Supreme Court of India
Paradise Industrial Corpn Bombay vs Kiln Plastics Products on 29 September, 1975
Equivalent citations: 1976 AIR 309, 1976 SCR (2) 32
Author: A Alagiriswami
Bench: Alagiriswami, A.

PETITIONER:
PARADISE INDUSTRIAL CORPN BOMBAY

Vs.

RESPONDENT:
KILN PLASTICS PRODUCTS

DATE OF JUDGMENT29/09/1975

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
GOSWAMI, P.K.
UNTWALIA, N.L.

CITATION:
1976 AIR 309 1976 SCR (2) 32
1976 SCC (1) 91
CITATOR INFO :
RF 1989 SC 162 (8,12)

ACT:
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 Section 11(4) Failure of defendants to deposit arrears of rent after fixation of fair rent-Court. if competent to make order that defences of defendants be struck on failure to deposit arrears of rent.

HEADNOTE:
The appellants plaintiffs filed a suit against the defendants respondents for recovery of possession of the property leased to them as also rent and mesne profits in March, 1968. It was alleged that the defendants were in arrears of rent from 1st March, 1966 and that the rent was Rs. 385/- a month. On 30th January, 1968, a notice to quit was given to the defendants and the notice was served on 1st February, 1968. On 20th February, 1968 they filed an application under s.11 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 for fixation of standard rent. It was thereafter that the suit was filed in March, 1968. On 23rd November. 1968, the suit came up before a Judge of the Small Causes Court and after hearing the

parties he made an order requiring the defendants to deposit Rs. 13,000/- as rent due up to the end of December 1968 and interim standard rent of Rs. 308/- per month to be paid beginning from, February 15, 1969. It was further ordered that in default of the defendants depositing the amount the plaintiffs were at liberty to follow the consequential remedy under s.11 (4) of the Act. The defendants did not deposit the amount ordered by the Court and on 24th February 1969 the plaintiffs applied to the Court praying for a notice to be issued to the defendants to show cause why they should not deposit the aggregate amount of' rent and further rent of Rs. 385/- per month from 1st August, 1969 till the disposal of the suit. There was a further prayer that in default of the deposit of the amount the defences of the defendants may be ordered to be struck off. Upon this application a notice was issued to the defendants and on 2nd June, 1969, an order was made requiring the defendants to deposit Rs. 14,007/- within one month and to continue to deposit Rs. 385/- per month in accordance with the earlier order. It was further ordered that in default of the deposit the defences of the defendants there to be struck of and that the suit should be placed for ex parte orders on 15th July 1969. The defendants were absent. On that day and the suit was adjourned to 5th August, 1969. On the 5th August the suit was again adjourned to 6th and on that day an ex-parte decree for possession, recovery of arears of rent and costs was passed. However, on the 5th August he defendants had made an application stating that on proper calculation the amount of arrears of rent would come to Rs. 7065/- and praying for extension of time for deposit of this amount. The defendants were allowed to deposit the amount without prejudice to the rights and contentions of the partied and notice was ordered to be issued to the plaintiffs. The defendants deposited the amount but did not take out and serve the notice on the plaintiffs and the notice was ultimately discharged for want of prosecution on 19th September, 1969. An appeal filed before the Appellate Bench of the Small Causes Court against the exparte decree and it was dismissed. The High Court on an application made by the defendants under Art. 227 of the Constitution set aside the decree passed by the Small Causes Court on 6th August, 1969 as also the decree passed by the Appellate Bench and also dismissed the suit.

The High Court held that the order passed by the Small Causes Court on June 2, 1969 was illegal and without jurisdiction and every step that was taken by the Court subsequently was without jurisdiction and, therefore, was illegal. The High Court further held that as the defendants had deposited

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all mounts as ordered by the Court previous to the order of June 2, 1969 and also deposited the monthly rent at the rate of Rs. 308/- per month the matter would fall under s.

12(3)(b) and the suit should be dismissed.
Allowing the appeal by special leave,
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HELD:(1) The Judge of. the Small Causes used the words "defences to be struck off" and did not use the words the shall not be entitled to appear in or defend the suit except with the leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify" The words "striking out the defence are very commonly used by lawyers The use of the words defence struck off does not in any way affect the substance of the order and the High Court was wholly in error in holding that because of the form of the order passed on June 2 1969 the order was illegal and without jurisdiction. The order squarely falls within s.11(4) What the law contemplates is not adoption or use of a formula. it looks at the substance. It is not possible to bring the case within the provisions of s. 12(3)(b) of he Act. [35 EF. 36 BC, H].

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 411 of 1973.

Appeal by special leave from the Judgment and decree dated the August 1972 of the High Court of Judicature at Bombay in Special Civil Application No. 2778 of 1969.

F. S. Nariman and B. R. Agarwala for the Appellant. Mrs. Urmila Kapoor and Miss Kamlesh, for Respondents 1 and The Judgment of the Court was delivered by ALAGIRISWAMI, J. This is an appeal against the judgment of the High Court of Bombay in an application under article 227 of the Constitution by which it not only set aside the ex-parte decrees passed by the Court of Small Causes, Bombay in a suit for eviction and rent but dismissed the suit itself. The facts are as Follows:

The appellants-plaintiffs filed a suit against the defendants-respondents for recovery of possession of the property leased to them as also rent and mesne profits in March 1968. It was alleged that the defendant were in arrears of rent from 1st March 1966 and that the rent was Rs. 385/- a month. On 30th January 1968 a notice to quit was given to the defendants and the notice was served on 1st February 1968. On 20th February 1968 they filed an application under s.11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 for fixation of standard rent. It was thereafter that the suit was filed in March 1965. On 23rd November 1968 the suit came up before a Judge of the Small Causes Court and after hearing the parties he made an order requiring the defendants to deposit Rs. 13,090/- as rent due up to the end of December 1968 and interim standard rent of Rs. 308/per month to be paid beginning from February 15, 1969. It was further ordered that in default of the defendants depositing the amount the plaintiffs were at liberty to follow the consequential remedy under s.11(4) of the Act. The defendant did not deposit the amount ordered by the Court and on 24th February 1969 the plaintiffs applied to the Court praying for a notice to be issued to the defendants to show cause why they should not deposit the aggregate amount of rent and further rent

of Rs. 385/- per month from 1st August 1969 till the disposal of the suit. There was a further prayer that in default of the deposit of the amount the defences of the defendants may be ordered to be struck off. Upon this application a notice was issued to the defendants and on 2nd June 1969 an order was made requiring the defendants to deposit Rs. 14,607/- within one month and to continue to deposit Rs. 308/- per month in accordance with the earlier order. It was further ordered that in default of the deposit the defences of the defendants were to be struck off and that the suit should be placed for ex-parte orders on 15th July, 1969. the defendants failed to deposit arrears of rent and the suit came up for orders on 15th July 1969. The defendants were absent on that day and the suit was adjourned to 5th August 1969. On the 5th August the suit was again adjourned to 6th and on that day an ex-parte decree for possession, recovery of arrears of rent and costs was passed. However, on the 4th August the defendants had made an application stating that on proper calculation the amount of arrears of rent would come to Rs. 7065/- and praying for extension of time for deposit of this amount. The defendants were allowed to deposit the amount without prejudice to the rights and contentions of the parties and notice was ordered to be issued to the plaintiffs The defendants deposited the amount but did not take out and serve the notice on the plaintiffs and the notice was ultimately discharged for want of prosecution on 19th September, 1969. An appeal was filed before the Appellate Bench of the Small Causes Court against the ex-parte decree and it was dismissed. On an application filed before the High Court a learned single Judge set aside the decree passed by the Small Causes Court on 6th August 1969 as also . the decree passed by the Appellate Bench and also dismissed the suit.

As far as we are able to see the only reason which persuaded the learned Judge to come to this extraordinary conclusion was that under s.11(4) of the Act the only order that could be passed was an order directing, after fixing the interim standard rent to be deposited within a particular time, 'that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify', and the section did not authorise the Court to strike of the Defences straightway. The learned Judge found it difficult to understand how the Court could pass an order on June 2, 1969 as follows:

> "The defendant No. 2 to deposit the balance amount of Rs. 14,607/- in Court within a month and continue to deposit Rs.308 per month as per order passed by scrutiny Court in default Notice absolute and defences to be struck off and suit b fixed for ex parte hearing, on 15th July 1969. Defendant No. 2 to pay Rs 30/- to the plaintiffs."

He therefore thought the order passed by the Court on June 2, 1969 was illegal and without jurisdiction and every step that was taken by the Court subsequently must be considered to by without jurisdiction and illegal. However, considering the question as to what was the proper order to be passed in the petition, the learned Judge thought as the defendants had, admittedly deposited by then all amounts as ordered by the Court previous to the order of June 2, 1969 and also deposited the monthly rent at the rate of Rs. 308/- per month the matter would fall under s.12(3)(h) and the suit should be dismissed.

We may in order to facilitate the discussion set out the provisions of s. 11(4) of the Act:

> "(4) Where at any stage or a suit for recovery of rent, whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may, make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the land lord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant an order to pay to the landlord such amount thereof as the Court may specify, during the pendency of the suit. The Court may also direct that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify."

The learned Judge of the Small Causes Court used the words "defences to be struck of and did not use the words "he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify". We are afraid the learned Judge of the High Court has missed the substance and chased the shadow. The words "sticking out the defence" are very commonly used by lawyers. Indeed the application made on 24th February 1969 by the plaintiffs was for a direction. to order the defences of the defendants to be struck off in default of the non-payment of the amount ordered by the Court. The phrase "defence struck off" or "defence struck but" is not unknown in the sphere of law Indeed it finds a place in order XI, rule 21 of the Code of Civil Procedure:

> "21. Where any party fails to comply with any order to answer interrogatories, or for discovery of inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an. Order to that effect, and an order may be made accordingly."

In effect, both mean the same thing. Nobody could have misunderstood what was meant. Indeed, one may even say that the phrase `'the defence to be struck off" or "struck out" is more advantageous from the point of view of the defendents. Even when a defence is struck off the defendant is entitled to appear, cross-examine the plaintiff's witnesses and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him, whereas if it is ordered in accordance with s. 11 (4) that he shall not be entitled to appear in or defend the suit except with the leave of the Court he is placed at a greater disadvantage. The use of the words 'defence struck off' does not in any way affect the substance of the order and the learned Judge of the High Court was wholly in error in holding that because of the form of the order passed on June 2, 1960 the order was illegal and without jurisdiction. The order squarely falls within s. 11(4). What the law contemplates is not adoption or use of a formula it looks at the substance. The order is not

therefore one without jurisdiction. It is one which the Judge was competent to make. Be it noted that the learned Judge does not hold that the amount ordered to deposited by the defendants by the order dated June 2, 1969 was wrong or that it could not have been ordered at all. That order also fired the interim standard rent as contemplated by that section. That section itself con templates that the Court may order the deposit of such amount of the rent as the Court considers to be reasonably due to the landlord. Therefore, the order dated June 2, 1969 could not be held to be invalid on any ground whatsoever; nor has it been held to be illegal any ground other than that the words used were not the proper ones. It is to be further noted that the order itself did not order the defenes be struck off, it only fixed the 15th July 1969 as the date for striking out the defences and to fix the suit for ex-part hearing. So, till the expiry of a month given by that order for the deposit of money the question of striking out the defence did not arise nor was it in fact struck out. On the date fixed for striking out defences and fixing the date, for ex-parte hearing the defendants did not appear nor did they appear on the 5th and 6th of August when the suit was fixed for hearing. 'Though they were permitted to deposit Rs. 7,000/- on their application dated 4th August 1969 they did not take any further steps and so the notice was dismissed. The deposit of Rs. 7,000/- does not make any difference to the decision in this case because it was allowed to be deposited without prejudice to the rights and contentions of the parties. The defendants did not even apply for setting aside the ex-parte decree giving proper reasons for their non-appearance on the 5th and 6th August. They went on appeal against the ex-parte decree. The Appellate Bench of the Small Causes Court could have decided the appeal only on the basis of the material before it and the learned Judge of the High Court did not rely upon any material whatsoever except the form of the order made on the 2nd June 1969 for not merely setting aside the decree but even dismissing the suit itself. The deposit of the money after the ex-parte decree was passed was wholly irrelevant in considering whether the ex-parte decree passed was a proper one and much more so whether the suit itself could be dismissed.

We are unable to understand how the learned Judge found it possible to bring the case within the provisions of s. 12(3) of the Act. The tenants did not pay either on the 1st day of the hearing of the suit or on or before the date the Court fixed. Indeed on proper construction of law it is s. 11(4) that will apply. Section 12(3)(b) does not deal with a case like the present.

The appeal is, therefore, allowed. The judgment of the High Court is set aside and the decree of the Court of Small Causes dated August 6, 1969 as well as the appellate decree passed by the Court of small Causes are restored. The respondents will pay the appellants' costs.

V.M.K Appeal allowed.