

MAHADEV P KAMBEKAR (D) TR. LRS.

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v.

SHREE KRISHNA WOOLEN MILLS PVT. LTD.

(Civil Appeal Nos. 5753-5754 of 2011)

JANUARY 31, 2019

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**[ABHAY MANOHAR SAPRE AND
R. SUBHASH REDDY, JJ.]**

Presidency Small Cause Courts Act, 1882 – s. 41 – Counter claim – Maintainability – On facts, dispute between the parties relating to land in Bombay suburban district – Suit by plaintiff-lessee(respondent) against defendant-lessor/owner(appellants) on the original side of Bombay High Court claiming specific performance of contract-lease deed in relation to suit land – Defendant filing counter claim against the plaintiff seeking their eviction from suit land and arrears of rent – Single Judge allowed the counter claim and passed decree for possession of the suit land – Division Bench of the High Court held that the Single Judge wrongly entertained the counter claim as it had no jurisdiction on its original jurisdiction to entertain counter claim of this nature in light of s. 41 – Correctness of – Held: Division Bench of High Court rightly held that the counter-claim filed by the defendant was not maintainable – Whether it is a suit between the licensor and the licensee or between the landlord and the tenant, such types of suits fall u/s. 41 and are, thus, cognizable by the Courts of Small Causes, Bombay – Once the tenancy is determined such suits would come within the purview of s. 41 – Parties to raise the factual issues before the competent court which would come to the conclusion on merits.

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Dismissing the appeals, the Court

HELD: 1.1 The High Court in the impugned judgment rightly held that the counter-claim filed by the defendant (appellants) is not maintainable. There is no ground to take a different view than what has been taken by the High Court. [Paras 25, 26][835-G-H]

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1.2 Whether it is a suit between the licensor and the licensee or between the landlord and the tenant, such types of

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A suits fall under Section 41 of the Small Cause Courts Act and are, therefore, cognizable by the Courts of Small Causes, Bombay. [Para 29][836-C-D]

B 1.3 The submission that once the tenancy is determined such suits would not come within the purview of Section 41 of the Small Cause Courts Act, was rightly rejected by the Division Bench of the High Court. [Para 30][836-D-E]

Nagin Mansukhlal Dagli v. Haribhai Manibhai Patel
AIR 1980 Bombay 123 – approved.

C 1.4 It is now for the parties to raise all such factual issue(s) such as how much area was leased out, how much area is outside the lease, who are the owners of the leased area and the areas adjacent to leased area and all incidental questions arising therefrom before the competent Court. It is apart from the fact that these factual issues were also not gone into by the Division Bench and indeed rightly. It is for this reason, there is no ground to deal with them for the first time in these appeals else it will cause prejudice to the rights of the parties while prosecuting their grievances before the competent Court. The competent Court would come to its own conclusion on their respective merits and pass appropriate orders in accordance with law. [Para 32, 33][836-G-H; 837-A-B]

E *Mansukhlal Dhanraj Jain & Ors. v. Eknath Vithal Ogale*
(1995) 2 SCC 665 : [1995] 1 SCR 996; *Prabhudas Damodar Kotecha & Ors. v. Manhabala Jeram Damodar & Anr.* (2013) 15 SCC 358 : [2013] 9 SCR 52 – relied on.

F Case Law Reference

[1995] 1 SCR 996	relied on	Para 20
[2013] 9 SCR 52	relied on	Para 25
AIR 1980 Bombay 123	approved	Para 30

G CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5753-5754 of 2011.

From the Judgment and Order dated 19.07.2007 of the High Court of Judicature at Bombay in Appeal No. 169 of 1999 in Suit No. 503 of 1980 and in Appeal No. 199 of 1999 in Suit No. 503 of 1980.

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Shekhar Naphade, Shyam Divan, Sr.Advs., Mahesh Agarwal, A
Yatin Shah, Gaurav Goel, Abhikalp Pratap Singh, Ms. S.Lakshmi Iyer,
Prateek Rusia, Ms.Aastha Mehta, E.C.Agrawala, Manish Sharma,
Mrs.Mayuri Raghuvanshi, Vjom Raghuvanshi, Pranay Raj Singh,
Ms.Samiksha, Ms.Deepa M. Kulkarni, Nishant Ramakantrao
Katneshwarkar, Ms.Asha Gopalan Nair, Adv. for the appearing parties. B

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. These appeals are directed
against the final judgment and order dated 19.07.2007 passed by the
High Court of Judicature at Bombay in Appeal No.169 of 1999 in Suit
No.503 of 1980 and in Appeal No.199 of 1999 in Suit No.503 of 1980 C
whereby the Division Bench of the High Court allowed both the appeals
filed by the appellants herein (defendant) and the respondent(plaintiff)
herein respectively.

2. In order to appreciate the controversy involved in these appeals
which lies in a narrow compass, it is necessary to set out the relevant D
facts hereinbelow.

3. The appellants are the legal representatives of Mahadev
Pandurang Kambekar, who was the original defendant whereas the
respondent-Shree Krishna Woolen Mills Pvt. Ltd. is the plaintiff in the
Civil Suit out of which these appeal arise. E

4. The dispute between the parties relates to the land bearing
survey Nos.58 and 60 (re-numbered as CTS 741,741/1 to 741/7) situated
at Nahur-Bhandup in Bombay suburban District (hereinafter referred to
as “the suit land”).

5. The plaintiff claims to be the lessee of the suit land whereas F
the defendant claims to be the owner/lessor of the suit land on the terms
set out in the indenture of the lease deed dated 20.06.1958 executed
between the parties.

6. A dispute arose between the parties. This led the defendant to
determine the lease in question by serving a quit notice dated 19.02.1980 G
to the plaintiff requesting them to handover the leased premises, which
was in their possession, to the defendant.

7. The plaintiff then filed a Civil Suit (No.503 of 1980) against the
defendant on the original side of the Bombay High Court claiming therein
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A the specific performance of the contract (lease deed) in relation to the suit land.

8. The suit was based essentially on clause 7 of the Lease Deed which, according to the plaintiff, enabled them to elect and exercise their right to purchase the suit land from the defendant on fulfillment of

B the conditions set out therein.

9. The defendant on being served filed the written statement. The defendant denied the claim and at the same time also filed his counter claim against the plaintiff seeking their eviction from the suit land and the arrears of rent.

C 10. The Single Judge by judgment/decreed dated 24.12.1998 decreed the plaintiff's suit for specific performance of contract and directed the defendant to execute the conveyance deed in favour of the plaintiff of the suit land. The Single Judge also allowed the counter claim filed by the defendant and accordingly passed the decree for possession of the
D suit land and arrears of rent for three years against the plaintiff.

11. The appellants (defendant) and the respondent (plaintiff) both felt aggrieved by the judgment/decreed passed by the Single Judge and filed their respective appeals before the Division Bench.

E 12. So far as the defendant's (appellants herein) Appeal No.169/1999 was concerned, it arose out of the decree passed against him for specific performance of the contract, whereas so far as the plaintiff's (respondent herein) appeal (No.199/1999) was concerned, it arose out of the decree passed against them for possession of the suit land and arrears of rent.

F 13. By impugned judgment, the Division Bench allowed both the appeals. So far as appeal (169/1999) filed by the appellants (defendant) was concerned, the Division Bench set aside the judgment /decree and remanded the suit for re-trial to the Single Judge on merits afresh in accordance with law.

G 14. So far as appeal (199/1999) filed by the respondent (plaintiff) was concerned, the Division Bench set aside the judgment/decreed on the ground that the counter-claim was not maintainable in view of Section 41 of the Presidency Small Cause Courts Act, 1882 (for short called "the Act 1882") . In other words, the Division Bench held that so far as
H counter-claim filed by the defendant against the plaintiff is concerned,

the Single Judge wrongly entertained it as it had no jurisdiction on its original jurisdiction to entertain counter-claim of this nature in the light of the provisions of Section 41 of the Act 1882. A

15. The defendant (appellants herein), i.e., lessor felt aggrieved by that part of the order of the Division Bench which resulted in dismissal of his counter-claim and filed the present appeals by way of special leave in this Court. B

16. So far as the order of the Division Bench which resulted in setting aside of the judgment/decreed of the Single Judge and remanding of the suit for re-trial on merits is concerned, it attained finality as a result of dismissal of SLP filed by the plaintiff in this Court. C

17. The short question, which arises for consideration in these appeals, is whether the Division Bench was right in dismissing the defendant's counter-claim as being not maintainable.

18. Heard Mr. Shekhar Naphade, learned senior counsel for the appellants and Mr. Shyam Divan, learned senior counsel for the respondent. D

19. Mr. Naphade, learned senior counsel appearing for the appellants (defendant) and Mr. Shyam Diwan, learned senior counsel appearing for the respondent (plaintiff) addressed the Court at length. However, having heard both the learned counsel and on perusing the record of the case, we find no merit in these appeals. E

20. In our considered opinion, the issue involved in the present appeals remains no longer *res integra* and is decided by this Court in the case of **Mansukhlal Dhanraj Jain & Ors. vs. Eknath Vithal Ogale** [(1995) 2 SCC 665]. F

21. In **Mansukhlal case** (supra), the question arose as to whether the suit filed by the plaintiff claiming to be the licensee of the premises on monetary consideration and seeking permanent injunction restraining the defendant (licensor) from recovery of the possession of the premises is cognizable by the City Civil Court, Bombay constituted under the Bombay City Civil Court Act or is cognizable by the Court of Small Causes Bombay as per Section 41(1) of the Act, 1882. G

22. It is this question, which was examined by this Court in detail in the light of the relevant provisions of the Bombay City Civil Court Act, H

A the Presidency Small Cause Courts Act, 1882 and the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

23. Having examined the question, their Lordships speaking through Majmudar, J. held that such suit is cognizable and thus maintainable in the Court of Small Causes, Bombay.

B 24. It is apposite to refer the discussion contained in paras 11, 12, 13, 16, 17 and 18 which read as under:

C **“11. In order to resolve the controversy posed for our consideration, it will be appropriate to note the relevant statutory provision having a direct bearing on this question. Section 41(1) of the Small Cause Courts Act reads as under:**

D **“41. (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try 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, or relating to the recovery of the licence fee or charges or rent thereof, irrespective of the value of the subject-matter of such suits or proceedings.”**

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G 12. A mere look at the aforesaid provision makes it clear that because of the non-obstante clause contained in the section, even if a suit may otherwise lie before any other court, if such a suit falls within the sweep of Section 41(1) it can be entertained only by the Court of Small Causes. In the present proceedings we are not concerned with the provisions of sub-section (2) of Section 41 and hence we do not refer to them. For applicability of Section 41(1) of the Small Cause Courts Act, the following conditions must be satisfied before taking the view that jurisdiction of regular competent civil court like City Civil Court is ousted:

(i) It must be a suit or proceeding between the licensee and licensor; or

H (ii) between a landlord and a tenant;

(iii) such suit or proceeding must relate to the recovery of possession of any property situated in Greater Bombay; or A

(iv) relating to the recovery of the licence fee or charges or rent thereof.

13. In the present case, we are not concerned with the 2nd and 4th conditions, as the only contention of the appellants is that the present suits do not satisfy conditions 1 and 3 for attracting Section 41(1). The respondents claim to the contrary. It is obvious that if the present suits satisfy conditions 1 and 3 they would clearly attract the applicability of Section 41(1) of the Act and such suits would be outside the purview of regular civil court like the City Civil Court. Therefore, the enquiry which becomes relevant at this stage is to find out from the averments in the complaints whether these are suits between a licensor and a licensee and whether they relate to the recovery of possession of immovable property situated in Greater Bombay. B C D

16. It is, therefore, obvious that the phrase “relating to recovery of possession” as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in the complaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits. E F G

17. We may now refer to the relevant decisions of this Court and other courts to which our attention was invited by learned counsel for both the sides. As some of the decisions

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A referred to a *pari materia* provision as found in Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as “the Bombay Rent Act”), it will be necessary to refer to the said provision. Section 28(1) of the Bombay Rent Act reads as under:

B “28. Jurisdiction of courts.—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,—

C (a) in Greater Bombay, the Court of Small Causes, Bombay, (aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and

D (b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

E 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....”

F 18. When Section 41(1) of the Small Cause Courts Act is read in juxtaposition with the aforesaid Section 28 of the Bombay Rent Act, it becomes clear that *pari materia* words are used about nature of suits in both these provisions for conferring exclusive jurisdiction on Small Cause Courts, namely, they alone can entertain such suits or proceedings relating to recovery of possession of premises. It is of course true that Section 41 of the Small Cause Courts Act

G deals with such suits between the licensee and licensor while Section 28 of the Bombay Rent Act deals with suits between landlord and tenant. But the nature of such suits as contemplated by both these sections is the same, namely, it should be the suit relating to the recovery of possession of premises. Interpreting the phrase “relating to recovery

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of possession” as found in Section 28 of the Bombay Rent Act, a Bench of three learned Judges of this Court in the case of *Babulal Bhuramal v. Nandram Shivram*⁶ held that a suit for declaration that one of the plaintiffs was the tenant of the defendant landlord and the other plaintiffs were his sub-tenants and they were entitled to be protected from eviction squarely falls within the exclusive jurisdiction of the Small Cause Court, Bombay under Section 28 of the Bombay Rent Act and jurisdiction of the City Civil Court for entertaining such a suit is excluded. Imam, J. speaking for the three-Judge Bench in that case observed at page 374 of the report as under:

“The present suit filed in the City Civil Court raised in substance a claim to the effect that the plaintiffs were the tenants of the premises within the meaning of the Act. Such a claim was one which arose out of the Act or any of its provisions. The suit related to possession of the premises and the right of the landlord to evict any of the plaintiffs was denied on the ground that the first plaintiff was a tenant within the meaning of the Act and the premises had been lawfully sublet by him to the second and third plaintiffs. The City Civil Court was thus called upon to decide whether the first plaintiff was a tenant of the premises within the meaning of the Act and whether he had lawfully sublet the same to the second and third plaintiffs. The City Civil Court, therefore, had to determine whether the plaintiffs had established their claim to be in possession of the premises in accordance with the provisions of the Act.”

25. In the light of the law laid down by this Court in *Mansukhlal’s case* (supra) which was later relied on in *Prabhudas Damodar Kotecha & Ors. vs. Manhabala Jeram Damodar & Anr.* [(2013) 15 SCC 358], we have no hesitation in affirming the view taken by the High Court in the impugned judgment which rightly held that the counter-claim filed by the defendant (appellants herein) is not maintainable.

26. In our considered view, the law laid down in these two cases has full application to the facts of this case and we find no ground to take a different view than what has been taken by the High Court.

A 27. The only distinction on the facts of the case of **Mansukhlal** (supra) and the case at hand is that in case of **Mansukhlal** (supra), the dispute was between the licensee and the licensor in relation to the land, whereas in the case at hand, the dispute is between the landlord and the tenant.

B 28. This factual distinction, in our view, is of no significance for deciding the issue in question against the appellants by placing reliance on the law laid down in the case of **Mansukhlal** (supra) because both the category of cases, i.e., the one arising between the licensor and the licensee and the other arising between the landlord and the tenant in relation to the land are governed by Section 41 of the Small Cause Courts Act.

C 29. In other words, whether it is a suit between the licensor and the licensee or between the landlord and the tenant, such types of suits fall under Section 41 of the Small Cause Courts Act and are, therefore, cognizable by the Courts of Small Causes, Bombay.

D 30. This takes us to deal with the next argument of Mr. Naphade, learned senior counsel for the appellants that once the tenancy is determined such suits would not come within the purview of Section 41 of the Small Cause Courts Act. This argument was rejected by the Division Bench and, in our view, rightly by placing reliance on the law laid down by the Bombay High Court in the case of **Nagin Mansukhlal Dagli vs. Haribhai Manibhai Patel** (AIR 1980 Bombay 123) (Para 8 of the said decision quoted in the impugned order). We approve the law laid down by the Bombay High Court in the case of **Nagin Mansukhlal Dagli** (supra) as laying down the correct principle of law. We, therefore, do not consider it necessary to elaborate our reasoning more than what we have said.

E 31. Before parting, we consider it apposite to make it clear that though both learned senior counsel in support of their respective submissions referred extensively to the factual matrix of the case from their respective list of dates, pleadings and the documents but we have refrained from recording any factual finding on any of the factual issues.

G 32. Indeed, in the light of what we have held *supra* on legal question, it is not necessary. It is now for the parties to raise all such factual issue(s) such as how much area was leased out, how much area is outside the lease, who are the owners of the leased area and the areas

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adjacent to leased area and all incidental questions arising therefrom before the competent Court. A

33. It is apart from the fact that these factual issues were also not gone into by the Division Bench and indeed rightly. It is for this reason, we find no ground to deal with them for the first time in these appeals else it will cause prejudice to the rights of the parties while prosecuting their grievances before the competent Court. Now, it will be for the competent Court to come to its own conclusion on their respective merits and pass appropriate orders in accordance with law. B

34. In view of the foregoing discussion and the observations, we find no merit in these appeals. The appeals thus fail and are accordingly dismissed. C

Nidhi Jain

Appeals dismissed.