

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.466 OF 2017

Arun Kumar ...Appellant
Versus
Aktar Quershi alias Aktar Kamru Qureshi & Anr ...Respondents

Ms Deepa Pohuja, *with Pratibha Rupnawar, for the Appellant.*
Mr V Sathaye, *with Mr Sayed Mulani, i/b Mulani & Co, for*
Respondents Nos.1 and 2.

CORAM: G.S. PATEL, J
DATED: 12th July 2017

PC:-

1. By consent heard finally. There is a compilation of the record below.

2. The Trial Court was required on account of an objection taken by Defendants to frame a preliminary issue of jurisdiction under Section 9A of the Code of Civil Procedure, 1908 (“**CPC**”). The Plaintiffs are, respectively, a private limited company and the proprietor of a firm. They brought suit (it was first filed on the Original Side of this Court) for a declaration that the Defendants were not entitled to enter into the suit premises, for a permanent injunction restraining the Defendants from disturbing the Plaintiffs’ possession, for damages and other reliefs. They said that one Harsh Saigal, one Mrs Kamlesh Saigal, one Goldie Sud and one Mrs Shilpa

Goldie Sud were the owners of commercial premises admeasuring 765 sq yards., Plot No.494, Bandra TPS III, Mumbai 400 050, CTS No.F/366. On this there is a ground plus three floor structure. There is also a separate independent garage. The 1st Plaintiff is a tenant of part of the ground floor premises and an independent shop. The 2nd Plaintiff is a licensee of part of the ground floor premises. The Plaint was mounted on the footing that the 1st Plaintiff had a Shops and Establishments licence in its name for the front portion of the tenanted premises. It had a rent receipt and an electricity meter in its name. The rear portion of the suit premises was taken by the 2nd Plaintiff on a leave and licence basis under a registered document dated 17th December 2005.

3. Paragraph 7 of the Plaint said that the Plaintiffs had set up a business appointing salespersons to sell ladies' garments and, separately but in the same establishment, edible items. Each salesperson was paid a commission on the turnover achieved. Commissions were calculated at the end of each day. According to the Plaintiffs, the Defendants were two such salespersons. They had no fixed place or counter. The Plaint proceeded on the footing that the Defendants did not perform up to expectations and were told on 18th January 2010 to leave and not return.

4. On account of the division of the premises into the front and rear portions, the 1st Plaintiff had the keys to the front portion and the 2nd Plaintiff had the keys to the rear portion. There were no internal partitions or separate divisions within the 1st Plaintiff's shop. There were only movable counters and racks. No salesperson could claim to be in 'possession' of any defined portion of the suit

premises. All sales persons were on a commission basis, from day to day. The apprehension was that the Defendants were seeking to forcibly enter the premises.

5. This Suit was first filed in this Court on Original Side as Suit No.998 of 2010. It was only much later transferred upon an increase and change of pecuniary jurisdiction to the City Civil Court. While it was pending in this Court, the Plaintiffs filed a Notice of Motion seeking interim reliefs. While it was pending on the Original Side of this Court, the Plaintiffs' Notice of Motion was finally disposed of by an order of 14th September 2010 (SC Dharmadhikari J). The Court passed a detailed order after considering the rival contentions and in paragraph 27 the Court held there was a *prima facie* case made out by the Plaintiffs of the Defendants having no authority whatever to remain in the property or premises. This is how paragraphs 27 to 29 of that order read:

27) **For the present, I have satisfied myself that the averments in the NMS1050-10 25 plaint makes out a prima facie case of defendants having no authority to remain in the property or premises.** Defendants have failed to produce any material in that behalf. If the arrangement as pleaded in the plaint be it as noticed by the learned Judge or otherwise having come to an end and the defendants failing to establish even prima facie semblance of the right to remain in the property, then, plaintiffs must succeed. The balance of convenience is also in their favour. However, considering that the defendants are petty traders who claim to have entered into some arrangement with the plaintiffs for selling their goods and which arrangement has been continuing till date, interest of justice would be served if the following order is passed.

28) There will be an interim order in favour of the plaintiffs and against the defendants restraining them or any person claiming through them from entering upon the premises which are more particularly described in prayer clauses of the plaint and demarcated on the sketch at Exh.A thereto.

29) However, **to enable the defendants to approach the competent court** NMS1050-10 and seek appropriate reliefs, interim or otherwise, so as to protect their claim, **it is directed that this order of injunction shall come into effect after a period of four weeks from today.** Motion disposed of in above terms with no order as to costs.

(Emphasis added)

6. The Defendants did not make any application to the Court of Small Causes seeking a declaration of tenancy in their favour.
7. Instead they filed an Appeal. On 23rd February 2011, that appeal was disposed of by a consent order in the following terms:

"1. Admit.

2. Heard finally by consent of parties. **By consent of parties the order impugned in the Appeal is set aside. The learned Single Judge is requested to decide the notice of motion afresh. First, the learned Single Judge shall frame preliminary issue as required by the provisions of Section 9A of the Civil Procedure Code as objection to the jurisdiction has been raised. Depending on the decision on the preliminary issue, the notice of motion shall be decided.** The learned Single Judge is requested to take up the matter on priority basis

and hear it as expeditiously as possible within a period of three months from today. The appeal is disposed of."

(Emphasis added)

8. Thus, it was at this stage that the preliminary issue was directed to be framed, viz., as to whether the Court had jurisdiction to entertain and try the Suit.

9. This is where matters stood when the suit was transferred to the City Civil Court upon a change in the jurisdictional limits of the two courts. It was in these circumstances that the City Civil Court took up the matter for a decision on the preliminary issue. The Defendants led evidence before the Trial Court and their witnesses were cross-examined.

10. The Defendants' case in their evidence Affidavit is set out in paragraph 1 of the evidence Affidavit of the 1st Defendant. This is how it reads:

"1. The plaintiffs have jointly filed this suit against me and other defendant seeking reliefs of declaration along with perpetual injunction restraining us from entering the suit property as mentioned in the reliefs clauses of the Plaint. I am filing this affidavit of evidence in support of the preliminary issue of jurisdiction raised on behalf of the defendant. **I say that we are tenants in the suit property and not the employees of the Plaintiff Nos.1 and 2.** The reliefs claimed are in the nature that indirectly plaintiffs are trying to disposes the defendants by seeking the relief of injunction against the defendants on the suit property. To say it otherwise under the guise of suit of injunction, **plaintiffs are trying to dispossess the defendants from**

the suit property in which they are tenants. I say that since defendants are tenants in the suit property, this suit filed in this Hon'ble Court is not maintainable. This Hon'ble Court does not have jurisdiction to try and entertain the present dispute. **I say that since defendants are tenants, and the dispute therefore is governed under Maharashtra Rent Control Act, 1999, Small Causes Court in Mumbai has the jurisdiction to try and entertain the present suit."**

(Emphasis added)

11. Obviously, so far as jurisdiction was concerned, therefore, the question was whether the jurisdiction of the Civil Court was ousted because of the special jurisdiction conferred on the Small Causes Court by virtue of Section 41 of the Presidency Small Causes Courts Act and the provisions of the Maharashtra Rent Control Act. There was no plea here of any easementary or prescriptive rights; clearly that objection could not have been taken as a preliminary issue to oust the jurisdiction of the City Civil Court.

12. It is important to note that the plea here is specifically of — and only of — a tenancy; there is no alternative plea of the Defendants being licensees, whether as protected licensees, licensees for consideration, or gratuitous licensees. The specific plea is of the Defendants being 'tenants', with everything that this implies. It necessarily follows that the claim of the tenancy had to be established. On the claim being established, the jurisdiction of the Civil Court would stand ousted.

13. The finding of the Trial Court to which I will immediately turn is in paragraph 26 of the impugned order:

"26. **Thus it is amply clear** from the evidence led by the defendants and there being no evidence from the side of plaintiffs to counter the claim of the defendants, ***that there exists some relationship between the defendant and the plaintiffs*** and that the defendants are not mere employees as contended by the plaintiffs in the suit. Therefore in view of the provisions of section 33 and 41 of the Small Causes Court **since there appears to be relationship like *landlord or tenant or licensee*** between the plaintiff and the defendants, **this Court certainly would not have jurisdiction to entertain and try this suit.** Hence issue is answered accordingly and following order is passed:

ORDER

1. This Court has no jurisdiction to try and entertain this suit.
2. The suit is returned to the plaintiff for its proper presentation in the appropriate forum."

(Emphasis added)

14. I am unable to understand how the court could have used this as a reason to find for the Defendants. The reasoning seems to be completely speculative. There is no finding that the Defendants established their only claim, one of tenancy. The Court seems uncertain whether what is established is a tenancy or a licensee. The emphasized portion quoted earlier shows that the Trial Court, with respect, proceeded on a basis of an assumption, and that it did so

because the evidence before it was unclear on the plea raised by the Defendants. This is also borne out by paragraph 23:

"23 Thus having marshalled the evidence led down by the defendants, the fact clearly emerges that not only the defendant No.1 but other persons are running some shops in the same premises which is known as Gazebo Departmental Store as pointed by the plaintiffs and there are certain transactions between the defendants and one of the co-owner Mr Goldie Sud and it is consistently deposed by all the witnesses that some amount is paid on monthly basis. **Therefore even if at this moment of time there is no straight evidence to prove and establish that the defendants are inducted in the suit premises as tenant or licensee.** However, there is evidence adduced by the defendants which indicate that **there is some relationship between the plaintiff and defendants concerning the different stores and shops in the said premises. Therefore there exists relationship either in the form of tenant or in the form of licensee.** The plaintiff was required to adduce evidence in rebuttal to the case of the defendant that in fact Departmental Store is run by the plaintiff and defendants were their employees. However, no such evidence is led by plaintiff. Hence the real interest in the present suit is to recover possession by giving go by to the provisions of Rent Act."

Thus, the suit was dismissed.

15. What is it, therefore, that the Defendants have placed on record to establish their claim of tenancy? That, as I have noted, was the only case pleaded by the Defendants: not a license, not prescription, but only a tenancy. First, Mr Sathaye for the Respondents-Defendants submits that the City Civil Court has no

power to issue a declaration of tenancy. That is correct; but in this context it is misconceived. The preliminary objection raised under CPC Section 9A does not envisage the grant of any kind of declaration. That is not the purpose or ambit of the section. In deciding a jurisdictional issue under CPC Section 9A, no declaratory decree is ever contemplated. But when a jurisdictional ouster is being tested, this cannot be done on speculation, surmise, or conjecture, and these cannot be allowed to take the place of the evidence. The Court must determine whether there is a tenancy or a license. If it finds this is established, its jurisdiction ends. It does not then go on to grant a declaration. It passes no decree. It only says that because of the nature of the juridical landlord-tenant relationship established by cogent evidence, its jurisdiction stands is ousted. In fact, the argument is self-defeating. Once the City Civil Court finds that there is a landlord-tenant or licensor-licensee relationship, it divests itself of jurisdiction. It cannot grant the declaration. Any such declaration would be a nullity for want of jurisdiction in the first place. But this does not mean that the Court is not to determine whether the jurisdiction is ousted on account of such a relationship being proved in the first place. It is not the defence taken that determines or changes the forum. The special jurisdiction of the Small Causes Court does not grant exclusive jurisdiction to try questions of title. Where a plaintiff does not admit the landlord-tenant relationship (this being the only case pleaded here), the defendant's plea cannot force the plaintiff to go to the Small Causes Court.¹

1 *Raizada Topandas & Anr v Gorakhram Gokalchand*, (1964) 3 SCR 214.

16. What Mr Sathaye propounds is actually unthinkable: in almost every case for possession, or in every single trespass action, a defendant has merely to plead a tenancy; this is taken a preliminary issue; and, on Mr Sathaye's formulation, because the Civil Court 'cannot decide whether there is a tenancy or not', on that plea taken by the defendant, the suit would fail a jurisdictional test, and the suit would have to be re-filed in the Small Causes Court. There, on Mr Sathaye's formulation, the parties would join issue on the existence or non-existence of a landlord-tenant relationship. There, in the Small Causes Court, a finding would be returned. If that finding was in the negative, i.e., that there was *no* landlord-tenant relationship, the suit in the Small Causes Court would be dismissed, and the hapless plaintiff would have to return to the City Court and start all over again. In short, the logical consequence of this is that every single possession suit must, willy-nilly, be filed first in the Court of Small Causes, if for no other reason than in anticipation of a defence of tenancy; because that defence, merely stated, is a sufficient ouster of a Civil Court's jurisdiction. The submission needs only to be stated to be rejected.²

17. Therefore, the question is what is it that was 'proved'? The answer is to be found in only two pages. This is the cross-examination of DW-1. Here he says that he gave Rs.5,00,000/- to Mr Goldie Sud in installments. Mr Sathaye argues that this must necessarily imply that a tenancy was created. It implies no such thing. The witness then goes on to say that there is no evidence of his having paid this amount. He says there was a notebook. He

2 *Raizada Topandas* anticipates precisely such a situation, and rejects it as untenable.

maintained details of the transaction but that was lost in a fire. In this fire he says their notebooks and goods were destroyed. He therefore has no evidence of any payment. According to him, he was paying rent of Rs.1,200/- per month. He has nothing to show this. He admits he has no evidence of having paid rent. This is exceedingly peculiar, and for more than one reason. There are of course no rent receipts. But there is no evidence of any payment either. We are left to assume that the payments must be in cash. If there was payment by cheque, this could have been proved. Even this has not been done. In short there is nothing at all directly in evidence to show the existence of any tenancy.

18. The Plaintiffs had then relied on two sets of photographs which show that there was a fire. On the second photograph there is a sign which says “Gazebo”; “opening soon”; “site office” and then “Gazebo Mela stall bookings open”.

19. Mr Sathaye would have it that from this I am necessarily required to conclude that a landlord-tenant relationship between the Plaintiff and the Defendants was proved, and that the Defendants were two of several persons who were given a “tenancy” of a counter space in the shop, and that this was for Rs.1,200/- per month. All of this, he says, is ‘proved’ by this signboard. I disagree. If anything, advertising the availability of ‘stalls’ defeats the argument of a tenancy. No one allotted a stall in a mela or fair can ever claim a ‘tenancy’.

20. Besides, to accept that there could ever have been a rent of Rs.1,200/- per month for any property at all on Linking Road in

Mumbai strains credulity. The rents are among the highest in the area, and Mumbai's rents are among the highest in the country. Second, and this is a recurrent problem in this matter, we are again pushed into the realm of conjecture, with surmise sought to be substituted for evidence. For, from this one signboard in an undated photograph of unknown origin or provenance, a Court is asked, on the purest speculation, to conclude that two individuals had a defined tenancy agreement with the owner. Other explanations are equally possible: there was a mela or a temporary fair for which stall bookings were open. This does not mean that the shop ran on the basis of tenancies being created. As we can see, there is no limit to speculation. But the law does not ask for speculation. It demands proof. It commands evidence. Sans proof, sans evidence, there is nothing on which a judicial decision can be taken.

21. Last and but not least, a case of tenancy must be one that does not, as this one does, defy common senses. I understand that in a city like Mumbai, every inch of real estate is valuable. But for someone to claim a 'tenancy' of a sale counter or of an otherwise unsegregated area is not only beyond credibility but very possibly does extreme violence to the language.

22. The Plaintiffs could not have been non-suited on this material, and most emphatically not on a finding that the Defendants were 'probably' either a tenant or a licensee; equally probably, they were neither. Equally probably, they were employees. Equally probably, they were, as the Plaintiffs say, salespersons on a commission basis with no defined station or counter.

23. An ouster of jurisdiction of a Civil Court is not likely to be assumed. That divesting happens in very restricted circumstances and in exceptional cases, and in every single case, the facts demanding the ouster must be established.

24. Mr Sathaye reliance on the decision of the Single Judge of this Court in *Miscellaneous Marketers Pvt Ltd vs Sun-N-Sand Pvt Ltd*,³ is of no assistance. In that case Sawant J held that on the expiry of a license, relief of injunction could be claimed as a consequential relief and the relief of possession was not referable to Section 41 of the Presidency Small Causes Court Act. The suit was held to be maintainable. In *Sutar Pukraj Somtiji vs Yellubai Mallappa Wagle & Another*,⁴ Khandeparkar, J had before him a case where the original tenant had surrendered the tenancy. The jurisdictional issue arose in those circumstances. It surely has no parallel to the case at hand.

25. In my view, the order under Appeal cannot be sustained. The Appeal is allowed. The order is set aside. In consequence, since the purpose of the appellate order of 23rd February 2011 has been achieved, the question is whether Dharmadhikari J's order of 14th September 2010 should be restored as the final interim order in the Suit. I say this only because the Appeal was allowed by consent on the limited ground of Section 9A and nothing else. There was no assessment on merits at all. In the view that I have taken, that preliminary issue had to be answered in favour of the Plaintiffs and not against the Defendants.

3 2016(5) Bom CR 578.

4 2002(5) Bom CR 16.

26. Mr Sathaye submits that now he must be at liberty to argue the Motion again. I do not think this remotely correct. The Defendants cannot constantly get second, third and fourth bites at the cherry like this. The matter was argued at the ad-interim stage. It was then argued at the interim stage before Dharmadhikari J. It was argued in Appeal. It was argued under CPC Section 9A issue. Now the Defendants have failed, they cannot be allowed to argue that the Plaintiffs should have to re-establish a *prima facie* case. The only reason for the appellate order was the jurisdictional issue. That was the only ground on which the appeal was allowed, and that too by consent. There was no assessment at all on merits of Dharmadhikari J's order or a finding that his order, on merits, was in any way incorrect at all. Mr Sathaye submits that the appellate order directed, albeit by consent, that the Motion be decided afresh; it was; and, in any case, I have not held against him only on the question of jurisdiction, but also on the merits of the defence raised.

27. In direct consequence, the view that Dharmadhikari J took on the Motion itself must be the one that will now hold the field as between these parties; not only for the reasons he gave then, but for the additional reasons I have set out above. There will however have to be a modification in that there is no longer any question of the Defendants now being entitled to approach the competent Court and to seek any variation thereafter of this order.

28. There will thus be an interim order in favour of the Plaintiffs against the Defendants restraining them and any all persons claiming through them from entering the premises described in the

prayer clause (a) and demarcated on the sketch at Exhibit 'A' to the plaint.

29. The Appeal is disposed of in these terms. Given the manner in which the Defendants have proceeded, there will be an order of costs against each of the Defendants in the amount of Rs.25,000/-. These costs are modest, in my estimation, but they are necessary, because of the complete frivolity of the Defendants' case on jurisdiction.

30. Mr Sathaye requests a stay of this order. The request is refused. There is no warrant or justification for it at all. The entire case is without a shred of merit. The Defendants were given the fullest opportunity to establish their case of a jurisdictional bar. They utterly failed to adduce an iota of credible evidence. The Plaintiffs have been put to unimaginable trouble in prosecuting their case and meeting the utterly unsubstantiated jurisdictional ouster case. To accept Mr Sathaye's request is to accept that a person who so completely fails to establish a case, despite every opportunity, must still be afforded a further chance. In this context, it is to be noted, at the cost of repetition, that Dharmadhikari J did just this: he gave the Defendants a chance to establish their claim. They squandered that opportunity. The reasons are obvious.

31. The Appeal is disposed of in these terms.

(G. S. PATEL, J.)