

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1039 OF 1996

Shri Subhan Ali	..	Appellant
VS.		
Shaikh Allauddin Allabux	..	Respondent

Mr. G. K. Masand for Appellant.
Mr. A. B. Tajane for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 13 January 2017

Date of Pronouncing the Judgment : 23 January 2017

JUDGMENT :-

1] Mr. G. K. Masand, learned counsel for the appellant and Mr. A. B. Tajane, learned counsel for the respondent.

2] The appellant, the original defendant in S.C. Suit No. 4232 of 1990 appeals judgment and decree dated 10 June 1996 made by the Bombay City Civil Court decreeing the suit in the following terms:

“ It is declared that the defendant Subhan Ali has no legal right, title or interest to carry on business at the pitch B-100, situated at Naik Nagar, Near Kachrapatti Road, Sion, Bombay 400022 and he is further directed to deliver back the vacant and peaceful possession of the suit pitch B-100 to the plaintiff within 3 months from the date of this order.

The amount deposited by the defendant Subhan Ali if any in the court shall be adjusted towards rent payable in respect of the suit premises and the defendant shall be liable for the rent payable in respect of the suit premises for and during the

period of his occupation of the suit premises i.e. from May 1980 until the possession of the suit premises is handed over to the plaintiff. The amount remaining surplus if any; after deducting the amount payable as above by the defendant shall be refunded to him. The plaintiff shall be at liberty to appropriate the amount thus recovered from the defendant towards mesne profit but not exceeding the amount of rent in respect of suit premises payable to him (in lieu of rent that was payable by the plaintiff to the Bombay Municipal Corporation).

The defendant shall be entitled to set off for the amount of rent already paid by him to the Bombay Municipal Corporation for and in respect of period of his use and occupation of the suit premises with effect from May 1980 onwards.

The defendant shall pay costs of the suit to the plaintiff and bear his own.

The decree be drawn accordingly."

3] This Court, whilst staying the execution of impugned decree had directed the appellant to deposit in the Court a sum of Rs.1,000/- per month in respect of the occupation and user of the suit pitch and learned counsel for the appellant states that this direction has been duly complied with and continues to be complied with.

4] Mr. Masand, learned counsel for the appellant submits that the suit in which the impugned decree has been made was not at all

maintainable since from the averments in the plaint it was quite clear that the suit is between a licensor and the licensee, thereby, being exclusively triable by the Small Causes Court in terms of Section 41 of the Presidency Small Cause Courts Act, 1882 (said Act). Mr. Masand submits that objection to the maintainability of the suit was specifically raised and even though, an issue was framed in this regard, the same was not at all decided. Mr. Masand submits that since this is an issue which goes to the jurisdiction of the civil court, the same is required to be considered in this appeal and on the said basis, the impugned judgment and decree is liable to be set aside, as being without jurisdiction.

5] In the alternate, Mr. Masand submits that there is overwhelming evidence on record which establishes that the suit pitch was handed over to the appellant some time in the year 1980, since, the defendant who was the allottee of suit pitch by Municipal Corporation of Greater Mumbai (MCGM) had left for employment to Bahrain. Mr. Masand submits that the evidence on record bears out that the respondent, in any case, was aware of the allotment of the suit pitch to the appellant since the year 1983 itself and therefore, the suit instituted in the year 1990, was clearly barred by limitation.

6] Mr. Masand finally submitted that from the material on record, it is clear that the business at the suit pitch was always owned by

the appellant and the appellant had become a lessee or a licensee of the suit pitch on account of acquiescence on the part of the MCGM. Mr. Masand submitted that the respondent had lost right to recover possession of the suit pitch from the appellant, having permitted the appellant to use such pitch for long number of years and upon obtaining consideration. Mr. Masand submitted that principles of estoppel and acquiescence clearly apply and upon such basis the suit as instituted by the respondent, ought not to have been decreed. Mr. Masand submitted that the learned trial Judge erred in holding that the respondent had a better title to the suit pitch as compared to the appellant, since, the respondent was the allottee from the MCGM and the terms and conditions of the allotment had precluded the respondent from transferring or creating any third party rights in the suit pitch.

7] On the other hand, Mr. Tajane, learned counsel for the respondent submitted that issues were framed by the learned trial Judge, taking into consideration the pleadings of the parties. Mr. Tajane submitted that the main issue in this case was whether the respondent had a better title to the suit pitch than the appellant. Upon detailed consideration of both documentary as well as oral evidence, learned trial Judge has rightly recorded that the respondent had a far better title to the suit pitch than the appellant and on this basis decreed the suit. Mr. Tajane submits that there is

no error whatsoever in the making of the impugned decree and therefore, this appeal deserves to be dismissed.

8] Mr. Tajane submitted that the pleadings in the plaint have to be construed in their entirety. Thus construed it is quite clear that it was the case of the respondent that the appellant is nothing but a trespasser upon the suit pitch and therefore, the suit was very much maintainable before the Civil Court. Mr. Tajane submitted that the issue of limitation has been considered by the learned trial Judge and on basis of the evidence on record, a proper conclusion is drawn that the suit was well within the period of limitation, particularly since cause of action for instituting the suit arose only in the year 1988. Mr. Tajane submitted that great prejudice will occasion to the respondent if the issue of jurisdiction is taken up at this stage, since, from the defence raised by the appellant, it is quite clear that the appellant has virtually no rights to the suit pitch. For all these reasons, Mr. Tajane submits that the present appeal is liable to be dismissed.

9] The rival contentions now fall for my determination.

10] The first point for determination is whether the jurisdiction of the Civil Court was barred to entertain a suit of this nature in view of the provisions contained in section 41 of the said Act.

11] Section 41 of the said Act, 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.*

(2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act [the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply]”

12] The Full Bench of this Court in the case of **Prabhudas Damodar Kotecha & Anr. vs. Manbharbala Jeram Damodar**¹ has ruled that even a suit against a 'gratuitous licensee' is covered under section 41 of the said Act. This decision has been approved by the Supreme Court in the decision reported in AIR 2013 SC 2959.

13] In order to consider whether the suit in the present case was

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one between a licensor and the licensee relating to recovery of possession of immovable property, reference is required to be made to the plaint in S.C. Suit No. 4232 of 1990.

14] In the plaint, the respondent (plaintiff) has stated that he is allottee of the commercial pitch / hut bearing No. G.N.M.C. B/100 at Sion, Mumbai (suit pitch). Paragraph 2 of the plaint, reads as follows :

“2. The Defendant No. 1 is the father of the Plaintiff. The Defendant No. 2 is in use, occupation and possession of the suit premises through the Defendant No. 1 as stated hereinafter.”

15] In paragraphs 3, 4 and 5 of the plaint, the respondent has pleaded that he was carrying on business from the suit pitch in the name and style of 'ZAKIRA SHOP NO. 5' and has pleaded about licences and permissions issued by various Authorities with regard to such business. This relates to the period between the date of allotment by MCGM and the year 1977.

16] In paragraph 6, the respondent has pleaded that in the year 1977 he was required to go to Bahrain for the purpose of employment and as such *'he allowed his father the Defendant No. 1, to do his business of waste paper and Scrap Metals, gratuitously'*. The pleadings in paragraph 6 of the plaint read thus :

“6. The Plaintiff states that in year 1977 he was required

to go to State of Bahrain for the purpose of his job and as such he allowed his father the Defendant No. 1, to do his business of waste paper and Scrap Metals, gratuitously. While leaving India, the Plaintiff handed over the Pitch Holders card, rent receipts, Registration Certificates under Shops & Establishments Act and other documents concerning the suit premises to the Defendant No. 1 so as to enable him to pay the rent to the Bombay Municipal Corporation and pay the renewal charges of the Registration Certificate. The Plaintiff used to come to India after interval of 2 to 3 years and he used to go back to Bahrain. During the Plaintiff's absence from India, his father, the Defendant No. 1 did the business and paid the rent to the Bombay Municipal Corporation on behalf of the Plaintiff. The Plaintiff used to make up the account with his Father, the Defendant No. 1 and reimburse him by allowing him to appropriate the profit of the Business for the Plaintiff's family and for the family of Defendant No. 1."

17] In paragraph 7 of the plaint, the respondent has pleaded that in the year 1988, upon his return from Bahrain, he was shocked and surprised to find that his father i.e. defendant no.1 had handed over the business and the suit premises to the defendant no. 2 i.e. the appellant herein. It is pleaded that the act of defendant no. 1 in handing over the business and the possession of the suit pitch to the defendant no.2 is wrongful and illegal. It is pleaded that the defendant no. 1, being the father of the plaintiff, had been allowed to run the plaintiff's business gratuitously and he had no right and/or

any authority to hand over the business and the suit premises to defendant no. 2 with the consent of the plaintiff. Thus, the occupation and possession of defendant no. 2 is wrongful and illegal. The averments in paragraph 7 of the plaint, read thus :

*“7. The Plaintiff finally came back to India in the year 1988 and he was shocked and surprised to see that the Defendant No.2 was doing the business in the suit premises. The Plaintiff enquired of the Defendant No. 2 as to how he was doing the business. **Thereupon the Defendant No. 2 told the Plaintiff that Defendant No. 1 had handed over the business of Waste Papers and Scrap Metals to him and he had also given the suit premises to him.** The Plaintiff also contacted the Defendant No. 1 and enquired of him as to how he had given charge of the business to the Defendant No. 2. However, the Defendant No. 1 gave evasive replies and told the Plaintiff that he had become old and it was not possible for him to continue the business of the **Plaintiff and as such he had given the business and the suit premises to the Defendant No. 2.** The Plaintiff states that act of Defendant No. 1 in handing over the business of the Plaintiff and possession of the suit premises to the Defendant No. 2 is wrongful and illegal. **The Defendant No. 1 being the father of the Plaintiff, he was allowed to run Plaintiff's business gratuitously and he had no right and/or any authority to hand over the business and the suit premises to the Defendant No. 2 without the consent of the Plaintiff.** Thus the occupation and possession of Defendant No. 2 is wrongful and illegal.”*

[Emphasis supplied]

18] In paragraph 8 of the plaint, there are averments to the effect that the respondent / plaintiff called upon the appellant / defendant to vacate the suit pitch but such requests were not complied with. There are also averments to the effect that the appellant unlawfully obtained registration or premises in his own name.

19] In paragraph 9 of the plaint, it is pleaded that both the defendants have no right, title or interest in the business or in the suit pitch and they are only trespassers since, the licence of the defendant no.1 is revoked and the defendant no. 2 is wrongfully occupying the suit premises through defendant no. 1. Since, the statements in paragraph 9 of the plaint are important, the same are transcribed below :

“9. The Plaintiff states that both the Defendants have absolutely no right, title or interest in the business of the Plaintiff and in the suit premises and both the defendants are trespassers of the suit premises, as the licence of the Defendant No. 1 is revoked and Defendant No. 2 is wrongfully occupying the suit premises through Defendant No. 1 and doing the business of the Plaintiff. The Defendant No. 1 has committed breach of Trust reposed in him by the Plaintiff and thus the Defendants have unlawfully and illegally misappropriated the articles, things and the running business of the Plaintiff for themselves and to the exclusion of the Plaintiff.”

[Emphasis supplied]

20] In paragraph 10 of the plaint, the respondent has asserted that he is the tenant in respect of the suit pitch and the two defendants have no right title to the same and therefore, are liable to vacate the suit premises and hand over the business to the respondent forthwith. In paragraph 11, the plaintiff has claimed the relief of appointment of receiver. In paragraph 12 the plaintiff has claimed for mesne profits. In paragraph 13 there are averments that the appellant is on the verge of creating third party rights. In paragraph 14 it is pleaded that cause of action has arisen at Bombay and therefore, Civil Court has jurisdiction to try the suit. In paragraph 16 of the plaint, the reliefs claimed for have been set out.

21] The original defendant no. 1 in the suit, who is none other than the respondent's father did not file any written statement in the matter. However, the defendant no. 1 did file a reply to the notice of motion, in which, he dealt with the averments in the plaint. The appellant – defendant no. 2 filed written statement. In respect of the point which now arises for determination, it is necessary to refer to the averments in paragraph 2 of the written statement, which reads thus :

“2. This Defendant further respectfully submits that the Hon'ble Court will have no jurisdiction to entertain and try this suit. This Defendant states that the market value of the suit premises along with the business establishment would be more than Rs.50,000/- and therefore the subject matter of

the suit is beyond the pecuniary jurisdiction of this Hon'ble Court. ***Moreover the allegation of the Plaintiff in Para 9 of the Plaint that he has revoked the alleged license of the Defendant No. 1 and therefore the Defendant No. 11 and this Defendant are trespassers. In view of the said averment made in the Plaint, the suit would be between the Licensor and the Licensee for possession of the licensed premises which is exclusively triable by the Small Causes Court at Bombay and hence also this Hon'ble Court will have no jurisdiction to entertain and try the suit.***

(Emphasis supplied)

22] On the basis of pleadings of the parties, the learned trial Judge framed the following 10 issues :

"5. On the above pleadings three issues framed and settled were as follows :- (vide noting dated 20.6.1995).

1) Whether Plaintiff is entitled to carry on the business in suit premises, as lawful tenant in respect of the suit premises?

2) Do the Plaintiff prove that defendant is trespasser in respect of the suit premises and is liable to hand over possession of the same to the Plaintiff?

3) Whether the defendants prove that he has right, title or interest in the suit premises so as to lawfully carry on business in the suit premises?

4) Whether plaintiff is entitled to recover possession of the suit premises?

5) Whether defendant prove that this court has no jurisdiction to entertain and try the suit and that the suit

is liable to be dismissed?

6) *Whether defendant further prove that suit is not valued properly for the purpose of court fees and jurisdiction of this court?*

7) ***Whether defendant proves that suit is barred by the law of limitation?***

8) *Whether plaintiff is entitled to claim mesne profits in respect of the suit premises? If yes, at what rate per month?*

9) *Whether plaintiff is entitled for relief of declaration & injunction as prayed for?*

10) *What order?"*

[Emphasis supplied]

23] Issue No. 5 relates to jurisdiction of the civil court to entertain and try the suit. This issue was taken up along with issue no. 7, which relates to limitation. The discussion on issue nos. 5 and 7 is at paragraph 8 of the impugned judgment and decree and the same reads thus :

"Issue Nos. 5 & 7 :- According to the defendant this court has no jurisdiction because the defendant was in possession of the suit premises since May 1980 and if according to the plaintiff he was in unlawful occupation then cause of action accrued in the year 1980 itself and suit ought to have been brought within 3 years from the date of accrual of the cause of action to pray for declaration in view of Article 58 of the Limitation Act. It is difficult to agree with the contention of Mr. Mani because cause of action would really accrue in favour of the plaintiff when defendant is called upon to hand over the possession and defendant refused. According to

plaintiff defendant claimed under his father and when the plaintiff came back to India in the year 1980 he was surprised to see defendant No. 2 doing business in the suit premises then it is case of the plaintiff that he repeatedly called upon the defendant No. 2 to vacate the suit premises and defendant failed and neglected to do so. Thus suit filed on 6th June 1990 cannot be said to be beyond the period of limitation as it was filed within 3 years. Issue Nos. 5 & 7 are not proved by the defendant and must be answered against him."

24] From the aforesaid, it is quite evident that only issue no. 7 has been considered or discussed and there is no consideration or discussion with regard to issue no. 5. There is no merit in the submission of Mr. Tajane that even the issue of limitation is an issue relating to jurisdiction. In this case, at paragraph 2 of the written statement, the appellant had clearly objected to the jurisdiction of the civil court on the ground that this was a suit between a licensor and licensee and therefore such a suit would lie only before the Small Causes Court. The learned trial Judge thought it fit to frame a specific issue on the aspect of jurisdiction (issue no. 5) and the separate issue was framed on the point of limitation. However, upon perusal of paragraph 8 of the impugned judgment and decree, it is clear that though issue nos. 5 and 7 were taken up for consideration together, the discussion or the consideration is restricted only to the issue of limitation (issue no. 7). There is no discussion or

consideration with regard to issue no. 5, which relates to the issue of jurisdiction of the civil court to entertain a suit of this nature.

25] As noted earlier, even a suit between a licensor and the gratuitous licensee stands covered under section 41 of the said Act. In paragraph 6 of the plaint, the respondent has pleaded that he had allowed his father to use the suit premises or to carry on business therein 'gratuitously'. In paragraph 7, respondent has pleaded that it is the defendant no. 1 who handed over the business of the suit premises to the appellant (defendant no. 2). In this paragraph, it is once again reiterated that the respondent had allowed the defendant no. 1 to run the business gratuitously. The clincher however is in paragraph 9 of the plaint, wherein, the respondent has pleaded that both the defendants are trespassers in the suit premises as the licence of defendant no.1 is revoked and defendant no. 2 is wrongfully occupying the suit premises through defendant no. 1 and doing business of the plaintiff.

26] From the aforesaid averments in the plaint, it does appear that the suit as instituted, was one between the licensor and the licensee, particularly since the respondent has averred that the appellant (defendant no. 2) was claiming through the defendant no. 1, who was a licensee in respect of the suit premises. The question really is not whether such averment stands proved or not. The

question is whether in the light of such averments, the civil court had jurisdiction to entertain the suit or whether the plaint, ought to have been returned to the plaintiff for presentation before the Small Causes Court, which was entitled to entertain and try suits of such nature.

27] On basis of the aforesaid averments, which are to be considered in the context of section 41 of the said Act and the decisions of the Full Bench of this Court and the Supreme Court in the case of *Kotecha* (supra), it does appear that the suit as instituted, was one between the licensor and the licensee seeking recovery of possession of the suit pitch. Accepting Mr. Tajane's contention that the issues were framed after considering the pleadings of the parties, it is obvious that issue no. 5 relates to jurisdiction of the court, in the context of provisions of section 41 of the said Act. Perusal of the impugned judgment and decree however indicates that though such issue was framed, the same was not even considered by the learned trial Judge whilst making the impugned judgment and decree.

28] Rather than, remand the matter to the learned trial Judge at this point of time, taking into consideration the pleadings in the plaint and the provisions of section 41 of the said Act, it would be appropriate to hold that the civil court lacked jurisdiction and the

proper course of action to be adopted would be to return the plaint to the respondent (plaintiff) for presentation before the Small Causes Court, which is the court which has jurisdiction to try and entertain this suit, even according to the case set out by the appellant. Accordingly, the impugned judgment and decree is set aside. The plaint in the suit is returned to the plaintiff for presentation before the Small Causes Court within a period of eight weeks from today. The Small Causes Court is directed to dispose of the suit on its own merits and in accordance with law within a period of one year from the date of its presentation.

29] From the material on record it is apparent that the suit pitch was allotted by the MCGM to the respondent (plaintiff) upon certain terms and conditions. Neither parties were able to demonstrate that there was any provision under which rights to the suit pitch could have been transferred or alienated, as has been done in the present case. The submission that the MCGM has acquiesced in the matter, is clearly misplaced, since, the MCGM was not even a party to these proceedings. Accordingly, Registry to forward a copy of this order to the MCGM, since, it appears that the appellant and the respondent are basically, dealing with the MCGM's property. The MCGM to consider whether any case is made out to take action in the matter. The pendency of the suit, shall not preclude the MCGM from taking action in accordance with the law.

30] In terms of the interim orders granted by this Court, the appellant was directed to deposit a sum of Rs.1,000/- per month towards the user of the suit pitch. This order was made sometime in the year 1997 or thereabouts. Although, the impugned judgment and decree is set aside, the plaint is ordered to be returned to the respondent – plaintiff for presentation before the Small Causes Court, which, in the facts and circumstances of the present case, will be the appropriate court having jurisdiction to entertain the suit. In fact, it is the case of the appellant that it is the Small Causes Court is the competent court for entertaining a suit of the present nature. In such circumstances, it is only appropriate that the appellant, during the pendency of the suit before the Small Causes Court, deposits in the Small Causes Court a sum of Rs.5,000/- (Rupees Five Thousand) per month on or before the 5th day of each month. The amounts already deposited by the appellant in pursuance of the interim order, are ordered to be transferred to the Small Causes Court, should the respondent – plaintiff, present the plaint to the Small Causes Court. Such amount / deposits during the pendency of the suit, shall abide by final orders that shall be made in the suit. The Small Causes Court shall be at liberty to make appropriate orders with regard to investment of such amount.

31] The appeal is allowed in the aforesaid terms. There shall be no order as to costs.

32] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

33] At this stage, Mr. Tajane seeks a stay on the implementation of this judgment and order. Since, already sufficient time is granted to the appellant in the matter of presentation of the plaint before the Small Causes Court, no useful purpose will be served by simply staying the judgment and order now pronounced. Accordingly, the request is not accepted.

(M. S. SONAK, J.)

Chandka