

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4388 OF 2001

Jimmy Darabshaw Adajania	...Petitioner
<i>Versus</i>	
Ajay Shardaprasad Sharma And Anr.	...Respondents

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Mr.Hemang S. Rajthatthu i/b. RMA Law Associates for the
Petitioner.

Mr. Girish Godbole, Senior Advocate a/w. Ms. Ulka Saranjame
i/b. Tiwari & Co. Advocate for Respondent No.1.

Mr. P.S. Dani, Senior Advocate i/b. Kiran U. Kapadia, Advodcate
for Respondent No.2.

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WITH

Writ Petition NO. 4394 OF 2001

Dhanjishaw Manchershaw Mistry	...Petitioner
<i>Versus</i>	
Ajay Shardaprasad Sharma And Anr.	...Respondents

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Mr. P.S. Dani, Senior Advocate i/b. Kiran U. Kapadia, Advodcate
for the petitioner.

Mr. Girish Godbole, Senior Advocate a/w. Ms. Ulka Saranjame
i/b. Tiwari & Co. Advocate for Respondent No.1.

Mr.Hemang S. Rajthatthu i/b. RMA Law Associates for
respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 11th July, 2016

P.C.

1. Heard Mr. Hemang Rajthatthu learned Counsel for the petitioner in Writ Petition No.4388/2001 and Mr. P.S. Dani, learned Senior Counsel for the petitioner in Writ Petition No.4394/2001 and Mr. Godbole, learned Senior Counsel for respondent No.1 in both the petitions, at length.

2. By these petitions under Article 227 of the Constitution of India, the petitioners have challenged the findings recorded in (i) the judgment and decree dated 17.12.1996 passed by learned Judge, presiding over Court Room No.10 of the Court of Small Causes Court at Bombay in R.A.E. Suit No.12/23 of 1992 as also (ii) the judgment and decree dated 24.6.1999 passed by the Appellate Bench of the Small Causes Court at Mumbai in Appeal No.89/1997. By these orders, the Courts below dismissed the suit instituted by respondent No.1, hereinafter referred to as the 'plaintiff'. It seems that, however, the learned trial Judge recorded finding against issue No.4 in the negative. As far as additional issue framed by the learned trial Judge is concerned, that was also answered in the negative. Issue No.4 and additional issue and the findings recorded

against these issues read thus :

No.	ISSUES	FINDING
(4)	Whether defendant No.2 proves that he is heir and legal representative of the deceased tenant Mr. Minocher H. Sethna as claimed by him and/or is protected under Section 5(11)(c) of Bombay Rent Control Act ?	No
	<u>ADDITIONAL ISSUE:</u> Does defendant No.3 prove that he is protected licensee or deemed tenant in respect of the suit premises?	No.

. As far as the Appellate Court is concerned, while dismissing the appeal as also cross-objections, the Appellate Court recorded findings against points No.3 and 4 in the negative. Points No.3 and 4 and findings recorded against these points read thus :

No.	POINTS	FINDING
3)	Whether the trial Court erred in holding that Dhanjishaw M. Mistry is not the heir of deceased tenant ?	No
4)	Whether the trial Court erred in holding	No.

	that defendant No.3 is not entitled for protection under the Act?	
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3. It appears that the plaintiff had instituted Suit No.6272/1999 on or about 28.10.1999 on the Original Side of this Court *inter alia* praying for direction to the defendants to hand over vacant and peaceful possession of flat No.5 on the first floor of the building known as Sharma Niwas situate on Plot NO.599, Jame Jamshed Road, Matunga, Mumbai – 400 019 to the plaintiff, amongst other reliefs. In paragraph-11, the plaintiff has reproduced the finding recorded by the learned trial Judge against issues No.4 and 10. In paragraph-12, the plaintiff had referred to the order passed by the Appellate Court dismissing the appeal. In paragraphs-13 and 17, the plaintiff has asserted thus :

“13. The plaintiff states that the Court of Small Causes at Mumbai is the only competent Court to entertain and try all the matters relating to the disputes, claims and rights under Bombay Rent Act. Hence its above findings have now become final and binding on all the parties including all the defendants herein in respect of suit flat No.5.

17. The plaintiff states that all the

defendants are trespassers as held by the Court of Small Causes at Mumbai in said R.A.E. Suit No.12/23 of 1992. All the findings of the trial Court have been confirmed by the Appellate Court. Plaintiff therefore, called upon the defendants to vacate the suit flat No.5. The plaintiff served notice dated 3rd October, 1999 personally on the defendants on 4th October, 1999 which they have acknowledged by putting their signature. But the defendants neither vacated the suit flat nor sent any reply to the said notice to quit. The plaintiff craves leave to refer and rely upon said notice dated 3.10.1999 when produced
....”

4. In that suit, the plaintiff took out Notice of Motion No.3683/1999. By order dated 8.8.2001, said Motion was granted by the learned Single Judge of this Court in terms of prayer clause (a) and this Court issued directions to the Court Receiver. In paragraph-2 of that order, submissions made on behalf of the defendants that they propose to challenge the finding recorded by the Small Causes Court in the suit instituted by the plaintiff by filing a Writ Petition before this Court on the Appellate Side, was recorded. Mr. Dani submitted that in pursuance of this order, the petitioner was advised to file this Writ Petition challenging the findings recorded by the trial Court and the Appellate Court.

5. Mr. Godbole raised preliminary objection on the ground of maintainability of these Petitions. He submitted that the suit instituted by the plaintiff was dismissed by the trial Court and that decree was confirmed by the Appellate Court. The plaintiff has not challenged dismissal of his suit. He submitted that the defendants in the suit filed in the Small Causes Court cannot maintain these Petitions challenging only the findings recorded in a suit filed by the plaintiff which is eventually dismissed by the Courts below. In support of this submission, Mr. Godbole relied upon following decisions :

- (i) **Smt. Ganga Bai v. Vijay Kumar and Ors.**
(1974) 2 SCC 393
- (ii) **Deva Ram v. Ishwar Chand**
(1995) 6 SCC 733
- (iii) **Banarsi and Ors. v. Ram Phal**
(2003) 9 SCC 606

6. Though Mr. Dani tried to contend that in view of the order dated 8.8.2001 passed by this Court in Notice of Motion No.3683/1999, the petitioners were advised to file Writ Petition, in my opinion, the Petitions challenging the findings recorded against the defendants in a suit filed in the Small Causes Court are not maintainable. In the case **Deva Ram** (supra), Apex Court

has observed in paragraphs-26 and 27 thus :

“26. It is provided in Section 96 of the C.P.C. that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeal from the decision of such Court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree passed in appeal. Thus sine qua non in both the provisions is the "decree" and unless the decree is passed , an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code. Similarly, an appeal lies against an "order" under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the "orders" against which appeal would lie have been enumerated. Unless there is an "order" as defined in Section 2(14) and unless that "order" falls within the list of "orders" indicated in Order 43, an appeal would not lie.

27. Thus, an appeal does not lie against mere "findings" recorded by a Court unless the findings amount to a "decree" or "order". Where a suit, is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue, has no right of appeal and he cannot question those findings before the appellate Court. (See Ganga Bai v. Vinay Kumar and Ors. [1974]3SCR882.”

7. As noted earlier, the suit was filed by the plaintiff in Small Causes Court in the year 1992 under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Bombay Rents Act'). Section 29(1) and proviso (I) reads thus :

“29. Appeal.- (1) Notwithstanding anything contained in any law, an appeal shall lie -

- (a) in Greater Bombay, from a decree or order made by the Court of Small Causes, Bombay, exercising jurisdiction under section 28, to a bench of two judges of the said Court which shall not include the Judge who made such decree or order.
- (b) elsewhere, from a decree or order made by a Judge of the Court of Small Causes established under the Provincial Small Cause Courts Act, 1887, or by the Court of the Civil Judge deemed to be the Court of Small Causes under clause (c) of sub-section (2) of section 28] or by a Civil Judge exercising such jurisdiction, to the District Court':

Provided that no such appeal shall lie from -

- (I) a decree or order made in any suit or proceeding in respect of which no appeal lies under the Code of Civil Procedure, 1908;”

8. It is common ground between the parties that against the judgment and decree passed by the Courts below appeal does not lie to this Court. If that be so, it cannot be said that

the Petitions can be entertained challenging the only finding in those decisions, as quoted in paragraph-2 above. Perusal of order dated 8.8.2001 passed by this Court in Notice of Motion will not come to the rescue of the petitioners. This Court while disposing of that Motion recorded the submission advanced on behalf of the defendants that they propose to challenge the findings recorded by the Small Causes Court in the suit instituted by the plaintiff by filing a Writ Petition before this Court on the Appellate Side. In other words, this Court did not have any occasion to consider the maintainability or otherwise of the proposed proceedings. That apart, said order was passed at the interlocutory stage.

9. In view thereof, it has to be held that the Petitions challenging only findings recorded by the Small Causes Court are not maintainable.

10. Learned Counsel appearing for the parties submitted that whether the findings recorded by the Small Causes Court against issues No.4 and 10 (additional issue) as also by the appellate Court against points No.3 and 4 constitute as resjudicata or not may be kept open for adjudicating the same

before the trial Court.

11. In view thereof, the Petitions are dismissed as not maintainable. It is expressly made clear that the question whether the findings recorded by the trial Judge against issues No.4 and 10 (additional issue) and the findings recorded by the Appellate Court against points No.3 and 4 operate as *resjudicata* is expressly kept open. All contentions in that regard, are expressly kept open. Rule is discharged in both Petitions with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)