

LAXMI & CO

v.

DR. ANANT R. DESHPANDE & ANR.

September 12, 1972

[A. N. RAY AND I. D. DUA, JJ.]

Presidency Small Cause Courts Act 1882 incorporated by Maharashtra Amendment Act 1963—S. 42A—Whether trial Court should frame a preliminary issue in absence of the defendant on the date hearing.

S. 42-A of the Presidency Small Causes Courts Act 1882 (incorporated by Maharashtra Amendment Act 1963) provides that :

"If any application, pending in the Small Cause Court immediately before the date of the commencement of the Presidency Small Cause Courts (Maharashtra Amendment) Act of 1963, or made to it on or after such date, the occupant appears at the time appointed within the meaning of the Bombay Rents, Hotel and Lodging Houses, Rates Control Act 1947, and in consequence whereof is entitled to the protection of that Act, and if such claim is not admitted by the applicant, then, notwithstanding anything contained in that Act, the question shall be decided by the Small Cause Court as a preliminary issue."

Two questions arose for decision in this appeal. First, whether the word "appears" occurring in S. 42A means appearance of the party in person, or through someone at the date of the hearing. Secondly, whether the Small Cause Court is required to frame an issue as to whether the occupant was a tenant within the meaning of the Bombay Act of 1947, and entitled to issue, whether or not the contesting party appears before the court at the date of the hearing. Allowing the appeal.

HELD : (i) S. 42 was introduced by the Maharashtra Amendment Act, which provided a special procedure, where occupant claims tenancy within the meaning of the 1947 Act. The occupant is to claim the tenancy of the applicant within the meaning of 1947 Act. If such claim of the occupant is not admitted by the applicant asking for possession, then the question shall be decided by the Small Cause Court as a preliminary issue. The words of importance to denote the time when the question is to whether the occupant is entitled to the protection of the 1947 Act are "then notwithstanding anything contained in that Act". The word "then" is prefaced by the preceding aspects; first, the occupant is to appear at the time appointed; 2nd, he is to claim that he is a tenant of the applicant within the meaning of the 1947 Act; thirdly, he is to claim that in consequence, he is entitled to the protection of the Act; fourthly, that the claim of the occupant is not admitted by the applicant asking for possession. It is clear from the provisions of that statute that the word "appear" in S. 42A of this statute means appearance at the date of the hearing. [177H]

(iii) Further, it is not obligatory on the trial court to frame a preliminary issue on the appointed day irrespective of the appearance of the occupant. In the present case, since the respondent did not appear at the date of hearing and claim the protection of the statute, he is entitled to retain possession of the said tenancy.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1036 of 1967.

A Appeal by special leave from the judgment and order dated March 1, 1967 of the High Court at Bombay in Civ. Rev. Application No. 64 of 1967.

N. A. Mody, P. C. Bhartari, J. B. Dadachanji, O. P. Mathur and Ravinder Narain, for the appellant.

B *V. S. Desai, Vilas V. Kamat, Yogeshwar Prasad Tri and Ganpat Rai*, for the respondent No. 1.

The Judgment of the Court was delivered by

C RAY, J. This is an appeal by special leave from the Judgment dated 1 March, 1967 of Naik, J. of the High Court at Bombay allowing Civil Revision Application under section 115 of the Code of Civil Procedure filed by the respondent Dr. Deshpande.

D The principal question which falls for consideration in this appeal is the construction of section 42A of the Presidency Small Cause Courts Act, 1882 (referred to as the 1882 Act) incorporated by Maharashtra Amendment Act 1963. The section is set out hereunder :

E "42A. *Procedure where occupant contests as a lawful tenant, etc.*—(1) If in any application pending in the Small Cause Court immediately before the date of the commencement of the Presidency Small Cause Courts (Maharashtra Amendment) Act, 1963 (Mah. XLI of 1963) or made to it on or after such date, the occupant appears at the time appointed within the meaning of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947) and in consequence whereof he is entitled to the protection of that Act, and if such claim is not admitted by the applicant, then notwithstanding anything contained in that Act, the question shall be decided by the Small Cause Court as a preliminary issue.

G (2) An appeal against the decision on this issue shall lie to a bench of Two Judges of the Small Cause Court.

(3) Every appeal under sub-section (2) shall be made within thirty days from the date of the decision appealed against;

H Provided that, in computing the period of limitation prescribed by this sub-section the provisions contained in sections 4, 5 and 12 of the Indian Limitation Act, 1908 (IX of 1906) as far as may be, apply.

(4) No further appeal shall lie against any decision in appeal under sub-section (2)".

Two questions arise for decision in this appeal. First, whether the word 'appears' occurring in section 42A means appearance of the party in person or through someone at the date of the hearing. Secondly, whether the Small Cause Court is required to frame an issue as to whether the occupant is a tenant within the meaning of the Bombay Act of 1947 and is entitled to protection of that Act, decide it as a preliminary issue, whether or not the contesting part appears before the Court at the date of the hearing.

The appellant is a firm owning lease hold rights in an immovable property known as "Lokmanya Department Stores" situate at Dadar in Bombay. The appellant became owner of that property in the month of August, 1960. The previous owner of that lease hold property was Department Service Stores. The respondent Deshpande is a medical practitioner. He had come to occupy under what is described as a "leave and licence" Agreement dated 1 November, 1952 a portion of the ground floor of the annexe to that property on payment of Rs. 250/- per month or 2% of the gross income of the clinic whichever was higher. The agreement was with the previous lease-holder Departmental Service Stores for a period of five years with an option of renewal for a further term of five years.

The appellant filed an ejectment application on 23 July, 1964 against the respondent Deshpande under Chapter VII of the 1882 Act in the Court of Small Causes at Bombay. A summons was issued to Deshpande. The summons was returnable on 22 August, 1964 calling upon him to show cause why he should not be compelled to deliver up the ground floor of the annexe in his occupation. The respondent Deshpande caused his appearance filed through his Advocate. The ejectment application was postponed for hearing on 22 September, 1964. It was again adjourned to 17 November, 1964 to enable the respondent Deshpande to file his defence. He filed his defence. The ejectment application was adjourned to 3 December, 1964 for scrutiny. After scrutiny the matter was transferred to what is described in the Bombay Small Cause Courts as non-priority warned list. In September, 1966 the ejectment application appeared on the monthly board. On 10 October, 1966 the matter was placed before Court in Court Room No. 12 in the Court of Small Causes at Bombay for the purpose of giving a fixed date for hearing. Advocates on behalf of both the parties were present in Court on 10 October, 1966 when the date for hearing was fixed for 23 November, 1966. On 23 November, 1966 the matter was called out for hearing. No one on behalf of

A the respondent Deshpande was present in Court. The matter was passed over and was again called out in the afternoon. No one on behalf of the respondent Deshpande was present. The matter was called out for the third time at about 4.30 p.m. Neither the respondent Deshpande nor his Advocate was present on any of the occasions when the application was called out. The application was heard *ex-parte*. Evidence was led on behalf of the appellant. B The Small Cause Court passed an *ex-parte* decree on 23 November, 1966 in favour of the appellant directing the responding Deshpande to deliver possession of the premises.

C The appellant in the month of January, 1967 made an application for execution of the decree. Possession was delivered up to the appellant by the bailiff.

The appellant thereafter agreed to let out the premises to the second respondent V. B. Gandhi.

D On 14 January, 1967 the appellant was served with an *ex-parte* order passed by the Small Causes Court, Bombay on respondent Deshpande's application for setting aside the *ex-parte* decree restraining the appellant from executing the *ex-parte* decree dated 23 November, 1966. In view of the fact that the appellant had already obtained possession through the bailiff the respondent Deshpande requested the appellant to allow the respondent Deshpande to use the ground floor for his professional work between certain stated hours. The appellant allowed the arrangement as a temporary one and without prejudice to the rights and contentions of the parties. E

F In the application dated 14 January, 1967 for setting aside the *ex-parte* decree the respondent Deshpande alleged that he was ill on 23 November, 1966 and could not attend the Court and he did not know that an *ex-parte* decree was passed on that day. The respondent Deshpande affirmed his second affidavit on 16 January, 1967 that his prior statement that he was ill on 23 November, 1966 was incorrect. In the second affidavit the respondent Deshpande said that after 10 October, 1966 when the date was fixed for hearing of the ejection application the respondent Deshpande's Advocate had misplaced his brief and that the matter had escaped the attention of his Advocate and accordingly no one remained present in Court on 23 November, 1966. G The Small Causes Court said that the respondent Deshpande had made a false affidavit on 14 January, 1967 with a view to obtaining an *ex-parte* injunction order and the Small Causes Court vacated the interim injunction and refused on 6 February, 1967 to set aside the *ex-parte* decree dated 23 November, 1966.

H The respondent Deshpande thereafter moved the High Court under section 115 of the Code of Civil Procedure. The respondent Deshpande contended that Small Causes Court acted with-

out jurisdiction in passing an *ex-parte* decree without framing and determining the preliminary issue as to whether the respondent Deshpande was a tenant in respect of the premises. It was particularly contended that framing of such an issue and its determination was obligatory on the Small Causes Court even in an *ex-parte* matter by reason of provisions contained in section 42A of the 1882 Act.

The respondent Deshpande also made a Civil Revision Application under section 115 of the Code of Civil Procedure against the order dated 6 February, 1967 refusing to set aside the *ex-parte* decree dated 23 November, 1966.

Both the applications were heard by the learned Single Judge of the High Court of Bombay who arrived at these conclusions. It was the duty of the trial Court even when the occupant did not appear before the Court to frame an issue as to whether the occupant was or was not the tenant of the premises and protected by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (referred to as the 1947 Act) and to decide the same as a preliminary issue on the next date of hearing. After framing the preliminary issue the Court would adjourn that matter for the hearing of the preliminary issue. The trial Court had not framed any preliminary issue, had not recorded a finding on that issue, but proceeded straightaway to pass an order of ejection. The learned Single Judge of the High Court set aside the *ex-parte* decree and sent it back to the Small Cause Court with a direction that the preliminary issue be framed as contemplated under section 42A of the 1882 Act and to give opportunity to the parties to lead evidence. No order was passed on the other application for setting aside the *ex-parte* decree.

Counsel for the appellant contended as follows. The provisions contained in section 42A of the 1882 Act indicated that the occupant against whom proceedings under Chapter VII of the 1882 Act for recovery of possession were commenced was required to appear at the date of hearing and to claim the protection of the Act and only if the claim was not admitted by the applicant asking for possession then the question was to be decided by the Court as a preliminary issue. The appellant placed accent on appearance of the occupant on the date of hearing in Court in view of the provisions indicating that the decision on a preliminary issue was required only where there was a contest between the parties at the date of hearing and the occupant claimed protection of the 1947 Act and such protection was denied by the applicant asking for possession. The defence of the respondent Deshpande that "he was the lawful tenant of the said pre-

A mises" did not amount to any pleading that he was a tenant within the meaning of the 1947 Act and in consequence thereof he was entitled to protection of that Act.

B Counsel for the respondent Deshpande on the other hand raised these contentions. The defence that he was a lawful tenant of the premises entitled him to protection under the 1947 Act. The defence was sufficient for framing of the preliminary issue. The provisions of the Code of Civil Procedure were attracted. Under Order 15 Rule 3 of the Code the Court has to postpone the further hearing of the suit for production of further evidence or argument as the case might be. Therefore, the trial Court was bound in law to postpone the case after the framing of the preliminary issue. Emphasis was placed on the provisions of section 42A of the 1882 Act which used the words "preliminary issue" and provided for an appeal against the decision on the preliminary issue. The right of appeal was therefore denied by not framing the issue and the respondent was denied the right of agitating the question of tenancy within the meaning of the 1947 Act.

D The provisions in section 42A of the 1882 Act which were introduced by the Maharashtra Amendment Act 1963 indicate a special procedure where the occupant contests as a tenant within the meaning of the 1947 Act. The proceedings under Chapter VII of the 1882 Act relate to recovery of possession of immovable property. Under section 41 of the Act summons is issued against the occupant calling upon him to show cause on a date therein appointed why he should not be compelled to deliver the property. Section 41 is attracted where tenancy has been determined and the tenant refuses to deliver the property. The summons issued under section 41 is served in the manner provided by the Code of Civil Procedure for the service of summons. Section 43 deals with order for possession. If the occupant does not appear and show cause the applicant becomes entitled to an order for possession. If the occupant proves that the tenancy was created or permission granted by virtue of a title, which determined previous to the date of the application, he shall be deemed to have shown cause. Section 43 also speaks of the occupant appearing and showing cause. The filing of a defence is not equated with appearance. The Court appoints a date for appearance of parties for the hearing. Unless there is appearance and a contest arises the Court will proceed *ex-parte*.

H It is manifest that section 42A which was introduced by the Maharashtra Amendment provides a special procedure where the occupant claims tenancy of the applicant within the meaning of the 1947 Act. The occupant is to claim the tenancy of the applicant within the meaning of the 1947 Act and that in consequence

he is entitled to protection of the Act. If such claim of the occupant is not admitted by the applicant asking for possession then the question shall be decided by the Small Causes Court as a preliminary issue. The words of importance to denote the time when the question as to whether the occupant is entitled to the protection of the 1947 Act are "then notwithstanding anything contained in that Act". The word "then" is prefaced by the preceding steps. First, the occupant is to appear at the time appointed; second, he is to claim that he is a tenant of the applicant within the meaning of the 1947 Act; thirdly, he is to claim that in consequence he is entitled to the protection of that Act; fourthly, that the claim of the occupant is not admitted by the applicant asking for possession.

It is correct that the pleadings will have an important bearing on the question as to whether the occupant contests the right of the applicant to possession. That contest has to be based on his tenancy within the meaning of the 1947 Act. In the present case, the occupant respondent Deshpande stated in his defence that he was a lawful tenant. The words "lawful tenant" by themselves do not expand as to how the occupant is a lawful tenant. Section 42A speaks of tenancy within the meaning of the 1947 Act and protection under that Act. One has to claim the benefit and protection of the Act. The claim of protection under the Act will become an issue at the hearing of the case. The word "appearance" cannot be equated with the filing of the written statement. After pleadings are complete the Court appoints a date for hearing. It is at the hearing that the occupant will assert his tenancy and claim protection against eviction. It is then that the Court will enquire whether an issue is to be struck between the applicant on the one hand and the occupant on the other by reason of denial by the applicant of the occupant's claim. It is, therefore, clear from the provisions of the statute that the word "appear" in section 42A of the 1882 Act means appearance at the date of the hearing.

The High Court was wrong in the conclusion that it was obligatory on the trial Court to frame a preliminary issue on the appointed day irrespective of the appearance of the occupant.

The High Court noticed that the two Maharashtra Amendments to the Act, namely, sections 42A and 49 indicate that only a decision on the claim of an occupant to be a tenant within the meaning of the 1947 Act can be the subject matter of an appeal and section 49 of the Act bars a suit on the basis of title as a tenant within the meaning of the 1947 Act. The High Court found that the question of tenancy within the scope of section

A 42A of the 1882 Act was to be decided once for all in the proceedings under Chapter VII of the Small Cause Courts Act, because a suit was barred.

B Under section 49 of the 1882 Act as it stood prior to the Maharashtra Amendment recovery of possession of any immovable property under Chapter VII was not a bar to the filing of a suit in the High Court as to the title of the occupant. The Maharashtra Amendment to section 49 has placed a bar against such suit because the occupant is given the opportunity under section 42A of the 1882 Act to contest the claim of the applicant to possession by pleading, proving tenancy within the 1947 Act and claiming the consequential protection under the provisions of the Act. The conclusion of the High Court that the bar of a suit under section 49 is a cogent reason for concluding that the Small Cause Court shall always try as a preliminary issue the claim of the occupant as a tenant within the meaning of the 1947 Act irrespective of his appearance is neither supported by the scheme of the Act nor by the scope and purport of section 42A of the Act. An occupant who claims tenancy within the meaning of the 1947 Act is given the opportunity to prefer the claim and to have a decision on that question as a preliminary issue. The occupant has to appear at the date of the hearing to prefer such a claim. Section 42A does not indicate that the Court will have to frame an issue. All that section says is that it has to decide the question as a preliminary issue. The Act does not indicate that there will be a preliminary hearing and a final hearing thereafter. The Act does not say that there will be a preliminary decree or a final decree. The words "preliminary issue" are intended to lend meaning to the provisions of the Act that before the applicant can obtain an order for possession that preliminary issue which is raised on contest between the applicant and the occupant shall be decided. If the occupant does not take benefit of section 42A of the 1882 Act by appearing and contesting the applicant's rights the occupant loses his rights.

C Counsel for the respondent Deshpande submitted that this Court should take notice of subsequent events. An application was filed for relying upon certain documents for that purpose. The respondent's contention was that on 19 November, 1968 the respondent surrendered possession to the original landlord Ashar and others and thereafter the original landlords created a new and independent tenancy in favour of the respondent. It was, therefore, said that the appellant had no right to prosecute the application for possession which gave rise to the present appeal.

H The respondent Deshpande relied on these facts in the affidavit. By lease dated 5 July, 1948 Pratap Singh Karsandas Ashar

and Bai Ratnabai Gordhandas leased the property to M/s Departmental Service Stores Limited for a period of 10 years commencing 1 June, 1946 to 31 May, 1956. The lease contained an option for renewal for a further term of 10 years from 1956. The Departmental Service Stores mortgaged its rights, title and interests, for the remaining period of lease on 13 August, 1951 to Dr. Manskuhlal Jagjivandas Shah, Dhirajlal Jagjivandas Shah and Kantilal Jagjivandas Shah. The Departmental Service Stores made default in payment of the mortgaged money. The mortgagees, namely, the Shahs took possession of the mortgaged property. The property was auctioned on 9 December, 1953. Ramniklal & Co., a partnership firm, purchased the right, title and interest of the mortgagees and obtained possession of the property. On 6 April, 1954 the property was conveyed by the mortgagees to the auction purchaser. The original lessees, namely, the Departmental Service Stores in 1954 filed a suit in the Bombay High Court against the mortgagees and the auction purchaser for setting aside the auction sale. On 2 August, 1960 by consent of the parties an order was passed for reconveyance of the property to the original lessees the Departmental Service Stores. On 21 November, 1961 the auction purchaser conveyed the property to the appellant.

On 24 December, 1965 Ashar and others filed a suit against the Departmental Service Stores, the mortgagees, namely, the Shah the auction purchaser and the appellant for possession of the property. The suit filed by Ashar and others is still pending in the Small Cause Court in Bombay. In the year 1965 about 18 Merchants occupying various shops in the premises filed suits in the Court of Small Cause for declaration that they are lawful sub-tenants. These suits were filed against the appellant and Ashar and others. In 1966 the appellant filed about 52 short cause suits restraining the merchants from entering into the shops. In 1967 Ashar and others the original landlords gave notice to the Departmental Service Stores that the term of lease had expired and that the ejectment suit filed in the year 1965 was pending and without prejudice to "accrued rights" served notice under section 12(2) of the 1947 Act on the ground of arrears of statutory rent and property taxes. Ultimately, Ashar and others filed a suit in 1968 against the appellant on the ground of arrears of statutory rent and property taxes from 1 October, 1966 to 30 June, 1967. An *ex-parte* decree was passed on 21 March, 1968. An application for setting aside the *ex-parte* decree was filed by the Departmental Service Stores. On 7 September, 1968 a consent order was passed to the effect that on the Departmental Stores depositing in Court Rs. 28,000 by 6 November, 1968 the *ex-parte* decree was to be set aside and the suit was to be placed

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A for new trial in default of which the notice for new trial was discharged. The Departmental Stores failed to deposit the amount. The notice was discharged and the *ex-parte* decree was valid and operative on and after 7 November, 1968. Most of the occupants in the lease property surrendered possession in pursuance of the warrant of possession. It is in this context of events that

B the respondent Deshpande says that on 19 November, 1968 he surrendered possession to Ashar and other original landlords and there was a new tenancy.

The appellant on the other hand in his affidavit alleged these facts. M/s Ramniklal & Co. were declared the highest bidder at the auction sale on 9 December, 1953. The auction purchaser was accepted as a lessee by the lessors Ashar and others.

C The Departmental Service Stores ceased to have any interest after the auction. The auction purchaser became tenant of the property. Ramniklal & Co. carried on the business of Departmental Stores in the premises. Departmental Stores filed a suit against

D Ramniklal and others to reconvey the property to Departmental Stores. A consent decree was passed that Ramniklal & Co. would convey the business along with tenancy rights to Departmental Service Stores Ltd. or their nominee. The appellant purchased the rights under the consent terms on 25 August, 1960. In the suit filed in the year 1965 by Ashar and others against

E *inter alia* the appellant, the lessors obtained an *ex-parte* injunction preventing the appellant from withholding the entry of the licensees of the appellant. The term of the licensee was to expire on 31 December, 1965. Ashar and others and the licensees of the appellant are in collusion. In the suits filed by the appellant against the licensees in the City Civil Court to prevent the entry of licensees to the property on the ground that the period of

F licence had expired by efflux of time, the Court did not grant any interim injunction against the licensees but directed that the licensees should deposit in Court the monthly compensation. Thereafter some of the licensees of the appellant filed declaratory suits that they were the tenants. The Small Cause Court passed an order restraining the appellant from withholding the entry of the licensees otherwise then by course of law.

G Ashar and others in their suit filed in 1965 obtained an injunction restraining the appellant from withdrawing the amount lying deposited by the licensees in the City Civil Court.

The appellant continued to pay rent to the lessor up to the month of September, 1966. The lessor thereafter declined to

H accept rent from the appellant. The lessor filed a suit against the Departmental Service Stores Ltd. only for non-payment of rent. An *ex-parte* decree was obtained by Ashar and others on

21 March, 1968. The appellant was kept in the dark. An application for setting aside the *ex-parte* decree was made by one Gangnaik as a Director of Departmental Stores Ltd. A consent order was made. The *ex-parte* decree would be set aside on Departmental Service Stores Ltd. paying Rs. 28,000 within one month. Gangnaik is not the Director of the Departmental Service Stores Ltd. The Departmental Service Stores Ltd. had no interest in the property. The appellant was neither a party to the suit nor to the consent order. The consent order does not represent the consent of the appellant. A warrant of possession was executed on 19 November, 1968 in collusion with the respondent and licensees. The appellant lodged a complaint at the Dadar Police Station. The appellant filed an application under Order 21 Rule 100 of the Code of Civil Procedure in the Court of the Small Cause at Bombay. The application was dismissed. The appellant preferred a revision application against the order. That revision application is pending. The appellant also filed a suit in the Bombay Small Cause Court under Order 21 Rule 103 of the Code of Civil Procedure. The suit is numbered 61/414/1971. The suit was filed on 23 November, 1970. The suit is pending.

It is true that the Court can take notice of subsequent events. These cases are where the court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes. If the court finds that the judgment of the Court cannot be carried into effect because of change of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the court also takes notice of such event. If the property which is the subject matter of suit is no longer available the Court will take notice of such event. The court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties and to subserve the ends of justice. Judged by these principles it is manifest that in the present case suits are pending. On the one hand the appellant has challenged the decree obtained by Ashar and others as also the warrant of execution. On the other hand, the suit instituted by Ashar and others against *inter alia* the appellant in 1965 for possession is pending. This Court cannot say with exactitude that any final decision has been reached on the respective and rival rights and claims of the appellant and the respondent. It is, therefore, neither desirable nor practicable to take notice of any fact on the rival versions of the parties as to subsequent events.

For the reasons indicated the appeal is allowed and the judgment of the High Court is set aside.

A

The High Court in view of the conclusion on section 42A of the 1882 Act set aside the decree and chose not to deal separately with the other application for setting aside the *ex-parte* decree.

B

The High Court will now deal with the application for setting aside the *ex-parte* decree. The parties will pay and bear their own costs, in this appeal.

S.C.

Appeal allowed.