

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.4796 OF 2018

The Navyug Co-operative Housing Society Ltd.] Petitioners

Vs.

Hita Chetan Sanghavi & Ors.] Respondents

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Mr. Vivek Walawalkar a/w Mr. Visal Amin i/b B. Amin & Co., for petitioner.
 Mr. Surel Shah & Mr. Abbas Zaidy i/b Zohair & Co., for respondents No.1 to 3.
 Mr. Vishal Kanade a/w Ms Aruna Mehta i/b M/s. S. Pathak & Co., for
 respondent No.4.
 Mr. Dharmesh N. Bhagat, representative of Ganesh Kunj Co-operative Housing
 Society Ltd, respondent No.4.

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CORAM : R.G. KETKAR, J.

DATE : 19TH APRIL, 2018.

P.C.

Heard Mr. Walawalkar, learned Counsel for the petitioners, Mr. Shah, learned Counsel for respondents No.1 to 3 and Mr. Kanade, learned Counsel for respondent No.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 21st March, 2018 passed by the learned Judge, Court Room No. 40 of the Court of Small Causes at Mumbai (Bandra Branch) below Exhibit 37 in R.A.E & R Suit No.374/726 of 2013. By that order, the learned trial Judge allowed the application made by respondent No.4, hereinafter referred to as “defendant No.3” and directed the plaintiffs to lead evidence first on preliminary issue of jurisdiction which was framed on 10th January, 2018 under section 9-A of the Code of Civil Procedure, 1908 (for short 'C.P.C').

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. Mr. Walawalkar at the outset submitted that the nomenclature of the suit is wrongly mentioned as “R.A.E & R Suit” instead of “L.E & C Suit”. He further states that the plaintiffs will take out appropriate application in the trial Court for correcting nomenclature of the suit. Statement made by Mr. Walawalkar is recorded.

5. Mr. Walawalkar submitted that defendant No.3 has contended that Small Causes Court has no jurisdiction to entertain and try the suit in view of the provisions of;

[1] Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

[2] Maharashtra Co-operative Societies Act 1960.

The learned trial Judge, therefore, was not justified in directing the plaintiffs to lead evidence first on this issue. He relied on the judgment of the Apex Court in the case of **Mahant Dooj Dass Vs. Udasin Panchayati Bara Akhara and Anr. (2008) 12 S.C.C 181** and in particular paragraph 35 thereof to contend that it is now well established principal of law that the ouster of jurisdiction of a civil court is not readily inferred and heavy burden of proof lies on the party who asserts that the civil court's jurisdiction is ousted. He, therefore, submitted that defendant No.3 will have to lead evidence first on this issue.

6. Mr. Kanade upon taking instructions from representative of the Society Mr. Dharmesh N. Bhagat states that defendant No.3 does not want to lead oral evidence on the issue of jurisdiction and will proceed to argue issue

of jurisdiction on the basis of assertions made in the plaint and documents annexed along with the plaint, if any. Mr. Walawalkar states that even the plaintiffs do not desire to lead oral evidence on the issue of jurisdiction. Statements made by learned Counsel for the parties are accepted.

7. A perusal of the preliminary issue framed by the learned Judge shows that the learned trial Judge has framed issue as regards jurisdiction of the Small Causes Court to entertain and try the suit. However, in the light of paragraph 10 of reply dated 18th June, 2014 filed by defendant No.3 to application Exhibit 12, the learned trial Judge ought to have framed issue as to whether suit is barred by limitation or not?

8. In view thereof, following issue shall be added as a preliminary issue to be decided by the learned trial Judge along with preliminary issue already framed on 10th January, 2018;

“whether the suit instituted by the plaintiffs is barred by limitation or not?”

9. Mr. Walawalkar states that the plaintiffs will first adduce evidence on this issue in support of their case that suit is within limitation. Learned Counsel for the defendants state that the defendants will also lead evidence to substantiate their plea that suit is barred by limitation. Statements made by learned Counsel are recorded.

10. Learned trial Judge will permit the parties to lead evidence in the aforesaid sequence and will thereafter take up the issue of jurisdiction as also limitation and pass a common order. Order accordingly.

11. It is reported that the learned trial Judge has fixed the matter on

20th June, 2018. The learned trial Judge is requested to decide these issues within three months from 20th June, 2018. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]