

(1955) 11 BOM CK 0044
In the Bombay High Court
Case No : First Appeal No. 629 of 1955

Harswarup Khannamal and Others	Vs	APPELLANT
Nandram Shriram and Others		RESPONDENT

Date of Decision : 07-11-1955

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1944 — Section 10, 12, 14
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 14, 28, 29, 29A
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3, Order 21 Rule 103, 9

Citation : AIR 1956 Bom 656 : (1956) 58 BOMLR 288 : (1956) ILR (Bom) 405

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : P.P. Khambata, N.A. Mody and M.C. Patolewala, instructed by Hasan Baxi and Co, for the Appellant; S.M. Shah and V.T. Gambhirwala, for the Respondent

Judgement

Chagla, C.J.—A rather important question arises in this appeal as to the effect to be given to the provisions of Section 29A (Rent Act.) The suit out of which this appeal arises was filed by three plaintiffs. The first plaintiff was the tenant of the first defendant. The property was then purchased from the first defendant by the second defendant sometime in 1949 and the property was subsequently purchased from the second defendant by the third defendant.

Plaintiffs 2 and 3 contended that they were the lawful sub-tenants of the first plaintiff. A notice to quit was given by the landlord on 6-12-1947 and a suit was filed in the Small Cause Court by the landlord on 29-4-1948. to eject the first plaintiff. To this suit he also made plaintiffs 2 and 3 parties alleging that they were trespassers and had no right to be on the premises.

The Small Cause Court raised various issues in that suit) and one issue which it decided and with which we are concerned is that plaintiffs 2 and 3 were not lawful sub-tenants, that the first plaintiff had sublet the premises to plaintiffs 2

and 3 contrary to law, and therefore had deprived himself of the protection of the Rent Act. The Small Cause Court, therefore, passed a decree for ejectment against all three plaintiffs.

The three plaintiffs appealed to a Bench of the Small Cause Court and the Bench also upheld the decision of the trial Court on this issue. Thereafter the plaintiffs filed the present suit in the City Civil Court from which this appeal arises, and the suit was substantially by plaintiffs 2 and 3 and the relief that plaintiffs 2 and 3 sought was for a declaration that they were the lawful sub-tenants of the first plaintiff in respect of the premises and entitled to the possession, use and occupation of the said premises as sub-tenants.

An issue as to the maintainability of the suit was raised by the City Civil Court and the learned Judge decided that issue in favour of the plaintiffs, but on merits held that plaintiffs 2 and 3 were not lawful sub-tenants and therefore dismissed the plaintiffs' suit. The plaintiffs have now come in appeal, and the first question that arises in limine is whether in view of Section 28, Rent Act (Act 57 of 1947) the City Civil Court has jurisdiction to try the suit.

2. Section 10, Rent Act 1944 provided :

"Notwithstanding anything to the contrary in any law for the time being in force, a tenant may sub-let any portion of his premises to a sub-tenant provided he forthwith intimates in writing to his landlord the fact of his having so sub-let the premises and also the rent at which they have been sub-let".

This alleged sub-letting took place when this Act of 1944 was in force, but it should be borne in mind that the Act of 1944 gave no protection to the subtenant, nor did it create any privity of contract between the sub-tenant and the landlord. When we come to the present Act LVII of 1947, Section 14 provides :

"Where the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the coming into operation of this Act shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued."

Therefore, a right has been created in favour of the sub-tenant u/s 14, which right does not exist under the ordinary law. There is no privity of contract or interest between a sub-tenant and a landlord, and under the ordinary law if a landlord gets a decree for ejectment against his tenant his sub-tenant could be ejected under that decree.

But Section 14 puts the sub-tenant in the same position as the tenant, and therefore he is entitled to claim u/s 12 the same protection which the tenant himself can claim. This was the very issue that the sub-tenant raised before the Small Cause Court. Whereas the contention of the landlord was that his tenant had created a tenancy which was not permissible in law and therefore he was

liable to be ejected, the contention of the subtenant was that the sub-tenancy was lawful, that by reason of Section 14 he was put in the same position as the tenant, and he was protected u/s 12 and could not be ejected.

This issue was decided against the sub-tenant by the Small Cause Court and finally by the appeal Court set up u/s 29, Rent Act.

3. The question is whether after the decision of this issue given by the Small Cause Court it is open to the sub-tenant to reagitate this question in the city Civil court. What is urged by Mr. Khambata is that he is entitled to file and maintain this suit by reason of Section 29A, Rent Act. Section 29A provides :

"Nothing contained in Section 28 or 29 shall be deemed to bar a party to a suit proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent court to establish his title to such premises."

Looking to the scheme of the Act which has been often considered in various decisions of this court it is clear that Section 28 sets up a special court upon which exclusive jurisdiction is conferred with regard to matters mentioned in that section. That section also expressly ousts the Jurisdiction of any court from trying or deciding matters mentioned in that section and with regard to which exclusive jurisdiction has been conferred upon the special court.

The Small Cause Court at Bombay is special court set up u/s 28, and the exclusive jurisdiction conferred upon that court is to entertain and try any suit or proceeding between a landlord and 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 and to deal with any claim or question arising out of this Act or any of its provisions and this section further provides that subject to the provisions of Sub-section (2) no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.

As we shall presently point out there is no dispute in this case that the issue as to whether plaintiffs 2 and 3 were lawful sub-tenants protected by reason of Section 14 is an issue which was properly tried by the Small Cause Court. Indeed it was an issue which could only have been tried by the Small Cause Court, that court being the competent court u/s 28.

4. The narrow question therefore we have to decide in this appeal is whether a question which is solely cognizable by the special court set up u/s 28 can be reagitated u/s 29A. Putting the question in a different language could it be said that the question of title of premises referred to in Section 29A is a question which has already been tried by the special Court u/s 28 and with regard to the trial of which it has been specially set up and made the exclusive court.

Apart from authorities and on first principles it would seem indeed curious that the Legislature after solemnly setting up a special court and investing it with

exclusive jurisdiction ousting the jurisdiction of every other court, should proceed in the very next section to nullify the effect of Section 28 and to permit another court to go into that very, question and to decide that question.

Section 29 is a section providing for appeal and the decision of the Small Cause Court attains finality when a decision is given in appeal u/s 29. Therefore the result of construing Section 29A as Mr. Khambata wants us to do would be further to interfere with the finality given to the decision of the Small Cause Court u/s 29. In this case the issue as to whether plaintiffs 2 and 3 are protected by the Rent Act has been tried by the special court, it has been confirmed by the appeal court and has become final.

The attempt of the plaintiffs has been to interfere with that finality by filing a suit with regard to the identical question and getting a different decision from the city civil court. If the intention of the Legislature was as Mr. Khambata would have us believe that the Small Cause Court being a court of subordinate jurisdiction should not be permitted to decide finally certain matters relating to title then nothing would have been easier than for the Legislature not to invest the Small Cause Court with jurisdiction with regard to those matters.

We can understand the argument that certain matters do not fall u/s 28 and therefore u/s 29A a party is entitled to agitate those matters in a competent court. We can also understand the contention that certain matters decided in a suit or application u/s 28 were incidentally decided and that decision was not intended to be final and the matter could be reagitated in a proper suit u/s 29A. But the contention of Mr. Khambata goes to this length that although a matter may fall u/s 28, although it may be a matter which is decided not incidentally but directly and substantially even so if it is a matter which according to him is a matter dealing with title it is open to the party aggrieved by the decision of the Small Cause Court to file a suit u/s 29A.

5. In this case it is perfectly true that the suit filed by the landlord was against his tenant and it was a suit between landlord and tenant only to the extent that it was a suit between landlord and the first plaintiff. Mr. Khambata is right when he says that the suit as between the landlord and the plaintiffs 2 and 3 was not suit between landlord and tenant.

The landlord sued plaintiffs 2 and 3 as trespassers and therefore to that extent that the suit was not filed within the ambit of Section 28. But it has now been held by the supreme Court and we must proceed to refer to that decision that where a landlord files a suit against a tenant and the suit is a suit exclusively triable by the special court set up u/s 28 and if the landlord makes party defendants persons who he alleges are trespassers and these trespassers contend that they are sub tenants and entitled to be protected the issue that arises in this suit as between the plaintiff and the sub-tenants is an issue which arises out of the Act and the Small Cause Court is competent to try that issue and that decision has the same efficacy u/s 28 as the decision between the

landlord and tenant.

6. In *Importers and Manufacturers Ltd. Vs. Pheroze Framroze Taraporewala and Others*, the matter has first come before me in civil revision and I rejected the contention of the sub-tenants that the issue between the landlord and the sub-tenants whether the sub-tenants were trespassers or sub-tenants could not be tried in the suit between the landlord and the tenant, and the reason why I came to that conclusion was that the sub-tenants were properly made parties under Order 1 Rule 3 and the decision given by the Small Cause Court against the sub-tenants was a valid and binding decision. My view was upheld by the Supreme Court and Das J. points out at p. 75 :

"Section 28 confers jurisdiction on the Court of Small Causes not only to entertain and try any suit or proceedings between a landlord and a tenant relating to the recovery of rent or possession of the premises but also to the deal with any claim or question arising out of this Act or any of its provisions". There is no reason to hold that "any claim or question" must necessarily be one between the landlord and tenant.

In any case once there is a suit between a landlord and a tenant relating to the recovery of rent or possession of the premises the Small Cause Court acquires the jurisdiction not only to entertain that suit but also "to deal with any claim or question arising out of the Act or any of its provisions" which may properly be raised in such a suit."

And the learned Judge further held that question that arose between the landlord and the sub-tenant was a question which was properly raised in that suit. If the Small Cause Court has jurisdiction to try the issue between the landlord and the sub-tenant it must follow as a necessary corollary that the jurisdiction of any other court to try that issue has been ousted.

Once it is conceded and it must be conceded in view of the decision of the Supreme Court that the Small Cause Court had jurisdiction to try the issue as to whether the plaintiffs 2 and 3 were lawful sub-tenants of the landlord then it is difficult to understand how it could possibly be contended that the jurisdiction of the city civil court or any other court was not ousted u/s 28 of the Act.

The issue that has been tried by the city civil court is the identical issue which was tried by the Small Cause Court, the evidence led by the plaintiffs is the identical evidence and the effect of the trial in the city civil court is nothing more than a rehearing of what was tried and decided by the Small Cause Court.

7. Mr. Khambata has argued that even so the language of Section 29A is wide enough to permit the plaintiffs to re-agitate this matter. (Turning) to that section what is permitted to a party is to establish his title to such premises. What is the title which Section 29A contemplates?

In view of Sections 28 and 29 and in view of the policy of the legislature to set up special courts and confer upon them exclusive jurisdiction in our opinion the

title contemplated by Section 29A cannot be a title which arises by reason of the provisions of the Rent Act. It must be a title de hors the Act. If the title arises by reason of the provisions of the Rent Act, then it is obviously a question arising out of the Act and that question can only be determined by the special court.

In this case it is clear that the title on which the plaintiffs 2 and 3 rely is not a title de hors the Rent Act. It is not a title which is in them by reason of the ordinary law. Under the ordinary law as we have already pointed out a sub-tenant has no title at all which he can assert against the landlord.

It is only by reason of Section 14. Rent Act that he has been given the same status as a tenant and he is protected u/s 12 of the Act. Therefore what plaintiffs 2 and 3 are alleging in the suit is that they are sub-tenants that by reason of Section 14 they have obtained the status of tenants and by reason of Section 12 their possession is protected and they cannot be evicted except on the grounds mentioned in the Act.

Further Section 29A enables an aggrieved party to sue in a competent court to establish his title. Therefore the court in which the suit must be filed must be a court competent to decide that question of title. The Small Cause Court has not been invested with jurisdiction to decide questions of title otherwise than by reason of the provisions of the Rent Act, and the ordinary courts of the land still continue to have jurisdiction to decide questions of title. It is because of this that the Legislature made it clear that suits on title and in respect of title could be riled in courts competent to decide those questions notwithstanding what is contained in Section 28 or 29.

8. Emphasis was placed upon the fact that the opening words of Section 29A are

"Nothing contained in Section 28 or 29 shall be deemed to bar a party to suit, proceeding or appeal mentioned therein in which a question of title to premises arises...."

This clause cannot be read to mean that the exclusiveness of the jurisdiction conferred upon the special Courts or the finality to be attached to the decision of a competent court is undermined by what is contained in Section 29. Attention is also drawn to the fact that even though a question as to title may arise and may be determined by the special court, even so Section 29A enables a party to sue in a competent court to establish his title. But the determination referred to in Section 29A can only be an incidental determination.

In trying suits u/s 28 it may become necessary to a special court incidentally to determine questions of title. Such determination is not binding upon the party against whom the decision is given and notwithstanding such decision a party can assert his title in a competent court. But where the decision is direct, where the decision is one of the very question which has been left to the special court to decide it is difficult to accept the contention that the Legislature permitted that very question to be reagitated u/s 29A.

9. Therefore the attempt should be as in the case of every piece of Legislation to reconcile Sections 28, 29 and 29A and not place an interpretation upon Section 29A which would lead to conflict between Sections 23 and 29 and Section 29A or which would render the object of the Legislature in establishing special Court and investing them with exclusive jurisdiction nugatory.

The only way we can reconcile Sections 28, 29 and 29A is to hold that the title contemplated by Section 29A is a title in a party de hors the Act and a title not arising out of any of the provisions of the Act. It may even be suggested, but it is not necessary to decide the question, that the title to premises referred to in Section 29A cannot be a right which a tenant or a sub-tenant has merely to enjoy property.

It is possible to take the view that the title to premises in Section 29A means the contention on the part of the landlord or the tenant that he is the owner of the property which contention has been decided incidentally by the Small Cause Court and which can be relitigated in a competent court u/s 29A. In this case if plaintiffs 2 and 3 had contended that they were the owners of the property and not sub-tenants the Small Cause Court, in order to give efficacious relief to the landlord would have to decide that issue.

But that issue would not have been binding upon plaintiffs 2 and 3 because the Small Cause Court cannot finally decide questions of title and it would have been open to plaintiffs 2 and 3 to assert their right to the property as owners in a compete it court. But the assertion of plaintiffs 2 and 3 is not on the strength of title which is independent of the Rent Act; it is a title which has its origin in the provisions of the Act itself.

10. It was then attempted to be argued by Mr. Khambata that the Small Cause Court suit bring essentially a suit between the landlord and his tenant, the first plaintiff, the decision with regard to plaintiffs 2 and 3 was merely incidental. What is urged is that the landlord wanted to evict the first plaintiff that he wanted to establish as against his tenant that he had created an unlawful sub-tenancy and that was the main contention in the suit and that with regard to plaintiffs 2 and 3 the decision with regard to sub-tenancy was really incidental. That contention is obviously untenable. The very basis for the eviction of plaintiffs 2 and 3 was that they were not lawful sub-tenants. If they were lawful sub-tenants and if they fell within the ambit of Section 14, then they could not be evicted. Therefore it is impossible to contend that the decision that the Small Cause Court gave as between the landlord and plaintiffs 2 and 3 was an incidental decision.

It was a decision that went to the very root of the matter and as it was a question arising out of the Act it became a final decision when the appeal court u/s 20 upheld the decision of the trial court.

11. Reliance has been placed on certain judgments of this court for the contentions put forward by Mr. Khambata. The first is Govindram Salamatrai and

Another Vs. Dharampal Amarnath and Another, . In that case Bhagwati J. and myself were dealing with a suit filed by the plaintiff seeking to evict the defendant on the ground that he was a licensee and that his license had been terminated and the defendant's contention was that he was not a licensee but a tenant and we held that the suit was rightly filed in the High Court and that the Small Cause Court had no jurisdiction to try that suit.

That was a suit not between a landlord and a tenant but between a licensor and a licensee and we pointed out that if the High Court came to the conclusion that the defendant was not a licensee but a tenant then the suit will have to be transferred to the Small Cause Court to be tried u/s 28. The suit that we are dealing with here is admittedly a suit between the landlord and tenant. Admittedly the Small Cause Court had jurisdiction to try this suit and any civil court had no jurisdiction. Therefore the principle of "Govindram's case", (B) does not apply to the case we have before us.

12. Strong reliance was also placed on another judgment of a Division Bench in Madhavprasad Kalkaprasad Vs. Indirabai Chandavarkar and Others, . At first blush it may seem as if the facts of that case are similar to the facts we have before us but the similarity is only apparent and superficial.

It is true that in that case also the plaintiff filed a suit in the High Court for a declaration of his title that he was a sub-tenant of the defendant and as an ancillary relief he sued for possession and differing from Shah J., Mr. Justice Bhagwati and myself held that the High Court had jurisdiction to entertain that suit. There are one or two important distinguishing features in that case.

The Small Cause Court suit there was between the landlord and his tenant and in that suit the tenant agreed to vacate the premises. Thereupon an order was passed in favour of the landlord. The plaintiff in the High court suit was not a party to that suit and he offered obstruction in the execution proceedings and he contended that he was the tenant and not the party whom the landlord had sued. An order was made against him in the execution proceedings. Thereupon he filed a suit in the High Court under Order 21. Rule 103, and the question that arose was whether this suit was maintainable by the High Court.

Shah J. held that the High Court had no Jurisdiction and in coming to that conclusion he applied three tests for deciding whether the suit fell u/s 28 or not and the three were, first, that it was a suit between the landlord & tenant, second that it was suit for possession and the third, that it was a suit in respect of premises to which part II of the Act applied. In appeal we took the view that with respect these were not the only three tests that should be applied in deciding whether the suit fell u/s 28 or not.

It is obvious that a suit under Order 21 Rule 103 can only be filed in a civil Court and not in a special court set up u/s 28. No issue had been decided by the Small Cause Court as between the landlord and the plaintiff to the suit in the High Court. He only appeared on the scene in the execution proceedings, and as the

CPC provides that any order made in summary proceedings in execution is not binding on the party against whom the order is made and he had a right to go to a Civil Court within the time specified in the Code, the plaintiff filed the suit.

Therefore it could not be contended in that case as it is contended here that an issue solely triable by the special court has already been tried and is sought to be reagitated in a civil court. Further what the plaintiff was contending in the High court suit was that he was a tenant of the landlord and not his subtenant. Therefore the title he was asserting is a title which he had under the ordinary law. He was not relying on any of the provisions of the Rent Act for asserting his title.

In the case before us as we have already pointed out the right which plaintiff; 2 and 3 assert is a right which does not flow to them from the ordinary law but from the provisions of the Rent Act. Mr. Khambata has relied on a passage in the judgment at "page 194" where it is stated :

".... We do not for a moment accept the proposition that even where a suit is substantially for title and possession is asked merely as an ancillary relief even so by reason of Section 28 the suit must be transferred to the special court set up u/s 28."

Then we set out the provisions of Section 29A and proceed :

"Therefore where the special court u/s 28, or the appeal court u/s 29, in dealing with suits referred to in Section 28 incidentally decided the question as to title the party to those proceedings is not barred from agitating the title to the suit premises in a competent court."

We do not for a moment accept the proposition that the Small Cause Court suit filed by the landlord was a suit substantially for title. Nor can we agree that any question as to title was incidentally decided by the Small Cause Court in the suit in question. Therefore what we said in that Judgment is correct and that when a suit is filed in the Small Cause Court substantially for title which title is de hors the Act and which title does not arise by reason of the provisions of the Rent Act, then the Small Cause Court would have no jurisdiction to entertain that suit.

The opinion we formed was that the High court suit which we were considering was a suit filed by the plaintiff substantially for title. The suit here is a suit where the plaintiff is claiming rights under the Rent Act and where he is asserting that the provisions of the Rent Act gives him protection and he cannot be evicted by the landlord.

13. Under the circumstances we are of the opinion that the learned city civil Judge with respect to him. was in error when he came to the conclusion that the suit filed by the plaintiffs was maintainable. In view of our decision it is unnecessary to consider whether on merits the Judgment of the learned judge is Justified or not. We will dispose of this appeal on this preliminary ground.

14. The result is that the appeal fails and must be dismissed with cost.
15. Decree not to be executed for fortnight.
16. Appeal dismissed.