(1983) 04 BOM CK 0033

Bombay High Court (Nagpur Bench)

Case No: Civil Reference No. 2 of 1982

Prabhakar Atmaram Kale		APPELLANT
	Vs	
Bharat and Another		RESPONDENT

Date of Decision: April 26, 1983

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11

Citation: AIR 1983 Bom 488 : (1983) MhLj 426

Hon'ble Judges: Waikar, J; Puranik, J

Bench: Division Bench

Advocate: P.S. Kshirsagar, for the Appellant; G.L. Bundele, for the Respondent

Judgement

Waikar, J.
This is a reference made by the District and Sessions Judge, Akola under Order XLVI, Rule 7 of the Civil P. C. on an application made to him by the original defendant in the small causes suit for ejectment which was decreed against him.

2. The dispute was in respect of one room admeasuring 13'' x 12'', which according to the plaintiffs (who are brothers), was let out to the defendant on a monthly rent of Rs. 3/-. The plaintiffs obtained necessary permission of the House Rent Controller and by a quite notice dated 21-9-1979 and filed the suit for ejectment, arrears of rent and damages.

3. It appears that the suit for ejectment was filed even before the appeal filed by the defendant (Tenant) to the Resident Deputy Collector, Akola against the order of the Rent Controller was decided.

4. The contention of the defendant in the Small Cause Suit was that the permission granted by the House Rent Controller had not become final as the appeal against the same before the Resident Deputy Collector was till pending. He, therefore, prayed for stay of the suit till the decision of that Appeal. He further stated that the

premises were taken on lease by his father atmaram from one Ranukabai. The plaintiffs, he contented were not the exclusive heirs of deceased Renukabai. The other legal heirs of deceased Renukabai were necessary parties to the suit. So also this defendant was not the sole tenant as there were other heirs of his deceased father Atmaram. He, therefore, questioned the jurisdiction of the Small Cause Court to entertain the suit. The defendant further stated in the written statement that he had offered the rent to the plaintiffs which was refused.

5. The learned Small Cause Judge held that the plaintiffs were the landlords and the defendant their tenant and that the tenancy was validly determined. He found the defendant in arrears of rent and decreed the claim for ejectment and arrears of rent as claimed. He found that the suit did not suffer from the defect of non-joinder of any parties.

6. The learned District Judge upheld the contention of the defendant that the learned Small Cause Judge had exercised a jurisdiction which was not vested in him as the suit was not cognizable by the Court of Small Causes and hence made a reference to this Court under Order XLVI, Rule 7 of the Civil P. C.

7. It is true that in view of the Bombay Amendment to Article 4 of Sch. II of the Provincial Small Cause Courts Act, it is only when the fact of tenancy, either written or oral, is not in dispute and the substantial issue arising for decision is about the determination of tenancy by efflux of time or by a notice under Clause (h) of Section 111 of the Transfer of Property Act that the Small Cause Court gets jurisdiction to try the suit. It is also true that once the tenancy is denied or disputed by the defendant, the jurisdiction of the Small Cause Court is ousted.

8. The learned District Judge, in his referring order, referred to the case reported in Hari Bai v. Nathubai Prabhubhai AIR 1939 Bom 353. It was a suit to recover possession founded upon a written lease. The defence raised was that it was executed merely as a matter of form, because the defendant had executed a mortgage deed of the property, which belonged to the defendant and the lease deed was executed at the instance of the plaintiff mortgagee, which was meant not to be acted upon. What was observed therein was:

"....., when the Legislature says ''substantial issue'' it means an issue arising not only upon the allegations in the plaint but upon those allegations combined with the allegations made in the written statement. That is only common sense. You can have no question at issue unless there is a difference between the parties, and in order to determine what the issue is, you have to consider the allegations of both sides."....

"A substantial issue is an issue which goes to the root of the case, other issues being merely incidental or concerned with matters of detail. Obviously the question of the hollowness of the lease is a matter which goes to the root of the whole case. If the lease is hollow then the defendant is not a tenant, and the plaintiff cannot succeed

upon the basis of tenancy. I think, therefore, that the Court had no jurisdiction."

9. A reference is also made by the learned Judge to Abdul Haq v. Smt. Kalsumbi 1976 Mah LJ 32. It was a suit for ejectment and arrears of rent and the plea raised by the defendant was that he was not the tenant, but was himself the owner by virtue of a gift deed dated 8-8-1950. It was further contended that in view of the controversy involved in the suit which involved a complicated question relating to the title of the suit, the Small Cause Court had no jurisdiction to entertain the same. This contention was negatived by the trial Court. The plaintiff claimed to eject the defendant on the basis of an oral contract of tenancy and there was neither any document of lease nor any rent receipts regarding the payment of rent. This Court, in revision, therefore, held that it was merely a case where there is merely denial of all the allegations made in the plaint, but besides denial the defendant had pleaded a positive case claiming title to the house on the basis of a registered deed of the year 1950, whereas the plaintiff claimed on the basis of some partition deed executed subsequently in the year 1954. The main question involved in the suit thus being one of title, it was held that the Small Cause Court had no jurisdiction to entertain the suit.

10. A reference has also been made by the learned Judge to Rameschandra v. N. L. Datta 1969 M LJ 29. It was a regular suit for ejectment and arrears of rent after duly determining the tenancy by a quite notice. Once of the pleas raised in defence was that the plaintiff alone not being the owner, the suit was not maintainable by him alone. The trial Court ahd decreed the suit. In the first appeal the question of jurisdiction of the Civil Court to try the suit was raised. The plea was negatived by the first appellate Court. This Court in second appeal held that the very right of the plaintiff to file the suit in his capacity as the owner was disputed, a question which related to the maintainability of the suit itself. The ground on which this objection was raised, was one which had relevance to certain question of Hindu Law. The substantial issue in such pleading would be the issue as to whether the suit had been properly filed or whether the suit filed by the plaintiff alone was maintainable. Thus it was held that the suit in the present form was outside the competence of the Small Cause Court and the Civil Court, therefore, had jurisdiction to try and decide the same.

11. In all these three decisions no question arose whether any previous decision between the parties on the issue of relationship of landlord and tenant operated or not as res judicata. In the absence of any such issue it was upon the nature of controversy involved according to the pleadings in each issue that it was decided whether the concerned Court (Regular or Small Cause) had jurisdiction to try that suit or not.

12. The learned District Judge here did not consider the effect of the finding pronounced by the Rent Controller between the parties or the effect of the application of the principle of res judicata, as now adumbrated under Explanation

VIII to Section 11 of the Civil P. C. The Rent Controller and the Residency Deputy Collector acting under C. P. and Berar Letting of Houses and Rent Control Order, 1949 (for short hereafter called "the Order"), exercise judicial functions and the Rent Controller is a legal Tribunal and not merely an Executive Officer. (See Bhailal v. Addl. Deputy Commr. AIR 1953 Nag 89 . Thus the Rent Controller, though a Tribunal of limited jurisdiction, was competent to hear and decide the issue as regards the existence of relationship of landlord and tenant between the parties before him. The finding pronounced on the issue by the Rent Controller would, therefore, operate in a subsequent suit as res judicata, notwithstanding the fact that the subsequent suit. This precisely is the effect of the Explanation VIII of Section 11 of the Civil P. C. which the learned District Judge failed to take note of. This is also the view taken by this Court in Laxman Vithal Rewankar Vs. Rajaram Narayan Pohurkar, .

13. During the hearing of this reference, the learned counsel for the non-applicants, Shri Bundele, filed a certified copy of the order dated 9-7-1982 passed by the Deputy Collector with Rent Control Appellate Powers, dismissing the appeal that was preferred by the defendant (Tenant). In this view of the matter, therefore, in the suit before the Small Cause Court, the defendant could not raise the contention that he was not the tenant of the plaintiffs or that he was not in arrears of the rent or that the notice served by the plaintiffs was bad and ineffective. The defendant had neither examined himself nor adduced any evidence before the Small Cause Court to show that the suit was bad for non-joinder of necessary parties.

14. Though we are not inclined to accept the reference made by the learned District Judge for the reasons aforesaid Shri P. S. Kshirasagar, the learned counsel for the defendant submitted that the notice the issued by the plaintiffs on the basis of the orders passed by the Rent Controller was ineffective once the appeal was preferred by the defendant to the Deputy Commissioner u/s 21 of the Order. Though the said appeal so filed came to be dismissed subsequently, the suit for ejectment founded upon the order of the Rent Controller, he submitted, was premature. He relied upon the decision of this Court pronounced in Mathew Charian v. Rajkumar Ramavatar 1982 Mah LJ 724 in support of his submission.

15. Before we deal with this submission, we would first advert to the observation of the District Judge made in the reference that the Small Cause Court should have stayed the suit and it could not pass a conditional decree. Now the operative part of the judgment reads thus :

"The decree shall not be executed until the order of the House Rent Controller is confirmed in appeal."

The learned District Judge did not find that the suit was premature and deserved to be dismissed, but what he observed was :

"In fact an application (Expression. 14) had been made before the lower Court that the suit should be stayed until the decision of the appeal against the order of the

Rent Controller; but the learned Judge ordered that he was not inclined to grant stay, because the decree passed would not be made executable till the decision of the appeal against the order of the Rent Controller. This was not the correct way of deciding the point. If there was a bar to bringing a suit for ejectment, unless the permission of the Rent Controller was obtained for giving a notice determining the lease the suit could not have been decided until the question whether the permission was valid or not was finally decided by the appellate Court and in the event of the order of the Rent Controller being set aside, the suit for eviction on the basis of the notice given upon such operative permission, cannot proceed. This position was overlooked by the learned Judge."

16. Now as observed in Ishwariprasad Ganpatrao Vs. Shankar Dayal Shukla, ; "it cannot be I laid down an invariable rule that in every case where the landlord obtains an order from the Rent Controller to issue a notice determining his lease and a suit is filed that suit must be stayed in all cases where the defendant prefers to challenge the order of the Rent Controller in appeal. The question whether a suit should be stayed is a matter of discretion and that discretion has to be exercised judicially." It cannot, therefore, be said that the Small Cause Court acted illegally in not allowing the application for stay and in passing such a conditional decree, postponing its executability only on confirmation of the order of the Rent Controller by the appellants authority.

17. Was the suit premature and should it have been thrown out in view of the decision of Mathew''s case 1982 M LJ 724, as submitted by the Shri Kshirasagar, is the next question.

18. The learned single Judge (Padhya J.) while deciding Mathew''s case 1982 Mah LJ 724 mainly relied upon the Division Bench decision of this Court in Indra Singh v. Shiavax AIR 1948 Bom 347 , as against the catena of cases (though all of single Judges), consistently holding that the suit can be instituted on the basis of the permission granted by the Rent Controller even though the appeal may be pending before the Collector, though, however, it would be necessary to stay the decision of such suit. These rulings are -- (1) Ishwariprasad Ganpatrao Vs. Shankar Dayal Shukla, ; (2) Mahadeo Subhanji Adekar Vs. Akaji Undersa Umathe, , (3) P. K. Deshmukh v. Subhabai 1966 Mah LJ 690; (4) Hariprasad v. Nathmal 1974 M LJ 637, (5) Ruprao v. Raghoba, (Civil Revision Application No. 229 of 1973, decided on 27-8-1975) and (6) Hemraj v. Shantram, Second Appeal No. 137 of 1966, decided on 6-10-1979.

19. In deciding Mathew''s case 1982 M LJ 724 the learned single Judge refused to follow these above decisions in view of the Division Bench decision of this Court in Indra Singh''s case AIR 1948 Bom 347. In none of the above decisions (all decided by the single Judges) is any reference made to Indra Singh''s case.

20. Indra Singh''s case was under the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1944, (Act No. VII of 1944). The learned single Judge found that

the language of Clause 21 (3) of the Order is in pari materia with Section 14(3) of the Bombay Act VII of 1944 viz.,

"The decision of the Collector and subject only to such decision, the order of the Controller shall be final."

Under the Bombay Act vide Section 9 no landlord was entitled to recover possession of any premises so long as the tenant paid and was ready and willing to pay the rent and perform other conditions of the tenancy. However this ban was not to operate where landlord obtained a certificate from the Controller certifying any or more grounds referred to in the proviso to Section 9. The determination of tenancy by a valid notice as per the provisions of the T. P. Act though of course necessary for the landlord, the prohibition was not for giving any notice determining the lease, but for recovery of possession vide Section 9.

21. Under the provisions of Clause 13 of the Order, the determination of the tenancy by the landlord is not permissible without a written permission of the Rent Controller. The opening words of Clause 13 are : "No landlord shall, except with the previous permission of the controller, ... give notice .....". The grant of permissions by the Rent Controller is, therefore, the charter for the landlord to issue a quite notice determining the lease and there is no provision in the Order which prevents him from filing ejectment suit. Pursuant to the grant of permission by the Rent Controller, if the landlord determines the lease by giving a notice, but voluntarily postpones filing of the suit for ejectment till the appeal preferred by the tenant under Clause 21 is decided and on dismissal of the appeal, chooses to file one, the same quite notice founded on the grant of permission by the Rent Controller can still hold good and no fresh notice after the decision of appeal would be necessary. Under the Bombay Act No. VII of 1944 the determination of tenancy by a quite notice can even precede filing of an application by the landlord to the Controller for a certificate under the proviso to Section 9(1).

22. In Indra Singh''s case AIR 1948 Bom 347 by a notice dated 30-3-1946 the landlord ahd terminated the tenancy with effect with 30-4-1946 and the requisite certificate was obtained by him from the Controller thereafter on 3-9-1946 on the ground that he required reasonably and bona fide the premises for his own use. The tenant had preferred an appeal to the Collector on 8-9-1946 and the Collector, by his order dated 9-10-1946, set aside the order of the Controller granting certificate to the landlord. The landlord then moved the High Court for writ of certiorari and Bhagwati J. ordered the writ to issue. There was then an appeal against that decision and the Court of appeal affirmed the decision of Bhagwati J. on 8-10-1947. On 22-10-1947, the landlord then filed the suit for ejectment. The suit was decreed by Desai J. holding that on the order being made in the petition for a writ of certiorari there was no pending appeal before the Collector. The Division Bench held that by virtue of writ of certiorari, the proceedings before the Collector was pending, the landlord was entitled on the strength of the certificate obtained from the Collector

to evict the tenant. Negativing this submission, it was observed that the finality of the order made by the Controller disappeared as soon as an appeal was preferred to the Collector that became final under S. 14(2). From the further observations that followed, it cannot be said that it was held that the suit itself was untenable or was premature. The relevant observations are :

"In our opinion, the proper thing for the learned Judge to have done was, as soon as his attention was drawn to the fact that the Collector ahd not yet disposed of the appeal, to have stayed the suit and awaited the decision of the Collector before the deciding the rights of the parties."

23. Thus the suit for eviction was unconditionally decreed on an erroneous assumption that no proceedings before the Collector were pending pursuant to the issue of writ of certiorari. When it was observed that the proceedings before the Collector were pending and even so when the efficacy of the decree was sought to be justified on the ground that the landlord would be entitled on the strength of the certificate obtained from the Controller to evict the tenant, it was observed, and with respect, we say rightly, that it was only the decision of the Collector that becomes final and operative and that the decree for eviction based merely on the certificate obtained form the Controller was bad. The decision is not an authority for a proposition that a suit for eviction filed after obtaining the certificate from the Controller is premature and unentertainable. From the further observations (extracted above), it is evident that the institution and the pendency of the suit was never held as bad nor illegal, but what was denounced was that decision and the decree which was founded on the mere certificate of the Controller when it was the subject matter of the appeal before the Collector It may be pointed out that the Division Bench did not pass any order either setting aside the decree on the ground that the Controller''s certificate had not become final nor modified it by making it executable on confirmation of the certificate by the collector in appeal. Since parties came to terms before the pronouncement of the final verdict, the Court only passed the decree in terms of the same.

24. The language of clause 21 (3) of the Order is no doubt in pari materia with Section 14(3) of the Bombay Act, but reading clause 21 (3) with clause 13 (1) of the Order, it is the written permission of the Rent Controller which serves for the landlord as a passport or a charter to determine the lease. The mere filing of an appeal under clause 21 does not efface the permission, thought the ultimate eviction of the tenant in some measure becomes restricted. With respect, we are unable to accept the view of the learned single Judge that fling of an appeal against an order of the Rent Controller takes away the right of the landlord to serve a quit notice because the matter is sub judice. Entitlement of a right and consumption of it are two different concepts. Disagreeing, with respect, with the view of the learned single Judge, in our opinion, as already observed above, the notice determining the lease after obtaining the permission of the Controller does not automatically stand

invalidated as soon as the appeal is filed by the tenant. If the landlord waits till the decision of the appeal and if the notice is not otherwise waived, it would still enure and be effective to sustain the suit of the landlord for eviction.

25. The ratio of Indra Singh''s case AIR 1948 Bom 347 in the light of the provisions of the Bombay Act is that the landlord is not entitled to evict his tenant on the strength of the certificate of the Controller pending the appeal before the Code, but it does not la down that the landlord is debarred from filing any suit and that it must be thrown out as premature. The observations of the Division Bench extracted above, on the other hand, seem to suggest that though there may be no inhibition for the landlord to file suit having obtained Controller''s certificate, the proper course for the Court would be to stay the proceedings and await Collector''s decision and not throw it away as untenable. Mathew''s case 1982 M LJ 724 which lays down such a proposition based on Indra Singh''s decision, therefore, is overruled and we accord our respectful agreement with the above eight decisions of the single Judge.

26. Thus the reference made by the learned District Judge is hereby dismissed. No order as to costs in view of the nature of the controversy involved.

27. Reference dismissed.