

(1970) 12 MAD CK 0025
In the Madras High Court

Palaniappa Chettiar (died) and Others	APPELLANT
Vs	
Babu Sahib and Others	RESPONDENT

Date of Decision : 02-12-1970

Acts Referred:

Citation : (1971) 84 LW 230 : (1971) 2 MLJ 22

Hon'ble Judges : G. Ramanujam, J

Bench : Division Bench

Judgement

G. Ramanujam, J.—One Khaji Peer Batcha Sahib leased out a vacant site of 21 cents in. survey field No. 894 Chinnaveedhi to the father of the petitioners herein for a period of ten years on a monthly rental of Rs. 3. The lease contained a covenant against subletting. On the grounds that the tenant, father of the petitioners 2 to 9, had sublet the land to various persons and that he had also committed wilful default in payment of the rents a petition for eviction was filed before the Rent Controller by respondents 1 and 2 herein who are the settlees from the original owner Khaji Peer Batcha Saheb in respect of the suit property. The Rent Controller passed an order for eviction which has also been affirmed by the appellate and revisional authorities constituted under the Madras Buildings (Lease and Rent Control) Act, 1960. This revision is directed against that eviction order.

2. The learned Counsel for the petitioners mainly contends that the proceedings for eviction before the Rent Controller are without jurisdiction and the orders passed by the Rent Controller as well as the appellate and revisional authorities have, therefore, to be set aside. His contention is that the lease being of a vacant site and the superstructure having been erected by their tenant the provisions of the Lease and Rent Control Act would not apply to such a lease and the Courts below have wrongly-assumed jurisdiction in entertaining the eviction petition. The learned Counsel for the respondents, on the other hand contends that it is not open to the petitioners to raise the question of jurisdiction of the Rent Controller to entertain the eviction petition in view of certain earlier

proceedings wherein there is a binding decision between the parties that the matter could be agitated before the Rent Controller.

3. Before deciding the tenability of the rival contentions of parties, a few relevant facts have to be set out. As already stated, the lease was of a vacant site which commenced on 22nd September, 1947 and under the terms of the lease deed the tenant had been authorised to have the superstructure of his own. In or about 1958 respondents 1 and 2 filed a suit, O.S. No. 803 of 1958, for recovery of possession of the demised land and arrears of rent against the tenant father of the petitioners 2 to 9. In that suit the tenant denied the plaintiff's title and set up title in himself on the basis of a sale deed dated 10th December, 1952 said to have been executed by the plaintiffs and compulsorily registered on 10th December, 1952. The said suit for recovery of possession was decreed against the tenant and the matter came up to this Court in S.A. No. 1153 of 1960. In that appeal this Court accepted the contention put forward by the tenant that the civil Court had no jurisdiction to entertain the suit for eviction and that the provisions of the Rent Control Act alone could be invoked to view of certain decisions of this Court holding that though the original lease was only in relation to a vacant site, if on the date of the eviction petition the land had been built upon, the Rent Controller will have jurisdiction to entertain an application for eviction of the tenant from the demised land, and allowed the appeal in favour of the tenant. Subsequently respondents 1 and 2 filed an application before the Rent Controller for eviction but at that stage the tenant filed a suit O.S. No. 3 of 1964 for a declaration of his title to the vacant site which was ultimately dismissed. This matter also was brought to this Court in S.A. No. 583 of 1970, which is pending disposal. In view of the fact that the tenant had filed a suit for a declaration of his title in respect of the leasehold site, the petition for eviction filed earlier by the respondents 1 and 2 had been withdrawn. After the dismissal of the suit O.S. No. 3 of 1964 filed by the tenant to establish their title, respondents 1 and 2 filed R.C.O.P. No. 33 of 1966, before the Rent Controller seeking eviction of the tenant from the demised, land on the ground of unauthorised subletting as well as wilful default in payment of the arrears of rent. In the light of the view prevailing then, the Rent Controller entertained the eviction petition and passed an order for eviction on the merits of the case. The matter was taken in appeal before the appellate authority by the legal representatives of the tenant the petitioners herein. They contend that the lease of a vacant site cannot come within the purview of Section 10 of the Madras Buildings (Lease and Rent Control) Act, 1960 in view of the decision of the Supreme Court in *Salay Mohamed Salt v. J. M. S. Charity* (1969) 1 M.L.J. 16 : (1969) 1 An. W.R. 16 : (1969) 1 S.C.J. 63., wherein the earlier view of this Court holding that the Controller will have jurisdiction to entertain an eviction petition even in respect of vacant site if the vacant site has been built upon by the tenant had been overruled. The appellate authority had rejected that contention on the ground that the Supreme Court decision sought to be relied on by the petitioners had not yet been reported, that it would not be proper to rely on an unreported

decision and that on the date of the order of the Rent Controller the only ruling that held the field being the one in M.P.S. Palaiappa Chettiar and Others Vs. V.E. St. Vairavan Chettiar, , it was not open to the petitioners to question the jurisdiction of the Rent Controller relying on the subsequent unreported judgment of the Supreme Court. The revisional Court had also rejected the same contention on the ground that the decision in S A. No. 1153 of 1960 will bind the petitioners and that a subsequent decision of the Supreme Court in a different case cannot be said to affect the earlier ruling of this Court rendered between the parties.

4. The question now therefore is whether the petitioners claiming under a person who successfully contended before this Court in S.A. No. 1153 of 1960 that the lease fell within the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960 and that the Rent Controller alone had jurisdiction to entertain an application for eviction, can now turn round and say that the lease will not come under the provisions of the said Act and that the Rent Controller had no jurisdiction to entertain the eviction petition in relation thereto.

5. The learned Counsel for the Respondents vehemently contended that it is not legally open to the petitioners to raise the question of jurisdiction both on the principle of estoppel and on the principle of res judicata. Reliance is placed on a Bench decision of this Court in Aiyathurai v. Gnanaprakasa 52 Ind.Cas. 829 : AIR 1919 Mad. 1172. In that case the plaintiff instituted a suit on the small cause side and the defendant pleaded want of jurisdiction by the Small Cause Court and on his objection the Court returned the plaint for presentation on the original side. After the suit resulted in a decree and the same had been affirmed in appeal the defendant raised the objection in a revision before the High Court that the suit was of a small cause nature and that no appeal lay to the Subordinate Judge. On these facts this Court held that it is not open to the defendant to object to the jurisdiction which he had himself designated as the proper one at the earlier stage. Sri Perla Annapurnammagaru and Another Vs. The Rajah, , is a case where this Court held that a person, who has successfully established in an earlier litigation that the land sued was not an "estate" within the meaning of Madras Act I of 1908, and that the civil Court had jurisdiction to try the suit cannot later on turn round and say that the same land was an "estate" as defined in the said Act so as to invoke the special jurisdiction of the Revenue Court. It was expressed therein that, apart from the principle of res judicata a party cannot be allowed to blow hot and cold at the same time. In Gurmurthappa v. Chickmunisamappa AIR 1953 Mys. 62, a case similar to the one here arose. There when a civil suit was brought by a lessor against the lessee the latter objected to the jurisdiction of the civil Court and pleaded that the House Rent Controller alone had jurisdiction to grant the relief. The lessor accepted that position and thereafter filed an application before the Rent Controller for eviction. Before the Rent Controller the lessee contended that the Rent Controller had no jurisdiction to entertain the application as the lease was only of a vacant site. On those facts the Court held that the lessee was clearly

estopped by his own pleadings and conduct from disputing the jurisdiction of the Rent Controller, *Indermull v. Sub-Judge, Secunderabad* (1957) 1 An.W.R. 196 : AIR 1958 A.P. 779, also held that a lessee who had successfully taken the plea in an eviction petition against his sub-lessee before the Rent Controller that he had jurisdiction in the matter, could not be allowed to deny the truth of the said plea in a subsequent proceeding for fixing fair rent filed by the sub-lessee before the Rent Controller. A Bench of the Andhra Pradesh High Court in *Amritlal N. Shah Vs. Alla Annapurnamma*, , has also taken the same view. A recent decision of Venkataraman, J. in *Ramachandra Mudaliar v. Thirunavukarasu Chettiar* (1965) 78 L.W. 65, is also to the same effect. In that case a tenant successfully objected to the jurisdiction of the Rent Controller and on the lessor filing a suit in the civil Court, an objection was again taken there that the civil Court had no jurisdiction. On these facts the learned Judge expressed:

The tenant cannot be allowed to approbate and reprobate since he had objected to the jurisdiction of the Rent Controller in first instance when the landlord filed the petition in that Court. He would be estopped from raising such contention.

6. Reference was also made to a decision of the Supreme Court in *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, , in support of the contention that a decision of the Court having jurisdiction even if wrong is binding between the parties till it is set aside. It is the contention of the learned Counsel for the respondents that the decision in S.A. No. 1153 of 1960 is binding as between the parties, though the view expressed in that decision might have been overruled by the Supreme Court.

7. It is true that the decisions above referred to clearly lay down the principle that a party who successfully raised the question of jurisdiction of a Court or tribunal cannot turn round and assert a contrary position either at the subsequent stages of the same proceeding or in a fresh proceeding between the same parties in relation to the same subject-matter, and that a party cannot be permitted to blow hot and cold or approbate and reprobate at the same time. The principle of estoppel and *res judicata* can also be invoked against such change of attitude on the part of a litigant *Hemanta Kumari Devi Vs. Prasanna Kumar Datta*, , says:

It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court to play fast and loose to blow hot and cold, to approbate and reprobate to the detriment of his opponent, and that this wholesome doctrine applies not only to the successive states of the same suit, but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

8. However, while considering a similar question, the Supreme Court has taken a contrary view in a recent judgment in *Mathura Prasad Bajoo Jaiswal and Ors. v. Dossibhai N. B. Jeejeebhoy* (1970) 2 S.C.J. 685. Therein, on a review of the relevant earlier decisions on the point the Supreme Court had held that if the

objection taken is in relation to the jurisdiction of the Court, a party cannot be estopped from raising it, if it had really no jurisdiction as per the correct position in law. In that case a petition for fixation of standard rent was filed by the lessor u/s 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 in respect of an open land which was let by the lessor to the lessee for putting up some residential and business premises. It was rejected on the ground that the Act will not apply to open land and that rejection was confirmed by the Bombay High Court. Later a Division Bench of that Court had held in another case that the lease in respect of open land let for construction of buildings is not excluded from the provisions of the said Act, if a superstructure has been built thereon by the lessee. Relying on this later judgment, the lessee filed a fresh petition under that Act for determination of standard rent. That application was rejected on the ground that the question whether the lease of open land came within the provisions of the Act was *res judicata* since it had been finally decided by the High Court between the same parties in respect of the same land in the earlier proceedings; that order of rejection was also confirmed by the High Court of Bombay. On appeal the Supreme Court held that the lessee is not entitled to maintain the application under the provisions of that Act, as the view taken by the Bench of the Bombay High Court that the lease of an open site if let for erection of buildings, both residential and non-residential would come within the provisions of the said Bombay Act of 1947 was not correct, and that the earlier view of the same High Court in *Vinayak Gopal Limaye v. Laxman Kashinath Athavale* ILR (1956) Bom. 826, that a lease of a vacant site will not come within the provisions of the said Act was the correct one. In the course of the judgment the Supreme Court has expressed that the doctrine of *res judicata* belongs to the domain of procedure that cannot be exalted to the status of a legislative direction between the parties so as to determine the question as to the interpretation of enactment affecting the jurisdiction of the Court finally between them, that a decision of a competent Court on a matter in issue may be *res judicata* in another proceeding between the same parties but that a question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court, and that such a question of jurisdiction cannot be barred by the principle of *res judicata*. Referring to the decision in *Tarini Charan Bhattacharjee v. Kedarnath Naldar* I.L.R.(1929) Cal. 723, it was observed that where the law is altered since the earlier decision, the earlier decision will not operate as *res judicata* between the parties, that in such cases the matter in issue in a subsequent proceeding is not the same as in the previous proceeding because the law interpreted there was different and that the question of jurisdiction of the Court or procedure being pure questions of law unrelated to the rights of the parties to the previous suit is not *res judicata* in a subsequent suit. The substantial reason for taking the view that the principle of *res judicata* will not apply to a question of jurisdiction seems to be this. If the decision of the Court as regards jurisdiction in the previous proceeding be regarded as conclusive and binding between the parties, it will assume the status of a special rule of law applicable to the parties in question relating to the jurisdiction of the

Court, in derogation of the rule declared by the Legislature. This reason will apply equally to exclude the rule of estoppel in matters relating jurisdiction. On the basis of the above decision of the Supreme Court, it has to be held in this case that the petitioners are entitled to raise the question of jurisdiction of the Rent Controller in these proceedings notwithstanding the earlier decision of this Court in S.A. No. 1153 of 1960 rendered between the parties. I cannot accept the contention of the learned Counsel for the respondent that the decision of the Supreme Court is an ex cathedra pronouncement not warranted by the facts in that case. I find Veeraswami, J., as he then was, had taken a similar view in Nagappa Chettiar v. Arunachala Mudaliar C.R.P. No. 2493 of 1966, while dealing with a similar question it was observed therein:

The petitioner cannot be prevented from relying upon the current legal position and contending that the Act would have no application. It is not a representation coming from him; it is a statement of the correct legal position which obtains today. There is, therefore, no room for invoking the doctrine of estoppel. Nor do I think that the principle of approbation and reprobation is applicable because the changing legal position is something which the petitioner could not help and the rival positions which he was compelled to take stemmed not from his own view of the law but the divergent views taken by Courts, the view of the Supreme Court being the final one.

9. The learned Counsel for the respondents then contended that this Court sitting in revision u/s 115, Civil Procedure Code, should not exercise its discretion in favour of the petitioners who had not taken the question of jurisdiction in their counter statement before the Rent Controller but have chosen to raise it during the course of the arguments before the appellate and revisional authorities. But being a question of jurisdiction, it is not possible for me to shut out that question merely on the ground that it was not raised by the petitioners at the earliest stage in their pleadings. In this case admittedly the original lease was of a vacant site and though there were buildings put up by the tenant on the site on the date of the eviction petition, the provisions of the Madras Buildings (Lease and Rent Control) Act, cannot be applied in relation there to and this question has been conclusively decided by the Supreme Court in Salay Md. Sait v. J. M. S. Charity overruling the view taken by this Court in Palaniappa Chettiar v. Vairavan Chettiar. The petitioners' objection that the Rent Controller had no jurisdiction to entertain the eviction petition has therefore to be upheld and the civil revision petition allowed.

10. The civil revision petition is accordingly allowed but, in the circumstances, without costs.