
(1986) 06 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 1603 of 1982

Mahendranath	Vs	APPELLANT
Nalini Vallabhdas Shah (Miss)		RESPONDENT

Date of Decision : 11-06-1986

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(4)

Citation : (1986) 3 BomCR 510

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : C.C. Chhaya, for the Appellant; N.V. Walawalkar, for the Respondent

Judgement

V.S. Kotwal, J.—Judgement suit instituted in the year 1976 has yet remained undecided while in between all this period there have been interim applications one after another for striking out the defence of the petitioner who claims tenancy under the respondent. In my opinion, having regard to all the features in proper context this is a fit case where interference is necessary even under Article 227 of the Constitution of India since there is an error apparent on the face of the record. To understand the thrust of the controversy only a few features need be stated. Reference to the prominent landmarks in the proceeding would make the situation clear.

2. The respondent herein filed judgement Suit Bearing Number R.A.E & R. Suit No. 337/1894 of 1976 against the petitioner on the ground of rental arrears being for more than six months and also on the ground of bona fide personal requirement. This suit was filed in the year 1976. Standard rent application was filed in the same year being No. 1496/SR of 1976. However, it was dismissed for default on 13th of July, 1981.

3. The record reveals that the respondent filed an application in the year 1978 in the trial Court suggesting that the petitioner has been in rental arrears to a vast extent. An order, therefore, was passed on 24th of April, 1978 calling upon the

petitioner to deposit Rs. 33, 900/- within two months. This was calculated on the basis of monthly rent at Rs. 475/-. The petitioner admittedly did not deposit the said amounts as stipulated. Consequently, therefore, on 29th of June, 1978 the respondent filed an application purporting to be one u/s 11(4) of the Bombay Rent Act for striking out the defence of the petitioner. This application was granted by the trial Court on 23rd of August, 1978. On 15th September, 1978 the petitioner applied with a prayer that he should be allowed to deposit the said amount. On 15th of November, 1978 the trial Court allowed the petitioner to deposit in all Rs. 37, 225/- as by that time rent upto the month of November 1978 had mounted to that amount. Admittedly the petitioner did deposit the entire amount within the stipulated period.

4. However, there was a repeat performance inasmuch as the petitioner remained in arrears for the subsequent period commencing from December 1978. Consequently, therefore, on 6th of August, 1979 the respondent filed a fresh application making an identical prayer u/s 11(4) of the Bombay Rent Act since the petitioner was in arrears of seven months rent. On 1st of July, 1981 the Court passed an order that petitioner shall deposit all the said arrears upto June 1981 tuning to Rs. 13,300/- on or before 15th of August, 1981. According to the petitioner he could not collect the entire amount and, therefore, offered to pay Rs. 10,000/- which offer was not accepted by the Advocate for the respondent though the petitioner made an application to that effect in the trial Court. However, since the entire amount as directed was not paid, the respondent filed fresh application on 1st of September, 1981 for disallowing the petitioner to participate in the proceeding. On 1st of October, 1981 the trial Court allowed that application and the defence was directed to be struck out. The petitioner carried the matter in appeal before the Appellate Bench of the Small Causes Court. However, that appeal was dismissed on 4th of February, 1982 which order is being impugned in this petition under Article 227 of the Constitution of India.

5. A further event can be noted at this juncture to the effect that this Court had granted conditional stay directing the petitioner to deposit all the rental arrears upto date and go on depositing regularly every month the rent that accrued. The record reveals that there were not regular deposits as such though ultimately Rs. 29,450/- were deposited in addition by the petitioner in the trial Court being the rental arrears upto April 1984.

6. The net result is that from time to time the petitioner has deposited roughly about Rs. 81, 395/- which is the amount due towards the rent upto March 1984 and a statement is made at the Bar on behalf of the petitioner that since then he has been depositing regularly every month in the trial Court and he is not in arrears.

7. Shri Chhaya, the learned Counsel for the petitioner, mainly contends that so far as the first order of 24th of April, 1978 is concerned it was passed behind his back since the matter was not posted for any orders or application on that day and that his client was totally unaware of any such application having been filed

by the respondent. The learned Counsel, therefore, submits that this cannot be treated as a wilful default. The learned Counsel then submits that when he was directed to deposit Rs. 37,225/- by the order dated 15th of November, 1978 he did comply with it faithfully and deposited the entire amount. As regards the last default of Rs. 13,000/- Shri Chhaya, contends that his client was in financial stringency and could collect Rs. 10,000/- only which he offered to pay to the Advocate directly or deposit in Court and made an application accordingly in the trial Court. However, the short amount was not acceptable to the party and the Court was therefore, unjustified in passing a harsh order of striking out the defence. According to him all the arrears upto date were cleared and there have been regular payments every month. The learned Counsel ultimately submits that this is not case where discretion of passing the order against the petitioner should have been exercised and that in view of the serious consequences that would follow on account of that order his entire defence would be jeopardised whereas his client should be given chance to contest the suit especially when he has deposited more than 80,000/- rupees so far and has been regular in payment in every month. Shri Walawalkar, the learned Counsel for the respondent, however, contends that every time his client has to knock the doors of the Court in view of the wilful default made by the petitioner and in view of this persistent default no indulgence should be shown to the petitioner, especially when even after this Court passed a conditional order while granting the stay, all the rental arrears were not deposited within the stipulated period. The learned Counsel, therefore, submits that the discretion exercised by the two courts below is fully justified and cannot be upset in this extraordinary jurisdiction.

8. I have already given a short catalogue of all the events that occurred and as to how applications were made from time to time by the respondent, how Court orders were passed and how the petitioner has been depositing various amounts. It is true that in some respects the payments were irregular and the respondent had to move the Court every time though u/s 11(4) of the Bombay Rent Act. As regards the first order vis-a-vis the payment of Rs. 33,900/- dated 24th of April, 1978 there is nothing to controvert Shri Chhaya's contention that this order was passed behind the back of his client when the matter was not scheduled on that day and such as he could not be held guilty of a wilful defaulter, whereas when the next time he was asked to deposit Rs. 21, 275/- on 15th of November, 1978 he promptly complied with that order. It also does appear that in so far as that amount is concerned, the Court did grant the time and indulgence and he honoured the undertaking and deposited the entire amount. Once the indulgence is shown to him then it cannot be tagged with subsequent event for the purpose of holding persistent demands. Then really remains in the field the last item of Rs. 13,000/-. In that behalf it is clear from the record that the petitioner did offer to pay Rs. 10,000/- and he actually moved the Court in that behalf. However, once the either side refused to accept the short amount and since the petitioner on account of financial stringency was unable to collect the entire amount of Rs. 13,300/- he could deposit Rs. 10,000/-. The explanation cannot be said to be

unreasonable. As regards the subsequent event after filing of this petition, it is an accepted position that in the trial Court the petitioner did deposit an amount of Rs. 29,450/- some time in April 1984. Shri Chhaya, the learned Counsel, makes a statement on behalf of the petitioner at the Bar that all the arrears have been paid upto date and there have been regular payments every month. Shri Walawalkar, the learned Counsel, however, submits that assuming all the payments have been paid, still those cannot be styled as regular payments but more or less erratic payments inasmuch as rental arrears at the span of three to four months used to be paid at a time. However, there is no adequate material one way or the other. However, the fact remains that it is not seriously controverted that all the rental arrears have been so far deposited in the trial Court. Even a cursory perusal would strongly indicate that more than Rs. 81,000/- have been so far deposited by the petitioner in Court from time to time.

9. Having regard to all these features in the context of the provisions contained in section 11(4) of the Bombay Rent Act, I am of the opinion that the authority below were not justified in passing such a harsh order of striking of the defence or disallowing the petitioner from participating in the proceeding or dissenting him to defend the suit except with the leave of the Court. Shri Walawalkar, the learned Counsel, submits that this may not cause prejudice to the petitioner inasmuch as he may cross-examine the respondent. However, that can hardly be an answer to the question posed. The fundamental question that harmoniously arises in this proceeding is whether under the facts and circumstances of the case there has been proper exercise of discretion by the courts below in passing such an order which entails into a serious impact on the litigant. Even a plain reading of sub-section (4) of section 11 of the Bombay Rent Act makes it very clear that there is no imperative mandate of legislature to pass such an order ipso facto the moment there is a default but the legislature in its wisdom has rightly vested the concerned Court with its discretion either to pass or not to pass such an order and that discretion if exercised against the defaulter it must have justification. As contemplated by the said provision itself the Court must be satisfied that either the tenant is withholding the amount on the ground that the rent is excessive or in any other case the Court is satisfied that it is just and proper to make such an order of deposits being made and once that order is made a discretion is given to the Court in case of default to direct that the defendant shall not be entitled to appear in or defend the suit except with leave of the Court. It does appear that it is a discretionary measure available to the Court that should be sparingly utilised only in exceptional cases when the Court feels satisfied that the conduct of the defendant is so gross that it deserves no sympathy. In the instant case nothing of that sort is in existence. That such an order being a discretionary order and not being under the mandate of law and the circumstances in which it can be justifiably passed has been well enunciated by the Supreme Court in the case of Miss. Santosh Mehta Vs. Om Prakash and Others, . The Supreme Court was dealing with a similar situation as also with the provision of section 15(7) of the Delhi Rent Control Act which on para materia on

major counts with the provisions of section 11(4) of the Bombay Rent Act. The Supreme Court thus observed as---

"Striking out defence of a tenant is a harsh extreme and having regard to the benign scheme of the legislation this drastic power is meant for use in grossly recalcitrant situations where a tenant is guilty of disregard in paying rent. That is why a discretion is vested, not a mandate imposed. Striking out a party's defence is an exceptional step, not a routine visitation of a punitive extreme following upon a mere failure to pay rent. First of all, there must be failure to pay rent which, in the context, indicates wilful failure, deliberate default or volitional non-performance, Secondly, the section provides no automatic weapon but prescribes a wise discretion, inscribes no mechanical consequence but invest a power to overcome intransigence. Thus, if a tenant fails or refuses to pay or deposit rent and the Court discerns a mood of reliance or gross neglect, the tenant may forfeit his right to be heard in defence. It will be noted that section 15(7) is not couched in mandatory language. It uses the word "May". There is no indication whatsoever in the Act to show that the exercise of the power of striking out of the defence u/s 15(7) was imperative whenever the tenant failed to deposit or pay any amount as required by section 15. The provisions contained in section 15(7) of the Act are directory and not mandatory. The effect of striking out of the defence u/s 15(7) is that the tenant is deprived of the protection given by section 14 and, therefore, the powers u/s 15(7) must be exercised with due circumspection."

10. No doubt in that case the tenant who was the working woman has been regularly paying rent to the Advocate and the default was committed by the Advocate and not by the litigant as such. Nonetheless the general principles enunciated in that ratio remain in fact attracting its application to the facts of this case also. The litigant in this case cannot be said to be person who wilfully refused to pay or exhibits wilful defiance or gross neglect. The caution underneath the said ratio is very material inasmuch as striking out defence is a harsh, extreme and drastic power which is required to be used only in grossly recalcitrant situations.

11. A similar view has been taken by the learned Single Judge of this Court in Anita M. Harretto Vs. Abdul Wahid Sanaullah, , wherein it was observed that non compliance with the order passed by the Court relating to the deposit of the amount will not automatically result in the striking off the defence. It is unnecessary to multiply the said ratio.

12. Though it is true that an utterly negligent or defaulting litigant cannot be encouraged for his negligence or default, still normally a litigant should get full opportunity to prosecute and defend the litigation or other wise an ex-parte order or debarring the litigant from participating in the proceeding may entail into the miscarriage of justice. Technical formalities may not entail into the pivotal concept of administration of justice.

13. Under the circumstances, therefore, the impugned order of the two Courts below refusing the petitioner to defend the suit is set aside.

14. A word at this juncture above closing the chapter would not be out of harmony since some features are brought to my notice by the learned Counsel for the respondent and which are not controverted by the learned Counsel for the petitioner. The suit is filed for eviction amongst other grounds also on the ground of personal requirement of the respondent u/s 13(1)(g) of the Bombay Rent Act. The respondent is an young lady and is a practising Advocate by profession. According to her assertion in the plaint, she has no other accommodation and she is in dire necessity of the suit premises because the situation has forced her to stay with the brother which she cannot continue for ever. It is contended further and in fact it is accepted by Shri Chhaya, the learned Counsel for the petitioner, that the petitioner proclaims himself to be an astrologer by profession and it is accepted that for quite some time he has to be out of station and may times housed to be out of country, as according to Shri Chhaya, at present also the petitioner has gone to United States. The respondent claims that the petitioner is never in the suit premises, but merrily moves outside. It is also a matter of record that the petition is not sworn by the petitioner but by one Miss Manju who claims to be the daughter of the Constituted Attorney of the petitioner. Thus it is not sworn by the petitioner or his Constituted Attorney. There are two Vakalatnamas on record in favour of the Advocate Shri Chhaya. One is purported to have been signed by the petitioner while the other by the said lady Miss Manju. It is also interesting to note that in the petition the petitioner is shown as petitioner No. 1 and his name is mentioned in the title as "Mahendranath" with a clear endorsement that his further name is not known. Same is the situation when his name is mentioned on the Vakalatnama. It would have been really better if the respondent instead of or in addition to making applications in the trial Court had moved the trial Court for early hearing of the suit. Nonetheless the fact remains that the suit of the year 1976 has yet not made any progress and has remained undecided even though a lady Advocate asserts that the suit premises are required for her personal use and occupation. According to Shri Walawalkar, the learned Counsel, the petitioner is interested in merely prolonging the suit and he apprehends on instructions from his client in view of the pause experience that even if the suit is expedited the petitioner may not be readily available to participate in the suit. Expedition of the suit under the circumstances is absolutely essential. In addition, in order to ward off any such move on the part of the petitioner to prolong the hearing on a spacious ground of the being required to go out of town or even out of country, it would be better if the learned trial Judge in charge ensures the presence of the parties and fixes the schedule in such a manner keeping enough margin of time so as to effect the final disposal of the suit within the scheduled period which can justifiably be six months in the instant case. In other words, all the other procedural formalities should be completed and the effective bearing should be commenced as early as possible so as to achieve the target of disposing the suit within the specified

period. Shri Chhaya, the learned Counsel for the petitioner, assures cooperation by his client in this process. Since the suit is yet to be heard it would but be proper to express any opinion on merits one way or the other though some of the features which are indicated herein above along with the trust and the contentions of the respondent will have to be seriously examined. It is also clarified that showing indulgence to the petitioner in the matter of depositing rental arrears periodically is only while considering the provisions of section 11(4) of the Bombay Rent Act and, therefore, it should not be tagged in any manner with the issue relating to section 12(3)(b) of the said Act if any such issue arises in the suit.

15. Under the peculiar facts and circumstances of the case since the respondent was obliged by the defaulting conduct of the petitioner to repeatedly move the trial Court by separate applications u/s 11(4)G of the Bombay Rent Act as also looking to the conduct of the petitioner, it would be just and proper as also equitable to direct the petitioner to pay the costs of this proceeding to the respondent in spite of his success, the costs being quantified at Rs. 500.

16. Rule absolute.

17. The impugned order recorded by the Small Causes Court and confirmed by the Appellate Bench of the said Court disallowing the petitioner herein to defend the suit as per section 11(4) of the Bombay Rent Act is set aside. The petitioner-defendant shall be allowed to defend the said Suit Being Number R.A.E. & R. Suit No. 337/ 1894 of 1976.

18. The trial Court shall endeavour to finally dispose of the said suit as far as possible and feasible under the circumstances on or before 31st of December 1986 and for that purpose to achieve that target fix the schedule well in advance as indicated herein above.

19. The petitioner shall pay Rs. 500/- (Rupees Five Hundred) to the respondent as costs of this proceeding in spite of his success for the reasons already assigned.

20. The petitioner also shall go on making regular payments for the subsequent periods vis-a-vis the rental amounts in the trial Court.

21. The respondent would be at liberty to move the trial Court in case there is any further default and in which case if a right accrues in her favour.