

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8438 OF 2015

Vishwanath V. Ghondhalekar ... Petitioner
vs.
Dr. Parasuram Ramamoorthy ... Respondents

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Ms. Sumedha Rao for the petitioner.
Mr. Sameer Tendulkar for the respondent.

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CORAM : M.S. SONAK, J.
DATE : 9th SEPTEMBER, 2015.

P.C.:

1. This petition challenges the order dated 03/08/2015 made by the Appellate Bench of the Small Causes Court. The Appeal Court, by the impugned order dated 03/08/2015 has set aside the judgment and order dated 4/05/2013 made by the Small Causes Court holding that it lacked jurisdiction to entertain the Suit. By the impugned order dated 3/08/2015, the Appeal Court has held that the Small Causes Court had jurisdiction to try and entertain the L.D. Suit No. 218 of 2012 and has issued direction that the said suit be proceeded with from the stage where it was terminated.

2. Ms. Sumedha Rao, learned counsel for the petitioner, submits that in this case the respondent-plaintiff had applied for a declaration that he is a licensee in respect of the suit premises. This according to her means and implies that the plaintiff had not asserted his status as a licensee. Further, Ms Rao submitted that the pleadings in the plaint make it clear that the relationship between the parties was only some provisional arrangement, which did not constitute any

relationship of licensor and licensee. In this view of the matter, Ms. Sumedha Rao submitted that the suit as instituted was clearly not maintainable under the provision of Section 41 of Presidency Small Causes Courts Act, 1882 (said Act).

3. Mr. Sameer Tendulkar, learned counsel for the respondent-plaintiff, countered the submissions of Ms Rao. Mr. Tendulkar submitted that the Appeal Court, upon proper appreciation of the facts and law, has held that the suit was maintainable before the Small Causes Court and such decision warrants no interference under Article 227 of the Constitution of India.

4. Having heard the learned counsel for the parties and perused the impugned order, in my judgment, there is no case made out to interfere with the impugned order. In the first place, the Appeal Court, on the basis of material on record, has held that the suit was properly constituted under Section 41 of the said Act. The Appeal Court has rightly held that though there were averments in the plaint which indicated that initially some provisional arrangement was reached between the parties, later on, the said arrangement was varied and a relationship of licensor and licensee came into existence. Of course, this is on the basis of averments in the plaint. After the parties have led their evidence, the Court would be required to take into consideration the position whether indeed the relationship of licensor and licensee is established before any reliefs are granted in the suit. However, Ms Rao is not correct in her submission that on the basis of averments in the plaint itself, no such relationship is pleaded or made out.

5. Secondly, the Apex Court, in case of ***Prabhudas Damodar Kotecha Vs. Manhabala Jeram Damodar***¹, has held that the provisions contained in Section 41 (1) of the said Act are in the nature of 'umbrella provisions', so as to include thereunder all suits between landlord and tenant and licensor and licensee, so as to avoid unnecessary delay, expenses and hardship. The Appeal Court has rightly adverted to the decision of the Hon'ble Apex Court.

6. Thirdly, this Court, in case of ***Walchandnagar Industries Ltd., Mumbai vs. Indraprastha Developers, Pune and others***², has held that normally this Court should not exercise its jurisdiction under Section 115 of the Code of Civil Procedure (CPC) to interfere with a preliminary judgment rejecting the objection regarding jurisdiction of the Court under Section 9A of the CPC. In this case, the petitioner has chosen to institute a petition under Article 227 of the Constitution of India. Without going into the issues as to whether i.e. proper remedy, there is no real difference in the principles expressed by this Court in the case of *Walchandnagar Industries Ltd., (supra)*, in the precise context of entertaining Civil Revision Applications under Section 115 of the CPC against the preliminary judgment rejecting objections regarding the jurisdiction of the Court under Section 9-A of the CPC, at paragraphs 75, 76 and 77 has observed thus:

“Preliminary judgment rejecting objection regarding the jurisdiction of Court under Section 9-A of Civil Procedure Code

75. The parameters for exercise of jurisdiction under section 115 of Civil Procedure Code laid down in the aforesaid para in respect of Order VII, Rule 11(d) and Order XIV, Rule 2 of Civil Procedure Code cannot be

1 LAWS (SC) 2013-8-12

2 2015(3) Mh.L.J. 786

applied in every situation to the cases where the Court decides the preliminary issues in exercise of its jurisdiction under Section 9-A of Civil Procedure Code, which permits the Court to decide a pure question of law and also a mixed question of law and fact, touching the jurisdiction of the Court. When the Court passes an order in exercise of its jurisdiction under Section 9-A on the principle of demurrer, then in that event the High Court should exercise its jurisdiction under Section 115 of Civil Procedure Code, for the reasons stated in the earlier para. However, when a decision relating to the question of jurisdiction of the Court based upon the conspectus of facts, the Court will have to decide in the facts and circumstances of each case whether such an interference is called for.

76. Under Section 9-A of Civil Procedure Code, the Court is empowered to frame an issue as to the jurisdiction of the Court and to permit the parties to lead evidence in support of it, if it is a mixed question of law and fact. When a decision relating to the jurisdiction of the Court is based upon conspectus of facts, then a question of appreciation or re-appreciation of the evidence on record, may arise. For example, the cases of bar of limitation, bar of res judicata, bar under Order II, Rule 2 of Civil Procedure Code, and the matters of like nature, where the parties lead oral and documentary evidence, and on conspectus of facts, the decision is arrived at by the Trial Court either that the suit is barred by law of limitation, or by a principle of res judicata or by a principle under Order II, Rule 2 of Civil Procedure Code. No doubt, these issues pertain to the jurisdiction of the Court in respect of which the power under Section 115 can be exercised.

77. The question is, should this Court in aforesaid situation exercise its jurisdiction under Section 115 of Civil Procedure Code. The High Court may not exercise its jurisdiction in such situation. The reasons would be – (i) the trial Court does not act beyond the jurisdiction, neither it fails to exercise the jurisdiction vested in it; (ii) the trial Court is bound to decide the right, may decide

wrong, and merely because it has decided wrongly, it does not amount to doing something which it had no jurisdiction to do; (iii) it is not the function of the High Court under section 115 to appreciate or re-appreciate the evidence on record and to come to a conclusion different than the one arrived at by the Court below; (iv) the High Court cannot act as a Court of Appeal and substitute the view on facts taken by the trial Court; (v) section 115 does not confer a jurisdiction upon the High Court to correct the errors of fact, howsoever gross they may be, or even the errors of law, not touching the jurisdiction of the Court; (vi) the exercise of jurisdiction by the High Court shall deprive a statutory right of appeal available to the party to challenge the findings of fact recorded by the Court below to answer a preliminary issue either in the negative, (vii) the error, if any, can be corrected in more convenient and effective manner in wider jurisdiction of appeal; (viii) it is possible that if the suit is dismissed on merits, the decision on preliminary issue may lose its significance; and (ix) if any appeal is preferred against dismissal of suit, then in terms of sub-section (1) of section 105 read with Order XLIII, Rule 1-A or under Order XLI, Rules 22 and 33 of CPC, it can be urged in such appeal by the defendant that the Trial Court could not have passed such an order and the Appellate Court is bound to decide the same on its own merits.

7. For all the aforesaid reasons, this petition is dismissed. However, it is made clear that in case, the suit is finally decided against the petitioner, and the petitioner chooses to institute substantive appeal questioning such decision, then the petitioner shall, in terms of Section 105 CPC, as also principles analogous thereto, be entitled to urge the issue of jurisdiction, on the basis of the material, which by then the parties will place on record. Before the Small Causes Court.

8. With the aforesaid observations, this petition is dismissed. There shall be no order as to costs. Since the petitioner is 90 years of

age, the proceedings under the suit are expedited. Accordingly, the Trial Court to dispose of the suit as expeditiously as possible and in any case within a period of one year from today.

9. All parties to cooperate in the matter of expeditious disposal of the suit.

10. All concerned to act on the basis of authenticated copy of this order.

(M.S. SONAK, J.)

CERTIFICATE

“Certified to be true and correct copy of
original signed Judgment/Order.”