

(2013) 12 BOM CK 0022

In the Bombay High Court

Case No : Notice of Motion No. 3262 of 2010 in Suit No. 2955 of 2010 & Suit No. 2955 of 2010

Shaikh Jaber Abdulah Jai Sabah

APPELLANT

Vs

Ravindra Mukund Chafe and Another

RESPONDENT

Date of Decision : 19-12-2013

Acts Referred:

Citation : (2014) 1 ABR 587 : (2014) 3 ALLMR 293 : (2014) 4 MhLj 132

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Haresh Jagtiani, assisted with Ms. Olga Lume-Pereira and Ms. Vandana Mehta, instructed by Yashpal Jain and Mr. Suprabh Jain, for the Appellant; Rohan Cama, Mr. T.N. Tripathi, A/w. Sapna Rachure, instructed by . T.N. Tripathi and Co. for the Defendant No. 1, Mr. Shailesh Shah, A/w. Mamta Sadh and Sunil Jadhav, instructed by . Hemant Deshpande, for Defendant No. 2, for the Respondent

Judgement

R.S. Dalvi, J.—The Plaintiff is the owner of the building A1-Jabriya Court at 69, Marine Drive, Mumbai 400 020. The Defendant No. 1 is stated to be the trespasser who has illegally encroached upon Flat No. 6 and a garage in the aforesaid building. Defendant No. 2 is also claimed to be stranger and trespasser illegally inducted in flat No. 6 by Defendant No. 1. The Plaintiff claims that the Defendants have entered upon the suit premises without his consent or permission and by breaking open the locks of the suit premises and dispossessed the Plaintiff from possession constraining the Plaintiff to recover possession of the suit premises. It is the Plaintiff's case that the premises was tenanted to one Jayantilal Desai. Rent receipts were issued to him. He died in April, 1976. His wife Urmila Desai and thereafter his married daughter Mrs. Renuka Shah lived and died in the suit premises. Mrs. Renuka has not left any legal heirs surviving her, residing with her at the time of her death on 23rd April, 2010. The Plaintiff, therefore, claims that the tenancy rights came to an end upon her death. The Plaintiff claims that the right, title and interest including the possession of the

suit premises devolves upon and reverts to the Plaintiff as the owner and accordingly he has constructive/symbolic possession.

2. The Plaintiff claims to be an absentee landlord. He claims the revisionary rights in respect of the suit premises upon the death of the last surviving tenant.

3. The Plaintiff has further claimed that on 31st August, 2010 Defendant No. 1 broke open the lock of the suit premises and entered therein. The Plaintiff obtained knowledge of the trespass committed by Defendant No. 1 from the neighboring tenants through his constituted attorney (CA) one Nabil Rashid Gani (Nabil).

4. Upon such a case the Plaintiff has sued for possession u/s 6 of the Specific Relief Act. Defendant No. 1 claimed that he had earlier entered upon the suit premises and was occupying it. Defendant No. 1 claims to have been living with deceased Renuka Shah, the Plaintiff's statutory tenant. He claims to have been transferred and bequeathed the suit Flat to him. Defendant No. 1 has relied upon a photocopy of the Will of the deceased, yet unprobated. Without the grant of probate and consequent title Defendant No. 1 has sought to transfer the tenancy to Defendant No. 2.

5. Defendant No. 2 claims to be a tenant upon the issue of a single rent receipt by the erstwhile CA of the Plaintiff whose Power of Attorney (POA) was since revoked. The receipt is shown to be rubber stamped with his name.

6. The Plaintiff applied for interim reliefs essentially of the appointment of the Receiver in respect of the suit premises upon his claim of recovery of possession of the property of which he was dispossessed u/s 6 of the Specific Relief Act. The Defendants claim that the Plaintiff was not in possession and could not have been dispossessed. It is, therefore, contended that the Plaintiff is required to sue U/s. 5 of the Specific Relief Act on his title. Defendant No. 2 claims to be a tenant.

7. Consequently two preliminary issues have been earlier raised and framed and are required to be answered; (1) relating to the maintainability of the suit U/s. 6 of the Specific Relief Act and (2) relating to the bar U/s. 41 of the Presidency Small Cause Courts Act, 1882 (PSCCA) as preliminary issue U/s. 9A of the CPC (CPC).

8. The issues are as follows and answered as follows:

9. The bar of jurisdiction created U/s. 41 of the Presidency Small Cause Court, 1882 is required to be determined first because if the Courts inherent jurisdiction is ousted, the Court would not be able to consider the maintainability of this suit U/s. 6 of Specific Relief Act. Hence the issues shall be determined accordingly.

Issues relating to bar of jurisdiction U/s. 41 of the Presidency Small Cause Courts Act, 1882.

10. U/s. 41 of the PSCCA suits inter-alia between landlord and tenants for

recovery of possession of property are enjoined to be filed in the Court of Small Causes. The relevant portion of Section 41 runs thus:

41.(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.

11. Even U/s. 33 of the Maharashtra Rent Control Act, 1991 the bar of jurisdiction is in similar terms. The relevant part of which runs thus:

... shall have jurisdiction to entertain and try any suit or proceedings between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under this Act.

.... and

no other Court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question.

12. It is a settled and an elementary rule of law that to see whether a suit is between a landlord and tenant one must see the Plaintiff's case from the plaint, whatever be the defence. The Plaintiff is the dominus litis. It is for him to sue. It is for the Plaintiff to show whether his suit is between him as the landlord and the Defendant as the tenant for recovery of possession, for recovery of rent of any other application under the Maharashtra Rent Control Act. It will have to be seen by the Court whether this is one such suit.

13. It can be seen that the Plaintiff's suit is against trespassers. The Plaintiff's suit is not against his tenants. The suit is not filed as a suit between a landlord and tenant for recovery of possession. Defendant No. 2 has sought to show that he has become a tenant. The Plaintiff has not accepted the tenancy. It is for the Defendant No. 2 to prove that he is tenant. If the Defendant proves that he is Plaintiff's tenant, the Plaintiff's contentions would be belied. The Plaintiff's suit itself would be dismissed. In the case of Laxmipat Singhania Vs. Larsen and Toubro Ltd., which was a case of a 99 year lease agreement allowing construction of a building on the land of the Lessor the Court considered the title to the land and the title to the building in English and Indian law and the Lessee's rights thereto even after the expiration of the lease. Having concluded that the suit as filed by the Lessor fell within the provisions of the Bombay Rent Act, 1947 it held that the Civil Court had no jurisdiction to try the suit and consequently dismissed the suit.

14. If, however, the Defendant No. 2 cannot prove the tenancy the Plaintiff's suit on trespass would be justified and his reliefs would require to be granted. It does not matter that the Defendant calls himself a tenant. It only matters whether the

suit is for the reliefs of recovery of possession or rent or any other application under the rent Act even between the admitted landlord and the tenant. Unless the suit specifies the requirements of Section 41 of the Presidency Small Cause Court Act, 1882 the Civil Court's jurisdiction cannot be barred.

15. In the case of Kanji Manji Vs. The Trustees of The Port of Bombay, , a monthly lease of land was made by BPT to five lessees. BPT sued to recover the land from the lessees in the Bombay City Civil Court which suit came to be decreed. The suit was for eviction from BPT land only. Such land was not included in the definition of premises U/s. 5(8) of the Bombay Rent Control Act. Similarly, U/s. 4A land belonging to BPT as the local authority was exempt. Hence the Civil Court's jurisdiction was held not barred.

16. An analogy can also be drawn from the judgments of this Court in the cases of Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. and Others, and Vardhman Developers Vs. Thailambal Co-Op. Hsg. Soc. Ltd. & Ors. in Notice of Motion No. 3274 of 2010 in Suit No. 2725 of 2010 dated 7th March, 2011 in which it has been held that the civil court's jurisdiction is not barred by the provisions contained in Section 91 of the Maharashtra Co-Operative Societies Act, 1960 in case of redevelopment of the Society building in a suit for claiming rights upon redevelopment as redevelopment is not a business of the society.

17. Even if the contentions of the Defendants have to be considered, the claims of Defendant No. 1 is not of tenancy but under a transfer and a bequest. Such a claim would have to be adjudicated in a Civil Court. Upon the ruling in the case of Vasant Pratap Pandit Vs. Dr. Anant Trimbak Sabnis 1994 Mh. L.J. 1450 a legatee is held not to be an heir as contemplated u/s 5(11)(c) of the Bombay Rent Act, 1947.

The analysis of Section 5(11)(c)(i) in paras 14 & 15 of the judgment shows the protection given to members of the family residing with the tenant at the time of the death of the tenant as the tenancy would be taken by the tenant not only for his benefit but also for the benefit of the members of the family residing with him. Such members of the family of the tenant would be protected under the avowed object of the legislation whether or not those family members were heirs in the strict sense. The Court, therefore, held that such heirs are given priority to be treated as tenants and it is only when such members of the family are not there that the heirs would be entitled to be treated as tenants. It is observed in para 14 of the judgment that a bequest under a Will which would require the court to honour the wishes of the deceased tenant as a Testator would render nugatory a provision of the section requiring the Court to decide the tenant amongst the heirs in case of default of agreement between the heirs themselves.

Consequently it is held in para 14 of the judgment that the legislature had not intended to confer the statutory tenancy upon a testamentary heir. Even the reasoning for this ultimate conclusion is given in the said para thus:

Otherwise the right of the landlord to recover possession will stand excluded

even though the original party (the tenant) with whom the landlord had contracted is dead.

It is thereafter observed:

Besides, a statutory tenancy is personal to the tenant.

The further analysis of the reasoning in para 15 of the judgment shows why a legatee under a Will of a tenant cannot claim as an heir. It is observed that if an "heir is to be interpreted to include a legatee even a stranger may have to be inducted as a tenant for there is no embargo upon a stranger being a legatee.

18. The oral evidence led by parties is essentially to show the relationship between the deceased statutory tenant and the Defendant No. 1 as also the tenancy of Defendant No. 2. No relationship of Defendant No. 1 with the last statutory tenant of the Plaintiff is shown, admitted or established. Defendant No. 1 is shown to be a stranger. The provisions of the Maharashtra Rent Control Act do not apply to such relationship. Defendant No. 2 claims through Defendant No. 1 as having been transferred the suit premises. His case similarly follows.

19. Upon seeing the plaint the above suit on trespass is required to be filed in the Civil Court and the Civil Court's jurisdiction is not seen to be barred U/s. 41 of the Presidency Small Cause Courts Act, 1882. The issue relating to bar of jurisdiction is, therefore, answered in the negative holding that the Civil Court's inherent jurisdiction is not barred.

Issue relating to the maintainability of the suit U/s. 6 of the Specific Relief Act.

20. The owner of a property can sue in a Civil Court for recovery of possession of the property from any party who he claims is in wrongful possession of the property owned by him. The Plaintiff has produced the property register cards showing the ownership. In this case the Plaintiff is the admitted owner of the building and consequently also the suit flat No. 6 therein. Defendant No. 2 has admitted the ownership of the Plaintiff. None of the Defendants claim that any other person is the owner.

21. The Plaintiff may recover possession either U/s. 5 of the Specific Relief Act on his title or U/s. 6 of the Specific Relief Act merely on his possession, if the Plaintiff has been dispossessed therefrom without his consent.

22. For the Plaintiff to recover such possession on title the Plaintiff would sue U/s. 5 of the Specific Relief Act which runs thus:

5. Recovery of specific immovable property. -

A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

23. The Plaintiff has valued the suit flat at Rs. 16 crores and paid Court fee on the entire amount. The Plaintiff has not valued the suit under item 2 of schedule I to the Bombay Court Fees Act, 1959 at half its value as a suit U/s. 6 of the

Specific Relief Act. The Plaintiff has prayed for recovery of possession as also compensation and mesne profits for the unlawful occupation of the suit premises by the Defendants. The reliefs are essentially as in a suit filed on title U/s. 5.

24. However the Plaintiff has not chosen to sue on title. He has chosen to sue on dispossession. The Plaintiff claims to be in constructive or juridical or symbolic possession only. He has described himself as absentee landlord in paragraph 7 of the plaint being absent from India. He has claimed the entitlement to the suit premises upon juridical or symbolic possession as an owner in paragraph 11 of the plaint. However he has claimed forcible dispossession of such symbolic possession on the specific date - 31st August, 2010 upon the trespass by Defendant No. 1.

25. The Plaintiff has claimed in paragraph 5 of the plaint that when his CA visited the suit premises on 4th September, 2010 "to take possession" Defendant No. 1 was not available. He did not state when he would handover possession. The Plaintiff was given to understand that Defendant No. 1 was residing with his family and would not handover possession. The Plaintiff claims that Defendant No. 1 intentionally made duplicate keys of the suit premises and changed the outer door lock to restrain the Plaintiff's entry and thus dispossessed the Plaintiff. The Plaintiff accordingly claims right of recovery of possession U/s. 6 of the Specific Relief Act the relevant part of which runs thus:

6. Suit by person dispossessed of immovable property. -

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

26. It is argued on behalf of the Plaintiff that all that the section requires is dispossession upon lack of consent. The section does not state that there should be "forcible" dispossession of "actual possession". The dispossession may, therefore, be of symbolic possession of an owner of an immovable property.

27. The title of section 6 shows a suit by a person dispossessed of immovable property. He must prove his possession. If a person shows his actual possession such actual possession would be restored even if he does not have title. It has to be seen whether a person who has title can be dispossessed of possession not actually with him because possession would follow his title and he would be in symbolic possession.

28. A suit u/s. 6 of the Specific Relief Act would essentially be filed against a person who has taken possession. Such possession is taken without his consent. Hence it would be illegal possession, even if it is not forcibly taken as in this case by breaking open the locks and entering upon the suit premises.

29. However the averments in the plaint more specially paragraph 20 do show that the suit is filed only U/s. 6 of the Specific Relief Act. The Defendants have

contended that the suit is not maintainable as a Section 6 suit. Yet the averments in the plaint also show the Plaintiff's right of recovery U/s. 5 of the Specific Relief Act. It may be for the Plaintiff to amend plaint to bring it within either of the aforesaid two sections of the Specific Relief Act.

30. What is the jurisdictional issue or the plea that concerns the jurisdiction of the Court must be first understood. The earliest case of Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, lays down that law thus:

It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court.

31. This has been the principle followed in various decisions of this Court, the first which is the case Smithkline Beecham Consumer Healthcare GMBH and Others Vs. Hindustan Lever Limited and Another, , in which the learned Single Judge of this Court considered what was the plea which concerned the jurisdiction of the Court and the finding on which its jurisdiction could be ousted.

32. That was a case of plea raised under Order 2 Rule 2 of the CPC. The Court considered that under Order 2 Rule 1 the Plaintiff had to raise all the grounds available to him in his suit for the matter in dispute. The object of that provision was to prevent further litigation. Hence the Plaintiff must include all the causes of action in one suit so far as was practicable and known to him. If that was not done, the later suit would be barred Under Order 2 Rule 2 of the CPC. The Court held that Order 2 Rule 1 was much like Section 11 - Explanation 4 which dealt with res judicata. Consequently if a subsequent suit was instituted after the earlier suit was finally decided it would be barred U/s. 11. The Court held that this bar was pursuant to the bar U/s. 9 of the CPC relevant part of which runs thus:

9. Courts to try all civil suits unless barred. -

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

33. In the case of Foreshore Co-operative Housing Society Limited Vs. Shri Praveen D. Desai, Indian Inhabitant of Bombay and Others, , the Division Bench of this Court, following the case of Pandurang (Supra) observed that the plea of limitation would deal with the power of jurisdiction of the Court to decide the matter. Referring to the case of Smithkline (Supra) it held that if a suit was barred by any statute the Court would have no authority to hear or decide the same. Hence the expression "jurisdiction" is used in the wider sense to include the bar to the maintainability of the suit. That is the statutory bar to the maintainability of the suit. It held that Section 3 of the Limitation Act was such a statutory bar and hence the suit had to be dismissed if it was barred by limitation because the Court would have no jurisdiction to entertain it and the parties cannot confer jurisdiction by consent. Consequently the Court concluded in

paragraph 21 of the judgment that the plea of limitation is a plea which goes to the jurisdiction of the Court and it is plea on law which would preclude the Court from proceeding with the merits of the contentions and obliged it to dismiss the suit.

34. It can be easily seen that there is no such bar U/s. 6(1) of the Specific Relief Act under which this suit is filed. It would be worthwhile to cite Section 6(1) and 6(2) of the Specific Relief Act to understand what is a statutory bar and what is not. Section 6(1) & (2) run thus:

6. Suit by person dispossessed of immovable property. -

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought -

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government

35. Section 6(1) only entitles the person dispossessed without his consent to sue. It does not bar any suit. In fact the only bar is u/s 6(2) if the suit U/s. 6 is filed after six months from the date of dispossession or it is filed against the government. If that was so, the Court would not have the jurisdiction to try the suit. Section 6(2) would bar the Court's jurisdiction. The Court would be obliged to dismiss the suit upon such statutory bar.

36. In the case of Royal Palms (India) Pvt. Ltd. and Others Vs. Bharat Shantilal Shah and Another has been followed.

37. In the case of Jagshi K. Shah Vs. M/s. Shaan Builders Pvt. Ltd. and Others, has been followed.

38. Hence it is now settled law that when a statute creates a bar, the Court's jurisdiction is barred. When the Court's inherent jurisdiction is barred, the Court cannot try the suit and must dismiss it. Hence it must follow as a matter of corollary that if the Courts jurisdiction is not statutorily barred either expressly or impliedly, the Court must try the suit on merits and may dismiss it if the provision under which it is tried is not satisfied or if reliefs cannot be granted under the provision under which it is tried or under any other provision of law considering the merits of the case.

39. In the case of Erasmo (Supra) which was filed U/s. 6 by the owner who claimed to be dispossessed the Court held that the Court must consider on merits his ownership rights and not only possession. The Court must go that extra mile against a wrongful party in possession. That judgment, therefore, considered that Section 5 prevails over Section 6 if the owner of the suit property

sued U/s. 6 since both the Sections 5 & 6 of the Specific Relief Act are in fact for recovery of property. The suit on title, which is filed only by the owner of the suit property, must get precedence over only possession that the owner claims upon the case of being dispossessed without his consent. Of course, if a party is only in possession but is not the owner of the property, he can sue only U/s. 6 and not Section 5 of the Specific Relief Act.

40. This suit is filed U/s. 6 of the Specific Relief Act as aforesaid. The Plaintiff has paid full Court fee. He has valued the suit property at the market value. He has not filed a misconceived action to avoid payment of court fee which of course, cannot be entertained by any Court. There is no bar to the jurisdiction of the Court in trying the suit.

41. The issue of maintainability of the suit was sought to be tried as a preliminary issue upon evidence led. The evidence is to show that a suit u/s 6 could not be filed upon the facts of the case. It may be mentioned that Plaintiff as the owner of the suit premises may sue u/s 5 also. Nevertheless the Plaintiff's case in the plaint, the Defendants defence and the evidence led may be considered.

42. The Plaintiff claims in paragraph 4 of the plaint that the Defendants have trespassed into suit premises. The suit is, therefore, on trespass. The Plaintiff is not in actual possession. The Plaintiff has sued for recovery of possession. The Plaintiff's suit is, therefore, on title.

43. Mr. Jagtiani argued that the mere fact that the Defendants broke open the lock of the suit premises as averred in paragraph 4 of the plaint, the Plaintiff must be taken to be forcibly dispossessed of his symbolic possession as the owner of the premises in actual occupation of his tenant. Accordingly the Plaintiff claims that the suit U/s. 6 can lie.

44. Paragraph 5 of the plaint shows that the CA of the Plaintiff went to take possession of the suit premises on 4th September, 2010. Mr. Shah and Cama drew my attention specially to the fact that this averment shows that until then the Plaintiff was not in possession. What is contemplated is actual possession. The Plaintiff concedes that the Plaintiff was not in actual possession. The only question of law to consider upon the averments in the plaint itself is whether a suit U/s. 6 of the Specific Relief Act can be maintained by an owner in symbolic possession of the suit property to recover possession from a trespasser.

45. It may be mentioned that the evidence of the Plaintiff's CA in his cross examination relied upon by the Defendants shows that neither the Plaintiff nor even his CA actually had the keys of the suit premises. Though he claimed to have had a key of the suit flat after the death of the tenant, he did not remember who gave him the key and when. He did not keep the key in his possession because he thought it was useless to keep the key. He deposed that he cannot ascertain its whereabouts and produce the key. The suit flat admittedly was in the actual possession of the tenant and hence the key must be

expected to be with her. The case of the breaking open the lock on 31st August, 2010 is upon information derived from a certain neighbour by the CA of the Plaintiff and informed to the Plaintiff. The evidence of the CA in his cross examination in this regard shows that one Sanghvi, the other tenant of building, orally informed him. He lodged police complaint but could not produce it.

46. Though the Plaintiff's cross examination would show a very nebulous case with regard to the actual act of dispossession or the Plaintiff being in possession of the suit flat by way of holding a key thereof as aforesaid, the Plaintiff cannot be non suited for any lapse in the plaint U/s. 9A of the CPC under which the objection to the jurisdiction of the Court alone would have to be decided as a preliminary issue.

47. In the case of Kumar Kalyan Prasad and Another Vs. Kulanand Vaidik and Others, dispossession of symbolic possession has been considered. It is relied upon by Mr. Jagtiani to show that the Plaintiff has not had to be in actual possession of the suit property to sue u/s 6. In that case the Plaintiffs sued to recover the possession in execution of a decree obtained by them. The decree was for eviction of the Defendants as also for arrears of rents. The Nazir handed over the symbolic possession to the Plaintiffs in execution of the decree. The Plaintiff claims that they were handed over actual possession and upon taking delivery of possession they locked the house and deputed two of the servants to keep a watch over the same. Despite that the Defendants forcibly entered and took possession of the house by ousting the Plaintiffs' servants and also assaulted them. A criminal case was then filed and accused persons were convicted and the conviction had been maintained by the High Court. The Defendant started erecting new structures and demolished the old ones. The Plaintiffs sued for recovery of possession U/s. 6 upon such actual dispossession. What is claimed by the Defendant in that suit was that the Plaintiffs were not in actual possession but in symbolic possession under a paper transaction of the Nazir regarding the delivery of possession in the execution proceedings. It was contended that because the Plaintiffs were delivered symbolic possession they could not sue U/s. 6. It was held that flagrant and contumacious violation of symbolic possession duly delivered by the court of law would merit the suit U/s. 6 for its recovery. In that case the possession was obtained by the Plaintiff from those very Defendants in accordance with law and by the Courts of law in execution proceedings. Possession obtained admittedly in execution proceedings was allowed to be recovered.

In this case the Plaintiff claims a symbolic possession only upon the statutory tenant having expired without leaving behind any heirs living with her at the time of her death in the suit premises. She expired in April, 2010. The Plaintiff would not come to be in symbolic possession ipso facto.

48. The word dispossession implies that the Plaintiff must show his possession. The Plaintiff must show how he came to be in possession, either actual or symbolic. Possession has to be obtained by following due legal process. If the

Plaintiff had actually taken possession of the suit premises after the death of the tenant peaceably and put his own lock on the suit premises and was in possession of its key, he would be taken to be in symbolic possession even though he was an absentee landlord and did not actually reside in the premises but kept it locked. In this case the Plaintiff has not locked the suit premises himself. That is not even his case. He has not taken possession at all, actually or symbolically. He was consequently not in possession at all actual or symbolic. He is certainly entitled to recover possession on the basis of his title, but that is to be recovered in accordance with law if there is any contest. Consequently the possession claimed by the Plaintiff is the possession which he is entitled to but which he has not secured for himself. Hence merely upon Defendant No. 1 wrongfully coming into suit premises and trespassing thereupon the Plaintiff could not be taken to be "dispossessed" as is required U/s. 6.

49. Mr. Jagtiani drew an analogy to a person owning a flat and going abroad. He questioned as to whether such a person, whilst he was abroad, could be taken to be dispossessed if another person broke open his lock. Mr. Cama rightly contrasted that analogy from that of the Plaintiff's case. Such a person would put his own lock on the premises. He would, therefore, be in symbolic possession. If the lock is broken and stranger entered upon suit premises during his absence, such a person would be "dispossessed" and would be entitled to maintain an action U/s. 6 of the Specific Relief Act. The Plaintiff is not one such person. The Plaintiff never put his lock on the suit premises.

He, therefore, cannot claim such symbolic possession. He is, therefore, not "dispossessed". Section 6 suit, therefore, would not lie.

50. Mr. Jagtiani relied upon the case of Sadashiv Shyama Sawant [D] through L.Rs. and Others Vs. Anita Anant Sawant, to contend that the Section 6 suit can be filed by the person dispossessed or any person claiming through him. In that case though a tenant was dispossessed, the landlord was held entitled to sue as a person claiming possession through such tenant. The Plaintiff in that case was held entitled to sue in that case as person claiming through the tenant. The tenant was in exclusive possession; he was forcibly dispossessed.

The Plaintiff's case is not one such; he has not sued through his tenant on his tenant's behalf.

Mr. Jagtiani relied upon the extract of the case of Ratanlal Ghelabhai Vs. Amarsing Rupsing, made in paragraph 14 of the judgment in which it is observed that there is nothing in Section 6 to show that the possession is confined to actual physical possession and that the landlord is in possession through his tenant and that the landlord can sue for revisionary interest in his own name.

However the point that is missed is that in that case, as rightly pointed out by Mr. Shah, the landlord sued through the tenant. The Plaintiff does not sue through his tenant. The Plaintiff has sought to sue in his own right as the owner to whom the property would revert after the death of the last statutory tenant.

Consequently the Plaintiff cannot fall under the category of the "person claiming through" another - i.e. his tenant.

Consequently in the extract of the judgment in the case of Gobind Ram Jamna Dass Vs. Mst. Mewa, whilst holding that the word "dispossession" is not confined only to actual possession, it is immediately added that a suit by a landlord is competent even if the landlord is not in actual possession but in possession through a tenant at the time of illegal dispossession. The discussion about why the landlord in such symbolic possession must be held entitled to sue is that a contrary view would defeat the aims and objects of the section 6 because if the tenant dispossessed refuses to sue, the landlord would suffer dispossession until he is forced to file a recovery suit. Thus the wrong door would be put in an advantageous position and that would be putting a premium on a wrongful act of the trespasser.

51. After considering the various judgments the proposition of law laid down in paragraph 18 is not of any person dispossessed but relates only to a landlord dispossessed in respect of the property let out to the tenant of which the tenant has been dispossessed forcibly by the third party. Consequently the forcible dispossession is the essential requirement. Dispossession contemplates the actual possession either of the landlord himself or of his tenant through whom he claims or sues.

Mr. Jagtiani would rely upon the following specific part of paragraph 18 of the judgment which runs thus:

A person is said to have been dispossessed when he has been deprived of his possession; such deprivation may be of actual possession or legal possession. Possession in law follows right to possession. The right to possession, though distinct from possession, is treated as equivalent to possession itself for certain purposes.

He would argue that any person dispossessed may be in actual possession or legal possession and that the Plaintiff is certainly in legal possession since he has the right to possess. However, the right to possess must be followed by possession since it is held that the possession in law follows the right to possession. It may be treated as equivalent to possession but there must be possession for a Plaintiff to be dispossessed.

The explanation of the distinction between physical and legal possession in Halsbury Laws of England set out in paragraph 19 of the Judgment further shows that the legal possession may exist without de facto possession. A person may be deemed to be in legal possession though not having de facto possession. Such is constructive possession. Consequently it is held in paragraph 21 of the judgment that dispossession of the tenant is dispossession of the landlord. If the tenant was forcibly thrown out by a trespasser, the landlord has the implied right of entry to recover possession. As the landlord would continue in legal possession through his tenant who is in actual possession but not contrary to his tenant who

was in possession. Hence if the tenant is in physical possession the landlord retains possession through him.

Consequently one of them must be in actual physical possession and must be forcibly dispossessed.

If a landlord is in such constructive possession and claims through the tenant, he can certainly sue U/s. 6 because his tenant is in possession and has been wrongfully, illegally and forcibly dispossessed without his consent. If not, the landlord himself must be in possession and must be wrongfully, illegally and forcibly dispossessed without his consent.

52. In this case the landlord's right is certainly impinged by the claim of the Defendants. Such a claim may be wholly false, frivolous, misconceived, malicious and even vexatious. The Plaintiff as the landlord would certainly have right to recover the possession but only by following due legal process. He cannot claim to be in possession merely because his last statutory tenant has expired without any act on his part in taking possession of the suit flat after her death and putting up a lock thereon. This the landlord can do by suing on title. That would be the action on trespass such as this case is. That would be for recovery of possession from the Defendants as trespassers. However, that is not an action U/s. 6 of the Specific Relief Act; it is an action for recovery of immovable property on title U/s. 5 of the Act as the person "entitled" to possession of the suit property.

53. Defendant No. 1, however, claims that he was transferred the suit premises and also bequeathed the suit premises. Mr. Shah on behalf of Defendant No. 1 relies upon the case of Bhavarlal Labhchand Shah Vs. Kanaiyalal Nathlal Intawala, in which the Plaintiff had not obtained even symbolic possession in accordance with law. The Plaintiff had not sued for any declaration and obtained possession under any decree in favour of the Plaintiff executed by the Plaintiff. The Plaintiff claimed to be in symbolic possession ipso facto. Such is not the symbolic possession contemplated in the judgment in the case Kumar Kalyan (Supra).

54. Mr. Cama on behalf of the Defendant No. 2 relied upon the judgment in the case of Lallu Yeshwant Singh (Dead) by his Legal Representative Vs. Rao Jagdish Singh and others in which it has been held by the Supreme Court that a person in actual possession could not be dispossessed even though he has no title because law respects possession even if there is no title to support it if possession is taken without having recourse to law. It, therefore, contemplates dispossession of actual possession as held in the case of Bhavarlal Shah & Vasant Pratap Pandit (Supra). The Plaintiff is certainly entitled to sue on title though not simpliciter on possession. The Plaintiff claims to be the landlord of suit building in which the suit flat is situate. Defendant No. 2 has admitted that the Plaintiff is the owner of the suit property in a criminal complaint filed by Defendant No. 2 against the erstwhile CA of the Plaintiff.

55. In any event Defendant No. 1 claims through the Plaintiff's tenant during the continuance of her tenancy. He cannot, therefore, be permitted to deny that the Plaintiff was the landlord of such tenant at the beginning of the tenancy and had title to the immovable property.

56. Defendant No. 2 also claims to be a Plaintiff's tenant. He claims to be issued a single rent receipt by the erstwhile CA of the Plaintiff. He also cannot deny the Plaintiff's title. The Plaintiff's suit on title for recovery of the possession from the Defendants as trespassers. Though the Plaintiff has averred in paragraph 20 of the plaint that he has sued U/s. 6 of the Specific Relief Act, the suit for recovery to possession and mense profits is seen to be a suit on title U/s. 5 of the Specific Relief Act.

57. However, the filing the suit under one or other of the provisions is not a jurisdictional issue and is capable of correction by amendment, if required. The Plaintiff cannot be non suited at the threshold. There is no bar to the filing of the suit u/s 6 of the Specific Relief Act. Seeing of the entire evidence which is on merits of whether the suit can succeed or fail as a Section 6 suit is, therefore, seen to be an act of frivolity undertaken in futility. Consequently the issue relating to the maintainability of the suit U/s. 6 of the Specific Relief Act is answered in the negative holding that the suit is maintainable.