

(2006) 03 KAR CK 0029
In the Karnataka High Court
Case No : Writ Petition No. 853 of 2006

Kashipathi and Another

APPELLANT

Vs

Fakirgouda Huchappa Patil and Others

RESPONDENT

Date of Decision : 14-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 115, 151

Constitution of India, 1950 — Article 226, 227

Karnataka Rent Control Act, 1961 — Section 21 (1) (a), 21 (1) (h), 21 (2), 29 (4), 50

Citation : (2006) 4 KarLJ 476

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : S.B. Hebballi, for the Appellant; M.C. Pynti and Kalyan for R4, R5 and R6, for the Respondent

Final Decision : Dismissed

Judgement

K. Ramanna, J

1. This is a writ petition filed by petitioner Nos. 1 and 2 under Article 226 of the Constitution of India to quash the order dated 31-1-1995, passed in HRC No. 190/1994, on the file of the PrL Munsif, Bijapur vide Annexure-E.

2. The brief facts of this case are that the petitioner Nos. 1 and 2 are brothers. They are running a joint family firm namely Kirana Merchant in the name and style of S.S. Swamy. Respondent Nos. 1 to 6 are the landlords of the petition schedule premises which is a non-residential building bearing CTS No. 898, situated in Ward No. III, Bijapur City and they are paying monthly rent of Rs. 30/- to the said premises in which they are running the business. They are paying the rent regularly and there is no arrears of rent as on today but the respondents have filed the petition u/s 21(1)(a) and (h) of the Karnataka Rent Control Act, 1961 (hereinafter referred as the K.R.C. Act") along with an application u/s 29(4) of the K.R.C. Act for a direction to the petitioner-tenant to pay a sum of Rs. 4950/- towards the arrears of rent and subsequent rents falling

due for every month, on the 10th of succeeding month; for stopping further proceedings and also for a direction to put the respondents in vacant possession of the suit premises. After appearance, the Principal Munsiff, Bijapur passed an order on I.A. No. I filed u/s 29(4) of the K.R.C. Act, 1961 and allowed the said application. All further proceedings in the said case were stopped and the petitioner-tenants were directed to hand over vacant possession of the petition schedule premises. Being aggrieved by the said order, the petitioners have come up with the instant writ petition.

3. The respondent No. 4 herein filed a detailed objection contending that the petition filed by the petitioners is barred by time and the writ petition is liable to be dismissed since the present petition filed by petitioners is by suppressing material facts.

4. The petitioners filed HRRP No. 229/2005 u/s 115 of the C.P.C. In that petition there was a delay of 376 days and the delay was not condoned in the said revision petition and the revision petition came to be disposed of granting time to vacate the premises and hand over the same on 31-12-2005. After disposal of the said writ petition, petitioners filed an application before the District Judge u/s 151 C.P.C. to extend the time for vacating the said premises by another five months. After hearing both the parties, the revisional Court extended the time till 15.1.2006 to vacate the premises in question and the petitioners have not stated anything with regard to the delay in filing the revision petition. Since the petitioners were in arrears of rent to the tune of Rs. 4950/-, the respondents filed application u/s 29(4) of the Karnataka Rent Control Act stating that the petitioners have not paid rents from 1973 to 1983, amounting to Rs. 4680/-. So after hearing both parties, the Trial Court has allowed the LA. filed by the petitioners directing the respondents to vacate the premises. So against the said order, the petitioners herein filed a revision petition before the District Court in Rent Revision No. 10/1995 and during the pendency of the revision petition, Rent Control Act came to be amended in 1999 and came into force on 31-12-2001. As per Section 70(2) (c) of the Karnataka Rent Act the revision petition came to be abated vide Court order dated 8-1 -2004. Therefore the petitioners preferred the revision petition before this Court in HRRP. No. 229/2005 which was also disposed of and the order passed by the H.R.C. Court on 31-1-1995 became executable and the respondents have already filed an execution petition and the said execution petition was posted for final orders. In the meanwhile, the petitioners filed this writ petition and obtained stay by suppressing the facts. The petitioners have willfully disobeyed the order passed by this Court which amounts to contempt of Court and the petitioners have adopted tactics of filing the petition after petition for the same cause of action which amounts to abuse of process of law. Hence prayed for dismissal of the writ petition.

5. Heard the arguments of the Learned Counsel for the petitioners and the Learned Counsel for the respondents.

6. During the course of arguments, Learned Counsel for the petitioners Sri

Hebballi contended that the premises in question is a non-residential one which exceeds more than 14 Sq. Mts. It is contended that the petitioners have challenged the order passed by the Munsiff in the H.R.R.P. only u/s 29(4) of Karnataka Rent Act of 1961. During the pendency of the said H.R.R.P. new Rent Act came into effect from 31-12-2001. Therefore on 31-12-2001 the proceedings which were pending on the file of the District Judge came to be abated as per Section 70(2) (c) of the said Act. It is submitted that the H.R.R.P. filed by the petitioners before this Court in HRRP No. 229/2005 came to be dismissed. As a last remedy, petitioner Nos. 1 and 2 herein have come up with the instant writ petition. It is contended that the writ petition is very much maintainable under Article 227 of the Constitution of India. In support of this contention, the Learned Counsel for the petitioners has relied on the following decisions:

a) B. Prakash Chand Vs. S.V. Gyanchand Jain, wherein the Division Bench of this Court held that when the revision is pending before the District Judge and new Act came into force, thereafter though proceedings filed in revision petition u/s 70(2) (c) of the Rent Act, the earlier order passed in H.R.C. becomes final and conclusive and becomes enforceable. The only remedy available to the tenant is to file a writ petition under Article 226 of the Constitution of India. In the instant case when the revision petition filed by the petitioners before the District Judge u/s 50 of K.R.C. Act was pending, the New Act came into force. Therefore there is no other way except to challenge the order passed by the H.R.C. Court under Article 227 of the Constitution of India before this Court.

b) As far as res judicata is concerned, Learned Counsel for the petitioners relied on a decision reported in Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., wherein it is held as follows:

If the Court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea at its inception or in appellate or revisional forums, provided law permits. The doctrine of res judicata u/s 11 C.P.C. is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them ... But the question relating to the interpretation of a statute touching the jurisdiction of a Court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. ... Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the Court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the Court inherently lacks jurisdiction.

Further it is contended by the Learned Counsel for the petitioners that the order is passed by the H.R.C. Court without framing appropriate points for

consideration. The respondents had filed H.R.C. petition u/s 21(1)(a) and (h) along with LA. No. I u/s 29(4) of the K.R.C. Act without determining what was the arrears of rent due by the petitioners. No show cause notice was issued calling upon the petitioners to pay the said arrears of rent but straightaway directed the petitioners to vacate and hand over possession of the said premises to the respondents which is highly illegal. Further it is contended that the respondents have not raised any objection before the revisional Court namely the District Judge u/s 115 of C.P.C. When it is contended earlier that the petitioners herein had filed a H.R.R.P. u/s 115 of the C.P.C., now the respondents cannot take such a contention that this Court has no jurisdiction to invoke Article 226 of the Constitution. In support of this contention, Learned Counsel for the petitioner relied upon a decision reported in *Smt. Kishori Devi v. Lala Ram Narain Salgal* (1969) 1 SCWR 133 wherein it has been held as follows:

Where no contention was raised by the appellant before the High Court as to its competence to deal with the case u/s 115 CPC the Supreme Court would be loath to entertain that objection for the first time in an appeal with special leave. If the High Court had appraised of the defect in its jurisdiction, the High Court would have considered that question. The High Court's power of revision is complimentary to the power of superintendence over all Courts and Tribunals under Article 227 and this was preeminently a case in which even if the High Court had no jurisdiction u/s 115 of the Civil Procedure Code, the High Court would have been justified in action under Article 227 of the Constitution.

Therefore the respondents cannot take up such a contention before this Court when the High Court is having jurisdiction under Article 227 of the Constitution. The scope of Article 227 of the Constitution is very wide on the said point. The Counsel for the petitioners also relied on another decision of the Apex Court reported in *Surendra Nath Bibra v. Stephen Court Limited*. Since the petitioners have no remedy to challenge the order passed by the H.R.C. Court on LA. No. I filed u/s 29(4) of the K.R.C. Act, the petitioners have come up with this writ petition which is maintainable. However, the Learned Counsel for the petitioners submitted that since the H.R.C. Court has not followed the procedure namely Section 29(1) (2) and (3) of the Act before passing order u/s 29 (4) of the Rent Control Act, the writ petition is maintainable.

Further Learned Counsel for the petitioners submitted that unless there is an order u/s 21(2) of the Karnataka Rent Control Act, 1961, straightaway an order u/s 29(4) of the Act cannot be passed. In support of this contention, he relied on a decision reported in *Venkatagiri Jois v. M. Sathyanarayana and Ors.* 1964 Mys. L.J. 249 wherein it has been held by this Court that:

Reading the provisions of Sub-section (2) of Section 21 and of Section 29 together, it would be manifest that in all cases where eviction is prayed for on the ground that the tenant had failed to pay the arrears of rent, it would not be open to the Court to pass an order of eviction under Sub-section (4) of Section 29 unless an order has been passed in the course of proceedings, under Sub-section

(2) of Section 21 and the tenant has failed to deposit the arrears of rent within one month from the date of the order and has also failed to pay the subsequent rent from month to month either by the aggrieved date or by the fifteenth of each succeeding month. In case where eviction is prayed for on other grounds and the tenant contests the application for eviction, the provisions of Section 29 will be applicable and an order under Sub-section (4) can be passed if there has been a failure on the part of the tenant to comply with the provisions of Sub-section (1) of that Section. It may be also noted that where there is a dispute between the landlord and the tenant about the amount to be deposited or paid, it is obligatory on the Court under Sub-section (3) to determine summarily the rent which should be so paid or deposited; it is only on such determination and on the failure of the tenant to comply with the provisions of Sub-section (1) that an order under Sub-section (4) can be passed by the Court.

Therefore the order passed by the Trial Court is illegal and the writ petition is maintainable under Article 227 of the Constitution. Further it is contended that when there is dispute with regard to payment of rent, Court has to determine the arrears and give time to the tenant to pay rent and the arrears as per Section 29(3) of the Act but in the instant case the Trial Court has not passed an order either u/s 21 (2) or u/s 29(3) of the Act but straightaway passed the order u/s 29(4) of the K.R.C. Act of 1961 which is incorrect and is liable to be quashed. In support of this contention, Learned Counsel for the petitioners has relied on a decision of this Court reported in SHORT NOTES, ITEM No. 82 1092 MYS. L.J. wherein it has been held as follows:

When there is a dispute as regards the amount of rent due to be paid, it is the duty of the Court to make an enquiry and determine what actually is the amount of rent that is to be paid or deposited. In the present case, the landlord stated that the tenant was due in certain sum of money and the tenant on the other hand denied that he is due in any sum. In that view, the provisions of Section 29(3) was attracted. It was the duty of the Court to have found out as to whether there was any rent due. If it is found that the rent was due when it was necessary to direct the payment of the amount and if there is failure to pay or deposit the rent as aforesaid then the Court has to proceed u/s 29(4) of the Act.

Finally Learned Counsel for the petitioners submitted that before passing any order u/s 29(4) of the Act, the H.R.C. Court is bound to go stage by stage as required by the procedure to be followed by the Court and since no such procedure has been adopted before passing an order u/s 29(4) has passed the impugned order.

Therefore, the writ petition is maintainable and in support of this contention, Learned Counsel for the petitioners relied on a decision reported in Abdul Rasheed v. Syed Mohammed 1983 (2) KarLJ 525 wherein this Court held that:

Section 29 speaks of four different stages, (1) determination of arrears (2) giving time to the tenant to pay (3) giving opportunity to show cause in default and (4)

in the event of the tenant to failing to show cause, ordering stopping of proceedings and direct him to put the landlord in possession. A composite order is an error in violation of Section 29(1) to (4). The only remedy left to the tenant to get the order corrected is by a revision to the High Court.

Therefore the writ petition filed by the petitioners is maintainable and prayed for quashing the impugned order passed on I.A. No. I by the H.R.C. Court.

7. On the other hand, the Learned Counsel for the respondents submitted that the petitioners have suppressed the very fact about the disposal of the revision petition filed by the petitioners before this Court. The writ petition filed by the petitioners is barred by limitation. After the Trial Court passed the order, the petitioners had challenged it before the District Judge in R.R. No. 10/1995 before the District Court and since the case was abated, the petitioners have challenged the said order before this Court u/s 115 of CPC in HRRP No. 229/2005 and no separate application was filed by the petitioners to condone the delay of 376 days in filling the petition and the said H.R.R.P filed before this Court came to be disposed of and time was fixed for the petitioners to vacate the premises. Annexure R-I is the order dated 28-6-2005 passed in H.R.R.P. No, 229/2005. Further it is contended that while dismissing the revision petition under preliminary stage, the petitioners-tenants were granted time till 31 -12-2005 to vacate and deliver the vacant possession. When once the petitioners have challenged the order by way of a revision before this Court, they cannot file a writ petition after seeking extension of time to vacate the premises, Therefore the present writ petition is "liable to be dismissed. Further it is contended that in order to seek extension of time to vacate the premises, an affidavit came to be filed before this Court but the petitioners have suppressed the very fact. In the affidavit filed by the petitioner in HRRP No. 229/2005 the petitioner has stated as follows:

that we are carrying on Kirana business since more than 50 years in the petition schedule premises and the said premises are the only main source to earn our livelihood. This Court has granted six months" time for vacating the suit premises. In the meantime, the marriage of my brother"s daughter i.e. daughter of petitioner No. 1(b) was settled and even the date of marriage was fixed on 21-12-2005. In the meanwhile, one of the relative expired. Therefore this Hon"ble Court be pleased to extend the time for vacating the suit premises by another 5 months.

When once the petitioners themselves have sought for time to vacate the premises, they have no locus standi to file a writ petition before this Court under Article 227 of the Constitution of India. In support of this contention, Learned Counsel for the respondents relied on a decision reported Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, Bapat wherein it has been held as follows:

Section 115 of the CPC empowers the High Court to call for the record of any

case which has been decided by any Court subordinate to it and in which no appeal lies to it....

It is only if by dismissal of the revision petition the order of the Subordinate Court has not merged in that of the High Court that it may be open to a party to invoke the extraordinary writ jurisdiction of that Court. There again the question will arise whether it would be right and proper for the High Court to interfere with an order of a Subordinate Court in a writ petition when a petition for revision u/s 115, Civil Procedure Code, against the same order has been dismissed....

If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the Subordinate Court.

He has relied on another decision of the Hon''ble Supreme Court reported in *Atha Ram v. Shakuntala Rani* 2005 (6) SCJ 698, regarding deposit of rent, which reads as follows:

Deposit of rent by tenant-in case of non-acceptance of same by landlord Provision providing procedure to be followed in such a contingency-In view of the said provision, held, it would not be open to tenant to resort to any other procedure - Appellant-tenant not having complied with the procedure said down in the said provision must be held to be in default-deposit made under the provisions of another statute was of no avail.

Therefore the Learned Counsel for the respondents submits that the present writ petition is liable to be dismissed as the petitioner has already challenged the order of the Trial Court in the revision petition namely HRRP No. 229/2005 and this revision petition came to be dismissed, time was granted and subsequently time was extended. Therefore the writ petition is liable to be dismissed.

8. It is an undisputed fact that Respondents are the owners of the petition schedule premises and the petitioners are paying monthly rent of Rs. 30/-. The respondents have filed a petition u/s 21(1)(a) and (h) of the Karnataka Rent Control Act 1961 for non-payment of rents. It is also an undisputed fact their Respondents have filed an application u/s 29(4) of the Act to stay all further proceedings in H.R.C. No. 190/84. So after hearing both the side, the Prl. Munsiff, Bijapur, allowed I. A.I. and consequently it has ordered to stay all further proceedings and directed the petitioners- tenants to vacate and hand over vacant possession of the petition schedule premises to the respondents on or before 28th February 1995. It is also an undisputed fact that the petitioners assailing the said order on I.A.I, passed by the Prl. Munsiff, Bijapur on 31 -1 -95 filed a revision u/s 50 of the Rent Control Act in Rent Rev. No. 10/95 before the II Additional District Judge, Bijapur. During the pendency of the said rent revision, the Karnataka Rent Act came into force on 31-12-2001. Therefore, the entire proceedings pending before the Revisional Court viz., District Court stood abated

u/s 70(2)(c). The petitioners herein approached this Court in H.R.R.P. No. 229/05 challenging the order passed by the Prl. Munsiff in H.R.C. No. 190/84, I.A.I. on 31-1-95 and the order passed by the II Additional District Judge, Bijapur on 8-1-2004. But this Court already held in the rent revision that there was no merit in the rent revision, therefore the said revision came to be dismissed at the stage of preliminary hearing itself. However the petitioners were directed to vacate and deliver vacant possession of the petition schedule premises to the Respondents within 28-2-1995 and also directed to pay the rents regularly and not to sub-let the schedule premises to any other person; the respondents-landlords are entitled to recover the arrears of rent, if any, which was deposited by the petitioners. But in the meanwhile the very petitioners have filed I.A.I./06 before this Court with a prayer to extent the time to vacate the petition schedule premises on the same ground. Accordingly, I.A.I/06 filed by the petitioners is disposed of by granting time till 15-1-2006, to vacate and hand over vacant possession of the premises to the respondents-landlords. In the meanwhile the petitioners have come up with this writ petition to quash the impugned order dated 31-1-1995 passed in H.R.C. No. 190/84.

9. The materials on record clearly indicates that the petitioners have challenged in this writ petition the very same order passed in H.R.C. 190/84, which was already challenged u/s 115 of CPC in HRRP No. 229/05 before this Court. After exhausting the remedy they have again approached this Court by way of petition which amounts to res-judicata. He cannot be again permitted to challenge the very same order, by way of a writ petition. It is also seen that the petitioners after dismissal of the HRRP No. 229/05, the time was extended by this Court by allowing I.A.I, till 15-1 -2006. Moreover the petitioners have not shown bona fides with regard to the arrears of rents, when the petition filed by the respondents u/s 21(1)(a) and (g) for recovery of arrears of rents. The petitioners have totally denied that there are no arrears of rents payable to the respondents. So subsequently during the pendency of the writ petition, the petitioners have filed a memo stating that they have deposited the rents through R.Os. on 27-7-99 amounting to Rs. 4000/- and odd. Since the petitioners have not shown prima facie material to quash the order passed by the Prl. Munsiff, Bijapur, the writ petition is liable to be dismissed.

Accordingly, the writ petition is dismissed. However the petitioners are directed to vacate and hand over vacant possession of the petition schedule premises to the respondents, within 30 days from the date of disposal of this writ petition.