

ishwari Devi Vs. Rallia Ram

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Court : Delhi

Decided On : Feb-10-1995

Reported in : 1995IAD(Delhi)1143; 57(1995)DLT781; 1995(33)DRJ237; 1995RLR278

Judge : K. Ramamoorthy, J.

Acts : [Delhi Rent Control Act, 1958](#) - Sections 25B(5)

Appeal No. : Civil Revision Appeal No. 650 of 1994

Appellant : ishwari Devi

Respondent : Rallia Ram

Advocate for Pet/Ap. : V. Shekhar and; K.R. Gupta, Advs

Judgement :

K. Ramamoorthy, J.

(1) The tenant, whose petition for leave to defend filed under [Delhi Rent Control Act, 1958](#) was dismissed by the learned Additional Rent Controller, is the petitioner in this revision petition. The landlord on 7th of June 1984 filed a suit No. 207/84 for possession under section 14(1)(e) of Delhi Rent Control Act (herein after referred as the 'Act') for personal occupation.

(2) The defense by the tenant was the petition was filed within 5 years from the date of purchase which is barred under the Act and that the landlord has not established his bona fide requirement. On 24th of September, 1988 the suit was decreed over ruling the objections of the tenant. The tenant preferred in this Court C.R. 109/89. This Court had that the sale certificate issued by the Competent Authority under the Evacuee Property Act was issued on 7th of January 1984 and, therefore, the eviction suit filed within 5 years was premature under the provisions of Section 14(6) of the Act. The Civil Revision was allowed on 22nd of February, 1993 by Hon'ble Mr. Justice Bahri. Thereafter, in 1993 the landlord filed suit No. 79/93 under section 14(1)(e) for owner's occupation. The tenant filed an application seeking leave to defend under section 25B(4) of the Act. The petition under this provision runs into 5 pages. There are five paragraphs. In paragraph 5 grounds (a) to (p) are mentioned. The prayer in the petition at the end of paragraph 5 is 'It is, therefore, most respectfully prayed that unconditional leave to defend the eviction petition may kindly be granted to the replying respondent and may pass such other order/s as may do complete justice in the facts and circumstances of the case and in the interest of justice'. therefore, the only point taken in the leave to defend petition is that the purchase by the first respondent-landlord from the authorities under the Evacuee Property Act is not valid and, therefore, the first respondent did not acquire any title to the property. The learned Additional Rent Controller by order dated 12th of April 1994 dismissed the petition and ordered eviction in the main suit. The learned Additional Rent Controller held that the landlord has become the owner of the property and the High Court while allowing C.R. 109/89 had held that first respondent -landlord had become owner of the property and that would operate as rest judicata.

(3) About the purpose of letting, the learned Additional Rent Controller in paragraph 8 said that the High Court in C.R. 109/89 held that the tenant has not challenged the finding of the lower court, that the demised premises was let out for residential purposes only and the landlord bona fide requires the same for occupation as well as for his family members dependent on him and that finding by the High Court would operate as rest judicata. The learned Additional Rent Controller in paragraph 9 has further stated that even otherwise inasmuch as the tenant has not at all disputed the claim of the landlord in the suit, claim of the

landlord is proved. In paragraph 9, learned Additional Rent Controller has given independent reasons for accepting the case of the landlord.

(4) This order of the learned Additional Rent Controller is challenged in the revision petition by the tenant. The learned counsel Mr. V. Shekhar argued the matter with ability and appreciation of facts. His contentions are four fold; (1) the landlord had not acquired title to the property; (2) the letting was for commercial purposes and now requirement for residence cannot be sought for; (3) the view taken by the learned Additional Rent Controller that what is observed by this Court while allowing C.R. 109/89 would operate as rest judicata is erroneous because once the revision petition was allowed and the suit ultimately was dismissed on the ground the Rent Controller had no jurisdiction to entertain the suit whatever finding that was given cannot operate as rest judicata; (4) The learned Additional Rent Controller has not appreciated the scope of the provision relating to leave to defend under section 25B of the Act and when the tenant has satisfied the requirements by filing affidavit, Additional Rent Controller cannot expect the tenant to file more documents to prove the case at this stage and the matter has to be decided only on the affidavit filed by the tenant. In this connection, he relied on the judgment of the Supreme Court *Precision Steel & Engineering Works vs. Prem Deva Niranjana Deva Tayal*, : [1983]1SCR498 and also referred *Narinder Kumar vs. Vishnu Kr. Nayyar*, 1993 Rajdhani Law Reporter 247.

(5) I shall take up the question relating to rest judicata because it was vehemently contended by the learned counsel for the petitioner that the learned Additional Rent Controller had relied only on the observations made by this Court in C.R. 109/89 and on the basis of that it would operate rest judicata the learned Additional Rent Controller has dismissed the petition for leave to defend. According to the learned counsel, the learned Additional Rent Controller has not appreciated the principles of law involved and contended that once there was no jurisdiction in a court whatever finding that is given in favor of the party when the suit for eviction was dismissed that can never operate as rest judicata in subsequent proceedings initiated by the said landlord. The learned counsel relied on *Pandurang Sakhamam vs. The Maharashtra Revenue Tribunal, Nagpur* and others, : AIR1974 Bom20 . Inasmuch as the counsel felt that the cases cited by

him would clinch the issue in favor of his client, I have to deal with this case and other cases cited by him. The facts of this case are, the landlord sought possession of the land from the tenant under section 36(2) read with section 38 of Bombay Tenancy and Agricultural Lands Act. The landlord appears to have acquired rights under the partition dated 17th of December 1958. Thereupon, he filed a petition for possession before the Naib Tahsildar for possession. On 22nd of October 1963, Naib Tahsildar ordered the petition for possession. On 13th of April 1964 the Appellate Authority affirmed the order of the Naib Tahsildar. The tenant took up the matter to Maharashtra Revenue Tribunal. On 23rd of February, 1965 the Tribunal held that the petition for possession was not maintainable in view of the provisions of section 38(7) of the Act and dismissed the petition. The landlord moved the High Court under Article 227 of the Constitution of India. When the matter was taken up for hearing by the High Court the decision of the same High Court had given a decision which was reported in Smt. Salubai Ramchandra and others vs. Chandu Saju and others, : AIR1966 Bom194 interpreting section 38(7) in favor of the landlord. Following the dictum laid down therein, the High Court allowed the petition of the landlord and remitted the case back to the Tribunal to dispose of the case on the merits to find out whether the landlord would satisfy the other requirements of section 38 of the Act. The Tribunal after remittal by the High Court simply followed the decision in : AIR1966 Bom194 (supra) and ordered the petition for possession. The tenant challenged the decision of the Tribunal in the High Court in Special Civil Application No. 902/68. During the pendency of this petition, a Full Bench of the Bombay High Court in Smt. Radhabai v. State of Maharashtra and others, : AIR1970 Bom232 had overruled the decision in : AIR1966 Bom194 and that view of the Full Bench was in favor of the tenant.

(6) The argument advanced on behalf of the landlord before the High Court was that earlier order of the High Court in favor of the landlord following the decision in : AIR1966 Bom194 would clearly operate as *res judicata* inasmuch as the tenant did not further question the judgment of the High Court, and, as the Full Bench rendered its decision later, in point of time that would not alter the position though the law after the decision of the Full Bench may be different. The Bombay High Court rejected that contention of the landlord and held that the earlier decision in

favor of the landlord would not operate as *res judicata* because the issue has been kept alive. The High Court while deciding the matter referred to a salutary principle evolved by the House of Lords in England in the case reported in *Carl-Zeiss-Stiftung vs. Rayner and Keeler, Ltd. and others* (No.2) 1966 2 All E L R 536. In that case the judgment rendered by a Court in German Democratic Republic was pressed into service and a plea of *res judicata* was taken. Their Lordships of the House of Lords did not accept the plea of *res judicata* because of various considerations and one of them being that England had not recognised German Democratic Republic as one of the States under International Law. Their Lordships said there may be sometime situations in which a judgment rendered by a competent court in a foreign country could raise what is called an issue estoppel. What, Lord Guest had observed at page 564 would be relevant. The same is as follows:-

'THE first question, which arises on what may conveniently be described as the second stage of the case, is whether the appellant is estopped *per rem judicatam* by the judgment of the West German court from arguing, in answer to the respondents' summons to stay the proceedings, that the appellant has authority to raise this action in the name of the Carl- Zeiss-Stiftung. A considerable part of the argument was devoted to this question which is not without difficulty and raises a number of complicated issues. The doctrine of estoppel *per rem judicatam* is reflected in two Latin maxims, (i) *interest rei publicae ut sit finis litium* and, (ii) *nemo debet bis vexari pro una et eadem causa*. The former is public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (SPENCER Bower On *res Judicata*, p.3). As originally categorised, *res judicata* was known as 'estoppel by record'. But as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared and it may be convenient to describe *res judicata* in its true and original form as 'cause of action estoppel'. This has long been recognised as operating as a complete bar if the

necessary conditions are present. Within recent years the principle has developed so as to extend to what is now described as 'issue estoppel', that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was identical to the main decision has been decided, then that may create an estoppel per rem judicatam'.

(7) In the instant case, principles of issue estoppel may be made applicable but the learned Judge who allowed C.R. 109/89 had held that the order of eviction passed by the Rent Controller was without jurisdiction. therefore, at this stage of the case, I do not want to rest my decision on the issue of estoppel alone which has not crystallized into a recognised principle approved by any binding authority in India.

(8) In Jaising Jairam Tyagi and others vs. Mamanchand Ratilal Agarwal and others : [1980]3SCR224 the facts can be tersely stated in order to appreciate the ratio of the case. In this case also the landlord filed a suit for possession under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, that relates to property situated in cantonment area i.e. called Kirkee Cantonment. The suit was decreed. There was an appeal. On 12th of June 1967 a decree was passed on the basis of a compromise. Tenant was granted sometime to vacate the premises. As tenant failed to vacate, as agreed to by him in the compromise, the landlord levied execution. It appears the Supreme Court in the meantime took the view during the pendency of the execution petition that Parliament alone was competent to make a law in regard to the 'Regulation and house accommodation in Cantonment areas'. On 29th of December 1969, Central Government issued notification extending the provisions of the land Act to Kirkee and other cantonment areas in view of the judgment of the Supreme Court. In the year 1970 the tenant filed Misc. Application No. 597/70 for a declaration that the decree obtained by the landlord was a nullity in view of the judgment of the Supreme Court. On 19th of November 1971 Misc. Application 597/70 was allowed. On 2nd of June 1972 Parliament enacted an Act 22/72 extending the Rent Control Act to the cantonment areas in order to clarify the position in the light of the judgment of the Supreme Court. On 11th of January, 1978 the landlord filed darkhast 104/73 to execute the decree passed, on the basis of the compromise.

(9) One of the objections of the tenant was that the order dated 19th November 1971 passed by the Court in Misc. Application 597/70 operated as rest judicata and, therefore, the execution petition must be dismissed. The Supreme Court held that there was no question of rest judicata. I fail to see how that principle could be made applicable to the facts of this case. The learned counsel for the petitioner Mr. Shekhar then referred to the decision in Gandabha Jinabhai vs. Ramubhai Fakirbhai (deceased by L.R.s), : AIR1982 Guj142 , a decision rendered by a Single Judge of that Court. The Court came to the conclusion that there was no rest judicata. The facts are that one Fakirbhai had two sons (i) Jinabhai (ii) Ramubhai. Gajindabhai, who is the son of Jinabhai, filed a suit against the paternal uncle Ramubhai for partition of the property described in the plaint. One of the items in the suit was alleged in Survey No. 122. The family held tenancy rights in that property. The plaintiff claimed that his father Jinabhai was the tenant and, therefore, after his death the tenancy rights devolved on him. The paternal uncle Ramubhai contended that he was the tenant. On these pleadings, issues were framed in the presence of the parties on 4th of July, 1978 and with reference to Survey No. 122 the issues framed on that date is as under :-

'WHETHER the suit property being Survey No. 122 of Dabholi village is a joint family property?'

(10) Ramubhai died pending suit. His L/Rs were brought on record and they adopted the written statement of Ramubhai. Sometime later, the plaintiff filed an application for framing two issues regarding survey No. 122 and prayed for those two issues being referred to the tenancy court under Bombay Tenancy and Agricultural Lands Act, 1948. The trial court rejected the application. Calling in question that order the revision petition was filed by the plaintiff. In opposing the revision petition the main contentions by the landlord were (1) the revision petition was not maintainable under Section 115 Civil Procedure Code as the order of the trial court cannot be considered to be case decided; (2) the order passed by the trial court on 4th of July 1978 while framing issues would operate as rest judicata. The Court noted the submission on behalf of the plaintiff and rejected the contentions. The learned Judge observed in para 5 in the following terms :-

'IN regard to the question of the rest judicata, the learned advocate Shri R.N. Shah cited a case of Bhikhabhai Jethabhai v. J.V. Vyas, Additional Collector reported in : (1963)4GLR873 . The Division Bench of this Court held as under :- 'Any decision of a court which lacks inherent jurisdiction to try the matter cannot operate as rest judicata in a subsequent proceeding. The doctrine of rest judicata is based on estoppel by record and no estoppel can be created by a nullity. If the decision of the executing court was a nullity, as being the decision of a court suffering from inherent want of jurisdiction, such decision could not operate as rest judicata.' The second objection, therefore, also fails.'

(11) The learned counsel Mr. Shekhar relying upon the passage in the above paragraph contended that any decision by the court which lacks jurisdiction to try the matter can not operate as rest judicata. The learned counsel then referred to Vellappan vs. Peter Thomas, : AIR1979 Ker194 . It is a case of fraud. Learned counsel said that the landlord had secured the order from the Competent Authority by playing fraud. His Lordship Mr. Justice V. Khalid, as His Lordship then was, held that principle of rest judicata is outside the region of fraud or collusion. I don't think that the petitioner can call in aid the ratio laid down in this case.

(12) The learned counsel further submitted that where a decree is one of dismissal in favor of the defendant and if there is an adverse finding against him on one point the plea of rest judicata cannot be founded upon that decision on that point vide Midnapur Zamindari Company, Ltd. vs. Naresh Narayan Roy 1922 P.C. 241, Arjun Singh and others vs. Tara Das Ghosh and others, : AIR1974 Pat1 , Genda Lal vs. Hazari Lal : AIR1936 All21 ,, Bhima Jally and others vs. Nata Jally and others, : AIR1977 Ori59 and Corporation of Madras vs. P.R. Ramachandriah and others, : AIR1977 Mad25 . In 1969 A W R 252 the Allahabad High Court has taken the view that the finding recorded in a suit for non maintainability does not operate as rest judicata.

(13) The learned counsel for the landlord Mr. K.R. Gupta relied upon the decision of the Supreme Court in P.K. Vijayan vs. Kamalakshi Amma and others, : [1994]3SCR213 to sustain the plea that tenant was barred under the principles of rest judicata. The facts of the case are entirely different and the ratio laid down by

the Supreme Court would not apply to the facts of this case. The learned counsel for the landlord contended that in suit No. 207/84 the Rent Controller had categorically given findings on facts in favor of the landlord on the merits besides holding on the point of ownership in favor of the landlord and the tenant while filing C.R. 109/89 did not challenge the findings rendered by the Rent Controller. thereforee, the observation of this Court coupled with the finding by Rent Controller would preclude the tenant from raising the same objections once over. The learned Judge of this Court while allowing C.R. 109/89 observed in the beginning of the judgment 'Counsel for the petitioner has urged only one legal contention in seeking setting aside of the eviction order. He has not challenged the findings of the Additional Rent Controller that the demised premises were let out to the tenant for residential purposes only and the respondent landlord bona fide requires the same for occupation as a residence for himself and for his family members dependent upon him and that neither the landlord nor his family members are in possession of reasonably alternative suitable residential accommodation. The contention raised before me is that eviction petition brought on June 7, 1984 was pre-matured as it had been brought within five years of the transfer of the property in question in favor of the respondent-landlord which according to the counsel for the petitioner took place with the issue of sale certificate on January 13, 1984.' thereforee, according to the learned counsel for the landlord-respondent the tenant cannot once again seek to challenge the claim of the landlord. The learned counsel for the respondent-landlord had ignored the observation by the learned Judge while allowing C.R. 109/89, which are in the following terms:-

'HENCE the eviction petition being premature was liable to be dismissed. The Controller had no jurisdiction to entertain the eviction petition before the expiry of five years and mere fact that during the pendency of the proceedings in the court five years period had elapsed cannot cure the jurisdictional defect appearing in this case. Subsequent events cannot make the original petition maintainable because on the date the petition was filed the Controller had no jurisdiction to entertain such a petition.'

therefore, in my view, the argument of the learned counsel for the petitioner that the landlord cannot rely upon the finding rendered earlier by the Rent Controller as operative as rest judicata is well founded. But it does not dispose of the matter. I have to see whether the tenant had satisfied the requirements of Section 25B(4) and (5) of the Act. Sections 25B(4) and (5) read as follows :-

'(4)The tenant on whom the summons is duly served (whether in the ordinary way or by registered post) in the form specified in the Third Schedule shall not contest the prayer for eviction from the premises unless he files an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Controller as hereinafter provided; and in default of his appearance in pursuance of the summons or his obtaining such leave, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant and the applicant shall be entitled to an order for eviction on the ground aforesaid. (5) The Controller shall give to the tenant leave to contest the application if the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the premises on the ground specified in clause (e) of the proviso to sub- section (1) of Section 14, or under Section 14A.'

(14) As stated above, the tenant while filing the application for leave to defend had taken only one point namely that the sale in favor of the landlord was not valid and that the point that it was filed within five years from the date of transfer was not put forth. The tenant apparently thought that he can invite the Rent Controller at this time to go into the question of validity of sale. The tenant while filing C.R. 109/89 against the order of the learned Additional Rent Controller did not question the validity of the sale in question in favor of the landlord and as pointed out above the only point was that the eviction suit having been filed within five years from the date of issue of sale certificate was barred under the provisions of Section 14(6) of the Act. The same reads as under :-

'14(6) Where a landlord has acquired any premises by transfer, no application for the recovery of possession of such premises shall lie under sub-section (1) on the ground specified in clause (e) of the proviso thereto, unless a period of five years

has elapsed from the date of the acquisition.'

(15) It is well settled that once a party who could have taken a point did not take it and chooses to challenge the order against him only at a particular point then on the principles of 'Might and Ought' he is barred from challenging the same on any other point. thereforee, the tenant cannot be heard to contend that the sale in favor of the landlord was not valid in law and, thereforee, on the basis of that sale he cannot seek recovery of possession from the tenant. The learned counsel for petitioner relying on the decision of the Supreme Court : [1983]1SCR498 (supra) said that the Rent Controller should have accepted the affidavit filed by the tenant and at this stage no other material should be looked into . In paragraph 10 Their Lordships observed as follows :-

'UNDOUBTEDLY the procedure prescribed in Chapter III-A of the Act is materially different in that it is more harsh and weighted against the tenant. But should this procedural conundrum change the entire landscape of law? When a landlord approaches Controller under Section 14(1) proviso (e), is the court to presume every averment in the petition as unchallengeable and truthful? The consequence of refusal to grant leave must state in the face of the Controller that the landlord gets an order of eviction without batting the eyelid. This consequence itself is sufficient to liberally approach the prayer for leave to contest the petition. While examining the question whether leave to defend ought or ought not to be granted the limited jurisdiction which the Controller enjoys is prescribed within the well-defined limits and he cannot get into a sort of a trial by affidavits preferring one set to the other and thus concluding the trial without holding the trial itself. Short-circuiting the proceedings need not masquerade as a strict compliance with sub-section (5) of Section 25B. The provision is cast in a mandatory form. Statutory duty is cast on the Controller to give leave as the legislature uses the expression 'the Controller shall give' to the tenant leave to contest if the affidavit filed by the tenant discloses such fact as would disentitle the landlord for an order for recovery of possession. The Controller has to look at the affidavit of the tenant seeking leave to contest. Browsing through the affidavit if there emerges averment of facts which on a trial, if believed, would non-suit the landlord, leave ought to be granted. Let it be made clear that the statute is not cast in a negative form by enacting that

the Controller shall refuse to give to the tenant leave to contest this application unless the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order, etc. That is not the mould in which the section is cast. The provision indicates a positive approach and not a negative inhibition. When the language of a statute is plain, the principle that legislature speaks its mind in the plainest language has to be given full effect. No cannon of construction permits in the name of illusory intendment defeating the plain, unambiguous language expressed to convey the legislative mind. And the legislature had before it Order 37, an analogous provision where leave to defend is to be granted and yet avoiding the phraseology of the Code of Civil Procedure, namely, 'substantial defense' and 'vexatious and frivolous defense', the legislature used the plainest language, 'facts disclosed in the affidavit of the tenant'.

In paragraph 22 the Supreme Court further observed as under:-

'WHAT then follows. The Controller has to confine himself indisputably to the condition prescribed for exercise of jurisdiction in sub-section (5). In other words, he must confine himself to the affidavit filed by the tenant. If the affidavit discloses such facts-no proof is needed at the stage, which would disentitle the plaintiff from seeking possession, the mere disclosure of such facts must be held sufficient to grant leave because the statute says 'on disclosure of such facts the Controller shall grant leave'. It is difficult to be exhaustive as to what such facts could be but ordinarily when an action is brought under Section 14(1) proviso (e) of the Act whereby the landlord seeks to recover possession on the ground of bona fide personal requirement if the tenant alleges such facts as that the landlord has other accommodation in his possession; that the landlord has in his possession accommodation which is sufficient for him; that the conduct of the landlord discloses avarice for increasing rent by threatening eviction; that the landlord has been letting out some other premises at enhanced rent without any attempt at occupying the same or using it for himself; that the dependents of the landlord for whose benefit also possession is sought are not persons to whom in eye of law the landlord was bound to provide accommodation; that the past conduct of the landlord is such as would disentitle him to the relief of possession; that the landlord who claims possession for his personal requirement has not cared to

approach the court in person though he could have without the slightest inconvenience approached in person and with a view to shielding himself from cross-examination prosecutes litigation through an agent called a constituted attorney. These and several other relevant but inexhaustible facts when disclosed should ordinarily be deemed to be sufficient to grant leave.'

In paragraph 11 Their Lordships of the Supreme Court had also noticed that the language of sub-section (5) of Section 25B casts a statutory duty on the Controller to give to the tenant leave to contest the application, the only pre-condition for exercise of jurisdiction being that the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of the possession of the premises on the ground mentioned in section 14(1)(e).

(16) thereforee, I have to consider whether the tenant in the instant case has disclosed facts in the affidavit in support of his evidence for leave to defend. As earlier noticed, the tenant has not denied the crucial facts mentioned in the suit by the landlord for claiming possession and the only point was that the sale in favor of the landlord was not valid in law. thereforee, I think that the tenant cannot at all press into service the decision of the Supreme Court, above referred to. As noticed by me, what persuaded the Supreme Court to hold in favor of the tenant is what is stated in para 22 of the judgment, as cited above.

(17) This Court had occasion to consider a case under similar circumstances in 1993 R L R 247 (supra). The learned Single Judge Hon'ble Ms. Justice Usha Mehra has considered the judgment of the Supreme Court, above referred, on this question and has affirmed the order of the Rent Controller refusing to grant leave to defend to the tenant.

(18) Having regard to the facts and circumstances of this case, when the tenant has not denied the facts entitling the landlord to obtain order of eviction and when he is barred by the order passed by this Court in C.R.109/89 and when the learned Additional Rent Controller has independently considered the aspects of ownership purpose of letting and bona fide requirement I do not find any reason to take a different view from what has been taken by the learned Additional Rent Controller. Accordingly, the revision petition is dismissed. No costs.

