
(1991) 02 BOM CK 0016

In the Bombay High Court

Case No : Letters Patent Appeal No. 12 of 1989

K.M. Bros.

APPELLANT

Vs

Aixabi Shaikh Karim and Others

RESPONDENT

Date of Decision : 22-02-1991

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 : (1991) 3 BomCR 467

Hon'ble Judges : H.W. Dhabe, J; E.S. Da Silva, J

Bench : Division Bench

Advocate : S.G. Desai and G.V. Tambe, for the Appellant; A. Agni, for the Respondent

Judgement

H.W. Dhabe, J.—The appellant in this Letters patent appeal challenges the orders of the courts below passed u/s 32(4) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (for short the Rent Control Act). Briefly the facts are that the appellant is a tenant in one of the shops in the buildings owned by the respondent No. 1. The lease of the shop was created in his favour in the year 1975 on a monthly rent of Rs. 150.00. According to the landlord/respondent No. 1, the appellant has created a sub-lease in October, 1981 in respect of the shop in favour of one Shri Adpekar. A notice was, therefore, sent to the appellant by the landlord on 21-10-1981 terminating his tenancy. the appellant/tenant replied to the said notice dated 21-10-1981 by his reply dated 11-11-1981. In his reply the appellant stated that the respondent No. 1 landlord stopped accepting rent from him since August 1981. He, therefore, sent the rent to him for the month of August 1981 by money order which the landlord refused to accept. Further, according to him, in September 81 the rent for August and September 81 was sent by money order to the respondent No. 1 by him, but the respondent No. 1 landlord refused to accept the same also. Subsequently again the appellant sent the rent to the respondent

No. 1 for the months of August, September and October 81 by cheque which was also returned back to the appellant.

2. The respondent No. 1 landlord filed an application on 9-12-1981 before the Rent Controller for eviction of the appellant from the suit premises. The notice of the said application was served upon the appellant on 16-1-1982. The appellant thereafter tendered the rent for the month of January 82 by money order sent on 4-2-1982, but the same was also refused by the respondent No. 1 landlord on 13-2-1982. The appellant thereafter filed an application on 19-2-1982 for deposit of the whole of the rent. The appellant also actually deposited the arrears of rent till the date of the application and according to the appellant, he thereafter continued to deposit the rent for every month in the trial Court.

3. On 1-3-1982 the respondent No. 1 landlord filed an application u/s 32(4) of the Rent Control Act for stopping all further proceedings and for making an order directing the tenant to put the landlord in possession of the shop on the ground that after the service of the notice on 16-1-1982 the appellant failed to deposit all arrears of rent within a period of one month from the date of service as required by section 32(2) of the Rent Control Act read with Rule 7 of the rules framed thereunder.

4. The learned Rent Controller initially without issuing any show-cause stopped all further proceedings and directed eviction of the appellant from the suit premises by his order dated 29-3-1982. The appellant preferred an appeal against the said order before the Appellate Tribunal which set aside the aforesaid order of the Rent Controller by its order dated 21-3-1984 on the ground that no show-cause notice was issued to the appellant and no opportunity was given to him before passing the order u/s 32(4) of the Rent Control Act. He, therefore, remanded the proceedings to the learned Rent Controller for affording an opportunity to the appellant by giving show-cause notice to him as required by section 32(4) of the Rent Control Act.

5. After remand, a show-cause notice was served upon the appellant to which he submitted his reply on 27-11-1985. The learned Rent Controller thereafter passed an order on 9-7-1986 holding that no sufficient cause was shown by the appellant for the delay of three days in making the deposit as required by section 32(2) of the Rent Control Act. He, therefore, passed an order u/s 32(4) of the Rent Control Act stopping all further proceedings and making an order directing eviction of the appellant/tenant from the suit premises. The appellant/tenant preferred an appeal before the Appellate Tribunal under the Rent Control Act, but the same was without any effect. The appellant then challenged the orders of the Rent Control authorities by preferring a writ petition in this Court which was summarily rejected on the ground that there is a concurrent finding of fact of both the courts below that the appellant/tenant had not shown any cause for not depositing the arrears of rent within the stipulated time. The appellant/tenant has, therefore, preferred the instant Letters Patent Appeal against the judgment of the learned Single Judge dismissing the writ petition.

6. At the outset when we asked the learned Counsel for the appellant how his Letters Patent Appeal is maintainable, the learned Counsel for the appellant has brought to our notice that the writ petition was preferred under Articles 226 and 227 of the Constitution of India by joining the authorities as parties whose orders were impugned by him in the writ petition. Further, according to him, the nature of the relief claimed by him showed that he had claimed a writ of certiorari which would show that he had claimed relief under Article 226 of the Constitution of India. The learned Counsel for the respondent No. 1 did not raise any objection at that time to the maintainability of the Letters Patent Appeal.

7. However, after the arguments of the learned Counsel for the appellant on merits were over and during reply on behalf of the respondent No. 1 sensing that on merits the judgment is likely to go against the respondent No. 1, the learned Counsel for the respondent No. 1 has sought to raise the question about the maintainability of the Letters Patent Appeal. Since the respondent No. 1 has taken a chance on merits, we cannot allow the respondent No. 1 to raise an objection about the maintainability of the Letters Patent Appeal at the fag end of the submissions.

7-A. It may be seen that the writ petition is not preferred purely under Article 227 of the Constitution. It may further be seen that the learned Single Judge has not stated in his order that he is exercising his jurisdiction under Article 227 of the Constitution. The writ petition shows that it is filed under Articles 226 and 227 of the Constitution to which all the authorities whose orders are impugned are joined as parties. It cannot therefore, be said that there is any inherent lack of jurisdiction in entertaining the Letters Patent Appeal. In fact, as urged by the learned Counsel for the appellant, in the absence of specific reference to Article 227 by the learned Single Judge in his impugned Order, the appellant is entitled to claim benefit of doubt in the sense that if there is any doubt we should err in favour of allowing a remedy to the appellant rather than depriving him of the same. For all these reasons, we cannot allow the learned Counsel for the respondent No. 1 to raise an objection to the maintainability of the Letters Patent Appeal at a late stage.

8. On merits, the learned Counsel for the appellant has urged before us that the learned authorities below have not applied their mind to the requirements of sub-section (4) of section 32 of the Rent Control Act and the case set out by the appellant in his reply to the show-cause notice thereunder to show why he should not be precluded from contesting the eviction proceedings. The only ground on which the learned Rent Control authorities and whose orders are maintained by the learned Single Judge is that the appellant has not stated in his reply to the show cause notice as to why he did not make any deposit of arrears of rent within the period stipulated u/s 32(2) of the Rent control Act read with Rule 7 of the Rules.

9. The learned Counsel for the appellant has urged before us that the jurisdiction of the learned Rent Controller u/s 32(4) of the Rent Control Act is not limited to

finding whether there was no reason for making any deposit within the stipulated period, but according to him, it is wider and can take into consideration such other relevant circumstances and factors which have been brought to his notice to show as to the further proceedings against the tenant should not be stopped and why there should be no direction issued for his eviction. The learned Counsel appearing for the respondent No. 1 does not dispute that even though the arrears of rent are not deposited within the period stipulated u/s 32(2) of the Rent Control Act, still in his discretion if a sufficient cause is made out the learned Rent controller can extend the time and can accept the deposit thereafter.

9-A. The learned Counsel for the appellant has brought to our notice the judgment of this Court in the case of Roque Antonio Judas v. Angelo Cassiano Neves & others, reported in 1989(2) Goa L.T. 313 in which this Court (Panaji Bench) has considered the scope of section 32(4) of the Rent Control Act. This Court has held in the above case that though the word "shall" is used in section 32(4) in the context of tenant's is right to show cause to the contrary, it must be read as "may" and as vesting discretion in the authorities to make order of stopping the proceedings and directing the tenant to put the landlord in possession only after taking into consideration all the relevant factors and circumstances. This Court has referred to some of the factors which would be relevant in exercising the discretion u/s 32(4) of the Rent Control Act. It has observed in para 16 of the said judgment that some of the factors which the Rent Controller should bear in mind while exercising his discretionary power would be whether the default is wilful or unintentional, whether it is for a short period or long period, whether it is stray or persistent, whether payment was made at the first opportunity or after contest, whether the default is bona fide or to harass the landlord. It is held that the circumstances of each case must be considered.

10. In considering the rival submissions, it is necessary to bear in mind that one of the factors referred to by this Court is whether the default was wilful or unintentional. In considering the said question in the facts of the instant case, it has to be seen that in para 3 of the reply to the show-cause notice u/s 32(4) of The Rent control Act, the appellant/tenant has stated that when the respondent No. 1 landlord refused to accept the rent tendered to him in the month of August 81, he sent the same by money order to him which he refused to accept. Thereafter in September 81 he sent the rent to him for the months of August and September 81 by money order. Subsequently, in October 81 he sent the rent for August, September and October 81 by a cheque which was returned to the appellant with the postal endorsement "not known". Similarly, it is urged before us that the rent for November 81 was sent by cheque and the rent for December 81 was sent by money order which was refused by the respondent No. 1-landlord. As regards the rent for January 1982 the same, according to the appellant, was sent in February 82 after the instant application for his eviction was filed by the respondent No. 1 landlord. Perusal of paras 4 and 5 of the reply of the appellant to the show-cause notice shows that it is because of the above facts that he has claimed that there is no delay on his part to pay the rent to the

respondent No. 1- landlord and even assuming that there was some delay in making the deposit, the delay of 2 or 3 days should be condoned by the learned Rent Controller. The learned Counsel for the petitioner has also urged that after the money orders or the cheques were refused by the respondent No. 1 - landlord he did not, thereafter claim the rent for the above months by giving any notice or otherwise before filing the eviction petition on the ground of sub-lease of the suit premises.

11. The question, therefore, which has to be considered by the learned Rent Controller and the learned appellant authority in the instant case was, whether the deposit of rent made after a delay of 2 or 3 days should be condoned because the conduct of the appellant showed that he was not a wilful defaulter which is one of the considerations referred to in the above judgment upon which the learned Rent Controller can exercise his discretion u/s 32(4) of the Rent Control Act. To this aspect of the matters and which is in fact the case which is set out by the appellant in his reply to the show-cause notice u/s 32(4) there is no application of mind by both the Rent Control authorities. The summary rejection of the writ petition in this Court also does not show that this aspect has been taken into consideration by the learned Single Judge. The above authorities have not also taken into consideration the other relevant factors referred to in the judgement of this Court cited supra.

12. It is pertinent to see that if the tenant is not a wilful defaulter in the sense that although he tenders the rent regularly every month, it is the landlord who refuses to accept the rent, the provisions of section 32(4) of the Rent Control Act can be misused by the landlord for eviction of his tenant summarily and can thus become very harsh to the tenant if the landlord deliberately does not accept the rent for a longer period allowing the substantial liability of rent to accumulate which the tenant is unable to pay or deposit within the short period stipulated u/s 32(2) of the Rent Control Act. The Rent Control Act is a beneficial legislation and should be construed to protect the tenants from the ill-designs of the landlord to evict him from the tenanted premises. In our view, therefore, before passing a drastic order having serious consequences, in the sense that it prohibits the tenant from contesting the eviction proceeding, it is necessary that the learned Rent Control authorities should apply their mind to the above aspect of wilful default in the instant case before passing the order u/s 32(4) of the Rent Control Act. They should also take into consideration such other relevant factors which may have bearing on the question of passing an order u/s 32(4) of the Rent Control Act in the facts and circumstances of the instant case in the light of judgment of this Court cited supra.

13. In the result, the instant Letters Patent Appeal is allowed. The impugned orders of the learned Single Judge, the Rent Controller and the Appellate Tribunal are set aside and the proceedings are remanded to the learned Rent Controller to consider afresh the question of passing an order u/s 32(4) of the Rent Controller Act in the light of our above judgment in the instant Letters Patent Appeal. Rule

is made absolute in the above terms. No costs.