

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1888 OF 2007

1. Rajani Ramchandra Shinde
Age 65 years, Occ. Service
 2. Gangaram Ramchandra Shinde
Age 40 years, Occ. Service
R/at Room No.1, Francis Gargachi Chawl,
Shreeram Lane, Near Sai Mandir,
Worli, Koliwada, Mumbai 400 025
- ... Appellants

-vs-

Moreshwar Vasant Chavan
Age 47 years, Occ. Service
R/at Room No.1, Francis Gargachi Chawl,
Shreeram Lane, Near Sai Mandir,
Worli, Koliwada, Mumbai 400 025

... Respondent

Shri Shashank Thatte, Advocate and Shri Ranjit Agashe, Advocate with
Vrushali Salvi, Advocate for appellants.
Shri Prakash Mahadik, Advocate for respondent.

CORAM : A. S CHANDURKAR, J.

ARGUMENTS WERE HEARD ON : NOVEMBER 21, 2018
JUDGMENT PRONOUNCED ON : NOVEMBER 28, 2018

Judgment :

This appeal under Section 96 of the Code of Civil Procedure, 1908 has been preferred by the original defendants who are aggrieved by the decree passed by the trial Court directing them to vacate the suit premises and also pay an amount of Rs.1000/- per month as compensation for use

and occupation of the suit premises.

2. The facts in brief as pleaded by the respondent-plaintiff are that the suit property is a room situated in a chawl. According to the plaintiff his grandmother Anandibai Chavan was the tenant of the same. Said Anandibai Chavan surrendered her rights as tenant in the suit premises in favour of the plaintiff by executing an irrevocable Power of Attorney on 09/09/1993. The plaintiff and his family members were residing in the suit room and were also paying rent to the landlord. The rent receipt was also transferred in the name of the plaintiff. The grandmother expired on 13/12/1995 after which the plaintiff and other family members continued residing therein. According to the plaintiff the defendants were related to the plaintiff and as they had some difficulty in finding residential accommodation, the plaintiff allowed them to reside in the suit premises for a temporary period. The plaintiff relying upon the assurance given by the defendants that they would vacate the same within a short period, permitted them to occupy the suit premises. The plaintiff thereafter requested the defendants to vacate the suit premises but the defendants refused to do so. They proceeded to file proceedings against the plaintiff without any legal basis. The plaintiff therefore filed suit before the City Civil Court, Mumbai seeking a declaration that the defendants were rank trespassers in the suit property and were liable to vacate the same. It was also prayed that the defendants be directed to pay

compensation of Rs.1000/- per month from the date of filing of the suit till delivery of possession.

3. The defendant No.1 filed her written statement and raised a plea that the civil Court had no jurisdiction to entertain the suit in view of provisions of Section 41 of the Presidency Small Cause Courts Act, 1882 (for short, the said Act). It was further pleaded that the original tenant Anandibai Chavan was the mother of defendant No.1 and that said defendant was residing with her mother during her life time. It was denied that the defendants were permitted to stay in the suit premises for a temporary period as pleaded. It was hence pleaded that the suit was liable to be dismissed.

4. The parties led evidence before the trial Court and after considering the same the trial Court held that the plaintiff had proved his right, title and interest in the suit property. The civil Court had jurisdiction to entertain the suit and that the defendants were not entitled to continue in possession. The suit was accordingly decreed and the defendants were declared as trespassers. They were directed to vacate the suit premises and also pay an amount of Rs.1000/- per month as compensation from the date of filing of the suit. Being aggrieved the defendants have filed this appeal.

5. Shri S. Thatte, learned counsel for the appellants submitted that the civil Court has no jurisdiction to entertain the suit as filed in view of provisions of Section 41 of the said Act. It was submitted that as per the averments in the plaint it was the case of the plaintiff that the defendants were allowed to stay in the suit premises for a temporary period. Accordingly a license stood created in favour of the defendants and in view of provisions of Section 41 of the said Act, a suit between a licensor and licensee could be entertained only by the Court of Small Causes and not by the civil Court. It was submitted that the legal position in this regard stands settled in view of the decision of the Honourable Supreme Court in case of ***Prabhudas Damodar Kotecha vs. Manharbala Jeram Damodar and Anr.*** **2013 (10) SCALE 242.** The learned counsel submitted that the trial Court erred in answering Issue No.4 in favour of the plaintiff and that conclusion was arrived at without considering the plaint averments. He referred to the observations in paragraph 10 of the judgment of the trial Court to urge that it has been observed that the defendants' license was terminated by the plaintiff after which they became rank trespassers. It was thus submitted that no decree could have been passed in the suit as filed.

It was then submitted that no rights were created in favour of the plaintiff by virtue of the document of Power of Attorney dated 09/09/1993. There were infact two thumb impressions on the said document when infact said Anandibai was suffering from leprosy and she could not put her thumb

impression. Considering the relationship of the defendants with the original tenant who was the mother of defendant No.1, the finding that the defendant No.1 was a rank trespasser could not have been arrived at. It was thus submitted that the decree as passed was liable to be set aside and the suit ought to have been dismissed.

6. Shri Prakash Mahadik, learned counsel for the respondent-plaintiff supported the impugned judgment. According to him a civil Court had jurisdiction to entertain the suit and the provisions of Section 41 of the said Act did not oust the jurisdiction of the civil Court. In the suit the plaintiff had sought a declaration that the defendants were trespassers and therefore such suit could only be entertained by the civil Court. In the written statement there was no plea raised that the defendants were gratuitous licensees and therefore it was not permissible for the defendants to question the jurisdiction of the civil Court. The denial in the written statement was evasive and the same was rightly not accepted by the trial Court. In support of his submissions the learned counsel relied on the decision in *Jaspal Kaur Cheema and anr. vs. Industrial Trade Links and ors.*(2017) 8 SCC 592 and *Conrad Dias, Dadar Bombay vs. Joseph Dias, Dadar Bombay* 1996(2) Mh.L.J. 208. It was thus submitted that the appeal was liable to be dismissed.

7. The following points arise for determination :

(a) *Whether the civil Court had jurisdiction to entertain the suit in view of provisions of Section 41 of the said Act ?*

(b) *If the civil Court had jurisdiction, whether the suit was liable to be decreed ?*

8. I have heard the learned counsel for the parties at length and with their assistance I have perused the records of the case. Since the question of jurisdiction of the civil Court to entertain the suit has been raised, it would be necessary to consider the averments in the plaint for said purpose. As per the plaint averments the plaintiff claimed to be the tenant of the suit premises as he and his family members were occupying the same along with original tenant-Anandibai Chavan. It was further pleaded that the original tenant had surrendered her rights with regard to the suit property in favour of the plaintiff by executing a document of Power of Attorney on 09/09/1993. His further pleadings are that the defendants came to the plaintiff and requested him to permit them to reside in the suit premises for a temporary period. As the defendants were related to the plaintiff and there was a difficulty in finding a residential accommodation, the plaintiff permitted the defendants to reside in the suit premises for a temporary period. The plaintiff relied on the assurance of the defendants that they would vacate the same as early as possible. It is on that basis that the defendants were allowed to stay in the suit premises for a temporary

period. He then pleaded that though the plaintiff called upon the defendants to vacate the suit premises, the same was not done thus giving rise to a cause of action to file the suit.

9. From the aforesaid averments, it can be seen that it is the case of the plaintiff that the defendants being related to him were permitted to reside in the suit premises as there was a difficulty in finding a residential accommodation. It is not the case of the plaintiff that any rent was being paid by the defendants as consideration for permitting them to reside in the said premises. The pleadings in the plaint when considered as a whole indicate that in view of the permission granted by the plaintiff to the defendants to reside in the suit premises, the defendants came in its occupation. In other words, the plaintiff was the licensor and the defendants were licensees. Under Section 41 of the said Act a suit between a licensor and licensee relating to recovery of possession of any immovable property can be tried only by the Court of Small Causes. The Honourable Supreme Court in *Prabhudas Damodar Kotecha and ors.* (supra) considered the question as to whether a suit filed against a gratuitous licensee would also lie before the Court of Small Causes under Section 41 of the said Act. It was held that the term license would include a gratuitous license. It was held that in a suit between licensee and licensor relating to recovery of possession of any property situated in Mumbai, it is only the

Small Causes Court that would have the jurisdiction. A licensee could also be a gratuitous licensee. In the light of this decision it becomes clear that a suit of the present nature can be entertained only by the Small Causes Court and not by the civil Court.

10. As noted above the plaint averments clearly indicate that the defendants were permitted to reside in the suit premises gratuitously and in view of the permission granted by the plaintiff. It is on account of such license that the defendants came in possession. Thus the requirements of Section 41 of the said Act stand satisfied in view of the fact that the suit as filed is between the licensor-plaintiff and licensee-defendants and a prayer is also made for possession of the suit premises by evicting the licensee.

The trial Court in paragraph 10 of its judgment has observed that despite the license in favour of the defendants being terminated, the defendants continued in possession. Infact they had no right to occupy the suit house and they were rank trespassers. Once it is found that the plaintiff had determined the license in question, the suit would be one between the licensor and licensee. Its cognizance in view of Section 41 of the said Act could only be taken by the Small Causes Court. The civil Court had no jurisdiction to entertain the same. In the light of the aforesaid decision of the Honourable Supreme Court in *Prabhudas Damodar Kotecha* (supra), the decisions relied upon by the learned counsel for the respondent do not

support his contentions. Point (a) is answered by holding that the civil Court had no jurisdiction to entertain the suit.

11. Once it is found that the civil Court had no jurisdiction to entertain the suit further adjudication on merits of the case by the civil Court would be an exercise without jurisdiction. In that view of the matter said adjudication on merits is not required to be examined in the present appeal.

12. In view of the foregoing discussion, the following order is passed :

- (i) The judgment of the trial Court in S.C.Suit No.4062/1996 dated 22/03/2007 is set aside. It is held that the civil Court had no jurisdiction to entertain the said suit. The suit as filed is held to be not maintainable before the civil Court.
- (ii) The plaint in question is directed to be returned to the plaintiff under provisions of Order VII Rule 10 of the Code of Civil Procedure, 1908 for its presentation before the Court of Small Causes.
- (iii) It is clarified that the Court of Small Causes would decide the suit on its own merits and it would not be influenced by any observations made by the trial Court in the impugned judgment on merits.
- (iv) During pendency of the First Appeal this Court on 22/08/2007 in Civil Application No.4105/2007 directed the appellant to pay an amount of Rs.500/- per month from the date of the judgment of the trial Court. This amount was to be deposited in the trial Court. The amount lying in deposit with the trial Court in terms

of the aforesaid order should be transferred to the Small Causes Court, Mumbai. It would be open for the original plaintiff to move the trial Court for passing any appropriate interim direction during pendency of the suit. The contentions of the defendant in that regard are kept open. The money lying in deposit would be subject to final outcome of the suit.

(v) The First Appeal is accordingly allowed with no order as to costs.

(A. S. Chandurkar, J.)