

(1952) 08 BOM CK 0012
In the Bombay High Court
Case No : O.C.J. Appeal No. 39 of 1951

Madhavprasad Kalkaprasad	Vs	APPELLANT
Indirabai Chandavarkar and Others		RESPONDENT

Date of Decision : 27-08-1952

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 12, 13, 16, 17

Citation : AIR 1953 Bom 192 : (1953) 55 BOMLR 21 : (1953) ILR (Bom) 332

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

Bench : Division Bench

Advocate : R.B. Andhyarujina and M.V. Desai, for the Appellant; S.T. Desai and K.H. Bhabha, for the Respondent

Judgement

Chagla, C.J.

[1] This appeal arises out of a suit filed by the plaintiff under Order 21, Rule 103, and the suit came to be filed under the following circumstances.

[2] The plaintiff's case was that he was a subtenant of the defendant and the defendant filed a suit in the Small Cause Court for ejecting one Anna Adgauda Patil alleging that Patil was his sub-tenant. Patil admitted the fact and agreed to vacate the premises. Thereupon an order was passed by the Small Cause Court on 14-5-1945, ordering Patil to vacate the premises. The defendant obtained a warrant of possession and the plaintiff offered obstruction. The defendant took out an obstructionist notice and the plaintiff was ordered to hand over possession to the defendant. The plaintiff thereupon filed the present suit. The plaintiff in the suit prayed for a declaration that he was the tenant of the defendant and as such tenant entitled to remain in possession of the premises. He also sought for a declaration that the defendant was not entitled to execute the order of the Small Cause Court. After the suit was filed and before the plaintiff could get a stay of execution of the order, the defendant obtained possession of the premises, and therefore the plaintiff asked for an amendment of the plaint and

prayed that the possession which had been taken away from him should be restored to him.

[3] The learned Judge tried the preliminary issue as to whether this Court had jurisdiction to try the suit, and the learned Judge came to the conclusion that this Court had no jurisdiction and that the suit had to be transferred to the Small Cause Court under the provisions of Section 50, Rent Control Act, and it is from that finding that this appeal is preferred.

[4] u/s 50 suits which were pending in this Court and which related to the recovery or fixing of rent or possession of any premises had to be transferred to and continued before the Courts which would Have jurisdiction to try such suits, and the Courts which would have jurisdiction are the Courts set up under the provisions of Section 28. Section 28 creates new Courts with exclu-sive jurisdiction to try certain class of suits and proceedings, and it is clear that to the extent that Section 28 is in derogation of the jurisdiction of the High Court it must be strictly construed. In construing Section 28, we cannot ignore the preamble which gives an indication as to the object with which the Act was passed. It is true that when the language of a section is clear, the Court ought not to look at the preamble in order to cut down the effect or the scope of the section. But when a Court with exclusive jurisdiction is created and when the jurisdiction of the High Court is excluded, and when the Court is called upon to construe Section 28 strictly it is perfectly permissible to look at the preamble in order to ascertain what was the object with which the special Court was created, and also to look at Section 28 in its proper context and setting. Now, the object with which the Act was passed was to consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions, and the Act deals with various questions that affect the relationship between landlord and tenant. On the one hand, the Act imposes limitations upon the rights of a landlord which he possessed under the ordinary law. On the other hand, it confers new rights upon the tenants which they did not have under the ordinary law; and the Act is primarily intended to define these new liabilities imposed upon the landlord and the new rights conferred upon the tenant, and the special Court which is set up u/s 28 is primarily intended to deal with all the questions that arise under, the Act.

[5] We had occasion to point out in Raghubir Narayan Lotlikar and Others Vs. G.A. Fernandes, that it is not every suit for possession between a landlord and a tenant which necessarily falls within the purview of Section 38. Mr. S.T. Desai is right when he points out that in that particular case we were dealing with the suit by a landlord against a tenant and we were not called upon to consider what the position in law would be if a tenant filed a suit against his landlord. But certain tests which we laid down in that case are equally applicable when a suit is filed by a tenant against a landlord. In that case we held that Section 28 applies only to those suits between a land-lord and a tenant when a landlord has become entitled to possession or recovery of the premises demised. When a landlord so

becomes entitled, the question arises whether he is entitled to possession by reason of Section 13 and Section 13 of the Rent Act, and therefore when a landlord files a suit for possession under those sections, the Court is called upon to construe the provisions of the Rent Act and such a suit must obviously be tried by the new Court set up u/s 28. But there may be other suits which a landlord may file against a tenant for possession which may not require the consideration of the provisions of the Rent Act at all in that particular case, in *Raghubir Narayan Lotlikar and Others Vs. G.A. Fernandes*, we were dealing with a suit filed by a landlord for specific performance against his tenant, and the landlord prayed for possession against the tenant as a result of an agreement entered into between them, and the learned Judge in deciding the suit applied the three tests which according to him were the only tests that should be applied in considering whether Section 28 came into operation or not. The three tests suggested by the learned Judge were that the relationship between the parties should be that of landlord and tenant, that the suit must be for possession, and that the suit must be in respect of the premises to which Part II applies, and the learned Judge took the view that as soon as those three tests were satisfied, no other inquiry need be made and the suit must be transferred to the Court set up u/s 28. Now, in the present case the learned Judge has applied the three identical tests. No blame whatever attaches to the learned Judge because, in fairness to him, it must be stated that our decision in AIR 1953 Bom. 70 was not before him when he decided this case. Therefore, when we are dealing with a suit by a tenant against a landlord, it is not sufficient to inquire whether the three conditions just mentioned have been satisfied or not. It is true that in this case the parties arrayed against each other are landlord and tenant. It is equally true that after the amendment of the plaint the tenant asked for possession. It is equally true that the premises in question are premises to which Part II applies. But even if all these conditions are satisfied, it does not necessarily follow that the suit we are considering is a suit to which Section 28 applies. In our opinion this suit substantially is a suit on title. It is not a suit for possession. This is not a case where the relationship of landlord and tenant is admitted and the tenant comes to Court for possession. This is a case where the relationship is in dispute, and what the plaintiff wants from the Court is the establishment of his title that he is the sub-tenant of the premises. It is only when the title is established that he can ask for any relief at all. When he originally filed the suit he would have been content with a mere declaration of title. All that he wanted was that his right to continue in possession should be established. By reason of certain fortuitous circumstances by which he lost possession pending suit he was compelled to ask for an amendment and ask for possession as an ancillary relief. But the mere fact that he asked for possession did not in any way change the nature of the suit. The suit continued to remain a suit for a declaration of the plaintiff's title. The plaintiff would only obtain the relief for possession provided the Court gave him the declaration that he sought and provided the Court held that he was a subtenant and entitled to be in possession as a subtenant. Therefore, in our opinion, it is clear that the suit is substantially a suit for a declaration of title and

possession is an ancillary relief which is sought by the plaintiff.

[6] With very great respect to the learned Judge, 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. In this connection Section 29A may be looked at. That section provides that :

"Nothing contained in Section 23 or Section 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."

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. Now, it is not disputed that this Court is a competent Court as far as the question of title to premises in suit is concerned. Therefore, a fortiori suits to establish title still continued to be triable by Courts which were competent Courts before the Rent Act was passed, and Section 29A makes it clear that the jurisdiction of the Courts to try suits on title has not been taken away by Section 28. Section 28 only permits the special Courts to try question of title incidentally, but when question of title arises substantially in the suit, then it is the ordinary Courts of the land which are competent Courts that must try and dispose of suits on title. Therefore, if the High Court was the proper Court to try the particular suit on title which the plaintiff has filed, then merely because incidentally he prays for possession, that fact does not oust the jurisdiction of this Court to try that suit for title and the Small Causes Court does not have jurisdiction u/s 28 to try the suit.

[7] Even assuming that this is not a suit on title, it is difficult to understand how the Small Causes Court would have jurisdiction to try this suit. Essentially this is an action in trespass. The plaintiff's case is that he is the sub-tenant and he has been wrongfully dispossessed by the defendant, and he wants possession from the defendant as a trespasser. Therefore, the plaintiff's suit is on his title against a person who has no title and who is a trespasser, and the interesting question that arises is whether, when a tenant files a suit against a landlord for possession alleging that he has been dispossessed, such a suit falls within the ambit of Section 28. The Rent Act gives certain special rights to the tenant in respect of obtaining possession from the landlord. Section 16 gives him right to re-enter upon the premises which have been given to the landlord for repairs. Section 17 also gives him the similar right of re-entry. Section 17A gives him right to recover possession from his landlord in cases where the building is demolished. There are also rights given to the tenant in respect of recovery of rent paid by him to his landlord. Section 20, for instance, gives him right to recover excess rent paid by him, and Section 11 gives him the right to fix standard rent. Therefore, the learned Judge is right when he points out that u/s 28 there may be applications,

certainly if not suits, which may be brought by the tenants against the landlords. But a suit or an action in trespass is not a new right conferred upon a tenant. If a tenant files a suit in respect of the landlord's trespass, he is merely exercising his ordinary rights under the ordinary law. He is not asserting a new right conferred upon him by the Act, and no question as to the provisions of the Act can arise when the plaintiff's suit is a simple suit by a tenant complaining of being dispossessed by a landlord and claiming possession from him as against a trespasser. Therefore, a suit of that nature is not a suit for possession contemplated by Section 28. To repeat, it is not every suit for possession by a tenant against a landlord, just as it is not every suit for possession by a landlord against a tenant, that falls within the ambit of Section 23. The object of enacting Section 28 was to set up a Special Court of summary jurisdiction to deal with matters which arise out of the Rent Act and one of the matters that arises out of the Rent Act was suit for possession contemplated by that Act between a landlord and a tenant, and may be between a tenant and a landlord. It is impossible to contend that a suit in trespass is a suit contemplated by the Rent Act and which calls into question the consideration of the provisions of the Rent Act. Therefore, in our opinion, whether we look upon this suit as a suit on title or a suit for possession, it is not a suit solely triable by the new Court set up u/s 28, and in respect of this suit the jurisdiction of this Court has not been ousted.

[8] The result, therefore, is that the appeal succeeds and the order of the learned Judge below will be set aside and the suit will go down for trial on merits. In view of the order made by us on 14-1-1952, the appellant must pay the costs of this appeal. The respondent to pay to the appellant the costs of the issue tried by the learned Judge below. Costs to be set off,

[9] Appeal allowed.