

(1988) 02 BOM CK 0040

In the Bombay High Court

Case No : Writ Petition No. 2362 of 1985

Pragji Gowardhan Waghela

APPELLANT

Vs

Omprakash Sureshchandra Mor

RESPONDENT

Date of Decision : 05-02-1988

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1988) 02 BOM CK 0040

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : R.R. Deshpande, for the Appellant; S.C. Mehadia, for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—This is a writ petition arising out of the proceedings under the C. P. and Berar Letting of Houses and Rent Control Order, 1949 (for short, "the Rent Control Order").

2. Briefly, the facts are that the respondent/landlord filed an application under clauses 13(3)(i), (ii) and (v) seeking permission of the Rent Controller to give quit notice to the petitioner/tenant. However, he did not press his ground under clause 13(3)(v) before the Rent Controller. As regards the ground under clause 13(3)(i) it is clear from para 3 of the order of the learned Rent Controller that the petitioner/tenant had made the payment of arrears of rent on 2-2-1980 as per Exhibit NA-20 and, therefore, the ground under clause 13(3)(i) did not survive for consideration. The only ground which thus survived for consideration was under clause 13(3)(ii) of the Rent Control Order.

2-A. As regards the ground under clause 13(3)(ii), the learned Rent Controller found that previously the respondent/landlord had filed an application under clause 13(3)(ii) of the Rent Control Order for the same defaults which were the subject matter of the instant application and in that previous case there was a compromise" arrived at between the parties because of which the landlord did

not prosecute the said case which was filed, vide order dated 18-12-1978 in the said case. After referring to the decision of the Supreme Court in the, case of P. Dasa Muni Reddy vs. P. Appa Rao, 1975 Mh.L.J. 262, the learned Rent Controller held that the respondent/landlord had by the said compromise waived his right for getting the declaration that the petitioner/tenant was a habitual defaulter. He further held that it was open to the landlord to claim such a declaration on the basis of the subsequent defaults but he could not move for the declaration on the basis of the same defaults which were the subject matter of the previous case or which were prior to the date of the compromise. He, therefore, dismissed the application of the respondent/landlord under clause 13(3)(ii) of the Rent Control Order.

2-B. The landlord preferred an appeal and in appeal the learned appellate authority held that the subsequent application was not barred under clause 13(9) of the Rent Control Order as held by the then-Nagpur High Court in the case of Oudh Beharilal vs. Brijmohan and others, 1954 N.L.J. 129. After considering the merits the learned appellate authority granted permission to the respondent/landlord under clause 13(3)(ii) of the Rent Control Order. Being aggrieved, the petitioner/tenant has preferred the instant writ petition in this Court.

3. The learned counsel for the petitioner has urged before me that apart from the specific provisions of clause 13(9) of the Rent Control Order the general principles of res judicata, waiver, estoppel etc. are applicable to the Rent Control proceedings. This proposition is not also disputed on behalf of the respondent. The learned counsel for the respondent has, however,, urged that unless there is a decision on merits neither the principles of res judicata are applicable nor the provisions of clause 13(9) of the Rent Control Order can be invoked. That, the general principles of waiver etc. are applicable to the Rent Control proceedings is also clear from the decision of the Supreme Court in the case of P. Dasa Muni Reddy vs. P. Appa Rao, cited supra.

3-A. The learned counsel for the respondent has, however, relied upon certain cases of the then Nagpur High Court in support of his contention that when the case is withdrawn or dismissed in default, or, when the case is merely filed, clause 13(9) of the Rent Control Order does not bar the subsequent application. The said cases are : Girdharimal vs. D. C., Durg, 1951 N.L.J. Note 105; R. V. S. Mani vs. G. G. Todkar, 1954 N.L.J. 500 and Dindayalu vs. Rajaram, 1955 N.L.J. Note 417. The learned counsel for the petitioner/tenant has also referred to the decision of the erstwhile Nagpur High Court in the case of Oudh Biharilal vs. Brijmohan and others, cited supra relied upon by the learned appellate authority in support of the proposition that the subsequent application is not barred, because, according to him, the proposition laid down therein is just otherwise. A perusal of the said decision would show, that the proposition laid down therein is that the meaning of the expression "filed" is "dismissed", because under the Rent Control Order, the Rent Controller has power either to allow or dismiss the application. In this view of the matter the Division Bench held in that case that

the subsequent application would be barred under clause 13(9) of the Rent Control Order.

4. Turning to the decision relied upon on behalf of the respondent, the facts in the case of *Girdharimal vs. D. C. Durg*, cited *supra*, would show that when in his deposition the tenant raised the question about the title of the landlord, the Rent Controller filed the case because the landlord did not want to prosecute the same. He however, filed a second application on the ground of arrears of rent and also on the ground that it was required for his business. The High Court held that as the previous order was not passed on merits the second application was not barred. It is not however clear from the facts stated in the note whether in the subsequent application the landlord had removed the defect about his title pointed out by the tenant in his deposition. It may also be seen that the question about the application of the general principles of *res Judicata* is not considered in the said case. However, in this regard it may be seen that the learned Single Judge of this Court in the case of *Arjundas vs. Sitaram*, 1973 Mh.L.J. Note 28 has held that it was not open to the tenant to raise a plea in the subsequent proceeding that some other person was the tenant and not he when in the previous proceeding he had entered into a compromise in which he agreed to execute a fresh rent-note and agreed to pay the rent regularly. The general principles of waiver or *res judicata* were thus made applicable by this Court to an identical question about the title raised by the tenant in the subsequent proceeding.

5. The next case referred to by the learned counsel for the respondent is the case of *R. V. S. Mani vs. G. G. Todkar*, cited *supra*, the facts in which show that the application under clause 13(3) therein was dismissed in default. It is in that context that the High Court considered the question of application of clause 13(9). No question, however, of general principles of waiver, *res judicata* etc. are considered therein. The last case relied upon by the learned counsel for the respondent is *Dindayalu vs. Rajaram*, cited *supra*, in which the facts were that in the previous case when certain arrears were pleaded a part payment was made by the tenant towards arrears of rent upon which the landlord did not proceed with the case and the case was, therefore, filed. The learned Single Judge of the then Nagpur High Court held that the previous case was only filed and that there was no finding on merits given by the learned Rent Controller. He, therefore, held that the subsequent application of the landlord was not barred under clause 13(9) of the Rent Control Order.

6. It is thus clear that in all the cases relied upon by the learned counsel for the respondent the question considered is only of applicability of clause 13(9) of the Rent Control Order. It is not necessary for me to consider the question whether clause 13(9) in terms would be attracted in the facts of the instant case or not because, in my view, clearly the principles of waiver as held by the learned Rent Controller would be applicable in the instant case. It may be seen that the landlord had filed the previous case on the ground of habitual default under

clause 13(3)(ii) for the same defaults which are the subject matter of the instant case. It is in such previous case that admittedly a compromise was arrived at as is noted by the learned Rent Controller in his order-sheet in that case (see Exhibit NA-1). It is because of such a compromise that the respondent did not want to proceed with the said case. Since the respondent did not want to proceed with the said case the learned Rent controller filed the same which would mean that he dismissed the case for want of prosecution. There is no liberty prayed for before the learned Rent Controller in that case about the filing of a fresh case on the same ground. If no such liberty is reserved and the parties have compromised the matter the only inference that can flow from the recital in the compromise that the landlord does not want to prosecute the said proceedings is that he has waived his right in regard to the default pleaded in the said application.

7. The learned counsel for the respondent has urged that the landlord filed the instant case because as agreed to as per the said compromise the tenant did not vacate the premises within two months. It may be seen that if the terms of compromise are not complied with by the tenant, it is open to the landlord to take suitable steps against him for enforcement of the compromise. But surely as already stated, if no liberty is reserved, he cannot file an application for permission under clause 13(3)(ii) for the same defaults again. On this question I may usefully refer to the principles enunciated by the Supreme Court in regard to withdrawal of cases in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, . The Supreme Court has held in the aforesaid case that the principle underlying Order XXIII, Rule 1 of the CPC is founded on public policy and that the said principle is not the same as the principle of res judicata. It has then held in the aforesaid case that except where the personal liberty is involved if the petitioner were to withdraw his writ petition without the leave of the Court to file a fresh petition, then at least in the same Court the petitioner would not be entitled to file a fresh petition, because in that event the remedy under Article 226 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition.

8. In my view the above principle of withdrawal of cases enunciated by the Supreme Court in regard to the writ petition in the High Court is a wholesome principle of universal application as it is founded upon public policy. It is, therefore, applicable to the proceedings under the Rent Control Order also. It may be seen that it is necessary to apply the said principle in the Rent Control proceeding because otherwise the said proceedings are liable to be misused or abused by the landlord who may enter into an agreement with the tenant in regard to enhancement of rent by dropping the proceedings and after which when the rent is enhanced he may file a fresh case in regard to the same defaults again and again. Applying thus the said principle in the instant case it is clear that by virtue of the compromise in the previous case without reserving any liberty to file a fresh case on the basis of the same defaults the respondent/landlord must be deemed to have abandoned or waived his right to file a fresh

case under clause 13(3)(ii) of the Rent Control Order in respect of the same cause of action i.e. the same defaults. I am, therefore, of the view that the decision of the learned Rent Controller in this regard is correct and deserves to be upheld.

9. In the result, the instant writ petition is allowed. The impugned order of the learned appellate authority granting permission to the respondent/landlord under clause 13(3)(ii) of the Rent Control Order is set aside and that of the learned Rent Controller dismissing his application under clause 13(3)(ii) is restored. Rule made absolute in the above terms. No order as to costs.