

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Revision Application No.131 of 2017
[Converted from Writ Petition NO. 12458 OF 2016]

Mr. Sai Prasad Pandharinath
Sarang

...Petitioner

Versus

Mrs. Prabha Gracias, Nee @
Kanchan Prabha Pandharinath Sarang

...Respondent

....

Mr.V.Y. Murudkar, Advocate for the Petitioner.
Mr.O.S. Kutty, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.
DATE : 10th FEBRUARY, 2017

P.C.

1. Not on board. At the request of Mr.Murudkar taken up in the production board.

2. Heard Mr.V.Y. Murudkar, learned Counsel for the petitioner and Mr.O.S. Kutty, learned Counsel for the respondent, at length.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 26.9.2016 passed by the learned Judge, City Civil Court at Dindoshi, Borivali Division, Goregaon, Mumbai. By that order, the learned trial

Judge answered the preliminary issue in favour of the respondent, hereinafter referred to as the 'plaintiff' and held that City Civil Court has jurisdiction to entertain and try the suit. The plaintiff has instituted suit against the defendant *inter alia* praying for declaration that the defendant has no right, title or interest to enter upon or remaining upon Flat No.301, admeasuring 395 sq. ft. carpet area, situate on 3rd floor, A Wing, M/s. Mary Elien Co-operative Housing Society Ltd. Mhatarpada, Amboli, Andheri (West), Mumbai – 400 058 (for short, 'suit premises')

4. Mr. Kutty raised preliminary objection that the Writ Petition is not maintainable. In thereof, leave to convert Writ Petition into C.R.A. is granted. Amendment shall be carried out within one week and office to renumber the petition as C.R.A.

5. In support of this application, Mr.Murudkar has invited my attention to the averments made in the plaint. In paragraph-3, the plaintiff has averred that the defendant is her brother. He has been permitted to live in the suit premises only as a member of the family. The defendant being a son and member of the family, has been allowed to reside in the suit

premises with his wife and children, as a member of the family. In paragraph-5, the plaintiff has averred that the defendant has been residing in the suit premises free of cost along with his wife and children as her brother and member of the family. In paragraph-10, the plaintiff has asserted that the defendant has been allowed to reside gratuitously as a son by her mother and later on as a brother and member of the family.

6. Mr. Murudkar submitted that while considering the question of jurisdiction, the Court has to only consider the averments made in the plaint and not the defence set up by the defendant. Perusal of the plaint clearly shows that the plaintiff has sought eviction of the defendant on the ground that he is a gratuitous licensee. In view of decision of Apex Court in ***Prabhudas Damodar Kotecha and Ors. vs. Manhabala Jeram Damodar and Anr. AIR 2013 S.C. 2959***, only Small Causes Court will have jurisdiction to entertain and try the suit. He, therefore, submitted that the learned trial Judge was not justified in holding that City Civil Court has jurisdiction to entertain and try the suit.

7. On the other hand, Mr.Kutty supported the impugned

order. He has invited my attention to paragraphs-13 and 14 of the plaint. In paragraph-13, the plaintiff has referred to the defendant filing suit being S.C. Suit No.1630/2009 against the mother, plaintiff, the society and the Registrar of Assurances. In paragraph-14, the plaintiff has referred to the issues framed in S.C. Suit No.1630/2009. In paragraph-15 it was averred that the learned trial Judge answer in the negative, namely, whether the defendant herein is the co-owner of the suit property. He submitted that perusal of the plaint in its entirety shows that the plaintiff has asserted that the defendant has no right, title or interest in the suit property and as such the suit is instituted for eviction.

8. Mr. Kutty has also invited my attention to paragraph-3 of the Petition wherein the petitioner claims to be co-owner in respect of suit premises.

9. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. It is settled principle of law that while considering the issue of jurisdiction, the Court has to go by the averments made in the plaint and not by the defence set up by

the defendant. In paragraph-13, the plaintiff has referred to S.C. Suit No.1630/2009 filed by the defendant. In paragraph-14, the plaintiff has referred to the judgment and decree dated 28.2.2014 passed by the learned Judge of the City Civil Court dismissing the suit. In paragraph-15, the plaintiff has referred to issue No.1 framed in that suit, which is to be following effect :

“1. Whether Plaintiff is the co-owner of the suit property?”

10. In paragraph-16 of the plaint, the plaintiff has asserted that the defendant was allowed to stay as a family member. He has no independent right of his own or right, title or interest. In paragraph-17, the plaintiff has averred that the defendant cannot claim any legal character or legal status in respect of the suit premises and he is not entitled to continue his possession in the suit premises, unless he obtains express permission in writing from the plaintiff. In paragraph-22 the plaintiff has averred that the defendant continues to reside in the suit premises wrongfully, unlawfully and in irresponsible manner. Reading of the plaint in its entirety shows that the plaintiff has instituted the suit against the defendant on the ground that he has no right, title or interest in the suit property. The plaintiff has

claimed to have acquired the ownership in the suit premises on the basis of the registered gift deed dated 23.3.2006 executed by her mother in her favour. She also claimed that in pursuance thereof, share certificate No.007 bearing distinctive Nos.31 to 35 issued by the society which was standing in the name of the plaintiff's mother, also came to be transferred in the name of the plaintiff on 9.4.2006. The plaintiff has also referred to suit filed by the defendant herein in the City Civil Court claiming to be co-owner and dismissal of that suit. Thus, reading of the plaint as a whole leaves no room for doubt that the plaintiff has claimed possession on the basis of the defendant has no semblance of right, title or interest in the suit premises. Merely because the plaintiff has averred that the defendant has been allowed to reside gratuitously will not change the nature of the suit. The suit is essentially between the owner and a person who has no right, title or interest in the suit premises. Understood thus, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Civil Revision Application fails and the same is dismissed.

(R. G. KETKAR, J.)