

J.M. Constructions Vs. Dr. Rustom P. Patel and ors.

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SooperKanoon Citation : sooperkanoon.com/361296

Court : Mumbai

Decided On : Aug-05-2008

Reported in : 2008(5)BomCR598; (2008)110BOMLR2806

Judge : A.M. Khanwilkar, J.

Acts : [Maharashtra Rent Control Act, 1999](#) - Sections 34; Provincial Small Causes Courts Act, 1887; [Limitation Act, 1963](#) - Sections 4, 5 and 12; Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Sections 29(3), 33, 33(2) and 34(4); Code of Civil Procedure (CPC) - Order 8, Rule 1; [Constitution of India](#) - Article 227

Appeal No. : Writ Petition No. 258 of 2007

Appellant : J.M. Constructions

Respondent : Dr. Rustom P. Patel and ors.

Advocate for Def. : V.R. Walawalkar, Adv., i/b., Sameer Bhalekar, Adv. for Respondent No. 1

Advocate for Pet/Ap. : P.S. Dani, Adv.

Disposition : Petition allowed

Judgement :

A.M. Khanwilkar, J.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith by consent.

3. Mr. Walawalkar waives notice for Respondent No. 1 who is the only contesting respondent for the purpose of present Writ Petition.

4. As short question is involved, Petition is heard finally forthwith by consent.

5. This Writ Petition under Article 227 of the [Constitution of India](#) takes exception to the Judgment and Order passed by the Appellate Bench of Small Causes Court at Bombay dated 2nd November, 2006 in Revision Application No. 228 of 2005. That Revision Application was filed by the Respondent No. 1 taking exception to the Judgment and Order passed by the trial Court dated 9th September, 2005 in Interim Notice No. 82 of 2005 filed in pending RAE No. 771/1409 of 2004. The said Interim Notice was taken out by the Respondent No. 1 praying for permission to file Written Statement beyond permissible period. In other words, the said Application was for condonation of delay in filing written statement and to take written statement of the Respondent No. 1 on record. The trial Court by its well reasoned Judgment and Order dated 9th September, 2005 rejected that Application. The Respondent No. 1 carried the matter in revision under Section 34 of the [Maharashtra Rent Control Act, 1999](#). The said proceedings were treated as revision by the Appellate Bench of the Small Causes Court. The Appellate Bench was pleased to reverse the opinion recorded by the trial Judge and instead allowed Interim Notice filed by Respondent No. 1.

6. The principal question raised before this Court is that the Appellate Bench of the Small Causes Court had no jurisdiction to entertain Revision Application preferred by the Respondent No. 1. To consider the correctness of that position, it would be appropriate to advert to Section 34 of the Act, which reads thus:

34. Appeal.

(1) Notwithstanding anything contained in any law for the time being in force, an appeal shall lie-

(a) in Brihan Mumbai, from a decree or order made by the Court of Small Causes, Mumbai, exercising jurisdiction under Section 33, to a bench of two Judges of the said Court which shall not include the Judge who made such decree or order;

(b) elsewhere, from a decree or order made by a Judge of the Court of Small Causes established under the Provincial Small Causes Courts Act, 1887, or by the Court of the Civil Judge deemed to be the Court of Small Causes under Clause (c) of Sub-section (2) of Section 33 or by a Civil Judge exercising such jurisdiction, to the District Court: Provided that no such appeal shall lie from,-

(a) a decree or order made in any suit or proceeding in respect of which no appeal lies under the Code of Civil Procedure, 1908;

(b) a decree or order made in any suit or proceeding (other than a suit or proceeding relating to possession) in which the plaintiff seeks to recover rent in respect of any premises and the amount or value of the subject matter of which does not exceed-

(i) where such suit or proceeding is instituted in Brihan Mumbai 4 Rs. 10,000; and

(ii) where such suit or proceeding is instituted elsewhere, the amount upto which the Judge or Court specified in Clause (b) is invested with jurisdiction of a Court of Small Causes, under any law for the time being in force;

(c) an order made upon an application for fixing the standard rent or for determining the permitted increases in respect of any premises except in a suit or proceeding in which an appeal lies;

(d) an order made upon an application by a tenant for a direction to restore any essential supply or service in respect of the premises let to him.

(2) Every appeal under Sub-section (1) shall be made within thirty days from the date of the decree or order, as the case may be:

Provided that, in computing the period of limitation prescribed by this sub-section the provisions contained in Sections 4, 5 and 12 of the [Limitation Act, 1963](#) shall, so far as may be, apply.

(3) No further appeal shall lie against any decision in appeal under Sub-section (1).

(4) Where no appeal lies under this section from a decree or order in any suit or proceeding in Brihan Mumbai, the bench of two Judges specified in Clause (a) of Sub-section (1) and elsewhere, the District Court, may, for the purpose of satisfying itself that order was made and the bench or court aforesaid or the District Judge or any Judge to whom the case may be referred by the District Judge, shall pass such order with respect thereto as it or he thinks fit.' The scope of Section 34 of the Act has already been considered by the Division Bench of our High Court in the case of Sukhdev Prasad Raghubir v. Rambhujarat Kshampati @ Rambhujarat Chhampati reported in : AIR1983 Bom25 . The Division Bench of our High Court has unambiguously held that the remedy under Section 34(4)(old Section 29(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947) was available only against the Order which was not a procedural order, which did not affect rights and liability of the parties.

7. The limited controversy in the present case therefore, is, whether the order passed on the Interim Notice filed by the Respondent for condoning delay in filing written statement and to take written statement on record can be said to be a procedural order or otherwise. The issue is no more res integra. The Apex Court in the case of Kailash v. Nanhku and Ors. reported in : AIR 2005 SC2441 , had occasion to deal with the similar contention. Even in that case, the issue answered by the Apex Court was whether the Order passed by the Court conducting election trial declining to extend time for filing Written Statement, can be said to be a procedural order. In paragraph-27 of the said decision after referring to provisions of Order 8 Rule 1 of C.P.Code, the Apex Court has noted that the said provision clearly indicates that obligation is cast on the Defendant to file Written Statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. In other words, it is the obligation of the

Defendant to file Written Statement within specified time. The fact that the Defendant has a right to file written statement, does not militate against the argument of the Petitioner that the order passed on the Interim Notice filed by the Respondent No. 1 is a procedural order and not amenable to the remedy of revision under Section 34(4) of the Act, 1999. Reverting to the decision of the Apex Court in the case of Kailash(supra) in paragraph-27, the Apex Court has expounded that the nature of the provision contained in Order 8 Rule 1 is procedural one. In view of this dictum of the Apex Court, there is no manner of doubt that the nature of provision under Section 34(4) of the Act of 1999 would be a procedural order to be passed on the interim notice filed by the Respondent No. 1 for condoning delay in filing Written Statement and to take Written Statement on record. If it is so, no remedy of revision against such an order under Section 34(4) of the Act of 1999 would be available having regard to the exposition of the Division Bench of our High Court in the case of Sukhdev(Supra).

8. Counsel for the Respondent No. 1 however, was at pains to contend that the right to file Written Statement is a substantive right of the defendant and pronouncement of the trial court on the said right in the form of order passed on the interim notice decided against the Respondent No. 1 is impinging upon the said substantive right which would entitle the parties such as Respondent No. 1 to file appeal within the meaning of Section 34(4) of the Act, 1999.

9. This argument is of no avail. As aforesaid, the Apex Court in the case of Kailash(Supra) has taken the view that it is the obligation or duty of the defendant to file written statement within specified time. Besides, the Order passed on the application taken out by the Defendant to condone delay would be a procedural order to be passed by the trial Judge. Thus understood, in view of the exposition of the Division Bench in the case of Sukhdev Prasad(Supra), the argument of the Respondent No. 1 will have to be stated to be rejected.

10. Counsel for the Respondent No. 1 then relied on another decision of our High Court in the case of Pacific Engineering Co. Pvt. Ltd. v. East India Hotels Ltd. reported in : 2005(1)BomCR427 , in particular dictum in paragraph-34(a) at page 441. This Judgment is of no avail to the Respondent No. 1, in view of the direct

judgment of the Supreme Court on the point considering the efficacy of the order passed on the interim application for condonation of delay in filing written statement, in the case of Kailash(Supra).

11. Counsel for the Respondent No. 1 would also rely on the Judgment in the case of Sayarabi Sayyad Abdul Ajj(deceased) through L.Rs. v. Shri Abdul Rashid Abdul Majid reported in 2004(4) All M.R. 581.

In this case, the Order passed by the trial Judge was on an application for seeking amendment in the plaint. Efficacy of the order to be passed on such application whether is procedural order or affecting the substantive rights as such has been dealt with in the said decision. Once again this decision will be of no avail to the Respondent No. 1, having regard to the direct judgment of the Apex Court on the point in issue in the case of Kailash (Supra).

12. Counsel for the Respondent No. 1 at this stage, furnishes Judgment of the Apex Court in the case of Sumatibai and Ors. v. Paras Finance Co. Regd. partnership firm reported in : AIR 2007 SC3166 . Reliance is placed on paragraph-8 of this Judgment which takes the view that every party in a case has a right to file a written statement. This right is in accordance with natural justice. This decision is not directly on the point in issue. The point in issue is whether an order passed on an application for condoning delay in filing Written Statement can be said to be a procedural order or otherwise. Suffice it to observe that the right of the Defendant to file Written Statement is hedged with the requirement to file the same within specified time. It is therefore, more an obligation of the Defendant to file Written Statement within specified time. That is what has been observed in paragraph-27 in the case of Kailash(Supra). The Order passed on the application taken out by the Defendant for condoning delay in filing Written Statement and to take Written Statement on record beyond specified period essentially is a procedural order. That is the issue that needs to be addressed in the present Petition.

13. Counsel for the Respondent No. 1 has also relied on the Judgment in the case of Sangram Singh v. Election Tribunal Kotah and Anr. reported in 1955 SC 425. This Judgment has been adverted to by the Apex Court in the case of

Kailash(Supra), as can be discerned from the paragraph-31 and 33 of the said Judgment.

14. In the circumstances, I have no hesitation in taking the view that the Order passed on Interim Notice by the Trial Judge dated 9th September, 2005 was a procedural Order against which no revision application could be maintained within the meaning of Section 34(4) of the Act of 1999. The Appellate Bench of the Small Causes Court had no jurisdiction to entertain revision against such an order, as observed by the Division Bench of our High Court in the case of Sukhdev Prasad(Supra).

15. Accordingly, the Judgment and Order impugned in this Writ Petition passed by the Appellate Bench on such Revision Application will have to be set aside, being without jurisdiction.

16. As the impugned Judgment and Order is required to be set aside, it is not necessary for me to enter into controversy on merit of the finding recorded by the Appellate Bench of the Small Causes Court in the impugned Judgment and Order, which is without jurisdiction.

17. Accordingly, Rule is made absolute in this Writ Petition. The impugned Judgment and Order is set aside and instead the Judgment and Order passed by the trial Judge dated 9th September, 2005 in interim notice No. 82 of 2005 is restored. Petition is allowed with costs.

18. At this stage, Counsel for the Respondent No. 1 submits that the Respondent No. 1 may carry the matter in appeal for which reason, the trial Court be directed to defer the proceedings for a period of six weeks from today.

19. As Counsel for the Petitioners fairly states that the request for adjournment if made before the trial Court will not be opposed, no further orders are necessary.