A CENTRAL BANK OF INDIA

v.

VRAJLAL KAPURCHAND GANDHI AND ANR.

JULY 16, 2003

B [SHIVARAJ V. PATIL AND ARIJIT PASAYAT, JJ.]

Rent Control and Eviction :

C *Maharashtra Rent Control Act, 1999—Section 3(1)(b)—Writ petition filed against eviction—Tenant filing amendment application seeking to challenge the validity of section 3(1)(b)—High Court allowing the application but dismissing the writ petition, declining to examine the validity of the provision—On appeal, held: High Court should have considered the constitutional validity of the provision—Section 113 CPC not applicable* D *since the question has already been decided by a Division Bench of High Court—Matter remitted to High Court for fresh adjudication—Code of Civil Procedure, 1908 Section 113.*

Respondents-landlords filed a suit against appellant-tenant seeking vacant possession of the suit premises. Small Causes Court decreed the suit E **in favour of the landlord. Appellant filed an appeal which was dismissed. Appellant-tenant filed a writ petition and also filed an amendment application seeking to challenge validity of provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999. High Court allowed the amendment application holding that section 3(1)(b) was applicable. It however, dismissed** F **the writ petition without dealing with the plea of validity of the section. Also the case was disposed of on the same date on which the amendment was allowed. Hence the present appeal.**

Appellant-tenant contended that after having allowed the amendment relating to validity of Section 3(1)(b), the High Court was not justified in G **dismissing the writ petition without examining that question; that the case was disposed of on the date application for amendment was filed; that it is inconceivable that the appellant having taken all pains to get the petition amended, would give up; that though a Division Bench of High Court has upheld the validity of the provision in question in earlier decision yet several matters have been admitted by this Court and validity of the section in question is**

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being examined by this Court; that section 113 CPC under which the Court could have made a reference to the High Court, has no application, and in any event the High Court having accepted the prayer for amendment ought to have considered the issue which was of vital importance; and that if it felt bound by the decision of the Division Bench rendered earlier, at least reference thereto should have been made. A B

Respondent-landlord contended that the challenge to the constitutional validity of Section 3(1)(b) was given up before the High Court as is evident from the impugned order and it is not open to the appellant to make a grievance that the question was not examined by the High Court; that if the appellant takes the stand that the plea was not given up, the proper course is to approach the High Court for clarification, if any; and that had the stand been taken before Courts below, in case of necessity, section 113 CPC could have been resorted to. C

Allowing the appeal, the Court

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HELD: 1.1. Since the Division Bench of the High Court has already decided the question in an earlier decision, Section 113 of the Civil Procedure Code, 1908 has no application to the present case. [567-A]

2.1. The High Court had permitted the challenge to be made by allowing the application for amendment. The case was disposed of on the date the amendment was allowed, and in fact by the consolidated order which dealt with the prayer for amendment, allowed it and went on to dispose of the writ petition, without dealing with plea of invalidity. Therefore, in the factual background, the High Court should have considered the challenge to the constitutional validity of Section 3(1)(b) of the Maharashtra Rent Act as raised by the appellant. It can certainly consider the effect of any earlier decision; however no opinion is expressed on that aspect. [567-B-D] E F

State of Maharashtra v. *Ramdas Shrinivas Nayak and Anr.*, [1982] 2 SCC 463; *Bhavnagar University* v. *Palitana Sugar Mill Pvt. Ltd.*, [2002] AIR SCW 4939; *Roop Kumar* v. *Mohan Thedani*, [2003] 3 SCALE 611; *K.S. Venkataraman & Co.* v. *State of Madras*, [1966] 2 SCR 229; *Dhulabhai* v. *State of Madhya Pradesh and Anr.*, AIR [1969] SC 78; *C.I.T. Madhya Pradesh, Nagpur and Bhandara* v. *M/s. Straw Products Ltd.*, AIR [1966] SC 1113; *L. Chandra Kumar* v. *Union of India and Ors.*, [1997] 3 SCC 261 and *West Bengal Electricity Regulatory Commission* v. *CESC Ltd.*, [2002] 8 SCC 715, referred to. G H

A **2.2. The order of the High Court is set aside and the case is remitted back to High Court for fresh adjudication. [567-D]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4634 of 2003.

From the Judgment and Order dated 7.1.2003 of the Mumbai High Court
B in W.P. No. 209 of 2003.

P. Chidambaram, J.S. Wad, Ashish Wad, Ms. Niharika Bhal for M/s. J.S. Wad & Co., for the Appellants.

R.F. Nariman, P.H. Parekh, Rohit Alex for M/s. P.H. Parekh & Co., for the
C Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

D Though controversy lies within a very narrow compass, elaborate arguments on various principles of law were highlighted, which shall be dealt with after noticing the factual scenario involved.

Factual background as highlighted by the appellant and accepted to be correct in material aspects by the respondents run as follows: Appellant, a
E nationalized bank, on the basis of a deed of lease executed on 8.4.1964 is a tenant under the respondents presently. The original landlord was respondents' predecessor-in-title. The respondents (hereinafter referred to as 'landlords') filed a suit under Section 13(1)(g) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 (in short 'the Bombay Rents Act') in 1983
F seeking eviction on the ground of *bona fide* requirement. The trial court decreed the suit in favour of the landlord by order dated 8.4.1994. It was held that landlords had proved reasonable need and greater hardship would be caused to the landlords if prayer for eviction is not allowed. The said order was challenged in Appeal No.208 of 1994 before the Small Causes Court, Mumbai by the present appellant, which was allowed. It was, inter alia, held
G that the hardship factor must be held against the landlords as the case was one where a purely business concern is pitted against the interest of the common man. It was noticed that the landlords had a flourishing business and had expanded his business and the present appellant being a nationalized bank existing for general public, and in that view of the matter the prayer for eviction was turned down. The landlords challenged the aforesaid order by
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filing a writ petition no. 5668 of 1995 before the Bombay High Court; which is pending. In the year 1999, Maharashtra Rent Control Act, 1999 (hereinafter referred to as 'the Maharashtra Rent Act') was enacted w.e.f. 31.3.2000. The said Act, according to the appellant-bank, took away protection of Bombay Rents Act to the institutions like banks and companies. However, provisions of Section 58 save pending proceedings under the said Act. On 10.4.2000 the landlords sent notice to the appellant-bank claiming termination of tenancy with reference to Section 3(1)(b) of the Maharashtra Rent Act. The appellant-bank disputed the claim of the landlords. Subsequently a suit was filed in the Small Causes Court, Mumbai under the Maharashtra Rent Act bearing No. T.E.&R Suit No. 91/120 of 2000. In the suit the landlords sought vacant possession of the suit premises and mesne profits at the rate of Rs. 3,00,000 per month.

Appellant-bank filed written statement refuting the stands taken that the tenancy had been lawfully terminated and the grounds indicated therefor. Reference was made also to the proceedings in the Bombay High Court under the Bombay Rents Act. It was contended that in view of Section 58 of the said Act, suit was not maintainable. The Small Causes Court, Mumbai passed judgment and decree in favour of the landlord holding that the suit was maintainable, the tenancy had been validly terminated and directed the appellant-bank to hand over possession of the suit premises to the landlord. Aggrieved by the said order the appellant-bank filed appeal no. 718 of 2001 before the Appellate Court which dismissed the same by order dated 12.7.2002. Appellant-bank filed writ petition (civil) No. 209 of 2003 in the Bombay High Court.

On 7.1.2003 an application for amendment of the writ petition was filed seeking to challenge validity of provisions contained in Section 3(1)(b) of the Maharashtra Rent Act. The High Court by the impugned order while allowing the application for amendment held that the case was covered by Section 3(1)(b) of the said Act and the writ petition was dismissed.

Mr. P. Chidambaram, learned senior counsel for the appellant submitted that after having allowed the amendment relating to validity of Section 3(1)(b) of the Maharashtra Rent Act, the High Court was not justified in dismissing the writ application without examining that question. It is submitted that though a Division Bench of the Bombay High Court has upheld the validity of the provisions in question yet several matters have been admitted by this Court and validity of the section in question is being examined by this Court.

A Additionally, it is submitted that a writ petition has been filed by the appellant as a matter of abundant caution, questioning validity of the aforesaid provisions, and by order dated 10.4.2003 the same has been directed to be heard along with Civil Appeal no. 8017 of 2002.

In response Mr. R.F. Nariman, learned senior counsel for the respondents
B submitted that challenge to the constitutional validity of Section 3(1)(b) of the Maharashtra Rent Act was given up before the High Court as is evident from the impugned order and it is not open to the appellant to make a grievance that the question was not examined by the High Court. With reference to the question of non-adjudication in this issue, it is submitted that if the appellant
C takes the stand that the plea was not given up, the proper course is to approach the High Court for clarification, if any.

It is also pointed out the validity of the provisions was never in issue before the Courts below and for the first time by way of amendment of the writ petition, the challenge was sought to be introduced.

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By way of reply to the aforesaid stand of the learned counsel for the landlords, Mr. Chidambaram pointed out that the application for amendment was filed on 7.1.2003 i.e. the date on which the impugned order was passed. The High Court granted leave to amend and thereafter proceeded to examine the matter. It is inconceivable that the appellant having taken all pains to get
E the petition amended, would give up. The order observing that no other plea was pressed in the matter means that no other point other than the pleas relating to Section 3(1)(b) were pressed. Clearly, earlier decision by the Division Bench was looming in the background, though not specifically stated. The courts below could not have decided the question regarding validity of the
F provisions, being creatures of the statutes.

According to him Section 113 of the Code of Civil Procedure, 1908 (in short 'CPC') to which Mr. Nariman has referred to submit, that the Court could have made a reference to the High Court, have no application, and in any event the High Court having accepted the prayer for amendment ought to
G have considered the issue which was of vital importance. If it felt bound by the decision of the Division Bench, rendered earlier, at least reference thereto should have been made.

The rival contentions need careful consideration. There can be quarrel with the proposition as submitted by Mr. Nariman that if an order records
H something, a party cannot be permitted to plead to the contrary specially in

the matters as to whether there was any concession regarding a point, or whether it was given at the time of hearing. A

The only course open to a party taking the stand that order does not reflect actual position is to move the High Court in line with what has been said in *State of Maharashtra* v. *Ramdas Shrinivas Nayak and Anr.*, [1982] 2 SCC 463. In recent decisions i.e. *Bhavnagar University* v. *Palitana Sugar Mill Pvt. Ltd.*, (2002) AIR SCW 4939 and *Roop Kumar* v. *Mohan Thedani*, (2003) 3 SCALE 611 the view in the said case was reiterated. Statements of fact as to what transpired at the hearing recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to a party to contend before this Court to the contrary. This Court cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy and judicial decorum do not permit it. Matters of judicial record in that sense are unquestionable. However, the Court can pass appropriate orders if a party moves it contending that the order has not correctly reflected happenings in Court. B C D

Applying the logic of aforesaid principles, the stand of Mr. Nariman at first flush appeared to be on terra firma. But there are several factors which make the contentions of Mr. Chidambaram acceptable. It is undisputed that the application for amendment was filed on 7.1.2003, and related to constitutional validity of Section 3(1)(b) of the Maharashtra Rent Act. The High Court granted leave to amend. Though the High Court has not clearly stated so in the order, in the contextual backdrop the same has great relevance. E F

It is fairly settled position in law that Court or Tribunal constituted under a statute cannot adjudicate upon the constitutional validity of the concerned statute. This position has been highlighted by this Court in several decisions. (See *K.S. Venkataraman & Co.* v. *State of Madras*, [1966] 2 SCR 229, at page 251), *Dhulabhai* v. *State of Madhya Pradesh and Anr.*, AIR (1969) SC 78, *C.I.T., Madhya Pradesh, Nagpur and Bhandara* v. *M/s. Straw Products Ltd.*, AIR (1966) SC 1113, *L. Chandra Kumar* v. *Union of India and Ors.*, [1997] 3 SCC, 261 and recently in *West Bengal Electricity Regulatory Commission* v. *CESC Ltd.*, [2002] 8 SCC 715. G H

A Great emphasis was laid on Sec. 113 CPC, by Mr. Nariman to contend that had the stand been taken before Courts below, in case of necessity, the provision could have been resorted to.

The said provision reads as follows:

B "*113 Reference to High Court* - Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

C [Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the D Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation - In this section, "Regulation" means any Regulation E of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.]"

The proviso is relevant for our purpose. It operates in the following circumstances.

F (a) The Court is satisfied that in a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained therein;

(b) Determination of the aforesaid question is necessary for disposal G of the case;

(c) The Court is of the opinion that such Act, Ordinance or Regulation or a provision contained in an Act, Ordinance or Regulation are inoperative;

(d) But the concerned Act, Ordinance or Regulation or provision has H not been declared invalid or inoperative by the High Court to which the Court

where the case is pending is subordinate or by the Supreme Court. A

Undisputedly, a Division Bench of the High Court has decided the question and, therefore, Section 113 has no application.

It is not, however, necessary to go into the question whether having not taken the plea before the courts below, the High Court should have B permitted the question to be raised before it as admittedly, the High Court had permitted the challenge to be made by allowing the application for amendment. The case was disposed of on the date the amendment was allowed, and in fact by the consolidated order which dealt with the prayer for amendment, allowed it and went on to dispose of the writ petition, without dealing with C plea of invalidity.

In the aforesaid factual background High Court should have considered the challenge to the constitutional validity of Section 3(1)(b) of the Maharashtra Rent Act as raised by the appellant. It can certainly consider the effect of any earlier decision. We do not express any opinion on that aspect. The order of D the High Court is set aside and the case is remitted back to the High Court for fresh adjudication on merits in accordance with law.

The appeal is allowed to the extent indicated. Costs made easy.

N.J. Appeal allowed. H