

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2893 OF 2018

Samir Narain Bhojwani	...Petitioner
<i>Versus</i>	
Yusuf Khan Alias Dilip Kumar	
And Ors.	...Respondents

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Mr. P.K. Dhakephalkar, Senior Advocate a/w. D.V. Deokar i/b. M/s.
Parimal K. Shroff & Co. for the Petitioner.
Mr. Vineet Naik, Senior Advocate a/w. Chirag Shah i/b. J.J. Shah, for
Respondent No.1.
Ms. Kashmira Bharucha a/w. Rajiv Jadhav, for Respondents No.5 to 8.

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CORAM : R. G. KETKAR, J.

DATE : 26th MARCH, 2018

PC.

1. Heard Mr.PK. Dhakephalkar, learned Senior Counsel for the petitioner, Mr. Vineet Naik, learned Senior Counsel for respondent No.1 and Ms. Kashmira Bharucha, learned Counsel for respondents No.5 to 8, at length.

2. Mr. Dhakephalkar submits that he has privately served respondents No.2 to 4. As respondents No.2 to 4 are not contesting respondents in the present Petition, he orally seeks permission to delete them. Leave to delete respondents No.2 to 4 is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 20.12.2017 passed by the learned Judge, Court Room No.38 of the Small Causes Court, Bandra Branch below Exhibit-59 in R.A.E. Suit No.1063/2010. By that order, the learned trial judge allowed the application made by respondents No.5 to 10, hereinafter referred to as the 'applicants', and directed the plaintiff to implead them as formal defendants to the suit.

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

5. The plaintiff has instituted suit against defendant No.1 Yusuf Khan alias Dilip Kumar, defendant No.2 M/s. Crest Ventures Ltd., defendant No.3 M/s. Gold Beam Construction Pvt. Ltd. and defendant No.4 M/s. Prajita Developers Pvt. Ltd. for recovery of property being land, hereditaments, premises and building/s forming part of Survey No.326, Plot No.3, N.A. No.329, bearing corresponding C.T.S. No.C-1395, C-1396 and C-1397 admeasuring 2412 square yards equivalent to 2013.9 square meters or thereabouts bearing plot No.16 of the Pali Hill

Estate in the village of Danda (Bandra), in the then Taluka South Salsette, now Taluka Bandra, in the registration District and Sub-District of Mumbai City and Mumbai Suburban (for short, 'suit property')

6. Defendants No.1 and 3 filed written statement at Exhibit-35 and denied in paragraph-4 that the plaintiff is the owner of the suit property. The defendants also denied that the plaintiff is the landlord. It was further contended that defendant No.1 is not a tenant of the plaintiff and consequently the Small Causes Court has no jurisdiction to entertain and try the suit. Defendants No.1 and 3 also contended that the plaintiff is claiming to be the owner on the basis of forged and fabricated documents.

7. By order dated 31.10.2013 below Exhibit-1, the learned trial Judge framed preliminary issue, namely, whether the Small Causes Court has jurisdiction to entertain and try the suit. By order dated 14.6.2016, learned trial Judge held that the suit is between the landlord and tenant and consequently in view of Section 33 of the Maharashtra Rent Control Act, 1999 (for short, 'Act'), the Small Causes Court has jurisdiction to entertain and try the suit. Aggrieved by this decision, defendant No.1 has instituted Revision Application before the Appellate Bench of the Small Causes Court which is said to be pending.

8. During pendency of the suit, the applicants preferred application Exhibit-59 on 25.8.2014 indicating background in which they claimed to be necessary or proper party to the suit. The plaintiff filed reply dated 9.3.2015. Defendants No.1 and 3 filed their reply dated 5.11.2014. By the impugned order, the learned trial Judge allowed the application, as indicated earlier. It is against this order, the plaintiff has instituted the present Writ Petition.

9. In support of this Petition, Mr. Dhakephalkar submitted that the learned trial Judge committed serious error in allowing the application. He relied upon Section 35 of the Act as also following decisions :

[i] **Bibi Begum Mard Shafiq Ahmed Khatimiti and others v. Mohmed Khalid Gulam Dastgir Jalal and others, 2007(3) Mh.L.J. 302.**

[ii] **Kanaklata Das and others vs. Naba Kumar Das and others, (2018) 2 SCC 352.**

10. Mr. Dhakephalkar submitted that the learned trial Judge did not record a finding that the applicants are either necessary or proper parties. In paragraph-37, the learned trial Judge in fact observed that whether the applicants are not entitled to question the alienation of the suit property which has taken place in or around the year 1980 and

whether they have no right or locus standi to question the same after a lapse of more than 30 years or are they estopped from making any claim in respect of the suit property would be decided by the High Court in the Petition before it. He submitted that the applicants have instituted Suit No.1448/2008 on the Original Side of this Court against the alleged trustees of Seth Mulraj Khatau Trust (for short, 'Trust') *inter alia* praying for declaration that the Trust stands determined and that the same be liable to be wound up by and under the directions of this Court; defendants No.1 to 3 claiming as trustees of the Trust be ordered and decreed to make the plaintiff a full, true and complete disclosure of all the trust funds and properties and under true full and proper accounts in respect thereof; defendants No.1 to 3 claiming as trustees of the Trust be ordered and directed to render true faithful and complete correct accounts of the funds and properties of the Trust and of the expenses and receipts of the Trust on the footing of willful default and on taking of the accounts, amounts and properties found payable or due to the share of the plaintiff and the respective defendants in terms of the Trust be paid and handed over to them and said Trust be thereafter dissolved; and defendants No.1 to 3 be restrained from acting as trustees of the said deed of settlement and that be pleased to appoint such other independent person/s as an Administrator of the Trust in

their place as the Court deem fit and proper to carry out the work and affairs of the Trust until Trust is dissolved and the beneficiaries under the Trust receive the amounts and properties due to them under the Trust.

11. On the other hand, Ms.Bharucha supported the impugned order. She has invited my attention to the affidavit-in-reply filed by Panna Sunit Khatau, respondent No.5 dated 23.3.2018 in this petition and in particular paragraph-5(i) to 5(xiii). Ms. Bharucha submitted that clause (9) of the Trust Deed required the trustees to hold the properties in the trust for male children of the sons of the settler and to appropriate the shares of each of the sons to their such male children or child, who would be living at the date of the death of such son. The last surviving son of Seth Mulraj Khatau, namely, Chandrakant died on 10.11.1988. The trustees were liable to dissolve the Trust and release and transfer the property to all the beneficiaries and render accounts of the dealings of the Trust properties. The Trustees contrary to the express mandate of the Trust deed failed to do so. Applicants No.5 and 6 are the Executrices to the Will of late Seth Sunit Chandrakant Khatau who was one of the beneficiaries of the Trust. Respondents No.6 to 8 (applicants No.2 to 4) are the legal beneficiaries of late Seth Sunit Chandrakant Khatau. The plaintiff along with the trustees Dilip Khatau,

Mahendra Khatau and Hiten Khatau have resorted to criminal and grossly unethical fraudulent tactics in order to grab the suit property from them without their knowledge or consent. The documents produced by the plaintiff to prove title are forged and fraudulent. Instead of distributing the corpus of Trust property to the concerned beneficiaries, the documents are executed which are illegal and not binding on the applicants. The alleged Deed of Confirmation dated 11.3.1994 was purportedly executed by the trustees purported to confirm the suit property in favour of the plaintiff which is illegal and is without consent of the beneficiaries which act on the part of the trustees is illegal. The Trust property cannot be dealt with by the trustees unilaterally. In short, she submitted that as the plaintiff does not derive any title and consequently is not owner or landlord of the suit property on the strength of the alleged Confirmation Deed. She submitted that the learned trial judge in turn hold that the applicants are necessary parties to the suit. She relied upon the decision of **Kanaklata Das** (supra) and in particular paragraphs-5, 11.3 and 11.4. In paragraph-11.4, the Apex Court observed that the the plaintiff being a dominus litis cannot be compelled to make any third person a party to the suit, be that a plaintiff or the defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his

presence, the suit cannot proceed and nor can be decided effectively. In other words, no person can compel the plaintiff to allow such person to become the co-plaintiff or defendant in the suit. It is more so when such person is unable to show as to how he is a necessary or proper party to the suit and how without his presence, the suit can neither proceed and nor it can be decided or how his presence the suit can neither proceed and not it can be decided or how his presence, the suit can neither proceed and not it can be decided or how his presence is necessary for the effective decision of the suit. In the present case, the learned trial Judge on the basis of material produced on record by the applicants held that the applicants are necessary parties. She, therefore, submitted that no case is made out for interfering with the impugned orders.

12. Mr. Naik submitted that in the trial Court, defendant No.1 had opposed application Exhibit-59 filed by the applicants. However, during the course of hearing of that application, it transpired that the plaintiff's title is defective and, therefore, defendant No.1 supported the applicants before the trial Court. He submitted that in paragraph-4 of the written statement, defendant No.1 specifically contended that the plaintiff is neither landlord nor the owner. He, therefore, submitted that as the Revision Application is pending before the Appellate Bench of the

Small Causes Court against the decision of the trial Court dated 14.6.2016, the applicants may be given liberty to file application after decision of the revision application.

13. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The short question is whether the applicants are the necessary or proper party in a suit filed by the plaintiff for eviction of defendants No.1 and 3. A perusal of the impugned orders shows that in paragraph-34, the learned trial Judge has referred to the general principles that govern the application under Order I Rule 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'). The learned trial Judge observed that what makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved. It would only make it a necessary witness. It is not also merely that it has an interest in the correct solution of some question involved and has arguments to advance. The only reason which makes it necessary to make applicant's a party to this suit is so that it should be bound by the result of the actions. These applicants are necessary as they are directly and legally interested in the action. The litigation may lead to a result which will affect these applicants legally, that is, may be by curtailing his legal right. Ms. Bharucha submitted that the learned trial Judge

held in paragraph-34 that the applicants are necessary as they are directly and legally interested in the action. I do not find any merit in this submission as in paragraph No.40, the applicants are ordered to be made formal defendants, without any relief against them. Section 35 of the Act reads thus :

“35. **Saving of suit involving title.**-- Nothing contained in sections 33 and 34 shall be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent court to establish his title to such premises.”

14. Under the old Act i.e. Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Bombay Rent Act'), the identical provision was Section 29A. Section 29A was considered by the learned Single Judge of this Court (Coram: H.L. Gokhale, J., as His Lordship then was) in **Bibi Begum** (supra). The learned Single Judge referred to the decision of the Apex Court in **Babulal Bhuramal and others v. Nandram Shivram and others**, AIR 1958 SC 677. In paragraph-15, the learned Single Judge referred to Sections 28 and 29A of the Bombay Rent Act and after extracting paragraph-9 of the Apex Court's decision in Babulal Bharumal's case (supra), it was observed in paragraph-17 thus:

“17. We are concerned with a Suit where four grounds of eviction have been set up by the plaintiffs. The

plaintiffs are claiming that the defendants are trespassers of the property. The defendants have squarely raised amongst others a dispute that the plaintiffs are not the landlords. It is for them to agitate it. For the other persons who claim to be the landlords of the property, their forum is to go to the Civil Court and establish their title. That is not an issue which is incidental to the determination and necessary in the Suit which is being tried under Section 28 of the Bombay Rent Act. The jurisdiction of the Rent Court under Section 28 is a limited jurisdiction circumscribed by the provisions of the Act. It cannot be expanded beyond that. A determination of the title to the property at the instance of a person who claims to be an owner of the property is outside the jurisdiction of the Rent Act.”

15. In my opinion, the aforesaid decision applies on all fours to the present case. Ms. Bharucha relied upon the decision of Apex Court in **Kanaklata Das** (supra). In paragraph-11 of that decision, the Apex court dealt with the well settled principles of law. In paragraphs-14 and 15, the Apex Court has observed thus :

“14. In the eviction suit, the question of title or the extent of the shares held by the Appellants and Respondent No. 1 against each other in the suit premises cannot be decided and nor can be made the subject matter for its determination.

15. The reason being that this is not a suit between the appellant-plaintiffs and Respondent 1 where their inter se rights relating to the suit premises can be gone into but rather is an ejection suit filed by the Appellants against Respondents 2 to 5 for their eviction from the suit premises.”

16. In view thereof, in my opinion the decision in **Kanaklata Das** (supra) really assists the plaintiff. In paragraph-36, after considering the order dated 14.6.2016 on the preliminary issue, the learned trial Judge held that the plaintiff is a landlord in terms of definition of the Act. In paragraph-37 the learned trial Judge in fact observed that whether the applicants are not entitled to question the alienation of the suit property which has taken place in or around the year 1980 and whether they have no right or locus standi to question the same after a lapse of more than 30 years or are they estopped from making any claim in respect of the suit property would be decided by the High Court in the Petition before it.

17. In paragraph-40, the learned trial Judge observed that the applicants are superior claimant being heirs of the original owner. In their absence, suit should be decided, this would not be fair. If the applicants are made formal party, defendant to the suit without any relief being asked against them and without the applicant seeking any relief, there will be no prejudice to the plaintiff, but the applicants will be bound with the decision in the suit. In my opinion, said finding is in the teeth of Section 35 of the Act, which I have already quoted above. In my opinion, the approach of the learned trial Judge is perverse. It is

settled principles of law that in view of Section 35 of the Act, the Small Causes Court in its limited jurisdiction cannot decide *inter se* dispute regarding title. Precisely that is what the learned Single Judge has held in paragraph-17 of **Bibi Begum** (supra) and even the Apex Court in paragraphs-14 and 15 of **Kanaklata Das** (supra) as extracted hereinabove.

18. In view thereof, the impugned order deserves to be set aside and is accordingly set aside. Liberty is reserved to the applicants to consider filing application in case Revision Application against the decision dated 14.6.2016 is allowed. If such an application is filed, all contentions of the plaintiff, including maintainability of such application, are expressly kept open. Rule is made absolute in aforesaid terms with no order as to costs. Petition is disposed of. Order accordingly.

(R. G. KETKAR, J.)