

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1652 OF 2018

Dr. Rustom Farhad Ginwalla

...Petitioner

Versus

Mrs. Zenobia R. Poonawala (Nee Ginwalla)

...Respondent

....

Mr. Sameer Pandit a/w. Ms. Sarrah Khambati I/b. M/s. Wadia Ghandy & Co. for the Petitioner.

Mr. Aryal N. Amin a/w. Ms. A.R. Khanna a/w. B. Amin i/b. B. Amin & Co. for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 17th JULY, 2018

P.C.

1. Heard Mr.Sameer Pandit, learned counsel for the petitioner and Mr.Aryan Amin, learned counsel for the respondent, at length.
2. 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 28.9.2017 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.146/2016. By that order, the Appellate Court allowed the Revision Application filed by the respondent, hereinafter referred to as the 'defendant' and quashed and set aside the judgment and order dated

6.2.2016 passed by the learned Judge, Court Room No.23 of the Small Causes Court at Mumbai below Exhibit-21 in R.A.D. Suit No.728/2015. The Appellate Court directed the trial Court to frame following preliminary issue and directed the trial Court to allow both the parties to lead their evidence, if any, in support of their stand on the issue of jurisdiction and decide said issue in accordance with law:

“Whether the Court has jurisdiction to entertain and try the suit”

3. Rule. Ms.Khanna waives service on behalf of the respondent. 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.

4. Mr. Pandit submitted that the defendant filed application Exhibit-21 under Section 9-A of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') for framing preliminary issue. He invited my attention to paragraph-3 of that application where the defendant contended that there is no relationship of landlord and tenant between the plaintiff and the defendant and, therefore, the Small Causes Court has no jurisdiction to entertain and try the suit. In paragraph-4 it is contended that the purported rent receipts relied upon by the plaintiff are false and fabricated and the rent receipts are issued in collusion with other co-

owner. In paragraph-5 it is contended that the plaintiff has misrepresented the facts, has not disclosed correct and true facts and malafidely suppressed true and correct facts for his vested interest. The plaintiff has not come to Court with clean hands and has filed the suit to abuse of process of law. The defendant, therefore, prayed for framing preliminary issue under Section 9-A of C.P.C.

5. Mr.Pandit invited my attention to paragraph-5 of the trial Court's order where the learned trial Judge observed that the jurisdiction of the Court is a pure question of law. The defendant has come with the case that the plaintiff has relied upon fabricated rent receipts. In such circumstances, when mixed question of law and fact has arisen, it is appropriate to hold a full-fledged trial. It is unsafe to decide that mixed question of law and facts as preliminary issue. As against this in paragraph-20 of the impugned order, the Appellate Court observed that undisputedly there is no landlord and tenant relationship between the plaintiff and the defendant. Mr. Pandit submitted that in the entire suit the plaintiff is claiming tenancy right in respect of garage No.2 and thus said observation is totally unwarranted. Even otherwise, in view of deletion of Section 9-A of C.P.C. under the Ordinance, the Appellate Court was not justified in framing preliminary issue.

6. On the other hand Mr.Amin supported the impugned order. He submitted that the defendant is the co-owner having 45% share and father of the plaintiff & defendant is also having remaining 55% share in the entire premises which also includes the suit garage. He, therefore, submitted that as there is no landlord and tenant relationship, 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 order.

7. I have considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit *inter alia* contending that he is a tenant of garage No.2. As against this, the defendant has contended that there is no relationship of landlord and tenant between the parties. In my opinion, the learned trial Judge was right in observing that this is not a pure question of law but is a mixed question of law and facts for which the parties are required to adduce evidence. Even otherwise, in view of deletion of Section 9-A of C.P.C. by way of Ordinance, the preliminary issue as framed by the Appellate Court cannot be allowed to stand and instead following issue shall be framed as one of the issues in the suit and the same shall be tried along with other issues by permitting the parties to adduce evidence :

“Whether there is a relationship of landlord and tenant between the parties ?”

8. In the result, the Petition succeeds. The impugned order is set aside. Th learned trial Judge will frame above issue as one of the issues and will try this issue along with other issues and permit the parties to lead evidence. The learned trial Judge shall not treat this as a preliminary issue. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

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Prakashrao
Deshmane

Digitally signed by
Pradipkumar
Prakashrao
Deshmane
Date: 2018.07.24
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