

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 597 OF 2022

1 Mr Mohan Damodar Raikar,
Son of Shri Damodar Raikar Jambhale,
Aged about 67 years, married,
Indian National,
and r/at H.No.143(4),
Nagmodem, Sinquetim,
Salcete Goa 403 707

2 Mrs Shubhangi Mohan Raikar,
Wife of Mr Mohan Raikar,
Aged about 58 years, married,
Indian National,
And R/at H.No.143(4), Nagmodem,
Sinquetim, Salcete Goa 403 707.

... Petitioners

Versus

1 Mr Stanley Anthony D'Souza,
Son of Shri Arnofo D'Souza,
45 years of age, married, employed,
and his wife,

2 Mrs Olivia Fernandes,
Daughter of Shri James Fernandes,
41 years of age, married, employed,
Both with Permanent Address
at H.No.233, Sinquetim, Navelim,
Salcete, Goa 403 702,
But presently on account of their
employment, R/at 6336 W Trace
Dr Plano TX 75093, U.S.A.
Both are represented through their
Power of Attorney,

Mrs. Maria Sindara D'Souza,
Daughter of late Arnofo D'Souza
51 years of age, R/at H.No.156,
Sinquetim, Navelim,
Salcete, Goa 403 702.

... Respondents

Mr Deepak Gaonkar, Advocate for the Petitioners.
Mr Mangirish Angle and Mr Chirag Angle, Advocates for the
Respondents.

CORAM: M. S. SONAK, J.

DATED : 27th JULY 2023

ORAL JUDGMENT

1. Heard Mr D. Gaonkar, learned counsel for the Petitioners and Mr M. Angle, learned counsel for the Respondents.
2. Rule. The rule is made returnable immediately at the request and with the consent of the learned counsel for the parties.
3. The Petitioners are the tenants, and the Respondents are the landlords arrayed each other in Rent Case No. 20/2019/G instituted before the Rent Controller. The eviction proceedings were instituted to seek the Petitioners' eviction under Section 22(2)(g) of the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968 (the said Act) and Rules made thereunder (the said Rules).

4. The Rent Controller issued notice to the tenants on 27.01.2020, returnable on 27.02.2020. On 27.02.2020, the matter was adjourned to 24.03.2020 because the Presiding Officer was on leave.

5. On 24.03.2020, the Central Government ordered a lockdown due to the Covid-19 pandemic. The matter was ultimately taken up on 07.01.2021, when the tenants' Advocate appeared and undertook to file Vakalatnama and reply by the next date, 09.03.2021.

6. On 09.03.2021, an adjournment was sought on behalf of the tenants, which was granted, and the matter was posted on 08.04.2021. On 08.04.2021, again, an adjournment was sought on behalf of the tenants on the ground that one of the tenants/Petitioner No.1 tested positive for Covid-19. The matter was then fixed on 22.06.2021.

7. By Circular dated 10.06.2021, the restricted Court working was declared given the second surge in Covid-19 cases. The matter was then adjourned to 26.08.2021. On 26.08.2021, neither the tenants nor their advocates appeared, but still, the matter was adjourned to 15.09.2021. On 15.09.2021, the proceedings were transferred to another Rent Controller/Court. The next date fixed was 28.10.2021.

8. On 28.10.2021, an oral application was again made to file a reply to the eviction application. This was granted, and the matter was fixed on 20.11.2021.

9. On 20.11.2021, since neither the tenants nor their Advocates were present for the hearing, the Rent Controller vide order dated 20.11.2021 closed the opportunity for the tenants to file their reply and adjourned the matter to 15.12.2021.

10. The roznama order dated 20.11.2021 reads as follows:-

*“20.11.2021 Called out today
Adv. M. Angale present for the Applicant
None present for the Resp.
Dispite of granting opp. the resp have failed to
file reply till date hence opportunity for
filing reply is closed.
Matter adj. and fixed 10.00 am.*

*Case Adjourn for: REPLY 15-12-2021
Sd/-
Judge”*

11. On the next date, i.e., on 15.12.2021, the tenants filed an application at Exhibit D-6 praying for recall of the above order dated 20.11.2021 and grant of opportunity to file reply. On 06.04.2022, the landlords filed their reply objecting to the application at Exhibit D-6. On 08.06.2022, the Rent Controller allowed the tenants' application at Exhibit D-6 and granted them an additional opportunity to file their reply subject to payment of costs of ₹2000/-.

12. On 14.06.2022, the landlords, aggrieved by the Rent Controller's order dated 08.06.2022, preferred Rent Revision No. 05/2022 before the Revisional Court. The Revisional Court stayed the order dated 08.06.2022 and ultimately allowed the revision by order dated 26.08.2022. The Revisional Authority has held that the Rent Controller had no power to recall its order dated 20.11.2021 and grant an additional opportunity to the tenants to file their reply to the eviction application.

13. The reasoning of the Revisional Authority is in paragraphs 6 and 7, quoted below for convenience of reference.

“6. The point for determination is restricted to the order passed by the Learned Rent Controller. The application for setting aside was filed well within time i.e. within a period of 30 days. According to Learned Advocate Shri Angle, the Learned Rent Controller did not have any power to recall its own order. Proceedings before the Rent Controller are regulated by the provisions laid down under the Mamlatdar's Court Act. The provisions of Civil Procedure Code apply only to the extent of recording of the evidence. Mamlatdar's Court Act does not provide for recall of one's own order.

7. Code of Civil Procedure permits filing of an application for setting aside an order passed by the same Judge. There is no such provision under the Mamlatdar's Court Act. The impugned order is casually passed without considering the powers conferred and laid down under the Mamlatdar's Court Act. The only remedy for the respondents was to file revision

application before the higher Court. The said order of closing right of the respondents to file reply is a revisional order under Section 46 of the Rent Control Act. The impugned order is therefore, perverse and bad in law. The impugned order is passed as if the proceedings were filed under the Civil Procedure Code. The impugned order therefore, needs to be quashed and set aside.”

14. The Revisional Authority has not adverted to Rule 11 of the said Rules which reads as follows:-

“11. Procedure for setting aside ex-parte orders. -
Where an ex-parte order is passed under the Act against a person, the said person may present either personally or through an Authorised Agent, an application to the authority passing such order, at any time within 30 days from the date of such order stating that he was prevented by some unavoidable circumstances from appearance before that authority. The authority may issue a notice in Form IV at the expense of the party concerned to the opposite party and if satisfied after hearing and recording evidence, if any, that the party concerned was prevented from attendance before the said Authority by some unavoidable circumstances, the authority may restore the case.”

15. Though it could be argued that Rule 11 on the strict construction applies only to situations where ex-parte order for eviction is made, I am not sure whether such a procedural requirement should be so strictly construed. Be that as it may, I am satisfied that under the ancillary and incidental powers vested in the Rent

Controller, an application for recall of order by which an opportunity to file a reply was closed, could be entertained by the Rent Controller provided sufficient cause was shown.

16. In this regard, the decision in the case of ***Major (retd.) Kehar Singh Vs Velentino Xavier Pereira***¹ is relevant. In the said case, the Division Bench was considering a reference on the issue of whether the Rent Controller had the power to permit amendment. The learned Single Judge, in the case of ***M/s Panduronga Timblo Industries Vs M/s Cosme Matias Menezes Ltd.***² held that the Rent Controller or the Administrative Tribunal had no power to permit an amendment to the pleadings in the course of proceedings under Section 22(2) of the said Act. However, another learned Single Judge of this Court disagreed with such a proposition and requested the Hon'ble Chief Justice to refer the matter to the Division Bench. This reference was answered in *Major (retd.) Kehar Singh* (supra).

17. The Division Bench took note of the Mamlatdar's Court Act and observed at paragraph 12 as follows:-

“ 12. It is true that Section 8 of the Mamlatdar's Court Act refers to a stage before the Mamlatdar issues notice to the defendants and does not seem to refer to the power to permit or carry out any amendment after the defendant has entered appearance. Nonetheless the

¹ WP No.302 of 2010 decided on 11.09.2012

² 2010 (5) AIR Bombay R 520

Section clearly contemplates that the plaint under the Mamlatdar's Court Act, can be amended if any defects or mistakes are notified. The power to permit amendment has undoubtedly been conferred on the Mamlatdar and must be held to be so conferred also on the authorities under the Rent Control Act which are bound to follow the procedure laid down in the Mamlatdar's Court Act. In any case, the existence of power conferred on the authorities to amend the plaint, though at an early stage, leads to an inference that the Legislature contemplated the power to permit amendment in the pleadings in a suitable case to advance the cause of justice. Certainly, in our view, the power to permit such amendments must be taken as having been conferred on the original authorities in any case impliedly, throughout the proceedings i.e. at all stages. We wish to make it clear that the power to carry out amendments must be extended not only to plaints but also to written statements under the Rent Control Act. Though the Mamlatdar's Court Act does not contemplate filing of written statement, it would be unjust to restrict this power only to plaints under the Rent Control Act which clearly contemplates an opportunity to the tenant to resist and oppose a landlord's application.”

- 18.** The Division Bench at paragraph 16 also held that the power to permit amendments of the pleadings must be considered as incidental and ancillary to the power to decide the application according to law. The relevant observations in paragraph 16 reads as follows:-

“16. Apart from the above, we find that such a power to permit amendments of the pleadings must be considered as incidental and ancillary to the power to

decide the application according to law. It is well known that amendments sometimes become necessary and many things such as change in the name and designation of the parties or the death of one of the parties or change in the circumstances of the case, make it necessary to bring it to the notice of the Court hearing the matter. For example, if a landlord has sought eviction on the ground of bonafide occupation of the premises by himself and for his family members and if need of the landlord or the family members ceases to exist for any reason, such subsequent events must be allowed to be brought on record in order to do justice between the parties. Many such eventualities, where the amendment becomes absolutely necessary, can be envisaged. Mr. Pangam Advocate relied on certain authorities of the Supreme Court in considering the scope of power to permit amendment of pleadings. Although in a different context, the Supreme Court in S. M. Banerji Vs. Sri Krishna Agarwal; AIR 1960 SC 368 observed in paragraph 12 as follows :

“12. As this stage we must guard against one possible misapprehension. Courts and Tribunals are constituted to do justice between the parties within the confines of statutory limitations, and undue emphasis on technicalities or enlarging their scope would on cramp their powers, diminish their effectiveness and defeat the very purpose for which they are constituted. We must make it clear that within the limits prescribed by the decisions of this Court the discretionary jurisdiction of the Tribunals to amend the pleadings is as extensive as that of a civil Court. The same well-settled principles laid down in the matter of amendment to the pleadings in a suit should also regulate the

exercise of the power of amendment by a Tribunal. This aspect has not been ignored by those Court in the aforesaid decision, and the Court observed, at p. 394 (of SCR): (at p. 456 of AIR):

It is no doubt true that pleadings should not be too strictly construed, and that regard should be had to the substance of the matter and not the form.”

This observation was made in the context of the limited power to permit amendment, conferred on the Election Tribunal.”

19. Mr Mangirish Angle, learned counsel for the landlords, submitted that the above decision in *Major (retd.) Kehar Singh* (supra) applies only to amendments. With respect, this is not a correct reading of the Division Bench's decision. Before the Division Bench, the issue was whether the Rent Controller was authorised to allow an amendment in the absence of a specific provision empowering the Rent Controller to permit amendments of the pleadings. By reference to the liberal construction of the requirements of the Mamlatdar's Court Act and by applying the doctrine of ancillary and incidental power, the Division Bench held that such power, if not expressly conferred, must be held as ancillary and incidental to the ability to decide the applications for eviction.

20. The above principle will apply to the present case assuming that there is no express power to recall an order closing an opportunity for

filing a written statement. Based on ancillary and incidental powers vested in the Rent Controller, there was no jurisdictional error in recalling the order dated 20.11.2021. The order dated 08.06.2022, by which the order dated 20.11.2021 was recalled, was within the jurisdiction. Besides, proper reasons were furnished by the Rent Controller for allowing recall. In particular, the Rent Controller considered the medical certificate, hospital invoice, discharge summary and other medical documents which had prevented the tenants from attending the Court or filing the reply. The costs were also awarded favouring the landlords.

21. Accordingly, the reasoning of the Revisional Authority cannot be accepted. Usually, when the Rent Controller exercises discretion positively on a procedural matter, the Revisional Court must hesitate to interfere unless the discretion is exercised perversely or arbitrarily. The Revisional Authority has not interfered on such ground, but the interference was because of Revisional Authority's opinion that the Rent Controller lacked jurisdiction or power to recall its own order. This reasoning is not acceptable for the reasons discussed above.

22. Accordingly, the impugned order dated 26.08.2022 is liable to be set aside and is hereby set aside. However, this is subject to tenants' paying further costs of ₹25,000/- favouring the landlords on or before 17.08.2023.

23. The parties must now appear before the Rent Controller on 17.08.2023 at 2.30 p.m. and file authenticated copy of this order. Mr Gaonkar states that a reply will be filed before the Rent Controller on or before 17.08.2023. Mr Gaonkar states that even the further costs of ₹25,000/- will be positively paid on or before 17.08.2023 to the landlords.

24. If the costs are not paid before 17.08.2023 or if the reply is not filed before 17.08.2023, then the tenants shall be deemed to have forfeited additional opportunity granted to them for filing their reply.

25. The rule is made absolute in the above terms with costs payable by the Petitioners as indicated above.

26. All concerned are to act on an authenticated copy of this order.

M. S. SONAK, J.