

ATUL

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 291 OF 2014
IN
SUIT NO. 6319 OF 2005

1. **M. S. SHETTY**
Adult, Indian Inhabitant, residing at
Shree Muktanand Ashram, 371,
Brickmen Road, Southfallsburg,
N. Y. State, United States of America
2. **GURUDEV SIDDHA PEETH**
a public Trust duly registered under the
Bombay Port Trust Act, 1950, having
its registered office at PO Ganeshpuri,
Taluka Bhiwandi, District Thane
401206, through its authorised trustee.

...Appellants
(Orig. Plaintiffs)

~ VERSUS ~

1. **ANOOP VYAS**
Adult, Indian Inhabitant, residing at
Shobhana, Tilak Road, Santacruz (W),
Mumbai 400054
2. **TUSHAR DESAI**
Adult, Indian Inhabitant, residing at 11,
Pancholi Society, Central Bank Lane,
Ghoddod Road, Surat, Gujarat 395007
3. **PADMA KHANNA**
Adult, Indian Inhabitant, residing at B-
1/6, Safdarjung Enclave, New Delhi
110029

4. ~~VINEY CHEDA~~
~~Adult, Indian Inhabitant, residing at~~
~~572, Anand Kunj, Vikas Puri, Outer~~
~~Ring Road, New Delhi 110018~~
5. ~~VARSHA DESAI~~
~~Adult, Indian Inhabitant,~~
~~Residing at A-5, Pearl Queen, North~~
~~Avenue, Santacruz (W), Mumbai~~
~~400054~~
6. **SHANTI MANDIR TRUST**
Presently at 21, Malti Niwas, 3rd N. S.
Road, JVPD Scheme, Vile Parle (West),
Mumbai 400054
7. **VENKATESHWAR RAO ALIAS SWAMI**
NITYANAND ALIAS SUBHASH SHETTY
Adult, Indian Inhabitant,
Residing at Shanti Mandir, presently at
21, Malti Niwas, 3rd N. S. Road, JVPD
Scheme, Vile Parle (West), Mumbai
400054

OR

C/o Shanti Mandir at Village Magod,
Mahafali, Post Atul, Dist. Valsad
396020, Gujarat, India

OR

C/o Shanti Mandir at Sanyas Marg,
Kankhal 249408, Uttaranchal, India

OR

51, Muktanand Marg, Walden, NY
12586, USA.
8. **RANI SHETTY**
Adult, Indian Inhabitant, residing at
603, Oyster Shell, Juhu Beach, Mumbai
400049
9. **SANJAY SHETTY**
Adult, Indian Inhabitant,

Residing at Flat No. 301, Royal
Heritage, Yari Road, Versova, Andheri
(West), Mumbai 400061

10. **YASH RAJU BHANSALI**
Adult, Indian Inhabitant,
Residing at Shanti Mandir at Village
Magod, Mahafali, Post Atul, Dist.
Valsad 396020, Gujarat, India
11. ~~**BHASKAR GOPALAN**~~
~~Adult, Indian Inhabitant,~~
~~Residing at 32, Sriram Nagar, North~~
~~Street, D1/D2, Chennai 6000187~~
12. **SWAMI KARUNANANDA SARASWATI**
Adult, Indian Inhabitant,
Residing at Shanti Mandir at Village
Magod, Mahafali, Post Atul, Dist.
Valsad 396020, Gujarat, India
13. **NARESH HARIPRASAD DESAI**
Secretary, adult, Indian Inhabitant,
residing at 1B, Takshashila, 50, Tagore
Road, Santacruz (West), Mumbai 400054
14. **VINAY G. SHARMA**
45F, BB Block, Janakpuri, New Delhi 110058
15. **RAVISH S. MADAN**
3A, Miniland Tank Road, Bhandup,
Mumbai 400078
16. **RAJESH I. ANKLESHWARIA**
202, Sai Keval Apartment, Near Circuit
House, Jalaram Mandir Road, Valsad
396001

...Respondents
(Orig. Defendants)

APPEARANCES

FOR THE APPELLANTS	Mr GS Godbole, Advocate, <i>i/b Mr. Shashikumar Kishanlal Jain</i>
FOR RESPONDENT NO. 7	Mr Harinder Toor, Advocate, <i>a/w M. Sumedha Sawant, i/b NN Amin</i>
FOR RESPONDENT NO. 9	Ms Tejasvi Dalvi, Advocate

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 13th July 2017

JUDGMENT PRONOUNCED ON : 31st July 2017

JUDGMENT:

1. The appellants are the original plaintiffs. They are in appeal under Order 43 Rule 1(a) read with Order 41 Rule 1 of the Code of Civil Procedure, 1908 (“CPC”) against an order dated 4th February 2014 of a learned judge of the City Civil Court. The appeal was admitted on 25th March 2014.

2. By the impugned order, the learned judge, finding that the defendants were probably tenants, returned the plaint for presentation to the proper court, viz., the Court of Small Causes at Mumbai. This order was passed on a preliminary issue framed under Section 9A of the CPC.

3. The suit was in respect of an immovable property at 21, Malti Niwas (formerly known as Tejpal Villa), North South Road No. 3, Juhu Vile Parle Development Scheme (“**Malti Niwas**”), part of the Navyug Co-operative Housing Society Ltd. This is a ground and three floor structure.

4. The 1st plaintiff, Malti Sheena Shetty, is now known as Swami Chidvilasnanda. She is the spiritual head and leader of the 2nd plaintiff, a registered public charitable trust originally founded by Swami Muktanand Paramhansa for his Siddha Yoga Mission. Defendants Nos. 1 to 4 are said to be the trustees of defendant No.6, the Shanti Mandir trust. Defendant No.5 is its secretary.

5. The 1st Plaintiff claimed to have been a tenant of Malti Niwas, then called Tejpal Villa, living in the ground floor of that house with her mother Devki Shetty, father Sheena Shetty, younger brothers Subhash (defendant No.7) and Sanjay (defendant No.9), and a younger sister named Champa alias Rani (defendant No.8). The property was then owned by one Jyoti Fakirchand Sharma. The 1st plaintiff says she purchased Tejpal Villa — the entire building, including two appurtenant garages, a garden and open space — by a registered Deed of Assignment dated 11th April 1978 for Rs1,70,000. It was renamed Malti Niwas. The three upper floors continued to be occupied by other tenants. The 1st plaintiff continued staying in the ground floor premises with her parents and siblings. In 1978, Champa (Rani) married and left for her matrimonial home. As the 1st plaintiff travelled greatly, she executed a general power of attorney in favour of her mother, Devki, empowering her *inter alia* to look after the property.

6. On 4th May 1982, the 1st plaintiff and her brother Subhash (defendant No.7) took sanyas. On 8th May 1982, the 1st plaintiff and defendant No.7 were anointed by Baba Muktananda as his successors. The 1st plaintiff took the name Swami Chidvilasnanda. Subhash, defendant No.7, took the name Swami Nityananda. The 1st plaintiff says she desired to dedicate all her properties to the 2nd plaintiff after her parents' lifetimes, and she instructed her Chartered Accountant, also the honorary treasurer of the 2nd plaintiff, one Shirish Thakkar, to take the necessary steps to effect this.

7. In paragraph 9, the plaintiffs say this:

9. The plaintiffs state that since plaintiff no.1 took sanyas, although she had decided to dedicate the suit property to plaintiff no.2, out of natural love and affection permitted her parents and her younger brother Sanjay to continue to live on the ground floor of the said Malti Nivas purely gratis and Devki Amma continued to look after the affairs of plaintiff no.1 in respect of the said property as plaintiff No.1 was totally pre-occupied with her seva in Baba's mission.

8. In November 1985, defendant No.7 renounced his status as a sanyasi and took the name Venkateshwara Rao. He thus stood divested of his status and position as a joint successor to Swami Muktananda, and ceased to be the spiritual head of the Gurudev Sidha Peeth at Ganeshpuri and other institutions of the Siddha Yoga Mission. Defendant No.7 continued to visit his parents in the suit property.

9. In 1986, the 1st plaintiff revoked the general power of attorney in favour of Devki, her mother. In the correspondence between lawyers that ensued over this, Devki claimed a tenancy of the ground floor premises. No action by either side resulted, however, and the 1st plaintiff seems to have allowed her parents to continue staying in the ground floor premises of Malti Niwas. Sanjay, defendant No.9, then got married and left these premises, thus leaving only the 1st plaintiff's parents who continued to live there. On revoking the general power of attorney to her mother, the 1st plaintiff issued a fresh one in favour of the chartered accountant, Shirish Thakkar. That is said to be still valid.

10. The 1st plaintiff's mother Devki died on 13th July 2003. Her father, Sheena Shetty, died on 3rd June 2004.

11. The 1st plaintiff asked Thakkar to get the ground floor premises in Malti Niwas readied for the 2nd plaintiff. Thakkar visited the premises and found strangers living there. They claimed to be caretakers of defendant No.6, the Shanti Mandir Trust. On enquiries, Thakkar and the 1st plaintiff found that this Trust was registered in Delhi on 19th April 1990. By a resolution dated 3rd June 1996, the registered address was shifted to the ground floor of Malti Niwas. Apparently, the 1st plaintiff's mother gave her no objection to the 6th defendant trust on 21st May 1996. In the plaint, the plaintiffs question Devki's authority to issue any such no objection or consent to defendant No.6.

12. In paragraph 21 of the Complaint, this is what the plaintiffs say:

21. The plaintiffs say and submit that the said premises constitute the exclusive property of the plaintiffs. The plaintiff no. 1 had merely permitted her family to reside in the said premises during the initial period as explained above. The plaintiffs further say and submit that thereafter plaintiff no.1 's parents were permitted to occupy the said premises merely upon a consideration that they were the plaintiff no.1's parents. **No rent was ever agreed and/or charged and the mother continued to occupy the said premises with the plaintiff's father merely as a gratuitous licensee.** As submitted hereinabove, the plaintiffs say and submit that **the said gratuitous license was terminable even during the life of the mother of the plaintiffs Smt. Devaki and in any case stood terminated upon the death of the plaintiff's parents.** The plaintiffs further say and submit that Devki Amma had no right to permit anyone to use the said premises even during her life time much less after her death neither Shanti Mandir Trust defendant No.6 nor any of its trustees have any manner of right, title or interest in the said premises. Under the circumstances, the plaintiffs say and submit that defendant No.6 and/or its trustees are rank trespassers in the said premises. They cannot claim any right to continue to occupy the said premises.

(Emphasis added)

13. Subhash, defendant No.7, claims to be the spiritual head of defendant No.6, the Shanti Mandir Trust. He says he has become a swami again, and has taken the name Swami Nityanand once more. He says he has established an ashram in the name of defendant No.6 in Haridwar, in Gujarat and in the USA.

14. In the suit, the plaintiffs sought these reliefs:

"(a) That this Hon'ble Court be pleased to declare that first plaintiff is the owner of the said premises situated at 21, Malti Niwas, being ground floor flat, two garages and the garden attached thereto.

(b) That this Hon'ble Court be pleased to declare that Gurudev Siddha Peeth, the plaintiff No. 2, to whom the property has been intended to be dedicated by its exclusive owner plaintiff No. 1, is entitled to the possession, ownership and the necessary documentation required for the purpose.

(c) That this Hon'ble Court be pleased to declare that the defendants are rank trespassers in the suit premises and pass an order and decree directing the defendants to hand over quiet, vacant and peaceful possession of the said premises and pay damages and compensation to the plaintiffs for use of the premises."

15. This suit was initially filed in this Court on its Original Side. It later stood transferred to the City Civil Court on a change in the pecuniary jurisdictional limits of the two courts. Defendants Nos. 7 to 9 were added by an amendment of 2006. The plaintiffs filed Notice of Motion 1401 of 2005 for interim relief. On 4th May 2005, DG Karnik J directed that no third party rights would be created. In the Notice of Motion, the defendants raised the plea of jurisdiction as a preliminary issue, saying that defendant No.7 was a tenant under a tenancy created by Devki. On 4th June 2008, Mrs Dalvi J of this Court framed the preliminary issue of jurisdiction. On 8th July 2008, Mrs Dalvi J passed another order taking on record the plaintiffs' evidence and appointing a Commissioner for recording evidence. This was completed by September 2013. By this time, the

suit stood transferred to the City Civil Court, which then took up the preliminary issue for decision, resulting in the impugned order. The learned judge of the City Civil Court held that *prima facie* a case of the defendant No.7 was made out, thereby ousting the jurisdiction of the City Civil Court. The learned judge returned the plaint for presentation to the proper Court, an order under Order 7 Rule 10 of the CPC. The Court held:

16. Thus, the plaintiff claimed defendants as trespassers and filed the suit in Civil as the issue regarding jurisdiction is now decided after evidence of the parties, it is important to see whether the defendant has disproved/displaced the jurisdictional fact.

17. I have gone through the evidence produced by both the parties and also answers to the particular questions as mentioned above by both the Ld. Counsels during their arguments. The Ld. Counsel for the defendant has argued at length pointing out the minute details of the evidence of both the parties. It is however, pertinent to note that this Court should not over indulge in the matter and cannot proceed to record finding that defendant no. 7 is a tenant in respect of suit premises, because the same pertains to the jurisdiction of competent Court, i.e., Small Causes Court. Hence, at this stage, it is only necessary to see whether the defendant has brought clinching evidence showing that bar of jurisdiction u/sec.41 of Presidency Small Causes Court Act is attracted in the present case and therefore, the detailed discussion as pointed out by the Ld. Counsel for the defendant would not be necessary.

18. I have gone through the evidence of the defendant as well as plaintiff. Apparently defendant has produced an agreement regarding tenancy and the same was also challenged by the plaintiff as fraudulent and therefore the

document was also referred to expert and three reports of hand writing expert Mr Haresh T. Gajjar are now received in the present case and the expert has lastly opined as follows:

"The disputed signature marked (X-1) and the two disputed initials marked (X-2) and (X-3) on the document marked X/1 as mentioned in detail in Para I above fall within the natural range of variations *inter se* seen in the Eleven Standard Signatures marked (A-1) to (A-11) and Eight Standard Initials marked (A-12) to (A-19) of Ms Malti S. Shetty on the ten documents marked A/1 to A/10."

19. The similar report is also received in respect of disputed signature marked (Y-1) and signature marked (Z-1) and (Z-2). Thus, after going through this report at this stage is clear that the Deed of indenture styled as agreement is prima facie not fraudulent document.

20. The defendant also produced various rent receipts which are colly. Marked as Exh.D-15 and its translation. Thus, documents also pointed out that there is prima facie evidence to show the existence of the tenancy in the present case. Both the parties have also pointed out many other aspects of these two important documents as well the evidence of the defendant as stated above, this Court cannot proceed to decide the issue regarding tenancy, as it pertains to the domain of Small Causes Court. At this stage, I find that the defendant has prima facie made out the case of tenancy in the present case and has apparently disproved the jurisdictional fact put forward by the plaintiff.

21. I therefore find that Civil Court has no jurisdiction to entertain and try the present and therefore I answer this issue in the negative.

22. In view of the above said findings the present suit is not maintainable in Civil Court in view of the provisions of Sec.41 of Presidency Small Causes Court [Act] and Sec.33 of Maharashtra Rent Control Act. **In the result, the plaint is therefore required to be returned to the plaintiff as per the provisions of Order 7 Rule 10 of the CPC.** In the result, I proceed to pass the following order:

ORDER

1. This Civil court has no jurisdiction to entertain and try the present suit **and plaint shall be returned to the plaintiff for presentation to the Court of competent jurisdiction.**
2. There is no order as to costs at this stage.
3. Office shall return the plaint to the plaintiff after keeping xerox copy of the plaint on record.
4. Proceedings in this Court closed.

(Emphasis added)

16. For the appellants, the original plaintiffs, Mr Godbole's quarrel is not so much with the finding of tenancy returned as with the frame of the final order. He submits, and I think correctly as the following discussion shows, that the learned judge ought not to have returned the plaint for a presentation to 'the proper Court'. Once he arrived at a finding, albeit *prima facie*, of the existence of a tenancy, he ought to have dismissed the suit. Had he done so, the plaintiff had the right of a substantive and statutory First Appeal under Order 41 of the CPC. Further, having regard to the frame of the prayers, the suit could not have been dismissed in its entirety. At best, prayer (c) of the plaint could be said to have been barred. This

is because prayer (a), which sought a declaration of title, was not one the Small Causes Court could ever grant; that prayer fell within, and only within, the jurisdictional remit of a civil court.

17. Even before we approach that, with respect, the learned judge was in error on a fundamental issue. The law does not say that, in testing a jurisdictional ouster, a civil court cannot find on the evidence before it whether or not a tenancy exists. If it does, it is simply divested of the jurisdictional power to grant any relief in relation to that tenancy. In *Raizada Topandas & Anr v Gorakhram Gokalchand*,¹ the Supreme Court clearly held that where a plaintiff does not admit the landlord-tenant relationship, the defendant's plea cannot force the plaintiff to go to the Small Causes Court. Otherwise, it would mean that in every case for possession, or in every trespass action, a defendant has merely to plead a tenancy; this is taken a preliminary issue; and, on this formulation, because the civil court 'cannot decide whether there is a tenancy or not', on that plea taken by the defendant, the suit would fail a jurisdictional test, and the suit would have to be re-filed in the Small Causes Court. There, the parties would join issue on the existence or non-existence of a landlord-tenant relationship. There, in the Small Causes Court, a finding would be returned. If that finding was in the negative, i.e., that there was *no* landlord-tenant relationship, the suit in the Small Causes Court would be dismissed, and the hapless plaintiff would have to return to the civil court and start all over again. In short, the logical consequence of this is that every single possession suit must, willy-nilly, be filed first in the Court of Small Causes, if for no other reason than in anticipation of a defence of

1 (1964) 3 SCR 214.

tenancy; because that defence, on being merely stated, is a sufficient ouster of a civil court's jurisdiction. The submission needs only to be stated to be rejected.²

18. *Raizada Topandas* fully covers the case at hand. There, the Supreme Court said:

6. ... [L]eaving out what is unnecessary for our purpose Section 28(1) states that notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction, the Court of Small Causes in Greater Bombay shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part (meaning thereby Part II) apply and to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its provisions and no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with any such claim or question. **It is to be noticed that the operative part of the sub-section refers to two matters (a) any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of Part II apply and (b) any application made under the Act or any claim or question arising out of this Act or any of its provisions. What is the true effect of sub-section (1) of Section 28 with regard to the aforesaid two matters? Does it mean that if the defendant raises a claim or question as to the existence of a relationship of landlord and tenant**

² *Raizada Topandas* anticipates precisely such a situation, and rejects it as untenable.

between him and the plaintiff, the jurisdiction of the City civil court is ousted even though the plaintiff pleads that there is no such relationship, and the only court which has exclusive jurisdiction to try the suit, is the Court of Small Causes, Bombay? That is the question before us.

In answering this question it is perhaps necessary to refer to the general principle which admittedly governs the question of jurisdiction at the inception of suits. This general principle has been well explained in the Full Bench decision of the Allahabad High Court, *Ananti v. Channu* [52 Allahabad 501] and has not been disputed before us. It was observed there:

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If ... he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint, as framed, would not justify the other kind of court to grant him the relief ...

If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognisable by the court, there will be two kinds of orders to be passed.

If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court. If, on the

other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety."

Having regard to the general principle stated above, we think that the view taken by the High Court in this case is correct. Section 28 no doubt gives exclusive jurisdiction to the Court of Small Causes to entertain and try a suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises to which any of the provisions of Part II apply; it also gives exclusive jurisdiction to decide any application under the Act and any claim or question arising out of the Act or any of its provisions — all this notwithstanding anything contained in any other law. The argument of learned counsel for the appellants is that the section in effect states that notwithstanding any general principle, all claims or questions under the Act shall be tried exclusively by the courts mentioned in the section e.g. the Court of Small Causes in Greater Bombay, and it does not matter whether the claim or question is raised by the plaintiff or the defendant. The argument is plausible, but appears to us to be untenable on a careful scrutiny. **We do not think that the section says or intends to say that the plea of the defendant will determine or change the forum. It proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under the Act as to parties, between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as questions as between the rightful owner and a trespasser or licensee, for such questions do not arise under the Act. If, therefore, the plaintiff in his plaint does not admit a relation which**

would attract any of the provisions of the Act on which the exclusive jurisdiction given under Section 28 depends, we do not think that the defendant by his plea can force the plaintiff to go to a forum where on his averments he cannot go. The interpretation canvassed for by the appellants will give rise to anomalous results; for example, the defendant may in every case force the plaintiff to go to the Court of Small Causes and secondly, if the Court of Small Causes finds against the defendant's plea, the plaint may have to be returned for presentation to the proper court for a second time.

Learned counsel for the appellants has argued in the alternative that the Court of Small Causes need not return the plaint a second time, for his contention is that that court has "exclusive" jurisdiction to decide the case whenever a claim is made under the Act even though the claim is found to be false on trial. We do not think that this contention can be accepted as correct, for to do so would be to hold that the Court of Small Causes has exclusive jurisdiction to decide questions of title, which is clearly negated by Section 29-A. Anomalous results may not be a conclusive argument, but when one has regard to the provisions in Part II it seems reasonably clear that the exclusive jurisdiction conferred by Section 28 is really dependent on an existing or previous relationship of landlord and tenant and on claims arising under the Act as between such parties.

(Emphasis added)

19. Straightaway, therefore, the order of 'return of the plaint' cannot be sustained. This was not a case of jurisdiction relating to territorial or pecuniary limits; had it been, an order of return of the plaint was correct. It was a finding that the suit *as instituted* was not

cognizable by the civil court at all. That had to result in a dismissal of the suit — assuming that the entire suit could be so dismissed.³

20. There remains the question of whether the whole suit could have been dismissed, given the frame of prayer clause (a). Here again, I believe Mr Godbole is correct, and the Small Causes Court could not ever have granted a declaration of title.⁴ Interestingly, on the issue of a title declaration, the Small Causes Court could have returned the plaint for presentation to the appropriate court, but the converse is not true. This is *inter alia* because Section 23 of the Provincial Small Causes Court specifically provides for a return of a plaint for determination of questions of title.⁵

21. Mr Toor for the contesting respondents argued that an order of recovery of possession from a tenant, and a declaration of tenancy, are solely within the purview of the Small Causes Court. There can be no quarrelling with this proposition. He also urged that the plaintiffs themselves canvassed a case of a gratuitous license, and therefore, following the decision in *Prabhudas Damodar Kotecha and Ors v Manharbala Jeram Damodar and Anr*,⁶ only the Small Causes Court would have jurisdiction. That jurisdiction is

3 *Om Prakash Gupta v Dr Rattan Singh & Anr*, (1964) 1 SCR 259, was a case in the reverse direction: the question there was of the ouster of the special tenancy jurisdiction upon the defendant denying the relationship of landlord and tenant. The Supreme Court held that a mere denial of the relationship would not oust the jurisdiction of the tenancy court.

4 *Ramji Gupta & Anr v Gopi Krishan Agrawal & Ors*, (2013) 9 SCC 438.

5 **See:** *Nirmal Jeet Singh Hoon v Irtiza Hussain & Ors*, (2010) 14 SCC 564, followed in *Ramji Gupta, supra*.

6 (2013) 15 SCC 358.

exclusive and exclusionary — even an arbitration agreement is ousted.⁷

22. The decision of the Division Bench of this Court in *Smita Rajeev Sah v Roop Narain Sah*⁸ is apposite. Dr Chandrachud J (as he then was) speaking for the Division Bench said:

1. This appeal arises from an order of a learned Single Judge dated 16 March, 2012 deciding a preliminary issue of jurisdiction.

2. The first Appellant is the widowed daughter-in-law of the first and second Respondents. The second Appellant is the daughter of the first Appellant. The Respondents were 68 and 63 years of age respectively when the suit was instituted in 1995. The suit is for a declaration that the First Respondent is the lawful and rightful owner of flat A-51 together with a garage in a building known as Meherina, situate at Plot No. C-51, Napean Sea Road, Mumbai 400 026. The Respondents seek a declaration that the Appellants are trespassers and have no right, title or interest in the flat. Among the prayers is a prayer for possession, styled as a mandatory order and decree requiring the Appellants to remove themselves from the flat. The suit proceeds on the basis that the flat was purchased under an agreement for sale dated 11 June, 1965 by the First Respondent for a consideration of Rs. 1.80 lakhs and that the share certificate stands in the name of the First Respondent. The First Appellant and her spouse, who was the son of the Respondents, got married in 1982 and it has been stated that the Respondents permitted

7 *Central Warehousing Corporation v Fortpoint Automotive Pvt Ltd*, 2010 (1) Bom CR 560 (FB).

8 2013 SCC OnLine Bom 474 : (2013) 5 Mah LJ 211 : (2013) 6 Bom CR 193

their son to reside with them as a member of the family. After he died in an accident on 29 October, 1994 it has been stated that the First Appellant "is now wrongfully claiming ownership/or share" in the said flat belonging to the First Respondent. For the purpose of these proceedings, it is not necessary to refer to the genesis or details of the dispute or the allegations of harassment made by the Respondents.

3. Issues were framed in the suit on 10 January, 2011. On 22 February, 2012 when the suit reached hearing, the Appellants asserted that in view of the decision of a Full Bench of this Court in *Prabhudas D. Kotecha v. Manharbala J. Damodar*, 2007 (5) Mh.LJ. (F.B.) 341 : 2007 (5) Bom.C.R. 1 the Court of Small Causes has exclusive jurisdiction to entertain and decide a suit against a gratuitous licensee. Hence, it was urged that the jurisdiction of this Court would be barred. In view of this defence, the following issue was framed as a preliminary issue:

"Whether this Court's inherent jurisdiction is barred".

The learned Single Judge has answered the preliminary issue by holding that the jurisdiction of this Court is not barred.

4. Counsel appearing on behalf of the Appellants submits that: (i) If the Appellants were to seek to establish a right to the premises, they would undoubtedly have to file a suit in the competent civil court; but in the present case, if the plaint is read in its entirety, it would be apparent that what the Respondents seek is possession of the premises from the Appellants; (ii) A suit for possession even against a gratuitous licensee is maintainable only before the Small Causes Court in view of the judgment of the Full Bench in *Prabhudas D. Kotecha's* case (supra); and (iii) **In any case,**

even before the Small Causes Court, where a suit for eviction is filed, the question of title would have to be determined.

5. On the other hand, it was contended on behalf of the Respondents that: (i) A suit for a declaration under section 34 of the Specific Relief Act, 1963 would lie before this Court. The Respondents are required to seek such a declaration since the Appellants have asserted a claim and interest in respect of the premises on the ground that it is H.U.F. property; **(ii) Once the Appellants have sought to interfere with or deny the title of the First Respondent in respect of the residential flat, the Respondents would necessarily have to seek and have sought a declaration before this Court on title and consequent to that, a decree for possession; (iii) The Small Causes Court would have no jurisdiction to adjudicate upon a question of title in view of the provisions of section 19(s) of the Presidency Small Causes Courts Act, 1882. Moreover, section 45 stipulates that nothing contained in Chapter VII (which would include section 41) shall be deemed to bar a party to a suit in which a question of title to any immovable property arises and is determined, from suing in a competent court to establish his title to such property.**

6. A reading of the plaint in the suit instituted by the Respondents would indicate that they seek first and foremost a declaration of title to the residential flat as vesting in the First Respondent in view of the fact that the flat was purchased by him on 11 June, 1965 for a consideration of Rs. 1.80 lakhs. According to the Respondents, the deceased spouse of the First Appellant was a young child when the residential flat was purchased. The declaration has been sought in view of the fact that it has been averred in paragraph 3(d) of the plaint that the First Appellant is claiming ownership and/or a share in the

residential flat. **The suit is a declaratory suit within the meaning of section 34 of the Specific Relief Act, 1963. Under the proviso to section 34, no Court shall make any declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.** The Respondents claim that they are entitled to possession and seek a mandatory injunction calling upon the Appellants to remove themselves from the residential flat.

7. The objection of the Appellants to the jurisdiction of this Court is founded on the provisions of section 41 of the Presidency Small Causes Courts Act, 1882 under which notwithstanding anything contained elsewhere in the Act, but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject-matter of such suits or proceedings. The Full Bench has held in *Kotecha* that this would cover a suit against a gratuitous licensee. **Section 41 forms a part of Chapter VII of the Act of 1882. Section 45, however, stipulates as follows:—**

“45. Nothing contained in this Chapter shall be deemed to bar a party to a suit, appeal or proceeding mentioned therein in which a question of title to any immovable property arises and is determined, from suing in a competent court to establish his title to such property.”

Consequently, notwithstanding anything contained in any other provisions of that Chapter, including section 41, **there**

is no bar to a party to a suit in which a question of title to any immovable property arises from suing in a competent court to establish his title to such property. Apart from this, section 19(s) of the Act of 1882 specifically stipulates that the Small Causes Court shall have no jurisdiction *inter alia* in suits for declaratory decrees. From these provisions, it is clear that a suit seeking a declaration of title and in consequence a decree for possession of the nature that has been sought would be maintainable before this Court and the jurisdiction would not be barred by the provisions of section 41 of the Presidency Small Causes Courts Act, 1882. The question of title cannot be decided by the Court of Small Causes. Whether the First Respondent has an absolute right of ownership as claimed is an issue which has to be decided in the suit before this Court in which a declaration of title is sought. The view of the learned Single Judge cannot, therefore, be held to be in error.

(Emphasis added)

23. The present case differs from *Smita Rajeev Sah* only in this particular, viz., that there is an admission of a gratuitous license, and there is a finding of the existence of a tenancy. Consequently, the relief of possession *vis-à-vis* a tenant could not be granted by the City Civil Court. However, the question of declaration of title and ownership is not one that the Small Causes Court could ever grant. Even if the title is admitted, a decree on admission could only be granted by the City Civil Court and never the Small Causes Court. The provisions of Section 45 of the Presidency Small Causes Court would bar the Small Causes Court from ever issuing any such declaration.

24. For this reason, prayers (a) and (b) of the suit can only be within the remit of the City Civil Court. Only prayer clause (c), seeking a decree of possession against the defendants would be outside the jurisdiction of the City Civil Court and within the exclusive jurisdiction of the Small Causes Court, now that there is a finding, after evidence, of the existence of a tenancy in favour of those defendants against whom the decree of possession is sought.

25. The suit could not, therefore, have been 'returned for presentation' to the Small Causes Court. That order is unsustainable. If at all, the entire suit would have had to be dismissed; or, alternatively, retained for prayers (a) and (b) and dismissed in regard to prayer (c).

26. The Appeal is therefore allowed. The impugned order is set aside. It will not be necessary for the Trial Court to re-appreciate the evidence in regard to the tenancy, and the previous findings may be accepted, since I have not addressed these at all, but confined myself to the frame of the final order. Having regard to the provisions of Section 34 of the Specific Relief Act, 1963 and its proviso, and the stand of the defendants in relation to the plaintiffs' claim of title, it will be for the City Civil Court to determine whether the suit is to be dismissed wholly or only in regard to prayer clause (c).

27. No costs.

(G.S. PATEL, J.)