

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **C.R.P. 1332/2002**

Decided on 04.05.2010

IN THE MATTER OF :

BRAHM PRAKASH

..... Petitioner

Through: Mr. Rakesh Kumar Garg, Advocate

versus

CHANDO DEVI & ORS.

..... Respondents

Through: Nemo

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J. (Oral)

1. The petitioner is aggrieved by an order dated 23.07.2002 passed by the Additional Rent Controller, dismissing his application filed under Order VII Rule 11 read with Sections 11 and 151 of the Code of Civil Procedure, claiming *inter alia* that the petition preferred by the respondents/landlords (petitioners in the court below) under the provision of Section 14(1)(a) of the Delhi Rent Control Act (hereinafter referred to as '**the Act**'), was barred by the principles of *res judicata* as the relationship of landlord and tenant between the parties stood decided, vide order dated 27.01.1998 passed in an earlier petition filed by Late Sh. Samey Singh, the husband of

respondent No.1 and the father of the remaining respondents, under Section 14(1)(a) of the Act.

2. The facts of the case lie in a narrow compass. In the year 1996, the predecessor-in-interest of the respondents, Shri Samey Singh filed an eviction petition against the petitioner herein (respondent therein) under Section 14(1)(a) of the Act, registered as E.P.No. 149/1996, stating *inter alia* that he was in arrears of rent in respect of premises bearing No.163(new)/143(old) situated in village Dhaka, Delhi, from 01.03.1993, till the date of issuance of notice, i.e., till 04.03.1996. The aforesaid petition was contested by the petitioner, who filed his reply in which he disputed the relationship of landlord and tenant between the parties. As a result, Sh. Samey Singh was called upon to adduce evidence to establish the relationship of landlord and tenant between the parties for which purpose, he was granted numerous opportunities. Last opportunity was granted to him to adduce evidence, on 09.09.1997 and again on 01.11.1997. Finally, the following order dated 27.01.1998 came to be passed by the Rent Controller:

"27.1.1998

Present: Counsel for the Petitioner Sh. Chander Shekhar.

Cl. For Petitioner submits that no witness has come today nor summoned. No ground for further adjournment. Last opportunity was granted to Petitioner on 9.9.97 & then on 1.11.97. Still the Petitioner has not cared to call witness.

The PE is thus closed.

Since the relationship of Landlord tenant itself is under dispute and the petitioner has failed to adduce any evidence to establish this fact, I am of the opinion that there is no point in fixing the

case further for RE. The petition is thus dismissed as the petitioner has failed to establish his case. File be consigned.

Sd/-
27.1.1998
R.Kiran Nath
RENT CONTROLLER: DELHI"

3. No appeal was preferred against the aforesaid order of dismissal of the eviction petition and as per the petitioner, during his lifetime, Shri Samey Singh did not file any subsequent eviction petition under Section 14(1)(a) of the Act. After his demise, the respondents, claiming through Sh. Samey Singh as his successors-in-interest filed another eviction petition registered as E.P. No.136/2001 against the petitioner under Section 14(1)(a) of the Act, claiming *inter alia* arrears of rent from 01.03.1993, till the date of issuance of notice, i.e., till 18.05.2001. A written statement was filed by the petitioner wherein, amongst others, he stated that Shri Samey Singh, the predecessor-in-interest of the respondents, had failed to prove the relationship of landlord and tenant between the parties in the earlier eviction petition filed by him, which was dismissed vide order dated 27.01.1998 and the said order having attained finality, the same issue cannot be permitted to be reopened in the second eviction petition as the same would be barred by the principles of *res judicata*.

4. Apart from taking a preliminary objection as to the maintainability of the eviction petition in the written statement, the petitioner also filed an application under the provisions of Order VII Rule 11 read with Sections 11 and 151 CPC, stating *inter alia* that the eviction petition was barred by the principles of *res judicata* and the

same was liable to be dismissed as not maintainable. The aforesaid application of the petitioner was contested by the respondents, who filed their reply. In the reply, while it was not denied that an order dated 27.01.1998 was passed by the Rent Controller in the first eviction petition, but it was denied that their eviction petition was liable to be dismissed as being barred by the principles of *res judicata*.

5. The aforesaid application filed by the petitioner was dismissed by the impugned order dated 23.07.2002, wherein the Additional Rent Controller held that the subsequent petition filed by the respondents under Section 14(1)(a) of the Act, was based on a fresh notice dated 18.05.2001 on a separate cause of action and that there was no finding on merits on the relationship between the parties in the order dated 27.01.1998, and, therefore, the principles of *res judicata* were not applicable. Aggrieved by the dismissal order, the present petition has been preferred.

6. The present petition has remained in the regular cause list since 15.03.2010, but none has appeared on behalf of the respondents. In these circumstances, this Court has no option but to proceed to hear the petitioner and dispose of the petition on the basis of the records available.

7. Learned counsel for the petitioner submits that the impugned order is erroneous as the learned Additional Rent Controller failed to appreciate that Section 11 of the CPC is applicable to the facts of the present case and that the issue in the earlier eviction petition

was directly and substantially an issue in the second petition. He states that as the parties were common in both the petitions and the earlier order dated 27.01.1998 having been passed by a court of competent jurisdiction, and having attained finality, a subsequent petition based on the same issue could not be maintained by the respondents. He argues that even if the order dated 27.01.1998 was a brief one, the same has to be held as one passed under the provisions of Order XVII Rule 3 CPC, as the predecessor-in-interest of the respondents, Shri Samey Singh had failed to adduce any evidence to establish the relationship of landlord and tenant between the parties, despite repeated opportunities having been granted to him for the said purpose, thus resulting in dismissal of the eviction petition. It is submitted that the learned Additional Rent Controller overlooked the fact that when time was repeatedly granted to a party to adduce evidence to prove that there was a relationship of landlord and tenant between the parties, but he failed to do so, the court could not have waited unendingly, and in these circumstances, rightly held that there was no point in fixing the case for recording evidence of the respondent and then proceeded to dismiss the petition of Sh. Samey Singh for failure on his part to establish his case. It is urged by the counsel for the petitioner that the aforesaid finding has to be held as one on merits and the bar of Section 11 CPC comes into play. He seeks to fortify his submissions by placing reliance on the following judgments:

- (i) Govindoss Krishnadoss vs. Rajah of Karvetnagar & Anr. **AIR 1929 Madras 404**

- (ii) Nila vs. Punun **AIR 1936 Lahore 385**
- (iii) Har Dayal vs. Ram Ghulam **AIR (31) 1944 Oudh 39**
- (iv) Satyadhyan Ghosal & Ors. vs. Smt. Deorajin Debi & Anr. **AIR 1960 SC 941**
- (v) Gulabchand Chhotalal Parikh vs. State of Gujarat **AIR 1965 SC 1153**
- (vi) Union of India vs. Nanak Singh **AIR 1968 SC 1370**
- (vii) Bhagwan Dass (died) through LRs and Ors. vs. Ramesh Kumar **(2000) 124 PLR 110**

8. Though none has appeared on behalf of the respondents, the reply filed by them has been perused. In their reply, the respondents have supported the impugned order and contended that the order dated 27.01.1998 does not operate as *res judicata* as there was a fresh cause of action to file the eviction petition and the issue of ownership of the suit premises by Late Shri Samey Singh was never decided on merits. It has been further stated that no evidence had been adduced to establish the fact that the petitioner is the owner of the suit property and hence, the second petition filed by them was maintainable.

9. As observed by the Supreme Court in the case of Dadu Dayalu Mahasabha Jaipur (Trust) vs. Mahant Ram Niwas & Anr. reported as **AIR 2008 SC 2187**, the principles of *res judicata*, estoppels and waiver are procedural in nature. However, once it is held that the issues, which arose in the subsequent suit, were directly and substantially, in issue in the earlier suit, Section 11 of the Code will apply. Section 11 of the Code not only recognises the general

principles of *res judicata*, it bars the jurisdiction of the Court in terms of Section 12 thereof. Explanation-V of Section 11 specifically states that any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of Section 11, be deemed to have been refused. For the purposes of application of Section 11, certain conditions as prerequisites are required to be satisfied, which were clearly set out by the Supreme Court in the case of Sheodan Singh vs. Daryao Kunwar reported as **AIR 1966 SC 1332**, in the following manner :-

"9. A plain reading of Section 11 shows that to constitute a matter *res judicata*, the following conditions must be satisfied, namely-

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(iii) The parties must have litigated under the same title in the former suit;

(vi) The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all

the five conditions mentioned above have been satisfied.”

10. In the present case, the question, which is required to be posed is, what was in issue in the earlier petition. In the earlier petition filed by Shri Samey Singh, the predecessor-in-interest of the respondents, under Section 14(1)(a) of the Act, it was averred that the petitioner (respondent herein) was in arrears of rent from 01.03.1993, till the date of issuance of notice, i.e., 04.03.1996. In his reply to the aforesaid eviction petition, the petitioner (respondent therein) had asserted that he was the absolute owner of the suit property and in occupation thereof in the said capacity since 28.12.1987. The relationship of landlord and tenant between the parties was specifically denied by the petitioner. As a result, Shri Samey Singh was required to produce evidence to establish the relationship of landlord and tenant between the parties so as to maintain his petition against the petitioner. He, however, failed to do the needful, which ultimately resulted in dismissal of the eviction petition.

11. In the second eviction petition filed under the provisions of Section 14(1)(a) of the Act, by the respondents herein claiming under Sh. Samey Singh, arrears of rent were sought to be recovered from the petitioner from 01.03.1993 till the date of issuance of the notice, i.e., 18.05.2001. In other words, the timeline for claiming the arrears of rent overlapped in both petitions. In the first petition, arrears were claimed from 1.3.1993 to 4.3.1996 and in the second petition, arrears

were claimed from 1.3.1993 till 18.5.2001, i.e., for an additional period of about five years. It is worthwhile to observe that in para 19 of the present eviction petition, the respondents categorically stated that during his lifetime, Shri Samey Singh had filed an earlier eviction petition No.149/96 under Section 14(1)(a) of the Act, which was dismissed on 27.01.1998 as he had failed to establish his case. Thus, indisputably the issue in the present case has to be held as identical to the issue raised in the earlier case, and hence, any finding returned in the earlier petition would operate as *res judicata* for the purposes of maintaining the subsequent petition.

12. The conditions necessary for applying the principles of *res judicata* are also fulfilled in the present case. The matter at hand in the second case, subject matter of the present petition, was directly and substantially in issue in the earlier petition. The earlier petition as also the second petition are between the same parties, as the respondents claim under Sh. Samey Singh, petitioner in the first eviction petition. Both petitions relate to the same premises. The Court, which had decided the former petition, was a Court competent to try the subsequent petition as well. The matter, directly and substantially in issue in the second petition, was heard by the Rent Controller in the earlier petition and was finally decided by dismissing the eviction petition in view of failure on the part of Shri Samey Singh to establish the relationship of landlord and tenant between the parties.

13. Failure to adduce evidence to prove the allegation of fact has to be held as a dismissal on merits under Order XVII Rule 3 CPC. The dismissal of the petition filed by Shri Samey Singh for want of evidence was a judicial order. Admittedly, the aforesaid order was not taken in appeal either by Sh. Samey Singh or by the respondents, and hence, it has to be held that the same had attained finality and could not be permitted to be re-opened. Therefore, the said order is binding not only on the parties, but on the Court as well. In the case of Govindoss Krishnadoss (supra), the Madras High Court held as under:

“The question of law that is for decision is whether already the lower Court has not gone more than once beyond its jurisdiction in entertaining further petitions on matters which it had already finally decided. It appears to me that in this discussion two general principles have to be kept in mind; (1) that a party who has objections to a proceeding before the Court must put these forward at the earliest opportunity and must put all of them forward and not keep back any of them for subsequent presentation and (2) that when a Court of law has, in any proceeding before it, decided upon evidence or in the absence of evidence, a question of fact, it is not competent to it to allow that question to be again reopened except on the very restricted terms laid down by the provisions for review of judgment.”

14. Similarly, in the case of Nila (supra), the Lahore High Court observed as below:-

“As to the second point, viz. that the decision was not on merits, the ruling cited by the learned counsel for the appellant viz. **1929 Mad 404(1)**, supports his contention that a decision under O. 17, R.3, Civil P.C., in circumstances like those of the previous suit by Kartar Singh, is to

be deemed to be a decision on merits, and such a decision falls within the scope of S. 11, Civil P.C.;ref. also **40 All 590.**"

15. Further, in the case of Nanak Singh (supra), the Supreme Court held as below:

"This Court in Gulabchand Chhotalal v. State of Gujarat, AIR 1965 SC 1153 observed that the provisions of S.11 of the Code of Civil Procedure are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. The Court in **Gulabchand's case, AIR 1965 SC 1153** left open the question whether the principle of constructive *res judicata* may be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding but was not so raised therein, must still be deemed to have been decided." (*emphasis added*).

16. In the case of Satyadhyan Ghosal (supra), the Supreme Court held as below:

“(7) The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. **When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.** This principle of *res judicata* is embodied in relation to suits in S.11 of the Code of Civil Procedure; but even where S.11 does not apply, the principles of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.”
(emphasis added).

17. In the present case in hand, Sh. Samey Singh, the predecessor-in-interest of the respondents/landlords failed to produce any evidence to establish the relationship of landlord and tenant between the parties in the first eviction petition filed by him under Section 14(1)(a) of the Act. As the said decision was not taken in appeal by any of the parties, the same attained finality. Having been afforded an opportunity to lead evidence and having failed to produce any evidence in the Court, it has to be taken as a decision on merits under Order XVII Rule 3 of the Code of Civil Procedure for the purpose of Section 11 of the Code.

18. By filing a subsequent eviction petition, the respondents cannot be permitted to do directly, what they could not do indirectly. Failure to adduce evidence, resulting in dismissal of the claim of the respondents for want of proof, is in reality, a decision on merits. Just as if the petitioner therein had produced evidence, which the Court had considered as inadequate proof and had dismissed it upon the said ground. Applicable to such a situation is the legal maxim '*De non apparentibus et non existentibus eadem est ratio*'. It is a rule which applies to those things, which do not appear, and to things which do not exist. So, for maintaining his right to claim arrears of rent, if Sh.Samey Singh was required to prove that he was the landlord of the petitioner, but he failed to do so, the Rent Controller had no option but to decide the issue against him on account of non-production of evidence. In other words, what does not appear, must be regarded as non-existent.

19. In these circumstances, the decision of the Rent Controller dated 27.01.1998, has to be taken as a decision on the merits of the matter. Merely because a subsequent cause of action has been pleaded by the respondents in the second eviction petition by claiming arrears of rent not only for the period for which the first eviction petition was filed, but also for the subsequent period upto 18.05.2001, cannot be a ground to hold that the second eviction petition was maintainable. The relationship of landlord and tenant between the parties was not established in the earlier proceedings and the same point is directly and substantially in issue in the second petition

wherein the foundation to claim the arrears of rent is the stand of the respondents (petitioners therein) that they are the landlords of the petitioner herein. The findings returned by the Rent Controller in his order dated 27.01.1998 passed in the first petition have to be held to be findings on merits and having been adjudicated conclusively, are final in nature and act as a bar of *res judicata* on the second eviction petition preferred by the respondents.

20. In view of the aforesaid facts and circumstances, this Court is of the opinion that the impugned order dated 23.07.2002 is not in accordance with law and cannot be sustained. The said order is therefore set aside and quashed. The application filed by the petitioner under Order VII Rule 11 of the CPC is allowed. It is held that the second eviction petition filed by the respondents under Section 14(1)(a) of the Act is liable to be rejected being barred by the principles of *res judicata*. Ordered accordingly.

21. The present petition is allowed with costs of Rs.10,000/-.

MAY 04, 2010
rkb

(HIMA KOHLI)
JUDGE