Erach Boman Khavar vs Tukaram Sridhar Bhat & Ors on 12 December, 2013

Equivalent citations: AIR 2014 SUPREME COURT 544

Author: Dipak Misra

Bench: Dipak Misra, Anil R. Dave

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11005 OF 2013
(Arising out of SLP (Civil) No. 25369 of 2010)

Erach Boman Khavar ... Appellant

Versus

Tukaram Shridhar Bhat and another ...Respondents

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. This appeal, by special leave, is directed against the judgment and order dated 23.6.2010 passed by the Division Bench of the High Court of Judicature at Bombay in Appeal No. 262 of 2007 reversing the judgment and order passed by the learned single Judge in Company Application No. 720 of 2006 in Company Petition No. 201 of 1994 whereby the learned single Judge had granted leave to the appellant to institute a suit for eviction against the respondent therein.

3. The broad essential facts giving rise to the present appeal are that on 17.6.1975 the father of the appellant entered into an agreement of leave and licence with respondent No. 2 – Company, namely M/s. Poysha Industrial Co. Ltd. in respect of a flat owned by him. As put forth by the appellant, the licence expired by efflux of time but the respondent No. 2 continued to pay the licence fee and the same was accepted by the father of the appellant without prejudice. In the year 1990 a suit for eviction was instituted by the predecessor-in- interest of the appellant against respondent No. 2 and

the sub-tenant under the Bombay Rent Act, 1947. On 4.3.1997 the sub-tenant, the first respondent herein, filed an application for impleading himself as a party in the suit contending that he was the sub-tenant. It is apt to note here that he was the Managing Director of the respondent No. 2 - company. On 17.6.1997 the Small Causes Court allowed the application and impleaded the respondent No. 1 as a defendant. While the suit was in progress, on 9.1.1998 in a separate proceeding the learned Company Judge passed a winding up order against the respondent No. 2 – Company. At that stage, the landlord filed CA No. 731 of 1999 before the High Court seeking possession of the flat. On 14.2.2000, the learned single Judge rejected the application opining that before the premises could be returned, the rights of the person to occupy the premises are required to be determined. It was observed that it was only in the clear case where there is no valid or legal subsisting tenancy or sub-tenancy that the premises could be returned to the landlord. The said order was assailed before the Division Bench which by order dated 22.8.2000 accepted the reasoning ascribed by the learned single Judge and dismissed the appeal.

4. As the factual matrix would further undrape, the father of the appellant filed an application for amendment of the plaint in the suit for incorporation of the certain other grounds including the unlawful subletting by the respondent-company to the first respondent and the said amendment was sought to be made in terms of Section 3(1)(b) of the Bombay Rent Act, 1947. Eventually, by order dated 9.11.2000 the said application for amendment was rejected on the ground that the Bombay Rent Act had been repealed on 31.3.2000. Thereafter, Suit No. 226/336 of 2001 was instituted in the Small Causes Court for eviction on the ground of illegal subletting. As set forth, the said suit was filed after obtaining leave from the Companies Court under Section 446 of the Companies Act, 1956 (for short "the 1956 Act"). On 2.1.2002 as the original plaintiff, the father of the present appellant expired, an application for substitution was filed and thereafter the legal representatives including the appellant were brought on record vide order dated 28.3.2002. As the factual matrix would unveil, the said suit was withdrawn on 12.7.2004.

5. On 21.9.2005 the appellant terminated the tenancy and thereafter on 18.10.2005 filed CA No. 45 of 2006 before the learned Company Judge under Section 446 of the 1956 Act seeking permission to file eviction suit in the Small Causes Court as the respondent – Company was not entitled to protection under Maharashtra Rent Control Act, 1999 (for brevity "the 1999 Act") in view of Section 3(1)(b) of the said Act.

6. The learned Company Judge on 23.2.2006, on the basis of a statement made by the contesting respondent, granted permission for filing an amendment subject to the rights and contentions of respondent No. 3 therein on merits. However, the Court observed that it was not necessary to present Judge's Summons and granted liberty to file application, if necessary. Though such an order was passed, the appellant did not file an application for amendment on the legal advice and keeping in view the liberty granted by the learned single Judge, filed CA No. 720 of 2006 for grant of leave to file the eviction suit in terms of the provisions contained in the 1999 Act. The learned single Judge vide order dated 27.7.2006 passed the following order: -

> "Perused the affidavit in support. Since the applicant has instituted a Suit against the Company in Liquidation, seeking its eviction from the premises, more particularly,

described in the affidavit in support and the Suit/Application is pending. Company Application is made absolute in terms of prayer clause (a).

This order is passed without prejudice to the rights and contentions of the Official Liquidator and it would be open for the Liquidator to raise all such contentions as are permissible in law."

7. Thereafter, an application for recall was filed contending, inter alia, that the court was misguided as the order indicated that the court was under an impression that the suit had already been instituted earlier. The learned Company Judge, on perusal of the Company Application No. 720 of 2006, found that the court was not misguided as the said suit was mentioned as proposed suit in the affidavit in support of the application. Being of this view, he opined that the order dated 27.7.2006 did not require to be interfered with. He further observed that as no provision of law had been shown under which the proposed defendants to the suit were required to be heard before leave was granted under Section 446 of the 1956 Act. He also took note of the fact that the official liquidator in the earlier proceedings had made a statement to the court that the suit premises were not required by the liquidator for effective management of the winding up proceedings and the order was passed without prejudice to the rights and contentions of the official liquidator and further it was observed that it would be open for the official liquidator to raise all such contentions as permissible in law. The learned Company Judge also took note of the fact that the tenancy right of the company had not been disputed by the plaintiff and no decree could be passed without a full-fledged trial in the suit. Being of this view, he dismissed the application.

8. The said order came to be assailed in appeal No. 779 of 2006 before the Division Bench which by order dated 7.11.2006, upon adumbration of all the facts and delineation of the impugned orders, set aside the orders dated 27.7.2006 and 28.9.2006 as the learned Company Judge had not kept himself alive to Rule 117 of the Companies (Court) Rules, 1959 which envisages that an application under Section 446(1) for leave of the Court to commence or continue in suit or proceedings against the company shall be made upon notice to the official liquidator and the parties to the suit or proceedings sought to be commenced or continued and, accordingly, remitted the matter to the learned Company Judge to hear and decide the application afresh in accordance with law after affording opportunity to the sub-tenant also.

9. After the remit, the learned Company Judge vide order dated 5.3.2007, adverting to the submissions raised at the bar, came to hold that the objection as regards the maintainability of the application raised by the counsel on behalf of the sub-tenant that failure to obtain leave prior to institution of the suit would debar the court from granting leave was devoid of any substance; that the contention to the effect that the order passed on 23.2.2006 debarred the applicant from moving and prosecuting another application for grant of leave to file a fresh suit under Section 41 of the Presidency Small Causes Court Act being hit by principle analogous to doctrine of res judicata was untenable inasmuch as on an earlier occasion the question of grant of leave had not been decided on merits and further liberty was reserved in favour of the applicant to apply; that the object behind Section 446 of the 1956 Act is to save the company which is being wound up from unnecessary litigation and to protect the assets for equitable distribution among its creditors and shareholders

and the court, while dealing with the question of grant of leave has to necessarily consider the interest of the company and ordinarily leave should be granted where the question at issue in such a situation cannot be gone into and decided in the winding up proceedings as in the case at hand, the tenancy rights of the company in the tenanted premises are not the assets for the purpose of liquidation proceedings and merely because the company is in liquidation and liquidator has been appointed, the rights of the company vis-à-vis the landlord or tenants did not go through any change; and that the official liquidator had no objection for releasing the premises in favour of the landlord and as the sub- tenant was the only contesting party, and accordingly granted leave. Be it noted, the learned Company Judge while granting leave has opined thus: -

> "The issues involved in the suit and the reliefs claimed cannot be adjudicated upon or decided by this Court in exercise of company jurisdiction. That jurisdiction shall be with the court trying the suit. The interest of the company in liquidation is not at all involved in the said suit as already recorded hereinabove for the reasons stated. Therefore, the question of invocation of jurisdiction of the Small Causes Court either under Section 28 of the Bombay Rent Act or under Section 33 of the Maharashtra Rent Act or under Section 41 of the Presidency Small Causes Court Act is not relevant for the purpose of grant of leave because the question of jurisdiction of the court will have to be decided on the basis of the plaint pleadings.

The small Causes Court would be well within its right to decide its own jurisdiction. In the event; it comes to the conclusion that it has no jurisdiction to try a suit under the Presidency Small Causes Court Act, in that event, it would be open for that Court either to return or reject the plaint or permit the conversion of the suit. All these conflicting questions need not be gone into and adjudicated upon by this Court at the stage of grant of leave. Only this Court has to consider that the suit is not a frivolous suit, that the suit is not such which is bound to fail for the reasons apparent on the face of the record and the same is not going to create strain on the resources of the Official Liquidator. At any stage the question raised in the suit is arguable one." [Underlining is ours]

10. The legal substantiality of the aforesaid order was challenged in Appeal no. 262 of 2007 and before the Division Bench it was contended that the application for grant of leave had already been disposed by refusing it vide order dated 23.2.2006 and granting permission to file an application for amendment in the plaint in the Small Causes Court and the concession given by the appellant not to oppose the same was not availed of and hence, a second application seeking grant of the same relief was not maintainable. It was further urged that TER Suit No. 111/127 of 2006, the second suit, was instituted pursuant to leave granted by the learned Company Judge vide order dated 27.7.2006 which was revoked by order of the Division Bench in appeal and, therefore, the learned Company Judge could not have granted leave to continue the said suit. The grant of leave by the learned Company Judge was criticized further on the ground that the earlier order dated 23.3.2006 was only for the limited purpose for seeking clarification of the order and not for filing a fresh application seeking grant of leave. The aforesaid submissions were resisted by the present appellant on many a score including the interpretation of the earlier order and how it would not operate as res judicata.

11. The Division Bench placed reliance on Arjun Singh v. Mohindra Kumar and others[1] and came to hold that when the second application for leave was filed, there was no change in the circumstances and in the absence of any changed circumstances, the second application for leave was not maintainable as it was barred by principles of res judicata being a successive application in the same court on self-same facts. It was further opined that it is open to the appellant to file an application for review or to file an appeal against the said order and as long as the said order remained alive, a fresh application could not have been entertained by the learned Company Judge. To interpret the term "grant of liberty" the Division Bench held that on the basis of the grant of liberty the case could not have been reopened. For the said conclusion reliance was placed on Kewal Chand Mimani v. S.K. Sen and others[2]. The Division Bench, however, clarified that the respondent No. 3 therein would be entitled to make an application for grant of leave for instituting a fresh suit after taking recourse to such remedy for annulment of the order dated 23.2.2006 passed in Company Application No. 45 of 2006.

12. We have heard Mr. Shyam Divan, learned senior counsel appearing for the appellant and Mr. Shekhar Naphade, learned senior counsel appearing for the respondents.

13. The central issues that seems to be cemented by the verdict of the Division Bench are that the order dated 23.2.2006 passed by the learned single Judge in Company Application No. 45 of 2006 in Company Petition No. 201 of 1994 operates as res judicata debarring the appellant to file an application for grant of leave and further the observation "liberty to applicant to apply" does not enable the appellant to get out from that legal labyrinth because it does not confer a right on a party to re-agitate the matter.

14. To appreciate the heart of the controversy, it is necessary to reproduce the order dated 23.2.2006 in entirety: -

> "Leave to amend the title in respect of Respondent No. 2 to read "The Official Liquidator of M/s. Poysha Industrial Company Limited". Amendment to be carried out within two weeks from today.
>
> 2. Mr. Thakkar, the learned Senior Counsel appearing on behalf of Respondent No. 3 states that in the event of the Petitioner making an Application for amendment of the plaint in R.A.E. suit No. 228/336 of 2001 on the basis of the averments made in the present Judges Summons, Respondent No. 3 will not oppose the same. In view thereof, it is not necessary to grant the present Judges' Summons.
>
> 3. Liberty to the Applicants to apply, if necessary. The amendment, if granted, will however be subject to the rights and contentions of Respondent No. 3 on merits."

15. Criticizing the analysis and the conclusion of the Division Bench Mr. Shyam Divan, learned senior counsel for the appellant, has submitted that the said order goes against the spirit of Section 446 of the 1956 Act and further it would not remotely attract the doctrine of res judicata in its conceptual essentiality, for none of the ingredients on which the edifice of the said principle is built

are attracted to the facts of the case. It is his further submission that when there had been no adjudication on merits by the learned Company Judge with regard to grant or refusal of leave on earlier occasion, the principles set out in the case of Arjun Singh (supra) would not be attracted. That apart, contends Mr. Divan, that the words "liberty to the applicants to apply, if necessary" are to be contextually understood and regard being had to the backdrop of the application and the delineation by the learned Company Judge and not to be put in a straight-jacket formula and, in any case, the decision in Kewal Chand Mimani (supra) is not applicable.

16. Mr. Nephade, learned senior counsel for the respondents, per contra, would contend with emphasis that the order dated 23.2.2006 has been appositely understood by the Division Bench and it has justifiably been held to operate as res judicata debarring a party from filing a successive application on self-same facts and hence, no fault can be found with the decision rendered in appeal. He would further submit that the learned Judges of the Division Bench have correctly understood the observation of the learned Company Judge "liberty to applicant to apply" and in law, no benefit did accrue to the appellant to file another application in the said proceeding for grant of leave. That apart, the appellant chose not to file amendment in the pending suit which was conceded not to be opposed by the respondents but, on some pretext or other he filed another application for grant of leave to institute a suit under another enactment and, therefore, the Division Bench has rightly unsettled and dislodged the order passed by the learned Company Judge.

17. To appreciate the submissions in their proper perspective, we may refer to Section 446 of the 1956 Act which reads as follows: -

> "446. Suits stayed on winding up order. – (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.
>
> (2) Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-
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> (a) any suit or proceeding by or against the company;
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> (b) any claim made by or against the company (including claims by or against any of its branches in India);
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> (c) any application made under section 391 by or in respect of the company;
>
> (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or rise in course of the winding up of the company, whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the

Companies (Amendment) Act, 1960 (65 of 1960).

3. (omitted by Act 11 of 2003, sec. 61)

4. Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

18. Reflecting on the said provision, this Court in Central Bank of India v. M/s. Elmot Engineering Company and others[3] has ruled that it aims at safeguarding the assets of a company in winding up against wasteful or expensive litigation as far as matters which could be expeditiously and cheaply decided by the company court are concerned. In granting leave under the said provision, the court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost.

19. In Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and others[4], while dealing with power under Section 446(1) of the 1956 Act, it has been observed that in the said sub-section the words used would indicate that the discretion to exercise such power is with the company court.

20. In State of J&K v. UCO Bank and others[5], while interpreting Section 446(1) of the 1956 Act, the Court opined that a suit cannot be instituted once a winding-up order is passed except by leave of the court. The two-Judge Bench referred to the earlier decision rendered in Bansidhar Shankarlal v. Mohd. Ibrahim[6], wherein the leave had been obtained at the time of filing of the suit and the question was whether fresh leave ought to be obtained before proceeding under Section 446(1) of the 1956 Act before institution of execution proceedings. The Court considered the contrary views expressed by different High Courts on the effect and purport of Section 446(1) of the 1956 Act and came to the conclusion that the view that failure to obtain leave prior to institution of suit would not debar the court from granting such leave subsequently and that the only consequence of the same would be that the proceedings would be regarded as having been instituted on the date on which the leave was obtained from the High Court.

21. We have referred to the aforesaid decisions solely for the two purposes. First, grant of leave of the court is not a condition precedent for initiation of a civil action or the legal proceedings. It is because the Section does not expressly provide for annulment of a proceeding that is undertaken without the leave of the court. There can be no shadow of doubt that leave of the winding up court can be obtained even after initiation of the proceeding. The second, the seminal object behind engrafting of the said provision is to see that the interest of the company is safeguarded so that it does not face deprivation of its right and claims are adjudicated without the knowledge of the company court and further the court has a discretion to see whether leave should be granted and, if so, with what conditions or no condition. That apart, the court may grant leave if it felt that the company should not enter into unnecessary litigation and incur avoidable expenditure.

22. In the case at hand, the official liquidator had clearly stated that the suit property was not the property of the company and, therefore, the company should not enter into that kind of litigation.

The learned Company Judge has taken note of it and further granting all protection to the official liquidator, has allowed the application for seeking leave. However, as is seen, the Division Bench had dislodged the order of the learned single Judge solely on the ground that the earlier order dated 23.2.2006 stared at the face of the appellant and operates as res judicata.

23. Presently we shall address to the issue whether the order which has been construed operating as res judicata by the Division Bench, does really come within the ambit and sweep of the principles of res judicata or not.

24. In Satyadhyan Ghosal and others v. Smt. Deorajin Debi and another[7], a three-Judge Bench adverted to the principle of res judicata and its application as between two stages in the same litigation and opined that when a Court at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding. The facts in the said case are that the appellant-landlord who had obtained a decree for ejectment against the tenant had not yet been able to get possession in execution of the decree. The decree was obtained on February 10, 1949 and soon thereafter the Calcutta Thika Tenancy Act, 1949 came on the statute book on March 3, 1949. The tenants made an application under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the decree. The said application was dismissed on July 16, 1949. On 9.9.1949, an application was made by the tenant under Section 28 of the Calcutta Thika Tenancy Act alleging that they were Thika tenants and hence, the decree made against them may be rescinded. After contest, the learned Munsif came to hold that applicants were not Thika tenants within the meaning of Thika Tenancy Act and accordingly declined to rescind the decree. The aforesaid order was challenged in a revision under Section 115 of the Code of Civil Procedure. At the time when the revision application was taken up for hearing, the Calcutta Thika Tenancy Ordinance had come into force on October 21, 1952 and thereafter the Calcutta Thika Tenancy (Amendment) Act, 1953 came into force. The Amendment Act omitted Section 28 of the original Act. In order to decide whether the application under Section 28 was still alive, the High Court had to consider the effect of Section 1(2) of the Amendment Act. The learned Single Judge on interpretation of the provisions came to hold that Section 1(2) of the Amendment Act did not affect the operation of Section 28 of the original Act to the proceeding and on that basis disposed of the application holding that Section 28 was applicable. The High Court had also held that in view of the amended provision of Section 28 of the Thika Act and the Ordinance which was recorded by the learned Munsif, the revisionists before the High Court were Thika tenants. Being of this view, he allowed the revision and set aside the order of the Munsif by which he dismissed the application under Section 28 and remanded the case to the Court of Munsif for disposal in accordance with law. After the remand, the Munsif rescinded the decree. The landlord preferred a revision under Section 115 of the Code of Civil Procedure contending that Section 28 of the Act was not applicable but the said submission was repelled by the learned Single Judge holding that the said issue having been decided earlier was res judicata between the parties. The said order passed in the revision was the subject matter of appeal before this Court by special leave. This Court stated the principle of res judicata which is based on the need of giving finality to judicial decisions. The learned Judges opined once a res is judicata, it shall not be adjudged again and it primarily applies between past litigations and future litigations. Further elucidating it was stated that when in a matter – whether a question of fact or a question of law had been decided between the parities in one suit or proceeding and the decision is final, either

because of an appeal was taken to a higher court or an appeal was dismissed, or when no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. In that context, the Court addressed the applicability of the principle of res judicata between two stages in the same litigation and, eventually, ruled thus:-

> "The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

25. After discussing the law in the field it was ruled that there was no reason to hold that the appellant was precluded from raising before this Court the question about the applicability of Section 28 of the 1953 Act merely because he had not appealed from the High Court's order of remand, taking the view against him the Section was applicable.

26. In the case of Arjun Singh (supra) the defendant had approached this Court as his application under Order IX Rule 13 of the Code to set aside an ex parte decree passed against him had been dismissed as barred by res judicata. The question that basically arose before this Court was when an application is made under Order IX Rule 7 of the Code and the Court considers that there is not any good cause for the previous non-appearance and proceeds further with the suits and ultimately results in an ex parte decree, can a court in dealing with applications to set aside the ex parte decree under Order IX Rule 13 reconsider the question as to whether the defendant had a sufficient cause for non-appearance on the day in regard to which the application under Order IX Rule 7 had been filed. The Court referred to the decision in Satyadhyan Ghosal (supra) and quoted a passage from the said decision and thereafter took note of two submissions advanced by the learned counsel for the respondents therein which were to the effect that (1) an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and (2) in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against. Dealing with the same the Court observed thus: -

> "We agree that generally speaking these propositions are not open to objection. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Similarly, as stated already, though S. 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching

> such decision are some of the material and relevant factors to be considered before the principle is held applicable."

27. After so stating the three-Judge Bench proceeded to deal with different kinds of interlocutory orders and, in that context, observed that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory, but would fall into a different category. These are not directed to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation.

28. In Prahlad Singh v. Col. Sukhdev Singh[8] an ex-parte decree passed in a petition for eviction based on ground of default in payment of rent was set aside on the finding that the landlord had agreed to withdraw the petition and accept rent from the tenant. After the decree was set aside the petition for eviction was once again ordered on the ground of default of payment of rent for the same period. The submission of the tenant that the eviction petition could not be allowed to continue and deserved to be dismissed on the finding of the court in the proceeding for setting aside the ex parte order was negatived by the High Court on the ground that those findings were made in the context of setting aside the ex parte order and not in the context of deciding the main petition for eviction. This Court, in appeal by special leave preferred by the tenant, observed that the view of the High Court was not right, for the decision given by a court at earlier stage of a case is binding at a later stage and for the said purpose reliance was placed on the pronouncement in Satyadhyan Ghosal (supra). While dislodging the order of the High Court this Court stated thus: -

> "In the present case, in the proceeding to be set aside an ex parte order, the Court recorded an express finding that the landlord had agreed to withdraw the suit and receive the rent from the tenant. That was a finding which was binding on the landlord at later stages of the proceeding. He could have questioned the finding before the appellate authority and the High Court in the appeals preferred by the tenant. He did not choose to do so. In fact he could not do so as he had earlier thought it prudent not to enter the witness box though he put the question in issue in the proceeding to set aside the ex parte order by contesting the statement of the tenant."

29. We have referred to the said decision for the purpose that the Court took note of the express finding recorded by the trial court while passing the ex parte decree. There was an expression of an opinion.

30. In C.V. Rajendran and another v. N.M. Muhammed Kunhi[9] the question arose for consideration whether the order of remand passed by the Rent Control Appellate Authority, Payyannur, dated November 25, 1988, holding that the second eviction petition (R.C.P. No. 13/87) filed by the respondent against the appellants under sub-section (3) of Section 11 of the Kerala Buildings (Lease and Rent Control) Act, 1965, is not barred by Section 15 of the Act, can be permitted to re-agitate in a proceeding arising from the order passed by the Rent Controller pursuant to the order of remand. Be it noted, in the said case, learned Rent Controller had declined to grant relief to the respondent on the ground that under Section 15(3) of the Act the eviction petition was not maintainable. On appeal being preferred the appellate authority remanded the matter to the Rent Controller for fresh disposal. After remand, the Rent Controller found that the need of the respondent was bona fide and alternative accommodation in the area was available and, accordingly, allowed the eviction petition. The same was affirmed by the Rent Control Appellate Authority. On a civil revision being preferred the High Court opined that the earlier order of the appellate authority holding that Section 15 of the Act does not bar the eviction proceeding against the tenant, had become final and could not be re-agitated. However, the High Court recorded a finding that Section 15 of the Act did not bar the subsequent eviction petition and being of that view dismissed the revision petition. A contention was raised before this Court that order passed by the appellate authority holding that the eviction petition was maintainable and Section 15 of the Act was not a bar, does not operate as res judicata. In that context, this Court observed as follows: -

> "In the light of the above discussion we hold that as the question whether S. 15 of the Act bars the present eviction petition, was decided against the appellants by the appellate authority at the earlier stage of the suit and it was allowed to become final, it is not open to the appellants to reagitate the same at the subsequent stage of the suit. In this view of the matter, we do not find any illegality in the order under appeal to warrant any interference."

> 31. From the aforesaid decision it is clear that this Court concurred with the view of the High Court as a finding was returned that the proceeding was not barred by Section 15 of the Kerala Buildings (Lease and Rent Control) Act, 1965 and thereafter the matter was remanded by the appellate court. Thus, on earlier occasion there was an expression of an opinion. In this context, we may fruitfully reproduce a passage from Arukkani Ammal v. Guruswamy[10]: -

> "It is also difficult to appreciate the view taken by the District Munsif that ex parte decree cannot be considered to be 'full decree on merits'. A decree which is passed ex parte is as good and effective as a decree passed after contest. Before the ex parte decree is passed, the court has to hold that the averments in the plaint and the claim in the suit have been proved. It is, therefore, difficult to endorse the observation made by the Principal District Munsif that such a decree cannot be considered to be a

> decree passed on merits. It is undoubtedly a decree which is passed without contest; but it is only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court, that an occasion to pass an ex parte decree can arise."
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> 32. The aforesaid passage was approved by this Court in Saroja v.

Chinnusamy (Dead) by LRs and another[11]. The purpose of citing the said authority is that though an ex parte decree is passed without contest but it is passed only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court.

33. In this regard, the pronouncement in Y.B. Patil and others v. Y.L. Patil[12] is worth referring to. In that case the High Court in the writ petition preferred on earlier point of time had recorded a finding and gave directions to the tribunal not to reopen the question of fact in revision and the tribunal complied with those directions of the High Court. This Court opined that the appellants therein were bound by the judgment of the High Court and it was not open to them to go behind the judgment earlier passed by the High Court as they had not preferred any appeal against the said judgment and it had attained finality. The Court observed that it is well settled that principle of res judicata can be invoked not only in separate subsequent proceedings, they also got attracted in subsequent stage of the same proceeding. The aforesaid decision has noted the fact that in the earlier writ petition the High Court has clearly stated that the tribunal shall not reopen the question of fact in revision. It is manifest that, this Court has taken note of the fact that there was an expression of opinion by the High Court that facts need not be adverted to again by the tribunal and that attracted the principle of res judicata.

34. From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation. In the case at hand, as the order dated 23.2.2006 would show that a statement was made by the counsel for the third respondent that in the event of the petitioner's making an application for amendment of the plaint in the pending suit on the basis of the averments made in the summons issued, he would not oppose the same. The learned Company Judge recorded the same and opined that it is not necessary to grant the present Judge's Summons. Thereafter, the learned Company Judge has observed "liberty to applicant to apply, if necessary". The Division Bench, after relying on the decision in Kewal Chand Mimani's case, has opined that grant of liberty is adopted by the court to obliterate any confusion or any difficulty being experienced in the matter but the said grant of liberty does not confer any right on the party to agitate the matter further nor does it confer any jurisdiction on the court to further probe the correctness of the decision arrived at. To appreciate the correctness of the said conclusion it is imperative to appreciate the verdict in Kewal Chand Mimani (supra). In the said case, an appeal was preferred against an order passed by the learned single Judge in the writ petition. The appeal was heard from time to time and the hearing was concluded but before the judgment could be pronounced, one of the Judges hearing the appeal was transferred as a consequence of which the judgment could not be pronounced. At that stage, the respondents 7 to 10,

after expiry of about 9 years, filed an application for being transposed as appellants to conduct the pending appeal and the Division Bench allowed the application for transposition, however, stating that the said transposition was without prejudice to the rights of the complainant to contest the appeal as appellant. Subsequently, the appeal was reheard by a reconstituted Division Bench of the High Court and the judgment was reserved by the Bench. During the pendency of the pronouncement of the judgment the appellant therein moved this Court under Article 136 against the order of transposition and this Court had passed an order to the following effect: -

> "The order against which the SLP has been filed is an order on transposition as appellants. The order itself indicates that the petitioners are at liberty to raise all the objections. We see that even including the transposition and their right to contest in the capacity as appellants also is left open.
>
> The petitioners are at liberty to have the matter adjudicated."

35. Thereafter, the High Court decided the appeal by delivering a judgment on 21.5.1997. A direction was issued to the State Government and the Municipal Corporation to restore the possession of the property to the owner and/or the occupier, as the case may be, within seven days from the date of the judgment. However, the Division Bench had stated "liberty to mention" the matter. Shortly thereafter, the matter was taken up by the concerned Collector to which certain objections were raised. In the said case, as the factual matrix would unfurl, on 23.5.1997 the matter was mentioned before the Appellate Bench by the learned advocate for the State arguing for extension of time for making over possession in terms of the order and the High Court thereupon extended the time. However, it directed the matter to appear on a particular day. Subsequently, a formal application was filed by the owners for a direction to restore the possession of the premises in question to the owners as the appellants, as alleged, were not the owners. It was on the state of facts the second judgment was pronounced by the Appellate Bench which directed making over of possession to the owners without prejudice to the rights and contentions of the parties and without prejudice to the rights of the lessee to file a suit for appropriate proceedings for recovery or otherwise and/or to enforce an agreement for purchase of the properties in accordance with law. The High Court allowed 48 hours time from the date of the communication of the order and by reason wherefor a notice was sent to the owners requiring them to be present to receive the possession of the land. The Mimanis being grieved by the said order moved this Court and maintenance of status quo was directed without creation of any third party interest. The Court, apart from other issues, addressed to the submission as raised by the learned counsel for the appellants therein to the effect of liberty granted to mention the matter after the judgment was delivered. It was urged that by the judgment directions were issued and it connoted a final disposal and specifically determined the issue raised in the matter. It was canvassed that when the High Court had recorded that though many other points were argued and several case laws were cited, but it was not necessary for deciding those points as the appeal succeeded on

the point of order of requisition not been continued on the basis of a lapsed statute and the appeal got disposed of, shelter or aid could not have been taken to "liberty to mention" for reopening the whole issue. In that context, this Court observed thus: -

"Be it noted, however, that the words "liberty to mention" have been as a matter of fact a phraseology which did not come through judicial process without any definite legal sanction for the purpose of clarification, if needed, but not otherwise. It is a legal process which has been evolved for convenience and for shortening the litigation so that the parties are not dragged into further and further course of litigation, and it is in this context that the submissions of Mr. Gupta, that the Court has no jurisdiction to reopen the issue on the ground of availability of the legal phraseology of liberty to mention cannot be brushed aside. As noticed hereinbefore, the insertion of the above-noted legal phraseology is to obliterate any confusion or any difficulty being experienced in the matter – it does not give the right anew to the party to agitate the matter further nor does it confer jurisdiction on the court itself to further probe the correctness of the decision arrived at: review of a judgment cannot be had on the basis of this liberty. The circumstances under which review can be had are provided under Order 47 of the Code of Civil Procedure. In any event, law is well settled on this score that the power to review is not any inherent power and it must be conferred by law either specifically or by necessary implication."

36. After so stating the Court referred to the decision in State of U.P. v. Brahm Datt Sharma[13] wherein it has been held that when proceedings stand terminated by final disposal of writ petition it is not open to the court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action, for if the said principle is not followed, there would be confusion and chaos and the finality of the proceedings would cease to have any meaning.

37. Coming to the case at hand, the Division Bench, after reproducing paragraph 19 of the judgment in Kewal Chand Mimani's case, held that the liberty granted by the learned single Judge to file an application was not maintainable, for the liberty granted by the learned single Judge cannot be used to seek from him orders which are contrary to his principal order rejecting the company application for grant of leave.

On a studied scrutiny of the order passed by the learned single Judge on 23.2.2006, we find that the Division Bench has committed three fundamental errors, namely (i) that the learned single Judge had rejected the application; (ii) that liberty granted could only mean the parties to seek further direction pursuant to the said order; and

(iii) that the liberty granted by the learned single Judge could not be used to seek from him any relief which is contrary to the main order.

38. It is clear to us that the learned single Judge had not dealt with the application for grant of leave on merits; that the application was disposed of on the basis of a submission made by the third respondent that if an application for amendment is filed in the pending suit, he would not oppose the same; that the learned Company Judge on the basis of the statement recorded that it was not necessary to grant the present Judge's Summons; and that liberty was granted to the applicant to apply if necessary. The Division Bench, we are disposed to think, has erroneously opined that the learned single Judge in the main part of the order having rejected the application could not have granted liberty to apply for filing of another application. As we notice, the Division Bench has not appositely appreciated the ratio laid down in Kewal Chand Mimani (supra) wherein the High Court had pronounced a judgment and, as a matter of practice, has stated "liberty to mention" and in that context, this Court stated that that did not confer jurisdiction on the High Court to dwell upon a different issue in a disposed of case. In fact, in the said case the order passed by this Court on earlier occasion has been reproduced wherein liberty was granted to get the matter adjudicated which, in the context, simply conveyed that as the controversy relating to transposition therein was pending before the High Court and the order indicated that the applicants were at liberty to raise all objections including the transposition and the right to contest in the capacity as appellants. When this Court said "liberty was granted to get the matter adjudicated", it meant that it was open to the petitioner in the SLP to raise all contentions before the High Court as the High Court itself had granted liberty in the order which was the subject-matter of challenge and the matter was sub-judice. We are only analyzing on this score to highlight that words, namely, "grant of liberty" are to be understood, regard being had to the context in which they are used. Context is really material. Had the learned Company Judge adjudicated the matter on merits, the matter would have been absolutely different. He had, in fact, on the basis of a statement made by the learned counsel for the third respondent, had not dwelled upon the merits and, in that context, had granted liberty to applicant to apply, if necessary. It is eminently so because the learned Judge has also stated "it is not necessary to grant the present Judge's Summons". Thus, the application for grant of leave was really not dealt with on merits and on the basis of a statement of respondent No. 3 the learned Company Judge opined that it was not necessary for the present and in that context liberty was granted. The principles stated in Arjun Singh (supra), Satyadhyan Ghosal (supra) and the other authorities clearly spell out that principle of res judicata operates at the successive stages in the same litigation but, the basic foundation of res judicata rests on delineation of merits and it has at least an expression of an opinion for rejection of an application. As is evident, there has been no advertence on merits and further the learned Company Judge has guardedly stated two facets, namely, "not necessary to grant present Judge's Summons" and "liberty to applicant to apply, if necessary". On a seemly reading of the order we have no shadow of doubt that the same could not have been treated to have operated as res judicata as has been held by the Division Bench. Therefore, the irresistible conclusion is that the Division Bench has fallen into serious error in dislodging the order granting leave by the learned Company Judge to file a fresh suit.

39. In view of the aforesaid analysis, we allow the appeal, set aside the order passed by the Division Bench and restore that of the learned Company Judge. The first respondent is directed to pay Rs.50,000/- to the appellant towards costs of the appeal.

.....J. [Anil R. Dave] .....J. [Dipak Misra] New Delhi;

December 12, 2013.

ITEM NO.1A COURT NO.10
SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).25369/2010 (From the judgement and order dated 23/06/2010 in CP No.201/1994,CA No.720/2006,AN No.262/2007 of The HIGH COURT OF BOMBAY) ERACH BOMAN KHAVAR Petitioner(s) VERSUS TUKARAM SRIDHAR BHAT & ORS. Respondent(s) Date: 12/12/2013 This Petition was called on for Judgment today.

For Petitioner(s) Ms. Surekha Raman, Adv.
for M/S. K.J. John & Co.

For Respondent(s) Mr. E.C. Agrawala, Adv.

Hon'ble Mr. Justice Dipak Misra pronounced the Judgment of the Bench comprising Hon'ble Mr. Justice Anil R. Dave and His Lordship.

Leave granted.

The Civil Appeal is allowed.

|(Jayant Kumar Arora) | |(Sneh Bala Mehra) |
|Sr. P.A. | |Assistant Registrar |

(Signed reportable Judgment is placed on the file)

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[1] AIR 1964 SC 993
[2] (2001) 6 SCC 512
[3] (1994) 4 SCC 159
[4] (1998) 7 SCC 105
[5] (2005) 10 SCC 331
[6] (1970) 3 SCC 900
[7] AIR 1960 SC 941
[8] AIR 1987 SC 1145
[9] AIR 2003 SC 649
[10] (1987) 100 LW 707
[11] (2007) 8 SCC 329
[12] (1976) 4 SCC 66

[13] (1987) 2 SCC 179
