

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

**CIVIL APPLICATION (L) NO. 8402 OF 2017
IN
SECOND APPEAL NO. 441 OF 2011**

Mr.Somnath Dattatray Jagtap & Ors. ...Applicants/Appellants

vs.

Mr.Shantaram V. Dharwadkar ...Respondent

Mr.Parag V. Dube for Applicants.

Mr.R.R. Salvi I/b. Suvarna Telegote for Respondent No.1.

**CORAM : S.C. GUPTE, J.
20 JUNE 2017**

P.C. :

This civil application is taken out by the original Appellants for setting aside an order passed by this court on 9 March 2017 and restoring the second appeal to file. The order of 9 March 2017, though passed in the absence of the Appellants, is not for want of prosecution. The order is passed on the merits of the controversy. No application is maintainable for setting aside that order and restoration of the appeal to the file. Besides, the order was passed after noticing that on the last three occasions, before the date on which the order was passed, the Appellants were absent. On the immediate prior date, i.e. on 6 March 2017, the appeal was called out not just once but twice, having been kept back on the first occasion. These consecutive defaults were followed by the absence of the Appellants on 9 March 2017, when the matter was called out and heard by this court. There is no ground, in any event, made out for the absence of the Appellants or their counsel as recorded by this court in its order of 9 March 2017. It is submitted in the civil application that on 6 March 2017 and 9 March 2017 when the matter appeared before this court, the Advocate was held up in a part-heard final

hearing matter before another Bench of this court and therefore, unable to remain present before this court when the matter was called out. There are no particulars as to the alleged part-heard final hearing matter. A bald statement such as this does not make out justifiable absence on the part of the Advocate. Even on merits, there is nothing that the Appellants' Counsel is able to point out to the court to pursue it to take a view different from the one taken in the order of 9 March 2017.

2 The order of 9 March 2017 notes the substantial question of law on which the second appeal was admitted, namely, as to whether the jurisdiction of the civil court was barred in view of the provisions of Section 26 of the Provincial Small Cause Courts Act, 1887 as applicable to the State of Maharashtra. It is the case of the Respondent (original Plaintiff) that the predecessor of the Appellants was his tenant in respect of one room. When the suit property was in the process of being developed, the predecessor of the Appellants was merely allowed to shift his goods to the two adjoining rooms forming the subject property so as to avoid damage to his goods and that there was no relationship of landlord and tenant in respect of the suit property as alleged by the Appellants. This was a pure question of fact decided by the courts below in favour of the original Plaintiff. Both courts below came to a concurrent finding that the Defendants had trespassed upon the suit property without any right to use or occupy the same. This court noted in its order of 9 March 2017 that there was, accordingly, no error of law in the courts below entertaining the Plaintiff's suit. What is now claimed by learned Counsel for the Appellants is that the plaint proceeded on the basis of a relationship of licensor and licensee between the parties and that having regard to the provisions of Section 26 of the Provincial Small Cause Courts Act read with Section 52 of the Easement Act, the trial

court did not have jurisdiction to entertain the suit, which could only have been filed before the court of Small Causes.

3 At no stage in the proceedings before the courts below did the Appellants (original Defendants) take up a plea that the court was barred from entertaining the suit on the ground of existence of a relationship of licensor and licensee between the parties within the meaning of Section 26 of Provincial Small Cause Courts Act. The plea was that the relationship between the parties was that of landlord and tenant. This was, in terms, negatived by the courts below. The alternative plea that the relationship between the parties, at any rate, amounted to a relationship of licensor and licensee was never put in issue before the courts below. The Plaintiff's case consistently before the courts below, and which was accepted by both courts concurrently, was that the Defendants were trespassers upon the suit property. Merely by picking up a sentence or two from the plaint, the Defendants cannot contend that at any rate, the relationship between the parties was that of licensor and licensee. There has to be a specific plea raised in the case, even if it be in the alternative to the plea of tenancy. The courts below have had no occasion to rule on the plea. This essentially is a plea of fact. Merely on the basis of a sentence or two from the plaint, it cannot be contended, and that too at the stage of the second appeal, that the plaint proceeds on the basis of a licensor and licensee relationship and that there is, accordingly, a substantial error of law on the part of the courts below in assuming jurisdiction.

4 Alternatively, it is contended by learned Counsel for the Appellants that under Section 55 of the Rent Control Act, any agreement for leave and licence or letting of any premises is required to be registered under the Registration Act and in the absence of such registered written

agreement, the contentions of the tenant or licensee about the terms and conditions subject to which the premises have been so given to him ought to prevail, unless proved otherwise. In the first place, no such plea is found in the written statement or in the submissions before the courts below. Secondly, it is pertinent to note that the provisions of Sub-section (2) of Section 55 apply only in a case where there is in fact an agreement for leave and licence or letting of premises between the parties and not in a case where the issue of existence of such agreement is itself decided by the court against the purported tenant or licensee. In a case where a court has come to the conclusion that there is no agreement either of tenancy or leave and licence between the parties and that the Defendants are trespassers upon the suit property, there is no question of any contention of the tenant about terms and conditions of tenancy or licence, as the case may be, prevailing over the contention of the landlord.

5 Alternatively, it is submitted that there was another suit filed by the original Plaintiff in this court against the Defendants which was decided against the Plaintiff, and accordingly, the present suit is barred by *res judicata* under Section 11 of the CPC. Once again, no such plea is to be found in any of the pleadings by the Defendants in the present suit. This was never put in issue before the courts below nor is it even a part of the grounds raised in the second appeal. There is no substance in the contention.

6 Accordingly, the civil application is dismissed. No order as to costs.

7 Learned Counsel for the Applicants / Appellants prays for stay

of the order. The application is rejected.

(S.C. Gupte, J.)