

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7299 OF 2014**

**New Shalimar Co-operative Housing)
Society Ltd., a Co-operative Society)
Registered under the Maharashtra)
Co-operative Societies Act 1960 &)
having office at 91, Marine Drive,)
“G” Road, Mumbai 400 002) ..Petitioner**

Vs.

**Jagannath B Shetty)
having address at Shop No.5,)
Gr. floor, New Shalimar Co-operative)
Societies Ltd., 91, Marine Drive,)
“G” Road, Mumbai 400 002) ..Respondent**

Mr. K.J. Hakani for the Petitioner

**Mr. A. G. Damle Senior Advocate i/b Mr. Satyam Acharya for the
Respondent**

CORAM : R. M. SAVANT, J.

DATE : 23rd NOVEMBER, 2015

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties
made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order
dated 4-4-2014 passed by the Appellate Bench of the Small Causes Court, by
which order, the Revision Application filed by the Respondent herein came to
be allowed and resultantly the Judgment and Order dated 29-7-2013 passed by
the Learned Judge of the Small Causes Court holding that the said Court has

the jurisdiction to try and entertain the Suit came to be set aside and the plaint in turn came to be rejected.

3 It is not necessary to burden this order with unnecessary details having regard to the nature of the directions to be issued. Suffice it would be to state that the proceedings have reached this Court by way of the above Petition by virtue of the adjudication that has taken place of the preliminary issue as regards the jurisdiction of Small Causes Court which preliminary issue was raised by the Defendant by invoking Section 9A of the Civil Procedure Code.

4 The Suit in question being RAE Suit No.1111/1783 of 2014 has been filed by the Petitioner/Plaintiff for eviction of the Respondent / Defendant from the suit premises on the ground of subletting and also on the ground that the Defendant has denied the title of the Plaintiff. In the said Suit certain antecedent facts have been referred to namely the conferment of membership on the Defendant by the authorities exercising powers under the Maharashtra Co-operative Societies Act to which exception has been taken by the Petitioner society. It is the case of the Plaintiff that the Respondent is one of its erstwhile tenants and who is in occupation of the suit premises in the said capacity. In the said Suit the Plaintiff filed an application for temporary injunction in response to which the Defendant filed an application invoking Section 9A of the Civil Procedure Code and raising the issue of jurisdiction of the Small Causes Court to try the Suit, in the light of the fact that the Defendant has been conferred membership of the Plaintiff society and that the dispute in the Suit

touches the business of the society. The Plaintiff i.e. the Petitioner society filed its reply to the application under Section 9A and justify the invocation of the jurisdiction of the Small Causes Court. It was the case of the Plaintiff that the Defendant continues to be a tenant and that the membership has been conferred on him when the society was under an administrator. The Plaintiff therefore disputed the grant of membership to the Defendant.

5 The Trial Court framed the preliminary issue which was to the following effect. "Whether this Court has jurisdiction to try and entertain th Suit". The Trial Court by its order dated 29-7-2013 ruled that it has the jurisdiction to try and entertain and Suit. In so far as the acquisition of membership of the Plaintiff society is concerned, the Trial Court held that though it is the case of the Defendant that he has acquired the membership of the Plaintiff society therefore he ceased to be a tenant from the said day. In so far as the tenancy is concerned, the Trial Court held that it can be surrendered or tenancy can be determined in the instant case the Defendant has not stated as to when the tenancy was surrendered and when he has acquired the membership of the Plaintiff society. The Trial Court further observed that the tenancy can only be determined on an eviction decree being passed. The Trial Court therefore held that the dispute in the Suit is not pertaining to the business of the society but is more particularly pertaining to the breach of the terms and conditions of tenancy. The Trial Court as indicated above has accordingly ruled that it has the jurisdiction to try and entertain the Suit and

accordingly disposed of the preliminary issue by its order dated 29-7-2013.

6 The Defendant aggrieved by the said order dated 29-7-2013 passed by the Trial Court invoked the revisionary jurisdiction of the Small Causes Court by filing Revision Application No.285 of 2013. The Appellate Bench of the Small Causes Court which was exercising the powers of revision, has by the impugned order dated 4-4-2014 allowed the Revision Application. A reading of the impugned order discloses that the Appellate Bench of the Small Causes Court has proceeded to consider the application which was filed by the Defendant in the Trial Court, as if it was an application under Order VII Rule 11 of the Civil Procedure Code. It is proceeding on the said premise that the Appellate Bench of the Small Causes Court has recorded findings and made observations in the impugned order. The Appellate Bench of the Small Causes Court as can be seen from paragraph 23 of its order, has recorded a finding to the effect that prima facie the dispute in the proceedings or the dispute between the member of the society on the one hand and the society on the other. The Appellate Bench of the Small Causes Court lost sight of the fact that the scope of an inquiry under Section 9A is different than the scope of an inquiry under Order VII Rule 11 of the CPC, whilst under Section 9A what is in contention is the jurisdiction of the court to try the proceeding. In so far as Order VII Rule 11 is concerned, the maintainability of the proceeding is challenged on the touchstone of one or more clauses of the said Order VII Rule 11 of the CPC. In so far as the scope and the result of an adjudication under

Section 9A is concerned, a useful reference can be made to the Judgment of the Apex Court in the matter of **Foreshore Co-operative Housing Society Ltd. Vs. Praveen Desai & Ors**¹ wherein the Apex Court has held that the issue of limitation is an issue which relates to the jurisdiction of the Court and has therefore to be tried as an issue under Section 9A of the CPC. A useful reference could also be made to the Judgment of the Division Bench of this Court in the matter of **Meher Singh Vs. Deepak Sawhny & Anr**,² wherein the Division Bench of this court has held that the adjudication of an issue of jurisdiction under Section 9A concludes the issue between the two parties and remains no more open for being tried in the Suit. The parties are therefore to be given an opportunity to lead evidence and the adjudication of an issue under Section 9A is therefore akin to a mini trial. Applying the principles which have been enunciated by the Apex Court as well as the Division Bench of this Court to the impugned order passed by the Appellate Bench of the Small Causes Court, is concerned, it would have to be said that the Appellate Bench of the Small Causes Court has not adjudicated the issue in the manner in which an issue under Section 9A was required to be adjudicated. There is no question of recording any prima faice view as has been done by the Appellate Bench of the Small Causes Court in the impugned order as the issue of jurisdiction if answered one way or the other concludes the parties and is no more open for being adjudicated at the trial of the suit.

¹ AIR 2015 SCC 206

² 1998(4)ALL MR 536

7 Since the adjudication of the preliminary issue is not in the manner warranted, the impugned order dated 4-4-2014 is required to be quashed and set aside and is accordingly quashed and set aside and the Revision Application is relegated back to the Appellate Bench of the Small Causes Court for a denovo consideration of the same. Needless to state that on remand of the Revision Application, the same would be considered by the Appellate Bench of the Small Causes Court on its own merits and in accordance with law having regard to the observations made hereinabove and more especially the judgment of the Apex Court in Foreshore Co-operative Housing Society Ltd. (Supra) and the judgment of the Division Bench of this Court in Meher Singh (Supra). The parties to appear before the Appellate Bench of the Small Causes Court on 7-12-2015. The Appellate Bench of the Small Causes court thereafter to decide the Revision Application within two months from 7-12-2015.

8 The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]