

(2001) 03 BOM CK 0126

In the Bombay High Court

Case No : Misc. Civil Application No. 224 of 1999 arising out of Second Appeal
No. 157 of 1984

Vasudeo Tulsiram Jambhale

APPELLANT

Vs

Raghuvir Singh Thakur and Another

RESPONDENT

Date of Decision : 09-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (2001) 3 ALLMR 61 : (2002) 3 MhLj 596

Hon'ble Judges : S.D. Gundewar, J

Bench : Single Bench

Advocate : J.T. Gilda, for the Appellant; Z.A. Haq, for the Respondent

Judgement

S.D. Gundewar, J.—The present review application is filed by the respondent/tenant seeking review of the judgment passed by me on 27-8-1998 in Second Appeal No. 157/84 arising out of Regular Civil Suit No. 126/81.

2. A few facts necessary for the disposal of this Review Application may briefly be stated as under --

An open site admeasuring 171/2 ft. x 8 ft. in addition to some other open portion from plot Nos. 28 and 30, sheet No. 20, situated at Akot, District Akola was let out by the original plaintiff/landlord to the original defendant/tenant on monthly rent of Rs. 5/-. The tenancy month of the defendant commences from the first day of every English calendar month and ends on the last day of the same month. The rent was payable at the end of every month. The defendant raised a structure on the said open site at his own cost. The defendant failed to pay rent regularly and remained in arrears of rent for 36 months amounting to Rs. 180/- in addition to the amount of Rs. 20/- towards municipal taxes and hence, the plaintiff had issued a notice on 19-3-1981 terminating his tenancy. The defendant received the said notice but in spite of that he did not deliver the possession and hence, the plaintiff was constrained to file a suit against him for the recovery of possession of the suit property.

3. The defendant resisted the plaintiffs suit vide his written statement (Exh. 13) and inter-alia contended that he paid the rent regularly and was not in arrears of rent as alleged. It is also contended by him that he was not liable to pay municipal taxes. According to him, construction on suit site was raised prior to 1950 and, therefore the provisions of C. P. and Berar Letting of Premises and Rent Control Order, 1949 (hereinafter referred to as "the Rent Control Order") are applicable to the suit property and as the plaintiff had not obtained previous written permission of the Rent Controller for determining the tenancy of the defendant, his suit must fail.

4. On the basis of the aforesaid pleadings of the parties, the trial Court framed the necessary issues and after recording, the evidence and hearing the learned Counsel for the parties, decreed the plaintiffs suit for possession as well as for recovery of arrears of rent, municipal taxes and notice charge and also directed an enquiry regarding future mesne profits vide its judgment and decree dated 30-9-1982.

5. Being dissatisfied with the aforesaid judgment and decree passed by the learned Civil Judge, Junior Division, Akot in Regular Civil Suit No. 126/81, the defendant/tenant filed Regular Civil Appeal No. 483/82 which was heard by the learned Joint Judge, Akola who allowed the same by setting aside the judgment and decree passed by the learned trial Judge vide his judgment and decree dated 20-1-1984.

6. Taking exception to the aforesaid judgment and decree dated 20-1-1984 passed by the learned Joint Judge, Akola in Regular Civil Appeal No. 483/82, the plaintiff/landlord preferred Second Appeal before this Court which was registered as Second Appeal No. 157/84. The said Second Appeal came up for hearing before me and since during the course of arguments it was submitted before me that the provisions of the Rent Control Order are not applicable to the suit premises, i.e. an open site, the said Second Appeal came to be allowed by me by setting aside the judgment and decree passed by the learned Joint Judge, Akola and affirming the judgment and decree passed by the learned Civil Judge, Junior Division, Akola.

7. The present Review Application is filed by the original defendant/tenant seeking review of the aforesaid judgment and decree passed by me in Second Appeal No. 157/84 on the ground that this Court erred in allowing the Second Appeal No. 157/84 filed by the plaintiff/landlord in view of the two amendments, in the Rent Control Order, namely, first amendment, i.e. insertion of Sub-clause (4-A) which was brought into force on 27-6-1989 and the second amendment, introducing Clause 13-A on 27-10-1989 which were inadvertently not brought to the notice of this Court by the learned Counsel for the respondent/tenant. It is also contended by the review applicant that in view of the aforesaid amendments in the Rent Control Order, no decree for eviction shall be passed in a suit or proceeding filed and pending against a tenant in any Court or before any authority even if the suit premises is an open site unless the landlord produces a

written permission of the Controller as required by Sub-clause (1) of Clause 13 and since admittedly in the case at hand, the appellant/landlord has not produced any such permission from the Rent Controller, the aforesaid appeal filed by him will have to be dismissed and the judgment and decree passed by the first Appellate Court needs to be upheld.

8. Admittedly, by the First Amendment in the Rent Control Order, 1949, brought into force on 27-6-1989, in Clause 2 of the Principal Order, Sub-clause (3) came to be substituted by Sub-clause (4-A), which reads as under : "Premises means --

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

(b) any building or part of a building (other than a farm building) let or given on licence and includes -

(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; and

(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."

By this amendment, the word "house" wherever it appeared in the Rent Control Order, 1949 was replaced by the word "premises" and the word "premises" came to be defined by the amended Sub-clause (4-A) in Clause 2 of the Rent Control Order 1949. The second amendment in the Rent Control Order, 1949 was published in the extraordinary Gazette on 27-10-1989 and Clause 13-A as incorporated by the said amendment in the Rent Control Order, 1949, which is relevant for our present consideration, reads thus :

"13-A. No decree for eviction shall be passed in a suit or proceeding filed and pending against the tenant in any Court or before any Authority unless the landlord produces a written permission of the Controller as required by Sub-clause (1) of Clause 13."

9. Now, it is contended by Shri J. T. Gilda, the learned Counsel for the review-applicant, that the Division Bench of this Court struck down aforesaid amendments by its judgment in Mohammad Azizul Haq v. State of Maharashtra and Anr. reported in 7995 Mh.LJ. 382 which was challenged before the Apex Court and the Apex Court vide its judgment in Dilip Murlidhar Lohiya v. Mohd. Azizul Haq and Anr. reported in 1994 Mh.L.J. 1334 set aside the aforesaid judgment rendered by the Division Bench of this Court and by allowing the appeal remanded the matter to this Court with a request to decide the important question, namely, the applicability of Sub-clause (4-A) of Clause 2 and Clause 13-A to the facts of the said case in the first instance before deciding the vires of the aforesaid amendments. According to Shri Gilda, thereafter the Division Bench of

this Court while considering the aforesaid amendments held that the said amendments are not retrospective but prospective. The Apex Court, however disagreeing with the aforesaid view taken by the Division Bench of this Court held in *Dilip v. Mohd. Azizul Haq* and Anr. reported in 2000(2) Mh.LJ. 741 that the aforesaid amendments have retroactive effect and, therefore, in view of the said decision of the Apex Court as both the aforesaid amendments in Rent Control Order came in force in the year 1989, i.e. during the pendency of the second appeal No. 157/84, the said amendments are applicable to the said appeal and since the plaintiff/landlord has not obtained previous permission of the Rent Controller for determining the tenancy of the defendant/tenant, the second appeal No. 157/84 needs to be allowed by affirming the judgment of the first Appellate Court."

10. Considering the aforesaid decisions cited on behalf of the review-applicant and having regard to the observations made by the Apex Court in *Dilip v. Mohd. Azizul Haq* and another reported in 2000(2) Mh.LJ. 741 in paragraphs Nos. 7 and 8 as below :--

"7. In theory the appeal is only a continuation of the hearing of the suit. Accordingly, the word "suit" in the Order has to be understood to include an appeal. The result is that at the time of the institution of the suit for eviction Clause 13-A was not in force, but at the time of appeal such a clause is introduced, the tenant in appeal becomes entitled to its protection. We draw support for these propositions from the three decisions of this Court cited by the learned Counsel for the appellants. Therefore, we are of the view that the High Court was not justified in holding that there was no appeal filed or pending against the tenant. In this case, although a decree for eviction had been passed in the suit, that decree was under challenge in a proceeding arising out of that suit in appeal and was pending in a Court. Thus an appeal being a rehearing of the suit, as stated earlier, the inference drawn by the High Court that no proceedings were filed or pending against the tenant as on the date would not be correct.

8. The High Court further concluded that the amendments have no retrospective effect. The provision came into force when the appeal was pending. Therefore, though the provision is prospective in force, has "retroactive effect". This provision merely provides for a limitation to be imposed for the future which in no way affects anything done by a party in the past and statutes providing for new remedies for enforcement of an existing right will apply to future as well as past causes of action. The reason being that the said statutes do not affect existing rights and in the present case, the insistence is upon obtaining of permission of the Controller to enforce a decree for eviction and it is, therefore, not retrospective in effect at all, since it has only retroactive force",

I find much force in the aforesaid submission made by Shri Gilda, the learned Counsel for the review-applicant.

11. As against this, Shri Z. A. Haq, the learned Counsel for the non-Applicants/landlord, submitted that the law relating to scope and amplitude of power of review u/s 114 read with Order 47 Rule 1 of CPC is limited and as per the said provisions an error which may be corrected in review must be an error apparent on the face of the record. According to him, an erroneous view or erroneous judgment is not a ground for review. For this he placed reliance on a decision in *Rajkumar Ramavtar Chourasia v. Mathew Charian Christian* reported in 1984 Mh.LJ. 898 .

12. It is no doubt true that the Division Bench of this Court in the aforesaid decision held that decision erroneous in law is no ground for review. However, it is well-settled that the judgment or order, which ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in review. I am fortified in this view by the decision of the Division Bench of this Court in *Nathu Yeshwantrao Bhusari (since deceased by L.Rs. and Ors.) v. Sonabai wd/o Jagannath Ganar and others* reported in 1994 Mh.L.J. 1829 . In the case at hand, admittedly, the aforesaid two amendments were not brought to the notice of this Court when the second appeal No. 157/84 was heard and decided and as the Apex Court in its judgment (cited supra) held that the said amendments have retroactive effect, I find that it is a good ground for correcting an error in this review application. In view of this, I find no substance in the aforesaid contention raised by the learned Counsel for the respondents.

13. It is further contended by Shri Haq, the learned Counsel for the non-applicants/landlord, that while advancing the arguments in the aforesaid second appeal, it was admitted by the learned Counsel for both the parties that the provisions of the Rent Control Order are not applicable to the suit premises and, therefore, now it does not lie in the mouth of the review applicant/tenant to state that in view of the aforesaid amendments in the Rent Control Order, the second appeal No. 157/84 needs to be dismissed. For this, he placed reliance on a decision in *Rajaram Bhau Kadam and Ors. v. Babu Shankar Kadam and Anr.* reported in 1976 Mh.LJ. 425. However, considering the facts of the said case, in my opinion, the ratio laid down in the said case is not applicable to the facts of the case at hand, because in that case the original defendants had taken inconsistent pleas. In tenancy proceedings they took up a stand that they were not tenants but owners of the suit land, while in Civil Suit they pleaded that they were tenants of the suit land and, therefore, in the said case the Court held that the original defendants were estopped from taking such inconsistent pleas. Here it is not so. In the case at hand, no such inconsistent pleas have been taken by the review applicant/tenant. He simply says that the aforesaid amendments which have, according to the Apex Court, retroactive effect, should be considered as the said amendments came into force during the pendency of the second appeal in question. In view of this, I find that the aforesaid decision is of no avail to the non-applicants/landlords.

14. Nextly it is contended by Shri Haq that though the aforesaid amendments were in force at the time when the second appeal in question was decided by this Court, the said amendments were not brought to the notice of this Court by the Counsel for the review-applicant and, therefore, an omission on the part of the Counsel to bring the said amendments to the notice of the Court does not amount to an error apparent on the face of the record so as to constitute a ground for reviewing judgment and decree in second appeal in question. For this, he placed reliance on a decision in *Dokka Samuel Vs. Dr Jacob Lazarus Chelly*, . It is no doubt true that the Apex Court in the aforesaid decision has held that omission on the part of the Counsel to cite an authority of law does not amount to error apparent on the face of the record so as to constitute ground for reviewing earlier judgment. In the case at hand, there was no omission on the part of the Counsel of the review-applicant to cite any authority of law but the provisions of the Act, namely, the two amendments in question which admittedly came into force while the second appeal in question was pending in this Court. It is well-settled that change in law during the pendency of the appeal or case has to be considered by the Court and the relief has to be molded in accordance with the change in law. Here, considering the aforesaid two amendments in the Rent Control Order which came into force during the pendency of the second appeal in question and since the Apex Court held that the said amendments have retroactive effect, in my opinion, this is certainly a change in law during the pendency of the appeal and the same will have to be considered in this review application and the relief will have to be molded in accordance with the said amendments. I, therefore, find that the contention raised by the learned Counsel for the non-applicants/landlord in this regard must fail.

15. In the facts and circumstances of the case, in my opinion, it would be just and proper to recall the judgment and decree dated 27-8-1998 passed by me in second appeal No. 157/84. I, therefore, allow the Review Application and recall the judgment and decree dated 27-8-1998 passed by me in Second Appeal No. 157/84 and for the reasons stated hereinabove, I dismiss the Second Appeal No. 157/84 filed by the appellant/landlord and restore the judgment and decree passed by the Joint Judge, Akola in Regular Civil Appeal No. 483/82 dismissing the appellant/landlord's suit for possession, arrears of rent and mesne profits. In the circumstances, there shall be no order as to the costs.