
(1996) 10 BOM CK 0085
In the Bombay High Court
Case No : Writ Petition No. 796 of 1983

Balu Mahadeo Randhir

APPELLANT

Vs

Nabilal Haji Habib Gadiwale and Others

RESPONDENT

Date of Decision : 15-10-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2), 12(3), 12(I)
Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 115, 3

Citation : (1997) 2 BomCR 462 : (1996) 98 BOMLR 803

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Advocate : V.S. Gokhale, for the Appellant; M.R. Katikar, for the Respondent

Judgement

V.P. Tipnis, J.—This is a petition by the original defendant challenging the legality and correctness of the decree of eviction passed against him by the lower Appellate Court under the provisions of the Bombay Rent Act.

2. Before I refer to the decisions of both the lower courts, it is necessary to point out some very relevant facts. One Pirale was the original owner of several lands and the defendant -tenant was tenant of the said Pirale. The present plaintiffs' father by name Hajihabib purchased the entire property from said Pirale under two sale deeds, one dated 2-2-1968 and the other dated 6-7-1971.

3. In the year 1968, said Pirale, his sons as also the father of the present plaintiffs, viz., Hajihabib filed Regular Civil Suit No. 66 of 1968 against several persons, including the present defendant-tenant as defendant No. 6 therein in the Court of the IIInd Joint Civil Judge, Senior Division, Sangli. It is relevant to notice that in the said suit, the plaintiffs, who included the father of the present plaintiffs, specifically averred in para 4 of the plaint that defendants No. 1, 2, 3, 4, and 5 are in possession of the five rooms constructed and other defendants (who included defendant No. 6 who is the present defendant-tenant Balu

Mahadeo Randhir) are given open place on rent and they have constructed their own sheds on the same. In the said plaint, it was also averred that the ground rent of the premises in possession of the present defendant-tenant, who was defendant No. 6 therein, was Rs. 7/-. In the suit, possession of all the premises was claimed as also Rs. 85/- was claimed towards compensation for the wrongful use by the defendants. It is extremely relevant to notice that the said suit was decreed on 30-6-1969 and it was decreed and ordered that defendant No. 1 therein should give possession of two rooms to the plaintiffs and so far as the remaining property is concerned (which obviously included the open plot demised to the defendant-tenant), the plaintiff should obtain symbolic possession.

4. The aforesaid decree, therefore, clearly showed that it was the specific case of Hajihabib that defendant No. 6 was tenant in respect of open space and that he had constructed a shed thereon. It is further clear that by decree dated 30-6-1969 between the said Hajihabib as plaintiff and the present defendant-tenant, who was defendant No. 6 therein, only symbolic possession of the said open plot was directed to be given.

5. The said Hajihabib, thereafter, filed Regular Civil Suit No. 298 of 1971 in the Court of the IInd Joint Civil Judge, Junior Division, Sangli, against the present defendant-tenant for possession of the suit premises on the ground of default of rent. It is relevant to notice that in the said suit, it was the case of the said Hajihabib that the defendant-tenant was tenant in respect of a room on a monthly rent of Rs. 7/- and the defendant-tenant categorically pleaded that he had taken an open plot of land on lease at a monthly rent of Rs. 3/- from Pirale. The copy of the judgement in the said Regular Civil Suit No. 298 of 1971 shows that the evidence in Civil Suit No. 298 of 1971 was treated as evidence in this suit and witness Pirale i.e. the original owner in his deposition had admitted that he had received rent from the tenant. The learned Judge held that as Hajihabib was not entitled to the rent prior to the purchase of the suit property and as previous owner Pirale had clearly admitted that the rent till the sale of the property to Hajihabib was paid to said Pirale, the learned Judge held that the defendant-tenant cannot be held to be defaulter for period of more than six months and that the suit for possession on the ground of default must fail. The learned Judge recorded a categorical finding that the agreed rent of Rs. 7/- is not shown to be excessive and, therefore, it is the standard rent. In para 7, the learned Judge dealt with the issue, viz., whether the defendant proves that the suit open plot was leased out to him. The learned Judge held that the description of the suit premises given in the plaint is not denied nor has it been challenged by the defendant and it is not pressed that the defendant was let an open plot of land. As a matter of fact, this observation is obviously factually incorrect because in para 2 of the very judgment, the learned Judge has referred to the fact that the defendant has contended that he has taken the suit premises as an open plot at a monthly rent of Rs. 3/-. It is extremely relevant to notice that even prior to the said suit, the defendant had filed Misc. Application No. 71 of 1971 before the very Judge for fixation of standard rent and in the said application, it was clearly

asserted that an open plot was leased to the defendant-tenant at the rate of Rs. 4/- per month as rent from the predecessors-in-title of the present owner Hajihabib and that the defendant-tenant had constructed a shed on the said open plot of land. In the application again it is mentioned that the application is made to determine the standard rent of the said open plot of land. On the said application, there is an order dated 21-9-1972 which is as under :-

"The evidence recorded in Civil Suit No. 298/1971 was admitted to be read over in this application. The standard rent of the suit premises is fixed at Rs. 7/- in that suit. Hence, I dispose of this application and hold the standard rent of the suit premises at Rs. 7/- p.m. No order as to costs."

Thus, it is clear that this application was disposed of in accordance with the finding recorded in Civil Suit No. 298 of 1971. I have already mentioned that the finding recorded by the learned Judge in the suit is that the description of the suit premises given in the plaint is not denied. What is, however, extremely relevant and important to note is that on the basis of finding that the defendant-tenant was not a defaulter, the learned Judge by his judgement and decree dated 21-9-1972 dismissed the plaintiffs' suit for possession and determined the standard rent of the suit premises at Rs. 7/-.

6. Thereafter, the present plaintiffs who are the heirs of the said Hajihabib filed the present Regular Civil Suit No. 247 of 1975 in the Court of the IInd Joint Civil Judge, Junior Division, Sangli, against the present defendant-tenant for possession of the suit premises. It was asserted that the defendant-tenant is a tenant in respect of one room belonging to the plaint. The plaint made reference to the decree in earlier Suit No. 298 of 1971 and stated that the standard rent of the said room was fixed at Rs. 7/-. That the defendant-tenant has not paid rent from 1-12-1973 and, hence, notice dated 21-4-1975 was issued. The defendant-tenant neither paid the arrears of rent nor the education cess. It was claimed that as the defendant-tenant is in arrears of rent for more than six months, the defendant-tenant is liable to be evicted.

7. The defendant filed his written statement and categorically stated that description of the suit property is not correct. The defendant categorically stated that a room in the plot is not let out to the defendant but an open plot was let out to the defendant by the predecessor in title of the plaintiffs and the defendant-tenant has constructed a shed (chappar) thereon. The written statement made a reference to the decree in Regular Civil Suit No. 66 of 1968 and further averred that in the said suit the plaintiffs therein, viz., the original owner Pirale and the father of the present plaintiffs Hajihabib had clearly stated that the defendant-tenant is tenant of a plot of land and decree was also passed accordingly. The plaintiffs are estopped from contending otherwise. The defendant, therefore, categorically stated that the contention of the present plaintiffs that the room has been leased out to the present defendant-tenant is untrue. The defendant-tenant also denied that he was a defaulter as alleged.

8. Plaintiff No. 1 Nabilal was examined on behalf of the plaintiffs. He asserted that the defendant is a tenant in respect of the suit room described in para 1 of the plaint and that it was originally belonging to his father and the father purchased it from one Pirale. Plaintiff No. 1 then asserted that his father had filed Regular Civil Suit No. 298 of 1971 against the defendant and it was ordered that standard rent of the suit premises is fixed at Rs. 7/- per month. Thereafter, plaintiff No. 1 has given details of the arrears of rent, service of notice, etc. Plaintiff No. 1 has further stated that as on the Money Order coupon, the defendant-tenant had written that he was sending the rent of open plot, he refused the rent sent by Money Order. Plaintiff No. 1 also asserted that the rent sent by the Money Order was also not tender of the full amount. In cross-examination, plaintiff No. 1 admitted that his father might have purchased the suit premises in 1967 and 1968 by two different sale deeds. The witness has categorically admitted that his father filed Regular Civil Suit No. 66 of 1968 against the tenant, including the present defendant-tenant, and he was defendant No. 6 in the said suit. The witness also stated that he does not remember whether he gave evidence on behalf of his father in the suits filed by his father in the Court.

9. The defendant-tenant Balu Randhir stated in his evidence that initially, the premises were let out to him at Re. 1/- per month. It was an open plot. He used to pay the rent to one Potdar who is father-in-law of Pirale. Thereafter, he constructed a shed. There were 7 to 8 tenants in the entire open plot. The father of the plaintiffs and Pirale filed Regular Civil Suit No. 66 of 1968 against all the tenants. The father of the plaintiffs also filed Regular Civil Suit No. 298 of 1971. The defendant-tenant stated that it is not true to state that the suit premises is a room and not a shed owned by the plaintiffs. He asserted that he is the tenant of the open plot. In cross-examination, he stated that he has no documentary evidence to prove that the open plot was leased out to him. He stated that after the receipt of the notice, he did not pay rent to the plaintiffs but deposited it in Court. He stated that it is not true to state that he is tenant of a room and not of open plot.

10. Upon these materials, the learned trial Judge held that the documentary evidence shows that the defendant had sent the rent by Money Order to the plaintiffs and, therefore, the defendant is not a defaulter. The learned Judge specifically referred to the decree in Regular Civil Suit No. 66 of 1968 which clearly shows that the defendant has been held to be the tenant of an open plot and symbolic possession of the open plot was given to plaintiff Pirale from the present defendant. The learned Judge, therefore, held that it cannot be said by the plaintiffs now that the defendant is the tenant of the room and not of the open plot. The learned Judge felt that decision in Regular Civil Suit No. 66 of 1968 will estop the plaintiffs now from raising the contention that the defendant is the tenant of room only. It is for this reason that the learned Judge held that the suit notice cannot be held to be legal and valid due to misdescription of the suit premises. The learned Judge, therefore, held that the plaintiffs have not

validly terminated the tenancy. On Issue No. 3A, the learned Judge held that the defendant contended that he is not a tenant of the suit room but tenant of the open plot and to prove his contention, he has produced a certified copy of the decree in Regular Civil Suit No. 66 of 1968 and this decree acts as an estoppel for the plaintiffs from raising the contention that the defendant is a tenant of the suit room only. Therefore, the learned Judge held that the defendant has succeeded in proving that he is the tenant of the open plot and not of the room. It is on this ground and reasoning that the learned Judge by his judgement and decree dated 29-11-1979 dismissed the plaintiffs' suit with costs.

11. Being aggrieved by the said judgement and decree, the original landlords preferred Civil Appeal No. 235 of 1980 to the District Court at Sangli. The learned Assistant Judge, Sangli, who heard the appeal, observed that the main contention between the parties is whether the defendant is a tenant of a room or of an open plot. The learned Judge felt that the learned trial Judge has not at all applied his mind to the facts of the case and has reached a wrong conclusion. The learned Judge felt that the evidence on record clearly shows that in view of previous decision between the parties, the tenant is now unable to take up the stand that he is tenant of the open plot and not of the room. Then the learned Judge referred to the decree in Regular Civil Suit No. 66 of 1968 but felt that, however, subsequently Hajihabib filed Regular Civil Suit No. 298 of 1971 against the present tenant for arrears of rent and possession. In the said suit, Hajihabib described the suit premises as a room. The judgement shows that the defendant had taken up the stand that he was tenant of an open plot and not of a room. Thereafter, the learned Judge referred to the discussion in the judgement in Regular Civil Suit No. 298 of 1971 regarding the description of the suit property and held that thus in the earlier suit, there was a dispute between the parties as to whether room was given to the defendant or a plot was given and after framing necessary issues, finding was recorded that the room was given to the defendant as tenant and that the finding has become final. The learned Judge has also referred that due to this finding, the defendant is estopped from contending that he is a tenant of the open plot and that his plea is clearly barred by res judicata is a position considered even by the learned Advocate for the defendant-tenant. Then the learned Judge referred to the application for determination of the standard rent and the fact that the defendant had contended therein that he was a tenant of open plot. Then the learned Judge referred to the order passed thereon and stated that even though in the application for standard rent, the defendant-tenant had contended that he was tenant of the open plot, in view of the finding given in Regular Civil Suit No. 298 of 1971, the learned Judge found that the suit premises were a room and their standard rent was fixed at Rs. 7/- per month. The learned Judge held that thus the dispute between the parties on this point is finally settled and the defendant now cannot say that he is the tenant of the open plot and not of the room. The learned Judge felt that the decree in Regular Civil Suit No. 66 of 1968 was superseded by the decree in Regular Civil Suit No. 298 of 1971 and, therefore,

the subsequent decree is clearly binding. The learned Judge, therefore, held that the present defendant-tenant was tenant of the room and not of the open plot.

12. Thereafter, the learned Judge held that on the basis of evidence on record, the case is clearly covered under the provisions of section 12(3)(a) and the Court has no discretion but to pass a decree for possession. Accordingly, the learned Judge of the lower Appellate Court by his judgement and decree dated 19th October, 1982 allowed the appeal, set aside the judgement and decree of dismissal and directed the defendant-tenant to deliver possession of the suit premises, viz., the room to the plaintiffs.

Being aggrieved by the said judgement and decree of the lower Appellate Court, the original defendant has preferred this writ petition.

13. I have heard Mr. Gokhale, learned Counsel appearing for the petitioner-tenant, and Mr. Katikar, learned Counsel appearing for the original landlords. As the matter pertains to the points of estoppel and res judicata, the learned Counsel for the petitioner has prepared an additional paper-book containing the plaint in Regular Civil Suit No. 247 of 1975 i.e. the present suit, the written statement in the present suit, depositions of plaintiff No. 1 and the defendant in the present suit, decree in Regular Civil Suit No. 66 of 1968, judgement in Regular Civil Suit No. 298 of 1971, Misc. Application No. 71 of 1971 and order thereon, notice dated 29-12-1973, notice dated 21-4-1974 and statement prepared by the Advocate regarding details of the Money Orders sent prior to 21-7-1974. The said paper-book shall form part of the record of this petition as I have made detailed reference to the various documents in the said paper-book in the earlier part of this judgement.

14. Mr. Gokhale, learned Counsel appearing for the petitioner, submitted that the learned Judge of the lower Appellate Court was wrong in law in holding that the decision in Regular Civil Suit No. 298 of 1971 operated as res judicata against the defendant-tenant in raising the issue whether he was a tenant in respect of open plot of land or of a room. Mr. Gokhale submitted that inasmuch as, ultimately, the suit was dismissed against the present defendant-tenant, there was no occasion for the defendant-tenant to challenge the mere finding as the appeal could not have been preferred. As such, Mr. Gokhale submitted that the said decision could never operate as res judicata against the defendant-tenant disentitling him from raising the plea that he was tenant in respect of the open plot of land. Mr. Gokhale next submitted that it is also relevant to notice that, as a matter of fact, in the earlier suit, viz., Regular Civil Suit No. 66 of 1968, filed by the father of the present plaintiffs and the predecessor-in-title, there was a specific assertion that the defendant was tenant of an open plot and the defendant-tenant had constructed a shed thereon and in the said suit, a decree was passed in favour of the predecessor-in-title of the present plaintiffs and only symbolic possession of the plot was given. Mr. Gokhale submitted that in law, the present plaintiffs are estopped from contending otherwise and they are bound by the admission and the stand taken by their father and the said Pirale in Regular

Civil Suit No. 66 of 1968. Mr. Gokhale, therefore, submitted that the learned Judge of the trial Court was more than justified in holding that as the description of the suit property in the notice is incorrect, the suit notice demanding the rent is illegal and the suit must fail. In that behalf, Mr. Gokhale placed reliance on the decision of the Apex Court in *Chimanlal Vs. Mishrilal*, . Mr. Gokhale also relied upon the decision of the Apex Court in *Deva Ram and Another Vs. Ishwar Chand and Another*, , in support of his contention that an appeal against a mere finding is not maintainable.

15. Mr. Katikar, learned Counsel appearing for the respondents/landlords, on the other hand, contended that the learned Judge of the lower Appellate Court was absolutely right in holding that the decision in Regular Civil Suit No. 66 of 1968 is superseded by subsequent decision in Regular Civil Suit No. 298 of 1971 and that the defendant is estopped by the principles of *res judicata* from contending that he is a tenant of the open plot of land and not of a room. Mr. Katikar, therefore, contended that once this is the position, on the basis of the facts, the defendant is clearly shown to be a defaulter.

16. Undoubtedly, the learned trial Judge has made many observations which are factually incorrect. So far as the issuance of notice demanding the rent and the failure of the tenant to pay the same within a month of the receipt of the notice is concerned, in my opinion, the learned trial Judge is obviously in error. It requires to be stated that even the tabular statement given by the learned Counsel for the petitioner-tenant shows that at the most the tenant had paid the rent or attempted to pay the rent by Money Orders till 30-6-1974. The notice dated 21-4-1975 alleged that the rent was in arrears from 1-12-1973. Admittedly, within one month of the receipt of the notice, no rent was paid. The standard rent was determined in the earlier proceedings at Rs. 7/- . Therefore, giving discount to all the Money Orders sent by the defendant-tenant, even then the defendant-tenant was clearly in arrears from 1-7-1974 to 31-10-1975, when the notice was issued and he was clearly in arrears for a period of nine months i.e. more than six months and within one month, he has not paid the said rent nor has he made any application. Therefore, so far as the finding of the learned Judge of the lower Appellate Court on the second point, viz., whether on the basis that the defendant was a tenant of a room, he is a defaulter is concerned, the same is clearly right.

17. However, I am of the clear opinion that the learned Assistant Judge was wrong in holding that the defendant-tenant is estopped from raising the contention that he is a tenant of an open plot of land. In that behalf, it requires to be noticed that u/s 11 of the Code of Civil Procedure, in order that the previous decision should act as *res judicata*, the issue must be shown to have been heard and finally decided. In the present case, it is relevant to notice that so far as the decision in Regular Civil Suit No. 298 of 1971 is concerned, ultimately, the suit was dismissed by order dated 21-9-1972 as against the present defendant-tenant. As such, any decision or a finding on a particular issue

cannot be held to be finally decided qua the defendant-tenant as the defendant-tenant could not have appealed only against the finding. In my opinion, the position in law is absolutely clear and Mr. Gokhale is also justified in relying upon the judgement of the Apex Court in Deva Ram's case (supra) wherein in para 27, it is held that an appeal does not lie against mere "findings" recorded by the Court unless the findings amount to a "decree" or "order". Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the Appellate Court. Inasmuch as the defendant could not have filed an appeal, the decision in the aforesaid Regular Civil Suit No. 298 of 1971 cannot act as res judicata and the decision of the learned Judge of the lower Appellate Court in that behalf is clearly wrong. What is more important is that, on the contrary, the decision and decree in Regular Civil Suit No. 66 of 1968 completely estops the plaintiffs from contending that the defendant-tenant was a tenant of a room and not of the plot. It is extremely relevant to notice that Pirale from whom the entire property was purchased by the father of the present plaintiffs and who had leased the original premises to the present defendant alongwith the said father of the present plaintiffs Hajihabib had filed Regular Civil Suit No. 66 of 1968 against several of the tenants, including the present defendant-tenant, and in the plaint of the said suit, it was categorically asserted that the present defendant-tenant was leased premises on the ground floor and that the present defendant-tenant had constructed a shed thereon. The said suit was decreed and that the decree gave only a symbolic possession of the plot of the land leased to the present defendant. In view of this decree, the present plaintiffs, in fact, are clearly estopped from saying that the defendant-tenant was tenant of the room and not of the open plot of land.

18. Once it is held that the present defendant-tenant was tenant of the plot of land and not of the room, the very notice u/s 12(2) demanding rent in respect of the room which did not belong to the plaintiffs but belongs to the tenant becomes unlawful. The Apex Court in Chimanal Vs. Mishrilal, , has held that the validity of a notice u/s 12(1)(a) of the M.P. Accommodation Control Act is a prior condition for the maintainability of the eviction suit. The notice referred to in section 12(1)(a) must be a notice demanding the rental arrears in respect of accommodation actually let to the tenant. It must be a notice (a) demanding the arrears of rent in respect of the accommodation let to the tenant and (b) the arrears of rent must be legally recoverable from the tenant. There can be no admission by a tenant that arrears of rent are due unless they relate to the accommodation let to him. A valid notice demanding arrears of rent relatable to the accommodation let to the tenant from which he is sought to be evicted is a vital ingredient of the conditions which govern the maintainability of the suit, for unless a valid demand is made no complaint can be laid of non-compliance with it, and consequently no suit for ejectment of the tenant in respect of the accommodation will lie on that ground. On the facts of that case, the Apex Court held that the notice of demand in the said case was invalid as the description of

the demised premises in the said notice was not correct.

19. So far as the provisions of the Bombay Rent Act are concerned, in substance, the only difference is that instead of "accommodation" the word "premises" is used in section 12(1) of the Bombay Rent Act.

20. For the aforesaid reasons, the very notice of demand being illegal and invalid, the tenant cannot be held to be a defaulter and no suit would be competent based on such notice and the failure of the tenant to comply with it. It may also be stated that even the learned Judge of the lower Appellate Court has observed that the tenant had deposited certain amounts as arrears of rent. Mr. Gokhale makes a statement that, in fact, the tenant had deposited rent in advance.

21. In the result, the petition succeeds. The judgement and decree dated 19-10-1982 passed by the learned Assistant Judge, Sangli, in Civil Appeal No. 235 of 1980 is hereby quashed and set aside and Regular Civil Suit No. 247 of 1975 filed in the Court of the IInd Joint Civil Judge, Junior Division, Sangli, is dismissed. The rule is made absolute in the aforesaid terms. However, in the facts and circumstances of the case, both the parties shall bear their own costs all throughout.