

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.6332 OF 2018

Ajaykumar D. Joshi] Petitioner

Vs.

Mohd. Yaqub Babu Sodawala] Respondent

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Mr. Jayesh Bhatt, learned Counsel for the Petitioner.

Mr. A.N. Nasikwala, learned Counsel for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 2nd APRIL, 2019.

P.C.

Heard Mr. Bhatt, learned Counsel for the petitioner and Mr. Nasikwala, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.1' has challenged the order dated 24th August, 2016 passed by the learned trial Judge below Exhibit 17 in R.A.E. Suit No.1124 of 2015 as also the order dated 20th January, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.278 of 2016. By these orders, the Courts below rejected the application made by defendant No.1 under Order-VII, Rule-11 (a) and (d) of the Code of Civil Procedure, 1908 (for short 'C.P.C') for rejection of the plaint.

3. The plaintiff has instituted the suit against defendant No.1, *inter alia*, contending that defendant No.1 is not using and/or occupying the suit premises for reasonable cause for the purpose of storage for which the suit premises were let out continuously for a period of six months immediately preceding the date of institution of the suit and due to closer of the suit

premises, the defendant is causing nuisance and annoyance to all the occupiers. During pendency of the suit, other co-owners filed application Exhibit 15 for their impleadment. By order dated 5th August, 2016, the learned trial Judge allowed that application and directed the plaintiff to join respondents No.2(a) to 2 (e) herein as defendants No.2(a) to 2(e). In pursuance thereof, respondents No.2(a) to 2 (e) are impleaded as defendants No.2(a) to 2(e).

4. Defendant No.1 filed application Exhibit 17 under Order-VII, Rule-11 (a) and (d) for rejection of the plaint. Defendant No.1 contended that defendants No.2(a) to 2(e) had addressed a letter dated 1st March, 2016 informing all the tenants that they are the co-owners along with the plaintiff. The plaintiff is filing case in the Small Causes Court mischievously behind their back. They have also threatened by that letter that from April, 2016, they will be the landlords and rent should be paid to them. Defendant No.1 further contended that the present suit is instituted on 4th July, 2015 contrary to the stand of defendants No.2 (a) to 2(e). They have filed application dated 2nd May, 2016 for their impleadment. He submitted that as the suit is instituted by the plaintiff without consent of defendants No.2(a) to 2(e), the plaint is liable to be rejected under Order-VII, Rule-11 (a). Defendant No.1 further contended that as the suit is not between the landlord and tenant, the Small Causes Court has no jurisdiction to entertain and try the suit. The suit is also liable to be dismissed as it is barred under the Rent Control Act. Thus, the plaint is liable to be rejected under Order-VII, Rule-11 (d).

5. In support of this Petition, Mr. Bhat has invited my attention to the application filed by defendants No.2 (a) to 2(e). In paragraph 1 of that application, it is asserted by them that the present suit is instituted by the plaintiff without intimating to them. In paragraph 3, it is asserted that it is

incumbent upon the plaintiff to join defendants No.2 (a) to 2 (e) in filing the suit. The suit is instituted by the present plaintiff against defendant No.1 for his own benefit. The plaintiff is aware that without the consent of the other co-owners, no action can be taken against any of the tenants in the suit property. Defendants No.2(a) to 2 (e) are having equal ownership right, title and interest in the suit premises. In paragraph 4, it is asserted that from the last few days, the plaintiff after filing the suit without the consultation and consent of the proposed defendants circulated letter to the tenants of the suit property by asking them not to pay rent to defendants No.2 (a) to 2(e). He submitted that a fair reading of the application filed by defendants No.2(a) to 2(e) for their impleadment clearly shows that they are objecting filing of the suit by the plaintiff. In fact, they are opposing eviction suit filed by the plaintiff on the ground that without their consent, the plaintiff has instituted the suit.

6. Mr. Bhat heavily relied on the dissenting view of Hon'ble Mr. Justice Lalit Mohan Sharma (As the Hon'ble Chief Justice of India then was) in **Sharfuddin Vs. Bibi Khatija, AIR 1988 Patna 58** as also decision of the Apex Court in **Mangal Builders & Emprises Ltd Vs. Willaimson Magor & Co. Ltd, S.L.P (c) No.9616-9617 of 2015 decided on 6th April, 2017**. In this decision, the Apex Court has referred to the Full Bench decision of Patna High Court. The Apex Court has approved dissenting view of the the Hon'ble Mr. Justice Lalit Mohan Sharma. The Apex Court specifically held that remedy of partition is a cumbersome remedy and merely because law provides a remedy which the aggrieved party can avail of, the same cannot be ignored only on the ground that asking the parties to avail of the said remedy would be relegating them to another round of litigation. In short, he submitted that the Apex Court held that even once co-owner objects to filing a eviction suit by another co-owner, such suit is not maintainable. As in the present case, defendants No.2 (a) to 2 (e) have objected filing of the suit by the plaintiff, the Courts below were not

justified in rejecting the application. He submitted that in paragraph 11, the Appellate Court referred to the decision of **Mangal Builders & Emprises Ltd (supra)** and observed that the said decision was rendered without considering the ratio laid down by the five Judges Constitution Bench of the Hon'ble Supreme Court in the case of **Sriram Pasricha Vs. Jagannath, (1976) 4 SCC 184**. He submitted that the decision is rendered by three Judges Bench and not by five Judges Bench. He further submitted that the Appellate Court overstepped its jurisdiction in recording such finding. He, therefore, submitted that the Petition requires consideration.

7. On the other hand, Mr. Nasikwala supported the impugned order. He submitted that while rejecting the application Exhibit 17, the learned trial Judge observed in paragraph 8 that defendants No.2(a) to 2(e) had filed application Exhibit 15 for their impleadment in the suit to safeguard their right, title and interest and to see that the plaintiff is not only benefited from the fruits of the decree if passed against defendant No.1 in the suit. Nowhere, defendants No.2 (a) to 2(e) stated that they oppose the filing of the suit.

8. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the plaintiff has instituted the suit against defendant No.1 for eviction. During pendency of the suit, defendants No.2(a) to 2(e) filed application Exhibit 15 for their impleadment. By order dated 5th August, 2016, the learned trial Judge allowed that application and directed the plaintiff to implead them as defendants No.2(a) to 2(e). A perusal of the application Exhibit 15 made by defendants No.2(a) to 2 (e) does not indicate that they objected the plaintiff for filing the suit. In paragraph 8 of the trial Court's order dated 24th August, 2016, the learned trial Judge has observed that application was made by defendants No.2(a) to 2 (e) to safeguard their right, title and

interest and to ensure that the plaintiff is not only benefited from the fruits of the decree if passed against defendant No.1. The learned trial Judge also thereafter observed that nowhere the co-owners have stated that they oppose the filing of the suit by the plaintiff. The learned trial Judge was also of the view that it cannot decide dispute of title among co-owners.

9. By order dated 20th January, 2018, the Appellate Court rejected the revision application. The Appellate Court observed in paragraph 16 that as per the provisions of Order-VII, Rule-11 (a), plaint can be rejected if it does not disclose cause of action. In so far as contention of defendant No.1 that suit is not between the landlord and tenant and, therefore, plaint is liable to be rejected under Order-VII, Rule-11 (d) is concerned, the Appellate Court observed that while considering the application under Order-VII, Rule-11, the Court cannot consider the defence raised by the defendant in his written statement. A perusal of the plaint shows that the suit is instituted by one of the co-owners against defendant No.1/tenant under the grounds available under the Rent Act. Therefore, application under Order-VII, Rule-11 (a) and/or (d) made by defendant No.1 is devoid of merits. For the reasons recorded by the Courts below, I do not find that they have committed any error in rejecting the application.

10. However, in paragraph 11, the Appellate Court observed thus;

“While deciding the said case the Hon'ble Supreme Court only relied upon the case of **India Umbrella Manufacturing Co Vs. Bhagabandei Agarwall** cited (supra) and the case of **Sharfuddin & Ors Vs. Bibi Khatija** (Calcutta High Court). However, it seems that this cases of Sriram Pasricha and Kanta Goyal cited (supra) which are on the direct point of consideration which was before the Hon'ble Supreme Court was not placed before it. Under such circumstance, the ratio laid down in the said case of **Mangal Builders & Enterprises Ltd** would not be applicable since it was without considering the

ratio laid down by the five Judges Constitution Bench of the Hon'ble Supreme Court in the case of **Sriram Pasricha**. The Hon'ble High Court in the case of **M/s. Sirsiwala Realty** relying on the said case laid down law that suit under Rent Act without the consent of other co-owners is tenable. Under such circumstances, in view of the ratio laid down in the above cited cases of **Sriram Pasricha, Kanta Goyal and M/s. Sirsiwala Realty** the suit filed by one of the co-owner without the consent or objection of the other co-owner would be tenable”.

11. In my opinion, finding of the Appellate Court in paragraph 11 “that decision of **Mangal Builders & Enterprises Ltd** is given without considering ratio laid down by the five Judges Constitution Bench of the Hon'ble Supreme Court in the case of **Sriram Pasricha**” is concerned, it is clearcut case of impropriety on the part of the Appellate Court. Decision in **Sriram Pasricha** is laid down by three Judges Bench and not by Bench comprising of five Judges. That apart, the Appellate Court is bound to follow decisions of the Apex Court and cannot question the same on the ground that it was rendered without considering the ratio laid down in **Sriram Pasricha's** case. Observations made in paragraph 11 to that effect stand deleted from the Appellate Court's order.

12. Registry is directed to send authenticated copy of this order to Adil M. Khan, Ad-hoc District Judge and Smt. S.J. Ramgadiya, Ad-hoc District Judge, Court of Small Causes at Mumbai so that in future they do not commit the same mistake.

13. In view of the aforesaid observations, the Petition fails and the same is dismissed. All contentions of the parties on merits are expressly kept open.

[R.G. KETKAR, J.]