IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 889 OF 2016

Tukaram Vithal More & Ors. ..Appellants

v/s.

Mahendra Pandurang Dhotre ..Respondent

Mr. V.S.Pandey a/w. Mr. A.S.Tripathi I/b. S.U.Pandey for the Appellant
Mr. Amarjot Anand I/b. H.S.Anand for the Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 05th MARCH, 2019.

JUDGMENT.

1. With consent, heard finally at the stage of admission.

2. The appellants-plaintiffs has challenged the Order dated 3rd May, 2012 whereby the learned Judge of the City Civil Court, Borivali has returned the plaint for want of jurisdiction.

3. Mr. Pandey, the learned Counsel for the appellants-plaintiffs submits that the plaintiffs had filed a suit for eviction on the ground that the defendant is a rank trespasser. He contends that the averments in the plaint are germane and that the learned Judge

could not have returned the plaint solely on the basis of the defence raised in the written statement.

4. Mr. Anand, the learned Counsel for the defendant submits that the defendant is a gratuitous licensee and that the City Civil Court had no jurisdiction to entertain the suit. He submits that since the defendant had raised the issue of jurisdiction the trial court was justified in framing 9A issue and returning the plaint.

5. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

6. The records indicate that the plaintiffs herein had filed a suit for eviction alleging that the defendant is a rank trespasser. The plaint proceeds on the footing that the predecessors of the plaintiffs had allowed one Vithal Dhotre to occupy a small portion of the old temporary structure as gratuitous licensee. After the death of said Vithal, his son Shivram continued to reside in the suit premises. His wife Sumati used to reside in the village. Sumati resided in the suit premises about a month prior to the death of Shivram. After the death of her Husband, sometime in the year 1989, she left the suit premises. At the request of Sumati, sometime in the year 1994, they

permitted her to reside in the suit premises for a temporary period. Said Sumati expired on 17th October, 2009.

7. The plaintiffs have averred that the defendant was not residing in the suit premises and that he has no concern whatsoever with the suit premises. The plaintiffs have further averred that after the demise of Sumati, the defendant had tried to enter into the suit premises. The plaintiffs have stated that after several unsuccessful attempts, the defendant forcibly entered into the suit premises.

8. The plaint thus proceeded on a footing that the defendant is a rank trespasser. He is neither the heir nor the legal representative of the deceased Sumati Shivram Dhotre, and that he is claiming right to the suit premises by taking advantage of his Surname as "Dhotre".

9. The defendant in his written statement denied that Sumati Dhotre was residing in the suit premises as a Gratuitous licensee. He has averred that he was taking care of Sumati Dhotre during her lifetime and that she has executed a Will dated 19th June, 2009, whereby she had bequeathed all her rights in respect of the suit premises in his favour. He claimed that the Court had no jurisdiction to entertain the suit.

10. Based on the aforesaid pleadings the learned Judge, City Civil Court, Bombay framed a preliminary issue as to jurisdiction of the Court. The learned Judge after considering the plea raised by the defendant in the written statement, held that the Sumati was residing in the suit premises as a gratuitous licensee. The learned Judge further held that the Plaintiffs have not given a specific date on which the defendant had tresspassed into the suit premises. The learned Judge held that the defendant has proved that he is residing in the suit premises since the year 2000. The learned Judge held that the suit is for recovery of possession from Gratuitous licensee or his/her legal heirs and hence the City Civil Court has no jurisdiction to try the suit. The learned Judge therefore returned the plaint for presentation in the proper Court having jurisdiction to try the suit.

11. It is well settled principle that the jurisdiction of the Court has to be decided on the basis of the averments in the plaint. The Court has to consider the pleadings in the plaint in its entirety, without embarking upon any roving inquiry as to the truthfulness or veracity

of the averments. Whilst considering the issue of jurisdiction, the Court is not required to take into consideration the defence set up by the defendant in his written statement. In this regard, it would be advantageous to refer to the decision of the Apex Court in ***Raizada Tokandas & Anr. vs. M/s. Gorakhram Gokalchand 1964 AIR 1348.*** In this case, the plaintiff had filed a suit before the City Civil Court for declaration that he was in lawful possession and that the defendant had no right to enter into or remain in possession of the shop. The defence raised was that the question involved in the suit related to possession of the premises as between landlord and tenant and that it was only the Court of Small Causes which would have jurisdiction to entertain and try the suit. The City Civil Court had framed a preliminary issue as regards jurisdiction. The City Civil Court held in favour of the defendant and returned the plaint for presentation to the proper Court. In an appeal before the High Court, the Court took a view that City Civil Court had jurisdiction. This order was challenged before the Apex Court in SLP . The question before the Apex Court was whether the jurisdiction of the

City Civil Court is ousted when the defendant raises a claim or question as to the existence of the relationship of landlord and tenant between him and the plaintiff and claims that it is only the Court of Small Causes which has exclusive jurisdiction to try the suit, even though the plaintiff pleads that there is no such relationship. In answering this question, the Apex Court has held thus :

> *"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. Chhannu (1), and bag 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 cognizable 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 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. S. 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 a 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 s. 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."

12. In the instant case, the plaintiffs have sought the relief of eviction on a specific plea that the defendant is a rank trespasser. The learned Judge of the City Civil Court has held the defendant is a gratuitous licensee and returned the plaint solely on the basis of the defence set up in the written statement. Suffice it to say that the question whether the defendant is a rank trespasser or whether he is a gratuitous licensee are factual in nature and can be adjudicated only by leading evidence. Consequently, the plaint could not have been returned on disputed facts on the basis of the plea raised by the defendant.

13. Under the circumstances, and in view of discussion supra, the appeal is allowed. The impugned order is set aside. The learned Judge is directed to proceed with the suit in accordance with law.

14. Both the parties are directed to appear before the City Civil Court on 4th April, 2019.

(ANUJA PRABHUDESSAI, J.)