
(1973) 09 GUJ CK 0007
In the Gujarat High Court

Thakorlal Chunilal Barrister

APPELLANT

Vs

Ishwarlal Uttamram and Others

RESPONDENT

Date of Decision : 06-09-1973

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3)(a),
12(3)(b), 12(3)(b)
Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 44

Citation : (1974) 15 GLR 766

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Judgement

D.A. Desai, J.—Petitioner Thakorlal Chunilal Barrister was the original defendant and opponents were the original plaintiffs. Plaintiffs filed Regular Civil Suit No. 1392 of 1967 in the Court of Third Joint cvti\\ Judge (Junior Division) at Surat against the defendant tenant for recovering possession of the suit premises on two grounds, namely, that the plaintiffs require the same reasonably and bona fide for their own use and occupation and secondly that the defendant tenant is in arrears for more than six months and is not shown to be ready and willing to pay the rent. It was contended on behalf of the plaintiffs that the standard rent in respect of the suit premises has been fixed between the parties in an earlier proceeding and therefore, there cannot be any dispute about the standard rent. The defendant contested the suit inter alia contending that there was a dispute about standard rent and that the suit must fail on account of nonjoinder of necessary parties. It was also contended that the plaintiffs did not require the suit premises reasonably and bonafide for their own use and occupation. A contention as to the validity of the notice was also taken up. The learned trial Judge held that the plaintiffs have failed to prove that they require the suit premises reasonably and bone fide for their own use and occupation. The learned trial Judge also held that the defendant is a tenant in arrears of rent for more than six months on the date of the suit as also on the date of the notice, and that it is not open to the defendant to reagitate the question of fixation of

standard rent and therefore, there was no dispute between the parties about the standard rent of the suit premises because it was already fixed by the Court's order in Regular Civil Appeal No. 171 of 1965 between the same parties. In accordance with these findings the learned trial Judge decreed the plaintiffs' suit with costs. Defendant preferred Regular Civil Appeal No. 154 of 1970 in the District Court at Surat. The learned District Judge confirmed the findings of the learned trial Judge and dismissed the appeal. The defendant being aggrieved by this judgment and decree of the learned District Judge preferred this Civil Revision Application.

2. When the Revision Application came up for admission, Mr. S.N. Shelat, learned Advocate who appeared for the petitioner-tenant contended that the defendant had taken a contention in his written statement that after the receipt of the notice, he had gone in company of witness Maganlal Motilal, to one of the landlords namely Venilal and offered to pay rent in arrears, but he was told that there was no hurry about the same and that he was thus ready and willing to pay rent, and though this contention was examined by the trial Court and negatived, the learned District Judge while disposing of the appeal, did not examine this contention and record any finding thereon. Mr. Justice J.M. Sheth before whom this Civil Revision Application came up for admission called upon Mr. Shelat to file an affidavit of the learned Advocate for the present petitioner who appeared before the learned District Judge stating therein that he had raised the contention and that the learned District Judge had not examined the same. Mr. Sbushilkant K. Kaji, learned Advocate who appeared for the petitioner before the learned District Judge filed his affidavit, where upon rule was granted.

3. When this petition came up for hearing before me, Mr. K.K. Chokhawala learned, Advocate appeared for the opponents and he filed an affidavit of Mr. J.Z. Halatwala, learned Advocate who appeared for the plaintiffs before the learned District Judge inter alia stating therein that Mr. Kazi had not raised the contention at the hearing of the appeal that the tenant was ready and willing to pay the rent. Mr. Halatwala also produced the notes of arguments which he had taken at the hearing of the appeal. Mr. Shelat then contended that the Court will have to decide whether Mr. Kazi is right in what he has stated in his affidavit or Mr. Halatwala is right in what he has stated in his affidavit. The problem was not very difficult. But a finding would certainly reflect upon the credibility of either of the two advocates who had filed absolutely contradictory affidavits, one of whom presumably may not be telling the truth. For the reasons stated in my order dated 30th November 1972 directed the learned District Judge to decide the contention on merits. The following issue was framed:

Whether the defendant tenant in the suit proves that he was ready and willing to pay real in the manner alleged by him in the written statement namely by attempting to personally tender the rent in the presence of witness Maganlal?

The record was sent down to the learned District Judge. The learned District Judge heard both the sides and recorded a detailed order and concluded as

under:

In the result I hold that the defendant has failed to prove that he was ready and willing to pay the rent in the matter alleged by him in the written statement, namely, by attempting to personally tender the rent in the presence of witness Maganlal and decide the issue accordingly.

4. When the petition was again set down for hearing, Mr. Shelat fairly stated that the question whether the defendant tenant was ready and willing to pay rent beirJg a pure question of fact and having been decided against him now by concurrent findings of fact, it would not be open to him to reagitate this question in this revision application.

5. Mr. Shelat however contended that the important question of law, which this Court must decide, is whether the suit filed by the landlords for possession on the ground of non-payment of rent would be governed by Section 12(3)(a) or Section 12(3)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Rent Act"). The contention assumed importance because if the contention is decided in favour of the landlord, decree for possession made in favour of the landlord will have to be confirmed. On the other hand, as both the Courts have held against the landlords on the question of requirement, if it is found that the tenant was ready and willing to pay real, and the suit would be governed by Section 12(3)(b) of the Rent Act, the defendant tenant having paid or deposited in Court rent in arrears, suit for possession will have to be dismissed and decree for possession will have to be set aside.

6. Mr. Shelat contended that both the Courts were in error in holding that the suit would be governed by Section 12(3)(a) and that on proper appraisal of the facts and findings, the only conclusion possible is that the suit would be governed by Section 12(3)(b) and the tenant is entitled to the protection of the Rent Act. Section 12(3)(a) and 12(3)(b) read as under:

12(3)(a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in Sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of the hearing of the suit or on or before such other date as the Court may fix the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.

In order to attract application of Section 12(3)(a) following four conditions must be satisfied: (1) that rent is payable by the month, (11) that there is no dispute

regarding the amount of standard rent, or permitted increases, (iii) such rent or increases are in arrears for a period of six months or more; and (iv) the tenant neglects to make payment thereof until the expiration of the period of one month after receipt of the notice referred to in Sub-section (2). There is no dispute that the rent is payable by the month. There remains no dispute between the parties that the tenant was in arrears of rent for a period of six months and more on the date of the receipt of the notice by him as also on the date of the suit. It is also satisfactorily established that the tenant failed to pay or tender rent in arrears within a period of one month from the date of receipt of the notice served by the landlord. Therefore, out of four conditions required to be proved by the landlord for attracting Section 12(3)(a), three conditions are satisfied. Controversy is about the fourth condition, satisfaction of which is in dispute. That condition is whether there was a dispute regarding the amount of standard rent or permitted increases between the parties.

7. In order to decide whether there was such a dispute or not, few facts which are not in dispute must be stated. Respondents-landlords had filed suit No. 1230 of 1963 against the present petitioner-tenant for recovering possession of the suit premises on various grounds. This tenant had raised a contention about standard rent of the suit premises. This contention finally came to be disposed of in Civil Appeal No. 171 of 1965 wherein standard rent of the suit premises was fixed at Rs. 71/- p. m. When the tenant received notice Ex. 45 dated 2nd October, 1967, he sent reply Ex. 48 dated 26th October 1967 stating therein that there is a dispute about standard rent of the suit premises between the parties. The suit was instituted on 18th November 1967. The tenant in his written statement stated that there is a dispute about the standard rent. The question is whether these allegations are sufficient to take the case out of the purview of Section 12(3)(a).

8. Mr. Shelat contended, and I must confess, his contention is not such which can be lightly brushed aside, that once there is a dispute regarding amount of standard rent or permitted increases, the suit would be taken out of the purview of Section 12(3)(a) and Mr. Shelat contended that word "dispute" is not qualified by any adjective and it would be improper for the Court to read into the section something which is not there such as a bona fide dispute or a dispute of which Court can take cognizance and adjudicate upon it. Mr. Shelat urged, again I must say with considerable force, that the dispute comes into existence once there is an assertion and a denial. And if in the case, the landlord asserted that standard rent of the suit premises was fixed in a proceeding inter-partes in Civil Appeal No. 171 of 1965 and tenant denied that assertion and contended that there is a dispute about the standard rent, there comes into existence a dispute about the standard rent and the moment such a dispute comes into existence, the suit in which such a dispute is raised would be taken out of the purview of Section 12(3)(a). Simultaneously Mr. Shelat contended that the issue about the standard rent can never become res judicata, because by now it is well settled that the standard rent is fixed in relation to the premises and any change in premise or

variation in taxation, or other circumstances which go into computation of standard rent of the particular premises would enable either the landlord or the tenant to get fixed the standard rent and previous fixation cannot bar the Court's jurisdiction either u/s 11 of the CPC or according to the general principles of res judicata. In this connection Mr. Shelat relied upon Section 11(1) (c) of the Rent Act and urged that where there is any dispute between the landlord and the tenant regarding the amount of standard rent, a duty is cast on the Court to fix standard rent at such amount as having regard to the provisions of the Act and circumstances of the case, the Court deems just. In other words, it was contended that once a tenant raises a contention about the standard rent in a proceeding before the Court, the Court cannot shirk its responsibility of fixing the same by saying that the issue as to standard rent is res judicata.

9. Mr. Chokhawala, on the other hand, contended that a dispute envisaged by Section 12(3)(a) would be one of which the Court can take cognizance and adjudicate upon it. Contended Mr. Chokhawala that if the Court is precluded from entertaining and adjudicating a dispute in view of the provisions contained in Section 11 of the Code of Civil Procedure, such is not a dispute contemplated by Section 12(3)(a) and therefore if in a given proceeding, issue as to standard rent is held to be res judicata, the suit would not be taken out of the purview of Section 12(3)(a), merely because at some point of time a contention was raised about the standard rent of the premises. Mr. Chokhawala urged that if the Court were to accept the construction canvassed for by Mr. Shelat, Section 12(3)(a) would be denuded of all the meaning and there would be no conceivable case which would fall u/s 12(3)(a). I must also confess that that is also a weighty submission.

10. At the outset, it must be conceded that word "dispute" as used in Section 12(3)(a) is neither defined nor qualified by any adjective. It would be impermissible for the Court to narrow down the meaning of word "dispute" by reading into the section something which is not there. Sometimes it is said that a dispute in order to be one as envisaged by Section 12(3)(a) must be a bona fide dispute. There is no justification for narrowing down the wide connotation of the word "dispute" as used in Section 12(3)(a). However, in order to find out exact connotation of the word "dispute" in Sub-section (3)(a) one must ascertain the intention of the legislature in using that expression in Sub-section (3)(a). Prior to the amendment of Section 12(3) by recasting it into two Sub-sections (3)(a) and (3)(b), Sub-section 3 of Section 12 read as under:

(3) No decree for eviction shall be passed in any such suit if, at the hearing of the suit, the tenant pays or tenders in the Court the standard rent or permitted increases then due together with the costs of the suit.

Subsequently, it was felt that sometimes recalcitrant tenants deliberately did not pay rent in arrears even after receipt of the notice under Sub-section (2) of Section 12 and landlords were forced to file suits, when the tenants pay the amount of arrears of rent and the landlords were non-suited. In order to curb

this tendency on the part of the defaulting tenant, Sub-section (3) of Section 12 was deleted and Sections 12(3)(a) and 12(3)(b) were introduced by Amending Act 16 of 1953. The purpose behind Section 12(3)(a) appears to be that if there is no dispute about standard rent or permitted increases between the landlord and tenant in respect of the leased premises, the tenant should go on regularly paying the rent. A further locus poenitentiae is granted to him even if he is in arrears for a period of six months or more by insisting upon the landlord serving a notice envisaged by Section 12(2), and if the tenant pays the amount of standard rent and permitted increases within a period of 30 days after receipt of the notice the landlord would not be entitled to recover possession from the tenant on the ground of default in payment of rent. However, the legislature was conscious of the fact that after the landlord serves notice alleging therein that the tenant is in arrear for a period of six months and more, and that he is called upon to pay the rent in arrears, the tenant has either to submit to the exorbitant demand of the landlord in order to escape the rigour of Section 12(3)(a) even though he has a dispute about the standard rent of the premises occupied by him or face eviction. By the scheme of the Rent Act the landlord is precluded from recovering anything more than the standard rent from the tenant, yet he would have to pay up the amount in order to escape the rigour of Section 12(3)(a). Therefore, in order to avoid the rigour of Section 12(3)(a) and yet to keep check on tenants who for no reason or justification commit default in payment of rent, the legislature provided that if there is no dispute about the standard rent, the tenant must pay the rent regularly, and at any rate, within a period of one month from the date of the receipt of the notice u/s 12(2) and if he fails to take the advantage of the locus poenitentiae granted in his favour by the statute, he should not be entitled to the protection of Rent Act. In order to put a curb on a tenant wilfully committing default in payment of rent without any excuse original Section 3 was substituted by Sub-sections (3)(a) and (3)(b). Now, if Sub-section (3)(a) was so worded that whenever a tenant committed default in payment of rent for six months and failed to pay rent on demand by notice u/s 12(2), he was to be deprived of the protection of the Rent Act, obviously the tenant would have difficulty in getting adjudicated standard rent of the suit premises. Either on receipt of notice, the tenant will have to file an application for determination of the standard rent of the suit premises, or in a suit for eviction filed against him, he can raise a contention about the standard rent and court will have to adjudicate upon the dispute raised by the tenant by framing a preliminary issue and deciding it and then giving opportunity to the tenant to pay rent according to the standard rent fixed by the Court. If such be the purpose of the legislature in introducing expression "dispute" in Section 12(3)(a) and making its absence a condition for attraction of Section 12(3)(a), obviously, it must be such a dispute which the Court must be in a position to resolve. A dispute for sake of a dispute of which the legislature took notice would be attributing to legislature something which it never intended to take into account. The legislature would not encourage a dispute which is one in respect of which there would be no forum for adjudication. Attempt of law is to provide a forum for resolution of dispute. To

illustrate, if there is an industrial dispute, either the Industrial Court or the Industrial Tribunal will resolve it. If there is a dispute about the standard rent, a special Court set up under the Rent Act would have jurisdiction to resolve it. That jurisdiction is conferred by Section 11 specifically. If, therefore, one has to give some meaning to the word "dispute" in Section 12(3)(a), it must be such a dispute of which Court can take cognizance, and in respect of which there must be a forum for resolving the dispute. By raising dispute, certain rigour of the law is mitigated. But the legislature would not allow the dispute to hang in air without providing a forum for resolving it. Therefore, the dispute contemplated by Section 12(3)(a) must hang on some peg and that peg can only be the Court which when some one comes before it with a dispute undertakes to adjudicate upon it and resolve it. Such must be a dispute contemplated by Section 12(3)(a).

11. Mr. Shelat however contended that raising of dispute has nothing to do with the bona fides of the dispute or ultimate success of the dispute. That is wholly true. A man who raises a dispute may fail to carry court with him. He may fail to lead evidence so as to get determination of the Dispute in his favour. Raising of a dispute is wholly unconnected with the determination of the dispute one way or the other. Dispute may ultimately turn out to be vexatious, time consuming or just imaginary. Existence of a dispute has nothing to do with the merit of the dispute. But this argument cannot be taken further and it cannot be said that the dispute would none-the-less be a dispute, notwithstanding the fact that the Court would be precluded from entertaining it. If the construction canvassed for by Mr. Shelat was to be accepted, though there is good amount of force in it, it would render Section 12(3)(a) wholly nugatory and denude it of any meaning. To illustrate again, whenever notice u/s 12(2) is received by the tenant in respect of the premises occupied by him, and in respect of which standard rent is already fixed in a proceeding interpartes on an earlier occasion and there is no change in circumstances, not even imaginary nor even one which can be contended, yet, if he merely states that there is a dispute about standard rent, the case would be taken out of the purview of Section 12(3)(a). If such be the position, all attempts made by me to find out which conceivable case would fall u/s 12(3)(a) and I waited for the answer in vain. No such conceivable case even of a hypothetical nature could be conjured up which can ever fall u/s 12(3)(a). And it is a known canon of construction that the legislature does not undertake an exercise in futility. Every section or every provision of law has some purpose or is made for some eventuality or is to meet for some situation. Therefore, in order to give some meaning at least to Section 12(3)(a), one must find out that class of dispute, which at least, though raised as a dispute, will not have the effect of taking the suit in which it is raised out of the purview of Section 12(3)(a). And the dispute I can think of is one, examination of which is kept out of the purview of the Court under the provision contained in Section 11 of the Code of Civil Procedure. Section 11 of the Code is so well known that I would not even quote it. Sec. 11 puts fetter on the power of the Court to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially

in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which same issue has been subsequently raised and has been heard and finally decided by such Court. Section 11 opens with the prohibition on the power of the Court to try a suit or issue as therein contemplated. Therefore, if there is a suit or issue which satisfies the conditions set out in Section 11, it is not a party which is precluded from agitating that question, but it is the Court which is precluded from trying that suit or issue. Therefore, assuming that the word "dispute" in Section 12(3)(a) is to be interpreted in its widest amplitude as contended by Mr. Shelat that it would take within its sweep a dispute in respect of which the Court may finally say that it is barred by *res judicata*, it would mean that dispute hangs in air because it is raised, but there is no forum for its resolution. The tenant would go on raising the dispute, and the Court would go on declining to itself the jurisdiction to resolve it. One cannot envisage any such dispute. Such at least could not be the intention of the legislature in enacting Section 12(3)(a).

12. Now, I must confess that the issue as to standard rent is not always *res judicata*, merely because standard rent was fixed in a proceeding *inter partes* on an earlier occasion. Standard rent is fixed in relation to the premises and not in relation to the person (vide *Popatlal Ratansey v. Kalidas Bhavan* 59 Bom. L.R. 860). In that case, on an earlier occasion, the landlord and tenant by a consent decree invited the Court to fix the standard rent of the premises. In a subsequent suit between the same parties, it was contended that the issue about the standard rent would not be *res judicata* because standard rent on an earlier occasion was fixed by consent decree and the Act does not envisage that the parties to a dispute as to the standard rent should arrogate to themselves the function of the Court or the Controller and should assume the duty which the Act has cast upon the Court of deciding what just or fair rent should be for the particular premises. Major portion of this judgment is not of much assistance for this reason that by a recent decision of the Supreme Court in *Baldevdas Shirlal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others*, the Supreme Court has held that the consent decree does not operate as *res judicata*. It is however definitely held in *Popatlal's* case that standard rent is always fixed in relation to the premises. If the standard rent is fixed in relation to the premises, it would always be open to the tenant to contend that the premises meaning thereby the area, availability of facility, change in taxation etc. would necessitate re-determination of the standard rent of the premises. Merely because the standard rent was fixed on an earlier occasion in the subsequent suit, the issue by itself would not become *res judicata*, if change of circumstances is pleaded, such as, alteration in premises in respect of which standard rent was fixed. But if no change of circumstances is pleaded and if there is not the slightest suggestion that either there is variation or alteration meaning thereby addition or diminution of the area occupied by the tenant or increase or decrease in tax payable by the tenant or some other circumstances which would have the impact on the

determination of the standard rent of the premises, obviously the issue would be res judicata. If the issue is res judicata Section 11 of the CPC must operate in its full rigour and the Court would be precluded from recording finding on the issue meaning thereby from adjudicating upon the dispute raised by the tenant.

13. The question then is: whether a dispute, which the Court is precluded from examining, is also a dispute contemplated by Section 12(3)(a)? Undoubtedly, the word "dispute" in its widest amplitude may take within its sweep any dispute, including such dispute which Court may be precluded from examining, as the issue bearing on the dispute may be res judicata. But the expression "dispute" will have to be given some meaning in order to give meaning to Section 12(3)(a). In order to give such a meaning, dispute would have to be so interpreted as the one which the Court has jurisdiction, power or competence to examine and pass upon it. The fact that the dispute may finally be rejected as unworthy of belief is irrelevant in deciding whether the dispute did or did not exist. The merit of the dispute has nothing to do with the existence of the dispute. Even a frivolous, vexatious and time consuming dispute will none-the-less be a dispute for the purpose of Section 12(3)(a). After all is said and done, a dispute which the Court is precluded from examining by virtue of Section 11 of the CPC is certainly not a dispute within the meaning of Section 12(3)(a) so that on raising of such a dispute, suit in which such a dispute is raised, would be taken out of the purview of Section 12(3)(a). There is some support for the view I am taking in a very passing observation in *Jaswantrai Malukchand v. Anandilal Bapalal* 6 GLR 325. A few facts of that case may be noticed. The tenant did not tender or pay rent in arrears on receipt of the notice u/s 12(2) and he was in arrears from 1st February 1955. On receipt of the notice, the tenant made an application for fixation of standard rent. The Court acting u/s 11(3) fixed Rs. 80 p.m. as provisional standard rent, and the tenant paid Rs. 1600/- by instalments for the period for which he was then in arrears. On November 9, 1956, the Court passed a final order in Standard Rent Fixation Application fixing Rs. 125 p.m. as standard rent. Both the landlord and the tenant challenged this order of the Court by filing revision application and both these applications came to be dismissed by the District Court on 25th March 1958. By the time when these applications were pending in the District Court on 4th March 1957 landlord filed suit for recovering possession and rent in arrears after serving notice demanding rent in arrears at the new rate at which it was fixed by the Court. The tenant did not pay. In the suit the landlord contended that the tenant was in arrears for a period of six months and more and had not paid rent in arrears within one month from the notice. It was also contended that the suit would be governed by sec, 12(3)(a) because there was no dispute about the standard rent between the parties. The trial Court dismissed the suit. The landlord appealed to the District-Court Ahmedabad, claiming that after the standard rent was fixed finally on November 9, 1956, the case fell to be governed by Section 12(3)(a) of the Rent Act and as the tenant was in arrears for a period of six months, he ought to have been evicted. The appeal was dismissed observing that the tenant was protected

by Section 12(3)(b). The landlord preferred revision application to the High Court and the High Court reversed the decision both of the trial Court as well as the appellate Court, observing that the suit would be governed by Section 12(3)(a) and decreed the plaintiffs suit for possession with costs. The tenant carried the matter to the Supreme Court by obtaining special leave under Article 136 of the Constitution. It was contended before the Supreme Court that once trial Court in an application u/s 11(3) determined the standard rent at Rs. 125 p.m. there was no dispute between the parties about the standard rent and the suit would be governed by Section 12(3)(a) of the Rent Act. On behalf of the tenant it was contended that as the dispute of standard rent was not finally resolved when the suit was filed, the suit would be governed by Section 12(3)(b). Accepting this contention, the judgment of the High Court was reversed and it was observed that as both the landlord and tenant had appealed against the order fixing the standard rent, the dispute about standard rent was not resolved and it was pending and suit would be governed by Section 12(3)(b). In fact, the matter should have ended here. But Mr. Chokhawala relied on one observation in this judgment in support of his submission that even the Supreme Court would have held against the tenant, if by the time the suit was filed, the dispute about the standard rent was finally resolved. The observation relied upon reads as under:

The contention of Mr. Ganpatrai that the dispute regarding the standard rent came to an end on November 9, 1956 when the court fixed Rs. 125 p.m. as the standard rent would be correct if the parties accepted the determination. But neither side did. Each side questioned the amount by filing a revision in the District Court. Since the dispute continued, the case was not governed by Clause (a) but by Clause (b) and the High Court was in error in applying the former clause and reversing the decisions based on the latter.

Relying on this, Mr. Chokhawala contended that even according to the Supreme Court, if the dispute about standard rent had been finally resolved by the time, the suit was filed then the Supreme Court was willing to accept the position that the suit would be governed by Section 12(3)(a). General reading of paragraph 6 of the judgment may bear out this submission, but the matter has not been gone into from that angle and one cannot draw sustenance from this judgment. But apart from this judgment on a construction of Sections 12(3)(a) and 12(3)(b) and the legislative background in which the amendment came to be made by deleting original Sub-section (3) and replacing it by Sub-sections (3)(a) and (3)(b), it becomes clear that the dispute contemplated by Section 12(3)(a) about the standard rent and permitted increases must be one which if it is taken to the Court, the Court would be able to take cognizance of it and resolve it. If the dispute is taken to the Court and the Court is unable to take cognizance of it and resolve it, such dispute would not be a dispute within the contemplation of Section 12(3)(a) and existence of such a dispute would not take the case out of Section 12(3)(a) if it is otherwise attracted.

14. I would now refer to some of the cases relied upon in support of the

submissions herein. Reference was made to *Gaurishankar Chhitarmal Gupta Vs. Srimati Gangabai Tokersey*, . The purpose underlying Sub-section (2) of Section 12 was examined by the Supreme Court. The contention was that a notice in order to be valid under Sub-section (2) of Section 12 must give a break up of the sum which was claimed as due from month to month. Negativizing this contention, it was observed that where the tenant is in doubt or requires clarification in respect of the sum which is claimed per month in the notice as due, he should have called for information on those points from the landlord especially when he was sending replies through a lawyer to the notice issued by the landlord. The mere statement by the tenant in his reply to the notice that the claim was excessive was not enough. It was clear from the conduct that he was fully aware that the amount represented the standard rent with permitted increases under the Act. In this background the Court held that there was DO dispute about the standard rent between the landlord and tenant so as to attract Section 12(3)(b) and the case would not be taken out of the purview of Section 12(3)(a). Now, Mr. Chokhawala contended that the statement in the facts of the case before the Supreme Court that the claim is excessive should be treated on par with the statement made by the present petitioner in reply to the notice that there is a dispute about standard rent and then he wanted me to record a finding that such a statement would not be sufficient to take the case out of the purview of Section 12(3)(a). One cannot pass upon a construction of factual statement in a notice by borrowing language of decided cases. However, it must also be conceded that in order to raise a dispute about the standard rent, the tenant should go a step further and should not rest content with merely saying that there is a dispute about the standard rent. Of course what precise statement he must make in order to avoid application of Section 12(3)(a) cannot be put down in any straight jacket formula. It will depend upon the facts and circumstances of each case, and notice and reply to it will have to be literally construed to find out whether a dispute about the standard rent has in fact been raised or not. In *Casamally Jairajbhai v. Sir Currimbhoy Ebrahim* ILR 1911 Bom 214, Justice Beaman drew specific distinction between estoppel and res judicata, by first saying that both of them are entirely distinct. Put in the most simple and colloquial way, res judicata, precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying something at one time and the opposite at another. This is a very terse observation clearly bringing out distinction between estoppel, and res Judicata and in its application it would mean that where an issue in the suit was res judicata not only the Court would be precluded from examining the same, but in the words of Justice Beaman, the party would be precluded from averring it twice over. If the effect of issue being res judicata is stretched that far, it would mean that the party would be precluded from averring it and the Court would be precluded from examining it. Of course this does not mean that party would be precluded from setting it out in the written statement because unless it is so set out the Court would not examine it whether it is res judicata or not. The ratio of the judgment is that if the issue is found to be res judicata, it would mean that averment about it stands obliterated from the

record. If that be the correct approach it would mean that the dispute about standard rent was never put forth. Therefore, the conclusion would be that there was no dispute about the standard rent and last of the conditions required to be satisfied for attracting Section 12(3)(a) would be satisfied. Mr. Chokhawala also referred to *Sitaram v. Amir Begam* ILR 1886 All 324 , and *Smt. Radharani Dassi Vs. Smt. Binodamoyee Dassi and Others*, . But the ratio extracted from them is on par with the ratio of the judgment of *Casamally's case* (supra) and therefore, it is not necessary to refer to them in details. Reference was also made to AIR 1937 1 (Privy Council) , where the effect of the provisions contained in Section 11 of the CPC read with Section 44 of the Evidence Act were examined and it was observed that the provisions contained in Section 11 of the Code are mandatory, and the ordinary litigant who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Section 44 of the Evidence Act. No attempt was made to avoid the application of Section 11 by pleading anything which would attract Section 44 of the Evidence Act and therefore, the mandate of Section 11 would apply. Conclusion would be that the dispute about standard rent was beyond the cognizance of the Court.

15. To conclude, both the Courts have found that issue about the standard rent was *res judicata*. Therefore, this is a case in which there was no dispute about standard rent. If the fourth and last condition for attracting Section 12(3)(a) was satisfied, the tenant would not be entitled to the protection of the Rent Act and decree for eviction passed against him would have to be confirmed.

15.1. Mr. Shelat then contended that the plaintiffs-landlords are not in immediate need of the premises because they have failed to carry conviction with both the Courts about their present requirement of the suit premises and they are only succeeding on slight negligence on the part of the tenant by not tendering amount then in arrears within a period of one month from the date of the receipt of the notice. That is true. This is a case of hardship for the tenant. After all if the landlords had succeeded in convincing the trial Court and the first appellate Court that they had present need of the premises and the requirement was bona fide and reasonable, the tenant could have been called upon to vacate soon after the decree-is passed against him or within such a short time allowing him to make alternative arrangement. That is not the position here. The landlords succeed on account of negligence or inadvertence of the tenant and then putting forth a controversy which is found to be unsustainable. Undoubtedly, Mr. Chokhawala tried to impress upon me that the conduct of the tenant is dishonest. Mr. Chokhawala pointed out that the tenant had raised four controversies none of which has been entertained by the Court, namely, (i) dispute about the standard rent, (ii) non-joinder of certain parties, (iii) legality of the notice on the same ground on which contention was negatived in the former suit; and (iv) the will of late Jamnadas who died pending the suit. Mr. Chokhawala urged that the fact that the tenant raised the aforementioned four disputes would show that he was not trying to protect his right but merely putting forth controversies in order to drag on the proceeding to take unfair

advantage which may flow out of it. It is not possible to condemn the tenant for putting forth certain dispute and a man who is under a threat of eviction must try his level best to defend his possession to the best of his ability by putting forth any and every conceivable dispute under the sun, if the Court is willing to examine it. And after all is said and done, the tenant must have put forth these controversies under some legal advice. How can a tenant be condemned for the acts done under legal advice and in these proceedings, the Court would not undertake to examine the conduct of the advocate who gave the advice. Further, the landlords are also not entirely free from blemish. In the former suit, they sought possession on the ground of personal requirement and failed upto the appellate Court. Present suit was also primarily based on personal requirement and as a second string to the bow, question of non-payment of rent was also put forth. On the main controversy, the landlords have failed both in the trial Court as well as in the appellate Court. It may be that the issue as to requirement may not become *res judicata* because change in circumstances could have been pleaded. The hard fact however remains that the landlords were also putting forth controversies though unsustainable on two different occasions and in the ultimate analysis the landlords succeed on the only ground that the tenant was not shown to be ready and willing to pay the rent-a ground on which ordinarily Court should be very reluctant to pass a decree for eviction-unless the Court's hands are tied. Therefore, while confirming the decree of possession, some time must be given to the tenant to make alternative arrangement and time must be long enough to permit him to acquire business premises-scarcity and nonavailability of which is quite well known. I think, therefore, the tenant should be given three years" time to vacate the premises.

16. This revision application is accordingly dismissed and decree of eviction is confirmed and the petitioner-tenant is given time up to 31st August 1976 to vacate the premises on a condition that he must regularly pay the amount of standard rent fixed already as mense profits from month to month and if he commits default in payment of the same for four months the landlords would be entitled to execute the decree forthwith. Petitioner to pay the costs of the respondent of this petition and to bear his own. Rule discharged on the terms herein indicated. Order accordingly.