

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.653 OF 2017

Shivsahay Jadunath Mishra and others ... Applicants

Vs.

Dwarkanath Shobhnath Mishra (decd) through
heirs and others ... Respondents

Mr. Atul Damle, Senior Advocate i/b. Mr. Vijay B. Mishra for
Applicants.

Mr. V. A. Thorat, Senior Advocate i/b. Mr. Ashok P. Pandey for
Respondents No.1a to 1c and 2.

CORAM : R. G. KETKAR, J.

DATE : JUNE 21, 2018

P.C. :

Heard Mr. Damle, learned Senior Counsel for applicants and
Mr. Thorat, learned Senior Counsel for respondents No.1a to 1c and 2 at
length.

2. By this Application under Section 115 of the Code of Civil
Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as
defendants No.1 to 5, have challenged the judgment and decree dated
25.02.2014 passed by the learned Judge, Court Room No.25 of the
Court of Small Causes at Bombay in L.E. Suit No.203 of 2010 as also
the judgment and decree dated 11.10.2017 passed by the Appellate
Bench of the Small Causes Court at Bombay in P. Appeal No.146 of
2014. By these orders, the Courts below decreed the Suit instituted by
respondents No.1a to 1c and 2, hereinafter referred to as 'plaintiffs' and
declared that the action of defendants No.1 to 5 of entering in flat
No.102 situate on the first floor of "Pushpa Kunj" building at 'A' Road,
Churchgate, Mumbai 400 020 (for short 'suit premises') and "Pushpa
Kunj" building (for short 'suit building') is bad, illegal and without any

authority. Defendants No.1 to 5 are restrained permanently by order of injunction from entering the suit flat, from remaining in the suit flat or any portion thereof, and / or using any portion of the suit flat including suit premises permanently. Defendants No.1 to 5 were given liberty to take their utensils or articles, if any, out of the suit premises.

3. In support of this Application, Mr. Damle submitted that basically, the Suit instituted by the plaintiffs, itself, is not maintainable. He invited my attention to paragraphs 5 and 6 of the plaint as also the prayer clause. He submitted that plaintiffs have sought injunction against defendants. The plaintiffs, therefore, ought to have approached City Civil Court, Bombay for the relief of injunction. The Small Causes Court at Bombay will have no jurisdiction to entertain and try the Suit. He submitted that this is a case of inherent lack of jurisdiction. The decree passed by the Courts below is, therefore, nullity. In support of his submissions that the plaintiffs ought to have approached City Civil Court for injunction, he relied upon decision of this Court in ***Packing Paper Products Vs. NICAF Pvt. Ltd., 2007 (5) Mh.L.J. 34.***

4. Mr. Damle further submitted that in any case, suit premises along with flat No.22 and flat No.105 are the joint family properties. He submitted that Bhagwant Mishra had three sons- Somnath, Ramnath and Jadunath. Dwarkanath - original plaintiff is one of the sons of Somnath. Defendant No.1 - Shivsahay is a son of Jadunath. He submitted that as the suit property is joint family property, even otherwise, plaintiffs cannot seek relief of injunction against the defendants No.1 to 5 being co-owners of the suit property. He has invited my attention to cross-examination of P.W.1-Suresh Dwarkanath Mishra as also evidence of D.W.1-Shivsahay Jadunath Mishra and submitted that application requires consideration.

5. On the other hand, Mr. Thorat supported the impugned orders. He submitted that plaintiffs have purchased the suit premises from one Smt. Ranjanadevi Mehra on 19.01.1973. The share certificate and electricity bills are in the name of plaintiffs. He submitted that the Courts below, after appreciating the evidence on record, have concurrently held that the suit property is not a joint family property and the suit property belongs to the plaintiffs.

6. Mr. Thorat further submitted that a perusal of the plaint in entirety will show that the Suit is essentially for recovery of possession of the suit property. The Suit is between licensor and licensee. In paragraph 10 of the plaint, plaintiffs have specifically asserted that they have permitted defendants No.1 to 5 to reside in the suit premises without any charges / compensation as the defendant No.1 is the cousin of the plaintiff No.1 and the defendants No.2 to 5 are the family members of defendant No.1. He submitted that as the relationship between the parties is that of licensor and gratuitous licensee, the Small Causes Court will have jurisdiction to entertain and try the Suit as it is relating to recovery of possession of the suit premises. In support of these submissions, he relied upon decision of the Apex Court in ***Mansukhlal Dhanraj Jain Vs. Eknath Vithal Ogale*, (1995) 2 SCC 665.**

7. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. After appreciating the evidence on record, the Courts below have held that the suit premises belongs to the plaintiffs. The Courts below also held that plaintiffs have established that defendants are their licensees. In particular, the Appellate Court has observed in paragraph 14 that agreement-exhibit 19, share certificate-exhibit 20 as

also electricity bill-exhibit 17 show that plaintiffs are the co-owners of the suit property. The Appellate Court also dealt with the contention of the defendants that the suit property was not self-acquired property of the plaintiffs but it was one of the joint family properties. After considering the evidence of D.W.1 Shivsahay, the Appellate Court observed that there is no evidence suggesting that suit property was one of the joint family properties except bare words of Shivsahay. After considering the material on record, the Appellate Court dismissed the Appeal preferred by defendants No.1 to 5.

8. In paragraph 19, the Appellate Court has considered the decision of this Court in ***Prabhudas Damodar Kotecha Vs. Manharbala Jeram Damodar***, 2007 (4) ALL M.R. 651, which was carried to the Apex Court, AIR 2013 SC 2959 and the Apex Court observed in paragraph 50 thus,

“50. We are of the considered view that the High Court has correctly noticed that the clubbing of the expression “licensor and licensee” with “landlord and tenant” in Section 41(1) of the PSCC Act and clubbing of causes relating to recovery of licence fee is only with a view to bring all suits between the “landlord and tenant” and the “licensor and licensee” under one umbrella to avoid unnecessary delay, expenses and hardship. The act of the legislature was to bring all suits between “landlord and tenant” and “licensor and licensee” whether under the Rent Act or under the PSCC Act under one roof. We find it difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception to keep gratuitous licensee alone outside its jurisdiction. The various amendments made to Rent Act as well the Objects and Reasons of the Maharashtra Act XIX of 1976 would clearly indicate that the intention of the legislature was to avoid unnecessary delay, expense and hardship to the suitor or else they have to move from the one court to the other not only on the question of jurisdiction but also getting reliefs.”

9. The Apex Court has held that the Suit between licensor and

gratuitous licensee lies exclusively in the Small Causes Court. In paragraph 20, the Appellate Court has considered the decision of the Apex Court in ***Sant Lal Jain's Vs. Avtar Singh***, AIR 1985 SC 857.

10. In the case of **Mansukhlal Dhanraj Jain** (*supra*), the Apex Court has considered Section 41(1) of the Presidency Small Cause Courts Act, 1882 and observed that for applicability of Section 41(1) of that Act, the following conditions must be satisfied before taking view that jurisdiction of regular competent civil court like City Civil Court is ousted:

- (i) it must be a suit or proceeding between the licensee and licensor; or
- (ii) between a landlord and a tenant;
- (iii) such suit or proceeding must relate to the recovery of possession of any property situated in Greater Bombay; or
- (iv) relating to the recovery of the licence fee or charges or rent thereof.

11. In paragraph 14, the Apex Court considered whether injunction suits can be said to be relating to the possession of the immovable property. In paragraph 16, the Apex Court observed thus,

“16. It is, therefore, obvious that the phrase 'relating to recovery of possession' as found in Section 41(1) of the Small Causes Court Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide sweep of the said phrase, Consequently in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Causes Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits.”

12. The present case is covered under conditions (i) and (iii) for attracting Section 41(1). In the present case, after appreciating the evidence on record, the Courts below have held that plaintiffs had proved that defendants were licensees in respect of the suit property.

13. In the case of ***Nagin Mansukhlal Daglil Vs. Haribhai Manibhai Patel***, AIR 1980 Bombay 123, the plaintiff had instituted Suit on the Original Side of this Court inter alia praying for declaration that defendant was a trespasser in respect of the suit flat and that he has no right, title or interest to remain or continue to remain in use and occupation or possession thereof. By prayer clause (b), plaintiff sought mandatory injunction directing the defendant to forthwith remove himself, his servants and agents, together with his belongingness from the suit flat and to handover vacant and peaceful possession of the suit flat to the plaintiff. While considering issue of jurisdiction of this Court, the Division Bench of this Court referred to Section 19(i) and (s) of the Presidency Small Cause Courts Act, 1882 and observed in paragraph 10 thus,

“10. Prayer (b) of the plaint, in the guise of a prayer for a mandatory injunction against the defendant to remove himself from the said flat, is in substance no other than a prayer for the recovery of possession of the said flat. Realizing full well that the proper relief to pray for would be a decree or order for possession but at the same time being desirous of bringing the suit in this Court and simultaneously not wishing the suit to suffer from a technical defect, the draftsman of the plaint has in the said prayer sought to protect the plaintiff by using the phraseology “that the defendant be ordered and decreed by a mandatory order or injunction...” Thus, really, what is prayed for is a decree for possession. “It is now well settled that when we have to determine the nature of the suit what we are to look at is the real substance of the suit and not legal ingenuity in drafting the plaint. The plaint read as a whole and the real substance of the suit leave no doubt that this is a suit between persons who hold the character of a licensor and licensee, which relationship having come to an end according to the plaintiff, the plaintiff has become entitled both in law

and under the agreement of licence to recover possession of the property from the defendant, his licensee.”

14. In view thereof, I do not find any merit in the submission of Mr. Damle that as the plaintiff had instituted Suit for injunction, Small Causes Court has no jurisdiction to entertain and try the Suit.

15. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in decreeing the Suit. Defendants No.1 to 5 were not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.1 to 5 were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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