

(1995) 09 BOM CK 0042
In the Bombay High Court
Case No : Writ Petition No. 275 of 1990

Manuel Mendes, since deceased, through his legal representatives APPELLANT

Vs

Smt. Shantidevi Ramchandra Halwai and Others RESPONDENT

Date of Decision : 02-09-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 226, 227
Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 22(1), 22(2), 32, 32(3), 32(4)

Citation : (1995) 3 BomCR 723

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : S.G. Desai and S.G. Bhobe, for the Appellant; S.K. Kakodkar, S.A. and R.V. Kamat, for the Respondent

Final Decision : Dismissed

Judgement

E.S. Da Silva, J.—The challenge in this writ petition is the judgment and order of the Administrative Tribunal, Goa, Daman and Diu dated 4th June, 1990 in Eviction Revision Application No. 3 of 1986 which was affirmed the judgment and order dated 28-12-1985 of the Additional Rent Controller, South Goa Sub-Division, Margao, in Case No. BIDG/160/ARC/83.

2. By the aforesaid judgment the Additional Rent Controller has dismissed an application of the original late petitioner Manuel Mendes, now represented by his legal representatives, (hereinafter called "the petitioner") u/s 32(4) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter called "the Act") seeking to stop all further proceedings with a direction to the respondents to put the petitioner in possession of the suit premises and allowed at the same time an application of the respondent No. 2 u/s 32(3) praying for an enquiry as to who should pay the rent and to what extent the said rent should be paid to the petitioner.

3. The case of the petitioner is that by agreement dated 11-9-1978 the late Manuel Mendes created a joint lease in favour of respondents Nos. 1 and 2 in respect of shop No. 5 situated on the ground floor in the building known as "Mendes Mansion" at Vasco da Gama for a period of five years on a monthly rent of Rs. 55/- payable every month in advance on or before the 5th day thereof.

On 7-12-1983 the said Mendes filed an eviction application against the respondents on the ground of non-payment of rents from February, 1980 onwards except for the month of April, 1980. It was stated that the said respondents were always irregular in the payment of rents. Before the institution of the eviction proceedings the said Mendes had filed a Civil Suit bearing No. 87 of 1980 against the respondents and the husband of respondent No. 1 for eviction from the demised premises. The respondent No. 1 and her husband also filed another Special Civil Suit bearing No. 14 of 1979 against the respondent No. 2 in which the said Mendes was not a party. Both the suits were instituted in the Court of Civil Judge, of Vasco-da-Gama.

4. It is further the case of the petitioner that during the pendency of the eviction application and after the notices issued to the respondents were served both admittedly failed to deposit the rents due and accrued thereafter or paid the same in terms of section 32 on the ground that there was a dispute inter se between the two tenants. The respondent No. 1 received a notice on 7-1-1984 and the respondent No. 2 on 19-3-1984. Upon receipt of the notices the respondent No. 1 filed an application dated 9-2-1984 and the respondent No. 2 another application dated 7-4-1984. Thereafter the respondent No. 1 filed one more application dated 27-4-1984. In his application dated 9-2-1984 the respondent No. 1 prayed that she be exempted from depositing the arrears of rents due and further prayed that the eviction application be not adjudicated till the disposal of the civil suit. Both these prayers were made by her on the basis of the facts averred in the aforesaid application dated 9-2-1984.

In his application dated 17-8-1984 the respondent No. 2 sought for an enquiry u/s 32(3) on the facts mentioned therein in order to determine who should, amongst the respondents, pay the rent in respect of the suit premises and to what extent.

In her application dated 27-4-1984 while making reference to the Civil Suit No. 14 of 1979 the respondent No. 1 claimed that the late Manuel Mendes was informed about the development referred to in the application and he had agreed to accept the rent directly which was being paid to him and therefore there was no need to file any eviction application.

5. It was further the case of the petitioner that the said Manuel Mendes disputed all these contentions and filed the application dated 14-5-1984 u/s 32(4) of the Act praying for an order of eviction on the ground that both the respondents had failed to deposit and/or pay the rents or the arrears due as required under the law. Upon receipt of this application the respondents were asked to show cause

against the same. The respondent No. 1 filed her written statement dated 5-8-1984 claiming adjournment in the matter until the appeal referred to therein had been disposed of. She subsequently filed her reply to the application of the late petitioner on 19-9-1984 together with her written statement. The respondent No. 2 also filed his reply to the application as well as his written statement.

Ultimately the Rent Controller by his order dated 20-12-1985 held that it was necessary to conduct an enquiry u/s 32(3) of the Act in view of the contentions raised before him and consequently dismissed the petitioner's application dated 14-5-1984 u/s 32(4) of the Act. In appeal the said order was maintained by the Administrative Tribunal vide judgment and order dated 4-6-1990 which together with the order of the Rent Controller are impugned in the present petition.

6. The first contention of Shri Dessai, learned counsel for the petitioner, is that what falls for the determination of this Court is the correct interpretation of section 32(3) of the Act. According to the learned Counsel the said provision deals with the quantum of the rent required to be paid by the tenant to the landlord and therefore any dispute or disputes between the tenants themselves cannot be contemplated in sub-section (3) of section 32. The dispute should refer only to the one between the landlord and the tenant and not between the tenants. The said sub-section (3) is to be read along with sub-section (1) which enjoins the tenant to pay rent to the landlord. It was submitted by the learned Counsel that in his application dated 14-5-1984 the late Manuel Mendes had asked the Rent Controller to stop proceedings instituted against the respondents for their manifest failure to deposit the rent in arrears within thirty days without sufficient cause and had also contested that there was any dispute between them within the meaning of section 32(3) of the Act which was required to be decided by the Rent Controller. In her reply to this application the respondent No. 1 did not say that rents were not due to him nor were in arrears. Her contention was that the rents were not paid on account of a dispute between her and the respondent No. 2 who was her brother-in-law as a result whereof the suit shop had been closed by the Court and she was out of business being therefore unable to pay any rents. She therefore prayed that she be exempted from such payment till the suit filed by her and her husband against the respondent No. 2 had been adjudicated.

7. It was further urged by the learned Counsel that this application of the respondent No. 1 was made beyond the period of thirty days because eviction application having been filed on 7-12-1983 and the respondents served on 7-1-1984, the application of the said respondent is dated 9-2-1984 which is clearly beyond thirty days from the date of the service of the notice on her. The notice issued by the Rent Controller was dated 28-12-1983 and it was made returnable on 9-2-1984 on which date the respondent No. 1 filed her application. In his turn the respondent No. 2 was served on 20-2-1984 and he filed his reply dated 17-4-1984 which was however tendered to him on 18-4-1984. The

petitioner got it only on 27-4-1984. At that time no deposit was made by the respondent No. 2 also and in his application he simply requested the Rent Controller to hold an enquiry on the question of the rents payable to the petitioner u/s 32(3). According to the learned Counsel the respondent No. 2 in his application did not agree or showed his willingness to pay any rents to the petitioner and he has disputed the very liability of the respondents to pay the rents to him which on the ground of the dispute was not obviously within the jurisdiction of the Rent Controller to decide. Subsequently, the learned Counsel urged, the respondent No. 1 suo motu filed an application expressing her willingness to pay the rents in arrears to which the petitioner filed reply dated 10-4-1974 which was the date fixed for reply of respondent No. 1's application dated 17-4-1984. This application is dated 27-4-1984 copy whereof was received by the petitioner. In reply to the petitioner's application dated 14-5-1984 to stop the proceedings the respondent No. 1 filed the application dated 19-9-1984 wherein she conveyed her willingness to pay or deposit the rents due. However, according to the learned Counsel, this willingness was not unconditional because she had stated that she was willing to deposit the arrears of rent if any as and when required by the Court. On that same day the said respondent filed her written statement wherein she admitted that she and the respondent No. 2 were the only opponents in the application for eviction moved by the petitioner to whom the lease had been granted by him. On this same date 19th September, 1984, the respondent No. 2 filed also his reply to the petitioner's application to stop the proceedings.

8. Thus, the learned Counsel argued, the position on 19-9-1984 was that after receiving the notice of the petitioner's eviction application on 7-1-1984, the respondent No. 1 sent her application dated 9-2-1984, that is to say, beyond thirty days from the date of the service of the notice that the respondent No. 2 has locked the suit shop and therefore she could not deposit the rents in arrears. In other words, in the said application the respondent No. 1 did not express any willingness to pay rents due to the petitioner within the prescribed time. The respondent No. 2 also after being served with the notice of the eviction application came with a request to the Rent Controller that an enquiry should be held u/s 32(3) on some grounds which did not come within the purview of the said provision although he showed his willingness to pay the rents in arrears only after the result of the enquiry. Thus, the learned Counsel submits, if one turns to the pleadings of the respondents neither the respondent No. 1 nor the respondent No. 2 disputed the existence of arrears of rents nor denied that the same were due nor alleged that they have been paid. In this background, the learned Counsel submitted, the order of the Rent Controller dated 28-12-1985 was clearly wrong and misconceived when at that time nobody had made an application offering to pay or deposit the rent in arrears. Therefore the judgment and the order of the Tribunal which has supported the order of the Rent Controller was also a bad and illegal order which was bound to be quashed and set aside.

9. It was next submitted by the learned Counsel that if a statutory notice as required u/s 22(1) of the Act is not served the same could not be held as/an incurable defect for the purpose of preempting the rights of the landlord as provided in section 32. Thus, according to the learned Counsel, a valid notice was not a condition precedent for the Rent Controller to assume jurisdiction to entertain the petitioner's eviction application u/s 22. It was urged that the Rent Controller on the presentation of certain application had to see whether there were arrears of rents for 3 months and whether the tenant did not pay those rents or arrears within 30 days from the date of the service of the registered notice issued by the landlord or have refused to accept such notice. It was contended that section 22 is not similar to section 80 of the C.P.C. or section 56 of the Panchayat Act which lays down a bar of jurisdiction on the concerned Courts to entertain any proceedings in case the legal requirements as provided in the respective enactments are not fulfilled. The learned Counsel stated that in the Act the jurisdiction clause is provided in section 56 only and therefore section 22 could not be said as imposing a bar of jurisdiction for the Rent Controller to entertain any application for eviction in case the requirements of the Act had not been complied with by the landlord. It was also urged that the jurisdictional issue was a multifaceted one. The first facet was regarding the right of the Courts to entertain a lis between the parties. The second one was dealing with the right to adjudicate a lis that is to say the exercise of the jurisdiction while the third one was the right to determine the rights of the parties, that is to say concerning the granting of the relief. For this purpose the learned Counsel has placed reliance on some observations made by the Supreme Court in the case of *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, wherein while dealing with the question of jurisdiction the Court has quoted, Mukherjee, Acting Chief Justice speaking for the Full Bench of the High Court in *Hirday Nath Roy v. Ramchandra Barna Sarma* AIR 1921 Cal. 34 as follows :-

"In the order of reference to a Full Bench in the case of *Sukhlal v. Tara Chand* (1905) I.L.F. 33 Cal. 68 it was stated that jurisdiction may be defined to be the power of a Court to `hear and determine a cause, to adjudicate and exercise any judicial power in relation to it': in other words, by jurisdiction is meant `the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.'" An examination of the cases in the books discloses numerous attempts to define the term `jurisdiction', which has been stated to be `the power to hear and determine issues of law and fact' "the authority by which the judicial officers take cognizance of and decide causes"; `the authority to hear and decide a legal controversy' "the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them"; "the power to hear, determine and pronounce judgment on the issues before the Court"; "the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect"; "the power to enquire into the facts, to apply the law, to

pronounce the judgment and to carry it into execution".

"Thus the jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character..... This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character..... The authority to decide a cause at all not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case in but an exercise of that jurisdiction."

10. The learned Counsel stated that in terms of section 9 of the CPC the rule was jurisdiction on the Courts to try all matters of civil nature unless they were expressly or impliedly barred. Thus, there was no restriction to exercise jurisdiction by the Civil Courts. Besides section 32 was an independent provision from section 34 and therefore there was no bar to the Rent Controller to assume jurisdiction although there might be a bar for him to exercise jurisdiction and grant relief in case the statutory notice was not served on the tenant by the landlord. The learned Counsel referred also to section 21 and its proviso which deals with the jurisdiction of the Rent Controller to decide, when a tenant denies the title of landlord or claims the right of permanent tenancy, whether the denial of the claim was bona fide subject to the right of the landlord to take appropriate remedy and sue the tenant for eviction in a Civil Court. Being so, the learned Counsel contended, with or without notice the Rent Controller was always bound to entertain an application filed by the landlord u/s 22 since nowhere in the Act it has been said that the lack of the notice was affecting or restricting his jurisdiction to entertain an eviction application filed by the landlord against the tenant. As such, Mr. Dessai concluded, the impugned order of the Rent Controller directing an enquiry u/s 32(3) was without jurisdiction because the dispute contemplated in sub-section (3) could not be a dispute arising between the tenants but only a dispute between the landlord and a tenant regarding the quantum of the rents due. Thus, the petitioner was free to challenge this order holding that the enquiry was required as an order passed on a wrong exercise of jurisdiction. Conversely the petitioner was also entitled to challenge the order of the Tribunal which has again held the dispute raised by the tenant between them was a dispute within the meaning of section 32(3). Besides in the instant case the Rent Controller had already assumed jurisdiction and therefore since in the exercise of this jurisdiction he was being vested with the same powers under the Mamlatdar's Court's Act once cognizance of the petitioner's application has been taken and notices issued whatever orders which were being passed were deemed to be orders passed in the correct exercise of the jurisdiction vested on him.

11. In order to appreciate the submissions of the learned Shri Dessai one must have in mind, first of all, that proceedings u/s 32 are available to the landlord only when there is already eviction proceedings instituted by him against the tenant. In other words, section 32 requires the existence of a valid eviction proceedings under the Act. Proceedings which are not valid cannot be said as attracting the provisions of section 32. As rightly contended by Mr. Kakodkar, learned Counsel for the respondents, proceedings for eviction under the Act on its very face must disclose grounds for eviction. The basic postulate in this regard is the disclosure of the grounds as provided in the Statute. Proceedings under sections 32(3) and 32(4) are just interim proceedings. Grounds are to be disclosed always in the plaint in terms of Order 7, Rule 11 of the C.P.C. and a plaint is to be rejected for non-disclosure of cause of action since a party cannot prove facts which he had not alleged in his pleadings. Therefore, the learned Counsel contends, if an application for eviction does not disclose grounds for eviction the Rent Controller cannot entertain or assume jurisdiction to evict a tenant. In this regard the learned Counsel cited the same authority relied by Shri Dessai in the case of Official Trustee, West Bengal referred to above wherein it is laid down that before a Court can be held to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue. The authority to hear and decide a particular controversy though has arisen between the parties, what is relevant is whether he had power to grant the relief asked for in the application made by the said parties. The Supreme Court then observed that this seems to be the very essence of the matter. Therefore, according to the learned Counsel, if the respondents were able to satisfy that the petitioner's application was not a valid application for eviction on account of his failure to disclose the cause of action or make out any ground for eviction u/s 32(3) then the question of the applicability of section 32(1) did not arise.

12. The learned Counsel contended that what the petitioner has filed before the Rent Controller was not an application disclosing any ground for the respondents' eviction under the Act or any compliance with Rule 9(c) of the Rules. My attention was invited to the application moved by the late Manuel Mendes before the Rent Controller wherein it is shown that the only ground pleaded by him to get the respondents evicted was the non-payment of rents besides some other allegations made by him which are not at all relevant nor material for the purpose of revision. The learned Counsel urged that the non-payment of rents by itself is not a ground for eviction since the application did not specify the elements which are required to show that the application falls under the provision of section 22(2)(a) of the Act, namely, (1) that the tenant is in arrears in payment of rents due for a total period of 3 months; (2) that he has failed to pay or tender such arrears of rents within 30 days of the receipt of or of the refusal of a registered notice served on him by the landlord for such arrears;

(3) that a notice of demand was sent by the landlord to the tenant by registered post.

It was contended that only after the compliance of these three requirements by the landlord that the cause of action would be said as arising for him to file eviction application. In this case the learned Counsel made a strong grievance that the petitioners have suppressed the notices allegedly sent by him to the respondents and on this very ground it was urged that the Rent Controller should have rejected the application moved for the eviction of the tenant. I was taken by the learned Counsel through the said application in some detail. It is seen that in its para 2 the applicant has only stated that the respondent were irregular in payment of monthly rents and failed or neglected to pay rents from February, 1980 onwards except for the month of April, 1980 which was inadvertently received by his daughter. In para 3 it is stated that the respondents had opened a door by breaking the rear door of the shop and occupied the rear portion of the shop which is a separate and distinct compartment meant or kept for garage which fact again is not at all relevant or material in connection with the application for eviction on the ground of non-payment of rents. In its para 4 the petitioner says that a notice sent to the respondents through his advocate dated 2nd February, 1980 was received by them and replied by the respondent No. 2 by letter dated 15th February, 1980. Nowhere it is said what type of notice was this one or what are its contents. The petitioner has not clarified whether this notice was for demand of the arrears of 3 months rent. The notice itself was suppressed as well as its alleged reply although a reference is made that in his reply the respondent No. 2 alleged that a sum of Rs. 53,000/- was paid by him to the applicant and that the rear part was also leased by the petitioner to him at the monthly rent of Rs. 130/-.

In paragraph 5 the petitioner makes a reference to Civil Suit No. 87 of 1980 filed by him against the respondents and one Ramchandra Halwai the husband of respondent No. 1 which he says was dismissed by the Court on technical grounds. In para 6 the petitioner states that his daughter inadvertently received the rent for the month of April, 1980, and another notice was given to the respondent dated July, 1980. Again the notice has not been produced and the contents thereof also were not mentioned.

Thereupon paragraphs 7, 8 and 9 of the application do not also make out any cause of action for the petitioner and merely because the petitioner has alleged that the respondents were in arrears of rents it does not give him the right to seek for their eviction without serving on them a notice of demand for the arrears of rents for a period of at least 3 months. The learned Counsel then produced the copies of the notices allegedly sent by the petitioner to them which he has failed to exhibit along with his petition.

13. I have gone through those notices which I find the first notice dated 2nd February, 1980 refers only to the alleged opening of the door in the rear wall of the shop without his permission thus amounting to material alteration of the

building and on this ground alone the petitioner claims the right to terminate the tenancy of the suit premises. The notice therefore called upon him to quit, vacate and deliver vacant possession of the premises without making any reference to arrears of rents due to him or making a demand for the payment of such rents. The second notice dated 31st July, 1980 after making reference to the first notice dated 2nd February, 1980 mentions the fact that inspite of the tenancy of the respondent having been terminated by the petitioner in February, 1980, however, through oversight his power of attorney collected the rents from the respondents with regard to the suit premises for the month of April and for which a receipt was issued to them on 5th May, 1980. Therefore the petitioner says that he feels it necessary to issue a fresh notice by way of abundant caution terminating the tenancy of the premises by the end of August, 1980. Obviously this second notice also is purportedly meant to terminate the tenancy and cannot be said to be a valid notice of demand of arrears of rents. It does not state also on what grounds the tenancy is terminated by the petitioner. The learned Counsel then contended that if it is so and no grounds have been made out by the petitioner in his application for eviction obviously section 32(1) is not attracted. Hence remedy u/s 32(4) could not have been also availed of by the petitioner in this case.

14. The submissions of the learned Counsel are indeed well conceived and deserve acceptance. Shri Desai's contention that the bare reading of section 22 does not show that there is any bar for the Rent Controller to assume jurisdiction in case the legal requirements of the provision are not complied with, namely, of the application disclosing the fact that 3 months' arrears of rent are due by the tenant and that a notice of demand has been issued by the landlord to pay or deposit such arrears within 30 days from the date of the receipt of the notice to be sent to him by registered post, although there might be a bar to exercise jurisdiction to grant relief in case the notice is not given to the tenant by the landlord, does not appear either to be a sound or permissible proposition. In my view it is difficult to conceive that the Rent Controller could have assumed jurisdiction to entertain an application, when obviously the said application did not disclose to him, on its bare perusal, any cause of action which would entitle him to claim the relief sought for against the respondents. Thus, if ex facie the Rent Controller was not able to grant the relief prayed for by the landlord against the tenant there was no question of the Rent Controller validly entertaining such an application knowing in advance that on account of the landlord's failure to disclose the ground of eviction and to make a prima facie case of his right to claim it would not be open to him to order the eviction of the tenant on the ground of non-payment of the arrears of rents. Hence the stand taken by Shri Dessai that with or without notice the Rent Controller is always bound to entertain a landlord's application u/s 22 because nowhere in the Act it is mentioned that the lack of notice is curbing or restricting his jurisdiction to entertain such application appears to be wrong and cannot be supported.

15. Mr. Kakodkar then says that by applying the principle that in case there is no

valid eviction proceedings, section 32(1) is not attracted, obviously the respondent No. 2's application u/s 32(3) appears to be a mistake. It was urged that in this regard the respondent has expressly pleaded that no notice has been served on the respondents by the petitioner. It was submitted that this being a point of law which goes to the very root of jurisdiction of the Rent Controller and deals with the maintainability of the application the same can be agitated in this Court even if it had not been raised by the respondents before the Courts below. The learned Counsel invited my attentions in this regard to the case of N.D. Khanna Vs. Hindustan Industrial Corporation, which while dealing with a case of eviction u/s 14(1)(e) of the Delhi Rent Control Act wherein the landlord did not plead one of the ingredients of the ground in his application, the Court held that when the eviction application does not contain any of the ingredients u/s 14(1)(e) the petition is liable to be rejected in view of the provisions of Order 7, Rules 1 and 11 of the Civil Procedure Code. If a plaint does not disclose a cause of action it is liable to be rejected under Order 7, Rule 11(a) C.P.C. specially when the tenant in his written statement has taken a specific plea that the plaint does not disclose a cause of action. When a plaint or an eviction application is filed it is the duty of the Court or the Controller to see whether the plaint or the eviction application contains the allegations which must be proved before a decree or an order of eviction can be passed. If the allegations in the plaint or the eviction application are insufficient or the facts constituting the cause of action are not disclosed, the Court or the Controller must reject the same. The Court also observed that in the absence of specific pleadings in the eviction petition mere reference of the notice does not mean that there is pleading of facts constituting the cause of action. Further in the absence of any specific pleading the fact that the evidence was recorded without any objection is immaterial. No amount of evidence can be looked into a plea which was not raised. In other words, the ruling lays down the principle that you cannot be allowed to prove at the end what you have not pleaded at the very beginning of your application.

16. It was further contended that assuming that section 32(1) would apply in this case the application of the respondent No. 2 u/s 32(3) was a valid one. The learned Counsel urged that section 32(3) ex facie contemplates the existence of a dispute as to the amount of rent due by the tenants to the landlord to be paid or deposited by them under sub-section (1). It thus normally presupposes a case of a sole tenant and not a case of a joint tenancy. The learned Counsel has drawn my attention to the lease deed dated 11th September, 1972 which is executed by the late Manuel Mendes with the respondents. Nowhere in the said deed, the learned Counsel submits, it is said that the tenancy created in their favour is a joint tenancy which is quite different from a situation of common tenancy wherein the rents and the leased object itself is to be shared between the tenants. It was in this context, according to the learned Counsel, that the respondent No. 2 raised the dispute before the Rent Controller u/s 32(3).

17. In the case of Mahomed Jusab Abdulla v. Fatmabai Jusab Abdulla AIR 1948 Bom. 53, this Court has observed that there is a presumption in India which

must be always in favour of tenancy-in-common rather than a joint tenancy. There is nothing to prevent the Court coming to a contrary conclusion if that presumption is displaced by clear and cogent language to the contrary. Thus, according to the learned Counsel, the presumption should be of a common tenancy and not of a joint tenancy. Common tenancy postulates that each tenant should have only a share in the tenancy. In the instant case the respondents were justified, on the face of the lease deed itself from which nothing conclusive emerges with regard to its being a joint tenancy, to ask the Rent Controller to decide or to determine how much each of the respondents had to pay out of the rent stipulated in the agreement. Therefore the respondents' application was a valid application and an enquiry was to be directed to decide who was liable to pay rent and to what extent the rents had to be shared between the tenants.

18. There is certainly a very valid point in this submission of Shri Kakodkar. A bare perusal of the agreement does not seem to support the claim of the petitioner that the same positively shows that a joint tenancy has been created by the petitioner in favour of the tenants in respect of the suit premises. In this regard the observations of this Court in the aforesaid ruling relied by the respondents' learned Counsel assume importance and are to be borne in mind to hold that the presumption in this country always points out to the fact that a tenancy executed by more than one tenant is a common tenancy rather than a joint one. Therefore in the absence of a clear indication in the lease agreement itself that what was aimed at by the deed is a joint tenancy it is always open to the parties to claim a case of common tenancy and to seek clarification as to what is the share of each tenant with regard to the payment of the rent to the landlord when an applications made by him for eviction on the ground of non-payment of rents. No doubt that in that case the landlord is always free to claim and prove that the tenancy is not a common but a joint one but unless this claim is not unmistakably reflected in the deed of lease it is impossible to accede to the contention of the learned Counsel for the petitioner that the deed dated 11-9-1978 has created in favour of the respondents a joint tenancy rather than a common tenancy. This being the position I am satisfied that the dispute raised by the respondent No. 2 appears to be a valid dispute in the facts and circumstances of the case, coming thus within the purview of sub-section (3) of section 33 of the Act.

19. There is no doubt that the dispute referred to in the aforesaid provision is a dispute with regard to the quantum of rents payable by the tenants to the landlord. However, the said dispute need not be always a dispute directly raised by the tenant against the landlord. If this may be true in a case where there is only one tenant it cannot be ruled out that when there is more than one such dispute may arise between them which ultimately amounts to a dispute between the tenants and the landlord with regard to the amount of rents claimed by him from them in respect of the suit premises. If the landlord claims the whole amount of rents from any of them it is always conceivable that each of the tenants might dispute that any of them individually is bound to pay the full

amount more so when in the instant case there is evidence to show that even prior to the filing of the application by the petitioner there was already a dispute between them so as to their share in the partnership which was sought to be terminated with regard to the business run in the suit premises. The said evidence also indicates that consequent upon that dispute the suit shop had been closed by an order of the Court and the respondents were out of the actual business which they were holding in the premises. Therefore the plea made by the respondent No. 2 to determine the share of each of the tenants in respect of the rent payable to the landlord seems to be a quite reasonable and justified one in the facts and circumstances of the case thus falling within the purview and spirit of sub-section (3) of section 32 of the Act which refers to any dispute as to the amount of rent due to the landlord by the tenants to be paid or deposited by them under sub-section (1) of section 32. In this regard both the Courts below have held that such dispute could arise and the Rent Controller found that in the circumstances an enquiry should have been held for the purpose of determining the share of each of the tenants in the rents payable to the landlord. The Administrative Tribunal has agreed with this view taken by the Rent Controller and held that on facts there was sufficient ground for the Rent Controller to refuse to entertain the petitioner's application for summary eviction of the respondents by stopping the proceedings u/s 32(4) of the Act as prayed for by him. I have no reasons to believe that these findings of the Courts below are perverse or without jurisdiction, thus meriting interference on the part of this Court in the exercise of powers under Articles 226 and 227 of the Constitution.

20. On the other hand after going through the several applications of the respondents I am in agreement with the learned Shri Kakodkar that even on merits of the case the conduct of the tenants in this whole affair is to be looked into and viewed in the light of the principles laid down in the pronouncements of this very Court on the question of a correct interpretation of the powers vested on the Rent Controller u/s 32(4) of the Act. The learned Counsel has urged in this regard that the facts of the case do not suggest that at any stage of the proceedings there was a contumacious or wilful refusal on the part of the respondents, as tenants, to pay rents due to the petitioner. Thus we should consider the respondents' mens rea and their good faith as well as the willingness expressed by them to pay the rents due once the disputes between them were sorted out by the competent Civil Court.

21. In the case of Roque Antonio Judas Tadeu Caetano Ribeiro v. Angelo Cassiano Neves e Souza & 4 others. 1989(2) G.L.T. 313 a Division Bench of this Court held that it is not mandatory for the Rent Controller to make an order stopping the proceedings u/s 32(4) but the power is directory and at his judicial discretion keeping in mind that the Act is a beneficial legislation. Thus the word "shall" used in the provision in the context of tenant's right to show case to the contrary must be read as "may" and as vesting discretion in the authorities to make an order of stopping the proceedings and directing the tenant to put the landlord in possession only after taking into consideration all the facts and circumstances.

The Court observed in this regard 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. The circumstances of the case must be considered.

22. Similarly in another case of Joao Xavier Pinto Vs. Oswald J.C. Velho and Others, a Division Bench of this Court, after taking note that sub-section (4) of section 32 provides cause to be shown by the tenant which must however be a sufficient cause not for the purpose of failure to pay but for the purpose of stopping or not all further proceedings and making an order directing the tenant to put the landlord in possession, has observed that section 32 has been enacted to protect the interest of the landlord to secure rents from cantankerous tenants who fail to pay or deposit before the Controller or the appellate or the revisional authorities so that landlords are not driven to file different proceedings for recovery of rents in another forum.

23. In the instant case the respondents have sought to explain as to how they have not been able to pay or deposit the rents due to the litigation which was going on between them with regard to the termination or dissolution of the partnership. In this regard the application of the respondent No. 2 dated 17th April, 1984 has to be read with the application of the respondent No. 1 dated 27th April, 1984 wherein she had informed the Rent Controller that the Civil Suit No. 14 of 1979 on the termination of the partnership had been finally decided by the Civil Court and the possession of the premises ordered to be given to her jointly with her husband. Therefore since the right of possession has been held in her favour jointly with her husband both were willing to deposit the entire amount of rents. The Rent Controller has further been told that the petitioner landlord had been informed of this development and he had agreed to receive the rents directly and consequently withdraw the case. In the circumstances the respondent stated that there was no need to file any written statement in the case. Thus, the cumulative effect of this stand taken by the respondents reveals their good faith and shows that none of them has displayed contumacious conduct aimed at depriving the landlord from payment of arrears of rents or harassing him in respect of their dues. Similarly the application of respondent No. 1 dated 19th September, 1984 again conveying her willingness to deposit the arrears of rent as and when required by the Court reflects her readiness to make such payment and rules out the possibility of holding that this appears to be a case wherein a contumacious tenant is seeking to harass the landlord.

24. In the case of Satyavijay Anna Tandel v. Administrative Tribunal of Goa, Daman & Diu, 1990 (XCII) Bom. L.R. 580 a Single Judge of this Court has reiterated the view taken by the rulings cited above and held that section 34(2) must be resorted to sparingly because it is a provision applicable in interrorem It is only to check and to correct contumacious conduct on the part of the tenants.

It is applicable only in such cases where the tenant despite opportunities being given to him and despite the order to deposit refuses or neglects to deposit the rent then due in Court.

25. It thus follows that the findings arrived at by the Courts below on the basis of the material on record need not be disturbed in the exercise of extraordinary or supervisory jurisdiction of this writ Court because, in my judgment, they seem to have taken a correct view of the matter in the special facts and circumstances of this case.

26. In the result I see no merit in this petition which therefore deserves to be dismissed.

Rule accordingly discharged with, however, no order as to costs.