

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1173 OF 1996

Sou. Bhamabai Wife of Ananda Raut,)
 aged about 38 years, Occ. Hawker,)
 Resident of CTS No.1294/2, B-Ward,)
 Southern Side Room, Kolhapur.)...Petitioner (Orig. Deft.no.3)

versus

1.Sudhir @ Dnyandeo Purushottam Petkar,)
 Age 35 years, Occ. Ptg,)
)
 2. Ananda Purushottam Petkar, age 31 years)
 Occ.Ptg., both residing at 3294/2, B-Ward)
 Kolhapur.)
)
 3.Vasant Dattatraya Potdar, Adult,)
 Occupation Goldsmith, resident of 2357/B,)
 Devani Galli, Kolhapur,)
)
 4. Ananda Keraba Raut, age 42 yrs.,)
 Occupation: Service, resident of Pandarpur)
 (deleted))...Respondents.

Mr.V.A.Desai i/b. Mr.A.P.Mundargi, for Petitioner.

Mr.R.R.Shinde i/b Mr.A.Y.Sakhare, for the Respondents.

CORAM : G. S. KULKARNI, J.

DATE : 28 NOVEMBER 2017

JUDGMENT :

1. By this petition under Article 227 of the Constitution of India, the petitioner-tenant (Defendant No.3) challenges the judgment and order dated 20

September 1995 passed by the 2nd Additional District Judge, Kolhapur whereby the petitioner's appeal against the judgment and decree dated 31 January 1992 passed by the Joint Civil Judge, Junior Division, Kolhapur, in Regular Civil Suit No.157 of 1989 has been dismissed. In the said civil suit respondent nos.1 and 2 are the original plaintiffs -landlords. Respondent No.3 is Defendant No.1 – tenant who was let out the suit premises. Respondent No.4 is Defendant No.2 who is the husband of the petitioner who appears to have separated from the petitioner. The petitioner is defendant No.3 who asserted a claim to be the tenant of the suit premises on account of her occupation of the suit premises. For sake of convenience the parties herein are referred as they stand before the trial Court.

2. Briefly the facts are:-

Plaintiff nos.1 and 2 (Respondent Nos.1 & 2) are the owners of the land and building situated on City Survey no.1291/2. The premises as let out to defendant No.1 (Respondent No.3) was one room admeasuring 12 ft. X 10 ft. (for short 'the suit room') in the suit building standing on the said land.

3. The case of the plaintiffs as set out in the plaint was that from 1 February 1989, defendant no.1 was inducted as monthly tenant in the suit room on a rent of Rs.75/- per month. In addition, defendant no.1-tenant was to pay Rs.10/- per month as light charges. Defendant No.1 had committed willful default in payment of rent from 1 September 1985 till 31 August 1988 which amounted to Rs.2700/- and Rs.360/- towards light charges as arrears of rent. Further defendant no.1-tenant was not residing in the suit room and had inducted defendant no.2

and his wife-defendant no.3 in the suit room and defendant no.1-tenant was no more in the need of the suit premises. Plaintiffs averred in the plaint that they required suit premises reasonably and bonafide for expanding their stationary business. In these circumstances, a notice was addressed to Defendant No.1 through the Advocate of the plaintiffs dated 16 September 1981 calling upon him to pay arrears of rent and other charges. Also the tenancy of defendant no.1-tenant was terminated with effect from 31 October 1988. This notice was not complied by defendant no.1-tenant, however was replied by letter dated 24 November 1988 interalia stating that the financial condition of defendant no.1 was not sound. Defendant no.1 showed his willingness to pay arrears as claimed. Defendant No.1 also recorded that he knew defendant no.2 and defendant no.3-wife of defendant no.2 and had allowed them to reside in the suit room, however, he was not accepting any rent from them as they were not sub-tenants. Defendant no.1 recorded his assurance to the plaintiffs that within few months, he would deliver possession of the suit room to the plaintiff. As defendant no.1 neither paid the rent nor handed over the possession of the suit room, the plaintiffs filed the suit in question for recovery of arrears of rent and possession.

4. Defendant no.2 (husband of the petitioner) moved an application (Exhibit 27) before the trial court praying that he be deleted as a defendant from the suit and was accordingly deleted. Defendant no.1-tenant did not file written statement. Defendant no.3 (petitioner) filed written statement and contested the suit. Defendant No.3 admitted the description of the suit property and the ownership of the plaintiffs. Defendant No.3 stated that she was not knowing that

the defendant no.1 was a tenant on monthly rent Rs.75/- per month from 1 February 1989 and Rs.10/- was to be paid as light charges and that he was in arrears of rent. Defendant No.3 admitted that defendant no.1 was not residing in the suit room. She also denied that she was not sub-tenant of defendant no.1. Defendant No.3 claimed complete ignorance about issuance of notice by the plaintiffs to defendant no.1 regarding arrears of rent and termination of tenancy and claimed that the said notices were not binding on her. The case of defendant no.3 was that one Bhagwan Dattatraya Potdar-brother of defendant no.1-tenant had inducted her husband (defendant no.2) into the suit room and who was his employee and was deducting Rs.60/- per month, as rent from his salary and this was known to the plaintiffs. Thereafter Defendant No.3 stated that she was residing alongwith her children in the suit room and this was to the knowledge of the plaintiffs. When defendant no.2, her husband left the house on ceasing to cohabit with defendant no.3, she had forwarded rent by money order which was refused by the plaintiffs. Thereafter, defendant no.3 is depositing the rent in the Court. Defendant no.3 averred that her children were going to nearby school and if she is evicted, it would cause severe hardship to her. Respondent No.3 further averred that she had constructed a wall at her cost which was demolished by the Kolhapur Municipal Corporation for road widening. Thus the case of the defendant No.3 was that she was a tenant of the suit room.

5. The parties on the above pleadings went to trial in the 1989 civil suit. The learned trial Judge framed eleven issues. The relevant issue was issue no.6 that is *'as to whether defendant no.3 proves that in the suit room defendant*

no.1's brother Bhagwan Dattatraya Potdar was the tenant and the suit premises were given in possession of defendants 2 and 3 as tenants of the plaintiffs as per oral agreement between plaintiffs and the said Bhagwan Dattatraya Potdar.'

Considering the evidence as placed on record, the learned trial Judge held that defendant no.1-tenant was in arrears of rent as also he admitted the facts of inducting defendant nos.2 and 3 and that they were not the sub-tenants. It was held that defendant no.3 also failed to prove that she was the tenant of the suit room even under any oral agreement. The learned trial judge held that the defendant no.3 never asserted her tenancy rights by approaching the court by filing any independent/separate suit. The learned trial judge thus held that defendant no.3 had no legal rights to be in possession of the suit room. It was held that defendant no.3 was a mere trespasser. It was further held that even the oral agreement as asserted by defendant no.3 with Bhagwan Dattatraya Potdar and defendant no.1 also was not proved and thus was not an acceptable contention as defendant no.3 had failed to examine Bhagwan D. Potdar. The learned trial Judge decreed the suit in the following terms:-

- “1. The suit is decreed with costs.
2. The defendant no.1 do pay to plaintiffs Rs.3585.00 towards rent and the charges for use and occupation including the costs or the notice Rs.100/-.
3. The defendants no.1 and 3 do deliver vacant possession to the plaintiffs within two months from the date of this order.
4. There shall be enquiry into mesne profit under order 20 rule 12 of the C.P.Code.
5. Decree be drawn accordingly.”

6. Defendant no.3 being aggrieved by the judgment and decree of the trial court, approached the Court of Additional District Judge, Kolhapur, by filing Regular Civil Appeal No.600 of 1993. As recorded by the learned Appellate Judge in paragraph 2 of the impugned order, the only point which was urged on behalf of defendant no.3 was the issue of jurisdiction of the learned Trial Judge to try the suit in question. Defendant no.3 did not urge any other ground on the merits of the case as decided by the learned trial Judge. The learned appellate judge in paragraph 2 of the judgment has observed thus:-

“2. It is to be noted at this juncture that the counsel for the appellant has hammered only on the point of jurisdiction to try the suit by the trial court. No other points on merits are argued by him and therefore there is no necessary for me to go into the pleadings and the evidence of both the parties in detail.”

7. Thus the only contention as urged on behalf of Defendant No.3/petitioner before the appellate court was the issue of jurisdiction of the trial Court to try the suit. The contention was that the trial Court had no jurisdiction under Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'the Bombay Rent Act') as there was no relationship of landlord and tenant between the plaintiffs and defendant no.3. In view of the observation of the trial court that defendant no.3 was a trespasser and therefore, the suit could not have been entertained under Section 28 of the Bombay Rent Act. Defendant No.3

asserted that the plaintiffs were required to give notice under Section 106 of the Transfer of Property Act, 1882 to defendant no.3 and then ought to have filed a suit in the court of the Civil Judge and not in a court having jurisdiction to entertain the suit under the Bombay Rent Act. This contention as urged on behalf of defendant no.3 was repelled by the learned Appellate Judge on the ground that it was misconceived on the part of defendant no.3 to raise the issue on the basis of the observations made by the learned trial Judge. It was held that once a decree was passed against defendant no.1, defendant no.3 could not have continued in possession over the suit room in the absence of any legal right as proved by the plaintiffs, the defendant no.3 could not have remained in possession of the suit premises and was rightly held to be a trespasser by the trial court. It was held that the decree as passed by the trial Court was not without jurisdiction as it was well settled that it was not necessary to prove the relationship of a landlord and tenant in respect of all the matters covered by Section 28(1) of the Bombay Rent Act. The learned Appellate Court accordingly dismissed the appeal of defendant no.3. On the above conspectus, defendant no.3 filled the present petition.

8. Learned Counsel for defendant no.3/petitioner on the above backdrop has argued and made submissions only on the issue of jurisdiction of the trial court to pass a decree against defendant no.3. It is submitted that once the learned trial Judge has held that defendant

no.3/petitioner was a trespasser, then, it was clear that the trial Court had no jurisdiction under Section 28 of the Bombay Rent Act. It is submitted that at the most the trial Court could have passed a decree only against defendant no.1/tenant and not against defendant no.3, as there was no relationship of landlord and tenant. In support of this submission, learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case “*Abdulla Bin Ali & Ors. Vs. Galappa & Ors.*”¹

9. On the other hand, learned Counsel for the plaintiffs/respondent nos.2 and 3 has supported the orders passed by the learned trial Judge as also the learned appellate Judge. It is submitted that the learned appellate Judge is correct in reaching to the conclusion that the trial court had jurisdiction to try and entertain the suit in question inasmuch as it was a suit properly filed against defendant no.1/tenant as also defendant nos.2 and 3 who were found in possession of the suit premises and who were so acknowledged by the defendant no.1-tenant. It is submitted that once defendant no.1 himself conceded that defendant nos.2 and 3 were not the sub-tenants, it was clear that they have no legal rights to be in possession of the suit room much less defendant no.3. It is submitted that defendant no.3 could not succeed in her assertion that she had become the tenant of the suit room. It is therefore, submitted that there is no perversity in the findings as recorded by the Courts below and

1AIR 1985 SC 577

the petition, therefore, deserves to be dismissed.

10. I have heard the learned Counsel for the parties and with their assistance I have gone through the judgment of the learned trial Judge as also of the learned appellate Judge. I have also perused the record and proceedings.

11. At the outset, it may be observed that defendant no.3/petitioner has not assailed the findings of the learned trial Judge on merits of the case. It is only the issue of jurisdiction of the said court to try and entertain the suit which was assailed by defendant no.3/petitioner before the appellate Court namely 'whether the Court has jurisdiction to entertain the suit under Section 28 of the Bombay Rent Act.' It would be appropriate to note Section 28 of the Bombay Rent Act which provides for jurisdiction of the Court which reads thus:-

“Section 28 - Jurisdiction of Courts

[1] 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.-

(a) in Greater Bombay, the Court of Small Causes, Bombay,

[(aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and]

(b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

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 Party apply [or between a licensor and a licensee relating to the recovery of the licence fee or charge] and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and [subject to the provisions of sub-section (2),] no other court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question.
(emphasis supplied)

12. The issue 'as to whether only when there is relationship between the parties of "landlord and tenant", the Court would have jurisdiction under Section 28(1) of the Bombay Rent Act, is no more *res integra*. The Supreme Court in their case "***Sushila Kashinath Dhonde & Ors. Vs. Harilal Govindji Bhogani & Ors***"² considering the provisions of Section 28(1) of the Act and referring to the earlier decisions in "*Importers and Manufacturers Ltd. Vs. Pheroze Framrose Taraporewala*" held that it was not necessary that there should be a relationship of landlord and tenant in respect of all the matters covered by Section 28(1) of the Act, so as to give jurisdiction to the Court of Small Causes . The observations of their Lordship in paragraphs 13, 18 and 26 are relevant which read thus:-

"13. Having due regard to the aspects mentioned above and the provisions of Section 18(3) and 28(1), in our opinion, it is not necessary that there should be a relationship of landlord and tenant in respect of all the matters covered by Section 28(1) of the Act, so as to give jurisdiction to the Court of Small Causes. No doubt, one type of action contemplated under that section, viz., a suit or proceeding for recovery of rent or possession of any premises to which any of the provisions of Part II apply may be between a landlord and a tenant; but in respect of the other matters dealt with in that sub-section, it is not necessary that the

2 1969(3) SCC 223

relationship of landlord and tenant should exist between the parties before the Court.

.....

18. We may also refer to a decision of this Court in *Importers and Manufacturers Ltd. Vs. Pheroze Framrose Taraporewala*. The landlord in that case had instituted the suit in the Court of Small Causes, Bombay, against his tenant and the sub-tenant for recovery of possession of the premises and also for compensation. According to the landlord the tenant had sub-let the premises without his previous consent and contrary to the terms of the tenancy. The Trial Court granted a decree in favour of the plaintiff. The defendants filed an appeal under Section 29 of the Act and before the appellate court they raised an additional plea that the Court of Small Causes had no jurisdiction to entertain the suit in so far as it related to the second defendant, the sub-lessee. The Appellate Bench of the Small Causes Court dismissed the appeal. The sub-lessee moved the High Court unsuccessfully in revision under Section 115, C.P.C. He came up to this Court by special leave and the only contention raised was that the Small Causes Court had no jurisdiction to entertain the suit under Section 28 of the Act. The contention of the sub-lessee was that his sub-lease has not been recognized by the landlord and there was no relationship of landlord and tenant between him and the plaintiff and therefore the Small Causes Court had no jurisdiction to entertain the suit. After holding that so far as the plaintiff and the first defendant (the tenant) were concerned, the suit being between a landlord and tenant, the only Court competent to entertain the suit under Section 28 was the Court of Small Causes, this Court observed at p.230:

“Section 28 confers jurisdiction on the Court of Small Causes not only to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of the premises but also 'to deal with any claim or question arising out of this Act or any of its provisions'. There is no reason to hold that 'any claim or question' must necessarily be one between the landlord and the tenant. In any case, once there is a suit between

a landlord and a tenant relating to the recovery of rent or possession of the premises the Small Causes Court acquires the jurisdiction not only to entertain that suit but also 'to deal with any claim or question arising out of the Act or any of its provisions ' which may properly be raised in such a suit."

In the above extract, this Court, in our opinion, has clearly laid down that when the Court of Small Causes under Section 28 of the Act is invited "to deal with any claim or question arising out of this Act or any of its provisions" the relationship between the parties to such proceedings need not be that of a landlord and a tenant. Mr.Hattangadi no doubt stressed the later part of the observations in the above extract wherein, according to him, this Court has emphasised that in that particular case the suit was between the landlord-plaintiff and the first-defendant tenant and, in consequence, held that the Small Causes Court had jurisdiction. In our opinion this is not a proper understanding of the principle enunciated by this Court. This Court has categorically held that the claim or question which the Small Causes Court is called upon to consider need not necessarily be between a landlord and a tenant. After having so held, this Court gave only an additional reason for upholding the jurisdiction of the Small Causes Court on the ground that the suit was between the landlord and the first-defendant who was admittedly a tenant.

... .."

13. In the facts of the present case, it is clear that the above position in law would apply with full force for two reasons, firstly the suit in question was a composite suit against the tenant as also defendant nos.1, 2 and 3 who were found in possession. Secondly, defendant no.3/petitioner had also asserted a plea that the defendant no.3 petitioner had become a tenant as defendant no.3/petitioner was earlier paying rent

to one Bhagwan Dattatraya Potdar, and this was an accepted arrangement between the plaintiffs, Bhagwan Potdar and defendant no.3/petitioner, as orally agreed between the parties. Defendant No.3 also asserted that she offered rent to the plaintiffs by money order however it was declined by the plaintiffs. Thus, this was a clear assertion of tenancy by defendant no.3/petitioner in her own right. This being the position on record, then, in my opinion, the eviction suit as instituted by the plaintiff against defendant no.3 squarely fell under the provisions of Section 28(1) of the Bombay Rent Act, which would confer jurisdiction on the court to decide any claim or question arising under the Bombay Rent Act. It was only after appreciation of evidence which had come on record, the learned trial Judge had reached to the conclusion that defendant no.3 had no independent legal rights to be in possession of the suit room, and that the occupation of defendant no.3 was illegal. It is significant that defendant no.3/petitioner had never put up a case before the learned trial Judge that the Court had no jurisdiction on the contrary asserted tenancy and it was for the first time on the basis of the observations as made by the learned trial Judge holding defendant no.3/petitioner to be a trespasser, asserted that issue before the appellate Court. In fact, such assertion by defendant no.3 was contrary to the plea she had set up in defending the suit. It is not permissible to shift stands and take contradictory positions. Further in doing so, the defendant no.3/petitioner completely overlooked another factor that the jurisdiction of the Court was required to be decided from the averments as made out in

the plaint and the question of jurisdiction could not have been urged on the basis of the observations as made by the Court. It is further significant that the defendant no.3/petitioner has accepted the findings on the merits of the matter and that there are clear finding of facts recorded by the learned trial Judge and accepted by defendant no.3/petitioner that the petitioner had no independent right or interest of any nature to be continued in occupation of the suit premises. Defendant no.1/respondent no.3 had accepted that he was a defaulter in making payment of the rent as also that he would hand over vacant possession of the suit premises to the plaintiff. Defendant no.1-tenant did not contest the suit and thus the finding on the merits of the matter on the termination of tenancy of defendant no.1 and the defendant no.1 being in arrears of rent, had attained finality.

14. In the above background, in my opinion, the contention as urged on behalf of defendant no.3 that the Court lacks jurisdiction to try the suit in question, cannot be accepted and it was rightly rejected by the learned Appellate Judge. The decision in the case “**Abdulla Bin Ali & Ors. Vs. Galappa & Ors**” (supra) would also not assist the defendant no.3/petitioner as it was a case where the landlord had earlier initiated proceedings against the tenant before the revenue Court for recovery of arrears of rent and for correction of tenancy register which was dismissed for want of jurisdiction. The tenant had denied the title of the landlord in those proceedings. Subsequently, a regular suit was filed by the landlord

for possession and mesne profit before the Civil Court alleging that the tenant was a trespasser. On entertaining the suit, the Court held that the landlord could not be non-suited on ground that he had not claimed a declaration of title and that he has set up the relationship of landlord and tenant in the plaint and it was held that the suit was cognizable by the civil Court.

15. The present case is not a case where the plaintiffs have approached the civil Court claiming that defendant nos.2 and 3 were trespassers but on an assertion that they were in possession of the suit room. As noted above in this situation Section 28 of the Act was clearly applicable, so as to cover a claim or question arising under the Bombay Rent Act. The suit in question was filed seeking relief against defendant no.1 who was a tenant. Further, defendant no.3 in the written statement asserted that she has become a tenant of the suit premises. An issue to that effect was also framed by the learned trial Judge as noted above being issue no.6. It was thus the case that the plaintiffs had instituted a suit on issues arising for determination by Court falling under Section 28 of the Bombay Rent Act involving disputes touching the relationship of a landlord and tenant. The learned appellate Judge has clearly applied the settled principle of law namely that the averments as made in the plaint would be the relevant to determine the jurisdiction of the court. On reading of the plaint, it was evident that the plaintiffs had approached the Court seeking a

decree of possession on the ground that the defendant no.1 was a defaulter being in arrears of payment of rent as also defendant nos.2 and 3 did not have any right to occupy the suit room in any capacity much less in the capacity of a tenant and that the plaintiffs were thus entitled to a decree against defendant nos.1 to 3. Thus, there is nothing erroneous or perverse in the findings and the approach of the learned appellate Judge.

16. In the circumstances, the petition is devoid of merits. It is accordingly dismissed.

17. The petitioner/defendant no.3 is directed to hand over possession of the suit room to respondent nos.1 and 2 -landlords within a period of eight weeks from today. No costs.

(G.S.Kulkarni, J)