



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 764 OF 2021

Shri Akhilesh s/o Mohansingh Thakur
Aged about 44 Years, Occu-Business, R/o
20, Zade Layout, Bharat Nagar, Nagpur.

... PETITIONER

VERSUS

Hari alias Haribhau s/o Shankar Masram
Aged about 65 Years, Occu-Nil; R/o Plot
No. 81, Pannase Layout, Indraprastha
Nagar, (Perfect Housing Society), Bhamti,
Nagpur.

... RESPONDENT

Mr. Ramaswamy Sundaram, Advocate for Petitioner.
Mr. Reynold T. Anthony, Advocate for Respondent.

CORAM	: ANIL L. PANSARE, J.
ARGUMENTS HEARD ON	: SEPTEMBER 18, 2024.
PRONOUNCED ON	: NOVEMBER 11, 2024.

ORAL JUDGMENT

. Heard. Issue Rule returnable forthwith. The learned Counsel for Respondent waives service of Rule on behalf of the Respondent. With consent of the learned Counsel for the parties, the Petition is taken up for final hearing.

2. This Petition arises out of the rejection of application filed by the Petitioner under Order VII Rule 11 of the Code of Civil Procedure, 1908 (*for short 'the Code'*) together with registration of the counter-claim without payment of Ad-veloram Court Fees.

3. The Petitioner/Original Plaintiff filed a suit against the Respondent/Original Defendant for specific performance of contract. The Respondent filed a written statement with counter-claim seeking declaration and possession of the suit property. The counter-claim is based on the premise that the Respondent was in financial crisis and required a sum of Rs.4,50,000/- for repayment of loan due to the Bank. Accordingly, he requested the Petitioner to extend finance to pay loan amount. The Petitioner agreed to do so on the condition of Respondent providing the block of first floor of the suit property on leave and license basis for monthly license fees of Rs.10,000/-. This license fee was to be adjusted towards repayment of finance and upon full discharge, the Petitioner was to vacate the premises. According to Respondent, the finance of Rs.4,50,000/- was fully adjusted on or about 15/4/2012, and therefore, the Petitioner ought to have vacated the suit premises. Having not done so, the Respondent sought declaration of the Petitioner being a trespasser and to restore possession.

4. The Petitioner filed application (Exhibit-49) under Order VII Rule 11 of the Code on two counts. One is that, the counter-claim is barred in view of Section 33 read with Section 47 of the Maharashtra Rent Control Act, 1999 (*for short, 'the Act of 1999'*); and the second is, the counter-claim was neither properly valued nor the Court Fees paid in terms of the reliefs sought. According to the Petitioner, since the Respondent is claiming possession and compensation, the suit ought to have been valued accordingly.

5. The trial court, opined that the Respondent has sought declaration of the Petitioner being a trespasser and not a tenant and that the claim of compensation is in the form of damages towards mesne profit and not license fees, and therefore, the provisions of the Act of 1999 will not apply on

the point of payment of Ad-veloram Court Fees. The trial court held that the question, whether Petitioner's possession over the suit property is that of a trespasser, has been not yet decided and unless the same is decided, the entitlement of Respondent for mesne profit cannot be ascertained. The trial court, accordingly, held that once these questions are answered in favour of the Respondent, then only he will be required to pay requisite Court Fees. Accordingly, the trial court rejected the application.

6. In my view, the trial court committed serious error of law in deciding both the questions involved in the case. It is well settled that the counter-claim is treated as plaint and the questions as regards jurisdiction and payment of Ad-veloram Court Fees are wholly dependent on the pleadings made in the counter-claim. As stated earlier, the Respondent, while filing counter-claim, has made certain averments which were relevant to decide the jurisdiction of the court. The Respondent averred that the parties entered into an agreement of leave and license with an understanding that license fees of Rs.10,000/- shall be adjusted towards repayment of finance and upon adjusting the entire liability, the Petitioner shall vacate the suit premises. Thus, a theory of licensor and licensee is put-forth in the counter-claim. The Respondent then averred that Petitioner failed to deliver the possession in terms of the agreement, and therefore, his possession be treated as that of trespasser.

7. On this point, Section 24 of the Act of 1999 is relevant, which reads thus :

“24. Landlord entitled to recover possession of premises given on licence on expiry

(1) Notwithstanding anything contained in this Act, a licensee in

possession or occupation of premises given to him on licence for residence shall deliver possession of such premises to the landlord on expiry of the period of licence; and on the failure of the licensee to so deliver the possession of the licensed premises, a landlord shall be entitled to recover possession of such premises from a licensee, on the expiry of the period of licence, by making an application to the Competent Authority, and, the Competent Authority, on being satisfied that the period of licence has expired, shall pass an order for eviction of a licensee.

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence.

(3) The Competent Authority shall not entertain any claim of whatever nature from any other person who is not a licensee according to the agreement of licence.”

As could be seen, sub-section (1) of Section 24 provides that a licensee in possession or occupation of the premises given to him on license for residence shall deliver possession of the said premises to the landlord on expiry of the period of licence; and on failure to do so, a landlord may file application to the Competent Authority for recovery of possession. The appointment of Competent Authority is made in terms of Section 40 of the Act of 1999. Sub-section (2) of Section 24 provides for damages to be paid by the licensee to the licensor upon his failure to deliver possession of the premises to the landlord.

8. Thus, the appropriate remedy, that was available to the Respondent, was to approach the Competent Authority for recovery of possession.

9. Section 47 of the Act of 1999 provides that no civil court shall have jurisdiction in respect of any matter which the Competent Authority or the State Government or an Officer authorized by it is empowered by or under this Act, to decide, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power so conferred on the Competent Authority or the State Government or such Officer.

10. As such, Section 47 commences with saving clause, however, the Counsels before the Court have not invited my attention to any provision that would enable the civil court to entertain the counter-claim.

11. The trial court, thus, committed serious error of law when it has read in isolation the reliefs claimed by the Respondent to declare the Petitioner as trespasser. The trial court ignored the averments made in the counter-claim to seek such relief. Once the claim has been based on the agreement of leave and license, the relationship of licensor and licensee stands admitted by the Respondent. In turn, the provisions of the Act of 1999 would attract. Consequently, the civil court shall have no jurisdiction to entertain the counter-claim.

12. On the point of valuation of counter-claim and payment of Ad-veloram Court Fees, again the trial court failed to apply the provisions of the Code, particularly Order VII Rule 11(b), which provides that the plaint shall be rejected in a case where the relief claimed is under-value, and the plaintiff, on being required by the Court to so correct the valuation within a stipulated time fails to do so.

13. Thus, the valuation is dependent on the relief claimed, and not on

the possibility of plaintiff's succeeding in the reliefs so claimed. The finding of the trial court that payment of requisite Court Fees is dependent on the Plaintiff's entitlement for declaration and mesne profit, if decided, runs contrary to the aforesaid provision. The trial court ought to have directed the Defendant (who will be Plaintiff in counter-claim) to correct the valuation and to pay the same within stipulated time.

14. The learned Counsel for Petitioner has placed reliance upon the Judgment of the Supreme Court in the case of ***Mahadev P. Kambekar (dead) through Legal Representatives V/s Shree Krishna Woolen Mills Private Limited, (2020) 14 Supreme Court Cases 505***. The plaintiff in the said case claimed himself to be lessee of the suit land whereas the defendant claimed himself to be the owner/lessor on the terms set out in the indenture of the lease deed executed between the parties. There arose dispute between the parties. The defendant terminated the lease by serving a quit notice requesting the plaintiff to handover the possession. The plaintiff filed a suit claiming specific performance of contract. The suit was based on Clause 7 of the lease deed, which according to the plaintiff, enabled him to elect and exercise his right to purchase the suit land. The defendant filed written statement and also counter-claim seeking plaintiff's eviction from the suit land and arrears of rent. The Division Bench of this Court held that counter-claim was not maintainable in view of Section 41 of the Presidency Small Cause Courts Act, 1882 (*for short, 'the Act of 1882'*). The Supreme Court upheld the Judgment of the Division Bench and held that the counter-claim is barred by Section 41 of the Act of 1882. In doing so, the Court also observed that it is immaterial, if the suit is between licensee and licensor or between the landlord and tenant, and held that such types of suits fall under Section 41 of the Act of 1882, and are therefore, cognizable by the courts of Small Causes.

15. One of the grounds raised before the Division Bench by the Defendant therein was that, if the tenancy is determined, such suit would not come within the purview of Section 41 of the Act of 1882. This argument was rejected by the Division Bench in the light of the law laid down by this Court in the case of ***Nagin Mansukhlal Dogli V/s Haribhai Manibhai Patel, 1979 SCC OnLine Bom 29***. In ***Nagin's case (supra)***, the Division Bench has dealt with the arguments, which is also the argument before this Court, so far as the Respondent is concerned. The Court held thus :

“17. Mr. Sanghavi next argued that the relief claimed by him in the suit was not a decree for possession but was a declaration that the defendant was a trespasser upon or in respect of the said flat and that he had no right, title or interest to remain or continue to remain in use and occupation or possession thereof, and for a mandatory injunction against the defendant forthwith to remove himself, his servants and agents, together with his belongings, from the said flat and to hand over vacant and peaceful possession of the said flat to the plaintiff. In Mr. Sanghavi's submission this was thus a suit for a declaration and an injunction, and by reason of clauses (i) and (s) of section 19 of the Presidency Small Cause Courts Act, 1882, the Small Cause Court had no jurisdiction to entertain such a suit or to grant such reliefs. The material provisions of the said section 19 are as follows:

“19. Suits in which Court has no jurisdiction. The Small Cause Court shall have no jurisdiction in—

<i>X</i>	<i>X</i>	<i>X</i>
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(i) suits to obtain an injunction;

<i>X</i>	<i>X</i>	<i>X</i>
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(s) suits for declaratory decree;”

18. *The first question which arises is whether this is really in substance a suit for a declaratory decree or an injunction, or a suit for recovery of possession of immovable property camouflaged in*

the guise of a suit for a declaration and injunction. The words which clause (s) of section 19 uses are “suits for declaratory decrees”. Suits for declaratory decrees are governed by Chapter VI of the Specific Relief Act, 1963, When declarations can be granted is provided for by section 34 of that Act which occurs in that Chapter. Under the said section 34 “any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right”. Now, here at no stage has the defendant denied or been interested in denying the plaintiff's title to the said flat. On the contrary, his case as set out in his said affidavit in reply and in the correspondence preceding the suit is that while the second agreement of licence was still subsisting, it was orally agreed between the parties that the licence would continue as long as the defendant desired. He is thus accepting the title of the plaintiff to the said flat as also the plaintiff's right to give the licence in respect thereof to him in the plaintiff's legal character as the licensor. The plaintiff has contended in the plaint that on the licence coming to an end the defendant is a trespasser upon the said promises. Whether the defendant has become a trespasser or not is an issue which has to be tried in the suit. What the plaintiff really wants by the declaration prayed for in prayer (a) of the plaint is a declaratory decree with respect to the answer in his favour to that issue. Such a declaration would stand on the same footing where a plaintiff in a suit for damages for breach of contract to ask for a declaration to the effect that the defendant has committed a breach of contract. It is the determination of the issue whether the licence has come to an end or not which would give the right to the plaintiff to obtain the relief of possession. The declaration sought for does not change the real nature of the suit. Section 34 of the Specific Relief Act has no application to the case, and this suit cannot be described as a suit for a declaratory decree.

19. *Prayer (b) of the plaint, in the guise of a prayer for a mandatory injunction against the defendant to remove himself from the said flat, is in substance no other than a prayer for the recovery*

of possession of the said flat. Realizing full well that the proper relief to pray for would be a decree or order for possession but at the same time being desirous of bringing the suit in this Court and simultaneously not wishing the suit to suffer from a technical defect, the draftsman of the plaint has in the said prayer sought to protect the plaintiff by using the phraseology "that the defendant be ordered and decreed by a mandatory order or injunction ..." Thus really, what is prayed for is a decree for possession.

20. It is now well-settled that when we have to determine the nature of the suit what we are to look at is the real substance of the suit and not legal ingenuity in drafting the plaint. The plaint read as a whole and the real substance of the suit leave no doubt that this is a suit between persons who hold the character of a licensor and licensee, which relationship having come to an end according to the plaintiff, the plaintiff has become entitled both in law and under the agreement of licence to recover possession of the property from the defendant, his licensee.

21. Mr. Sanghavi also submitted that in the plaint the plaintiff has claimed a sum of Rs. 35,625 by way of damages for trespass for the period from June 1, 1970, till the date of the suit, that is, till April 1978, at the rate of Rs. 375 per month and for a sum of Rs. 375 per month from the date of the suit till possession of the said flat is handed over to the plaintiff either by way of future mesne profits or damages or compensation for wrongful use and occupation of the said flat. Mr. Sanghavi argued that section 41 of the Presidency Small Cause Courts Act did not in terms include a suit for damages for trespass or for compensation for wrongful use and occupation or for mesne profits. In his submission, the section only related to recovery of licence fee or charges and that the license having been determined, all that the plaintiff could recover from the defendant was either damages for trespass or compensation for wrongful use and occupation of the property or mesne profits. This argument of Mr. Sanghavi overlooks the language used in the said section 41. The said section 41 speaks of "all suits and proceedings between a

licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay". It is significant that the words used in the said section 41 are "suits ... relating to the recovery of possession" and not "suits, for possession". Rule 12, of Order XX of the Code of Civil Procedure, 1908, provides as to how a Court is to proceed "Where a suit is for the recovery of possession of immovable property and for rent or mesne profits." The contrast between the language used in Order XX, Rule 12 and the said section 41 immediately strikes one. The phrase "relating to the possession of any immovable property" is wider than the phrase "for the recovery of possession of any immovable property." The words "relating to" are intentionally and designedly used in the said section 41 not to confine the section only to a suit for the recovery of possession of immovable property situate in Greater Bombay but also to permit to be included within the ambit of such a suit all other reliefs which the plaintiff can claim in a suit for the recovery of possession of immovable property on the termination of a licence or a tenancy."

Thus, the argument that counter-claim was not for a decree of possession, but was for a declaration that the Petitioner herein is a trespasser, will not take away the jurisdiction of the Small Causes Court to entertain the claim. What is important, is a substance in the suit, and not any relief in isolation. In fact, in the present case, the Respondent has categorically sought restoration of possession, which relief is covered under Section 25 of the Act of 1999.

16. Thus, the finding of the trial court that the Respondent is seeking relief of trespasser and not a tenant, is not in tune with the settled principles of law. The order impugned is, therefore, unsustainable. The Petitioner has made out a case.

17. The Writ Petition is, accordingly, allowed. The order dated

28/9/2020 passed below Exhibit-49 by the Civil Judge Senior Division, Nagpur in Special Civil Suit No. 326/2012 is hereby quashed and set aside. The counter-claim is returned to the Respondent in terms of Order VII Rule 10 of the Code. The consequential orders, in terms of Order VII Rule 10 and 10-A of the Code, shall be passed by the trial court.

18. Rule is disposed of in above terms. No order as to costs.

(ANIL L. PANSARE, J.)

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