

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

APPEAL FROM ORDER NO.1227 OF 2012

Savio Robert Gonsalves ..Appellant
V/s.
Mrs.Rosy Mendonca & Ors. ..Respondents

Ms.Eventa A. Gonsalves for the Appellant.
None for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 05 JANUARY 2017.

P.C.

1. Heard Ms.Gonsalves for the appellant. The respondents are absent. Advocate for the respondents are also absent.

2. Challenge in this appeal is to the order dated 14 February 2012 made by the City Civil Court at Dindoshi (Trial Court). The operative portion of the impugned order reads thus:-

*“1. The Plaint be returned to the plaintiff for being presented before proper Forum.
In the peculiar circumstances of the case, no order as to costs.”*

3. Ms.Gonsalves submits that the appellant-plaintiff, in the plaint, as clearly pleaded that none of the respondents are either the tenants for the licensee in respect of the suit premises which are admittedly owned by the appellant. The parties had led evidence in the matter. The learned Trial Judge, without taking into consideration the material on record has incorrectly concluded that this is a suit between a landlord and tenant and on the said basis ordered the return of the plaint for presentation before the Small Causes Court. Ms.Gonsalves submits that this is solely on the basis of the plea of the respondent No.3 (Original defendant no.3) that she is the tenant in respect of the suit premises. Ms.Gonsalves submits that the impugned order is vulnerable and is required to be set aside.

4. Ms.Gonsalves further submits that the respondent no.3 had in fact instituted R.A.D. Suit No.455 of 2006 before the Small Causes Court seeking declaration that she is a tenant in respect of the suit premises. By judgment and order dated 29-03-2014, the Small Causes Court, has dismissed the suit.

Ms.Gonsalves fairly points out as against such dismissal, the respondent No.3 has instituted the said appeal is pending adjudication. Nevertheless, Mr.Gonsalves submits that this is also a circumstance, which establishes that there is no landlord tenant relationship between appellant and the respondent No.3.

5. On perusal of the impugned order, it is seen that the learned Trial Judge has not at all adverted to the evidence led by the parties. The impugned order proceeds, almost entirely on the basis of the plea raised by the respondent No.3 that she is a tenant in respect of the suit premises. This is not a correct approach. This is akin to exercise of powers under Order VII Rule 11 of the C.P.C. by relying upon the defense of the defendant.

6. Since, evidence was led by both the parties, the least that was expected was that such evidence is taken into consideration for the purpose of the determining whether at least prima-facie, any case of landlord tenant relationship is

made out between the parties. On this short ground, impugned order is liable to be set aside and the same is hereby set aside.

7. The matter is however, remanded to the learned Trial Judge for a fresh decision on the issue of jurisdiction. In addition to the evidence already on record, leave is granted to the appellant to place on record copy of the judgment and order dated 29-03-2014 made by the Small Causes Court in R.A.D. Suit No.455 of 2006. The learned Trial Judge, upon consideration of the entire material on record, including the judgment and order dated 29-03-2014 made by the Small Causes Court shall decide the issue of jurisdiction on its own merits and in accordance with law. If, the learned Trial Judge comes to the conclusion that it has jurisdiction in the matter, then, since evidence is already been led by the parties, the Trial Judge should proceed further in accordance with law.

8. All contentions of all parties are kept open.

9. The appeal is allowed in the aforesaid terms. There

shall be no order as to costs.

10. The appellant to appear before the learned Trial Judge on 24 January 2017 at 11.00 a.m. and produce authenticated copy of this order. In case, the respondents are not present, the learned Trial Judge is requested to issue notice to the respondents to remain present. The appellant shall also give a notice to the respondents.

(M. S. SONAK, J.)