1963

Kalwa Devadattam
v.
Union of India

Shah J.

The Appeal No. 642 of 1961 must therefore also fail.

Both the appeals are therefore dismissed with costs.

Appeals dismissed.

1963

April 22

RAIZADA TOPANDAS & ANR.

v.

M/S. GORAKHRAM GOKALCHAND

(S. K. DAS, A. K. SARKAR and M. HIDAYATULLAH JJ.)

Jurisdiction of Court—Suit filed in City Civil Court alleging that defendant was a licensee—Prayer for injunction—Defendant alleging relation of landlord and tenant—Whether small causes court has exclusive jurisdiction—Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LXII of 1947), ss. 28,29,29A.

The respondent is a partnership firm. It instituted a suit in the Bombay City Civil Court against the appellant. It was alleged in the plaint that by virtue of an agreement appellant No. 1 appointed the respondent as his commission agent for the sale of his cloth in the shop which was in the possession of the respondent. The agreement was to remain in force for four years. Persuant to the agreement the appellants, their family members, servants and agents were allowed by the respondent to visit the shop only for the purpose of looking after the business of commission agency. On the expiry of the agreement the appellants had no further rights to enter into the shop. The respondent prayed for a declaration that it was in lawful possession of the shop, for an injunction restraining the appellants, their family members, servants and agents from entering into the shop and for an amount of commission payable to it under the agreement. The plaint proceeded on the footing that

during the period of agreement the appellants were mere licensees and after the expiry of the agreement they were mere trespassers. The plaint in terms negatives any relationship of land-lord and tenant as between the parties to the suit. The defence of the appellants was that the respondent had sublet the shop to them at a certain monthly rent. But since no subletting is possible under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, without the consent of the land-lord the parties entered into a sham agreement which was never acted upon and which was only a cloak to conceal the true relationship. The relationship was that of a land-lord and tenant. On these averments in the written statement the appellants took the plea that the Court of Small Causes Bombay alone had jurisdiction to try the suit.

The City Civil Court relying on a decision of this Court upheld the contention of the appellants and made an order that the plaint be returned for presentation to the proper court. The respondent thereupon appealed to the High Court. The High Court held that on a correct interpretation of s.28 of the Act the suit out of which the appeal had arisen was not a suit within the exclusive jurisdiction of the Court of Small Causes Bombay and setting aside the order of the City Civil Judge directed that it should dispose of the suit in accordance with law. The present appeal is by way of special leave. In the appeal the same question as to the Jurisdiction of the City Civil Court was raised.

Held (per S.K. Das and M. Hidayatullah, JJ.) that s. 28 no doubt gives exclusive jurisdiction to the Court of Small Causes to entertain and try a suit or proceeding between a land-lord and a tenant relating to recovery of rent or possession of any premises to which any of the provisions of Part II of the Act 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.

Section 28 does not invest the Court of Small Causes with exclusive power to try questions of title 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, the defendant by his plea cannot force the plaintiff to go to a forum where on his own averments he cannot go. If the suit as framed is by a land-lord or a tenant and the relief asked for is in the nature of a claim which arises

1963

Raizada Topandas v. Gorakhram Gokalchand

out of the Act or any of its provisions then only and not otherwise will it be covered by s. 28. The City Civil Court had jurisdiction to entertain the suit and the High Court correctly came to that conclusion.

Ananti v. *Chhannu*, (1929) I.L.R. 52 All. 501 *Govindram Salamatrai* v. *Dharampal*, (1951) 53 Bom. L.R. 386, and *Jaswantlal* v. *Western Company*, India (1959), 61 Bom. L R. 1087, approved.

Babulal Bhuramal v. *Nandram Shivram* [1959] S.C.R. 367, explained.

Per Sarkar, J. The suit is not one between a land-lord and a tenant for recovery of possession of premises and therefore it does not come under the first kind of matters mentioned in s. 28(1). The suit does not come under the second kind mentioned in that section as that deals with certain applications only.

Section 28 thirdly provides that no court other than a Court of Small Causes shall have jurisdiction to deal with any claim or question arising under the Act concerning properties in Greater Bombay. This part of the section does not purport to affect any court's jurisdiction to entertain and try a suit but it only prevents a court from dealing with certain claims and questions. Therefore a court may try a suit in so far as it does not thereby have to deal with a claim or question arising out of the Act.

It is unnecessary to decide the dispute whether it is permissible under the section to look at the defence for ascertaining whether a claim or question under the Act, arises in the suit because even the defence in the present case does not raise any claim or question under the Act. The defence really is that the appellants are not licensees. That being so, the only question that the suit involves is whether the appellants are licensees of the shop. Quite clearly, such a question is neither a question nor a claim arising out of the Act. Neither is a question whether the appellants are sub-tenants one arising out of the Act for the Act says nothing as to the creation of a tenancy.

No discussion of any question or claim arising out of the Act is necessary for deciding the suit.

1963

Ramzada Tapandas
v.
Gorakhram Gokalchand

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 75 of 1962.

Appeal by special leave from the judgment and decree dated October 19, 1959, of the Bombay High Court in Appeal No. 152 of 1959.

N. C. Chatterjee, J.B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellants.

A. V. Viswanatha Sastri and *D. D. Sharma,* for respondents.

1963. April 22. The Judgment of S.K. Das and Hidayatullah, JJ. was delivered by Das J., Sarkar J., delivered separate, Judgment.

Das J.

S.K. DAS J.—The only question which arises in this appeal is, whether on a proper interpretation of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act LVII of 1947) the Court of Small Causes Bombay had exclusive jurisdiction to deal with the suit out of which this appeal has arisen.

The respondent before us is a partnership firm. It was in possession as a tenant of a shop No. 582/638, at Mulji Jetha Market, Bombay. It instituted a suit in the Bombay City Civil Court (to be distinguished from the Court of Small Causes, Bombay) in which it asked for (1) a declaration that it was in lawful possession of shop No. 582/638 at Mulji Jetha Market, Bombay and that the present appellants (who were the defendants in the suit) or their family members, servants or agents had no right to enter into or remain in possession of the said shop ; (2) for an injunction restraining the present appellants, their family members, servants and agents from entering into the said shop ; and (3) for an amount of commission payable to it under an agreement

1963

Raizada Topandas
v
Gorakhram Gokalchand

Das J.

dated June 23, 1955. The main averments in the plaint were that by the aforesaid agreement defendant No. 1, appellant No. 1 before us, appointed the respondent as his commission agent for the sale of the appellants' cloth in the shop in question. The agreement was to remain in force for a period of four years expiring on June 30, 1959. Pursuant to the agreement, the appellants, their family members, servants and agents were allowed by the respondent to visit the shop only for the purpose of looking after the business of commission agency. On the expiry of the agreement the appellants had no further right to enter into the shop and in paragraphs 10 and 11 of the plaint the respondent-firm alleged that some commission was due to it and further it asked the appellants not to disturb the possession and peaceful enjoyment of the shop by the respondent ; but the appellants, their servants and agents were visiting the shop daily and preventing the respondent from having access to its various articles such as stock-in-trade, books of account, furniture, fixtures etc. On these averments the respondent-firm asked for the reliefs to which we have earlier referred. The plaint proceeded on the footing that during the period of the agreement the appellants were mere licensees, and after the expiry of the agreement they were trespassers and had no right to be in the shop. The plaint in terms negatives any relationship of landlord and tenant as between the parties to the suit.

The substantial defence of the appellants was that the respondent-firm had sublet the shop to the appellants at a monthly rent of Rs. 500/ ; but as no sub-tenancy could be legally created at the time, without the consent of the landlord, by reason of the provisions of the Act, the respondent-firm with a view to safeguard its position in regard to the penal provisions of the Act required the appellants to enter into a sham agreement in the shape of a letter dated June 30, 1952. The agreement was never acted

upon and was intended to be a cloak to conceal the true nature of the transaction. The appellants further alleged that the agreement dated June 23, 1955, was also not operative between the parties, and the true relation between the parties was that of landlord and tenant. On these averments in the written statement the appellants took the plea that as the question involved in the suit related to the possession of premises as between a landlord and his tenant, the Court of Small Causes, Bombay, alone had jurisdiction to try the suit.

On these pleadings a preliminary issue as to jurisdiction was framed by the City Civil Court, Bombay and this issue was in these terms :

> "Whether this court has jurisdiction to entertain and try this suit ?"

The learned Judge of the City Civil Court relying on a decision of this court in *Babulal Bhuramal* v. *Nandram Shivram* (1), decided the preliminary issue in favour of the present appellants. He held that in view of the observations of the Supreme Court in the aforesaid decision, an earlier decision of the Bombay High Court in *Govindram Salamatrai* v. *Dharampal* (2), which had taken a different view was of no assistance to the present respondent, and must be deemed to have been over-ruled by the Supreme Court decision. We may state here that the decision in *Govindram Salamatrai* (2), had itself over-ruled an earlier decision of the same court in *Ebraham Saleji* v. *Abdulla Ali Reza* (3), where Gajendragadkar J. (as he then was) had taken the view that s. 28 of the Act included within its jurisdiction all suits and proceedings where the trial court has to consider all claims or questions arising out of the Act, and it makes no difference whether such claim or question arises from the allegations made in the plaint or those made in the

(1) [1959] S.C.R. 367. (2) (1951) 53 Bom. L.R. 886.
(3) (1950) 52 Bom. L.R. 897.

1963

Raizada Topandas v. Gerakhram Gokalchand

Das J.

written statement. The learned Judge of the City Civil Court accordingly made an order that the plaint be returned to the present respondent for presentation to the proper court.

An appeal was taken by the present respondent to the High Court of Bombay from the decision of the learned City Civil Judge. The High Court pointed out in its judgment dated October 19, 1959, that the ratio of the decision of this court in *Babulal Bhuramal*'s case (1), was correctly explained in a later decision of the Bombay High Court in *Jaswantlal* v. *"Western Company, India"* (2) and on a correct interpretation of s. 28 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, the suit out of which this appeal has arisen was not a suit within the exclusive jurisdiction of the Court of Small Causes, Bombay. The High Court said that the decision in *Babulal Bhuramal* (1), did not in effect hold, nor did it justify any interpretation to the effect, that s. 28 of the Act made a departure from the general principle that governs the question of jurisdiction, which is that jurisdiction at the inception of the suit depends on the averments made in the plaint and is not ousted by the defendant saying something in his defence. In this respect, the High Court accepted as correct the view expressed by Chagla C. J. in *Govindram Salamatrai* (3), rather than the view of Gajendragadkar, J. in *Ebrahim Saleji* (4). In this view of the matter the High Court held that the City Civil Court has jurisdiction to try the suit out of which the appeal has arisen. It, therefore, set aside the order of the learned City Civil Judge and directed that it should now dispose of the suit in accordance with law. The appellants then asked for special leave to appeal to this court from the judgment and decree of the High Court, and having obtained special leave have preferred the present appeal.

(1) [1959] S.C.R. 367. (2) (1959) 61 Bom. L.R. 1087.
(3) (1951) 53 Bom. L.R. 386. (4) (1950) 52 Bom. L.R. 897.

The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was enacted to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions. In Part II of the Act there are provisions which make rent in excess of standard rent illegal, provisions relating to increase of rent, provisions as to when a landlord may recover possession, when a sub-tenant becomes a tenant, unlawful charges by landlord etc. All these proceed on the footing that there is or was, at the inception, a relation of landlord and tenant between the parties. In the same Part occur ss. 28. 29 and 29-A. Section 28 which we shall presently read deals with jurisdiction of courts ; s. 29 deals with appeals, and s. 29-A is a section which saves suits involving title. The particular section the interpretation of which is in question before us is s. 28 and we shall read only sub-s. (1) thereof in so far as it is relevant for our purpose. This sub-section reads...

> "28. (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) xx xx xx
>
> (b) xx xx xx .....
>
> ...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 apply and to

1963

Raizada Topandas v. Gorakhram Gokalchand

Das J.

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 suit, proceeding or application or to deal with such claim or question."

S.29-A also has some relevancy and may be set out here...

"Nothing contained in section 28 or 29 shall be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent court to establish his title to such premises."

Leaving out what is unnecessary for our purpose s.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 su it or proceeding would not, but for this provision, be within its jurisdiction, the Court of Small Causes in Greater Bomby 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 applic ation 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-s.(1) of s.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 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. *Chhannu* (1), 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 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

(1) (1929) I. L. R. 52 All. 501.

1963

Rukmada Tapandas v. Gerakhram Gokalchand

Das J.

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. 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 question of title, which is clearly negatived by s. 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 s.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.

Dealing with a similar argument in *Govindram Salamatrai* (1) Chagla, C.J. said :

> "There can be no doubt that when a plaintiff files a suit against a defendant alleging that he is his licensee, it is a suit which cannot be entertained and tried by the Small Causes Court because it is not a suit between a landlord and a tenant, and judging by the plaint no question arises out of the Rent Control Act or any of its provisions which would have to be determined on the plaint as it stands.....

(1) (1951) 53 Bom. L. R. 886.

1963

Raizada Topandas v. Gerukhram Gokalchand

Das J.

It cannot be suggested that the plaintiff should anticipate any defence that might be taken up by the defendant that he is a tenant or that the initial jurisdiction which the Court had or which the Court lacked should be controlled or affected by any subsequent contention that might be taken up by the defendant. The jurisdiction of a Court is normally and ordinarily to be determined at the time of the inception of a suit. Therefore when a party puts a plaint on file, it is at that time that the Court has to consider whether the Court had jurisdiction to entertain and try that suit or not. But it is argued that although the Court might have had jurisdiction when the suit was filed, as soon as the defendant raised the contention that he was a tenant the Court ceases to have jurisdiction to try that suit and that contention could only be disposed of by the Small Causes Court by virtue of the provisions of s. 28.

Therefore, the question that I have to address myself to is whether the question as to whether the defendant is a tenant or a licensee is a question which arises out of the Act or any of its provisions. Really, this question is not a question that has anything to do with the Act or any of its provisions. It is a question which is collateral and which has got to be decided before it could be said that the Act has any application at all."

We are in agreement with these observations, and we do not think that s. 28 in its true scope and effect makes a departure from the general principle referred to earlier by us. Nor do we think that the right of appeal given by s.29 affects the position in any way. In respect of a decision given by a Court exercising jurisdiction under s. 28, an appeal is provided for in certain circumstances

under s.29. This does not mean that s.28 has the effect contended for on behalf of the appellants.

As to the decision of this Court in *Babulal Bhuramal* (1), we do not think that it assists the appellants. We consider that the Bombay High Court correctly understood it in *Jaswantlal* v. *"Western Company, India"* (2). In *Babulal Bhuramal's* case the facts were these. A landlord after giving a notice to quit to his tenant on December 6, 1947, filed a suit against him in the Court of Small Causes, Bombay, joining to the suit two other persons who were alleged to be sub-tenants of the tenant. The landlord's case was that the tenancy of his tenant was validly terminated and he was entitled to evict his tenant; that the alleged sub-tenants of the tenant were trespassers who had no right to be on the premises. The suit succeeded in the Small Causes Court, the Court holding that the sub-tenants were not lawful sub-tenants, the sub-letting by the tenant to them being contrary to law. The Small Causes Court, therefore, passed a decree against the plaintiff and the alleged sub-tenants. Thereafter, the tenant as plaintiff No. 1 and the alleged sub-tenants as plaintiffs Nos. 2 and 3 filed a suit against the landlord in the City Civil Court for a declaration that plaintiff No. 1 was a tenant of the defendant and was entitled to protection under the Rent Act and that plaintiffs Nos. 2 and 3 were lawful sub-tenants of plaintiffs No. 1 and were entitled to possession and occupation of the premises as sub-tenants thereof. A question was raised in the City Civil Court as to whether the City Civil Court had jurisdiction to entertain the suit. The City Civil Court held that it had jurisdiction to entertain the suit, but dismissed it on merits. In the appeal which was filed in the High Court, the High Court dismissed the appeal holding that the City Civil Court had no jurisdiction to entertain the suit and, therefore, the suit filed by the plaintiffs in the City

(1) [1959] S.C.R. 367. (2) (1959) 61 Bom. L.R. 1037.

1963

Raizada Topandas v. Gorakhram Gokalchand

Das J.

Civil Court was not maintainable. It was from this decision of the High Court that an appeal was filed in the Supreme Court and the question which the Supreme Court had to consider was whether the second suit filed by the plaintiffs was within the jurisdiction of the City Civil Court. It was urged before the Supreme Court that the suit was maintainable under s. 29-A of the Bombay Rent Act which provided that nothing contained in ss. 28 or 29 should be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent Court to establish his title to such premises. The Supreme Court held that a suit which was competent to establish title under s. 29-A was a suit to establish title *de hors* the Bombay Rent Act and not a suit which sought to establish title which required to be established under the Rent Act itself. It is obvious that in the suit before the Court of Small Causes, it was open to the tenant to claim protection under the Act and by reason of s. 28 no other Court had jurisdiction to try that claim; therefore, the Supreme Court held that s. 28 barred the second suit and s. 29-A did not save it, because it only saved a suit to establish title *de hors* the Act. The observations made in that decision on which the present appellants rely were these :

> "Do the provisions of s. 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of the provisions ? The answer must be in the affirmative on a reasonable interpretation of s. 28."

We agree with the High Court that these observation merely show this that in order to decide whether a suit comes within the purview of s. 28 what must

be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28. The High Court has rightly said :

> "A suit which is essentially one between the landlord and tenant does not cease to be such a suit merely because the defendant denies the claim of the plaintiff. In the same way, a suit which is not between the landlord and tenant and in which judging by the plaint no claim or question arises out of the Rent Act or any of its provisions does not become a suit covered by the provisions of s. 28 of the Act as soon as the defendant raises a contention that he is a tenant."

For the reasons given above, we hold that the City Civil Court had jurisdiction to entertain the suit and the High Court correctly came to that conclusion. Therefore, the appeal fails and is dismissed with costs.

SARKAR J.—I agree that this appeal fails.

Sarkar J.

The City Civil Court, Bombay held that in view of s. 28 of the Bombay Rents Hotel and Lodging Rates Control Act, 1947 it had no jurisdiction to entertain and try the suit which the respondent had filed agaginst the appellants in that Court and directed the plaint to be returned to the respondent for being filed in the proper Court indicated by that section, namely, the Court of Small Causes, Bombay. The City Civil Court had tried the question as a preliminary issue in the suit. There was an appeal to the High Court of Bombay from this decision and the High Court took a contrary view holding that

1963

Raizada Topandas
v.
Gorakkram Gokalchand

Sarkar J.

the City Civil Court's jurisdiction to entertain and try the suit had not been taken away by s. 28 of the Act. The matter is now before this Court in further appeal.

The suit asked for a declaration that the appellants were not entitled to enter into or remain in possession of a certain shop in Greater Bombay and for a permanent injunction restraining them from entering the shop. The allegations on which the claim to these reliefs was based were that the appellants had been granted a licence to use the shop of which the respondent was the tenant under the owner and that the appellants were wrongfully continuing there in spite of the termination of the licence and were thereby preventing the respondent from carrying on its business in the shop. The suit, therefore, was by a licensor against a licensee for certain reliefs based on the termination of the licence.

The defence of the appellants to this suit was that the relationship between the parties was not that of licensor and licensee but that the shop had in fact been sub-let to the first appellant and that the agreement between the parties had been given the form of a licence only as a cloak to protect the respondent from ejectment under the Act by its landlord on the ground of unlawful sub-letting. The appellants contended that as they were really tenants, their landlord, the respondent, was not entitled to remove them from possession in view of the provisions of the Act.

The question is, how far the suit is affected by s. 28 of the Act. I proceed now to set out the terms of that section omitting the unnecessary portions.

S. 28 (1)—"Notwithstanding anything contained in any law.....

.....

(a) in Greater Bombay, the Court of Small Causes, 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 apply 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..... no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

The section deals with three different kinds of matters, namely, (1) suits or proceedings between a landlord and a tenant relating to the recovery of rent or recovery of possession of premises, (2) an application made under the Act and (3) a claim or question arising out of the Act or any of its provisions. It provides that no court except the Court of Small Causes, so far as properties in Greater Bombay are concerned, shall have jurisdiction to entertain and try any suit or proceeding or to decide any application or lastly to deal with any claim or question of any of the said three kinds mentioned in it.

I think it is fairly clear that the suit of the respondent does not fall within the first two kinds of matters contemplated by the section mentioned in the preceding paragraph and I did not understand learned counsel for the appellants to contend to the contrary. The suit obviously does not come within the second kind for that consists of applications under the Act only and a suit is, of course, not an "application". Turning now to the first kind, it has to be

1963

Ranzada Topandas
v.
Gorakhram Gokalchand

Sarkar J.

observed that it deals with two varieties of suits between landlord and tenant, namely, a suit for rent and a suit for possession of premises. Obviously the respondent's suit is not a suit for rent for no rent is claimed at all. Nor do I think it possible to say that the suit is one between a landlord and a tenant for recovery of possession of premises. I suppose whether a suit is of this kind or not will have to be decided by the frame of the suit, that is, by reference to the plaint for the suit is by the plaintiff and it must be as he has decided it shall be. Admittedly the plaint that the respondent filed does not show that the suit filed by it is between landlord and tenant nor does it contain any claim for recovery of possession of premises.

That brings me to the third class of matters mentioned in the section namely, claims and questions arising out of the Act. The section provides that no court other than a Court of Small Causes shall have jurisdiction to deal with any claim or question arising under the Act concerning properties in Greater Bombay. It is important to note here that this part of the section does not purport to affect any court's jurisdiction to entertain and try a suit but it only prevents a court from dealing with certain claims or questions. Therefore, a court may try a suit in so far as it does not thereby have to deal with a claim or question arising out of the Act. If the other claims and questions arising in the suit cannot be tried without dealing with a claim or question arising out of the Act, then of course the practical result would be to prevent the court from trying the suit at all.

Therefore, it seems to me that the real question in this case is whether the City Civil Court had no jurisdiction to try the respondent's suit as a whole or in part because it would thereby be dealing with a claim or question arising under the Act. Does the

decision of the suit then require any claim or question arising out of the Act to be dealt with ? If it does not, the City Civil Court would be absolutely free to try the suit.

Now, if one considers the plaint only, then of course it is clear that the present suit raises no claim or question arising out of the Act. But it is said by the appellants that the defence raises such a claim or question. The respondent answers that the section contemplates claims or questions raised by the plaint only, for the section determines the jurisdiction of a court to entertain and try a suit and this must be done when the suit is instituted and, therefore, it is irrelevant to consider what questions the defence raises.

I think it unnecessary to decide the dispute whether it is permissible under the section to look at the defence for ascertaining whether a claim or question under the Act arises in the suit. As at present advised, I do not want to be understood as assenting to the proposition that a reference to the written statement is not at all permissible for deciding whether a court has jurisdiction under the section to deal with claims or questions of a certain kind. It is important to remember that the question now is whether a court has jurisdiction to deal with a claim or question and not whether a court has jurisdiction to entertain a suit.

thinkI it unnecessary to decide the dispute because in my view even the defence in the present case does not raise any claim or question under the Act. The defence really is that the appellants are not licensees. No doubt the appellants have gone on to say that they are sub-tenants but they say that only to show why they are not licensees ; apart from that it is irrelevant to enquire whether they are sub-tenants or not. I think the defence is only one of

1963

Raizada Tepandas v. Gorakhram Gokalchand

arkar J.

a traverse ; it is that the appellants are not licensees as the plaint alleges. That being so, the only question that the suit involves is whether the appellants are licensees of the shop. If they are not licensees, then the suit must fail. No other question would fall for decision. Quite clearly, a question whether a defendant is a licensee or not, is not a question nor is it a claim arising out of the Act.

Assume however that the defence by contending that the appellants are not licensees as they are sub-tenants, also raises the question whether the appellants are sub-tenants. Even so, it does not seem to me that that is a question or claim arising out of the Act. The Act does not create any tenancy. That has to be created by a contract. The question whether the appellants are sub-tenants, that is to say, tenants of a certain kind, is really a question whether a contract of tenancy was made between the appellants and the respondent. That question is not one arising out of the Act for the Act says nothing as to the creation of a tenancy and is only concerned with the regulation of the relations between a landlord and tenant in a tenancy the existence of which is otherwise brought about.

The appellants no doubt say that the respondent cannot evict them because they are tenants whose right to possession is protected by the Act. They say that, therefore, a question arises whether they are entitled to remain in possession as sub-tenants by virtue of the provisions of the Act and without the decision of that question the respondent's suit cannot be decided. I am entirely unable to see that such a question arises in the suit or that it cannot be decided without a decision of that question. As soon as it is held that the appellants are licensees, the suit has to be decreed. When it is so held it has also been necessarily held

that the appellants are not tenants, and, therefore, no further question as to rights of tenants under the Act falls to be decided. If however it is held that the appellants are not licensees but tenants, then on that ground alone the suit has to be dismissed for the claim is not based on any ground other than that the appellants are licensees whose licence has expired. It would not in such an eventuality be necessary further to consider whether the appellants who have been found to be tenants, are entitled to protection from eviction under the Act for the suit involves no claim whatever for ejectment of the appellants considered as tenants. No question, therefore, can possibly arise in the suit as to whether the appellants are entitled to be in possession as tenants by virtue of rights created by the Act. Looking at the matter from whatever point of view I do, I am wholly unable to think that the decision of any question or claim arising out of the Act is necessary for deciding the suit.

Learned counsel for the appellants referred to *Babulal Bhuramal* v. *Nandram Shivram* (1), in support of the proposition that the claim or question arising out of the Act mentioned in the section may be one where only the defence gives rise to it. I find it wholly unnecessary to discuss whether this case supports that proposition for, as I have said in the case in hand, even the defence of the appellants does not raise any such claim or question.

I think it right before concluding to refer to s. 51 of the Act under which reference to suits and proceedings in the Act are to include reference to proceedings under Chapter VII of the Presidency Small Causes Court Act, 1882. Chapter VII of the Presidency Small Causes Court Act contemplates proceedings for the recovery of possession of premises from licensees after the termination of licences in certain cases. Whether the present case is of that

(1) [1959] S. C. R. 367.

1963

Raizada Topandas
v.
Gorakhram Gokalchand

Sarkar J.

type or not is not known. If it is of that type, then it may be that the City Civil Court would have no jurisdiction to deal with it and only the Court of Small Causes would have jurisdiction to do so in view of s. 28. As however no argument was advanced by counsel for the appellants on the basis of s. 51 nor the facts necessary for its application appear on the record, I do not feel called upon to express any opinion on the matter. I only draw attention to it to show that if the question does arise that has not been argued nor decided in this case. I think it also right to point out that it may be a moot question whether the appellants, having on their own statement entered into an agreement to defraud, in a manner of speaking, the superior landlord of his rights arising under the Act from an unlawful sub-letting, can be permitted to say that the real transaction between them and the respondent was a sub-tenancy.

For these reasons I concur n i the order proposed by my brother Das.

Appeal dismissed.