

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****CIVIL WRIT PETITION NO. 6356 OF 2021**

Goodwill Realtors and Properties Pvt. Ltd.

A Company incorporated and registered

Under the provisions of the Companies

Act, 1956 and having its Registered

Address at 101, Arun Chambers, Tardeo,

Mumbai 400 034.

... Petitioner.

Vs.

1 Smt. Bhanumati Keshrichand Jhaveri,

(Since deceased) Through LRs

2 Mr. Nikhilesh Keshrichand Jhaveri

Age 60 years, Occupation: Consultant

3 Ms. Meera Keshrichand Jhaveri

Age 54 years, Occupation: Consultant

4 Ms. Jayhshree Jhaveri Lederman

Age 62 years, Occupation: Housewife

All the above having Hindus Indian

Inhabitants, having their residence at

39, Chowpatty Sea Face,

Ratnagar Palace, Mumbai-400 007

....Respondent Nos.1 to 4
Original Plaintiffs.

5 M/s. New Era Fabrics Ltd.,

A Company incorporated under the

Indian Companies Act, 1956 having its

registered office at Mogul Lane, Tulsi

Pipe Road, Matunga (West),
Mumbai-400 016.

- 6 Home Care Retails Marts (P) Ltd.,
A Company incorporated under the
Indian Companies Act, 1956 having its
registered office at Unit 1,
Wasan Udhyog Bhavan,
Tulsi Pipe Road, Op. Phoenix Mills,
Lower Parel, Mumbai-400 013.
- 7 Television 18 India Limited,
A Company incorporated under the
Indian Companies Act, 1956 having its
office at Empire House, 1st Floor,
Senapati Bapat Marg, Lower Parel,
Mumbai-400 013.
- 8 Johnson Dye Works (P) Ltd.,
A Company incorporated under the
Indian Companies Act, 1956 having its
registered office at Mogul Lane, Tulsi
Pipe Road, Matunga (West),
Mumbai-400 016.
- 9 Hanil Era Textiles Limited,
A Company incorporated under the
Indian Companies Act, 1956 having its
registered office at Mogul Lane, Tulsi
Pipe Road, Matunga (West),
Mumbai-400 016.

- 10 Royal Energy Limited
A Company incorporated under the
Indian Companies Act, 1956 having its
registered office at Mogul Lane, Tulsi
Pipe Road, Matunga (West),
Mumbai-400 016.

....Respondent Nos.5 to 10
Original Defendant Nos.1 to 6.

- 11 Gnani Investment & Trading Co.Ltd.
A Company incorporated under the
Indian Companies Act, 1956 having its
registered office at A/07, Banco
Mansion, August Kranti Marg,
Cumbala Hill, Mumbai-400 036.
- 12 Ms. Daksha Kesharichand Jhaveri,
Age 74 years, Occupation : Housewife
- 13 Smt. Vimal Dilip Jhaveri,
Age 76 years, Occupation : Housewife
- 14 Mr. Sunil Dilip Jhaveri,
Age 51 years, Occupation : Business
- 15 Mr. Manoj Dilip Jhaveri,
Age 42 years, Occupation : Business
- 16 Mrs. Neeta Mahesh Tomar,
Age 57 years, Occupation : Housewife
- 17 Mr. Deepak Chandrakant Jhaveri,
Age 50 years, Occupation : Housewife
All the above having their residence at
39, Chowpatty Sea Face,

Ratnagar Place, Mumbai – 400 007.

....Respondent Nos.11 to 17
(Orig. Plaintiff Nos.13,2,7,
8, 9, 10, 12 transposed as
Defendant Nos.7 to 13)

Mr.Vineet Naik, Senior Advocate a/w. Mr.Naushad Engineer i/b. Mr.Kuber Wagle for Petitioner.

Mr.Gautam Ankhad a/w. Mr.Vishal Narichania a/w. Mr.Ankur Shah i/b. Ms.Sushma Singh for Respondent Nos.2 to 4.

Mr.M.M.Vashi, Senior Advocate a/w. Mr. Gaurang Mehta and Ms. Neelam Dedhia i/b. M/s. M.P Vashi for Respondent No.5.

CORAM : A.S. GADKARI, J.
RESERVED ON : 8th APRIL 2022.
PRONOUNCED ON : 13th APRIL, 2022.

JUDGMENT:-

Petitioner, Original Defendant No.14 in T.E. & R. Suit No.42/62 of 2009 filed by the Respondent Nos.2 to 4, has invoked jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, impugning the Judgment and Order dated 1st September, 2021 passed in Revision Application No.95 of 2021, by the Appellate Bench of the Court of Small Causes at Mumbai thereby dismissing the said Revision and confirming the Order dated 2nd August, 2021 passed below Exh-601, filed by Petitioner, for framing of additional issues in the said Suit.

2 Heard Mr. Vineet Naik, learned senior counsel for the Petitioner, Mr. Gautam Ankhad, learned counsel for Respondent Nos.2 to 4 and Mr. M.M. Vashi, learned senior counsel for Respondent No.5. Perused entire record produced before me.

3 The record reveals that, the Plaintiffs/Respondent Nos.2 to 4 herein along with their mother Smt. Bhanumati Keshrichand Jhaveri have instituted a suit bearing T.E. & R. Suit No.42/62 of 2009 in the Court of Small Causes at Mumbai under Section 41 of the Presidency Small Causes Court Act, for eviction of the Defendant Nos.1 to 7 from the suit property.

The suit property was originally acquired by the members of Baria family, who gave it on lease along with structures standing thereon to Mr.Tarachand N. Jhaveri and Mr. Ratanchand N. Jhaveri in the year 1938. The suit property was inherited by 7 legal heirs of Mr. Tarachand and Mr. Ratanchand namely; (i) Keshrichand (ii) Dilip (iii) Chandrakant (iv) Pratap (v) Kantaben (vi) Vinaben and (vii) Shantilal. The said 7 legal heirs had filed a Suit No.236 of 1968 in this Court against the Respondent No.5/Defendant No.1 for its eviction from the suit premises and for a declaration that, it has no right, title and interest in it. The said suit was decreed in terms of Consent Terms dated 6th July, 1977 and the Respondent No.5/Defendant No.1 was accepted as a monthly tenant by the said 7 legal heirs. That, subsequently a declaratory suit bearing R.A.D. Suit No.4081 of 1977 was filed in the Court of

Small Causes at Mumbai against the said 7 legal heirs. The said suit was disposed off by the Court of Small Causes, at Mumbai on the basis of the Consent Terms dated 7th November 1977. Smt. Kantaben Gajjiwala (Legal heir No.(v) above) passed away on 10th April, 1980 leaving behind her, Smt. Hansa Shah (daughter) and Miss. Lopa Arunkumar Gajjiwala (grand-daughter) and other legal heirs. Smt. Hansa Shah received 1.43% of share and Miss. Lopa Gajjiwala received 3.5715% of share in succession from Smt. Kantaben Gajjiwala. Thus, their total share component in the entire suit property constitutes 5.015%. During the pendency of the present suit, Petitioner acquired right, title and interest constituting 5.015% share in the suit property from the said two successors of Smt. Kantaben by executing registered Deeds of Assignments dated 18th March, 2019 and 10th July, 2019 respectively.

After acquiring the said 5.015% share in the suit premises, Petitioner filed an application below Exh-454 in the said suit for joining it as a Plaintiff or in the alternative, as a Defendant. The Trial Court rejected the said Application filed below Exh-454 by its Order dated 16th December, 2019. In an Appeal preferred by the Petitioner bearing Misc. Appeal No.32 of 2020, the Appellate Bench of the Court of Small Causes at Mumbai while allowing the said Appeal, directed the Respondent Nos.2 to 4 to add Petitioner as Defendant in the said suit. The Appellate Bench further directed the

Petitioner to appear in the said suit as Defendant on or before 2nd March, 2020 and submit its written statement on or before 6th March, 2020. It appears from record that, the Respondent Nos.2 to 4 i.e. original Plaintiffs did not effect necessary amendment to implead Petitioner as Defendant No.14 within stipulated period. However, Petitioner filed its written statement within the period of limitation as prescribed by the Appellate Bench i.e. on 6th March, 2020.

4 Petitioner thereafter, filed an Application below Exh-601 on 23rd June, 2021 for framing of additional issues as per schedule annexed thereto, for the reasons more specifically stated in the said Application. The Respondent Nos.2 to 4/Plaintiffs filed their reply below Exh-603 on 7th July, 2021 to the said Application and opposed it predominantly and mainly on the ground that, the Petitioner has no *locus standi* to raise any issue on merits as it has been added only as a proforma Defendant. Petitioner filed its rejoinder dated 9th July, 2021 to the Reply filed by the Respondent Nos.2 to 4.

5 The Trial Court rejected the said Application filed below Exh-601 by its Order dated 2nd August, 2021. The Revision No.95 of 2021 preferred by the Petitioner has been dismissed by the Appellate Bench of the Court of Small Causes at Mumbai by its impugned Judgment and Order dated 1st September, 2021 though by giving reasoning, on the predominant ground that the said Revision was not maintainable before it.

6 Mr. Naik, learned senior counsel for the Petitioner submitted that, in its written statement filed by the Petitioner, from para Nos.2 to 13 it has in detailed narrated the facts about acquisition of 5.015% of share in the undivided leasehold rights in the suit property from the successors of Smt. Kantaben J. Gajjiwala. That, in paragraph Nos.13,14 and 15 the Petitioner has taken a categorical stand that, the Plaintiffs did not seek prior permission of predecessor-in-title of Petitioner to issue notice of termination in respect of the suit premises against the Respondent No.5/Defendant No.1. That, the predecessor-in-title of the Petitioner was also not made party Defendant/Plaintiff to the said suit with an obvious reason to grab the entire suit property. That, even the description of the suit property has not been properly mentioned by the Plaintiffs in the plaint, which may give rise to multiplicity of unending litigation even if the decree is passed in favour of the Plaintiffs. He submitted that, in para No.24 of the written statement the Petitioner has categorically stated that, it was specifically agreed by the parties to the R.A.D. Suit No.4081 of 1977 that, it shall thereafter belong to Plaintiffs in the said suit and not form part of demise. He submitted that, the Consent Terms dated 6th July, 1977 filed in this Court in Suit No.236 of 1968 and dated 7th November, 1977 filed in R. A.D. Suit No. 4081 of 1977, gave valuable rights in favour of Smt. Kantaben J. Gajjiwala to the extent of 7.14% of undivided share in the entire suit property. That, the Petitioner has

acquired 5.015% of undivided share in the entire suit property from the successors in title from Smt. Kantaben J. Gajjiwala. Therefore, it was necessary for the Trial Court to frame additional issues as per the Schedule annexed to Exh-601.

During the course of the arguments, Mr. Naik fairly conceded to the fact that, though the Petitioner had prayed for framing of 8 additional issues, some of them are overlapping and some of them covers already framed issues by the Trial Court. He submitted that, issue No. (A) in the schedule has not been happily worded and it requires to be re-drafted. Therefore, issue No. (A) and (H) in the schedule annexed to the Application below Exh-601 are now only the necessary issues, which are to be framed as additional issues by the Trial Court. He submitted that, the following two issues therefore be framed as additional issues in the present suit.

- “A) *Whether the Original Lessors, who created the tenancy under the Consent Terms filed in Suit No.236 of 1968 before the Hon’ble High Court of Bombay in R.A.D. Suit No.4081 of 1977 before the Small Causes Court, Bombay, were joint Tenants?*
- B) *Whether the Plaintiffs have correctly described the suit property?”*

He submitted that, the Trial Court has committed grave error in considering and rejecting the Application filed by the Petitioner below Exh-

601. That, the Trial Court has taken into consideration irrelevant aspects than necessary, to decide the said Application. He submitted that, once the Revisional Court comes to conclusion that, the said Revision is not maintainable, it ought not have dwell into the merits of the said case, however it has done it and has committed further error while passing the impugned Judgment and Order. He submitted that, by framing of the said two additional issues no harm or prejudice would be caused to the Plaintiffs and in fact, it is necessary for proper and complete adjudication of the present Suit. He therefore prayed that, the impugned Orders be quashed and set aside by allowing the Application filed below Exh-601 by directing the Trial Court to frame the aforementioned two additional issues.

7 Mr. Ankhad, learned counsel for the Respondent Nos.2 to 4/Plaintiffs vehemently opposed the Petition. He submitted that, it is not necessary to frame the aforementioned issue No.(B), as the description of suit property as mentioned in para Nos.2, 7 and 15 in the plaint is correct. He on instructions submitted that, even if the said description is incorrect or erroneous, the Plaintiffs are ready and willing to face further litigation at the behest of unknown persons occupying '*some structures standing thereon*', even after passing of decree in their favour. He submitted that, in para No.16 of the Application filed below Exh-454 for impleading as necessary party to the suit, the Petitioner had categorically pleaded that, it is also entitled to get

a Decree of Eviction against the Defendant No.1 in respect of the suit premises. That, if the Hon'ble Court comes to conclusion that, the Petitioner need not be joined as party Plaintiff, then in the alternative, the Petitioner was entitled to be joined as party Defendant to the said suit and is also entitled to get a Decree of Eviction against the Defendant Nos.1 to 6 in respect of the suit premises. He submitted that, on the basis of these precise pleadings, the Application for impleadment of the Petitioner was allowed by the Appellate Bench by its Order dated 29th February, 2020. That, subsequently in its written statement, the Petitioner has taken volte face than its previous stand taken in its impleadment Application. That, in its written statement the Petitioner has now adopted a totally contrary stand and has pleaded that, the suit against Defendant No.1 may not be decreed and *inter alia* be dismissed. That, the Petitioner has alleged that the Plaintiffs Respondent Nos.2 to 4, with a view to grab the entire suit property, have not impleaded other parties and also have not taken prior consent of the predecessor-in-title of the Petitioner while terminating the tenancy of the Respondent No.5/Defendant No.1 by its notice dated 11th February, 2009. He submitted that, the Petitioner is now trying to support the Defendant No.1 and to frustrate the suit filed by Respondent Nos.2 to 4, which cannot be permitted. He submitted that, it is an elementary rule that a party litigant cannot be permitted to assume inconsistent position in Court, to play fast and loose, to blow hot and cold, to

approve and reprove to the detriment of his opponent. That, if a man once determines his election, it shall be determined forever. That, the common law doctrine prohibiting approbation and reprobation is a facet of law of estoppel and well established in our jurisprudence also and therefore even though the Petitioner has taken a U-turn in his written statement from para No.14 upto 17 from his earlier pleadings in the Application filed below Exh-454, the present Application for framing additional issues need not be entertained. In support of his contention, he relied on a decision of the Hon'ble Supreme Court in the case of *Mumbai International Airport Private Limited Vs. Golden Chariot Airport & Anr. reported in (2010) 10 SCC 422*. He submitted that, in the case of *Kanaklata Das & Ors. Vs. Naba Kumar Das & Ors. reported in (2018) 2 SCC 352*, the Supreme Court has laid down the principles with respect to impleadment of parties, title of landlord and its relevance in an eviction suit and the said principles are also applicable to all the suits for eviction under any Act and law of the land. He submitted that, Order dated 20th September, 2017 thereby transposing original Plaintiff Nos.2, 7 to 10, 12 and 13 as Defendant Nos.7 to 13 passed by this Court was challenged in the Supreme Court by Ms. Daksha Keshrichand Jhaveri and Ors. That, the Supreme Court by its Order dated 6th February, 2018 while dismissing the said Special Leave Petition made it clear that, in case the Plaintiffs succeed in the suit, the benefit thereof shall enure to the Petitioners

(therein) as well, who are transposed as proforma Defendants by the High Court.

Mr. Ankhad submitted that, the present Petitioner being Defendant No.14 also stands on the same footing as those of Defendant Nos.8 to 13 and therefore is a *proforma Defendant* only. That, if the Plaintiffs succeed in the suit, the Petitioner will get benefit of its fruits to the extent of their undivided share and their share to that extent cannot be denied. He therefore submitted that, both the Courts below have rightly rejected the Application filed below Exh-601 by the Petitioner for framing of additional issues and therefore the present Petition may be dismissed.

8 It is an admitted fact on record that, the impleadment of Petitioner as Defendant No.14 in the suit, is in furtherance of Judgment and Order dated 29th February, 2020 passed in Misc. Appeal No.32 of 2020. The said Order as of today holds field and is not either varied or modified by any higher Court. By the said Order, the Appellate Bench of Court of Small Causes has not only permitted the Petitioner to be impleaded as a Defendant but had also permitted it to file written statement within stipulated period as directed thereof. By the said Order dated 29th February, 2020, the Petitioner has been given *locus standi* as Defendant No.14. By the said Order dated 29th February, 2020, no prohibition was imposed upon Petitioner from adopting additional plea than taken in impleadment Application or to restrict its pleading as

adopted in its Application below Exh-454 for impleadment. In para No.15 of the written statement, Petitioner has adopted additional pleading with respect to the fact of non issuance of termination notice, in respect of suit property to Defendant No.1 without obtaining consent of the predecessor of Petitioner. Smt. Kantaben J. Gajjiwala one of the legal heirs out of the total seven legal heirs of Mr. Tarachand and Mr. Ratanchand was having 7.14% undivided share in the suit property. Petitioner has acquired 5.015% of the undivided share in the suit property from the legal heirs of Smt. Kantaben J. Gajjiwala namely Smt. Hansa Shah (daughter) and Kum. Lopa Arunkumar Gajjiwala (grand-daughter). According to this Court, the Petitioner has not changed its stance than was taken in its Application for impleadment, but has now adopted additional pleading which is not prohibited under the law and therefore it cannot be said that, it is a complete U-turn taken by the Petitioner to approbate and reprobate to the detriment of its opponents. The decision of the Supreme Court in the case of *Mumbai International Airport Private Limited (Supra)* relied upon by the Respondent Nos.2 to 4 therefore is of no avail to them.

9 It is a fact on record that, the Respondent Nos.2 to 4 have filed the aforestated suit under Section 41 of the Presidency Small Causes Court Act and not under the State Rent Act i.e. The Maharashtra Rent Control Act, 1999. During the Course of arguments, Mr. Ankhad, learned counsel for the

contesting Respondents/original Plaintiffs has fairly asserted that, the suit filed by the Plaintiffs is under Section 41 of the Presidency Small Causes Court Act and not under the provisions of Maharashtra Rent Control Act. In the case of *Kanaklata Das & Ors. (Supra)*, the Hon'ble Supreme Court has taken into consideration an eviction suit filed under the State Rent Act and therefore the contention of the learned counsel for the Respondent Nos.2 to 4 that, the principles enumerated in para No.11 therein are equally applicable to a suit filed under Section 41 of the Presidency Small Causes Court Act, cannot be accepted.

10 A bare perusal of Reply filed below Exh-603 by the Respondent Nos.2 to 4 would clearly indicate that, the said Respondents have pleaded that the Petitioner is only the proforma Defendant; it does not have any right to raise any issues on behalf of other Defendants and it has no *locus standi* to raise any issues on merits of the suit. That, the Petitioner is in collusion with other Defendants, intends to defeat the suit. Apart from these pleadings, nothing further has been pleaded in the Reply. It is to be noted here that, out of the extensive and elaborate arguments advanced by the learned counsel for the Respondent Nos.2 to 4, i.e. from pointing out the events from filing of Impleadment Application by the Petitioner below Exh-454 till passing of various Orders by this Court, including the last Order dated 21st April, 2021 passed in Writ Petition (St.) No.5747 of 2021, even the basic excerpts from it

are not pleaded in the Reply filed below Exh-603 dated 7th July, 2021 by the Respondent Nos.2 to 4 to the Application filed below Exh-601. As noted earlier, the said reply basically proceeds only on the footing, questioning the *locus standi* of the Petitioner and none else.

11 After allowing the Application filed below Exh-454 by the Petitioner for its impleadment in the said suit, the stage of Order 1 Rule 10 (2) of the Code of Civil Procedure (for short, “CPC”) is completed and in furtherance of permission granted by the Appellate Bench to permit Petitioner to file written statement and after it is filed on record on 6th March, 2020, the stage as contemplated under Order 8 of CPC has also been completed. Thus, the *locus standi* of the Petitioner as Defendant No.14 and its filing of written statement has been duly accepted by the Plaintiffs/Respondent Nos.2 to 4.

Order 14 Rule 1(3) of CPC prescribes that, each material proposition affirmed by one party and denied by other, shall form the subject of a distinct issue. Order 14 Rule 1(4) of CPC says that, the issues are of two kinds, (a) issues of fact and (b) issues of law. The pleading of Petitioner in paragraph 15 of written statement according to this Court, gives rise for framing of issue of fact so also of law. Petitioner has therefore requested to frame aforementioned two issues for proper adjudication of the said suit which according to this Court, is necessary for proper and complete adjudication of the present suit.

12 It is to be noted here that, para No.2 of the Plaint describes the suit property as under-

“Prior to the termination of tenancy, Defendant No.1 were Plaintiff’s monthly tenants in respect of land bearing C.S. No.560 and 561, Final Plot No.268 T.P.S. III of Mahim Division, Ward No. G/North 5546 (I-IA) situated at Mogul Lane, (earlier known as Lady Harding Road), Tulsi Pipe Road, known as Senapati Bapat Road, situated at Mahim (W), Mumbai-400 016, along with some structures standing thereon.”
(underline emphasized)

13 It is thus clear that, the Plaintiffs are not certain about the structures standing on the suit property and the pleadings of the Plaintiffs while describing the property is not precise and is as vague as possible. Petitioner/Defendant No.14 has therefore raised a contentious material proposition as to, whether the plaintiffs have correctly described the suit property. In view thereof, this Court is of the opinion that, it is necessary to frame the said issue No. (B) as noted hereinabove.

14 Perusal of impugned Order dated 2nd August, 2021 passed below Exh-601 by the Trial Court clearly indicates that, the same proceeds on some irrelevant consideration. The Trial Court has given undue weightage to the fact that, despite being an Order of Appellate Bench dated 29th February, 2020, the Plaintiffs did not amend the plaint; though the Petitioner filed its

written statement, it has not been impleaded as Defendant till date; the Application for additional issues are not maintainable and the grounds of defence raised by other Defendants are identical to the grounds of defence raised by the Petitioner. It appears to this Court that, the Trial Court has not considered the facts as noted hereinabove in the present Order and has erroneously rejected the said Application. The Revisional Court in para No.19 of its impugned Judgment and Order dated 1st September, 1991 has held that, the said Revision Application preferred by the Petitioner was not maintainable, however, in earlier paragraphs has expressed its opinion and findings on merits. It is the settled position of law that, if a proceeding is not maintainable before the Court, it is not expected from the concerned Court to record findings on merits of the case before it. The Appellate Bench has thus committed a serious error while evaluating the merits of the matter, while recording a categorical finding that, the said Revision was not maintainable and dismissed it. Thus, both the Courts below have committed serious error in rejecting the Application filed below Exh-601 by the Petitioner.

15 In view of above, the Petitioner succeeds. The Application filed below Exh-601 by the Petitioner in the said Suit is partly allowed and the issue Nos.(A) and (B) as noted in para No.6 above, are directed to be framed as additional issues in T. E. & R. Suit No.42/62 of 2009 pending on the file of the Court of Small Causes at Mumbai.

Petition is allowed in the aforesaid terms.

16 At this stage, Mr. Ankhad, learned counsel for the Respondent Nos.2 to 4 submitted that, the Respondent Nos.2 to 4 intend to challenge the present Order before the Hon'ble Supreme Court and therefore the operation and implementation of the present Order be stayed for a period of four weeks from today.

In view thereof and at his request, the effect and implementation of the present Order is stayed for a period of four weeks from today.

(A.S. GADKARI, J.)

SANJIV
SHARNAPPA
MASHALKAR

Digitally signed
by SANJIV
SHARNAPPA
MASHALKAR
Date: 2022.04.16
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