

(1998) 02 BOM CK 0039
In the Bombay High Court
Case No : Writ Petition No. 339 of 1987

Vikrant Engineers and others	Vs	APPELLANT
Shridhar Bhaskar Paranjape and another		RESPONDENT

Date of Decision : 26-02-1998

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 18, 28
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Constitution of India, 1950 — Article 227

Citation : (1998) 3 ALLMR 753 : (1998) 5 BomCR 269 : (1998) 2 BOMLR 140 :
(1998) 2 MhLj 132

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : Anil V. Anturkar, for the Appellant; Deepak R. More, for the Respondent

Judgement

D.K. Deshmukh, J.—By this petition filed under Article 227 of the Constitution of India, the petitioners challenges the order dated 14-8-1986 passed by the II Extra Joint District Judge, Pune in Civil Appeal No. 862/1984. That appeal was filed by the respondents challenging the judgment and decree dated 20-7-1984 passed by the IVth Addl. Small Causes Judge, Pune in Civil Suit No. 184/79. That civil suit was filed by the present petitioners, claiming therein that the respondents Shridhar Bhaskar Paranjape and Bhaskar Tukaram Joshi, the original defendants Nos. 1 and 2 are the owners of a final plot of land No. 9 Survey No. 91, Pune. It was alleged that as the defendants did not have enough funds to raise a construction on that plot of land they approached the plaintiffs and an agreement was entered into between the plaintiffs and the defendants on 24-2-1971. As per that agreement the plaintiffs were to advance an amount of Rs. 20,000/- to the defendants. The defendants were to construct a building on that land, which would be suitable for a factory and that after completing the building, a lease would be granted to the plaintiffs of that building for a period of 50 years at the monthly rent of Rs. 200/-. It was alleged that thereafter the

defendants raised construction on the plot. But as per the agreement they did not create lease of the building in favour of the plaintiffs and did not hand over possession of the building to the plaintiffs as agreed to by the agreement. Therefore a suit was filed for a direction to the defendant to execute lease deed as per the agreement dated 24-2-1972 in favour of the plaintiffs. A direction was sought for fixation of the Standard Rent at Rs. 200/- per month and further direction was also sought against the defendants to hand over possession of the building to the plaintiff. The trial Court decided the suit by its order dated 20th July, 1984 and the trial Court decreed the suit in favour of the plaintiffs and directed the defendant No. 1 to execute lease deed as per the agreement dated 24-2-1971. The Court also directed the defendants Nos. 1 and 2 to deliver possession of the building as per the agreement to the plaintiffs. In the appeal filed by the defendant No. 1 the Appellate Court, however, held that the suit for specific performance of contract to grant lease was not tenable u/s 28 of the Bombay Rent Act and therefore, the Appellate Court allowed the appeal filed by the defendant No. 1, set aside the judgment and order passed by the trial Court and dismissed the suit. Therefore it is the order of the Appellate Court which is challenged by the original plaintiffs in the present petition.

2. Shri Anturkar, the learned Counsel appearing for the petitioners urged before me that the suit for specific performance of an agreement to grant lease of the building in favour of the petitioners and/or in the alternative form, to refund of the earnest money, was tenable u/s 28 of the Bombay Rent Act. He submitted that a suit for compensation or for refund of the amount advanced would be tenable u/s 28 of the Bombay Rent Act, because the suit arises out of provisions of section 18 of the Bombay Rent Act. In the submission of the learned Counsel if it is held that a suit for refund of the consideration is tenable u/s 28 of the Act and at the same time if it is held that a suit for lease deed, which also arises out of the same agreement is not tenable u/s 28 of the Bombay Rent Act, then it would amount to driving the litigants to two suits, namely, a suit in ordinary Civil Court of general jurisdiction for an execution of a lease deed and the other for compensation or for refund of the earnest money. The learned Counsel by referring to the provisions of Specific Relief Act, pointed out that in a suit for specific performance of a contract, a claim for refund of the earnest money and also a claim for compensation can always be made. By referring to the provisions of Order II, Rule 2 of Civil Procedure Code, he submitted that failure of the defendants to perform their part of contract gives a right to the plaintiffs to claim two reliefs namely, a relief for specific performance of the contract and for compensation or refund of the earnest money then in the teeth of the provisions of Rule 2 of the Order II the plaintiff cannot file a suit only for a part the relief which he is entitled to. The learned Counsel further submitted that section 28 of the Act, therefore, is to be so read that it permits filing of one suit where both the reliefs can be claimed by the plaintiffs. The learned Counsel also submitted that section 28 of the Act confers jurisdiction on the Court under the Bombay Rent Act, to try any proceeding or to deal with any claim or question arising out

of this Act or any of its provisions. In the submission of the learned Counsel the claim of the plaintiffs for execution of the lease deed therefore, can be tried u/s 28 of the Act.

3. On the other hand the learned Counsel appearing for the original defendants relying on the judgment of the Division Bench of this Court in Civil Revision Application No. 616/72, the case of Govindji Vanmalidas v. Makhai Ladhabei and others, decided on 16th and 17th July, 1975, submitted that a suit for possession between prospective lessee and prospective landlord is not tenable under the provisions of section 28 of the Act. The learned Counsel further relying on a judgment of the Supreme Court in the case of Sushila Kashinath Dhonde and Others Vs. Harilal Govindji Bhogani and Others, , submitted that in a suit for possession filed u/s 28 of the Bombay Rent Act there has to be existing relationship of landlord and tenant between the plaintiff and defendant. As there is no existing relationship of landlord and tenant in the present case, the suit as framed and filed by the plaintiffs would not be tenable before the Court u/s 28 of the Bombay Rent Act.

4. Now if in the light of these rival submissions, the record of the case is perused it becomes clear that the plaintiffs were claiming three reliefs in the suit:- (i) a direction to the defendant to execute lease deed in favour of the plaintiffs (ii) a direction to the defendants to place the plaintiffs in possession of the demised premises and (iii) an order for fixation of the standard rent at the rate of Rs. 200/- per month.

5. Now so far as the first relief is concerned clearly it will not be covered by the provisions of section 28 of the Bombay Rent Act. The provision of the Bombay Rent Act, which is material for the purpose of this petition is to be found in sub-section (1) of section 28 of the Bombay Rent Act which reads as under :

"(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 provisions, 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 Causes 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 proceedings 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 for 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."

6. So far as the second relief claimed by the plaintiff in the suit is concerned, which is for possession of the demised premises, perusal of the provisions of section 28 of the Act shows that the courts under the Bombay Rent Act, have jurisdiction to entertain and try any suit or proceedings between a landlord and tenant relating to the recovery of rent or possession of the demised premises to which any of the provisions of Part II applies. Thus it appears that for a suit claiming a decree of possession to be tenable u/s 28 of the Act there has to be relationship of landlord and tenant in existence.

7. In so far as the judgment of the Supreme Court in the case of Sushila Kashinath Dhonde, referred to above is concerned, it appears that there was an agreement between the parties for construction of a building and for that an amount of Rs. 12,500/- was advanced as a loan towards the construction. It was also agreed that after completion of the building a portion of the building would be given on lease to the plaintiff. However, the agreement was breached and the premises were given on lease to some 3rd party. Therefore, the suit was filed for recovery of the construction loan of Rs. 12,500/-. The question, therefore, that fell for consideration before the Supreme Court was would a suit for recovery of construction loan, filed by a person against another persons, who did not answer to the description of the landlord and tenant to be tenable under the provisions of section 28 of the Act. The case put up before the Supreme Court was whether for a suit to be filed u/s 28 of the Act, existence of the relationship between the landlord and tenant, between the parties to the suit, is a condition precedent. That argument was not accepted by the Supreme Court and the Supreme Court held that the suit for recovery of the loan advanced which was in the nature of the construction loan is recoverable under the provisions of section 18 of the Bombay Rent Act and therefore, though the relationship of landlord and tenant does not exist between the parties to the suit, the suit was tenable under the provisions of section 28 of the Act. However, while deciding this aspect of the matter the Supreme Court in paragraph 13 has observed thus :

"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 sub-section, it is not necessary that the relationship of landlord and tenant should exist between the parties before the Court."

It is clear from these observations of the Supreme Court that according to the Supreme Court there are various types of actions contemplated by section 28 of

the Act. However, in so far as one type of action contemplated by section 28 of the Act i.e. a suit or proceeding for recovery of rent or possession of any premises to which any of the provisions of part II, existence of relationship of landlord and tenant between the parties to the suit is necessary. Though that may not be so in relation to the other actions contemplated by section 28 of the Act. It appears that this judgment has been considered by the Division Bench of this Court in its judgment in Govindji Vanmalidas case referred to above, the Court in paragraphs 33, 34 and 35 of its judgment have dealt with this aspect of the matter. It is obvious, therefore that the Division Bench of this Court has held that for maintaining a suit u/s 28 of the Bombay Rent Act, for a decree of possession existence of relationship of landlord and tenant between plaintiff and tenant is necessary. It has also been held in categorical terms that a suit for specific performance of an agreement to grant lease is not covered by the provisions of section 28 of the Act.

8. It is no doubt true that there is considerable force in the submission made by the learned Counsel Shri Anturkar appearing for the petitioner that in this view of the matter now the plaintiff has necessarily to split up his cause of action while he can maintain a suit u/s 28 of the Act against the same party for recovery of the amount and also for compensation as it would be covered by the provisions of section 18 of the Act, he will have to approach another Court for specific performance of that contract. There is also considerable force in the submission of Shri Anturkar that such a course of action would not be permissible under the provisions of Order II, Rule 2 of the Civil Procedure Code. Shri Anturkar is also right in submitting that this aspect of the matter has not been considered by the Division Bench while deciding Govindji Vanmalidas's case. However, in my opinion only because one or some aspects of the matter have not been considered by the Division Bench, for that matter the judgment of the Division Bench does not lose its binding effect. As the judgment in Govindji's case is rendered by the Division Bench I am bound by it though I may be having some reservations about the law that is laid down. I have no alternative but to follow the law laid down by the Judgment of the Division Bench.

9. In the result, the petition fails and is dismissed. Rule discharged with no order as to costs.

10. At this stage it is pointed out by Shri Anturkar that the Appellate Court has dismissed the suit on finding that the Rent Court had no jurisdiction to entertain the suit. In the submission of Shri Anturkar the correct course to be followed by the Appellate Court, after finding that the Rent Court had no jurisdiction to entertain the suit was to return the plaint to the plaintiffs for representation to the appropriate Court. The request is not opposed by the learned Counsel for the defendants. In this view of the matter it is directed that, as the Appellate Court has held that the courts under the Bombay Rent Act, did not have jurisdiction to entertain the suit of the plaintiffs the plaint be returned to the plaintiffs for presentation to the appropriate Court.

11. Petition dismissed.