

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 28th September, 2018**

+ **RSA 141/2018 & CM No.39672/2018 (for stay)**

SHAHIDA KHATOON & ORS

.... Appellants

Through: Mr. S.S. Jain and Ms. Veena, Advs.

Versus

QAIYUM ALI & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 28th August, 2018 in RCA No.44/2017 of the Court of Additional District Judge (ADJ)-01 (South-East)] allowing the First Appeal under Section 96 of the CPC preferred by the respondents against the judgment and decree [dated 20th March, 2017 in CS No.52013/2016 of the Court of Administrative Civil Judge (South-East)] on admissions allowing the claim of the appellants/plaintiffs insofar as for possession, in the suit for recovery of possession of immoveable property and *mesne* profits. Resultantly, the First Appellate Court has set aside the decree for possession on admissions in favour of the appellants/plaintiffs and since the appellants/plaintiffs had executed the decree, also directed the appellants/plaintiffs to restore possession of the property to the respondents/defendants and dismissed the suit.

2. This appeal came up first before this Court on 26th September, 2018, when finding that the only issue for consideration in the appeal was, whether

Delhi Rent Control Act, 1958 (Rent Act) applies to the property subject matter of the suit or not and further finding that the counsel for the appellants/plaintiffs, during his arguments was shifting his stand, sometimes saying that Rent Act applies and another time saying that it does not, the hearing was adjourned to today to enable the counsel for the appellants/plaintiffs to, after studying the relevant Notifications, make up his mind, whether the Rent Act applies to the suit property or not.

3. Suffice it is to state that, if the Rent Act applies, as has been held by the First Appellate Court, the jurisdiction of the Civil Judge to pass a decree for recovery of possession of the property, is barred by Section 14(1) and Section 50 of the Rent Act.

4. The counsel for the appellants/plaintiffs has been heard and the record of the Suit Court and the First Appellate Court annexed to the memorandum of appeal perused.

5. The appellants/plaintiffs, on 13th January, 2016, instituted the suit from which this Regular Second Appeal arises, for recovery of possession of a portion at ground floor consisting of a room with attached toilet, bathroom, kitchen, in part of property No.F-39/3, Shaheen Bagh Part-II, Abul Fazal Enclave, Okhla, New Delhi-110025 and for recovery of arrears of rent and *mesne* profits and future *mesne* profits, pleading (i) that the appellants/plaintiffs were the owners of property No.F-39/3, Shaheen Bagh Part-II, Abul Fazal Enclave, Okhla, New Delhi-110025 comprising of ground, first and second floors; (ii) that the predecessor of the appellants/plaintiffs inducted the respondents/defendants, in the portion aforesaid of the property, as tenant, on 28th March, 2008, with effect from 1st April, 2008 at rent at Rs.1,800/- per month; (iii) that the

respondents/defendants had failed to pay rent inspite of repeated demands; (iv) that a notice of termination of tenancy was got issued to the respondents/defendants; (v) that the appellants/plaintiffs earlier filed a petition under Section 14(1)(a), (c), (e), (f) & (g) of the Rent Act for eviction of the respondents/defendants from the tenancy premises; (vi) however the respondents/defendants, in their written statement to the said petition for eviction, took a plea that the Rent Act did not apply to the premises in the tenancy of the respondents/defendants; (vii) that the aforesaid plea of the respondents/defendants was accepted and the petition for eviction under the Rent Act filed by the appellants/plaintiffs rejected. Hence the suit.

6. The respondents/defendants contested the suit by filing a written statement pleading that the suit was barred by the Rent Act and the Delhi Land Reforms Act, 1954. It is not necessary to deal herein the other defences taken by the respondents/defendants in the written statement.

7. The appellants/plaintiffs applied for a decree for possession on admissions under Order XII Rule 6 of the CPC.

8. The Suit Court allowed the aforesaid application under Order XII Rule 6 of the CPC and passed a decree for possession reasoning, (a) that finding ambiguities and inconsistencies in the written statement of the respondents/defendants, statement on oath under Section 165 of the Indian Evidence Act, 1872 of the respondents/defendants was recorded on 7th November, 2016 and whereafter the respondents/defendants had also amended their written statement; (b) that in the amended written statement, the respondents/defendants had admitted being tenants under the appellants/plaintiffs and also admitted that in the earlier petition for eviction under the Rent Act filed by the appellants/plaintiffs, the

respondents/defendants had taken the plea of Rent Act being not applicable; (c) that that the order of rejection of the petition for eviction under Rent Act on the ground of the Rent Act being not applicable to the property had attained finality between the parties and was binding on the parties and as per which, Rent Act was not applicable to the property; and, (d) else, in terms of the judgment in ***Jeevan Diesels & Electricals Limited Vs. Jasbir Singh Chadha (HUF)*** (2010) 6 SCC 601, the appellants/plaintiffs were entitled to a decree for possession on admissions. Accordingly, a decree for possession was passed and the suit for other reliefs including for recovery of arrears of rent and *mesne* profits was continued.

9. On First Appeal being preferred by the respondents/defendants, the First Appellate Court has, in a lucid, well written, reasoned and erudite judgment held (i) that village Okhla was urbanised vide Notification No.F.9(2)/66/law/corpn. dated 28th May, 1966 under Section 507 of the Delhi Municipal Corporation Act, 1957 (Municipal Act); (ii) that vide Notification No.SO 1236, New Delhi dated 27th March, 1979 published in Gazette of India Part-II Section III (II) dated 14th April, 1979, the Central Government, in exercise of powers conferred by proviso to sub-section (2) of Section 1 of the Rent Act, extended all the provisions of the Rent Act to the areas as covered under the Notification aforesaid under Section 507 of the Municipal Act; (iii) that on the basis of the aforesaid Notification, it was clear that the Rent Act was applicable to Okhla area; (iv) it was however the contention of the counsel for the appellants/plaintiffs that since Shaheen Bagh colony in which the property was situated was an unauthorised colony, the provisions of the Rent Act did not extend thereto; (v) however neither under Section 507 of the Municipal Act, nor under Section 1(2) of the Rent

Act, nor in the Notifications aforesaid, any exception was carved out with respect to unauthorised colonies in the locality; (vi) that Rent Act was enacted based on public policy and is primarily for the protection of tenants and the tenants cannot waive the benefit of the provisions thereof; (vii) that the tenants cannot by consent confer or exclude applicability of the Rent Act; and, (viii) that the finding of the Additional Rent Controller in the earlier proceedings under the Rent Act, of the Rent Act being not applicable, did not bind the parties. Accordingly, the decree for possession was set aside and since the Rent Act was applicable and the jurisdiction of the Civil Court was barred, the suit was dismissed. Further, as aforesaid, since the appellants/plaintiffs in the meanwhile had recovered possession in execution of the decree which had been set aside, restitution was ordered.

10. The counsel for the appellants/plaintiffs today has first drawn my attention to sub-section (2) of Section 1 of the Rent Act and has thereafter taken me through the Notifications aforesaid and referred to ***Rajpal Singh Vs. Deen Dayal Kapil*** 2014 SCC OnLine Del 337 and has contended that there is nothing to show that Shaheen Bagh colony, in which the property is situated, is in Okhla.

11. I have reminded the counsel for the appellants/plaintiffs that the appellant / plaintiff herself, in the plaint in the suit from which this appeal has emanated, has described the property as situated in Okhla. In the memorandum of this appeal also, it is not pleaded that the property is not situated in Okhla.

12. There is no merit in the desperate attempt being made, to not return possession received in pursuance to the decree which has been set aside. Else, it would be in the interest of the appellants/plaintiffs also to, instead of

flogging this appeal, inspite of it being clear as daylight that the Notifications aforesaid extend the provisions of the Rent Act to Okhla, pursue their remedies under the Rent Act.

13. Though the counsel for the appellants/plaintiffs today has not so urged but during the hearing on 26th September, 2018 had also urged the plea of estoppel, contending that the respondents/defendants having taken a plea in their defence to the petition for their eviction earlier filed by the appellants/plaintiffs under the Rent Act that the Rent Act was not applicable, are now estopped from ousting the appellants/plaintiffs from the Civil Court as well. However, it was enquired from the counsel for the appellants/plaintiffs, how can there be estoppel against a Statute. No reply was given on 26th September, 2018 and today nothing has been urged in this regard. Supreme Court in *Isabella Johnson Vs. M.S. Susai* (1991) 1 SCC 494 dealt with the same facts as in the present case. Relying on another decision of the Supreme Court in *Mathura Prasad Bajoo Jaiswal Vs. Dossibai N.B. Jeejeebhoy* (1970) 1 SCC 613, it was held that where the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of *res judicata*, a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land. It was further held that a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of *res judicata* and that it is well settled that there can be no estoppel on a pure question of law and in that case, the question of jurisdiction of the Rent Controller was a pure question of law. Mention in this context may also be made of a recent dicta of the Supreme

Court in *Canara Bank Vs. N.G. Subbaraya Setty* 2018 SCC OnLine SC 427 holding that there is no *res judicata* on a legal issue when the decision relates to the jurisdiction of the Court. Supreme Court held that where an issue of law decided between the same parties in a former suit or proceeding relates to jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not *res judicata* in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding; an erroneous decision as to the jurisdiction of a court cannot clothe a Court with jurisdiction where it has none. The issue, whether the provisions of the Rent Act are applicable or not, is a pure legal issue and even if the order of the Additional Rent Controller were to be binding on the Civil Court and which it is not, the principle of *res judicata* would not apply.

14. Else, suffice it is to state:

(A) that Section 1 of the Rent Act is as under:

“1. Short title, extent and commencement.—(1) This Act may be called the Delhi Rent Control Act, 1958.

(2) It extends to the areas included within the limits of the New Delhi Municipal Committee and the Delhi Cantonment Board and to such urban areas within the limits of the Municipal Corporation of Delhi as are specified in the First Schedule:

Provided that the Central Government; may, by notification in the Official Gazette, extend this Act or any provision thereof, to any other urban area included within the limits of the Municipal Corporation of Delhi or exclude any area from the operation of this Act or any provision thereof.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.”;

(B) that the urban areas of Delhi as described within the limits of the Municipal Corporation of Delhi to which the Act extended are the areas, which immediately before 7th April, 1958, were included in—

1. the Municipality of New Delhi excluding the area specified in the First Schedule to the Delhi Municipal Corporation Act, 1957;
2. the Municipal Committee, Delhi;
3. the Notified Area Committee, Civil Station, Delhi;
4. the Municipal Committee, Delhi-Shahdara;
5. the Notified Area Committee, Red Fort;
6. the Municipal Committee, West Delhi;
7. the South Delhi Municipal Committee;
8. the Notified Area Committee, Mehrauli.

(C) that vide Notification dated 28th May, 1966 under Section 507 of the Municipal Act, the localities mentioned in First Schedule thereto earlier forming part of rural areas, ceased to be rural areas. The Schedule, under the column ‘Name of the revenue Estate’ includes ‘Okhla’ and under the column ‘Particulars of area proposed to be urbanised’, mentions “The entire remaining area of the said revenue Estate which has not so far been urbanised”. It is thus clear that vide

the said Notification, whatsoever areas of Okhla till then were not urbanised, were urbanised;

(D) that vide Notification dated 14th April, 1979 aforesaid, under Section 1(2) of the Rent Act, the Rent Act was extended to all the areas subject matter of Notification aforesaid under Section 507 of the Municipal Act.

15. It is for the aforesaid reason that I have observed that it is clear as daylight that the Rent Act extends to the subject locality.

16. There is no need to say more, as other judgments, if any required to be referred, are mentioned in the judgment of the First Appellate Court.

17. There is thus no merit in the appeal. The same does not raise any substantial question of law.

18. Dismissed.

A copy of the judgment of the First Appellate Court and a copy of this judgment be forwarded to the Committee of Inspecting Judges of the First Appellate Court.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 28, 2018

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