

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4448 OF 2017

Smt.Olga Kriplani alias
Smt.Olga Satish Patkar & ors. ... Petitioners

Vs.

Shri Surendra Chandumal Gandhi & anr. ... Respondents

Mr.P.S. Gidwani for the Petitioner

Miss Firdaus Moosa i/b Prakash Mahadik for Resp. No.1

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JULY 19, 2017

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
2. The petitioners are the original defendants in the Bombay City Civil Court Suit bearing S.C. Suit No.9572 of 1993 (High Court Suit No.4097 of 1993). Defendant No.1 Surendra Gandhi is the original plaintiff. The original plaintiff Surendra has filed a suit against the defendants to remove themselves from the suit flat and

give vacant and peaceful possession of the same. Further, demand for mesne profits for the wrongful use and occupation and possession of the suit flat No.163, Meherdad, Cuffe Parade, Bombay-400 005. Respondent No.2, the original plaintiff, has sought amendment and the prayer of declaration is added that she be declared as the owner of the suit flat at Meherdad and also sought eviction of the suit flat. Chamber Summons No.344 of 2017 in the said suit was taken out by the petitioners/defendants with prayer that additional issue regarding jurisdiction is to be framed, which is as follows:

Whether the Court has jurisdiction to entertain and try the suit in lieu of the averments made by the original plaintiff in paragraph 26 of the plaint?

3. The trial Court called upon the parties to make submissions on the prayer in Chamber Summons and by order dated 3.4.2017 held that there is no need to frame the issue and rejected the Chamber Summons. The said order is under challenge.

4. The learned Counsel for the petitioners has submitted that the plaintiff has filed a suit against the gratuitous licencees, who are staying with the permission of the owners of the suit premises i.e., flat No.163 of Meherdad building. Petitioner No.1 is the mother and petitioners Nos.2 and 3 are the minor daughters of the petitioner No.1. He submitted that the flat originally belonged to one Kim Gandhi, the wife of the original plaintiff Surendra Gandhi and after her death, the original plaintiff, who was the only successor became the sole owner of the said flat. Petitioner No.1 , Olga Kriplani, is the sister in law of late Kim Gandhi, who was the original owner of the suit flat. She is the wife of Mohan Kriplani, who was the brother of Kim Gandhi. It is argued by the learned Counsel that petitioner No.1 occupied the said flat with the permission of Kim Gandhi and thereafter, her husband i.e., the original plaintiff. He submitted that the trial Court has no jurisdiction to try and entertain the said suit. He argued that the suit against the gratuitous licensee should go before the Small Causes Court. This position of law is made clear in the case of **Prabhudas Damodar Kotecha & Ors. vs. Manhabala Jeram Damodar & anr.**¹ which was confirmed by the Supreme Court².

1 2007 (5) Mh.L.J. 341 (FB)

2 AIR 2013 SC 2959

He also relied on the judgment of a learned Single Judge of this court in the case of **John Francis Anthony Gonsalves & anr. vs. Coin M. Rebello**³. The learned Counsel submitted that in the suit dealing with the eviction of a gratuitous licensee, if the issue of title erupts, then, the Small Causes Court has power and jurisdiction to deal with the said issue. The learned Counsel, therefore, submitted that the finding given by the learned trial Judge that the suit is for possession and title and not against the gratuitous licensee is incorrect and illegal, especially in the light of the pleadings in paragraph 26 of the plaint. Thus, he has prayed that the said order is to be set aside.

5. The learned Counsel for the petitioners raised one more point that though the issue of title is decided by the civil Court and if the issue is held in favour of the plaintiffs, then, the status of the petitioner/defendants will be automatically gratuitous licensees. In the event of such a finding, the dispute will be between the owner and the gratuitous licensee. Thus, at that stage, the ratio laid down in the **Prabhudas Damodar Kotecha & Ors. (supra)** will bar the jurisdiction of the City Civil Court and at that stage, the suit will have to be transferred by City Civil Court to the Small Causes

³ 2014 (1) Mh.L.J. 562 (Bom)

Court. If it is so, then, the proceedings will prolong and trial will be manifold and delayed. In support of his submission, he relied on the Full Bench judgment of the Bombay High Court in the case of **Dattatraya Krishna Jangam vs. Jairam Ganesh Gore (supra)**.

6. Per contra, learned Counsel for the respondent, drew my attention to the pleadings in the plaint. She submitted that the pleadings in para 26 of the plaint cannot be read in isolation as the plaint is to be read as a whole. In support of her submission, she relied on the judgment in the case of **Udhav Singh vs. Madhav Rao Scindia**⁴.

7. She further submitted that the suit is not against a gratuitous licensee but the defendants i.e., the petitioners/defendant claim their right and title in the suit flat as successors of Kim Gandhi nee Kriplani. She further submitted that the suit was filed in 1993. the defendants have filed the written statement. Issues were framed on 28.7.2015 and then, in the year 2017, a Chamber Summons is taken out and thus, the defendants cannot after 23 years of pendency of the suit, raise framing of an additional issue of jurisdiction.

4 AIR 1976 SC 744

8. The learned Counsel for the respondents have further submitted that the petitioners / defendants in their written statement have claimed ownership and 1/3rd share in the suit flat and they are the co-owners and therefore, they are not liable to pay compensation and are in rightful occupation and possession of the suit flat. The learned Counsel has submitted that thus, the stand taken by the petitioners/defendant in their affidavit of Chamber Summons and the written statement is contrary. She supported the order passed by the learned Judge.

9. The Chamber Summons preferred by the petitioners/defendants mainly is based on the law laid down in the case of **Prabhudas Damodar Kotecha & Ors. (supra)** decided by the Supreme Court and the judgment of the Bombay High Court in **John Francis Anthony Gonsalves & anr. (supra)**. In the case of **Prabhudas Damodar Kotecha & Ors. (supra)**, the Supreme Court has defined the expression "licencee" u/s 41 of the Presidency Small Cause Courts Act, 1882 and also section 5(4A), 15A of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947. It held that the gratuitous licensee which is defined in Easements Act includes gratuitous licensee also and

therefore, all the suits between the gratuitous licensee and the landlord or the owner shall be tried by the Small Causes Court. The ratio laid down in the case of **Prabhudas Damodar Kotecha & Ors.** (supra) by the Supreme Court, as on today, is the law of the land and no civil Court can try and entertain the suit between the gratuitous licensee and the owner.

10. The learned Counsel for the petitioner also relied on the Full Bench judgment of the Bombay High Court in the case of **Dattatraya Krishna Jangam vs. Jairam Ganesh Gore** (supra). The Full Bench while dealing with the issues of declaration of tenancy and sub-tenancy, jurisdiction of the City Civil Court, Bombay, u/s 28 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, the Full Bench has held that as specified in section 28, the Small Causes Court not only to decide the questions referred to in section but also all matters which are incidental or ancillary to the determination of those questions. This finding of the Full Bench of the Bombay High Court also holds the field.

11. In the case of **John Francis Anthony Gonsalves & anr.** (supra), the plaintiffs were two brothers and the defendant who

was the step son of their sister, though was a family member, was termed as a gratuitous licensee. The probate of the last will of the deceased John Frederick, the father of the plaintiffs, was issued in favour of the plaintiffs. It was contended by the defendant in the said suit that he was put in possession on the basis of the understanding that he would continue to have a life interest in the suit flats and it was exclusively in his use. In the said matter, the defendant No.1 has opposed the probate and the defendant No.1 has taken a stand that they are to be termed as co-owners. The learned Single Judge of this Court referred to the earlier judgment in the case of **Conrad Dias v. Joseph Dias**⁵, wherein it was held that a person residing with his parents cannot claim legal character muchless the character of the licensee but would be residing simpliciter as a member of the family and nothing more, nothing less. He also referred to section 41 of the Presidency Small Cause Courts Act in the light of the ratio laid down by the Full Bench of the Bombay High Court in **Prabhudas Damodar Kotecha & Ors.** (supra) and held that the defendant in the said case was permitted to use the premises; has to be considered as a gratuitous licensee on the basis of the averments made in the

5 AIR 1995 Bombay 210

plaint itself and, therefore, the civil Court has no jurisdiction to try and dispose of the suit.

12. Thus, from the above discussion, it is clear that the pleadings as a whole in the suit are to be taken into account to decide the claim made by the plaintiffs against the defendants. In the present case in hand, it is not disputed that Kim Gandhi *nee* Kriplani, was the owner of the suit flat and after her death, the original plaintiff Surendra became the owner of the suit flat. Earlier, the defendant started staying with Kim Gandhi as her family member being a wife of her brother Mohan Kriplani. After the death of Kim Gandhi, her husband Surendra became the sole owner of the suit flat and he filed the suit in the year 1993 against the petitioner that they should leave the premises and hand over vacant and peaceful possession of the suit flat to the plaintiff. However, at that time, no objection was taken to the jurisdiction of the civil Court as earlier, the legal situation was different in light of the Division Bench judgment of the Bombay High Court in the case of **Ramesh Dwarikadas Mehra v. Indirawati Dwarika Das Mehra**⁶ and so, the suits between the owner and the gratuitous licensee were tried before the City Civil Court. However, in the

⁶ AIR 2001 Bombay 470

year 2007, the Full Bench of the Bombay High Court delivered the judgment in **Prabhudas Damodar Kotecha & Ors.** (supra).

13. In the case in hand, the suit remained pending earlier before the High Court and then in the City Civil Court, and in between the original plaintiff expired on 10.11.2014 and plaintiff No.2 was allowed as a legal representative in the shoes of the original plaintiff. Thereafter, the amendment was sought and the prayer clauses A1 and AB were added that she be declared as the owner of the suit flat and the defendant be directed to hand over vacant and peaceful possession of the suit flat. She also made a claim of mesne profits for wrongful use and occupation for the said flat. Thereafter, in the year 2013, the Supreme Court delivered the judgment in the Prabhudas Damodar Kotecha & Ors. (supra) and held that for the suits and the disputes between the landlord/owner and the gratuitous licencees, the jurisdiction lies with the small Causes Court and not with the Civil Court. Thereafter for four years, no steps were taken. However, in the year 2017, the Chamber Summons challenging the jurisdiction of the Bombay High Court was filed.

14. Necessarily, the pleadings are to be read to decide whether the Suit is between gratuitous licensee and the owner. The learned trial Judge after going through the pleadings has rightly observed that it is a pure dispute of title as to who is the owner of the suit flat and is required to be answered. My attention is drawn to the pleadings in the plaint. The petitioners have prayed for framing of additional issues especially in light of paragraph 26 of the plaint. In para 26, the plaintiff has stated that the defendants have no right in the suit flat and they have been staying only with the permission of Kim Gandhi earlier and now the plaintiff. It is to be considered that the original plaintiff was occupying as a sole successor in title of Kim Gandhi. Earlier, the defendants were staying in the suit flat with the permission of Kim Gandhi. The original plaintiff expired in the year 2010. Thereafter the plaintiff No.2 came in his place as the plaintiff and the plaint was extensively amended. In the case of **Udhav Singh vs. Madhav Rao Scindia (supra)**, the Supreme court has held that the compartmentalization or dissection, segregation and inversion of any of the paragraph is contrary to the principles of interpretation that the pleadings have to be read as a whole to ascertain its true import. Thus, as per the Supreme Court, the intention of the party is to be gathered from the tenor

and terms of the party's pleadings taken as a whole. In the pleadings, the plaintiff has referred to the proceedings filed by the defendant in Suit No.1450 of 1993 where the plea was raised that the petitioners/defendants are the co-owners and have right and share in the suit flat. Therefore, consistent with the pleadings, the suit was allowed to be amended. The suit is also for possession and declaration that the plaintiff be declared as an owner of the suit flat. The relationship of the parties with the original owner is also taken into account in light of the prayer of possession and declaration and demand of co-ownership by defendants. It is true while deciding the jurisdiction, the defence raised in the written statement by the defendant is not to be considered. However, in the pleadings, itself, the plaintiff has put a case of the claim of the defendant as co-owner in the earlier proceedings and further set out the pleadings accordingly. Kim Gandhi was the maternal aunt of plaintiff No.2 who claims her right in the property as Kim Gandhi's successor. On the other hand, defendant No.1 is the wife of the real brother of Kim Gandhi who also claims to be the legal successor of Kim Gandhi. Therefore, while deciding the issue of the right of the parties to occupy and stay in the suit flat, the Court will have to necessarily deal with the title and ownership of the

parties. Moreover, the plaintiff has sought the declaration as the owner of the suit flat. Thus, the Court will have to go into the rights of the parties on the basis of law of succession. Thus, the present case cannot be covered under the ratio laid down in either **Prabhudas Damodar Kotecha & Ors. (supra)** or **John Francis Anthony Gonsalves & anr. (supra)**.

15. The submission of the learned Counsel for the petitioners on the issue of title are not convincing. The ratio laid down in **Dattatraya Krishna Jangam vs. Jairam Ganesh Gore (supra)**, cannot be applicable and is not useful in the present case. In the case of **Dattatraya Krishna Jangam vs. Jairam Ganesh Gore (supra)**, the Full bench held that all the matters which are incidental and ancillary to the question of tenancy are to be decided and thus, the matters relating to recovery of rent or possession, eviction can be dealt with between the parties by the Small Causes Court. However, when the suit itself is based on the proof of title and ownership of the party claiming vacant and peaceful possession, then necessarily, by import of section 9 of the Civil Procedure Code, the civil Court has jurisdiction. Section 9 reads thus:

“9. Courts to try all civil suits unless barred .- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all Suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

.....

.....”

16. Thus, if the suit on the point of title is dismissed, then, the matter ends there and possessory rights of the parties will have to be decided. However, if the relief of ownership is granted in favour of the plaintiffs, then, by way of necessary corollary, the status of the petitioners/defendants will be unauthorised occupants who were earlier permissive user. The permission to occupy and stay in the premises was earlier given by Kim Gandhi, the original owner and subsequently it was withdrawn by the original plaintiff. Therefore, even though the status as argued by the learned Counsel is converted into gratuitous licensee i.e., occupying with permission of earlier owner, then also, that issue is to be decided by the City Civil Court and the said situation cannot be covered under the ratio laid down by **Prabhudas Damodar Kotecha & Ors.** (supra). A relief of declaration of title as an owner is the main relief and relief of vacant and peaceful possession is a

consequential relief. The dispute between the gratuitous licensee and the owner decided by the Small causes Court. However, the Small Causes court cannot decide the issue of title and ownership. On the other hand, the civil Court is the competent Court to decide all the civil disputes including the issue of title, ownership and possession, therefore, can also decide further issue of unlawful occupant or gratuitous licensee which may be a fallout of the first decision. Such decision of the civil Court deciding the further issues cannot be said as without jurisdiction but it will avoid manifold litigations. Thus, this petition fails.

17. In the circumstances of the case, no interference is required as the impugned order dated 3.4.2017 passed by the learned trial Judge is legal and correct. Writ Petition is therefore dismissed. Rule is discharged.

18. Learned Counsel for the petitioner prays that this order be stayed for 8 weeks as the petitioners want to challenge this order before the hon'ble Supreme Court. Accordingly, stay of this order is granted upto 14.9.2017.

(MRIDULA BHATKAR, J.)