
(2015) 07 BOM CK 0185

In the Bombay High Court

Case No : Notice of Motion (L) No. 472 of 2015 in Suit No. 3734 of 1996

Bababhai Jamnadas and Others

APPELLANT

Vs

Jaisingh V. Mariwala and Others

RESPONDENT

Date of Decision : 06-07-2015

Acts Referred:

Presidency Small Cause Courts Act, 1882 — Section 41, 41 (1), 41(1)
Specific Relief Act, 1963 — Section 41 (b)

Citation : (2015) 07 BOM CK 0185

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : A.S. Daver, Anagha Kharade and Jyoti Ghag, i/b. Thakore Jariwala and Associates, for the Appellant; Robin Jaysinghani and Rohan Kelkar, instructed by Dastur Kalambi and Associates, Advocates for the Respondent

Judgement

S.C. Gupte, J—The Notice of Motion seeks transfer of a suit pending before the Bombay City Civil Court to this Court to be heard with the present suit inter alia on the ground that the subject matter of the two suits is identical; common oral and documentary evidence is likely to be led in both the suits; and there is a likelihood of conflicting decisions in the two suits if separate trials are conducted.

2. The Plaintiffs claim to be trustees for the time being of a public charitable trust, Bai Motibai Kasara Baug Borivali Trust. The Defendants are trustees of another public charitable trust, M.N.K. Bhatia High School Trust. The Plaintiffs as such trustees own a plot of land together with a building consisting of ground and two upper floors and a terrace with two rooms and washrooms together with open ground at Kandivali in Mumbai. Prior to 1982 the Defendant trust was running a school in the name of M.N.K. Bhatia High School somewhere near Bombay V.T., Fort, Mumbai. The school was closed down in 1982. The Defendants were thereafter desirous of re-starting the school somewhere in the suburbs of Mumbai. It is the Plaintiff's case that the Plaintiffs agreed to accommodate the Defendants in parts of their building in the suit property under a leave and licence agreement to be executed between the parties. Pending finalization of

such agreement, in April 1991, the Defendants started using parts of the suit building on the ground and first floors thereof. It is the case of the Plaintiffs that despite several attempts on the part of the Plaintiffs, the Defendants refused to execute any agreement and contended instead that the building was to be given to the Defendants on a "rental" basis. Since the parties could not arrive at any agreement of licence, the Plaintiffs called upon the Defendants to vacate the ground and first floors of the building. Since the Defendants refused to comply, the Plaintiffs have filed the present suit claiming a declaration that the Defendants are trespassers of the ground and first floors of the suit building and praying for a decree of possession and mesne profits. This suit was filed on 23 August 1996.

3. The Defendants, on the other hand, claim that the Plaintiffs had agreed to let out to the Defendants the entire suit building including the second floor as well as the ground around the building on terms and conditions as may be agreed upon between the parties. Though this agreement was not finalized, the Plaintiffs put the Defendants in possession of the whole of the suit building in April 1991 and the Defendants had since been in possession of the suit building together with the ground. It is the Defendant's case that in December 1993, the Plaintiffs dispossessed the Defendants from the second floor of the suit building by illegally obstructing their entry to the second floor. It is the case of the Defendants that the Plaintiffs have also taken forcible charge of the keys of the suit building and each of the rooms therein and in the premises, from 20 December 1993, the Plaintiffs are in illegal control of the suit building including the class rooms and the Defendants are at the mercy of the Plaintiffs for opening and closing the class rooms on the ground and first floors, whilst the second floor is permanently closed for them. The Defendants submit that they are also prevented from using the playground forming part of the property. On these facts, the Defendants filed their own suit on 13 April 1994 in the Bombay City Civil Court, claiming their dispossession by the Plaintiffs herein otherwise than by due process of law of the second floor of the suit building together with the playground, and praying for a mandatory order and injunction directing the Plaintiffs to handover the keys to the whole of the suit building including each of the rooms from the ground to the second floor and the compound, and for other incidental reliefs. This suit, originally numbered as B.C.C.C. Suit No. 2450 of 1994, was redeclared and lodged in this Court in May 1997 and numbered as High Court Suit No. 1739 of 1997. Subsequently, on transfer of jurisdiction in respect of suits of the value of less than Rs. One Crore, the suit was transferred back to the Bombay City Civil Court and renumbered as B.C.C.C. Suit No. 107152 of 1997.

4. The Plaintiffs herein now apply that the subject matter of the two suits, namely, the present suit and B.C.C.C. Suit No. 107152 of 1997, being the same and with most of the issues and evidence being common, the pending B.C.C.C. Suit be transferred to this Court to be heard along with the present suit.

5. The Defendants oppose this application. It is their case that, in the first place,

this Court, sitting as a Suit Court on the Original Side, has no power or authority to withdraw any pending suit from the City Civil Court and transfer it to itself for two reasons: One, the City Civil Court is not sub-ordinate to this Court in exercise of the original civil jurisdiction of this Court, and two, as a matter of assignment of judicial work, transfer applications (for transfers of suits, etc.) are not assigned to the Single Judge hearing original side suits, but have to be moved before the Learned Judge hearing residuary civil work on the Appellate Side. Secondly, it is submitted that this Court has no jurisdiction to hear the present suit and ought not to transfer the suit pending before the City Civil Court. Learned Counsel for the Defendants relies on several judgments in support of both these submissions.

6. Let me first deal with the question of power or authority of a judge of this Court sitting as a suit court on the original side to deal with the Application for transfer of a suit pending before the City Civil Court, to be heard along with suit pending before this Court. As I have noted above, this question, in turn, has two aspects: (a) the question as to sub-ordination of City Civil Court to this Court on its original side, and (b) the question as to assignment of judicial work.

7. The first question is more or less answered by the Full Bench Judgment of our Court in *Export Credit Guarantee Corporation of India Ltd. Vs. Mrs. Annamma Philips and Others*, AIR 2011 Bom 18 : (2010) 5 BomCR 823 : (2010) 112 BOMLR 4118 , where the Full Bench considered whether the Small Causes Court constituted under the Presidency Small Causes Court Act was sub-ordinate to this Court on its original side, within the meaning of Section 41 (b) of the Specific Relief Act. The Full Bench, relying on Article 13 of the Letters Patent, held that this Court on its original side, in exercise of its extraordinary civil jurisdiction, was empowered to remove and try any suit falling within the jurisdiction of any Court within or without the Presidency of Bombay (as it was then known), subject to the superintendence of this Court. So also, the Full Bench, relying on Clause 36 of the Letters Patent, held that where a Single Judge is performing judicial functions on the original side of the High Court, he is as much a High Court Judge as a Judge sitting Singly on the Appellate Side. Clause 36, in terms, provides that each and every function of the High Court can validly be performed by a Single Judge sitting on either side of the Court. The net result is that a Single Judge sitting on the original side has the power to withdraw any suit from a sub-ordinate Court and try it himself.

8. As for the second question, the argument of the Defendants is as follows: Under Rule 6 of Chapter I of the Appellate Side Rules framed by this Court, all applications for transfer of suits, appeals, criminal cases or other proceedings pending for trial or disposal before any Civil or Criminal Court sub-ordinate to the High Court may be disposed of by a Single Judge; the judicial work to be done by the Single Judge under this Rule is assigned by the Hon"ble the Chief Justice, who is "the Master of the Roster", to another learned Single Judge sitting on the Appellate Side and not to me; and therefore, I should not take up this application

for transfer. At the outset, it is pertinent to note that the present Notice of Motion is not a general application for withdrawal of a pending suit before a sub-ordinate court for trial before this Court. It is an application made in a pending suit on the original side, which falls within my assignment, for withdrawal and transfer of a suit pending before a sub-ordinate court on the ground that the suit involves the same subject matter as, and can be conveniently be tried along with, the pending suit on the original side, and separate trials are likely to result in conflicting decrees. This Court obviously has the discretion in such a case to order such withdrawal and transfer and it is certainly for me as a judge hearing the High Court Suit to exercise that discretion in exercise of extraordinary civil jurisdiction that I exercise in the matter. There is no question of any judicial work beyond the roster here. It is very much a part of my assignment as a suit court on the original side.

9. The first set of objections having been disposed of, we may now turn to the objection to the jurisdiction of this Court on account of the purported exclusive jurisdiction of the Small Causes Court. The latter Court has exclusive jurisdiction to hear all suits and proceedings between a licensor and a licensee relating to recovery of possession of any immovable property within Greater Mumbai, or relating to recovery of any licence fee or charges therefore, under Section 41 of the Presidency Small Causes Courts Act, 1882 ("the Act"). It is submitted that the present suit, though termed as a trespass suit, is really a suit between a licensor (the Plaintiffs) and licensee (the Defendants). It is submitted that the Defendants are nothing but ""gratuitous licensees"" of the suit building (or part thereof as alleged in the plaint) and any gratuitous licensee, even one whose licence has come to an end, is covered within the expression "licensee" under the Act.

10. In the first place, it is pertinent to note that the Defendants have so far not filed any Written statement raising this contention. Even in reply to the Notice of Motion, the contention is raised only to claim that this Court ought not to order transfer. There is no case, therefore, for either framing or trying of any preliminary issue of jurisdiction on this score in the suit herein. This being, however, an issue raised on a demurrer, I have nevertheless proceeded to hear the submissions on the principle of Order 7 Rule 11.

11. A threshold requirement of an application under Order 7 Rule 11 is that the lack of jurisdiction of the Court has to be judged merely with reference to the averments in the plaint. Taking these averments to be correct, if it can be demonstrated that the suit does not lie before the Court, the plaint can be returned under Order 7 Rule 11. With this principle in mind, let us consider the Defendants"" objection to the jurisdiction of this Court. The objection is that this is, in effect, a suit between a licensor and a licensee, at best a gratuitous licensee whose licence has come to an end, for recovery of possession and licence fee or charges. Learned Counsel for the Defendants submits that a gratuitous licensee is, as held by the Supreme Court in Prabhudas Damodar

Kotecha and Others Vs. Manhabala Jeram Damodar and Another, (2013) 5 ABR 1081 : AIR 2013 SC 2959 : (2013) 11 JT 208 : (2013) 2 RCR(Rent) 599 : (2013) 10 SCALE 242 , covered within the expression "licensee" appearing in Section 41 (1) of the Act. So also, relying on the Division Bench decision of this Court in Nagin Mansukhlal Dagli Vs. Haribhai Manibhai Patel, AIR 1980 Bom 123 , it is submitted that the words "licensors and licensees" would cover the case of persons who once held such relationship but which relationship has now come to an end. Both the propositions are unexceptionable. Their combined result is that a dispute for recovery of possession between a licensor and a gratuitous licensee, whose licence has been brought to an end, lies exclusively before the Small Causes Court under Section 41 (1) of the Act. All we have to see is if the present suit is such a dispute, taking the averments in the plaint to be true.

12. If one has regard to the averments in the plaint in our case together with the reliefs sought therein, considered in their entirety and not with reference to stray statements here and there, the case of the Plaintiffs is not of a gratuitous licence created in favour of the Defendants, which is terminated by a notice. The case here is of the Defendants being allowed use of the suit premises in view of an agreement of licence then in contemplation of the parties, which the parties could not finalize. The Plaintiffs claim that this permission was granted on an express understanding that an agreement of licence would be created between the parties, under which the Defendants would inter alia deposit a sum of Rs. 1.25 Crores by way of a security deposit. It is the Plaintiffs' case that the terms of this agreement were mutually discussed and prepared in the form of a draft agreement, but the Defendants, instead of executing the agreement in terms of the draft, contested the terms and conditions contained in the draft and claimed that they were to be put in possession as tenants for a monthly rent varying between Rs.40,000/-to 50,000/-. Since the parties could not enter into any agreement, the Plaintiffs claim that the Defendants have no authority to occupy the premises and are nothing but trespassers occupying the property without any authority of the Plaintiffs. The Plaintiffs, accordingly, pray for a declaration that the Defendants are trespassers and for a decree of mesne profits for the latter's illegal occupation. The suit is, thus, on the Plaintiffs' averments, a suit between the owners of the property and their prospective licensees in whose favour no licence was in fact created. The Plaintiffs, on the basis of these averments, ask for reliefs in the nature of a trespass claim, namely, declaration, possession and mesne profits. They have not come before the Court that the Defendants are licensees, gratuitous or otherwise, but that the Defendants are trespassers, though it was originally proposed that the Plaintiffs would create a licence in favour of the Defendants. The Plaintiffs, thus, pray mesne profits for wrongful possession and not licence fees or charges within the meaning of Section 41(1), in addition to possession. Even the Defendants' case, though it is not strictly relevant for our purpose, is not of a gratuitous licensee, but of a person in whose favour a tenancy agreement was to be created, but was in fact admittedly not created. It is difficult to see how such a case can go before the Small Causes

Courts, which entertains disputes between landlords and tenants or licensors and licensees and for recovery of possession and rent or licence fee.

13. That brings us to the merits of the application, namely, the question as to whether, in the facts of the case, the pending suit should be withdrawn from City Civil Court and brought before this Court, to be heard with the present suit. The application is on the footing that the subject matter of the two suits is common, the evidence to be led is common and the trials can be conveniently held together, and on the other hand, separate trials would result into a conflict of decrees. It is submitted by the Defendants that the subject matters of the suits are wholly different; the City Civil Court Suit is in respect of the claim of the Defendants herein of dispossession by the Plaintiffs otherwise than with due process of law from the second floor and the playground; whereas the High Court Suit is in respect of the claim of the Plaintiffs herein to recover possession of ground and first floors from the Defendants. A mere reading of the plaint in the City Civil Court indicates that what the Plaintiffs therein (i.e. the Defendants herein) complain about is not only dispossession from the second floor and the playground, but that the Plaintiffs have also taken forcible charge of the keys of the entire suit building and each of the rooms, that is to say, even the ground and first floors of the suit building. On the basis of these averments, the reliefs sought are a mandatory order and injunction directing the Plaintiffs herein to handover the keys of the whole of the suit building including each of the rooms from ground to the second floor and the compound, and for other incidental reliefs. These incidental reliefs include a permanent injunction restraining the Plaintiffs herein from interfering with the Defendants' use of the whole of the suit building, playground and open spaces forming part of the property. Thus, we have two suits here, one where the owners claim possession of ground and first floors of the suit building from purported trespassers and the other where the same purported trespassers, as agreement tenants (whose tenancy has not actually come about), claim to be entitled to exclusive possession of the whole of the suit building to the exclusion of the owners. It does not require elaborate arguments to realize that several common issues arise in the two suits, which are really like cross suits; common evidence is likely to be led; and two separate trials can lead to conflicting decrees, which is best avoided by hearing the two suits together. A clear case for withdrawal and bringing to this Court of the City Civil Court suit for a joint trial is made out on merits.

14. The Notice of Motion, thus, deserves to be allowed and is, accordingly, made absolute in terms of prayer clause (a). The Registrar of the Bombay City Civil Court is directed to send the papers and proceedings of Suit No. 107152 of 1997 to this Court. The Suit, upon such transfer, shall be tried along with Suit No. 3734 of 1996 pending in this Court.

15. On the application of the learned Counsel for the Defendants, this order is stayed for a period of four weeks from today.