
(1959) 02 BOM CK 0005

Bombay High Court

Case No: Appeal No. 577 of 1957

Abdul Kayum
Mahomed Hoosein
Pitalvala

APPELLANT

Vs

Ebrahim Abbasbhai
Harianivalla

RESPONDENT

Date of Decision: Feb. 25, 1959

Acts Referred:

- Presidency Small Cause Courts Act, 1882 - Section 41, 46, 47

Citation: AIR 1960 Bom 338 : (1959) 61 BOMLR 1223

Hon'ble Judges: V.S. Desai, J; Gokhale, J

Bench: Division Bench

Advocate: D.S. Parikh, for the Appellant; S.J. Sorabji, instructed by Jehangirand Seervai
Attorneys, for the Respondent

Judgement

Gokhale, J.

(1) This is an appeal by the original defendant against a decree passed in respondent's favour by the Bombay City Civil Court in Suit No. 1106 of 1956. The suit came to be filed in the following circumstances:

(2) The premises in the suit consist of a room on the first floor of Bandukwalla Bungalow situated at First Hasnabad lane, Santa Cruz. The present appellant was the tenant of the suit room as well as a room on the ground floor of the same building. According to the plaintiff in April 1945 the room in suit was sublet to him by the defendant on a monthly rent of Rs. 15/- and a further amount of Rs. 3/- was payable for electric charges, and it is the plaintiff's case that he was in exclusive possession and occupation of the said room and used to pay to the defendant the said room and used to pay to the defendant the amount of Rs. 18/- per month inclusive of rent and electric charges upto October 1950, but the defendant did not pass any receipts in his favour in respect of this

payment of rent. In October 1950 the defendant threatened to evict the plaintiff and to throw out his belongings from the room and the plaintiff had to address a letter to the defendant through his advocate on 20th November 1950 recording as to how he got possession of the room, and he also sent a sum of Rs. 18/- by postal money order in respect of rent and electric charges for October 1950. The defendant was also called upon to send all rent receipts which had not been issued in reply on 25th November 1950 through his advocate denying that the plaintiff was a tenant but alleged that he was permitted to stay in the room under leave and licence of the defendant. The defendant also denied that he had received any rent from the plaintiff. According to the plaintiff in October 1950 he came to know that the defendant was paying rent of Rs. 15/- only per month in respect of both the rooms, namely, the room in suit as well as the room on the ground floor and, therefore, the plaintiff approached him through one Kadarbhai for reduction of rent but the defendant insisted on his paying Rs. 18/- per month as the plaintiff had been doing upto that time. In 1954 the defendant filed an application being ejectment Application No. 2102 of 1954 in the Court of Small Causes under S. 41 of the Presidency Small Cause Courts Act against the plaintiff of recovery of possession of the suit room on the basis that it was given to the plaintiff under leave and licence and that the licence had been revoked. This allegation was denied by the plaintiff who contended that he was the lawful sub-tenant of the defendant. However, the Small Causes Court passed an order on 17-2-1956 in favour of the defendant under which the plaintiff was required to vacate the premises by 30th June 1956. It is the case of the plaintiff that he was at all times the lawful subtenant of the defendant in respect of the suit room and was in exclusive possession and occupation thereof and was entitled to protection under the Bombay Rent Act. The plaintiff, being aggrieved by the order of ejectment obtained by the defendant in the Small Causes Court under S. 41 of the Presidency Small Cause Courts Act, filed the present suit for a declaration that the said ejectment application was an act of trespass and that the defendant was not entitled to recover possession of the premises from the plaintiff. Without prejudice to these contentions, the plaintiff also stated that there being no notice of revocation of the leave and licence alleged by the defendant and the same not having been proved before the Small Causes Court, the defendant was not entitled to obtain the order of ejectment. On this the plaintiff filed the present suit under S. 47 of the Presidency Small Cause Courts Act, which will hereafter be referred to as "the Act" in this judgment. The suit was filed on 26-4-1956 and the plaintiff prayed inter alia for a declaration that the ejectment application No. 2102 of 1954 filed by the defendant against the plaintiff and the aforesaid order dated 27th February 1956 amounted to acts of trespass and the defendant was not entitled to recover possession of the premises in suit. He also claimed a sum of Rs. 100/- by way of damages or compensation in respect of the said trespass.

(3) This suit was resisted by the defendant on several grounds. He denied that the plaintiff was the sub-tenant of the room on the first floor of Bandukwalla Bungalow. According to him the suit premises were occupied by his son and daughter-in-law prior to 1945. The defendant's son is married to the daughter of one Kadarbhai Valliji, who was

at one time employed with one Abdul Hussein Ariswalla. The plaintiff is the son of the sister of Ariswalla according to the defendant. In April 1945 the plaintiff approached Kadarbhai and stated that the sister of the plaintiff was coming down to Bombay and he had no accommodation in Bombay and requested Kadarbhai to arrange for some accommodation and Kadarbhai requested his son-in-law and the defendant to provide accommodation for a temporary period, and it was under these circumstances that the defendant permitted the plaintiff either and his sister to reside in the room as his licencees. The defendant stated that at no time he recovered or received any amount from the plaintiff either as rent or compensation. He denied that the room was sub-let to the plaintiff; that he had agreed to receive Rs. 15/- as rent and a further sum of Rs. 3/- in respect of electric charges. The defendant also denied that the plaintiff was in possession of the suit premises as a sub-tenant or that the plaintiff paid to him rent at the rate of Rs. 15/- per month or at any other rate or electric charges at the rate of Rs.3/- per month, from April 1945 to October 1950. The defendant further denied that the plaintiff was in exclusive possession of the suit premises but stated that when the plaintiff was allowed to occupy the room, several articles and things belonging to the defendant were left lying in the room and continued to be there even after the plaintiff began to occupy the room as a licensee. According to the defendant he never threatened the plaintiff that he would evict him or throw out his belongings in or about October 1950 as alleged by the plaintiff, but he stated that he had requested the plaintiff to remove himself and his belongings from the suit premises at about that time, as the plaintiff had been allowed to occupy the room for a temporary period but instead of complying with that request the plaintiff addressed the defendant an advocate's letter dated 20th November 1950 wherein he made a vain attempt to claim sub-tenancy in respect of the said premises. According to the defendant the total rent of the suit room as well as another room on the ground floor of which he was the tenant was Rs. 17/- per month. He denied the plaintiff's allegation that at any time Kadarbhai had approached him to reduce the rent payable by the plaintiff. The defendant also denied that the plaintiff was his sub-tenant or that he was at any time in exclusive possession of the suit premises or that he was entitled to the protection of the Bombay Rent Act. He further stated that he was entitled to the possession of the room as he had revoked the licence of the defendant and denied that his act in filing the ejectment application was an act of trespass as alleged by the plaintiff. The defendant also contended that the suit as framed by the plaintiff could not be entertained by the Bombay City Civil Court.

(4) On these pleadings several issues were framed and the trial Court held that the Bombay City Civil Court had jurisdiction to entertain the suit and the plaintiff was a sub-tenant of the defendant. The learned trial Judges also came to the conclusion that the plaintiff was at all material times in exclusive possession and occupation of the suit premises, and that he had paid to the defendant rent at the rate of Rs. 15/- per month and Rs. 3/- per month in respect of electric charges upto the month of October 1950. In accordance with these findings, he held that the defendant committed an act of trespass by filing the ejectment application No. 2102 of 1954 in the Court of the Small Causes at

Bombay and the plaintiff was accordingly entitled to Re. 1/- as nominal damages. The trial court did not find it necessary to decide the question whether the plaintiff was entitled to the protection of the Bombay Rent Act and also took the view that it was not necessary to grant the injunction claimed by the plaintiff. A decree was passed in favour of the plaintiff in accordance with these findings. That is why the original defendant has come in appeal against that decree.

(5) Mr. D. S. Parikh, the learned advocate appearing on behalf of the defendant-appellant, in the first instance contended that the learned trial Judge's view that the Bombay City Civil Court had jurisdiction to entertain the suit was erroneous. According to Mr. Parikh the plaintiff claimed to be a sub-tenant and he also claimed protection under the Bombay Rent Act. Though the defendant disputed the claim of the plaintiff to be his sub-tenant, Mr. Parikh contends that that would not change the essential nature of the suit, which according to him would fall within the provisions of S. 28 of the Bombay Rent Act. Mr. Parikh further contends that alternatively the plaintiff has also based his suit on the allegation that the leave or licence granted to him was not proved to have been validly revoked and that, says Mr. Parikh, is a claim which cannot be entertained in a suit filed in the City Civil Court because in granting the ejectment order the Bombay Small Causes Court had held that the plaintiff was not a sub-tenant but was a licensee of the defendant and that the licence had been revoked. That in short is the argument of Mr. Parikh on the question of jurisdiction.

(6) Now, in order to examine this argument it is necessary to understand the real nature of the plaintiff's suit. According to the plaintiff in April 1945 the defendant sub-let the suit room to the plaintiff on certain terms and plaintiff occupied, the premises as defendant's sub-tenant of the defendant long before the Bombay Rent Act came into force. It is obvious, therefore, that the plaintiff is claiming a title to sub-tenancy under the defendant not by virtue of the provisions of the Bombay Rent Act, but by virtue of an agreement between him and the defendant who as himself a tenant and which agreement as it was entered into prior to the Bombay Rent Act would not be rendered invalid by the provisions of that Act. This claim of the plaintiff is denied by the defendant according to whom the plaintiff was merely a licensee. Now the question whether the plaintiff became a subtenant in April 1945 or whether he was allowed to occupy the suit room as a licensee it is not a question which arises out of the provisions of the Bombay Rent Act. Secondly, it is clear from the facts of this case that the plaintiff filed this suit under the provisions of Ss. 46 and 47 of "the Act." It is necessary for the purpose of the arguments addressed to us in this appeal to examine the relevant provisions of Chapter VII of "the act." Under S. 41 of "the Act" when any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rackrent does not exceed three thousand rupees, as the tenant, or by permission of another person, or of some person through whom such other person claims, and such tenancy or permission has been determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him refuses

to deliver such property in compliance with a request made to the Small Causes Court for a summons against the occupant, calling upon him to show cause why he should not be compelled to deliver the property. Under S. 43 if the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall be entitled to an order for possession of the property from the occupant if the Small Cause is satisfied that he was entitled to apply under S. 41. The explanation to this section says that if the occupant proves that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of this section. Section 45 provides that when the applicant, at the time of applying for any such order as aforesaid, was entitled to the possession of such property, neither he nor any person acting in his behalf shall be deemed, on account of any error, defect or irregularity in the mode of proceeding to obtain possession thereunder, to be trespasser; but any person aggrieved may bring a suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity. Then comes S. 46 which provides that nothing contained in the foregoing provisions shall be deemed to protect any applicant obtaining possession of any property under Chapter VII from a suit by any person deeming himself aggrieved thereby, when such applicant was not at the time of applying for such order as aforesaid entitled to the possession of such property, and paragraph 2 of S. 46 provides that when the applicant was not at the time of applying for any such order as aforesaid, entitled to the possession of such property, the application for such order, though no possession is taken thereunder, shall be deemed to be an act of trespass committed by the applicant against the occupant. The first paragraph of S. 47 deals with the power of the Small Causes Court to stay proceedings u/s 41 on the occupant giving sureties, to bring a suit against the applicant. The second paragraph of S. 47 states that if the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made under S. 43. Under S. 49 recovery of the possession of any immovable property under Chapter VII shall be no bar to the institution of a suit in the Bombay City Civil Court for trying the title thereto.

(7) It would be clear from these provisions that when an application for possession is filed under S. 41 of the applicant is entitled to an order for possession under the summary procedure contemplated by these provisions. But the party aggrieved can still challenge the order by filing certain kinds of suits. Under S. 45 if there is any error, defect or irregularity in the mode of proceedings to obtain possession, that itself will not constitute a trespass though any person aggrieved by the order may bring a suit for recovery of compensation for damage sustained by him on account of an error, defect or irregularity. Under Ss. 46 and 47, the party aggrieved may also file a suit for a declaration that the applicant was not at the time of applying for an order under Ss. 41 and 43 entitled to the possession of such property, and the application for such an order constituted an act of trespass. If the applicant obtains a decree in such a suit, such decree is to supersede the order made under S. 43. Section 49, however, contemplates suit instituted for trying the title which is claimed by the occupant and which suit is not barred even if recovery of

possession of property is obtained by the occupant. The present suit filed by the plaintiff is obviously a suit under sections 46 and 47 of "the Act." It is true no doubt that in paragraph 7 of the plaint the plaintiff, after describing himself as a lawful sub-tenant of the defendant, has stated that he was entitled to the protection under the Bombay Rent Act, but that, by itself, in our opinion, would not convert the suit into a suit contemplated under S. 28 of the Bombay Rent Act. Looking to the prayers of the plaintiff in the plant, there can be no doubt that in substance the plaintiff has filed the suit under sections 46 and 47 of "the Act" for a declaration that when the defendant filed the ejectment application against him he was not entitled to do so and the order passed in his favour amounted to a trespass.

(8) In support of his argument that the Bombay City Civil Court could have no jurisdiction to entertain the present suit, Mr. Parikh relied upon certain decisions of this Court. In [Govindram Salamatrai and Another Vs. Dharampal Amarnath and Another](#), it was held by this Court that section 28 of the Bombay Rent Act did not deprive the High Court of its jurisdiction in all suits for possession wherever the defendant took up the contention that he was a tenant. It was held that the High Court was deprived of the jurisdiction in such suits where the landlord filed a suit against his tenant and the tenant sought the protection of the Rent Act and the High Court's jurisdiction was also deprived in those cases where, although the landlord might have filed a suit against a person alleging that he was a licensee or a trespasser, it might ultimately turn out that the defendant was not a licensee or a trespasser but a tenant and he was entitled to the protection of the Act. It was further observed that whether a person was entitled to the protection of the Rent Act, whether a person was entitled to the benefit of any of the provisions of that Act, all these were questions which only the Small Causes Court could decide and determine, but whether a person was a tenant o a licensee or a trespasser were not questions which S. 28 had left to the determination of the special Court set up under the Act.

(9) Now, it is the contention of Mr. Parikh in the first instance that in this case also in the plaint it is stated that the plaintiff is entitled to the protection of the Rent Act. As we have already stated, that by itself would not change the nature of the suit which is essentially one filed under Ss. 46 and 47 of "the Act." It is also contended that the authority of the decision in [Govindram Salamatrai and Another Vs. Dharampal Amarnath and Another](#), has been affected to some extent by a recent decision of the Supreme Court in [Babulal Bhuramal and Another Vs. Nandram Shivram and Others](#), . Now, this argument has been considered recently in Jaswantlal, Jagjivandas & Co v. Westrex Company India Bombay First Appeal No. 200 of 1957 from the Bombay City Civil Court decided by my learned brother and myself on 11th February, 1959, and we have taken the view that the authority of [Govindram Salamatrai and Another Vs. Dharampal Amarnath and Another](#), has not been affected by the Supreme Court decision, but before we deal with Mr. Parikh's argument on the basis of the Supreme Court decision, it is necessary to refer to other cases to which also a reference was made before us.

(10) In [Madhavprasad Kalkaprasad Vs. Indirabai Chandavarkar and Others](#), the question arose whether in a suit filed by the plaintiff in the High Court for a declaration of his title that he was a sub-tenant of the defendant and possession was asked for by him merely as an ancillary relief, in view of S. 28 of the Bombay Rent Act, the High Court had jurisdiction to try the suit, and it was held by this Court that S. 28 of the Act only permitted the special Courts to try a question of title incidentally, but when the question of title arises substantially in the suit, the ordinary Courts are competent to try and dispose of the suits on title and, that, therefore, even though incidentally the plaintiff prayed for possession, that fact did not oust the jurisdiction of the High Court to try the suit for title. This case obviously does not support the contention of the defendant.

(11) Then reference was made to the case of [Harswarup Khannamal and Others Vs. Nandram Shriram and Others](#). It may be observed that the Supreme Court decision in [Babulal Bhuramal and Another Vs. Nandram Shivram and Others](#), was given in the appeal against the decision of this Court in 58 Bom LR 288: AIR 1956 656. Now, in this latter case, the Court affirmed its earlier view that in trying Suits under S. 28 of the Bombay Rent Act, it might become necessary to a special Court incidentally to determine questions of title, but that such determination was not binding upon the party against whom the decision was given, and notwithstanding such decision a party could assert his title in a competent Court. But where the decision of the Special Court was direct, where the decision was on the very question which had been left to the Special Court to decide, such a question could not be reagitated under S. 29A of the Bombay Rent Act. It was further observed that the title contemplated by S. 29A was a title in a party de hors that Act and a title not arising out of any of the provisions of the Rent Act. If, on the other hand, the title which was sought to be established arose by reason of the provisions of the Rent Act, then it was a question arising out of that Act and that question could only be determined by the Special Court set up under that Act.

(12) Now in the decision of the Supreme Court in [Babulal Bhuramal and Another Vs. Nandram Shivram and Others](#), the view taken by this Court regarding S. 29A has been affirmed and it had been held that by enacting S. 29A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under S. 28 on a question of title de hors the Act. But Mr. Parikh contends that the observations of the Supreme Court regarding the ambit and scope of S. 28 of the Bombay Rent Act would go to show that a suit as the present one would be entertainable by the Bombay City Civil Court. We are not persuaded to uphold this argument. That case arose out of a suit filed in the City Civil Court by three plaintiffs, plaintiff No. 1 being the tenant of the premises under defendant No. 1, plaintiffs Nos. 2 and 3 being persons to whom the said premises were sublet by plaintiff No. 1. The landlord defendant No. 1 had given a notice to quit to plaintiff No. 1 in 1947 and thereafter the landlord filed a suit in the Court of Small Causes, Bombay, in 1958 whereby he sought to evict plaintiff No. 1. To that suit plaintiffs Nos. 2 and 3 were also made parties on the allegation that they were trespassers and had no right to be on the premises. The Small Causes Court held that plaintiffs Nos. 2 and 3

were not lawful sub-tenants and the subletting by plaintiff No. 1 to them being contrary to law, the latter had deprived himself of the protection of the Rent Act. A decree for the eviction of all the plaintiffs was accordingly passed by the Small Causes Court. An appeal against this decree was unsuccessful as also a revision application to the High Court. Thereafter all the three plaintiffs filed a suit in the Bombay City Civil Court praying for a declaration that plaintiff No. 1 was a tenant of the defendant and was entitled to the protection of the Rent Act and plaintiffs Nos. 2 and 3 were lawful sub-tenants and were entitled to possession, use and occupation of the premises sub-tenants thereof. The City Civil Court dismissed the suit on the ground that there was no lawful subletting by plaintiff No. 1 of the premises to plaintiffs Nos. 2 and 3 though on the question of jurisdiction it held that it had jurisdiction to entertain the suit. The appeal to the Bombay High Court was also dismissed and the decision is reported in [Harswarup Khannamal and Others Vs. Nandram Shriram and Others,](#) . The High Court disagreed with the view of the City Civil Court that it had jurisdiction to entertain the suit and therefore confirmed the dismissal of the plaintiff's suit though on a different ground, but did not record any decision on the merits of the appellants' case as being unnecessary. Now, this decision of the High Court was confirmed by the Supreme Court and it was observed that the suit filed in the City Civil Court raised in substance a claim that the plaintiffs were tenants of the premises within the meaning of the Rent Act and such a claim was one which arose out of that Act and was, therefore, within the ambit of S. 28. In dealing with the argument that the suit in the City Civil Court was not one between a landlord and a tenant because the defendant to the suit did not admit that the plaintiffs were tenants of the premises in question, their Lordships of the Supreme Court observed as follows:-

"Section 28 applies to a suit where admittedly the relationship of landlord and tenant within the meaning of the Act subsists between the parties. The plaint in the suit in the City Civil Court admits that the defendants were landlords of the premises at various stages and the plaintiffs were a suit between a landlord and a tenant. The suit, therefore, was essentially a suit between a landlord and a tenant. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs. Whether the plaintiffs were the tenants would be a claim or question arising out of the Act or any of its provisions which had to be dealt with by the Court trying the suit. On a proper interpretation of the provisions of S. 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in S. 28 and no other."

It is the submission of Mr. Parikh that these observations would apply with equal force to the present suit. In our opinion this contention is not well-founded. The question whether the defendant is or is not entitled to an order for possession under the summary procedure under Chapter VII of "the Act," cannot attract the exclusive jurisdiction of the Courts specified in S. 28 of the Rent Act. It is the case of the plaintiff that he became a

lawful subtenant of the defendant in April 1945 before the Rent Act came into force and that he was not a licensee. It is on this basis that the plaintiff claims that the defendant was not entitled to recover possession under S. 41 of the "the Act" alleging that Plaintiff was a mere licensee whose licence has been revoked. He therefore, filed the present suit which is essentially one under Ss. 46 and 47 of the "the Act" for a declaration that Defendant's application for an order for possession under Chapter VII was an act of trespass and for damages. The fact that the plaintiff has stated in addition that he was entitled to protection under the Rent Act would not, as already stated, change the nature of the suit as framed. We are also not impressed by the argument of Mr. Parikh that, since the plaintiff has claimed alternatively that the alleged licence given to him was not duly determine, defendant was not entitled to obtain the order of ejectment against him, that would come in the way of the Bombay City Civil Court entertaining the present suit as the Small Causes Court had decided that point against him. The order of possession obtained by the defendant is under the summary procedure provided under Chapter VII of "the Act" and the plaintiff is entitled, in our judgment, to challenge that order by filing a suit as contemplated by sections 46 and 47 of "the Act." Such a suit will not fall within the ambit of section 28 of the Rent Act. In our view, therefore, the learned trial Judge's finding that the Bombay City Civil Court had jurisdiction to entertain the suit is correct and must be upheld. (The rest of the judgment is not material for this report).

(13) Appeal dismissed.