(1986) 04 P&H CK 0010

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 1369 of 1980

Hari Shankar	APPELLANT
Vs	
Kailasho Devi and Others	RESPONDENT

Date of Decision: April 14, 1986

Acts Referred:

- Haryana Urban (Control of Rent and Eviction) Act, 1973 - Section 13
- Limitation Act, 1963 - Article 113

Citation: AIR 1987 P&H 47 : (1987) 1 ILR (P&H) 317 : (1986) 2 RCR(Rent) 470

Hon'ble Judges: Gokal Chand Mital, J; D.V. Sehgal, J

Bench: Division Bench

Judgement

D.V. Sehgal, J.

Hari Shankar plaintiff petitioner is a tenant in house No. 383, Ward No. 6, Khail Bazar, Panipat. Prem Chand and Manu Ram, his landlords, filed an application under S. 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (hereinafter called "the Act"), before the Rent Controller, Panipat, for his ejectment on as many as five grounds, one of them being that he had neither paid nor tendered the rent for a period of three years at the rate of Rs. 51/- per month amounting to Rs. 1836/-. On 1-2-1977 when the application came up for hearing before the Rent Controller, he made a statement that the rate of rent of the demised. premises is Rs. 21.25 per month including house-tax. He, however, tendered the amount of Rs. 1836/- besides Rs. 30/- as costs assessed by the Rent Controller and Rs. 239/- towards interest in all Rs. 2105/-. He also filed written statement before the Rent Controller asserting therein that the rate of rent was Rs. 21.25 per month and not Rs. 51/- per month as alleged in the ejectment application. Since he had tendered the amount of rent as alleged in the ejectment application, which had been accepted by the landlords, the Rent Controller proceeded to adjudicate upon the other four grounds for ejectment. While the ejectment application was still pending before the Rent Controller, he filed the instant suit on 26-2-1977 against Prem Chand and Manu Ram for the recovery of

Rs. 1790/- on the allegation that he had been made to pay Rs. 1836/- as rent for three years at the rate of Rs. 51/- per month while the defendants were entitled to receive rent at the agreed rate of Rs. 21.25 per month only.

2. It may be mentioned here that during the pendency of the suit Prem Chand defendant died on 26-6-1977 and defendant-respondents 1 to 4 were impleaded as his legal representatives. The Sub Judge 1st Class, Panipat, returned the finding that the rate of rent. agreed and settled between the plaintiff and the defendants was Rs. 21.25 per month and consequently decreed the plaintiff s suit for Rs. 1790/- with costs together with interest at the rate of 6% per annum. On appeal by the defendant-respondents, the same was allowed by the learned Additional District Judge, Karnal, vide judgment and decree dt. 6-3-1980 on the ground that the suit was barred by the principle of constructive res judicata as the rent had been tendered by the plaintiff before the Rent Controller unconditionally and he did not claim any issue with regard to the rate of rent before the Rent Controller. The learned Additional District Judge relied on a judgment of R. S. Narula, C.J. in Avtar Singh v. Machhi Ram (1977) 1 Rent LR 150. The plaintiff consequently filed the present revision petition in this Court.

3. This revision petition earlier came up for hearing before my learned brother G. C. Mital, J., on 28-1-1986 when doubt was expressed about the correctness of the law laid down in Avtar Singh''s case (supra) and it was considered proper that the matter be decided by a larger Bench. This is how it has been placed before us.

4. During the course of hearing arguments were addressed not only on the question whether or not the suit was barred by the principle of constructive res judicata but the respondents'' counsel raised an additional contention to the effect that the excess amount even if tendered by the plaintiff during the proceedings of the ejectment application before the Rent Controller could not be sought to be recovered by filing the instant suit, as it was not a remedy available to him under the law.

5. Raising the latter contention first, the learned counsel for the respondents submitted that under S. 7 of the Act where any sum has been paid which sum by reason of the provisions of the Act should not have been paid, such sum at any time within a period of 6 months after the date of payment is recoverable by the tenant from the landlord, who received the payment or his legal representatives and without prejudice to any other method of recovery, it may be deducted by him from any rent payable to the landlord. He proceeded to contend that it is only in a case where fair rent of a premises is determined under S. 4 of the Act that any amount exceeding fair rent cannot be claimed by the landlord under S. 6(a) of the Act. In the present case, fair rent of the premises was not fixed under S. 4 of the Act. Therefore, the amount paid at a rate higher than the agreed rate of rent cannot be recovered by the tenant under S.7 of the Act. This contention, in our view, has no force. It has been held by this Court in Bhagat Panju Ram v. Ram Lal (1968) 70 Pun LR 409, and

Nauhar Chand v. Thakar Dass 1977 Cur LJ 251, that a tenant has a right to recover the amount of rent paid by him in excess of what was payable at the agreed rate of rent by filing a civil suit for the recovery of the same. The tenant is not required to seek support of any statutory provision for sustaining his right to recover the excess amount so paid. The following observations in The Rajaputana Malwa Rly. Co-operative Stores, Ltd. v. Ajmer Municipal Board ILR 32 All 491: (1910(7) All LJ 496), quoted in Municipal Committee, Amritsar v. Amar Dass AIR 1953 Punj 99, would be helpful to appreciate the position of law in this respect:

"The most comprehensive of the old common law counts was that for money received by the defendant for the use of the plaintiff. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff. It was a form of suit which was adopted when a plaintiff''s money had been wrongfully obtained by the defendant as for example, when money was exacted by extortion or oppression, or by abuse of legal process, or when overcharges were paid to a carrier to induce him to carry goods or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff''s money had been wrongfully obtained by the defendant, the plaintiff in adopting it waiving the wrong and claiming the money as money received to his use."

6. Again, the following observations of Mookerjee, J. in Mahomed Wahib v. Mahomed Ameer ILR(1905) Cal 527, quoted in Amar Dass''s case (supra) are worth reproduction:

"As pointed out by Lord Mansfield, C.J., in Moses v. Macferlan; (1760) 2 Burr 1005, this form of action lies for money paid by mistake, or upon a consideration, which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or an undue advantage taken of the plaintiff''s situation contrary to laws made for the protection of persons under those circumstances, in other words, this form of action would be maintainable in cases in which the defendant at the time of receipt, in fact or by presumption of fiction of law receives the money to the use of the plaintiffs."

7. Keeping in view the above position of law as also the provisions of S. 9, Civil P.C. (hereinafter called ''the Code''), there can be no doubt that the Court had the jurisdiction to try this suit which is undoubtedly of a civil nature and its cognizance is not barred either expressly or impliedly.

8. The learned counsel for the respondents then invited our attention to a Division Bench judgment of this Court in Bhim Sain v. Laxmi Narain AIR 1982 &H 155, and contended that the petitioner ought to have taken resort to the provisions of Rr. 6-A to 6-G of O. VIII of the Code and should have filed a counter-claim before the Rent Controller in the course of the trial of the ejectment application for determination of

the question whether the agreed rate of rent was Rs. 51/- per month as claimed by the landlord or Rs. 21.25 per month as contended by him and the Rent Controller had the jurisdiction to direct recovery of the excess amount paid by him to the landlord in case this question was decided in his favour. The learned counsel thus submitted that in view of the ratio of the judgment in Bhim Sain''s case (supra), the instant suit was not maintainable. We have no doubt in our minds that Bhim Sain''s case does not lay down that an independent civil suit by the tenant for the recovery of excess amount of rent rendered by, him is not maintainable. The Division Bench in fact has made it categorically clear that the excess amount of rent paid by the tenant is recoverable by him and an action by way of suit is not barred. At the same time, it has been held that right in the ejectment proceedings brought by the landlord the tenant can by filing a counter-claim seek determination of the rate of rent and the Rent Controller has the jurisdiction to determine the same and direct recovery of the excess amount of rent if any tendered by. the tenant to the landlord. It may be noted here that Rr. 6-A to 6-G of O. VIII of the Code were inserted by the Civil P.C. (Amendment) Act, 1976 with a view to avoid multiplicity of litigation. Under the provisions of the Code before its amendment, a claim to set-off against the plaintiff''s demand could be made by the defendant under O. VIII, R. 6 of the Code. A set-off which is covered within the ambit of R. 6 ibid was known as legal set-off while the one which did not fall within its ambit was styled as equitable setoff which it was within the discretion of the Court trying the suit to entertain. The amendment has brought about a long needed reformation in this procedural law but it is the right of the plaintiff either to make a counter-claim under O. VIII, Rr. 6-A to 6-G of the Code or to file an independent suit.

9. While concluding the discussion on this aspect, it necessarily bears mention that where any sum has been paid which sum by reason of the provisions of the Act should not have been paid and is recoverable by the tenant from the landlord under S. 7 of the Act, the tenant must bring the suit seeking recovery of the over-paid amount within six months as held by the Supreme Court in Maganlal Chhotabhai Desai Vs. Chandrakant Motilal, . However, where the excess amount paid by the tenant to the landlord, as in the case in hand, is beyond the contemplation of S. 7 of the Act and is recoverable from the landlord under the genera? law as elaborated above, limitation for institution of suit for recovery of such amount by the tenant is three years. We are in full agreement with the view taken by P. C. Pandit, J. in Bhagat Panju Ram''s case (1968(70) Pun LR 409) (supra) that a suit of this nature is governed by the residuary Article viz. Art. 113 of the Schedule to the Limitation Act, 1963.

10. Then coming to the question whether or not the suit of the plaintiff was barred by the principle of res judicata, the learned counsel for the respondents contended that the ratio of Avtar Singh''s case (1977(1) Rent LR 150) has been approved by the Division Bench in Bhim Sain Vs. Laxmi Narain, . This contention is not borne out on going through the judgment in Bhim Sain''s case. It, in fact, approves the judgment

of M. R. Sharma, J. in Nasib Singh Vs. Om Prakash and Another, , wherein it has been held that tender of rent made by the tenant on the first date of hearing of an application for ejectment filed by the landlord before the Rent Controller does not debar the tenant from claiming trial of the issue relating to quantum of rent. The principle of "payment under protest" was held not to be sacrosanct but a matter inferable from the facts and circumstances of each case. If the lower rate of rent had been pleaded by the tenant in the written statement, thus proceeds the judgment in Nasib Singh''s case, there is a presumption that the tender of rent at the higher rate made by the tenant was under protest or only provisionally so that if the decision of the issue regarding the quantum of rent ultimately went against the tenant he could not be deprived of the benefit of the proviso to S. 13(2)(i) of the Act. The written statement so filed by the tenant is thus to be construed as an in-built protest against the demand of higher rate of rent by the landlord. More often than not, after the tenant tenders the rent in ejectment proceedings before the Rent Controller in accord with the demand made by the landlord even when it is at a higher rate of rent, the landlord gives up the ground of non-payment of rent. Until and unless recourse to the provisions of O. VIII, Rr. 6-A to 6-G of the Code by raising a counter-claim is made by the tenant, the parties do not join issue on the question of rate of rent or adequacy of the amount of rent tendered under the proviso to S. 13(2)(i) of the Act. Thus, arises the inevitable question whether in such a situation a suit filed by the tenant for recovery from the landlord of the excess amount of rent tendered by him is barred by the principle of constructive res judicata, which thus necessarily brings into focus the correctness or otherwise of the judgment in Avtar Singh''s case. The question is not elaborately dealt with therein. For its conclusion reliance has straightway been placed on the judgment of the Supreme Court in Union of India (UOI) Vs. Nanak Singh, . In Nanak Singh''s case the highest Court was dealing with the question whether in a writ of certiorari where a ground of attack against the impugned order is available but has not been raised can it be raised in a subsequent suit filed by the petitioner after dismissal of his writ petition. It was held that the suit based on such a ground would be barred by the principle of constructive res judicata. The Supreme Court in a subsequent judgment in Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, , again dwelt on the question of application of constructive res judicata with regard to writ proceedings, and observed as under:

"It is not safe to extend the principles of res judicata to such an extent so as to found it on mere guesswork. To illustrate our view point, we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the writ petition is dismissed after contest by a speaking order obviously it will operate as res judicata in any other proceeding, such as, of suit, Art. 32 or Art. 136 directed from the same order or decision. If the writ petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an

alternative remedy, then another remedy open in law either by way of suit ox any other proceeding obviously will not be barred on the principle of res judicata. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly, even if one writ petition is dismissed in limine by a non-speaking one word order ''dismissed'' another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter, then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principles of res judicata."

11. While relying on the principles'' elaborated by the final Court as cited above, it may be further mentioned here that writ proceedings which are in exercise of the extraordinary jurisdiction of the High Court under Art. 226/227 of the Constitution stand at a higher pedestal. The proceedings before a Rent Controller which is a Court of limited jurisdiction cannot be placed at the same footing. When an issue has neither been raised before nor decided by the Rent Controller, such an issue raised in a subsequent suit shall, in our view be not barred by the principle of res judicata. It is in fact no longer a matter of disputation requiring extensive discussion. Explanation VIII to S. 11 of the Code, introduced by Amendment Act, 1976, has finally resolved this controversy and provides--

"An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such doubt has been subsequently raised."

12. This provision makes it clear that an issue in a subsequent suit shall be barred by the principle of res judicata if the same was heard and finally decided by the Court of limited jurisdiction. Applying this principle to the present case, it can be safely concluded that the issues with regard to the rate of rent and whether the landlord had claimed and received the amount of rent in excess of what he was entitled to receive were neither heard nor finally decided by the Rent Controller. Therefore, by applying the technical rule of constructive res judicata, the suit for the recovery of the amount received by the landlord in excess in ejectment proceedings before the Rent Controller cannot be held to be barred.

13. We are of the considered view that Avtar Singh''s case (1977(1) Rent LR 150) (supra) does not lay down good law. The learned Additional District Judge was this wrong in his conclusion that the instant suit is barred by the principle of constructive

res judicata.

14. Consequently, we allow this revision petition, set aside the judgment and the decree dt. March 6, 1980, of the learned Additional District Judge, Karnal, and remand the appeal to him for decision on merits.

15. The parties through their learned counsel have been directed to appear before the learned Additional District Judge, Karnal, on 19-5-1986.

16. There shall be no order as to costs.

17. Petition allowed.