

(2002) 08 BOM CK 0057

In the Bombay High Court

Case No : Writ Petition No. 1450 of 1984

Madhukar Narayan Rao since deceased by his heirs Malati
Madhukar Rao and Others

APPELLANT

Vs

Ramchandra Rajaram Wani and Another

RESPONDENT

Date of Decision : 30-08-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 17, 17(1)
Limitation Act, 1963 — Article 137, 28, 29(2)

Citation : (2003) 1 ALLMR 687 : (2003) 1 BomCR 796 : (2003) 2 BOMLR 154 :
(2002) 4 MhLj 462

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.L. Kapse, for the Appellant; A.K. Abhyankar, for the Respondent

Final Decision : Partly Allowed

Judgement

A.M. Khanwilkar, J.—This writ petition, under Article 227 of the Constitution of India, takes exception to the order passed by the Assistant Judge, Nasik dated September 3, 1983 in Civil Appeal No. 320 of 1981.

2. The original petitioner was tenant in respect of house No. 185 situated at village Mamlatdar Lane, Malegaon. The respondents are the landlords. The respondents had filed suit for recovery of possession of the suit premises inter alia on the ground of bona fide requirement u/s 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act). That suit was decreed in favour of the respondents. In execution of that decree the respondents obtained possession of the suit premises on 4-5-1974. According to the petitioners, the respondents did not occupy the suit premises within one month from obtaining possession thereof, therefore, they filed application u/s 17 of the Act for restoration of possession of the suit premises. That application u/s 17 was filed on 21-6-1975. It is not in dispute that this application was not accompanied by any application for

condonation of delay. Nevertheless, condonation of delay application was filed subsequently on 26-6-1975. The ground taken in the application for condonation of delay was that the applicant was bed ridden at the relevant time which resulted in delay. In support of that application, affidavit of applicant's wife as well as of the concerned doctor who had certified that the applicant was not well was filed. The court below however, by order dated 13-4-1981, was pleased to dismiss the application essentially taking the view that the provisions of Limitation Act have no application to this proceedings and there was no provision to condone the delay. The first court also addressed itself to the merits of the ground for condonation of delay. The petitioners took the matter in appeal before the Assistant Judge, Nasik being Civil Appeal No. 320 of 1981. Before the Appellate Court, the respondents took objection that no appeal was provided against the impugned order. Besides, it was contended that provisions of the Limitation Act had no application to this proceedings and therefore there was no question of condoning the delay. It was further contended that in any case no sufficient cause has been shown for condoning the delay. The Appellate Court accepted the above contentions and dismissed the appeal by the impugned order which is the subject matter of challenge in the present writ petition.

3. The learned Counsel for the petitioners contends that the conclusion reached by the courts below that the provisions of the Limitation Act were inapplicable is inappropriate; whereas the provisions of Limitation Act would apply by virtue of Section 29(2) of the Limitation Act. Besides, the petitioners have made out sufficient cause for condoning the delay. The learned Counsel further contends that the affidavits filed on behalf of the applicant in support of application for condonation of delay have gone unchallenged and in such a situation the issue ought not to have been answered against the petitioners. The learned counsel has also emphasised on the observations made by the Appellate Court that even before the Appellate Court the parties were willing to go for recording of evidence with regard to the issue of whether sufficient cause for condonation of delay was made or not.

4. On the other hand, the learned Counsel for the respondents fairly accepts that that the provisions of the Limitation Act will have application even to the present proceedings u/s 17 of the Act. He submits that this position is no more res Integra as the same stands answered by the decision of the Constitution Bench of the Apex Court reported in Krishanlal Ishwarlal Desai Vs. Bai Vijkor and Others, . He however, submits that two courts below have recorded finding of fact that no sufficient cause has been shown and for that purpose have given cogent reasons. He, therefore, submits that this is not a fit case for interference under Article 227 of the Constitution of India.

5. Having considered the rival submissions, the main question which has been answered by the courts below against the petitioners that the provisions of the Limitation Act have no application need not detain us any more. As rightly pointed out by the learned Counsel for the respondents, the said issue stands

answered in favour of the petitioners in the case of Krishnalal Ishwarlal Desai's case (supra). In that case, the Apex Court was called upon to examine the purport of Section 17 of this very Act and, while doing so, in para 10 of the decision, the Apex Court has observed that a period of limitation is prescribed for the exercise of the rights conferred on the tenants by the last clause of Section 17(1) of the Act. In view of this enunciation of the Apex Court, it is not necessary to deliberate any further on the issue as to whether the provisions of the Limitation Act would apply or for that matter the Court will have power to condone the delay in a given case. Once it is held that Section 17 is in the nature of provision of limitation, then it necessarily follows that by virtue of Section 29(2) of the Limitation Act, Sections 4 to 24 (inclusive) shall apply to the proceedings u/s 17 of the Act. Inasmuch as, those provisions have not been expressly excluded by the present State enactment. This proposition can be discerned from the decision of the Apex Court in Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker, . The Apex Court has observed that two conditions must be fulfilled then the provisions of Sections 4 to 24 (inclusive) of the Limitation Act would automatically apply. Those two conditions are, viz; 1) there must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application, 2) the said prescription of period of limitation under such special or local law should be different from the period prescribed by the schedule to the Limitation Act. Thus on fulfilment of those two conditions, as observed by the Apex Court, the consequences that would automatically follow are : 1) in such a case Section 3 of the Limitation Act would apply as if the period prescribed by the Special or local law was the period prescribed by the schedule, 2) for determining any period of limitation prescribed by such special or local law for a suit, appeal or application all the provisions containing Sections 4 to 24 (inclusive) would apply insofar as and to the extent to which they are not expressly excluded by such special or local law. Insofar as Section 17 of the Act is concerned, as observed by the Apex Court in Krishnalal Desai's case (supra), the last clause of Section 17(1) provides for period of limitation. A priori, it is a provision for period of limitation under the Special and local law in connection with an application to be filed under that provision. Moreover, the period of limitation prescribed thereunder is different from the period prescribed by the Schedule to the Limitation Act in Article 137. Understood thus, I have no hesitation in taking the view that provisions of Limitation Act would apply and the Court will have power to condone the delay in institution of application u/s 17 of the Act, if the fact situation of the case so requires.

6. That takes me to the next contention that whether the appeal as filed by the petitioners could be maintained. It cannot be disputed that the application u/s 17 of the Act is required to be decided in exercise of powers conferred on the Rent Court in terms of Section 28 of the Act. Section 28 postulates that the Rent Court has exclusive jurisdiction to entertain and try any suit or proceedings between the landlord and tenant relating to the "recovery of possession of any premises

to which any of the provisions of that part of the Act apply" and to decide "any application made under that Act" and to deal with "any claim or question arising out of that Act" or any of its provisions and subject to the provisions of Sub-section (2). In view of this provision, the application u/s 17 of the Act will have to be adjudicated by the Rent Court in exercise of powers u/s 28 of the Act. If that be so, the order passed on such application is an appealable order in view of the provisions of Section 29 of the Act, for the same is not excluded by the proviso to Sub-section (1) of Section 29 of the Act. Accordingly, the view taken by the Appellate Court that the appeal was not maintainable against the order passed on an application u/s 17 cannot be sustained.

7. The next question that arises for consideration is, whether in the fact situation of the present case the Courts below were justified in taking the view that the applicants-petitioners herein failed to make out any sufficient cause for condoning the delay in filing the application u/s 17 of the Act. Once it is held that the provisions of the Limitation Act would apply to the present proceedings u/s 17 of the Act, then the delay in institution of the application will have to be examined on the touch stone of the well settled principles that the delay should not be intentional one or due to inaction, negligence and so on, only when the same can be condoned. It is not in dispute that in the present case, in support of the application, the applicant had caused to file affidavit of his wife as well as affidavit of the doctor who had certified that the applicant was unwell at the relevant time and was bed ridden. It is also not in dispute that the affidavits so filed on behalf of the petitioners-applicants were not challenged by filing any reply thereto or by bringing on record any contrary material. The averments in the said affidavits have therefore gone uncontroverted. In such a situation, it is incomprehensible as to how the courts would still hold against the applicant. No doubt the Courts below have recorded reason that the affidavit of the wife was not verified and therefore cannot be looked into. However, the fact remains that in support of the application for condonation of delay the applicant had caused to file the affidavit of the concerned doctor who had certified him to be unwell at the relevant time. There can be no reason to straightway doubt the affidavit of the doctor unless it was controverted. Moreover, it cannot be overlooked that the delay was hardly of few days and no reason is forthcoming as to why the applicant would have caused to file application belatedly. If that be so, then surely it was necessary for the Court to call upon the parties to adduce necessary evidence, if so advised; and only then proceed to record findings on the basis of evidence so adduced. To my mind, the Appellate Court having adverted to the contention in para 12 that, both the sides agree that it would be proper and just to remand the matter for fresh enquiry because the parties had not led evidence properly in the case, ought not to have dwelled upon the merits of the cause for delay. On the other hand the Appellate Court ought to have relegated the parties to adduce proper evidence on that issue, for that would have been the proper course to be adopted while disposing of the said application instead of proceeding on the surmise and conjecture that the case made out by the

applicant was false.

8. In the circumstances, orders passed by the courts below are set aside and the subject application is restored to the file of the first Court for being decided on its own merits in accordance with law. The trial Court shall permit the parties to adduce evidence if so advised and then record finding on the basis of the materials produced before the Court. Since the original application has been instituted in the year 1975, the trial Court may be well advised to dispose of the application after remand expeditiously and preferably within six months from the receipt of writ of this court. All questions relevant to decide the subject application on merit are left open to be decided without being influenced by any of the observations in the impugned order or in this order,

9. Writ petition partly succeeds in the above terms. No order as to costs.