

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION (ST) NO. 13533 OF 2018

1. Mrs. Shaikh Naboota (since deceased)
Through Legal Heirs
1(a) Gulam Hussain Annula Shaikh
1(b) Anwari Begum Inamullah Shaikh
1(c) Mairunisa Annula Shaikh ... Applicants
V/s.
1. Mr. Satyanarayan Bachunath Singh
2. Mr. Vijaypratap Bachunath Singh ... Respondents

Mr. Direndra Singh, for the Applicants.
Mr. Tushar Dahibawkar a/w. Ms. Vrushali Bhoir I/b. Dahibawkar and
Co. for the Respondent Nos.1 & 2.

**CORAM : DAMA SESHADRI NAIDU, J.
DATE : 19th JULY 2019.**

ORAL JUDGMENT:-

Facts:

The applicants are the tenants, and the respondents the owners. Initially, the respondents' father, the original owner, let out the property to the applicants' predecessors. The applicants' father and their elder paternal uncle were the tenants. It emerged from the parallel litigation in R.A.D. Suit No.54 of 1994 that during their lifetime, the brothers divided the tenanted property. They started

living separately, under the same roof though. That is how the once-joint-tenancy has been split, and the leased property was recognized as Room Nos.3 and 3A.

2. The respondents, as the owners, filed R.A.E. & Suit No.344/599 of 2009 before the Small Causes Court at Bombay. It was against Smt. Shaikh Naboota, the deceased original tenant's wife and the applicant's mother. The eviction concerned the property the applicant's father occupied. On trial, the court decreed the suit on 28th March 2013. As the defendant died pending the suit, the applicants, as legal representatives, came on record and defended the proceedings. After suffering a decree, they filed a statutory appeal before the Appellate Bench of the Small Cause Court. Eventually, 30th January 2018 the Appeal No. 59 of 2013 too was dismissed. Further aggrieved, the applicants have filed this Civil Revision Application.

Submissions:

Applicants':

3. In the above factual backdrop, Shri Dhirendra D. Singh, the learned counsel for the applicants, has submitted that the judgments of both the courts below suffer from incurable legal infirmities. To elaborate, he has submitted that "admittedly" the tenancy is joint. Yet

the owners chose to file the suit only against one co-tenant, that is the applicants' mother. So, according to him, no suit for eviction could be maintained exclusively against one co-tenant. To support his contentions, Shri Singh has relied on *Uma Devi Khanna v. Ava Rani Das*¹, a Division Bench judgment of Kolkata High Court.

4. Shri Singh has also contended that, as the appeal only continues the original proceedings, the Appellate Court is a court of both fact and law. The applicant, therefore, has every right to raise even a plea of fact at the Appellate stage. In the alternative, Shri Singh has contended that the maintainability of a suit is a question of law and it can be raised at any stage of the proceedings before the proceedings culminate. To support his contentions, he has relied on *State of Rajasthan v. Rao Raja Kalyan Singh*².

5. According to Mr. Singh, the decree the owners have secured has become nullity in the eye of law because they failed to bring on record all the necessary parties. So they cannot enforce it. He has also contended, in the alternative, that the leased structures stand on the property that actually belongs to the Municipal Corporation. Therefore, the owners have no title to the property to press on with

1 2005(2) RCR 697

2 AIR 1971 SC 2018

the decree and to get the applicants evicted.

Respondents’:

6. In response, Shri Tushar Dahibawkar, the landlords’ counsel, has submitted that there was no plea about the nonjoinder of necessary party. Neither the applicants nor their predecessors, including their mother against whom the eviction proceedings were originally initiated, ever pleaded that there are co-tenants or joint tenants, besides the defendant. To elaborate, he has submitted that in Suit No. 54 of 1994, filed by the applicants’ mother against her brother-in-law, that is her husband's elder brother, the court on evidence has held that the brothers had the property divided as room No.3 and 3A and started living separately. Then, eventually, through the judgment dated 22nd February 2001, the trial court declared the applicant's mother as tenant occupying room No.3A.

7. About the lack of title to the property, Shri Dahibawkar has submitted that though the applicants raised that plea, the courts below rejected that on the merits.

8. Heard Shri Dhirendra Singh, the learned counsel for the applicants, and Shri Tushar Dahibawkar, the learned counsel for the Respondent Nos.1 and 2.

Discussion:

9. Shri Singh for the applicants has taken two pleas: (a) No suit can be maintained against one co-owner without joining the other co-owner. Thus, the suit is bad for nonjoinder of the necessary party. (b) The owners lack the title to the property. So they ought not to have instituted the eviction proceedings.

10. Shri Singh has strenuously contended that the competent Civil Court in Suit No. 54 of 1994 declared the applicants' mother and their uncle as joint tenants of the suit schedule property. The judgments of both the trial court and Appellate Bench are part of the Record as exhibits 43 and 44 respectively. I perused both. In its judgment, the trial court has noted that Room No.3, stood divided and marked as "3" and "3A". They measure 18'x12' and 9'x12', respectively. Eventually, it has declared that the applicant's mother has exclusively possessed Room No.3A. Based on those observations, the trial court decreed the suit as follows:

1. Suit is hereby decreed with cost.

2. The defendants are directed to handover the vacant and peaceful possession of the suit premises i.e. Room No. 3A, Ground Floor, Bachunath Singh Suryanath Singh Chawl, 28 A B Ambewadi, Parel Tank Road, Near Trimurti Garage, Mumbai-400 033 to the plaintiffs within three months from the date of this order.

3. The defendants are directed to pay the arrears of rent within one month from the date of this order to the plaintiffs.

4. A separate inquiry be made under Order XX Rule 12(1)(c) of C.P.C. for ascertaining the mesne profit of the suit premises.

5. Decree be drawn up accordingly.

11. The applicant's mother took the matter to the Appellant Bench of the Small Causes Court, in Appeal No.484 of 2001. The Appellate Bench has observed that the applicants' mother filed the suit for declaring herself, along with her brother-in-law, as the tenant of the suit property comprising two properties measuring 18'x12' and 9'x12'. But the declaration, as the Appellate Bench notes, was the tenant one portion measuring 9'x12'. Thus, it has refused to interfere with the trial Court's judgment. So Shri Singh's assertion that a competent civil court has declared the applicants' mother as a co-tenant with their uncle stands falsified.

(a) Maintainability:

12. I accept that maintainability of a suit is a question of law and it can be raised at any stage before the proceedings eventually terminate. This proposition is not universal. Plainly put, if a court inherently lacks jurisdiction, all proceedings that emanate from that court become void. It is a case of *coram non judice*. It literally means

the proceedings are before a judge not competent or without jurisdiction. There are other aspects of jurisdiction, such as pecuniary or territorial. They do not strike at the proceedings with the same force. If we consider the nonjoinder of necessary parties, Order 1 deals with parties to suits.

(b) Non-Impleadment of Necessary Party:

13. Rule 9 of Order 1 deals with misjoinder and nonjoinder. No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. But the proviso emphasises that nothing in this Rule shall apply to nonjoinder of a necessary party. But Rule 13 of the same Order has a salutary effect. All objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen. If no objection is taken at an appropriate time, it shall be deemed to have been waived. That said, we should acknowledge that this waiver applies to the parties under Rule 9: misjoinder of any party and nonjoinder of only a proper party. That means, the plea of nonjoinder

of a necessary party can be raised at any stage; it does not stand waived.

14. The applicants have relied on *Rao Raja Kalyan Singh*. The Supreme Court, in that case, has held that the plea of maintainability of the suit is essentially a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were taken or no precise issues were framed is of little consequence.

15. But the nonjoinder of a necessary party does not prove to be fatal from the word go. The proviso to Rule 9 was added through the 1976 Amendment, for the Law Commission had felt that the non-joinder party of the essential party should be excluded from the operation of the Rule. So the insertion of the proviso has come about. Then, to bring home any plea under the provision, the defendant must have taken a clear plea about the non-impleadment of the necessary party. If that plea is absent, the plaintiff cannot be non-suited.

16. That plea taken, the court will not, however, straight away dismiss the suit. Then, the court may exercise powers under Order 1, Rule 10 (2) or Order 6, Rule 17 of CPC; it may order the plaintiff or allow him to join the necessary party or parties by amending the plaint. But despite the defendant's objection, if the plaintiff refuses or

neglects to join the necessary party to the suit, it will prove fatal. The suit ought to be dismissed.³ But here the question is, who is that necessary party?

(c) Was there a Necessary Party to have been Impleaded?

17. First, there was no plea about the nonjoinder of necessary party. So the question of the plaintiffs' heedlessly persisting with the proceedings does not arise. That apart, in Civil Suit No.54 of 1994, filed by the applicants' mother, she was declared to be an exclusive tenant of Room No.3A. That was in 2001.

18. In *Uma Devi Khanna*, when the original tenant died, the landlord has brought on record only one of his heirs, but not the others. It was despite the defendants' pointing out that there were other legal heirs. In that context, *Uma Devi Khanna* has observed that curiously enough, in spite of the defendants' specific defence in the written statement about the "want of necessary party, the plaintiff did not utter a single sentence in examination-in-chief denying the defence case." In cross-examination, the plaintiff, on the other hand, admitted that there were other co-tenants. So *Uma Devi Khanna* has observed that "if on the death of a tenant some of his heirs are left out in a suit for eviction, the suit is not maintainable." I am afraid this

³ C. K. Thakker's Code of Civil Procedure, Vol.3, p.386-87, EBC Reader

decision does not affect the case before us.

19. Indeed, the courts below did consider the applicants' plea that the owners lack the title to the property. Undeniably, the owners' predecessors inducted the applicants' father and their uncle as the tenants into the property. To be a lessor or landlord, one need not own the property. Whoever intermeddles with the property is treated as the landlord. The tenant having been inducted by a person into possession, he is estopped from denying that person's right to intermeddle with the property. Even otherwise, the courts below did address this issue and found no merits in the applicants' assertion.

20. After all, this Civil Revision Application is under section 115 of the Code of Civil Procedure. This Court only ensures that the trial court has not crossed its jurisdictional bounds. Even an erroneous finding on merits—on an appreciation of facts—does not call for interference in a revision.

(d) Conclusion:

So I dismiss the Civil Revision Application. I was inclined to impose costs on the applicants because in their submissions, they insisted that earlier the civil court declared their mother and their uncle as co-tenants. But that was not to be. And that amounted to

.docx

misleading the Court. Yet given the applicants' financial condition, I refrain from doing so.

(DAMA SESHADRI NAIDU, J.)