
(1994) 10 BOM CK 0056
In the Bombay High Court
Case No : F.A. No. 826 of 1994

Conrad Dias, Dadar, Bombay

APPELLANT

Vs

Joseph Dias, Dadar, Bombay

RESPONDENT

Date of Decision : 26-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Easements Act, 1882 — Section 5(4A), 52

Presidency Small Cause Courts Act, 1882 — Section 41, 45

Citation : AIR 1995 Bom 210 : (1995) 3 BomCR 218 : (1996) 2 MhLj 208

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : Anand Grover with S.P. Shirekar and Ms. Firdaus Mehta instructed by M/s Haresh Mehta and Co, for the Appellant; V.Y. Sarglikar, for the Respondent

Final Decision : Dismissed

Judgement

R.G. Vaidyanatha, J.—This is an appeal against the judgment and decree dated 17th June, 1994 in Short Cause Suit No. 6487 of 1988 on the file of City Civil Court, Bombay. I have heard the Learned Counsel appearing for both the parties.

2. This is an appeal involving dispute between a father and a son. The father, who is Respondent to this appeal, filed a suit in the trial Court for injunction restraining the Appellant-Defendant from entering or remaining in the suit premises. His case is that he is the owner of the suit property which is called as ""Brazvilla" situate at Dadar. It is stated in the plaint that the Plaintiff and the Defendant are residing in second floor of the suit premises. The Plaintiff was working in the Reserve Bank of India and on transfer was forced to stay at Bangalore. He had authorised his uncle to look after the suit property. The uncle was unwell and died in 1982. Hence in 1982 the Plaintiff had given a power of attorney to the Defendant to look after the maintenance of the suit property. Since, the Defendant was playing mischief and was attempting to alienate the property, the power of attorney was revoked. There is strained relationship

between the father and the son. The Plaintiff docs not want to have anything to do with the Defendant. Hence, he does not want the Defendant to continue in the suit premises. The Defendant has no manner of right or interest in the suit property except staying there gratuitously as a son of the Plaintiff. He, therefore, wants an order of injunction against the Defendant and the members of his family to restrain them from entering or remaining on the suit premises.

The Appellant is the son, who was the Defendant in the Court below, filed a written statement contesting the suit on many grounds. It is stated that R. F. 27 the suit is not maintainable. That Defendant is in possession of the suit premises under an understanding with the Plaintiff in 1970-1971 under which Defendant could occupy the suit premises as a tenant under the Plaintiff. The consideration for this understanding was that the Defendant should assign his LIC policy in favour of the Plaintiff and the Defendant should pay the taxes for the suit property, look after its maintenance etc. Accordingly, the Defendant endorsed the LIC policy in favour of the Plaintiff who in turn assigned it to one J. M. Parekh. The Defendant has been paying taxes on the suit property. Once Defendant had sent rent to the Plaintiff by money order, but it was refused by the Plaintiff. That the Defendant is in possession and enjoyment of the house in his own right. It is further pleaded that the Defendant has perfected the title to the suit property by adverse possession for more than 12 years. Plaintiff's title is also denied. It is denied that the Plaintiff is residing in the second floor of the building. It is asserted the Plaintiff has been residing permanently at Bangalore since 1974. The Defendant has been looking after repairs to the suit property. Giving of power of attorney by the Plaintiff in favour of the Defendant and subsequent cancellation are admitted. That the Plaintiff is not entitled to the relief of injunction. It is, therefore, prayed that the suit be dismissed with costs.

3. The learned trial Judge framed the following issues:

1. Does the Plaintiff prove that he is the owner of the suit premises?
2. Does the Plaintiff prove that Defendant has no right, title or interest in the suit premises?
3. Docs the Defendant prove that he is staying in the suit premises as of right?
4. Whether the Plaintiff proves that he was in joint possession of the suit premises with the Defendant at the time of filing of the suit?
5. Does the Defendant prove that he is the owner of the suit premises by virtue of his adverse possession as alleged in paragraph 3 of his written statement?
6. Does the Defendant prove that the suit is not maintainable?
7. Does the Plaintiff prove that he is entitled to permanent injunction against Defendant as prayed in Prayer (a) of the plaint?
- 7-A. Does the Plaintiff prove that he is entitled to mesne profits and if so at what rate?

8. What relief, what order?

4. After trial, the trial Court answered all the issues in favour of the Plaintiff and decreed the suit. Being aggrieved by the judgment and decree of the trial Court, the Defendant has come up in appeal.

5. The Learned Counsel for the Appellant has questioned the correctness and legality of the impugned judgment. It was argued that the Appellant is in possession of the suit premises as a licensee under an agreement with the Plaintiff. It was also submitted that since the Appellant is in possession as a licensee, the Civil Court has no jurisdiction to try the suit and the Plaintiff's remedy is to file a suit in the Small Causes Court. It was argued on behalf of the Appellant that the suit for injunction is not maintainable and the Plaintiff should have filed a suit for possession. The Learned Counsel for the Respondent supported the judgment of the trial Court.

6. In the light of arguments addressed before me, the points that fall for determination in this appeal are as follows:

1. Whether the Appellant is a licensee of the suit premises?
2. Whether the Civil Court has no jurisdiction to try the suit?
3. Whether the suit for injunction, as brought, is not maintainable?
4. What order?

POINT No. 1

7. The Learned Counsel for the Appellant contended that the Appellant is in possession of the suit premises as a licensee. I am unable to see as to on what pleading the Appellant claims to be a licensee. It is well settled that a party has to plead a certain fact and then prove the same in order to obtain the relief. I have gone through the written statement filed by the Appellant more than once, but nowhere I get a pleading to the effect that the Defendant is in possession as a licensee of the suit premises.

A perusal of the written statement shows that the Defendant has taken two pleas regarding his possession. One is that he is in possession of the suit premises as a tenant. The other is that the Defendant has perfected title to the suit premises by adverse possession. A person who is pleading adverse possession in the written statement, now wants to say before the Appellate Court that he is in possession as a licensee. Except pleading tenancy and adverse possession the Appellant has not pleaded anywhere that he was a licensee of the suit premises.

I have gone through the entire trial Court record. I find that in the earlier stages when the Plaintiff filed an application for injunction and took out Notice of Motion No. 5325 of 1988 in the trial Court, the Appellant filed a lengthy reply in the form of an affidavit dated 22nd August 1988. There he neither pleaded tenancy nor licence. He pleaded in para 6 of his reply affidavit as follows:

I further say that the suit building is ancestral property and as such my mother, myself, and my family members have a right of residence in the suit premises.

Therefore, what was the case of the Defendant at the earliest stage when he filed the reply affidavit in August, 1988 was that he was residing in the premises as a member of the family since the property was an ancestral property.

The Appellant became wise. Five years later when he filed written statement on 7th January, 1993, he pleaded not only tenancy but also adverse possession. The plea of tenancy and plea of adverse possession cannot go together at all.

Now, after having lost in the trial Court and at least at the time of filing this appeal in 1994 the Appellant would have us believe that he is in possession of the premises as a licensee, which has never been pleaded in the trial Court. In my view, the Appellant has taken inconsistent and conflicting stands at different stages of this litigation. Hence, this delayed attempt now made to say that the Appellant is a licensee cannot be accepted and furthermore such a plea cannot be permitted to be argued in the Appellate Court, when it is not based on pleadings in the trial Court.

8. Now granting for a moment that the Appellant is entitled to canvass a plea of licence in the Appellate Court, whether the Appellant has made out such a case. The Learned Counsel for the Appellant made it clear that he is not claiming as licensee as defined in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 obviously because the definition of a "licensee" therein excludes a member of the family. The Appellant being a son cannot claim to be a licensee or a tenant under the said Act of 1947. The Learned Counsel for the Appellant contended that the Appellant is a licensee u/s 52 of the Indian Easements Act, 1882.

In my view, the Appellant cannot be called as a licensee u/s 52 of the said Act. What Section 52 of the said Act says is that if one person grants to another a right to do something on an immovable property of the grantor, then such a right is called "licence". That means it is a transaction between one person and another where some permission is granted to do something. In the present case, we are not concerned with any such two persons at all. Here we are concerned with a father and a son who are members of one family. A son gets into the family by birth and resides with the parents. Can it be said that when a child is born and lives with the parents, he is a licensee within the meaning of Section 52 of the Act? Certainly not. A child and later a son or a daughter resides in the house with the parents not as a licensee or in any other legal capacity but only as members of the family. Nobody can claim a licence by birth. In the present case, admittedly the father and children including the Appellant were residing together in 1962 when the house was purchased. In 1962, the Appellant was a minor boy. It may be in course of time the Appellant became a major and he is continuing to reside in the same premises. It may be that the father who was working at Bombay in Reserve Bank of India got a transfer to Bangalore and was

staying there. It does not make the Appellant a licensee or a person having any independent legal right to stay in the premises except as a member of the family viz. being the son of the Plaintiff in this case. In my considered view, a person who is residing with the parents in the house cannot claim any legal character much less, the character of a licensee as defined in Section 52 of the Easements Act, but he is residing simpliciter as a member of the family and nothing more and nothing less.

9. It was argued that there was some arrangement or agreement that the Defendant should make some payments to creditors, towards repairs of the buildings, towards taxes etc. Even if such an agreement is proved, the Defendant is continuing as the son of the father and may do certain things on behalf of his father without any legal character or legal status. The evidence is that the Defendant was collecting rent from the tenants and also from the boarders and was paying municipal taxes, attending to repairs and paying some amount to Plaintiff's creditors. According to the Defendant he is in possession of the suit house by virtue of this agreement or understanding since 1970-1971. Admittedly, it is an oral understanding. The Plaintiff has denied this understanding. There is oath against oath on this point. In the very nature of things and having regard to the close relationship between father and son it is impossible to believe that father has allowed his son to become a tenant or a licensee on terms. As already stated, the son never took such a stand at the earliest stage in 1988 when he filed the reply affidavit mentioned above and never took such a stand that he was either a tenant or a licensee. He was content by pleading that he is residing as a member of the family since it was an ancestral house. The parties being Christians, the theory of joint family or ancestral property cannot be applied at all. The evidence is that the suit property is self-acquired property of the father. The Defendant is there not in any legal capacity but purely as a son of the father.

10. There is one intrinsic material on record which improbabilities and even falsifies the defence theory of alleged oral agreement or understanding to give a legal right to the Defendant to remain in possession of the suit premises. As already stated in the written statement the allegation is that by virtue of this oral arrangement the Defendant is collecting rent and paying taxes etc. since 1971. But we have on record that as late as 1982 the Plaintiff has appointed the Defendant as a constituted attorney by executing a power of attorney dated 9th July, 1982, which is marked as Exhibit "A" in this case. It is an admitted document. It is also in evidence that subsequently after few years the Plaintiff revoked that power of attorney on the ground that the Defendant was misusing it. Anyhow this power of attorney shows that the Plaintiff is owner of the suit property and since he is now staying at Bangalore he has appointed his son, the Appellant, as his agent "to manage the aforesaid property, to collect rent, to issue receipts, to effect repairs etc." If really the Defendant was already in possession of the premises under the oral understanding of payment of taxes, repairs etc. there was no necessity of incorporating that clause in Ex. A or at

least there would have been some reference in this document about any such oral understanding or agreement.

Hence, in my view, this theory of oral agreement under which the Defendant was allowed to continue in the premises cannot be accepted.

11. It may be that as a son the Defendant was collecting rent and paying the maintenance amount to the mother, paying taxes, paying some creditors of the Plaintiff etc. But that he has done in his capacity as a son and not in any legal capacity or independent right like a tenant or a licensee. In fact, the Defendant himself has sent statements to the Plaintiff to show how much amount he has collected and how much taxes he has paid (vide Ex. G collectively).

He has written number of letters to the Plaintiff which are collectively marked as Exhibit "H", but nowhere we get any idea of any legal character of a tenant or a licensee. The Defendant wanted a loan of Rs. 5,000/- from his father and in that connection wrote a letter to the Plaintiff dated 25-3-1981, which is one of the letters Ex. "H" collectively. In order to appease the father for a loan of Rs. 5,000/-, he writes as follows:

Of course you know I stood by you etc. That was just my duty and I have not done anything great.

In another letter dated 11th March, 1983 (Ex. "H" collectively) he requests the father to send the balance amount. This also shows that the father used to send some amount and the son has requested the father to send the balance amount. He even reminds the father that he had assured him that the father will never let down the son, and therefore, he requested him to send the balance amount.

In another letter written in December 1980 (Exh., H collectively) the son writes to the father praising him very high. He praises the father for bringing up children including him and giving them good education and then he assures the father that he need not worry for the finances after his retirement. There is no whisper in any of these letters either about licence or lease. On the other hand, the contents of the letters show that the Defendant was writing the letters to the Plaintiff as a son of his father and not asserting or claiming any such legal right. The same thing we get from the Plaintiff's letters written to the Defendant which are Ex. 5.

As already stated, the Plaintiff has denied having any such agreement or understanding with the Defendant about tenancy or licence.

In para 4 of his evidence the Defendant says that in 1970-1971 his father demanded him to pay some money and told him that he can occupy the suit premises as a tenant. As already stated, the theory of tenancy is now given up and what is being pressed is licence. The Defendant does not say in his evidence that he is a licensee under his father. He also says that he had endorsed his LIC policy in favour of the father who in turn endorsed it in favour of one Parekh as consideration for the alleged oral agreement of tenancy. This is denied on oath

by the Plaintiff. Except oath against oath, there is no other material to corroborate this version. The insurance policy is not produced. Mr. Parekh is not examined. No other witness is examined to prove this fact.

In cross-examination, he admits that his father incurred expenditure to educate him by keeping him in a boarding school. He further admits that his father took efforts to teach him mathematics and English during week-ends. Instead of being grateful son to his father, who took so much interest in him, the son goes to the extent of denying father's title in the written statement, pleads adverse possession and then pleads tenancy. In para 26 of his cross-examination the Defendant admits as follows:

It is true that in the year 1970-1971 I was residing with my father in the suit premises....

Therefore on his own admission he was residing with his father in the suit premises. It may be that the father has now shifted to Bangalore in view of his transfer. It does not create any legal right in the son. In fact, the Defendant attained majority in 1970-1971 (vide para 28 of the deposition of the Defendant). He clearly admits in para 30 of his deposition that in none of the letters to the Plaintiff he has made reference to this alleged oral understanding. He admits in cross-examination that most of the payments made by him are made out of the rent he collected from the tenants of the suit premises. He admits that he even informed the Plaintiff about the amount collected not only from the tenants but also from boarders (Para 39).

Then we have the evidence of the Defendant's wife who has been examined as second witness. She says that some amounts are paid from her bank account towards Plaintiff's creditors as instructed by her husband. What is more she makes a statement in examination-in-chief in para 2 as follows:

It is true that I am staying in the suit premises since my marriage with the Defendant in my capacity as a wife of the Defendant and as a member of my father-in-law's family.

The above admission clearly goes to show that she is residing in the suit premises as a member of the family and not as a wife of a tenant or a wife of a licensee.

The learned trial Court has considered the evidence from a proper perspective and has rejected the theory of tenancy. As already stated, the theory of tenancy is not pressed before me. The theory of licence is not pleaded and even otherwise the evidence does not show that Defendant is a licensee of the house. The admitted position is that right from his younger days when the Defendant was a minor, the Defendant was residing in the suit premises as a son of the father and continued to reside as a member of the family and not under any legal right or legal status. In my considered view, the Defendant is residing in the suit premises as a son of the Plaintiff and as a member of the family and it

cannot be called as a licence as defined in Section 52 of the Easements Act. In this connection, I am also fortified by an earlier decision of this Court reported in 1988 Mah.R.C.J. 15, Hoshang Rustomji Dotiwala v. Rustomji Eruchsha Dotiwala, where it has been held that a son staying with father is residing there only as a member of the family and he has no independent right to continue to stay in the premises. For these reasons, my finding on Point No. 1 is in the negative.

POINT No. 2

12. In view of my finding on Point No. 1. this point does not survive for consideration at all. However since arguments have been addressed at the bar and number of authorities have been cited I will however consider this question and give my finding.

13. The Learned Counsel for the Appellant contended that a Civil Court has no jurisdiction to try the suit in view of specific provision in Section 41 of the Presidency Small Cause Courts Act, 1882, where the jurisdiction to try a suit of this type has been conferred on a Court of Small Causes. In my view, the Appellant has not taken such a plea of want of jurisdiction in the written statement. No such issue has been framed in the Court below. No such argument has been canvassed in the Court below. For the first time in this appeal the question of jurisdiction of Civil Court has been raised. I have already pointed out that a party cannot take up a new plea or a new contention in an appeal unless he has pleaded the same in the written statement. Strictly speaking, the Appellant should not be permitted to canvass this plea in the appeal stage. The argument is liable to be rejected summarily for want of plea.

However, since it is a question of law, I will consider the same.

14. Section 41 provides that all suits between a licensor and licensee or a landlord and tenant relating to "recovery of possession" of any immovable property should be tried by a Court of Small Causes.

In the first place, the present suit is not one for recovery of possession of the suit premises at all. The present suit is one for injunction to restrain the Defendant from entering or continuing to remain in the suit premises. Whether such a relief can be granted or not, will be considered while discussing point No. 3. As far as point No. 2 is concerned, as per the allegations in the plaint and the relief asked for, the suit is not for recovery of possession, and therefore, Section 41 of Small Cause Courts Act cannot and does not apply.

Even if Section 41 of the Act is attracted, it does not specifically bar the jurisdiction of a Civil Court. We may note that Civil Court has plenary powers to try all suits of civil nature u/s 9 of CPC Code. Then we find that in the Presidency Small Cause Courts Act, 1882 there is a specific provision viz. Section 45 which is in the form of an exception to Section 41.

Section 45 reads as follows:

Nothing contained in this Chapter shall be deemed to bar a party to a suit, appeal or proceeding mentioned therein in which a question of title to any immovable property arises and is determined, from suing in a competent Court to establish his title to such property.

The above provision shows that the said Chapter VII where Section 41 finds a place does not bar a party from filing a suit in a competent Court where there is a dispute regarding question of title etc.

In the present case, the Defendant has denied Plaintiff's title and that is covered by Issue No. 1 framed by the Court below. Then the Defendant has pleaded adverse possession which is covered by Issue No. 5. In fact in view of denial of title and framing of Issue No. 1, Plaintiff had to produce all his documents of title and the trial Court has considered the evidence and given a finding that Plaintiff has proved his title. Then the trial Court has also negated the plea of adverse possession. These two issues of question of title and adverse possession could not be decided by a Court of Small Causes. Hence in view of Section 45 of the Presidency Small Cause Courts Act, since the question of title and adverse possession were involved as can be seen from the pleadings and issues framed by the trial Court, it cannot be said that the Civil Court had no jurisdiction to try the suit. If the plaint had been filed in the Small Causes Court and Defendant had taken these pleas, the Small Causes Court could not have decided the issues regarding title and adverse possession. Hence, even on this ground it has to be held that the Civil Court had undoubted jurisdiction to try the suit.

It is well settled and there is no dispute about it that the jurisdiction of a Court is decided mainly on the allegations in the plaint (See *Abdulla Bin Ali and Others Vs. Galappa and Others*,).

As can be seen from the allegations in the plaint, the Plaintiff's case is that he and Defendant are in joint possession and that Defendant being a son and the member of the family has been residing there and now the Plaintiff does not want his son to continue there, and therefore, wants an order of injunction against him. The Plaintiff nowhere concedes that the Defendant is either a tenant or a licensee. It is a suit filed by a father against a son for injunction who is a member of the family. Such a suit is not covered by Section 41 of the Presidency Small Cause Courts Act. Hence, if the allegations in the plaint are read as a whole this is not a suit by a landlord against a tenant or a licensor against a licensee. This is a suit between an owner of a property against a member of his family who is none other than his son. To such a suit Section 41 of the Presidency Small Cause Courts Act is not attracted.

15. As already stated, Defendant does not claim either tenancy or a licence within the meaning of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. There the "licensee" is defined in Section 5(4-A) of the Act which excludes a member of a family. Hence, advisedly, the Appellant does not claim that he is either a tenant or a licensee under that Act.

I have already given a finding that the Defendant has failed to prove the alleged agreement or understanding. There is neither evidence nor plea that the Defendant has to pay any licence fee or rent every month. At best, the Defendant can be called a gratuitous licensee who is residing in the house being a son of the owner. Even if such a view is taken, it does not oust the R. F. 28 jurisdiction of a Civil Court as can be seen from some of the decisions of this Court.

16. Now let me refer to some of the decisions cited by both the Counsel.

In *Nagin Mansukhlal Dagli Vs. Haribhai Manibhai Patel*, , the question was whether after termination of the lease or licence, the ex-tenant or ex-licensee becomes a trespasser, and if so, whether the suit should be filed in a Civil Court or in the Small Causes Court. It was held that notwithstanding the expiry of the lease or licence, the person continues as a tenant or licensee, and therefore, the suit should be filed in the Small Causes Court. There is no dispute about this proposition of law, but it has no bearing on the point under consideration.

In 1988 (2) BCR 9, *Eknath Vithal v. Mansukhlal*, the question was whether a suit for injunction filed by a licensee is a suit within the meaning of Section 41 of the Presidency Small Cause Courts Act. It was held that even such a suit for injunction falls within Section 41 of the Act. In that case there was no dispute about the relationship of licensor and licensee.

Both the counsel relied on 1988 Mah.R.C.J. 15, *Hoshang Rustomji Dotiwala v. Rustomji E. Dotiwala* which I have already referred to on another point. It was a case where the son had claimed a right of tenancy in the property which was held by the father as a tenant. It was held that the son is living in the house as a member of the family being son of the father and he has no independent right to continue to stay in the premises. This decision is directly applicable to the facts of the case and it clearly shows that the Appellant-son has no right to continue in the suit premises.

In *Bal Kalyani and others Vs. State of Maharashtra and others*, the question was whether an employee who is in occupation of the quarters given by the company becomes a trespasser after his retirement or termination of the licence. In my view, this decision has no bearing on the point under consideration.

The Learned Counsel for the Appellant also invited my attention to an unreported judgment of a learned Single Judge of this High Court dated 21-7-1994 in Writ Petitions Nos. 354 and 356 of 1991. That was a dispute between uncle who was a licensor and licensee who was his nephew. It was an admitted case where the nephew was in exclusive possession of one bedroom "with attached bath. That was a case where the licensor had approached the Small Causes Court for eviction of the licensee. The licensee took an objection that the suit should have been filed in the Civil Court. In the present appeal the stand taken is otherwise. Anyhow it is held in that case that having regard to the allegations in the plaint the suit was maintainable in the Small Causes Court u/s 41 of the Presidency

Small Cause Courts Act. The High Court also noticed that there was a concurrent finding of fact that the licensee in that case was staying in the suit premises as a gratuitous licensee under his maternal uncle. Therefore, it was a case where the owner himself had approached the Small Causes Court on the ground that the Defendant was a licensee under him and it was held that the Small Causes Court had jurisdiction. This decision has no application to the facts of the present case having regard to the allegations in the plaint.

17. As against this, there is a clear decision of this High Court reported in 1990 Mah.R.C.J. 273, Vishwanath v. Jandabhai where after an exhaustive survey of case law it has been held a gratuitous licensee cannot claim any legal right in the property and suit is maintainable in a Civil Court for eviction. It was, held that the Defendant was in the position of a trespasser, and therefore, Section 41 of the Presidency Small Cause Courts Act is not attracted.

In 1986 Mh.L.J. 304, Municipal Corporation of Greater Bombay v. M. A. Qureshi it was a case of an eviction case filed by the Municipality against the tenant. The question was whether son of a tenant can claim any legal right in the property. It was held that the son is residing in the house along with the father as a member of the family and he cannot claim any independent legal right.

In 1994 Bom.R.C. 47, Vijay V. Divekar v. Deepak J. Gandhi, it was held that the Defendant was in possession as a gratuitous licensee, and therefore, the suit is maintainable in a Civil Court.

In 1972 All India R.C.J. 703, v. N. Puri v. Bishan Lal Agarwal, the question was about the legal character of a wife's brother and sister of the tenant residing in the premises along with the tenant. In that case it appears the tenant vacated the premises and allowed the wife's brother to continue to stay in the house. The question was whether the tenant had created sub-tenancy or not. In those circumstances, it was held that the tenant had not created any sub-tenancy but permitted his brother-in-law to stay in the premises which is only a licence and not sub-tenancy. In my view, this decision has no application to the facts of the present case.

18. I have already shown that the Appellant has no legal character or status except staying in the house as a member of the family. Section 41 of the Presidency Small Cause Courts Act does not apply to a suit filed by a father against a son either for possession or for injunction. We have already seen that even the father had given a power of attorney to the son to look after and manage the property. Section 41 does not apply to such a case. Hence, in my view the argument that the City Civil Court had no jurisdiction to try the suit has no merit and is liable to be rejected. Point No. 2 is answered accordingly.

POINT No. 3

19. It was argued that the Plaintiff should have filed a suit for possession and not for injunction. It is true that normally a person who is not in possession of the

property should file a suit for possession. But in the present case, the Plaintiff nowhere says that he is not in possession of the suit premises. His case is that he and his son are in joint possession of the suit premises. I have already shown that even when he was a boy the Appellant-son was residing with the father and continued to stay in the suit premises even after the Plaintiff was transferred to Bangalore. It is also in evidence that Plaintiff has been visiting Bombay and residing in the suit house every year. Since the relationship between the parties is one of father and son and they are residing together, it is a case of joint possession even though Plaintiff has been subsequently transferred to Bangalore. The Plaintiff has nowhere admitted that he has been dispossessed or that he has lost possession. Hence, in the circumstances since the Plaintiff is held to be in joint possession along with the Defendant and he has never lost possession, he cannot file a suit for possession. Therefore, the present frame of suit asking for an injunction against the Defendant cannot be said to be bad. Since Defendant has no legal right to continue to stay in the premises, Plaintiff has advisedly asked the relief of injunction which is perfectly and legally permissible. Hence, I find no merit in the contention that the suit is not maintainable.

POINT No. 4

20. In view of my finding on Points Nos. 1 to 3, the appeal has to fail.

Before parting with the case, I have to point out that the son has taken unrighteous stand in contesting the suit and instead of being graceful to the father who had accommodated him all these years and who had given him good education by keeping in a boarding school, the son has made serious allegations against the father and has cross-examined him at length. A son must know his limitations. A father is father even if he is bad. I hope better sense will prevail on the son at least in future.

I cannot help observing that even the Plaintiff-father must also change his ways. It is in evidence that at this old age of the husband being of 70 years, the wife has filed a petition for judicial separation. She has already taken an order of maintenance against the husband and recovering the amount from the husband. There is also allegation against the father that he is a womaniser and he is living with some woman at Bangalore. In view of the broken home because of the strained relationship between the husband and wife, the son has tried to take undue advantage of the situation. Even the Plaintiff must feel one with the family and treat the members of the family as his own irrespective of legal rights over the property. I hope in future better wisdom will dawn on both the father and son and they will try to make amends and lead a happy life in future. With this fond hope I am giving one year's time to the son to comply with the order of the trial Court so that in the meanwhile they can try to change their prejudice against each other.

21. In the result the appeal fails and is dismissed. The judgment and decree of the trial Court are confirmed. However, the Appellant is granted one year's time

from today to comply with the decree of the trial Court. In the circumstances of the case, there will be no order as to costs.