

BOMBAY HIGH COURT

Ebrahim Saleji

Vs

Abdulla Ali Reza

(Gajendragadkar, J.)

24.10.1950

ORDER

Gajendragadkar, J.

1. The short question which this revn. appln. raises relates to the scope & proper effect of the provisions of Sections 28 & 29, Bombay Act LVII [57] of 1947. It is a question of considerable importance because it affects a large number of ejection proceedings pending in the Court of Small Causes at Bombay. This question arises in this way: The opponents had made an appln. in the Ct. of Small Causes at Bombay under Section 41, Presidency Small Cause Courts Act against the petr. Their case was that the petr. opponent was in occupation of the premises in question by their leave & licence & that he refused to vacate the premises though called upon to do so after the opponents had withdrawn their leave & licence. The petr.'s defence was that he was in occupation of the premises not by leave & licence of the opponents, but as their tenant & that he was ready & willing to pay the rent & as such was entitled to the protection of the provisions of Bombay Act LVII [57] of 1947. The learned trial Judge came to the conclusion that the premises in question were given to the petr. by the opponents by leave & licence & that the petr. was not the opponents' tenant. On that view the petr. was directed to vacate the premises by 31-3-1950. Against this order the petr. went in appeal to a Bench of two Judges of the Ct. of Small Causes, Bombay. But the appellate Ct. dismissed his appeal on the ground that the appeal was incompetent. The view which prevailed with the appellate Ct. was that the present proceedings did not attract the provisions of Section 28 of Bombay Act LVII [57] of 1947 & as such an order made in the said proceedings was not appealable under Section 29 of the said Act. It is this view of the appellate Ct. which the petr. seeks to challenge before me in the present revn. appln. The petr.'s contention is that in rejecting his appeal as incompetent the appellate Ct. in the Ct. of Small Causes has misconstrued the provisions of Section 28 of Bombay Act LVII [57] of 1947. He argues that the present proceedings do fall within the purview of Section 28 of the said Act, & as such the order passed by the trial Ct. in these proceedings was appealable under Section 29.

2. Now, before Bombay Act LVII [57] of 1947 was passed recovery of possession of immovable property through the Ct. of Small Causes, Bombay, was governed by the provisions contained in Chap. VII, Presidency Small Cause Courts Act. This Chapter contains nine sections which provide for the procedure to be adopted by persons claiming possession of immovable property from their tenants or licensees. Section 41 authorises the landlord or licensor to apply for a summons for possession against his tenant or licensee in respect of any immovable property of which the annual value at a rack-rent does not exceed two thousand rupees. Section 42 provides for the service of summons & under Section 43 the Ct. is given jurisdiction to issue an order addressed to the bailiff of the Ct. directing him to give possession of the property to the appct. in case the Ct. is satisfied that the appct. is entitled to such an order. Section 47 permits the occupant of the premises to move the Ct. to stay the execution proceedings of the order passed under Section 43 & he can do so if he binds himself with two sureties to institute without delay a suit in the Ct. of competent jurisdiction for compensation for trespass & to pay all the costs of such suit in case he does not prosecute the same or in case judgment therein is given against him. If the requirements of Section 47 are satisfied, it is obligatory for the Ct. of Small Causes to stay the proceedings as claimed by the occupant. If the occupant succeeds in obtaining a decree in his suit, such decree shall supersede the order made by the Ct. of Small Causes under Section 43. Section 48 provides for the application of the provisions of the Code of Civil Procedure "as far as may be and except as herein otherwise provided". Section 49 provides that the order made for the recovery of possession under Section 43 would be no bar to the institution of a suit in the H. C. or the City Civil Court as the case may be. Thus, it would be clear that in all cases where the owner of any immovable property claimed to recover possession of his property from the occupant on the ground that the occupant was either his tenant or his licensee, it was open to him to apply to the Ct. of Small Causes & obtain an order for ejectment. "The proceedings thus instituted by him by means of an appln. made under Section 41 did not constitute a suit properly so-called & an order made in those proceedings was liable to be challenged by a suit as provided under Section 47 & Section 49 of the said Act.

3. When Bombay Act LVII [57] of 1947 came to be passed it purported to confer wider jurisdiction on the Ct. of Small Causes in the matter of suits for ejectment against tenants or licensees. The proceedings which the Ct. of Small Causes was authorised to entertain under the provisions of this Act now became suits, with the result that the decrees passed in such suits were conclusive between the parties, subject of course to the decision of the appellate or the revisional Ct. Section 28 of the Act provides that notwithstanding anything contained in any law & notwithstanding that by reason of the amount of the claim or of any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction, in Greater Bombay, the Ct. of Small Causes, Bombay, shall have jurisdiction to entertain & try any suit or proceeding

between a landlord & a tenant relating to the recovery of rent or possession of any premises of which any of the provisions of this Part apply & to decide any appln. made under this Act & to deal with any claim or question arising out of this Act or any of its provisions; and no other Ct. shall have jurisdiction to entertain any such suit, proceeding or appln., or to deal with such claim or question. It would be noticed that the first part of Section 28 confers jurisdiction upon the Ct. of Small Causes, Bombay to deal with suits falling under this section notwithstanding the fact that the value of the immovable properties involved in such suits may exceed Rs. 2,000. In other words, the limitation imposed upon the jurisdiction of the Ct. of Small Causes by Section 41, Presidency Small Cause Courts Act, would be no bar where the Ct. of Small Causes, Bombay, is exercising jurisdiction under Section 28 of Bombay Act LVII [57] of 1947. It is quite clear that if the landlord files a suit to eject his tenant the Ct. of Small Causes would try such a suit under the provisions of Section 28 & a decree passed by the trial Ct. in such a suit would be appealable under Section 29. Section 29 provides for an appeal in Greater Bombay from a decree or order made by the Ct. of Small Causes, Bombay, exercising jurisdiction under Section 28 to a Bench of two Judges of the said Ct. which shall not include the Judge who made such decree or order. There is no doubt that if the suit in terms purports to be by a landlord against his tenant it would fall under Section 28 & the decree passed in the suit would clearly be appealable under Section 29. The pltf's claim for ejectment may, however, not always be made in this simple & straightforward form. He may ask for a decree for ejectment on an alternative basis. He may allege that the deft. is in possession of the premises by his leave & license & the same has been revoked; or he may say that he is entitled to a decree for ejectment under the provisions of Section 13 of Bombay Act LVII [57] of 1947 even on the footing that the deft. is a tenant. While dealing with such an alternative claim the trial Ct. may have to frame issues on both the pleas. If at the trial the pltf's case of leave & license fails & the trial Ct. proceeds to deal with his claim on the basis that the deft. is a tenant, whatever decree may be passed at the end would clearly fall within Section 28 & as such it would be appealable under Section 29. That would be so because whatever be the nature of the trial Ct.'s. decision, it would be based upon the provisions of Bombay Act LVII [57] of 1947, & as such the decision would be in exercise of the jurisdiction conferred by Section 28. This position is not disputed before me by Mr. Chhatrapati for the opponents. He, however, suggests that if in such a suit the trial Ct. rejects the deft's contention that he is a tenant & accepts the pltf's version that the deft. is in possession by leave & license, the proceedings would cease to be governed by Section 28 & the order made in such proceedings would not be appealable under Section 29. I find considerable difficulty in accepting this contention. It seems to me that if in trying any suit the Ct. of first instance is called upon to deal with issues or questions arising under any of the provisions of Bombay Act LVII [57] of 1947 the said suit or proceedings must be deemed to fall within the provisions of Section 28 & the nature of the jurisdiction exercisable under Section 28 would not vary according as the decision is one

way or the other. There is yet a third category of cases in which the pl'tfs.' claim for possession may be based solely on the ground that the def't. is in occupation by leave & license. In such a case the def't. may claim the protection of Bombay Act LVII [57] of 1947 by denying the pl'tfs. allegation of leave & license & by pleading that he is in occupation as a tenant. In such a case again, Mr. Ghhatrapati contends that if the pl'tfs. plea of leave & license fails & the def't's. plea of tenancy succeeds, an appeal would lie against the decree dismissing the pl'tfs.' suit; but no appeal would lie if the pl'tfs.' plea succeeds & the def't.'s plea fails. Mr. Chhatrapati says that such a case cannot attract the provisions of Section 28: it is not a suit or proceeding between a landlord & tenant, nor is it an appln. made under the provisions of this Act; and his argument is that the nature of the suit or proceeding must be determined by the allegations in the plaint. In fact this is the view which the Ct. of Appeal has accepted. In their judgment the learned Judges have observed that in dealing with the question as to whether such a suit or proceeding falls under Section 28 "regard has to be had only to the form in which the pl'tf. has chosen to frame his suit and ask for relief by his prayers; and such a question of jurisdiction does not depend on whether the suit in that form is one that will lie in law." In support of their conclusion the learned Judges of the Ct. of Appeal in the Ct. of Small Causes have referred to a decision of this Ct. in *Lakshumandas v. Anna*,¹ in which it has been held that in determining whether a second appeal lies in a particular case the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Ct. In a sense this view is right, and if Section 28 had merely referred to suits or proceedings between a landlord & a tenant, much could have been said in favour of this view. But the last clause of Section 28 in terms extends its scope to cases where the Ct. of first instance "has to deal with any claim or question arising out of this Act or any of its provisions;" now it is obvious that questions which arise for decision in any suit or proceeding arise not only by reference to the plaint but by reference to the plaint & the written statement read together. On the plaint by itself no issue can possibly arise. It is only when the Ct. considers the allegations made in the plaint & the denials contained in the written statement that it can & does frame issues for its determination. That being so, it seems to me impossible to hold that the provisions of Section 28 can apply only to cases or proceedings which can be said to arise between a landlord & a tenant solely by reference to the plaint. With respect, it seems to me that the Court of Appeal have failed to give effect to the provisions contained in the last part of Section 28.

4. There is yet another aspect of this matter which deserves to be considered. As I have already mentioned, the trial Ct. may have to consider the def't's. claim for the protection of Bombay Act LVII [57] of 1947 either because the def't. claims it though the pl'tf. does not admit it, or because the pl'tf. himself claims ejectment on an alternative basis. Now, in dealing with this claim made by the def't. if the trial Ct. finds in favour of the def't. and holds that he is a tenant, the claim for

ejection is liable to be dismissed. Mr. Chhatrapati says that if the pl'tfs.' claim for ejection is thus dismissed, an appeal would lie under Section 28 because the order of dismissal of the pl'tfs.' claim for possession would fall under that section. In other words, it is the nature of the decision of the trial Ct. in the suit or proceedings which would determine whether the said suit or proceedings fall under Section 28. In my opinion, this contention is based upon a misconstruction of the provisions of Section 28. If this view were right, it would lead to this result that wherever the tenant's plea prevails an appeal lies, but wherever his plea fails an appeal would not lie. It seems to me that on a proper construction Section 28 includes within its jurisdiction all suits & proceedings where the trial Ct. has to consider the claims or questions arising out of Bombay Act LVII [57] of 1947 & it makes no difference whether such claim or question arises from the allegations made in the plaint or those made in the written statement. In this connection the words of Section 29 also may afford some assistance. Under the provisions of this section an appeal lies in Greater Bombay from a decree or order made by the Ct. of Small Causes exercising jurisdiction under Section 28. Now, a decree or order may be either in favour of the pl'tf. or against him, & an appeal lies against such a decree or order whether it is in favour of the pl'tf. or against him. In deciding whether an appeal lies or not the only material question is whether the decree or order under appeal has been passed by the trial Ct. in exercise of its jurisdiction under Section 28, & the trial Ct. is undoubtedly exercising its jurisdiction under Section 28 whenever it deals with any claims or questions arising out of the provisions of this Act. Take a case where the trial Ct. may find that the def't. is a tenant & yet it may pass a decree for ejection under Section 13 (2); in such a case, on Mr. Chhatrapati's contention, the tenant cannot challenge the trial Ct's. conclusion by way of appeal; and the only course open to him is to treat the proceedings as those under Section 41, Presidency Small Cause Courts Act & file a suit under Section 47 of the said Act. It seems to me that the object of enacting Section 28 of Bombay Act LVII [57] of 1947 is to avoid such multiplicity of proceedings & to provide for an appeal against decrees & Orders passed in exercise of the jurisdiction conferred by it. Decrees or orders passed by the appellate or revisional Ct. in such proceedings are final & cannot be challenged by a separate suit. The whole basis of this legislation is to have the dispute between landlords & tenants speedily & finally determined; that is why as regards such proceedings, Section 28 virtually supersedes the provisions of chap. VII, Presidency Small Cause Courts Act. Incidentally, I may also refer to the provisions of Section 51 of this Act, by which it is declared for the removal of doubt that unless there is anything repugnant in the subject or context, references to suits or proceedings in this Act shall include references to proceedings under chap. VII, Presidency Small Cause Courts Act, 1882 & references to decrees in this Act shall include references to final orders in such proceedings.

5. I must, therefore, hold with respect that the Ct. of Appeal was wrong in coming to the

conclusion that the appeal preferred before them by the petnr. was incompetent. It is no doubt true that the pltf. sought for a decree for ejectment on the sole ground that the occupant was in possession by leave & license & the said leave & license had been revoked; but the petnr. had claimed the protection of Bombay Act LVII [573 of 1947 by alleging that he was a tenant. The trial Ct. has not been impressed with the petnr's. plea. However, the trial Ct. has undoubtedly dealt with his plea & as such has considered a question arising under the provisions of Bombay Act LVII [57] of 1947. That being so, the decree passed by the trial Ct. must be treated as a decree passed in the exercise of its jurisdiction conferred by Section 28. In my opinion, therefore, the tenant would be entitled to go in appeal against this decree under Section 29 & claim the decision of the appellate Ct. on the merits of the case.

6. The revn. appln. accordingly succeeds, the order passed by the appellate Ct. is set aside & the appeal sent back for disposal in accordance with law. The petnr. is entitled to his costs of this revn. appln. from the opponents.

Cases Referred.

132 Bom. 356 : (& Bom. L. R. 731)