
(1979) 04 DEL CK 0033

Delhi High Court

Case No: Second Appeal No. 51 of 1973

Jiwan Lal Seth

APPELLANT

Vs

P.N. Nagpal and Others

RESPONDENT

Date of Decision: April 4, 1979

Citation: (1979) 15 DLT 330 : (1979) RLR 370

Hon'ble Judges: Leila Seth, J

Bench: Single Bench

Judgement

Leila Seth, J.

(1) This second appeal is directed against the judgment and order of the Rent Control Tribunal, Delhi dated 1st February, 1973.

(2) The facts in brief, are that the appellant took a room on the ground floor of premises No. A-430, defense Colony, New Delhi on a monthly rental of Rs. 150.00 . He was running his business under the name and style of M/s. Seth Estates Agency therein. No lavatory, bath room or kitchen or any other facility was attached to this room. On 3rd June, 1963 a note was executed which is Exhibit A-9 which mentions that the room has been taken for residential purposes. The landlord was one Girdhari Lal predecessor of the respondents.

(3) Girdhari Lal filed an ejectment petition dated 27th December, 1965, against the appellant mainly on the ground of misuse etc. This was suit No. 43 of 1965. On 10th October, 1966 Girdhari Lal filed another petition for ejectment being suit No. 366/66. On 20th June, 1967, Girdhari Lal died. On 20th September, 1967, the said suit No. 366/66 was dismissed as having abated (Exhibit A5). On 3rd February, 1968 the ejectment petition i.e. suit No. 43 of 1965 was dismissed (Exhibit A6). This was dismissed by Shri P.K. Bahari, Additional Rent Controller on the preliminary objection that no valid notice had been served and the other questions were left open.

(4) On 19th September, 1968 the present petition for ejectment was filed, inter alia, on the ground of misuse, non-payment of rent and nonresidence for more than six months. On 14th May, 1969, the appellant filed the written statement. On 23rd December, 1969, the date was fixed for recording evidence of the tenant on 3rd February, 1970. Thereafter the matter was adjourned to 26th March, 1970 and on 26th March, 1970 it was noted that no process fee had been filed by the tenant, so the matter was further adjourned to 28th April, 1970 and responsibility was fixed "on the tenant. On 28th April, 1970 the matter was again adjourned to 14th May, 1970. On 14th May, 1970 when the case was called out for recording the tenant's evidence, neither he nor his counsel appeared, though the petitioner was present. Several calls were made and thereafter the case was ordered to proceed ex-parte. The petitioner's evidence having already been closed earlier. It was directed to be fixed on 20th May 1970 for arguments. The tenant, however, filed an application praying that the order of ex parte be set aside. The Rent Controller by his order dated 28th May, 1970 set aside the ex parte order on payment of Rs. 25.00 as costs. The tenant was given a last opportunity to produce whatever evidence he wanted to on 27th July.. 1970 at his own responsibility.

(5) On 27th July, 1970 the counsel for the parties were present but no witnesses were present. It was noted that even the tenant was not present nor had the costs been paid. At 3.30 p.m. counsel requested that the court further await the tenant. The court recorded that the tenant had been given a final opportunity for producing his entire evidence at his own responsibility and on payment of Rs. 25.00 as costs. The tenant had done nothing beyond depositing the process-fee and diet money for production of evidence, and as he had not even paid the costs nor presented himself, he was not entitled to any more adjournments. The evidence of the respondent was closed and the case was fixed for arguments on 6th August, 1970.

(6) On 5th August, 1970 an application for setting aside the ex parte order of 27th July, 1970 along with certain affidavits and documents was filed by the tenant. It was averred that he had summoned the witnesses and that Smt. Gulab Devi and Shri R.L. Dang refused to accept the summons whereas Jaswant Singh was held up in Germany and Surinder Singh was reported to be out of station. It was mentioned in the said application that the appellant, one Dara Dutt and Charan Singh had left the court at 1.30 p.m. and returned at 2.30 p.m. after having their attendance noted in the court of Shri H.R. Kalra, Judicial Magistrate, Delhi as a matter i.e. D.D.A. v. Jiwan Lal Seth and Dara Dutt and Charan Singh, was pending there. It was also mentioned that the counsel for the petitioner did not appear when the case was called.

(7) The cause list of the Court of Shri H.R. Kaira Judicial Magistrate 1st Class, Delhi dated 27th July, 1970 was filed as also the affidavits of Dara Dutt, Charan Singh and the appellant himself. In his affidavit he has stated that he was away from 1.30 p.m. to 3.40 p.m. and identical affidavits have been filed by Dara Dutt and Charan Singh.

(8) On 14th August, 1970 a reply was filed by Shri P.N. Nagpal, wherein it is mentioned that the tenant was required to produce his evidence on his own responsibility on 28th April where after the case was adjourned to 14th May, 1970 for the evidence of the tenant on his own responsibility. That no body was present on 14th May, 1970 and the case was ordered to proceed ex-parte and the case was fixed for 20th May, 1970 for arguments. The tenant had moved an application on 14th May, 1970 for setting aside the order undertook to close this evidence on the next date of hearing. As such the court set aside the ex- parte order on payment of Rs. 25.00 and also ordered that the entire evidence be produced by the tenant on 27th July, 1970. On 27th July, 1970 at about 3.30 p.m. counsel for the respondent appeared but neither the respondent nor his witnesses were present, nor had the costs for setting aside the exparte order dated 14th May, 1970 been tendered. As such the Court closed the evidence of the respondent. It was submitted that the tenant had no right to summon any witness unless he paid the costs for setting aside the exparte order. It was also urged that the whole idea of summoning a person like Gulab Devi who is a very old widow was to delay the proceedings, and he managed to procure a report regarding Gulab Devi's refusal to accept summons. Despite the fact that he had undertaken to produce his entire evidence at his own responsibility, he tried to summon those witnesses who were out of Delhi in order to delay the proceedings. It was averred that the absence of the tenant was willful and intentional and in fact the counsel for the tenant appeared and requested that his client be awaited so that he can tender the costs.

(9) On 19th August, 1970 the application of 5th August, 1970 was rejected. While rejecting the application, the Rent Controller dealt with all the aspects of the matter especially the fact that the earlier ex parte proceedings had been set aside on 28th May, 1970 on payment of Rs. 25.00 as costs and that while setting aside of the exparte order the tenant was directed to produce his entire evidence on his own responsibility on 27th July, 1970. He was given two months time to summon evidence and to get the witnesses served and produce them in Court either by summoning them or bringing them. It is clear from the order passed on 27th July, 1970 that the tenant did not abide by any of the conditions imposed on him by the order dated 28th May, 1970. It is also clear that he was awaited for sufficient time on that date. As such there was no reason to accept the application and it was dismissed.

(10) On 15th September, 1970, the Rent Controller, Delhi by her judgment passed an order of ejectment in favor of the landlord-against the tenant with costs. She held that the petition was not barred on the principles of res judicata, as Exhibit A6, the certified copy of the order passed in the previous ejectment petition revealed that there had been no adjudication on merits and the petition had been dismissed only for want of notice u/s 106 of the Transfer of Property Act. As such the objection on the basis of res judicata was rejected.

(11) The tenant being aggrieved by the order filed a appeal u/s 38 of the Delhi Rent Control Act, 1958 (hereinafter referred to as "the Act"). The Rent Control Tribunal by its order dated 1st February, 1973 held as the tenant had been allowed to produce evidence on payment of Rs. 25.00 as costs and he did not even tender the costs on 27th July, 1970, which was the date fixed for evidence, nor had he given the costs to his counsel for tendering it, the Rent Controller was justified in refusing another opportunity to the tenant for producing his evidence. This was particularly so in view of the fact that certain adjournments had been granted to the tenant in the past. As such he held that the order dated 19th August, 1970 was correct and did not call for any interference. He also held that the misuse was detrimental to the interest of the landlord and the requirements of Section 14(5) had been fulfilled and the tenant was liable to be evicted u/s 14(i)(c) of the Act. He also held that neither the tenant nor any member of his family had been residing in the premises in dispute for more than six months prior to the filing of the eviction petition and as such the tenant was liable to be evicted u/s 14(l)(d) of the Act. It was also held that clauses (i)(c) and (l)(d) of Section 14 are separate and independent.

(12) The other question posed was whether the tenant had enjoyed the benefit of the provisions contained in Section 14(2) of the Act. The argument, that since the earlier application had been dismissed as having abated, the appellant could not be deemed to have enjoyed the benefit of the provisions contained in Section 14(2) of the Act, was accepted. The Rent Control Tribunal held that the mere passing of an order u/s 15(1) of the Act is not sufficient to attract the provisions contained in the proviso to Section 14(2) of the Act. He Therefore, held that the tenant had not enjoyed the benefit of the provisions contained in Section 14(2) of the Act and was entitled to the benefit of the provisions contained in Section 15(1) of the Act. As such while dismissing the appeal, he held that the tenant would not be liable to be evicted under clause 14(1)(a) of the Act if he deposited the arrears of rent at the rate of Rs. 115.00 per month w.e.f.1st March, 1967 to 31st January, 1973 within one month of the order. He would also be entitled to an adjustment of Rs. 1350.00 admittedly received by the landlord as also to an adjustment of any amount already deposited in Court in compliance with any order granting the stay of execution. The landlord was awarded costs which were assessed at Rs. 150.00

(13) The first point urged by counsel for the appellant is that the Court was in error in closing the evidence. He submits that it could not fix responsibility - on the party to produce his witnesses as there is no provision in the CPC to get the process served personally. Once the witnesses were summoned, the court should have initiated attendance and should not have closed the evidence. If the witnesses were not present due to non-service of summons then the Court ought to have issued fresh summons. A number of decisions were relied on. As a broad proposition of law this is no doubt correct. But what happened in this case as noticed above in detail was different. The exparte order was to be set aside on payment of costs. No costs were paid or tendered. The tenant had been indulging in dilatory tactics and even

he was not present. In these circumstances the Controller was justified in closing the evidence.

(14) Learned counsel submits that the Court should have waited for the toe tenant on 27th July, 1970, as requested by counsel, so that costs could be tendered. He urges that if a suit is adjourned on payment of costs and the party erroneously thinks that the payment of costs is not additional and seeks an adjournment then this should be allowed. He places reliance for this proposition on *Esso Standard E. 1. Co. v. Wearwell Cycle*, 1977 Raj LR 497.

(15) In *Esso Standard E.I. Co. v. Wearwell Cycle* (supra) a bench of this court observed the order granting adjournment subject to payment of costs, being in the handwriting of the reader, there could be some misapprehension about it. Thus the counsel could have been misled as to whether the order granting an adjournment subject to the payment of costs was conditional or not. In that case it appears that the trial court thought it was bound by its own earlier order and had no discretion to give further time to pay costs. The High Court held that this was a clear error and the trial court always has the discretion to give time for the payment of adjournment costs.

(16) The case before me is entirely different. It is not concerned with adjournment costs but an *ex parte* order being set aside on the payment of costs. The Court was aware of its discretion and did not exercised it in an arbitrary manner. Further there is no question of any misapprehension in the mind of the tenants about the payment being a condition precedent for setting aside the *ex parte* order. In fact the tenant had been resorting the dilatory tactics. The facts in some detail have been noticed above which throw light on this aspect.

(17) As no costs were tendered the order setting aside the *ex-parte* did not take effect and the earlier order dated 14th May, 1970 revived. Unless Rs, 25.00 had been paid as costs for setting aside the *ex-parte* order the process fees for summoning the witnesses should really not have been accepted. The conduct of the tenant is also to be taken into consideration and he had been given two months time to produce his evidence. He had failed to make the payment of Rs. 25.00 as costs which was only a nominal amount. The process-fee itself had not been filed for a month and twenty days and was filed only on 27th July, 1970 i.e. ten days before the last opportunity for producing the evidence. The *ex parte* order of 14th May, 1970 had been set aside on 28th May, 1970 on payment of costs of Rs. 25.00 . The tenant was given a last opportunity to produce his witnesses by 27th July, 1970. He was indulging in dilatory tactics by summoning witnesses who were either too old or out of station. The court waited till 3.30 p.m. on 27th July, 1970 and yet the tenant states in his petition that he was away from 1.30 p.m. to 2.30 p.m. which is patently erroneous. The statements in his petition and affidavit are at variance, as noticed above. He also states that his counsel was not present when in fact his counsel was present as indicated from the record. He does not even leave money with his

counsel to erroneous tender the costs. The court had already given him several opportunities in the past and it was not necessary to give him any further opportunity. There is no arbitrariness, capriciousness and unreasonableness in the exercise of discretion nor have relevant facts been ignored. In the circumstances, the discretion to close the evidence of the tenant was reasonably exercised and calls for no interference.

(18) On merits, with regard to Section 14(1)(c) of the Act, learned counsel for the appellant submitted that the rent note was merely a camouflage and the landlord was aware and knew the purpose for which the premises had been taken on rent i.e. to run a business. As such the landlord had waived his right to charge the tenant with misuse, despite the rent note which indicates that it was for residence. The landlord's consent had to be presumed in view of the fact that the landlord resided in the same premises and ignored what was happening and was collecting rent from the office of the appellant.

(19) In my view there is no merit in this contention. Section 14(1)(c) deals with premises used for a purpose other than that for which they were let out. They were let out for residence according to the rent note. They were admittedly being used for running a business. Section 14(1)(c)(i) provides that in case of premises let out on or after 9th day of June, 1952 the consent must be obtained in writing) then only it will not amount to a misuse. No consent in writing has been obtained nor brought on record in this case.

(20) It is next argued that the order u/s 14(1)(d) of the Act is erroneous as admittedly the tenant was running an office in the disputed premises. As such the court could not record the finding that the tenant was not "residing" in the premises for six months. He urges that it does not mean that he must sleep in the premises. According to his submission Section 14(1)(d) of the Act is only attracted if the premises are locked. As noticed earlier, the premises were let out for residential purposes according to the rent note. Running an office is not "residing" in the premises and so the Court was right in coming to conclusion that the appellant was not residing in the premises for six months.

(21) Lastly it has been urged that the petition is barred on the principles of rest judicate as the order of Shri P.K. Bahri dated 3rd February, 1968 (Exhibit A6) and the order of 20th September, 1967 (Exhibit A5) on the basis of two previous petitions for ejectment amounted to dismissal of the suit on merits. Learned counsel has relied on [Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others](#), .

(22) In the said case the Supreme Court has reiterated its earlier observations in [Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai](#), to the effect, "that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point-each of which by itself would be sufficient for the ultimate decision-the decision on each of these points operates as

res judicata between the parties". It has also observed in paragraph 10 as follows:

" NO doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiffs cause of action is against a Government and the plaint does not show that notice u/s 80 of the CPC claiming relief was served in terms of the said Section it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

(23) It is thus apparent that with regard to Exhibit A6, the principles of res judicata cannot apply as the petition was dismissed only on the question of lack of notice. With regard to Exhibit A5, however, where the petition was dismissed on the ground of abatement, this is a mixed question of law and fact. The pleadings, issues etc. with regard to Exhibit A5 are not on record nor was this question pressed before the lower courts. The principles of res judicata cannot be applied by implication. Further the burden of establishing the plea of res judicata is on the party who sets it up, and the appellant has not discharged this burden.

(24) In view of the reasons outlined above, the appellant has made out no case for interference with the order of the Rent Control Tribunal, Delhi dated 1st February, 1973. The appeal is accordingly dismissed with costs.