BOMBAY HIGH COURT

Bai Meherbai Sorabji Master

Vs.

Pherozshaw Sorabji Gazdar

O.C.J. Appeal No. 75 of 1926 and Suit No. 65 of 1925

(Amberson Marten, Kt., C.J. and Blackwell, J.)

15.03.1927

JUDGMENT

Amberson Marten, Kt., C.J.

1. This appeal is one only as to costs. But it raises questions of some importance as between suits in the High Court and suits in the Small Causes Court.

2. The plaintiff and defendant were landlord and tenant. On September 25, 1925, the plaintiff gave a notice to quit by January 1, 1926, That notice was not complied with. Accordingly, on January 6, 1926, this suit was filed in the High Court claiming (a) ejectment;(b) rent from April 1, 1925, to December 31, 1925, and compensation thereafter at ₹ 500 per month; and (c) ₹ 30 as rent for the garage from September 1, 1925, to December 31, 1925, and compensation thereafter at ₹ 50 a month. The letting of the main building, viz., the first floor thereof, and the letting of the garage were separate tenancies. The total under (b) would be ₹ 1,542, and under (c) ₹ 175 calculated up to January 29, 1926.

3. On January 19, the writ in the High Court suit was served. On January 29, the defendant vacated both premises. Between January 19 and 29, he paid in all ₹ 400 which was appropriated in satisfaction of claim (c) as regards the rent for the garage, and as to the balance for compensation for the mouth of January in respect of the first floor under claim (b).

4. The suit came on for hearing as a Short Cause on February 2. It was adjourned for four weeks. Then, on March 2, the defendant was ordered to put in his written statement. It was adjourned again, and then it came on for hearing on March 9. Substantially, the written statement contended, first, that the standard rent was not ₹ 144 as claimed by the plaintiff, and; secondly,

that in the past the defendant had paid rent at the agreed amount under the tenancy, which amount exceeded the standard rent, and therefore the plaintiff had been overpaid.

5. I should now explain that in December 1925 the defendant had filed a Small Cause Court suit to recover ₹ 1,800 in respect of this alleged excess over the standard rent. That suit came before the Chief Judge on January 29, 1926, when he held that the defendant was only entitled to recover ₹ 170. On February 9, the Judge reduced that amount to ₹ 55 on the ground of a slip in the previous order. There was an appeal to the Full Court of the Small Cause Court and a cross-appeal. Both those then were pending when the High Court suit came on for hearing on March 9 before Mr. Justice Fawcett.

6. It appears that on that date issues were raised: (1) whether the suit was res judicata having regard to the suit in the Small Causes Court; (2) whether, if so, the present suit was maintainable; and (3) what amount the plaintiff was entitled to recover from the defendant. On March 12, Mr. Justice Fawcett gave a detailed judgment holding that the suit was not res judicata. He said :-

> The first issue that was raised is : Whether this wait is res judicata having regard to the Small Cause Court suit. In my opinion the answer is clearly in the negative on this ground that the Small Cause Court is not a competent Court to try the present suit within the manning of Section 11 of the Civil Procedure Code. The present suit is one for ejectment which is outside the jurisdiction of the Small Cause Court.

7. Then the learned Judge went into the question as to what was the standard rent, and it was taken by agreement between the parties for the purpose of the present suit that the standard rent was ₹ 138. That was ₹ 115 plus twenty per cent, for two years making up the ₹ 188. Then the learned Judge dealt with what he described as the main question, viz., whether the defendant was entitled to set off this alleged excess of rent paid by him; and, after dealing with the law on the point and various authorities, he decided eventually against the defendant. He concluded :-

> The result is that the plaintiffs must have a decree for the standard rent at the rate of ₹ 138 p. m. due for the months of April to September 1925, i.e. for ₹ 828. The claim in regard to the rents for the succeeding three months of October, November and December 1925 will be decided, as already mentioned, later on. The suit is adjourned for three months. The question of costs is reserved.

8. That adjournment arose because of the Small Cause Court suit, Eventually, on July 13, the appeal of the present plaintiff was allowed by the Full Court of the Small Cause Court, and the present defendant's suit in that Court was dismissed. Thereupon this High Court suit came on again for hearing before Mr. Justice Fawcett on July 26, 1926, when he delivered the judgment now under appeal. In the first place he came to the conclusion in respect of the outstanding rents

for October, November and December that as the defendant's claim for a refund had been rejected by the Small Cause Court, the present plaintiff was entitled to ₹ 414, But inasmuch as there had already been a payment of ₹ 400 made by the defendant, he was only entitled to a further decree for the balance, viz., ₹ 14. Now that ₹ 400 was paid in September 1925 on account, and must not be confused with the ₹ 400 which was paid in January 1926. There is no dispute up to that point.

9. Now comes the question of costs. The learned Judge dealt with Sections 22 and 41 of the Presidency Small Cause Courts Act 1882, and he ended up saying:-

> The case accordingly is one that, in my opinion, falls under the first paragraph of Section 22, as this is a suit founded on a contract of tenancy, and the plaintiff has obtained a decree for only ₹ 828. I do not consider that it is a case, which I should certify as fit to be brought in the High Court. Therefore, I pass no order as to costs.

10. As I read that judgment, the learned Judge considered that Section 22 of the Act applied here. That was on the assumption that the suit could have been brought in the Small Causes Court, for Section 22 only applies to a suit cognizable by the Small Causes Court. On the other hand, when one comes to look at Chapter VII, Sections 41-49, it is clear that the summary proceedings there are not a suit. They are begun by a summons, and there are various references in the sections, e.g., Sections 46, 47 and 49 referring to a suit, and which, in my opinion, clearly show that the Legislature was distinguishing there between summary proceedings brought by a summons and what is described in this Act as a suit.

11. This view is one which was adopted in *Krishnasami Chetti v. The Natal Emigration Board*[1] where Sir Arthur Collins and Mr. Justice Shephard held that a suit for ejectment was not a suit cognizable by the Small Causes Court, and therefore Section 22 did not apply. Their Lordships say (p. 218): "An application under chapter VII is not a suit within the meaning of Section 22." They, accordingly, reversed the judgment of Mr. Justice Wilkinson to the contrary effect. Similarly, in *Tyeb Beg Mahomed v. Allibhai*[2] Sir Lawrence Jenkins says (p. 49) :- "It is quite true that it (i.e. Section 108 of the Civil Procedure Code) has not a direct application, because proceedings under chapter VII are not a suit, nor is an adjudication in the proceedings a decree." And indeed Mr. Justice Fawcett had himself held on February 9 that the present suit for ejectment was outside the jurisdiction of the Small Causes Court.

12. In my judgment, then, this present suit, as brought on January 6, was not a suit cognizable by the Small Causes Court within the meaning of Section 22 and, accordingly, that section does not apply.

13. It is, however, argued that we should in some way split up this suit and say that although the plaintiff was entitled to bring his suit for ejectment on January 6, yet when the defendant vacated the premises on January 29, that thereafter the suit became as it were a new suit merely for rent, and, accordingly, it could then be brought apart from Section 41, and that after that date you had a suit cognizable by the Small Causes Court. To ray mind that argument is entirely erroneous. The date to teat a suit is the date when it is brought, and not some subsequent date in its history. One example alone may show the injustice of that argument if it was to prevail. Admittedly here (for it cannot be contended

[1] I.L.R. (1893) 17 Mad. 216

[2] I.L.R. (1906) 31 Bom. 45, 8 Bom. L.R. 803

to the contrary) the plaintiff was entitled to bring her suit for ejectment. Consequently, up to the date when the defendant delivered possession, the plaintiff was prima facie entitled to the costs of her suit. But if the argument of the defendant was to prevail, the defendant would escape scot free from all costs in that respect.

14. I now pass to the second branch of the argument on which it was contended that that learned Judge's order could be supported. That was on the alternative ground that quite apart from Section 22 the learned Judge came to the conclusion in the exercise of his discretion that separate suits should have been brought in the Small Causes Court instead of one in the High Court, and that consequently the plaintiff should be disallowed all costs. It was, accordingly, argued that no appeal would lie from the exercise of that discretion. But in my opinion the judgment is founded on reasons which this appellate Court is entitled to review as involving questions of principle. In this respect I would refer to the judgment of Sir Basil Scott in *Laxmibai v. Radhabai*[3]

15. Now, in the first place, it has to be conceded here that if the plaintiff had proceeded in the Small Causes Court to obtain all the reliefs she wanted, she would have had to bring three separate suits, viz., (1) for ejectment in respect of the first floor, (2) for ejectment in respect of the garage, and (3) for rent in respect of the first floor and. the garage. This is because the limitation of value under Section 41, viz., where the annual value at a rackrent does not exceed ₹ 2,000, would have been exceeded if the plaintiff had joined in one ejectment suit the first floor premises as well as the garage. Moreover, a separate suit for rent was in any event necessary because it would appear that claims for rent cannot be added to summary proceedings under Chapter VII.

16. To my mind the very fact that the defendant would thus be exposed to three suits instead of one would prima facie show that this would be the wrong remedy to adopt, more especially when you get the third suit relating to the rent of the properties involved in both the first two suits. Secondly, it is an error to suppose that necessarily a suit in the Small Causes Court is cheaper than one in the High Court. It depends partly on the value. But, having regard to the high and increasing Court fees levied in suits in the Small Causes Court, it can be shown from the High Court records that in certain classes of suits where they are undefended, a High Court suit is

cheaper than one in the Small Causes Court. Similarly, as regards matters of expedition short causes in the High Court come on at least as quickly as those in the Small Causes Court. Further, if a suit is eventually defended, then there may be considerable delay in the Small Causes Court, because that Court may be unable to hear the case de die in diem, as is the practice in the High Court. Therefore, all these matters must be taken into consideration before one considers that necessarily in any particular case, any saving of money or time would be effected by taking proceedings in the Small Causes Court.

17. But I base my judgment on this that at the most the procedure given by Section 41 is permissive; that the plaintiff here was entitled to bring this suit in the High Court (see Section 21); and that in my opinion it was an error of principle for the learned Judge under these circumstances to hold that the plaintiff undoubtedly should have brought three separate suits in the Small Causes Court, and that she was so wrong in coming to the

[3](1917) 20 Bom. L.R. 905

High Court that she should be given no costs at all-not even of the suits which she might have brought, according to the learned Judge, in the Small Causes Court and in which she would wholly or partially have succeeded. Even if the order had been that she should recover no more costs in the High Court than she would have obtained in the Small Causes Court, that would have been an order I should have better understood. But here the plaintiff. was, I think, entitled to complain of the order which the learned Judge made as being based on an erroneous view of Section 22, and on an erroneous view as to the proper principles applicable to the awarding of costs in the present case apart from Section 22.

18. I would, accordingly, allow the appeal, and discharge the order of the learned Judge so far as it relates to costs, and order that instead the defendant do pay the costs of the suit throughout, including the costs of this appeal.

Blackwell, J.

19. I am of the same opinion. In *Ranchordas Vithaldas v. Bai Kasi*[4] it was laid down by a Bench of this Court that the principle to be deduced from the decisions therein referred to is that (p. 682) "appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all." That case is referred to in the judgment of Scott C.J. in *Laxmibai v. Radhabai (1917) 20 Bom. L.R. 905(Supra).*

20. I think the learned Judge was under a misapprehension of fact in this case. It appears to me that he overlooked the fact that after this suit had been brought, a sum of ₹ 150 was paid by the defendant to the plaintiff to cover the rent of the garage from September 1, 1925, to the end of January 1926, and ₹ 250 by way of compensation for the occupation of the first floor during

January. That sum having been paid after suit was, in substance, recovered in the action, and although the learned Judge passed a decree in the first instance for ₹ 828 and in the second instance for ₹ 14, making in all ₹ 842, in effect ₹ 1,242 were recovered by the plaintiff in this suit from the defendant. In my judgment, therefore, in so far as the learned Judge based his decision relating to costs on Section 22 of the Presidency Small Cause Courts Act, he was under a misapprehension, because, although the decrees passed were for ₹ 828 and ₹ 14, the amount in effect recovered in the suit was ₹ 1,242, and it is provided by Section 21 of the Presidency Small Cause Courts Act that "all suits whereof the amount or value of the subject matter exceeds one thousand rupees maybe instituted in the High Court at the election of the plaintiff as if this Act had not been passed". Further, I think that the learned Judge was under a misapprehension of law. He had, in the course of his first judgment, as has been pointed out by the learned Chief Justice, held that this suit was a suit in ejectment. In my opinion it did not cease to be a suit in ejectment, because after the suit possession of the premises was given by the defendant. I think, therefore, that the learned Judge was wrong in holding that the suit was a suit founded on a contract of tenancy, and that therefore Section 22 applied, In my judgment the suit, begun as a suit in ejectment, combined with a claim for rent and for

[4] I.L.R. (1892) 16 Bom. 676

compensation, did not, because possession of the premises was given after suit, cease to be a suit in ejectment, but remained such up to the termination of the suit.

21. Moreover, a suit in ejectment is not cognizable by the Small Causes Court. Only a summons under Section 41 is cognizable by the Small Causes Court. But proceedings by way of summons under Section 41 are permissive only. When a plaintiff has got to decide whether he should bring three different proceedings in the Small Causes Court, as he would have been obliged to do if he had adopted that method of proceeding, viz., a summons in ejectment for the first floor, a summons in ejectment for the garage (inasmuch as the rack-rent of the two taken together would have exceeded the limit provided for by Section 41, namely, ₹ 2,000) and a suit to recover the rent for the first floor and for the garage, it seems to me that he would be thoroughly justified in deciding to combine all those proceedings in one suit in the High Court. In so far, therefore, as the learned Judge based his judgment upon general questions of discretion, with great deference to him, I think that he was wrong, and that he overlooked the fact that proceedings under Section 41 are permissive, and not compulsory.

22. I, therefore, respectfully agree with the learned Chief Justice that the learned Judge was wrong in the decision he came to in regard to costs. I agree that this appeal should be allowed with costs here and below.

Appeal allowed.