
(2000) 02 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 225 of 1991

Kisanrai V. Gaonkar

APPELLANT

Vs

Rajendra N. Dharwadkar and Others

RESPONDENT

Date of Decision : 16-02-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 32(4)

Citation : (2000) 2 ALLMR 580 : (2000) 3 BomCR 21 : (2000) 4 MhLj 59

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : Smt. A.A. Agni, for the Appellant; L.V. Talaulikar, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—This petition arises from the judgment dated 19th April, 1991 passed by the Administrative Tribunal in Eviction Appeal No. 29/90. By the impugned judgment, the Tribunal dismissed the appeal filed by the petitioner against the order dated 5-4-90 of the Additional Rent Controller of Panaji in Rent Case No. A.R.C./2/84. By the said order dated 5-4-90, the Additional Rent Controller had directed the petitioner to vacate the suit premises and hand over the vacant possession thereof to the respondent No. 1 landlord within three months from the date of the order. The said order was passed in the proceedings u/s 32(4) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter referred to as the said Act).

2. The facts in brief relevant for the decision are that the petitioner is a tenant in respect of Flat No. 6 on the third floor of Karim Building situated at St. Inez, Panaji and that the respondent No. 1 is the landlord in respect thereof. The petitioner was inducted as the tenant in respect of the said premises by Lease Deed dated 1-5-1978. The monthly rent was agreed to be Rs. 300/-. On account of need of the suit Flat for personal occupation, the respondent initiated eviction proceedings against the petitioner, by filing an application dated 9-1-84 in the

Court of Rent Controller at Panaji. Though the petitioner was duly served with the notice of the application for eviction, the respondent found that the petitioner had neither paid nor deposited the rent of the suit premises with effect from November, 1983 and therefore by an application dated 30th September, 19.18 u/s 32(4) of the said Act, the respondent No. 1 requested the Rent Controller to stop the proceedings and to direct the petitioner to hand over possession of the suit Flat to the respondent. On receipt of the notice of the said application, the petitioner contended that he used to entrust on the first day of every month the monthly rent of Rs. 300/- in the hands of his employee by name Ashok Teggi and the latter used to deposit the amount of rent in the Court of Rent Controller in the said eviction proceedings and the petitioner used to get this fact confirmed orally from the said employee. It was only on receipt of the notice regarding non-deposit of the rent that on perusal of the records, he found that the amount of rent though was regularly entrusted with the said employee, it was not deposited in time on number of occasions in the Court of Rent Controller by the said employee. The petitioner reposed total faith in his employee and bona fide believed that the rent was being paid on 1st of every month by the said employee. According to the petitioner that was a sufficient cause for non-stopping of the proceedings and allowing him to contest the same on merits.

3. The impugned judgment has been challenged mainly on two counts. One that material evidence has been totally ignored by both the authorities below while deciding the matter and the material evidence is in the form of an affidavit of one Ashok Teggi, employee of the petitioner and secondly, that both the authorities below have failed to consider that the matter was required to be considered, from the point of view of finding out whether there was sufficient cause shown for non-stopping of the proceedings and not merely whether there was sufficient cause for delay in depositing or paying the rent while dealing with the proceedings u/s 32(4) of the said Act.

4. It is the contention of Smt. Agni, learned Advocate appearing for the petitioner that neither of the authorities has taken into consideration the affidavit of Ashok Teggi, the employee of the petitioner which was filed in support of the defence put forth by the petitioner in reply to the show cause notice u/s 32(4) of the said Act and that both the authorities have failed to consider whether there was sufficient cause for non-stopping of the proceedings.

5. Shri Talaulikar, learned Advocate appearing for the respondent No. 1, on the other hand, did try to contend that though there is no specific reference in the analysis of both the judgments to the said affidavit, it cannot be said that the materials placed on record by the petitioner have not been considered while arriving at the finding that the petitioner had failed to show sufficient cause for non-stopping of the proceedings. He also sought to rely upon the decisions of the Apex Court, while drawing my attention to the limited scope of jurisdiction of this Court under Article 227 of the Constitution of India. The decisions relied upon are in the matter of Nagendra Nath Bora and Another Vs. The Commissioner of Hills

Division and Appeals, Assam and Others, and in AIR 1975 1297 (SC) .

6. In Nagendra Nath Bora's case (supra) the Apex Court has held that the power of judicial interference under Article 227 with orders of judicial or quasi judicial nature is not greater than the power under Article 226. Under Article 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 the power of interference is limited to seeing that the tribunal functions within the limits of its authority. In Babhutmal Raichand Oswal's case (supra) the Apex Court has held that the power of superintendence of High Court under Article 227 being extraordinary is to be exercised most sparingly and only in appropriate cases. This power, as in the case of certiorari jurisdiction, cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory power as a Court of Appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of Appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate Court or tribunal final on facts. The High Court cannot, while exercising jurisdiction under Article 227, interfere with findings of fact recorded by the subordinate Court or tribunal. It is further observed by the Apex Court that its function is limited to seeing that the subordinate Court or tribunal functions within the limits of its authority and it cannot correct mere errors of fact by examining the evidence and reappreciating it.

7. Perusal of the impugned judgment of the tribunal discloses that the tribunal has discarded the affidavit of Ashok Teggi on the ground that it was not sworn and, therefore, it cannot be treated as an affidavit. The finding of the tribunal in that regard reads thus :-

"It is pertinent to note that although this reply of the appellant is supported by an affidavit but the so called affidavit of Ashok Teggi, has not sworn in at all and as such it cannot be treated as an affidavit. Therefore, the appellants word does not get corroboration."

8. As against the said finding, perusal of the judgment of the Rent Controller discloses the fact that said Ashok Teggi had filed an affidavit in support of the reply of the petitioner was never in dispute before the Rent Controller. The judgment of the Rent Controller discloses that the Advocate of the respondent while arguing the matter had extensively referred to the said affidavit of Ashok Teggi. Perusal of the judgment of the Rent Controller further discloses that though the fact that Ashok Teggi had, in fact, filed an affidavit in support of the defence of the petitioner, the same was nowhere referred to or considered by the Rent Controller while arriving at the finding that the petitioner had not shown sufficient cause for non-deposit of rent within the prescribed time. In other words, both the authorities below while deciding the matter did not at all consider the evidence produced by the petitioner in support of the defence put forth by the petitioner in answer to the notice u/s 32(4) of the said Act. The point which therefore arises for consideration is whether the evidence was of such

nature and importance that failure to consider the same can be said to have resulted in prejudice to the petitioner and whether it is failure to exercise the jurisdiction properly and judiciously by the authorities below.

9. In answer to the show cause notice u/s 32(4) it was the case of the petitioner that the petitioner used to entrust on the first day of every month the monthly rent in the hands of his employee by name Ashok Teggi and further used to inquire from time to time with said Ashok Teggi whether he had deposited the monthly rent and said Ashok Teggi used to reply to the petitioner in the affirmative. It is further case of the petitioner that the petitioner reposed total faith in his employee and bona fide believed that the rent was being paid on first of every month by his employee said Ashok Teggi as he himself used to hand over the said amount in the hands of the said employee every month and for that reason he did not himself personally check the files of chalans pertaining to monthly rent. It is pertinent to note that the said case put forth in the reply to show cause notice has been supported by the affidavit of the petitioner himself. The fact that the said reply was supported by the affidavit of the petitioner is not in dispute nor there is any finding contrary to that fact by any of the authorities. It is also pertinent to note that there was no counter affidavit filed by the respondent in relation to the statements made by the petitioner in reply to the show cause notice u/s 32(4) of the said Act. The fact that Ashok Teggi had filed the affidavit before the Controller is also a matter of record. The only defect sought to be pointed out by the appellate authority was that the affidavit was not sworn at all and therefore could not be treated as affidavit. Since the defence sought to be raised by the petitioner was to the effect that the practice which the petitioner used to follow for depositing the monthly rent was through his employee and in that regard he had produced an affidavit of the concerned employee, in those circumstances, the affidavit of the employee was certainly of great importance and material piece of evidence for arriving at any finding regarding the defence raised by the petitioner. Considering the fact that the authority before whom the affidavit was filed had not found it defective in any manner and it is undisputed that the procedure of swearing the affidavit before the concerned authority is by executing the affidavit in the presence of the same authority before whom the said affidavit is filed, in case the appellate authority had noticed any defect in the matter of swearing of the affidavit, certainly the same could not have been rejected without giving opportunity to the concerned party to rectify the defect in the matter of swearing of the affidavit. In the facts and circumstances of the case, it cannot be said that the affidavit could have been rejected straightaway by the appellate authority on the ground that the affidavit was found not to have been sworn before the lower authority when the lower authority before whom the affidavit was filed did not find any such defect nor had rejected the said affidavit on any such ground. It is also to be borne in mind that this Court in number of judgments have repeatedly held that the provisions u/s 32(4) are not mandatory in nature and it is not that the moment there is any default in payment or deposit of rent that the order to stop the

proceedings has necessarily to follow; on the contrary, an opportunity has to be given to the tenant to show cause as to why the proceedings should not be stopped on account of default committed by the tenant in depositing or paying the rent. Once the tenant puts forth his defence in reply to any show cause notice issued u/s 32(4) and such defence is sought to be corroborated by filing an affidavit in support of the defence, such affidavit is not to be rejected on some technical ground and that too at the appellate stage without even giving an opportunity to the concerned tenant to get the defect rectified in terms of the procedure required by law. The tribunal having failed in this regard, has clearly acted with material irregularity in discarding the affidavit and not even given opportunity to the petitioner to get the affidavit sworn by the deponent if it was found lacking in that regard. On that ground alone, the impugned judgment of the tribunal is liable to be set aside. Similarly, the judgment of the Rent Controller does not disclose that the said affidavit was considered in any manner while arriving at the decision and, therefore, it is apparent that the Rent Controller has also failed to take into consideration the material piece of evidence while deciding the matter and thereby has acted with material irregularity while deciding the case.

10. The learned Advocate for the petitioner is also justified in her grievance that both the authorities below have totally failed to bear in mind that the defence put forth by the petitioner was required to be considered from the point of view to find out whether the petitioner/tenant had shown sufficient cause for not stopping of the proceedings. The analysis of the materials placed on record in proceedings u/s 32(4) of the said Act is not merely to find out whether there was sufficient cause for not depositing or non-payment of the rent, but it is essentially to find out whether the tenant has been able to show sufficient cause for not stopping the proceedings. Justification for delay in deposit or payment of rent may be one of the reasons for not stopping the proceedings, but is not the sole reason which is to be considered while dealing with the matter u/s 32(4) of the said Act.

11. Perusal of the impugned judgment of the tribunal as well as of the Additional Rent Controller therefore discloses that both the authorities have not exercised their jurisdiction in the manner required to be exercised u/s 32(4) of the said Act and, therefore, both the judgments cannot be sustained and are liable to be quashed and set aside and the matter requires to be remanded to the Additional Rent Controller to consider the same afresh after hearing the parties and bearing in mind the observations hereinabove.

12. Accordingly, the judgment of the Additional Rent Controller as well as of the Administrative Tribunal are quashed and set aside. The matter is remanded to the Additional Rent Controller to decide the proceedings u/s 32(4) of the said Act bearing in mind the above observations. Needless to say that the matter relates to the year 1984, the Additional Rent Controller shall dispose of the same as expeditiously as possible and in any case within a period of six months from the

date of receipt of writ of this Court.

13. Rule is made absolute in the above terms with no order as to costs.

14. Rule made absolute.