
(1980) 10 BOM CK 0012

In the Bombay High Court

Case No : Civil Revision Application No. 542 of 1980

The Children"s Educational Uplift Society and Another

APPELLANT

Vs

Kaushalya Govindsing Moral

RESPONDENT

Date of Decision : 28-10-1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(3),
11(4), 11(5), 11A, 12(2)
Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Section 3

Citation : AIR 1981 Bom 364

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.B. Baadkar and H.S. Deshpande, for the Appellant; K.J. Abhyankar, for the Respondent

Judgement

1. This revision application is filed by the original defendant in the following circumstances.
2. A plot of land was allotted by the Government to the present respondent, who is the plaintiff in the suit out of which the revision application arises. For the sake of convenience, the parties will be referred to as the plaintiff and the defendants.
3. On the said plot of land, received the plaintiff as an allottee from the Government, a structure was constructed by the plaintiff in the year 1954 and the same was let out by him to the defendants at an agreed rent of Rs. 250/-per month. It appears that along with the structure same furniture was also let out to the defendants.
4. Dispute started between the parties sometime in the year 1964 by virtue of which the defendants made an application for fixation of standard rent of the suit premises. The trial Court fixed the standard rent at Rs. 100/- per month but in appeal the amount was increased to Rs. 250/- per month, which was the agreed rent; but it was further made clear by the appellate Judge that the rent included

the rent for furniture which was given for use to the defendants. It is not disputed that the matter had come up to this Court, and that the decision of the appellate Court fixing the standard rent at that rate was confirmed by this Court.

5. There is no dispute that in spite of this fixation of standard rent the defendants fell in arrears and hence on 4-3-1978 the plaintiff gave a notice to the defendants to pay all the arrears of rent within one month from the date of the notice. This notice was evidently the one contemplated by Section 12(2) of the Bombay Rent Act. It is the plaintiff's case that no reply has been given to this notice by the defendants nor was anything paid towards the arrears of rent by the defendants. The plaintiff, therefore, filed, in August, 1978. Suit No. 223/78, out of which the present petition arises, for the eviction of the defendants. The grounds urged were threefold, viz.:

(i) that the defendants were in arrears of rent for a period exceeding six months;

(ii) that the defendants had committed breach of terms of tenancy; and

(iii.) that the defendants carried out construction of permanent nature on the suit premises. After filing the suit, the plaintiff also filed an application u/s 11(4) of the said Act requesting the Court that the defendants be directed to deposit all the arrears as well as the current rent in Court. To this application a reply was filed by the defendants and in the reply it was contended that the allotment of land in favour of the plaintiff had been cancelled by the Government and that possession of the land was taken away by the Authorities from the plaintiff and that the same was handed over to the defendants. The defendants further contended that though the standard rent was fixed by the Court on an earlier occasion that standard rent included the rent for user of furniture as well. The defendants averred that the plaintiff had taken away the furniture from the custody of the defendants. They, therefore, contended that Rs. 250/- per month was no longer the standard rent in respect of the suit premises.

6. The learned trial judge held that the plaintiff had already lost possession of the suit premises. This was held by him on the strength of certain orders produced by the defendants at the time of the hearing of the application which orders showed that the possession was ordered to be taken from the plaintiff. A panchanama of taking possession of the land as also some other papers showing that the possession was handed over to the defendants were also produced by the defendants. The conclusion from all these papers drawn by the learned trial Judge was that the plaintiff was no longer in possession of the suit premises as owner of the same. He, therefore, held that the plaintiff might not be entitled to recover rent subsequent to 22-10-1978 when possession was already taken from him by the Authorities concerned. It was admitted before the learned Judge that the defendants were in arrears of rent for a period exceeding three years but it was contended that the Court acting u/s 11(5) had no jurisdiction to direct deposit of the amount of rent, recovery of which was barred by limitation. This argument also prevailed upon the learned Judge and he held that only the rent

which was legally recoverable in a Court of law, that is to say, the arrears for a period of three years before the date of the suit, could be directed to be deposited by the defendants.

On the question regarding the rate at which the rent was to be deposited, the learned Judge observed that the defendants had made a statement in their reply affidavit to the effect that furniture which was part and parcel of the premises rented out to the defendants was removed by the plaintiff from the suit premises. The learned Judge observed that this averment made by the defendants was not denied by the plaintiff. Taking this fact into account he held that some of the amenities which were made available and for which a portion of rent must be deemed to be payable by the defendants were withdrawn from the enjoyment of the defendants and hence he was of the opinion that this was a fit case where the interim rent should be fixed at Rs. 175/- per month. He directed, that the said amount to be paid for a period of three years before the date of the suit but only till 22nd October, 1978.

7. The plaintiff filed a revision application to the District Court. A preliminary objection was raised to the said revision application that the same was not competent. It was urged that u/s 29(3) of the said Act, a revision application would be competent to the District Court only, if an appeal was not provided by Section 29 of the said Act itself. The contention was that the appeal was not competent not because it was not provided by Section 29, but because it was barred by Section 11(5) of the Act. The provisions of Section 29(31) by virtue of which the revision application could have been competent, it was contended, would not have any application to the facts of the case. This contention was in a way accepted by the learned Judge, but the learned Judge also held that the plaintiff's original application in the trial Court could not be said to be one u/s 11(4). The learned Judge also held that application for fixation of interim rent was also barred, by necessary implication, by virtue of the provisions of Section 11A of the said Act. With this reasoning he held that he had jurisdiction to revise the order passed by the trial Court.

On merits the learned Judge noticed that the observation made by the trial Court to the effect that the plaintiff had not denied the defendants' allegation regarding removal of furniture was incorrect on the face of it. The learned Judge noticed that the plaintiff had filed a rejoinder to the defendants' reply and in the said rejoinder he had clearly denied that the furniture was ever removed by the plaintiff. The reduction of rent on this account was, therefore, clearly erroneous.

On the question as to whether the Court could pass an order regarding deposit of time-barred rent also or not, the learned Judge differed from the view taken by the trial Court and held that there was nothing in Section 11(4) of the said Act which precluded the Court from directing the defendant to deposit even the time barred rent. In this view of things, the learned Judge allowed the revision application, set aside the order passed by the trial Court and remanded back the matter to the trial Court for fixing interim rent and to pass requisite orders in the

light of the discussion contained in his judgment. He also directed the defendants to pay the costs of the revision application to the plaintiff. The present revision application is filed by the defendants against the said order of remand.

8. Mr. Baadkar, the learned Advocate appearing for the defendants, has questioned the correctness and legality of the judgment of the Appellate Court on three points. Firstly, he contends that the revision application was not competent in the District Court at all. He, therefore, contends that the entire order of remand suffers from want of jurisdiction. Secondly, he contended that the Court had no jurisdiction to direct deposit of rent of the time barred period and thirdly he contended that in effect what the District Court has done is that the trial Court has been directed to fix interim rent at Rs. 250/- per month. According to him, the order of remand is nothing but an exercise in futility; the order to be passed by the trial Court being one predetermined.

9. As regards the first point regarding the jurisdiction of the Court, Mr. Baadkar contended that as per Section 29(3) of the said Act, which provided for the revision application contemplated that such an application would lie only if an appeal was precluded by Section 29 itself. He contended that there was nothing in Section 29 which precluded an appeal against an order u/s 11(4) of the said Act. The appeal was done away with not by virtue of anything contained in the provisions of Section 29(4) but by virtue of the provisions of Section 11(5). He, therefore, contended that Section 29(3) the Act did not come into play at all and hence, consequently the revision application was not competent. In support of the contention he has also sought to place reliance upon a judgment of this Court in a publication called the Bombay Cases Reported in its November issue of 1979. It appears to be a judgment of Kantawala, C.J. in C. R. A. No. 330 of 1978 decided on 31-8-1978. It appears that it was held in that case that the bar against an appeal against any order u/s 11(3) or (4) was provided not u/s 29, but u/s 11(5) and that, consequently, a revision application provided by the said Section 29(3) would not be competent against any such order.

10. I may state here that I have my own reservations regarding the conclusion which is sought to be drawn from the discussion in the said report. The judgment itself states that it is extremely doubtful whether an application u/s 29(3) is competent in the present case. What it referred to was no doubt the amplitude of Section 29(3); but what is to be noted is that the view expressed therein may not be necessarily regarded to be the considered view of the Court. Moreover, a view is possible that the expression "where no appeal lies under this section" can as well be construed, without much struggle with the language, to mean "where no appeal as contemplated by this section lies". If that meaning is ascribed to the said expression, a view would be possible that if for any reason appeal is not competent, revision application would lie. But I make it clear that I wish to express no final opinion on this point, in view of the fact that to my mind the entire question can be approached from a different standpoint. If it is the contention of the defendants that the revision application was not competent to

the District Court and if they cannot satisfy this Court that the order passed by the revisional court was erroneous in law and equity, there is no reason in the first place, why I should hold that I am bound to interfere with the said order. The revisional jurisdiction of this Court u/s 115 of the CPC is discretionary in the sense that this Court is not bound to interfere if it is found that real justice has been done by virtue of the said order. But apart from this aspect, it would be perfectly open for me to consider that I was myself considering the matter in my own revisional jurisdiction and if I find that the order passed by the revisional courts below is unexceptionable, there is no reason why I should not confirm the same myself. The technical objection raised by Mr. Baadkar would not, therefore, be of any avail to the defendants at all.

11. The second contention raised by Mr. Baadkar, however, need a careful examination. He contends that u/s 11(4) of the said Act the Court would not be having jurisdiction to direct deposit of time barred rent. This contention is based upon the ground that the Court could not have decreed the plaintiff's suit for time barred rent even at the time of the passing of the decree for eviction. He, therefore, contends that nothing which could not have been done at the final stage could be done at the interim stage. I am unable to agree with Mr. Baadkar on this point. Even at the time of the final stage when decree for eviction is to be passed the Court give protection to the tenant and allow him to remain in possession, but only if he pays all the arrears of rent including time barred. The position is that in such a case the Court is not decreeing the plaintiffs suit for recovery of rent. If the plaintiff had filed a suit for recovery of rent simpliciter, the Court would have no option but to dismiss the suit so far as the time barred rent was concerned. This effect follows inexorably from the provisions of Section 3 of the Limitation Act. When the Court passes a decree giving relief to the tenant to continue to be in possession provided he pays all the arrears of rent including time barred rent, the Court does not pass a decree in favour of the plaintiff decreeing his suit for arrears of time barred rent as well. The Court is in fact giving the relief to the tenant on certain condition and so far as that condition is concerned, the question as to whether the dues of the defendants are barred by limitation or not is an irrelevant consideration. The very basis of Mr. Baadkar's contention, viz. that some thing which could not be ordered at the final stage should not be ordered at the interim stage, therefore, does appear to be devoid of rational ground.

12. Mr. Baadkar has next contended that the Court acting u/s 11(4) could not order deposit of time barred rent, also because, according to him, the time barred rent was not reasonably due to the landlord. According to Mr. Baadkar, the expression "reasonably due" connoted same meaning as the expression "legally due". He contended that the time barred rent should not be said to be legally due to the landlord and hence the Court had no jurisdiction to direct the tenant to deposit the said time barred rent. In support of his contention he relied upon the judgment of the Supreme Court in *New Delhi Municipal Committee Vs. Kalu Ram and Another*, . In that case the Supreme Court was required to

construe the word "payable" used in the Public Premises (Eviction of Unauthorised Occupants) Act 1958. Before appreciating the ratio of the said judgment, it is necessary to bear in mind that in that case the entire machinery for recovery of arrears of rent was set UD anew. Under the general law the task of recovery of possession or of the arrears of rent from tenant and handing over the same to the landlord is performed by the Civil Courts. Under the Public Premises (Eviction of Unauthorised Occupants) Act 1958, that function is given to the Authorities under the said Act. But except this difference there was no difference in particular so far as the Court acting under the general law of the land and the Authority acting under the said statute were concerned. The question then arose as to whether the Authority while directing the occupant to pay the arrears of rent was competent to direct that even time barred rent should be required to be made. The Supreme Court held that what was not legally due should not be said to be payable and hence it was held that the Authority had no jurisdiction to pass an order against the occupant to pay even the time barred rent. This is what the Supreme Court observed in the last paragraph of the report in that behalf:--

"When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law. Section 7 only provides a special procedure for the realisation of rent in arrears and does not constitute a source or foundation of a right to claim a debt otherwise time-barred."

The Supreme Court also compared the position under the Indian Companies Act 1913 and relied upon the judgment of the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63

13. The following observation of the Privy Council was particularly relied upon by the Supreme Court (at p. 1639):

"It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment, It creates no new rights. We are clear that the word "payable" in Section 7, in the context in which it occurs, means "legally recoverable". Admittedly a suit to recover the arrears instituted on the day the order u/s 7 was made would have been barred by limitation."

To my mind this authority would have a direct application if at the time of the passing of the final decree the Court was to pass a decree in respect of even a time barred rent. The question in this case does not relate to a decree to be passed for a time-barred rent. The question is as to whether the tenant should be entitled to get some kind of facility from the Court without being ready to deposit the time-barred rent. I do not find anything in Section 11(4) of the said Act which in a way places embargo upon the jurisdiction of the Court to order deposit of the time-barred rent as well. After all the prohibition against the Court to decree time-barred rent stems exclusively from the provision of Section 3 of the Limitation Act. The provision regarding Limitation Act, as we understand, is

not a matter of general principle of administration of justice. A discretionary remedy may be denied to a person because he is guilty of delay or laches, but this would not mean that the Court would not have jurisdiction to grant relief. Limitation Act imposes restriction upon Court's jurisdiction and such restriction is the creature of the statute. There is no reason why the statute should be extended to regions which it does not cover. In the instant case I do not find that any restriction is contemplated by Section 11(4) upon the jurisdiction of the Court while directing deposit of the arrears. What is reasonably due cannot be said necessarily to be the same thing as what is legally due. The expression "legally due" is no doubt construed by the Courts consistently to mean that which is within the period prescribed by the law of Limitation. But the words "reasonably due" have an entirely different connotation.

13A. In this connection Mr. Abhyankar sought to place reliance upon the decision of the Division Bench of this Court in *Ramrao Raoji Palkar Vs. Amir Kasam Bhagwan*, , where the expression "rent then due" employed in Section 12(3)(b) of the Rent Act fell for consideration of this Court and after examination of the authorities on the point this Court came to the conclusion that the meaning of the expression "rent then due" meant not only those dues which were legally recoverable but all rent which was in fact payable by the tenant to the landlord. I do not find the words "then due" should be in any way distinguished from the words "reasonably due". As a matter of fact the word "due" itself has got a moral connotation. It should be, therefore, said that the expression "reasonably due" is more akin to the expression "morally due" than to the expression "legally due". It can hardly be doubted that the time-barred rent is something which is due morally from the tenant to the landlord. If this is so there is no reason to hold that the time barred rent was not reasonably due from the tenant to the landlord. If this is so, to my mind there is no reason why the court should not have jurisdiction to direct the tenant to deposit even the time barred rent, if he wants his defences to be heard in the suit.

14. Mr. Baadkar, however, contended that the Court had jurisdiction to direct payment even of time-barred rent at the time of the final decree only because the tenant wanted to protect his possession. At the interim stage no such question of protecting the possession of the tenant arose because by non-deposit of the time-barred rent he would not lose the possession. All that would have happened was that his defences raised were liable to be struck off. In these circumstances, therefore, the Court could not direct deposit of the time-barred rent again. To my mind this distinction is without any principle. To my mind the difference in jurisdiction of the Court for directing payment of time-barred rent at the time of the final decree for eviction and the jurisdiction of the Court for directing deposit of rent at the interim stage is difference only of details and not of principle. In both the cases the tenant is found to be in arrears of rent and the payment of arrears are barred by limitation. But in one case he wants to protect his possession, in the other case he wants to continue to remain in possession and before the suit and thereafter protect his possession. In both of the cases he

will not be entitled to get assistance of the Court for what he wants unless he had paid even the time-barred rent. If he could be directed to pay time-barred rent at the final stage, there is no reason why he should not be directed to deposit the rent even due at the interim stage when the fact that he is in arrears of rent is an admitted fact or a fact found by the Court,

15. To my mind this question has got to be examined also in the larger context. The Courts, these days, are helpless in the matter of giving relief to the aggrieved parties within any reasonable period. This being the universally recognised position, the Court has to see to it that the hardship caused to the aggrieved party is at least minimised, No doubt this has got to be done within the framework of the law but when the question arises as to what should be the procedure in cases such as the present one where the arrears is an admitted fact, there is no reason why the defendant should not be required to pay the time-barred rent if he wants to continue to be in possession by taking advantage of the Court's inability to relieve him by a decree either to pay rent or to vacate. To my mind the lower Court was perfectly right and justified in holding that the Court had power to direct deposit also of the time-barred rent at the interim stage of an application u/s 11(4) of the Rent Act.

16. Mr. Baadkar, however, further contended that in the case such as present one an order to deposit time-barred rent would mean that the plaintiff would be entitled to a decree for possession although he has no subsisting title to get back the possession. In this connection he relied upon the fact that the plaintiff's allotment was cancelled by the Government and the possession of the premises were in fact handed over to the defendants on 20-10-1978. He contended that if on account of non-payment of the time-barred rent his defences were ordered to be struck off, the Court would have no other option but to pass a decree in favour of the plaintiff, though he was not entitled to possession from the defendants because the defendants' continuance of possession was referable to the title of the Government and no more to the original title of the plaintiff. To my mind this grievance has reference more to the facts of the case than to the principle of law as such. If in a given case the Court finds that the plaintiff is not entitled to possession for reasons independent of the provisions of the Rent Act, it would be perfectly open for the Court to allow the defendant to defend the suit on that limited ground only. It can be seen from the provisions of Section 11(4) of the Rent Act that it is not as if that in every case of default on the part of the tenant his entire defence can be ordered to be struck off. If in the case such as the present one, when the defendant has committed default in the matter of deposit of the time-barred rent, it would be open for him to make an application to the Court for leave to defend the suit, not on the grounds mentioned in any of the provisions of the Bombay Rent Act but on the ground that the plaintiff himself did not have a subsisting title to the suit premises. The difficulty raised by Mr. Baadkar has an in-built answer in the scheme of Section 11(4) of the said Act itself. His objection on this count must therefore be rejected.

17. Moreover, there is another important aspect of the matter to which Mr. Abhyankar has invited my attention. It is that the defendant cannot contend that the plaintiff has no subsisting title to the suit premises. It is common ground that what was let out to the defendants was a structure on the land and not the land itself. In *Dinkar S. Vaidya Vs. Ganpat S. Gore and Others*, I have examined fully the authorities on this point and I have held that the tenant of the structure is presumed only to be a licensee in respect of the land below the structure in the absence of the contract to the contrary. This is so in view of the fact that the doctrine of dual ownership is well recognised in India. In the instant case the plaintiff is the lessee or owner of the land in question. He constructed the structure on the same. It cannot be said, therefore, that the defendants are the tenants in respect of the land below the structure. Now it is an admitted fact that so far as the Government was concerned it was only the owner of the land and not of the structure upon the land. What Mr. Baadkar has brought to my notice is that the panchanama showing that the possession of the structure itself was given by the Government to the defendant on 20-10-1978. It passes one's comprehension as to under what provisions of law the Government could have done so. The Government at the most could have directed the plaintiff to remove the structure, on the land. It could have demanded vacant possession of the land and if it had felt such a fancy for the defendants, could have allotted vacant land to the defendants. What has come out from the record, however, is that the possession of the structure itself, allegedly, has been handed over by the Government officers of the defendants, Prima facie this is an act of patent illegality and if this is so it could not be said that the plaintiff did not have a subsisting title so far as the structure is concerned. It follows that so long as the plaintiffs contend to be the owner of the structure, the defendants continue to be the tenants of the plaintiff of the structure. Their plea, therefore, that the plaintiff had no subsisting title to the premises, viz. the structure, would, therefore, fail and in such a case the defendant would have no defence to the plaintiff's suit whether his defences are struck off or not.

18. Mr. Abhyankar also tried to invite my attention to the fact that the panchanama which was relied upon by Mr. Baadkar as per which the possession of the suit premises was handed over by the Government Officers to the defendants was made behind the plaintiff's back. He, therefore, contended that the contention that the plaintiff was no longer in possession was not correct, I am told that already an appeal has been filed by the plaintiff against the order cancelling his allotment etc. and the matter is already sub judice. I, therefore, do not wish to express any opinion on the above mentioned contention raised by Mr. Abhyankar.

19. As a matter of fact a number of other contentions would have been open for the plaintiff to contend the correctness of the judgment of the trial Court, It is possible to contend that even if the amenities were reduced still at no stage the tenant had complained that the rent was excessive within the meaning of Section 11(4) of the said Act. The expression "excessive" has got a recognised

connotation. Moreover, the Court gets jurisdiction u/s 11(4) of the said Act only when the Court itself is satisfied that the reason for the tenants for non-payment of rent was that, according to him, it was excessive. It was necessary for the Court to apply its mind to this aspect of the question and after satisfying itself that the tenant was so oppressed that it became difficult for him to pay the rent that the Court would get jurisdiction to fix the interim rent u/s 11(4) of the said Act. Unfortunately for the plaintiff no such plea has been raised in the revision application filed in the lower Court, and no independent revision application has been filed by the plaintiff in this Court as such. I, therefore, do not propose to give any specific direction to the lower Court to take into consideration this aspect of its jurisdiction.

20. The third point raised by Mr. Baadkar must, however, be accepted. Mr. Baadkar contended that the lower Court has in fact ordered the trial Court to fix the interim rent at Rs. 250/- only. This has been done by the Court by holding that the standard rent application was not competent u/s 11(4) of the said Act because standard rent was already fixed in the previous proceedings. To my mind this reasoning of the learned Judge is not correct. It must be borne in mind that it has been the defendants' contention that the amenities in the form of certain furniture were taken away by the plaintiff-landlord and, hence, they were entitled to have the standard rent reduced u/s 11(4) of the said Act. It will, therefore, be open for the trial Court to consider the question as to whether defendants had really made out a prima facie case of the furniture having been removed by the plaintiff and will further consider the question as to how much the reduction should be in the light of his finding in that behalf.

21. The revision application, therefore, fails. Rule earlier issued is, therefore, discharged.

22. In the circumstances of the case there shall be no order as to costs.

23. Revision dismissed.