

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION***
WRIT PETITION NO. 9772 OF 2023

Chhaya Parish Kotwal)
Prior to marriage known as)
Ms.Chhaya Hindram Rotkar,)
Granddaughter of)
Late Shri Moreshwar Damodar Rotkar,)
aged about 50 years, Indian Inhabitant)
residing at 105/I, Tarabaug, Love Lane)
Mazgaon, Mumbai 400 010)

..... Petitioner**VERSUS**

1. Manasi Anant Mhatre,)
Prior to marriage known as)
Miss Manasi Ravindranath Mhatre,)
Maternal great granddaughter of)
Late Shri Moreshwar Damodar Rotkar,)
aged about 42 years, Indian Inhabitant,)
Occupation : Housewife, Residing at)
Rubi Villa, Sai Nagar (E), Vidya Nagar)
Tal. Alibaug, Dist. Raigad and having)
address at 105/I, Tarabaug, Love Lane,)
Mazgaon, Mumbai 400 010)

2. Nipunchandra Hindram Rotkar,)
Grandson of Late Shri Moreshwar)
Damodar Rotkar and son of late)
Shri Hindram Moreshwar Rotkar,)
aged about 65 years, an adult,)
Indian Inhabitant, having address)
at 105/I, Tarabaug, Love Lane,)
Mazgaon, Mumbai 400 010)

3. Tarabaugh Aikyawardhak Co-operative)**Housing Society Ltd.,)****(Red.No. BOM/HSG-4906 of 1976))****having registered address at Tarabaug)****Sheth Motishah Road, Mazgaon,)****Mumbai 400 010)****4. Darshan Developers,)****Having address at Shankeshwar)****Darshan Building B Wing, Ground Floor,))****Sheth Mothsah Lane, Mazgaon)****(Near Mazgaon Telephone Exh.))****Mumbai 400 010)****..... Respondents**

Mr. Prashant Karande a/w. Dr.A.S.Tilak for the Petitioner.

Mr.Dharam Sharma i/b. Ms.Trupti J.Gohil for the Respondent No.1.

Mr.Parag M.Tilak for the Respondent No.3.

Smt. Manasi A.Mhatre - Respondent No.1 present in Court.

CORAM: RAJESH S. PATIL, J.

RESERVED ON : 20th OCTOBER, 2023

PRONOUNCED ON : 22nd DECEMBER, 2023

JUDGMENT :-

This writ petition is filed under Article 227 of the Constitution of India, challenging the judgment and decree dated 23 March, 2023, passed in Appeal No. 265 of 2017, by the Appellate Bench of the Court of Small Causes at Mumbai.

FACTS :-

2. One Mr.Moreshwar Damodar Rotkar was initially let out Bungalow No.105/1, situated at Tarabaug, Motishah Lane, Mazgaon, Mumbai – 400 010, (for short “suit premises”). The said Moreshwar died leaving behind his only son Hindram. Accordingly, the tenancy rights were transferred in the name of Hindram. The respondent no.1 was claiming to be the joint tenant along with the petitioner and Ms.Laxmibai Rotkar, with regard to a declaratory suit under the Maharashtra Rent Control Act, 2009, being R.A.D.Suit No. 1800 of 2013 against the owners i.e. Tarabaug Aikyawardhak Co-operative Housing Society Ltd., (for short “Housing Society”) and Darshan Developers; and the other three joint tenants were also arrayed as party defendants. The plaintiff is the great granddaughter of the original tenant ‘Moreshwar’. It is pleaded in the plaint that ‘Moreshwar’ died in the year 1986, hence, thereafter the rent receipts of the suit premises were transferred in the name of ‘Hindram’ (son of Moreshwar). The said Hindram is the grandfather of the plaintiff. Hindram’s first wife was ‘Suman’ (who was grandmother of the plaintiff). The said Hindram expired in the year 1990. The said Hindram after the death of Suman (first wife) married to Laxmibai (for short ‘the second wife’). It

is further pleaded in the plaint that the plaintiff was born and brought up in the suit premises. The great grandfather i.e. Moreshwar (original tenant) in his affidavit filed in Misc.Petition No. 285 of 1981, under the Guardian and Wards Act, VIII of 239 in which it was stated that Kumari Manasi (plaintiff) is residing with him. It was further stated in the plaint that the plaintiff got knowledge about the transfer of tenancy in the name of Laxmibai (second wife of Hindram), on 25 April, 2013. The plaintiff filed a suit in the City Civil Court in the year 2013 as there were certain disputes between the plaintiff and the family of the second wife of Hindram. The landlord (defendant no.4) by their reply dated 13 May, 2013, informed that after the death of Hindram, the rent receipts of the suit premises have been transferred in the name of the second wife of Hindram i.e. Laxmibai. Hence, the plaintiff withdrew the suit filed in the City Civil Court and immediately thereafter filed the present proceedings in the form of declaratory suit in the year 2013, before the Small Causes Court at Bombay. Hence, it was prayed that the suit is within limitation.

3. The owners/landlords/defendant no.4, after lodging their appearance filed an application under Section 9A of the Code of Civil

Procedure, 1908 (as then prevailing) being numbered as Ex.30, thereby contending that the Small Causes Court has no jurisdiction to try and entertain the suit on the ground of limitation and jurisdiction.

4. The respondent no.1 herein, being the plaintiff in the said declaratory suit, filed her reply thereby opposing the application filed under Section 9A of the Code of Civil Procedure, 1908. The defendant nos.1 and 2 filed their reply to the said application filed under Section 9A, and supported the stand taken by the owner/landlords, defendant no.4.

5. The issues were framed on the application filed under Section 9A of the Code of Civil Procedure, 1908 by the defendant no.4 society/owner, as regards Whether the suit is bad for want of jurisdiction and Whether the suit is barred by law of limitation and also whether the suit is bad in law and deserved to be dismissed for non-issuance of notice under Section 164 of the Maharashtra Co-operative Societies Act.

6. The issue whether the suit is bad in law for non-issuance of

notice under Section 164 of the Maharashtra Co-operative Societies Act, was answered in negative by the Single Judge of Small Causes Court, by his judgment and order dated 6th of May, 2017, however the issue of jurisdiction and limitation was answered in favour of the owner/housing society.

7. The plaintiff being aggrieved by the judgment and order dated 6th of May, 2017, filed her appeal before the Appellate Bench of the Court of Small Causes at Mumbai, being Appeal No. 265 of 2017. The said appeal was heard by the Appellate Bench of the Court of Small Causes, Mumbai and by its judgment and order dated 23 March, 2023, allowed the appeal, thereby setting aside the judgment and order passed by the Single Judge of the Court of Small Causes, which had allowed the application under Section 9A of the Code of Civil Procedure. Thereby declaring that the Court of Small Causes at Mumbai had jurisdiction to entertain and try the declaratory suit of the plaintiff. It was also further held that the suit is well within the limitation and that the suit is not bad for non-issuance of the notice under Section 164 of the Maharashtra Co-operative Societies Act.

8. The present writ petition is filed by the original defendant no.1 challenging the judgment and order dated 23 March, 2023 passed by the Appellate Bench of the Court of Small Causes at Mumbai.

SUBMISSIONS :-

9. Mr.Prashant Karande, learned counsel, made his submissions on behalf of the petitioner (original defendant no.1).

(i) Mr.Karande submitted that the provisions of Section 9A of the Code of Civil Procedure and Order 14, Rule 2 of the Code of Civil Procedure, which is open to decide preliminary issues, if it is purely a question of law, and not a mixed question of law and facts.

(ii) Mr.Karande further submitted that the learned Single Judge's judgment and order was passed on 6 May, 2017, and as such on that day, the judgment of Hon'ble Supreme Court in case of ***Nusli N.Wadia vs. Ivory Properties & Ors., AIR 2019 SC 5125*** was not before the learned Single Judge. However, the Appellate Bench has considered the judgment of Hon'ble Supreme Court in case of ***Nusli N.Wadia*** (supra)

for setting aside the judgment of the learned Single Judge, which was unwarranted.

(iii) Mr.Karande further submitted that the Appellate Court by its impugned judgment and order has infact given its findings on the question of joint tenancy under Section 7(15)(d)(i) of the Maharashtra Rent Control Act, thus determining the outcome of the suit.

(iv) Mr.Karande submitted that Article 58 of the Limitation Act prescribes the period of three years for seeking any declaration and time from which the period begins to run when the right to sue first accrues. In the plaint, the respondent no.1 has concealed the said aspect and claimed the date of knowledge of alleged transfer of tenancy to run away from rigors of limitation.

(v) Mr.Karande further submitted that the Appellate Bench has erroneously recorded that a suit filed on 18 October, 2013 is well within three years in view of Article

58 of the Limitation Act, which is contrary to the provisions of law.

(vi) Mr.Karande further submitted that the Appellate Bench had erred in appreciating the learned Single Judge's judgment and infact determined the issue contrary to the reported judgment of the Hon'ble Supreme Court in case of ***Nusli N.Wadia*** (supra).

10. Mr.Parag Tilak, learned counsel appeared on behalf of the respondent no.3/owner of the suit premises.

10 (i) Mr.Tilak submitted that he is supporting the case of the petitioner and is adopting the submissions made by Mr.Karande.

11. On the other hand, Mr.Dharam Sharma, learned counsel made his submissions on behalf of the respondent no.1/original plaintiff.

(i) Mr.Sharma submitted that the Appellate Court has considered the submission of both the parties and by well reasoned judgment had allowed the appeal, therefore there

is no reason to interfere with the findings recorded by the Appellate Bench.

(ii) Mr.Sharma submitted that the application under Section 9A of the Code of Civil Procedure was filed by the original owner. The said application of the original owner was challenging the jurisdiction and limitation under Section 9A of the Code of Civil Procedure, was dismissed by the Appellate Bench of the Court of Small Causes.

(iii) The owner has accepted the said judgment and order by not challenging the impugned judgment and order passed by the Appellate Bench of the Court of Small Causes. Therefore, the present writ petition filed by the other defendants, who have been joined as party defendants in the suit by the plaintiff and having claimed a relief of joint tenancy which will also be in their favour, therefore, the writ petition filed by them should not be entertained by this Court.

ANALYSIS AND CONCLUSION:

12. I have heard both the parties and I have gone through the documents on record and the judgments referred by both the parties.

13. The suit premises is situated in the city of Mumbai. The Maharashtra Rent Control Act, 1999 is applicable to the suit premises. If the landlord is desirous to file an eviction suit against the tenant, the same can be filed under the Maharashtra Rent Control Act, before the Court Small Causes at Bombay. Similarly, if a person claims to a declaration that he is a tenant of the landlord, the suit for such declaration can be filed only before the Court of Small Causes at Mumbai.

14. The plaintiff has claimed to be great grand daughter of the original tenant "Moreshwar". In the Complaint it has been specifically stated that "Moreshwar" was the Original tenant of the suit premises, and after the death of said "Moreshwar" the rent receipts of the suit premises were transferred in the name of son of "Moreshwar" by name "Hindram". Hindram's first wife was "Suman". Only after the death of

“Suman”, Hindram married for the second time with Laxmibai (Original Defendant No.1). Plaintiff has submitted that she is daughter of Saundaryalata (daughter of Suman). Plaintiff has also relied upon the affidavit filed in Miscellaneous Petition No.285 of 1981 by “Moreshwar” under the Guardian and Wards Act, in which it was stated that plaintiff was residing with him. It is plaintiff’s case that she got knowledge about the transfer of rent receipt in the name of second wife of Hindram, on 25 April 2013. The landlord (Defendant No.4) by their reply dated 13 May 2013 informed plaintiff that after the death of Hindram, the rent receipt of the suit premises have been transferred in the name of second wife of Hindram (Laxmibai/Defendant No.1). Shortly, thereafter in the same year i.e., 2013 Plaintiff filed a declaratory suit, to declare plaintiff jointly with petitioner (Chhaya) and the second wife of original tenant as joint tenant of suit premises. According to me, therefore, the suit is not barred by law of limitation.

15. The declaratory suit in the present proceeding has been filed in the year 2013. The land lord (original defendant No.4) had filed Application under Section 9A of the CPC on 28 April 2014. The said application filed under Section 9A of the CPC was decided on 6 May

2017 by the Single Judge of the Court of Small Causes at Bombay, by holding that the suit is barred by law of limitation and further the Court will have no jurisdiction, and hence, the suit was dismissed. Plaintiff being dissatisfied with this order filed an Appeal before the Division Bench of Court of Small Causes at Bombay on 22 June 2017.

16. During the pendency of the Appeal, in the meanwhile, by an ordinance dated 27 June 2018 there was an amendment to the CPC (Maharashtra Amendment), whereby section 9 (A) in its application to State of Maharashtra was deleted. However, in the cases where such an application filed under Section 9A where an order has been passed, and an appeal thereto is pending on the date of the ordinance, the same was to be decided as if Section 9 A of the CPC has not been deleted.

17. Hence, the Appellate Bench Court of Small Causes at Bombay heard and decided the Appeal of the original plaintiff. The Appellate Bench quashed and set aside the judgment and order passed by the Single Judge of Court of Small Causes at Bombay and thereby held that Court of the Small Causes has jurisdiction to try and entertain the declaratory suit. So also It was held that the suit was within limitation.

And also, it was held that the suit is not bad for non issuance of the notice under Section 164 of the Maharashtra Co-operative Societies Act.

18. The declaratory suit in the present proceedings is filed by Plaintiff seeking declaration against the land lord that she is a joint tenant of the suit premises. No doubt the landlord in the present proceedings is a cooperative Housing society. The present proceeding is not filed by the plaintiff against a housing society touching the business of the housing society. Neither have the Defendant No.4/Landlord proved its case that the suit would be barred for non issuance of notice under Section 164 of the Maharashtra Cooperative Societies Act. Moreover, landlord/housing society have not challenged the order passed by the Appellate Bench Court of Small Causes at Bombay, which has held that the Small Causes Court has jurisdiction and the suit is within limitation and the suit is not barred for non issuance of notice under Section 164 of the MCS Act. I am therefore, not impressed with the submission urged by Mr. Karande. Hence, I held that the Court of Small Causes has jurisdiction to entertain and try the suit.

19. The plaintiff who is respondent no.1 herein, has filed a declaratory suit in the Small Causes Court claiming joint tenancy along with the petitioner herein, the said declaratory suit seeks relief against the Landlord/Housing Society of joint tenancy. An application was filed under Section 9A of the Code of Civil Procedure for dismissal of the suit on the ground of jurisdiction and limitation was filed before the Small Causes Court by the Landlord of the suit premises. The said application under Section 9A has been rejected by the Appellate Bench of the Court of Small Causes at Bombay. The Landlord of the suit premises the Housing Society has not challenged the impugned judgment and order dismissing their application. The present writ petition is filed by a person who has been arrayed as a defendant for whom a joint tenancy is claimed. The petitioner has not challenged jurisdiction of Small Causes Court.

20. In my view, a declaratory relief is sought against the owner who has accepted the impugned judgment and order. Therefore, a writ filed by the party with whom a joint tenancy is claimed against the owner will not be entertainable.

21. In the case of *Nusli Wadia* (supra), the Supreme Court held that the issue of limitation can be decided as a preliminary issue when it is based on admitted facts. When facts about issue of limitation are disputed, it cannot be decided as preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976. The submission on behalf of the petitioner that there was no need for the Appellate Court to discuss the said judgment, does not defiance sense.

22. The Writ Petition has no merit, and its dismissed. No cost.

[RAJESH S. PATIL, J.]

At this stage, Mr.Sudam S. Patil, learned counsel i/b. Dr.A.S.Tilak appearing for the petitioner seeks stay to this order. Request is rejected.

[RAJESH S. PATIL, J.]