

Vasantkumar Radhakisan Vora and ors. Vs. Board of Trustees of the Port of Bombay and ors.

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Court : Mumbai

Decided On : Jan-18-1983

Reported in : AIR1984Bom96; 1984(2)BomCR478; ILR1984Bom1784a

Judge : Shan and;Kkhatrri, JJ.

Acts : [Presidency Small Cause Courts Act, 1882](#); [Constitution of India](#) - Articles 14, 226 and 227

Appeal No. : Writ Petn. Nos. 3144 of 1961, 2404, 2754 of 1982 and Civil Appln. No. 2728 of 1982

Appellant : Vasantkumar Radhakisan Vora and ors.

Respondent : Board of Trustees of the Port of Bombay and ors.

Advocate for Def. : M.O. Chinoy,;W.J. Makhjija,;S.H. Kapadia, Advs.,;i/b., Mulla & Mulla,;C.B.C. and;D.P. Hedge, Addl. Govt. Pleader

Advocate for Pet/Ap. : C. Tunare,;C.D. Shenoy,;B.K. Raje and;M. Agarwal, Advs.;J.J. Thakkar, Adv.

Judgement :

Shah, J.

1. These matters are before is on a single by his order dt. Oct. 26 1982. Masodkar. J. formulated the following two question for the consideration of a division Bench :

Whether, by interpreting the provisions of s. 46(2) of the Act No, XIX of 1976 all the proceedings pending when chap. VII was enacted by that ACt and it came into force would be governed by the amended provisions of Chap. VII or otherwise weather the provisions of Section 46(2) maintaining two different procedures would be villative of Art. 14 of the constitution of India

A few relevant facts in so far as they are material for deciding the reference need to be stated. In Writ Petition NO. 3144 of 1981 the respondents are the Board of Trustees of the Port of Bombay. They owned a property bearing old B. B. NO. 941 situated at Jackeria Bunder Boad, Bombay . On the said plot of land a building consisting of five rooms belonging . After giving a notice to quit dt. Jan. 22, 1975, on Mar. 19 1976 the respondent-Port Trust filed an ejectment application bearing No. 39|194|E of 1976 under S. 41 of the Presidency small Cause courts ACt, 1882 (hereinafter called the ACt). In respect of another tenant who is in possession Room No. 1, the respondents gave a notice to quite dt. Jan 22, 1975, and thereafter on April 5, 1976. Filed an ejectment application bearing No. 28|166|E of 1976 under s. 41 of the ACt. Then in respect of the third tenant, Sohanlal Mathurmali Chavan, who is in possession of Room NO. 3 the respondents served a notice to quit dt. Nov. 23, 1977, (which was the second notice since there was an earlier notice to quit dt. July 18, 1975 served on him) and after serving this notice, the respondents filed a suit bearing No, L. E. & C. Duet NO, 228|313 of 1976 under S. 41 of the newly instated Chap. VII of the ACt. As a decree in favour of the Port Trust was passed by the court of small Cause the said tenant , Sohanlal, preferred an appeal under s. 42 of the

Act as amended and the said appeal is pending . IN the case of the fourth tenet, Ramsevak Budhai Chaurasia, who is in possession of Room NO. 5, the respondents served on him a notice to quit on Jan. 22, 1975, and thereafter filed Suit NO. L.E. & C. Suit NO. 188|497 of 1976 on decree in favour of the respondents for possession having been passed, the said tenant has preferred an appeal under s. 42 of the Act and it is pending under s. 42 of the Act and it is pending in the court of small Cause.

2. Writ Petition No. 2754 of 1982 relates to the proceedings initiated under s. 41 of the Act which a was filed on July 22, 1976, on the basis of a notice said to have been given by the respondent therein on Feb. 16. 1961. It is sufficient to state at this stage that the premises in this petition are owned by a private individual while as mentioned earlier the individual while as mentioned earlier the premises in Writ Petition No. 3144 of 1981 belong to a public authority - the Port Trust, It is not necessary to state the facts of review application NO. 2723 of 1982 as the point involved is the same.

3. After hearing the counsel on both the sides, the learned Judge was of the view that the two questions which arose in these mattress were of general importance and affected a large number of cases, he directed that the matters be placed before a Division Bench. This is how these matters have come before us.

4. After hearing the counsel appearing for the parties , we though it fit to recast the two questions referred for our consideration. In substance the following questions arose for our consideration.

5. Whether the provisions of Ss. 2, 3 and 4 of the Maharashtra ACT No. XLI of 1963 whereby s. 42 was inserted in chap. VII of the Act and Ss. 45, 46 and 47 of the ACT were deleted and s. 47 thereof was amended are ultra vires as being villative of Art. 14 of the constitution of India ?

6. Mr. Tunara advanced three sub-section (2) of s. 46 of the Act as amended by Maharashtra Act XXX of 1976 are ultra vires as being villative of ART. 14 of the constitution of India?

7. Mr. Tunara advanced three submissions before us. Firstly , so far as the pre-1976 and post-1963 amendments are concerned, it is in the discretion of the landlord to decide the corum. If the files a substantive suit in the civil court he automatically gets the rights of appeal and so does the licenesee, but on the other hand he could avail of the forum of the court of Small causes under s. 41 and precedent an appeal being filed by the occupant against the decision of the court of Small Causes, because according to him the concept of deemed trespasser is done away with by deletion of Ss. 46 and 47 and further by amending S. 49 the occupant is prevented form filing a civil situ raising the same contentions which were the subject-matter in the application before the Court of Small causes and then availing of a right to file an appeal against the decision of the civil court. In other words, he contended that by reason of option to be exercised by the landlord to adopt the procedure of a summary nature under s. 41, the landlord deprives the tenant of from taking the benefit of the judgement of a higher court in appeal both on questions of law ands facts thus nullifying the option of the tenant which he had by counter exercising , an option under Ss. 46 and 47 and getting the summary proceedings stayed and in such a suit which is filed in the regular court viz. The city civil court an appeal would lie. Thus, further by deleting Ss. 46 and 47 while incorporating S. 42 A for a private landlord, the legislature discriminated between the two types of tenants viz, the tenants of private landlord and the tenants of the government and public authorities with out any reasonable classification and without any nexus with their object of such amendment of deletion. Thus discrimination alleged by Mr. Tunara is between the private landlords and public landlords within the limit of rack-rent of Rs. 3,000|- because if the rack-rent is above Rs. 3,000|- neither the private landlord nor the public landlord, could file proceedings under s. 41 and they are equally dealt with by the legislature.

8. The second contention urged by Mr. Tunara is that in any event, even amongst is tenants of the public landlords, inter se, there is a clear procedural discrimination between occupants who are paying Rs. 3,000|- and above per annum and those who are paying less than Rupees 3,000|- per annum, with the result that the tenants who are poor are deprived of the shelter of the availability of the with of filing a substantive suit agitating the same question over again and then filing an appeal. This discrimination, according to him, is the

result of the summary remedy under s. 41 being made available to the public landlord and such tenant losing a right to file a substantive suit which he could under old Ss. 45 and 46 or s. 49 which decision could be challenged by him in the an appeal. Thus, according to him, in the case of tenants paying rent more than Rs. 3,000|- per annum they are having a right of appeal because the suit is tried by a regular court while the tenants who are paying rent less ha Rs. 3,000|- per annum are at the mercy of the public landlords who have the choice of filing a substantive suit or resorting the summary remedy of making an palliation under s. 41 and in the event of resort to summary redder of making an application under S. 41 and in the event of reset to summary remedy by the public landlord by reason of deletion of Ss. 46 and 47 and the amendment of s. 49 such tenants are deprived of their right of appeal which they would have, if the public landlords filed a substantive suit for recovery of possession.

9. The third submission of Mr. Tunara is that the provisions of s. 46(2) of the ACt introduced by the amending ACt of 1976 are discriminatory and villative of ART. 14 of the Constitution because in the case of pending proceedings the tenant is deprived of the appeal procedure while in a proceeding instituted after the coming into force of the amending Act of 1976 I , e . after July 1, 1976. A right of appeal is conferred on such a tenant under s. 41. According to him whereas with regard to which is instituted and is pending of July 1, when the amending Act of 1976 came into force, the tenement has no right oto the appeal procedure, in the case of a proceeding under s. 41 instituted after July 1, 1976, under the new s. 42(a) right of appeal had been specifically provided. Not only that the tenant is deprived of a right of appeal under s. 42, but reason of deletion of Ss. 46 and 47 and amendment of s. 49 by the amending Act of 1963 , he is also deprived of the procedure of filing a substantive suit and then filing and appeal against such a decision in such a suit. He further urged that on one hand an under the Scheme of Champ. VII prior to 1976 amendment, the tenant is under the disadvantage of leading evidence first, under the new S. 41 which contemplated filing a substantive suit for possession and not an application, the initial burden of proving the right to possession would be on the plaintiff-landlord and thus was bound by law to lead evidence first. He submitted that merrily because the application was by chance filed before July 1, 1976 , and was pending, the tenant loses the advantage of compelling the landlord to prove his case and this also amounts to hostile discrimination against the tenant against whom the proceedings had Benin filed earlier, though the evidence was record after July 1, 1976, not only the initial burden of proving the case lies on the landlord, but the tenet gets a further right of appeal Luanda S. 42 while in a proceeding pending on that the handicap of showing case against the landlord's prayer for possession and without any right to the appeal procedure because he has been already prevented by reason of amendment of s. 49 and deletion of Ss. 46 and 47 by the 1963 amendment from filing a substantive suit.

10. In order to appreciate the contentions urged by Mr. Tunara ir is necessary to consider the provisions of the Act as they stood prior to the two amendments and also firstly after the amendment of 1963 and secondly after the amendment of 1976. By the amending ACt of 1963 the provisions of Chapter VII with which we are concerned were amended so as to confer a right of appeal a tenant who has taken up to the Rent Act. However, by the amending Act of 1976 of the entire Chap. VII has been radically changed , and also a finality is given to the decision of the court of Small Causes either in the original suitor in appeal preferred by either party. The remedy under lode s. 41 was merely by way of an application for summons against person occupying for summons against person occupying property without leave to show-cause why he should not be compelled to deliver up tee property. However , under S. 41 of the ACt after amendment of 1976 a suit is provided for and exclusive jurisdiction is conferred on the court of small Caesuras to entertain and try all suits and proceedings between the licenser and licensee, or 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 therefor , irrespective of the value of the subject matter of such suits or proceedings. Rent Act and some other Acts apply Section 42 confers a right of appeal against the decision inset a suit of proceeding under s. 41 . In other words, a compact procedure is provided under Ss. 41 and 42 giving a finality to the decision and thus reducing multiplicity of the proceedings.

11. We will now proceed to examine the provisions of the ACt as it stood prior OT Jan 1, Chap, VII of the Act in particular and the nature of remedy provided by these provisions. Counsel on booth et sides referred to ad relied on the decision of a Division Bench of this Court in Monads Vishindas Chainani v. Hiranand Assumal (1874) 76 Bom LR 494. In that case the Division Bench has elaborately considered the Scheme of the Act as it stood before the amendment of 1963 with particular reference to chap. VII and the nature of the remedy provided by these provisions. As observed by the division Bench, Ss, 1 to 40 seem to form one part and Ss. 41 to 49 contained in Chap. VII seem to form the other. Looking to the first part it is seen that a remedy of suit is provided in respect ascertain causes of action and a list of matter is included in S 19 in respect of which the Court . section 18 deals with the suits in which the Court of Small Causes Has been the jurisdiction. Under that Section, it is laid down that subject to the exceptions s. 19 the Small Cause court shall have jurisdiction to try all suits of a civil nature when the amounted value of the subject-matter does not exceed Rs. 3,000|- Calluses (a), (b) and (c) which follow thereafter in that Section lay down the conditions under with which that court will boot have jurisdiction and the class. (d) to (g) and (s) indicate that no suit relating to immovable property is ordinarily within the cognizance of the court of small Causes. So far as the question before us is concerned, class (d) and (s) are relevant for our consideration. These clauses relate to the suits for recovery of immovable property and the suits for declamatory decree. Similarly, the jurisdiction conferred on that Court in respect of matters covered by s. 18 is exclusive and as provided by s. 37 the decree of the Court of Small Causes and having also provided that decrees and orders in those suits shall be conclusive and final the Legislature has added Chap. Vii which is again in the nature of an exception proviso to s. 19. The title given to the Chapter is 'Recovery of Possession of Certain Immovable Property' . The remedy provided by this Chapter is not a suit is described by the legislature as an application by the legislature as an application by the applicant for summons against person occupying the property . The provisions of s. 41 show that the application could be filed by person, if he satisfy the conditions viz. (I) the annual rack-rent does not exceed Rs. 3,000|- and (ii) the possession of such other person viz. The occupant against whom the summon s is sought is that tenant or is permissive and such tenancy or is permissive and such Tenneco or permissions been determined or has been withdrawn. In other words, in cases where there is a relationship of landlord and tenant or licensee and licensor, the landlord or licensor is eentitled to apply for a summons to recover possession after the tenancy is or permission is withdrawn and the occupation of the occupant thus becomes without leave. Section 41 thus provides a speedy and summary remedy against the occupant by way of an application by the landlord or the licensor. Section 42 provides the manner in which the summons has to be served on the occupant in the manner provided by the Civil P. C. for the service of a summons on a defendant . Section 43 provides that if the occupant does not appear at the time appointed and show cause to the contrary, the application shall, if the small Causes court is satisfied that he is entitled to apply under s. 41 , be entitled to apply under order addressed to a bailiff of the court directing him to give possession of the property OT the applicant on such day as the court thinks it fit to name in such order. There is an explanation to S. 43 which is in the nature of deeming provision hereunder the occupant shall be deemed to have shown cause within the meaning of s. 43. According to the explanation, if the occupant proofs that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of its section. Section 44 enables the bailiff to enter the property for giving possession to the applicant. Under s. 45 a provision to the is made that notwithstanding any error, defect or irregularity in the mode of proceeding to obtain possession the applicant would not have the effect of a deemed trespasser, but the person aggrieved may bring, a suit for the recovery of compensation for any damage which he has sustained by for the reason of such error, defect or irregularity. Then a concept of deemed trespass is introduced in S. 46. It declares that an applicant who has no right to apply for possession on the date of the application is not protected, if the he obtains possession under this Chapter against a person who is aggrieved by the application and the aggrieved by the person is entitled to file a suit for damages for the act of the deemed trespasser. Under s. 47 the occupant is entitled to file a suit for compensation against the deeming trespasser. Section 47 runs thus :

'Whenever or an application being made under S. 41 the himself, with two sureties, in a bond for such amounts as the small Cause court thinks reasonable, having regard to the value of the property and the

probable cost of the suit next hereinafter mentioned, to institute whiteout delay a suit in the High court against the applicant for compensation for trespass and to pay all the costs of such suit in case he does not prosecute the same or in case judgement therein is sign for the applicant, the small Cause Court shall stay the proceedings on such application until such suit is disposed of.

If the occupants obtains a decree in any such suit against the applicant, scout decree shall supersede the order (if any) made under s. 43.

Nothing contained in 's. 22 shall apply to suits under this Scion '.

S. 48 merely provides for the application of the procedure prescribed by the Civil P. C. to proceedings under Chap. VII.

12. The next important provision is S. 49 which runs as under :

'Recovery of the possession of any immovable property under this Chapter shall be no bar to the institution of a suit in the High Court for trying the title thereto'.

On an examination of the Scheme of the relevant provisions of the ACT and in particular those of Chap. VII it would firstly appear that an order passed in a proceeding under s. 41 is neither final nor conclusive, Unlike s. 37 which attributes a finality and conclusiveness to a decree or order of the Small Cause court in a suit, there is no such provision in chap. VII which governs the proceedings relating to the recovery of possession of immovable property; (ii) s. 41 contemplates an application by the landlord for a summons against the occupant to show-cause why he should not be compelled to deliver up the property. section 46 and 47 introduce a concept of deeming trespasser and provides the remedy to the occupant of filing a substantive suit for damages for compensation for trespass against the applicant landlord and such a decree suppresses the order for delivery of possession, if any, , passed under S. 46(iii) In view of s. 49 , the occupant is also entitled to file a substantive cut either in the High court or the city civil court as the Amy be, though possession of the property the proceeding under s. 41(iv) the proceedings under S, 41 are of a summary nature and, therefore, in a substantive suit filed by the same contentions which were heard and decide by the Court of Small Causes. In *Monads Vishindas Chainani v. Hirandand Assumal*, : (1974)76BOMLR494 the question of that arose for consideration by the Division Bench was whether the decision of the small Cause Court in the application under s. 41 that the occupant was not a licensee operated as res judicata in a suit subsequently filed by the applicant against the occupant in the City Civil Court that the applicant could again plead in such a suit in the city Civil court and whether the applicant could again plead in such a sut in the city ? civil Court that the applicant was his licensee and that his licence was terminated. The Division Bench held that an order under Chap. VII of the Act was never intended to be final. If either of the parties I . e . either the applicant or the occupant, so desired , a substantive audit was permitted and the order under s. 43 , if any was subject to the final result of the litigation in the Civil court and, therefore, it is not possible that the order of the court of small Causes operates as reps judicata. The Division Bench also referred to the following observations of the Full Bench decision of this Court in *dattatraya Krishna v. Jairam Ganesh* : AIR1965Bom177 which throws some light on the scheme of chap. VII of the Act.

'.....The title in respect of which a suit may be filed under S. 47 or 49 may be a title or a right to possession or a title in the nature of ownership. The claim to possession or a title in the nature of ownership. The claim to possession in a suit between a landlord and a tenant can only be adjudicated upon bu the Special Court under S. 28 and the suit in regard to it must be filed under S. 28 in the small Cause Court. A suit to establish anu other title may, however, be filed either in the High Court or in the City Civil Court.'

Mr. Tunara pointed out that having regard to the Scheme of Chap. VII of the Act both the landlord and the occupant are treated on equal feasting so far as the availability of remedy of appeal to wither of them is concerned. If the landlord chooses to file a substantive suit in the High Court or the City Civil Court both the landlord and the occupant get the right of appeal. Similarly the landlord to of this summary remedy under S.

41 even then the decision of the Small Cause Court being not final either of them could file a substantive suit in the High court or the City Civil Court and the decree passed therein could be challenged by way of an appeal. Thus, according to Mr. Tunara, both the landlord and the occupant are treated equally without any discrimination so far as the right to file an appeal is concerned under the Scheme of Chap. VII prior to the amendments of 1963 and 1976.

13. The first major amendment to the provisions in Chap. VII was by Maharashtra Act No. 14 of 1963 which came into force on Jan. 1, 1964. By S. 2 of the amending Act a new S. 42 was inserted. It runs as under :

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

15. An appeal against the decision on this issue shall lie to a Bench of two Judges of the Small Cause court.

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

17. Provided that, in computing the period of limitation prescribed by this sub-section the provisions contained in Ss. 4, 5 and 12 of the Limitation Act, 1908, shall, so far as may be, apply.

18. No further appeal shall lie against any decision in appeal under sub-sec. (2).'

19. Thus, if the occupant raises the contention that he is entitled to protection of the Rent Act and if such claim is not admitted by the applicant, then the Small Cause Court has to decide this contention as a preliminary issue and either party is given a right to prefer an appeal to a Bench of the two Judges of change is also made by s. 4 of the amending Act by substituting a new S. 49 by amending s. 49 so as to render the decision of the Small Cause Court on the question as to whether the occupant is entitled to protection under the Rent Act final. Section 49 runs thus :

'An order made for recovery of possession of any immovable property on an application under s. 41 pending in the small Cause court immediately before the date of the commencement of the Presidency small Cause Courts (Maharashtra Amendment) Act, 1963, or made to it on or after such date, shall (whether possession is taken thereunder or not) bar the institution of a suit in any Court, except a suit in which relief is claimed on the basis of title (other than title as the applicant's tenant within the meaning of the Bombay Rents, Hotel and Lodging House Rates control Act, 1947) to such immovable property'.

all that has been done by the amendment of s. 49 is to take away the right of a party to file a substantive suit only with regard to the question of entitlement to the protection of Rent Act. All other types of suits are not affected nor are intended to be affected in any manner. It is clear that the amendment of s. 49 is merely consequential and made with a view to avoid multiplicity of the proceedings or suits so far as the question of entitlement of the rights under the Rent Act are concerned. It must be remembered that even under S. 28 of the Rent Act exclusive jurisdiction is conferred on the Court of small Causes to entertain and try any suit of proceedings between the landlord and tenant relating to the recovery of possession of any premises and s. 29 provides for an appeal against the decision of the Small Causes court, and the High Court or City Civil Court is barred from entertaining or trying any such suit between the landlord and a tenant. Keeping in view these provisions, of the Rent Act in order to avoid multiplicity of proceedings by reason of the same contention being raised over again, the legislature thought it proper to add s. 42(A) and suitably amend s. 49 . Just as s. 29 of the Rent Act contemplates one appeal against the decision of the Small Cause court in the suit or

proceeding between a landlord and a tenant, so is now the case with the appeal on the primary issue where the occupant has taken up the plea that he is entitled to the protection of Rent Act. We are clearly of the view, barring this change with regard to the plea of tenant within the meaning of the Rent Act, the amendment of s. 49 has not brought about any change in so far as the availability of remedy of filing a substantive suit in the competent which were raised before the Small Cause court in the application under s. 41 and decided by it

20. Mr. Tunara, however, placed emphasis on the change in the wording of s. 49 by the amendment. He submitted that the original words 'trying the title thereto' occurring in s. 49 are not found in the new s. 49 as amended by 1963 amendment. He further submitted that original s. 49 had to be read in the context of the concept of deeming trespasser found in Ss. 45 to 47 of the old Act and these provisions stood deleted by the amendment of 1963. According to Mr. Tunara, s. 49 has lost its original colour and efficacy so far as the availability to the occupant of a right to prefer an appeal by first filing a substantive suit in the competent court, It is contended by Mr. Tunara that in view of the radical changes, the effect is that the what is now permitted under the amendment S. 49 is a remedy of filing a suit based on title other than the one which was the subject matter of the application under s. 41 and in such a suit it would be impermissible for the applicant to regatta the question of right relating to recovery of possession which has been the subject-matter of contest between the parties in the application under s. 41. He further submitted that old ss. 45 to 49 envisage a comprehensive scheme and in the absence of Ss. 45 to 47 the new S. 49 as it stands after amendment of 1963 could not have the same effect which it had prior to the amendment so far as the nature of the suit permitted by that section is concerned. As observed by the Supreme Court in Babulal Bhunamal v. Nandram Shivram : [1959]1SCR367 , under s. 41 no claims or rights are settled. The nature of remedy under s. 41 has not undergone any change even after the amendment of 1963. Neither S. 37 is amended nor any finality given to the application under s. 41 except in the case where an occupant raises a plea claiming title to the property, as a tenant within the meaning of Rent Act. In the case of a public landlord like Bombay Port Trust the provisions of the Bombay Rent Act do not apply. In such cases the occupant will still be entitled to agitate the same question and ask the court to try the title to the recovery of possession by filing a substantive suit wherein he could agitate the same issues indigents the decision of the Court in such a suit he has the remedy of an appeal. Just as in the case of the occupants setting up the plea that he is the applicants stagnant within the meaning of Rent Act 42-A, in other cases where the rent Act does not apply in view of S. 49 the occupant still has the remedy of filing a suit of being a title to the other than a title as a tenant within the meaning of the Rent Act. All that is achieved by the deletion Ss. 45, 46, and 47 is that the suit for damages on the basis of deemed trespass as contemplated by the provision may not lie. We are, therefore, of the view that the changes brought about by the amending Act, 1963, have not substantially altered the position, except with regard to the cases where the occupant raises a plea that he is attendant within the meaning of Rent Act and as such protected; only it this limited extent, the decision of the Small Cause Court is final under S. 42(A) read with S. 49. On other cases even after the amendment of 1963 the decision of the Small Cause Court in the application under s. 41 would not constitute a bar to the filing of a substantive suit in the competent court and also agitating the identical issues in such a suit. For instance, notwithstanding the decision of the court of Small Causes that the occupant is not a licensee of the applicant - public landlord, it would still be open to the applicant even after the amendment of 1963 to file a substantive suit contending that the occupant is a licensee and the licence has been validly terminated and against the decision in such a suit either of the parties will have a right of appeal. The bone of contention of Mr. Tunara is that prior to the amendment of 1963, though the landlord could choose the forum either of the regular civil suit or the Small Cause court for claiming the property, the occupants were not under disadvantages so far as the availability of the remedy of the filing an appeal is concerned because if the landlord chooses to file a suit in the regular civil court there is a right of appeal which can be availed of by the occupant can still file a substantive suit in the regular civil court and then avail of the remedy of filing an appeal in case he does not succeed in that court. It was on this premises that Mr. Tunara contended that in view of the changes effected by the 1963 amendment there has been a discrimination and the occupant is treated unfavourably by taking away this his right of appeal merely because the landlord exercises his choice of filing an application under S. 41 instead of filing a suit in the regular court. As explained above, the argument cannot be accepted in view of that the fact

that the Scheme of Chap. VII including S. 49 remains basically unaltered excepts with regard tooth occupants who could take up the plea of protection under the Rent ACt. If the landlord files a substantive suit in a regular court there is obviously a right of appeal available tooth occupant. If the occupant raises the plea of protection of Rent Act in the application under s. 41, he has the right of an appeal under S. 42(A). Lastly , even if the occupant against whom an application under S. 41, is filed by the landlord does not raise the plea of his being protected under the Rent Act still his right to file substantive remains intact by reason of the amended s. 49 and also the basically unaltered Scheme of Chap, VII so far as occupant who do not raise a plea of protection of the Rent Act are concerned and consequently also his right to avail of the remedy of filing an appeal in the event of the adverse decision by the trial court in the substantive suit.

21. Now, we may turn anything amending Act of 1976 which has brought about substantial and radical changes in chapter VII, as well as S. 37 of the Act. The new s. 41 runs as under :

'(1) Notwithstanding anything contained elsewhere in this Act or in any other law for the tine being in force, but subject to the provisions of sub-sec, (2) , the court of Small Causes shall have jurisdiction oto entertain and try all suits and proceedings between a licenser and licensee, or landlord and tenant, relating of 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 therefor, irrespective of the value of the subject-matter of such suits or proceedings.

Nothing contained in sub-sec (1) shall apply to suits or proceedings for the recovery of possession of any immovable property or of licence fee or charges of rent thereof to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Premises (Eivtion) Act, 1955, the Bombay Municipal Corporation ACt, the Bombay Housing Boar Act, 19948 , or other law for the time being in force, applies.'

It would appear that the ambit and scope of new s. 41 is totally different form the ambit and scope of ole S. 41. As pointed out earlier, lode S. 41 contemplates filing of an application and furnishes a summary remedy against the occupants for recovery of possession of the property and such an application can be filed only when the rack-rent is ;less than Rs. 3.000|- while under the new s. 41 a suit is provided for. The restriction of the rack-rent being not more than Rs. 3000|- is done away with and further the section confers on the small causes court exclusive jurisdiction to entertain and try all the suits and proceedings between a licenser and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property of situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent ther for, irrespective of the value of the subject-matter of such suits or proceedings. Of course, there are certain exceptions contemplated by sub-sec, (2) of s. 41 where the small Cause Court should not have jurisdiction. Broadly speaking it can be said that the private landlords would go out of the ambit of s. 41 in cases where Rent ACt applies to the premises. Sub-sec. (1) would cover public landlords such as Bombay Port Trust who are not exclude under sub-sec,(2) of s. 41.

22. Then follow section 42 which inter alia provides for one appeal against the decision of the small Cause court which runs thus :

'(1) An appeal shall lie from a decree or order made be the small Cause Court exercising jurisdiction under S. 41 to a Bench of two Judges of the said court, which shall not include the Judge who made such decree or order : Provided that, no such appeal shall lie from a decree or order made in any suit or proceedings in respect of which no appeal lies under the Civil P.C., 1908.

Every appeal under sub-sec. (1) shall be made within thirty days from the date of the decree or order, as the case may be :

Provided that, in computing the period of limitation prescribed by this sub-section the provisions contained in Ss. 4, 5 and 12 of the Limitation Act, 1963, shall, so far as may be, apply.

No further appeal shall lie against any decision in appeal under sub-sec (1).

23. Where no appeal lies under this sub-section from a decree or order in any suit or proceeding, the bench of two Judges specified in sub-sec. (1) may, for the purpose of satisfying itself that the decree or order was according to law, call for the case in which case such decree or order was made and pass such order with respect thereto as it thinks fit'. Section 43 is similar to led s. 48 and provides that in all suits, appeals and proceedings under this Chapter, the small Cause court shall, as far as possible and except as herein otherwise provided, follow the procedure prescribed by the Civil P. c. 1908.

24. Section 45 relates to the saving of a suit involving title and it provides that nothing contained in the chapter shall be deemed to bar party to a suit, appeal or proceeding mentioned therein in which a question of title of to any immovable property arises and is determined, from suing in a competent court to establish his title to such property. The new s. 45 has to be read and interpreted in the light of the new s. 41 and the provisions for appeal and revision under new s. 42. In view of the exclusive jurisdiction conferred in the small Cause court and the provisions appeal and revision under s. 42 as also the finality given to the decree or order in the suit or proceeding under chapter VII as provided in the amended section 37, it is clear that the suit contemplated under the new s. 45 is a suit on title other than a title litigated in the suit or proceeding which could be filed under s. 41.

25. section 46 is a saving clause in respect of pending proceedings. Under sub-sec. (1) of S. 46 all suits and proceedings cognizable by the small Cause court under this chapter and pending in the High court or the Bombay City civil court, on the date of coming into operation of the amending Act have to be continued and disposed of by the High Court or the city civil Court, as if the amending ACT had nor been passed. Similarly, under sub-sec, (2) of s. 46 it is provide that all in the small Cause Court under this Chapter and pending in that court on the date aforesaid shall a be cause court, as ir this Act had not been passed. Thus, all matters pending on the date of coming into operation of the amending Act remained unaffected and have to be disposed of as if the amending ACT had not come into force.

26. On a perusal of the scheme of the new Chap. VII it would appear that is aimed at preventing multiplicity of proceedings in respect of the same subject- matter and giving a finality to the decrees and orders passed in suits and proceedings under s. 41. Prior to the amendment of 1976 the decision being not final except in the case an occupant raising the plea of being protected under the 'Rent Act, the same issues could be reagitated by filing a substantive suit. As pointed out earlier, the alleged discrimination is with regard to the availability of the remedy of filing the availability of the remedy of filing an appeal toleration categories of occupant while in respect of others no such remedy is available. This is the bone of contention and the basis of the challenge tote provisions of the two amending Acts of 1963 and 1976. A large number of authorities were cited before us both by Mr. Tunara and Mr. Chinoy in support of their rival contentions. However, we do not think it necessary to refer to each one of them,. But would prefer to make a reference to some of the leading cases under Art. 14 of the constitution.

27. The ambit 14 of the scope of interpretation of Art 14 of the constitution arose for consideration in re : the Special courts Bill, : [1979]2SCR476 . In para 73 of the judgement of My Lord the Chief Justice Chandrachud, the broad propositions which emerge from various judgements of the supreme court rendered earlier have been pithily recapitulated. WE do not refer to all of them, but it would be pertinent to reproduce the propositions set which are directly relevant for our case and they are :

28. Article 14 enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discriminations of favouritism. It is a pledge of the protection of equal laws, that is, laws that operated alike on all persons under alike circumstances.

29. the constitutional command to the State to afford equal protection of its law as sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should nor insists on delusive

exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

30. (c) The principle underlying the guarantee of Art. 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences or circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject-matter of the legislation, their position is substantially the same.

31. By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality, but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation into classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of persons. A classification should ordinarily have prospective operation. This is also consistent with the provisions of s. 6 of the General Clauses Act or 7 of the Bombay General Clauses Act. All that is provided by sub-sec (2) of s. 46 is that pending proceedings have to be disposed of either under the substituted Chap. VII, but under the old Chap. As it stood prior to the amendment. Thus the classification is between pending proceedings and newly instituted proceedings. It cannot be said that persons against whom proceedings have been instituted under the old law and such proceedings are pending are similarly situated with those against whom the proceedings are instituted after coming into force of the amendment under the new procedure. If any authority is needed to support the proposition, that pending proceedings form a separate class and a classification made between pending proceedings and the newly instituted proceedings is valid and does not offend Art. 14 of the Constitution we can usefully refer to the decisions in *M/s. Jain Bros v. Union of India* : [1970] 77 ITR 107 (SC), and *Anant Mills Co Ltd. v. State of Gujarat* : [1975] 3 SCR 220. These decisions show that classification between pending cases and newly instituted cases has always been held a reasonable and permissible classification. If that is so, the provisions s. 46(2) cannot be said to be discriminatory merely on the ground that such occupants against whom the proceedings are initiated prior to the addition of the new Chapter do not get a right of appeal under s. 42. Similarly, a classification can be founded on the basis of a particular date and for that purpose we may usefully refer to the decisions of the Supreme Court in *Union of India v. Partamaeswaran Match Works*, : 1978(2) ELT 436 (SC) and *D. G. Ghouse & Co. (Agents) Pvt. Ltd. v. State of Kerala*. : [1980] 1 SCR 804. Of course, this would be so unless the choice of the date is whimsical or capricious. The enactment with which we are concerned is not affected by this vice in view of the fact that the provisions of s. 46(2) have been brought into force when the entire amending Act came into force on July 2, 1976, and not on some date arbitrarily fixed. As pointed out above s. 46(2) merely embodies the well-known principles enunciated in the provisions of s. 6 of the General Clauses Act, Now, as a result as they stood prior to the amendment of 1976 are applicable. As pointed out earlier, the Act was amended by the amending Act of 1963 and the same was in force prior to July 1, 1976. In case of an application instituted under s. 41 as it stood before July 1, 1976, the position is that if the occupant raises a plea of protection under the Rent Act he has the remedy of filing an appeal. In other case, the decision under s. 41 being not final or conclusive and also in view of s. 49, the occupant is entitled to file a substantive suit and raise identical contentions which he had raised or could have raised in the application and against an adverse decision in such a substantive suit he has the remedy of an appeal under the ordinary law. Under the circumstances, it cannot be said that the provisions of Chap. VII before the amendment of 1976 are more onerous because of the non-availability of the procedure of appeal under s. 42 of the Act after the amendment of 1976. The occupants in both these cases are by and large equally treated so far as the availability of the appeal procedure is concerned. Taking any view of the matter, therefore, it is not possible to accept the contention that the provisions sub-sec, (2) of S. 46 are discriminatory and violative of Art. 14 of the Constitution and so far as the remedy of appeal procedure is concerned, as contended by Mr. Tunara.

32. There is also no merit in the contention that the addition of s. 42 or deletion of Ss. 46 and 47 and the amendment of s. 49 by the amendment Act, 1963 is discriminatory and violative of Art, 14 of the constitution. This question has been incidentally, discussed and answered in the above discussion. As far as s. 42-A is concerned, the classification is between the person claiming protection under the Rent Act and others who do not. The classification is between the persons claiming protection under the Rent Act and others who do not. The classification cannot in the least be said to be unreasonable or arbitrary having regard to the fact that the Rent Act confers certain rights on the tenants to whom the Act applies. On the other hand, such rights cannot be claimed by the tenants of the government or the Public authorities since the Rent Act does not apply to them. According to Mr. Tunara, the vice lies in proving the remedy of an appeal to the occupant merely because he raises the other hand no such appeal lies under s. 42-A where such a plea is not raised. In other words, he contended that by merely raising such a plea in the written statement the occupant gets a right of appeal. He submitted that a classification based merely on the circumstance of such a plea being raised is only irrational and unreasonable. Though, the possibility of false connotation of protection under the Rent Act being raised cannot be ruled out, the truth or the contention can be finally judged on the basis of the mere possibility of abuse of a particular provision. Moreover, the object of enacting s. 42-A was to prevent abuse and multiplicity of proceedings. In the absence of such of a provision giving finality to a decision the question of protection under the Rent Act, the tenant could raise the same issue over and over again in different proceedings, particularly having regard to the provisions of s. 28 of the Rent Act which confers exclusive jurisdiction to the special courts mentioned therein. We thus find that there is clear nexus in enacting these provisions with the object to be achieved viz. To prevent abuse and multiplicity of proceedings where a contention of the protection of Rent Act is raised. Barring the cases where protection of Rent Act is claimed, in our view, the amendment Act of 1963 has not changed the original position on account of the deletion of the Ss. 46 and 47 or amendment of 49 except with regard to the cases where the plea of the occupant being protected with the provision of the Rent Act in which case an appeal is provided and a finality is given to such a decision. In other cases the position substantially remains the same viz, that the occupant can file a substantive suit as before in which case he automatically gets the right of appeal under the ordinary law. It cannot, therefore, be said that the post-1963 amendment procedure under chap. VII as compared with the procedure under the old chap. VII is more drastic, onerous, prejudicial or harsh.

33. According to Mr. Tunara, the availability of two forums one under the ordinary law of filing a substantive suit and the other under s. 41 to the public landlord by itself renders the . In other words, according to him, a choice of forum being available to the public landlord renders the provisions and the procedure prescribed in Chap. VII discriminatory and violative of Art. 14. A similar argument was repelled by the supreme Court in *Maganlal Chhaganlal (P) Ltd. v. Bombay Municipal Corporation*, : [1975]1SCR1, by observing that 'in considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not fancied possibility but the real risk of discrimination that the court must take into account. Discrimination may be possible but is very improbable. And if there is discrimination in actual practice this court is not powerless'.

34. Assuming that by reason of deletion of ss. 46 and 47 and the amendment the tenant cannot regulate the same issue which are decided by the court of small Causes and only a question paramount title or title other than the title to the recovery of possession which is the subject-matter of the application under s. 41 could be raised into sub-matter suit, and therefore, the tenant is deprived of any right of appeal which he would otherwise have, if the public landlord were to file a substantive suit or a right which is conferred on the tenant who claims protection under the Rent Act, it does not necessarily follow that there has been hostile discrimination between the two groups or that the procedure becomes violative of Art. 14 on the ground that the summary procedure under s. 41 is drastic, onerous, harsh as prejudicial to the tenant. As far as the proceeding before the small Cause court is concerned, one should bear in mind that it is a proceeding before a court. Even in such a proceeding the landlord has to prove that he is entitled to an order addressed to a bailiff of the court directing him to give possession of the property to the applicant as provided in s. 43. It is difficult to accept the submission of Mr. Tunara that in a proceeding under old s. 41 because the occupant has

to show cause on a summons being served on him the primary burden is on the occupant to prove that the landlord is not entitled to possession. s. 43 clearly provides that the order for delivery of possession can be passed by the small Cause court only if it is satisfied that the applicant is entitled to apply under s. 42. In other words, the applicant must satisfy the Court that the tenancy or permission granted to the occupant has been determined and is withdrawn before the application was filed. As observed by the Division Bench of this Court in *K.M. Motwani v. Albert Sequeira* 60 B.Nom LR 1282 : AIR 19960 Bom 13, when a party comes to the small Causes court under chap. VII and makes an application, he must satisfy the court that his application is maintainable and that he is entitled to the order as provided by that chapter. VII and makes an application, he must satisfy the court that his application is maintainable and that he is entitled to the order as provided by that Chapter. In other words, the initial onus is on the applicant to prove his case. We have already pointed out so far as the remedy of filing a substantive suit which is saved under s. 49 is concerned and, therefore, it would not be correct to say that the remedy of appeal which was available prior to the amendments has been curtailed. Even if we were to accept the contention of Mr. Tunara, that S. 49 as amended by the amending Act of 1963 does not preserve the right of the occupant to file a substantive suit where identical points whichever the subjects, matter of the application under s. 41 could be raised still it cannot be said that such an occupant is without any efficacious remedy comparable to the appeal procedure. He has a right to challenge the correctness of the decision of the court of small Cause by filing a writ petition under Arts. 226 and 227 of the Constitution. Though, it cannot be denied that s. 42 expressly provides for a remedy by way of an appeal to the occupant against whom the suit is instituted after July 1 1976, and assuming that no such remedy of appeal remains available to the occupant by reason of changes effected by the amendment Act of 1963, that by itself would not vitiate the classification if it is otherwise reasonable and we have already held that this distinction between pending proceedings and the new proceedings is a valid classification. In this connection, we may refer to the decision of the Supreme Court in *Kuala Singh v. Mt. Lajwanti*, [1980]1SCR854. In that case the provisions of the Delhi Rent Control Act (1953) were challenged as violative of Art. 14 of the Constitution on the ground that they were arbitrary and discriminatory in nature because while in the case of an application for possession on the ground other than bona fide requirement the remedy of appeal was provided, on the other hand, in the case of an application for possession on the ground of bona fide requirement no appeal is provided. Not only that there was a provision that the tenant against whom an application for possession on the ground of bona fide requirement is filed had no right of an appeal, but also a different procedure was prescribed for such an application. A distinction was made even with regard to the procedure to be followed. Even at the initial stages in the case of an application for possession on the ground of bona fide requirement, the tenant had to apply for leave to defend which was not the procedure prescribed for eviction of tenants it was held that the classification made by the relevant provisions is a reasonable classification and cannot be said to be in any way discriminatory or arbitrary. In para 18 of the judgement the Supreme Court observed.

'The comments by the learned counsel for the appellant are first that there was no reason to discriminate the landlord suing for personal necessity by trying his application in a summary fashion. We have already pointed out that the classification made by s. 25B is a reasonable classification and cannot be said to be in any way discriminatory or arbitrary. Even though a summary procedure has been evolved the tenant has been afforded full opportunity to defend the application provided he can disclose good grounds for negating the case of the landlord. No litigant has a right to protect the legal proceedings by taking frivolous, irrelevant, irrational or unavailing pleas. This is what the section seeks to prevent.'

In para 23 it is observed that -

'In the instant case, the legislature has not taken away the right of the tenant at all but has merely simplified the procedure for eviction of the tenant in cases falling within the ambit of ss. 14A and 14(1)(e) of the Act'.

35. Applying the ratio in the said case before the Supreme Court, it cannot be said that the amended provisions are discriminatory since in any event against the decision of the small Cause court the occupant could approach the High court under Arts. 226 and 227.

36. A question was raised before us that in respect of the proceedings which were pending on the date of the commencement of the amendment of 1976 even of a substantive suit could be filed by reason of such remedy being saved under s. 49 of the Act, the ordinary courts would not be competent to entertain such a suit in view of new s. 41 which confers exclusive jurisdiction in the small Cause Court and, therefore, the occupant will have to file a suit in the same court viz, the Small Cause Court. In this connection it must be noticed that the nature and ambit of old S. 41 is entirely different from the new s. 41. The decision in a proceeding under old s. S. 41 is neither final nor conclusive and the remedy is of a summary nature . It the application which was filed before the amendment of 1976 is decided after the amendment and an offer for recovery of possession is passed, the occupant would be entitled to file a substantive suit under s. 41 and in that suit raise the samara contentions which were decided by the small Cause Court under the old S. 41 . However, after the decision of the suite under S. 41 the occupant automatically gets the right of appeal under the new S. 42. In other words only the forum of the substantive suit available to the occupant is changed. For merely , he had to flee a suit in the city civil court; now the suit has to be filed in the Small Cause court, but in both the cases the decision gets a finality subject to the availability of remedy of filing of an appeal. Thus, in both the cases viz., the proceedings under s. 41 pending on the date of the coming into operation of the amendment of 1976 as well as the occupants against whom the suit is filed after the provisions of that ACT came into force, the remedy of appeal procedure as provided in s. 42 is equally available. The firs proviso in s. 41 indicates that in certain cases the remedy of appeal is not available , but that would apply to both the categories of cases. In the circumstances the plea of validity of the provisions of the amendment act of 1976 as being discriminatory and violative of Art. 14 of the constitution must fail.

37. It is common ground that as far as the position of law as prevailed prior to the amendment of 1963 is concerned, there was no hostile discrimination amongst the occupants since they had a right to file a suit for damages under Ss. 46 and 47 or file a substantive suit which is expressly saved under S. 49 and against the decision in such a suit they had the availability of appeal procedure a under the ordinary law. As held by us above, the classification of occupants to claim protection of Rent Act and those who do not is a valid classification. Moreover, occupants raising such a plea of protection of et Act had the right of appeal under S 42-A, for for those who do nor raise such a plea also could file a substantive suit and thus avail of the remedy of appeal procedure under the ordinary law. After the amendment of 1976 the pending proceedings are saved under s. 46(2) and they are governed by the pre-amendment provisions. The classification on the basis of the pending proceedings is legal, valid and permissible and is not discriminatory or violative of ART. 14 . Further, in view of the provisions of old s. 49 which govern the pending proceedings, the right to file a substantive suit is saved band though it may be that such a suit is equipped to be filed in the small Cause Court under the new s. 41, all the occupants are treated alike since each one of the gets the advantage of the appeal and other procedure under s. 42 subject to the limitation mentioned therein. It would, therefore, follow that the contention of Mr. Tunara, that as a result of the amendments of 1963 and 1976, the occupants against whom proceedings under s. 41 are instituted are discriminatory in the matter of availability of appeal procedure cannot be accepted.

38. Lastly, it may be mentioned that during the course of the argument a question was raised as the to whether there can be classification between public landlords and private landlords. The point is concluded by the decision of the supreme Court in Maganlal Chaganlal v. Bombay Municipal corporation, : [1975]1SCR1 , where it has been laid down that special provisions of law applying tooth ?government and public bodies does not amount to unreasonable classification nor does it offend Art. 14.

39. IN the view that we have taken the two questions that we have formulated above are answer in the negative. The matters Amy now be placed for disposal before the learned single Judge.

40. Mr. Tunara orally applies for a certificate under Art 132 of the constitution. Since we have applied the well settled legal principles and decisions of the Supreme court, we so not think of the that this is a fit case for granting the certificate. Prayer refused.

41. Costs, costs in the cause.

42. Order accordingly.

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