

(2008) 06 BOM CK 0090
In the Bombay High Court
Case No : Suit No. 291 of 1976

Raj Krishanlal Marwah and Another

APPELLANT

Vs

Govind H. Rohira and Others

RESPONDENT

Date of Decision : 11-06-2008

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 5, 5(8), 6, 6(1)
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2008) 4 ALLMR 449 : (2008) 5 BomCR 775

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : P.K. Dhakephalkar, Rajesh Singh and A.A. Joshi, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; V.A. Thorat and D.D. Madon, Sr. Counsels, Sanjay Jain and V.A. Sugdare, instructed by L.D. Shah and Co. for Defendant No. 4, for the Respondent

Judgement

S.J. Vazifdar, J.—The plaintiffs have sought a decree directing the defendants to vacate the suit premises and to hand over the same to them. The plaintiffs have also sought a decree for arrears of rent and mesne profits.

2. Defendant Nos. 1, 2 and 3 expired and their heirs have been brought on record. I will refer to the original Defendant Nos. 1, 2 and 3 as the lessees. Defendant No. 4 is the Hind Saurashtra Service Industries Co-Operative Society Ltd.

3. The Plaintiffs claimed to be the owners and lessees of different portions of the suit land. Their title as such has not been denied. By a registered indenture of lease dated 19.2.1965 the plaintiffs leased / subleased the suit land to the original defendant Nos. 1, 2 and 3 for a term of 98 years commencing from 1.2.1965 for the consideration and on the terms and conditions contained therein. The relevant clauses of the lease deed read as under:

2. The Lessees shall as and when required by the Lessors deposit with the

Lessors a sum of Rs. 10,090:25 being three months rent which amount shall be refunded by the Lessors to the Lessees on the Lessees constructing buildings and structures on the demised premises in conformity with the Bye- laws and regulations of the Bombay Municipal Corporation or other public body local or other authority having jurisdiction to regulate the same of the minimum value of Rupees three lacs as certified by the Lessors Architects.

3. The Lessees with intent to bind all persons into whose hands the demised premises may come do and each of them doth hereby for themselves, himself. Their or his heirs executors and permitted assigns and to the intent that the obligations may continue throughout the term hereby created covenant with the Lessors as follows:

(a) ...

(b) In the event of the Lessees failure to pay the said monthly rent on the due date as aforesaid, the Lessors shall be entitled to interest at the rate of nine per cent per annum from and after the expiry of 30 days grace period till payment without prejudice to the other rights of the Lessors.

(c) To construct buildings, factories, workshops, sheds or other structures on the demised premises within a period of three years from the date hereof in all respects in a substantial and workman like manner and with the materials of the best descriptions of the several kinds conformably with the statutory, local and Municipal rules and regulations and bye-laws applicable thereto with proper drains, connections and other conveniences in conformity with the Bye-laws and Regulations of Bombay Municipal Corporation or other public body, local or other authority having jurisdiction to regulate the same at the minimum cost of rupees three lacs as certified by the Lessors Architects.

(d) ...

(e) From time to time and at all times during the said term hereby created well and substantially to repair clean maintain amend and keep the messuages and buildings and factories and all structures that may be erected on the demised premises and the fixtures therein and the walls fences roads sewers drains and appurtenances thereof with all necessary reparations cleanings and amendments whatsoever;

...

(m) To insure and keep insured all the structures and buildings factories sheds etc. erected on the demised premises against loss or damage by fire in the full insurable value thereof in the joint names of the Lessors and Lessees.

(p) To use the demised premises for erecting and conducting factories for industries of all kinds workshops, godowns, factories, bungalows, chawls or any other structures of any kind whatever as may be permitted by the Municipality and/or Government and/or any other authorities. Industrial activities shall be

carried out only in such portion of the said premised premises as are earmarked for industrial purposes.

4. The Lessees shall be entitled to transfer or assign the demised premises to a co- operative society without obtaining consent of the Lessors as hereinafter mentioned upon terms and conditions which are not in any manner inconsistent with the terms herein contained. The Lessees with the consent in writing of the Lessors (which consent shall not be unreasonably withheld, in the case of any respectable and financially sound and solvent party) shall be at liberty to sub-let, transfer or assign the demised premises or any part thereof upon terms and conditions which are not in any manner inconsistent with the terms herein contained. Provided however that in the event of such sub-letting the Lessees shall be liable to pay the rent and observe and perform the terms and conditions herein contained.

5. The Lessees hereby covenant with the Lessors that the Lessors shall have first charge on the buildings structures and factories to be constructed or erected upon the demised premises for arrears of rent, interest and damages for breach of any of the terms and conditions hereof.

7. PROVIDED ALWAYS AND IT IS HEREBY AGREED as follows:

(a) ...

(b) That if and whenever any part of the rent hereby reserved shall be in arrears for a period of 30 days whether the same shall have been legally or formally demanded or not and also if and whenever there shall be a breach of any of the covenants, terms conditions and provisions by the Lessees herein contained the Lessors may re-enter upon the demised premises or any part of the said premises in the name of the whole and immediately thereupon this demises and all rights of the Lessees hereunder shall absolutely be determined PROVIDED that the lessors shall have before exercising the right of re-entry herein contained in case of breach of the term of payment of rent given to the Lessees one Calendar month's notice and in case of breach of any other terms and conditions herein contained given to the Lessees three calendar months" notice in writing specifying such breach and requiring the Lessees to pay the said arrears of rent and to remedy the said breach and the Lessees shall have failed and neglected to pay the said arrears of rent or remedy the said breach within the said respective period of notice. All costs charges and expenses of such notice incurred by the Lessors shall be borne and paid by the Lessees alone.

4. Pursuant to the lease deed vacant possession of the suit land was delivered by the Plaintiffs to the lessees, who obtained non-agricultural permission from the revenue authorities for using the suit land for non-agricultural purposes and constructed buildings thereon. The plaintiff's have alleged that they were informed that the original defendants had purported to execute an assignment deed dated 29.8.1972 purporting to assign their leasehold interest in the suit land along with the buildings standing thereon in favour of defendant No. 4. The

plaintiffs allege that the said assignment is without their knowledge and consent. The plaintiffs have further alleged that the lessees failed to insure the property and paid the rent as per the said lease deed only up to August 1974 but failed and neglected to pay the same thereafter.

5. Defendant No. 4 filed in the Court of Small Causes an application being any RAN No. 1597/RS of 1974 in which defendant No. 4 contended that they were lawful lessees of the plaintiff in respect of the suit land and had acquired the leasehold interest of the lessees and that the provisions of the Bombay Rent Act were applicable to the suit lands and that standard rent of the suit land would be much less than the rent reserved under the said lease deed. In that application, the Plaintiffs contended that the provisions of the Bombay Rent Act are not applicable to the suit lands and that defendant No. 4 is not their tenant or lessee.

6. A learned Judge of the Court of Small Causes by a judgment dated 11.2.1976 held that the suit lands were agricultural lands at the relevant time and that the provisions of the Bombay Rent Act do not apply to them. It was accordingly held that the RAN application for fixing the standard rent was not maintainable and dismissed the same.

7. The plaintiff contended that the defendants failed and neglected to pay the rent and insure the suit premises as per the said lease deed. By their advocate's notice dated 19.7.1975 addressed to the lessees, the Plaintiffs called upon them to remedy the breaches in accordance with Clause 7 (b) of the lease deed. They however failed to comply with the said requisitions. The Plaintiffs contend that they are accordingly in terms of the said lease deed entitled to re-enter upon the suit premises and to forfeit the said indenture of lease. The Plaintiffs accordingly by their advocate's notice dated 20.11.1975 informed the lessees that they had thereby forfeited the lease and had re-entered upon the suit premises and called upon them to immediately surrender vacant possession of the said premises to them. In these circumstances it is contended on behalf of the plaintiffs that the defendants have become complete trespassers and are liable to vacate and deliver vacant possession of the suit premises to them.

8. In paragraph 12 of the plaint it is pleaded that the suit lands were agricultural lands and that the provisions of the Bombay Rent Act were not and are not applicable to the same. Without prejudice thereto the plaintiffs have also pleaded that the suit lands were not demised to original defendant Nos. 1, 2 and 3 for the purpose of residence, education, business, trade or storage; that the said lands were open lands demised in favour of original defendant No. 1, 2 and 3 who were at liberty at all times and from time to time to construct and erect upon any part of the demised lands, buildings of every description, howsoever without any restriction and that consequently the suit lands were not let out for residence, education, business trade or storage and consequently the provisions of the Bombay Rent Act were not applicable to the suit lands. Finally it is pleaded that the judgments of the Court of Small Causes decided between the parties to the suit that the provisions of the Bombay Rent Act are not applicable to the suit

lands and that the said decision operates as a res judicata between the parties.

9. Defendant No. 1, 2 and 3 have not filed a written statement. Defendant No. 4 has filed a written statement. As I am to decide only the preliminary issue of jurisdiction it is not necessary for me to refer to the written statement in any detail. Suffice it to state that the plaintiff's contention regarding jurisdiction has been denied and it is pleaded in considerable detail that this Court has no jurisdiction. I will refer to the details of the pleading in this regard when I deal with the rival submissions.

10. On 18.8.2000 ten issues were framed. There was no issue on the question of jurisdiction. Two witnesses each were examined on behalf of the plaintiffs and defendant No. 4. By an order and judgment dated 30.7.2001 the learned single judge decreed the suit. Defendant No. 4 filed Appeal No.971 of 2001. By an order dated 30.8.2007 the Division Bench set-aside the order and judgment by consent and remanded the matter for a fresh hearing. By an order dated 13.12.2007 S.A. Bobde J. framed five additional issues being issue numbers 9 A to 9E.

11. Both the Counsel invited me to decide issues 9A, 9B and 9C as preliminary issues. This judgment is accordingly confined to the decision on these issues which read as under:

9A. Whether the plaintiffs prove that the suit land were agricultural lands and that the provisions of the Bombay Rent Act were not and are not applicable to the suit lands as alleged in paragraph no 11 of the plaint?

9B. Whether the plaintiffs prove that the judgment of the Small Causes Court in Standard Rent Application being RAN No 1597/SR of 1974 finally decides between the parties to the suit that the provisions of the Bombay Rent Act are not applicable to the suit lands and the decision thereon operates as res judicata between the parties as alleged in paragraph No. 11 of the plaint?

9C. Whether the plaintiffs prove that this Court has jurisdiction to entertain and/or try the present suit ?

12. Logically, it would be necessary to first decide whether the issue of jurisdiction is res judicata in view of the judgment of the Small Causes Court. Mr. Thorat, the learned senior counsel appearing on behalf of defendant No. 4 submitted that the question of jurisdiction can never be res judicata. The proposition as such is too wide. The judgments relied upon by Mr. Thorat do not indicate any such absolute rule. It would depend upon the facts and circumstances of the case. It would depend upon whether the judgment in the earlier proceedings decided the issue as to jurisdiction as a pure question of fact, a mixed question of law and fact or a pure question of law. Mr. Thorat's proposition would apply only in the third case.

13. In Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, , the Supreme Court held:

5. But the doctrine of *res judicata* belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be *res judicata* in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is *res judicata*: the reasons for the decision are not *res judicata*. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is *res judicata*, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is *res judicata*. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be *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 relates 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.

9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not *res judicata* in the subsequent suit. Rankin, C.J., observed in *Tarini Charan Bhattacharjee* case:

The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided.

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision, if the Court assumes jurisdiction which it does not possess

under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the CPC means the right litigated between the parties i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

12. In the present case the decision of the Civil Judge, Junior Division, Borivali, that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous: see *Mrs. Dossibai N.B. Jeejeebhoy v. Khemchand Gorumal*. If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature.

14. In *Smt. Isabella Johnson Vs. M.A. Susai*, , the Supreme Court held:

6. The same view has been reiterated by a bench comprising three learned Judges of this Court in *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead)* through his Lrs., . We find that the decision of three learned Judges of this Court in *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, has not been noticed at all by the Division Bench comprising two learned Judges of this Court which delivered the judgment in *Avtar Singh and Others Vs. Jagjit Singh and Another*, and hence, to the extent, that the judgment in *Avtar Singh's* case¹ takes the view that the principle of res judicata is applicable to an erroneous decision on jurisdiction, it cannot be regarded as good law. In our opinion a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of res judicata. It is well settled that there can be no estoppel on a pure question of law and in this case the question of jurisdiction is a pure question of law.

15. Mr. Thorat and Mr. Dhakephalkar relied upon the above judgments. I agree with Mr. Dhakephalkar that neither of these judgment support Mr. Thorat's proposition which is in absolute terms. It is only where the question even as to jurisdiction is decided as a question of law alone and not as a question of fact or a mixed question of law and fact that a judgment in a previous proceeding would not render the issue res judicata between the parties. This to my mind is clear from the judgments themselves. In fact, a view to the contrary would enable a party to re-agitate all questions of fact in subsequent proceedings which would be contrary to the mandate of Section 11 of the Civil Procedure Code. It would ensure that there is no finality to proceedings.

16. The question therefore is whether the judgment of the Small Causes Court relied upon by Mr Dhakephalkar as constituting resjudicata on the issue of jurisdiction was based purely on a question of law or was based on a question of fact or a mixed question of law and fact. If it was based purely on a question of law it would not operate as res judicata between the parties. If on the other hand it was based on a question of fact or a mixed question of law and fact it would operate as res judicata between the parties.

17. The difficulty in deciding this question arises from the fact that neither party has led any evidence as to the nature of the judgment and the basis on which it was delivered. The judgments themselves were not tendered in evidence. The issue that arises in turn for consideration therefore is the party on whom the burden lies to establish this issue and whether that party has discharged the burden.

18. Issue 9B places the burden of proving this issue on the plaintiff. Even otherwise as a question of law the burden of proving whether a judgment in an earlier proceeding operates as res judicata lies on the party that asserts the same.

19. Mr. Dhakephalkar did not deny this. He however submitted that the plaintiffs having proved that the issue was decided in an earlier proceeding is sufficient to shift the burden then upon the defendants to prove that the judgment did not operate as res judicata. I do not agree.

20. We have already seen that the question whether the judgment operates as res judicata or not depends upon the nature of the judgment namely whether it was a judgment based on a question of law or whether it was based on a question of fact or a mixed question of law and fact. It would not therefore be sufficient for the party asserting that a judgment operates as res judicata to merely established the existence of a judgment on the issue. The party must also establish that the judgment is of such a nature that it operates as res judicata. There is no warrant for a presumption that a judgment is based only on a question of law. Nor is there a presumption that a judgment is not based on facts or on mixed questions of law and fact. The nature of the judgment itself is a question of fact. It is necessary therefore for the party asserting the positive to

establish the nature of the judgment.

21. As I have noted earlier there is no evidence regarding the nature of the judgment of the Small Causes Court. The judgment has not even been produced in evidence. In the circumstances it must be held that the plaintiff had failed to discharge the burden of proving that the judgment of the Small Causes Court operates as *res judicata*. It is open therefore for the defendants to urge the question of jurisdiction.

22. A decision on the issue whether this Court has jurisdiction or not on merits involves a consideration of Sections 5(8) and 6(1) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 which read as under:

5. Definitions.-In this Act unless there is anything repugnant to the subject or context,- (8) "premises" means-

(a) any land not being used for agricultural purposes,

(b) any building or part of a [building let or given on licence separately] (other than a farm building) including-

(i) the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building,

(ii) any furniture supplied by the landlord for use in such building or part of a building,

(iii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house ;

6. Application.-(1) In areas specified in Schedule I, this Part shall apply to premises let [or given on licence] for residence, education, business, trade [or] storage [* * *]

[Provided that [State] Government may, by notification in the Official Gazette, direct that in any of the said areas, this Part shall cease to apply to premises let [or given on licence] for any of the said purposes]; [Provided further that the State Government may by like notification direct that in any of the said areas this Part shall re- apply to premises let [or given on [licence] for such of the aforesaid purposes as may be specified in the notification.]

23. The provisions of Section 5(8)(a) apply to the facts of the present case. In other words the suit premises not being used for agricultural purposes fall within the ambit of the term "premises" in Section 5(8)(a) of the said Act.

24. It is settled law that the point of time for determining whether property is governed by the expression "premises" u/s 5(8)(a) is when protection given under the Act is sought to be asserted or when a right conferred by it is sought to be enforced and that the date of the lease cannot be of any consequence for determining as to whether the premises were covered by Section 5(8) of the Act.

(See Govindram Bros. Pvt. Ltd. and Others Vs. Alexander Benedict Joseph Pereira, . In Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, , the Supreme Court held:

4. The expression "premises" in Section 5(8) of the Bombay Rents Hotel and Lodging House Rates (Control) Act 57 of 1947, does not include premises used for agricultural purposes. By Section 6 of that Act the provisions of Part II which relate to conditions in which orders in ejectment may be made against tenants and other related matters apply to premises let for education, business, trade or storage. It is plain that the Court exercising power under the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947, has no jurisdiction to entertain a suit for possession of land used for agricultural purposes. Again in ascertaining whether the land demised is used for agricultural purposes, the crucial date is the date on which the right conferred by the Act is sought to be exercised: Mst. Subhadra Vs. Narsaji Chenaji Marwadi, .

25. In Nalanikant Ramadas Gujjar Vs. Tulasibai (dead) by LRs. and others, , a Constitution Bench of the Supreme Court held:

9. In the case of Mst. Subhadra Vs. Narsaji Chenaji Marwadi, the land which had been let out for agricultural purposes, no construction whatsoever appears to have been made on the same. The landlord only got an order of conversion on the basis whereof he filed a petition for fixation of standard rent of the plot under the provisions of the Bombay Rent Act. So far the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, is concerned, on the land which had been leased out, construction had been made from which eviction was being sought by the landlord and in that context it was said that the crucial date for ascertaining whether the provisions of the Bombay Rent Act shall be applicable or not, shall be the date when the right under the Act was sought to be exercised. So far the facts of the present case are concerned, the lease had been granted to the Binny Company for installing ginning and processing machines and admittedly a building was constructed in which ginning and processing machines were installed and godown was also constructed. Once a piece of land which was agricultural in nature is put to non-agricultural use, it shall be covered by the definition of "premises" u/s 5(8) of the Bombay Rent Act. It need not be impressed that Clause (a) of Section 5(8) excludes from the definition of "premises" "any land not being used for agricultural purposes". The words not being used are significant. It can be said that the framers of the Act for applying the provisions of the said Act in the definition of "premises" indicated that the crucial date shall be the date when the right conferred under the Act is sought to be exercised. There being no dispute in the present case that the land had been put to non-agricultural use several decades before the coming into force of the Bombay Rent Act, the provisions of the said Act were applicable. We are in respectful agreement with the views expressed in the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, .

26. There is no dispute between the parties that as on the date on which the suit

was filed the premises were not being used for agricultural purposes. This is in terms admitted in the Plaintiff itself. For instance, in paragraph 6 of the plaint, it is stated that the lessees had obtained non-agricultural permission from the revenue authorities for using the suit land for non-agricultural purposes. In paragraph 7 of the plaint it is stated that the lessees had assigned in favour of defendant No. 4 their leasehold interest in the suit land along with the buildings standing thereon.

27. The oral evidence also establishes that at the time of the filing of the suit the property was not being used for agricultural purposes. Plaintiff No. 2 examined himself. He admitted that the lease deed permitted the lessee's to put up construction upon the suit property; that to his knowledge construction was put up on the suit property and that he did not object to the same. In cross-examination he admitted that he was aware that the lease was obtained for the purpose of constructing an industrial building. He further admitted in cross-examination that he was aware that there were different industrial units in the society building.

28. PW 2 who was examined as an architect and valuer stated in the cross-examination that he had seen the non- agricultural order in respect of the property. In his valuation report (Exhibit P-4) he stated that on 12-2-1966 the N.A. Order was passed. He further admits that in the buildings constructed upon the suit property there were " industrial gallas". He also stated that the suit property is situated in the industrial area. Considering the evidence as a whole it is clear to me that he referred to the property as being used for industrial purposes as opposed to agricultural purposes. In other words the use of the term industrial or industries by both the witnesses is in contradistinction to the word "agricultural".

29. These facts coupled with the admission that the land had admittedly been converted to non-agricultural user indicates, at least on a balance of probabilities, that at the time of the filing of the suit it was not used for agricultural purposes. Further there is nothing on record which even remotely suggests that the property was being used for agricultural purposes. This has neither been pleaded or even remotely suggested in the evidence, both documentary as well as oral.

30. The next question is whether the provisions of Section 6 of the Act apply to the facts of this case.

31. Mr. Dhakephalkar submitted that the defendants were not entitled to contend that the case falls within the ambit of Section 6 of the said Act as there was no effective denial to the averment in paragraph 12 of the plaint that the suit lands were not demised to the lessees for the purpose of residence, education, businesses, trade or storage. He submitted that the written statement merely states as to what use the said land was put to and does not deal with or contain any averment as to the purpose for which the land was leased.

32. I do not find the submission well founded. Paragraph 15 of the written statement filed by defendant No. 4 deals with this contention in detail. It is denied that at the relevant time, the suit lands were agricultural lands or that the provisions of the Act were not and are not applicable to the suit land as alleged or otherwise; it is averred that the lands were converted into non-agricultural land and that in accordance with the provisions of the lease, buildings had been constructed upon the land after conversion thereof into non-agricultural land and that in the circumstances the provisions of the Act became applicable and/or are in any event now applicable to the suit land. It is further denied that the lands were not demised to the defendant for the purpose of residence, education, business, trade or storage. It is also important to note the following averment in paragraph 15:

This Defendant says that the Judgement of the Court of Small Causes in the said Standard Rent Application is without Jurisdiction and a nullity and, in any event, is not a valid legal or binding upon this Defendant, in view of, inter-alia, the fact that the said lands have been properly converted into non-agricultural and the constructions have come up on the suit land for business, trade, storage and other purposes envisaged by the Rent Act.

33. The pleading is, in my opinion, sufficient for the defendants to contend the point of jurisdiction. The question now is whether the evidence on record establishes that the case of falls within the provisions of Section 6 of the said Act. I think it does.

34. I have already held that the suit lands have been used for non-agricultural purposes since inception. The facts that I have adverted to also establish that at the time of execution of the said lease deed the parties had agreed that the land was to be used for the purpose at least of business, trade and/or residence. This is established by various other facts apart from the facts already mentioned. There is, for instance, reference throughout the lease deed to the construction of buildings, factories, workshops, sheds or other structures on the demised premises. In Clause 3(b) there is also a reference to erecting and conducting factories for industries of all kinds, workshops, godowns, factories, bungalows, chawls or any other structures of any kind whatever as may be permitted by the authorities. The clause further states that industrial activities shall be carried out. Reading the deed as a whole I have little, if any, doubt in my mind that the industrial activities referred to therein were for the purpose of business and/or trade.

35. It is extremely important to note the following cross- examination of PW 2, where he admitted that he was aware that the lease was obtained for the purpose of constructing an industrial building:

The lease of the land was sought by defendants 1 to 3 from me for no specific purpose. It is true that at the time of executing the lease I was aware that the lease was obtained for the purpose of constructing an industrial building.

There is nothing to suggest that the industrial building was for any purpose other than trade or business. It is not even suggested by the plaintiff that it was contemplated between the parties that the industrial purpose was other than for the purpose of trade or business. Further, as I have already held, the property was in fact used for non-agricultural purposes. This part of the cross-examination establishes that the parties were aware at the time of execution of the lease deed itself that the property was taken on lease for non-agricultural purposes and for trade and/or business.

It is both reasonable and logical to infer that if a lease is taken for the purpose of constructing an industrial building, it was for the purpose of carrying on trade or business therefrom. I cannot think of any reasonable inference to the contrary. The reference therefore in the lease deed to the right of the lessees to construct bungalows clearly establishes that the property was taken on lease inter-alia for the purpose of residence. This is also established by the reference to the right of the lessees to construct chawls.

36. Thus even assuming that the lease deed by itself does not establish that the same was executed for the purpose of residence, education, business, trade or storage the lease deed read as a whole together with the facts and circumstances of the case and the evidence and other record establishes clearly that the suit lands were let for the purpose of residence and/or business and/or trade.

37. This view is also fortified by the approach adopted by a Division Bench of this Court in the case of *Vinayak Gopal v. Laxman Kashinath* (1956) 58 BLR 592. At page 594 it was held as follows:

In deciding the question as to what is the purpose of a lease, it would be necessary to consider the lease as a whole and find out the main or dominant purpose for which the lease has been executed. Normally the purpose of the lease can be determined from the terms of the document itself. If the instrument of tenancy specifically and clearly declares the purpose of the lease, there can be no difficulty in deciding whether the lease falls u/s 6(1) or not. If the instrument of lease is silent as to the purpose, then it would be permissible to allow evidence aliunde in regard to the said purpose and the purpose can be determined in the light of such evidence. In such cases, it would be permissible and legitimate for the court to look at evidence concerning the user of the premises by the tenant in order to determine the purpose of the lease. If the user of the premises by the tenant is otherwise not inconsistent with any of the terms of the lease, an inference about the purpose of the lease may reasonably be drawn from such user. It is, however, necessary that before such an inference is drawn it must be shown that the user was known to the lessor and had been acquiesced in by him. The enquiry u/s 6(1) would naturally centre on the question as to the purpose, and once the purpose of the lease is determined, the question as to whether Section 6(1) is attracted by the lease or not would be automatically resolved. This position appears that to be well settled by judicial

decisions, vide T. Dakshinamoorthy Vs. Thulja Bai and Another, and Wolfe v. Hogan (1949) 2 K.B. 194.

38. Mr. Thorat stated that the judgment had been approved by the Supreme Court in Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, . However the Supreme Court approved the judgment on another point but expressly observed that it was unnecessary to examine whether all the reasons given in the judgment were correct. In any event, the judgment of the Division Bench of this Court is binding on me.

39. Even assuming that the dominant purpose of the lease is not clear from the deed itself, it is clear from the user which admittedly was known to the plaintiffs and the plaintiffs had acquiesced in the same. This is established by the evidence of PW 1 (Plaintiff No. 2) who in his cross-examination admitted that the lease was obtained for the purpose of constructing an industrial building and his admission in his examination in chief itself that he never objected to the construction work undertaken by the defendants. There is no dispute that the construction work comprised of buildings which contained industrial galas. The evidence of DW 1 establishes that there were 174 units and approximately 150 members.

40. The date of the N.A. Order is also of significance. The lease deed was executed on 19.2.1965. The N.A. Order was passed on 12-2-1966. It is reasonable to resume that the application for the said order was made considerably prior to the date thereof. The fact that the application for the N.A. Order was made in all probability soon after the execution of the lease itself, though not by itself, when viewed with all the other facts of the case would justifiably raise a presumption that the parties were ad idem at the time of the execution of the lease, that it was for the purposes specified therein, viz. for constructing factories for industries of all kinds and workshops, godowns, factories, bungalows and chawls which in turn, as I have already held, were for the purposes of trade and/or business and/or residence.

41. Faced with this, Mr. Dhakephalkar submitted that the lessees, viz. original defendant numbers 1, 2 and 3 had not filed a written statement and had therefore admitted the averments in paragraph 12 of the plaint to the effect that the premises were not let out for the purposes mentioned in Section 6. He submitted that defendant No. 4 cannot be on a better footing. It is difficult to accept this submission. Defendant No. 4 had accepted the sublease pursuant to and in accordance with the provisions of the lease deed which permitted the same. Naturally, original defendant numbers 1,2 and 3 are now probably not interested in defending the suit having assigned their rights to defendant No. 4. It would be unfair in the extreme in these circumstances to visit defendant No. 4 with the effect of the other defendants having failed to file a written statement. In any event defendant No. 4 being a party to the suit and an assignee of the rights of the other Defendants in accordance with the said lease deed is entitled to defend the suit on all grounds having acquired such rights from the other

defendants pursuant to and in accordance with the lease executed in favour of the other defendants by the plaintiffs. There is nothing on record which even remotely suggests that the assignment was not in accordance with law or the said lease deed.

42. In view of the above findings, Mr. Dhakephalkar's reliance upon the judgment of a Division Bench of this Court in the case of Osman Fakir v. Ali Akbar 73 Bombay Law Reporter 72 is of no assistance to him. Clause 8 of the lease deed therein empowered the lessees therein "at all times and from time to time hereafter to construct and erect upon any part of the land hereby demised buildings of every description howsoever but subject to the rules and regulations of the Municipality and Government..." The Division Bench held that the clause was not for constructing buildings for the purposes mentioned in Section 6(1). It was held that though the lands demised were premises within the meaning of Section 5(8) they were not premises let for the purposes mentioned in Section 6(1).

43. The clauses in the case before me however are different from Clause 8 which fell for the consideration of the Division Bench. In the present case, several clauses in the lease deed expressly provided the purposes for which the same was executed. In any event, even assuming that there is some ambiguity or doubt regarding the correct construction of the lease deed, as I have already held, it must be so construed having regard to all the other facts and circumstances of the case. It is not necessary therefore for me to consider Mr. Thorat's submission that the judgment of the Division Bench is impliedly overruled by the judgment of the Supreme Court in Nalanikant Ramadas Gujjar Vs. Tulasibai (dead) by LRs. and others, .

44. For the same reason the judgment of a Learned single judge of this Court in Hector Hoshang Mehta and Others Vs. Marol Nand Dham Udyog Premises Co-op. Society Ltd., does not carry the plaintiff's case any further. The clause in that case was different from the clauses in the present case. Further the learned judge construed the clause to be only for the purpose of constructing buildings and held that the said purpose is not contemplated by Section 6(1). In the present case, the clauses are not merely for the purpose of constructing buildings.

45. Mr. Dhakephalkar submitted that if the document is not clear and conclusive as to the purpose for which the premises were let, it would necessarily mean that the purpose must be established only by evidence. In other words, he submitted that in such a case the issue as to jurisdiction in view of Section 5 and 6 of the Act would necessarily have been decided as a mixed question of law and fact and therefore the principle of res judicata by virtue of the the judgment of the Court of Small Causes would apply.

46. The argument though attractive at first blush is not well founded. Even assuming that the lease deed is not conclusive as to the purpose for which the

premises were let it does not necessarily follow that the learned judge of the Court of Small Causes decided the issue of jurisdiction as a question of fact or a mixed question of law and fact. The manner in which the issue was decided is itself is a question of fact. It cannot be a question of law. It is possible that though the document itself is not conclusive as to the purpose for which the premises were let the decision may have been rendered only as a question of law.

47. In the circumstances the three preliminary issues are answered in the negative. The plaint is accordingly returned to the Plaintiffs to be presented to the proper Court. The Plaintiffs find themselves in a most unfortunate situation. The question of jurisdiction was a complicated one. It can by no stretch of imagination be suggested that the suit was not filed in this Court bona-fide and with a genuine impression that this Court had jurisdiction. This is fortified by the judgment of the Small Causes Court. Indeed, in view of the judgment of the Small Causes Court, it was only natural that the Plaintiffs filed the suit in this Court. It was filed in this Court bona-fide beyond any doubt. They succeeded in their contention over thirty years ago. They have failed in establishing the same contention today. This case on merits cannot be decided yet. Thus, in the facts and circumstances of this case there shall be no order as to the costs.