

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8019 OF 2015**

Shri Nagji Palan Sawala

..Petitioner.

Vs

Shri Haribhai Palan Sawala and
Ors.

.. Respondents

Mr. Abhay A. Anturkar i/b R.C.Barge, Advocate for petitioner.
Mr. S. C. Wakankar, Advocate for Respondent no.1.

**CORAM : R.G.KETKAR,J.
DATE : 27/07/2016**

PC:

1. Heard Mr. Abhay Anturkar, learned counsel for the petitioner and Mr. S.C.Wakankar, learned counsel for respondent no.1 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'original plaintiff', has challenged the Judgment and order dated 8.6.2015 passed by the learned 4th Addl. Judge of Small Causes Court, Pune below Exhibits 1 and 114 in Civil Suit No.82 of 2012. By that order, the learned trial Judge rejected Application Exh.114 filed by the plaintiff for proceeding with the matter further and for hearing on Exhibit 104 filed on 30.4.2013.
3. Plaintiff had instituted Spl. Civil Suit No. 781 of 2002 in the Court of Civil Judge, Senior Division, Pune against the respondents, inter alia, contending that they are gratuitous

licensees occupying the suit premises. 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 learned trial Judge, by order dated 9.1.2012, returned the plaint along with counter claim to the plaintiff under Order VII, Rule 10, 10-A of C.P.C. for presenting it before the Small Causes Court, Pune. After return of the plaint, the plaintiff filed application Exh. 114 for hearing on application Exhibit 104 filed on 30.4.2013. It appears that the plaintiff filed application Exhibit 104 seeking temporary injunction. The defendants opposed that application on the ground that the suit will have to be tried de novo and application Exh.104 is not maintainable. The controversy, therefore, is whether the suit is to be tried de novo or to proceed on the basis of evidence already recorded by the learned Civil Judge, Senior Division, Pune.

4. Mr. Anturkar has invited my attention to paragraph 9 of the order dated 9.1.2012. In paragraph 9, the learned trial Judge had recorded that the plaintiff had filed documents below Exhibit 3 and 34. Defendants have examined defendant no.2 at Exhibit 60 and witness DW 2 Harakchand Sawala at Exh.77 and produced documents at Exhibits 65 to 68 and 88 to 90. He, therefore, submitted that the learned trial Judge ought to proceed from the stage where the plaint was returned by the learned Civil Judge,

Sr.Dn., Pune. In other words, the evidence which was recorded by the learned Civil Judge, Sr. Dn., should form part of record of the proceedings before the Small Causes Court, Pune and evidence from that stage onwards has to be recorded. In support of this proposition, he relied upon the decision of Joginder Tuli Vs. S.L.Bhatia, (1997) 1 S.C.C. 502 and in particular paragraph 5 which reads 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.”

5. Relying upon the above observations, Mr. Anturkar submitted that when the plaint is directed to be returned for presentation to proper court, perhaps it has to start from the beginning, but as the evidence has already adduced in the present case, the trial Court ought to proceed from that stage at which the suit stood transferred. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Wakankar supported the impugned order. He has invited my attention to the decision of the Apex Court in the case of O.N.G.C. Ltd. Vs. M/s Modern Construction and Co., (2014)1 SCC 648 and in particular paragraphs 14 and 17

thereof. 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.”

7. Relying upon the aforesaid observation, Mr. Wakankar submitted that having regard to relationship between the parties, the Court of Civil Judge, Senior Division, was not competent to entertain and try the suit. As the Court of Small Causes is competent court, once after return of the plaint, suit is presented before the Small Causes Court which is the court of competent jurisdiction, the trial has to be conducted de novo even if it stood concluded before the court having no competence to try the suit.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record.

9. In the case of Joginder Tuli (supra), 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.

10. In the case of ONGC, 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.

11. 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.

12. 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.

13. 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, Sr. 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.

14. 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. While ordering return of plaint, the learned Civil Judge, Sr. Dn., did not direct to proceed from that stage at which the suit stood transferred.

15. In the present case, after the plaint was presented before the Small Causes Court which is undisputedly the court of

competent jurisdiction, the plaint has to be considered as a fresh plaint and trial has to be conducted de novo. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application and directing the suit to be tried as de novo. Hence, Petition fails and the same is dismissed.

16. At this stage, Mr. Anturkar prays for stay of this order for a period of 4 weeks from today and further submits that the learned trial Judge may be directed to dispose of the suit in a time bound manner.

17. Mr. Wakankar does not oppose this application. In view thereof, notwithstanding dismissal of the petition, this order shall remain stayed for a period of four weeks from today with clearly understanding that no further extension will be sought.

18. As far as request for disposal of the suit in a time bound manner is concerned, liberty is reserved to the plaintiff to file appropriate application for disposing of suit in time bound manner. If such application is made the learned trial Judge will bear in mind that suit was instituted in the Court of Civil Judge, Sr. Dn. in the year 2002 and the plaint was ordered to be returned by order dated 9.1.2012. Order accordingly.

(R.G.KETKAR, J.)