

(2007) 01 BOM CK 0094

In the Bombay High Court

Case No : Writ Petition No. 3709 of 2005

J.C. and Sons and Another

APPELLANT

Vs

Ghafrana Banobi Ahmed Ali

RESPONDENT

Date of Decision : 31-01-2007

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1944 — Section 10
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28, 29A
Civil Procedure Code Amendment Act, 1982 — Order 47 Rule 1, Order 7 Rule 11, 151, 57
Maharashtra Rent Control Act, 1999 — Section 33, 33(2)
Provincial Small Cause Courts Act, 1887 — Section 20(2), 23, 23(1), 26
Transfer of Property Act, 1882 — Section 111

Citation : (2007) 4 ALLMR 245 : (2007) 2 BomCR 673 : (2007) 4 MhLj 705

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.V. Purohit, for the Appellant; Gulam Mohommad, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This petition filed by the tenants is directed against orders dated 14-6-2005 passed below Exhibit 24 and earlier order dated 25-1-2005 passed below Exhibit 20 by 5th Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit 122/2002. Said suit is filed by present respondent/landlady for decree of possession, arrears of rent, damages and notice charges etc. and in that suit application moved by present petitioners under Order 7, Rule 11, CPC read with Section 33 of Maharashtra Rent Control Act, 1999 (Rent Act-hereafter) came to be rejected on 25-1-2005. Petitioners thereafter moved application under Order 47, Rule 1 read with Section 151 of CPC for review (vide Exhibit 24) which also came to be rejected on 14-6-2005. Petitioners contend that as it is a suit between landlord and tenant, Small Cause Court alone has jurisdiction while respondent states that as her title has been denied by petitioners, suit filed by her for recovery of possession on the basis of her title

before Civil Court is maintainable. Both the orders passed by Civil Court are in favour of landlady. As per orders of this Court dated 26-7-2005, writ Petition is to be disposed of finally at admission stage only. Accordingly Rule made returnable forthwith and matter is heard finally by consent of parties.

2. In her plaint respondent states that her husband owned shop block No. 29 on the ground floor of municipal house number 49/62-A, Ward No. 30, General Merchant Co-operative Market cum Housing Society Ltd, Gandhibagh, Nagpur which said husband let out to present petitioners through its Partner as per agreement of lease dated 26-9-1973. She further states that firm of petitioners was paying rent to her husband who latter gifted the block orally on 25-8-1999 to her and also delivered its constructive possession to her. Letter of attornment was issued to petitioners and petitioners on 24-3-2000 forwarded reply questioning said a gift and demanded true certified copy of gift. Hence plaintiff as also her husband issued registered notice dated 10-7-2001 but petitioners/ original defendants continue to forward rent in the name of husband. Respondent/plaintiff as also her husband accepted the rent up to 30th April, 2000. Husband of respondent then called upon petitioners to pay arrears from 1-5-2000 to 30-6-2001 amounting to Rs. 7000/- " of Rs. 500 per month to his wife i.e. present respondent and also pointed out that in case of non-compliance of notice defendants would be required to face legal action and also pointed out provision for forfeiture of tenancy. Petitioners forwarded reply to their advocate again making allegations against the gift and specifically mentioning that petitioners/defendants were legal and lawful tenants of husband and denied any attornment and arrears. They also enclosed two cheques for Rs. 7000/- each. Hence husband of respondent sent another reply notice dated 3-9-2001 to counsel for petitioners in which he again reiterated earlier facts of oral gift and pointed out that petitioners were unnecessarily causing harassment. He returned two cheques mentioned above along with said reply notice. On 17-9-2001 respondent/plaintiff issued notice under certificate of posting asserting her title and mentioning all subsequent facts and demanding arrears of rent from 1-5-2000 till 31-10-2001. She also pointed out that there was denial of her title and hence petitioners incurred forfeiture of their tenancy. She accordingly forfeited their tenancy rights from midnight of 31st October, 2001 as per provisions of Section 111(g) of Transfer of Property Act (hereinafter TP Act) and demanded vacant possession. In default she also claimed damages at the rate of Rs. 100/- per day from 1-11-2001. She stated that this notice was again replied with the same false and mischievous allegations on 26-9-2001 by petitioners. The respondent states that because of this reply forwarded to him, her husband forwarded a detailed notice on 15-10-2001 and again pointed out the correct position. As the petitioners did not vacate as per notice dated 17-9-2001, respondent filed Special Civil Suit 122/2002 claiming relief of recovery of arrears of rent, damages, interest, notice charges and also decree for possession. In this Civil Suit, petitioners filed application at Exhibit 20 for rejection of plaint on the ground that suit filed by respondent was before wrong forum and said Court had

no jurisdiction as it was dispute between landlord and tenant. They also relied upon provisions of Section 33 of Maharashtra Rent Act, 1999. Application was opposed by respondent who pointed out entire history and also stated that petitioners renounced their character as tenant of respondent and set title in her husband and pointed out that her suit was after forfeiture of tenancy. On 25-1-2005, after hearing parties Court below found that Section 33 of Rent Act gave it jurisdiction because its Court i.e. 5th Joint Civil Judge, Senior Division, Nagpur is newly created Court and pending Civil suits on file of 2nd Additional Small Causes Court and Joint Civil Judge Senior Division, Nagpur have been withdrawn and transferred to it on administrative grounds for disposal according to law. It found that in view of this administrative orders of High Court dated 23-12-2004 and in view of provisions of Section 33(2)(a) of Rent Act, as it is a Court trying suit withdrawn from Small Cause Court; it is deemed to be the Court of Small Cause. In addition it also mentioned that there is denial of relationship of landlord and tenant in the matter. It therefore rejected application of petitioners and proceeded to frame issues. The petitioners then sought review of this order by moving application at Exhibit 24 contending that suit was never registered as Small Cause Suit but was always a Special Civil Suit and it was never instituted in Small Cause Court. They also invited attention to Section 26 of Provincial Small Cause Courts Act, 1887. Review was opposed by present respondent as dilatory tactics to avoid trial of Suit on merits. On 14-6-2005, Court below rejected this application holding that no case for review was made out.

3. I have heard Advocate S.V. Purohit for petitioners and Advocate Gulam Mohommad for respondents. Counsel for petitioners after narrating the facts has contended that Court below has erroneously used provisions of Section 33 of Rent Act to hold that as it was transferee Court, it became the Court of Small Causes for all purposes. He states that what is required to be transferred by Section 33(2)(a) is a Small Cause Suit and Suit instituted by present respondent was not at all such suit. He has invited attention to various judgments and contended that all disputes between Landlord and Tenant are to be adjudicated upon only by Small Cause Court. To substantiate his contention he placed reliance upon Babulal Bhuramal and Another Vs. Nandram Shivram and Others, , Om Prakash Gupta Vs. Rattan Singh and Another, and Shamom Akhtar v. Iquabal Ahmad AIR 2001 SC 1 . Counsel for respondent also invited attention to the necessary facts to state that there was deliberate and repeated denial of title of respondent and no amends were made by petitioners in spite of warning by previous landlord as also by respondent. He relies upon Ratanlal Manikchand Shah Vs. Chanbasappa Sanganbasappa Chincholi and Others, and Kashinath G. Patil v. Govala V. Tatayya 1995(1) Mh.L.J. 861 to urge that title has been denied and Small Cause Court cannot decide question of title as it has no such jurisdiction. Both Advocates have also tried to distinguish case law cited by other side.

4. In view of provisions of Section 26 of Provincial Small Causes Court Act (refer

to as Provincial Act hereafter) as introduced by Maharashtra Act No. 24 of 1984 with effect from 1-1-1985 the Suit or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and license fee or rent, except those to which other Acts apply must be filed in Court of Small Causes. However in the facts of present case respondent plaintiff is trying to plead denial of her title and therefore forfeiture of tenancy. She has therefore filed a Suit on the basis of title which she claims to have acquired on account of oral gift executed by husband in her favour. Whether there is denial of title or forfeiture of tenancy in the facts of present case is question which is not relevant at this stage. Learned Counsel for petitioners has tried to contend that in plaint the respondent/plaintiff has made prayer for recovery of arrears of rent and thus according to him suit is not on the basis of title. Again it is to be noted that the controversy needs to be looked into at the stage of consideration of application under Order 7, Rule 11 moved by petitioners and hence, needs to be decided only in the light of plaint allegations without considering the defence raised. The plaintiff states that there is forfeiture of tenancy on account of denial of her title by petitioners and for that purpose she has pointed out earlier relationship of landlord and tenant between her husband and petitioners, oral gift with delivery of constructive possession in her favour by husband, efforts made to attorn tenancy of petitioners in her favour and rent arrears to be recovered during said period upto notice of forfeiture. Her case is by challenging oral gift in her favour petitioners have denied her title. She has pointed out that that by notice dated 17-9-2001 she informed petitioners that there tenancy stood forfeited by 31-10-2001 in view of provisions of Section 111(g) of T. P. Act and they were called upon to handover vacant possession on 1-11-2001. It is therefore apparent that demand of arrears of rent for period till 31-10-2001 does not in any way go to show that suit filed by her is not title suit. Whether reliefs claimed by her are proper or not, whether case of denial of title or forfeiture can be established are all questions to be adjudicated after trial. If respondent fails in establishing forfeiture, her suit would be dismissed. Only relevant question was whether Small Cause Court is or was competent to take cognizance of such dispute.

5. In this connection provisions of Section 23 of Provincial Act need to be looked into. Section 23 reads as hereunder:

23. Return of plaints in suits involving questions of title. -- (1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

(2) When a Court returns a plaint under Sub-section (1), it shall comply with the provisions of the second paragraph of Section 57 of the CPC (14 of 1982) and make such order with respect to costs as it deems just and the Court shall, for

the purposes of the Indian Limitation Act, 1877 (15 of 1877) be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction.

In *Budhu Mal Vs. Mahabir Prasad and Others*, Hon''ble Apex Court observes:

9. It is true that Section 23 does not make it obligatory on the Court of small causes to invariably return the plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be *res judicata* in a suit based on title. It cannot, however, be gainsaid that in enacting Section 23 the Legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties. On the facts of the instant cases we feel that these are such cases in which in order to do complete justice between the parties the plaints ought to have been returned for presentation to a Court having jurisdiction to determine the title. In case the plea set up by the appellants that by the deed dated 8th December, 1966 the benefit arising out of immovable property which itself constituted immovable property was transferred and in pursuance of the information conveyed in this behalf by Mahabir Prasad to them the appellants started paying rent to Smt. Sulochna Devi and that the said deed could not be unilaterally cancelled is accepted, it is likely not only to affect the title of Mahabir Prasad to realise rent from the appellants but will also have the effect of snapping even the relationship of landlord and tenant, between Mahabir Prasad and the appellants which could not be revived by the subsequent unilateral cancellation by Mahabir Prasad of the said deed dated 8th December, 1966. In that event it may not be possible to treat the suit filed by Mahabir Prasad against the appellants to be suits between landlord and tenant simpliciter based on contract of tenancy in which an issue of title was incidentally raised. If the suits cannot be construed to be one between landlord and tenant they would not be cognizable by a Court of Small Causes and it is for these reasons that we are of the opinion that these are such cases where the plaints ought to have been returned for presentation to appropriate Court so that none of the parties was prejudiced.

Reference to consideration of this issue by Hon''ble Apex Court in *Shamom Akhtar v. Iqbal Ahmad* AIR 2001 SC 1 relied upon by petitioners also shows same approach. It shows that Section 23 of Small Cause Courts Act provides that when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depends upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title. It is held there the power vested under Sub-section (1) in the Court is discretionary. It is to be exercised only when the relief claimed by the plaintiff in the proceeding before the Small Cause Court depends

upon the proof or disproof of a title to the immovable property and the relief sought cannot be granted without determination of the question. In the case before Hon''ble Apex Court, the plaintiff filed a petition for eviction u/s 20(2)(f) of U. P. Act alleging that she was the landlady of the house and she had inducted respondent as tenant of the premises. Tenant there denied landlord tenant relations. The question was whether that case was to be accepted or not. The question of title of the plaintiff to the suit house could be considered by the Small Cause Court in the proceedings as an incidental question and final determination of the title could be left for decision of the competent Court. In such circumstances, it could not be said that for the purpose of granting the relief claimed by the plaintiff it was absolutely necessary for the Small Cause Court to determine finally the title to the property. The tenant-respondent by merely denying the relationship of landlord and tenant between himself and the plaintiff could not avoid the eviction proceeding under the Rent Control Act. Hon''ble Apex Court declares that such is neither the language nor the purpose of the provisions in Section 23(1) of the Small Cause Courts Act. I therefore find that this ruling does not help petitioners at all.

6. In this background reference can also be made to other rulings relied upon by petitioners. Om Prakash Gupta Vs. Rattan Singh and Another, is the constitutional bench judgment of Hon''ble Apex Court which considers provisions of Section 15 of Delhi Rent Control Act, 1958. The appellant before Hon''ble Apex Court registered proceedings for his eviction before Rent Controller on the ground that premises were let out to one trade union for office, residential purposes and its tenancy was not terminated and Rent had not been demanded from it. The Hon. Apex Court has held that under Rent Control Law, the special Tribunal has to proceed on the basis of relationship of landlord and tenant existing between parties and mere denial by tenant of tenancy is not sufficient to oust jurisdiction of such special Tribunal. It has been held that only when such Tribunal comes to the conclusion that landlord-tenant relationship does not exist, it will have no jurisdiction. Again in the facts of present case, this ruling has no application. Babulal Bhuramal and Another Vs. Nandram Shivram and Others, , Section 28 of Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) are considered. There plaint in the suit filed by the appellants in the City Civil Court clearly asserted that the first plaintiff was entitled in law to sublet the premises in question to the second and third plaintiffs and that there had been a lawful subletting of the premises to them. It was not necessary for the first plaintiff to comply with the provisions of Section 10 of the Bombay Rents Act, 1944. Prayer of plaintiffs in the suit was : "The plaintiffs submit that they are entitled to a declaration that 1st plaintiff is a tenant of the said premises within the meaning of the Bombay Rents Hotel and Lodging House Rates Control Act of 1947; and that the 2nd and 3rd plaintiffs are entitled to the possession, use and occupation of the said premises as the lawful sub-tenants of the 1st plaintiff in respect of the said premises." Hon''ble Apex Court states that the provisions of Section 28 cover a case where in a suit one party alleges that he is the landlord

and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions. On a proper interpretation of the provisions of Section 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in Section 28 and no other. Where the plaint in the suit admits that the defendants were landlords of the premises at various stages and the plaintiffs were their tenants, the suit is essentially a suit between a landlord and a tenant. The suit does not cease to be a suit between a landlord and a tenant merely because the defendants (landlord there) denied the claim of the plaintiffs. Whether the plaintiffs are the tenants would be a claim or question arising out of the Act or any of its provisions which has to be dealt with by the Court trying the suit. In paragraph 9 Hon''ble Court holds that it is possible to conceive of cases where in a suit u/s 28 a question of title to premises which does not arise out of the Act or any of its provisions may be determined incidentally. Any party to the suit aggrieved by such a determination would be free to sue in a competent Court to establish his title to such premises by virtue of the provisions of Section 29A. On the other hand, in a suit where a question of title entirely arises out of the Act or any of its provisions, the jurisdiction to try such a suit was exclusively vested in the Courts specified in Section 28 and no other. That is to say, a title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in Section 28 and a title de hors the Act may be determined in any other Court of competent jurisdiction.

7. Before considering this issue further I find it proper to refer to judgments on which counsel for respondent/original plaintiff has placed reliance. In *Ratanlal Manikchand Shah Vs. Chanbasappa Sanganbasappa Chincholi and Others*, , Division Bench of this Court has in paragraph 35 held that the tenant disclaiming the title of claimant landlord and his relationship of tenancy literally knocks of the very bottom of statutory protection and it amounts to disclaiming the benefits available under the Bombay Rent Act. It has been observed that it is open to a person to bring about by his own voluntary actions a situation which results in cessation of relationship of landlord and tenant. It becomes a dispute of title and falls outside the purview of Section 28 of the Bombay Rent Act. *Kashinath G. Patil v. Govala V. Tatayya* 1995(1) Mh.LJ. 861 is the judgment of the learned Single Judge of this Court in which it has been observed that by disclaimer of title of landlord, tenancy of defendant itself comes to an end and dispute between claimant owner and the occupant ceases to be a dispute between a landlord and tenant and falls outside the purview of Section 28 of Bombay Rent Act.

8. In the facts of present case whether the respondent original plaintiff succeeds in proving her title is not at all relevant at this stage. Petitioners have not

accepted her to be their landlady and they are not accepting oral gift executed by husband of respondent in her favour. In spite of notices for attornment of their tenancy with respondent and several efforts for the same, petitioners have not paid rent to her and have not accepted her as landlady. In such circumstances, respondent cannot approach Small Cause Court because unless and until she establishes her title, she cannot succeed in establishing landlord tenant relationship and evicting petitioners. As is evident from *Shamom Akhtar v. Iqubal Ahmad* (supra) the relief claimed by her in a Court of Small Causes will depend upon the proof or disproof of her title to immovable property which said Court cannot finally determine. The relief sought against petitioners cannot be granted to her without determination of the question. Petitioners have not urged that they are not questioning her title and without taking any specific defence in this respect, the petitioners have only filed application at Exhibit 20 for rejection of plaint mentioning that it is dispute between landlord and tenant and placing reliance upon provisions of Section 33(b) of Rent Act. There is no other defence raised by them. It is also clear that defences if any, of present petitioners are not relevant at this stage. One is concerned only with plaint allegations and as already stated above plaint is filed on the basis of title and has been valued accordingly for the purposes of jurisdiction and Court fee. Again whether filing of such suit by respondent plaintiff in present facts is illegal or not cannot be relevant consideration at this stage. I therefore find no substance in the objection raised by petitioners. The question which arises for consideration in plaint as filed is about acquisition of title to tenanted premises by respondent plaintiff and it is not an incidental question which falls for adjudication.

9. However reference to provisions of Section 33(2)(a)(b)(c) of Rent Act by Court below is misconceived. The District Court can withdraw suit or proceedings or application from Court of Small Cause and transfer it to Court of Civil Judge (Senior Division) and thereupon such transferee Court is deemed to be Court of Small Cause. It is therefore apparent that suit validly instituted before Small Cause Court can be so withdrawn and transferred. Present respondent never filed her suit before Small Cause Court and hence her suit was not covered by words "any such suit" occurring in Section 33(2)(a) of Rent Act. But then that by itself is not sufficient to set aside impugned orders. For reasons recorded above I do not find any error in rejection of application at Ex. 20 moved by present petitioners under Order 7, Rule 11, CPC read with Section 33, Rent Act and subsequent application Ex. 24 under Order 47, Rule 1 read with Section 151 of CPC for review. No case is made out for interference in writ jurisdiction. Writ Petition is accordingly dismissed, however in the circumstances of the case there shall be no order as to costs.

10. At this stage, Advocate Shri Purohit, requests for continuation of interim order for a period of four weeks, so as to enable him to take appropriate further steps in the matter. Counsel for respondent is not present. However, in the interest of justice interim order is extended for a further period of four weeks from today. It shall cease to operate automatically thereafter.