
(2005) 08 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No's. 1239 of 1984 (B) and 2889 of 1997 (A)

Rafiuddin Nuruddin Musalman

APPELLANT

Vs

Abduyl Karim Abdul Reheman and Others

RESPONDENT

Date of Decision : 18-08-2005

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28, 28(1), 29
Civil Procedure Code, 1908 (CPC) — Section 96, 99
Constitution of India, 1950 — Article 227

Citation : (2006) 2 ALLMR 687 : (2005) 4 MhLj 646

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : V.A. Nimbalkar, instructed by P.S. Runwal, for the Appellant; S.P. Brahme, for the Respondent

Final Decision : Allowed

Judgement

A.B. Naik, J.—By this petition, the petitioner original defendant No. 2 has challenged the judgment and decree passed by the learned Assistant Judge, Dhule on 16-1-1984 allowing the appeal filed by the plaintiff and setting aside the judgment and decree passed by learned 3rd Joint Civil Judge (J.D.) Dhule, on 31-12-1981, dismissing the suit filed by the plaintiff. The present respondent is original plaintiff. The parties hereinafter will be referred to as the plaintiff and defendant respectively. Respondent No. 2 herein was original defendant who died during pendency of the proceedings and his two heirs were brought on record. In order to understand the controversy/point raised in this petition, the facts which are borne by the record are required to be stated.

2. The plaintiff instituted a suit in the Court of 3rd Joint Civil Judge (J.D.) Dhule, for possession of house CTS No. 4373-B, situate at Dhule proper (hereinafter referred to as suit house). It is contended by the plaintiff that the suit house is owned by him as he has purchased the suit house from defendant No. 1 under registered sale deed dated 1-5-1975 for a consideration of Rs. 7,000/-.

Accordingly, a sale deed came to be executed and possession also came to be delivered. It is contended by the plaintiff that after the sale transaction, the defendant No. 1 was put in possession as a tenant in presence of the panchas on his request on a monthly rent of Rs. 20/-. It was contended that the defendant was allowed to occupy the suit house upto 1-8-1975 and it was agreed that after 1-8-1975 the possession will be restored back to the plaintiff. It is contended that thereafter, the defendant No. 1 did not pay the rent even though demanded and neglected to make the payment of the rent as agreed. It was contended that defendant No. 1 did not pay the rent but allowed defendant No. 2 to take possession of the suit house with only intention to create a dispute. According to the plaintiff, defendant No. 2 has no right to remain in possession as he is a trespasser. It was contended that plaintiff required the suit premise for personal bona fide requirement and it is contended that there are six members in his family which includes his brothers, parent and in-laws and the children. It was contended that plaintiff has four brothers who are taking education and the premises is presently occupied by them is not sufficient for their accommodation and they are facing difficulties, as such the suit house is needed for him and his family members for occupation which is genuine need and it is bona fide one. It is contended that the plaintiff requested the defendant No. 1 to vacate the premises and hand over the possession of the house but he refused to do so. It is contended by the plaintiff that defendant No. 1 after obtaining the amount of consideration from the plaintiff, he has purchased a house at another place but he is not occupying the said premises but allowed her daughter to occupy that premises. It is contended that the plaintiff has tried to locate other premises for the defendant No. 1 of which the rent is hardly Rs. II- to Rs. 8/-, with intention that defendant No. 1 may occupy that house but the defendant No. 1 in order to harass the plaintiff, has not vacated the suit house nor occupied the premises which was shown by the plaintiff and which were available for occupation on rent. According to the plaintiff, the act of the defendant No. 1 is nothing but an act to harass and trouble the plaintiff. It was contended that the suit house is required for use and occupation for him and for his family members. It was contended that defendant No. 1 is residing with his other sons and at present defendant No. 2 is occupying the suit premises without any authority as he is a rank trespasser. It was further contended that as per the agreement entered into by the parties, the defendant No. 1 did not pay the rent nor vacated the suit premises. Therefore, from 1st September, 1975 till the date of filing of the suit i.e. 19-6-1976 he has not paid the rent which is more than six months and as such he has committed default in making payment. On these premises, the plaintiff prayed for recovery of arrears of rent at the rate of Rs. 20/- p.m. from defendant No. 1 and also for possession. Similarly, he sought possession from defendant No. 2 who according to the plaintiff is a trespasser.

3. On receipt of the summons from the Court, the defendant Nos. 1 and 2 have filed written statement on 7-4-1977 and denied all adverse contentions raised by the plaintiff. The defendants contended that the suit is bad for multifariousness

as the plaintiff has claimed possession from defendant No. 1 on the allegation that he is a tenant and defendant No. 2 as a trespasser. Therefore, it was contended that the suit as filed cannot be proceeded with and the suit has to be dismissed on that ground. It is contended that the cause of action shown in the plaint is imaginary one as there is no cause of action to plaintiff to file suit. It was denied by the defendants that the suit house was owned by the defendant No. 1 alone. They have denied the fact that the plaintiff has purchased the suit house for consideration of Rs. 7,000/-. It is contended that the suit house was of the ownership of defendant No. 1 and 2 and they are in possession of the same as a owner. It was contended that defendant No. 1 has no right to sell the property. It was contended that defendant No. 1 was of 95 years of age and due to his old age, he is not in a position to take any decision and he has become insane. It was contended that taking benefit of the old age of defendant No. 1, the plaintiff obtained a sale deed in collusion with one Sharafuddin, who is son of defendant No. 1. It was therefore, contended that the plaintiff has not acquired the title to the suit premises. It was denied that defendant No. 1 is occupying premises as tenant as alleged by the plaintiff. It was denied by defendant No. 2 that the claim of the plaintiff that he is a trespasser. On the contrary, it was contended that he is in possession of the suit house as owner. Therefore, on these allegations the defendants prayed for dismissal of the suit.

4. On the basis of the pleadings of the parties, the learned trial Judge has framed following issues :

"1. Whether plaintiff proves his title to the suit premises. Yes. 2. Whether plaintiff proves that after the purchase of the suit from defendant No. 1, it has let out to defendant No. 1 as a monthly tenant since 1-5-1975 for a period of 4 months as alleged in para No. 1 No 3. Whether plaintiff proves that defendant No. 1 did not pay only rent since 1-5-1975 and is a defaulter within the meaning of Bombay Rent Act. Does not survive 4. Whether the plaintiff proves that defendant No. 1 has unlawfully subject the suit premises to defendant No. 2 illegally without the permission or consent of the plaintiff. Does not survive. 5. Whether plaintiff proves that defendant No. 1 is a trespasser in the suit premises? Does not survive. 6. Whether plaintiff proves that he requires the suit premises reasonably and bona fide for his personal occupation and for the occupation of the family members? Does not survive. 7. To whom greater hardship will be caused by passing a decree for possession than by refusing to pass it? Does not survive. 8. Whether the suit notice is legal and valid? Does not survive. 9. Whether the defendant proves that the suit is bad for multifariousness Yes. 10. Whether the suit is properly valued for the purposes of Court fee? No. 11. Whether the plaintiff is entitled to the possession of the suit premises from the defendant? No. 12. What is found due to the plaintiff towards arrears of rent damages in lieu of rent and notice charges? No. 13. What order regarding future mesne profits? Does not survive. 14. What decree and order? As per final order."

On the basis of the issues framed, the parties went to the trial. The parties produced oral as well as documentary evidence to substantiate their contentions. The plaintiff examined three witnesses and the defendants have examined two witnesses. The plaintiff has also produced on record the suit notice which is at Exh. 32. The sale deed dated 6-2-1975 is also produced on record and the same has been proved by the plaintiff. The defendant also produced notice dated 14-2-1975 at Exh. 44 raising an objection to the sale deed which has been executed by defendant no. 1 in favour of the plaintiff. On the basis of the evidence placed on record, the learned Civil Judge came to the conclusion that the plaintiff has established his title over the suit house. The learned Civil Judge further held that the plaintiff has failed to prove that he has inducted defendant No. 1 as a monthly tenant from 1-5-1975 for a period of four months. The learned Civil Judge therefore, on the basis of the finding on issue No. 2 held that issue Nos. 3 to 7 does not survive. So far as issue No. 9 is concerned, the learned Civil Judge held that the defendants have proved that the suit is bad for multifarious. On recording this finding the learned Civil Judge negatived other issues and accordingly by the judgment and decree dated 13-12-1981 dismissed the suit.

5. Feeling aggrieved by the judgment and decree dated 31-12-1981 passed by the learned 3rd Joint Civil Judge (J.D.) Dhule, the plaintiff preferred an appeal before the District Court at Dhule being R.C.A. No. 231/82. The said appeal was heard by the learned Assistant Judge, Dhule. On the basis of the submissions which were advanced before the Assistant Judge, the learned Judge framed point for determination which reads thus :

- "1. Whether the plaintiff proves his title to the suit property?
2. If whether the plaintiff proves that defendant No. 1 is his tenant in the suit property?
- 2A. If yes, whether the plaintiff proves that he requires the suit house for his own use and occupation reasonably and bona fide? 2B. To whom greater hardship is likely to cause in passing or refusing eviction decree? 2C. Whether the plaintiff proves that the defendant is a defaulter in payment of rent for a period of more than six months prior to the suit notice?
3. Whether the defendant No. 2 is a trespasser?
4. Whether the plaintiff is entitled for possession as claimed?
5. What order."

The Assistant Judge on the basis of the submissions and the evidence on record accepted the findings recorded by the trial Court regarding the title of the plaintiff. The learned District Judge also confirmed the findings of the trial Court regarding the status of defendant No. 1 and held that the plaintiff has failed to prove that defendant No. 1 was inducted as a tenant. Consequently, the learned Asstt. Judge recorded a finding that the plaintiff has failed to prove that he

required the suit premises for his personal occupation. Thus, he recorded negative findings on the point Nos. 2B and 2C. The learned Assistant Judge has recorded a finding that defendant No. 2 is a trespasser. On recording these findings, the learned Assistant Judge modified the part of the decree and decreed the suit of the plaintiff and ordered that the possession of the suit house be delivered to the plaintiff. He directed that the enquiry into mesne profit be determined separately in a separate proceeding. He directed the defendant No. 2 to pay the costs. Accordingly, he set aside the judgment and order of the trial Court, allowed the appeal and decreed the suit.

6. Feeling aggrieved and dissatisfied with the judgment and decree/order dated 16-1-1984 passed by the Assistant Judge, the defendant No. 2 approached this Court by filing instant petition under Article 227 of the Constitution of India.

7. Shri Nimbalkar, learned counsel instructed by Shri P. S. Runwal, learned advocate for the petitioner, submitted that the learned Assistant Judge, committed an error appearing on the face of record in decreeing the suit of the plaintiff, ignoring the fact that the suit which was filed by the plaintiff was filed u/s 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as Act) claiming that defendant No. 2 is a trespasser, such suit cannot be entertained by the Civil Judge who is a Special Court u/s 28 of the Act, hence the learned Assistant Judge erred in law in directing the defendant No. 2 to deliver the possession by passing a decree for possession as if the suit is filed under the Code. The learned counsel submitted that the learned Asstt. Judge having confirmed the finding recorded by the trial Court that defendant No. 2 is a trespasser, he should have confirmed the decree passed, by the trial Court, as the trial Court has recorded a finding that the suit is bad for multifariousness and dismissed the suit on that ground. He therefore, submitted that once the finding has been recorded by the learned trial Judge as the suit is bad for different causes of action, the Asstt. Judge has no jurisdiction to reverse the decree. He submitted that the plaintiff has come to the Court with a definite allegation that the defendant No. 1 being his tenant and as the tenant has not paid the rent for a period of six months, therefore, he has committed a default and as such the plaintiff sought possession of the suit house on the grounds which are available to a landlord under the Act. He submitted if the plaintiff had filed suit against defendant No. 1 alone, the Assistant Judge could get a jurisdiction to pass a decree but in fact the plaintiff has clubbed two distinct relief i.e. one under the Act, against defendant No. 1 and one under the general jurisdiction under the Code against defendant No. 2. Thus on face of it the Appellate Court should have dismissed the appeal. He further submitted that it is a case of the plaintiff that there was an agreement between the plaintiff and defendant No. 1 of payment of Rs. 20/- as rent and as the rent is not paid, the suit was filed on that ground of default which is a ground available to the landlord to seek possession of the suit house from the tenant but the plaintiff has failed to establish the fact as both the Courts below have recorded concurrent finding of fact that the plaintiff has failed to prove that he has inducted

defendant No. 1 as a tenant of the suit house, the appeal should have dismissed by the Assistant Judge. Thus he submitted that the suit as filed cannot be decreed in any circumstances even though the title of the plaintiff is established and accepted by both the Courts below. He therefore, submitted that the approach of the learned Assistant Judge being perverse and the learned Assistant Judge who was hearing an appeal which was filed u/s 29 of the Act and not u/s 96 of the CPC though the Asstt. Court may be a Court of appeal against the judgment and decree that is passed by the Civil Court. He submitted that by virtue of Section 28 of the Act, a special jurisdiction is conferred on the Court of Civil Judge (J.D.) to entertain the suit filed by the landlord for eviction of a tenant under the Act. He therefore, submitted that though the Civil Judge has both jurisdiction i.e. jurisdiction under the Special Act and general jurisdiction under the Code to try and decide the suit for possession of the property but he cannot entertain the suit of such nature i.e. suit against the tenant and against the trespasser. He therefore, submitted that once it is held that the suit is bad for misjoinder of causes of action, the suit u/s 28 has to be dismissed. The learned counsel further submitted that from the averment of the plaint and the notice which is issued by the plaintiff, it is apparent that the plaintiff is seeking possession of the house from defendant No. 1 under the Act and also from defendant No. 2 alleging that he is in possession of the suit house as a trespasser and as such the plaintiff has clubbed two different causes of action in a suit filed u/s 28 of the Act, which is impermissible. Therefore, he contended that the suit in any circumstances cannot be decreed by the Appellate Court. He therefore, submitted that the Appellate Court has thus not only committed an error apparent on the face of record but has assumed the jurisdiction which is not vested in him by law i.e. Section 29 of the Act. He submitted that this petition is filed under Article 227 of the Constitution of India, and as such if this Court comes to the conclusion that the judgment and order passed by the learned Assistant Judge thus without jurisdiction, then this Court has to allow the petition and grant relief to the petitioner. The learned counsel in order to substantiate his contention has relied on the judgments of this Court and the Apex Court and also the judgment of the Nagpur High Court and the Calcutta High Court. It is contended by the learned counsel that on plain reading of the plaint, it is clear that the suit is bad for multifariousness of causes of action. He therefore, submitted that the learned Assistant Judge has committed an error in decreeing the suit by ordering possession in favour of the plaintiff. He submitted that the defendant has specifically alleged and averred in the written statement that the suit is bad for multifariousness and is bad for different causes of action. He brought to my notice para 2 of the written statement which reads thus :

He therefore, submitted that specific contention about granting of relief and maintainability of suit was taken by the defendants and the trial Court did accept the plea of the defendants and answered the issue No. 9 in favour of the defendant. On these premises, the learned counsel submitted that the judgment of the Asstt. Judge suffers in all respects and therefore, he submitted that the

judgment of the Asstt. Judge required to be interfered with. The learned counsel also relied on the provisions of Sections 28, 29 to substantiate his contention in order to bring home the point by contending that if the suit is filed u/s 28 of the Act, the procedure prescribed for the trial of the suit is also different. The procedure of filing appeal and hearing the appeal by the District Court is also different. He also submitted that there is no further appeal provided under the Act against the order of the Dist. Judge u/s 29 of the Act. Such as Second Appeal to this Court. He therefore, submitted that though the Civil Judge (J.D.) is invested with the jurisdiction under both the statute while hearing and deciding the suit u/s 28, the learned Civil Judge being a Special Court has to decide the suit between landlord and tenant only. Therefore, he submitted that these aspects have been totally ignored by the learned Assistant Judge. Thus this is a fit case where this Court will issue a writ of certiorari and dismiss the suit by setting aside the judgment of the learned Asstt. Judge.

Shri Nimbalkar, learned Advocate, has placed reliance on the following authorities :

(i) Importers and Manufacturers Ltd. v. Phiroze Framroze Tara reported in AIR 1952 SC 271; (ii) Vasudev Gopalkrishna Tambwekar v. The Board of Liquidators, Happy Home Co-operative Housing Society Ltd., reported in 1964 Mh.L.J. 410 : 1964 66 BLR 205; (iii) Raizada Topandas v. Gorakhram Gokalchand reported in 1964 Bom LR 106; (iv) Ratanlal Manikchand Shah Vs. Chanbasappa Sanganbasappa Chincholi and Others, ; (v) Govindbhai Parshottamdas Patel and Others Vs. New Shorrock Mills, Nadiad, ; (vi) Miss. Sukla Choudhury Vs. Miss. Manjolyn Tweedie and Others, ; (vii) Khem Chand Dayal Ji and Co. Vs. Mohammad Bhai Chand Bhai, ; (viii) Madanlal Kewalchand v. Radhakisan Laxminarayan and Anr. reported in 1950 NLJ 49 : AIR 1950 Nag 101; (ix) Nagendra Bala Debi and Others Vs. Provash Chandra and Others, ; (x) Rama Shanker Vs. Bidhey Khan and Another, ;

8. Per contra, Shri Brahme, learned counsel has supported the order. In addition to support to the judgment and order the learned counsel for the plaintiff though not filed any cross-objections or cross-petition to the finding which has been recorded by the Courts below regarding the status of defendant No. 1 as a tenant, Shri Brahme, learned counsel sought permission to challenge those findings on the point of status of the defendant No. 1 relying on a judgment rendered by me in case of Musaji Mohamadali Master and Anr. v. Mr. Gulamali Dadabhai Amreliwala (deceased) through L.Rs, and Ors. reported in 2005 (2) All MR 320. Though, I permitted the learned counsel Shri Brahme, to make submissions on the findings recorded by the Courts below in respect of issue Nos. 2 and 3 and point No. 2. I must remind myself that the contentions which are advanced by the learned counsel Shri Brahme, has to be tested on the touchstone of the jurisdiction of this Court under Article 227 of the Constitution of India as both the Courts below on appreciation of evidence laid by the parties (which is in the nature of oral evidence) has not accepted the case of the plaintiff

and held that plaintiff has failed to prove the relationship of landlord and the tenant. This being essentially a finding of fact, generally this Court will not interfere in the said finding, unless it is established or demonstrated to be a perverse finding. With this backdrop, I have to consider the submissions which are advanced by Shri Brahme. Shri Brahme, contended that the findings which are recorded by both the Courts below regarding status or establishment of relations of landlord and tenant with the plaintiff and defendant No. 1 are perverse. He submitted that the plaintiff specifically has stated the terms of tenancy in para 3 of the plaint, whereby the plaintiff stated that after the suit house was purchased, he allowed defendant No. 1 to occupy the suit house from 1-5-1975 on monthly rent of Rs. 20/-. He submitted that though, no direct evidence was produced by the plaintiff regarding the creation of tenancy, all ingredients of tenancy are established by the plaintiff by making specific averments in para 3 of the plaint which are also supported by his oral evidence. He submitted that both the Courts below thus have recorded the finding contrary to the pleadings and the evidence on record. Therefore, the said findings being perverse, hence required to be set aside. He submitted that the suit which is filed though making composite relief of possession against both the defendants but it is contended by the learned counsel that plaintiff has filed a suit against the defendant No. 1 claiming himself to be a tenant and defendant No. 2 as a trespasser. Therefore, he submitted that such a suit is entertained by the Civil Court, as the Civil Judge (J.D.) who was hearing the suit having jurisdiction to pass a decree of eviction u/s 28 of the Act and also under Civil Procedure Code. He submitted that the Civil Judge and for that purpose learned Asstt. Judge were competent to pass a decree for possession on recording a finding and also accepting the fact that the plaintiff has established his title to the suit house. Therefore, he submitted that this Court by taking different view of the matter can record a finding regarding the tenancy of defendant No. 1 and confirmed the decree passed by the Appellate Court. He submitted that the defendant No. 2 being a rank trespasser and this Court may not entertain the petition filed under Article 227 of the Constitution of India. He submitted that a trespasser cannot seek a relief in a special and extraordinary jurisdiction of this Court under Article 227 of the Constitution of India. He submitted that the findings recorded by the Appellate Court particularly in para 14 being just and required to be upheld. He submitted that by considering the provisions of Section 99 of the CPC the suit cannot be dismissed or decree cannot be reversed on the ground of non-joinder and misjoinder of causes of action and irregularities committed in proceedings which does not affect the jurisdiction of the Court. The learned counsel emphasizes that the same Judge i.e. Civil Judge (J.D.) or for that purpose the Asstt. Judge have jurisdiction to pass a decree against a tenant and/or against a trespasser as both the Courts below i.e. C.J.J.D. and Asstt. Judge are clothed with jurisdiction under the Special Statute and under the CPC and both the Courts below can exercise both the jurisdiction simultaneously. Therefore, he submitted that considering the fact that the suit was filed in 1976 and in case this Court interfere in the judgment and order passed by the learned Asstt.

Judge, the landlord i.e. plaintiff has to approach the Civil Court again for seeking possession on the basis of his title. Therefore, considering this aspect, he submitted that this Court may not interfere in the order passed by the learned Asstt. Judge as he submitted that learned Assistant Judge has rightly exercised his discretion in passing a decree for possession. He submitted that suit cannot be dismissed on the ground of multifariousness as on the ground that there are two distinct causes of action. He submitted that the claim put forth by the plaintiff being interdependent, this Court considering the fact that the petitioner is trespasser may dismiss the petition. Shri Brahme, learned counsel submitted that in view of the judgment of this Court in Rudrayya Tippayya Swami (since deceased) and Ors. v. Kalyanappa Gurushantappa Alagundagi and Ors. reported in 2005 (2) All MR 530. He submitted that the learned Single Judge of this Court in Rudrayya Tippayya Swami's case (supra) was dealing with an identical case and had an occasion to consider the judgment of the Gujarat High Court in Govindbhai's case, on which Shri Nimbalkar, advocate has relied. He therefore, submitted that considering the judgment of the learned Single Judge and also considering the fact that this petition is filed under Article 227 of the Constitution of India, and the Appellate Court recorded reasons in para 14 has passed a decree for possession, the present petition therefore, required to be dismissed. On considering the rival submissions advanced before me following points emerged for my consideration :

(a) Whether suit as filed is maintainable and whether the suit can be dismissed for misjoinder of causes of action i.e. multifariousness of causes of action;

(b) Whether this Court can interfere in the finding of fact recorded by both the Courts below regarding status of defendant No. 1;

(c) Whether in a suit filed u/s 28 of the Act, the District Judge who was hearing appeal u/s 29 of the Act can pass a decree for possession against a trespasser.

Before dealing with the abovesaid point for determination, let me refer to the provisions of Section 28 of the Act. Section 28 of the Act reads thus :

"28.(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction -

(a) in Greater Bombay, the Court of Small Causes, Bombay,

(aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and

(b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge the Court of the Civil Judge (Senior Division) having ordinary jurisdiction, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply [or between a licensor and a licensee

relating to the recovery of the licence fee or charge] 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 [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.

(2) (a) Notwithstanding anything contained in clause (aa) of Sub-section (1), the District Court may at any stage withdraw any such suit, proceeding or application pending in a Court of Small Causes established for any area under the Provincial Small Causes Courts Act, 1887 and transfer the same for trial or disposal to the Court of the Civil Judge (Senior Division) having ordinary jurisdiction in such area.

(b) where any suit, proceeding or application has been withdrawn under clause

(a) the Court of the Civil Judge (Senior Division) which thereafter tries such suit, proceeding or application, as the case may be, may either re-try it or proceed from the stage at which it was withdrawn.

(c) The Court of the Civil Judge trying any suit, proceeding or application withdrawn under clause (a) from the Court of Small Causes, shall for purposes of such suit, proceeding or application, as the case may be, be deemed to be the Court of Small Causes.]

Explanation- In this section "proceeding" does not include an execution proceeding arising out of a decree passed before the coming into operation of this Act."

(emphasis by me)

Considering the abovesaid provisions of the Act, that by virtue of sub-clause (b) of Sub-section (1) of Section 28, the Court of Civil Judge (J.D.) is entrusted to deal with the suits or any proceedings between the landlord and the tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply. Therefore, to entertain suit u/s 28. First and foremost thing is to be established that there exist relationship of landlord and tenant, who are parties to the suit. Now as such, I have to find out about the plea taken by the plaintiff qua defendant Nos. 1 and 2. As it has come on record i.e. statement made in para 3 of the plaint and the notice issued by the plaintiff to defendants. The suit notice which is at Exh. 32 also supports the averments made in the plaint. The plaintiff has examined himself at Exh. 38, where he has reiterated the fact which are stated in the plaint para (3) and notice Exh. 32.

9. Having noticed the first contentions raised, by Shri Brahme, learned advocate, the findings recorded by the trial Court as well as the Appellate Court and considering the parameters of writ jurisdiction as explained by the Apex Court in *Essen Deinki Vs. Rajiv Kumar*, . The Apex Court in the following manner has explained jurisdiction of this Court under Article 227 of the Constitution of India. The Apex Court observed thus :

"Exercise of jurisdiction under Article 227 of the (Constitution is limited and restrictive in nature. It is so exercised in normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the Courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for."

Keeping this aspect, in my mind, I have perused judgment of the learned trial Judge who has considered evidence of the plaintiff and disbelieved the plaintiff on the point of creation of tenancy. This finding of the trial Court has been confirmed by the Appellate Court. The Appellate Court in para 8 of the judgment has made the following observations :

"In view of the fact of scanty oral evidence and no document, the trial Court rightly held the plaintiff failed to prove the relationship of landlord and tenant between himself and deceased Nuruddin."

In my judgment this finding which has been recorded by the Courts below is on appreciation of evidence. Therefore, under the jurisdiction of this Court under Article 227 of the Constitution of India, this Court will be very slow in interfering in that finding. One more aspect cannot be ignored that the plaintiff based his claim or tried to support his contention solely on oral evidence and when the case is rest on oral evidence and the trial Court as well as Appellate Court either accept or reject that oral evidence, it will not open for this Court to reconsider the said evidence. In my judgment, therefore, both the Courts below were right in holding that the relationship between the plaintiff and the defendant as landlord and tenant is not established. Therefore, the said finding cannot be interfered with by this Court. Hence, I reject the contention of Shri Brahme.

10. Once this finding has been accepted, then the second question arises for consideration whether the suit as filed u/s 28 of the Act, whether Court can grant a decree for possession against the trespasser. It is apparent from the pleadings and notice the plaintiff is making distinct claim against the defendants. So far as defendant No. 1 is concerned, the claim put forth by the plaintiff to seek possession of suit land from him is on the allegation that defendant No. 1 occupying the suit house as his tenant, on payment of monthly rent of Rs. 20/-. Thus the plaintiff in no uncertain terms has treated defendant No. 1 as his tenant. Thus for his eviction only remedy that is available to him to file a suit in the Civil Court having jurisdiction to entertain the suit u/s 28 of the Act. If this was only the claim then no fault can be found but looking to other part of the plaint and claim against defendant No. 2, where the plaintiff has accepted defendant No. 2 as a trespasser and claimed possession from him as such. Thus this relief of possession qua the defendant No. 2 being outside scope and jurisdiction of the Civil Court u/s 28 of the Act. Thus on the material which is on

record and on proved facts, the suit on face of it is bad for multifariousness. Thus the finding on issue No. 9 recorded by the trial Court coupled with the findings of fact recorded by the Appellate Court in respect of point No. 2, the suit has to be dismissed. Thus the learned Asstt. Judge committed an error, apparent on face of record to pass a decree in favour of the plaintiff in a suit which on face of it bad for multifariousness.

11. Having noticed the judgment which are cited at the Bar by the learned advocates in support of their respective stand, when all the authorities have held that though Civil Judge trying the suit or the Appellate Court hearing the appeal against the decree or order of Civil Judge is one and the same Court but their investment of jurisdiction is totally different e.g. suit against ejectment of tenant has to be filed by the landlord u/s 28 of the Act, while suit against the trespasser based on title has to be filed in the Civil Court having jurisdiction to try the suit i.e. territorial or pecuniary has to be dealt with under the Civil Procedure Code. So also u/s 29 of the Act which provides for appeal to the District Court. u/s 96 of the CPC also the appeal is preferred to the Appellate Court depending on the pecuniary jurisdiction of that Act. So far as Section 28 is concerned, it does not matter, if the suit is filed by the landlord against the tenant for recovery of possession of demised property including arrears of rent, which may in given case exercised the pecuniary jurisdiction of that Court, still the Civil Judge u/s 28 of the Act has to decide the suit. Then in my judgment, the plaintiff has clubbed two distinct causes of action against two defendants. Thus suit as filed is required to be dismissed. I am of the confirmed view that the suit as filed was not maintainable. Therefore, the trial Court was right in dismissing the suit by recording the finding that the suit was bad for multifariousness and as such the plaintiff is not entitled to the possession of the suit house. In view of this finding, in my judgment, the learned Assistant Judge exceeded his jurisdiction in reversing that finding and directing a decree for possession by ordering eviction of a trespasser to which the Courts i.e. trial Court and Appellate Court as a Special Courts under the Act are not empowered with. Therefore, in my judgment, the contention raised by Shri Nimbalkar, learned advocate requires to be accepted and upheld. Therefore, in my judgment, the learned Assistant Judge, ignoring the aspect that he was hearing an appeal filed u/s 29 of the Act, against the judgment and order passed by the Civil Judge in a suit filed u/s 28 of the Act, has thus assumed the jurisdiction in granting decree in favour of the plaintiff which he does not have. In my opinion, therefore, such exercise of jurisdiction in my judgment, is, an error apparent on the face of record and as such the judgment cannot stand for any reason. In my judgment, the consolidated suit for recovery of possession from the tenant on the ground available under the Act and against a trespasser is not maintainable. In these premises, in my judgment, the learned Assistant Judge has erred in allowing appeal and ordering possession of the property. Accordingly, order passed by the Assistant Judge, Dhule on 8-1-1984 in Appeal No. 231/1982 stands set aside and the judgment and order passed by the learned 3rd Joint Civil Judge (J.D.) Dhule

in R. C. S. No. 193/1976 stands restored.

12. Rule made absolute. No order as to costs.