

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****FIRST APPEAL NO. 101 OF 2006****Smt.Sangita Pradipkumar Magade****..... Appellant****VERSUS****Vishnu D. Magade,
since deceased, legal representatives
Vijay Vijay Tokle & Ors.****..... Respondents**

Ms.Vaijyanti Kalekar for the Appellant.

None for the Respondents.

CORAM : R.D. DHANUKA, J.**DATE : 8th NOVEMBER, 2019****P.C.**

By this first appeal filed under section 96 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and decree dated 21st December,2005 passed by the Bombay City Civil Court in S.C.Suit No.5386 of 2003. None appeared for the respondents though served.

2. The respondent nos. 1 and 2 were the original plaintiffs before the trial court. After demise of the respondent no.1, his legal heir was brought on record. In the later part of the judgment, the parties are described as per their original status before the learned trial court.

3. The plaintiff was the father-in-law of the defendant. The original plaintiffs were father in law and mother in law of the defendant respectively. The defendant was married to Mr.Pradeepkumar Magade who was son of the original plaintiffs. The husband of the defendant expired leaving behind him the original plaintiff no.1, the defendant

and a minor daughter. The plaintiff filed a suit for permanent injunction against the defendant, his servants, agents and representatives restraining them from evicting the plaintiffs from the suit premises viz. B-602, Brahma Niwas, Shree Ganesh Co-op. Housing Society, MHADA Colony, Mulund (West), Mumbai 400 081 without due process of law and the injunction against the defendant from entering the suit premises in prayer clause (c) of the plaint. The plaintiffs also prayed for a declaration that the suit premises was a joint family property.

4. The defendant filed a written statement before the trial court and raised a plea of pecuniary jurisdiction as well as the subject matter jurisdiction before the trial court and also an issue of mis-joinder and non-joinder of necessary parties. It was the case of the defendant that the suit property was acquired by her husband exclusively from his own funds. The defendant also filed a counter claim before the Trial Court *inter alia* praying for an order and direction and for a mandatory injunction against the plaintiffs to remove themselves from the suit premises with all their belongings including the members of their family. The defendant also prayed for a decree against the plaintiff to pay a sum of Rs.10,318/- with interest at the rate of 18% per annum from November 2003 till realization. The defendant also prays for injunction against the plaintiffs from parting with possession, transferring, alienating or encumbering the suit premises in any manner whatsoever or creating third party right. The defendant has not impugned the decree.

5. The learned trial judge framed following issues :-

1. Does defendant prove that this court has no subject matter jurisdiction to try the suit ?
2. Does defendant prove that this court has no pecuniary jurisdiction to try the suit ?
3. Does defendant prove that suit is bad in law for non joinder of necessary parties ?
4. Do plaintiffs prove that suit flat is joint family property of parties to suit ?
5. Does defendant prove that suit flat is self acquired flat of her husband ?
6. Does defendant prove that plaintiffs have no right to reside in suit flat after death of their son even as licensee ?
7. Does defendant prove that she is entitled for damages @ Rs.5,000/- p.m. towards unlawful use of suit flat by plaintiffs ?
8. Does defendant prove that she is entitled to recover sum of Rs.10,318/- from plaintiffs towards such damages as counter claimed ?
9. Are plaintiffs entitled for the relief of perpetual injunction to restrain defendant from evicting plaintiffs from suit flat ?

10. Are plaintiffs entitled for the relief of perpetual injunction to restrain defendant from entering into suit flat?

11. Is defendant entitled for the relief of injunction as counter claimed ?

6. The plaintiff no.1 himself entered the witness box. The defendant also entered the witness box. During the pendency of the suit, the plaintiff filed a chamber summons bearing no.3 of 2004 in the said S.C.Suit No.5386 of 2003 *inter alia* praying for deletion of prayer clause (c) i.e. for a joint declaration of the suit property as family property and also for leave under Order 2 Rule 2 of the Code of Civil Procedure. By an order dated 15th April,2005, the learned trial judge dismissed the said chamber summons. The said order passed by the Trial judge was not impugned by the plaintiffs before this court.

7. Insofar as issue of subject matter jurisdiction is concerned, the learned trial judge held that the defendant has failed to prove that the City Civil Court had no subject matter jurisdiction to try the suit. Insofar as issue of pecuniary jurisdiction raised by the defendant is concerned, the learned trial court held that the defendant had failed to prove that the City Civil Court had no pecuniary jurisdiction. In paragraph (16) of the judgment and decree, the learned trial judge decided the said issue of pecuniary jurisdiction against the defendant on the ground that the plaintiffs had valued the suit under section 6(iv) (j) of the Bombay Court Fees Act and paid the court fees accordingly. However on perusal of the paragraphs (20) and (21) of the impugned judgment and decree, it is clear that the learned trial judge has rendered a finding that the plaintiffs had proved that the said flat was a joint

family property to the suit.

8. A perusal of the oral evidence led by both the parties and also the averments made in the plaint and in the written statement clearly indicates that the value of the suit flat even according to both the parties was much more than Rs.50,000/-. On the date of filing of the suit by the plaintiffs, the pecuniary jurisdiction of the City Civil Court was Rs.50,000/-.

9. It was the case of the plaintiffs themselves that the plaintiffs had borrowed a loan of Rs.4,95,000/- in the name of the deceased son of the plaintiffs for purchase of the flat which allegation was disputed by the defendant. The said averments itself would indicate that the value of the said flat was much more than Rs.50,000/- and thus the City Civil Court had no pecuniary jurisdiction to entertain, try and dispose of the said suit.

10. Insofar as prayer for injunction made in the plaint is concerned, those prayers were consequential to the substantive prayers for declaration which is beyond the pecuniary jurisdiction of the City Civil Court.

11. In my view, since the City Civil Court did not have pecuniary jurisdiction to entertain, try and dispose of the said suit, the learned trial court could not have gone into the merits of the matter and could not have rendered any finding on the issue whether the suit flat was a joint family property or not. I am thus not inclined to go into the other findings of fact rendered by the trial court since those findings would also be beyond the jurisdiction of the trial court. In my view, since the

issue of pecuniary jurisdiction was raised by the defendant and the value of the suit was beyond the pecuniary jurisdiction of the City Civil Court, the learned trial judge ought to have returned the plaint to the court having jurisdiction under Order 7 Rule 10 of the Code of Civil Procedure.

12. I, therefore, pass the following order :-

(a) The judgment and decree dated 21st December, 2005 passed by the learned trial judge in S.C.Suit No.5386 of 2003 is set aside.

(b) S.C.Suit No.5386 of 2003 is restored to file.

(c) The learned trial judge is directed to return the plaint to the original plaintiffs to be presented to the court in which the suit should have been instituted.

(d) It is made clear that both the parties would be entitled to rely upon the evidence already led before the trial court in the said suit before the court which would try and entertain the suit upon the presentation of the plaint under Order 7 Rule 10 of the Code of Civil Procedure.

(e) The hearing of the suit is expedited.

(f) It is made clear that since City Civil Court did not have pecuniary jurisdiction to dispose of the said civil

suit filed by the original plaintiffs, the court which has jurisdiction to hear the suit will not take into consideration, the findings of fact rendered by the City Civil Court in the impugned judgment and decree and shall decide the suit without being influenced by the findings rendered therein and shall decide on its own merits.

(g) First appeal No. 101 of 2006 is allowed in the aforesaid terms. There shall be no order as to costs.

(h) The office is directed to transmit the records and proceedings in the S.C.Suit No.5386 of 2003 to the City Civil Court expeditiously.

(i) The court having proper jurisdiction shall decide the matter expeditiously and shall not grant any unnecessary adjournment to any of the party. The interim order passed by this court, if any, in favour of the appellant and in force today shall continue during the pendency of the suit.

[R.D.DHANUKA, J.]