

(1978) 08 BOM CK 0032

In the Bombay High Court

Case No : Civil Revision Application No. 330 of 1978

Juliana Margarida Coelho by C.A. Peter Coelho

APPELLANT

Vs

Makarand Shankar Parnaik

RESPONDENT

Date of Decision : 31-08-1978

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(3),
11(4), 11(5), 29, 29(1)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1978) 08 BOM CK 0032

Hon'ble Judges : R.M. Kantawala, C.J

Bench : Single Bench

Advocate : R.V. Saudagar, for the Appellant;

Final Decision : Allowed

Judgement

R.M. Kantawala, C.J.—The plaintiff has filed this revision application against the order passed by the learned Judge of the Court of Small Causes at Bombay, where by he set aside the order that was passed by his predecessor and permitted the defendant to defend the suit unconditionally and expedited the hearing of the matter.

2. A suit for possession and arrears of rent was filed by the landlady (plaintiff) against the tenant (defendant) in respect of a flat situate in a building belonging to the Co-operative Housing Society. The plaintiff felt that the defendant was permitted to occupy the flat as a licensee. However, since in the proceedings for eviction, he contended that he was a tenant, she accepted the same position and took the further proceedings on that footing. The case of the plaintiff is that the agreed rent payable by the defendant-tenant was Rs, 400/- per month. Her allegation in the plaint is that when the defendant was permitted to occupy the flat, the monthly outgoing in respect of the flat for municipal taxes, security, water charges etc., were Rs. 150/- and on the date of the making of the application the same were Rs. 168.83. According to the plaintiff, the defendant-

tenant did not pay any rent for a period of nearly 18 months from March 1, 1970. Ultimately, the plaintiff's served a notice upon the tenant terminating his tenancy on or about July 8, 1971. Ultimately, in the month of October 1971, the plaintiff-landlady filed a suit for eviction against the defendant-tenant and for arrears of rent.

3. In the written statement the defendant claims a dispute as regards the standard rent of the premises and also alleged that certain payments were made in respect of which no credit was given by the landlady. After the suit was instituted, by the order passed by the trial Court on April 17, 1972 the defendant-tenants was directed to deposit in Court the sum of Rs. 800/- being the arrears of rent and compensation upto the end of March 1972 within eight weeks and was thereafter directed to deposit Rs. 160/- on 20th day of every following two months commencing from August 20, 1972. The order further provided that if the defendant failed to comply with the order he would not be entitled to appear in or defend the suit except with leave of the Court.

4. It appears that after the order was passed during the years 1972, 1973 and 1974, the tenant had made more or less the deposits as per the said order. However, in the year 1975 he made deposits of Rs. 80/- only for two months. In the year 1976 from time he made deposits of the aggregate sum of Rs. 720/- while in the year 1977 he only deposited Rs. 160/- in two installments of Rs. 80/- each. Under these circumstances, on July, 18 in 1977, the plaintiff through her constituted attorney made an application to the trial Court inter alia stating that the defendant-tenant had committed defaults in making the payments in accordance with the order passed by the Court on April 17, 1972, and he should not be permitted to appear in the suit and defend the same. In answer to that application, the defendant put in a reply pleading that the time to make the deposit should be extended and he should be permitted to appear and defend the suit. On this application the trial Court passed an order on December 6, 1977, whereby the defendant was directed to deposit the arrears amounting to Rs. 1,920/- till the end of December 1977 by January 6, 1978. The order further directed that if such deposit was made, the defendant will be allowed to appear and defend the suit, but if he failed to comply with the order then the suit will be proceeded with ex parte on January 7, 1978. Ultimately, the suit reached hearing on March 3, 1978. On that day the defendant made an application to the Court that he may be permitted to defend the suit unconditionally in view of the alleged difficulties that he was put to. Ultimately, by the order dated March 5, 1978. The trial Court varied the order made earlier and granted leave to defend the suit unconditionally and expedited the hearing of the suit and fixed the date for hearing on June 15, 1978. It is against this order that the present revision application is filed by the plaintiff-landlady.

5. Mr. Saudagar, on behalf of the plaintiff, submitted that the learned trial Judge when he passed the order on May 5, 1978, arbitrarily interfered with the order that was passed by his predecessor earlier inspite of the fact that most lenient

treatment was given to the defendant-tenant and inspite of such treatment the tenant persistently committed defaults in complying with the order. He urged that the outgoings in respect of the flat exceeded Rs. 150/- per month, while the tenant was merely required to deposit a mere sum of Rs. 80/- per month. Actually, his submission was that every month the landlady was out of pocket in respect of the outgoings and ultimately if a money decree was passed at the time of eviction there would be no chance of the plaintiff being in a position to realise the amount that may be allowed in a decree. He also submitted that the learned Judge, who had passed the order on May 5, 1978, had no good and reasonable ground to interfere with the discretionary order that was passed by his predecessor earlier and permitted the defendant to unconditionally defend the suit, even though he had committed persistent and wilful defaults in complying with the liberal order that was passed in his favour. He, therefore, submitted that the order that has been passed on May, 1978, is without jurisdiction or in any event suffers from material irregularity and ought to be set aside.

6. The defendant, who appears in person, urged the following contentions before me. Firstly, he submitted that having regard to the provisions of the Bombay Rents and Lodging House Rates Control Act, 1947, (hereinafter referred to as the Act), an appeal lies to the Bench of two Judges of the Court of Small Causes under the provisions of section 29(3) of the Act and, therefore, a revision application to the High Court was not competent. He further submitted that in any event having regard to the provisions of section 29(3) of the Act a Bench of two Judges of the Court of Small Causes had jurisdiction to interfere in the matter with a view to satisfy itself whether the order passed by the Single Judge was in accordance with law and, therefore, a revision application to the High Court was not competent u/s 115 of the Code of Civil Procedure. Lastly, he submitted that since the learned Judge of the Court of Small Causes has passed a discretionary order in his favour permitting him to defend the suit notwithstanding the fact that he failed to comply with earlier order of making monthly deposits of Rs. 80/- this Court in exercise of its revisional powers ought not to interfere with such exercise of discretionary powers.

7. After giving notice, the landlady filed the suit for eviction and for arrears of rent and mesne profits against the tenant. At no stage prior to the institution of the suit was any plea taken up by the defendant-tenant to the effect that the contractual rent was excessive and the standard rent would be much less. Such a plea was taken up by the tenant for the first time when he filed the written statement in answer to the suit. Sub-section (4) of section 11 provides as under :---

"(4). Where at any stage of a suit for recovery of rent, whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and the standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may make an

order directing the tenant to deposit in Court forthwith such amount of rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay the landlord such amount as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant an order pay to the landlord such amount thereof as the Court may specify, during the pendency of the suit. The Court may also direct that if tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify."

It was pursuant to this provision that on April 17, 1972, an order was passed by the then learned trial Judge directing the tenant to pay at the rate of Rs. 80/- per month. The tenant paid the amount in Court for almost three years regularly but thereafter committed persistent defaults. When an application was made by the landlady for passing an order that the tenant should not be permitted to defend the suit, even indulgence was granted by the trial Court to make good the defaults. However, the conditions subject to which such indulgence was granted were not complied with by the tenant. It was after these circumstances that by an order dated May 5, 1978, another learned Judge of the Court of Small Causes before whom the matter came up for hearing modified the earlier order. I have carefully gone through the whole of the order and I fail to find a single reason which would justify the variation of the order that was passed by the learned Judge earlier, when the tenant was required to deposit in Court a sum of Rs 80/- per month. If the case of the landlady is correct, then that amount is insufficient to meet the outgoings of the flat. Notwithstanding such position, for a number of months no amount whatsoever was deposited by the tenant in the trial Court even at the rate of Rs. 80/- per month. The learned Judge has merely used the phrase "compelling circumstances" with a view to justify the order permitting the defendant-tenant to defend the suit unconditionally, but what that "compelling circumstance" is, cannot be elucidated from the order passed. Undoubtedly u/s 11(4) of the Act powers vested in the Court even to permit the tenant to defend the suit unconditionally and without directing the deposit of any amount. However, such a power has to be exercised Judicially in accordance with the well recognised legal principles. It is not the policy of this Court that a tenant may be continued to occupy the premises taken by him on rent indefinitely without paying a single penny. At no time prior to the institution of the suit was even a plea raised by the tenant that Rs. 400/- which was the contractual rent per month was excessive. He came up with such defence only at the stage of filing the written statement, after he has realised that he had committed defaults for a number of months prior to the institution of the suit.

8 In the present case in the impugned order dated May 5, 1978, I fail to find a single ground which could justify the learned trial Judge to modify the earlier order, in compliance with the earlier order passed by his predecessor. Even

though the suit was filed in the year 1971, and the contractual rent was Rs. 400/- even upto June 1978 the tenant was unwilling to comply with the order of deposits of Rs. 80/- per month. Thus it appears to me that the impugned order that has been passed by the learned Judge is neither based in any legal principles nor on equitable considerations, nor on any justifiable ground.

9. That takes me the technical contention that has been urged by the tenant, who appeared in person before me. His first contention was that an appeal lay against an order passed by the trial Court May 5, 1978, and it was not open to the landlady to file a revision application in the High Court. Such a plea is entirely inconsistent with the provisions of sub-section (5) of section 11 of the Act. That sub-section provides that no appeal shall lie from an order of the Court under sub-sections (3) or (4). Thus, it is expressly made clear that any order passed under sub-section (4) of section 11 is not appealable under the Act.

10. It was then urged that it was open to the landlady to make an application u/s 29(3) of the Act the outset, it may be stated that it is extremely doubtful whether an application u/s 29(3) of the Act is competent in the present case. The provisions of the said sections are as under :

"29. (3) where no appeal lies under this section from a decree or order in any suit or proceeding in Greater Bombay the bench of two judges specified in Clause (a) of sub-section (1) and elsewhere the District Court, may for the purpose of satisfying itself that the decree or order made was according to law, call for the case in which such decree or order as made and the Bench or Court aforesaid or the District Judge or any Judge to whom the case may be referred by the District Judge shall pass order with respect thereof as it or he thinks fit."

The opening part of this sub-section clearly shows that the provisions of this sub-section can only be attracted where no appeal lies u/s 29. In the provision to sub-sections (1) of section 29, the decreed or order from which no appeal lies are enumerated. It is not under this provisions that the appeal is incompetent. In the present case as I have indicated earlier, no appeal is competent against impugned order in view of the provisions of section 11(5) of the Act. When such is the case, the powers under sub-section (3) of section 29 cannot be availed of to exercise revisional jurisdiction which is vested in the bench of two Judges of the Court of Small Causes under sub-section (3) of section 29. Even apart from that, u/s 115 of the CPC powers in exercise of revisional jurisdiction can be exercised by the High Court in every case which is decided by the courts subordinate thereto and in which no appeal lies thereto. In the present case, against the impugned order dated May 5, 78 no appeal lies to the High Court and the revisional jurisdiction that is vested in this High Court can always be invoked. There is no substance in the contention of the defendant that in such a case the provisions of section 115 of the CPC are not attracted.

11. That takes me to the last contention of the defendant that simply because a discretionary order is passed by the learned trial Judge, whether the High Court

should interfere with in exercise of its revisional jurisdiction. In the present case, as I have indicated while narrating the facts, more than sufficient indulgence was shown to the tenant and he was merely directed to pay a sum of Rs. 80/- per month, which, if the plea of the landlady is correct, was insufficient even to meet the outgoing in respect of the flat. It is an incontrovertible position that for the last several years the tenant has not paid the rent. Not only that but that he had failed to comply with an order requiring him to deposit a meagre amount of Rs. 80/- per month in the trial Court. Actually notwithstanding persistent defaults indulgence was shown to the tenant when the order dated December 6, 1977, was passed by another Judge of the Court of Small Causes at Bombay. He was prepared to condone the defaults committed by the tenant and permit him to defend the suit provided he absolved himself by making a deposit of Rs. 1,920/-. Even that order he failed to comply with. When such is the case it is quite apparent, even though the landlady has not received rent for a number years, the learned Judge considered it proper to almost set aside the order of his predecessor in refusing leave to defend in case the deposit was not made and granted unconditional leave to defend the suit. The order does not disclose on the face of it any justifying reason which could permit a Court acting with a sense of responsibility to pass such an order.

12. In the result, it is quite evident that the learned Judge, when he passed the impugned order, had acted without any regard to the material on record and, therefore, it is permissible to interfere with such an order in exercise of any revisional powers.

13. In the result, the revision application is allowed, the impugned order, dated May 5, 1978, is set aside and order passed on December 6, 1977 by Judge Purandare is restored. The defendant-tenant shall pay the costs of this revision application.

14. The trial Court is directed to expeditiously dispose of the suit as it has been pending ever since the year 1971.