

(1988) 11 BOM CK 0052
In the Bombay High Court
Case No : Writ Petition No. 2134 of 1986

K.V. Ramna Ram

APPELLANT

Vs

Ereikal Samuel since died by Lrs. and Another

RESPONDENT

Date of Decision : 29-11-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, 11
Constitution of India, 1950 — Article 226

Citation : (1989) 3 BomCR 185

Hon'ble Judges : M.S. Ratnaparkhi, J

Bench : Single Bench

Advocate : R.B. Pendharkar and S.D. Date, for the Appellant; A.M. Tayade, Assistant G.P. and G.S. Shukla, for respondents 1A to 1E, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Ratnaparkhi, J.—The order dated 8-9-1986 passed by the House Allotment Officer, Nagpur in Revenue Case No. 22/A-71 (6-A) of 1982-83, directing these proceedings to be filed has been challenged in this petition.

2. The controversy encompassed in this petition is rather interesting. The factual positions giving rise to this litigation are not much disputed. One Ereikel son of Benjamin Samuel, the original respondent-1 in this petition, was occupying House No. 323 situated in Ward No. 65 Mohan Nagar, Nagpur. He was the Government servant and as such, these tenements were allotted to him by the House Allotment Officer sometimes in 1958 under Clause 23(1) of the C P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as the Rent Control Order). Samuel retired from Government service sometimes in 1974. However, he continued to be in possession thereafter. The house was subsequently purchased by the present petitioner Shri K.V. Ramna Rao on or about 1984. One Shamrao Darpe filed an application before the House Allotment Officer contending that the house has fallen vacant due to retirement of Samuel and it may be allotted to him (Shamrao) under Clause 23(1) of the Rent Control

Order. This application came to be registered as Revenue Case No. 22/A-71 of 1982-83. During the pendency of these proceedings the present petitioner K.V. Ramna Rao put in his appearance as an intervener. On hearing all the sides concerned, the House Allotment Officer passed an order on 6-4-1985 to the effect that due to retirement of Samuel he is not entitled to continue in occupation of the premises, that his occupation is in breach of Clause 25 of the Rent Control Order and that he should vacate the premises within 15 days of the communication of the order failing which action under Clause 28 of the Rent Control order would be initiated for compliance of the order.

3. This order of the House Allotment Officer came to be challenged before this Court in Writ Petition No. 804 of 1985. In that petition, however, the validity of Chapter III of the Rent Control Order was not challenged. The High Court on hearing both sides set aside the order of the House Allotment Officer and remanded the matter back to the authority with a direction that he should decide as to under what provision the allotment order was made in his favour. On remand, the House Allotment Officer heard both the parties and passed the order on 16-7-1986. The House Allotment Officer held that the allotment was made under Clause 23(1) of the Rent Control Order, that the allottee on his superannuation ceased to be a tenant and that he was liable to be evicted within 15 days. This order came to be challenged before this Court vide Writ Petition No. 1478 of 1986. In this petition even the validity of Chapter III of the Rent Control Order was challenged. However, at the stage of admission this petition came to be withdrawn on 31st July, 1986. The withdrawal was unconditional.

4. On 4-8-1986 Samuel filed an application before the House Allotment Officer in pursuance of explanation to Clause 25 praying that four months time should be given to him for vacating the tenements. On 13-8-1986 another application was filed by Samuel showing his willingness to file an undertaking and an affidavit to vacate the tenements. Time was granted till 26-8-1986 and further extended till 5-9-1986. In the mean while neither the undertaking nor the affidavit was filed. On 5-9-1986 Samuel filed an application praying that the proceedings be dismissed as this Court in *Vidarbha Rent Control, Bhadekaru Sangh, Akola v. State of Maharashtra* 1986 Mh.L.J. 882 has declared Chapter III of the Rent Control Order as ultra vires and, therefore, the very basis of the impugned order vanished. It was his contention raised that the House Allotment Officer has no jurisdiction to initiate the proceedings to vacate the tenements under Clause 28 of the Rent Control Order as the very order directing him to vacate the tenements is passed under the provisions which have been declared by the competent Court as ultra vires Article 14 of the Constitution of India.

5. This application was opposed by the present petitioner. The learned authority on hearing both the sides held that the order of vacation having been passed under the law which has been declared as ultra vires by the High Court cannot be executed under Clause 28 of the Rent Control Order and hence he had no jurisdiction to proceed with this matter. This order came to be passed on

8-9-1986 and it is this order which is subject-matter of challenge in this writ petition.

6. During the pendency of this petition, Samuel who was added as respondent No. 1 died and the respondents Nos. 1-A to 1-E have been added as his legal representatives. Mr. Shukla, the learned Advocate for the respondents has filed his reply on affidavit. The House Allotment Officer came to be represented by the Assistant Government Pleader. In spite of the directions given by this Court to file an affidavit, merely a pursis has been filed on behalf of the respondent No. 2. The stand taken by the State Government (if at all the pursis is to be taken as an authorised stand of the Government) is that Chapter III of the Rent Control Order having been declared as ultra vires the Collector shall have to direct the vacation of the allottees after their retirement.

7. Mr. Pendharkar, the learned Counsel for the petitioner strenuously urged before me that the respondent No. 1 cannot be allowed at this stage to raise the contention about the validity of Chapter III of the Rent Control Order because, according to him, this contention was never raised in Writ Petition No. 804 of 1985 wherein the order passed by the House Allotment Officer on 6-8-1985 was challenged. His further contention was that in Writ Petition No. 1478 of 1986 (where the order passed by the House Allotment Officer on 16-7-1986 was challenged) the contention about the validity of Chapter III was raised, but that writ petition was allowed to be withdrawn unconditionally. Thus, according to him once the challenge was laid before the Court and it was withdrawn unconditionally, the petitioner cannot be allowed to raise that ground again. The argument appears to be full of confusion inasmuch as Chapter III of the Rent Control Order has been declared by this Court to be ultra vires in Vidarbha Bhadekaru Sangh's case supra. The judgment of this Court has not been challenged so far and it remains a good law which this Court is bound to follow. Mr. Pendharkar's argument was that once the party raises a particular ground in the petition and subsequently withdraws that petition unconditionally without obtaining any liberty to file a fresh petition on that ground, that party cannot be allowed to agitate that ground again.

8. Reliance was placed for this proposition on the observations made by this Court in Narayan Yeshwant Nene Vs. Rajaram Balkrishna Raut and Another, . In that case an election petition was filed by the defeated candidate for setting aside the election of the elected candidate on the ground of corrupt practices. This petition was dismissed by the Tribunal. An appeal was taken to the High Court. At the conclusion of the hearing of the appeal, a prayer came to be made from the appellant's side for leave to withdraw the petition. This was not opposed and hence the petition was allowed to be withdrawn with no orders as to costs. Thereafter one Jagannath Patil put in his appearance before the Court on 4-8-1958 and sought leave of the Court to proceed with the appeal on the ground that it was not a proceeding in between the two parties, but it was a dispute in which the entire electorate is concerned. This Court held that the

appeal was already disposed of and that must be regarded as a decision of the High Court irrespective of the fact whether that decision was on merits or otherwise. This Court also held that the Representation of the People Act does not provide for a remedy of review. This Court, therefore, rejected the prayer of Jagannathbhau Patil. I fail to appreciate as to how the ratio laid in this case helps him in this matter.

9. Reliance was also placed on *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, . In this case the order of the State Transport Appellate Tribunal granting a permit to "X" came to be challenged before the High Court in writ petition. When this writ petition came up for hearing the Advocate for the petitioner sought leave to withdraw the petition. The leave was granted and the petition was withdrawn. After the withdrawal of this petition, a fresh petition was filed by the same party. That petition came to be summarily rejected. As the earlier petition had been withdrawn without any liberty, the fresh petition was not maintainable. This order of the High Court was challenged before the Supreme Court. The Supreme Court observed:

"But we are of the view that the principle underlying R. 1 of O. XXIII of the Code (Civil Procedure Code) should be extended in the interests of administration of justice to cases of withdrawal of writ petitions also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution once again, while the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on different footing altogether."

10. The ratio of the above judgment shows that it would be on the principles of public policy that the litigant may not be allowed to put in the same disputes before the Court again and again. The ratio further shows that withdrawal of the previous petition does not amount to res-judicata but it only precludes the party from reagitating that very cause subsequently before the Court after the

withdrawal of the first petition. However, by way of abundant caution exceptions are well spelt out in the underlined portion of the paragraph. According to me, this list is not exhaustive but illustrative. There may be some other points involved in the subsequent controversy which may not have been completely covered by the previous controversy. The challenge to the statute on the ground of ultra vires may be pursued in the subsequent litigation inspite of the fact that the challenge was withdrawn in the previous litigation. Mr. Pendharkar wanted to give the above underlined portion a very restricted meaning. According to him, the exception is only in respect of a right in the nature of habeas corpus or a right to enforce a fundamental right guaranteed under Article 21 of the Constitution of India. In my opinion, this restricted meaning would not be just because there may be the disputes which stand above the ordinary cause of action constituting the previous litigation.

11. What happened in the present case is very much interesting. In Writ Petition No. 1478 of 1986, no doubt the vires of Chapter III of the Rent Control Order was challenged. The challenge to that very statute was already pending before this Court in Writ Petition Nos. 1670 and 1695 of 1985. Writ Petition No. 1478 of 1986 came to be withdrawn on 31-7-1986, whereas Writ Petitions Nos. 1670 and 1695 of 1985 were finally heard by this Court and in fact Chapter III of the Rent Control Order has been declared as ultra vires. This judgment is reported in 1986 Mh.L.J. 882. There is thus an adjudication from the competent Court to the effect that Chapter III of the Rent Control Order is ultra vires the Constitution. In these circumstances, it will be futile to hold that the same challenge cannot be put forth. In fact the challenge which the present respondents took in that writ petition has been accepted by this court by its judgment reported in 1986 Mh.L.J. 882. In these circumstances, it would be futile to hold that the petitioner cannot raise the point regarding the vires of the Chapter III of the Rent Control Order. That point does not command a decision from this Court today because that point has already been decided by the larger Bench long back in 1986.

12. In view of this, it cannot legitimately be said that the petitioner cannot raise the point regarding the vires of Chapter III of the Rent Control Order. This point has hardly any force.

13. Next point urged by Mr. Pendharkar is that the order passed by the House Allotment Officer on 16-7-1986 has become final even before this Court struck down Chapter III of the Rent Control Order as ultra vires the Constitution. This order dated 16-7-1986 has not been challenged by the respondent No. 1 in this Court. On the other hand, what was urged before me by the learned Counsel for the petitioner was that the respondents accepted this order and merely sought some concessions from this Court on the assurances given by the respondent No. 1. My attention was invited to the fact that on 4-8-1986 an application for extension of time to vacate was made before the House Allotment Officer. The House Allotment Officer showed his willingness to grant extension subject to two conditions; (1) giving of an undertaking to vacate and (2) filling of affidavit. Time

was granted till 13-8-1986 by which both these conditions were to be satisfied. But no undertaking was filed and it is only for this purpose that the time was granted till 5-9-1986. On 5-9-1986 instead of furnishing the undertaking and filing an affidavit the respondent No. 1 requested the Court to dismiss the whole proceedings. On this factual position Mr. Pendharkar strenuously urged before me that the respondent No. 1 did accept the finality of the order passed on 16-7-1986 and what he wanted was merely some time to vacate the tenements. This time was ultimately granted by the Court till 5-9-1986. According to Mr. Pendharkar, having accepted the finality of the decision of the House Allotment Officer and after giving some assurances, the respondent No. 1 reaped some benefits and remained in possession of the tenements which he was not entitled to, in view of the order passed by the House Allotment Officer. This according to him, creates an estoppel and he cannot now take the advantage of breach of his own words and assurances. While considering this argument it shall have to be noted that the petitioner wants to pin down the respondent No. 1 at his own words. The doctrine of estoppel is well recognised as a part of common law, but the real skill lies in applying that doctrine.

14. The point that is germane to this litigation is whether the assurance given by the respondent No. 1 that he would vacate the tenements if some time is given and when in pursuance of this assurance he gets some time to vacate, it amounts to estoppel. In fact estoppel contemplates three things; (1) the assurance of representation made by the party (2) the other party relying upon the truthfulness of this representation must act and (3) that act must result in prejudice to the other party so acting thereupon. In the present case, the respondent No. 1 has given assurance to the Court. On the basis of this assurance the Court has granted time. The respondent No. 1 has taken the benefit of this assurance and remained in possession of the tenements inspite of the order of vacation passed against him.

15. It must be pointed out that an estoppel is always against a party and not against the Court. The other party did not act in any way on the assurance. It is only the Court who was impressed by the assurance and extended the time. It is none of my intention to say that the assurance given to the Court has no value at all. What is debated in the present case is not the ethical or moral aspect, but a legal aspect in toto. The arguments of Mr. Pendharkar appear to be that because of the assurance given by the respondent No. 1 and the Court acted upon that assurance and granted him time to vacate precludes the respondent No. 1 from agitating the validity of the order of vacation. The real question that poses before this Court is whether there can be an estoppel as is contended in the present case.

16. Reliance was placed by Mr. Pendharkar on the following observations of the Supreme Court in *Mansaram Vs. S.P. Pathak and Others*, :

"As a sequel to the right to obtain allotment on the ground of being holder of office of profit under Union or State Government a corresponding obligation is

cast upon such person to vacate the premises as soon as he ceases to hold office or the post which enabled him to obtain the order of allotment."

Relying upon these observations Mr. Pendharkar strenuously urged before me that the respondent No. 1 was under the statutory obligation to vacate these tenements soon after his superannuation. In spite of that obligation, he applied for extension of time and got the benefit. Because of the enjoyment of these benefits, he should now be precluded from asserting that there is no obligation. This is all right when the obligations are purely contractual. Different considerations arise if the obligations are created not by the contract but by the statute. I will consider this point in some detail a bit subsequently. For the present, it is enough to say that the statutory obligations have to be discharged only according to the provisions in the statute and not otherwise. The conduct of the individual may become a very weak circumstance vis à vis the statutory obligations. It is true that no person can be allowed to eat his own words and go behind his own words. That is also in consonance with the public policy. Had this been a case under the Contempt of Courts Act, this Court would have definitely given due weight to this sort of argument as has been done in the case of *Indian Hotel Co. Ltd. Vs. T. Stevenson*, . Mr. Pendharkar strenuously relied on this authority. In this case the defendant came in occupation of the tenements as a licensee of the plaintiff. He continued to remain in possession as a licensee. Subsequently a statute came to be amended so as to afford additional protection to the licensees. In a suit claiming relief from undertaking the defendant raised the plea that he is entitled to take the protection of the amended statute. On the other hand, it was contended that the defendant had given assurance that he would vacate by a particular date. The undertaking was given to that effect. The question was whether in spite of this undertaking given, the defendant can claim the benefit of the amended legislation. Mr. Pendharkar placed reliance on paragraph 21 of that judgment which reads as follows:

"This being the position I am of the view that it lies ill in the mouth of any party to say "though I have given a solemn undertaking which I had given for obtaining concession from the opponent, and though I have now enjoyed the full benefit of the concession, please relieve me of the same because though it is in my power to comply with the undertaking, the legislature has now sought to give me further benefit". The benefit given by the Legislature is a right conferred on the party, but it does not take away the power of the party to comply with the undertaking and this by itself cannot be a ground for holding that the party is not bound by the undertaking or for relieving the party from the undertaking."

17. Thus as far as the defence raised of *res judicata* is concerned, there is no force in it. Had the petition been only for the individual rights, this point would have assumed importance, but the petitioner has come before the Court with a positive case that the statute under which the action has been taken against him has been declared *ultra vires* by the High Court and, therefore, no action could be taken against him in law. This defence cannot in any way be barred either

under the principles of res judicata or under the principles of estoppel.

18. Mr. Pendharkar next contended before me that the conduct of the original respondent No. 1 in asking for extension of time to vacate inspite of the vacation order passed and thus obtaining the benefit from the Court disentitles him from claiming the relief in the present petition. This point has already been touched in the preceding part of the judgment. I have also referred to Mansaram Vs. S.P. Pathak and Others, where it was observed that the right to seek an accommodation under Clause 22 is followed with the obligation to vacate the tenements on the superannuation. This obligation flows from the statute which has been declared ultra vires the Constitution. Because of this declaration, there is no obligation in the eye of law. Even there is no power now vesting in the House Allotment Officer to allot the tenements. The observations of the Supreme Court in the above mentioned case were made when the Chapter III of the Rent Control Order was intact in the statute book. The position has been changed because of the adjudication by this Court by judgment reported in Vidarbha Bhadekaru Sangh v. State 1986 Mh.L.J. 882.

19. It was also feebly contended by Mr. Pendharkar that the assurance to vacate the tenements within a specified time amounted to surrender of the leasehold rights and reliance was placed for this proposition on Indian Hotel Co. Ltd. Vs. T. Stevenson, and Kamlabai and Others Vs. Mangilal Dulichand Mantri, . In fact Indian Hotel Co. Ltd. Vs. T. Stevenson, nowhere states that it amounts to surrender. Even Kamlabai and Others Vs. Mangilal Dulichand Mantri, does not anywhere say that the assurance amounts to surrender. On the other hand, the facts of that case are quite different. In that case tenant had already surrendered his tenancy rights in a compromise petition and claimed only some time to vacate. In fact the point of surrender does not at all arise in the present case because the case of the petitioner is that the tenancy has come to an end by a statute and not by operation of any of the provisions of section 111 of the Transfer of Property Act. The petitioner is not claiming possession on the ground that the tenant has surrendered the tenancy. What he contends before the Court is that the tenancy is automatically terminated in view of Clause 25 of the Rent Control Order. This case needs no consideration at the hands of this Court.

20. Mr. Pendharkar, the learned Advocate for the petitioner, strenuously urged before me that what has been declared ultra vires in Vidarbha Bhadekaru Sangh's case 1986 Mh.L.J. 882 is the post Constitutional Law and, therefore, this declaration will have its effect only from the date of adjudication. His further argument was that the adjudication in Vidarbha Bhadekaru Sangh's case 1986 Mh.L.J. 882 came at the end of August 1986, whereas the order of vacation was finally passed by the House Allotment Officer on 16-7-1986. His argument was that the order passed on 16-7-1986 is in no way affected by the adjudication of this Court. I find myself unable to agree with this argument. In fact, the distinction between the pre-constitutional and post constitutional statute is not so relevant in so far as the present case is concerned. The statute which has

given rise to this litigation is the Rent Control Order which was promulgated in 1949 i.e. before the coming into force of the Constitution. Clauses 23, 24 and 24-A etc. contained in the term "Crown". The House Allotment Officer was under obligation to nominate the persons who were in service of the Crown and in service of the Madhya Pradesh Electricity Board. With the coming into force of the Constitution, the word "Crown" came to be deleted and the word "Union of India" and the "State" were substituted. This amendment came in 1952. According to Mr. Pendharkar, this was the post-constitutional amendment and what has been declared void by the Court was this post-constitutional amendment. In his view this part would become void only from the date of adjudication and not prior to it. There appears to be a misconception about the appreciation of the judgment. What has been declared void is not the amendment which was effected in 1952, but that part of the statute which came in Chapter III. Chapter III was definitely a pre-Constitutional statute. The whole Chapter III has been declared as ultra vires by this Court. Mr. Pendharkar placed reliance on *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . I do not think that these cases are of any assistance as far as the present case is concerned. Enough to say that the whole Chapter III of the Rent Control Order has been declared ultra vires and that Chapterwise effaced from the statute book. This is in short the effect of the adjudication in *Vidarbha Bhadekaru Sangh's case* (supra).

21. The scheme of Chapter III needs a scrutiny at this stage. This Chapter consists of Clauses 22 to 27. Clause 22(1) (as it stood then) required the landlord to give intimation to the Collector regarding the vacancy. The landlord was precluded from inducing any tenant before any orders could be passed under Clause 23 or 24 of the Rent Control Order. Under clause 23 the Collector was within 15 days of the receipt of the intimation obliged to order the landlord to let the vacant house to any person holding an office of profit under the Union or the State Government or to any person holding a post under the Madhya Pradesh Electricity Board or to any displaced person or to an evicted person and the landlord was under the statutory obligation to let his house to such nominee of the Collector. If the Collector did not pass any orders within 15 days from the intimation, the landlord was at liberty to let out his house to anybody. Clause 25 provides that the tenancy of any person who has been accommodated under Clause 23(1) shall terminate on the date of the transfer of or on the date from which he ceases to hold office under the Union or the State. Proviso to this clause vested a discretion in the Collector to extend the tenancy by a period not exceeding four months. This is in short the scheme contemplated under Chapter III. We are not concerned with the other clauses as far as the present controversy is concerned.

22. The scrutiny of the provisions would show that the powers to nominate a person were vested in the Collector by operation of Clause 23(1) of the Rent Control Order. Similarly Clause 25 created for the first time a different mode of termination of tenancy which was not so far recognised by the Transfer of

Property Act and particularly section 111 thereof. The tenancy of the nominee of the Collector stood automatically terminated on his superannuation without recourse to the provisions of the Transfer of Property Act or to the provisions of Clause 13 of the Rent Control Order.

23. Thus, what can be seen from the scheme of Chapter III is the vesting of some powers in the Collector to nominate a person who could be the tenant of the landlord, the automatic termination of tenancy of such nominee on his superannuation and a discretion vested in the Collector in extending that tenancy upto the period of four months. These powers and the consequential obligations flows from the Statute, as it stood then. These powers could be exercised only under the statute. Thus what is provided in Chapter III was the powers vested in the Collector to ask the landlord to accept his (Collector's) nominee as a tenant and the automatic termination of the tenancy of such tenant on his superannuation. Now when this Chapter itself stands effaced from the statute, the consequences are obvious. Firstly the Collector has no powers to thrust his nominee on the landlord. Secondly the tenancy cannot be automatically terminated upon superannuation or otherwise of the tenant.

24. We have now to examine the present case on the background of the legal position that has been stated in the previous paragraphs. The Collector nominated the original respondent No. 1 and the landlord accepted him as his tenant in the suit tenements. The original respondent No. 1 continued to occupy the suit tenements as a tenant. He retired in 1974. In spite of this he continued to remain in possession and continued to pay rent to his landlord till 1982 or 1983. The present petitioner came into picture only in January 1984 when he purchased the suit tenements from the original landlord. The factual position that even after his superannuation the tenant continued to remain in possession of the suit tenement is undisputed. The landlord accepted the rent and allowed the original respondent No. 1 to enjoy the tenements. Even when the Chapter III was lawfully on the statute book, the relationship between the landlord and the tenant and the rights and obligations of the tenants and the landlord inter se remained intact. Though the tenant was thrust on the landlord by the Collector, he remained a lawful tenant for all purposes and his status as a tenant was recognised by law. Now comes the crux of the problem. Admittedly the tenant was inducted under Clause 23(1) of the Rent Control Order. Under the law then prevailing a corresponding obligation was cast on the tenant to vacate the premises within a week on the order of his superior officer. As already pointed out, this was altogether a new Code of termination of tenancy inasmuch as it was not recognised by the Transfer of Property Act. It was in 1982 or 1983 that a stranger filed an application before the House Allotment Officer to the effect that the original respondent No. 1 retired from service in 1974 and his tenancy stood terminated on his superannuation. He wanted the House Allotment Officer to take a note of this vacancy (which was as a result of the statute) and then allot the tenements to him. The controversy that is before this Court started from this stage. The authority passed the order finally on 16-7-1986 and directed the

eviction of the tenant.

25. We have now to examine whether in view of the present law the tenancy could be terminated automatically. To repeat it once again this Court adjudicated in Vidarbha Bhadekaru Sangh's case, 1986 Mh.L.J. 882 that the whole Chapter III of the Rent Control Order was ultra vires the Constitution. With this declaration the powers of the Collector to thrust his nominee on the landlord and also the automatic termination of the tenancy on superannuation also went away. Thus the statute providing for automatic termination of the tenancy is itself declared ultra vires . The tenancy could not be automatically terminated. There is no other law which terminates the tenancy automatically like this. Thus, what we find in the present case is that the very order of the authority passed on 16-7-19986 is without any legal basis. Clause 25 having been effaced from the statute book, there is no legal power to terminate the tenancy automatically. The legal position being clear on this point, there is no escape from this legal inference. The House Allotment Officer could declare the tenancy automatically terminated only in pursuance of Clause 25. If that clause is effaced from the statute book, there is no power vested in the House Allotment Officer to adjudicate that the tenancy is automatically terminated. The authority has no powers to direct the tenant to vacate the tenements on the ground that the tenancy is automatically terminated. Thus, the order on the very face of it is illegal.

26. Mr. Pendharkar, the learned Advocate for the petitioner strenuously urged before me that if the Collector ceases to have the powers due to the effacement of Clause 23(1) of Chapter III, then the inference must follow that whatever the Collector has done in 1958 is without any authority and thus it was the duty of the Collector to pass an order directing the original respondent No. 1 to vacate the house on the ground that he has been unlawfully inducted in the suit premises. Mr. Pendharkar urged that on this very ground the House Allotment Officer could have seen that the status qua ante was maintained. This argument suffers from a serious infirmity. Under the provisions of Collector could only nominate a person and ask the landlord to accept him as his tenant. The acceptance was obligatory. Thus the induction of such tenant though not voluntary (on the part of the landlord) clothed the rights of tenancy on the tenant so inducted. The landlord could not allege that the tenant inducted into the house was not of his choice and, therefore, no tenancy rights could be conferred on him. Thus the induction of a person by way of nomination by the Collector under Clause 23 has hardly any relevance as far as the rights of tenancy are concerned. Once such a person occupies the house, he is clothed with all the rights flowing from the tenancy. The action of the Collector may be wrong, but that did not affect his rights once he was inducted. It does not lie in the mouth of the landlord to say that the initial induction is void because of contravention of Clause 22. The Supreme Court in Nanakram Vs. Kundalrai, has taken such a view. In that case the tenant was inducted into the premises in contravention of Clause 22 and the landlord came before the Court alleging that

the tenancy itself was void. The Supreme Court observed:

"No where does the Rent Control Order mandate that the Deputy Commissioner must eject a person who has entered into possession of a house in violation of clause 22. If upon a view of the circumstances prevailing then, the Deputy Commissioner takes no action in the matter, there is no reason why the lease between landlord and the tenant, although inconsistent with Clause 22, should not be binding as between the parties thereto. It is not a void transaction. There is nothing in the Rent Control Order declaring it to be so. Now if the lease is not void then it is not open to either party to avoid the lease on the ground that it is inconsistent with Clause 22. The parties would be bound, as between them, to observe the conditions of the lease and it cannot be assailed by either party in a proceeding between them."

This observation of the Supreme Court negatives the arguments of Mr. Pendharkar and Mr. Pendharkar cannot now justifiably urge that the tenant was inducted by the Collector without any authority and so the action of the Collector itself is ultra vires. As already, pointed out, the nomination by the Collector has very little relevancy as far as rights between the parties are concerned. The nominee once inducted into the tenement becomes a tenant for all the purposes and the relationship cannot be attacked on this count.

27. This Court in *Kamal v. Deputy Collector, Nagpur* 1970 Mh.L.J. 430 has taken a view that it is clear from the provisions of Clause 23(1) that only power which the allotting authority exercises under the clause is the power to order the landlord to let the vacant house to particular person who satisfied the requirements of that clause and the landlord has no choice in the matter in the sense that the allotting authority has chosen a person who is to become his tenant. It is further observed that this clause does not bring into being a relationship of landlord and tenant which is brought about by the act of the landlord who lets the vacant house to the person in whose favour the allotment order is passed under Clause 23(1), and the tenancy is created by the landlord and not by the order of allotment.

28. Mr. Pendharker lastly urged that in any case order of vacation came to be passed on 16-7-1986 i.e. long before the adjudication in 1986 Mh.L.J. 882. This order has been challenged before this Court in a writ petition and that writ petition was withdrawn. Thus, according to him, a finality has been attached to this order. He further urged before me that when the order of vacation has become final, then the Collector has no choice but to implement his order under Clause 28. Clause 28 of the Rent Control Order comes in Chapter IV and that remains intact. Thus, what Mr. Pendharker urged before me was that when the order of vacation has become final, then the Collector has no option but to implement that order and, therefore, his order passed on 8-9-1986 is bad inasmuch as he refused to pass an order of vacation though he had the powers. As far as the finality of the order passed on 16-7-1986 is concerned, we may assume for the time being that this order is final. It is true that the original

respondent No. 1 filed a review petition on 16-8-1986. That review petitions is still pending. Mr. Pendharkar strenuously urged before me that the review petition does not lie and for this proposition he relied on C. Balan v. Vijay Shankar Khare. 1982 Mh.L.J. 570, where this Court held that the powers of review are restricted to order passed in appeal contemplated by Clause 21 and there is no power to review the order passed under Clause 28. We may assume for the time being that the order passed on 16-7-1986 has become final. Clause 28 of the Rent Control Order reads as follows:

"The Collector may take or cause to be taken such steps and use or caused to be used such force as may in his opinion be reasonably necessary for the purpose of securing compliance with, or for preventing or rectifying any contravention of this order or for the effective exercise of such powers"

What Mr. Pendharkar urged before me was that the Collector can taken such steps as in his opinion may be necessary for the purposes of securing compliance with the orders passed. There was already an order of vacating the premises and this order could be implemented by the Collector under Clause 28, which is a part of the statute even today when this point was agitated before the Collector, he found that this order of vacation was based on law, which has been declared ultra vires the Constitution. According to him with the law being effaced that order cannot remain valid or lawful order and he could not take any steps for implementing that order which has no basis in law. Mr. Pendharkar strenuously urged before me that it could not lie in the mouth of the Collector himself to say that his order is unlawful. What we find in the present case is that the Collector has not observed that his order is unlawful. What he says is that the order is passed under the piece of legislation which has been declared by the competent Court as ultra vires. Thus according to him this was the order passed under a statute which no longer exists and that is why he said that he has no powers to implement this order. There is nothing wrong with this reasoning of the Collector. Mr. Pendharkar further urged that his case falls squarely within the four corners of the saving clause in the penultimate paragraph of the judgment of this Court reported in 1986 Mh.L.J. 882 . This Court while declaring Chapter III of the Rent Control Order as ultra vires the Constitution was conscious about the complications which would arise in view of this decision because for decades the very law was followed in this part of the Region. The doctrine of Prospective Overruling has been recognised by the Supreme Court in I.C. Golak Nath and Others Vs. State of Punjab and Another, . The same doctrine has been applied by this very Court in 1986 Mh.L.J. 882. While declaring the whole Chapter III of the Rent Control Order as ultra vires this Court made certain exceptions to this rule. The relevant portion reads as follows:

"We however make it clear that this decision would not affect the validity of any proceedings in which a decree or order of eviction has become final and the landlord has already taken possession of the building or any part thereof pursuant thereto."

Thus, while making an exception, this Court accepted two criteria (1) where the decree or order of eviction has become final, and (2) where the landlord has already taken possession of the building or part thereof in pursuance thereto. These two conditions have to be read conjunctively and disjunctively. Thus to come within this exception a party has to establish that the decree or order of eviction has become final and at the same time he has to establish that he has taken possession of the building or any part thereof in pursuance of such decree or order. In the Present case Mr. Pendharkar wants to read this clause disjunctively". He further says that the restriction mentioned in this paragraph is not applicable to his case and it applies only to the decrees of eviction passed by the Competent courts. He urged before me that he did not obtain any decree of eviction from Civil Court and, therefore, this restriction is not applicable to him. It appears that Mr. Pendharkar has not properly read the limitations or the restrictions. The paragraph does not speak only of any decree of eviction, but it also speaks of order of eviction. In fact what he wants from this Court in this petition is the direction to the respondent No. 1 to vacate the tenements in pursuance of the order of vacation already passed against him on 16-7-1986. There is thus no force in this contention of Mr. Pendharkar. His other contention of reading this paragraph disjunctively also fails because he cannot extract something from the report which is there. This High Court definitely observed that this adjudication will not be applicable under two conditions (1) that a final decree or order of eviction is passed and (2) that in pursuance of that decree possession has already been obtained.

29. Thus what we find in the present case is that there is no estoppel or waiver as contended by Mr. Pendharkar. The order directing eviction of respondent No. 1 loses its effect because clause 25 has been declared ultra vires. The order, though final, cannot be implemented by the Collector under Clause 28 because that is not a lawful order (being passed under the ultra vires legislation). The possession has not been taken in pursuance of the order before the adjudication in 1986 Mh.L.J. 882.

30. Mr. Pendharkar, lastly urged that the House Allotment Officer failed to exercise his powers though he was obliged to exercise them in view of Clause 28, which is intact. From this angle, he urged that the mandate was necessary to the public authority failing to discharge the statutory obligations I find myself unable to accept that argument. As clause 28 stands it only vests discretion in the Collector. The Collector may use his discretion depending upon circumstances obtaining. As far as present case is concerned, the Collector could refuse to exercise his discretion. Firstly that for about 8 years the landlord allowed the original respondent No. 1 to remain in possession of the tenements as a tenant, though cause of action accrued in 1974. Secondly that the law which provided the cause, has been declared as ultra vires. Thirdly that the landlord accepted the rent from the respondent No. 1 during the intervening period. There are the circumstances which could have come in the way of exercising that discretion. The Supreme Court in *Mansaram Vs. S.P. Pathak and Others*, observed that

Clause 28 did not give a mandate to Collector to take action. It observed that these powers are to be invoked reasonably. I have no doubt that the Collector has refused to exercise these powers in a proper way.

31. In view of this, the order passed by the House Allotment Officer on 8-9-1986 is quite proper and it needs no interference at the hands of this Court with the result that the writ petition is dismissed. Rule is discharged. There shall, however, be no order as to costs.