

(2003) 11 AHC CK 0112

In the Allahabad High Court

Case No : Civil Miscellaneous W.P. No. 48107 of 2003

Sharifan and Ors.

APPELLANT

Vs

Wakf Alal Aulad Imamunnisha & Anr.

RESPONDENT

Date of Decision : 03-11-2003

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 23

Citation : (2003) 11 AHC CK 0112

Hon'ble Judges : S.P.Mehrotra, J

Final Decision : Dismissed

Judgement

S.P. Mehrotra, J.—The present writ petition has been filed by the petitioners under Articles 226/227 of the Constitution of India, inter alia, praying for quashing the order dated 2312002 (Annexure8 to the writ petition) passed by the learned Judge Small Cause Court, Bijnor and the judgment and order dated 1592003 (Annexure10 to the writ petition) passed by the learned Additional District Judge (Court No. 4), Bijnor.

2. The dispute relates to a shop situated in main Bazar, Kasba and ParganaNahtor, TahsilDhampur, DistrictBijnor, the details whereof are given in the plaint of SCC Suit No. 90 of 1999 referred to hereinafter. The said shop has hereinafter been referred to as "the dispute shop".

3. From a perusal of the averments made in the writ petition and the Annexures thereto, it appears that the respondent Nos. 1 and 2 herein, as plaintiffs, filed a suit for eviction, arrears of rent, damages etc. against Fahim Uddin, predecessorininterest of the petitioners herein. It was, inter alia, alleged in the said suit that Musammam Imamunnisha established WaqfAlal Aulad by Waqf Deed dated 1371988, and that she appointed her husband Mohd. Shibgat Ullah as the first Mutawalli of the Waqf; and that the said WaqfAlalAulad Imamunnisha (the respondent No. 1 herein and the plaintiff No. 1 in the said suit) purchased Khasra Nos. 111, 112, 113 in the name of the said WaqfAlalAulad Imamunnisha had and that five shops including the disputed shop were built in the said property from

the income of the Waqf and that thus, the disputed shop was the property of the said Waqf. Alal Aulad Imamunnisha; and that the said Waqf was registered with the Sunni Waqf Board at Sl. No. 98.

4. It was, inter alia, further alleged in the said suit that the disputed shop was the property of the said Waqf Alal Aulad Imamunnisha, and the U.P. Act No. XIII of 1972 (in short 'the Act') was not applicable to the disputed shop; and that the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, was the tenant of the disputed shop at a monthly rent of Rs. 200/ besides Water Tax and House Tax; and that the tenancy of the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, was month to month; and that the rent of the disputed shop was earlier realized by the said Shibgat Ullah as Mutawalli; and that thereafter, Mohammad Ahmad alias Abdul Qayyum (respondent No. 2 herein) became Mutawalli, and as Mutawalli, he was realizing rent of the disputed shop from the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein; and that the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein did not pay rent with effect from 12/1/1999 despite demand; and that the respondents herein (plaintiffs in the said suit) gave a notice dated 8/9/1999 to the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, which was received by the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, on 13/9/1999; and that the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, gave an incorrect reply to the said notice; and that despite the service of the said notice, the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein neither vacated the disputed shop nor did he pay the rent.

5. The said suit was registered as SCC Suit No. 90 of 1999. Copy of the plaint of the said SCC Suit No. 90 of 1999 has been filed as Annexure 2 to the writ petition.

6. It further appears that the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein, filed written statement in the said SCC Suit No. 90 of 1999, a copy whereof has been filed as part of Annexure 3 to the writ petition.

7. In paragraph 21 of the said written statement, it was, inter alia, alleged that a complicated question of title in regard to the disputed shop was involved in the said suit, and, therefore, the said suit was not cognizable by the Small Cause Court.

8. It further appears that an application dated 21.11.2000 (No. 80 Ga) was also filed on behalf of the said Fahim Uddin (defendant in the said suit), predecessor in interest of the petitioners herein. Copy of the said application has been filed as part of Annexure 3 to the writ petition.

9. It was, inter alia, alleged in the said application dated 21.11.2000 (No. 80 Ga) that in the said SCC Suit No. 90 of 1999, there was involvement of complicated

question of title of WaqfAlalAulad in regard to the disputed shop, for which measurements etc. by Survey Commission were also necessary; and that an earlier suit being SCC Suit No. 16 of 1991 was filed by the said Mohammad Ahmad (respondent No. 2 herein) claiming himself to be the owner of the disputed shop; and that the said SCC Suit No. 90 of 1999 was not cognizable by the Small Cause Court.

10. It further appears that the respondents herein (plaintiffs in the said suit) filed objections (No. 81 Ga) against the said application (No. 80 Ga) filed on behalf of the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein.

11. It further appears that by the order dated 2312002 (Annexure8 to the writ petition) passed by the learned Judge, Small Cause Court, Bijnor, the said application (No. 80Ga) filed on behalf of the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, was dismissed.

12. Thereupon, the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, filed a revision under Section 25 of the Provincial Small Cause Courts Act, 1887 which was registered as SCC Revision No. 6 of 2002.

13. It further appears that during the pendency of the said SCC Revision No. 6 of 2002, the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, expired, and the petitioners herein were brought on record as the heirs and legal representatives of the said Fahim Uddin.

14. By the judgment and order dated 1592003 (Annexure10 to the writ petition), the learned Additional District Judge (Court No. 4), Bijnor dismissed the said SCC Revision No. 6 of 2002.

15. Thereafter, the petitioners have filed the present writ petition seeking the reliefs mentioned above.

16. I have heard Shri Dev Raj, learned counsel for the petitioners at length.

17. It is submitted by Shri Dev Raj, learned counsel for the petitioners that a perusal of the plaint of the said suit, i.e., SCC Suit No. 90 of 1999 shows that the necessary pleadings for a suit by lessor against lessee were not made in the plaint, and, therefore, the said suit was not cognizable by the Small Cause Court. It is further submitted by Shri Dev Raj, learned counsel for the petitioners that a combined reading of Section 15 of the Provincial Small Cause Courts Act, 1887 and Article 4 of ScheduleII to the said Act shows that normally a suit for the possession of immovable property or for the recovery of an interest in such property is not cognizable by Small Cause Court. However, the submission proceeds, in view of the amendment made in the State of Uttar Pradesh by the U.P. Act 37 of 1972, Article 4 of ScheduleII to the Provincial Small Cause Courts Act, 1887 has been substituted by the following Article:

?(4) a suit for the possession of immovable property or for the recovery of an interest in such property, but not including a suit by a lessor for the eviction of a lessee from a building after the determination of his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

Explanation. For the purposes of this article, the expression ?building? means a residential or nonresidential roofed structure, and includes any land (including any garden), garages, outhouses, appurtenant to such building, and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof.? Uttar Pradesh Act 37 of 1972, Section 4 (w.e.f. 2091972).

18. It is submitted by Shri Dev Raj, learned counsel for the petitioners that as per the aforesaid Uttar Pradesh amendment, a suit by a lessor for the eviction of a lessee from a building after the determination of his lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease is cognizable by Small Cause Court.

19. It is submitted by Shri Dev Raj that in view of the said U.P. amendment, it is necessary that there should be pleadings in the suit that there is relationship of lessor and lessee between the parties. In the present case, the submission proceeds, a perusal of the plaint shows that such relationship has not been pleaded by the respondents as plaintiffs in the said suit.

20. I have considered the submissions made by Shri Dev Raj, learned counsel for the petitioners, and I find myself unable to accept the same.

21. A perusal of the plaint of the said SCC Suit No. 90 of 1999 shows that the necessary pleadings for a suit by a lessor for the eviction of a lessee from a building after the determination for his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease, as per the requirements of the aforesaid U.P. amendment, have been made in the plaint of the said suit. As noted above, it has, inter alia, been pleaded in the said suit that the disputed shop was the property of WaqfAlalAulad Imamunnisha, and the Act (i.e., U.P. Act No. XIII of 1972) was not applicable to the disputed shop; and that the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, was the tenant of the disputed shop at the rent of Rs. 200/ per month besides Water Tax and House Tax; and that the tenancy of the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, was month to month; and that the rent of the disputed shop was earlier realized by Shibgat Ullah, as Mutawalli; and that thereafter, Mohammad Ahmad alias Abdul Qayyum (respondent No. 2 herein) became Mutawalli and he, as Mutawalli, was realizing rent of the disputed shop from the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein; and that the notice dated 891999 was given by the respondents herein (plaintiffs in the said suit) to the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein

which was received by the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, on 1391999; and that despite the service of the said notice, the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, neither vacated the disputed shop nor did he pay the rent.

22. It is thus evident that necessary pleadings for the suit by a lessor against a lessee for eviction from the disputed shop and for arrears of rent, damages/compensation etc. for use and occupation in respect of the disputed shop after the determination of lease have been made in the plaint of the said suit. Therefore, the plea of Shri Dev Raj regarding absence of necessary pleadings as required in view of the Uttar Pradesh Amendment, cannot be accepted.

23. Shri Dev Raj, learned counsel for the petitioners then submits that there was no relationship of landlord and tenant between WaqfAlalAulad Imamunnisha and the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein, and, therefore, the plaint was liable to be returned for presentation before the regular Court in view of the provisions of Section 23 of the Provincial Small Cause Courts Act, 1887.

24. I have considered the submissions made by Shri Dev Raj, and I find myself unable to accept the same.

25. Section 23 of the Provincial Small Cause Courts Act, 1887 lays down as under :

?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 subsection (1), it shall comply with the provisions of the second paragraph of Section 57 of the Code of Civil Procedure and make such order with respect to costs as it deems just, and the Court shall, for purposes of the Indian Limitation Act, 1877, be deemed to have been unable to entertain the suit by reason of a cause of a nature like that of defect of jurisdiction.?

26. The said SCC Suit No. 90 of 1999 has been filed on the ground that there was relationship of landlord and tenant between the respondents (plaintiffs in the said suit) and the said Fahim Uddin (defendant in the said suit), predecessorininterest of the petitioners herein. One of the questions involved in the said Suit would be as to whether there was any relationship of landlord and tenant between the plaintiffs and the defendants. In case the plaintiffs are able to establish such relationship and other requisite conditions for decreeing the said suit are satisfied then the decree may be passed in favour of the plaintiffs.

In case the plaintiffs fail to establish the relationship of landlord and tenant, the said suit may be dismissed. Therefore, no question of title, as mentioned in Section 23 of the Provincial Small Cause Courts Act, 1887, is involved in the present case.

27. Certain judicial decisions may be referred to in this regard, which support the above conclusion.

28. In *Bhajan Lal v. District Judge, Mathura and others*, 1997 (2) ARC 95, a learned Single Judge of this Court opined as follows (paragraph 9 of the said ARC):

“(9) The jurisdiction of the Court depends upon the allegations made in the plaint. In *Mohd. Fasi v. Abdul Qyayum*, AIR 1978 All. 470, the Court held that Judge, Small Causes Court should refer to the allegations contained in the plaint, to determine whether it has jurisdiction to try the suit. If the plaintiff alleges that there is relationship of landlord and tenant, the suit is cognizable by Judge, Small Causes. Section 23 of Provincial Small Causes Court only gives an option to the Court to return the plaint to be presented to a Court if the case of the plaintiff depends upon the proof or disproof of a title to Immovable Property. In *Smt. Qaisari Begum v. Munney and another*, 1981 ARC 291, the Court held that if the defendant denies the title of the plaintiff and claims himself as owner but if the plaintiff alleges that the defendant was the tenant, the suit is cognizable, by Court of Small Causes. Similar view was expressed in *Abdul Kalam v. Abdul Majid*, 1992 (1) ARC 453. The plaintiff respondent alleged that there was relationship of landlord and tenant. The Small Causes Court was to decide such relationship of landlord and tenant. ?

29. In *Rakesh Kumar v. Vth Additional District Judge, Bulandshahar and others*, 1998 (2) ARC 178, a learned Single Judge of this Court held as under (paragraphs 7, 14, 15 and 16 of the said ARC):

“(7)On a perusal of the above provisions, it would appear that in order to attract them, it is necessary that when the Court in which suit has been filed comes to the conclusion that the relief claimed by the plaintiff in the suit depends upon the proof or disproof of title to the immovable property involved in the suit, which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented before a proper Court having jurisdiction to determine the title. The purpose and intention of this provision is to enable the Court of Small Causes to save its time by returning the plaint which involves an elaborate inquiry of intricate question of title and is, therefore, likely to take time.

(14) Under the scheme of the Act, a right has been conferred upon a suitor to get his matter determined in a summary manner quickly. No appeal is also provided against the decree passed by such Courts. The plaintiff, therefore, cannot be divested of that right merely on the ground that since question of title has been raised by the defendant, the Court is bound to return the plaint for

presentation before the proper Court. If this could be the interpretation of Section 23, a clever defendant will always succeed in every case in compelling the plaintiff to go to a rigorous trial before a regular Court for establishing his right and for getting the relief which he otherwise could obtain in a lesser time without going into a cumbersome process. This was not the intention behind enacting Section 23 of the Act. Inquiry under Section 23 is limited to the right of the plaintiff and to the relief claimed by him. Therefore, before ordering return of plaint, it is necessary for the Small Cause Courts to record a definite finding that the right of the plaintiff and the relief claimed by him is wholly dependent upon the proof or disproof of the title to the immovable property and the matter cannot finally be determined conveniently in a summary manner. The Court of Small Causes has also the power to go into the question of title as well for adjudicating upon the plaintiff's right to get the relief claimed where such question is incidentally involved and the inquiry is not an elaborate one.

(15) Therefore, to say that the Court of Small Causes has no jurisdiction to go into the question of title is not correct. The law whether the Court of Small Causes can go into the question of title can be said to be beyond controversy. In brief, it can be said that the Judge, Small Cause Court has the power to go into such a question incidentally for determining the real issue before it. However, where the Court feels that an intricate question of title is involved which cannot be conveniently decided in a summary manner, it may order return of plaint under Section 23 of the Act for presentation before the proper Court.

(16) In the present case the plaintiff has claimed in himself rights of the lessor which according to him stood transferred to him by virtue of the sale deed executed by the previous landlady. It is further the case of the plaintiff that prior to this transfer rent by the defendant was being paid to the predecessor in interest of the plaintiff. It is also not disputed by the defendants that rent was being paid to Smt. Athar Zamani Begum though according to them the landlady was realizing rent on behalf of other coshaires. In the circumstances of the present case the grant of relief of ejectment and recovery of arrears of rent depends upon the proof or disproof of the rights claimed by the plaintiff in the suit. The correctness of the defence case and its effect in law on the plaintiff's right are yet to be determined by the trial Court on the basis of evidence led by the parties. Merely on the basis of the defence plea that there are other cosharers of the property in suit and, therefore, the sale deed executed in favour of the plaintiff was not valid, the jurisdiction of Small Cause Court in the present case was not ousted. If the plaintiff ultimately does not succeed in establishing the relationship of landlord and tenant between him and the defendants, his suit would fail. The trial Court examined this question and came to the conclusion that the plaint was not liable to be returned under Section 23 of the Act and rejected the petitioner's application 85B. The Lower Revisional Court on an erroneous view of law has set aside the said order which has caused great injustice to the petitioner. The said order of the Revisional Court, therefore, cannot be upheld.?

30. In Shiv Nath v. Additional District Judge, Maharajganj and others, 1999 (1) ARC 264 : 1999 (17) LCD 197, a learned Single Judge of this Court held as follows (paragraphs 6,7 and 8 of the said ARC):

?(6) There can be no dispute that on Small Cause Court side only a suit for rent and ejectment by a lessor against a lessee after determination of lease is maintainable and all other suits for recovery of possession based on title would lie to Civil Court on regular side. In the present case, however, plaintiffs have come with the allegation that Gabbu Lal was the original tenant of the previous owner of the property and after the transfer of title in their favour, they became landlords of Gabbu Lal and after the death of Gabbu Lal his legal representatives became tenants. The further case of the plaintiffs is that the legal representatives of Gabbu Lal permanently shifted to State of Bihar leaving the building in question in occupation of defendant No. 3 as sub tenant. If the plaintiff succeed in proving their allegations, the petitioner would not have any independent rights as against the landlords and where decree for eviction in the suit is sought against the tenant in chief, the subtenant can also be added as a party so that there may not be any objection to the execution of decree against him also if the same is ultimately passed. If the plaintiffs fail to prove that there existed a relationship of landlord and tenant between them and Gabbu Lal or that the occupation of the present petitioner in the accommodation in question is only that of subtenant or on behalf of the legal representatives of the deceased Gabbu Lal, the suit may fail.

(7) A perusal of Section 23 of the Small Cause Courts Act makes it clear that in order to attract the same, the Court in which the suit has been filed if comes to the conclusion that the relief claimed by the plaintiffs in the suit depends upon proof or disproof of title to the immovable property involved in the suit which such Court cannot finally determine, it may at any stage of the proceedings return the plaint to be presented before the appropriate Court having jurisdiction to determine the title because the proceedings before the Small Cause Court are of summary nature while for determining the question of title an elaborate inquiry is required which can only be had by the competent Court having jurisdiction to determine the said question. In Abdul Kamal v. Abdul Majid and another, 1992 (1) ARC 453, it has been held that where the question of granting relief of ejectment in favour of the plaintiff against the defendant depends upon the existence of proof of relationship of landlord and tenant and not on the proof or disproof of title to the property in dispute, the plaint should not be returned under Section 23 of the Small Cause Courts Act. It cannot be said or held that the Court of Small Causes has no jurisdiction at all to go into the question of title and this proposition has been settled beyond controversy by a series of judicial pronouncements to wherein it has been held that Judge, Small Cause Court has the power to go into such a question incidentally for determining the real issue before it. In this connection a reference may be made to the case of Rakesh Kumar, Bulandshahar v. VIth Additional District Judge, Bulandshahar and others, (Civil Misc. Writ Petition No. 22390 of 1991, decided on 7498).[Reported in 1998

(2) ARC 178].

(8) In the present case also relief of grant of decree for eviction as per the case of the plaintiffs will depend upon proof or disproof of relationship of landlord and tenant between Gabbu Lal and the plaintiffs and as against defendant No. 3, the grant of relief would depend upon proof or disproof of the fact whether the petitioner's occupation in the accommodation in question has been in the capacity of subtenant or on behalf of the legal representatives of the deceased tenant Gabbu Lal. If the plaintiffs fail to prove these facts, their suit may fail. While deciding the aforesaid issues it is open for the Court of Small Cause to inquire into the question incidentally whether the petitioner has perfected his title on the basis of adverse possession. If his occupation is found to be on behalf of the legal representatives of the deceased, in that event there can be no question of perfection of title by adverse possession as no tenant or subtenant can claim adverse possession against his landlord. In the facts and circumstances of the case, it was not obligatory or essential for the trial Court to have returned the plaint for presentation before the appropriate Court. Therefore, the view taken by the Courts below does not require any interference.?

31. In view of the aforesaid discussion, I am of the opinion that the writ petition lacks merit, and the same is liable to be dismissed. The writ petition is accordingly dismissed.