S. Hantukkumar Laxmikant Sharma Vs. Shah Kumudchandra Valchandbhai

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Court : Gujarat

Decided On : Sep-09-1985

Reported in : (1986)1GLR232

Judge : J.P. Desai, J.

Appellant : S. Hantukkumar Laxmikant Sharma

Respondent : Shah Kumudchandra Valchandbhai

Judgement :

J.P. Desai, J.

1. The facts leading to the filing of this appeal may be briefly stated as follows:

The suit property consists of a room bearing municipal census No. 1635/ 2 on the first floor of the house situated in TankshaFs pole at Ahmedabad. The suit property belongs to a joint Hindu family of Shah Kumudchandra Valchandbhai. The plaintiff is the manager. The suit property was let out to Pandit Joravarlal Ramlal on monthly rent of Rs. 15/- plus taxes and education cess. The said Joravarlal, according to the plaintiff, wanted to go away to his native place viz. Agra and transfer the suit premises to some one else and therefore suit No. 2804 of 1973 was filed against the said Joravarlal in the court of Small Causes at Ahmedabad to obtain permanent injunction to restrain him from transferring the suit property to any one else and injunction was accordingly granted in that suit on 14-3-1977. The plaintiff was in need of the suit permises and therefore, he gave a notice by registered post on 3-10-1979 to Joravarlal terminating his tenancy and calling upon him to vacate the same which notice was rceived by one S.K. Sharma who is the defendant in the suit. It was received on 6-10-1979 by him and he gave a reply on 8-10-1979 contending that the said Joravarlal had expired at Agra on 29-12-1978 and that he i.e. S.K. Sharma the defendant, was son of daughter of Joravarlal and was residing with Joravarlal for the last many years prior to his death in the suit premises and clamed tenancy rights in the suit premises by that reply. The plaintiff then filed the present suit against the defendent S.K. Sharma in the City Civil Court alleging therein that the defendant had never been resided with Joravarlal in the suit premises and that he was coming forward with a false say that he was related to Joravarlal. The plaintiff alleged that the defendant had trespasser into the suit premises recently after the death of Joravarlal and had no legal right to remain in possession of the same being a trespasser. On these grounds, he prayed for possession of the suit premises from the defeandant contending that the. defendant was a trespasser.

2. The defendant filed his written statement at ex. 16 and contended that he was residing in the suit premises with deceased Joravarlal and, therefore, he was entitled

to claim tenancy rights in the suit premises under the provisions of the Rent Act. The defendant thus contended that he cannot be evicted from this suit premises as he was a tenant. He also contended that the City Civil Court had no jurisdiction to entertain the suit as he was a tenant. The learned trial Judge framed issues at ex. 7. The learned trial Judge held that the defendant was a trespasser and, therefore, the plaintiff was entitled to recover possession of the suit premises from the defendant. He held that the City Civil Court at Ahmedabad had jurisdiction to entertain the suit. The learned trial Judge accordingly passed a decree for possession and mesne profits against the defendant. Being dissatisfied with the same, the original defendant has filed this appeal.

The learned trial Judge has decided all the issues as stated by me above, but it appeared to me that it would be better if the question about jurisdiction was decided first because in that case, it may not be necessary to enter into the merits of the case. In view of this I have heard the arguments only with regard to the question of jurisdiction and as I was inclined to hold that the City Civil Court had no jurisdiction to decide the question viz. whether the defendant was entitled to date the status of a tenant under Section 5(11)(c) of the Rent Act, I did not ask the learned Advocates to put forward their submission on the merits of the case.

3. Now, as slated in the beginning, the plaintiffs case is that the defendant is a trespasser while the defendant claims to be a tenant in the suit premises on the allegation that he was entitled to claim tenancy rights by virtue of the provisions of Section 5(11)(c) of the Rent Act as he was residing with his maternal grand father who was the tenant in the suit premises at the time of his death. In view of this the City Civil Court had jurisdiction to entertain the present suit because the question of jurisdiction is ordinarily decided on the allegations made in the plaint and not on the contentions raised by the defendant in the written statement. The real question, however, which requires consideration is whethe the City Civil Court will have jurisdiction to decide the question raised by the defendant viz. that he is entitled to claim, the status of a tenant under Section 5(11)(c) of the Rent Act and if not, what will be the effect of the same on the suit

4. Section 28(1) of the Rent Act with which we are concerned in the present case reads as follows:

(1)Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within the jurisdiction:

(a) in the city of Ahmedabad, the court of Small Causes at Ahmedabad;

(b) in any area for which a court of small causes is established under the Provincial Small Cause Courts Act, 1887, such court; and

(c) 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,

shall have jurisdiction to entertain and try 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 (part II) apply and to decide any application made under

this Act and to deal with any plaint or question arising out of the Act or any of its provisions and subject to the provisions of Sub-section (2) no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.

Sub-section (1) of Section 28 which is reproduced above deals with three different kinds of matters viz. (i) suit for possession between landlord and tenant relating to recovery of rent or recovery of possession of premises; (ii) application made under the Act and (iii) claim or question arising out of the Act or any of its provisions. It is thus clear that so far as the suit property which is admittedly situated at Ahmedabad is concerned, no other court except the court of Small Causes at Ahmedabad has jurisdiction to deal with a question arising under the provisions of the Rent Act. The plaintiff of course has come forward with a case that the defandant has trespassed upon the suit premises after the death of his maternal grand-father, the original tenant, while it is the defendant who has contended that he is a tenant by virtue of the provisions of Section 5(11)(c) of the Rent Act. It is thus the defendant who has raised the question arising out of the provisions of the Rent Act. The present suit is not by a landlord against a tenant because the plaintiff does not admit that the defendant is a tenant. The present suit therefore does not fall within the first two kinds contemplated by Section 28(1) of the Act as mentioned above. The question whether the suit falls within the third category of the matter covered by Sub-section (1) of Section 28 where the suit involves claim or question arising out of the Act or any of its provision. The provisions of Sub-section (1) of Section 28 do not purport to affect the jurisdiction of the court to entertain and try a suit of the type with which we are concerned but it only prevents the court from dealing with claim put forward by the defendant. The only claim or question which is required to be considered in the present suit is whether the defendant is a tenant by virtue of the provisions of Section 5(11)(c) of the Rent Act and that is the only contention on which the fate of the suit depends. There are no other claims or questions which do not arise out of the Act that are required to be considered in the present suit and, therefore, the practical result would be that though the City Civil Court may have jurisdiction to entertain the suit, the said court cannot proceed further with the suit because the only claim involved in the present suit is whether the defendant is a tenant by virtue of Section 5(11)(c) of the Rent Act. It is obvious that this question can be decided only by the court of Small Causes at Ahmedabad and not by the City Civil Court at Ahmedabad.

5. Mr. M.D. Pandya, learned Advocate for the appellant relied upon the following decisions of this Court in support of the submission that the City Civil Court had no jurisdiction to deal with or decide the question viz. whether the defendant was entitlad to claim status of tenant by virtue of the provisions of Section 5(11)(c) of the Rent Act which question arises out of the provisions of Section 5(11)(c) of the Rent Act.

(i) Chakubhai Ranchhodlal and Anr. v. Bai Pushpa 1973 All India Rent Control Journal 267;

(ii) Prabhakar Bhaskerrao Patkar v. Shalinibai wd/o Shankerrao Anandrao Kamtekar and Ors. Special Civil Application No. 496/65 decided by J.B. Mehta, J. on 16-6-1970.

(iii) Heirs and legal representatives of Shah Jethalal Chhotalal v. Smt. Kalavati w/o. Champaklal Baxi and Anr. Second Appeal No. 282 of 1972 decided on 23-6-1979 by M.C. Trivedi, J.

(iv) Nafisaben v. John alias Zenub 22 G.L.R. 674.

(v) Babulal v. Nandram : [1959]1SCR367 ;

(vi) Topandas v. Gorakhram : [1964]3SCR214 .

Mr. H.B. Shah for the respondent on the other hand relied upon the decision of the Division Bench of this Court reported in Nanakram Shobhraj Mills v. Kirtidev 20 G.L.R. 469. He also relied upon the decision of the Supreme Court in Topandas's case (supra). Two decisions of the Supreme Court referred to above have been considered by this Court while deciding the question of jurisdiction which arose in these cases. This Court while deciding the case of Nafisaben (supra) has also considered the decision of the Division Bench in the case of Nanikram (supra).

6. In the case of Chakubhai (supra), the facts were more or less similar to the facts of the present case, except that in that case, the plaintiff had also alternatively claimed possession on the grounds mentioned in Sections 12 and 13 of the Rent Act. In that case, notice was given to the tenant who died after the receipt of the notice and after paying up the rent. The notice was given to the legal heirs of the tenant after her death and the suit was filed after the heirs and legal representative gave reply to the notice claiming that they were residing with the original tenant at the time of her death and were therefore, entitled to claim status of tenants. The trial court as well as the appellate court held that the heirs and legal representatives of the deceased, tenant were not entitled to claim any status as tenants under Section 5(11)(c) of the Act and, therefore, the plaintiff was entitled to possession. When the matter came up before this Court in revision the question about jurisdiction was raised. This Court considered the ratio of the decision in Babulal's case (supra) and reached the conclusion that when a person files a suit against another alleging therein that the person in possession wrongfully clarified status of tenant under Section 5(11)(c) of the Act, such a suit would be a suit between landlord and a person who claims to be tenant and, therefore, the suit would be cognizable by a court having jurisdiction under the Rent Act. In the case of Babulal (supra), the plaintiff filed the suit in the court of Small Causes at Bombay alleging that defendant No. 1 was his tenant while second and third defendants were trespassers and had no right to be on the premises. Defendants Nos. 2 and 3 claimed to be sub-tenants of the rented premises. The Small Cause court, held that they were not lawful sub-tenants and accordingly passed a decree for eviction. The appellate Bench dismissed the appeal and the revision application to the High Court also failed. Thereafter, the tenant as well as the two alleged sub-tenants filed a suit in the City Civil Court for a declaration that as the plaintiff was a tenant and was entitled to the protection of the Act and that the second and third plaintiffs were lawful sub-tenants of the first plaintiff and were entitled to possession, use and occupation of the premises as sub-tenants. The question of jurisdiction of the City Civil Court arose in that case. It held that it had jurisdiction but dismissed the suit on merits. The High Court in appeal disagreed with the view of the first court about jurisdiction and held that it had no jurisdiction to entertain the suit. Then the matter went to the Supreme Court in appeal. The Supreme Court while examining the contents of Section 28 of the Act which had material bearing on the question of jurisdiction, observed at para 7 of the judgment as follows:

Do the provisions of Section 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant on vice versa and the relief

asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions? The answer must be in the affirmative on a reasonable interpretation of Section 28.

The above observations of the Supreme Court came up before the Supreme Court again in the year 1964 in Topandas's case (supra). Having reproduced the aforesaid provisions on page 1354, the court stated:

We agree with the High Court that these observations merely show this that in order to decide whether a suit comes within the, purview of Section 28, what must be considered is, what the suit, as framed, in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of claim! which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by Section 28.

7. The learned Single Judge of this Court who decided the case of Chakubhai (supra), after referring to the above two decisions of the Supreme Court and after reproducing the above relevant observations of the Supreme Court, observed that the above observations settled the point which was raised before him. The learned Judge observed that the landlord in a case like the one which arose before him, can approach the rent court saying that he is the landlord of the rented premises and that he required possession thereof on the grounds mentioned in Sections 12 and 13 of the Act. The learned Judge has then further observed that in the the same suit, he can say that the person in possession against whom the suit had been filed wrongly claimed status under Section 5(11)(c) of the Act and such a suit would be a suit between landlord and a person who claims to be a tenant. The learned Judge also examined the question from another angle. The learned Judge, after referring to the peculiar facts of that case observed that the plaintiff can sue the heirs and legal representatives of the deceased tenant on the basis of the obligation of the deceased tenant arising out of the contract to deliver possession even though the landlord does not admit the defendants as tenants. The learned Single Judge has observed at para 7 that the plaintiff can go to the rent court because the claim or question arises under the Act and the relief of possession depends upon the determination of that claim or question. In that case, it appears that the tenancy was also terminated prior to the death of the tenant while here it does not appear that tenancy was terminated. But that aspect does not make any difference so far as the question of jurisdiction is concerned.

8. The learned Judge has then referred to a decision of this Court in Special Civil Application No. 496 of 1965 decided on June 16, 1970, which also supports the view taken by the learned Single Judge who decided the case of Chakubhai (supra).

9. In Special Civil Application No. 496 of 1965, decided on 16-6-1970, it appears that the claim of the petitioners (original defendants) that they were tenants by virtue of Section 5(11)(c) of the Rent Act was negatived by the Trial Court as well as the first appellate court and hence it was contended before this Court that the rent court had no jurisdiction to pass a decree for possession against them. The said contention was negatived by this court. The learned Single Judge who decided this petition has observed that it is not necessary that relationship of landlord and tenant should exist between the parties before the Court so as to enable the Court to entertain and decide the question arising out of the provisions of Section 5(11)(c) of the Act.

10. Such a question again came up for decision before the Court in Second Appeal No. 282 of 1972 decided on 23-6-1977. It appears that the plaintiffs allegation in that case was that the heirs of the deceased tenant were trespassers in the suit premises and, therefore, liable to be evicted. The suit was filed in the Court of ordinary civil jurisdiction under the Code of Civil Procedure. The defendants resisted the suit and contended that they were tenants under the pro visions of Section 5(11)(c) of the Act. The dispute between the parties was as to whether the defendants were entitled to claim status of tenants of suit premises under Section 5(11)(c) of the Act as in the present case. The learned Judge held that the defendants were the tenants and further held that the Court of ordinary civil jurisdiction had no jurisdiction to entertain the said suit. The learned Judge accordingly dismissed the suit and an appeal before the district court was heard by the learned Assistant Judge. The learned Assistant Judge held that the defendants were not able to establish that they were residing with deceased tenant at the time of his death and, therefore, they were not entitled to claim the status of 'tenants'. He did not decide the question of jurisdiction. He reversed the judgment of the trial court and passed a decree in favour of the plaintiff.

The defendant then filed second appeal before this court. The contention about jurisdiction was argued at length. The learned Single Judge, after considering the ratio of the decisions in Topandas's case (supra) and Babulal's case (supra) and Special Civil Application No. 496 of 1965 decided on 16-6-1970, reached the conclusion that ordinary civil court had no jurisdiction to entertain the suit as it involved the question arising out of the provisions of Section 5(11)(c) of the Rent Act and directed the plaint to be returned to the plaintiff for presentation to the proper court.

11. This question came up for decision again before this Court in Nafisaben's case (supra) and this Court again reached the same conclusion. The learned Judge, after referring to the provision of Sub-section (1) of Section 28 observed that the exclusive jurisdiction of the court of Small Causes or court functioning under Section 28 of the Act is not merely in respect of suits and proceedings between landlord and tenant, regarding recovery of rent or possession of premises, but the exclusive jurisdiction relates to obligations under the Act and the exclusive jurisdiction to deal and decide any claim or question arising out of the Act or any of the provisions of the Act is in these courts of exclusive jurisdiction referred to in Section 28(1). The ratio of this decision of this Court is that only the court having exclusive jurisdiction referred to in Section 28 can deal with and decide any claim or question arising out of the Act or any of its provisions.

12. I have referred to the decision of Babulal (supra) while discussing the decision of this Court in Chakubhai's case, (supra). I, therefore, do not propose to again discuss this decision of the Supreme Court. Suffice it to say that the observations made by the Supreme Court in the above case have been approved by the Supreme Court in a later decision in Topandas's case (supra) which also I have referred to earlier and which I shall discuss hereafter.

13. The learned Advocate Mr. H.B. Shah appearing for the respondent-plaintiff relied upon the following observations made in Topandas's case (supra) by S.K. Das and Hidayatullah, JJ. at para 7:

The plaintiff chooses his forum and files his suit. If ho establishes the correctness of

his facts he will get his relief from the forum chosen. If he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the palint, as framed, would not justify the other kind of court to grant him the relief. If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognizable by the court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court. If on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiffs suit will have to be dismissed in its entirety.

Having regard to the general principle stated above, we think that the view taken by the High Court in this case is correct. Section 28 no doubt gives exclusive jurisdiction to the court of Small Causes to entertain and try a suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises, to which any of the provisions of Part II apply; it also gives exclusive jurisdiction to decide any application under the Act and any claim or question arising out of the Act or any of its provisions all this notwithstanding anything contained in any other law. The argument of learned Counsel for the appellants is that the section in effect states that notwithstanding any general principle, all claims or questions under the Act shall be tried exclusively by the courts mentioned in the section e.g. the court of Small Causes in Greater Bombay, and it does not matter whether the claim or question is raised by the plaintiff or the defendants. The argument is plausible, but appears to us to be untenable on a careful scrutiny. We do not think that the section says or intends to say that the plea of the defendants will determine or change the forum. It proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under the Act as to parties, between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of titles, such as questions as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. If, therefore, the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Act on which the exclusive jurisdiction given under Section 28 depends, do not think that the defendant by his plea can force the plaintiff to go to a forum where on his averments he cannot go.

There cannot be any dispute, With the above general principles of law upon which Mr. Shah relied, but it is pertinent to note that further on, S.K. Das and Hidayatullah, JJ. have reproduced the following observations made by the Supreme Court in the case of Babulal (supra):

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

They have men stated that the above observations merely show this that in order to decide whether a suit comes within the purview of Section 28 what must be considered is what the suit as framed in substance is and what the relief claimed

therein. They have further observed that if the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of claim which arises out of the Act or any of its provisions, then only and not otherwise, will it be covered by Section 28. They have then reproduced the following observations made by the High Court in the case of Topandas (supra) and said that the said observations of the High Court were quite correct:

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

The above observations of the High court which are approved by the Supreme Court show that the written statement is not to be looked into for considering whether a particular suit is covered by Section 28 of the Act. The above observations go to show that the ordinary court's jurisdiction to entertain a suit will not be ousted simply because a contention is raised in the written statement in volving a question arising out of the Rent Act or any of its provisions. S.K. Das and Hidayatullah, JJ. have not considered as to how the ordinary civil court i.e. a court having no jurisdiction to deal with or decide a question arising out of the Rent Act or any of the provisions of the said Act will be competent to proceed with and decide the suit when it involves decision of such a question though it may have jurisdiction to entertain the suit as framed by the plaintiff. But Sarkar, J. in his concurring judgment explains how in such a situation, the practical result would be to prevent such court from trying such a suit. Section 28(1) of the Act deals with three different kinds of matters namely. (1) suits or proceeding between a landlord and a tenant relating to recovery of possession of premises, (2) an application made under the Act and (3) a claim or question arising under the Act or any of its provisions. So far as the first and second class of matters are concerned, it is crystal clear that only the courts mentioned in the said section will have jurisdiction to entertain and decide the suit or the application as the case may be. The present suit does not fall under the first class. This being a suit, the second class is out of question, In view of this, the City Civil Court could well have juridiction to entertain, and decide the suit as framed by the plaintiff. The suit involves a claim put foward by the defendant which arises out of the provisions of Section 5(11)(c) of the Act and hence prime facie, one may be inclined to say that the City Civil Court will have no jurisdiction to entertain and try the suit. The section provides that no court other than the court of Small Causes at Ahmedabad shall have jurisdiction to deal with any claim or question arising under the Act concerning properties in the city of Ahmedabad. It is, however, pertinent to note that this part of section does not purport to affect any court's jurisdiction to entertain and try a suit but it only prevents a court from dealing with certain claim or questions. In view of this, the City Civil Court at Ahmedabad has jurisdiction to entertain and try such a suit so far as it does not thereby have to deal with a claim or question arsing out of the Act. The suit as formed by the plaintiff can therefore certainly be entertained and tried by the City Civil Court but the practical result would be to prevent the said court from trying the suit at all because the only claim or question involved in the suit arises out of the provisions of Section 5(11)(c) of the Act which claim the City Civil Court cannot decide. While the comt may have to look only at the plaint for considering the question whether a particular court, has jurisdiction to entertain and try the suit, both the plaint as well as the written

statement have to be looked into for ascertaining whether it involves a claim or question arising out of the Act or any of its provisions, because issues always arise out of the pleadings and not only the plaint. The written statement filed by the defendant in the present suit on the face of it raises a claim arising out of the provisions of Section 5(11)(c) of the Act and, therefore, the City Civil Court is prevented from trying the suit at all even though it had jurisdiction to entertain and try this suit when filed. It was contended by the appellant before the Supreme Court in the case of Topandas (supra) that the defence raised a question arising out of the Act and therefore the City Civil Court at Bombay having no jurisdiction to deal with or decide that question, the said court was prevented from trying the suit at all. On the other hand, it was contended by the respondent that the plaint did not raise any such question and, therefore, the City Civil Court had jurisdiction to try the suit. While dealing with these rival submissions, Sarkar, J. observed as follows:

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

Sarkar, J. has then explained at paras 20 and 21 how the defence also in that case did not raise any such claim or question falling within the exclusive jurisdiction of the court of Small Causes at Bombay. Sarkar, J. has explained at para 21 as to how the defence of the defendants did not raise any question arising out of the Act. The Act does not create any tenancy. That has to be created by a contract. In the case of Topandas (supra), the plaintiff s case was that defendants were licensees while the defendants case was that they were tenants. The question whether defendants were tanants was really a question whether there was a contract of tenancy between the parties and hence, Sarkar, J. observed at para 21 that no question arising out of the Act was raised even by the defendants in their written statement and, therefore the City Civil Court had jurisdiction to try and decide the suit. The defence in the present case, however, does raise a claim arising out of provisions of Section 5(11)(c) of the Rent Act as stated earlier and, therefore, applying the test laid down by Sarkar, J. particularly at para 16, it is clear that the City Civil Court was prevented from trying the suit though it had jurisdiction to entertain the same.

14. So far as the decision of the Division Bench of this Court in Nanikram's case (supra) is concerned, it appears that the defendant mills were in occupation of substantial part of the estate as tenant of the plaintiff. So far as the suit land was concerned, it was the case of the plaintiff that the same was never let out to the tenant nor was any permission granted to the defendant to make use of the same at any time; while the defence of the defendant mill was that alongwith the mill property let out to the defendant mill in the year 1938-39, the suit land was also let out and it formed part of the tenancy existing between the defendant mill and the landlord of the mill property. The Division Bench after referring to the decision of the Supreme Court in Topandas's case (supra) and some other decisions, held that the ordinary civil court had jurisdiction to entertain the suit. The Division Banch of course observed that it is well settled that the jurisdiction of the court to entertain and try such a suit depands upon the averments made in the plaint and the same cannot be

ousted by the averments made in the written statement. It is obvious, looking to the facts of that case that no question arising out of the Act or any of the provisions of the Act arose for decision in that case because the question was one of contract between the parties and it had nothing to do with the provisions of the Rent Act. The facts, more or less, were similar to those of the case of Topamdus (supra), the only difference being that in case of Topandus (supra), the plaintiff alleged that the defendants were licensees and the defendants contended that they were tenants while in the case of Nanikram (supra), the plaintiff contended that the defendants were trespassers over the suit land while the defendants contended that they were tenants because the suit land was also let out to the defendants. This question again came up for consideration before this Court once again in. the case of Nafisaben (supra) decided by the then learned Chief Justice B.J. Divan. The learned Chief Justice after discussing the case of Supreme Court in Topandas (supra) particularly discussion made by Sarkar, J. at paras 16 to 21, has explained how the decision of this Court in the case of Nanikram (supra) fairly and squarely fell within the ratio of the said decision of the Supreme Court and how the case of Nafisaben was distinguishable from the said decision viz. Topandas's case (supra) and Nanikram's case (supra) and how the case of Nafisaben fairly and squarely fell within the ratio of the decision of this Court in Chakubhai's case (supra) (see paras 6, 7, 8, 9 and 10.) This question once again came up for consideration by this Court in Civil Revision Application No. 503 of 1983 decided by D.H. Shukla, J. on 12th. June 1983. In that case also, the defendant claimed the status of a tenant under Section 5(11)(c) of the Act. D.H. Shukla, J. after referring to the decision of this Court in Chakubhai's case (supra) held that only the court of Small Causes at Ahmedabad had jurisdiction to entertain and try the suit. The discussion made above will go to show that in all the cases decided by this Court which have been discussed above defendant was contending that he was entitled to claim the status of a 'tenant' under Section 5(11)(c) of the Act and this Court in all these cases held that only the court having jurisdiction under Section 28 of the Act can deal with and decide that question and that the ordinary civil court has no jurisdiction to deal with or decide the same. It is true that in all these cases, except Second Appeal No. 282 of 1972, the suit was filed in the court having jurisdiction to deal with and decide the claim of tenancy under Section 5(11)(c) of the Act while the present suit as well as the suit out of which Second Appeal No. 282 of 1972 arose was filed in the ordinary civil court. But that will not make any difference because the ratio of all these decisions is the, same viz. that only the court having jurisdiction under Section 28 of the Act can deal with or decide the claim of tenancy under Section 5(11)(c) of the Act raised by the defendant and Sarkar, J. has explained as discussed earlier in the case of Topandas (supra) how the ordinary civil court will be prevented from trying the suit at all even though it may have jurisdiction to entertain the suit.

15. It is also true that in Chakubhai's case (supra), the plaintiff had also made an alternative prayer based on Section 12 and 13 of the Act. But that also will not make any difference so far as the ratio is concerned. The suit in that case was filed in the court having jurisdiction under Section 28 and hence the said court was competent to entertain and decide all the questions raised in that suit because all these questions arose out of the provisions of the Act viz. Sections 5(11)(c), 12 and 13 of the Act.

16. It is true that the plaintiff has drafted the plaint as if it was simple case between an owner of a property and a trespasser. But it is pertinent to note that the plaintiff has himself stated in the plaint that in reply to the notice, the defendant had raised the claim of tenancy on the ground that he was residing with his mother's father who

was a tenant in the suit premises at the time of his death and, therefore, he was entitled to claim the status of a 'tenant'. This shows that plaint is in the case of Nafisaben (supra) itself raised a question which can be dealt with and decided only, by the court of Small Causes at Ahmedabad. In view of this, even we look at the plaint only, then also, it can be said that the plaint itself raises a question which can be dealt with and decided only by the court of Small Causes at Ahmedabad. But I may observe here that even if the plaintiff had not referred to that claim of the defendant in the plaint it would not make any difference because as discussed by me earlier written statement can be and has to be looked into for considering whether the case falls within third category of matters viz. whether it involves decision of a claim or question arising out of the Act or any of its provisions though it may not be permissible to do so if the matter falls within the first or second category as discussed earlier.

The discussion made above will go to show that the learned trial Judge, with respect to him, committed agrave error in going into the merits of the claim raised by the defendant and in passing a decree against the defendant for possession.

17. In view of the above discussion, the judgment and decree passed by the trial court against the defendant are set aside on the ground that the learned trial Judge had no jurisdiction to deal with or decide the question arising out of the provisions of Section 5(11)(c) of the Act without deciding which no decree for possession could have been passed against the defendant.

18. The next question is what course should be adopted after quashing and setting aside the judgment and decree of the trial court. The first course is to direct the plaint to be returned to the plaintiff-respondent for presentation to proper court while the second course is to dismiss the suit on this ground. I had inquired of Mr. H.B. Shah as to what course should be adopted in the present case if ultimately it was found that the trial court could not have tried the present suit. He stated that the proper course would be to dismiss the suit. It is obvious that proper course in the present case would be to dismiss the suit particularly looking to the frame of the suit. Hence, while allowing the appeal and setting aside the judgment and decree passed by the trial court, 1 propose to dismiss the suit on the above ground.

19. Before parting with this case, I am constrained to observe here that even though, as observed by the learned trial Judge in para 15 of his judgment, he was conscious of the position of law that the question whether the defendant was entitled to claim the status of tenant under Section 5(11)(c) of the Act was within the exclusive jurisdiction of rent court in view of Section 28 of the Act, the learned trial Judge fell into error in proceeding to consider that very question by appreciating the evidence recorded before him. The issue about jurisdiction was framed by the learned trial Judge being issue No. 6. The learned trial Judge dealt with issue No. 6 at para 21 of his judgment. While dealing with this issue, he has observed that on appreciation of-the evidence he had reached the conclusion that the defendant had failed to prove that be was residing with Joravarlal during his life time and hence his possession was not lawful and, therefore, the City Civil Court had jurisdiction to entertain the suit against the defendant for a declaration that he was a trespasser. The reasoning adopted by the trial Judge, with respect to him, appears to be somewhat curious. As observed by me a little earlier, he was conscious of the position of law that he could not deal with or decide the above question and inspite of that, he went into that question and recorded evidence and decided that very question and then held that he had

jurisdiction to entertain and try the suit. It is not understood how the learned trial Judge though conscious of the position of law that he was not competent to deal with or decide the question raised by the defendant, proceeded to decide the same.

20. I may also observe here that the defendant-appellant made an application to the trial court to permit him to produce certain documents. The documents with a list were submitted alongwith the application. The said application was shown to the learned Advocate for the other side who had made an endorsement that he objected to the same. The application does not bear any orders passed by the court. The Rojnama of the trial court does refer to this application and the list. Curiously enough, we do not find any reference to this application in the judgment of the trial court. It is not clear whether this application was placed before the learned trial Judge for orders because there is no order passed by the learned trial Judge below this application. The application does not indicate, that it was placed before the learned trial Judge at any time before he delivered the judgment. As I am not going into merits of this, I am not considering this aspect while disposing of this appeal. But it is necessary to inquire as to how this application has been left unattended without any order being passed below the same. The Rojnama of 8-1-1985 shows that this application and the list were produced on that day on which arguments of the parties were heard and adjourned for judgment to the next date and the judgment was then delivered on 17-1-1985. It is necessary to take such action on administrative side of this Court as may be deemed fit so that there is no recurrence of such an incident in future.

21. The result of the aforesaid discussion is that the appeal is allowed. The judgment and decree passed by the learned trial Judge are hereby set aside and the suit of the plaintiff is dismissed on the ground that the question raised by the defendant could not be dealt with or decided by the trial court and no other question being involved in the suit which can be decided without deciding the Status of the defendant, the trial court was prevented from trying the suit at all. Looking to the facts of this case, the parties to bear their own costs throughout.