

(2017) 11 BOM CK 0034
In the Bombay High Court
Case No : 934 of 1994

Smt Laxmibai Ganpati Bhingare

APPELLANT

Vs

Shivaji Dnyani Salunkhe

RESPONDENT

Date of Decision : 28-11-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 6Rule
17>Order 6Rule 17 -
Bomb

Citation : (2017) 11 BOM CK 0034

Hon'ble Judges : G.S.Kulkarni

Bench : SINGLE BENCH

Advocate : S.S.Patwardhan, Anil Kumar Patil

Judgement

1. The petitionertenant who suffers a decree of eviction in a civil suit as filed by the respondentlandlord and as confirmed in an appeal by the appellate Court is before the Court in this petition under Article 227 of the Constitution.

2. The petitioner is the tenant (Original defendant) and respondent (Original Plaintiff) in Regular Civil Suit No.325 of 1979 filed before the Court of Civil Judge, Junior Division at Sangli. During the pendency of this petition, the petitioner tenantsSmt Laxmibai Ganpati Bhingare expired and her legal heirs who were brought on record pursue this petition. For convenience, the parties are referred as they originally stand when the petition came to be filed.

3. In nutshell, the facts are :The respondent instituted the civil suit in question for recovery of possession of the suit property which is a open plot admeasuring 30 sq.ft x 20 sq.ft out of city survey No.1009 of 2004 situated in Gaonbhag locality at Sangli, as also for possession of the encroached open land admeasuring 200 sq.ft towards northern side of the let out premises.

4. One Ganesh Yashwant Bhide was the original owner of the land under the said

city survey numbers who had sold the said land to the respondent under a registered Sale deed dated 23.4.1979. Except for the actual area in possession of the petitioner, it is not in dispute that the petitioner was let out an open plot. The case of the respondent in the plaint was of an open plot admeasuring 30 sq.ft x 20 sq.ft being let out to the petitioner and the petitioner encroaching upon the open plot to an extent of 200 sq.ft in westnorth corner of the city survey number. As averred in the plaint by the respondent, the petitioner had constructed certain temporary structures such as cattle shed, place for stocking cattlefodder etc in this encroached portion. The respondent's case was that by committing such encroachment, the petitioner had made herself liable for eviction under section 13 (1) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1974 (for short "Bombay Rent Act"). The second ground as urged by the respondent was that the suit premises were let out, only for the purpose of residence and the defendant had started using the premises for the purpose of milk and tailoring business. Such change of user was contrary to the provisions of clause (a) of section 13 (1) of the Bombay Rent Act. The third ground was that the respondent reasonably and bonafide required the open plot for erection of a new building and hence he was entitled for a decree of possession under clause (i) of section 13 (1) of the Bombay Rent Act.

5. The petitioner resisted the suit by filing written statement as also an additional written statement. It was the petitioner's case that the original landlord (Ganesh Yashwant Bhide) had let out open plot admeasuring 1538 sq.feet to her deceased father and thus the respondent's case of having let out the plot admeasuring 30 sq.ft.x 20 sq.ft, as also allegation of the petitioner having committed an encroachment was false. This contention was supported by the petitioner relying upon her reply to the respondent's notice dated 8.2.1979. As regards the respondent's contention on change of user, the same was denied inter alia stating that the suit premises were used for the said purposes, since the beginning, and as such there was no change of user. As regards the contention that the respondent on bonafide requirement that he intended to construct a building, the same was denied by the petitioner to be false.

6. The learned trial Judge framed seven issues. The relevant issues or the controversy in the present petition are Issue nos.1,5 and 6 which are answered in the affirmative which read thus : 1. Does plaintiff prove that the defendant committed encroachment over northern side plot admeasuring 10"x20" to the open plot admittedly let out by predecessor in title of the plaintiff to the defendant's predecessor ?

5. Is plaintiff entitled to get possession on the ground of encroachment, erection of new building and change of user ?

6. Whether the plaintiff is entitled to possession of alleged encroachment in issue no.1 above ?

7. The learned trial Judge considering the evidence on record decreed the

respondent's suit in regard to the encroachment to the tenanted premises admeasuring 30 sq.ft x 30 sq feet in the following terms : " (a) The suit is partly decreed.

(b) The defendant do deliver possession of open property admeasuring 20"

(Eastwest) x 10" (Northsouth) as shown with part "B" in the rough sketch map (not to the scale) drawn by the Court Commissioner and filed with his report at Exh.40. It is clarified that the encroached portion is towards northern side of the tenanted property shown with part "B" in the map. It is out of property bearing C.T.S.No.1009/4 situated at Gaonbhag, Sangli. By way of clarification it is hereby stated that the encroached property is bound as follows :

"To the East: Open land of one Karmarkar To the West: Wall of building over C.T.S.No.1009/4

To the North: House of Tukaram Bandkar and To the South: Open space admeasuring 3"out of C.T.S.No.1009/4

The rough map referred to above shall be part and parcel of the decree. (c) The plaintiff's suit is so far as the relief of possession of the tenanted premises admeasuring 30" x 20" is concerned stands dismissed. (d) An inquiry in respect of mesne profits of the encroached portion for the period of pendency of the present suit till recovery of possession shall be carried out as per the Order XX Rule 12 of the Code of Civil Procedure.

(e) The defendant do pay Rs.9/to the plaintiff as rent. (f) Parties shall bear their respective costs (g) A decree be drawn up accordingly.

14th January 1988, Sangli S/d

(K.J.Paratwar)

III Jt.CJJD,Sangli

8. The petitioner being aggrieved by the judgment and decree passed by the learned trial Judge filed an Appeal being Regular Civil Appeal No.158 of 1988 before the Court of the learned District Judge at Sangli. The petitioner after filing of the Appeal moved an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the Appeal Memo to raise an issue that the learned trial Judge, should have considered that in a suit under the Bombay Rent Act, a prayer for possession on the basis of title could not have been entertained before the same Court and that the learned trial Judge should have held that the respondent was required to file a separate suit for the encroached portion. This application was rejected by the learned Appellate Judge on the ground that this contention ought to have been raised before the learned trial Judge as this defence was available to the petitioner. A Civil revision application was filed by the petitioner dismissing the said application of the petitioner. The Civil revision application was not entertained, as the Court observed that since the petitioner was entitled to argue the point without amending the Appeal Memo.

9. In the appeal filed by the petitioner against the judgment of the learned trial judge, the learned Appellate Judge held that the respondent/landlord was entitled to receive possession of 200 sq.ft encroached area from the petitioner/tenant and accordingly dismissed the appeal as filed by the petitioner, confirming the judgment and decree dated 14.1.1988 as passed by the learned trial Judge. In regard to the objection as raised by the petitioner on the ground that the suit not being maintainable in regard to the encroached portion, the appellate Judge referring law enunciated in the decision of the Supreme Court in Sushila Kashinath Dhonde vs Harilal Govindji Bhogani¹ held that the learned trial Judge was within the jurisdiction as conferred under section 28 (1) of the Bombay Rent Act to grant a decree in regard to the encroachment to the tenanted premises. The respondent also filed a cross appeal (Appeal No.109 of 1988) dismissing the respondent's suit on other grounds which came to be dismissed by the learned appellate judge.

10. In the above circumstances, the petitioner suffering a decree of possession in regard to the encroached portion to the tenanted premises as confirmed by the appellate court, is before the Court, being aggrieved by the concurrent findings of both Courts.

11. The learned counsel for the petitioner in assailing both the Judgments has principally argued on the issue of jurisdiction of the Court to decree the suit in regard to the encroached premises. It is submitted that the encroached portion was admittedly not the tenanted premises and thus in regard to the said premises, there was no relationship between the respondent and the petitioner, as that of a landlord and tenant and therefore, the issue thus fell outside the purview of section 28 (1) of the Bombay Rent Act and thus the learned trial Judge could not have proceeded to grant a decree in regard of the premises which fell beyond the jurisdiction of the Court. It is submitted that the impugned judgment deserves to be quashed and set aside and on the basic issue of the learned trial Judge lacking jurisdiction to entertain the said prayer under Section 28 of the Bombay Rent Act. It is submitted that also the learned Appellate Judge on this count, has erred in confirming the decree as passed by the learned trial Judge. In support of his submissions, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of (1) Laxmidas Morarji (dead) by LRs vs Behrose Darab Madan, (2009) 10 Supreme Court Cases 425(2) Sushila Kashinath Dhonde vs Harilal Govindji Bhogani (supra), (3) M/s Importers and Manufacturers Ltd vs Pheroze Framroze Taraporewalla & ors., AIR 1953 Supreme Court page 73 (4) Natraj Studios (P) Ltd vs Navrang Studios & anr, (1981) 1 Supreme Court Cases 523.

12. On the other hand, learned counsel for the respondent has supported the findings of the Courts below. It is submitted that the concurrent findings of the courts below, clearly indicate that the petitioner had made encroachment over and above the tenanted premises. It is submitted that the petitioner had in fact never raised the objection of jurisdiction of the Court to entertain the suit in

regard to the encroached portion. However, considering the law in that regard, the learned Appellate Judge has rightly rejected the contention of the petitioner that the Court had jurisdiction to grant a decree in regard to the encroached portion under section 28 (a) of the Bombay Rent Act.

13. Learned Counsel for the respondent in support of his contention has placed reliance on the judgment of the learned Single Judge of this Court in Rudrayya Tipayya Swami (since deceased) & ors vs Kalyanappa Gurushantappa Alagundagi & ors., (2005) Bom.R.C.293

14. As the issue involved is the issue of law, the parties have referred to the decision of the learned Single Judge of this Court in Rudrayya Tipayya Swami (since deceased) & ors vs Kalyanappa Gurushantappa Alagundagi & ors.(supra)

15. I have heard learned counsel for the parties. With their assistance I have also perused the impugned judgments. I have also perused the record and proceedings.

16. At the outset, it may be noted that on the factual matrix on the analysis of the entire evidence on record, on the issue of the petitioner having encroached on the open land admeasuring 200 sq.ft which was the area over and above the tenanted premises, both the Courts are adidem. These findings on merits in my opinion are appropriately arrived on a proper appreciation of evidence on record and would not call for interference of this Court under Article 227 of the Constitution in absence of any perversity.

17. Thus, the only issue and as rightly canvassed on behalf of the petitioner is the issue of jurisdiction namely whether the learned trial Judge had jurisdiction to entertain the suit qua the encroachment to the tenanted premises, so as to hold that the decree as passed by the learned trial Judge as confirmed by the learned appellate Judge is legal and valid?

18. Section 28 of the Bombay Rent Act confers jurisdiction on the Court to entertain a suit under the Bombay Rent Act interalia in relation to a dispute between the landlord and tenant, Section 28 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 subsection (2), no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question." (emphasis supplied)

19. In *Messrs Importers and Manufacturers Ltd v Pheroze Framroze Taraporewala and others* (supra) the Supreme Court held that in a case once there is a suit between a landlord and tenant relating to the recovery of rent or possession of the premises, the Small Cause Court acquires the jurisdiction not only to entertain such suit but also "to deal with any claim or question arising out of the Act or any of its provisions" which may properly be raised in such a suit". In para 3 the Court observed as under : "3. The respondents (the plaintiffs) do not contend that the appellant (the second defendant) is a tenant" as defined in S.5 (11) of the Act. The appellant on the other hand, does not and, indeed cannot deny that, as between the plaintiffs and the first defendant the suit is one between a landlord and a tenant and as such the Small Causes Court is, under S.28 of the Act, the only Court competent to entertain the suit. Section 28 confers jurisdiction on the Court of Small Causes not only to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of the premises but also "to deal with any claim or question arising out of this Act or any of its provisions." There is no reason to hold that "any claim or question" must necessarily be one between the landlord and the tenant. In any case, once there is a suit between a landlord and a tenant relating to recovery of rent or possession of the premises the Small Causes Court acquires the jurisdiction not only to entertain that suit but also "to deal with any claim or question arising out of the Act or any of its provisions" which may properly be raised in such a suit. The plaintiffs in this suit claimed that the purported subletting by the first defendant to the second defendant was unlawful both because it was a breach of the terms of the tenancy and also because as the statutory tenant after the determination of the contractual tenancy the first defendant was not entitled to create a subtenancy and they questioned the validity of the second defendant's claim to any protection under the Act. The claim or question as to the respective rights of the plaintiffs and the second defendant thus raised in the plaint certainly arises out of the Act and the language of S.28 appears to be wide enough to cover the same. "

20. The issue again fell for consideration of the Supreme Court in the case "*Sushila Kashinath Dhonde & Ors. Vs. Harilal Govindji Bhogani & Ors*" (supra). Considering the provisions of Section 28(1) of the Act it was held that it was not necessary that there should be a relationship of landlord and tenant in respect of all the matters covered by Section 28(1) of the Act, so as to give jurisdiction to the Court of Small Causes. The observations of their Lordship in paragraphs 13, 18 and 26 are relevant which read thus "13. Having due regard to the aspects mentioned above and the provisions of Section 18(3) and 28(1), in our opinion,

it is not necessary that there should be a relationship of landlord and tenant in respect of all the matters covered by Section 28(1) of the Act, so as to give jurisdiction to the Court of Small Causes. No doubt, one type of action contemplated under that section, viz., a suit or proceeding for recovery of rent or possession of any premises to which any of the provisions of Part II apply may be between a landlord and a tenant; but in respect of the other matters dealt with in that subsection, it is not necessary that the relationship of landlord and tenant should exist between the parties before the Court.

18. In the above extract, this Court, in our opinion, has clearly laid down that when the Court of Small Causes under Section 28 of the Act is invited "to deal with any claim or question arising out of this Act or any of its provisions" the relationship between the parties to such proceedings need not be that of a landlord and a tenant. Mr.Hattangadi no doubt stressed the later part of the observations in the above extract wherein, according to him, this Court has emphasised that in that particular case the suit was between the landlordplaintiff and the firstdefendant tenant and, in consequence, held that the Small Causes Court had jurisdiction. In our opinion this is not a proper understanding of the principle enunciated by this Court. This Court has categorically held that the claim or question which the Small Causes Court is called upon to consider need not necessarily be between a landlord and a tenant. After having so held, this Court gave only an additional reason for upholding the jurisdiction of the Small Causes Court on the ground that the suit was between the landlord and the firstdefendant who was admittedly a tenant."

21. In Rudrayya Tipayya Swami "s case (supra) the learned single Judge of this Court considered the issue as to whether a composite suit, wherein a relief for restoration of possession based on title and other in relation to the eviction of the petitioner from the suit premises on the basis of the grounds available under the Bombay Rent Act was not maintainable and whether as such a suit would suffer from misjoinder of causes of action, as the cause of action for possession on the basis of tile of the property being totally distinct and separate from the cause of action for eviction in favour of the landlord under the Bombay Rent Act and thus both could not be combined in the same proceedings. The learned Single Judge held such a suit to be maintainable by making the following observations. In para 5 of the decision, it is held as under : 5. " As already observed above, the petitioners seek to challenge the judgment and orders primarily on the ground of nonmaintainability of composite suit inasmuch as that the claim of the respondents for restoration of possession on the basis of title to the property was sought to be mingled with the grounds for eviction of a tenant available under the Rent Act. Irrespective of the fact whether such a suit can be filed or not, the fact remains that the decree for eviction was passed by the Civil Judge, Junior Division, Solapur. It is not in dispute that the suit for eviction of the tenants on the grounds available under the Rent Act in relation to the premises situated at Solapur and within the jurisdiction of the Civil Court at Solapur are to be entertained and tried and decided by the Civil Judge, Junior Division, Solapur.

It is also not in dispute that the suits for restoration of possession of immovable properties situated within the jurisdiction of the said Court had necessarily to be filed in the said court when the market value of the property was less than Rs.10,000/at the relevant time. In the case in hand, the plaint apparently discloses that the market value of the suit property was valued at Rs.8,767/and the same was not disputed by the petitioners predecessors, who had contested the suit by filing written statement. Obviously, therefore the suit for restoration of the possession of the property was maintainable before the Civil Court, Junior Division Solapur in relation to the property in question. In other words, the Civil Judge, Junior Division, Solapur had at the relevant time jurisdiction to entertain the suit for restoration of possession in relation to the suit property as well as the suit for eviction of a tenant from the suit property."

22. Adverting to the position in law as laid down in the decision of the Supreme Court in the above decisions, in my opinion, in the facts of the present case, it cannot be held that the learned trial Judge lacked jurisdiction under section 28 (1) of the Bombay Rent Act to entertain the suit in question.

23. It is significant that the jurisdiction of the Court to entertain a suit is required to be gathered from the averments as made in the plaint and not from the defence as would be taken in the written statement as filed by the defendant. In the present case, it is not in dispute that the petitioner is a tenant of the respondent in regard to the open plot admeasuring 30 sq.ft x 20 sq.ft and that it was a clear assertion of the respondent in the plaint that the petitioner had encroached upon the land admeasuring 200 sq.ft. In the written statement as filed by the petitioner resisting this allegation as made in para 1B of the plaint, the petitioner denied the respondent's allegations. The contention of the respondent was that in fact the petitioner was a tenant of an area admeasuring 1538 sq.ft since last 50 years and not of an area of 30 sq.ft x 20 ft as alleged by the respondent. This assertion was replied in para 3 of the written statement, which shows that there was a clear dispute between the tenantrespondent and petitioner (landlord and tenant) in regard to the area of the tenanted premises. Section 28 (1) of the Bombay Rent Act confers a jurisdiction on the Court to entertain and try any suit or a proceeding between a landlord and a tenant relating to recovery of possession of any premises to which any of the provisions of para II of the Act (Section 6 to section 31) applies and to decide any application under the Act or to deal with any claim or question arising under the Act or any of its provisions and that subject to the provisions of section 2, no court shall have the jurisdiction to entertain such a suit proceedings or application or deal with such a claim or question. In view of this clear mandate of section 28, which would permit the Court to deal with "any claim or question arising under the Bombay Rent Act between a landlord and a tenant, it cannot be said that in the facts in hand, the Court lacked the jurisdiction to entertain the respondent's suit even to try the issue of encroachment to the tenanted premises. In any event, the petitioner had denied the case of encroachment and in fact the petitioner claimed tenancy if an area admeasuring 1538 sq.ft. This

itself clearly shows that under section 28 the trial Court was within its jurisdiction under section 28 (1) to entertain the respondent's suit in question.

24. The reliance on behalf of the petitioner on the decision *Laxmidas Morarji* (supra) in my opinion, would not assist the petitioner. This for the reason that in the said case admittedly the appellants/plaintiffs who were owners of the demised premises had filed a suit against the respondent (defendant no.5) who was not a tenant, it is in this context the Court analysed the provisions of section 5 (ii) which defines tenant and section 28 of the Bombay Rent Act. In para 13 the Court observes that it was the specific case of the plaintiff in the suit filed before the Court of Small Cause that the respondent was not a tenant and had no legal and valid claim over the suit premises. In para 14 the Court has noted that the respondent had raised a specific defence that the Small Causes Court at Bombay did not have the jurisdiction to entertain the suit, even it was not the case of the appellant/plaintiff that the respondent was not a tenant of the suit premises. It is in this context that the Court considered the provisions of section 28 that the Small Causes Court had no jurisdiction to entertain the suit as there was no relationship of landlord and tenant subsisting between the parties.

25. The decision in *Natraj Studios (P) Ltd vs Navrang Studios and another*, (1981) 1 Supreme court Cases 523 would also not assist the petitioner inasmuch as in the said case the Court held that the Small Causes Court would not exercise jurisdiction over any arbitration proceedings merely because the agreement between the parties contains an arbitration clause. It was held that as there was relationship between the parties as that of licensor(landlord) and licensee(tenant) and the dispute between them concerned the possession of the licenced premises, the Small Causes Court thus had the jurisdiction and the Arbitrator had no jurisdiction to adjudicate the dispute between the parties.

26. In the light of the above discussion, in my opinion, the learned trial Judge has rightly entertained the suit in regard to the encroachment of the petitioner to the tenanted premises and proceeded to decree the same. Further the findings of the learned appellate Judge in confirming the findings of the learned trial Judge are eminently appropriate based on correct appreciation of facts and on application of proper legal principles. Thus, there is no perversity in the findings as recorded by the Courts below, for the Court to interfere in this writ petition. The petition is accordingly rejected. Rule stands discharged.

27. No order as to costs.

28. The petitioner is directed to hand over possession of the premises under the decree within a period of eight weeks from today.