A SMT. KAMLABAI & ORS.

v.

MANGILAL DULICHAND MANTRI

OCTOBER 14, 1987

B [SABYASACHI MUKHARJI AND G.L. OZA, JJ.]

C.P. and Berar Letting of Houses and Rent Control Order, 1949—cl. 13—The provision puts restriction on right of landlord to determine the tenancy—Permission required under the clause is needed only when landlord wants to terminate the tenancy.

C *Transfer of Property Act, 1882—ss. 106 and 111—Read with cl. 13 of the C.P. and Berar Letting of Houses and Rent Control Order 1949—cl. 13 of the Order does not restrict the tenant from surrendering the lease either by specific agreement or by implication demonstrated by conduct.*

D

On 24-2-1970 the appellants filed an application under cl. 13(3) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 for permission to issue notice determining the respondent's lease of the premises in question on grounds of bona fide need, subletting, etc. On 28-3-1970 both the parties made an application for recording compro-
E **mise. By the terms of the compromise, the respondent expressly admitted the claim of the appellants for permission to terminate the tenancy, and, surrendering his tenancy rights, undertook to vacate the premises on or before 31-3-1974. By an order dated 31-3-1970, the Rent Controller filed the proceedings observing that the matter had been compromised out of court and since there was no provision for recording of**
F **compromise, he was treating the petition of compromise as an application for filing the proceedings.**

On 18-2-1974 the parties entered into an arbitration agreement wherein it was clearly mentioned that the tenancy in favour of the respondent stood surrendered and the arbitrator should decide how
G **much further time should be granted to him for vacating the premises and what should be the quantum of damages for use and occupation thereof beyond 31-3-1974. Pursuant to the arbitration, a further compromise was entered into by which time till 31-3-1977 was given for vacating the premises. An award was made in terms of this compromise on 29-3-1974 and a decree in terms of the award was passed by the Civil**
H **Judge on 16-4-1974.**

The respondent wrote two letters requesting for extension of time to vacate the premises, firstly upto the end of December 1977, and then upto the end of December, 1980. However, the respondent did not vacate the premises on 31-12-1980 and the appellant applied for execution of the decree. Notice was issued, under 0.21, r.22, C.P.C. but no cause was shown by the respondent. On 24-3-1981, an application was made by the parties for recording of compromise to the effect that time for vacating the premises was extended upto 31-12-1982 as the last chance. Accordingly, the executing court passed an order disposing of the execution application as compromised.

The respondent did not vacate the premises on 31-12-1982. The appellant filed a fresh application for execution on 31-1-1983. When moves for a further compromise failed, the respondent filed objections claiming that the decree was a nullity and could not be executed as it had been obtained without the prior permission contemplated under cl. 13 of the aforesaid Rent Control Order. The Civil Court, by its order dated 1-10-1985, rejected the objections and directed the execution to proceed.

The respondent approached the High Court in revision but his application was dismissed *in limine*. The respondent sought special leave to appeal and this Court disposed of the matter directing the High Court to admit the revision and hear it on merits and dispose it of in accordance with law. The High Court allowed the revision petition.

Allowing the appeal,

HELD: The scheme of cl. 13 of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 indicates that it is meant to protect the rights of the tenant by restricting the rights of the landlord. Sub-cl. (1) thereof starts with the expression "no landlord" making it clear that it is a restriction put on the right of the landlord to determine the tenancy. Sub-cl. (2) indicates that when a landlord seeks to obtain permission under sub-cl. (1) he has to apply to the Rent Controller. Sub-cl. (3) provides that the Rent Controller shall grant permission if he is satisfied in respect of the grounds enumerated thereunder. Thus, the permission which is required under cl. 13 is needed only when the landlord wants to terminate the tenancy. It is not at all necessary if the tenant wants to surrender the lease or terminate the tenancy or vacate the premises. Clause 13 of the Order does not restrict the tenant from surrendering the lease either by specific agreement or by implication demonstrated by conduct. [473G-H; 474H; 475A-B]

A (b) Section 106 of the Transfer of Property Act provides for termination of the lease either by the lessor or by the lessee, and, s. 111 thereof, which lays down the various circumstances under which the lease of immovable property comes to an end, contemplated implied surrender. [475F; G]

B In this case, the terms of the compromise filed on 28-3-1970 made it clear that the tenant himself offered to vacate the premises on or before 31-3-1974 without any recourse to any proceedings before the Rent Control Authorities or the Civil Court. From the language of cl. 13 of the Rent Control Order aforesaid it is plain that after this compromise there remained nothing for which permission could be granted by the Rent Controller. Thus, when the landlord sought per-
C mission, the tenant came forward offering to surrender the lease thereby expressing a desire to terminate the lease from a particular date. As is clear from cl. 13 aforesaid, no permission is necessary where the tenant chooses to terminate the lease either by a notice under s. 106 or by surrender under s. 111 of the Transfer of Property Act. [476B-D]

D The agreement of arbitration signed by the parties clearly stated that party No. 2, namely the tenant, had surrendered his tenancy rights and agreed to deliver vacant possession. The arbitration was entered into on the basis of this agreement and an award was passed. The decree was passed in terms of the award. During the proceedings before the
E Civil Court no objection was raised that the decree of eviction could not be passed as there was no permission of the Rent Controller to determine the lease. Clearly therefore the decree which is to be executed is not a decree for eviction on the basis of determination of lease by the landlord but is a decree passed on the basis of the lease having been determined by the tenant himself by surrender. [476G-H; 477H; 478A]

F *Shah Mathuradas Maganlal & Co.* v. *Nagappa Shankarappa Malaga & Ors.*, A.I.R. 1976 S.C. 1565, referred to.

The High Court was in error in applying the principle of 'a contract contrary to public policy' to the agreement of arbitration and
G compromise filed before the Arbitrator and in arriving at the conclusion that it could not be permitted. The arbitration agreement, the compromise filed before the Arbitrator and the Award, and the decree passed by the Court all put together clearly go to show that what was referred to arbitration was not as to whether the lease was determined or not but the period for which the tenant should be permitted to
H continue in possession. The lease came to an end by surrender and what

was evolved by the Award was an arrangement on new terms which was not a contract just to bypass cl. 13 aforesaid; for, when the lease itself is determined nothing survives and therefore it could not be contended that it was contrary to the provisions of cl. 13. [479A-D] A

The High Court was also not right in coming to the conclusion that there was no surrender as possession was not handed over. The tenancy came to an end by mutual agreement and what was sought by arbitration as an arrangement for time on payment of damages for use and occupation. It did not either continue the old tenancy or start a new one. [481B-C] B

Foster v. *Robinson,* [1950] All E.R. 342, referred to. C

If the tenant intended to raise the objection that the decree in question could not have been passed on the basis of the arbitration Award as it was in contravention of cl. 13 aforesaid, he should have raised it when the Award was filed in the Court and notice was served on him. The tenant admittedly did not raise this objection which was open to him even when the decree was put to execution more than once. In this view of the matter, the contention that, by not raising this objection earlier the respondent has lost his right to raise the objection and is estopped from doing so, deserves to be accepted. It has already been held that the principles of constructive *res judicata* are applicable even in execution proceedings. [481D-F] D E

Mohanlal Goenka v. *Benoy Kishna Mukherjee & Ors.*, A.I.R. 1953 S.C. 65, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4102 of 1986. F

From the Judgment and Order dated 11.9.1986 of the Madhya Pradesh High Court in Civil Revision No. 176 of 1986.

F.S. Nariman, V.A. Bobde, Anoop V. Mehta, Shyam Mudalia and A.K. Sanghi for the Appellants. G

V.M. Tarkunde, Madan Lokur, N.S. Manudhane and Subodh Lalit for the Respondent.

The Judgment of the Court was delivered by H

A **OZA, J.** This appeal arises out of the judgment passed by the High Court of M.P. in Civil Revision No. 176/86 dated 11.9.86.

This matter arises out of execution proceedings. This execution case was filed by the present appellant against the non-appellant judgment-debtor claiming relief of possession of property including B the Cinema Theatre known as Gujanan Talkies bearing House No. 57(209) in Ward No. 12 (new Ward No. 11) Chalapula on Nazul Plot No. 72, Sheet No. 53-D, Khamgaon Teh. Khamgaon Distt. Buldhana with furniture etc. Against an order passed in this execution in favour of the decree holder the present appellant, the respondent judgment-debtor filed a revision petition before the High Court of Bombay at Nagpur. The revision petition was rejected and against that C order a special leave petition was filed before this Court by its order dated 4.3.86 in Civil Appeal No. 842 of 1986 set aside the order of the High Court and observed that the High Court shall dispose of the revision petition afresh after hearing parties and giving reasons in support of the conclusions. It appears that at the time of hearing, a D request was made by the learned counsel for the judgment-debtor present respondent which was also supported by the counsel for the other side for the revision being sent to some other High Court than the High Court of Bombay at Nagpur and consequently the revision petition was sent to the High Court of M.P. where the learned Judge of the High Court disposed of this revision petition by the impugned E judgment and after obtaining leave from this Court the present appeal is before us.

The facts giving rise to this appeal are that the petitioners appellants are the landlords and the respondent admittedly are the tenants of the suit premises which is a cinema house alongwith furniture, fit- F tings and other things.

On Feb. 24, 1970 the appellants-landlords filed an application under Sec. 13(3)(i), (ii), (iii) and (iv) of the Rent Control Order for permission to issue notice determining the respondent's lease over the premises on the grounds of eviction mentioned in the application G which were bona fide, need, subletting, arrears of rent for more than three months and habitual default in payment of rent. This application was filed against the five respondents, three of whom are sub-tenants. On 9.3.1970, the respondent appeared and filed W.S. denying the allegations but it was not pleaded that there was a written consent for keeping sub-tenants which is essential under Section 13 clause 3 (iii) H and therefore in substance Sec. 13(3)(iii) was, in effect, admitted.

The case was fixed for filing of documents and was adjourned to 16.3.70. On this date the appellant-landlord filed 42 documents and the case was adjourned to 28.3.70. On this date an application was made by both the parties for recording of compromise. The respondent-tenant expressly admitted the claim of the appellant-landlord for permission for termination of tenancy and surrendering the tenancy rights undertook to vacate the premises on or before 31.3.1974. The learned Rent Controller on 31.3.70 passed an order saying that as there is no provision for recording of a compromise, the petition for compromise is treated as an application for filing of the proceedings. He therefore filed the proceedings observing that the matter has been compromised out of the Court.

On 25.6.1970 there was a partition between the three landlords and the property in dispute fell to the share of Shri Vallabhdas Mohta.

On 18.2.1974 an agreement was arrived at between the parties for referring the matter to the arbitration wherein it was clearly mentioned that the tenancy in favour of the respondent tenant stands surrendered and the Arbitrator should decide how much further time should be granted to the respondent-tenant for vacating the premises and what should be the quantum of damages for use and occupation beyond 31.3.1974 which was the agreed date for delivery of possession in their earlier compromise. It is contended by the appellant that this agreement for referring the matter to the Arbitrator clearly showed that the parties agreed that the tenancy stands surrendered and is substituted by an arrangement for continuance of possession. It appears that in pursuance of the arbitration a further compromise was entered into by which time till 31.3.1977 was given for vacating the premises and the compensation for use and occupation was fixed at Rs.1300 plus taxes and on 29.3.1974 an award was made in terms of this compromise and on the basis of this award Civil Judge, Senior Division, Khamgaon by his order dated 16.4.1974 passed a decree in terms of the award in Civil Suit 95/74 after notice to the parties who were represented by counsel.

On 29.12.76 respondent wrote a letter requesting for extension of time to vacate upto the end of December, 1977 on the ground that his amount was blocked with the Distributors of films. On 18.12.77 respondent wrote another letter for extension of time for a longer period as the amount could not be realised during the short period and agreeing to vacate the premises positively by the end of December, 1980.

A On 10.7.1978 the partition was effected between the members of the HUF of Shri Vallabhdas Mohta. On 27.4.79 Vallabhdas Mohta was elevated to the Bench. As the respondent did not vacate as per their assurances on 31.12.1980 the present appellant filed an execution case No. 11/81 for execution of the decree. Notice was issued under order 21 Rule 22 of C.P.C. but no cause was shown by the B respondent and on 24.3.81 an application was made by the parties for recording of compromise to the effect that time for vacating the premises is extended upto 31.12.1982 as the last chance. On 24.3.81 the executing court passed an order disposing of the Execution Application as compromised.

C On 31.12.82 the respondent did not vacate and hand over possession. Consequently on 31.1.1983 a fresh application for execution was filed by the appellant bearing No. 4/83 alongwith four documents. On 29.9.1983 respondent filed another application requesting for recording a compromise that the time is further extended upto 30.6.1984. This application was signed only by two of the appellants and in sub- D stance there was no effective compromise but in the application the respondent stated that the matter has been settled. The appellant filed a reply on 20.10.83 denying the settlement and saying that it was only a tentative suggestion but was not finally settled. On 26.12.83 the respondent filed objections claiming that decree is a nullity and can not be executed. On 21.1.84 a rejoinder was filed replying to the E objections raised by the respondents and on 17.4.84 the appellant filed an application praying to the Court to decide the objections as a preliminary question.

On 1.10.85 Civil Court rejecting the objections filed by the respondents directed the execution to proceed and on 4.10.1985 on the F request of the respondent granted 10 days stay in execution. On 14.10.85 a revision application was filed by the respondent in the High Court and on 15.10.85 this revision was dismissed by the Bombay High Court *in limine* after hearing both the parties but granted one month's time staying the execution to approach this Court. SLP was filed before this Court on 23.10.85 but in the meantime on 15.11.85 one G month's time granted by the High Court expired. The respondent moved the trial court (executing court) and executing court granted a week's time. On 19.11.85 the respondent also moved the High Court for further extension of time but the prayer was rejected by the High Court and ultimately on 30.11.85 decree was executed through the process of the Court and possession was taken from the respondent. H On 9.12.85 in the SLP, this Court passed an order that the appellant be

put in possession to run the business of the Cinema house. The respondent was permitted to take away his machinery and other things but it was directed that the appellant will not create any interest in favour of the third party during the pendency of the matter. Consequently between 28.12.85 and 30.12.85 the respondent removed all his machineries and other sundry articles. This Court on 4.3.86 granted special leave and disposed of the matter finally and remitted it to the High Court to admit the revision petition and hear it on merits and dispose it of in accordance with law and on request made by the parties the matter was sent to the M.P. High Court. The property was given in possession of the receiver although in between the petitioners had installed and put up a new screen. It was also observed by this Court that the revision petition will be disposed of within three months. Thereafter the revision petition was disposed of by the M.P. High Court by the impugned judgment against which the present appeal is filed.

It was contended by learned counsel for the appellant that the C.P. & Berar Letting of Houses and Rent Control Order, 1949 is a regulatory order and controls the action of the landlord in certain aspects only. According to him Sec. 2 sub-clause 6 read with Sec. 2 sub-clause 5 and Sec. 13(1)(a) and (b) shows that it was meant for restricting eviction in specific circumstances by fettering the right of the landlord to terminate the tenancy under Sec. 106 of the Transfer of Property Act with the permission of the Rent Controller. But according to the learned counsel so far as tenant is concerned no permission is necessary and the tenant may terminate the tenancy by giving a quit notice under Section 111 of the Transfer of Property Act or may surrender the tenancy rights by mutual agreement under Sec. 111(e) or surrender impliedly under Sec. 111(f) and such termination may be lawfully done by the tenant even before, during or after the proceedings under clause 13 of the Order and so far as this right of the tenant is concerned, according to the learned counsel, no permission is necessary.

In accordance with the compromise where the tenant declares his intention to surrender the tenancy it is unnecessary for the landlord to pursue the proceedings under clause 13 as the tenant agrees to go and therefore once the tenant expresses the desire to surrender the tenancy there is no need for termination of the lease by the landlord under Sec. 106. Consequently the compromise petition in this case filed before the Rent Controller rendered the proceedings for permission unnecessary. In the face of the compromise it appears that if the view

A taken by the Rent Controller is not correct then in substance the order indicates that he granted permission for surrender of the tenancy and it is only in that context that he could pass an order for filing of the application as once the lease is surrendered the question of determining the lease does not arise and it was contended that this conclusion is the direct result of the recitals in the compromise and the order passed B by the Rent Controller. According to the learned counsel it could only be understood to mean two things i) that the lease stands surrendered and therefore the need of permission to determine does not arise or that as the tenant expresses his desire to surrender the lease stands terminated and therefore the question of permission does not arise or as the tenant expresses the desire to surrender the Rent Controller files the proceedings thereby impliedly permitting the determination C of lease by surrender. In either of the event, according to the learned counsel, in the face of the order passed by the Rent Controller the objections raised by the judgment-debtor in execution could not be sustained.

D It was also contended that delivery of physical possession by the tenant to the landlord is not a pre-requisite for an effective and valid surrender under Section 111(e) and (f). It is only a circumstance from which an implied surrender may be inferred as it is also one of the modes of implied surrender. Similarly actual delivery of possession is also not essential for the determination of lease as according to him, E the plain language of Sec. 111(e) and (f) of Transfer of Property Act does not indicate that delivery of possession is an essential requisite of surrender.

According to the learned counsel compromise and subsequent extension of time by mutual consent ultimately shows the respondent-F tenant's conduct that at every stage the original position of surrender of his tenancy rights was accepted and admitted and still after securing about 12 years on the basis of such compromises this objection has been raised ultimately as according to the learned counsel, the objection to the executability of the decree or its validity should have been raised at the earliest moment as is clear that this decree of 1974 on the G basis of compromise of 1970 is not questioned for all these years but is questioned for the first time in 1983 and repeatedly the judgment-debtor respondent having accepted the position and got further time extended by either compromise or otherwise clearly indicates that he accepted this position and therefore he is estopped from raising such an objection at this stage. Learned counsel for the respondent on the H other hand contended that clause 13(1) of the Order clearly provides

that no lease could be determined without the permission of the Rent Controller and therefore when on the basis of the compromise in 1970 the Rent Controller passed an order filing the application, it is clear that no permission was granted and according to him after that a number of compromises have been entered into but as initially the lease has not been determined with the permission of the Rent Controller the decree for eviction could not be said to be in accordance with Clause 13 and on this basis the objection filed by the respondent judgment-debtor are fully justified. Learned counsel for both the parties on the questions involved referred to series of decisions of High Courts and of this Court in support of their contentions.

Even learned counsel for the respondent could not contend that even if a tenant intend to terminate the lease, a permission under Section 13 was necessary nor it was contended that even if a tenant intended to surrender the lease he could not do so without the previous permission of the Rent Controller under Clause 13. In fact clause 13 of the Order puts restriction on the rights of the landlord to terminate the tenancy and seek eviction. It is because of this that sub-clause 3 of clause 13 of this order provides for grounds on the basis of which a permission for determining the lease could be granted. A perusal of this Sec 13 of the Order therefore indicates that restriction has been imposed on the right of the landlord to seek eviction by determining the lease of the tenant and that could only to be done on specific grounds specified in clause 3 with the previous permission of the Rent Controller.

> "13(1) No landlord shall, except with the previous written permission of the Controller—
>
> (a) xx xx xxx
>
> (b) where the lease is determinable by efflux of the time limited thereby, require the tenant to vacate the house by process of law or otherwise if the tenant is willing to continue the lease on the same terms and conditions."

The scheme of this Order clearly indicates that it is meant to protect the rights of the tenant by restricting the rights of the landlord. It initially puts an embargo on the right of a landlord to determine the lease, if he so chooses. But it does not restrict the tenant to surrender the lease either by specific agreement or by an implication demonstrated by conduct and it will be therefore necessary to examine the

A proceedings which started with the application of the appellant-landlord for permission under clause 13, the reply filed by the respondent-tenant, compromise petition filed by both the parties and ultimately an order passed by the Rent Controller and it is in fact the interpretation of this order which is really material for the decision of this matter as the sole ground challenging the execution is that this B decree of eviction is obtained without the prior permission under clause 13 of the Order, the decree can not be executed and in our opinion therefore it is in this context that the order passed by the executing court which rejected the objections of the judgment-debtor respondent and the High Court of M.P. which allowed the revision petition and allowed the objections filed by the judgment-debtor has C to be examined.

The executing court by its order dated 1.10.85 considered the question including the question of estoppel raised by the appellant decree-holder, the learned Court came to the conclusion that after the compromise and orders of the Rent Controller in Original Suit No. D 5/74 was filed in which the decree was passed which is now being executed. It was held that the tenant respondent did not raise this objection in the suit and that the suit could not be filed as there is no previous permission of the Rent Controller in accordance with Clause 13 of the Order. It also shows that the first execution i.e. Execution No. 11/1981 was filed and notice was served on the judgment-debtor E the decree was not challenged by the judgment-debtor on the ground that it was obtained without the permission of the Rent Controller. In this view of the matter the executing court rejected the objections holding that if after the passing of the decree it was put to execution on number of occasions when the judgment-debtor instead of raising an objection only pleaded for time and time was extended again and F again. Ultimately after 11 years for the first time this objection the judgment-debtor could not raise, the executing court rejected the objections filed by the objector judgment-debtor.

In fact the basic question is as to what is the restriction put because of Sec. 13 of the C.P. & Berar Rent Control Order. As this G Section has been quoted above it is very clear that it starts with *no landlord* and it is this which makes it clear that it is a restriction put on the right of landlord to proceed with the determination of the tenancy and for that purpose it is necessary that he should obtain the permission of the Rent Controller. Sub-clause 2 of this Section again indicates that when a landlord seeks to obtain permission under sub-sec. 1 H then he will have to apply to the Rent Controller.

Sub-clause 3 of this Section thereafter provides that the Rent Controller shall grant permission if he is satisfied in respect of grounds enumerated as sub-clauses of clause 3 of Section 13. The scheme of this Section therefore clearly indicates that the permission which is required under Sec. 13 is only needed when the landlord wants to terminate the tenancy. It is not at all necessary if the tenant wants to surrender the lease or terminate the tenancy or vacate the premises. Section 106 of the Transfer of Property Act reads as under:-

> "106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months, notice expiring with the end of a year of the tenancy, and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.
>
> Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

This provides for termination of the lease and it is clear that the lease could be determined either by the lessor or by the lessee and it is only when the lease is determined by the lesser i.e. landlord that provisions of Section 13 of the C.P. & Berar Rent Control Order is attracted but not otherwise.

Section 111 of the Transfer of Property Act provides for various circumstances when the lease of immovable property comes to an end. It contemplates surrender, implied surrender and it is in this context that the compromise filed before the Rent Controller deserves to be looked at. This compromise was filed before the Rent Controller on 23.3.70. The relevant clause of this compromise reads:

> "(b) The applicants assure and hereby undertake not to evict N.A. 2 before 31st March, 1974. The Applicant No. 2

A shall vacate the premises on or before that day without recourse to any procedure to be followed either before Rent Control Authorities or the Civil Court."

It is therefore clear that the tenant himself offered to vacate the premises on or before 31st March, 1974 without any recourse to any B proceedings before any Tribunal. It therefore clearly appears from this compromise that the tenant agreed to surrender the lease and further agreed to hand over possession on or before 31st March 1974. It is in this context that if language of Sec. 13 is examined, it is plain that after this compromise there remained nothing for which permission could be granted by the Rent Controller. The permission is necessary if the landlord wants to terminate the tenancy on any one of the grounds C available under the provisions of Section 13 and before granting such permission the Rent Controller has to satisfy himself about the existence of the grounds. In this case when landlord sought permission the tenant came forward offering to surrender the lease thereby the tenant expressed a desire to terminate the lease from a particular date and as D is clear from the language of Section 13 that no permission is necessary where the tenant chooses to terminate the lease either by a notice under Sec. 106 or by surrender under Sec. 111 of the Transfer of Property Act and under these circumstances therefore the order passed by the Rent Controller filing this compromise appears to be just and fair. It appears that the Rent Controller took the view that as the E tenant himself has offered to surrender and determine the lease by surrender the question of permission does not arise.

In 1974, Civil Suit No. 5/74 was filed before the Civil Judge and an agreement of arbitration was filed before the Court. In this agreement of arbitration the first clause is very material which reads as F under:

> "Whereas Party No. 2 had surrendered his tenancy rights and had agreed to deliver vacant possession of the following property to landlord party No. 1 and"

G It is signed by the landlord and the tenant and it is clearly stated that party No. 2 had surrendered his tenancy rights and had agreed to deliver vacant possession. It is on the basis of this arbitration agreement that the matter was before the Arbitrator where the compromise was filed which is the basis of the award and on the basis of the award a decree was passed by the Court of Civil Judge, Khamgaon Senior H Division in Regular Civil Suit No. 95/74. During the proceedings in

this suit it is clear that no objection was raised that a decree for eviction could not be passed as there was no permission of the Rent Controller to determine the lease. On the contrary the arbitration agreement itself started with the condition that the tenant had already surrendered his tenancy rights as is clear from the clause quoted above. Clause 2 incorporated in the compromise filed before the Arbitrator reads as under:

> "(2) That Party No. 2 shall pay Rs 1301 (Rs Thirteen hundred and one only) per month as damages from 1.4.1974 and shall also pay all the present and future taxes, including house tax and nazal rent, regularly every month in advance. The quantum of damages is agreed between the parties only upto the agreed date of vacation, after which Party No. 1 will be entitled to damages on the basis of the then market rate."

A similar clause in the agreement and consequent decree go to show that as lease was surrendered and a new arrangement was substituted under which the respondent continued in possession and agreed to hand over possession upto 31.3.77.

Thereafter there was no objection that could be raised to the passing of this decree for eviction and thereafter when possession was not given as provided for in this decree upto 31.3.77 further time was sought and ultimately in spite of repeated extension of time the possession was not handed over till 31.12.80 an execution case was filed which was No. 11/81 and notice was issued under Order 21 Rule 22. In response to this notice again an application was made for recording of compromise for grant of time till 31.12.82 as a last chance and on 24.3.81 the executing court passed an order disposing of the execution on the basis of the compromise permitting time upto 31.12.82. But when possession was not delivered even on 31.12.82 an execution was filed on 31.1.83 bearing No. 4/83 out of which the present appeal arises.

It is clear that from the beginning in 1970 when the compromise was filed before the Rent Controller the tenant has admitted to have surrendered the tenancy rights and thereby determined the lease by surrender. This was again reaffirmed when second time the arbitration was entered into and on the basis of that arbitration agreement, an award was passed on the basis of a compromise, and a decree was passed in terms of the award. Clearly therefore the decree which is to

A be executed is not a decree for eviction on the basis of determination of the lease by the landlord but is a decree passed on the basis of lease having been determined by the tenant himself by surrender which has been stated by the tenant on number of occasions in categorical terms.

In *Shah Mathuradas Maganlal and Co.* v. *Nagappa Shankarappa* B *Malaga and Others*, AIR 1976 S.C. 1565 this Court had the occasion to examine the question of surrender and it was observed as under:

> "A surrender clause (e) and (f) of Section 111 of the Transfer of Property Act, is an yielding up of the term of the lessee's interest to him who has the immediate reversion of the lessor's interest. It takes effect like a contract by mutual C consent on the lessor's acceptance of the act of the lessee. The lessee cannot, therefore, surrender unless the term is vested in him; and the surrender must be to a person in whom the immediate reversion expectant on the term is vested. Implied surrender by operation of law occurs by the D creation of a new relationship, or by relinquishment of possession. If the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such fact as the relinquishment of possession by the lessee and taking over possession by the lessor."

E

It appears that the learned Judge of the High Court felt that when originally a compromise was filed before the Rent Controller it was not in accordance with Sec. 13. In fact Sec. 13 contemplates a permission for determination of the lease but where the tenant agrees to determine the lease himself by mutual consent the question of F permission does not arise. Apart from it, it has not been noticed that in the reply filed before the Rent Controller the subletting is not disputed and it is not pleaded by the tenant the judgment-debtor now the respondent that the sub-lease was with the written consent of the landlord as is required and in this view of the matter the order of the Rent Controller could even be interpreted to mean that permission G was granted but apart from it as the order itself states that the matter is filed apparently because the Rent Controller felt that as the tenant himself has agreed to determine the lease on a particular date there is no question for grant of permission and it is here it appears that the learned Judge fell into the error.

H Thereafter the learned Judge of the High Court has examined

the agreement of arbitration and the compromise filed before the Arbitrator, and had applied the principle of a contract contrary to the public policy and on that basis have come to the conclusion that this could not be permitted. Here again it appears that the learned Judge has committed an error. Apparently the arbitration agreement, the compromise filed before the Arbitrator and the Award and the decree passed by the Court all put together clearly go to show that what was referred to the Arbitration was not as to whether the lease is determined or not but what was referred was the period for which he should be permitted to continue in possession. The determination of lease was agreed between the parties as it was even agreed earlier. The only question therefore was grant of time on the new terms and conditions which were to be determined by the Arbitrator. Thus, in fact the lease came to an end by surrender and what by the Award was evolved was an arrangement on new terms and this therefore does not appear to be any contract just to bypass Section 13, as when the lease itself is determined nothing survives and therefore it could not be contended that it was contrary to provisions of Section 13.

In *Foster* v. *Robinson*, [1950] 2 All E.R. 342 a question more or less similar, as is before us, came for consideration. In that case the question of surrender although the tenant continued to be in possession was considered. It was observed as under:

> "The landlord, a farmer, was the owner of a cottage. Shortly after the 1914-1918 war the defendant's father was engaged to work for the landlord on his farm, and at the time of that engagement and in consequence of his employment the cottage was let to the defendant's father at a rent of £ 3.5.s a half year. Shortly before May 1946, the defendant's father, owing to age and infirmity, gave up work, and in that month there was made between him and the landlord a verbal agreement whereby the existing tenancy was to cease, the landlord was not to charge rent any more, and the defendant's father was to be allowed to live in the cottage for the remainder of his life rent free. On Jan. 15, 1950 the defendant's father died. The defendant, a daughter of the deceased, had lived with him in the cottage for a number of years and was residing there at the date of his death. The landlord informed the defendant that it was his intention to sell the cottage, but that she could continue to reside there rent free until Apr. 6, 1950. On Feb. 18, 1950, letters of administration were granted to the defendant

A who refused to leave the cottage, claiming that at the date of his death her father was still a contractual tenant under the original tenancy and that tenancy was now vested in her.

The question on the facts quoted above was examined and in plain language it was observed:

B

"The question in the present case is whether on the facts as found by the learned county court judge there are circumstances which prevent the tenant from asserting that the old relationship has been superseded by the new. Put in its simplest form, if there is a new arrangement which the tenant represents by his conduct that he is asserting, then C he is estopped from denying that the landlord was capable of entering into the new arrangement, and, if the new arrangement could not be entered into if the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone."

D

And having so found it was further held:

"Having so found, I can see no ground why the transaction should not have the result the parties intended it should have. I think it amounts to this, that the determination of E the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. I think, to use the language of *Cockburn, C.J. in Oastler* v. *Henderson* (6) (2 Q.B.D. 578) there was a virtual taking of possession. If the key had been handed over and then been F handed back the next minute that would have symbolised the delivery up and the grant of possession and I cannot think that it vitally matters that performance was not gone through. That is the effect of a surrender by operation of law in such a case as the present and the learned Judge has so found, and, there being evidence to support that finding, G we would not be justified in differing from his conclusion as to fact, and, if not, it seems to me the conclusions which I have stated necessarily follow. The whole question is: Was the old contractual tenancy determined? Was it determined as the result of surrender by operation of law? The learned county court judge found that it was, and I think that is a H finding supported by the evidence without any misdirection

in law and that this appeal should be dismissed." A

It is thus clear that when the parties surrendered the tenancy and substituted by a fresh arrangement merely because technically the possession was not handed over is of not much consequence. Apparently in the present case also by mutual agreement the tenancy came to an end, and by arbitration what was sought was an arrangement for time B on payment of damages for use and occupation. Admittedly it did not either continue the old tenancy or started any new one. This substitution of new arrangement and the determination of the old by mutual agreement clearly indicates that the tenant surrendered his tenancy rights and the court below was not right in coming to the conclusion that the surrender is no there as possession was not handed over. C

The next question which is of some importance is about raising of the objections at the earlier stage. Admittedly when the award was filed in the court, notice was served and no objection was raised. If the tenant intended to raise the objection that this decree on the basis of D the award could not be passed as it was in contravention of Sec. 13 of the Rent Act and therefore was absolutely without jurisdiction. Such an objection could have been raised there and then. The tenant admittedly did not raise this objection which was open to him. In this view of the matter, the contention on behalf of the appellant about the constructive res-judicata also is of some significance. This question of E constructive res judicata in execution proceedings came before this Court in *Mohanlal Goenka* v. *Benoy Kishna Mukherjee and others,* AIR 1953 S.C. 65. In this decision following the earlier decision of the Privy Council, this Court ruled that the principles of constructive res-judicata will be applicable even in execution proceedings.

F

It is also clear that if when the decree was passed on the basis of award and notice was issued to the judgment-debtor respondent no such objection was raised. It is also clear that the decree was put in execution on more than one occasions and this objection was for the first time raised only in 1983. In this view of the matter also the contention of the learned counsel for the appellant that by not raising this G objection earlier the judgment-debtor has lost his right to raise this objection and he is estopped, deserves to be accepted, although in the light of what we have discussed earlier, it is not necessary to go into this question, having come to the conclusion on the first question against the respondent.

H

A In the light of the discussion above therefore the judgment passed by the High Court can not be maintained. The appeal is therefore allowed. The judgment passed by the High Court is set aside and that passed by the executing court is maintained. In the circumstances of the case the parties are directed to bear their own costs.

B H.L.C. Appeal allowed.