

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 273 OF 2015

Aktar Qureshi alias Aktar Kamlu
Qureshi and Anr.

..Petitioners

Vs

Gazebo Restaurant and
Departmental Store Private
Limited and Anr.

.. Respondents

Mr. Vikram Sathaye with Mr. Sayeed Mulani and Mr. Dileep Satale
i/b Mulani & Co, Advocates for Petitioners.

Ms. Deepa Ahuja a/w Ms. Martine Sapkal i/b M/s Arun Sapkal &
Co, Advocate for Respondent no.1.

Mr. Atul G. Damle, Senior Advocate i/b Prakash Wagh, for
Respondent no.2.

**CORAM : R.G.KETKAR,J.
DATE : 30/06/2015**

PC:

1. Heard Mr. Vikram Sathaye, learned counsel for the petitioners, Ms. Deepa Ahuja, learned counsel for Respondent no.1 and Mr. Atul Damle, learned senior counsel for respondent no.2 at length.
2. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up finally.
3. By this Petition under Section 115 of the Civil Procedure Code, 1908 (for short, 'C.P.C.'), original defendants have

challenged the Judgment and order dated 25.2.2015 passed by the learned Judge, City Civil Court, Greater Mumbai, in Suit No.3526 of 2010 (High Court No.998 of 2010). By that order, the learned trial Judge overruled the objection raised by the petitioners, hereinafter referred to as 'defendants', that the Civil Court has no jurisdiction to entertain and try the suit as the defendants are either tenants or licensees in respect of the premises in dispute.

4. In support of this Petition, Mr. Sathaye submitted that during the pendency of the suit, the respondents, hereinafter referred to as 'plaintiffs' applied for ad-interim relief. The ad-interim relief was refused on 28.4.2010 by the learned Single Judge of this Court. Motion was thereafter heard finally and interim relief was granted in favour of the plaintiffs on 14.9.2010 restraining the defendants from entering upon the suit premises, more particularly described in the prayer clause of the Plaint and demarcated on the sketch at Exhibit 'a' thereto. The defendants filed Appeal No.699 of 2010 before the Division Bench of this Court. By consent of the parties, the order passed by the learned Single Judge was set aside with direction to decide Motion afresh. The Division Bench also directed framing of preliminary issue under section 9-A of C.P.C. as objection to jurisdiction was raised. The suit was thereafter transferred to the City Civil Court. By

order dated 30.7.2014, the trial Court was directed to decide preliminary issue within two months.

5. Mr. Sathaye submitted that the defendants examined in all 10 witnesses. The plaintiffs, however, did not adduce any oral evidence. He submitted that in paragraphs 12 to 15 the learned trial Judge recorded the submissions advanced on behalf of the defendants and also noted the judgments cited by them. From paragraphs 16 to 19, the learned trial Judge recorded the submissions advanced on behalf of the plaintiffs and has also noted the judgments cited across the Bar. From paragraph 20 onwards, the learned trial Judge proceeded to discuss the merits of the case. He submitted that perusal of the discussion from paragraphs 20 onwards shows that the learned trial Judge proceeded to consider the issue on the footing that he is deciding proceedings filed under Order 7, Rule 11(d). He submitted that undoubtedly if the defendants have taken out Motion under Order 7, Rule 11(d), the Court has to consider only averments made in the plaint and cannot travel beyond that. However, issue was raised under section 9-A of C.P.C. and in that case the learned trial Judge ought to have considered the evidence adduced by the defendant. Without considering the evidence on record, the learned trial Judge overruled the objection only on the ground that for considering the issue of jurisdiction, only the

averments made in the Plaint are relevant. In particular, he invited my attention to paragraph 24 of the impugned order.

6. On the other hand, Mr. Damle and Ms. Ahuja supported the impugned order. Mr. Damle invited my attention to paragraph 7 of the Plaint as also the prayers (a), (b), (c) in the suit. He submitted that DW 2 Mr. Imran Ramzan admitted in paragraph 10 of cross examination that he does not have documentary evidence to show that he is a licensee or tenant. He does not have rent receipt or document. He does not have document to show that the defendants are tenants or licensees. DW 1 Aktar also admitted in paragraph 12 of cross examination that he does not have any documentary evidence to show that he is a tenant. He submitted that all the witnesses have deposed on similar lines.

7. Mr. Damle invited my attention to paragraph 18 of the impugned order wherein the learned trial Judge has dealt with oral evidence adduced by the defendants. He, therefore, submitted that the learned trial Judge, after considering the evidence adduced by the defendants has held that the Civil Court has jurisdiction to entertain and try the suit. He therefore submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

8. I have considered the submissions made by the learned

counsel appearing for the parties. I have also perused the material on record. As noted earlier, this Court had directed the learned trial Judge to decide preliminary issue under section 9-A of C.P.C. Perusal of discussion from paragraphs 20 onwards of the impugned order shows that the learned trial Judge proceeded to decide the issue of jurisdiction on the footing that that issue arises in proceedings under Order 7, Rule 11 (d). This is evident from the observations made in paragraph 24 of the impugned order which reads as under :

“24. Learned counsel for the defendants tried to give emphasis to their defence and to invite attention of the Court towards evidence adduced by them to prove that this Court has no jurisdiction to try the suit. As many as 10 witnesses have been examined by the defendants and also filed various documents on record. I have gone through the said oral as well as documentary evidence, but I do not want to make any comment in respect of evidence adduced by the defendants on record, for the reason that Hon'ble apex Court has laid down a principle that allegations in the plaint are only relevant in order to decide jurisdiction of Court (AIR 1985 Supreme Court 577).”

9. Mr. Damle fairly stated that considerations for deciding issue of jurisdiction under section 9-A and issue whether the suit is barred by law under Order 7, Rule 11(d), are different. Having regard to the fact that the issue was raised under section 9-A of C.P.C., I find that the learned trial Judge has totally misdirected himself in deciding the issue of jurisdiction. At the cost of repetition, it must be held that the learned trial Judge was not

deciding proceedings under Order 7, Rule 11(d). Since he was deciding the issue of jurisdiction raised under section 9-A of C.P.C., the learned trial Judge was bound to consider evidence led by the defendants. Perusal of the impugned order shows that the learned trial Judge rather refused to consider the evidence led by the defendants on the ground that the Apex Court has laid down a principle that allegations in the plaint are only relevant in order to decide the jurisdiction of Court.

10. In view thereof, the impugned order cannot be sustained and is liable to be set aside. The impugned order is accordingly set aside and matter is remanded to the trial Court for deciding the issue afresh under Section 9-A of C.P.C. in the light of the observations made herein. The learned trial Judge will discuss the evidence adduced by the defendant while deciding the issue of jurisdiction. It is made clear that I have not examined the merits of issue of jurisdiction. All contentions in that regard are expressly kept open.

11. Rule is made absolute in the aforesaid terms, with no order as to costs.

(R.G.KETKAR, J.)