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

**SECOND APPEAL NO.358 OF 2018
WITH
CIVIL APPLICATION NO.923 OF 2018
IN
SECOND APPEAL NO.358 OF 2018**

Satish @ Santosh Ganpati Vhatkar ... Appellant.
V/s.
Dattatray Kadam (decd)
through legal heirs ... Respondents

Mr. Saurabh M. Railkar, for the appellant.
Mr. Abhijit M. Adagule, for respondent Nos. 1(A), 1(B)
(I), to 1(B)(IV), 1(C) to 1(H).

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 13th AUGUST, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondents.
- 2] Admit.
- 3] With the consent of learned counsel for both the parties,
this appeal is taken up for final hearing at the stage of admission
itself.
- 4] This appeal takes an exception to the judgment and decree
dated 18th September, 2008, passed by the District Judge-4,
Kolhapur, in Regular Civil Appeal No.273 of 2006, preferred against

the judgment and decree dated 31st August, 2006, passed by 3rd Joint Civil Judge Senior Division, Kolhapur in Regular Civil Suit No.886 of 2003.

5] The said suit was filed by the respondent herein seeking possession of the suit premises from the appellant on the count that said possession is permissive and therefore, on the request of respondent, the appellant should have vacated the same.

6] This suit was resisted by the appellant herein denying all the averments in the plaint, but without raising any specific plea that he is in possession of the suit premises either as tenant or in any other particular capacity.

7] In support of their respective contentions, appellant and respondent examined themselves. In his evidence also, the appellant has not stated in which capacity he is occupying the suit premises. His entire written statement is conspicuously silent about he being in possession as tenant. No such suggestion was put up to the respondent also in his cross examination. Thus, the appellant has not made out any specific plea of tenancy. As a result the first Appellate Court decreed the suit.

8] While challenging this judgment of the Appellate Court, the submission of learned counsel for the appellant is that the respondent himself has produced on record the Municipal

Assessment extract of the year 1997-98 at Exh.41, in which the name of the appellant is appearing as tenant alongwith others. It is urged that the Appellate Court, however, has not at all considered this document. The entire judgment of the Appellate Court is silent about this document. According to learned counsel for the appellant there is, thus, substantial question of law raised in this appeal, as to what will be the effect of Appellate Court not considering this document Exh.41 which was considered by the trial Court. According to learned counsel for the appellant, therefore, on this substantial question of law, the appeal needs to be admitted.

9] Per contra, learned counsel for respondent has supported the judgment of the Appellate Court and submitted that the appellant himself has not raised any plea that he is in possession of the suit premises as tenant. Merely on the basis of such document, the appellant has no case to prove his plea of tenancy which is not raised at all. Unless he pleads that he is in possession as a tenant, it was not necessary for the Appellate Court to consider this document; thus on this substantial question of law the appeal needs to be admitted.

10] As stated above, the entire written statement filed by the appellant in the trial court is conspicuously silent about raising any plea of his being in possession of the suit premises as tenant. It is despite the fact that, in the plaint, respondent has clearly averred

about how possession of the appellant is permissive and may be as licensee at the most. It is also in the backdrop of the fact that the earlier Suit bearing R.C.S.No.104 of 1996, which was filed by the appellant himself against respondent and in which Counter Claim was also filed by the respondent, the said plea of tenancy was not accepted. In spite of these facts, in this case also the appellant has not raised any plea in his written statement that he is in possession of the suit premises as tenant. It is pertinent to note that even in the evidence before the Court, the appellant has not stated that his possession is that of tenant. No such suggestion is put up to the respondent also in his cross examination.

11] In such circumstances, merely on the basis of some document which is Municipal Assessment Tax extract at Exh.41 and which is meant for the purpose of collection of tax, appellant cannot contend that his possession is that of tenant and hence the Appellate Court should have considered this document. A specific plea was required to be taken by the appellant, in the Written Statement or in the evidence before the Court, to rely on this document. Thus, sans pleadings, any material produced on record, which may be admitted in evidence, cannot be taken into consideration. Therefore, if the Appellate Court has not touched this document, in the absence of specific plea of tenancy being raised by the appellant herein either in

his written statement or in his evidence or in cross examination of respondent, in my considered opinion, it can hardly be accepted that there is any substantial question of law raised in this Second Appeal to admit it.

12] The Appeal, therefore, stands dismissed.

13] In view of dismissal of appeal itself, Civil Application No.923 of 2018 becomes infructuous and the same is disposed off accordingly.

14] At this stage, learned counsel for the appellant seeks stay to the execution of the decree. Learned counsel for respondent strongly resisted the same on the count that during pendency of this Appeal, there was no stay.

15] In view thereof, no case is made out to say the execution of the decree, therefore, prayer is rejected.

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[DR.SHALINI PHANSALKAR-JOSHI, J.]