

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12150 OF 2012**

Shri Vishwas Panditrao Jape	)	
Age-Adult, Occ-Business	)	
Residing at Plot No.51,	)	
Mitra Mandal Co-operative Housing	)	
Society, Pune 411009	)	..Petitioner

Vs.

Shri Shrikant Bhagwan Phadnis	)	
Age-67 years, Occ-Business	)	
Residing at 120/561, Shivajinagar,	)	
Kanpur – 200805	)	
through his daughter	)	
Mrs. Reshma Amit Honap	)	
Age 34 years, Occ Service	)	
Residing at 98/37, “Pranav”	)	
Bhusari Colony,	)	
Paud Road, Pune – 411 0029	)	..Respondent

Mr. R. M. Pethe for the Petitioner
Mr. Atul P. Vanarse for the Respondent

CORAM : R. M. SAVANT, J.
DATE : 29th FEBRUARY, 2016

ORAL JUDGMENT

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 1-10-2012 passed by the Learned District Judge-6, Pune by which order,

the application filed by the Petitioner herein came to be allowed and the Applicant was directed to lead oral and documentary evidence pertaining to additional issues framed below Exhibit 20 in Regular Civil Suit No.192 of 2004 before the said Court without fail.

3 The said application was filed in Civil Appeal No.553 of 2006 which has been filed by the Petitioner against the decree passed by the Trial Court dated 1-7-2006. One of the grounds on which the decree has been challenged is the ground that proper issues were not framed. The matter had reached this Court by way of Writ Petition No.1631 of 2009, a Learned Single Judge of this Court A.M.Khanvilkar J., as His Lordship then was, by order dated 23-3-2009 disposed of the said Writ Petition by directing the Lower Appellate Court to frame additional two issues which were mentioned in the said order dated 23-3-2009. The said two issues are to the following effect:

“(1) Whether the defendant proves that the relationship between the parties was that of licensor and licensee.

(2) If yes, whether the Rent Court has jurisdiction to entertain suit filed by the Plaintiff for possession on the assertion that the relationship between the parties was that of landlord and tenant.”

4 It seems that the after the said order, the matter rested there for sometime. The Petitioner filed the said application Exhibit 5 for referring the said additional issues to the Lower Appellate Court for returning the findings thereon after recording evidence. The Lower Appellate Court made the said application referable to Order XLI Rule 27 of the Civil Procedure Code. The Lower Appellate Court has rejected the said application on the ground that this Court vide the said order dated 23-3-2009 had directed the Lower Appellate Court to add the said additional issues and that the Appellate Court was within its powers under Order XLI Rule 28 to try the said issues, the Lower Appellate Court accordingly directed the Petitioner to lead oral and documentary evidence pertaining to the said additional issues on the next date without fail and accordingly disposed of the said application by the impugned order dated 1-10-2012.

5 The principal contention of the Learned Counsel for the Petitioner is that recourse to Rule 28 of Order XLI can only be taken by the Lower Appellate Court in the event of additional evidence is allowed to be led under Order XLI Rule 27 and not when additional issues are framed. It is also the submission of the Learned Counsel that if the Lower Appellate Court tries the said issues the Petitioner would loose a right of Appeal.

6 Per contra the Learned Counsel appearing for the Respondent would support the impugned order and would contend that since this Court had directed the said additional issues to be tried, the Appellate Court could consider to try the said issues under Order XLI Rule 28.

7 Having heard the Learned Counsel for the parties, in my view, the Lower Appellate Court has erred in rejecting the said application filed by the Petitioner for referring the said issues to the Trial Court for returning the findings thereon by permitting the parties to lead evidence. The Lower Appellate Court has erred in observing that it could carry out the said exercise under Order XLI Rule 28. It is required to be noted that recourse to Order XLI Rule 28 can only be taken by the Lower Appellate Court in the event of additional evidence is allowed to be led under Order XLI Rule 27 and not when additional issues are framed by the higher court. The Learned Counsel was right in his submission that the Petitioner / Defendant would lose his right of Appeal against the findings recorded and order passed in respect of the said issues. In my view the impugned order is required to be quashed and set aside and is accordingly quashed and set aside. The said two issues are directed to be referred to the Trial Court i.e. the concerned Small Causes Court, Pune to return findings on the said issues to the Lower Appellate Court. The parties to appear before the Small Causes Court Pune, on 14-3-2016 with a copy of the instant order. The parties to also inform the Lower Appellate Court of the

instant order. The Trial Court to return the findings on the said issues to the Lower Appellate Court latest by 30-6-2016.

8 The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]