Ramkarandas Radhavallabh

Vs

Bhagwandas Dwarkadas

Civil Appeal No. 851 of 1964

(A. K. Sarkar, R. S. Bachawat JJ)

20.11.1964

JUDGMENT

SARKAR J. –

The appellant was the tenant of the respondent of a third floor flat in Bombay. The tenancy was governed by the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, hereafter referred to as the Rents Act. We will refer to the appellant as the tenant and the respondent as the landlord.

The landlord obtained a decree in ejectment against the tenant in a suit filed under Or. 37 of the Code of Civil Procedure and the present appeal arises out of an application made by the tenant to set aside that decree under r. 4 of that Order. The question is, should the decree be set aside ?

There were various proceedings between the parties before the judgment under appeal came to be passed but it will be unnecessary to refer to all of them. The suit was filed in the Court of Small Causes, Bombay on November 1, 1960 for ejectment on two grounds, namely, (1) a certain default in payment of rent and (2) unlawful subletting of the demised premises. The Rents Act permits ejectment if these grounds are proved. The tenant entered an appearance to the suit on December 3, 1960. On March 23, 1961, the landlord took out a summons for judgment under Or. 37 r. 2 and the tenant opposed that summons by an affidavit, setting out various defences to the claim for ejectment to the details of which it is unnecessary to refer. On May 2, 1961, an order was made by consent of parties on that summons directing the tenant to deposit moneys in Court by certain instalments on account of the arrears of rent and providing that if it made a default in making the payments on the dates mentioned, the suit was to be set down for disposal in accordance with law. The effect of this order clearly was to give a conditional leave to defend so that on failure to perform the conditions the tenant would under the provisions of Or. 37, r. 2 no longer have the right to defend the action.

Now the first instalment under the consent order was payable on June 1, 1961. It was not however paid. The tenant thereafter made an application for extension of time and this was rejected on June 22, 1961. It filed an appeal against the order refusing extension of time but this was rejected. The tenant then appealed against the consent order of May 2, 1961 but this also failed. Thereafter the suit was placed on the list on June 28, 1961 and a decree in ejectment was passed on that date under the provisions of Or. 37 on the basis of the statements made in the plaint and without permitting the tenant to appear and oppose. This is the decree which the tenant sought to set aside. These are all the proceedings between the parties that need be mentioned for the purpose of this judgment.

On September 12, 1961 the application under r. 4 of Or. 37 to set aside the ejectment decree was

made to the trial Court. The trial Court dismissed the application holding that no special ground had been made out by the tenant as required by r. 4 Or. 37 to set aside the decree. The tenant then appealed from this Order to a bench of the Court of Small Causes under section 29 of the Rents Act which is said to have treated the appeal as a revision. That bench agreed with the trial Court that no special circumstances as required under r. 4 of Or. 37 had been made out to justify the setting aside of the decree, but it observed that that Court had not considered whether relief could be given to the tenant under section 151 of the Code and itself set aside the decree acting under that section. The landlord appealed to the High Court from the judgment of the bench. The High Court agreed with the Courts below that no special circumstances justifying the setting aside of the decree existed. It however held that there was no scope for applying section 151 to the present case as r. 4 of Or. 37 of the Code had made special provision for it. It also rejected the other contentions raised by the tenant, to one of which we will refer later. In the result the High Court allowed the appeal and hence the present appeal to this Court.

Learned advocate for the tenant contended that the High Court was wrong in its view that section 151 had no application to the present case. We are unable to accept this contention. It has been observed by this Court in Manohar Lal v. Seth Hiralal ([1962] Supp. 1 S.C.R. 450.), "The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure." This is a well recognised principle. Rule 4 of Or. 37 expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under Or. 37 and hence if a case does not come within the provisions of that rule, there is no scope to resort to section 151 for setting aside such a decree. We, therefore, agree with the High Court that the appellate bench of the Court of Small Causes was in error in setting aside the ex parte decree in exercise of powers under section 151. Again all the Courts have taken the view, and we think rightly, that no circumstances justifying the setting aside of the decree under r. 4 of Or. 37 existed in the present case. We did not also understand learned advocate for the tenant to rely on any such circumstances in this Court. No question of setting aside the decree under that order, therefore, arises.

The next point argued by learned advocate for the tenant was that Or. 37 was not applicable to a decree in ejectment in view of the provisions of the Rents Act in terms of which alone such a decree could be passed. Now section 49 of the Act gives the Government power to make rules for the purpose of giving effect to its provisions. The Government made certain rules under these powers and r. 8 of these rules provides that suits under the Act may be instituted in accordance with the procedure laid down in Or. 37. It is by virtue of this rule that the landlord filed his suit for ejectment under the procedure laid down in Or. 37. The High Court of Bombay had made certain amendments to the provisions of Or. 37 as contained in the Code. Rule 2 of that Order as so amended and so far as relevant, is in these terms :

> Rule 2. (1) "Suits in which the landlord seeks to recover possession of immovable property ..... may in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the prescribed form but the summons shall be in form No. 4 in appendix B, or in such other form as may be from time to time prescribed.
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> (2) In any case in which the plaint and summons are in such forms respectively, the defendant shall not defend the suit unless he enters an appearance and obtains leave from a Judge as hereinafter provided so to defend; and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted, and the Plaintiff shall be entitled to a decree for

possession....."

It is by virtue of this rule that the decree in the present case was passed without permitting the tenant to be heard. This was because the tenant had been given leave to defend on May 2, 1961 on a condition that it paid the arrears of rent by installments as prescribed in the order. This order had been made by consent and the tenant had failed to perform that condition, the result of which was to deprive him of the leave to defend earlier granted; the case became one as if no leave to defend had been given to the tenant and upon which the landlord became entitled to a decree under sub-r. (2) of r. 2 of Or. 37.

The contention of learned advocate for the tenant is that under the provision of the Rents Act the landlord is not entitled to a decree as a matter of right; the Court has to consider the position of the tenant and has a discretion to pass or not to pass a decree. Therefore to a suit governed by the Act the provisions of r. 2 of Or. 37 which make it incumbent on the Court to pass a decree in circumstances coming within that sub. rule, are inapplicable. It is on this ground that it is said that r. 8 of the Rules made under the Rents Act is ultra vires and void.

The first difficulty that appears to us to arise on this line of argument is that even if the contention is right, we cannot in the present appeal make an order setting aside the decree. The appeal has come to us out of an application originally filed in a Court of Small Causes under the provisions of Or. 37 r. 4 by the tenant itself. If the present contention is right, then the tenant's application was wholly incompetent. The result of that however would not be to set aside the decree; it would only cause the dismissal of the tenant's application. The tenant has to take other appropriate proceedings to show that the decree was ineffective in case it wants to contend that the suit had not been brought according to the procedure permissible in law, and that it had been illegally deprived of a hearing. It itself having resorted to Or. 37, it scarcely lies in it now to contend that that Order is wholly inapplicable. Furthermore, by consenting to the Order of May 2, 1961, it had in this case clearly agreed that the suit had been rightly brought under Or. 37. It cannot be allowed to change its position in the proceedings arising out of that very suit. For that reason alone we think no relief can be granted to it in this appeal based on the present contention.

On the merits too, we think that the contention is fallacious. It proceeds on the basis that when leave to defend has been refused to a defendant, the Court is bound to pass a decree. It seems to us that what sub-r. (2) of Or. 37 contemplates is that the Court will accept the statements in the plaint as correct and on those statements pass such decree as the plaintiff may in law be entitled to. If, for example, the plaint discloses no cause of action, the Court cannot pass any decree in favour of the plaintiff. If this were not so, the words "allegations in the plaint shall be deemed to be admitted" in sub-r. (2) of r. 2 of Or. 37 would have been unnecessary. The Court in making a decree under sub-r. (2), r. 2 of Or. 37 has to keep the law in mind. If the law requires the Court to exercise a discretion on the facts deemed to be admitted, it will have to do so.

In the procedure laid down under Or. 37 the defendant may not be allowed at the hearing to place his side of the case for assisting the Court in the exercise of that discretion, but that does not create any conflict with the Rents Act. A rule can be made quite consistently with the Act that the defendant will have to adopt a certain procedure and to act within a certain time in order to be heard in that matter. Suppose a defendant does not put in an appearance in a suit for ejectment not brought under Or. 37, can he say that the Act gave him a right to appear at the hearing and place his case

before the Judge ? We feel no doubt that such a thing is not contemplated by the Act and cannot be permitted. Rules of procedure may be framed for the exercise of rights and such rules are not ultra vires only because the right has to be exercised in accordance with them. Therefore we do not think that r. 8 is ultra vires.

In what we have said in the preceding paragraph we have proceeded on the assumption that the Court has a discretion. Certain provisions in sections 12 and 13 of the Rents Act had been read to us and it had been contended that they conferred that discretion on the Court. In the view that we have taken, it is unnecessary to express any opinion on that contention and we do not do so.

In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

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