

(2009) 10 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No. 3926 of 2008

Laheribai J. Trivedi (since deceased)

APPELLANT

Vs

Dharamdatta V. Trivedi and Others

RESPONDENT

Date of Decision : 08-10-2009

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28, 29(3)
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 8, Order 9 Rule 3, Order 9 Rule 4,
Order 9 Rule 8, Order 9 Rule 9
Maharashtra Rent Control Act, 1999 — Section 34, 34(4)

Citation : (2010) 1 BomCR 870

Hon'ble Judges : Oka A.S., J

Bench : Single Bench

Advocate : A.A. Patel, for the Appellant; Vaibhav Mehta, a/w., Deepti B. Mistry, instructed by Vaibhav Mehta and Associates for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

Oka A.S., J.—By order dated 28th July, 2009, this Court directed that this petition shall be heard finally at the stage of admission. The submissions of the learned Counsel appearing for the parties were heard earlier. One of the issues involved in this petition is whether a revision application u/s 29(3) of the Bombay Rents Hotel and Lodging House Rents Control Act, 1947 (herein after referred to as said Act of 1947) was maintainable.

2. The petitioners are the original plaintiffs and the respondents are the original defendants. The suit was filed in the year 1982 for possession against respondents under the provision of the said Act of 1947. The present petitioners are the legal representatives of the original plaintiff. An application was made by the petitioners seeking permission to delete the names of 2nd to 4th respondents. The said application was filed by the petitioner No. 1(c) on 31st March, 2005. According to the petitioners, they along with their Advocate were under an impression that the suit was pending for passing an order on the said application. According to petitioner, on 8th November, 2005, the petitioners and

their Advocate learnt that the suit has been dismissed in default. It was noticed that application for deletion of respondent Nos. 2 to 4 was allowed by the trial Court and time of 14 days was granted for carrying out amendment. The said order was not complied with. Therefore, a notice was taken out by the petitioners for restoration of the suit. The notice was dismissed by the learned Judge of the Court of Small Causes. A revision application was preferred by the petitioner which has been rejected by the Appellate Bench of the Court of Small Causes Court. The revision application was dismissed by holding that the order of dismissal of the suit was under Rule 8 of Order IX of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") and therefore, against the order of the trial Court dismissing the application for restoration, an appeal was maintainable.

3. The learned Counsel appearing for the petitioners submitted that this was a fit case where the order of restoration ought to have been passed by the trial Court. Inviting my attention to the case made out in the application for restoration, he submitted that the revision application filed by the petitioner was maintainable u/s 29(3) of the said Act of 1947. He criticized the finding of the Appellate Court that impugned order has been passed under Rule 8 of Order IX of the said Code. He submitted that the order of dismissal of the suit was passed by the trial Court under Rule 3 of Order IX of the Code and, therefore, a remedy for applying for restoration under Rule 9 of Order IX of the said Code was not available to the petitioners. He has relied upon the various decisions of this Court to show that a revision application u/s 29(3) of the said act of 1947 was maintainable.

4. The learned Counsel appearing for the first respondent submitted that the revision application ought to have been heard on merits. In fact, when the petition appeared before this Court on 28th July, 2009, a statement of the learned Counsel appearing for the first respondent was recorded by this Court that the revision application was maintainable. His submission was that as the revision application was maintainable, this writ petition may not be entertained and the revision application be ordered to be heard on merits.

5. I have carefully considered the submissions. It must be noted that the challenge in this writ petition is to both the orders i.e. order of the trial Court as well as order of the Appellate Bench in revision application. On 8th November, 2005, the suit was dismissed by following order:

ORDER

None present. Hence suit is dismissed in default No order as to cost.

Thus, the suit was dismissed in default when both the parties and their Advocates were absent. The Rule 8 of Order IX applies to a situation when the defendant appears and the plaintiff is absent. Rule 3 of Order IX applies to a situation when neither party appears. In such a case, the Court is empowered to dismiss the suit. Therefore, on face of it, the Appellate Bench of Court of Small Cause has committed a grave error by holding that order of dismissal was passed

in exercise of powers under Rule 8, Order VIII of the said code. As the suit was dismissed under Rule 3, Order IX; an application for restoration was maintainable under Rule 4 of Order IX of the said code. Therefore, observation of the Appellate Bench that the remedy of appeal was available against order of the trial Court is completely erroneous in as much as the notice taken out was not the one under Rule 9 of Order IX of the said Code. An order passed under Rule 4 of Order IX, is not subject to any appeal.

6. As stated earlier, by the impugned order, the application for restoration made by the petitioner under Rule 4 of Order IX of the said Code was rejected by the trial Court. The question is whether a revision application u/s 29(3) of the said Act of 1947 was maintainable against said order. The scope of Section 29(3) has been considered by Division Bench of this Court in the case of Sukhdev Prasad Raghbir Vs. Rambhujarat Kshampati, . The matter was referred to the Division Bench by a learned Single Judge of this Court. The matter before the Division Bench arose out of an order passed by the Court of Small Cause in a suit filed under the said Act of 1947 by which an application for amendment of the plaint was rejected. The Division Bench considered the scheme of the said Act of 1947. The Division Bench referred to a judgment of learned Single Judge of this Court in Civil Revision Application No. 38 of 1977 Bhagat Singh v. Prakash Roadlines Private Limited which was decided on 11th March, 1977. The learned Single Judge held that an order rejecting an application for amendment of plaint would not effect the substantial right of the plaintiff under the said Act of 1947 and, therefore, revision application u/s 29(3) was not maintainable. This Court held that revision application will be maintainable if the substantive rights of the parties to suit under the provisions of said Act of 1947 are affected. The Division Bench also referred to a judgment of another learned Single Judge of this Court Madanlal Mulchand Soni Vs. Mainikchand Dhanraj Gugle and Another, . The learned Single Judge held that unless order formally adjudicates and affects the rights of the parties, including those in the matters of procedure, it is difficult to conceive that the remedy u/s 29(3) would be available. After referring to a decision of Gujrat High Court, the Division Bench in paragraph 7 of the decision observed thus:

After analysing the relevant provisions of the Rent Act as well as the rules framed there under, it is held by the Gujarat High Court in Maharana Mills v. H. Manharrai AIR 1972 Guj. 226 case that purely procedural orders which do not affect the substantive rights of a party under the Bombay Rent Act or the Rules made there under the subject matter of which is not governed by the Rent Act or the rules made there under are not the orders which attract the revisional jurisdiction of the District Court u/s 29(3) of the Act.

The perusal of the decision of the Division Bench shows that the Division Bench has approved the law laid down by the learned Single Judge in Writ Petition No. 3359 of 1981. In paragraph 8, the Division Bench observed thus:

Therefore, obviously no revision petition can lie against a mere procedural order.

It is not disputed that order passed in the present case rejecting the application for amendment was an interlocutory order which does not decide finally the rights and liabilities of the parties to the suit. Therefore, in our opinion the Bench of Small Causes Court was right in holding that the revision petition was not maintainable.

The view taken by the Division Bench is that if an order is passed in a suit u/s 28 of the said Act of 1947 and if the said order does not affect the substantive rights of the parties under the said Act of 1947 or the rules made there under, a revision application u/s 29(3) will not lie. What is held by the Division Bench is that only if the order affects the rights of parties under the said Act of 1947 and rules framed there under, a revision application u/s 29(3) will be maintainable. The Division Bench expressly held that the orders passed which do not affect the rights under the said Act of 1947 and the Rules made there under are not the orders which attract the revisional jurisdiction of the District Court u/s 29(3) of the said Act of 1947. Thus, if there are orders passed under the said Code which do not affect the rights of the parties under the said Act of 1947, a revision application u/s 29(3) is not maintainable. In such a case, the aggrieved party will have to adopt remedies under said Code or under the Constitution of India.

7. Reliance has been placed on subsequent decisions of the learned Single Judges of this Court in the case of Pacific Engineering Co. Pvt. Ltd. Vs. East India Hotels Ltd., and Abeda Iqbal Patel Vs. Cormorant Investment Pvt. Ltd., . These are the case where impugned orders were passed in exercise of powers under the Code of Civil Procedure, 1908 and learned Single Judges of this Court held that revision applications were maintainable before the Appellate Court. The decision in the case of Abeda I. Patel (supra.) is rendered u/s 34 of the Maharashtra Rent Control Act, 1999. Sub-section (4) of Section 34 is similar to Sub-section 29(3) of the said Act of 1947. With the due respect to the decisions in the case of Pacific Engineering Co. Pvt. Ltd. (supra) and Abeda I. Patel (supra), I find that the view expressed therein is contrary to the law laid down by the Division Bench of this Court in the case of Sukhdev Prasad Raghurir (supra). The judgment of the Division Bench in terms upholds the view taken by another learned Single Judge holding that if the impugned order does not affect rights of the parties under the said Act of 1947 and rules framed there under, then a revision application 29(3) will not be maintainable. The Division Bench affirmed the view taken by learned Single Judge in Writ Petition No. 3359 of 1981. In view of the binding precedent of the decision of the Division Bench in the case of Sukhdev P. Raghurir (supra) it will have to be held that the revision application preferred u/s 29(3) of the said Act of 1947 against the order dismissing the application for restoration under Rule 4 of Order IX of the said Code was not maintainable.

8. Now, coming to the order of the trial Court rejecting the said application, it must be noted here that the suit was dismissed when both the parties were absent. In the application for restoration made by the petitioner and in particular

in paragraphs 8 and 9, reasons have been assigned by the petitioners for their absence on 8th November, 2005. The suit was dismissed at a stage when it was pending for deletion of the name of the 2nd to 4th respondents. It must be noted here that the application for restoration was immediately made by the petitioner in December, 2005. The Application was filed within the stipulated period of limitation. In view of the reasons assigned in the application, the trial Court ought to have restored the suit. The loss caused to the respondents could have been compensated by ordering payment of costs.

9. Therefore, the petition must succeed and I pass following order:

(i) Order dated 11th July, 2006 passed by learned trial Judge is quashed and set aside and Misc. Notice No. 336 of 2005 is made absolute and the suit stands restored;

(ii) Petitioners will pay costs of Rs. 10,000/- to the first respondent, who is represented by a Counsel in this Court. Time of eight weeks is granted to pay and/or to deposit costs with the trial Court;

(iv) Considering the fact that the suit is of the year 1982, the same shall be decided as expeditiously as possible.

(v) The writ petition is allowed in above terms.

9A. After the judgment was dictated, the Counsel for the first respondent appears and seeks stay. Operation of this order will remain stayed for the period of twelve weeks from the date of the order.