

**(2004) 01 BOM CK 0035**

**In the Bombay High Court**

**Case No :** Appeal From Order No. 657 of 2001 and Civil Application No. 762 of 2001

Dr. Bhaga Gujasing Pawar

APPELLANT

Vs

Sou. Shrilekha Sitaram Gavit

RESPONDENT

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**Date of Decision :** 16-01-2004

**Acts Referred:**

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A(2), 28, 29A, 31, 5(4A)

**Citation :** (2004) 5 BomCR 371 : (2004) 3 MhLj 977 : (2004) 4 RCR(Civil) 697 : (2004) 2 RCR(Rent) 509

**Hon'ble Judges :** V.M. Kanade, J

**Bench :** Single Bench

**Advocate :** M.M. Sathe, for the Appellant; S.M. Gowarkar, for the Respondent

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**Judgement**

V.M. Kanade, J.—Heard the learned counsel appearing on behalf of the appellant and the learned counsel appearing on behalf of the respondent.

2. The appellant - original plaintiff is challenging the order passed by the Civil Judge, Senior Division, Nasik, dated 9th July 2001 whereby it held that the Civil Court has no jurisdiction to entertain the suit as filed by the plaintiff - appellant herein. The trial Court, therefore, directed that the plaint be returned to the plaintiff for proper presentation to the appropriate authority having jurisdiction under the Bombay Rent Act.

3. The brief facts giving rise to the present appeal from order are as under:

The plaintiff filed the suit in the Court of Civil Judge, Senior Division, Nasik being Special Civil Suit No. 216 of 1995 praying for possession of the suit premises from defendant No. 1 and for damages and mesne profit. The case of the appellant - original plaintiff was that he and respondent No. 2 - original defendant No. 2 were friends. He was owner of the residential Flat bearing No. F-7, admeasuring 542 square feets, situate at Labdhi Apartments, Shingada

Talao, Nasik, (for short hereinafter referred to as "the suit property"). It is the case of the plaintiff that he is a Doctor and is working as a Medical Officer in the Nasik Municipal Corporation Hospital and that he was allotted a staff quarter by the Corporation, therefore, he was staying in the said Corporation quarter. Respondent Nos. 1 & 2 are husband and wife and respondent No. 2 is a Doctor, and is also working in Nasik Corporation Hospital as a Medical Officer. The plaintiff knew respondent No. 2 for quite sometime. Respondent No. 2 was in need of some premises and therefore on the request being made by respondent No. 2, the appellant allotted the suit property on leave and licence basis. It was agreed that respondent No. 2 will pay Rs. 500/- per month towards the licence fees. It was further specifically averred in the plaint that the relations between respondent Nos. 1 & 2 became strained and the petitions were filed by respondent Nos. 1 & 2 against each other in the Court and police station and in view of the strained relations, respondent No. 2 left the suit property and started residing in Nishiganda Co-operative Society and he surrendered the rights under the licence in respect of the suit property in favour of the plaintiff. Though it was further claimed that respondent No. 2 had left the suit property, respondent No. 1 continued to stay therein. In paragraph No. 5 of the plaint, it was averred by the plaintiff that there are no contractual relationship between the plaintiff and respondent No. 2. It was further averred that too, there was no statutory relation between the plaintiff and respondent No. 1 quay the suit property. It was further averred in the plaint that respondent No. 1 was a rank trespasser. It was further averred that defendant No. 1 did not have any independent right in respect of the suit property and after the surrender of the licence by respondent No. 2, she had no right to continue to stay in the suit property.

3. Respondent No. 1 filed the written statement and claimed that she was the tenant of the suit property. Even in the reply given to the notice which was sent by the plaintiff - appellant herein, she has claimed that she is a tenant in the suit property. Respondent No. 2 filed the separate written statement and supported the claim of the plaintiff. Respondent No. 1 also raised issue regarding the maintainability of the suit and it was her case that the suit was barred by Section 28 of the Bombay Rent Act and the Civil Court has no jurisdiction to entertain the said suit. Trial Court framed various issues. The relevant issues for the purposes of deciding this appeal from order are Issue Nos. 5, 7 & 8, which are reproduced hereinbelow:

"5. Does defendant No. 1 prove that she is residing in suit property as a tenant and defendant No. 1 and 2 were paying monthly rent of Rs. 500/- to plaintiff?

7. Whether this Court has jurisdiction to try and entertain this suit in view of the provisions of Bombay Rent Act?

8. Whether this suit is barred by Section 28 of the Bombay Rent Act?"

4. Both the parties led evidence in respect of all the issues framed by the trial Court. The trial Court, however, did not decide the other issues but gave its

findings on Issue Nos. 7 & 8 and came to the conclusion that the civil Court did not have a jurisdiction to entertain the suit as filed by the plaintiff in view of the provisions of the Bombay Rent Act. It held that, the suit was barred by Section 28 of the Bombay Rent Act.

5. The trial Court, therefore, did not appreciate the evidence adduced by both the parties in respect of the other issues or even on the issue regarding the jurisdiction. The trial Court proceeded to decide the issue of jurisdiction on the basis of averments made by respondent No. 1 in written statement and by comparing them with the averments made by the plaintiff in the plaint. The trial Court, therefore, held that the suit is not maintainable. The appellant is challenging the said order passed by the trial Court.

6. The learned counsel appearing on behalf of the appellant urged that the trial court has clearly erred in coming to the conclusion that the civil Court had no jurisdiction, without recording in finding on the basis of the evidence adduced on record that the prima facie respondent No. 1 had proved that she was a tenant in the suit property. He submitted that therefore, if the averments in the plaint are taken into consideration as a whole the civil Court would alone have jurisdiction to decide the suit. He submitted that in order to hold that the Civil Court had no jurisdiction to try and decide the suit, the finding had to be given on the issue of tenancy. He, however, submitted that merely because respondent No. 1 had averred in her written statement that she was a tenant in the suit property that alone would not oust the jurisdiction of the civil Court. In support of the said submission he has relied on the decision of Division of this High Court in the case of Govindram Salamatrai and Another Vs. Dharampal Amarnath and Another, and the judgment of the Apex Court reported in 1963 66 Bom.L.R. 205 in the case of Vasudev G. Tambwekar v. The Board of Liquidators. He further relied on the Division Bench judgment of this Court reported in 1976 Bom.R.C.16 in the case of Sarfarzali N. Mirza v. Miss. Meneck G. Burjorji Reporter. He also placed his reliance on the judgment of this Court (Single Judge) reported in 1987 Bom.R.C. 24 in the case of Ratanlal Gulabji Bhati v. Himmatlal Hukumji Parihar.

7. The learned counsel appearing on behalf of respondent No. 1 submitted that the trial Court had rightly concluded that the Civil Court did not have jurisdiction. It was submitted that the competent Court under the provisions of Section 15A(2) would have jurisdiction to decide the present dispute as the plaintiff had come but with a case that respondent No. 2 was a licensee. He submitted that since it is an admitted position that respondent No. 1 was the wife of respondent No. 2, she being a member of the family, the only remedy open before the plaintiff was to approach the competent authority u/s 15A(2). He further urged that under the provisions of Section 31 of the Bombay Rent Act, the jurisdiction of the civil Court is expressly barred. The learned counsel appearing on behalf of respondent No. 1 urged that even if the averments in the plaint are considered, in view of the admitted position that respondent No. 2 was a licensee of the plaintiff, the Civil Court's jurisdiction is ousted by virtue of the provisions of the

Bombay Rent Act.

8. I have heard the learned counsel appearing on behalf of the appellant and respondent at length.

9. The issue regarding the jurisdiction of the Civil Court in entertaining the suit has to be decided on the basis of the averments and pleadings in the plaint and the case of the plaintiff put forth in the plaint has not be considered in its entirety and not on the basis of the stray statements made in the plaint. It is a settled position in law that merely on the basis of the averments made by the defendants in the written statement the jurisdiction of the civil Court will not be ousted and jurisdictional fact has to be established before deciding as to whether the civil Court has jurisdiction. In the present case, in my opinion, the plaintiff has come out with a case that though respondent No. 2 was a licensee, he had surrendered his licence and was residing elsewhere. Respondent No. 1 has not denied the fact that respondent No. 2 was residing elsewhere. Respondent No. 1 had also not denied that there are matrimonial disputes between herself and respondent No. 2. Respondent No. 2 had also supported the case of the plaintiff and averred that the decree may be granted in favour of the plaintiff. Thus, he has also admitted that there are matrimonial disputes between himself and respondent No. 1. Respondent No. 1, in the written statement and also in the reply given to the plaintiff's notice, has claimed that she is a tenant in respect of the suit property. In support of the said statement, she has not produced any documentary evidence. Counsel appearing on behalf of respondent No. 1, however, in this court has submitted that though the trial Court in holding that the civil Court had no jurisdiction it had erroneously proceeded to give a finding that Rent court would have jurisdiction to decide the suit in question as respondent No. 1 had claimed to be a tenant. He further submitted, for the first time, in this Court that the Competent court would have jurisdiction to decide the present dispute as per the provisions of Section 15A(2) of the Bombay Rent Act. It is submitted that on the basis of the averments in the plaint, the plaintiff having admitted that there was licence executed in favour of respondent No. 2, respondent No. 1 being the wife of respondent No. 2, a member of the family, becomes a licensee. As such, he urged that, the competent Court established under the Rent Act alone would have jurisdiction to decide the said suit. The learned counsel, therefore contended that the only remedy available to the plaintiff was to present the plaint before the competent Court. To substantiate his contention, he relied on the judgment of the Apex Court wherein it is held that even if the relationship between the landlord and tenant or licensor and licensee had been terminated, yet the possession of that person could not be termed as the trespasser and therefore, the civil Court would have no jurisdiction in such a case. The learned counsel submitted that in the present case respondent No. 2 was admittedly licensee and respondent No. 1 being the wife of the licensee could not be termed as a trespasser. Therefore, he submitted that in this background, only the competent Court would have jurisdiction.

9. In my view, the trial Court has erred in returning the plaint by giving a finding that the Civil Court has no jurisdiction to decide the said suit without giving finding on issue No. 5. It is a settled position in law that while deciding the issue of jurisdiction, the trial Court has to consider the averments made in the plaint in its totality and conclusion in that regard has to be arrived at not on the basis of the stray averments made in some paragraphs. The Apex Court in the case of Vasudev Gopalkrishna Tambwekar (supra) has held that the exclusive jurisdiction of the Small Causes Court arises only if the person invoking jurisdiction of the Court alleges that the other party is a tenant or a landlord and the question is one which is referred to in Section 28. The Apex Court has further observed that the defendant was not entitled to displace the jurisdiction of the ordinary Court by alleging that he stands in that relation qua the other and on that ground the Court has no jurisdiction to try the suit or proceeding or an application. The Apex Court at page No. 207 in the said judgment has observed "It is well-settled that the real nature of a transaction has to be determined on a proper construction of the document as a whole and not upon any particular words used in the document."

In the present case, the plaintiff has not invoked the jurisdiction of the civil Court by alleging that respondent No. 1 is either a tenant or licensee. He has come with the specific case that respondent No. 1 is neither a tenant nor a licensee but she is a trespasser; as there is neither a contractual nor statutory relationship between the himself and respondent No. 1. Respondent No. 2, husband of respondent No. 1, is residing separately after having surrendered the licence. Thus, the ratio of the judgment laid down by the Apex Court in the case of Vasudev Gopalkrishna Tambwekar (supra) is squarely applicable in the present case.

10. Similarly, the learned Single Judge of this Court in the decision reported in 24 Bom.R.C. 1987 in the case of Ratanlal Gulabji Bhati v. Himmatlal Hukumji Parhar, has observed that the Civil Court has the jurisdiction to agitate upon the jurisdictional fact as to whether the defendant was falling in the category of the "protected licensee" u/s 5(4-A) of the Bombay Rent Act or whether he falls under the expected category. The learned Single in paragraph 13 of the judgment has observed as under:

"13. So far as the provisions of Section 28 are concerned, the plea that the ordinary Civil Court has no jurisdiction can be negated having regard to Section 29-A of the Act. But it must fall also on another ground independent of the provisions of Section 29-A of the Rent Act. It was not disputed even by Mr. Manudhane that so far as the question of jurisdiction is concerned, the Court's jurisdiction has to be verified from the averments made in the plaint. This is the result of the well-known doctrine of demurrer. A suit between a landlord and tenant for possession of the suit premises or for any other relief arising out of the Rent Act may be barred from the jurisdiction of the Civil Court, but if the plaint shows that the suit is not between a landlord and tenant and if the plaint

further shows that the suit is not for any other relief arising out of the Rent Act, the question of the application Section 28 itself does not arise."

11. Thus, in my view, in the present case also it was the duty of the trial Court to decide the jurisdictional fact as to whether the defendant was a tenant or licensee by giving a finding on issue No. 5. In my view, the ratio of the above case would be squarely applicable to the facts of the present case. Therefore, the trial Court has clearly erred in not deciding the Issue No. 5 and independently came to the conclusion that the Civil Court had no jurisdiction.

12. Similarly, in the case of Govindram v. Dharampal (supra) the Division Bench of this Court has observed as under:

"Therefore the question that I have to address myself to is whether the question as to whether the defendant is a tenant or a licensee is a question which arises out of the Act or any of its provisions. Really, this question is not a question that has anything to do with the Act or any of its provisions. It is a question which is collateral and which has got to be decided before it could be said that the Act has any application at all. The very application of the Act depends upon the defendant being a tenant. If he is not a tenant, the Act has no application, and therefore before the Court can apply any provisions of the Act or decide any question arising out of the Act it has got to determine whether the defendant is a tenant who can claim the protection of the Act. It is a jurisdictional question which has got to be determined in order to decide whether the particular Court in which the suit has been filed has or has not jurisdiction to try the suit, and in my opinion, Section 28 does not deal with jurisdictional questions which have got to be decided in limine before matters arising under the Act can be considered by the Court. I see no difficulty in giving this construction to the section because if Mr. Justice Shah had held that the defendant was not a licensee but a tenant, then the question as to whether the defendant was protected under the Act or whether the plaintiff was entitled to a decree under the Act would be a question which would undoubtedly arise out of the Act and which would require consideration of the provisions of the Act, and therefore once that decision was arrived at, the suit would have to be transferred to the Small Causes Court in order that these questions should be decided as laid down by Section 28. If, on the other hand, as the learned Judge has held, the defendant is a licensee, no question arises as to applying any provisions of the Act and therefore this Court rightly dealt with the suit and passed a decree against the defendant as a licensee and not as a tenant. If Mr. Advani's argument were sound, the result would be that this court would be in substance deprived of its jurisdiction in all suits for possession. According to Mr. Advani, all that the defendant would have to allege would be that he is a tenant. As soon as he made that allegation this court would have ceased to have jurisdiction. Whether the plaintiff filed the suit against a trespasser or he filed a suit against a licensee, the mere allegation by the defendant in the written statement would be sufficient to deprive the High Court of its jurisdiction. It is well established cannon of construction that when

the Legislature deprives the High Court of its jurisdiction the language used by the Legislature must be strictly construed. Equally so, when the Legislature confers special jurisdiction upon a subordinate Court, that language must also be strictly construed. I see nothing in Section 28 to warrant the contention that the High Court has been deprived of its jurisdiction in all suits for possession wherever the defendant takes up the contention that he is a tenant. The High Court has only been deprived of the jurisdiction in those suits where a landlord files a suit against his tenant and the tenant seeks the protection of the Rent Restrictions Act. The High Court's jurisdiction is also deprived in those cases where, although the landlord might file a suit against a person alleging that he is a licensee or a trespasser, it may ultimately turn out that the defendant was not a licensee or a trespasser but a tenant and he was entitled to the protection of the Rent Control Act. Whether a person is entitled to the protection of the Rent Control Act, whether a person is entitled to the benefit of any of the provisions of the Rent Control Act, all these are questions which only the Small Causes Court can decide and determine, but whether a person is a tenant or a licensee or a trespasser are not questions which Section 28 has left to the determination of the Special Court set up under the Rent Control Act."

13. In the facts and circumstances of the present case the ratio laid down by the Division Bench is squarely applicable to the facts of the present case. The trial Court has clearly erred in coming to the conclusion that the civil Court had no jurisdiction on the basis of the averments made in the written statement by respondent No. 1 that she was a tenant.

14. Similarly, in the case of Sarfarzali N. Mirza v. Miss Maneck G. Burjorji Reporter reported in 1976 Bom.R.C.16 it is observed as under:

"From the above authorities, the legal position is well-settled that in order to determine which Court has jurisdiction to try a suit, the Court should read the plaint as a whole and ascertain the real nature of suit and what in substance the plaintiff has asked for. Whatever may be the form of relief claimed, if on a fair reading of the plaint, it becomes apparent that the plaintiff has alleged relationship of landlord and tenant between him and the defendant and the relief claimed in substance related to the recovery of rent or possession or raises a claim or question arising out of the Rent Act or any of its provisions, then it is the special Court alone that will have jurisdiction to decide the suit. If a dispute is subsequently raised by the defendant about the existence of relationship of landlord and tenant, the continuance of the suit in the special Court will depend on the Court on that issue. Similarly, if the plaint does not allege the relationship of landlord and tenant and no claim or question arises out of the Act or any of its provisions then it will be the ordinary civil Court and not the special Court that will have jurisdiction to entertain the suit."

15. In the present case, the trial Court has, on the basis of conjunctures and surmises, attempted to interpret the plaint with the help of the stray averments made in the plaint and has erroneously come to the conclusion that "prima facie

it appeared from the pleadings that the dispute involved in the suit moves around the tenancy dispute between the parties." The trial Court further relied on the reply given by respondent No. 1, Exhibit-68 and came to the conclusion that in the reply also respondent No. 1 had specifically claimed the tenancy right in the suit flat. The trial Court further, on the basis of the pleadings in the plaint, has come to the conclusion that the dispute resolves around the tenancy dispute. Therefore, it held that the suit had to be decided by the competent Court having jurisdiction to decide the tenancy. In the entire order, the trial Court has not considered the evidence which is adduced on record in order to decide whether respondent No. 1 has proved that she is tenant qua the suit property or that from the averments in the plaint, the plaintiff had invoked the jurisdiction of the Court on the basis that there is relationship between himself and respondent No. 1 as a landlord and tenant. Therefore, the approach of the trial Court is totally erroneous. In the result, Appeal from order is allowed, the order passed by the trial Court is set aside. The trial court is directed to decide the issue of jurisdiction after giving appropriate finding on Issue No. 5 and after appreciating the evidence on record. In the event the trial Court comes to the conclusion that the Civil Court has jurisdiction then it shall also decide the rest of the issues. The trial Court is directed to finally decide the matter as expeditiously as possible, preferably within a period of six months from today.

16. Office to issue writ immediately.

17. Appeal from order is disposed off in the above terms.