

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11435 OF 2016

Rajeev Prabhakar Kulkarni

...Petitioner

Versus

Rajesh Gangadhar Kulkarni

...Respondent

....

Mr.Aniket P. Ranade, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 07th OCTOBER, 2016

P.C.

1. Heard Mr.Aniket Ranade, learned Counsel for the petitioner, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 6.11.2015 passed by the learned 7th Additional Small Causes Judge & Civil Judge, Senior Division, Pune below Exhibit-40 in Civil Suit No.329/2014. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as the 'defendant', by observing that as the defendant has raised objection about jurisdiction of Small Causes Court to entertain and try the suit, he has to prove said fact independently and cannot compel the plaintiff to lead evidence firstly.

3. Mr. Ranade submitted that the respondent, hereinafter referred to as the 'plaintiff' has instituted suit alleging that he is tenant of flat No.4, admeasuring about 765 sq. ft, on the second floor in the building known as Shardakunj Apartment, situate at Shahu Colony Lane No.1, near Cummins College at Karve Nagar, Pune – 411 052 (for short, 'suit premises') and that defendant is the owner of the suit premises. The plaintiff has sought declaration that he is a tenant of suit premises and for perpetual injunction restraining the defendant from disturbing his possession or forcibly removing the plaintiff from the suit premises either by himself or through his agents, servants or anybody else.

4. During pendency of the suit, the plaintiff filed application for temporary injunction at Exhibit-5. Pending hearing of that application, the plaintiff filed application Exhibit-34 under Section 9-A(2) of C.P.C.. By order dated 29.4.2015, the learned trial Judge rejected that application. He submitted that the application for temporary injunction at Exhibit-5 is pending. During pendency of this application, the defendant filed application at Exhibit-40 on 24.7.2015 for framing preliminary issue on the ground that there is no relationship of landlord and tenant between the parties. The learned trial Judge framed preliminary issue regarding jurisdiction of the Small Causes Court. The defendant, therefore, submitted that as the plaintiff has

asserted that Small Causes Court has jurisdiction to decide the suit as the relationship between the parties is of landlord and tenant, he has to lead evidence first. The defendant cannot establish negative statement made in the reply to Exhibit-5. The defendant, therefore, prayed that the plaintiff should be directed to lead oral evidence for deciding the issue of jurisdiction. By the impugned order, the learned trial Judge rejected the application on the ground that the defendant has raised objection to the jurisdiction of the Court and, therefore, he has to lead evidence first.

5. Mr. Ranade relied upon Sections 102 and 109 of the Indian Evidence Act, 1872 (for short, 'Act'). He submitted that Section 102 of the Act lays down that the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side. Section 109 lays down that when the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it. He submitted that the plaintiff will have to lead evidence first to show that the parties have been acting as landlord and tenant and, therefore, the learned trial Judge was not justified in

rejecting the application.

6. I have considered the submissions advanced by Mr. Ranade. I have also perused the material on record. It appears that during pendency of the suit, the plaintiff took out application at Exhibit-5 for temporary injunction. While filing reply to this application, the defendant has raised objection as regards jurisdiction of Small Causes Court to entertain and try the suit. It also appears that the plaintiff filed application at Exhibit-34 under Section 9-A(2) of C.P.C. for grant of ad-interim relief which was rejected on 29.4.2015. It appears that the plaintiff's application at Exhibit-5 for temporary injunction is pending. As the defendant has raised objection to the jurisdiction of Small Causes Court, the learned trial Judge has framed preliminary issue. The moot question is whether the suit can be decided on the basis of preliminary issue. On one hand, the plaintiff asserts that he is tenant of defendant and there is a relationship of landlord and tenant between them. On the other, the defendant asserts that the relationship between the parties is that of licensor and licensee and not that of landlord and tenant. In my opinion, this cannot be treated as a preliminary issue and said issue will have to be decided only after recording of the evidence during course of a full fledged trial. Order XIV Rule 2 reads thus:

“ORDER XIV

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON
ISSUE OF LAW OR ON ISSUES AGREED UPON

2. Court to pronounce judgment on all issues.-- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to--

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

7. Perusal of above provision clearly shows that where issues both of law and of fact arise in the same suit, **and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force.**

[emphasis supplied]

8. In my opinion, whether there is a relationship of landlord and tenant as contended by the plaintiff or that of licensor and licensee as contended by the defendant has to be decided after recording evidence in a full fledged trial. The relationship between the parties is not a pure question of law and it is a mixed question of law and fact. Mr. Ranade relied upon Section 109 of the Act, which reads thus :

“109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent. –When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.”

9. Perusal of Section 109 shows that when the question is whether persons are landlord and tenant, **and it has been shown that they have been acting as such**, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it. In order to show that the parties have been acting as such, the plaintiff will have to lead evidence in that regard. However, that cannot be

[Emphasis supplied]

treated as a preliminary issue and it is a matter of a full fledged trial. Understood thus, no case is made out for interfering with the impugned order, subject to the clarification that the learned trial Judge will frame other issues and will also try preliminary issue along with other issues and permit the parties to lead evidence and thereafter decide the suit in accordance with law.

(R. G. KETKAR, J.)

Deshmane (PS)