

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

CIVIL WRIT PETITION NO. 7084 OF 2015

1. Ardeshir Behram Dubash
Aged about 72 years.
2. Manek Cyrus Guzdar
Aged about 70 years
3. Laleh Ardeshir Dubash
Aged about 46 years and
4. Feroz Kaikhushroo Ardeshir Dubash
Aged about 40 years

All Trustees of the Jam-E-Jamshed Charity Funds
having its office at Ador House, 3rd Floor,
6 K. Dubash Marg, Mumbai 400 001.

...Petitioners

Vs.

The Central Bank of India
Kodadad Circle Branch, Jam E Jamshed
Charity Building, Khodadad Circle,
Dadar (E), Mumbai 400 014.

...Respondent

Mr. D.D. Madon, Sr. Advocate
a/w. Ms. Mrinalini Rajpal, a/w. Ms. Taruna Nagpal and
Mr. Rushad Parbhoo i/b. Doijode Assoc., for the Petitioners
Mr. K.K. Jadhav a/w. Mr. J.K. Jadhav for the Respondent

**CORAM : R.M.SAVANT, J.
DATED : 18TH FEBRUARY, 2016**

ORAL ORDER:

1. Rule. With the consent of the learned Counsel for the

parties made returnable forthwith and heard.

2. The writ jurisdiction of this Court is invoked against the order dated 23rd April, 2015 passed by the Appellate Bench of the Small Causes Court by which order the Appeal filed by the Respondent herein ie., the Central Bank of India came to be allowed and resultantly the judgment and decree dated 18th October 2013 passed in TE Suit No.19/26 of 2006 came to be quashed and set aside and the matter came to be remanded back to the Trial Court for a de-novo consideration of the Suit.
3. It is not necessary to burden this order with unnecessary details, suffice it to state that the Petitioners herein who are the original Plaintiffs have filed the Suit in question, being TE Suit No.19/26/2006 for eviction of the Respondent from the suit premises, which is an area of 2982.58 sq. ft in building at 811, Jamshed Road, Dadar(E), Mumbai 400 014.
4. It was the case of the Plaintiffs that the said premises were given on leave and license basis to the Defendant under the agreement dated 1st April, 1974 on the payment of monthly

compensation for the same. It was the case of the Plaintiffs that the said Leave and License agreement came to be renewed from time to time till its expiry on 31st March,1984. It is the case of the Plaintiffs that on account of the non-renewal of license agreement the Defendant became a statutory tenant and continued to occupy the premises. It is further the case of the Plaintiffs that by the Advocate's letter dated 21st January, 2002 the Defendant's tenancy was terminated and it was called upon him to quit, evict and handover the possession of the suit premises.

5. The Plaintiffs contended that the Defendant does not enjoy the protection of the Maharashtra Rent Control Act, 1999 in view of Section 3(b) of the said Act and therefore, the Defendant is liable to be evicted under Section 41 of the Transfer of the Property Act, 1882. They lastly contended that the Defendant is in unlawful occupation from 21st January, 2002 ie., on the date when the Plaintiffs terminated the tenancy. It seems that the plaint came to be amended and averments were incorporated inter alia to the effect that since the Defendant was in occupation pursuant to the Leave and License Agreement dated 6th September, 1964. The Defendant by virtue of Section 15(A) of the Bombay Rent Act,

1947 was a protected tenant. It is on the basis of the said averments that the suit was sought to be prosecuted.

6. The Defendant Bank filed its written statement and questioned the maintainability of the suit on the ground that the relationship between the parties was that of Licensor and Licensee. It is on the basis of the said stand taken by the Defendant that the plaint came to be amended by the Plaintiffs, reference to which has been made herein above. The Defendant then filed the additional written statement and questioned the maintainability of the Suit on the ground of its subject matter as also on merits.

7. The Trial Court on the basis of the pleadings, which were originally existing framed as many as six issues, the seventh issue being a formal issue viz.

As to what Order and Decree ?

Thereafter on the pleadings being amended, framed two additional issues, which read thus:

(7) Whether the suit as filed is maintainable ?

(8) Is the suit within limitation ?

8. The Suit proceeded to Trial. The Trial Court on the basis of the material on record, which included both the oral and documentary evidence ,decreed the suit and answered the issues in favour of the Plaintiffs. The Trial Court accordingly directed the Defendant Bank to handover vacant possession to the Plaintiffs within three months and also directed the payments to be made by issuing directions which are contained in clause 3 of the operative part of its order dated 18th October, 2013 in so far as mesne profits are concerned the Trial Court directed a separate inquiry under Order 20 Rule 12 of the CPC.

In the context of the challenge in the present Petition it is required to be noted that in so far as the additional issues are concerned neither do they appear in the issues which have been reproduced by the Trial Court in its judgment nor any findings have been recorded in respect of the said issues.

9. The Defendant aggrieved by the judgment and decree dated 18th October 2013 passed by the Trial Court carried the matter in Appeal by way of Appeal No.122 of 2014. In the Appeal the

challenge to the decree was on merits of the findings recorded by the Trial Court as also on the ground that the Trial Court had not answered the two additional issues viz.

Whether the Suit as filed is maintainable ? And

Whether the Suit is within limitation ?

10. The Appellate Bench of the Small Causes Court having regard to the said challenge did not deem it fit to adjudicate the Appeal on the merits of the findings recorded by the Trial Court, but proceeded to consider the Appeal on the touch stone of the ground that the said two additional issues were not answered by the Trial Court,. The Appellate Bench of the Small Causes Court referred to a judgment of the learned Single Judge of this Court reported in **(2012) Mh.LJ at page 738 in the matter of Sadanand Mahadev Kurdikar and others Vs. Someshwar Devasthan of Curdi and others.** The said case involved proceedings under Section 18 of the Land Acquisition Act 1894. It seems in the said case the Reference Court had framed as many as 15 issues, but whilst discussing the evidence on record the Reference Court did not give any finding on each of the issues framed. It is in the said context that the learned Single Judge of

this Court held that not giving a specific finding on each issue vitiates the judgment.

11. Hence, the Appellate Court held that since the two additional issues have not been answered by the Trial Court it would be appropriate to set aside the decree and remand the matter back to the Trial Court for a de-novo consideration of the Suit.

12. Heard the learned Counsel for the parties. The learned Senior Counsel appearing on behalf of the Petitioners was at pains to demonstrate that though the additional issues do not appear in the list of issues which appear in the judgment of the Trial Court, but having regard to the findings recorded in paragraphs 25 to 27 of the judgment of the Trial Court he submitted that the issues are deemed to have been answered. This was the principal contention of the learned Senior Counsel. The learned Senior Counsel also sought to place reliance on the judgment of the Apex Court reported in **(1999)3 SCC page 161 in the matter of Ashwinkumar K. Patel Vs. Upendra J. Patel and others** in support of his contention that the Appellate Court ought not to

have remanded the matter back, but could have proceeded to consider the material on record and answered the said issues.

13. Per contra Shri Jadhav the learned Counsel appearing on behalf of the Respondent Bank would contend that the two additional issues having been framed it was incumbent on the part of the Trial Court to answer the said issues. Reliance is placed on the judgment of a learned single Judge reported in **2014 (7) Bom. C.R. 342 in the matter of State of Goa Vs. Shri Modusudan Camotin Timblo (D) Lrs. And Others** it was also the submission of Shri Jadhav that the findings recorded in paragraphs 25 to 27 are referable to issue Nos. 1 to 3 which were originally framed and the said findings cannot be referable to the additional issues.

14. Having heard the learned Counsel for the parties I have considered the rival contentions. The issue that arises is whether the decree as a whole was required to be set aside and the matter being remanded to the Trial Court for a denovo consideration. In the instant case as indicated above the two issues which were framed on account of the pleadings which were amended have not been reflected in the judgment of the Trial Court and neither can it

be said that the said issues have been answered. It is required to be noted that in the issues as originally framed issue No.3 is of some relevance which reads thus:

Does the defendant Bank prove that this is suit between Licensor and Licensee and as such T.E & R Suit is not maintainable ?

15. Having regard to the said issue that the findings have been recorded by the Trial Court in paragraphs 25 to 27 of its judgment there is therefore, merit in the submission of the learned Counsel for the Respondent that the findings recorded in the said paragraphs 25 to 27 cannot be ascribed to the additional issues. There can be no dispute about the fact that the additional issues have not been specifically answered and therefore, by a round about process the answer to the said issues cannot be found. In so far as the first fact finding Court is concerned which is the Trial Court, it is incumbent upon it to record findings and answer all the issues that have been framed, may be in a given case the answer to a particular issue may be a formality having regard to the issues which have already been answered, but nevertheless all issues

would be required to be answered. In my view the judgment of the Apex Court in **Ashwinkumar** (supra) does not further the case of the Petitioners / original Plaintiffs having regard to the fact that the Appeal in the said case was filed against an order passed under Order 39 Rule 1 of the CPC and was not a substantive appeal against a decree. It is in the said context that the Apex Court has held that in all cases the matter need not be remanded back to the Trial Court. However, in the instant case the Appeal was directed against the decree. The impugned order though need not be interdicted, the interference of this court in respect of one aspect is warranted. The Appellate Bench of the Small Causes Court as indicated above has set aside the decree wholly on the ground that the additional issues having not been answered by the Trial Court. The Appellate Court has not recorded any finding as regards the merits of the findings recorded by the Trial Court in respect of the issues which have been answered and therefore, could not have set aside the decree in its entirety. In fact the Appellate Court as indicated herein above has not ventured to consider the Appeal on merits. In my view therefore, the Appellate Bench of the Small Causes Court has exceeded its jurisdiction in setting aside the decree wholly when what was required to be done was to remand

the matter back only for a decision to be rendered on the two issues. The effect of the judgment of the Appellate Court would result in unnecessary duplication of the work as the other issues have already been answered. In my view, therefore, the interest of justice would be served, if the impugned judgment of the Appellate Court is set aside to the extent it sets aside the decree in its entirety and the following directions are issued:

- (I) The impugned judgment of the Appellate Court to the extent that it quashes and sets aside the decree dated 18th October, 2013 is set aside.
- (II) The decree dated 18th October, 2013 would stand intact.
- (III) The Trial Court is directed to return findings on the additional issues which were framed and which have been adverted to in the earlier part of this judgment the same to be done on the basis of the material which is already on record as both the parties have filed purshis that they do not desire to lead any evidence.

(IV) The Trial Court to return findings on the said two additional issues latest by 30th April, 2016.

(V) It would be contingent upon the findings that would be recorded on the said two additional issues that the fate of the decree dated 18th October 2013 would be decided. The Trial Court to pass appropriate orders in respect thereof, after it returns its findings.

(VI) It would be open for the Defendant Bank to challenge the decree dated 18th October, 2013 as also the findings that would be recorded on the additional issues and that the setting aside of the order of the Appellate Bench of the Small Causes Court by the instant order, would not be an impediment for the Defendant Bank to challenge the judgment and order dated 18th October, 2013.

(VII) Till the findings are returned on the said two additional issues and for a period of four weeks thereafter in the event, the issues are answered against the Defendant

Bank no precipitative steps to be taken against the Defendant Bank. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.

(R.M.SAVANT, J.)