

(1994) 06 BOM CK 0058
In the Bombay High Court
Case No : Writ Petition No. 128 of 1990

Shri Mariano Silveria

APPELLANT

Vs

Antonio Silveira and Others

RESPONDENT

Date of Decision : 28-06-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 32(4)

Citation : (1995) 1 BomCR 487

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

Bench : Single Bench

Advocate : A.A. Agni, for the Appellant; L.V. Talaulicar, for the Respondent

Final Decision : Allowed

Judgement

E.S. Da Silva, J.—This writ petition is challenging the judgment and judgment and order of the Administrative Tribunal, dated 10th May, 1990, in Eviction Appeal No. 41/85 which has affirmed the judgment and order of the Additional Rent Controller, dated 30-4-1985, in Case No. Rent/ARC/73/79. By the aforesaid order the learned Additional Rent Controller has allowed an application of the respondent No. 1 u/s 32(4) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter called the Act), stopped the proceedings instituted by the respondent No. 1 against the petitioner and directed the petitioner to put the respondent No. 1/landlord in possession of the suit premises within sixty days from the date of the order.

2. The respondent No. 1 had filed an application for eviction against the petitioner before the Rent Controller on 15-9-1979 on the ground that the petitioner was irregular in the payment of rents and since March, 1979 he was in arrears of rents. The further ground was that some nuisance was being committed by the petitioner like heaping rejects and wasting water. The petitioner filed his written statement to the application denying all the allegations

made by the respondent No. 1. While the proceedings were going on the respondent No. 1 came with a fresh application u/s 32(4) of the Act which was stating that the petitioner had failed again to regularly deposit the rents during the pendency of the application and therefore the proceedings should be stopped and the respondent be put in possession of the suit premises. The said application was granted by learned Additional Rent Controller by the impugned judgment and order which is the subject matter of the petition.

3. It is case of the petitioner that he is the tenant of the respondent No. 1 in respect of two rooms of House No. 198-a situated at St. paulo, Taleigao and belonging to his brother (respondent No. 1). There was no written agreement executed between him and the respondent No. 1 and the lease was merely oral. The rent agreed was Rs. 200/- per month which was payable upto the 10th of the next month. Therefore and since the rents were payable upto the 10th of the subsequent month as per Rule 7(20 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Rules, 1969 (hereinafter called the Rules) the petitioner was entitled to make the deposit within 15 days from the due date i.e. upto 25th of the next month. Before filing the eviction application a notice dated 5-7-79 was served on him to which he gave his reply dated 23-7-79.

4. Mrs. Agni, learned Counsel appearing on behalf of the petitioner has submitted that in the eviction application the respondent No. 1 has nowhere mentioned when the rents were payable to him i.e. whether it was on the first day of the next month or on any other day of the next succeeding month. Similarly in the application u/s 32(4) of the Act nothing in this regard also was said by the respondent. The learned Counsel then contended that in any event the delay with regard to the month of July was only of one day and while in respect of the month of May, 1981 this was for the period of one year and nine months, that also due to forgetfulness of his daughter Irene. All other alleged delays mentioned by respondent No. 1 in his application had been condoned by the Administrative Tribunal and the Rent Controller. Therefore the only faults which could be attributed to him were the ones with regard to the month of July, 1980 and the month of May, 1981. It was further urged by the learned Counsel that section 32(i) is a provision which enjoins a tenant to deposit the rents in arrears if they want to contest the eviction proceedings filed by the landlord so as to ensure the landlord to recover the amount of the rent due without requiring to resort to any further proceedings in the Court and get involved in separate litigation. There is also a provision u/s 32(4) of the Act giving discretion to the Rent Controller, even in case of failure on the part of the tenant to regularly deposit the rents due, whereby the penalty of stopping the proceedings and directing the summary eviction of the tenant in case there is no sufficient cause for the delay. Thus the learned Counsel argued that in these circumstances at the highest the delay complained of by the respondent No. 1 was negligible as far as the month of July, 1980 which according to the petitioner was only for one day. With regard to the failure to deposit the rents in the month of May, 1981, it was submitted by the learned Counsel that this was entirely due to the fact that his

daughter Irene who, according to his wife who was sick and used to regularly look after these deposits of rent and therefore had entrusted Irene to make the deposit in that month, forgot to comply with her instructions and for this reason the said rent remained without being paid. The learned Counsel then made a grievance that both the courts below erroneously held that this cause shown by the petitioner was not sufficient to explain the delay and on the contrary there was sufficient ground to justify the petitioner's summary eviction from the suit premises. According to the learned Counsel the order under challenge was passed against settled decisions of this Court because in the facts and circumstances of the case the said delay regarding the month of May, 1981 should have been treated as an aberration being thus to be foregone. In this regard the learned Counsel submitted that a person who has paid the monthly rents regularly throughout in case he had failed to deposit the rent for one month only, it is to be presumed that this was done by a bona fide mistake. Besides, the learned Counsel urged, neither the Court nor the landlord had pointed out to him before or on earlier occasions that there was default for one month and when the default was brought to the notice of the Court by the landlord only after about 9 months he was notified of the landlord's application after a period of more than one year from that application. Thereafter immediately the petitioner effected the payment of the defaulted installment of rent. Reliance was placed by the learned Counsel in three judgments of this Court and one judgment of the Supreme Court. The first two are in the cases of Roque Antonio Judas Tadeu Catetano Ribeiro v. Angelo Cassiano Neves Souza & others, 1989(2) GLT313 and Shir Joao Xavier Pinto v. Shri Oswald J.C. Velho and others, 1990 10 GLT 116 both these being Division Bench judgments, while the third one is in the case of Satyavijay Anna Tandel v. The Adm. Tribunal of Goa, Daman and Diu and others, in Writ Petition No. 456 of 1988, this being of a decision of Single Judge of this Court. The last one is in the case of Manmohan Kaur Vs. Surya Kant Bhagwandi, . All these rulings were cited by the learned Counsel to drive home the point that section 32(4) of the Act is not attracted when there is no deliberate intention in committing default or delay and when the payment is done on the first available opportunity after the receipt of the notice for default which, in other words, means that only a willful and persistent defaulter should be visited with the consequences contemplated in the aforesaid provision.

5. In reply Shri Talaulikar, learned Counsel for the respondents, has firstly submitted that in the absence of any express stipulation consequent upon the fact that there was only an oral agreement between the parties the latest day for the payment or deposit of the rent should be the 15th day of the next month. Hence it was the statutory date which would come into play in terms of section 17 of the Act r/w Rule 7(2) of the Rules. It was further contended by the learned Counsel that the Rent Controller had considered the facts of the case in detail and after proper application of mind found there was no sufficient cause shown by the petitioner. The Tribunal has affirmed this order which means that there

were concurrent findings of facts on the matter. Thus, according to the learned Counsel, these concurrent findings should not be interfered with by this Court under Articles 226 and 227 of the Constitution unless they were perverse or capricious and passed on the basis of no evidence at all. The learned Counsel relied for this purpose on several decisions of the Supreme Court, namely, in the cases of AIR 1975 1297 (SC) , Trimbak Gangadhar Telang and Another Vs. Ramchandra Ganesh Bhide and Others, , Smt. M.M. Amonkar and Others Vs. Dr. S.A. Johari, , Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, and Ganpat Ladha Vs. Sashikant Vishnu Shinde, , which in sum and substance have reiterated the principle that the power of superintendence by the High Court under Article 227 being an extraordinary one cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory powers as a Court of appeal. The High Court cannot thus interfere with the findings of fact recorded by the subordinate Tribunals and its function is limited to examine whether they have acted within the limits of its authority. The same decisions have also held that concurrent findings of fact should not be interfered unless they are perverse and based on no evidence to justify it or have resulted in manifest injustice. Therefore merely because two views are possible on the facts of a case it is only when an order of the Tribunal is violative of the fundamental basic principles of justice and fair play or when patent or flagrant errors of procedure of law have crept out then the Court was justified in intervening under Article 227 of the constitution.

6. It is not necessary for us to elaborate any further on these decisions since there cannot be any dispute on the propositions sought to be laid down in the aforesaid rulings. It was also urged by the learned Counsel that the Act is meant to give protection not only to the tenants but also to the landlords. It is in this context that the discretion u/s 32(4) has to be exercised by the Court as a judicial discretion. This, according to the learned Counsel, is the real scope of the power u/s 32(4) of the Act which is merely a directory one and not a mandatory power. The Court should thus exercise its discretion under the aforesaid provision in the interest of both the tenant and landlord so as to advance the cause of justice.

7. On facts the learned Counsel sought to impress upon me on the failure of the petitioner to deposit the rent in the month of May, 1981, even assuming that the said parment had been entrusted by the petitioner's allegedly sick wife to his daughter Irene. It was contended that when one goes to make a deposit of rents the person who does it is always given a duplicate of the challan at the very time the deposit is made. Being so, it is not permissible for any person in such a situation to plead a bona fide mistake or wrong impression that the rent has been deposited. The learned Counsel urged that the whole story put up by the petitioner in this respect appears to be a concocted one. First of all there was no medical certificate produced by the petitioner to substantiate the alleged illness of his wife. There was also no explanation on the part of the petitioner as to why he personally did not make the deposit or payment in the month of May, 1981, if

his wife was sick and unable to do it on behalf of her husband as usual. Further, no affidavit of the petitioner's daughter Irene had been made available before the Court to support the case of the petitioner that inspite she having been asked by her mother to make a deposit she ultimately forgot to comply with her request. Besides it was submitted that even assuming that the daughter had been asked to make the deposit there was no explanation as to why in that case neither the petitioner nor his wife did check with Irene as to whether the payments had been actually done by her or made an attempt to secure the copy of the chalan which he was expected to collect from the concerned authority. Thus, the learned Counsel urged, it could not be said that there was anything perverse in the findings of both the courts below when they refused to accept the petitioner's application which regard to his failure to make a timely deposit of the rent due in the month of May, 1981. According to the learned Counsel the Rent Controller's order declining to entertain such plea was not a summary order. On the contrary, the Rent Controller had elaborately discussed the facts and applied its mind to the cause shown by the petitioner in this regard before he found it not acceptable.

8. In this view of the matter the learned Counsel contended that in the facts of the case and looking to the judgments of both the courts it was difficult to hold that the findings recorded were perverse or based on no evidence and that the same were revealing non-application of mind.

9. Although there is no difficulty in accepting the propositions of law canvassed by the learned Counsel for the respondent, I am however afraid that on facts the impugned order of both the courts below appear to have grossly overlooked the true spirit of the judgments of this very Court which were relied by Mrs. Agni on behalf of the petitioner. In this regard we may usefully extract from these decisions some of the relevant passages which seem to lay down the correct law on the contentious issue which is deemed to be the real subject matter of this petition.

10. In the case of Roque Antonio Judas Tadeu Caetano Ribeiro v. Angelo Cassiano Nevese Souza and others, 1989(2) GLT 313, while dealing with similar cases u/s 31(4) of the Act, the Division Bench of this Court observed as follows :

"The next question, however, is whether it is mandatory for the Rent Controller to stop all further proceedings and to direct the tenant to put the landlord in possession in case of every default on the part of the tenant. In our opinion, the answer must be in the negative. Section 32(4) while directing that the Controller or the appellate or revisional authority shall stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building, if the tenant fails to pay or deposit the rent as mentioned in section 32, further lays down that such an order shall be made "unless the tenant shows sufficient cause to the contrary". That means that the tenant is entitled to satisfy the Court that circumstances exist in view of which the Court ought not to make an order under sub-section (4) of section 32 against him. If every default,

however unintentional, whether willful or due to circumstances beyond the control of the tenant were to be a ground to make an order against him, then the provision giving the tenant an opportunity to show cause would become superfluous. Though the word "shall" is used in sub-section (4), in the context of the tenant's right to show cause to the contrary, it must be read as "may" and as vesting discretion in the Rent Controller, the appellate and revisional authority, as the case may be, to make an order stopping all further proceedings and directing the tenant to put the landlord in possession of the building only after taking all the facts and circumstances into consideration. It is not mandatory for the Rent Controller to put the landlord in possession u/s 32(4) no sooner than a default is committed by a tenant. While upon every default that landlord may apply for being put in possession, the tenant is entitled to show cause to the contrary and it is for the Court to consider whether the cause shown by the tenant is sufficient or not and whether the order prayed for by the landlord should be made or not. In exercising the discretion it is necessary for the Authorities under the Act to bear in mind the scheme of the Act. u/s 22 the landlord is vested with the right to seek eviction if the tenant is in arrears of rent due by him for a total period of three months or more and has failed to pay or tender such arrears within thirty days of the receipt of a notice. But then, if the tenant pays or deposits that amount within thirty days of the service of the summons of proceedings on him, as laid down in sub-section (3) of section 22, the landlord has no right to evict. If the Controller is satisfied that the tenant's default to pay or tender the rent has not been without reasonable cause, sub-section (4) further empowers the Controller to give the tenant a reasonable time to pay or tender the rent due by him. In our view, if eviction of a tenant can be sought u/s 22 only after giving such opportunity to pay arrears of rent, it could not have been the intention of the Legislature that for any and every default, however unintentional it may be, to vest the landlord with an absolute and indefeasible right to seek eviction of the tenant and deny to the Rent Controller and the other Authorities under the Act the jurisdiction to consider whether there was any reasonable cause or not for such default. Not only having regard to the language of section 32 and in particular sub-section (4) of section 32, but also having regard to the scheme of the Act, it must be held that the power vested in the Rent Controller and other authorities to stop proceedings and direct the tenant to put the landlord in possession of the building is directory and not mandatory. Some of the factors which would be relevant for exercising this power, would be whether the default is for a short period or for long period, whether the default is willful or unintentional, whether the default is stray or persistent, whether payment was made at the earliest opportunity or after cantankerous contest, whether the default was bona fide or to harass the landlord; in short, what has to be found is whether in the facts and circumstances of the case, there was reasonable cause for non-payment or deposit of rent within such time as is prescribed. In our view, the provision contained in section 32(10 is intended to secure payment on pain of the tenant being precluded from contesting the proceedings and on being required to put

the landlord in possession; it is not intended to serve as an order of eviction u/s 22. Section 32(4) vests a discretion in the Authorities constituted under the Act to make an appropriate order, taking into account all the facts and circumstances of the case. It is significant to note that the Act does not specifically vest any power in the Authorities to dismiss or allow the main petition for eviction; it only empowers them to stop the proceedings. No doubt this is a provision to enforce payment of rent regularly during the pendency of the proceedings and to deny opportunity to the defaulting tenant to resist the proceeding for eviction. But keeping in view the fact that this provision is part of a beneficial legislation and considering it in the light of the scheme of the Act, we are unable to hold that the Legislature intended to make it mandatory for the Court to put the landlord in possession no sooner than the tenant committed default wholly ignoring the circumstances in which it occurred. This Act being a beneficial legislation, an interpretation that advances the object of the Act compels us to take the view that in case of default in the payment or deposit of rent pendente lite, the Authorities constituted under the Act are not denied the discretion to make appropriate orders having regard to the facts and circumstances of the case. Section 32(4) is not mandatory but is directory."

11. A similar view was taken again by a different Bench of this same Court in the case of *Shri Joao Xavier Pinto v. Shri Oswal J.C. Velho and others*, 1990(1) GLT116, wherein the Court ruled that if it was true that the Act was enacted for the purpose of giving protection to tenants and arresting their eviction by rapacious landlords and therefore the rights of landlords were curtailed to seek eviction on certain restricted grounds, it was equally true 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 them before the Controller or the appellate or revisional authorities so that the landlords are not driven to file different proceedings for recovery of rents in another forum.

12. In another decision dated 13th November, 1990, a Single Judge of this Bench, in the case of *Satyavijay Anna Tandel v. The Administrative Tribunal and others*, Writ Petition No. 466 of 1988, has emphasized the same position while holding that section 32(4) of the Act must be resorted sparingly. The Court observed that it is a provision enacted in *terrorem* because it is applicable only to check and correct contumacious conduct on the part of the tenants. It was only attracted in case where the tenant despite opportunities being given to him and despite the order to deposit the rents due in Court fails to make the payment of the arrears. But if the tenant on receipt of such show cause notice pays the arrears then due and assures its regular payment in future there could not be any ground for eviction just because he had delayed to deposit in the past.

13. In the judgment of the Supreme Court referred to above in the case of *Manmohan Kaur Vs. Surya Kant Bhagwandi*, , which was a case under the Bihar Rent Control Act dealing with a situation of delay or failure to deposit rents by tenant in eviction suit, the Supreme Court observed in this respect that the

courts must from a proper perspective Judge the question whether the delay or failure to deposit the rent in terms of order u/s 13 of the Act has been properly explained and if that delay has been properly explained, then the Court has a discretion to excuse the delay, but if the delay has not been properly explained then the Court has no discretion. However on facts the Court held that where there was a genuine mistake in failure to deposit rent of two months under the mistaken belief that the rent for those two months had been deposited, and the challans for subsequent period were passed without any objection, it was held that the delay having been properly explained, and the rent having been paid subsequently the defence could not be struck off.

14. It thus follows that the discretionary power u/s 32(4) is to be held as exercisable only in relation to cantankerous or contumacious defaulters and/or in case of a congenital and compulsive litigant who inspite of being given an opportunity to behave is resisting the payment of rents due only to harass the landlord. The said provision is certainly not meant or intended to be acted upon those who commit only inadvertent mistakes which can be condoned in view of their overall past conduct. Thus, in my view, the facts of the case seem to be obviously not sufficient to enable us to come to the conclusion that the petitioner can be held as a cantankerous cantankerous or contumacious defaulter only because he has defaulted to pay the rent in time during the month of July and this also for a single day and on another instance in the month of May, 1981 on account of his failure to make the deposit of the due rent for a period of about one year and nine months. Indeed both these delays have been sought to be explained by the petitioner. But even assuming that the justification of the alleged mistake or forgetfulness advanced by the petitioner is not to be reasonably accepted, as contended by Shri Talaulikar, the fact remains that even in that case it is impossible to subscribe the view that in the circumstances brought on record it can be safely concluded that no sufficient cause was shown by the petitioner so as to avoid the drastic consequences contemplated in section 32(4) of the Act.

15. In the result I find merit in this petition which is therefore bound to be allowed. The judgment of the Administrative Tribunal dated 10th May, 1990 affirming the order of the Addl. Rent Controller dated 30th April, 1985 is hereby quashed and set aside. The Rent Controller shall go on with the eviction proceedings and adjudicate the same on its merits. Needless to say that in view of the fact that since admittedly these are old proceedings, the learned Rent Controller shall expeditiously decide the matter as per law. Rule accordingly made absolute in the above terms with however no order as to costs.