

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION**

CIVIL REVISION APPLICATION [ST] NO.7130 OF 2018

Madhuri Gopikishan Sharma and another	]	Applicants
Vs.		
Yogendra R. Sharma and another	]	Respondents

**WITH
CIVIL REVISION APPLICATION [ST] NO.7139 OF 2018**

Veena Shankar Sharma	]	Applicant
Vs.		
Sunita Sharma & Anr.	]	Respondents

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Mr. Rushikesh Soni a/w Raveena Yadav i/b Ashok Purohit & Co., for applicants.

Mr. H.K. Menghani a/w Ms. Krishna Sharma, for respondents.

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CORAM : R.G. KETKAR, J.

DATE : 2ND MAY, 2018.

P.C.

Heard Mr. Soni, learned Counsel for the applicants and Mr. Menghani, learned Counsel for respondent No.1 in both the Civil Revision Applications at length.

2. C.R.A (ST) No.7130 of 2018 takes exception to the judgment and order dated 3rd February, 2018 passed by the learned Judge, Court Room No.9 of the Court of Small Causes at Mumbai on preliminary issue in R.A.E & R Suit No.99/159 of 2013. That suit was instituted by the applicants, hereinafter referred to as “plaintiffs” against respondent No.1 Mr. Yogendra Sharma,

hereinafter referred to as “defendant No.1” and respondent No.2 M/s. Polyfabrics, hereinafter referred to as “defendant No.2” for recovery of possession of Flat No.3 at Manoj Kunj situate at 144, CTS No.1A. 1374, CS No. 1/G/S ward of BMC Matunga Road, Matunga (West) Mumbai 400 016, hereinafter referred to as “suit premises”. By the impugned order, the learned trial Judge held that the Small Causes Court has no jurisdiction to entertain and try the suit and ordered return of the plaint under Order-VII, Rule-10 of the Code of Civil Procedure, 1908 (for short 'C.P.C').

3. Mr. Soni seeks leave to challenge the order dated 21st June, 2016 passed by the learned Judge below Exhibit 19. By that order, the learned trial Judge allowed the application Exhibit 19 made by defendant No.1 and framed issue of jurisdiction as a preliminary issue. Application Exhibit 19 was filed under section 9-A read with Order-XIV, Rule-5 of C.P.C for deciding the issue of jurisdiction as a preliminary issue. Leave to amend as prayed for is granted. Amendment shall be carried out forthwith.

4. C.R.A (ST) No.7139 of 2018 takes exception to the order dated 3rd February, 2018 passed by learned trial Judge on preliminary issue framed in R.A.E. Suit No.110/177 of 2013. That suit was instituted by the applicants, hereinafter referred to as “plaintiff” against respondent No.1, Sunita Sharma, hereinafter referred to as “defendant No.1” and respondent No.2, Jayaben Shah, hereinafter referred to as “defendant No.2” for recovery of possession of Flat No.2 at “Manoj Kunj” situate at 144, Senapati Bapat Marg, on Plot No. C.T.S No.1A/1374 CS No.1/G/S Ward of B.M.C Matunga Road, Matunga (W), Mumbai 400 026, hereinafter referred to as “suit premises”.

5. Mr. Soni seeks leave to amend the Application so as to challenge order dated 21st June, 2016 passed by the learned trial Judge below Exhibit 30. By that order, the learned trial Judge allowed the application made by defendant No.1 for

framing issue of jurisdiction as preliminary issue under section 9-A read with Order-XIV, Rule-5 of the C.P.C. Leave to amend as prayed for is granted. Amendment shall be carried out forthwith.

6. Ms. Soni orally applies for deleting respondent No.2 as no reliefs are claimed against them. On oral application, leave to delete respondent No.2 is granted. Amendment to be carried out forthwith.

7. Rule. Mr. Menghani waives service on behalf of respondent No.1. Having regard to the narrow controversy raised between the parties and at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and Applications are taken up for final hearing. Since common question of law and facts arise in these applications, the same can be conveniently disposed of by this common order. For appreciating controversy raised in these applications, facts from C.R.A (ST) No.7130 of 2018 are taken into consideration.

8. The plaintiffs have instituted the suit against the defendants for recovery of possession of Flat No.3, Manoj Kunj, 144, Senapati Bapat Marg, Matunga (W), Mumbai – 400 016 , inter alia, contending that defendant No.2 M/s. Polyfabrics was the monthly tenant in respect of the suit premises. The plaintiffs have alleged that defendant No.1 is in unlawful possession of the suit premises. The plaintiffs have instituted the suit under section 16 (1) (e) r/w Section 26 of the Maharashtra Rent Control Act, 1999 (for short 'Act') against the defendants. Defendants No.1 and 2 filed written statement dated 18th March, 2013 resisting the suit. During pendency of the suit, defendant No.1 filed application Exhibit 19 on 1st March, 2016, inter alia, contending that the suit instituted by the plaintiffs is not maintainable as there is no whisper in the entire plaint regarding relationship of landlord and tenant between the parties. Defendant No.1 submitted that under section 9-A of C.P.C, preliminary issue will decide entire fate of the suit. Provisions of section 9-A r/w Order-XIV, Rule-5 are mandatory and require the issue of jurisdiction to be decided as a preliminary issue. Plaintiff No.2 filed reply dated 18th March, 2016 opposing that application. By order

dated 21st June, 2016, the learned trial Judge allowed the application Exhibit 19 and framed issue of jurisdiction as a preliminary issue and directed both the parties to lead evidence accordingly. Parties adduced evidence. After considering the evidence on record on the preliminary issue, by the order dated 3rd February, 2018, the learned trial Judge held that Small Causes Court has no jurisdiction to entertain and try the suit and accordingly, ordered return of the plaint under Order-VII, Rule-10 of the C.P.C. The plaintiffs have challenged the order dated 21st June, 2016 below Exhibit 19, whereby, issue of jurisdiction was framed as a preliminary issue and order dated 3rd February, 2018, whereby the learned trial Judge held that the Small Causes Court has no jurisdiction to entertain and try the suit and ordered return of the plaint. It is against these orders, the plaintiffs have instituted the above Civil Revision Application.

9. In support of this application, Mr. Soni invited my attention to paragraphs 5,6,8,12,13,14,16,17 and 19 of the plaint as also prayer clauses (a) and (b). He submitted that a perusal of the plaint in its entirety unmistakably shows that the plaintiffs have claimed possession of the suit premises on the ground that defendant No.2 M/s. Polyfabrics is a tenant in respect of the suit premises and that defendant No.1 is unlawful occupant in the suit premises. He submitted that suit is instituted under section 16 (1) (e) read with section 26 of the Act. He submitted that during pendency of the suit, the plaintiffs did not take out any application for interim relief. Defendant No.1 was, therefore, not justified in filing application under section 9-A of the C.P.C. He submitted that Order-XIV, Rule-2 of the C.P.C lays down that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2) pronounce judgment on all issues. Sub-Rule-(2), thereof, lays down that where issues both of law and facts arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first, if that issue relates to-

- (a) the jurisdiction of the Court, or
- (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks it fit, postpone

the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue.

10. In the present case, question whether there is relationship of landlord and tenant between the parties is not a pure question of law and is a mixed question of law and fact. That issue can be tried as a preliminary issue only if no evidence is required to be adduced. The very fact that while allowing the application Exhibit 19, the learned trial Judge permitted the parties to adduce evidence itself suggests that it is not a pure question of law. The order dated 21st June, 2016 passed below Exhibit 19 is, therefore, liable to be set aside.

11. Mr. Soni further submitted that the learned trial Judge observed in paragraph 8 of the order dated 3rd February, 2018 that the plaintiffs' witness admitted that the plaintiffs never accepted rent from the defendants nor issued any rent receipt at at point of time. Similarly, it is admitted position that one Mr. Virendra Mishra was accepting rent from the tenants who is not party to the suit. In paragraph 9, the learned trial Judge referred to compromise entered into between the parties in Suit No.1130 of 2009 before the High Court. The plaintiffs have not challenged the said consent terms before any Court or Forum till date. As such, the consent terms had attained finality. Merely by saying that the plaintiffs were not party to the said consent terms and therefore, the said consent terms are not binding upon them cannot be legally accepted, more particularly when the plaintiffs are married daughters of Surendrakumar Sharma.

12. In paragraph 10, the learned trial Judge noted that it is equally clear that the plaintiff is claiming to be co-owner of the building, however, she has not filed a specific document showing the same. Merely because the defendant in paragraph 3 of the written statement had made certain passing reference that the plaintiffs are not only landladies/co-owners of the suit building, but other co-owners have not been made party to the suit that by itself cannot be regarded as giving

status of co-owners/landladies of the suit premises. Therefore, unless and until the plaintiffs succeed in establishing their exclusive right in respect of the suit building by challenging the consent terms in Suit No.1130 of 2009, they cannot step into shoes of landlord/co-owner of the suit building. Therefore, without determining their exclusive right in the family pertaining to the suit property, they cannot become the landlord of tenants of the suit building though they are family members of the deceased landlord. He submitted that this is complete misreading of the plaintiffs' case.

13. Mr. Soni further submitted that once it is accepted that section 9-A is not applicable in the present case as also issue of jurisdiction is not a pure question of law, while determining issue of jurisdiction at this stage only assertions made in the plaint are required to be considered. If the plaint is read in its entirety, it cannot be said that the suit is not between the landlord and tenant and consequently, Small Causes Court has no jurisdiction to entertain and try the suit. He, therefore, submitted that the impugned orders are liable to be set aside.

14. On the other hand, Mr. Menghani supported the impugned orders. He submitted that for the first time, the plaintiffs have challenged the order dated 21st June, 2016 below Exhibit 19. In fact, the challenge to that order no longer survives. It is implemented and acted upon. In pursuance of that order, parties have adduced evidence. It is, therefore, not permissible for the plaintiffs to challenge the order dated 21st June, 2016 belatedly.

15. In so far as the validity of the order dated 3rd February, 2018 is concerned, he submitted that a careful perusal of the plaint clearly shows that the plaintiffs have claimed possession of the suit premises from defendant No.1 alleging that defendant No.1 is illegal occupant of the suit premises. In other words, the plaintiffs have not claimed any relief against defendant No.2 who is a monthly tenant in respect of the suit premises. As the plaintiffs have not claimed any relief against defendant No.2 being the tenant and has claimed a relief only against defendant No.1

who is according to the plaintiffs is illegal occupant, there is no relationship of landlord and tenant between the parties. The learned trial Judge, therefore, rightly held that the Small Causes Court has no jurisdiction to entertain and try the suit. He, therefore, submitted that no case is made out for interfering with the impugned orders.

16. Mr. Menghani relied on Order-XIV Rule-2 of the C.P.C. Order-XIV, Rule-2 reads thus;

“2.Court to pronounce judgment on all issues._ (1)

Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

- (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to_
 - (a) the jurisdiction of the Court, or
 - (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Thus, under Order-XIV, Rule-2(2), if the Court is of the opinion that a case or any part thereof can be disposed of **on a issue of law only**, it may try that issue first if that issue relates to;

- (a) the jurisdiction of the Court, or
- (b) a bar to the suit created by any law for the time being in force,

He, therefore, submitted that no case is made out for interfering with the impugned order.

17. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. It is common ground between the parties that the plaintiffs have not claimed any interim relief in the suit. If that be so, defendant No.1 could not have filed application under section 9-A of C.P.C. Application has to be treated as one under Order-VII, Rule-11 (d) of the C.P.C. In the present case, defendant No.1 has contended that as there is no relationship of landlord and tenant between the parties, Small Causes Court has no jurisdiction. While allowing application Exhibit 16 on 21st June, 2016, the learned trial Judge directed the parties to adduce evidence. In view thereof, it cannot be said that in the present case, issue of jurisdiction is a pure question of law. In other words, it has to be concluded that it is a mixed question of law and fact for which the parties have to lead evidence. Thus, issue of law can be decided without parties adducing any evidence. The very fact that the learned trial Judge while allowing the application Exhibit 19 directed the parties to adduce evidence clearly shows that the said issue cannot be treated as pure question of law. In view thereof, order dated 21st June, 2016 cannot be sustained and is liable to be set aside.

18. In so far as order dated 3rd February, 2018 is concerned, a perusal of the plaint in its entirety clearly shows that the plaintiffs had come with the case that the building “Manoj Kunj” consisting of 15 flats and one office comprising of ground plus three floors was owned by Dr. Jhabarmal Sagarmal Mishra. Dr. Jhabarmal Mishra died on or about 7th August, 1979 leaving behind him;

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|----|----------------------------------|--------------------|----------------|
| a) | Smt. Purnadevi Jhabarmal Mishra, | (wife) | now deceased. |
| b) | Surendrakumar Jhabarmal Mishra | (son) | now deceased |
| c) | Virendrakumar Jhabarmal Mishra | (son) | |
| d) | Devendrakumar Jhabarmal Mishra | (son) | now deceased |
| e) | Yogendrakumar Jhabarmal Mishra | (son) | |
| f) | Smt. Shenalata B. Sharma | (Married daughter) | |
| g) | Smt. Kusum S. Joshi | (Married daughter) | |
| | | | (now deceased) |

Dr. Surendrakumar Mishra, one of the sons of Dr. Jhabarmal Mishra is their father. He applied for grant of Letters of administration of the estate of the deceased Dr. Jhabarmal Mishra by filing Testamentary Petition No.649 of 1981. By consent of the parties, Letters of Administration were granted in favour of Dr. Surendrakumar Mishra by this Court on 19th January, 1983. A perusal of the consent terms shows that it was agreed between the parties that estate of Dr. Jhabarmal Mishra be distributed and divided among 7 shares each one having 1/7 share in the said estate. Admittedly, the plaintiff's father Dr. Surendrakumar Sharma is given 1/7 share in the building "Manoj Kunj".

19. In paragraph 12, it is asserted that the plaintiff being one of the landlords is entitled to adopt such legal action against the tenant if there is any breach of terms of the tenancy. In paragraph 13, it is asserted that defendant No.2 M/s. Polyfabrics was a monthly tenant in respect of the suit premises. In paragraph 16, it is asserted that defendant No.1 is occupying the suit premises illegally without permission or consent of the plaintiffs. In paragraph 19, it is contended that suit is instituted u/s 16 (1) (e) read with section 26 of the Act. It is, in that context, in paragraph 22, the plaintiffs asserted that defendant No.1 being illegal occupant is a trespasser in the said flat. By prayer clause (a) plaintiffs have sought decree of eviction against defendant No.2 from the suit premises directing/ordering the defendants to hand over vacant and peaceful possession of the suit premises to the plaintiffs. In other words, decree of eviction is sought not only against defendant No.1 but even against defendant No.2 who is tenant in the suit premises. It is settled principle of law that while considering the application under Order-VII, Rule-11 (d) of the C.P.C, only averments made in the plaint are required to be considered and not defence set up by the defendant in the written statement. Reading of the plaint in its entirety, it cannot be said that the plaintiffs have not asserted relationship of landlord and tenant. Thus, the suit is essentially between the landlord and tenant. The learned trial Judge was, therefore, not justified in framing preliminary issue by passing order on 21st June, 2016.

20. In paragraph 1 of the written statement defendants No.1 and 2 contended that the plaintiffs are not landlords and/or co-owners in respect of Manoj Kunj Building and, therefore, Small Causes Court has no jurisdiction to entertain and try the suit.

21. That apart, in paragraph 9, the learned trial Judge committed serious error in holding that the plaintiffs have not challenged the consent terms. The plaintiffs need not challenge the consent terms as their father Dr. Surendrakumar Mishra is given 1/7 share in the estate of Dr. Jhabarmal Mishra. Dr. Surendrakumar Mishra died leaving behind him;

a]	Chandrakant Mishra	wife
b]	Manoj S. Mishra	Son
c]	Veena S. Sharma	daughter (married)
d]	Madhuri G. Sharma	(Plaintiff No.2 herein]
e]	Seema D. Sharma	(Plaintiff No.1 herein)
f)	Priti P. Mandrekar	(daughter married)
g)	Brinda H. Sharma	granddaughter (married)
h)	Gaurav M. Mishra	grandson

Thus, prima facie, legal representatives of Dr. Surendrakumar Mishra will inherit his 1/7 share in Manoj Kunj Building. It is, therefore, not necessary for the plaintiffs to challenge the consent decree. The plaintiffs are one of the co-owners of the suit building.

22. In paragraph 10, the learned trial Judge observed that the plaintiffs have not filed any document showing that they are co-owners of the suit building. The said finding is clearly un-sustainable for the reasons set out earlier. It is settled principle of law that one of the co-owners can maintain the suit for eviction. Defendant No.1 has not brought anything on record to show that other co-owners have objected to the plaintiffs filing suit for eviction. In paragraph 10, the learned trial Judge committed further error in holding that unless and until, the plaintiffs

succeed in establishing **exclusive right** in respect of the suit building by challenging the consent terms, they cannot step into the shoes of the landlord/owner of the suit building. The said finding is also un-sustainable. In the result, Civil Revision Applications succeed. Impugned orders dated 21st June, 2016 and 3rd February, 2018 are quashed and set aside. The learned trial Judge will frame following issue as one of the issues;

'Whether there is relationship of landlord and tenant between the parties and consequently whether Small Causes Court has jurisdiction to entertain and try the suit?'

and shall try this issue along with other issues on the basis of the evidence adduced by the parties. The learned trial Judge shall not treat this issue as a preliminary issue. Subject to this modification, Applications succeed. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]