

# **BOMBAY HIGH COURT**

Institute of Radio Technology

Vs

Pandurang Baburao

(Divatia and Lokur, JJ.)

12.12.1944

## **JUDGMENT**

### **Divatia, J.**

1. These are three applications in revision against the judgments of the Small Cause Court Judge at Bombay. They arise out of three applications for summons registered as suits under Section 41 of the Presidency Small Cause Courts Act for eviction of the three defendants, the present petitioners, who were the plaintiffs' tenants. The case for the plaintiffs was that the tenant in each case occupied one block in a building at Dadar belonging to them. The plaintiffs were living and also doing their business near the dock area in Bombay. On account of the explosion which occurred in April last, the property, which they were occupying, was destroyed with the result that they were rendered homeless and a friend of their family accommodated them temporarily. They, therefore, wished to occupy a part of their own premises at Dadar. The first plaintiff, who was an old man, was suffering from cancer, and wanted rooms with good light and air. He, therefore, selected four blocks on the second floor of his building and gave notices to the tenants of those blocks for eviction. As the notices were not complied with, the plaintiffs filed four applications for summons under Section 41.

2. The defendants' case was that they had been occupying the premises for a long time, that the plaintiffs were not in need of four blocks for their reasonable and bona fide occupation and there was no reason why they should be ousted from possession. On the evidence led by the parties the learned Judge came to the conclusion that the plaintiffs reasonably and bona fide required at least three out of the four blocks for their occupation. He, therefore, asked the plaintiffs to select which three out of the four blocks they required. The plaintiffs selected the three blocks occupied by the present petitioners. The learned Judge thereafter dismissed the suit as against the defendant in the fourth suit and passed decrees for eviction against the three petitioners. Two of the three blocks are occupied by the Institute of Radio Technology and by its proprietor Mr. Ambre, and the third by a grain merchant. In view of the fact that the Institute had its apparatus and machines installed

in the blocks, the learned Judge below gave two months' time to all the defendants within which to vacate the premises. The petitioners then applied to this Court in revision and obtained interim stay orders.

3. The first contention raised by Mr. Coyajee as well as Mr. Thakor on behalf of the petitioners relates to the jurisdiction of the Small Cause Court. It is urged that the Small Cause Court had no jurisdiction to entertain these applications for summons under Section 41. The point is indeed a novel one as it has not been taken, so far as I know, ever since the Bombay Rent Restriction Act of 1939 was enacted and even while the Rent Act of 1918 was in force because the provisions of the two Acts on this point are common. It is contended that under Section 19(d) of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for the recovery of immovable property. The only jurisdiction which it possesses for passing orders of eviction is conferred by Section 41. It is, however, a condition precedent to the maintainability of the application under that section that the tenancy must have been determined, and it is only after its determination that an order for eviction could be made. It is further urged that by virtue of Section 11 of the Rent Restriction Act of 1939 the tenancy could not be determined as long as the tenant was ready and willing to pay the rent to the full extent allowable by the Act and perform the other conditions of the tenancy, or, among other things, if the premises are not reasonably and bona fide required by the landlord for his own occupation. On this ground it is urged that reading the two sections together no application for summons can be proceeded with when the tenant takes any defence under Section 11. Reliance is placed on the provisions of Section 43, that if the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Small Cause Court was satisfied that he was entitled to apply under Section 41, be entitled to an order for possession of the property, and it is contended that therefore as soon as the tenant appears to show cause to the contrary the tenancy is not determined and the jurisdiction of the Court is ousted. In my opinion this contention is unsustainable. Whether a tenancy has been legally determined or not is to be decided on the provisions of Section 111 of the Transfer of Property Act which says, among other things, that a lease of immovable property determines on the expiration of a notice to determine the lease, or to quit. Therefore, when the landlord gives the tenant a valid notice to quit, the tenancy is determined in law at the expiration of the period and the Small Cause Court gets jurisdiction to entertain the application for summons. Even if the tenant relies on the provisions of Section 11, the tenancy will be deemed to be subsisting only if his defense succeeds and it is the Court which is seized of the application which has the power to decide whether the defense is good. The jurisdiction is not therefore ousted by taking up the defense. The only result of the defense being successful is that the Court cannot pass an order of eviction and the application would be dismissed. Mr. Thakor has relied on a decision of our Court in *Luckmidas Khimji v. Mulji Canji*<sup>1</sup> and contended that if, for instance, the tenant sets up a title in himself, the Small Cause Court

would have no jurisdiction to decide the matter. That question, however, does not arise in the present case, because the defendants have not disputed the plaintiffs' title in any way. They have admitted their ownership and have put in the defenses under Section 11 of the Rent Act in their capacity as tenants.

4. It is next contended that the words "performs the other conditions of the tenancy" in Section 11 show that it is the original tenancy that continues and that therefore it cannot be said to be determined. In my view the original tenancy is determined by the notice and a new statutory tenancy is created if the defence succeeds. In further support of his argument Mr. Thakor has relied upon the recently added provision in the Provincial Small Cause Courts Act by which the Small Cause Court can take cognizance of a suit for ejectment when the only substantial issue for decision is about the determination of the tenancy under the Transfer of Property Act. It is urged that this Court has recently held in a case under the former Act that where the tenant has defended the suit under Section 11 of the Rent Restriction Act, the substantial question between the parties is whether the landlord requires the premises for his own use or whether the tenant is willing to pay rent or not, and that therefore, the Small Cause Court has no jurisdiction to proceed with the suit. In my opinion, that analogy cannot apply to the present case. We have no words in the Presidency Small Cause Courts Act similar to those in the recently amended Provincial Small Cause Courts Act. Under the Presidency Small Cause Courts Act, once the Court has initial jurisdiction over the case, it is not ousted because the tenant takes up a defence under Section 11 of the Rent Act.

5. It is next contended that the words in the section are that the premises must be required by the landlord for his own occupation, that the first plaintiff is now dead and the second plaintiff, who is his son, does not require these blocks for his own Occupation. On that point evidence was led, and the first plaintiff, while he was alive, went into the box and stated that his family consisted of his son, his widowed sister, her two daughters, two daughters of his daughter and his cousin. The learned Judge was presumably satisfied with the evidence that those persons were the plaintiff's dependents, and that therefore they were entitled to live along with the plaintiff. In my opinion, the words "his own occupation" mean occupation of himself and all persons who are dependent on him. There is, therefore, no substance in that contention.

6. The last point urged before us was that when the learned Judge was of the opinion that the plaintiff reasonably required the use of three blocks and not four, he ought not to have given the plaintiff the choice of selecting the three blocks of which he wanted possession. It is contended that it is for the Court to decide, after taking into consideration the Wants not only of the plaintiff but also of the defendants, as to which of the four blocks should be given to the plaintiff, and that in not so deciding the Court acted without jurisdiction and with material irregularity. It is no doubt true that the learned Judge gave the choice of selection to the plaintiff and he selected the

blocks of the three petitioners for reasons known to him. If the plaintiff had withdrawn his suit against the other defendant, the Court could not have compelled him to go on with that suit. As held in *Rustomji v. Dosibai* it is the plaintiff's choice as to which part of the property he wishes to proceed against. In that case the plaintiff did not wish to turn out the defendants in one of the suits, and it was held that as he did not desire to do so, the appeal so far as they were concerned should be dismissed. It, therefore, follows that it is the plaintiff's choice and the Court cannot compel him to continue the suit against the defendant whom he does not desire to evict.

7. For these reasons the decision of the) lower Court cannot be said to be without jurisdiction or vitiated by illegality or material irregularity.

8. As to the period within which the petitioners are to hand over possession to the plaintiff, the lower Court gave two months' time to each of them which has now expired in November. Mr. Coyajee's client in the two petitions has got the Institute of Radio Technology where the apparatus and machinery have been installed and a part of it is occupied by the proprietor for his own use. Mr. Thakor's client is living in the block and is doing grain business elsewhere. We think that in the circumstances of the case Mr. Coyajee's client will require more time for making arrangements for shifting his instruments and apparatus elsewhere.

9. We, therefore, discharge the rule in Civil Revision Application (No. 682 of 1944, and direct that the possession of the block occupied by the petitioner in that application should be handed over to the opponent-original plaintiff before January 31, 1945.

10. The petitioners in Civil Revision Applications Nos. 669 of 1944 and 670 of 1944 should hand over possession of the blocks occupied by them to the opponent before February 28, 1945. The rules in all the three applications are discharged with costs.

**Lokur J.**

11. I agree.

12. I should like to add a few words regarding the question of the jurisdiction of the Presidency Small Cause Court to pass an order of eviction under Section 43 of the Presidency Small Cause Courts Act when any question other than the determination of the tenancy is raised on an application made under Section 41. I think that question can be answered on the plain interpretation of the sections themselves. An application under Section 41 is not, a suit, and although under Section 19 suits for the recovery of immovable property or for the determination of any other right to or interest in immovable property are excluded from the jurisdiction of the Small Cause Court, special provisions are made in Sections 41 to 43 for compelling a tenant to deliver possession of the demised property to the landlord on the determination of the tenancy.

Hence the principle laid down in *Luckmidas Khimji v. Mulji Canji*<sup>2</sup> relied upon by Mr. Thakor, where the Small Cause Court is held not to possess jurisdiction to try suits for possession of immovable property when the question of title is raised, does not apply to an application under Section 41 where no such question is raised, as in this case. It is admitted that the petitioners are the tenants of the opponent and that notice sufficient for the determination of the tenancy under Section 106 of the Transfer of Property Act has been given. The tenancy having been thus determined by a proper notice, the lessees are bound to put the lessor into possession of the property under Section 108(q) of the Transfer of (Property Act. But the defence raised is that under Section 11, Sub-section (1), of the Bombay Rent Restriction Act, 1939, an order for the recovery of possession cannot be made as the petitioners have paid and are ready and willing to pay rent to the full extent and to perform all other conditions of the tenancy. The proviso to that sub-section, however, enables the landlord to recover possession of the premises from the tenant if they are reasonably and bona ride required by him for his own occupation and for certain other reasons mentioned in the proviso, Mr. Thakor contends that when such a defence is raised, it is outside the scope of the Small Cause Court, and under Section 41 or 43 no other question except determination of the tenancy can be decided. Section 41 provides that when the landlord claims that the tenancy is determined, he may make an application to the Small Cause Court for a summons against the occupant or tenant calling upon him to show cause why he should not be compelled to deliver up the property. Then Section 43 provides that if the said occupant or tenant does not appear at the time appointed to show cause to the contrary, the applicant shall, if the Small Cause Court is satisfied that he is entitled to apply under Section 41, be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in such order. This contemplates that not only must the applicant satisfy the Court that the tenancy is determined and he has a right to apply under Section 41, but also that the occupant does not show cause to the contrary, that is to say, show cause why an order addressed to the bailiff of the Court directing him to give possession of the property to the applicant should not be passed. The notice contemplated by Section 41 is intended to call upon the occupant to show cause why he should not be compelled to deliver up the property after the determination of the tenancy. This necessarily suggests that there may be other reasons why he should not be evicted even though the tenancy has been determined, and hence Section 43 provides that if he succeeds in showing cause to the contrary, the Small Cause Court will refuse to pass an order of eviction. One of such causes is that set out in Section 11 of the Bombay Rent Restriction Act, 1939, and the Small Cause Court has jurisdiction to see if the occupant has succeeded in showing that under that section he is entitled to retain possession of the property in his occupation even after the determination of the tenancy. I, therefore, agree that the Small Cause Court had jurisdiction in this case to decide whether the applicant was entitled to obtain an order of eviction under Section 43 in view of the provisions of

Section 11 of the Bombay Rent Restriction Act of 1939.

13. On other points I agree with the view taken by my learned brother and with the order proposed by him.

Cases Referred.

1(1880) I.L.R. 5 Bom. 295

2(1880) I.L.R. 5 Bom. 295