

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT (L) NO. 950 OF 2014
ALONG WITH
NOTICE OF MOTION (L) NO. 259 OF 2015**

- 1. Valimohamed Haji Allarakha Sonawala**
Wakf through its Trustees and /or
Mutawallis and having its office at Flat No.
6, 3rd Floor, Silver Foil, Nowroji Gamadia
Road, Mumbai 400 026
 - 2. Afzal Muzafar Sonawala**
Trustee and /or Mutawalli and sole
beneficiary of Plaintiff No. 1, Aged about
44 years, of Mumbai, Indian Inhabitant
having his address at Flat No. 6, 3rd Floor,
Silver Foil, Nowroji Gamadia Road,
Mumbai 400 026 and residing at 3rd Floor,
B Wing, Beston, Off Carter Road, Bandra
(West), Mumbai 400 050
 - 3. Imtiyaz Ashfaq Ahmed**
Trustee and/or Mutawalli of Plaintiff No.1,
Aged about 53 years, of Mumbai, Indian,
Inhabitant having his address at Dheeraj
Plaza, 6th Floor, Hill Road, Bandra (West),
Mumbai 400 050
- Applicants/
... Plaintiffs

Versus

- 1. Zainal Abidin Afzal Dewji**
aged about 38 years, and having his address
at Zainal Jewellers, P.O.Box No.72075,
Dubai, U.A.E.

2. **Ms. Fatima Afzal Dewji**
aged about 32 years and having his address
at Zainal Jewellers, P.O.Box No.72075,
Dubai, U.A.E.
3. **Abdul Razak Shaikh**
aged about 35 years, Adult, Indian
Inhabitant illegally occupying a portion of
Flat No. 6, 3rd floor, Silver Foil, Nowroji
Gamadia Road, Mumbai 400 026
4. **Shamim Abdul Razak Shaikh**
aged about 28 years, Adult, Indian
Inhabitant having illegally occupying a
portion of Flat No. 6, 3rd floor, Silver Foil,
Nowroji Gamadia Road, Mumbai 400 026
5. **Memona Fatima Abdul Razak Shaikh**
a minor aged about 5 years, of Mumbai,
Indian Inhabitant through her legal parents
and natural guardians illegally occupying a
portion of Flat No. 6, 3rd floor, Silver Foil,
Nowroji Gamadia Road, Mumbai 400 026
6. **Ahmed Abdul Razak Shaikh**
a minor aged about 3 years, of Mumbai,
Indian Inhabitant through his legal parents
and natural guardians illegally occupying a
portion of Flat No. 6, 3rd floor, Silver Foil,
Nowroji Gamadia Road, Mumbai 400 026
7. **Khatijabi Shaikh**
aged about 61 years of Mumbai, Indian
Inhabitant having illegally occupying a
portion of Flat No. 6, 3rd Floor, Silver Foil,
Nowroji Gamadia Road, Mumbai 400 026 ... Defendants

APPEARANCES

**FOR THE APPLICANTS/
PLAINTIFFS**

Mr. G.R. Joshi, Senior
Advocate, a/w Mr. Piyush
Raheja, i/b Yogesh Adhia.

**FOR DEFENDANTS NOS. 1
AND 2**

Mr. N.H. Seervai, Senior
Advocate, a/w Mr. M. W.
Padgaonkar & Mr. Firdaus
Pavri, i/b M/s. Mulla &
Mulla.

CORAM : G. S. Patel, J.

RESERVED ON : 21st August 2015

PRONOUNCED ON : 5th February 2016

JUDGMENT:

1. This is an action in trespass. The Plaintiffs seek, first, a declaration that the Defendants are trespassers over premises that are described as “illegally occupied premises”, and have no right, title or interest in these; second, for a decree of possession; and finally, a permanent injunction restraining the Defendants from entering these premises. The Plaintiffs filed the present Notice of Motion for interim reliefs. A preliminary issue was raised under Section 9A of the Code of Civil Procedure, 1908 (“CPC”), and this issue was framed on 16th April 2015 as follows:-

Whether this court has jurisdiction to
entertain and try this suit?

2. The Plaintiffs led evidence. They were cross-examined. The Defendants led no evidence. They had, however, filed affidavits in the Notice of Motion itself. I have heard Mr. Joshi for the Plaintiffs and Mr. Seervai for the 1st and 2nd Defendants at some length. This order disposes of the preliminary objection. Before proceeding further, I must note that the contest is only between the Plaintiffs and Defendants Nos. 1 and 2, Defendants No. 3 to 7 having made a statement that they claim no independent right in the premises.

3. For the reasons that follow, I have been unable to accept Mr. Joshi's submission that the Court does indeed have jurisdiction to entertain this Suit. In my view, and particularly on account of this specific averments made by the Plaintiffs in the plaint, and the evidence led on their behalf, there is a clear and unambiguous ouster of jurisdiction. This Suit is one that can only be tried by the Court of Small Causes at Bombay, one that has exclusive jurisdiction in matters such as these.

4. The premises in question are part of Flat No. 6 on the 3rd floor of a building named 'Silver Foil' at Gamadia Road, Mumbai 400 026. The flat is about 3000 sq.ft. There is also a garage linked to this flat. The flat has four bedrooms, a servants' room, a separate kitchen and a large living/dining area. Three of the four bedrooms have attached baths, and there is also a servants' toilet next to the kitchen and the servants' room.

5. The Plaintiffs' case is that the Defendants have illegally trespassed upon the two bedrooms marked as "C-1" and "C-2" in

the sketch plan Exhibit “A” to the plaint¹ as also the servants’ room, kitchen and toilet. The Plaintiffs themselves are in possession of the two separate bedrooms marked “A-1” and “A-2” on the sketch plan. This position, at least as regards actual possession, does not seem to be disputed. The question is about the manner and circumstances in which the Defendants Nos. 1 and 2 came to occupy that part of the premises currently in their possession.

6. One Valimohamed Haji Allarakha (“**Valimohamed**”) was the grandfather of Plaintiff No. 2 and the great-grandfather of Defendants Nos. 1 and 2. He formed a Wakf by a Deed dated 13th March 1932. This was subsequently modified by a Deed of Rectification dated 13th November 1952. The Deed of Wakf was signed by Valimohamed as the settlor, and by him and his wife Faizubai as the first trustees/Mutawallis. In 1935 Valimohamed purchased the ‘Silver Foil’ building. It was later transferred to the Wakf that he had settled. I must note at this stage that there is some disagreement between the Plaintiffs and the Defendants even on this factual historical narrative, for according to the Plaintiffs Valimohamed purchased the plot being Survey No. 1/C/755 of the Malabar and Cumbala Hill Division and had between 1936 and 1937 constructed this Silver Foil building. However, this makes very little difference to the present action. It is common ground that the Wakf was or became the owner and landlord of the entire building.

7. The building had ten flats. These were (and are) let out on rent. Valimohamed and Faizubai had six children, three sons named Sultan, Mehboob and Muzaffar, and three daughters named

¹ Plaint, page 44

Gulshan, Maleck and Ashraf. Before 1955, all three daughters were married. It seems that between 1956 and 1958, Flat No. 6 was one of the two flats in the building that were requisitioned by the Government of India. At that time Valimohamed and his family were residing elsewhere at Laburnum Road, Gamdevi in tenanted premises.

8. Flat No. 6 was ultimately released from requisition on 27th October 1958, and, according to the Plaintiffs, it is after that time that Valimohamed came to reside in the flat with his wife Faizubai, and two of his three sons, Sultan and Muzaffar. The Plaintiffs' case is that Mehboob never lived in Flat No. 6 and subsequently died unmarried. Valimohamed and his wife Faizubai were themselves the tenants of Flat No. 6 on the third floor along with its appurtenant garage.

9. Valimohamed died on 2nd June 1976 while residing in Flat No. 6. At that time, his wife Faizubai, two sons Muzaffar and Sultan, his two widowed daughters Maleck Shauket Dewji and Gulshan Nensey, his daughter-in-law Mariam Muzaffar Sonawala and grandson Afzal Muzaffar Sonawala were all residing in Flat No. 6.

10. The rival narratives begin to diverge at the time of Valimahomed's death. The Plaintiffs claim that although Faizubai continued living in flat till her death two years later on 18th December 1978, it was Muzaffar, one of Valimahomed's three sons and the father of the 2nd Plaintiff who, as the Mutawalli of Plaintiff No. 1, started looking after the affairs of the 1st Plaintiff Wakf. The

Plaintiffs' case is that Muzaffar was the only person living in the flat at that time. This is disputed by the Defendants who say that at the time of Faizubai's death, in addition to Muzaffar, another son Sultan Sonawala and two daughters Maleck and Gulshan, by then both widowed, were also residing in the flat. They point to Faizubai's Will dated 4th October 1977 which specifically says so. Probate has been obtained to that Will.

11. According to the Plaintiffs, Maleck, the grandmother of Defendants Nos. 1 and 2, lived elsewhere at Nepean Sea Road and only occasionally visited her family at the Silver Foil flat. The 1st and 2nd Defendants on the other hand say that Maleck was widowed at an early age; that after her husband died, she came to reside with her parents, Valimohamed and Faizubai, in the Silver Foil flat some time in 1974-1975, and that she stayed with her parents till their demise and continue to stay there till her own death in 1999. It is Defendants' case that the building at Nepean Sea Road, named Mira-Mar, where the Plaintiffs allege Maleck resided, was not even constructed in the year 1958. This is used to controvert the Plaintiffs' assertion that even after Maleck's husband died in 1958 she continued to stay in the Mira-Mar building.

12. Maleck had a son Afzal Dewji, the father of Defendants Nos. 1 and 2. Afzal married one Hafza in 1969 or 1970. Hafza is said to have been of Saudi Arabian Origin. In 1978 or 1979 Afzal and his family moved to Dubai.

13. In paragraph 5.13 of the plaint the Plaintiffs say that while Afzal and his family moved to Dubai, Maleck did not. Since the

Mira-Mar flat had been sold by Afzal prior to his move to Dubai, Maleck “was allowed to reside in” one of the rooms in the flat. This is the room marked “C-1” in the sketch plan Exhibit “A” to the plaint. The Plaintiffs also say that sometime in 1980 Maleck was appointed as a Mutawalli of the Wakf.

14. On 21st February 1985, Muzaffar Sonawala, Plaintiff No. 2’s father, died. The Defendants claim that after Muzaffar’s death, his widow, Mariam, and son Afzal (the 2nd Plaintiff) left the flat and took up a residence at Bandra. Mariam however retained possession of two bedrooms in the flat. These are the bedrooms marked as “A-1” and “A-2” in the sketch plan Exhibit “A” to the plaint. The Defendants allege that even before Muzaffar died, he and Mariam had sharp differences and Mariam had already begun to stay for much of the time at Bandra, only occasionally visiting the suit flat. On Muzaffar’s death, Mariam shifted to Bandra permanently. The Plaintiffs contest this, saying that Mariam’s move to Bandra was temporary.

15. Sultan Sonawalla died a bachelor on 4th December 1989. According to the Defendants, after Sultan’s death, his sisters Maleck and Gulshan continued to live in the flat as tenants of the Wakf. They paid rent. Thus, say the Defendants, after the original tenants passed on, four of their six children, viz., Muzaffar, Sultan, Maleck and Gulshan were entitled to succeed to the tenancy rights, and all lived in the flat as tenants. After Faizubai died, these four children were recognized as tenants, according to the Defendants. Maleck was at that time the Mutawalli of the Wakf.

16. For convenience, a family tree (adapted from Exhibit P-6 in evidence) is annexed to this order.

17. The Plaintiffs claim that Afzal Dewji, Maleck's son, separated from his wife Hafza in 1989. The Defendants say otherwise: that Maleck asked Afzal to return to Mumbai from the Middle East since, with Muzaffar and Sultan both having passed on, Maleck and Gulshan were two elderly ladies living alone in the flat in question. The Defendants also say that Afzal returned to the flat with his two children, Zainal and Fatima, Defendants Nos. 1 and 2. The Plaintiffs claim that those Defendants stayed overseas with their mother and that Afzal alone returned to Mumbai.

18. In paragraph 5.17, the Plaintiffs say:

"... Afzal Dewji having no other place to reside, came to reside with Plaintiff No.2 in Flat No. 6. **He was allowed to reside in one of the rooms of the initially illegally occupied premises which was earlier occupied by Sultan (son of Valimohammed, who expired on 4th December 1989) as a gratuitous licensee.**"

(Emphasis added)

19. Gulshan died on 17th December 2008. Afzal Dewji, the father of Defendants Nos. 1 and 2, died on 13th March 2009.

20. Then comes this passage in paragraph 5.23 of the Plaint:

"5.23. On or about 30th March 2009, Afzal Dewji expired. The Defendant Nos. 1 and 2 were at that time not in India. In or about April 2009, the Defendant Nos. 1 and 2 came to India to perform the last rites of their father. The Plaintiffs permitted the Defendant Nos. 1 and 2 to enter Flat No. 6 and utilize one of the rooms of the initially illegally occupied premises for the limited purpose of performing their fathers' last rites. The Plaintiffs also allowed the Defendant Nos. 1 and 2 to enter Flat No. 6, because as per their culture, the relatives of the deceased read Quran (holy book of Islam) for 40 days period. After the ceremonies were over, the Defendant Nos. 1 and 2 however trespassed upon the other room of the initially illegally occupied premises and unlawfully refused to vacate the same and continued to wrongfully occupy not only the room which was occupied by their late father but also the room next to their father's room (which was previously occupied by Maleck and Gulshan). The Defendant Nos. 1 and 2 occupied the initially illegally occupied premises without their servants. The Defendant Nos. 1 and 2 were in joint access to the portion marked as "D" on the sketch of the flat. The Defendant No. 1 left the initially illegally occupied premises in or about May 2009 and returned to Dubai but Defendant No. 2 continued to occupy the initially illegally occupied premises and

moved her belongings in the initially
illegally occupied premises."

(Emphasis added)

21. There are several other contentions raised and facts narrated in both the Plaint and in the return filed by Defendants Nos. 1 and 2 in the Plaintiffs' Notice of Motion. I do not think these are immediately material for the purposes of the preliminary issue. It is, however, important to note that the 1st and 2nd Defendants filed a declaratory suit No. 1596 of 2009 in the Small Causes Court. They also filed an injunction notice. On 16th October 2009, Defendants Nos. 1 and 2 obtained ad-interim reliefs directing the Plaintiffs not to dispossess the Defendants without due process of law. The injunction application was finally disposed on 15th January 2011. It was allowed in part. The present Plaintiffs were restrained from interfering with or disturbing the possession of Defendants Nos. 1 and 2. The Plaintiffs filed a Revision Application No. 34 of 2011. That was withdrawn. In the meantime, the Plaintiffs had filed S.C. Suit No. 579 of 2010 in the Bombay City Civil Court. This, too, was an action in trespass. The Plaintiffs sought ad-interim reliefs, and on 8th April 2010, obtained these. Aggrieved, Defendants Nos. 1 and 2 filed A.O. No. 1163 of 2010. That was disposed of on 20th December 2010 directing that the issue of jurisdiction be tried as a preliminary issue. The City Civil Court accordingly framed the issue of jurisdiction as a preliminary issue and by an order of 10th February 2012, held that the Plaintiffs' suit in the City Civil Court was not maintainable for want of jurisdiction. The City Civil Court returned the plaint under Order VII Rule 10 of the Code of Civil Procedure, 1908 for presentation to the proper Court. The Plaintiffs

appealed, filing A.O. No. 730 of 2012. That Appeal was disposed of on 8th August 2013 (R.S. Dalvi, J). The appeal Court held that the City Civil Court erred in its finding that the suit was one against gratuitous licensees, and therefore covered by the Full Bench decision of this Court in *Prabhudas Damodar Kotecha & Anr. v Smt. Manharbala Keram Damodar & Ors.*² That decision, Mrs. Dalvi J held, was inapplicable to a trespass action against heirs of a gratuitous licensee. However, Mrs. Dalvi J also found that the City Court did not have the *pecuniary* jurisdiction to entertain a suit on trespass, and therefore while there was no statutory ouster of jurisdiction on account of the Rent Act, the plaint had correctly been returned for presentation to a Court with sufficient pecuniary jurisdiction, viz., this Court. The Defendants' rights to contest jurisdiction was kept open. This is how the present suit has come to be filed.

22. Indeed, this is a fundamental strut of Mr. Joshi's case, for he says the question of whether or not this Court has jurisdiction has been finally decided by that order of 8th August 2013, and there is no question of a reversal of course now. The Plaintiffs filed a trespass suit in the City Civil Court; that plaint was returned for want of inherent jurisdiction due to a statutory bar, and that finding was reversed in appeal, though the return of the plaint was upheld on the ground that the City Civil Court lacked pecuniary jurisdiction. Only this Court, Mr. Joshi says, has the necessary pecuniary jurisdiction; and there now being no question of a want of inherent jurisdiction, the preliminary issue must be answered in his favour.

² 2007 (5) Mh. L. J. 341

23. Before I consider this submission, I must refer to the evidence led. Plaintiff No.3 filed an Affidavit in lieu of Examination-in-Chief. This is dated 18th April 2015. For the most part, it follows the Complaint. However, paragraph 17 corresponding to paragraph 5.17 of the Complaint, show a minor departure:

"17. By an order dated 27th October 1958, the Estate Officer of the Government of India released Flat No. 6 in favour of the Wakf/ landlord on a condition that if it is not so occupied it would remain open for the government to requisition the flat for housing central Government officers. I tender the order dated 27th October 1958 as available in the records of the 1st Plaintiff. The said document is over 30 years old."

24. It will at once be noticed that in the evidence affidavit, the 3rd Plaintiff has been careful to take out all mention of a license, gratuitous or otherwise. I do not think it would be wise to make too much of this, or even to describe it as an 'improvement'. Perhaps all that needs to be said, is that the description in the Complaint is in the nature of a legal submission and therefore finds no place in an Evidence Affidavit. What is material is that there is no variation from the factual narrative about the creation of that license or of the giving of the permission. In paragraph 17 of the Evidence Affidavit it is clearly stated that Afzal was 'permitted' a limited occupancy.

25. The major departure however comes in paragraph 21 of the Evidence Affidavit, corresponding to paragraph 5.23 of the Complaint:

"21. On or about 13th March 2009 (inadvertently mentioned in the Plaint as 30th March 2009) the said Mr. Afzal Dewji passed away. He had an heart attach while travelling by car and passed away in the hospital. His body was directly taken to the cremation ground and was not brought to the room (marked as C-1 in the plan) which was occupied by him in Flat No. 6. After his funeral, Defendant Nos. 1 and 2 with their mother visited in or about March 2009 (inadvertently stated in the plaint to be April 2009) the residence of the Plaintiff No. 2. In my presence, the Defendant Nos. 1 and 2 and their mother told the Plaintiff No. 2, (who was then the sole Mutawalli of the 1st Plaintiff), that they would like to carry out obsequial ceremonies by reading Quran in the room which was occupied by the said Mr. Afzal Dewji. The Plaintiff No. 2's mother was also present at that time. The said Mr. Afzal Dewji was and his children are Shia Muslims. As per the customs of their sect, obsequial ceremonies are conducted by the immediate relatives of the deceased by reading the Quran (holy book of Islam) for a period of 40 days at the last place of residence of the deceased. Since Mr. Afzal Dewji had last occupied the said room, the 2nd Plaintiff, in my presence, informed the Defendant No. 1 and 2 that he had no objection if such obsequial ceremonies are conducted from the said room. These ceremonies are carried out in late afternoon (between Asar and Maqrib)

for about one hour every day, when Maulana and immediate family members would read Quran. No permission to reside in/occupy the said room was either sought by Defendant Nos. 1 and 2 or granted by the Plaintiff No. 2 or to use it for any other purpose except as aforesaid. The Defendant Nos. 1 and 2 and their mother during that period of 40 days did not reside in flat No. 6 and after the obsequial ceremonies were completed each day, they returned to the premises at 7, Mohammedbhoy Mansion, Hughes Road (also known as Sitaram Patkar Marg), Mumbai - 400 026. The premises in the aforesaid building were owned by Hafza's father and Hafza's sister's name appears on the electoral rolls prepared for the area where the said premises are situated. In fact, even today when the Defendant Nos. 1 and 2 visit India, they stay in the said premises at Mohammedbhoy Mansion."

26. Now this is materially different from what is said in the Plaint. Here, the Plaintiffs seek to distance themselves wholly from the creation of any license in favour of Defendants Nos. 1 and 2, whatever be its terms. Plaintiff No. 3 was specifically cross-examined by Mr. Seervai on both these paragraphs in the Evidence Affidavit and their corresponding paragraphs in the Plaint.

"4. Q. According to you, from which year did Mr. Afzal Dewji become

a gratuitous licensee of Flat
No. 6?

Ans. From the year 1989.

6. Q. *(Shown paragraph 5.17 at page
12 of the Complaint.)*

Are the statements in this
paragraphs correct, and do you
now reconfirm them?

Ans. Yes. They are correct.

8. Q. *(Shown paragraph 5.17 of the
Complaint and paragraph 18 of the
Evidence Affidavit.)*

I put it to you that your
statement in the Complaint and in
the Affidavit therefore, that
"in 1989 Afzal Dewji came to
reside in the Flat along with
Plaintiff No. 2" is incorrect
in view of your previous
answer. Do you agree?

Ans. Both statements are correct. My
previous answer today was in
regard to Mr. Afzal Sonawala
and the statements in this
paragraph are in regard to Mr.
Afzal Dewji.

9. To I am repeating the question

Court after explaining to you what it is that you have said in paragraph 5.17 and paragraph 18 of your Evidence Affidavit. Would you now answer the question?

Ans. My answer is the same. Both my previous answers are correct.

10. Q. If, according to you, in 1989 Afzal Dewji made a request to the 2nd Plaintiff, Mr. Afzal Sonawala, and to the 2nd Plaintiff's mother for permission to occupy one room in Flat No. 6, why have you not said so in the Plaintiff?

Ans. I have said so. The suggestion put to me is incorrect. I have said so in paragraph 5.17 of the Plaintiff.

11. Q. Why have you not said in the Plaintiff that you were present when this discussion took place?

Ans. It is true that I had not said so in the Plaintiff.

Witness volunteers : I

explained everything to my Solicitor.

12. Q. Why have you deleted from paragraph 18 of your Evidence Affidavit that Afzal Dewji was a gratuitous licensee of Flat No. 6?

(Mr. Joshi objects to the question on the ground that in paragraph 33 of the Evidence Affidavit the witness has generally confirmed what is stated in the Complaint. This is no reason to disallow the question. The witness is directed to answer and the objection is overruled.)

Ans. There is no specific reason.

13. Q. *(Shown paragraph 5.23 of the Complaint.)*

Are the contents of this paragraph true and correct?

Ans. Yes.

25. Q. Is it correct that in 1989 when Mr. Afzal Devjee became a gratuitous licensee of flat No. 6, he was not already a

Mutawalli of the Wakf?

Ans. Yes, that is correct.

26. Q. *(Shown paragraph 5.23 of the
Plaint and in particular the
portion beginning with the
words "Plaintiffs permitted
... 40 days period" also shown
paragraph 21 of the witness
Evidence Affidavit and
particularly the portion at
the foot of page 8 beginning
with words "No permission to
reside in/occupy ... except as
aforesaid".)*

I put it to you that in view of
what you have said in paragraph
5.23 of the Plaint, the portion
shown to you in your Evidence
Affidavit is incorrect.

Ans. There is no conflict between
the two. My Evidence Affidavit
is more detailed, that is all.

27. Q. *(Shown paragraph 5.23 of the
Plaint from the words "after
the ceremonies got over ...
without their servants ... and
paragraph 24 of the Evidence*

Affidavit, first sentence.)

I put it to you that in light of what is stated in paragraph 5.23 of the Complaint, the statement in your Evidence Affidavit is incorrect. Do you agree?

Ans. Yes it is somewhat incorrectly stated in my Evidence Affidavit.

28. Q. When exactly, according to you, did Defendants No. 1 and 2 enter the suit flat for the first time?

Ans. From the very next date after Afzal Dewjee passed away. This is when they entered the flat to perform the obsequial ceremonies.

29. Q. I put it to you that Defendants No. 1 and 2 were residing in the suit flat with their father Afzal Dewjee when he died on 13th March 2009. Do you agree?

Ans. No."

27. It is impossible from these answers not to conclude that Plaintiff No.3 was either trying to improve on his case or, at any rate, to dodge the bullet, as it were, and distance himself from any case of creation of a license. It is important to note that in the Appeal from the order of the City Court, the only question that seems to have been taken is whether the suit as then filed in the City Court was against Defendants Nos. 1 and 2 as heirs of a licensee, their father Afzal Dewji. In paragraph 5.23 of the present Complaint, however, there is a different approach: here we find a specific averment of creation of another license in favour of Defendants Nos.1 and 2. The reasons for the creation of that license are unimportant.

28. What seems not to be in doubt, reading both the Complaint and the evidence, is that the initial entry of Afzal Dewji (the father of Defendants Nos. 1 and 2) was lawful or permissive; and, *so too was the initial entry into the premises of Defendants Nos. 1 and 2*. This has nothing whatever to do with any case placed by the contesting Defendants. This is the Complaint as it stands.

29. Mr. Seervai submits that it is not possible to accept Mr. Joshi's submission that the suit is jurisdictionally competent because Mr. Seervai's clients have *failed* to prove their tenancy. That endeavour by Defendants Nos. 1 and 2 can only happen in the Court of Small Causes and in no other court. Conversely, their failure to establish it in this Court cannot imbue the Complaint with a jurisdiction that it does not otherwise disclose. The matter begins and ends, Mr. Seervai submits, with the decision of the Supreme Court in *Prabhudas Damodar Kotecha & Ors. v Manhabala Jeram Damodar &*

Anr.,³ in which a challenge to the decision of the Full Bench of this Court⁴ failed. Mr. Seervai points out that the Supreme Court decision was rendered on 13th August 2013, about five days after Mrs. Dalvi J's order of 8th August 2013. The Supreme Court has in terms approved the Full Bench's view that even a gratuitous licensee is covered by the expression 'licensee' in Section 41(1) of the Presidency Small Causes Court Act, 1882 ("**the Presidency SCC Act**"), as amended in 1976. The Presidency SCC Act makes no distinction between a licensee for consideration and a licensee for no consideration. Neither does Section 52 of the Easements Act, 1882. The rule of *noscitur a sociis* has no application to such cases. In paragraph 57⁵ the Supreme Court noted that the High Court's Full Bench correctly held that the purpose of clubbing the expression 'licensor and licensee' with 'landlord and tenant' in Section 41(1) of the Presidency SCC Act was to bring both under a single jurisdictional umbrella, and it makes no difference that one of these — 'landlord and tenant' — is covered by local rent control legislation and the other, 'licensor and licensee', is not. The Supreme Court specifically rejected the proposition that when such exclusive jurisdiction was statutorily conferred, it could plausibly be said that the legislative intent was to keep out of the sweep of this jurisdictional provision one particular species of licensor-licensee relationship, viz., a gratuitous licensee. That, the Supreme Court held, was not the statutory intent.

³ (2013) 15 SCC 358 : AIR 2013 SC 2959

⁴ *Prabhudas Damodar Kotecha & Anr. v Smt. Manharbala Keram Damodar & Ors.*, 2007 (5) Mh. L. J. 341.

⁵ Paragraph numbers follow the SCC report

30. I have very great difficulty in accepting Mr. Joshi's submission that the cause of action should be ordered to be split up, and that there be a carving up of the plaint between the various cases pleaded — licensee, or gratuitous licensee, or tenants — and, on that basis, allow part of the suit to continue here. As I have noted, even if the cause of action is based on a relationship of licensor and licensee, gratuitous or otherwise, this will not assist Mr. Joshi in the slightest.

31. Mr. Joshi's submission that the preliminary issue of jurisdiction is to be decided finally on the pleadings and evidence and not on a demurrer does not take us anywhere. The preliminary issue before me is being decided not on any demurrer but on the basis of the plaint as laid and the evidence led in support of it. When, therefore, Mr. Joshi says that the preliminary issue of jurisdiction is to be decided 'fully', I gather he means that I must determine whether or not the 1st and 2nd Defendants are indeed licensees or tenants; and that Mr. Seervai's clients having failed to 'prove' their tenancy or license, must be held to be trespasser. The answer to this, in Mr. Seervai's inimitable formulation, is that this is a Catch-22: Mr. Joshi's submission requires Mr. Seervai to prove tenancy to demonstrate that this Court cannot arrive at a finding of tenancy. I do not believe Mr. Joshi to be at all correct in this submission.

32. As to the question of issue estoppel, as I have noted, paragraph 5.23 of the present Plaint appears to be a significant and pivotal departure from what was presented to Mrs. Dalvi J. There is no longer any question of Defendants Nos.1 and 2 being merely

heirs of a gratuitous licensee; the averment and the evidence both now show that the Plaintiffs' own case is that a license of some kind was indeed created in favour of the 1st and 2nd Defendants. In any case, the order of Mrs. Dalvi J is, on the face of it, not a final determination of the issue. Had it been, no liberty could ever have been reserved to the present Defendants to raise all defences, including that of jurisdiction. The principles of *res judicata* and issue estoppel, and their public policy imperatives, are all well known and there can be no quarrelling with any of this, nor is much authority needed in support, though Mr. Joshi nonetheless cites one.⁶ What his submission overlooks is the specific wording of Mrs. Dalvi J's order of 8th August 2013 where this very issue of jurisdiction was expressly left open.

33. Once that is done, no question arises of this court determining the contours of that license or its terms. That lies solely in the jurisdictional domain of the Small Causes Court. Therefore, whether or not there was a misuse of that license, or whether that license was limited in any manner are questions that the Small Causes Court will determine. Mr. Joshi's authorities on the point may apposite or they may not. The Small Causes Court will no doubt look into them.⁷ Mr. Joshi's submissions on the nature of a trespass tort and the concept of trespass *ab initio*⁸ are also of no assistance to him in the facts of this case. Indeed, I find it difficult to

⁶ *Hope Plantation Ltd v Taluka Land Board, Peermade*, (1999) 5 SCC 590

⁷ *Conrad Dias v Joseph Dias*, 1995 (3) Bom CR 218; *Sarika Sureka v Kusumlata Sureka*, 2014 (6) Bom CR 240; *Deepak Natwarlal Parekh v Tejas Natwarlal Parekh*, 2015 (1) Bom CR 180;

⁸ *Hillen & Pettigrew v ICIC (Alkali) Ltd.*, [1936] AC 65; *Baker v R*, (1983) 153 CLR 338; *Laxmi Ram Pawar v Sitabai Dhotre*, (2011) 1 SCC 356

accept any such submission in the facts of this case, having regard to the Plaintiffs' pleadings and their evidence.

34. Mr. Seervai also points out that in the Small Causes Court, the present Plaintiffs have entered a Written Statement. There, the case seems to be materially different from the one pleaded here. The present Plaintiffs seem to have accepted that the Valimohammed and his wife were tenants of the Wakf and that on their death their children did become tenants, but there is a plea taken that there can be only one tenant. The present Plaintiffs attempted to amend their Written Statement to delete these averments. They sought to introduce a plea that a Mutawalli cannot be a tenant. That application was dismissed. A writ petition relating to that attempt at changing a plea was withdrawn. There is yet pending a writ petition against an order of the Small Causes Court dismissing the present Plaintiffs' application under Section 9A and under Order VII Rule 11 of the CPC. The declaratory suit filed by the 1st and 2nd Defendants in the Small Causes Court is still pending and is being contested.

35. In a matter that questions at the threshold the jurisdiction of this Court, it is for a Plaintiff to show that there exists jurisdiction. It is not necessary for the Defendant to establish his entire case on merits in response to that preliminary issue. I do not see how I can possibly determine whether or not the 1st and 2nd Defendants are or are not tenants or licensees. The jurisdictional dominion over that lies with, and only with, the Small Causes Court.

36. There is also, in my view, no substance to Mr. Joshi's submission that in every single trespass action, a Defendant only needs to plead a tenancy or a license to defeat the Plaintiff. That is not so at all. As I have noted, both the pleadings *and* the evidence led by the Plaintiffs themselves unequivocally point to the creation of a license in favour of the 1st and 2nd Defendants.

37. Mr. Joshi cited several authorities, but with no great enthusiasm. None of these are apposite. As to the general question of the scope of enquiry under Section 9A of the CPC, there is no manner of doubt, and little authority is required for that proposition.⁹ Again, whether or not Afzal Dewji was a tenant or, being a mutawalli, could claim tenancy is not for this Court to determine;¹⁰ it is doubtful whether any such question arises in the present suit, and in any case, that is something that the Small Causes Court will determine.

38. In the result, the preliminary issue is answered in the negative. This Court does not have the jurisdiction to entertain and try this suit. The suit is, therefore, dismissed. The Notice of Motion, filed by the Plaintiffs seeking the appointment of a Court Receiver and for an injunction, does not survive and is disposed of as such. There will be no order as to costs.

(G.S. PATEL, J.)

⁹ *Meher Singh v Deepak Sawhney & Anr.*, 1998 100 (3) Bom LR 840; *ICICI Bank v Shri Durga Bansal Fertilizers Ltd. & Ors.*, 1999 101 (3) Bom LR 38.

¹⁰ *Karnataka Board of Wakf v Land Tribunal Sira & Ors.*, AIR 2000 Kant 141

