

(2009) 07 BOM CK 0009

In the Bombay High Court

Case No : Appeal Against Order No. 38 of 2009

Narendra Motibhai Patel and Others

APPELLANT

Vs

Janardhan Moreshwar since deceased through L.Rs. and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Provincial Small Cause Courts Act, 1887 — Section 26, 26(2)

Citation : (2010) 3 BomCR 738

Hon'ble Judges : Dongaonkar S.R., J

Bench : Single Bench

Advocate : A.J. Thakkar, for the Appellant; R.L. Khapde, for the Respondent

Final Decision : Allowed

Judgement

Dongaonkar S.R., J.—Heard Shri Thakkar, Advocate for the appellants and Shri Khapre, Advocate for respondent No. 1. None present for respondent No. 2.

Admit. Heard finally.

2. The appellants herein challenge the order passed by the Ad hoc District Judge-3, Nagpur in Regular Civil Appeal No. 278/2005 dated 23.9.2008. The order excludes to the jurisdiction of the Civil Court to try the instant suit holding that Small Causes Court alone has jurisdiction to try the present subject-matter.

3. Regular Civil Suit No. 110/1991 was filed by the appellant for declaration, permanent and mandatory injunction. The reliefs which are sought in the said suit; are thus:

Prayer: It is, therefore, most respectfully prayed that this Hon Tale Court be pleased to:

i) declare that the defendant No. 1 has no right, authority or propriety to enter into the business premises of the Firm, "DarjeelingTea Co" and to interfere with

the business and possession of the plaintiffs in Darjeeling Tea Co.;

ii) declare that the Firm, Darjeeling Tea Co. is the tenant of the defendant No. 2 and not any partner or defendant No. 1 or the plaintiff are individually the tenants of the premises of the Firm;

iii) issue permanent/prohibitory/perpetual/injunction against the defendants, their agents, representatives, etc. restraining them from taking the possession of the tenanted premises of the Firm, Darjeeling Tea Co, situated at Badkas Chowk, Nagpur, which is owned by the defendant No. 2;

iv) restrain the defendants, their agents representatives, assignees or any other person acting through them from entering the premises of Darjeeling Tea Co and to disturb the business of the plaintiffs;

v) issue mandatory injunction against the defendant No. 2 to issue the future rent receipts in the name of the Firm or the plaintiff, but not in the name of the defendant No. 1;

vi) issue mandatory injunction to restore the possession to the plaintiffs, in case, during the pendency of suit, the defendants are dispossessing the plaintiffs and the firm;

vii) saddle the cost of this suit upon the defendants;

viii) grant any other relief, which this Hon"ble Court deems fit in the circumstances of the case.

The suit was disposed by the 21st Joint Civil Judge, Junior Division, Nagpur by the judgment dated 3.5.2005. The judgment reveals that the following issues were framed and findings were recorded by the learned Civil Judge on those issues:

The trial Court has held that the suit needs to be decreed. It has been declared that the defendant No. 1 has no right, authority or propriety to enter into the business premises of the firm Darjeeling Tea Co and to interfere with the business and possession of the plaintiffs in Darjeeling Tea Co. It was also declared that Darjeeling Tea Co is the tenant of defendant No. 2, through its partners plaintiff Nos. 1 & 2. Defendant No. 1 was restrained from faking possession of the tenanted premises of the firm Darjeeling Tea Co situated at Badkas Chowk, Mahal, Nagpur. Defendant No. 1, his agents, representatives and assignees or any other person were also restrained from entering the premises of Darjeeling Tea Co and directed not to disturb the business of the plaintiff.

4. This judgment and decree was challenged before the District Judge, Nagpur in R.C.A. No. 278/2005. The said appeal was decided by the learned Ad hoc District Judge-3 and A.S.J. Nagpur by its judgment dated 23.9.2008. Learned District Judge passed following order:

Order

- i) Appeal is allowed.
- ii) The judgment and decree of the trial Court is set aside.
- iii) The matter is remanded back to the trial Court to pass appropriate order under Order 7, Rule 11 of the CPC for making over the case to the Court of Small Causes Court, Nagpur for decision.
- iv) The Court of Small Causes to expedite the matter and decided the suit within six months from the receipt of record;
- v) The respondent/plaintiff Nos. 1 & 2 and respondent/defendant No. 1 to bear their own costs in addition to the cost of appellant/defendant No. 2
- vi) Parties to appear before Lower Court on 30.9.2008
- vii) Decree be drawn up accordingly.

The learned District Judge has held that the Civil Court has no jurisdiction to try the subject-matter inasmuch as the dispute was essentially triable by the Court having jurisdiction over the Rent matter, in this case; Small Causes Court. According to him, the Small Cause Court being a Special Court to try the matters between the landlord and the tenant, the Civil Court will have no jurisdiction, particularly in view of the provisions of Section 26 of the Provincial Small Cause Courts Act.

5. This judgment of the learned District Judge is under challenge in this appeal.

6. Learned Counsel for the appellant has submitted that the issues framed by the learned trial Court would disclose that some of the issues therein are triable only by the Civil Court. They cannot be tried by Small Cause Court dealing with the subject-matter under Rent Act. According to him, considering the subject-matter of the suit, the said matter cannot be at all tried by the Court of Small Cause, as its jurisdiction is restricted to only rent matter u/s 26 of the Provincial Small Cause Courts Act, 1887. He has relied on the judgment of this Court reported in 1997 (Supp.) Bom.C.R. 873 (N.B.) : 1996 (2) Mh.L.J. 897 S.H. Jawandhiya and Ors. v. Onkareshwar Birbal Prasad Mishra, to contend that when issues are triable by the Civil Court, such as declaration; when such relief can be given only by Civil Court and not by Rent Controller, such a suit can be tried only by the said Court. Therefore, according to him, the impugned order is totally incorrect and unsustainable at law. He further contended that in such circumstances, the matter needs to be remanded for fresh disposal with a direction to the learned District Judge to dispose of the matter on merits by deciding of the issues involved in the suit.

7. As against this learned Counsel for the respondent relying on the judgment reported in Kamala Mills Ltd. Vs. State of Bombay, and The State of Maharashtra Vs. Kriti V. Ambani and another, , and contended that when the substantial issues in the suit are triable by the Small Cause Court being under Rent Act, all the ancillary issues can be decided by that Court. According to him, when in the

present case the dispute was as to who was the tenant, whether partnership firm or the respondent No. 2 is the actual tenant, the subject-matter would be triable only by Small Causes Court as it has jurisdiction over the rent/lease matters. According to him, by the judgment in Southern Automatic Industries Private Limited, cited above, when the issues in suit were to be considered by the Co-operative Court and main issues were under Rent Act, this Court has held that the subject-matter can be tried by the Court having jurisdiction over the Rent matters. Therefore, according to him, the order passed by learned District Judge impugned in this appeal is correct.

8. In order to appreciate the controversy in the matter, one has to peruse the issues framed by the learned trial Judge, the issues would show that the issue - as to whether the firm under the name and style as Darjeeling Tea Co is a partnership firm or not & the retirement of defendant No. 1 from the firm is also in dispute. Issue as to whether defendant No. 1 was the proprietor of the said company is also one of the issues. Another issue which is important to note is whether defendant No. 1 is a partnership firm. Needless to mention, all these issues are triable only by Civil Court and not by Rent Court.

9. Turning to the authorities cited by learned Counsel for the respondent, it would be seen that in the judgment of the Apex Court in Kamala Mills Ltd. Vs. State of Bombay, , the relevant issues which were required to be decided by the concerned assessing authority were regarding taxes only. The issues which were to be considered were - whether or not return is correct, whether or not transaction which are not mentioned in the return, but about which appropriate authority has knowledge, that will then the mischief of charging section and the allied questions were required to be determined by the authority. Therefore, in my opinion, the decision in that case is not at all attracted in this case.

10. As regards the judgment of this Court in The State of Maharashtra Vs. Kriti V. Ambani and another, it would be seen that in that case some of the issues rather main issues were triable by the Rent Court. The Court, while considering the contentions raised by the learned Counsel for the therein observed that they leave no doubt whatsoever that the respondents approached the Co-operative Court with a clear case that the petitioners had continued in possession under a subsisting leave and licence agreement. The facts therein were essentially as regards the tenancy of the petitioner. In my opinion, if observations of this Court in that case are considered, it would be apparent that the issues which were liable to be considered, were regarding of tenancy. Therefore, in my opinion, it is not possible to say on the strength of that decision, that the decision jurisdiction of the Civil Court for this case is barred.

11. In 1997 (Supp.) Bom.C.R. 873 (N.B.) : 1996 (2) Mh.L.J. 897 S.H. Jawandhiya and Ors. v. Onkareshwar Birbal Prasad Mishra, this Court has considered said aspect and while considering so, in paragraph 9 it has been observed thus:

Having heard the arguments of the learned Counsel, I find no substance in the arguments of Mr. Mohta. The fact that there is dispute between the parties about the tenancy, because the defendants treat the plaintiff as an employee and not their tenant and on the other hand the plaintiff treats himself as a tenant at the rate of Rs. 100/- per month of the premises in question and since the defendants are disputing the status of the plaintiff as tenant, a declaration is being sought in the suit, the said relief can only be given by the Civil Court and not by the Rent Controller. The trial Court was justified in holding that the questions involved in the suit related to the civil right of the plaintiff and it is only the Civil Court which has jurisdiction to adjudicate the said dispute. In this view of the matter, the finding given by the trial Court on Issue No. 1 is proper and does not call for any interference by this Court.

That was a case where declaration was sought and the said relief could have been given only by the Civil Court. Similar is the case here. Therefore, in my opinion, the Civil Court will have jurisdiction over the subject-matter of the present suit.

12. Provisions of Section 26 of the Provincial Small Cause Act on which learned Counsel for respondent also placed reliance also need to be considered in this context.... Relevant section reads thus:

26-Suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except those to which other Acts apply, to lie in Court of Small Causes: (1) Notwithstanding anything contained elsewhere in this Act, but subject to the provision of Sub-section (2), the Court of small causes shall have jurisdiction to entertain and try all suits and proceeding between in licensor and licensee, or a landlord and tenants, relating to the recovery of possession of any immovable property situated in the area within the local limits of the jurisdiction of the Court of Small Causes, or relating to the recovery of the licence fee or charges or rent therefore ,irrespective of the value of the subject-matter of such suits or proceedings.

13. It would be seen that the Court of small causes has jurisdiction to entertain and try all the suit and proceedings between licensor and licensee, landlord and tenant, relating to recovery of possession of any immovable property situated in the area. Jurisdiction which is conferred on the Court of small causes is only in respect of the suits and proceeding between licensor and licensee and landlord and tenant relating to recovery of possession etc as provided by Section 26 of the Act.... It goes without saying that instant suit is not such a suit. No doubt with some remote inference it may be said that the some of the points involved are relating to the subject of lease between defendant No. 1 and defendant No. 2. but that fact by itself will not oust the jurisdiction of the Civil Court to decide all other relevant matters. If the order-of the lower Appellate Court is allowed to stand, it would lead to a situation that the Small Cause Court having jurisdiction over the matters contained in the Section 26 of the Provincial Small Cause Courts

Act, would be required to decide the issues which can be decided only by the Civil Court. As such in my opinion, the judgment passed by the learned Appellate Judge which is challenged in this appeal can not sustain. Same is liable to be quashed and set aside.

14. The appeal is therefore, allowed. The judgment and decree passed by the learned Appellate Judge in Appeal No. 278/2005 is hereby set aside. Matter is remanded back to learned District Judge to decide the matter afresh and to pronounce the judgment after hearing the parties on merits, on issues and points involved; in the matter.

15. It is made clear that any of the above observations shall not in any way influence the learned Appellate Judge while deciding the matter on merits. Cost of the appeal shall be the costs in the cause.