

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

WRIT PETITION NO.3239 OF 2017

Colin Mario Rebello

..Petitioner

V/s.

John Francis Anthony Gonsalves & Anr.

..Respondents

Mr.D.H. Krishnan for the Petitioner.

Ms.U.S. Patel a/w Ms.M.M. Patel i/by Mr.M.M. Patel for the
Respondents.

CORAM : M. S. SONAK, J.

DATE : 08th SEPTEMBER 2017

P.C.

1. Rule.

2. With the consent of and at the request of the learned
counsel for the parties, Rule is made returnable forthwith.

3. The challenge in this petition is to the impugned order
dated 16th September 2016, by which the learned Trial Judge has
declined to re-frame the issues already cast on 11th February 2015.

4. Mr.Dushant Krishnan, the learned counsel for the

petitioner submits that in response to the suit for eviction, the petitioner, who is the defendant in the said suit, has specifically pleaded that the Flat Nos.501 and 502 constitutes one composite flat. Further, he submits that the petitioners has clearly pleaded that he is not the gratuitous licensee in respect of such composite flats and that he is one of the co-owners in respect of the same. In these circumstances he submits that the additional issues as proposed were required to be framed. He submits that the learned Trial Judge, while deciding the application for re-framing of issues has virtually proceeded to decide such issues against the petitioners.

5. Ms.Urvi Patel, the learned counsel for the respondents has tendered the reply on behalf of the respondents and further, she has submitted that application for re-framing of issues filed by the petitioners was frivolous, in the nature of dilatory tactic and therefore, the same has been rightly rejected by the Trial Court. She submits that the respondents are aged 85 and 89 respectively. They are the executors in respect of a Will left behind by Mr.Jhon Fedric Gonsalves who died on 03rd January 1983. The Will itself is dated 01-04-1983. She submits that the issue of co-ownership or the compositeness of the two flats is quite irrelevant for final decision in the suit. She submits that in the Will itself, the two flats have been

indicated as separate flats. For these reasons, she submits that the impugned order may not be interfered with.

6. In this case, we are concerned with the suit under Section 41 of the Presidency Small Causes Court Act, 1882 (said Act). In this suit, the plaintiff claims to be the licensor in respect of the suit premises and has alleged that the defendant (original petitioner) is a gratuitous licensee in respect of the same. The petitioner, in his written statement, has denied that he is the gratuitous licensee in respect of the suit premises and stated that he is the co-owner in respect of the suit premises.

7. Based on the aforesaid pleadings, the learned Trial judge has framed issue No. 1, which reads thus :

“Issue No.1-Whether the plaintiff proves that the defendant is his gratuitous licensee and he is the licensor in respect of the suit premises?”

8. The aforesaid issue takes care of the defense raised by the petitioner. Accordingly, there is no necessity for framing any additional issue as to whether the petitioner is indeed the co-owner in respect of the suit premises. In his defense, the petitioner, has

already denied the respondent's contention that he is mere gratuitous licensee and has pleaded that he is a co-owner in respect of the suit premises. Based upon the issues framed, it will be free for parties to prove their respective contentions. There is no necessity of framing any additional issue or issues as proposed, since, the scope of inquiry in a suit under Section 41 of the Presidency Small Causes Court Act, 1882 is quite limited. In any case the defense raised by the petitioner is covered in the first issue as framed by the learned Trial Judge.

9. The second proposed issue as regards the compositeness of the two flats is quite irrelevant and the framing of such issue is not at all necessary for the resolution of the matter.

10. Mr. Krishnan is however right in his submission that the learned trial Judge was not justified in adverting to merits and demerits of the case whilst deciding the application for re-framing of the issues. Merits and demerits are to be decided on the basis of the evidence which the parties lead in the matter and by the application of the law as may be found to be applicable to the established facts. Therefore, it is made clear that though the impugned order is not being interfered with, the learned Trial Court, shall not permit itself

to be influenced by any observations in the impugned order regards the merits and demerits of the case of the respective parties.

11. With the aforesaid observations therefore, this petition is disposed of. There shall be no order as to costs.

(M. S. SONAK, J.)