

(1973) 11 BOM CK 0004

In the Bombay High Court

Case No : Special Civil Application No. 2312 of 1972

Lila Kishenchand Jaisinghani

APPELLANT

Vs

Odhavji Popatlal Ahya

RESPONDENT

Date of Decision : 17-11-1973

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 11A, 49, 5

Constitution of India, 1950 — Article 227

Presidency Small Cause Courts Act, 1882 — Section 9

Citation : (1974) 76 BOMLR 523

Hon'ble Judges : Sapre, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sapre, J.—In this petition under Article 227 of the Constitution of India by the tenant, a question about the scope and construction of Section 11 and Section 11A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as "the Act", arises. That question, in short is whether an application for fixation of standard rent is barred if an earlier application for similar purpose had been dismissed for default without being decided on merits.

2. The petitioner is a tenant of the respondent in the suit premises. The premises are a block of five rooms on the first floor of a building known as Sharad Villa, Plot No. 130, Old Khar, Bombay. The premises were let out to the petitioner on May 17, 1953 on a rent of Rs. 150 per month. The petitioner filed an application bearing R.A. No. 113 of 1954 in the Court of Small Causes at Bombay u/s 11 of the Act for the fixation of standard rent of the premises. After the respondent appeared and filed his reply, the matter was referred to the Commissioner for recording evidence. Evidence was led by the parties before the Commissioner. Thereafter, the Commissioner made his report to the Court. The parties filed their objections to the report. While the matter was pending at that stage in Court, the petitioner and her advocate remained absent, whereas the respondent's

advocate remained present. Hence, the application was dismissed for default of appearance of the petitioner. The petitioner filed an application for the restoration of her application u/s 11 of the Act, but that was also dismissed.

3. The petitioner filed another application bearing R.A.N. No. 252 of 1957 in the Court of Small Causes, Bombay, u/s 11 of the Act for the fixation of standard rent. The respondent opposed it on the ground that a similar application having been once dismissed, a second application for the same purpose was not maintainable. This objection prevailed with the Court and the application was dismissed as barred under the provisions of Order IX, Rule 9 of the Code of Civil Procedure. The petitioner went in revision before the Bench of the Court of Small Causes, Bombay. The revision application was also dismissed on the ground that the second application for the fixation of standard rent was barred under the provisions of Order IX, Rule 9 of the Civil Procedure Code. The petitioner came in revision to this Court. That application was dismissed as barred by limitation.

4. The petitioner thereafter filed a third application out of which the present petition arises on October 30, 1964 bearing R.A.N. No. 3045/SR of 1964 in the Court of Small Causes, Bombay, for the fixation of standard rent u/s 11 of the Act. In the meantime, s. HA was introduced in the Act by the Maharashtra Act No. XIV of 1963, which Act came into force on March 28, 1963. On the contentions taken by the respondent, a preliminary issue was raised by the Court regarding the maintainability of the application filed by the petitioner u/s 11 of the Act for the fixation of standard rent. The trial Court held that such an application was maintainable. The respondent went in revision to the Bench of the Small Causes Court, Bombay, comprising two Judges. The learned Additional Chief Judge, who was the senior of the two, held that the petitioner's application was not maintainable. On the other hand, the junior Judge held that the application was maintainable. However, under the Rules of the Court, the order of the Bench was to be in conformity with the view taken by the senior Judge. As the senior Judge had decided that the application was not maintainable, the petitioner's application for fixation of standard rent was dismissed. It is this order that is being challenged in this petition.

5. Mr. Agurwal, appearing for the petitioner, has made two submissions before me :--(1) Apart from Section 11A of the Act, an application u/s 11 for fixation of standard rent is maintainable any number of times as long as an earlier application in this behalf is not decided on merits, and (2) by virtue of the introduction of Section 11A, a right is further conferred on the tenant to file an application for fixation of standard rent provided his earlier application is not decided on merits, subject to certain conditions. Before going to the submissions made by Mr. Agarwal, it is necessary to notice the relevant provisions in the Act as well as certain other provisions of law.

6. Section 5(10) defines "standard rent" as under:

"standard rent" in relation to any premises means--

(a) where the standard rent is fixed by the Court and the Controller respectively under the Bombay Rent Restriction Act, 1939, or the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, such standard rent; or

(b) where the standard rent is not so fixed--

subject to the provisions of Section 11,

(i) the rent at which the premises were let on the first day of September 1940, or

(ii) where they were not let on the first day of September 1940, the rent at which they were first let before that day, or

(iii) where they were first let after the first day of September 1940, the rent at which they were first let, or

(iv) in any of the cases specified in Section 11, the rent fixed by the Court.

Section 11 deals with the question of fixation of standard rent and permitted increases. The relevant provisions in the section are:

11. (1) Subject to the provisions of Section 11A in any of the following cases the Court may, upon an application made to it for that purpose, or in any suit or proceeding, fix the standard rent at such amount as, having regard to the provisions of this Act and the circumstances of the case, the Court deems just--

(a) where any premises are first let after the first day of September 1940, and the rent at which they are so let is in the opinion of the Court excessive; or

(b) ...

(c) ...

(d) ...

(e) where there is any dispute between the landlord and the tenant regarding the amount of standard rent.

Section 11A is in these words:

No Court shall upon an application or in any suit or proceeding fix the standard rent of any premises u/s 11, or entertain any plea that the rent or increases are excessive, if the standard rent or the permitted increases, in respect of the same premises have been duly fixed by a competent Court on the merits of the case, without any fraud or collusion or an error of the facts, and there has been no structural alterations or change in the amenities or in respect of any other factors which are relevant to the fixation of the standard rent, or change in such increases, thereafter in the premises.

The other provisions of law, so far as they are relevant, may also be noticed. Order IX, Rule 8 of the CPC provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing-, the Court shall

make an order that the suit be dismissed, etc. Order IX, Rule 9 provides that where a suit is dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal, etc.

7. In exercise of the powers conferred by Section 49 of the Act, certain rules known as the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948 have been framed. Rule 7 provides for the procedure in applications for fixing standard rent, etc. The Rule provides that in miscellaneous applications under the Act the Court of Small Causes, Bombay, shall follow, as far as may be and with the necessary modifications, the practice and procedure applicable to suits referred to in Rule 5 as if such applications were suits for sums not exceeding Rs. 1,000. Rule 5 provides for the procedure for suits, the value of the subject-matter of which does not exceed Rs. 3,000, etc. The procedure to be followed is the one provided (a) in the Presidency Small Cause Courts Act, 1882, except Chapter VI, and (b) in the rules made u/s 9 of the said Act. Section 9 of the Presidency Small Cause Courts Act provides that the High Court may frame rules in regard to the procedure and practice of the Small Causes Court, Bombay. Accordingly, rules have been made by the High Court to lay down the practice and procedure, which are known as the Presidency Small Cause Court Rules. Rule 1(2) says:

The portions of the Code of Civil Procedure, Act V of 1908,...specified in the 1st column of the Schedule hereto annexed shall, subject to the additions, alterations and modifications specified in the 2nd and 3rd columns of such schedule, extend and shall be applied to the Small Cause Court and the procedure prescribed thereby shall be the procedure followed in the Court in all suits cognizable by it....

The first column of the Schedule referred to in Rule 1(2) relates to portions of the CPC extending to the Court and in this column is contained Order IX. The second and the third columns of the Schedule are in respect of additions, alterations and modifications referred to in Rule 1(2). The second column relates to suits for sums exceeding Rs. 1,000 and the third column to suits for sums not exceeding Rs. 1,000. It will be seen from the third column against the entry relating to Order IX that neither Rule 8 nor Rule 9 has been omitted or altered or modified, The effect of all this is that Order IX, Rule 8 and Order IX, Rule 9 of the CPC will both apply to an application for fixation of standard rent u/s 11 of the Act.

8. Having stated the relevant provisions in the Act and the other provisions of law, I will turn to the several points raised by Mr. Agarwal on behalf of the petitioner. His first contention was that Order IX, Rule 9 of the CPC applies only to suits and not to an application u/s 11 of the Act and, therefore, a fresh application u/s 11 is not barred. I have already pointed out the relevant

provisions of law which clearly show that Order IX, Rule 9 is applicable to an application u/s 11 of the Act and, therefore, the above contention of Mr. Agarwal cannot be accepted.

9. The main submission of Mr. Agarwal, however, is that a rule framed under the Act making applicable the provisions of Order IX, Rule 9 of the CPC to an application u/s 11 and thus placing a bar on the maintainability of a second application cannot control the Act and if on the plain terms of Section 11, a second application is maintainable, it cannot be held to be barred only because the rule provides such a bar. Moreover, Rule 1 itself provides that the procedure prescribed for suits in the Presidency Small Cause Courts Act, 1882 as far as may be and with the necessary modifications should be followed. Mr. Agarwal points out that Section 11(7)(e) of the Act provides that where there is any dispute between the landlord and the tenant regarding the amount of standard rent, if an application is made to the Court for fixing standard rent, the Court has to fix it. An application to the Court for fixing standard rent u/s 11 of the Act will, therefore, lie so long as the dispute about the standard rent remains. According to Mr. Agarwal, when an application is dismissed in default, as here, the Court cannot be said to have decided the dispute and if the dispute remains, an application will lie u/s 11 notwithstanding the fact that an earlier application had been dismissed in default.

10. Mr. Vakharia on behalf of the respondent contended that the petitioner's case is not u/s 11(7)(e) of the Act, which is a residuary clause. According to Mr. Vakharia, the petitioner's case falls u/s 11(7)(a) of the Act. Under the definition given in Section 5(JO), "standard rent" in relation to any premises means, in the case of premises let on the first day of September 1940, the rent at which the premises were let and in the case where they were not let on the first day of September 1940, the rent at which they were last let before that day, and these two cases do not fall under any of the Clauses (a) to (d) of Sub-section (1) of Section 11 of the Act. But even in such cases a dispute may arise between the landlord and the tenant and it is to cover such a case that Clause (c) of Sub-section (1) of Section 11 has been enacted.

11. Assuming that what Mr. Vakharia says is correct, nothing turns on it in considering the argument of Mr. Agarwal. Even if the petitioner's case falls u/s 11(1)(a), what Mr. Agarwal contends is that the petitioner having come forward with the case that the rent at which the premises were let was excessive and, therefore, the standard rent should be fixed, the standard rent under this clause cannot be said to have been fixed by the Court when the application is dismissed for default and if it is not so fixed and so long as it is not fixed, a second application for the purpose will lie.

12. If we accept the argument of Mr. Agarwal, it will have to be held that only when the Court on full trial gives a finding about standard rent, it can be said that the question of fixation of standard rent no longer survives. But there can be cases where the question can be said to survive no longer even if the Court does

not give a finding on full trial. One of such cases can be when by a compromise arrived at between the landlord and the tenant, on their agreeing that such and such is the standard rent, the Court fixes the standard rent. Another case can be \\when the tenant withdraws his application for fixation of standard rent after the landlord opposes it and comes forward with the contention that the rent that is being actually charged would be the standard rent. In such a case, the conduct of the tenant might mean that he admits that the rent being¹ charged is the standard rent. In both these cases, the question about the fixation of standard rent can be said to be no longer surviving. In *Popatlal Ratansey Vs. Kalidas Bhavan*, the tenant had made an application for the fixation of standard rent. The landlord filed a cross-suit. The trial Court fixed the standard rent at Us. 40 per month and decreed the landlord's suit for possession. Appeals were filed by the aggrieved parties and in appeals the parties agreed that reasonable and standard rent of the premises was lis. 91 per month. The landlord gave up his claim to recover possession of the premises. The Court considered that it was a fair and just agreement and it was satisfied that there was nothing unlawful about it. Accordingly, it passed a decree in terms of the agreement. Thereafter, the landlord filed a suit to recover possession of the premises alleging that the tenant had failed to pay rent and was in arrears of it. The tenant contended that he was not in arrears of rent, as the standard rent for the premises was Rs. 40 per month as previously fixed by the Court and that he had paid rent at that rate. On the question whether the consent decree, which was passed in the appeals, would operate as a bar to the tenant's contention in the suit that the standard rent of the premises was Rs. 40 per month and not Rs. 91 per month, it was held that in the circumstances of the case, between the Parties, who were also parties to the appeals, the determination of the standard rent as embodied in the consent decree passed in the appeals would constitute a bar of res judicata and would estop the tenant from contending that the standard rent should not be Rs. 91 per month as fixed by the consent decree but it should be Rs. 40 per month. In *Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa*, the Supreme Court cited with approval an English decision that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case.

13. Mr. Agarwal relied upon the decision of the Supreme Court in *Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others*, to show that a compromise decree is not a decision by the Court and since only a decision by the Court can be res judicata, a com-promise decree does not operate as res judicata. Such a decree might create an estoppel by conduct between the parties, but such an estoppel must be specifically pleaded. We are not concerned here with a decision based on a compromise decree on consent and such a decision operating as res judicata. What we are concerned here is whether the bar of estoppel can be raised against the petitioner in her conduct of allowing her application to be dismissed in default at a stage where an indication was available that she did not want to go on with that application and impliedly

admitted that the rent that was being paid by her was the standard rent. As already noted, after the petitioner filed her first application, the respondent filed his reply and the matter was referred to the Commissioner for recording evidence. After evidence was recorded by the Commissioner, the matter came back to the Court and it was at that stage that the default on the part of the petitioner had occurred. The petitioner, in these circumstances, can be said to have abandoned the question raised by her about the fixation of standard rent and after the application was dismissed in default, the question of standard rent no longer survived.

14. Mr. Agarwal next referred to another decision of this Court in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, in which Vaidya J. has taken the view that the mere fact that for some reason the tenant agreed to have a consent decree about standard rent does not preclude him from raising a fresh dispute about it u/s 11(7)(e) of the Act. In that case the learned Extra Assistant Judge had relied upon the decision in Palatial Ratansey v. Kalidas, and Vaidya J. pointed out that, by virtue of the provisions in Section 11A, whatever has been laid down in Popatlal's case regarding the bar of res judicata to a subsequent application for fixation of standard rent was no longer valid. But in that decision it was also held that the earlier decision would estop the tenant from contending that the standard rent should not be Rs. 91 per month as fixed by the consent decree but it should be Rs. 40 per month as originally fixed by the trial Court. Vaidya J. has not referred to this aspect of the matter.

15. If we go into the reasons which necessitated the insertion of Section 11A in the Act, it will be seen that the view expressed in Popatlal's case that the earlier decision based on consent of the parties under which standard rent was fixed created a bar of res judicata and also estopped the tenant from reagitating that question is correct. In Vasant Shankar v. Baghunath (1960) 63 BomLR 404 the facts were these. The tenants made applications to the Small Causes Court for fixation of standard rent u/s 11 of the Act in respect of their respective premises. The landlord resisted the said applications on the ground that the predecessors of the present tenants had made similar applications before the Civil Judge, Junior Division, Thana, and that there was an order fixing the standard rent based on the consent of the parties. It was contended that the judgment in those cases operated as judgment in rem and, therefore, the applications by the present tenants were barred. That contention was upheld and the applications were dismissed by the trial Judge. The tenants' revision applications were also dismissed by the full Court of the Small Causes Court. Thereafter, the tenant approached the High Court in revision. Naik J, held that the applications filed by the present tenants were maintainable and he formulated these three conclusions:

(1) A decision between a landlord and tenant determining the standard rent does not operate as a judgment in rem.

(2) Such a decision is not binding upon the successor tenant and it is open to the

latter to seek to reagitate the issue in properly constituted proceedings.

(3) Such is the position notwithstanding the fact that the earlier decision was arrived at on merits of the case.

Before Naik J., the decision in Popatlal's case was cited and he distinguished it on the ground that there the question about standard rent was sought to be reopened by the tenant who was a party to the previous compromise and, therefore, it was not open to the tenant to seek to reopen the question which was settled in the previous litigation on the basis of the compromise between the parties. While doing so, Naik J. did not dispute the proposition of law laid down in Popatlal's case. As a corollary to the conclusions formulated by Naik J. it follows that if there is a previous decision between the landlord and the tenant determining the rent, then the same tenant cannot reagitate that question again. The principle of *res judicata* did thus apply to a proceeding u/s 11 of the Act, but it was held by Naik J. that it did not apply where another tenant had come on the scene after the first decision. The idea underlying the insertion of Section 11A is that the standard rent is determined in relation to the premises and whether A or B occupies them is irrelevant. Where, therefore, the question of standard rent has been once decided in respect of the premises, except in the cases mentioned in Section 11A, that question could not be reagitated." As the judgment of Naik J. sought to curtail the applicability of the principle of *res judicata*, which applied to an application u/s 11 of the Act, by stating that the earlier decision did not create a bar of *res judicata* if another tenant came on the scene and he tried to reagitate the question of standard rent, s. 11A was inserted to, remove the curtailed application of the principle of *res judicata* to Section 11.

16. Mr. Agarwal laid stress on the words "on the merits of the case" used in Section 11A and argued that until the previous application for fixation of standard rent filed by the petitioner was decided by the Court on merits, there would still remain a question of fixation of standard rent between the parties and if that is the position, any number of successive applications will lie to the Court u/s 11 of the Act. In my opinion, this is not the correct position. In order to come to the conclusion whether any dispute about standard rent survives, it is not necessary that in every case the Court must have given its findings after full trial. The dispute can still be held to be no longer existing and not surviving if the tenant is barred from agitating it on the principle of estoppel. In the instant case, as I have already pointed out, the stage at which the petitioner had remained absent and her application was dismissed in default, it could mean that she was withdrawing her application. Consequently the question of fixation of standard rent also came to an end which in effect meant that no dispute or question regarding the standard rent existed or survived because of which a further application u/s 11 could lie on the same set of circumstances.

17. The next submission of Mr. Agarwal is that Section 11A itself gives a right to the tenant to file an application for fixation of standard rent under certain conditions and this section is not in the nature of providing a bar to Section 11

under certain circumstances. According to him, a right is provided in Section 11A to the tenant to file an application in a negative form. He gave an instance. If there is a banquet hall to which no entry can be had if a person is not in a formal dress and has not received an invitation card, then it follows that a right of entry is there to that person if he has an invitation card and goes dressed in a formal dress. According to Mr. Agarwal, an application u/s 11A would be barred if the following conditions obtained:

- (1) Standard rent should have been fixed in respect of the suit premises.
- (2) Standard rent must have been, fixed by a competent Court.
- (3) It must have been fixed without any fraud or collusion or an error of the facts.
- (4) It must have been fixed by the Court on merits.
- (5) There should have been no structural alterations or change in the amenities.

According to Mr. Agarwal, it is only if all these conditions are satisfied that an application under s. HA is barred. In the instant case, it cannot be said that all these conditions are satisfied and hence an application u/s 11A would lie.

18. I find it difficult to accept this argument. I have already pointed out that the intention of the Legislature in enacting s. HA was to remove the curtailment of the bar of res judicata in the case of a succeeding tenant which followed from the pronouncement of this Court that a decision between the landlord and tenant determining the standard rent does not operate as a judgment in rem and such a decision is not binding upon the successor tenant to Whom it was open to reagitate the issue. The intention of inserting s. HA was not to create a new right in the tenant to file an application which would have been barred on grounds of res judicata, estoppel, etc., u/s 11. No independent right was, therefore, available to the tenant under s. HA to file an application for fixation of standard rent apart from the right which she had u/s 11.

19. In the result, the view taken by the learned Additional Chief Judge and the Order passed by the Bench of the Court of Small Causes, Bombay, that the application filed by the petitioner for fixation of standard rent was not maintainable and that application should be dismissed, are correct and must be upheld. The petition consequently fails and the rule is discharged with costs.