
(1962) 01 GUJ CK 0014
In the Gujarat High Court

Dhagad Ambalal Bhailalbhai and Another	APPELLANT
Vs	
Bai Narmada	RESPONDENT

Date of Decision : 29-01-1962

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Civil Procedure Code, 1908 (CPC) — Section 11, 11

Citation : (1963) 4 GLR 90

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Judgement

V.B. Raja, J.—The facts giving rise to this civil revision application are as follows:

The applicants filed a suit against the opponent-defendant in the Court of Civil Judge, Senior Division at Nadiad, for a declaration that the opponent had no right to recover actual possession of the suit house from the applicants under a decree which was obtained by the opponent in previous Regular Civil Suit No. 40 of 1951 in the Court of the Civil Judge. Junior Division at Nadiad, together with a perpetual injunction restraining the opponent from recovering possession of the suit house. The said suit was transferred to the Court of the Civil Judge, Junior Division at Nadiad, and was numbered as Civil Suit No. 187 of 1957. The learned Judge, however, dismissed the suit on the ground that the suit was barred by res judicata and an appeal against the judgment was dismissed by the learned District Judge.

2. In revision, it is contended that the learned Civil Judge has failed to exercise jurisdiction by wrongly holding that the suit which was filed before him was barred by res judicata. The contention is that the first suit was an ordinary suit cognizable by ordinary Courts, whereas the suit out of which this revision application has arisen is a special civil suit u/s 28 of The Bombay Rents, Hotel and Lodging House Rates Control Act. 1947. which will hereinafter be referred to as the Act. It is contended that the present suit, as framed, is clearly a suit between a landlord and a tenant and relates to the recovery of possession in

respect of premises to which the Act applies. Section 28 of the of the Act, so far as it is relevant, reads as follows:

Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceedings would not but for this provision, be within its jurisdiction.

(a) in Greater Bombay, the Court of Small Causes, Bombay.

(aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and

(b) elsewhere the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of Sec-section (2), no other Court shall have jurisdiction yo entertain any such suit, proceeding or application or to deal with such claim or question.

3. It is clearly stated in Para 7 of the plaint that the defendant is the owner of the house and that the plaintiffs are the tenants in respect of the house. It is, further averred in the plaint that the defendant is not entitled to obtain possession by executing the decree passed in Civil Suit No. 40/51. It is clearly stated in the plaint that the plaintiffs are tenants of the premises and that the defendant is not entitled to take possession of the house in execution of a decree. The plaintiffs therefore claimed an injunction restraining the defendant from taking possession.

It is, however, contended by the Learned Counsel for the opponent that in the plaint the plaintiffs stated that they were the tenants of Yashod and not of the present defendant. No. doubt, in the plaint it is stated that Bai Yashod told the plaintiffs to stay in the house as tenants. It is also stated in the plaint that since then the plaintiffs have been staying in the house as tenants. The suit is, therefore, clearly one between a landlord and a tenant in respect of premises to which the Act applies. But it is contended by the Learned Counsel for the opponent that the suit does not relate to the recovery of possession, which is the second requirement mentioned in Section 28 of the Act. It is contended that this is not a suit by a landlord to recover possession or a suit by the tenant to recover possession as the tenants are already in possession. The contention of the Learned Counsel for the opponent is that when a suit has to be filed under section. 28 of the Act, mit must be either by the landlord to recover possession on by the tenant to recover possession and the suit for an injunction restraining the defendant from recovering possession is not a suit relating to the recovery of

possession. This contention cannot be accepted, because the expression used in Section 28 of the Act is "a suit relating to the recovery of rent or possession of any premises". Section 28 of the Act does not use the expression "a suit for possession" and uses the expression "a suit relating to the recovery of possession". A suit in which an injunction is prayed to restrain the detention from taking possession in respect of the suit premises is a suit relating to the recovery of possession of the suit premises. This contention cannot, therefore, be accepted. In *Baburamal v. Nandram Shivram* 60 Bom. L R, 954, their Lordships of the Supreme Court have observed as follows:

It is manifest from the assertion in the plaint and the nature of the relief asked for, that the plainridd based their case on the provisions of the Act. According to them, the Act gave plaintiff No. 1 protection and plaintiffs Nos. 2 and 3 were entitled to remain in possession as sub-tenants of plaintiff No. 1. They Accordingly sought to avoid eviction by seeking an injunction against the execution of the decree for eviction.

Their Lordships gave, therefore, clearly laid down that a suit in which the plaintiffs claim that they are entitled to remain in possession and seek to avoid eviction by praying for an injunction against the defendant is a suit which falls u/s 28 of the Act, if other requirements of that section are fulfilled. This contention of the Learned Counsel for the opponent is, therefore, rejected.

The first suit, namely Civil Suit No. 40 of 1951 was a regular suit filed under the regular law. It was not a suit filed u/s 28 of the Act. This position is conceded by the Learned Counsel for the opponent. But, he contends that it was open to the defendant to raise a contention that they were tenants and to covert the suit into a suit u/s 28 of the Act. The contends that the Civil Judge, who was trying the suit had jurisdiction to try regular civil suit not falling u/s 28 and also suits falling u/s 28 of the Act. It is, therefore, contended that the present plaintiff, who were defendants in C.S. No. 40/51, should have raised a contention that they are tenants and that they not having done so. Explanation 4 to Section 11 of the CPC would be attracted. Explanation 4 to Section 11, C.P. Code, read as follows:

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

This explanation cannot apply to a ground of defence which would convert the suit into a suit of a different type cognisable by a different type of Court. The ground of defence or attack referred to in Explanation 4 to Section 11, C.P. Code, is a ground of defence or attack in the course of the same suit. The suit having been filed as a regular suit. Explanation 4 refers to any ground of defence or attack in such a regular suit. It does not refer to defence or attack which would have the result of changing the nature of the suit and covering it into one cognisable yb a different Court.

4. Section 11, CPC applies where the earlier suit was filed in a Court competent

to try such subsequent suits or the suit in which such issue had been subsequently raised and had been heard and finally decided by such Court. In the instant case, the second Court is a Court trying the suits u/s 28 of the Act and specially constituted u/s 28 of the Act. The first suit was an ordinary regular suit falling Section 28 of the Act. In such a case, the principle of res judicata cannot apply. As observed in *Vithal Ramchandra v. Sitabai* ILR 36 Bom 548, the finding in a previous suit cannot be res judicata in a subsequent suit, which is of a different character given to it by a special law unless the previous suit also could fall within the class of suits to which the law applies.

5. I, therefore, hold that the Courts below were in error in applying the principles of res judicata and holding that the suit filed by the present petitioners was barred by res judicata. The learned Civil Judge, Junior Division, at Nadiad, therefore, failed to exercise his jurisdiction and he failed to hear the suit which was filed before him, which should have been heard by him. The revision application is, therefore, allowed, the decree of the appellate Court set aside and the learned Civil Judge, Junior Division, is directed to hear the suit u/s 28 of the Act. Costs of the appellate Court and of the revision to be costs in the cause.