

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

CIVIL REVISION APPLICATION NO. 487 OF 2015

1. Sohan M. Shah and Ors. ..Applicants

Vs

Mohan M. Shah .. Respondent

Mr. Vishal Kanade i/b Ms. Neha Bhide, Advocate for Applicants.

Mr. Kiran Kulkarni a/w Ms P. Padmashri i/b Kulkarni & Associates,
Advocates for Respondent.

**CORAM : R.G.KETKAR,J.
DATE : 10/02/2016**

PC:

1. Heard Mr. Vishal Kanade, learned counsel for the applicants and Mr. Kiran Kulkarni, learned counsel for respondent at length.
2. By this Application under section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C'), the applicants have challenged the Judgment and order dated 16.6.2015 passed by the learned Judge, presiding over Court Room No.3 of the Bombay City Civil Court for Greater Bombay, in Notice of Motion No.4211 of 2014. By that order, the learned trial Judge dismissed Motion taken out by the applicants, hereinafter referred to as 'defendants', under section 9-A of C.P.C. and held that City Civil Court has jurisdiction to entertain and try suit instituted by the respondent, hereinafter referred to as 'plaintiff'.
3. The plaintiff has instituted Short Cause Suit No. 1938 of

2013 against the defendants praying for perpetual injunction restraining the defendants from dispossessing or disturbing the plaintiff's exclusive possession, use and enjoyment of the bedroom shown in red outline in Exhibit A and common use of the kitchen, drawing room and dining area in Flat No.13, admeasuring 2300 sq.ft carpet area, situate on 2nd floor of Sonawala Building, 67, Marine Drive, Mumbai 400 001, (for short, 'suit flat'), in any manner whatsoever, save and except by due process of law and preventing the plaintiff's son Aditya and daughter Nina, the plaintiff's doctor, visitors and friends from entering and using the suit flat.

4. Pending the hearing and final disposal of the suit, the plaintiff also sought injunction restraining the defendants from alienating, encumbering, transferring, dealing with or disposing of or creating third party rights or parting with possession in any manner whatsoever or creating any Leave and Licence in respect of the suit flat. The plaintiff has also sought injunction restraining the defendants from disturbing the plaintiff's exclusive use, occupation and enjoyment of the bedroom shown in red outline in Exhibit-A and the common use of the kitchen, drawing room and dining area in the suit flat and from preventing the plaintiff from using one parking space allotted to the suit flat, as also restraining the defendants from preventing the plaintiff's

wife and children, servants, doctors, visitors and friends from entering the suit flat and from occupying the bedroom shown in red outline in Exhibit-A and using the kitchen, drawing room and dining area in the suit flat.

5. The defendants took out application under section 9-A of C.P.C, inter-alia contending that the plaintiff being the heir and legal representative of Baldeoprasad who was the tenant of the suit flat, has filed suit against the defendants who are also heirs and legal representatives of deceased tenant Baldeoprasad. City Civil Court has, therefore, no jurisdiction to entertain and try the suit and only the Small Causes Court at Mumbai has jurisdiction to entertain and try the suit. Defendants have filed affidavit of defendant no.2-Maya Sohan Shah in support of that application. The plaintiff filed reply dated 25.6.2013 opposing that application. By the impugned order, the learned trial Judge rejected the application/Notice of Motion and held that City Civil Court has jurisdiction to entertain and try the suit.

6. In support of this Application, Mr. Kanade submitted that the plaintiff had instituted R.A.D.Suit No.1033 of 2012 against (1) Anjana A. Sonawala, (2) Mukul Sonawala (defendants no.1 and 2 collectively hereinafter referred to as "Sonawalas") and (3) Sohan Mahavirprasad Shah (defendant no.1 in the present suit), inter-alia, praying for declaration that the plaintiff is lawful monthly

tenant in respect of the suit flat and for mandatory injunction directing Sonawalas to transfer and issue the rent receipt of the suit flat in the name of the plaintiff; for perpetual injunction restraining defendant no.3 from dispossessing the plaintiff and his family or interfering, obstructing or disturbing peaceful use, occupation and possession of the plaintiff and his family in the suit flat, among other reliefs. The plaintiff filed application at Exh.9 therein on 5.11.2012 under Order XXIII, Rule 1(3) of CP.C. for withdrawal of the suit with liberty to file fresh suit. On 5.11.2012, the learned Judge of Small Causes Court permitted the plaintiff to withdraw the suit wholly with liberty to file suit.

7. Mr. Kanade submitted that the plaintiff has thereafter instituted the present suit. He has taken me through paragraphs 2 to 5 of the Plaint wherein the plaintiff asserted that initially grand-father of the plaintiff and defendant no.1, Baldevprasad Shah was tenant of suit flat prior to 1950. After the death of Baldevprasad, the plaintiff's father Mahavirprasad paid rent to the landlord. Mahavirprasad died intestate in Mumbai in 1958. At that time, the plaintiff and defendant no.1, Shankarlal (other brother of plaintiff and defendant) and Giniadevi (mother of plaintiff, defendant no.1 and Shankarlal), were residing in the suit flat. Mahavirprasad survived by his wife Giniadevi and three sons, the plaintiff and defendant and Shankarlal who were at the

time of his death the only heirs and legal representatives of late Mahavirprasad. Mr. Kanade relying upon these assertions contended that the plaintiff claims to be heir of the tenant as contemplated by Section 5(11)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Bombay Rent Act') and Section 7(15) (d) of the Maharashtra Rent Control Act, 1999 (for short, 'Maharashtra Rent Act'). Thus for claiming relief the foundation laid by the plaintiff is acquiring tenancy, being heir of the tenant. He submitted that while considering the relief of injunction, it will necessary involve adjudication of the rights claimed by the plaintiff. The plaintiff has specifically claimed the tenancy rights as legal heir of the deceased tenant.

8. Mr. Kanade submitted that even after withdrawal of the earlier suit on 5.11.2012, once again the plaintiff had instituted R.A.D. Suit No.1272 of 2015 in the Small Causes Court, Greater Mumbai, inter alia, praying for declaration that the plaintiff is tenant of 'Sonawalas' in respect of the suit flat. He also submitted that the difference between Section 34 of the Specific Relief Act, 1963 and Sections 38 on the other is that court may not grant a declaration where matter is capable of consequential relief. But there is no such restriction put on injunction and the Court may grant an injunction as a substantive relief without any prayer for declaration, although in many cases a declaration may

be implicit in the grant of a perpetual injunction. He submitted that though the plaintiff has sought perpetual injunction, in that he has also claimed declaration of his status as tenant and the same is implicit. In support of this proposition, he relied upon decision of this Court in the case of Indumatiben Vs. Union of India, AIR 1969 Bombay 423.

9. Mr. Kanade submitted that the plaintiff has claimed to be a gratuitous licensee of the defendants. In other words, suit is between licensor and licensee and, therefore, City Civil Court will have no jurisdiction to entertain and try the suit and Small Causes Court will have exclusive jurisdiction. He relied upon the decision of the Apex Court in the case of Mansukhlal Dhiraj Jain Vs Eknath Vithal Ogale, (1995) 2 Supreme Court Cases 665 and Prabhudas Damodar Kotecha Vs. Manhabala Jeram Damodar AIR 2013 SC 2959.

10. On the other hand, Mr. Kulkarni submitted that the suit is not between either landlord or tenant or licensor or licensee. He submitted that in the present suit the landlord is not made a party. Suit is essentially between heirs of the deceased tenant. In short, he submitted that suit is not between either landlord or tenant or licensor or licensee and, therefore, suit is not barred in view of Section 33 of the Maharashtra Rent Control Act or Section 41 of the Presidency Small Causes Court Act, 1882. In support of

this proposition, he relied upon decision of the learned Single Judge of this Court in Arun Bhaskar Adarkar Vs Mina Srinivasan Krishnan, 2012 (3) ALL MR 79. He submitted that the said decision is confirmed in Appeal No.312 of 2012 on 16.6.2014. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff had earlier instituted R.A.D Suit No.1033 of 2012 in the Court of Small Causes, Bombay against defendants no. 1 and 2 and (landlords) and defendant no.3 -Sohan who is defendant no.1 in the present suit. In that suit, the plaintiff prayed for declaration that he is a lawful monthly tenant in respect of the suit flat, among other reliefs. On 5.11.2012, the plaintiff was permitted to withdraw the suit with liberty to file a suit.

12. The plaintiff has thereafter instituted present suit, being S.C. Suit No. 1938 of 2013, against the defendants. It is not in dispute that Sonawals, landlords are not made party in the present suit. In paragraph 3 of the plaint, the plaintiff asserted that his grand father Baldevprasad Shah was inducted as tenant prior to 1950. Baldevprasad died and after his death, his father Mahavirprasad Shah was paying rent to the landlord.

Mahavirprasad Shah died intestate in Mumbai in 1958. At that time, the plaintiff and his two brothers, defendant no.1 Shankarlal and the mother Giniadevi were residing in the suit flat. Mr. Kanade submitted that the plaintiff has asserted his rights under section 5(11)(c) of the Bombay Rent Act corresponding to Section 7(15)(d) of the Maharashtra Rent Act and therefore the City Civil Court has no jurisdiction to entertain and try the suit. It is not possible to accept this submission for more than one reason. Section 33 of the Maharashtra Rent Act deals with jurisdiction of Courts. Relevant portion reads thus:

“33. Jurisdiction of Courts. (1) Notwithstanding anything contained in, any law for the time being in force, but subject to the provisions of Chapter VIII, and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdictions,-

(a) xx xx

(b) xx xx

(c) elsewhere, the court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the court of the Civil Judge (Senior Division) having ordinary jurisdiction, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under this Act (other than the applications which are to be decided by the State Government or an officer authorized by it or the Competent Authority); and subject to the provisions of sub-section (2), no other court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question.”

Section 41 of the Presidency Small Causes Courts Act, 1882 reads thus:

“41. (1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.”

Perusal of the above provisions clearly shows that if the suit is between either a landlord and tenant or a licensor and licensee, relating to recovery of possession of any immovable property, only Small Causes Court shall have jurisdiction to entertain and try the suit.

13. Secondly, perusal of the assertions made in the plaint as also parties in the suit leaves no room for doubt that the suit is not between the parties as described either under section 33 of the Maharashtra Rent Act or Section 41 of the Presidency Small Causes Court Act, 1882.

14. In the case of Arun Bhaskar Adarkar (supra), the learned Single Judge of this Court has observed in paragraph 10 thus:

“10. This is not a case of landlord and tenant. The landlord is not involved in this litigation between the heirs of the deceased tenant. There is no question of any relationship of licensor and licensee or their such related rights. Both the parties are claiming rights over the tenanted flat being heirs of the deceased tenant. The plaintiffs long and settled possession is quite established as supported by documents

on record. It is the case and relief against the Defendants no where refer or deal with any aspect of landlord and tenant or Licensor or Licensee relationship. This is a interse dispute between legal heirs of the deceased tenant. In absence of any proceedings or involvement of the landlord, in the present case, the Suit so filed cannot be treated as a Suit or proceedings for eviction or in relation to the Landlord and tenant relationship. The Plaintiff is claiming, being in settle possession of the flat, reliefs against the Defendants treating them trespassers. There are even Criminal Complaints filed. It is settled that all the legal heirs of the deceased, unless, accepted and/or treated by the landlord, cannot claim tenancy over the flat. Therefore, as there is dispute between the heirs of the tenant with regard to the possession or occupation rights in full or in part and in the present facts and circumstances, therefore, the Suit is maintainable in this Court."

The said decision is confirmed by the Division Bench of this Court in Appeal on 16.6.2014. In my opinion, the said decision applies on all fours to the facts of the present case.

15. Mr. Kanade submitted that even after filing of the suit in the City civil Court, the plaintiff has instituted suit in the Small Causes Court in the year 2015. Perusal of the plaint also shows that the plaintiff has impleaded as 'sonawalas' landlord in that suit. Thus, that suit is essentially between landlord and tenant.

16. Mr. Kanade relied upon decision in the case of Indumatiben (supra). In my opinion, the said decision is not applicable as the plaintiff has not even impliedly claimed declaration of his status as a tenant, The suit instituted by the plaintiff is referable to Section 38 of the Specific Relief Act, 1963. In fact, in that case this Court has specifically observed that the difference between

Section 34 on one hand and sections 37 and 38 on the other is that Court may not grant a declaration where the matter is capable of consequential relief. **But there is no such restriction put on injunction** and the court may grant an injunction as a substantive relief without any prayer for declaration, although in many cases a **declaration may be implicit** in the grant of a perpetual injunction.

17. Mr. Kanade relied upon the decision of the Apex Court in the case of Mansukhlal Dhanraj Jain (supra). In that case, the question that fell for consideration for the Apex Court is reproduced in the opening paragraph of that judgment. As indicated earlier, suit is not between landlord and tenant and licensor or licensee. In view thereof, the decision in the case of Mansukhlal Dhanraj Jain (supra) is also not applicable to the present case. Mr. Kanade submits that perusal of the plaint shows that the plaintiff claims to be a gratuitous licensee. In other words, the suit is between licensor and defendants' who are licensees. He relied upon the decision in the case of Prabhudas Damodar Kotecha (supra). It is not possible to accept the submission as well, as the plaintiff has not even remotely asserted that he is a gratuitous licensee. For all these reasons, no case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed.

18. At this stage, Mr. Kanade orally applies for stay of this order for a period of four weeks from today. Mr. Kulkarni submits that in case the Court is inclined to stay this order for a period of four weeks, the ad-interim order dated 10.9.2015 granted by this Court may be continued and it may be clarified that the proceedings before the trial Court including proceedings under Order 39 (2A) and application for police protection are not stayed. Mr. Kanade opposes continuation of this ad-interim order on the ground that such order was not continued.

19. It is not possible to accept the contention of Mr Kanade. In the present case, defendant no.1 had challenged the judgment and order dated 27.2.014 passed by the learned trial Judge. By that order, the learned trial Judge allowed the motion and the stop gap arrangement as recorded in the order dated 17.5.2013 with direction to maintain status-quo and permitting the plaintiff to use one bedroom marked in red in Exh.A to the plaint and permitting the plaintiff to cook his food in the kitchen during his stay at Mumbai, was continued till the decision of the preliminary issue. Aggrieved by that decision, defendant no.1 has preferred Appeal from order no .275 of 2014 in this Court. By order dated 13.10.2014, Appeal from order is dismissed. Defendant no.1 preferred Special Leave Petition before the Apex Court which was also dismissed on 17.8.2015.

20. Mr. Kanade submitted that stop gap arrangement was continued only till decision on preliminary issue. In other words, moment preliminary issue was decided, interim arrangement stood vacated. The said argument is also devoid of substance. As the interim arrangement was continued till the decision on the preliminary issue does not mean that if the Court holds that it has jurisdiction to entertain and try the suit, the said order shall stand vacated automatically. In case the trial Court were to hold that it has no jurisdiction to entertain and try the suit, then alone the interim arrangement would come to an end. By the impugned order, the learned trial Judge has held that City Civil Court has jurisdiction to entertain and try the suit. It, therefore, cannot be said that the interim arrangement came to an end after deciding the issue on preliminary in favour of the plaintiff. That apart, by order dated 10.9.2015 this Court continued the status-quo granted by the trial Court. Order accordingly. It is made clear that this part of the order is not stayed.

21. At this stage Mr. Kanade orally applies for stay of this order. Oral application is rejected.

(R.G.Ketkar, J.)