

(1993) 07 GUJ CK 0001
In the Gujarat High Court

Shivabhai Jijidas Patel (Decd.) through his Heirs	APPELLANT
Vs	
Chandrashekhar Rajnarayan Pande	RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(4), 28, 29, 29(1), 29(2)
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115

Citation : (1994) 1 GLR 501

Hon'ble Judges : B.S. Kapadia, J

Bench : Single Bench

Judgement

B.S. Kapadia, J.—Mr. Yatin Soni, learned Advocate for the respondent has argued this matter two days in instalments and he covered major part of his arguments. However, today though the matter was called out repeatedly he did not remain present. Therefore, the judgment is proceeded with.

2. The present revision application is filed by the original plaintiff-landlord against the order dt. 24-1-1991 passed by the learned 2nd Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur in Civil Revision Application No. 3 of 1990 which was filed by the original defendant (tenant) against the order dt. 31-1-1990 passed by the learned 2nd Joint Civil Judge (J.D.), Mirzapur dismissing the Restoration Application No. 87 of 1980.

3. The facts of the case in brief are that the petitioner-plaintiff has filed the Regular Civil Suit No. 540 of 1983 against the respondent (original defendant) u/s 28 of the Bombay Rent Act for recovering the possession of the suit premises on the ground of arrears of rent, bona fide requirements and change of user. In the said suit summons was served on the defendant and he filed written statement (Ex. 8) on 29-9-1983. Thereafter the defendant did not remain present. The issues in the said suit were framed at Ex. 9 on 3-2-1984. Even the plaintiff-landlord took out an application at Ex. 20 u/s 11(4) of the Bombay Rent Act on 12-10-1984. A copy of the said application was also served on the

defendant as it was sent Under Certificate of Posting. Thereafter the plaintiffs evidence was recorded at Ex. 23. However, neither the original defendant nor his Advocate remained present and ultimately ex-parte decree in the aforesaid suit was passed on 16-10-1985. The said decree was executed on the original defendant in Execution Application No. 52 of 1987 on 16-12-1987 and according to the landlord on the next day, i.e., on 17-12-1987 the suit premises were let out to another tenant.

4. In spite of this the Restoration Application No. 87 of 1988 was filed by the defendant on 1-1-1988 along with an application for condoning the delay in filing the restoration application. After condoning the delay the said application was heard and it was dismissed by the learned trial Court Judge. Against the said decision the aforesaid Revision Application was filed. It came to be allowed. Hence the present C.R.A.

5. The first contention raised by Mr. Yatin Soni, learned Advocate for the respondent is that the revision application u/s 29 of the Bombay Rent Act is not maintainable and it should be a revision application u/s 115 of the C.P.C. It may be stated that so far as the nomenclature is concerned, the petitioner has filed this revision application u/s 29(2) of the Bombay Rent Act as well as u/s 115 of the C.P.C.

6. Mr. Soni, learned Advocate for the petitioner while raising this preliminary objection has submitted that as the restoration application is filed under Order IX Rule 13 of the C.P.C. Revision Application only u/s 115 of C.P.C. would lie. It may be mentioned that so far as Section 29 of the Bombay Rent Act is concerned, Sub-section (1) provides for appeal from a decree or order made by the Court exercising jurisdiction u/s 28 of the Act. In the proviso to said sub-section certain exceptions are given in respect of which no appeal would lie. There is not a single exception which provides that no appeal would lie against the order refusing to restore the suit after setting aside the ex-parte decree. Therefore, appeal u/s 29(1) would lie. So far as Sub-section (3) of Section 29 is concerned, it provides that Where no appeal lies under this section from the decree or order in any suit or proceeding in the City of Ahmedabad the Bench of two Judges and elsewhere the District Court, may for the purpose of satisfying itself that the decree or order made was according to law, call for the case in which such decree or order was made and pass such order with respect thereto as it thinks fit. While Sub-section (2) of Section 29 of the Rent Act provides that no further appeal shall lie against any decision in appeal under Sub-section (1) but the High Court may, for the purpose of satisfying itself that any such decision in appeal was according to law, call for the case in which such decision was taken and pass such order with respect thereto as it thinks fit. Therefore, bare reading of Section 29 of the Rent Act would make it clear that revision u/s 29(2) would lie as no further appeal would lie to this Court against the order passed by the District Court u/s 29 of the Rent Act, It may be mentioned that how the appeal or revision can be filed or regulated and which is the procedure to be followed has been provided by the

Legislature u/s 31 of the Rent Act wherein it is provided that the Courts specified in Sections 28 and 29 shall follow the prescribed procedure in trying and hearing suits, proceeding, applications and appeals and in executing orders made by them. When that is so, it is clear that in a suit under the Rent Act revision would lie to this Court u/s 29 even against the order passed in appeal setting aside the ex parte decree and restoring the suit. In that view of the matter there is no need to refer to any case law.

6.1. However, Mr. Medh, learned Advocate for the petitioner has pointed out that there is a direct judgment of the Division Bench of this Court in the case of Keshavlal v. Chinitbhai (1967) GLR 772 wherein similar question was raised as to whether appeal would lie before the Bench of the Small Causes Court against the order deciding the restoration application under the Bombay Rent Act. It is held in the said case that order made under Order IX Rule 13 of the C.P.C. by the Court exercising jurisdiction u/s 28 of the Bombay Rent Control Act refusing to set aside an ex parte decree passed by it is appealable to the Bench of two Judges of the Small Causes Court as provided u/s 29 of the Act. The said Division Bench judgment is binding to the single Judge of this Court and I fully agree with the ratio laid down in the said judgment. When that is so, the natural corollary would be that when no further appeal lies u/s 29(2) of the Rent Act to this Court and hence only the revision application would lie against the order passed in appeal allowing the Restoration Application u/s 29(2) of the Rent Act.

7. This question was required to be dealt with because it was raised as a preliminary point. Secondly, the scope of Section 29(2) of the Rent Act is larger than the scope of the Revision Application u/s 115 of the C.P.C. When this Court examines the question as to whether the lower appellate Court has decided the case according to law, it refers to the decision as a whole. It has to consider the overall decision.

8. Mr. Medh, learned Advocate for the petitioner has submitted that the entire order passed by the lower appellate Court is bad and illegal and has resulted in miscarriage of justice inasmuch as the negligence on the part of the defendant-tenant has been totally ignored by the learned Judge in the name of doing substantial justice to the tenant. He submitted that gross inaction and/or negligence under no circumstances can be treated to be a sufficient cause which confers jurisdiction on the Court to restore the proceedings by setting aside the ex-parte decree, because that sufficient cause should have prevented the defendant-tenant from remaining present on the date when the suit proceeded for hearing and when it was decided.

9. The ground which is advanced by the defendant-tenant in this case is that when he filed the written statement on 29-9-1983 his Advocate Mr. P.M. Bhatt told him that he (defendant) need not come unless he calls him and therefore, he did not turn up at all. This will be a stock argument in every case. In this case unfortunately Mr. P.M. Bhatt, Advocate has expired on 29-9-1987, i.e., before the decree was executed and before the present application for restoration was filed.

Therefore, there is no question of getting any affidavit from the Advocate corroborating what the defendant-tenant says. However, on that point only bald statement of the defendant cannot be considered as true. It requires to be scrutinised from the circumstances of the case. As stated above, in this case the issues were framed on 3-2-1984 at Exh. 9 and the plaintiff filed an application at Exh. 20 u/s 11(4) of the Rent Act on 2-10-1984 and copy thereof was served on the defendant and the order on the said application was passed on 14-2-1985. Still however, the defendant did not turn out. A question was raised on behalf of the defendant as to why the notice was sent to him Under Certificate of Posting and why it was not served on his learned Advocate and/or why it was not sent by Regd. A.D. It is for the plaintiff to consider and he wanted that the notice of the application should reach the defendant at the earliest. If it was sent by Regd. Post possible there would have been delay and there were chances of further delay in case of refusal by the defendant. The fact remains that it was sent Under Certificate of Posting and it was received by the defendant. When it was received by the defendant it is immaterial as to how it was sent and why it was not served on the learned Advocate. The very fact that though notice was served on the defendant he did not remain present clearly shows that no such instruction was given by the learned Advocate. This ground is made out in order to shield the gross negligence on the part of the defendant in not remaining present.

10. The learned Appellate Judge has observed in para 18 of his judgment that "No doubt there is negligence on the part of the defendant, but should be ignored while scaling the sufficient cause." This observation of the learned Judge clearly indicates that he has given a go-bye to the total negligence on the part of the defendant in not remaining present even on the date when the ex-parte decree was passed. Thus, the learned Appellate Judge has committed an error of jurisdiction in ignoring the negligence on the part of the defendant and setting aside the decree in the name of doing substantial justice. If there was no sufficient cause which prevented the defendant from remaining present on the date of hearing of the suit, the Court has no jurisdiction to set aside the ex-parte decree. If there is sufficient cause certainly it would be within the discretion of the Court to set aside the ex-parte decree. However, when there is no such sufficient cause and when it is a clear case of gross negligence on the part of the defendant the appellate Court had no jurisdiction to set aside the ex-parte decree and restore the suit. This is a jurisdictional error committed by the learned Appellate Judge. It is pertinent to note that in setting aside the decree there will be pliscarriage of justice inasmuch as undisputedly the possession of the suit premises was taken in execution of the decree by the petitioner on 16-2-1987 and immediately thereafter on 17-2-1987 the premises were let out to some other tenant. When that is so, if the decree is set aside it would create further complication and the person who is lawfully inducted in the suit premises will have to face various litigations for protecting his possession of the suit premises.

11. In that view of the matter the order passed by the learned Appellate Judge cannot be said to be according to law when it is examined as a whole. Therefore,

it deserves to be set aside and is hereby set aside. The order passed by the trial Court dismissing the restoration application is hereby confirmed. Rule is accordingly made absolute with no order as to costs In view of the order passed in the C.R.A. no order on the C.A.