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

WRIT PETITION NO. 12640 OF 2015

Mohan Vishnu Sapkal

...Petitioner

VS

St. Annes Girls High School & Anr.

...Respondents.

.....

Mr Rajesh Patil i/b Ms Sheetal M. Nadkarni for the Petitioner.

Mr Anil D'souza for Respondent Nos.1 and 2.

.....

CORAM : **B.P.COLABAWALLA J.**
JUNE 09, 2017.

P.C.:

Rule. Respondents waive service. Rule made returnable forthwith and heard finally.

2 By this Petition filed under Article 227 of the Constitution of India the Petitioner seeks to quash and set aside the Trial Court judgment and order dated 3rd December 2010 passed in R.A.D. Suit No.682 of 2009 as well as by the Appellate Bench dated 8th July 2014 passed in Miscellaneous Appeal No.223 of 2011. In both these orders, the Courts below have decided the preliminary issue of jurisdiction, as framed under Section 9A of the Code of Civil Procedure, 1908 (as applicable to the State of Maharashtra), and have held that the Small Causes

Court has no jurisdiction to entertain and try the suit filed by the Petitioner who was the Plaintiff in R.A.D. Suit No.682 of 2009. In a nutshell the Courts below have held that the Petitioner is unable to prove that he is a tenant and consequently held that it had no jurisdiction to entertain the Suit filed by the Petitioner. It is being aggrieved by these two orders that the Petitioner is before me under Article 227 of the Constitution of India.

3 The brief facts pertaining to the present controversy are as follows:-

- (a) The Petitioner claims that he was tenant of a room admeasuring 250 sq.ft. on the Ground Floor of St. Anne's Girls High School Compound, St. Francis Xavier st., Burrows Lane, Thakurdwar, Mumbai – 400 002 (for short “the suit premises”). The Respondents are the landlords of the said suit premises.
- (b) According to the Petitioner, prior to 1944 one Vishnu Sapkal (the father of the Petitioner) was the original tenant of the suit premises and who was in service of

the Respondents as a peon. In January - 1976 Vishnu Sapkal became bedridden, and therefore, his son Ashok Sapkal, the elder brother of the Petitioner, was given employment as a peon in the said school. The Petitioner's father died due to illness in the suit premises on 22nd August, 1976 and according to the Petitioner his brother Ashok Sapkal continued to pay rent to the Respondents. Thereafter Ashok also expired on 8th November, 1992. According to the Petitioner the wife of Ashok, the Petitioner, and the original heirs of Vishnu continued to reside in the suit premises.

- (c) According to the Petitioner after the death of Ashok (the brother), the Respondents from December 1992 stopped accepting the rent in respect of the suit premises. Accordingly, the Petitioner addressed a letter dated 15th February, 2000 to the Respondents informing them that the other legal heirs of Vishnu Sapkal released their rights in respect of the suit premises in favour of the Petitioner. I must mention

here that this letter has been denied by the Respondents as never having been received and in fact the Courts below have given a finding that there is no proof that such a letter was ever delivered to the Respondents.

(d) Be that as it may, on 14th July, 2008, Respondent No.1 called upon the Petitioner to handover possession of the suit premises on or before 30th April, 2009 as Respondent No.1 required the same for their own use and occupation. This was followed by another letter dated 3rd February, 2009 asking the Petitioner to handover the possession by 31st March, 2009.

(e) In view of this demand of Respondent No.1, the Petitioner on 20th April, 2009 filed R.A.D. Suit No. 682 of 2009 in the Small Causes Court of Bombay for a declaration that the Petitioner is a lawful tenant and the Respondents be directed to accept the rent and issue the rent receipts in favour of the Petitioner. A

mandatory order was also sought to restrain by way of an injunction, the Respondents from dispossessing the Petitioner and also to restore the electricity supply.

(f) In this suit, the first Respondent filed its Written Statement on 6th May, 2009. Thereafter, vide an order dated 7th May, 2009 the Trial Court framed the preliminary issue regarding jurisdiction and directed the Respondents to restore the electric supply of the suit premises. Thereafter, on 19th December, 2009 Respondent No.2 – trust was joined as Defendant No.2 in the suit.

(g) On the preliminary issue of jurisdiction as framed under Section 9A of the Act, the Petitioner in March 2010 entered the witness box and led evidence. The Respondents chose not to enter the witness box. After the evidence was led and hearing the parties, the Trial Court by its decision dated 3rd December 2010 held that the Small Causes Court had no

jurisdiction to entertain and try the suit for want of relationship between the Petitioner and the Respondents being one of a tenant and landlord.

- (h) Being aggrieved by this decision, the Petitioner preferred Miscellaneous Appeal No.223 of 2011 before the Appellate Bench of the Small Causes Court. This appeal was finally decided on 8th July, 2014 by which the Appellate Bench agreed with the findings given by the Trial Court and dismissed the appeal. It is being aggrieved by these two orders that the present Writ Petition has been filed seeking my interference under Article 227 of the Constitution of India.

4 In this factual backdrop Mr Patil, learned advocate appearing on behalf of the Petitioner submitted that both the Courts below have committed an error in not considering the documents produced before them in the suit and there was a material irregularity in not considering the evidence led by the Petitioner. He submitted that both the Courts below failed to

appreciate that the father of the Plaintiff/ Petitioner was a tenant in the suit premises even prior to 1944 and he was also in the service of the Respondents. According to the learned advocate for the Petitioner, undue importance was given to the fact that the Petitioner was not able to state the amount of rent that was paid for the suit premises to the Respondents without appreciating that at the time of the death of his father (who was the original tenant of the suit premises) the Petitioner was a minor, and therefore, could not be aware of the rent that was being paid to the Respondents.

5 Additionally Mr Patil learned advocate appearing on behalf of the Petitioner, submitted that the issue of jurisdiction has to be decided on the basis of the averments made in the plaint. He was at pains to point out the relevant paragraphs in the plaint and more particularly paragraph Nos. 1,2,6,12,13 and 14 to bring to my attention that the Petitioner had come with the clear case before the Small Causes Court that he was tenant of the suit premises and had sought a declaration to that effect. He submitted that the defence put forth by the Defendants is not to be looked into at the time of determining whether the Court has

jurisdiction to entertain the suit. He submitted that looking to the averments in the plaint, the Small Causes Court could not have come to the conclusion that it had no jurisdiction. This was ex-facie contrary to the pleadings in the plaint, and therefore, the impugned orders clearly suffer from perversity and/ or clearly indicate an error apparent on the face of the record requiring my interference under Article 227 of the Constitution of India. For all the aforesaid reasons, the learned advocate for the Petitioner submitted that the impugned orders have to go and ought to be quashed and set aside. To support his argument, the learned advocate for the Petitioner also relied upon a decision of the Supreme Court in the case of **Sushila Kashinath Dhonde Vs. Harilal Govindji Bhogani** reported in **1969(3) S.C.C. 223**.

6 On the other hand Mr D'souza, learned advocate appearing on behalf of the Respondents, submitted that the arguments canvassed on behalf of the Petitioner were wholly misconceived. He brought to my attention the order of the Trial Court as well as the Appellate Bench. He submitted that the Trial Court as well as Appellate Bench have correctly

appreciated all the facts and the evidence that was led by the Petitioner whilst deciding the preliminary issue of jurisdiction under Section 9A of the CPC, and thereafter, came to the conclusion that the Petitioner was unable to prove that he is the tenant. According to the learned advocate for the Respondents, proper and cogent reasons have been given by the Trial Court as well as the Appellate Bench to render such a finding. He submitted that these conclusions are fully justified from the evidence led by the Petitioner, and by no stretch of the imagination it can be termed as perverse or suffering from any error apparent on the face of the record requiring my interference, much less under Article 227 of the Constitution of India.

7 Mr D'souza additionally submitted that the arguments canvassed on behalf of the Petitioner that for deciding the issue of jurisdiction, only averments in the plaint ought to be looked at, is wholly misconceived in the facts and circumstances of the present case. He submitted that in the facts of the present case there was an issue of jurisdiction framed as a preliminary issue as contemplated under Section 9A

of the CPC. He submitted that it is settled law that when a preliminary issue of jurisdiction under Section 9A is framed and decided, the same is done after giving an opportunity to the parties to lead their evidence. Once decided, it is final and cannot thereafter be agitated once again at the trial of the suit, if the Court holds that it has jurisdiction. He submitted that this is a distinct departure from Order VII Rule 10 of the Act.

8 In any event, and without prejudice to the aforesaid arguments, the learned Advocate submitted that the Courts below have given a finding that they have no jurisdiction only on the basis of the evidence led by the Plaintiff and not by looking into any defence put forth by the Defendants. According to the learned advocate, the finding given by the Lower Court is that the Plaintiff / Petitioner has been unable to prove the jurisdictional fact that he was a tenant of the suit premises. It is on the failure of proving this jurisdictional fact, the Courts below have come to the conclusion that they had no jurisdiction to entertain the declaratory suit filed by the Petitioner seeking a declaration that he is the tenant of the suit premises. For all the aforesaid reasons, the learned advocate submitted that there

was no merit in this Writ Petition and the same ought to be dismissed with costs.

8 I have heard the learned counsel for parties at length and have carefully perused both the impugned orders. The facts clearly are not much in dispute. It is not in dispute that the father of the Petitioner was in the service of the Respondents and was occupying the suit premises. It is also not in dispute that the elder brother of the Petitioner (Ashok Sapkal) was employed with the Respondents as a peon after the death of his father (Vishnu Sapkal). However the main dispute between the parties appears to be whether the Petitioner's predecessors were treated as tenants or whether the father of the Petitioner as well as the brother of the Petitioner were allowed to occupy these premises on the ground that they were in the services of the Respondent. Whilst deciding the preliminary issue of jurisdiction and which was answered against the Petitioner, I find that the Trial Court has come to its conclusion after giving detailed reasoning and considering all the evidence on record. The Trial Court came to the conclusion that despite the fact that the Petitioner has come with the specific case that his father and

thereafter his brother were paying rent to the Respondents he was unable to prove this fact. In fact he was unable to state what was the rent paid. Even if the version of the Petitioner/ Plaintiff is to be accepted that after the death of his brother in the year 1992, the Plaintiff attempted to pay such rent on his behalf but could not do so due to refusal on the part of the Respondents to accept the same, not once has the Petitioner called upon the Respondents in writing to accept the rent or any arrears. Furthermore, I find nowhere on record as to what was the rent that was sought to be tendered by the Petitioner to the Respondents. As rightly held by the Trial Court, this entire case seems to be put up as an afterthought and the evidence led by the Petitioner does not inspire any confidence. Thereafter the Trial Court has proceeded to examine the definition of the word **“tenant”** as well as the word **“licensee”** as appearing in the Maharashtra Rent Control Act, 1999. After considering the evidence on record and relevant statutory provisions the Trial Court has come to a conclusion that the Petitioner had failed to prove that either his father or his brother were tenants in respect of the suit premises. Consequently, the Petitioner, therefore, could not get any right, title or interest as a tenant in

the same, and therefore, no relationship between the Petitioner and the Respondents as one of tenant and landlord could be established. Consequently the preliminary issue of jurisdiction was answered in the negative and against the Petitioner/Plaintiff.

9 As mentioned earlier, aggrieved by this order, the Petitioner preferred an appeal to the Appellate Bench of the Small Causes Court. The Appellate Bench also has passed a detailed judgment and order considering all the facts on record as well as the evidence led by the Petitioner. Even the Appellate Bench has examined the evidence carefully as set out in paragraph Nos.14 to 24 of its decision. The Appellate Bench has specifically noted the admission on behalf of the Petitioner in his cross-examination that he has no documentary evidence to show that his father was a tenant of the suit premises. The Petitioner has further admitted that he has no documentary evidence to show that his father was depositing the rent with the Respondents. Apart from making these bald assertions there was nothing on record to establish this fact. The Petitioner in the cross-examination has further admitted that he had no

information or knowledge as to how much rent was paid by his father or his brother and that he is not in service of the school but doing his own business. The Appellate Bench has further noted that the Petitioner had no evidence whatsoever to show that after the death of his father and brother he attempted to deposit the alleged rent of the suit premises with the Respondents. He has specifically admitted that he has no knowledge as to what was the monthly rent payable for the suit premises. Looking to all this evidence as considered by the Courts below, not only do I think that the findings given by them are wholly justified but certainly do not suffer from any perversity or error of law apparent on the face of the record requiring my interference under Article 227 of the Constitution of India. I find that both the orders passed by the Courts below are well reasoned and have taken into consideration all the aspects of the matter before coming to the conclusions and the findings that they have.

10 This now only leaves me to deal with the decision of the Supreme Court cited by the learned advocate for the Petitioner in the case of **Sushila Kashinath Dhonde** (supra).

On carefully perusing this decision I find that the same is wholly inapplicable to the facts of the present case. In the case before Supreme Court, the Plaintiff therein had instituted a Rent Act suit in the court of Small Causes at Bombay against Respondent No.2 therein and its three partners. According to the Plaintiff therein Defendant Nos.2 to 5 were the owners of a open plot of land known as Jalaram Nagar situate in Greater Bombay and were doing business of construction. The said Defendants represented to the Plaintiff that they were putting up a building on the suit premises according to the plans and specifications submitted to the Bombay Municipality. The Plaintiffs applied to the Defendant to let to them, on the basis of a monthly tenancy, a portion of the building to be constructed. Since the building was ready for occupation, Defendant Nos.1 to 4 agreed to do so on the Plaintiff advancing a sum of Rs.12,500/- as a loan towards construction and on their executing a Deed of Charge in accordance with the provisions of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. The Plaintiff agreed to these conditions and accordingly advanced a sum of Rs.12,500/-. In turn the Defendants executed a Deed of Charge in favour of the Plaintiff which Deed of Charge was also registered with the

Sub-Registrar of Bombay on the same date. Thereafter Defendant Nos.1 to 4 started construction of the building. Though the construction was completed, they failed to let out the said premises to the Plaintiff despite the conditions to that effect in the Deed of Charge dated 12th August, 1959. Instead the said Defendants let out the same to some third parties contrary and in breach of the conditions contained in the Deed of Charge. It is in this light that a suit came to be filed in the Small Causes Court by the Plaintiff claiming charge under Section 18 of the old Rent Act. The arguments canvassed before the Supreme Court was that the Small Causes Court had no jurisdiction because the property had been let out to some third parties. It is in this light that the Supreme Court at paragraph 18 held that having due regard to the aspects mentioned and the provisions of Section 18(3) and 28(1), it was not necessary that there should be a relationship of landlord and tenant in respect of all matters covered by Section 28(1) of the Act so as to give jurisdiction to the Courts of Small Causes.

11 There is no dispute with the aforesaid proposition especially considering the specific language of Section 28 of the

old Rent Act. I however fail to see how this judgment would apply to the facts of the present case. Firstly there is a material difference in the language of Section 28 of the Old Rent Act and Section 33 of the new Rent Act. The words appearing in Section 28 of the old Rent Act, namely, “*ought to deal with any claim or question arising out of this Act or any of its provisions*” are conspicuously missing in Section 33 of the new Rent Act. In fact, the Supreme Court, whilst rendering its decision has placed reliance on these very words in Section 28 of the old Rent Act. Keeping this in mind, I find that the judgment of the Supreme Court relied upon by the learned advocate for the Petitioner is wholly misconceived and has no application to the facts of the present case.

12 For all the aforesaid reasons, I find that no case for interference under Article 227 of the Constitution of India is made out for interfering with the decisions of the Courts below on the issue of jurisdiction.

13 However, I find that the Courts below were in error when they ordered that the plaint be returned to the Plaintiff

under Order VII Rule 10 of the Code of Civil Procedure. When a Court comes to a conclusion that it has no jurisdiction regarding the subject matter of the suit, it cannot return the plaint under Order VII Rule 10 of CPC but has to dismiss the suit. This has also been held in a decision of our Court in the case of **Anil Bhat Vs Citibank, N.A.** reported in **AIR 2009 Bombay 99**. The relevant para of this decision reads thus:-

“Let us consider the submission. An added submission is that even if the Civil Court holds that it has no jurisdiction over the subject matter then its jurisdiction to direct return the plaint is limited to those cases relating to want of territorial or pecuniary jurisdiction. The argument proceeds on the footing that if the Court has no jurisdiction over the subject matter, once it holds that it has no jurisdiction it can pass no further order. In a case of territorial or pecuniary jurisdiction the Court would have jurisdiction over the subject matter, but cannot entertain the proceedings because it does not have territorial jurisdiction or the claim is not within its pecuniary limits.

Such an issue had come up for consideration before the Supreme Court in **Raizada Topandas and Anr. v. Gorakhram Gokalchand** : [1964] 3 SCR 214 . The issue before the Supreme Court was whether on a proper interpretation of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 the Court of Small Causes, Bombay, had exclusive jurisdiction to deal with the same. Relief sought in a Suit filed before the City Civil Court was that the plaintiff be declared to be in lawful possession and the Defendants had no right to enter into or remain in possession of the shop, injunction and other consequential reliefs. The defence raised was that the question involved in the suit related to possession of the premises as between landlord and tenant and the Court of Small Causes alone will have jurisdiction to entertain and try the suit. On these pleadings a preliminary issue was framed. The City Civil Court held in favour of the defendants and accordingly made an order that the plaint be returned to the plaintiff for presentation to the proper Court. In Appeal before the High Court the Court took a view that the City Civil Court had jurisdiction. Against that order Special Leave to Appeal was preferred from which the Appeal arose. Before the Court the issue was, if the defendant raised the claim or question as to existence of relationship of landlord and tenant as to between the defendant and the Plaintiff the jurisdiction of City Civil Court is ousted even though the plaintiff pleads that there is no such relationship and the only Court which has exclusive jurisdiction to try the suit is the Court of Small Causes. In answering the question the Court relied on the principle as explained in a Full Bench decision of

the Allahabad High Court in *Ananti v. Channu*, AIR 1930 All. 193. We may gainfully reproduce the said paragraph:

“The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chose. If.....he frames his suit in a manner not warranted by the facts and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint as, would not justify the other kind of court to grant him the relief..... If it is found on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognisable by the court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper Court. If, on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety.”

Relying on this principle the Court held, that the view taken by the High Court was correct. The proposition which follows is that the power of the Civil Court to direct return of the plaint is limited to those cases where it has no territorial or pecuniary jurisdiction. In case if it has no jurisdiction in respect of the subject matter then it cannot direct return of the plaint. If this principle is accepted on the facts of the case then the Tribunal would have no jurisdiction to direct return of the plaint as it came to the conclusion that it had no jurisdiction over the subject matter.”

14 In view of the aforesaid, the direction of the Trial Court that the plaint be returned under Order VII Rule 10 of the CPC is set aside and the suit filed by the Petitioner stands dismissed. The Petitioner is at liberty to adopt appropriate proceedings to agitate his rights in accordance with law. The Writ Petition is disposed of in the aforesaid terms. There shall be no order as to costs.

(B.P.COLABAWALLA, J.)