

## IN APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Bhagwati.

1952  
Aug. 27

MADHAVPRASAD KALIKAPRASAD NIGAM, APPELLANT (ORIGINAL PLAINTIFF) v. INDIRABAI WIDOW OF S. G. CHANDAVARKAR AND OTHERS, RESPONDENTS.\*

*Bombay Rents, Hotel and Lodging House Rates Control Act (Bombay Act LVII of 1947), ss. 28, 29A, 50—Suit under O. XXI, r. 103 of the Code of Civil Procedure Code, 1908—Tenant's suit for declaration that he was a tenant—Relationship of landlord and tenant in dispute—Possession asked for as ancillary relief—Suit filed in High Court—Whether High Court competent to try such suit—Scope of s. 28.*

Section 28 of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947, creates new courts with exclusive jurisdiction to try certain suits and proceedings and to the extent that it is in derogation of the jurisdiction of the High Court, it must be strictly construed.

Section 28 only permits the special Courts to try a question of title incidentally; when a question of title arises substantially in a suit it is the ordinary Courts of the land which are competent to try and dispose of the suit on title, even though the plaintiff may incidentally pray for possession in that suit. It is not every suit by a landlord against a tenant that falls within the ambit of s. 28; likewise it is not every suit for possession by a tenant against a landlord that falls within the ambit of s. 28.

*Raghuvir Narayan Lotlikar v. Fernandes*,<sup>(1)</sup> referred to.

The plaintiff's case was that he was a sub-tenant of the defendant who had filed a suit in the Small Causes Court for ejecting one Patil alleging that Patil was his sub-tenant. Patil admitted the fact and agreed to vacate the premises. Thereupon an order was passed by the Court ordering Patil to vacate the premises. The defendant obtained a warrant for possession and the plaintiff offered obstruction. The defendant took out an obstructionist notice and the plaintiff was ordered to hand over possession. The plaintiff thereupon filed this suit for a declaration that he was the tenant of the defendants, and, as in the meantime the defendant had obtained possession of the premises, he incidentally prayed for possession being restored to him. On the question whether the suit fell within the purview of s. 28 and whether the High Court had jurisdiction to try the suit,

*Held*, that the suit was substantially a suit for a declaration of title and possession was an ancillary relief sought by the plaintiff which did not deprive High Court of the jurisdiction to try the suit for title and that the Small Causes Court did not have jurisdiction to try it.

*Held*, therefore, that the High Court had jurisdiction to try this suit.

\* O. C. J. Appeal No. 35 of 1951; Suit No. 835 of 1947.

<sup>(1)</sup> (1952) 54 Bom, L. R. 505.

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Madhavprasad K. Nigam (plaintiff) claimed rights of tenancy in respect of a shop No. 9 situate on the ground floor of a building known as Badrikashram at Khetwadi, Bombay. S. G. Chandavarkar (original defendant) filed a suit in the Small Causes Court, Bombay, against Patil alleging that Patil was his sub-tenant of the shop No. 9 and he was in arrears of rent. At the hearing Patil admitted the fact that he had failed to pay rent to Chandavarkar and thereupon the Court passed an ejectment decree against Patil ordering him to vacate the said shop on or before May 14, 1945. On May 18, 1945, the original defendant obtained a warrant of possession against Patil and sought to obtain possession by executing the warrant. But the plaintiff obstructed in the delivery of possession. Thereupon the original defendant took out an obstructionist notice against the plaintiff. At the hearing of the notice the plaintiff was ordered to hand over possession of the said shop to the original defendant.

The plaintiff thereupon filed the present suit against the original defendant for a declaration that he was a tenant of the defendant and as such tenant he was entitled to possession of the said shop. The plaintiff took out a notice of Motion returnable on April 7, 1947 for an order restraining the original defendant from executing the said order of the small Causes Court. But the original defendant on April 3, 1947 in execution of the decree of the Small Causes Court against Patil, obtained possession of the said shop. The plaintiff thereupon amended his plaint by, *inter alia*, adding a prayer, that the defendant may be ordered by a mandatory injunction to restore possession of the said shop to the plaintiff.

At the hearing of the suit Shah J. tried the issue whether the High Court had jurisdiction to try the suit as a preliminary issue and held that by reason of the provision of s. 50 of the Bombay Rents, Hotel and Lodging House Rates Control Act LVII of 1947, the High Court was not competent to try this suit. He therefore transferred the suit to Small Causes Court, Bombay.

The plaintiff appealed.

The original defendant having in the meantime died, the respondents as the heirs of the original defendant were brought on record pursuant to the Appellate Court's order dated April 14, 1952.

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R. B. *Andhiyaujina* with M. V. *Desai*, for the appellant.

S. T. *Desai* with K. H. *Bhabha*, for the respondents.

CHAGLA C. J. This appeal arises out of a suit filed by the plaintiff under O. XXI, r. 103 and the suit came to be filed under the following circumstances.

The plaintiff's case was that he was a sub-tenant of the defendant and the defendant filed a suit in the Small Causes Court for ejecting one Anna Adgauda Patil alleging that Patil was his sub-tenant. Patil admitted the fact and agreed to vacate the premises. Thereupon an order was passed by the Small Causes Court on May 14, 1945, ordering Patil to vacate the premises. The defendant obtained a warrant of possession and the plaintiff offered obstruction. The defendant took out an obstructionist notice and the plaintiff was ordered to hand over possession to the defendant. The plaintiff thereupon filed the present suit. The plaintiff in the suit prayed for a declaration that he was the tenant of the defendant and as such tenant entitled to remain in possession of the premises. He also sought for a declaration that the defendant was not entitled to execute the order of the Small Causes Court. After the suit was filed and before the plaintiff could get a stay of execution of the order, the defendant obtained possession of the premises, and, therefore, the plaintiff asked for an amendment of the plaint and prayed that the possession which had been taken away from him should be restored to him.

The learned Judge tried the preliminary issue as to whether this Court had jurisdiction to try the suit, and the learned Judge came to the conclusion that this Court had no jurisdiction and that the suit had to be transferred to the Small Causes Court under the provisions of s. 50 of the Rent Restriction Act, and it is from that finding that this appeal is preferred.

Under s. 50 suits which were pending in this Court and which related to the recovery or fixing of rent or possession of any premises had to be transferred to and continued before the Courts which would have jurisdiction to try such suits, and the Courts which would have jurisdiction are the Courts set up under the provisions of s. 28. Section 28 creates new Courts with exclusive jurisdiction to try certain class of suits and proceedings and it is clear that to the extent that s. 28 is in derogation of the jurisdiction of the High Court it must be strictly construed. In construing s. 28 we cannot

ignore the preamble which gives an indication as to the object with which the Act was passed. It is true that when the language of a section is clear the Court ought not to look at the preamble in order to cut down the effect or the scope of the section. But when a Court with exclusive jurisdiction is created and when the jurisdiction of the High Court is excluded, and when the Court is called upon to construe s. 28 strictly, it is perfectly permissible to look at the preamble in order to ascertain what was the object with which the special Court was created, and also to look at s. 28 in its proper context and setting. Now, the object with which the Act was passed was to consolidate the law relating to the control of rents and repairs of certain premises of rates of hotels and lodging houses and of evictions, and the Act deals with various questions that affect the relationship between landlord and tenant. On the one hand, the Act imposes limitations upon the rights of a landlord which he possessed under the ordinary law. On the other hand, it confers new rights upon the tenants which they did not have under the ordinary law, and the Act is primarily intended to define these new liabilities imposed upon the landlord and the new rights conferred upon the tenant, and the special Court which is set up under s. 28 is primarily intended to deal with all the questions that arise under the Act.

We had occasion to point out in *Raghubir Narayan Lotlikar v. G. A. Fernandes*<sup>(1)</sup> that it is not every suit for possession between a landlord and a tenant which necessarily falls within the purview of s. 28. Mr. S. T. Desai is right when he points out that in that particular case we were dealing with the suit by a landlord against a tenant and we were not called upon to consider what the position in law would be if a tenant filed a suit against his landlord. But certain tests which we laid down in that case are equally applicable when a suit is filed by a tenant against a landlord. In that case we held that s. 28 applies only to those suits between a landlord and a tenant when a landlord has become entitled to possession or recovery of the premises demised. When a landlord so becomes entitled, the question arises whether he is entitled to possession by reason of ss. 12 and 13 of the Rent Act, and, therefore, when a landlord files a suit for possession under those sections, the Court is called upon to construe the provisions of the Rent Act and such a suit must obviously be tried by the new Court set up under s. 28. But there may

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be other suits which a landlord may file against a tenant for possession which may not require the consideration of the provisions of the Rent Act at all. In that particular case, in *Raghubir Narayan Lotlikar v. Fernandes*<sup>(1)</sup> we were dealing with a suit filed by a landlord for specific performance against his tenant, and the landlord prayed for possession against the tenant as a result of an agreement entered into between them, and the learned Judge in deciding the suit applied the three tests which according to him were the only tests that should be applied in considering whether s. 28 came into operation or not. The three tests suggested by the learned Judge were that the relationship between the parties should be that of landlord and tenant, that the suit must be for possession, and that the suit must be in respect of the premises to which part II applies, and the learned Judge took the view that as soon as those three tests were satisfied, no other inquiry need be made and the suit must be transferred to the Court set up under s. 28. Now, in the present case the learned Judge has applied the three identical tests. No blame whatever attaches to the learned Judge because, in fairness to him, it must be stated that our decision in *Raghubir Narayan Lotlikar v. Fernandes*<sup>(1)</sup> was not before him when he decided this case. Therefore, when we are dealing with a suit by a tenant against a landlord, it is not sufficient to inquire whether the three conditions just mentioned have been satisfied or not. It is true that in this case the parties arrayed against each other are landlord and tenant. It is equally true that after the amendment of the plaint the tenant asked for possession. It is equally true that the premises in question are premises to which Part II applies. But even if all these conditions are satisfied, it does not necessarily follow that the suit we are considering is a suit to which s. 28 applies. In our opinion this suit substantially is a suit on title. It is not a suit for possession. This is not a case where the relationship of landlord and tenant is admitted and the tenant comes to Court for possession. This is a case where the relationship is in dispute and what the plaintiff wants from the Court is the establishment of his title that he is the sub-tenant of the premises. It is only when the title is established that he can ask for any relief at all. When he originally filed the suit he would have been content with a mere declaration of title. All that he wanted was that his right to continue in possession should be

<sup>(1)</sup> (1952) 54 Bom. L. R. 505.

established. By reason of certain fortuitous circumstances by which he lost possession pending suit he was compelled to ask for an amendment and ask for possession as an ancillary relief. But the mere fact that he asked for possession did not in any way change the nature of the suit. The suit continued to remain a suit for a declaration of the plaintiff's title. The plaintiff would only obtain relief for possession provided the Court gave him the declaration that he sought and provided the Court held that he was a sub-tenant and entitled to be in possession as a sub-tenant. Therefore, in our opinion, it is clear that the suit is substantially a suit for a declaration of title and possession is an ancillary relief which is sought by the plaintiff.

With very great respect to the learned Judge, we do not for a moment accept the proposition that even where a suit is substantially for title, and possession is asked merely as an ancillary relief, even so by reason of s. 28 the suit must be transferred to the special Court set up under s. 28. In this connection s. 28-A may be looked at. That section provides that,

"Nothing contained in s. 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".

Therefore, where the special Court under s. 28, or the appeal Court under s. 29, in dealing with suits referred to in s. 28 incidentally decided the question as to title, the party to those proceedings is not barred from agitating the title to the suit premises in a competent Court. Now, it is not disputed that this Court is a competent Court as far as the question of title to premises in suit is concerned. Therefore, a *fertiori* suits to establish title still continued to be triable by Courts which were competent Courts before the Rent Act was passed, and s. 29-A makes it clear that the jurisdiction of the Courts to try suits on title has not been taken away by s. 28. Section 28 only permits the special Courts to try question of title incidentally but when question of title arises substantially in the suit, then it is the ordinary Courts of the land which are competent Courts that must try and dispose of suits on title. Therefore, if the High Court was the proper Court to try the particular suit on title which the plaintiff has filed, then merely because incidently he prays for possession, does not deprive the jurisdiction of this Court

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to try that suit for title and the Small Causes Court does not have jurisdiction under s. 28 to try the suit.

Even assuming that this is not a suit on title, it is difficult to understand how the Small Causes Court would have jurisdiction to try this suit. Essentially this is an action in trespass. The plaintiff's case is that he is the sub-tenant and he has been wrongfully dispossessed by the defendant, and he wants possession from the defendant as a trespasser. Therefore, the plaintiff's suit is on his title against a person who has no title and who is a trespasser, and the interesting question that arises is whether when a tenant files a suit against a landlord for possession alleging that he has been dispossessed, such a suit falls within the ambit of s. 28. The Rent Act gives certain special rights to the tenant in respect of obtaining possession from the landlord. Section 16 gives him right to re-enter upon the premises which have been given to the landlord for repairs. Section 17 also gives him a similar right of re-entry. Section 17-A gives him right to recover possession from his landlord in cases where the building is demolished. There are also rights given to the tenant in respect of recovery of rent paid by him to his landlord. Section 20, for instance, gives him right to recover excess rent paid by him, and s. 11 gives him the right to fix standard rent. Therefore, the learned Judge is right when he points out that under s. 28 there may be applications, certainly if not suits, which may be brought by the tenants against the landlords. But a suit or an action in trespass is not a new right conferred upon a tenant. If a tenant files a suit in respect of the landlord's trespass, he is merely exercising his ordinary rights under the ordinary law. He is not asserting a new right conferred upon him by the Act, and no question as to the provisions of the Act can arise when the plaintiff's suit is a simple suit by a tenant complaining of being dispossessed by a landlord and claiming possession from him as against a trespasser. Therefore, a suit of that nature is not a suit for possession contemplated by s. 28. To repeat, it is not every suit for possession by a tenant against a landlord, just as it is not every suit for possession by a landlord against a tenant, that falls within the ambit of s. 28. The object of enacting s. 28 was to set up a special Court of summary jurisdiction to deal with matters which arise out of the Rent Act and one of the matters that arise out of the Rent Act was suit for possession contemplated by that Act between landlord and a tenant, and may be between a tenant and a land-

lord. It is impossible to contend that a suit in trespass is a suit contemplated by the Rent Act and which calls into question the consideration of the provisions of the Rent Act. Therefore, in our opinion, whether we look upon this suit as a suit on title or a suit for possession, it is not a suit solely triable by the new Court set up under s. 28, and in respect of this suit the jurisdiction of this Court has not been ousted.

The result, therefore, is that the appeal succeeds and the order of the learned Judge below will be set aside and the suit will go down for trial on merits. In view of the order made by us on April 14, 1952, the appellant must pay the costs of this appeal. The respondent to pay to the appellant the costs of the issue tried by the learned Judge below. Costs to be set off.

Attorneys for appellant: *Manilal, Kher, Ambalal & Co.*

Attorneys for respondents: *Khunderao, Laud & Co.*

*Appeal allowed.*

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*Before Mr. Justice Bhagwati and Mr. Justice Dixit.*

BAI RAMLAXMI RANCHHODLAL (ORIGINAL PLAINTIFF), APPELLANT  
v. THE BANK OF BARODA, LTD. (ORIGINAL DEFENDANT), RESPONDENT.\*  
Indian Registration Act (XVI of 1908), ss. 17 (1), 49—Partition of joint family property—Unregistered deed of partition—Admissibility of document to prove fact of partition—"Collateral transaction," meaning of—Civil Procedure Code (Act V of 1908), O. XXI, r. 103—Scope of suit—Right of erstwhile coparcener to present possession as tenant-in-common—Whether right can be established in such suit.

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Feb. 1

Where a memorandum of partition of the immovable properties belonging to a joint Hindu family is not registered though it requires registration, it is inadmissible in evidence under the main provisions of s. 49 of the Indian Registration Act, 1908, to prove the terms of the partition. But the severance of joint status which is not required to be effected by a registered instrument is a collateral transaction within the proviso to the section and the memo. is admissible to prove the fact of such partition.

The expression "collateral transaction" in the proviso to s. 49 of the Indian Registration Act is used not in the sense of a transaction

\*First Appeal No. 500 of 1948.