

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 469 OF 1992

Parvatibai Amrita Shinde
(since deceased) through LRs

1A. Smt. Taramati Rajaram Nikam

1B. Sahebrao Amrita Shinde

Both residing at & Post : Chandwad,
Taluka : Chandwad, District Nashik

..Petitioners

Vs.

1. Ganesh Radhakrishna Pathak
(Since deceased, through legal heirs
& representatives)

1a) Shri Anil Ganesh Pathak
Age Major
Kalewadi, Pune

1b) Ms. Shailaja Chandrakant Dixit
Age Major,
Panchawati, Nashik

1c) Shri Arun Ganesh Pathak
Age Major Suyog Bunglow,
Sanjiwani CHS, Ozar Mig,
District Nashik.

2. Dattatraya Radhakrishna Pathak
Age 52 years, Occ. Service,
Resident of Deolali Camp,
District Nashik

3. Dwarkanath Radhakrishna Pathak
(Since deceased, through legal heirs and
representatives)

3a) Smt. Shalini Dwarkanath Pathak
Age Major
Mayur Building, Vikash CHS,
Devi Chowk, Shastri Nagar,
Dombivali (West)

3b) Smt. Shraddha Mahesh Desai
Age Major
Agasthi Sangam CHS,
Block No.G-4, Near Ganpati
Mandir Road, Titwala.

3c) Smt. Sadhana Ulhas Phadke
Age Major
Bhagirathi Building, 3 Badam Galli,
Gupte Road, Vishnu Nagar,
Dombivali (West)

5. Vijaykumar Radhakrishna Pathak
(Since deceased, through legal heirs
& representatives)

5a. Smt. Madhuri Vijay Pathak

5b. Shri Rajendra Vijay Pathak

5c. Shri. Prashant Vijay Pathak

All major, and all residing at Janki
Row Houses, Senior Citizen Park,
Jogging Track, Indira Nagar,
District Nashik.

..Respondents

Mr. P. J. Thorat, for the Petitioners.
Mr. P. N. Joshi a/w. Nikhil Pujari, for the Respondent Nos.1 to 3 & 5.

CORAM : C.V. BHADANG, J.
RESERVED ON : 02nd FEBRUARY 2021
PRONOUNCED ON : 9th APRIL 2021

Judgment:

. The present petition arises out of a suit for eviction and possession filed in the year 1975. The respondent Ganesh Pathak, Dattatray Pathak and Dwarkanath Pathak filed RCS No.16/1975 against Parvatibai Shinde (defendant No.1) for eviction and possession of Grampanchayat House No.247 situated at Chandwad more specifically described in paragraph 1 of the plaint. Rajaram Pathak and Vijaykumar Pathak who are brothers of the original plaintiffs were the defendant Nos.2 and 3. The case made out in the plaint is that the suit property was purchased by father of the plaintiffs from Gangaram Samber for Rs.500/- under Registered Sale Deed dated 8/9/1943. The mother of the plaintiffs late Laxmibai used to look after the suit property after the death of her husband Balkrishna Pathak. She was residing in the rear part of the property and the rest was let out to the tenants. The suit house was let out to the defendant No.1 Parvatibai on monthly rent of of Rs.20/-. The tenancy was as per the English calendar month. The plaintiffs claimed that the defendant No.1 was in arrears of rent from February 1971. It was further contended that the defendant No.1 had made permanent alterations in the said house. It was further contended that the tenancy was terminated by a notice

dated 18/9/1974 calling upon her to vacate the suit premises and to pay the arrears, which she failed to do. It is in these circumstances that the aforesaid suit came to be filed for eviction and possession and arrears of rent etc.

2. The defendant No.1 resisted the suit. She denied her status as a tenant. It was contended that late Laxmibai, the mother of the plaintiffs and the defendant No.3 had agreed to sale the suit house to her for a consideration of Rs.2,000/- out of which she had paid Rs.500/- to Laxmibai on 23/4/1968 as an earnest against which an agreement for sale (visar Parvati) was executed in her favour. The transaction was to be completed by the end of February 1969. She also contended that Laxmibai had received further amount of Rs.100/- against the price of the suit house for which a receipt was given. In short, the defendant No.1 claimed to be in possession of the suit house, as a prospective purchaser on the strength of the agreement for sale. She contended that during the lifetime of Laxmibai she had called upon her and defendant No.3 to complete the sale transaction by a registered notice dated 4/7/1979. It was contended that subsequently Laxmibai left Chandwad and thereafter expired without executing the sale deed.

3. On the basis of the rival pleadings, the learned Trial Court framed the following issues.

Sr. No.	Issues
1	Whether the plaintiffs prove the tenancy of the defendant No.1 as alleged ?
2	Does he further prove that the monthly rent was agreed at Rs.20/- per month as alleged ?
3	Do they further prove that the defendant No.1 is in arrears of rent for more than six months period as alleged ?
4	Do they prove that the defendant No.1 worked out permanent alterations in the suit premises and sublet the same illegally as alleged ?
5	Whether the plaintiffs further prove that in alternate that the alleged agreement alleged to have been executed by their deceased mother Laxmibai is not binding on them so also on the defendant Nos.2 and 3 ?
6	Whether the suit is tenable in the present form ?
7	Whether the suit notice is valid ?
8	What order and decree ?

4. The plaintiff No.1 had examined himself, while the defendant No.1 Parvatibai examined herself alongwith Gani Rahim Bagwan in whose presence Laxmibai had executed the agreement for sale dated 23/4/1968.

5. The learned Trial Court answered Issue Nos.1 to 4 in the negative and the Issue Nos. 5 to 7 in the affirmative. The learned Trial Court in terms held that the alleged agreement for sale is not binding on the plaintiffs. In the face of the findings, as above, the learned Trial Court by a judgment and decree dated 26/4/1983 decreed the suit.

6. Feeling aggrieved, Parvatibai (defendant No.1) challenged the same before the learned District Judge in Regular Civil Appeal No.312/1983. The learned District Judge framed following points for determination.

Sr. No.	Points
1	Whether the suit agreement Exhibit 36 dated 23 rd April 1968 is binding on the respondent ?
2	Whether the Judgment and Decree passed by the Lower Court is legal, proper and correct ?
3	What order ?

7. The learned District Judge answered the Point No.1 in the negative and the Point No.2 in the affirmative and by a judgment and decree dated 19/12/1991, dismissed the appeal. Hence, this petition.

8. I have heard Mr. Thorat, the learned Counsel for the petitioners and Mr. Joshi, the learned Counsel for the respondent Nos.1 to 3 & 5. With the assistance of the learned Counsels for the parties, I have gone through the record.

9. It is submitted by the learned Counsel for the petitioners that the suit as framed and filed was not maintainable. In the submission of learned Counsel, the jurisdiction exercised under Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ('the Rent Act' for short) is distinct than the plenary and ordinary Civil jurisdiction vested in the Trial Court under Section 9 of the Code of Civil Procedure (CPC). It is submitted that thus it was not open for the plaintiffs to have called upon the Trial Court to exercise two different and distinct jurisdictions simultaneously. It is submitted that the First Appellate Court has failed to consider the issue of simultaneous exercise of the jurisdiction under Section 28 of the Rent Act and Section 9 of CPC although a specific ground to

that effect is raised in the appeal memo. It is submitted that the said ground was also raised at the time of the hearing of the appeal. In short, it is contended that the nature of the proceedings and the jurisdiction exercised is materially different and therefore, the Courts below were in error in entertaining and decreeing the suit. It is submitted that the Courts below were simultaneously called upon to exercise jurisdiction under Section 28 of the Rent Act alongwith requirement to consider the effect of Section 53-A of the Transfer of Property Act, 1882.

10. It is submitted that Courts below were in error in holding that the agreement for sale (Exh.36) did not fulfill the requirements of Section 53-A of the Transfer of Property Act. It is submitted that the Courts below have not properly considered the agreement for sale (Exh.36).

11. It is next submitted that the plaintiffs had sisters who had right, title and interest in the suit house and therefore, the suit suffered from non-joinder of necessary parties. Except these, there are no other contentions raised.

12. On behalf of the petitioners reliance is placed on the decision of the Supreme Court in the case of i) **Jamnadas Dharamdas Vs. Dr. J. Joseph Farreira and Anr.** (1980) 3 SCC 569 ; ii) **Rudrayya Tipayya Swami (Since Deceased) and Ors. Vs. Kalyanappa Gurushantappa Alagundagi & Ors.** 2005(2) ALL MR 530 iii) **Mohmad Husain Chotamiya Shaikh Vs. Taraben Manilal Shah** 1991 Mah. RC.J. 572; iv) **Rafiuddin Nuruddin Musalman Vs. Abduyl Karim Abdul Reheman and Ors.** 2005 Bom.R.C. 548 ; v) **Shantabai Yashwant Kothare and Ors. Vs. Shankar Parshuram Naik (Since deceased)** represented through LRs. **Prabhavati Shankar Naik and Ors.** 2006(5) Mh.L.J. 651 and vi) the decision of the Gujarat High Court in the case of **Govindbhai Parshottamdas Patel Vs New Shorrock Mills, Nadiad** AIR 1984 Gujarat 182.

13. The learned Counsel for the respondent has supported the impugned judgment. It is submitted that the Civil Court has jurisdiction both under Section 9 of CPC which is plenary jurisdiction and the one under Section 28 of the Rent Act. It is submitted that this ground was not raised before the Appellate Court. A common reliance is placed on the decision of the Supreme Court in **Jamnadas Dharamdas and Rudrayya** (supra) by the parties. It is submitted that Laxmibai died before the institution of the suit.

It is submitted that the respondents are ready and willing to abandon the claim with reference to the jurisdiction under the Rent Act. It is submitted that this not a case which justifies interference under Article 227 of the Constitution of India particularly in view of the current findings by the Courts below.

14. Mr. Thorat, the learned Counsel for the petitioners has submitted that the respondents cannot seek to abandon the claim under the Rent Act at this stage.

15. I have carefully considered the rival submissions made. It is not in dispute that the Trial Judge had both jurisdictions i.e. plenary jurisdiction under Section 9 of CPC and the jurisdiction under Section 28 of the Rent Act. It is true that the suit as framed and filed sought relief of eviction and possession on the ground that the defendant No.1 was the tenant of the suit premises and alternatively sought declaration about the agreement for sale (Exh.36) not being binding on them. Later relief was claimed in the context of the defence of the defendant No.1 that she was in possession of the suit property as a prospective purchaser under the agreement (Exh.36) and had paid part consideration as earnest. The Trial Court answered the Issue Nos.1 to 4 in the negative and

thus has refused to accept the claim of tenancy and has not considered the case based on Section 28 of the Rent Act. A perusal of the judgment of the Trial Court would indicate that the Trial Court has essentially considered the alternate relief about agreement (Exh.36). The learned Trial Court not being binding on the plaintiffs while deciding the Issue No.5 has held that the defendant No.1 had not fulfilled the requirement of Section 53-A of the Transfer of Property Act. It can thus be seen that essentially the Trial Court has exercised jurisdiction which is plenary jurisdiction under Section 9 of CPC.

16. Coming to the judgment of the Appellate Court and looking to the points framed, here again the Appellate Court has restricted the consideration to the agreement (Exh.36) and the question whether it can be said to be binding on the plaintiffs. In short, both the Courts below have decreed the suit in exercise of the plenary jurisdiction and not one under Section 28 of the Rent Act. On facts, the First Appellate Court has negated the contention on behalf of the petitioners that the Trial Court ought to have drawn an adverse inference for non examination of Laxmibai, the mother of the plaintiffs. The First Appellate Court has found that Laxmibai died long before the filing of the suit in the year 1975 and therefore, she

was not available for being examined in the suit. The First Appellate Court has as a matter of fact found that the agreement (Exh.36) was not properly stamped. The agreement does not recite that the possession was delivered to the defendant No.1. It has also been found that the sale deed was to be executed by the end of February 1969 and defendant No.1 had failed to obtain the sale deed in pursuance of the agreement (Exh.36). It has thus been held that the documents (Exh.36 and 37) were barred by limitation and therefore, protection under Section 53-A of the Transfer of Property Act was not available.

17. Coming to the ground as raised on behalf of the petitioners, I do not find that it can be accepted for the reason that this is not a case where the Courts have exercised composite jurisdiction under Section 28 of the Rent Act and under Section 9 of CPC. At the cost of repetition, it is necessary to state that the alternate relief was sought in the context of the defence of the defendant No.1. In such a case, it cannot be envisaged that the plaintiffs would file two separate suits one under the Rent Act and the other invoking plenary jurisdiction. That apart, the Supreme Court in the case of **Jamnadas Dharamdas** (supra) in para 18 has refused to accept the contention, that plaintiff having sought the relief one under the

Bombay Rent Act and another under the Contract Act, the entire plaint must be rejected. The Trial Court has found that the principle would be applicable in the present case. It is necessary to emphasise that this is not a case where relief granted is a composite relief under Section 28 of the Rent Act and in the exercise of the plenary jurisdiction under Section 9 of CPC.

18. In the case of **Mohmad Husain** (supra) the suit was filed by the plaintiffs who had obtained the suit premises on lease from deceased Jaishankar who was a tenant in the suit premises. Manilal was the owner of the premises. During the pendency of the suit, an amendment was sought claiming relief of protection of possession under the Rent Act, which amendment was disallowed. This Court while upholding the said order found that by virtue of the amendment, the plaintiffs could not have invoked the jurisdiction under the Rent Act. In my considered view, the case clearly turned on its own facts.

19. In the case of **Rafiuddin Musalman** (supra) it was held that the suit was bad for multifariousness in as much as the consolidated suit for recovery of possession from the tenant on the grounds

available under the Rent Act, as also on the ground that the defendant was a trespasser was not maintainable.

20. In the case of **Shantabai Kothare** (supra) the suit premises were situated at Majiwade which village was included within the limits of Municipal Corporation of Thane, whereupon the provisions of Bombay Rent Act became applicable to the tenanted premises and tenant / respondent became protected tenant. It was in these circumstances held that the Appellate Court committed a grave error in observing that the Civil Judge Junior Division was the Competent Court. It was held that the Small Causes Court was alone competent to try the suit.

21. In the case of **Govindbhai Patel** (supra), the defendants were heirs of one Parshottamdas Patel who according to the plaintiffs had occupied the suit premises till he was in service of the plaintiff's Company. The service of Parshottamdas came to an end on 10/1/1976 whereupon a notice of eviction was issued to him and he was called upon to hand over the possession. Since he did not comply with the requisition, the suit came to be filed. Defendant appeared and contended that he was a tenant and not a licensee and the Court had no jurisdiction. It can thus be seen that the said

case turned on its own facts. That apart, I am bound by the decision of the Supreme Court in the case of **Jamnadas Dharamdas** (supra) which has been relied upon by the Trial Court.

22. At this stage, a useful reference can also be made to the decision of this Court in **Rudrayya** (supra) in which a similar defence was raised. This Court referring to Section 99 of CPC found that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any mis-joinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court, provided that, nothing in that section would apply to non-joinder of a necessary party. This Court held that no interference in such case is called for in the supervisory jurisdiction under Article 227 of the Constitution of India.

23. To conclude, this is not a case of inherent lack of jurisdiction with the Trial Court which had both the jurisdictions i.e. under Section 9 of CPC and under Section 28 of the Rent Act. The alternate relief was claimed by the plaintiffs in the context of the defence that the defendant No.1 was in possession as a prospective

purchaser. The Trial Court has not exercised jurisdiction under Section 28 of the Rent Act. Thus, this is not a case of exercise of the composite / simultaneous jurisdiction and lastly as held by this Court in the case of **Rudrayya** (supra) and in view of Section 99 of CPC, unless and until this affects the merits of the case, no interference is called for.

24. In so far as ground of non-joinder of the necessary parties namely the sisters of the plaintiffs is concerned, it is well settled that any one of the co-sharers can seek eviction and possession and in the absence of the relief being adverse to the co-sharers, the suit cannot be said to be bad for non-joinder of necessary parties.

25. Thus, the impugned judgment does not suffer from any infirmity. The Writ Petition is dismissed. Rule is discharged with no order as to costs.

C.V. BHADANG, J.