

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 794 OF 2016**

Deepak Jyoti Co-operative Housing	)	
Society, a society duly registered	)	
under the Maharashtra Co-operative	)	
Societies Act 1960 and having its	)	
Office at Ambedkar Road,	)	
Kalachowki Mumbai 400 033	)	..Petitioner

Versus

1 Shri Kirshnakant Chandrakant Jaitha	)	
Indian Inhabitant residing at 2 B,	)	
Brighton No.2, 68 Napensea Road,	)	
Rungta Lane, Mumbai 400 006	)	

2 Shri Rajanikant Chandrakumar Jaitha	)	
Indian Inhabitant residing at 10, Koregaon)		
Park, Pune -1	)	

3 Shri Sanjay Krishnakant Jaitha	)	
Indian Inhabitant residing at 301 Paradise)		
Apartments, Koregaon Road Pune -1	)	

4 Shri Manish Rajanikant Jaitha	)	
Indian Inhabitant residing at 10, Koregaon)		
Park, Pune -1	)	

5 Shri Amish Rajanikant Jaitha	)	
Indian Inhabitant residing at 10, Koregaon)		
Park, Pune -1	)	
All Trustees of Navanagar Sadavrat	)	
Trust A Public Charitable Trust	)	
Under the Bombay Public Charitable	)	
Trust, having its office at 185/187	)	
Princess Street, Mumbai 400002	)	

6 M/s. Jeevanlal (1929) Ltd.	)	
having its registered office at	)	
C/o. N. H. Shah, 14, Gulistan	)	
Carmichael Road, Mumbai 400 006	)	..Respondents

Mr. Mr. Cyrus Ardhesir a/w Mrs. Ferzana Behramkamdin a/w Ms Bharti Bhansali i/b FZB & Associates for the Petitioner

Mr. S. A. Sawant for the Respondent No.1

CORAM : R. M. SAVANT, J.
DATE : 23rd FEBRUARY, 2016

ORAL JUDGMENT

1 At the outset, the Learned Counsel for the Petitioner seeks deletion of the Respondent No.6 as in the context of the challenge raised in the above Petition, it is a formal party. The Respondent No.6 is accordingly deleted at the risk of the Petitioner. Amendment to be carried out in the course of the week.

2 Rule. Having regard to the nature of the challenge raised made returnable forthwith and heard.

3 The Writ Jurisdiction of this Court is invoked against the order dated 3-12-2015 passed by the Appellate Bench of the Small Causes Court, by which order the Revision Application being No.182 of 2012 filed by the Petitioner came to be dismissed and resultantly the order dated 10-5-2012 passed below application Exhibit 23 came to be confirmed.

4 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the Respondent Nos.1 to 5 are the original Plaintiffs being trustees of Navanagar Sadavrat Trust. The Suit in question

being L.E. Suit No.133/153 of 2006 has been filed for possession of the suit property which has been described in the plaint. The Petitioner herein is a co-operative society comprising of the occupants of two buildings which have been constructed on the suit property. It seems that the lease of the plot of land which comprises the suit property was granted to the Respondent No.6 who in turn has constructed the said two buildings. The said lease was for 99 years with a clause for renewal, which renewal was declined by the Plaintiffs and resulting in filing of the Suit in question. In the said Suit, the Plaintiffs filed an application for injunction for restraining the members of the Defendants from creating third party rights in respect of the suit property. It seems that the Petitioner herein i.e. the Defendant No.2 to the Suit had filed its Written Statement on 8-1-2007 in which Written Statement in paragraphs 1(a) and 1(b) the issue of jurisdiction of the Small Causes Court has been raised. It seems that prior thereof the Plaintiffs filed an application for temporary injunction against the Defendants. The Defendant No.2 / Petitioner herein filed an application for framing of preliminary issue of jurisdiction on 10-2-2010. The said application was replied to by the Plaintiffs by filing their reply on 25-2-2010. It seems that the affidavit in rejoinder was also filed by the Defendant No.2 on 31-3-2010. The application for temporary injunction is admittedly pending.

5 Though the Defendant No.2 raised the issue of jurisdiction of the

Small Causes Court to try the Suit by invoking Section 9-A, the Learned Judge of the Small Causes Court declined to frame the said issue and embarked upon an exercise to consider as to whether it was required to frame a preliminary issue as accordingly to the Learned Judge the answer to the preliminary issue lay in the facts of the case before him. After carrying out the exercise, the Learned Judge came to a conclusion that under Section 41 of the Presidency Small Causes Court Act the Small Causes Court has the jurisdiction to try the Suit between a licensor and licensee and therefore held that the Small Causes Court has the jurisdiction to try and entertain the Suit and thereby rejected the application for framing of preliminary issue. Before the Learned Judge of the Small Causes Court the judgments of the Division Benches of this court as regards the mandate of Section 9-A were cited, the said judgments were in the matter of **Meher Singh Vs. Deepak Sawhny & Anr.¹**, **Mukund Ltd. Vs. Mumbai International Airport & ors.²**, **Associates Bombay Cinemas Pvt Ltd. Vs. Jamni S. Ramchandani³**, and **Forshore Co-op Hsg Soc. Ltd. Vs. Praveen⁴** Though a number of judgments of the Division Benches of this Court were cited before the Learned Judge, concerning the mandate of Section 9-A, the Learned Judge has not applied the law laid down by the said judgments on the ground that the facts would have to be considered for an answer whether the preliminary issue is required to be framed. The Learned Judge of the Small

1 1998(4) All M.R. 536

2 2011(2) Mh.L.J. 936

3 2011(3) Mh.L.J.340

4 2009(2) Mh.L.J. 28

Causes Court opined that Section 41 empowers the Small Causes Court to try all Suits and proceedings between the licensor and licensee or a landlord and tenant for recovery of possession and therefore there is no necessity to frame any preliminary issue. The Learned Judge accordingly by order dated 10-5-2012 rejected the said application.

6 The aggrieved Defendant No.2 carried the matter by way of a Revision Application being No.182 of 2012 before the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court in a way also misdirected itself by embarking upon an exercise to see whether the order passed by the Trial Court in rejecting the application and thereby not framing the preliminary issue, was proper. The Appellate Bench of the Small Causes Court in the said exercise has therefore like the Trial Court gone into the facts when all it was required to do was to remand the matter back to the Trial Court for framing of the preliminary issue.

7 In my view, having regard to the judgments (supra) of the Division Benches of this court which have been referred to hereinabove and mentioned in paragraph 13 of the order passed by the Trial Court. It was incumbent on the part of the Trial Court to frame a preliminary issue relating to its jurisdiction. Once such an issue was raised by the Defendants the Trial Court ought not to have embarked upon the exercise of deciding whether the

preliminary issue is required to be framed as in the said process the Trial Court has gone into the merits of the matter. As indicated above, the Appellate Bench of the Small Causes Court can be said to have compounded the matter further by carrying out the exercise to see as to whether the order passed by the Trial Court refusing to frame the preliminary issue is justified.

8 The Learned Counsel for the Petitioner Mr. Cyrus Ardhesir would by seeking support from the judgments (supra) of the Division Benches of this Court also in addition thereto by further relying upon the judgments of the Division Benches of this court in **Ferani Hotels Pvt Ltd. Vs. Nusli Neville Wadia & Ors.**⁵ and **Royal Palms (India) Pvt Ltd. & Ors. Vs. Bharat Shantilal Shah & Ors.**⁶, would contend that the courts below have fallen into an error by not framing the preliminary issue of jurisdiction.

9 Per contra the Learned Counsel appearing on behalf of the Respondent Nos.1 to 5 herein sought to justify the orders passed by the Trial Court as well as the Revisionary Court but not with any deal of conviction. It was also sought to be faintly suggested that the conduct of the Defendant No.2 was such that the framing of preliminary issue is not warranted.

10 Having heard the Learned Counsel for the parties, in my view,

5 (2013)3 BCR 669

6 (2009) 2 BCR 622

both the order i.e. order dated 10-5-2012 passed by the Trial Court and the order dated 3-12-2015 passed by the Revisionary Court are required to be quashed and set aside. It is well settled by the judgments (supra) of the Division Benches of this Court that once an issue of jurisdiction is raised under Section 9-A, then it is incumbent on the concerned court to frame the preliminary issue, as the issue of jurisdiction goes to the root of the matter and once the issue of jurisdiction is decided, the same is conclusive between the parties and is not available for being raised in the trial. In spite of the mandate of the Division Benches of this Court, the Trial Court as indicated above has misdirected itself by going into facts and thereafter coming to a conclusion that issue of jurisdiction was not required to be framed. The Revisionary Court has misdirected itself by not remanding the matter back to the Trial Court for framing of the preliminary issue but venturing to consider whether the order passed by the Trial Court is proper. In my view, having regard to the well settled position in law, in so far as Section 9-A is concerned, both the orders are unsustainable and are required to be quashed and set aside and are accordingly quashed and set aside and the following directions are issued:

- i) The Trial Court is directed to frame a preliminary issue as regards its jurisdiction to try the Suit.
- ii) The said issue would be tried by giving proper opportunity to the parties

which would include to lead evidence.

iii) The pending application being injunction notice Exhibit 7 to be treated as an application under Section 9-A(2) of the Civil Procedure Code.

iv) The contentions of the parties in respect of both the preliminary issue as well as the application under Section 9-A(2) are kept open for being urged before the Trial Court.

v) The Trial Court would try the said application Exhibit 7 having regard to the principles which are applicable to an application under Section 9-A(2) of the Civil Procedure Code.

vi) The preliminary issue which is directed to be framed would be tried expeditiously and adjudicated upon latest by 31-5-2016.

vii) The aforesaid development to be pointed out to the Trial Court on the date when the Suit or the Application comes up.

11 Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]