
(1938) 12 BOM CK 0012

In the Bombay High Court

Case No : Civil Revision Application No. 161 of 1938

Bai Hari

APPELLANT

Vs

Nathubhai Parbhubhai

RESPONDENT

Date of Decision : 20-12-1938

Acts Referred:

Evidence Act, 1872 — Section 116

Citation : AIR 1939 Bom 353 : (1939) 41 BOMLR 755

Hon'ble Judges : Macklin, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Macklin, J.—This was a suit to recover possession and rent on the strength of a lease. It was tried by the Court of Small Causes and the defendant comes in revision upon the allegation that the Court had no jurisdiction to try it except as a long cause suit. Coupled with the application for revision there is a further application for restitution of possession to the defendant.

2. Normally this suit would not be triable by a Court of Small Causes. But by an amendment of the year 1930 the Bombay legislature permitted Courts of Small Causes to entertain suits for possession of landed property in cases where "the only substantial issue arising for decision is as to whether the lease has determined by efflux of time limited thereby or has been determined by a notice in accordance with Clause (h) of Section 111 of the Transfer of Property Act of 1882." In this case the defence was that the property belonged to the defendant but that she executed a rent-note merely as a matter of form and because she had mortgaged the land and the mortgagee-plaintiff insisted that a lease should be executed. She contends that it was, never intended that the lease should be acted upon and that in no circumstances was the nominal lessor to recover either rent or possession. The learned Judge thinks that the hollowness of the lease is not a substantial issue arising in the case within the meaning of the Bombay amendment. He cites certain authorities which state that the jurisdiction of the

Court is determined purely upon the allegations in the plaint, but he recognises that those authorities are earlier than the Bombay amendment and are of no effect in determining the meaning of the amendment. He goes on to say that the amendment itself was made in the interests of plaintiffs to give them a speedy remedy and it seems unreasonable that the legislature should have in effect ousted the jurisdiction of the Small Causes Courts merely because the defendant raises a defence which gives rise to the issue specified in the amendment. I am not concerned with the reason or unreason of an Act of the legislature; but I am perfectly satisfied when the legislature says "substantial issue" it means an issue arising not only upon the allegations in the plaint but upon those allegations combined with the allegations made in the written statement. That is only commonsense. You can have no question at issue unless there is a difference between the parties, and in order to determine what the issue is, you have to consider the allegations of both sides : see for example *Bai Jivkore Lakshmiram Vs. Himatlal Girdharlal Parekh*, , and the remarks of the learned Chief Justice in that connection. But the question is whether this issue is substantial. It is contended on behalf of the plaintiff that it is not substantial but is merely frivolous and the Court is not in a position to say that it was a substantial issue until it had heard evidence and found on the facts that it was not frivolous. This seems to me to give to the word "substantial" a meaning which it does not possess. A substantial issue is an issue which goes to the root of the case, other issues being merely incidental or concerned with matters of detail. Obviously the question of the hollowness of the lease is a matter which goes to the root of the whole case. If the lease is hollow then the defendant is not a tenant, and the plaintiff cannot succeed upon the basis of tenancy. I think therefore that the Court had no jurisdiction.

3. It has also been contended that Section 116 of the Indian Evidence Act precludes the defendant from raising this defence, since in effect it involves a denial of the landlord's title. If it were admitted that the defendant is a tenant, then no doubt she would not be permitted to deny her landlord's title. But the tenancy itself is denied in this case, and I do not see how Section 116 has any applicability.

The application must therefore succeed and the decree of the Court below be set aside. I direct that the plaint be returned to the plaintiff for presentation in a Court having jurisdiction. The application for restitution of possession automatically succeeds. The costs to date including the costs of C.A. 644 of 1938 will be costs in the cause.