

Vashdev Prakash Vs. Vimal Premchand Hinduja (Mrs) and ors.

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Court : Mumbai

Decided On : Apr-20-1988

Reported in : 1988(2)BomCR288

Judge : S.M. Daud, J.

Acts : Presidency Small Clause Courts Act, 1882 - Sections 41; Presidency Small Clause Courts (Amendment) Act, 1976; [Specific Relief Act, 1963](#) - Sections 38; [Constitution of India](#) - Article 133(3)

Appeal No. : Appeal from Order No. 598 of 1986

Appellant : Vashdev Prakash

Respondent : Vimal Premchand Hinduja (Mrs) and ors.

Advocate for Def. : M.V. Paranjape, Adv., i/b., M.E. Shivaji & Ranjit & Co. for respondents 1 and 2, ; Rajendra Pai, Adv. for respondents 3 to 5

Advocate for Pet/Ap. : A.V. Savant and ; R.G. Ketkar, Advs.

Judgement :

S.M. Daud, J.

1. This appeal assails the dismissal of a Motion taken out by the plaintiff/Appellant for an injunction to restrain the Respondents/Defendants from interfering with his

alleged possession and enjoyment over the part of the premises described in para 1 of the plaint.

2. Plaintiff, which is described as a partnership registered under the Partnership Act, but is in reality partner 'Prakash Hinduja' instituted the suit out of which this appeal arises, on 28th November, 1984. Briefly, the case of the plaintiff was that it had its place of business at the suit premises where from was carried on business as an importer, Shroff and Financier. Defendants 1 and 2 were members of a co-operative Housing society which owned building 'Neelkanth'. They and defendants 3 to 5 also were carrying on the same business as the plaintiff in the suit premises. Plaintiff came on the scene in 1966 when the premises were owned by one S. Mathuradas. The licence fee was being paid by the plaintiff to a firm known as M/s. Gangadas Ramdas comprising Defendant 3 and Fetechand Gangadas (since deceased). The monthly licence fees of Rs. 118.75 ps. continued to be paid upto March 1982. Thereafter, defendant 3 stopped accepting the plaintiff's compensation, making the unacceptable demand that the same be paid in cash and that too without any receipt. The arrears were remitted twice by money order but defendant 3 declined to accept the same. Just before the institution of the suit, Prakash Hinduja noticed attempted alterations of the premises by defendants 2 to 5. The contemplated alteration was designed to exclude plaintiff from the suit premises. A permanent injunction was claimed to restrain the defendants from doing anything which would interfere with plaintiff's access to and use of the suit premises for carrying on business as of yore. Alongside the institution of the suit, a Motion was taken out to obtain an interim injunction. Upon a request made by the plaintiff a Commissioner was appointed and that officer on 1 December, 1984 submitted a report. What is of importance in that report, is, the Commissioner noticing the existence of the equipment of a telephone numbered 298780 which admittedly stands in the name of the plaintiff firm. A box and a cushion admittedly belonging to Prakash Hinduja were lying outside the suit premises. As to how they came there need not detain me, for the appeal can be disposed of on the limited ground of lack of jurisdiction. The learned Judge hearing the Motion dismissed the same and almost all the findings recorded by him go against the plaintiff. I make it clear that I have serious doubts about the correctness of certain findings reached by the learned Judge. This is made clear, last the Court having jurisdiction when

approached, allows it itself to be swayed by the findings recorded by the learned Judge whose order is impugned in the present appeal. For the purposes of the appeal before me the short question is whether the City Civil Court where the suit has been instituted and the Motion heard, had jurisdiction to decide the suit and the Motion My finding is in the negative and I dismiss the appeal for the reasons given below :---

3. Reading the plaint, it is clear that the plaintiff claims to be in possession as a licensee and apprehending the dispossession otherwise than in accordance with law, has solicited the relief of a prohibitory injunction to prevent the defendants from taking the law into their own hands to accomplish the object of dispossessing plaintiff from the premises. Can a case of this nature where the relief claimed is that of an injunction be entertained by the City Civil Court? That Court is for the purposes of Greater Bombay the ordinary Civil Court. There are statutes which clearly exclude the jurisdiction of an ordinary Civil Court to entertain suits of this nature. These are Presidency Small Cause Courts Act, 1882 (PSCC Act) and the Bombay Rents, Hotel and Lodging House Rates control Act, 1947 (Rent Act). Mr. Ketkar for the appellant submitted that section 28 of the Rent Act did not apply because that section did not govern cases 'relating to recovery of possession' as between a licensor and licensee. If that be the case, section 41 of the PSCC Act is attracted. This section applies to all such actions for 'relating to recovery of possession' as between a licensor and licensee or a landlord and tenant not governed by the statutes mentioned in sub section (2) of section 41. In sub-section (2), the statutes mentioned are the Rent Act, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, the Bombay Housing Board Act, 1948 or any other law for the time being in force. Mr. Ketkar tried to avail of section 38 of the [Specific Relief Act, 1963](#) as being a suit falling within the expression 'any other law for the time being in force' appearing in section 41(2) of PSCC Act. It is not possible to agree with this submission. This is for the reason that section 41(2) of the PSCC Act attracts suits or proceedings 'for the recovery of possession of any immovable property' and not like section 41(1) which embraces suits 'relating to the recovery of possession of any immovable property'. The words used in sub-section (1) of section 41 would cover suits under section 38 of the Specific Relief Act. Turning to authorities, the matter is no longer open to doubt. A

similar question arose in Civil Revision Application No. 212 of 1985. The said CRA was referred to a Division Bench by His Lordship Chief Justice K. Madhava Reddy by an order dated September 20, 1985. When the matter came up before the Division Bench consisting of Sawant and Guttal, JJ., there was difference of opinion between them. In accordance with the rules of business the matter was referred to a third Judge, who happened to be Pendse, J. Pendse, J., agreed with the view of Guttal, J., and held that the jurisdiction of the Court of Small Causes would not be ousted merely because an injunction had been claimed, where, in other respects, the claim could be said to be a suit or proceeding 'relating to recovery of possession'. Pendse, J., observed---

'The Court of Small Causes therefore would have jurisdiction to grant relief of injunction in proper cases where the suit fell within its jurisdiction. The mere fact that the suit is for injunction simpliciter will not oust the jurisdiction of the Small Causes Court if the other conditions of exercise of jurisdiction are satisfied.'

Apprehending that the above precedent would be used against the plaintiff, its learned Counsel has moved an application being Civil Application No. 1690 to direct the placement of the papers of this appeal before the Chief Justice for the matter being referred to a larger Bench. It was submitted that there was a conflict of opinion between two Division Benches viz. Justices Guttal and Pendse on the one hand and Justices Chandurkar and Jahagirdar on the other. The decision of the latter set of Judges is at *Faijulbee Hajeel v. Yadali Amir*, : AIR1984 Bom290 . As I read the two decision, there is no conflict at all. Faijulbee's case arose out of a suit for relief based exclusively under section 6 of the Specific Relief Act. That the parties there allegedly occupied the character of landlord and tenant, was incidental. What the Division Bench had to decide, was, whether even where a suit fell under section 6 of the Specific Relief Act. That the parties there allegedly occupied the character of landlord and tenant, was incidental. What the Division Bench had to decide, was, whether even where a suit fell under section 6 of the Specific Relief Act, the jurisdiction of the ordinary Civil Court was excluded because it was alleged that the person seeking relief was a tenant and the person against whom the relief was sought, was a landlord. This question was answered thus by Jahagirdar, J. speaking on behalf of the Bench :---

'After a careful examination of the relevant provisions of law and the earlier decisions on this subject we are of the opinion that the suit under section 6 of the Specific Relief Act which is based on the allegation of dispossession and which is for recovery of possession of immovable property continues to be within the jurisdiction of the Civil Court despite the fact that the parties may happen to be fulfilling the character of a landlord or a tenant or a licensor or a licensee. The question of the title of the parties including the title of a tenant does not arise in such a case and will naturally be not decided in the suit.'

Even by analogy this cannot be applied to suits where an injunction is sought by an alleged licensee to protect his possession or to prevent his apprehended dispossession. That will be for the reason that a suit in which those reliefs are sought will be a suit 'relating to the recovery of possession' and therefore within the exclusive jurisdiction of the Court specified in section 41 of the PSCC Act. Mr. Ketkar submitted that Pendse, J.'s decision and the precedents followed there in were cases in which the landlord was out of possession and was seeking to dispossess the tenant. According to learned Counsel in the instant case, the landlord viz. defendants 1 and 2, were in joint possession of the suit premises with the plaintiff and defendants 3 to 5. His client's apprehension was that all these persons had joined hands to dispossess him. That, according to Mr. Ketkar, made inapplicable the decision in CRA No. 212 of 1985. I cannot agree. In terms in that case it has been held that the issue of jurisdiction revolves upon the nature of the relief claimed and not whether this or that party is in exclusive or joint possession with the alleged encroacher upon his rights. When there is no conflict between the decision in Faijulbee's case and the majority decision in CRA No. 212 of 1985. I cannot accede to the request contained in the Civil Application to direct the reference to a larger Bench. In the result the said application is rejected and the appeal dismissed. Having regard to the equities of the matter I leave parties to bear their own costs.

4. For the appellant, learned Counsel Mr. Ketkar, prays for grant of a certificate to appeal to the Supreme Court. It is submitted that the present case involves a substantial question of law of general importance and that it is necessary that the matter be decided by the Supreme Court. Mr. Ketkar's request will have to be

considered in the background of Article 133 of the Constitution. Sub-Article (1) of Article 133 provides for the certification by the High Court of a case involving a substantial question of law of general importance for being appealed against to the Supreme Court. I have no doubt that this case does involve a substantial question of law of general importance which keeps recurring time and again and which affects the rights and remedies of occupants and owners of immovable properties in the State of Maharashtra and, in particular Greater Bombay. Nonetheless, Sub-Article (3) of Article 133 seems to be a restriction in the power of certification, for it reads :

'Notwithstanding anything in this article no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of a one Judge of High Court.'

Mr. Ketkar points to the judgment of a Division Bench of this Court Letters Patent Appeal No. 17 of 1988 as precluding the right of his client to prefer an LPA against my decision. The judgment relied upon by the learned Counsel is an interpretation of section 104(2) of the Code of Civil Procedure, 1908. The fact that appellant cannot prefer an LPA does not if conclude the matter. Unless the appellant be in a position to show the existence of a law made by the Parliament permitting the certification of a case before a Single Judge as being one fit for appeal to the Supreme Court, it will not be permissible for me to grant the certificate contemplated by Article 133(1) of the constitution. Section 109 of the Code of Civil Procedure, 1908 to which reference is made by the learned Counsel, in terms says, that the said section will be subject to Chapter IV of Part V of the Constitution and such rules as may from time to time be made by the Supreme Court regarding appeals from the Courts of India. Once section 109, is made subject to Chapter IV of Part V which include Article 133 in its entirety, there exists no law enabling the Appellant to get over the restriction carved out in Article 133 of the Constitution. Part II of the Rules framed by the Supreme Court which govern Appeals on certificate by the High Court, do not override the limitation in Article 133(3). Mr. Ketkar wants me to refer the problem of the existence or otherwise of a right to certify under Article 133 from a judgment of a Single Judge, to a Division Bench. I cannot agree for the language of Article 133(3) is very clear. There exists

no law which overrides the embargo placed on the issue of a certificate against the judgment of a Single Judge of this Court. The oral application made by the learned Counsel has therefore to be rejected, though I repeat that the question of jurisdiction dealt with by me in this appeal is one involving a substantial question of law of general importance which requires to be decided by the highest Court of the land.

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