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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 69 OF 2011
IN
PRELIMINARY ISSUE OF JURISDICTION
IN
SUIT NO. 2355 OF 2003

Bhaimsain Khurana ... Appellant
vs.
Sweet Home Cooperative Housing Society Ltd. ... Respondent

Mr. C.P. Deogirikar, Advocate for the appellant.

CORAM: A.S. OKA &
MRS. MRIDULA BHATKAR, JJ.
DATE : AUGUST 4, 2016.

ORAL JUDGMENT (Per A.S. OKA, J.)

By this Appeal, the appellant/original defendant has taken an exception to the judgment and order dated 28th October, 2010 passed by the learned Single Judge in a suit filed by the respondent. By the impugned order, the learned Single Judge has answered the issue of jurisdiction against the appellant/defendant.

2. The respondent-Society filed a suit invoking sub-section (1) of Section 6 of the Specific Relief Act, 1963 (for short 'the said Act of 1963').

On the basis of the plea raised by the present appellant that the jurisdiction of this Court to entertain a suit under section 6(1) of the said Act of 1963 is barred in view of Section 163 read with section 91 of the Maharashtra Cooperative Societies Act, 1960 (for short 'the said Act of 1960'), the issue of jurisdiction was ordered to be heard as a preliminary issue.

3. With a view to appreciate the submissions canvassed across the bar, a reference to the brief facts of the case is necessary. The respondent is a Society duly registered under the said Act of 1960. In the plaint, it is stated that the Maharashtra Housing and Area Development Authority has allotted a plot to the respondent/Society on the various terms and conditions. The plot was allotted for construction of the residential premises for the benefit of its members. It is stated that the present appellant/defendant is one of the original approved members of the respondent/Society. Various averments have been made regarding the terms and conditions on which a flat in the building constructed on the said plot was to be allotted to the present appellant. It is contended that the appellant is a defaulter and he did not pay a sum of Rs.9,63,350/- together with interest. A reference is made to the correspondence made by the respondent calling upon the

appellant to deposit the amount. Ultimately, on 30th September, 2002 the respondent/Society cancelled the allotment of flat made to the present appellant. It is further alleged that though the appellant was not entitled to the possession of the said flat, which was said to be in possession of the respondent-Society, the appellant took forcible possession of the said flat. It is alleged that on 11th October, 2002, a member of the Managing Committee of the respondent/plaintiff through one of the security personnel was made aware of the alleged act of the appellant of taking forcible and illegal possession of the suit flat. It is alleged that a complaint was filed with the police for dispossession. Accordingly, a suit under sub-section (1) of Section 6 of the said Act of 1963 was filed by the respondent.

4. The learned counsel appearing for the appellant submitted that the suit filed is the suit between the Society duly registered under the said Act of 1960 and its member. He submitted that the dispute relating to the possession of the premises of the respondent-Society, which is tenant co-partnership Society, is a dispute touching the business of the respondent-Society and therefore, on plain reading of Section 91 of the said Act of 1960, the Cooperative Court has exclusive jurisdiction to entertain the suit.

He relied upon a decision of a Full Bench of this Court in the case of **Dr. Manohar Ramchandra Sarfare vs. The Konkan Cooperative Housing Society Ltd. & Ors.**,¹. He also invited our attention to a decision of a learned Single Judge of this Court in the case of **Sudhir Cooperative Housing Society Ltd. vs. State of Maharashtra & Ors.**² in support of his contention that a Cooperative Court is also a Civil Court. He relied upon a decision of a Division Bench of this Court in the case of **Prof. Dr. D.R. Bharadwaj vs. The State of Maharashtra and Anr.**³. He urged that the decision relied upon by the learned Single Judge in the case of **Shiavax C. Cambata vs. Sunderdas Ebji**⁴, is distinguishable. He submitted that this Court held that when a person claiming to be a tenant governed by the Bombay Rents, Hotels and Lodging Houses Rates (Control) Act. 1947 (For short 'the said Act of 1947) files a suit in his personal capacity complaining about dispossession, under section 9 of the Specific Relief Act 1877, a suit will be maintainable in the ordinary Civil Court. He further urged that in the present case, the respondent-Society proceeded on the footing that the appellant is its member. He also relied upon a decision of the Division Bench of this Court in the case of **C.P. Khanna vs. V.K.**

1 AIR 1962 Bom. 154

2 2010 (1) Mh.L.J. 240

3 1994 (1) Bom. C.R. 176

4 Vol. LII Bom. Law Reporter 381

Kalghatgi & Ors.⁵. He pointed out that the respondent/Society has not adduced evidence, but the appellant adduced evidence at the time of hearing of preliminary issue.

5. We have given careful consideration to the submissions. Section 6 of said Act of 1963 reads thus-

“6. Suit by person dispossessed of immovable property.—

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought—
 (a) after the expiry of six months from the date of dispossession; or
 (b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.”

6. When the Court is deciding the preliminary issue of jurisdiction, the Court will have to proceed on the footing that the averments made in the plaint are correct. It is true that in the plaint it is averred that the name of

5 AIR 1970 Bom. 201

the appellant/defendant figured as one of the original members duly approved by the Maharashtra Housing & Area Development Authority and it was proposed to allot the suit flat to the present appellant. In the plaint it is averred that the allotment was cancelled as the appellant did not pay the requisite amount. Thereafter, the allegation is that the respondent/Society was dispossessed, as the appellant took forcible and illegal possession of the suit flat by breaking upon the lock put on it. Though in the plaint, the respondent may have admitted that the name of the appellant figured in the list of Members originally approved by Maharashtra Housing & Area Development Authority and though it is averred that the allotment was made to the appellant, the suit is not filed with the allegation that the defendant in his capacity as a member dispossessed the respondent. The case is that though appellant had absolutely no right, title and interest in respect of the suit flat and he has forcibly and illegally dispossessed the respondent/Society. Though in one or two paragraphs, the respondent may have stated that the defendant was a member in the original approved list, it cannot be said that the suit is between the Society and its members touching the business of the Society, as the allegation in the plaint is of illegal dispossession by the appellant. It is not the case of the respondent

that the appellant dispossessed the respondent in his capacity as a member. On the contrary the allegation is that the appellant indulged in illegal dispossession. The allegation is that the allotment of the suit flat made to the appellant was already cancelled.

7. On this aspect, it will be necessary to make a reference to the decision of the Division Bench of this Court in the case of **Shiavax Cambata** (*supra*). The decision was rendered by a Division Bench in an Appeal against the order of the learned Single Judge. There was a pending suit on the Original Side of this Court under section 9 of the Specific Relief Act, 1877. We may note here that Section 9 of the said Act of 1877 is *pari-materia* with Section 6 of the said Act of 1963. The question before the learned Single Judge was whether after coming into force of the said Act of 1947, the suit should be transferred to the Court of Small Causes which had exclusive jurisdiction under section 28 of the said Act of 1947 to deal with the suits between tenants and landlords in relation to the property subject matter of tenancy. The suit was filed by the plaintiff who was incidentally claiming to be a tenant of the defendant. In Appeal, the Division Bench of this Court held that the suit was a simple suit under section 9 of the said

Act of 1877 which was filed by a person claiming to be tenant in his personal capacity.

8. The Division Bench was dealing with the provisions of Section 28 of the said Act of 1947. Sub-section (1) of Section 28 of the said Act of 1947 reads thus:

“(1) Notwithstanding anything contained in any law 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 jurisdiction.

(a) in Greater Bombay, the Court of Small Causes, Bombay, in any area for which, a Court of Small Causes is established under the IX of Provincial Small Cause Courts Act, 1887, and Court and] 1887.

(b) 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 to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions 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.”

Thus, the exclusive jurisdiction to entertain and try suits between a

landlord and a tenant relating to possession of the premises is conferred upon the Courts included in Sub-section (1) of Section 28. It is in this context that the learned Single Judge held that the suit filed before him was the one between tenant and landlord relating to recovery of possession of the premises to which the said Act of 1947 was applicable. While reversing the view taken by the learned Single Judge that the suit will be cognizable of the Court of Small Causes, the Division Bench observed that section 9 of the said Act of 1877 gives a special remedy to a party who has been dispossessed to file a suit in which the question of title cannot be gone into. The Division Bench observed that a summary remedy is provided under section 9 of the said Act of 1877 to a dispossessed person to obtain possession of the property of which he is dispossessed. It was held that considering the nature of the suit under section 9, the suit would not fall within the description of the suit mentioned in Section 28 of the said Act of 1947. The relevant part of the said decision reads thus:

“Once the nature of the suit under section 9 is understood, it will be clear that such a suit would not fall within the description of the suit mentioned in S. 28 of the Act. The object of S. 9 is to protect possession without regard to the title or the origin of possession. In the plaint in the suit the plaintiff sets out the history which led to his coming into possession and what he says is that one Dalaya was a tenant of the defendants and this tenant assigned his tenancy rights to the plaintiff and thereby became entitled to be in possession of the

property. Then he goes on to say that he was lawfully in possession of the premises and he was dispossessed by the defendants without his consent and otherwise within due course of law and he asks for possession under [S. 9](#). In the written statement the defendants controvert the averments contained in the plaint and allege that the plaintiff was not in possession, but the defendants were in possession. Therefore it is clear that the only issue that would arise in this suit and which would have to be determined by the Court would be whether the plaintiff was in possession of the premises in suit within six months from the filing of the suit, and if he was in possession whether he was dispossessed by the defendants. If that issue is answered in favour of the plaintiff, a decree must go in his favour. If the issue is answered against him, the suit must be dismissed.

The view that the learned Judge has taken is that the plaintiff was in possession as a tenant because he relies on the assignment in his favour by Dalaya and therefore according to him this is a suit by a tenant against his landlord for possession. It is not every suit for possession that is liable to be transferred under [S. 50](#) of the Act. It is only those suits for possession which are filed between a landlord and a tenant. In our opinion, it is only when a landlord or a tenant files a suit for possession as a landlord or a tenant and in his capacity as a landlord or a tenant and relying on his title as a landlord or a tenant that it becomes a suit of the description mentioned in [S. 50](#) and [S. 28](#) of the Act. Although the plaintiff might have set out his title in the plaint, those averments were entirely unnecessary and irrelevant. It is clear that the defendants could not have raised an issue as to the plaintiff's title in the suit. He could not have contested the position that the plaintiff was not entitled to possession because he was not a tenant. He could only have contested the plaintiff's claim on the one simple and short ground, viz., that the plaintiff was not in possession within six months of the filing of the suit. Therefore, the issue as to landlord and tenant could never have arisen in this suit.

(underlines supplied)

9. As held by the Division Bench, in the present case, the respondent/plaintiff have incidentally stated in the plaint that it is a tenant co-partnership society registered under the said Act of 1960 which was holding the plot on which a building was constructed for allotting the premises therein to its members. In a suit under section 6 of the said Act of 1963, the appellant could have contested the suit only on two grounds. The first ground is that the respondent/plaintiff was not in possession within 6 months from the filing of the suit or that he has not dispossessed the respondent/plaintiff.

10. Incidentally, the appellant may be a member of the respondent/society. The issue was of alleged illegal dispossession by the appellant. Therefore, in our view, the issue involved in the suit cannot be said to be touching the business of the society. The contention of the respondent is that the plaintiff has obtained illegal forcible possession of the suit flat.

11. Therefore, in our view, the law laid by the Division Bench in the case of **Shiavax Cambata** (*supra*) is squarely applied to the facts of the

case. In fact that is the broad view taken by the learned Single Judge.

12. As far as decisions of the Division Bench of this Court in the cases of **C.P. Khanna** (*supra*) and **Prof. Dr. D.R. Bharadwaj** (*supra*) are concerned, the same do not deal with the issue of maintainability of a suit under section 6(1) of the said Act of 1963. As far as the Full Bench decision in the case of **Dr. Manohar Ramchandra Sarfare** (*supra*) is concerned, again the issue of jurisdiction of Registrar of Cooperative Societies under provisions of the Bombay Cooperative Societies Act, 1925 was not considered in the context of illegal dispossession by the member of the Society. Therefore, in our view, none of the decisions relied upon by the learned counsel appearing for the appellant advance the case of the appellant any further.

13. Some of the submissions which are made by the learned counsel appearing for the appellant are on merits. His submission is that the respondent/Society co-partnership Society was never in possession of the suit flat. If at the time of trial, it is established that the respondent/Society was not in possession of the suit land within the period of 6 months from

the date of institution of the Suit, the same will naturally fail. Therefore, the contentions on merits of the suit need not to be gone into considering the limited scope of this Appeal.

14. We find no error in the view taken by the learned Single Judge. There is no merit in the Appeal and the same is dismissed with no order as to costs.

15. We must clarify here that the observations made in this judgment and order are confined to the decision on preliminary issue of jurisdiction. None of the observations made shall be construed as any adjudication on merits of the suit or any adjudication of the rights claimed by the rival parties.

(MRIDULA BHATKAR, J.)

(A.S. OKA, J.)