

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8011 OF 2016

Sau Usha Sunil Deoru and Ors

..Petitioners.

Vs

Mugaji Narayan Bhagat and Ors.

.. Respondents

Mr. T.D.Deshmukh, Advocate for petitioners.

Mr. Gorakh H. Liman, Advocate for Respondents no.1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 12/08/2016

PC:

1. Heard Mr. T.D.Deshmukh, learned counsel for the petitioners and Mr. G.H.Liman, learned counsel for respondents no.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 11.4.2016 passed by the learned Ad-hoc District Judge-3, Pune, in Regular Civil Appeal No.258 of 2012 as also Order dated 11.4.2016, below Exhibit-72 in Civil Appeal No. 258 of 2012. By order below Exhibit-72, the learned District Judge allowed the application made by the defendants for production of the documents. By order dated 11.4.2016 in Regular Civil Appeal No.258 of 2012, the learned District Judge quashed and set aside the trial Court's decree and remitted the matter to the Small Causes Court for taking evidence afresh.

3. In support of this Petition, Mr. Deshmukh submitted that the subject matter of the suit is a garage shop along with bathroom, situate in Manurkarwada, Pune (for short, 'suit premises'). It is the case of the petitioners that on 26.12.1974 the suit premises was given to the defendants as a gratuitous licensees. On 15.4.2004, the plaintiffs revoked the licence and called upon them to hand over possession. Initially, the petitioners had instituted Regular Civil Suit No. 1725 of 2004 before the learned Civil Judge, Jr. Dn., Pune for recovery of the suit premises on the ground that the defendants are a gratuitous licensees. The defendants contested the suit by filing written statement. After framing of issues, the plaintiffs adduced evidence. Defendants failed to cross examine the plaintiffs' witness and did not lead evidence. Evidence was closed and on 24.2.2008, the matter was fixed for final argument. On 9.11.2009, the suit was transferred to Small Causes Court. The defendants filed application for recalling the orders dated 29.1.2008 and 22.2.2008. That application was rejected on 11.2.2010. Application seeking review of order dated 11.2.2010 was rejected on 3.3.2010. The matter was carried to this Court and ultimately writ petition was rejected on 19.9.2011. Suit instituted by the plaintiffs was eventually decreed on 13.2.2012. Aggrieved by that decision, the defendants preferred Appeal No.258 of 2012.

4. During the pendency of the Appeal, the defendants filed

application under Order 41, Rule 27 at Exhibit 36. By order dated 14.7.2015, that application was rejected and the Appeal was kept for final hearing. On 21.9.2015, as the defendants and their Advocate were absent, it was adjourned to 26.10.2015 'for dismissal'. On 26.10.2015, Advocate for the defendants did not appear and the matter was kept for dismissal on 30.10.2015. On 30.10.2015, the defendants preferred application for adjourning the Appeal for one month. On the same day, the learned District Judge dismissed the application by imposing costs of Rs.1000/-. On 30.12.2015, the defendants filed application Exhibit-67 for adjourning the matter. The learned District Judge rejected the application. On 27.1.2016, the defendants filed application at Exhibit-72 under Order 41, Rule 27 of C.P.C. for adducing additional evidence. By the impugned order dated 11.4.2016 below Exhibit-72, the learned trial Judge allowed the application and remitted the matter to the trial Court for recording of evidence. On the same day, the learned District Judge allowed the Appeal and set aside the trial Court's decree and remitted the matter to the trial Court for taking evidence afresh. It is against the orders dated 11.4.2016 below Exhibit 72 and in Appeal, the plaintiffs have instituted the present petition.

5. In support of this petition, Mr. Deshmukh submitted that after having rejected the application Exh.36 filed under Order 41, Rule 27, the learned District Judge was not justified in

allowing the application Exh.72 again filed under Order 41, Rule 27 for adducing additional evidence. He submitted that the learned District Judge was not justified in setting aside the trial Court's decree and remitting the matter to the trial Court for recording evidence afresh. In other words, he submitted that once the evidence is already recorded in the trial Court, it was not open to the learned District Judge to permit the parties to lead afresh evidence by issuing direction to the trial Court to that effect. In support of this submission, he relied upon the following decisions:

- (i) Harshad Chemanilal Modi Vs. DLF Universal Ltd, (2006) 1 Supreme Court Cases 364; and
- (ii) Oil and Natural Gas corporation limited Vs. Modern Construction and Company, (2014) 1 Supreme Court Cases 648.

6. On the other hand, Mr.Liman supported the impugned orders. He invited my attention to paragraph 27 of the impugned order. In paragraph 27, the learned District Judge observed that the suit was originally filed in the Court of Civil Judge, Junior Division. The said Court had no jurisdiction to entertain and try the suit under the Rent Control Act. The evidence recorded by the learned Civil Judge, Junior Division cannot be taken into consideration by the Small Causes court. When the suit was transferred to the Small Causes Court, it has to record the evidence afresh. He, therefore, submitted that no case is made

out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, it is not in dispute and rather is a matter of record that the plaintiffs had initially instituted the suit in the Court of Civil Judge, Junior Division. It is the case of the plaintiffs that the defendants were inducted in the suit premises as gratuitous licensees. In view of the decision of the Apex Court in the case of Prabhudas Damodar Kotecha Vs. Manabala Jeram Damodar, AIR 2013 SC 2959, the Court Civil Judge, Junior Division, has no jurisdiction to entertain and try the suit against a gratuitous licensee. The suit, therefore, will have to be tried before the Court of Small Causes being competent Court. In the case of Joginder Tuli Vs. S.L.Bhatia, (1997) 1 S.C.C. 502 and in particular paragraph 5 the Apex Court observed thus:

“5. Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court has directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference.”

In that case, the respondents had instituted Suit No. 133 of 1993 for possession. He had valued the suit at Rs. 72,000/- on yearly rent. Respondent no.1 filed application for amending the plaint to

recover damages for the use and occupation. On that basis, the pecuniary jurisdiction of the trial court was beyond its jurisdiction and accordingly plaint was returned for presentation to proper court. On revision, the High Court directed to return it to the District Court with a direction that the matter would be taken up by the District Court and proceeded with from the stage at which it was returned. It is in that context, the Apex Court observed in paragraph 5 to the effect that normally, when the plaint is directed to be returned for presentation to the property Court, perhaps it has to start from the beginning **but in this case, since the evidence was already adduced by the parties,** the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. The Apex Court did not find any illegality in the order passed by the High Court warranting interference. The said decision was considered in ONGC case.

8. In the case of ONGC(supra), the suit was instituted by the respondents in the Civil Court at Mehsana for recovery of outstanding dues from the appellant. The learned trial Judge decreed the suit on 31.1.1994. Aggrieved by this decision, the First Appeals were preferred before the High Court of Gujarat. By common judgment and order dated 18.3.1997, the High Court held that the civil court at Mehsana did not have territorial jurisdiction to entertain and try the suits and accordingly

returned the plaints to the respondent for presenting it before the Civil Court at Surat.

9. In paragraph 14, the Apex Court referred to the decision of Joginder Tuli and extracted paragraph 5 of that decision. In paragraph 17, the Apex Court observed that after presentation before the Court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same.

10. In the case of Joginder Tuli (supra), issue of pecuniary jurisdiction was involved. In the case of O.N.G.C. (supra), issue of territorial jurisdiction was involved. Section 21(1) of C.P.C. lays down that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. Sub section (2) lays down that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice. The objection

relating to territorial or pecuniary jurisdiction can be waived.

11. In the present case, the objection of jurisdiction is neither based on territorial jurisdiction or pecuniary jurisdiction. In other words, the objection is in respect of subject matter of the suit. In view of the decision of the Apex Court in the case of Prabhudas Damodar Kotecha (supra), once the dispute is between licensor and licensee, the Civil Court is not competent to entertain and try the suit and only Small Causes Court will have jurisdiction. It is a case of inherent lack of jurisdiction. In short, the Court of Civil Judge, Jr. Dn., was not competent to entertain and try the suit. It is in that context, the observations of the Apex Court in para 17 of O.N.G.C's case, extracted herein above, are relevant. Even in paragraph 5 of Joginder Tuli's case, the Apex Court observed that normally, when the plaint is directed to be returned for presentation to the proper court, perhaps it has to start from the beginning. In that case, the High Court had directed to proceed from that stage at which the suit stood transferred. The Apex Court did not find any illegality in the order passed by the High Court warranting interference.

12. In paragraph 14, the Apex Court considered the decision of Joginder Tuli. In paragraph 17, it was observed thus:

“17. However, after presentation before the Court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same.”

13. As the Court of Civil Judge, Jr. Dn., lacks inherent jurisdiction to entertain and try the suit, the evidence recorded before it cannot be considered. In view thereof and for the reasons recorded in paragraph 27 of the impugned order, I do not find any error in setting aside the trial Court's decree and remitting the matter to the trial Court for recording evidence afresh.

14. As I have upheld the order passed in Appeal permitting the parties to lead evidence afresh, obviously, the order passed below Exhibit 72 on 11.4.2016 also cannot be interfered with.

15. In view thereof, Petition fails and the same is dismissed. As the suit was instituted originally in the year 2004, learned trial Judge is requested to dispose of the suit as expeditiously as possible.

(R.G.KETKAR,J.)