
(1974) 02 DEL CK 0003
In the Delhi High Court
Case No : Second Appeal No. 58 of 1973

R. Dhiren Kiri

APPELLANT

Vs

Suraj Balaram Sahni and Sons

RESPONDENT

Date of Decision : 27-02-1974

Acts Referred:

Citation : (1974) ILR Delhi 210 : (1975) RLR 73

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Advocate : B.D. Sharma and K.L. Sethi, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) It is the distinction between the general principle of res judicata (not confined to section 105 Civil Procedure Code) and the statutory finality of an order of remand u/s 105(2) CPC which has to be spelt out and applied to the facts of the present case which are briefly as follows :-

(2) MESSRS. Suraj Balram Sahni and Sons, & firm registered under the Indian Partnership Act (respondent herein) is the landlord and Dr. Dhiren Kiri is the tenant of the premises in question. The lease had been given in April 1958. An application for eviction was filed by the landlord against the tenant in 1962. The tenant filed a written statement in 1963 praying that standard rent of the premises be fixed. The landlord thereupon absented himself and the eviction petition was dismissed for his, default. The Controller latter dismissed the prayer of the tenant for the fixation of standard rent also on the ground that the petition for eviction having been dismissed the tenant's prayer made in the written statement could not be considered. The decision of the Controller was, however, set aside by the Rent Control Tribunal who passed an order of remand directing the Controller to fix the standard rent inasmuch as the dismissal of the landlord's petition could not be the ground for refusing to consider the prayer of the tenant. In the appeal to the then Circuit Bench of the Punjab High Court at

Delhi, the landlord expressly urged against the order of the Rent Control Tribunal that the application of the tenant for the fixation of standard rent was barred by limitation u/s 12 of the Delhi Rent Control Act, 1958 inasmuch as it had been made more than two years after the date on which the premises were let by the landlord to the tenant and also more than two years after the commencement of the Delhi Rent Control Act, 1958. Gurdev Singh, J., however, held that the application was not barred by limitation and upheld the order of remand which had been made by the Rent Control Tribunal. The decision of Gurdev Singh J., is reported in J 965 P.L.R. 1197- No appeal was taken to the Supreme Court against that decision under Article 136 of the Constitution.

(3) Remand, when the Controller proceeded to fix the standard rent of the premises, the landlord challenged the correctness of the finding of Gurdev Singh, J., and contended that the application for fixation of standard rent was barred by time. The Controller, however, held following Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , that the decision of Gurdev Singh, J., had become final between the parties and its correctness could not be challenged before him. The Controller thereupon fixed the standard rent at Rs. 210.00 per month. In the landlord's appeals to the Rent Control Tribunal, however, the decision of the Tribunal was two-foM :- (a) Following the Supreme Court decision in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, , it was. held that a wrong decision on a question of law did not operate as res judicata. The decision of Gurdev Singh, J., on the question of limitation (which was a pure question of law on the admitted facts) was disapproved by the Supreme Court in M.M. Chawla Vs. J.S. Sethi, . The said decision on a question of law being wrong was not res judicata even between the same parties in the same proceeding after remand. The application for fixation of standard rent was, Therefore, dismissed as barred by time; (b) If the said application had to be considered on merits, then the standard rent would come to Rs. 198.00 per month. The tenant has filed this second appeal attacking both the above findings.

(4) In the argument before me, Shri B. D. Sharma learned counsel for the appellant tenant, did not argue against the finding regarding the quantum of the standard rent fixed by the Rent Control Tribunal. Shri K. L. Sethi, learned counsel for the respondent landlord, also. Therefore, did not argue that point. This finding of the Rent Control Tribunal not being disputed is, Therefore, upheld.

(5) The only question for decision, Therefore, is whether the Rent Control Tribunal was right in disregarding the decision of Gurdev Singh, J., as being wrong on a question of law in view of the Supreme Court decision in Mathura Prasad v. Dossibai. The proposition established by the Supreme Court in Mathura Prasads case was summarised by Shah, J., speaking for the Court at the end of paragraph 5 of the decision as follows :-

" A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same. as in the previous proceeding, but not when the cause of action is

different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision rebates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

IT is to be noted that in Mathura Prasad's case, the application of the tenant for the fixation of standard rent was dismissed by the Civil Judge on the ground that the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would not apply to the lease of an open land for the purpose of constructing a building thereon. The said order was confirmed in revision by a Single Judge of the High Court of Bombay. But this view was disapproved by a later decision of the same High Court. Thereupon the tenant filed a fresh petition in the Court of Small Causes, Bombay, for the determination of standard rent. Meanwhile, the Supreme Court also held in Dossibhai v. Kherchand Gonimal. Air 1966 S-C. 1936, that the view of the learned single Judge of the Bombay High Court that the application for the determination of the standard rent was not maintainable was wrong. But the Court of Small Causes before which the fresh application was filed as also the High Court in a revision petition against the decision of the Court of Small Causes held that even the wrong decision of the learned Single Judge of the Bombay High Court upholding the dismissal of the first application for the fixation of standard rent was res judicata between the parties. In an appeal against this decision of the High Court, the Supreme Court laid down the proposition of law reproduced above and held that the decision of the learned Singh Judge of the Bombay High Court could not operate as res judicata in a subsequent proceeding between the same parties inasmuch as it was a wrong decision on a pure question of law and also because it wrongly disclaimed jurisdiction to entertain the application for fixation of standard rent.

(6) The applicability of this Supreme Court decision to the case before us may be considered under the following headings :-

(A) Whether the decision, of Gurdev Singh, J., is not binding between the parties as being a wrong decision on a pure question of law?

(B) Whether it is not the general principle of res judicata but the specific rule of statutory finality embodied in section 105(2) CPC which applies to the present case ?

(E) Whether the order of Gurdev Singh J., was without jurisdiction and can, Therefore, be challenged as being void ?

(D) Whether the correctness of the order of Gurdev Singh J., can be challenged on the ground that subsequently the Supreme Court took a different view and disapproved the view taken by Gurdev Singh, J., in M. M. Chawla v. J. S. Sethi ?

and (e) Whether the decision of Gurdev Singh, J" had the effect of declaring valid a transaction which is prohibited by law ?

(A) An initial distinction must be made between the same proceeding and a

subsequent proceeding. A finding arrived at by the competent Court between parties which has become final by not being

APPEALED against is final between the parties in the same proceeding. Whether such a finding is right or wrong is immaterial. It is only if the finding is sought to be used as *res judicata* in a subsequent proceeding that the question arises whether a finding on a question of law can operate as *res judicata* in a subsequent proceeding. In *Jawahar Singh v. Jai Gopal Grover*, 2nd (1973) 1 Delhi 63, it was urged before me that even a wrong decision on a question of law would be *res judicata*. On this contentation, the following observation was made:

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"IT is true that the correctness or otherwise of a decision is not relevant to determine whether it is *res judicata* or not. But it cannot be said that all decisions on questions of law are always *res judicata*. The first exception to the rule that a decision on a question of law is *res judicata* is this. If a question of law is wrongly decided then it is *res judicata* only in the case in which the decision is given. But in a subsequent case arising out of different cause of action, it is not *res judicata*. This exception was recognised by the Supreme Court in *Anwar Khan Mehboob and Co. Vs. State of Madhya Pradesh and Others*, . and *Mathura Prasad v. Tossibai* (supra)."

IN Mathura Prasad's case, the fresh application for fixation of standard rent had to be regarded as a subsequent proceeding. For, the previous proceeding had finally come to an end after the learned Single Judge of the High Court had dismissed the previous application for fixation of standard rent. On the contrary, the application for the fixation of the standard rent filed by the tenant in the present case remains the same. It was originally dismissed by the trial Court but was regarded as valid by the Rent Control Tribunal and as valid and within limitation by Gurdev Singh, J. The application had been dismissed by the Controller on a preliminary issue without trial on merits. The remand by the Tribunal upheld by Gurdev Singh J., was, Therefore, on the principle embodied in Order Xli rule 23 CPC applicable by analogy to the Rent Control proceedings. The effect of such a remand is stated by Order Xli rule 23 itself in the following words:-

".. .the Appellate Court may, if it thinks fit, by order remand the case.and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred. with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit."

Accordingly, original application was re-admitted under its original number by the Controller after the order of remand. There can be no doubt, Therefore, that the proceeding before me is the same as it was before Gurdev Singh, J. If an order in the same proceeding has become final, then at a later stage of the same proceeding its correctness cannot be canvassed. In this respect, the decisions in Mathura Prasad and Jawahar Singh are distinguishable. The question of the

decision of Gurdev Singh, J., being not res judicata as being wrong on a question of law does not, Therefore arise as the order of Gurdev Singh, J., had become final and the proceeding in which it was passed is the same as the proceeding before me. In Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , and in Arjun Singh Vs. Mohindra Kumar and Others, , certain orders of interlocutory nature which had not become final were held to be not res judicata in the same proceeding. But these orders were neither orders of remand nor had they become final. These decisions do not, Therefore, help the respondent in the present case. On the other hand, the Supreme Court has expressly applied the rule of statutory finality embodied in section 105(2) to appealable orders of remand in preference of the general principle of rest pudicata in Nain Singh Vs. Koonwarjee and Others, . and Sita Ram Goel Vs. Sukhnandi Dayal and Another, .

(7) (B) The general principle is that interlocutory orders are not final and their correctness may be canvassed in the appeal against such final decision in the case. This law is laid down in sub-section (1) of section 105 of the CPC the principle of which applies to the Rent Control proceedings. Sub-section (2), however, enacts an exception to this rule. The exception to this rule is stated in sub-section (2) of section 105 as follows:

"....Where any party aggrieved by an order of remand made..... from which an appeal lies does not appeal there from, .he shall thereafter be precluded from disputing its correctness."

AN order of remand is not a final order inasmuch as it only re-starts the same proceeding for a trial de novo. But for section 105(2) ; Therefore, the correctness of an order of remand could have been canvassed in the same proceeding after the remand order is passed in view of sub-section (1) of section 105. This would have led to anomalies and inconvenience. The legislature, Therefore, thought that a distinction should be made between the kinds of order of remand, namely, (a) which are appealable and (b) which are not appealable.

THIS distinction was made by section 105 Civil Procedure Code. A non-appealable order of remand would fall u/s 105(1) while an appealable order of remand falls u/s 105(2). In our case, the order of remand was passed by the Rent Control Tribunal. That order of remand was expressly made appealable by section 38 of the Delhi Rent Control Act, 1958. Appeal was also filed but dismissed by Gurdev Singh, J. It is for that reason that the order of remand attains the statutory finality which cannot be disputed in the same proceeding. The general principle of res judicata applies to final orders only. It docs not apply to an order which does not have the effect of finality. It does not, Therefore, apply to an order of remand which by its very nature is not a final order. But an artificial rule has been enacted by the Legislature in section 105(2). The principle of res judicata cannot, Therefore, be applied to the rule embodied in section 105(2). It is not on general principle but by a special statutory provision that an appealable order of remand has been made final by section 105(2). It is section 105(2) and not the general principle of res judicata which applies to the present

case. The various exceptions to the general principle of res judicata noted in Mathura Prasad and Jawahar Singh become relevant only when the principle of res judicata can operate. It operates only in a subsequent proceeding. It does not, Therefore, apply in the same proceeding to an order which has become final. It, Therefore, does not apply to an appealable order of remand which has been made final in the same proceeding by section 105(2) as in the present case.

(8) (E) In Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, , the Supreme Court held that an order of a quasi-judicial tribunal which is contrary to the fundamental provisions of the statute under which it is acting would be regarded as an order without jurisdiction. Such an order can, Therefore, be challenged "both in an appeal against the said order as also in a collateral proceeding. The order of the Controller entertaining the application for fixation of standard rent of the tenant in the present case could be challenged as being without jurisdiction in the appeal before the Rent Control Tribunal as also before Gurdev Singh, J. Unfortunately for the landlord, however, the said order was upheld by them. Even though Gurdev Singh, "J., was acting u/s 39 of the Delhi Rent Control Act, 1958, he was acting as the High Court and not as a persona designata (Municipal Corporation of Delhi Vs. Kuldip Lal Bhandari and Others, . The decision of the High Court cannot be challenged as being without jurisdiction before me. Further, as the High Court is a Court of superior jurisdiction, its decision cannot be challenged as being without jurisdiction even in the Supreme Court in a collateral proceeding (Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another,). Secondly, section 105(2) CPC precludes a challenge to an order of remand on any ground whatever in the same proceeding even if it is assumed for the sake of argument that such an order could be challenged on the ground of jurisdiction in a subsequent proceeding or in a collateral proceeding. Without, Therefore, deciding the question whether the decision of Gurdev Singh, J., was without jurisdiction, I am unable to accept the contention of the respondent that the correctness of that order can be canvassed before me.

(9) (D) It was then urged by Shri Sethi that the decision in Mal."iura Prasad"s case applies inasmuch as there was a change of law effected by the decision of the Supreme Court in M. M. Chawla v. J. S. Sethi after the decision of Gurdev Singh, J., was delivered. Therefore, says the learned counsel, this Court should hold that the decision of Gurdev Singh, J., did not act as res judicata. There are two answers to this contention. Firstly, the law laid down by the Supreme Court in M. M. Chawla v. J. S. Sethi does not have the effect of re-opening decisions which had already become final. Secondly, such a decision by the Supreme Court would not affect the operation of section 105(2) CPC even if a wrong decision is arrived at contrary to a previous decision of the Supreme Court in making the remand. The order of remand even if wrong is made final by section 105(2).

(10) (E) There is no question of any transaction being held valid in the present case contrary to law. Even if such a question had arisen, section 105(2) would

probably have protected the order of remand unless some relevant statute is shown to prevail over section 105(2) Civil Procedure Code.

(11) Learned counsel for the respondent contended that the preseat appeal has been filed against two orders of the Rent Control Tribunal, namely, (1) an order reversing the decision of the Controller and holding that the application for fixation of standard rent was barred by time, and (2) an order fixing the standard rent at Rs. 198.00 per* month. Learned counsel contended that two separate appeals ought to have been filed against two separate orders. Firstly, even if this contention were true, learned counsel for the tenant did not argue against the correctness of the quantum of standard rent fixed by the Rent Control Tribunal. One may, Therefore, take it that the tenant did not file any appeal against the said order. Only one appeal can be deemed to have been filed and that against the order holding that the application for fixation of standard rent was barred by time. Secondly, the fixation of standard rent was only a consequential order. It could not survive a finding that the application for fixing standard rent was barred by time. Hence only the latter finding had to be challenged in appeal. Thirdly, the original subject matter of litigation was a single one, namely, the application for the fixation of standard rent. The subject-matter cannot be split merely because two appeals were filed against the fixation of standard rent by the Controller before the Rent Control Tribunal. The Rent Control Tribunal while deciding the two appeals was really considering one subject-matter, namely, the application for fixation of standard rent. There was, Therefore, no need for the tenant to file two separate appeals against the two separate orders of the Tribunal. The law on this point has been considered fully under question No. 2 in *Jawahar Singh v. Jai Gopal Grover*, referred to above. For the reasons stated therein this contention is untenable.

(12) The appeal against the order of the Rent Control Tribunal passed in R.C.A. No. 460 of 1970 is accepted and that order of the Tribunal holding the application for fixing standard rent as time barred is set aside, The appeal against the order of the Rent Control Tribunal in R.C.A. No. 930 of 1970 is, however, dismissed and the order of the Tribunal fixing the standard rent at Rs. 198.00 per month is affirmed. The appeal is. Therefore, partly allowed and partly dismissed in the above terms with no order as to costs.