stage of the proceedings. It would however depend entirely on the nature of the ground that is canvassed; where it is a pure point of law and where it is so fundamental and sweeping the interest of justice would require that it must be permitted. It is ultimately, these over-riding considerations that outweigh the technical objections in the Court's approach to these matters.

7. It is in these circumstances, that I am required to consider the objection raised with regard to the ingredients of section 12(2). I need to record at this stage that the facts of the case before the Supreme Court in the decision referred to supra were entirely different and more so the debate that was sought to be re-opened at the High Court stage was with regard to the limited question of the validity of the notice u/s 12(2). In the present case it is a question of maintainability of the proceedings. As I shall proceed to illustrate since the record undisputedly indicates that the suit was filed at a point of time less than one month after the date of the service of notice. The problem that arises is that on the date of the filing of the suit, no cause of action was in existence. The provisions of section 12 of the Rent Act do not entitle a landlord to institute an eviction proceeding merely on the ground that the tenant is in arrears for six months. The cause of action arises and germinates only at the point of time when after this fact is brought to the notice of the tenant and he is given one month's time by law to pay up the arrears that he still defaults and thereby renders himself liable to eviction. Having regard to the scheme of the Act, the position in law is that even the tenant who is in arrears is immune from the passing of a decree of eviction against him if he makes payment within a period of one month. Since the legislature has provided this period of one month for payment of the arrears, it must be treated as a total period of immunity. The cause of action could therefore originate only after this period of time has elapsed. We have in the present instance a proceeding that has been instituted before that period of time had elapsed and at the point of time where there existed a legal bar to the institution of the suit. Under these circumstances there can be no two opinions about the fact that the suit itself was not maintainable as on 10-12-1974 when it was filed before the trial Court. In this view of the matter, the orders passed in that proceedings or in an appeal arising out of that proceeding would be non-est and are liable to be quashed.

8. I am however required to deal with a further aspect of the matter namely the

question with regard to the default committed by the present petitioner during the pendency of this proceeding. I need to record here that the obligation to pay rent from month to month for occupation of the premises is a statutory obligation that arises in law and has nothing to do with the eviction proceeding. After the decree was passed against the present petitioner, he requested the indulgence from this Court of continuing in occupation right from the year 1982 onwards under the protection of a stay order from this Court and the stay order in question was granted to him on his performing certain obligations namely depositing the arrears in the trial Court and continuing to pay the arrears of rent from month to month. Mr. Mulchandani has submitted that even if he fails in the proceedings that the petitioner cannot be allowed to get away from having committed a breach of the terms of the order passed by this Court. Under these circumstances, he submits that the petitioner must be directed to deposit in the trial Court all the arrears upto the end of August, 1993 with liberty to the respondent to withdraw the same.

9. Mr. Angal has opposed this submission because it is his contention that the legal effect of what has been pointed out to him would be that the entire proceeding from beginning to end which includes the proceeding that has culminated to this Court is virtually non-est and in that view of the matter, the proceeding is not maintainable and the decree goes. Consequently there can be no question of passing any orders against his client. This submission is fallacious. On the date of the filing of the present petition there existed a decree passed by the competent Court against Mr. Angal's client and that decree was stayed on certain terms and it was obligatory on the part of the petitioner to comply with those terms. Even in equity I see no ground whatsoever under which the petitioner can be permitted to get away with the default committed by him. Under these circumstances, inspite of vehement objection canvassed by the learned Counsel, to my mind, this Court would be within its rights to direct that the petitioner must deposit on or before 31-12-1993 in the trial Court all the arrears of rent due from him in respect of occupation of the premises upto 31-12-1993. If the petitioner deposits the said amount in any of the subsequent months after August, 1993, the order for deposit shall include the rent for that subsequent months also. The respondent shall be entitled to withdraw the amounts so deposited before the trial Court. In the event of petitioner committing default of the aforesaid order, the Registrar of this Court shall issue notice under the Contempt of Courts Act, to the petitioner to show cause as to why action according to law should not be taken against him. For this purpose, the trial Court shall intimate to the Registrar of this Court after 1-1-1994 as to whether the arrears in question having fact has been deposited in the trial Court or not. This direction to my mind is essential in the interest of justice and it has virtually nothing to do with the validity or otherwise of the proceeding because this is something entirely between the petitioner and the Court.

10. In this view of the matter, the petition succeeds. The order of the Appeal Court is set aside. The suit filed against the present petitioner is dismissed. In

the circumstances of the case, there shall be no order as to costs.

Rule absolute accordingly.

Certified copy expedited.