

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10354 OF 2014

1. Smt. Laxmidevi Jagmohan Bagarka
Aged about 71 years, Occ. Housewife,
of Mumbai, Adult, Hindu Inhabitant,
Residing at Shriniwas, Ground Floor,
63, J. B. Nagar, Andheri, Mumbai-400 059.

2. Shri Sushil Jagmohan Bagarka
Aged about 55 years, Occ. Business of Mumbai,
Adult, Hindu Inhabitant, Residing at
Shriniwas, Ground Floor, 63, J. B. Nagar,
Andheri, Mumbai-400 059.

3. Shri Sunil Jagmohan Bagarka
Aged about 53 years, Occ. Business
of Mumbai, Adult, Hindu Inhabitant,
Residing at Annapurna (Bagarka House)
42, J. B. Nagar, Andheri, Mumbai-400 059.

4. Shri Sanjay Jagmohan Bagarka,
Aged about 51 years, Occ. Business
of Mumbai, Adult, Hindu Inhabitant,
Residing at Annapurna (Bagarka House)
42, J. B. Nagar, Andheri, Mumbai-400 059.

... Petitioners
(Org. Defendants)

V/s.

1. Arun Parmeshwar Bagarka
(Deleted since deceased)

1(a) Smt. Kalpana Arun Bagarka
aged about 62 years,
Shriniwas, 63, J. B. Nagar,
Shrinivas Bagarka Marg,
Andheri (East), Mumbai- 400 059.

1(b) Shri. Agyey Arun Bagarka
aged about 51 years,
Shriniwas, 63, J. B. Nagar,
Shrinivas Bagarka Marg,
Andheri (East), Mumbai- 400 059.

1(c) Smt. Arpana Tiberwala
Aged about 53 years,
Fkat Bi, G28/F, Tower-3,
Caribbean Coast Phase-I,
2 Kin Tung Road, Lantau Island,
Tung Chung NT, HongKong.

1(d) Smt. Archana Vinay Kothari
Aged about 48 years,
202, Satyan Tower,
90 ft Road, Thakur Complex,
Kandivali (East), Mumbai-400 101

2. Anil Parmeshwar Bagarka
Aged 61 years, Occupation : Retired

3. Ashok Parmeshwar Bagarka
Aged 59 Years, Occupation : Business,
All of Mumbai Adults, Hindu Inhabitants,
Residing at Shriniwas, 63, J. B. Nagar,
Shrinivas Bagarka Marg, Andheri (East),
Mumbai- 400 059.

...Respondents
(Org. Plaintiffs)

Mr. Surel Shah, Counsel with Mr. Ankur Jain i/by Mr. Ram Singh,
Advocate for the Petitioners.

Mr. Vinod Pandey with Ms. Nilima C. Sarvagod i/b i/by Mr. S. U. Pandey,
Advocate for the Respondents no.1 to 3.

CORAM	:	ABHAY AHUJA, J.
RESERVED ON	:	4 th AUGUST 2023
PRONOUNCED ON	:	12 th JANUARY 2024

JUDGMENT :

1. This Writ Petition under Article 227 of the Constitution of India impugns the judgment and order of the Appellate Bench of the Small Causes Court at Mumbai (Bandra Branch) passed on 30th October, 2014 in Revision Application No. 87 of 14 in Exhibit No. 14 taken out in L. E. & C. Suit No. 91/138 of 2008 (the “said suit”) by the Petitioners.

2. The arguments in this matter were concluded on 4th August, 2023 and the judgment was reserved. The Ad-interim order granted was also permitted to continue till the pronouncement of the judgment. Learned Counsel were also granted liberty to submit written submissions within a period of one week. However, the matter was mentioned on 18th August, 2023 and extension of time was sought to file written submissions. Accordingly, the written submissions on behalf of the Respondents were received on 1st September, 2023.

3. The Petitioners are the original Defendants and the Respondents are the original Plaintiffs, who had filed the said suit against the Petitioners for possession of property being premises on the ground

floor on the plot of land bearing plot no. 63 (old plot no.1) of Shree Rajasthan Co-operative Housing Society Limited admeasuring 650 sq. ft carpet area situated on land bearing C.T.S. No. 318 of village-Kondivita, Taluka Andheri, Mumbai Suburban District (the “said property”) on the premise that the predecessor in title of the Petitioners was a gratuitous licensee of the predecessor in title of the Respondents.

4. The Petitioners appeared and raised an issue under Section 9-A of the Code of Civil Procedure, 1908 (the “CPC”) as it existed then. By an order dated 10th February, 2009, the Trial Judge, framed a preliminary issue on jurisdiction and also granted liberty to the parties to lead evidence. The Petitioners led evidence and it is submitted on behalf of the Petitioners that the Respondents did not lead any evidence.

5. By judgment and order dated 10th February, 2009, the Trial Court held that the Court has jurisdiction to try and entertain the suit and also held that the theory put forth by the Petitioners that they are co-owners cannot be believed. The Petitioners took exception to the aforesaid judgment and order and filed Revision Application before the Appellate Bench of the Small Causes Court. The Appellate / Division

Bench of the Small Causes Court dismissed the Revision Application holding that the Trial Court had rightly held that it had jurisdiction to try and entertain the Suit and that no error was committed by the Trial Court in recording its finding.

6. Being aggrieved by the aforesaid judgment and order of the Appellate Bench of the Small Causes Court, the Petitioners have filed this Petition.

7. Mr. Shah, learned Counsel for the Petitioners would submit that the Trial Court framed preliminary issue under Section 9-A of the CPC. The law that held the field was that the parties could lead evidence while deciding issue under Section 9-A of the CPC. The Trial Court has held on merits that the Petitioners are co-owners is not believable. Mr. Shah, would submit that the Revisional Court despite recording that parties had led evidence still in paragraph 22 observed that it would require full fledged hearing and further erred in holding that on the basis of pleadings in the Plaint, the Trial Court has held that it has jurisdiction to entertain the suit. Learned Counsel submits that this finding is not only contrary to the record that the parties have led evidence, but the finding that the issue is to be tried under Order

14 Rule 2 of the CPC is contrary to the scope of Section 9-A as it existed then.

8. Learned Counsel also submits that the judgment of the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors*¹ has categorically held that issue of jurisdiction under Section 9-A of the CPC cannot be tried if it is a mixed question of law and facts and has further held that no evidence could be led in support of such issue. That the Hon'ble Supreme Court has overturned the judgment of the Division Bench of this Court in the case of *Meher Singh Vs. Deepak Sawhny*². Learned Counsel would submit that thus, the law as it stands is that pending proceedings under Section 9-A are to be continued which includes the present Writ Petition. Therefore, the contention of the Respondents that the issue under Section 9-A of the CPC of jurisdiction cannot now be dealt with in view of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)* is not the correct proposition.

9. It is submitted that the Revisional Court has not considered the fact that the Trial Court has on merits after appreciating the evidence rejected the Petitioners' case of being a co-owner. The Revisional Court

1 (2020) 6 SCC 557

2 CDJ 1998 BHC 1406

has only held that the issue requires full fledged trial but has not dealt with the issue of ownership of Petitioners. In that eventuality the matter has to be remanded back to the Revisional Court because the parties had already led evidence pursuant to the liberty granted by the Trial Court and that this fact has not been considered.

10. Without prejudice to the above contention, the learned Counsel would submit that even if it is assumed for the sake of argument that under Section 9-A of the CPC, the issue of jurisdiction which involves mixed question of law and facts cannot be gone into, then the issue of jurisdiction will have to be kept open and tried along with other issues. The Petitioners cannot be non-suited and left remediless as the findings of the Trial Court that the Petitioners are not the co-owners would be binding on Petitioners without the same being set aside.

11. On the other hand, Mr. Pandey, learned Counsel for Respondents would submit that the suit has been filed for evicting the Petitioners being gratuitous licensee. That Petitioners by filing the written statement dated 25th November, 2008 resisted the claim and submitted that Petitioners are not gratuitous licensee and claimed to be co-owners of the suit premises. That after filing of the written statement,

Petitioners had taken out an application for framing preliminary issue of jurisdiction, which issue was framed after which the parties were directed to lead evidence. That Petitioners had filed their affidavit in lieu of oral examination-in-chief and compilation of documents. Thereafter, examination-in-chief and cross-examination of the Defendants' witness No.1 was conducted. After the completion of cross-examination an order was passed on 6th May, 2014, pursuant to which the Trial Court held that it has jurisdiction to entertain and try the said suit. Being aggrieved by the said decision, Revision was filed before the Appellate Bench and by order dated 30th October, 2014, the Appellate Bench upheld the order dated 6th May, 2014 of the Trial Judge.

12. Mr. Pandey, learned Counsel would submit that in view of the law settled by the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, by which the law laid down by this Court in the case of *Meher Singh Vs. Deepak Sawhny (supra)* has been reversed, both under Section 9-A of the CPC as well as under Order 14 Rule 2, only a pure question of law but not a mixed question of law can be decided as a preliminary issue as a mixed question of law requires recording of evidence. That although none of the proceedings can be said to be pending, the law laid down by the Hon'ble Supreme

Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)* would apply to any application pending under Section 9-A of the CPC or under Order 14 Rule 2 of the CPC. Learned Counsel would submit that both the Courts have observed that the Small Causes Court has jurisdiction to entertain and try the said suit and therefore, the Petition cannot be said to be in continuation of those proceedings and is also devoid of merits and deserves to be dismissed.

13. I have heard the learned Counsel for the parties and considered the rival contentions.

14. In the facts of this case, the Trial Court had framed the issue, “Whether this Court has jurisdiction to try and entertain the present suit?” and after framing the issue, and after considering the evidence, came to a conclusion that the Trial Court did have jurisdiction to try and entertain the said suit. While deciding the issue of jurisdiction, as Petitioners had claimed co-ownership of the suit property, the Trial Court after considering the evidence as recorded in paragraphs 9 and 10 of the order dated 6th May, 2014, held that the documents filed on record did not support the case of Petitioners, that they were the co-owners. That the lease deed dated 6th December, 1960 executed

between Rajasthan Co-operative Housing Society Limited stood in the name of Shriniwas Bhanwandas Bagarka. The share certificate was also not in the name Jagmohan Bagarka, when he was acting as a secretary of the society. That the theory put forth by Defendants (Petitioners herein) that they were co-owners could not be believed; that if the averments in the Plaint were seen, Plaintiffs had come up with the case that Defendants were gratuitous licensee of Plaintiffs; that from the pleadings in the Plaint it appeared that the occupation of Defendants in the suit premises was in the capacity of the gratuitous licensee and that relationship between the parties was not denied; that in the circumstances, the possibility that the predecessor in title of Plaintiffs had given the suit premises as a gratuitous licensee to Defendants could not be ruled out and that once that was the conclusion, the Small Causes Court, was the only Court to try all suits against the gratuitous licensee.

15. The Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)* decided on 4th October, 2019, has observed that under the provisions of Section 9-A of the CPC and Order 14 Rule 2 of the CPC, it is open to decide preliminary issues if it is purely a question of law and not a mixed question of law and fact by

recording evidence, overruling the decision of this Court in *Meher Singh Vs. Deepak Sawhny (supra)* holding that under Section 9-A of the CPC, the issue to try a suit/jurisdiction can be decided by recording evidence if required and by proper adjudication.

16. It is worthwhile here to observe that prior to the decision in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, the position of law with respect to Section 9-A of the CPC was governed by decision of this Court in the case of *Meher Singh Vs. Deepak Sawhny (supra)*, which held that under Section 9-A, the issue to try a suit/jurisdiction can be decided by recording evidence, if required and by proper adjudication of the issue. Paragraph 13 of the said decision is usefully quoted as under :-

13. In the result we hold that if section 9-A is not added, then at interim stage, the Court is not required to decide the issue of jurisdiction finally and the Court by referring to the averments made in the plaint, would ordinarily determine whether or not the Court has jurisdiction to try the suit. However, it is apparent that section 9-A is added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. According to the Legislature, the practice of granting injunctions without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication.

Adjudication would require giving of opportunity to the parties to lead evidence, if required.

17. However, the decision of the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, which has overruled the decision in the case of *Meher Singh Vs. Deepak Sawhny (supra)*. After the decision of the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, only a pure question of law concerning inherent jurisdiction of the Court to entertain the Suit can be decided as a preliminary issue under Section 9-A or Order 14 Rule 2 of the CPC and not a pure question of fact or a mixed question of fact and law be decided as a preliminary issue as the same would involve consideration of facts and evidence to be led.

18. The Trial Court in the case at hand, after recording in paragraph 8, that the Small Causes Court cannot decide the title and ownership, however, it could decide the issue of landlord and tenant relationship or licensor or licensee relationship, observed that in the facts of this case the Defendants (the Petitioners herein) have raised an objection that they are co-owners of the property, therefore, the Court was required to look into the said aspect in an ancillary manner to ascertain that the landlord and tenant relationship/licensor or licensee existed

between the Plaintiffs and the Defendants. The Trial Court held that only if it is proved that such a relationship is in existence only then the Small Causes Court would have jurisdiction to entertain the Suit.

19. The Respondents herein being the Plaintiffs in the said suit premises under Section 41 of Presidency Small Causes Courts Act, 1882 have alleged that the Defendants (the Petitioner herein) were gratuitous licensee. The Petitioners herein who are the Defendants in the Suit had filed written statement denying that they were the gratuitous licensee. They had also raised a defense that they were the co-owners in respect of the suit property and also challenged the relationship between themselves and the Plaintiffs. The Defendants also filed an Application for framing preliminary issue as to whether the Small Causes Court had jurisdiction to try and entertain the Suit. The Application was heard and decided whereby the preliminary issue was framed. Thereafter, the parties were given an opportunity to lead evidence on the preliminary issue regarding jurisdiction of the Court. The Defendant examined himself and one more witness in support of their contentions. No one was examined on behalf of the Plaintiffs.

20. Based on the law existing prior to the decision of Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, the Trial Court examined the witnesses to ascertain the Predecessors-in-title of the Defendant as well as the documents produced by the Defendants as referred in paragraphs 9 and 10 of the Judgment of the Trial Court. After examining the said documents it was observed that the theory put forth by the Defendants that they were co-owners could not be believed. That in the Plaint, the Plaintiff had come up with the case that the Defendants are the gratuitous licensee of the Plaintiffs. That considering the pleading in the Plaint it appeared that the occupation of the Defendants in the Suit premises was in the capacity of gratuitous licensee. Holding that the relationship between the parties was not denied, the Trial Court observed that in the circumstances the possibility could not be ruled out that the Predecessors-in-title of the Plaintiffs had given the Suit premises as a gratuitous licensee to the Defendants. That once the said conclusion was reached, the Small Causes Court being the only Court to try all the Suits against the gratuitous licensee would have jurisdiction to try and entertain the Suit.

21. The Trial Court in accordance with the law prevailing on 6th May, 2014, passed the order declaring that the Small Causes Court had jurisdiction to try and entertain the suit.

22. In my view, the finding of the Trial Court that the theory put forth by the Defendants that they are the co-owners cannot be believed would not mean that the Trial Court has foreclosed the Suit. The Suit for eviction has been filed, as noted above by the Plaintiffs for eviction of the Defendants from the Suit premises alleging that the Defendants are the gratuitous licensee, the Small Causes Court has only disbelieved the co-ownership theory put forth by the Defendants but considering the possibility that the predecessors in title of the Plaintiffs had given the Suit premises on gratuitous license to the Defendants could not be ruled out, decided the issue of jurisdiction but the issue whether the Defendants are to be evicted from the Suit premises on the basis of that they are gratuitous licensee is yet to be decided.

23. The Revisional Court has upheld the order of the Trial Court that the Trial Court has jurisdiction to try and entertain the Suit and that no error has been committed by the Trial Court in recording its finding. In the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*,

the Hon'ble Supreme Court, while discussing the scope of Section 9-A and Order 14 Rule 2 of CPC, has observed that although the scope of Section 9-A is different as compared to the provisions of Order 14 Rule 2 and scope of Section 9-A is limited and not as comprehensive as that of Order 14 Rule 2, however, the concept of Order 14 Rule 2 of CPC with respect to what can be treated as preliminary issue will be applicable under Section 9-A only in case question of "jurisdiction to entertain" arises.

24. Ergo, going by the above analysis, firstly, because in view even of the preliminary issue of jurisdiction having been decided under Section 9-A of the CPC, in accordance with law prevailing prior to *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, and not interfered with by the Revisional Court, and secondly because in any event after the said decision in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, any preliminary issue under the provisions of Section 9-A as well as Order 14 Rule 2 can be decided only if it is purely a question of law and not a mixed question of law and fact by recording evidence, the submissions of Mr.Shah, with respect to the Revisional Court's findings in relation to Order 14 Rule 2 of the CPC or of the requirement of a full fledged hearing to decide the preliminary issue of jurisdiction

or a request for remand in my view, would not be relevant.

25. In paragraph 89, of the decision in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, the Hon'ble Supreme Court has observed that to the effect that even though Section 2 of the Maharashtra Second Amendment Act, 2018, which provides that where consideration of preliminary issue framed under Section 9-A is pending, on the date of commencement of the CPC, and the said issue shall be decided and disposed of by the Court under Section 9-A, as if the provision under Section 9-A has not been deleted, that does not change the legal scenario as to what can be decided as a preliminary issue under Section 9-A of the CPC as applicable to Maharashtra. The Hon'ble Supreme Court has held that the saving created by the provisions of Section 2 where consideration of preliminary issue framed under Section 9-A is pending on the date of commencement of the CPC (Maharashtra Amendment) Act, 2018, can be decided only if it comes within the parameters as found by the Hon'ble Supreme Court on the interpretation of Section 9-A and that it has been reiterated by the Hon'ble Supreme Court that no issue can be decided only under the guise that the issue has been framed under Section 9-A and was pending consideration on the date of commencement of the

Maharashtra Amendment Act, 2018. This clearly means that even if an issue was pending consideration under Section 9-A, the law as to the applicability of the said Section as decided by the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)* would apply viz. only pure question of law can be decided as a preliminary issue and not a mixed question of law and fact by recording evidence.

26. Also in view of the above, opinion of the Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, that if on the date of determination of the subject matter in *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*, if any Application is pending under Section 9-A or any issue of is pending for adjudication under Order 14 Rule 2 of the CPC, the same shall be decided in the light of the law laid down, would not mean that the decision of the Trial Court on 6th May, 2014 and of the Appellate Court on 30th October, 2014 can be reopened on the ground that the Writ Petition is pending when the decision of Hon'ble Supreme Court has been rendered as the preliminary issue of jurisdiction has already been determined by two competent Courts of law. Moreover, the aforesaid opinion of the Hon'ble Supreme Court does not mean that the Judgment in the case of

Nusli Neville Wadia Vs. Ivory Properties and Ors (supra), can be used to reopen already decided and concluded decision on the preliminary issue of jurisdiction raised under Section 9-A and decided in accordance with the law prevailing prior to the decision in the case of *Nusli Neville Wadia Vs. Ivory Properties and Ors (supra)*.

27. The present Writ Petition cannot therefore be considered to be a continuance of pending proceedings under Section 9-A, as the subject matter of the Suit with respect to the issue of jurisdiction of the Small Causes Court was not only concluded by the Trial Court by order dated 6th May, 2014 but also confirmed by the Appellate Bench by order dated 30th October, 2014. It cannot be, therefore, said that the subject matter of Exhibit-14 viz. Application for framing preliminary issue decided by the Trial Court and the Appellate Court is pending.

28. Mr. Shah, has also sought to canvass that even if it is assumed for the sake of argument that under Section 9-A, issue of jurisdiction involves mixed question of law and facts cannot be gone into, then in that eventuality the issue of jurisdiction will have to be kept open at trial along with other issues as the Petitioners cannot be non suited and left remediless as the findings of the Trial Court that the Petitioners are

not the co-owners would be binding on the Petitioners without the same being set aside. I am afraid that this contention of Mr.Shah, is only stated to be rejected in as much as the Defendants (the Petitioners herein) have not been non suited as the Suit has been filed by the Plaintiffs for eviction of the Defendants on the ground that they are gratuitous licensees. It is not a Suit that has been filed by the Defendants for a declaration that they are co-owners; the said ground was taken only to challenge the jurisdiction of the Small Causes Court which was not believed by the Trial Court as noted above. Needless to say that the Trial Court under Order 14 Rule 2 of the CPC is required to pronounce a judgment on all issues and the Plaintiffs having filed the Suit against the Defendants for eviction on the basis that the Defendants are a gratuitous licensee which would need adjudication by the Trial Court on issues framed after considering the Plaint and the written statement.

29. The Trial Court, in my view, has correctly come to the conclusion that it has jurisdiction to entertain and try the said suit after recording the evidence in line with the law then prevailing. The Appellate Court has confirmed the decision of the Trial Court. Therefore, in view of the above discussion, I do not deem it fit to interfere with the order dated

30th October, 2014 of Appellate Bench of the Small Causes Court in Revision Application No. 87 of 14 in Exhibit No. 14 taken out in L. E. & C. Suit No. 91/138 of 2008, under Article 227 of the Constitution of India, there being neither any error nor illegality nor perversity. The Writ Petition is accordingly dismissed. No order as to costs.

30. When the judgment is pronounced, a request is made to continue the ad-interim order granted earlier. Let the ad-interim order continue for a period of four weeks from the date of uploading of the order.

(ABHAY AHUJA, J.)

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signed by
NIKITA
YOGESH
GADGIL
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