

(1972) 09 GUJ CK 0005

In the Gujarat High Court

Case No : Letter Patent Appeal No. 58 of 1968 and 8 of 1970

Mansukhlal Kapurchand Sanghavi and Another

APPELLANT

Vs

Shushilaben Durlabhji Virani and Another

RESPONDENT

Date of Decision : 22-09-1972

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1)

Citation : AIR 1973 Guj 278 : (1973) 14 GLR 422

Hon'ble Judges : P.N. Bhagwati, C.J.;D.A. Desai, J

Bench : Division Bench

Advocate : J.R. Nanavati and D.D. Vyas, for the Appellant; Suresh M. Shah, for the Respondent

Judgement

Bhagwati, C.J.—These Letters Patent Appellant involve an interesting question of law relating to the scope of an appeal preferred under clause 15 of the Letter Patent against a decision given by the Single Judge of the High Court in Second Appeal. The question is, whether an appellant in such a Letter Patent Appeal is entitle to raise a new contention which has not been taken by him before the learned Judge hearing the Second Appeal or he is limited only to the contentions advances by him at the hearing forth Section appeal. The question is of the some importance and it is necessary to examine it closely because there are conflicting decision of this Court and the conflict has to be resolved. The facts giving the rise to these Letter Patent Appeals are similar in material particulars and it would therefore, be sufficient if we state the facts of one on of them, namely, Letter Patent Appeal No. 58 of 1968.

2. The plaintiff in Letter Patent Appeal No. 58 of 1968 filed a suit against the defendants to recover possession of the certain premises let to the defendants. The premises were suite in a area which formed part of the former State of Saurashtra. The case of the plaintiff was that premises were new premises erected and let for the first time after 1st January 1951 and by reason of Section 4(2) of the Saurashtra Rent Control Act. 1951, (hereinafter referred to as the

Saurashtra Rent Act) the premises were exempt from the applicability of the Saurashtra Rent Act and the plaintiff was, therefore, entitled to recover possession of the premises from the defendants under the ordinary law of landlord and tenant. The defendants in his written statement conceded that the premises were new premises erected for the first time after 1 January 1951 but according to him he was not the first tenant of the premises and premises could not, therefore, be said to be "let of the first time on or after 1st January 1951" and the exemption u/s 4 (2) was accordingly not available and the premises were governed by the Saurashtra Rent Act. The defendants thus pleaded the protection of the Saurashtra Rent Act and contended that the suit was liable to fail as no ground was made out by the plaintiff which would entitle him to recover possession of the premises from the defendants under the Saurashtra Rent Act. The trial Court took the view that the premises were new premises erected for the first time after 1st January 1951 but as the letting of the premises to the defendants was not the first letting after 1st January 1951, the exemption u/s 4 (2) could not be invoked by the plaintiff and the premises were governed by the Saurashtra Rent Act and since no ground under Sec 12 or 13 of the Saurashtra Rent Act was made out by the plaintiff, he was not entitled to recover possession of the premises from the defendants. On this view, the learned trial Judge negatived the claim for recovery of possession and dismissed the suit. The plaintiff being aggrieved by the decision of the learned trial Judge preferred an appeal against it but the learned District Judge who heard the appeal agreed with the view taken by the learned trial Judge and dismissed the appeal. The plaintiff thereupon preferred a Second Appeal to this Court. The Second Appeal came up for hearing before Mr. Justice Sompura. The main contention urged on behalf of the plaintiff before Mr. Justice Sompura was that the premises were exempt from the applicability of the Saurashtra Rent Act by reason of Section 4 (2) and the plaintiff was, therefore, entitled to recover possession of the premises from the defendants according to the ordinary law of landlord and tenant. This contention found favour with Mr. Justice Sompura. The learned Judge took the view that in order to attract the applicability of Section 4 (2) of the Saurashtra Rent Act two conditions were required to be satisfied; (1) the premises should be new premises erected for the first time on or after 1st January 1951 and (2) they should be let for the first time on or after 1st January 1951. The first condition was admittedly fulfilled in the present case and so far as the second condition was concerned, that was also, according to the learned Judge, satisfied because the premises had not been let at any time before 1st January 1951 but they were let for the first time on or after that date. The learned Judge observed that what the second condition required was that the premises should not have been let at any time before 1st January 1951 but should be let for the first time on or after that date and not that the letting in question should be the first letting so that the second condition would not be satisfied if the premises were let a second or third or subsequent time. It was entirely immaterial to the applicability of Section 4 (2), said the learned Judge, whether the letting in relation to which the question of protection of Saurashtra

Rent Act arose was the first letting of the premises or a second or third or subsequent letting so long as the premises had not been let out at any time that before 1st January 1951 and the first time that they were let was on or after that date. The learned Judge held since, in the present case, the premises were new premises which had not been let at any time prior to 1st January 1951 but where let for the first time after that date, the examination u/s 4 (2) was applicable, not with standing the fact that the defendants was not the first pennant of the premises and the premises were not governed by the Saurashtra Rent Act. The learned Judge in this view of the matter concluded that the plaintiff was entitled to recover possession of the premises from the defendants under the ordinary law landlord and tenant and passed a decree for eviction against the defendants. The defendants being aggrieved by the decree for eviction pass against them appeal for a certificate of fitness under Clause 15 of the Letter patent and on such certification being granted by Mr. Justice Sompura, brought Letter Patent Appeal No. 58 of 1968 in this Court. Letter Patent appeal No. 8 of 1970 is also brought before this Court in identical circumstance and the judgment of Mr. Justice Sompura challenged in the Letter Patent Appeal is based on the same ground as the judgment impugned in Letter Patent Appeal No. 58 of 1968. In fact, in disposing of the Second Appeal giving rise to Letters Patent Appeal No. 8 of the 1970. Mr. Justice Sompura has following his either judgment challenged in Letter Patent Appeal No. 58 of 1968.

3. When these letter Patent Appeals reached hearing before us the learned counsel appearing on behalf of the defendants assailed the judgment of Mr. Justice Sompura on the ground that the learned Judge has fallen into an error in construing Section 4 (2) of the Saurashtra Rent Act. They contended that on a proper construction. the second conditions for Section 4 (2) limited the applicability of that Section only to first letting of the premises and if there was a second or third or subsequent letting, Section 4 (2) had no application and enough premises were governed by the Saurashtra Rent Act. This contention raised an interesting question of construction of Section 4 (2) of the Saurashtra Rent Act, but for reason which we shall presently state, it is not necessary for us to decide this question, as we find that there is another point in which it is possible to effectively disposal of these Letter Patent Appeals. that point arises in the following manner.

4. When the suits were filed, the Saurashtra Rent Act was in force in Saurashtra area of the State. of Gujarat. But during the tendency of the suits Gujarat Act 57 of 1963 came into force with effect from 31st December 1963 and it extended the provisions of the Bombay Rent Act to the Saurashtra area of state of Gujarat and introduced Section 51 in the Bombay Rent Act repealing inter alia the Saurashtra a Rent Act. The defendants, therefore raised a condition before us at the hearing of the Letter Patent Appeals that the Saurashtra Rent Act having been perplexed an the Bombay Rent Act having been made applicable to the premises during the presidency of the suit. the defendants were entitled to claim the protection of Section 12(1) of the Bombay Rent Act and no decree for

possession could be passed against them since they're at the date of the suit ready and willing to pay the standard rent of the premises and perform and observe the other conditions of the tenancy. This contention would seem to be unanswerable in view of the decision given by us this morning. in Letter Patent Appeal NO. 89 of 1970 (Guj) and there can be urged by the defendants, it would afford a complete answer to the claim of the plaintiff for recovery of possession of the premises from the defendants. The plaintiff, however, raised a preliminary objection against the contention at the instance of the defendants and urged that this contention could not be allowed to be raised by the defendants in the Letter Patent appeal because it had not been raised before at any earlier state of the proceeding and even before Mr. Justice Sompura who heard the Second Appeal, it has not been urged on behalf of the defendants. The plaintiff contended that it was not open to the defendants to urge for the first time at the hearing of the Letter Patent Appeal a new contention which had not been taken by the Second Appeal. This contention was sought to be supported by a decision of Division Bench of this Court in Kadi Municipality Vs. New Chhotalal Mills Company Ltd., and we must state that the strongest reliance was placed upon it by the plaintiff. The defendants on the other hand urged that there was no invariable rule that a contention was not raised before the learned Judge hearing the Second Appeal it could not be allowed to be raised for the first time in the Letter Patent Appeal. It was ultimately a matter for the Court hearing the Letter Patent Appeal to decide in the exercise of its judicial discretion whether a new contention should or should not be allowed to be raised for the first time at the hearing of the Letter Patent Appeal. If the Court hearing the Letter Patent Appeal found that the contention sought to be raised on behalf of the appellant involved a pure question of law which went to the root of the matter, the Court could always in the interest of justice permit such a contention to be raised for the first time, even if it was not raised before the learned Judge hearing the Second Appeal. The defendants sought to support this contention by placing strong reliance on another decision of a Division Bench of this Court in Hajam Hussein Dadu and Another Vs. Bai Kunverbai Prabhudas Decd. and Another, . The defendants submitted that the new contention sought to be raised by them involved a pure question of law relating to the applicability of Section 12(1) of the Bombay Rent Act and it went to the root of the matter. because it was decided in favour of the defendants, the plaintiff would not be entitled to recover possession of the premises from the defendants and their suits would fail.

5. Now there can be no doubt that a Division Bench of this Court has taken the view in Kadi Municipality Vs. New Chhotalal Mills Company Ltd., that "a new point which has not been urged before the Judge hearing a Second Appeal cannot be allowed to be urged for the first time at the hearing of the Letter Patent Appeal". But equally another division Bench of this Court has said in (1971) 1 GLR 610 that if a pure question of law going to the root of the matter is sought to be raised for the first time at the hearing of the Letter Patent Appeal. it would be

proper for the court of permit it to be raised even if it has not been raised before the Judge hearing the Second Appeal. There is thus prima facie conflict between two decision of Division Benches of this Court and it was, therefore, suggested by the learned advocate appearing on behalf of the plaintiff that this particular point should be referred to a large Bench. But we do not think it necessary to make a reference to a large Bench. The law as to the binding nature of precedents is now well-settled as result of a Special Full Bench decision of this Court in *State v. Gordhandas* (1962) 3 GLR 269 = (AIR 1962 Guj 129 and it has been state din the form of several oppositions in the leading judgment of K. T. Desai C. J. in that case. The fourth proposition formulation in that judgment is material of purpose and it reads as follows:--

"(4). A Court is not bound by it's won previous decision that are in conflict with one another. if the new decision is in conflict with the old, it is given per incuriam and it is not binding on a later Court.

Although a letter Court is not bound by the decision so given per incurred this does not mean that it is bound by the first case. Perhaps in strict logic, the first case should be binding since it should be binding since it should never have been departed from and was only departed from per incuriam. However, this is not the rule. The rule is that where there are previous inconsistent decision of its won. the court is free to follow either. It can follow the earlier, but equally if it thinks fit. it can follow the later".

It is, therefore, open to us to follow out of the two decision of this Court in *Kadi Municipality Vs. New Chhotalal Mills Company Ltd.*, and *Hajam Hussein Dadu and Another Vs. Bai Kunverbai Prabhudas Decd. and Another*, that which commends itself to us for our acceptance and we must, accordingly, proceed to consider which of the two decision lays down the correct law. Is there any inviolable rule, as seems to have been assumed in *Kadi Municipality Vs. New Chhotalal Mills Company Ltd.*, that new point which has not been urged before the Judge hearing a Second Appeal can never be allowed to be urged for the first time at the hearing of the Letter Patent Appeal? We do not think so. If we look at the decision in *Kadi Municipality Vs. New Chhotalal Mills Company Ltd.*, it will be found that the Division Bench in that case did not examine this question on principle but merely followed there decision of the High Court of Bombay, namely, *Shripad Shivram Sardeshpande Vs. Shivram Bhikaji Patki*, , *Sattappa Gurusattappa Hukeri Vs. Mahomedsaheb Appalal Kazi*, and *Ramabai Govind Vs. Raghunath Vasudeo*, . It is, therefore, necessary to considered what exactly these decision of the Bombay High Court laid down and what is the principle on which they proceed. It will be apparent on a close suturing of these decision that what these decision laid down was that an appellant in a Letter Patent Appeal is not entitled as a matter fright to urge a new contention which has not been raised by him before the Judge hearing the Second Appeal and not that the Court hearing a Letter Patent Appeal has not power in a fit case to grant him permission to do so. The distinction made in these decision of the Bombay High

Court is between right of an appellant to be heard on a new contention and the power of the Court to grant permission to the appellant to raise a new contention. The former cannot prevail in a Letter Patent Appeal but the latter is not excluded. The Division Bench of the Bombay High Court pointed out in *Shripad Shivram Sardeshpande Vs. Shivram Bhikaji Patki*, :

"Finally, Mr. Walavalkar has pointed out two rulings of the Lahore Court. of which I need only refer to the latter one viz., *Teja Singh v. Gurchanran Singh* AIR 1930 Lah 632. This is a judgment of a Division Bench including the chief Justice of that court. It is laid down that it is a well-settled rule of the law that an appellant is not entitled in an appeal under the Letter Patent to be heard on points which had not been raised before the Judge from the whose judgment he has preferred the appeal".

So also in AIR 1936 Bom 277 (supra) Mr. Justice Broomfield speaking on behalf of the Division Bench said:

"But that particular point hasn't been taken in any of the lower Courts and in accordance with the usual practice we have declined to allow it to be taken in the Letter Patent Appeal. Mr. Cane, who appears for the appellant, cited *Parbhu Lal Vs. Badri* in support of his right to argue the point before us. In that some decisions of the Privy Council have been referred to, but we do not think that there is anything in these cases which affects the power of the High Court to decide what matter they will consider in a Letter Patent Appeal. A Full Bench of the same, High Court in *Mahabir Singh Vs. Narain Tewari and Others* has recognized that practice according to which new points are not to be allowed to be raised in such appeals, though it was held that that practice does not mean any absolute prohibition. In *Shripad Shivram Sardeshpande Vs. Shivram Bhikaji Patki*, our own High Court has held that in an appeal under the Letter Patent the appellant is not entitled to be heard on points which have not been raised before the Judge from whose judgment the appeal has been preferred. We think the practice is salutary and we see no reason why we should depart from it in this case".

These observations from the decision of the Bombay High Court and particularly the portion underlined by us clearly show that there is no rule of law that an appellant in a Letter Patent Appeal cannot be heard on a point which has not been raised by him before the Judge hearing the Second Appeal. It is merely a rule of practice which can be adopted by the Court since long and that rule of practice also does not go to the length of debarring an appellant in a Letter Patent Appeal from even being able to urge a new contention which has not been raised by him before the Judge hearing the Second Appeal. What it prescribes is merely this that an appellant in a Letter Patent appeal shall have no right to be heard on a point which has not been raised by him in the Second appeal but it does not take away the power of the Court hearing a Letter Patent Appeal to permit the appellant in a fit case to urge a new contention not taken by him before the Judge hearing the Second Appeal. The appellant has no new right to

insist that he shall be heard on a new contention but the Court always has the power of the permit him to do so if the justice of the case so requires. It is true that there are observations in *Ramabai Govind Vs. Raghunath Vasudeo*, which might at first blush seem to suggest that an appellant can never be permitted in a Letter Patent Appeal to raise a contention which has not been urged by him before the Judge hearing the Second Appeal but if closely read, they would show that what the Division Bench wanted to emphasize was that the appellant in such a case would not be entitled to urge a new contention in the Letter Patent Appeal. Mr. Justice N. H. BHAGWATI speaking on behalf of the Division Bench pointed out that "Mr. Bhalerao would not under the circumstance be within his rights if he wanted to argue a point which he had not argued before Chainani J." This restriction between the right of an appellant in a Letter Patent Appeal to urge a new contention not raised before the judge hearing the Second Appeal and the power of the Court hearing a Letter Patent Appeal to permit the appellant to do so in a proper case in the interest of justice, thus runs clearly through all these decisions of the Bombay High Court. But it seems that the Division Bench in *Kadi Municipality Vs. New Chhotalal Mills Company Ltd.*, did not correctly appreciate this distinction and laid down a broad proposition that "a new point which has not been urged before a Judge hearing a second Appeal cannot be allowed to be urged for the first time at the hearing of a Letter Patent Appeal" on the erroneous assumption that it was supported by these decisions of the Bombay High Court. This proposition must be regarded as too wide a statement of the law on the subject. It would be more appropriate to say that an appellant in a Letter Patent Appeal is not entitled as a matter of right to be heard on a new point which has not been urged by him before the judge hearing the Second Appeal. The appellant cannot insist that he must be heard on such new point as he can in regard to a point urged by him before the Judge hearing the Second appeal. But the Court always has the power to permit the appellant to raise a new contention, if it is necessary in the interest of justice to do so. That power of the Court is not taken away by any rule of law and it would indeed be most unwise to take it away by a rule of practice. Of course, the Court would not ordinarily permit a new contention to be raised by an appellant if the contention raises a question of fact and cannot be determined without fresh investigation of facts. But if the contention is a pure question of law going to the root of the matter, the court may in the exercise of its judicial discretion permit such contention to be raised in aid of justice. That is what the Division Bench of this Court did in *Hajam Hussein Dadu and Another Vs. Bai Kunverbai Prabhudas Decd. and Another*, . The Division Bench pointed out in that case that the question which was brought to be raised before it for the first time in the Letter Patent Appeal was a pure question of law which went to the root of the matter and therefore, even in the Letter Patent Appeal, it would be proper to permit the appellant to raise it. We must confess, with the greatest respect to the learned Judge who decided that case, that they were right in allowing the new contention to be raised by the appellant in the Letter Patent Appeal before them. It is true that they did not indicate the principle on which they proposed in

allowed the new contention to be raised but the principle is clear and indisputable. We have already discussed it.

6. Now here in the present case the contention sought to be raised on behalf of the defendants was that. since the Bombay Rent Act became applicable to the premises during the pendency of the suits. the defendant in each suit was entitled to claim protection of Section 12(1) of the Bombay Rent Act as he was ready and willing to pay the standard rent of the premises -- there being no dispute as to this fact -- and no ground for recovery of possession under the Bombay Act having been made out, the plaintiff in each suit was disentitled to recover possession of the premises from the defendant. This contention raises a pure question of law and goes to the root of the matter. If well-founded. it would completely displace both the suits. We do not, therefore, see any reason why we should not permit the defendants to raise this contention before us in the Letters Patent Appeals. even though it was not urged by them at the hearing of the Second Appeals before Mr. Justice Sompura. So far as the merits of this contention are concerned. they are concluded by the decision given by us in Letters Patent Appeal No. 89 of 1970 (Guj.). There we have taken the view that even in a case where the premises were. by reason of Section 4 (2). exempt from the applicability of the Saurashtra Rent Act of possession was filed. the Bombay Rent Act would be applicable to the premises and the defendant would be entitled to the protection of Section 12(1) of the Bombay Rent Act, if the suit was pending at the date when the Bombay Rent Act was extended to the Saurashtra area of the State of Gujarat by Gujarat Act 57 of 1963. The defendant in each case before us would. therefore. be entitled to the protection of Section 12(1) of the Bombay Rent Act and since no ground for recovery of possession under the Bombay Rent Act has been made out by the plaintiff for recovery of possession of the premises from the defendant must fail in both cases.

7. We. therefore. allow the Letters Patent Appeals. set aside the decree for possession passed by Mr. Justice Sompura in both cases and dismiss both suits so far as they relate to the claim for possession. There will be order as to costs all throughout in both cases.

8. Appeals allowed.