

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE SIDE JURISDICTION  
WRIT PETITION NO.851 OF 2018**

The Navyug Co-operative Housing Society Ltd.     ]     Petitioners

Vs.

Shri Ganesh Kunj Co-operative Housing                             ]  
Society Limited & Ors.                                                     ]     Respondents

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Mr. Vivek Walawalkar a/w Mr. Visal Amin i/b B. Amin & Co., for petitioner.  
Mr. Vishal Kanade a/w Ms. Aruna Mane i/b M/s. S. Pathak & Co., for  
respondent No.1.  
Mr. Surel Shah & Mr. Abbas Zaidy i/b Zohair & Co., for respondents No.2 to 4.  
Mr. Dharmesh N. Bhagat, representative of Sai Ganesh Kunj Co-operative  
Housing Society Ltd., respondent No.1.

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**CORAM :   R.G. KETKAR, J.**

**DATE :   19TH APRIL, 2018.**

**P.C.**

Heard Mr. Walawalkar, learned Counsel for the petitioners, Mr. Kanade, learned Counsel for respondent No.1 and Mr. Shah, learned Counsel for respondents No.2 to 4 at length.

2.           By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “plaintiffs” have challenged the judgment and order dated 24<sup>th</sup> November, 2017 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch) passed in Misc. Appeal No.128 of 2017, thereby, setting aside the judgment and order dated 23<sup>rd</sup> August, 2017 passed by the learned trial Judge, Court Room No.40 of the

Court of Small Causes at Mumbai (Bandra Branch) below Exhibit 12 in R.A.E & R Suit No.374/726 of 2013.

3. Rule. Learned Counsel for the respondents waive service. Having regard to the narrow controversy raised in this Petition and at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

4. In support of this Petition, Mr. Walawalkar submitted that after considering the material on record, the learned trial Judge had issued injunction restraining the defendants from dealing with, transferring, alienating, subletting, assigning, parting with possession of the sub-plot No.1 in Plot No. U/8 of Juhu Vile Parle Development Scheme, Vile Parle (West), Mumbai 400 049 together with building/buildings constructed thereon including flats, Units or any space appurtenant thereto amongst others (for short 'suit property') or any part thereof or inducting or creating third party interests.

5. The Appellate Court, however, allowed the Misc. Appeal preferred by respondent No.1/defendant No.3 and directed the trial Court to frame and decide preliminary issue of jurisdiction as contemplated u/s 9-A of the Code of Civil Procedure, 1908 (for short 'C.P.C') on its own merits and in accordance with law and depending on outcome, directed the trial Court to dispose of Exhibit 12 filed by the plaintiffs. The Appellate Court directed defendant No.3 to maintain status-quo in respect of the suit premises till the date of framing of preliminary issue by the trial Court. He submitted that the Appellate Court was not justified in directing the defendant to maintain status-quo and should have issued or confirmed injunction issued by the trial Court.

6. On the other hand, Mr. Kanade submitted that defendant No.3 had filed reply Exhibit 17 and had raised issue of jurisdiction of the Small Causes Court to entertain and try the suit. Once the objection is raised at the time of hearing of interim application in terms of Section 9-A, the Court has to decide issue of jurisdiction and thereafter proceed to decide interim application finally. The learned trial Judge did not frame and decide issue of jurisdiction and proceeded to dispose of the application for interim relief finally. The Appellate Court was, therefore, justified in interfering with the impugned order.

7. Mr. Kanade further submitted that in case the Court is inclined to direct that the order dated 23<sup>rd</sup> August, 2017 passed by the learned trial Judge below Exhibit 12 is to be treated as ad-interim order, explanation “dealing with” may be clarified, thereby permitting members of defendant No.3 to induct person/persons on leave and licence basis. He further submitted that members of defendant No.3 are occupying the building in pursuance of occupation certificate granted by the Corporation in the year 1992. It, therefore, may be clarified that the injunction restraining defendant No.3 will not prohibit defendant No.3 from carrying out day-to-day activities.

8. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have taken out application claiming injunction against the defendants. Defendant No.3 filed reply and in that reply, raised objection as regards jurisdiction of the Small Causes Court to try and entertain the suit. Section 9-A of the C.P.C reads thus;

*“9-A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue. \_1)Notwithstanding anything contained in this Code or*

any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit”.

9. In view of section 9A, at the time of hearing of any application for grant of any interim relief, once objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court has to proceed to determine at the hearing of such application the issue as to the jurisdiction at the time of hearing of such application as a preliminary issue and has to dispose of that application as expeditiously as possible. Sub-section (2) thereof lays down that the Court has power to grant interim order as it may consider necessary, pending determination of issue as to jurisdiction.

10. In view thereof, in my opinion, the learned trial Judge was not justified in disposing of application Exhibit 12 finally without adjudicating the issue of jurisdiction. At the same time, the Appellate Court had directed defendant No.3 to maintain status-quo in respect of the suit property till the date of framing a preliminary issue by the learned trial Judge. The Appellate Court should have issued positive injunction instead of directing defendant No.3 to maintain status-quo. In the case of **Kishore Kumar Khaitan & Anr. Vs. Praveen Kumar Singh, (2006) 3 Supreme Court Cases 312**, the Apex Court in paragraph 4 observe thus;

“It is necessary to notice at this stage that in an original suit of this nature, it was not appropriate for the Additional District Judge to pass an order

directing the parties to maintain status quo, without indicating what the status quo was. If he was satisfied that the appellant before him had made out a prima facie case for an ad interim ex parte injunction and the balance of convenience justified the grant of such an injunction, it was for him to have passed such an order of injunction. But simply directing the parties to maintain status quo without indicating what the status quo was, is not an order that should be passed at the initial state of a litigation, especially when one Court had found no reason to grant an ex parte order of injunction and the appellate court was dealing with only the limited question whether an ad interim order of injunction should or should not have been granted by the trial court, since the appeal was only against the refusal of an ad interim ex parte order of injunction and the main application for injunction pending suit, was still pending before the trial court itself”.

11. In view thereof, order dated 23<sup>rd</sup> August, 2017 passed by the learned trial Judge below Exhibit 12 as also the order dated 24<sup>th</sup> November, 2017 passed by the Appellate Court stands modified in the following terms;

[1] Order dated 23<sup>rd</sup> August, 2017 shall be treated as “ad-interim order”.

It is clarified that grant of ad-interim order does not preclude members of defendant No.3 from inducting the person/persons on leave and licence basis in the flats in defendant No.3/Society as also does not preclude defendant No.3 from carrying out its day-to-day activities.

[2] The learned trial Judge will decide issue of jurisdiction and thereafter proceed to decide application Exhibit 12 finally.

[3] The learned trial Judge will decide the proceedings uninfluenced by the observations made herein.

[4] All the contentions of the parties are expressly kept open.

[5] The proceedings instituted by defendant No.3 under Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and The Maharashtra Co-operative Societies Act 1960 shall be decided un-influenced by the observations made in the impugned order and this order.

12. Rule is made absolute in the aforesaid terms with no order as to costs.

**[R.G. KETKAR, J.]**