

(2017) 02 BOM CK 0027

In the Bombay High Court

Case No : Civil Revision Application No. 17 of 2016

Ashok Khubchand Vaswani

APPELLANT

Vs

Smt. Gopidevi, Widow of Shyamkumar Vaswani

RESPONDENT

Date of Decision : 13-02-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10
Provincial Small Cause Courts Act, 1887 — Section 23

Citation : (2017) 2 ALLMR 401 : (2017) 2 BCR 507 : (2017) 3 MhLJ 536

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : Mr. A.A. Naik, Advocate, for the Applicant; Mr. A. Shelat, Advocate, for the Respondent Nos. 1 and 2

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—Admit. Heard finally with consent of counsel for the parties who have been served with notice for final disposal of the Civil Revision Application.

2. The applicant, who is the original plaintiff in Regular Civil Suit No. 409 of 2009, is aggrieved by the order dated 17th November, 2015, passed by the trial Court, thereby directing the plaint to be returned to the plaintiff under Section 23 of the Provincial Small Causes Court Act, 1887 [for short "the said Act"] in accordance with provisions of Order-VII, Rule 10 of the Code of Civil Procedure Code, 1908 [for short "the Code"]. The plaint has been directed to be presented before the Civil Court.

3. The applicant claims to be the absolute owner of House No. 203 which was initially owned by his father and which was bequeathed in his favour by a registered Will. According to the applicant, the nonapplicants are his close relatives and were in occupation of the said house as gratuitous licensees. On 21st October, 2009, the applicant issued a notice to the non-applicants seeking possession of the house property and on being unsuccessful in said attempt, he

filed the aforesaid suit for their ejectment. The non-applicants in their Written Statement denied the claim of the applicant that he was the exclusive owner of the house property. They sought to substantiate their right to occupy the premises on the basis of subsequent Will dated 11th January, 1978 executed in their favour.

4. During pendency of the aforesaid suit, the defendant nos. 1 to 3 moved an application below Exh.71 seeking to amend the Written Statement. A plea was sought to be raised that the applicant's father was not the exclusive owner of the suit house and that the same was joint family property. This application was opposed by the Applicant and the trial Court, by its order dated 28th September, 2012, rejected said application on the ground that granting such amendment would have the effect of permitting the defendants to retract the admission made by them in their Written Statement.

5. Thereafter, non-applicant no.2 moved an application under provisions of Section 23 of the said Act praying that the plaint be returned for its presentation to the Civil Court, as the parties to the proceedings were co-owners of the suit property and that the jurisdiction of the Small Causes Court to decide the question of title was ousted. This application was opposed by the applicant by filing his reply. The trial Court, by the impugned order, held that the dispute was between the legal heirs of Khubchand, the father of the applicant and as the applicant had not produced any document to show that the non-applicants were licensees, it had no jurisdiction to deal with the suit. Being aggrieved, the applicant has challenged the aforesaid order.

6. Shri A. A. Naik, the learned counsel for the Applicant, after referring to the pleadings of the parties, submitted that the trial Court was not justified in directing the plaint to be returned for its presentation to the Civil Court. He submitted that though the defendants had sought to amend their pleadings so as to raise a defence that the suit property was joint family property and that the applicant's father had no legal right to execute any Will, the rejection of the amendment application had been accepted by the nonapplicants and said order had not been challenged further. The subsequent Will dated 11th January, 1978, on the basis of which the entitlement of the non-applicants was sought to be canvassed, was never brought on record nor was any evidence in that regard led. It was urged that the aspect of title was only an incidental issue which was not required to be determined finally. It was only where a genuine dispute was sought to be raised giving rise to complicated questions that the Small Causes Court could exercise its powers under Section 23 of the said Act, so as to return the plaint. The powers in that regard being discretionary in nature, the trial Court committed an error while directing return of the plaint. It was, therefore, submitted that the impugned order was liable to be set aside and the suit ought to be tried by the Small Causes Court itself. In support of his submissions, the learned counsel placed reliance upon the judgment of the Honourable Supreme Court in *Shamim Akhtar v. Iqbal Ahmad & another* [(2000) 8 SCC 123] and

judgments of the learned Single Judge in [a] Rambilas Mohanlal Kabra & another v. Krishnabai Motilal Agrawal & others [AIR 1973 Bombay 168], and [b] Shankarrao Amrutrao Deshmukh v. Gendalal Tunnawalal Bhoi [AIR 1976 Bombay 52].

7. Per contra, Shri A. Shelat, the learned Counsel for the Nonapplicant Nos. 1 and 2, submitted that the Court of Small Causes was a Court of limited jurisdiction, while adjudication on the entitlement and validity of the respective Wills required a full-dressed trial. It was submitted that merely because the application for amendment was rejected by the trial Court, the same would not affect the case of the Non-applicants and that by directing return of the plaint, the Small Causes Court had acted within its jurisdiction. The discretion in that regard had been rightly exercised by taking a possible view on the basis of material placed before it. He also referred to the conduct of the applicant of keeping silent despite the claim of the applicant that the property was bequeathed in his favour in the year 1975. It was, therefore, submitted that no case for interference under Section 115 of the Code had been made out.

8. I have heard the learned counsel for the parties at length and I have gone through the documents filed on record. Under provisions of Section 23(1) of the said Act when the right of the plaintiff and the relief claimed by him depends upon the proof or disproof of title to immovable property or other title which the Court of Small Causes cannot finally determine, the said Court can at any stage of the proceedings return the plaint for being presented to a Court having jurisdiction to decide the title. It is well settled that the question of title to the suit property can be considered by the Small Causes Court only as an incidental question. A finding as to title if recorded by the Small Causes Court does not operate *res judicata* as held by the Honourable Supreme Court in *Gangabai v. Chhabubai* 1982 Mh.L.J. 1. In *Kesharbai v. Chhunulal* (2014) 11 Supreme Court Cases 438 it has been reiterated that in eviction proceedings the question of title to the property in question can be incidentally gone into but the same cannot be finally decided. In *Shamim Akhtar* (*supra*) it was held that the power vested under Section 23(1) of the said Act with the Small Causes Court is discretionary and that it has to be exercised only when the relief claimed by the plaintiff in the proceedings before it depends upon the proof or disproof of title of the immovable property and the relief cannot be granted without determining that question. It has been further observed that by mere denial of the relationship between landlord and tenant, the eviction proceedings could not be avoided.

9. In the present case, the applicant has pleaded that he became the sole owner of the suit property as per the registered Will dated 25th June, 1975 and sought eviction of the non-applicants who were in occupation as gratuitous licensees. In the written statement filed by non-applicant Nos.1 to 3 it was pleaded that the Will dated 25th June, 1975 had been cancelled by the testator after which another Will was executed on 11th January, 1978. After the preliminary issue as to jurisdiction was framed, the applicant had led evidence. The Will dated 11th

January, 1978 was not brought on record by the nonapplicants. The amendment sought by the non-applicants to plead that the house property was joint family property was refused by the trial Court. In the aforesaid facts therefore the only jurisdictional question was whether the applicant had proved that there existed relationship between the non-applicants as licensor and gratuitous licensees. The question as to entitlement to title based on the Will was merely an incidental question and it could not be said that in the present facts, the relief sought by the applicant depended upon the proof or disproof of title.

10. In Shankarrao Amrutrao Deshmukh (supra) it was observed by learned Single Judge that on the basis of mere pleadings in the written statement and in absence of any specific ground of challenge to the title, the jurisdiction of the Small Causes Court to deal with the suit was not ousted. In Ramvilas Mohanlal Kabra (supra) it has been observed on the basis of pleadings of the parties that if no complicated question of title is raised, there is no need to change the forum chosen by the plaintiff.

11. Considering the aforesaid legal position, I find that the trial Court misdirected itself by observing that the suit filed by the applicant involved a complicated question of title and that as the applicant had kept silent after the Will was executed in his favour, the suit was required to be tried by the Civil Court. Considering the pleadings of the parties, the issue of title to the suit premises was purely incidental in nature and as per the provisions of Section 26-B of the said Act the parties to the present proceedings were not barred from suing in a competent Court to establish their title. The Small Causes Court therefore ought to have adjudicated the proceedings on merits on the basis of material available before it. By directing the plaint to be returned under Section 23 of the said Act, the trial Court has acted with material irregularity and hence a case for exercising jurisdiction under Section 115 of the Code has been made out.

12. In the result, the impugned order dated 17th November, 2015 passed below Exhibit-1 in RCS No.409/2009 is quashed and set aside. It is held that the Small Causes Court has jurisdiction to entertain and decide the proceedings in accordance with law. By observing that the Small Causes Court shall decide the proceedings on its own merits and without being influenced by any observations made in this order, the civil revision application is allowed. There would be no order as to costs.