

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER (ST.) NO.12688 OF 2018
WITH
CIVIL APPLICATION (ST.) NO.12689 OF 2018

Shitala Durgaprasad Vishwakarma ... Appellant
Vs.
Bitjoram Rajpat Yadav ... Respondent

Mr. Dilip Shukla i/b. Mr. S. R. Upadhyay for Appellant.

CORAM : R. G. KETKAR, J.
DATE : JUNE 25, 2018

P.C. :

Not on Board. At the request of Mr. Shukla, learned Counsel for the appellant, taken up for admission.

2. By this Appeal from Order filed under Order XLIII, Rule 1(t) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), appellant has challenged the judgment and order dated 20.03.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in Marji Application No.97 of 2017. By that order, the Appellate Bench rejected the Marji Application filed by the appellant herein under Order XLI, Rule 19 of C.P.C. on the ground that the Appellate Court has dismissed the appeal on 07.04.2017 in default and not on merits.

3. With the assistance of Mr. Shukla, I have gone through the order dated 07.04.2017. A perusal of that order shows that the Appellate Bench has considered the entire evidence on record and has dismissed the appeal on merits and not in default. As the appeal is dismissed on merits and not in default, in my opinion, the application filed by the

appellant herein under Order XLI, Rule 19 of C.P.C. was, itself, wholly misconceived. Resultantly, the Appeal presented in this Court is also misconceived. Hence, Appeal is dismissed on the ground of maintainability. In view of the dismissal of the Appeal, Civil Application (St.) No.12689 of 2018 for stay does not survive and the same is disposed of reserving liberty to the appellant to challenge the order dated 07.04.2017 by adopting appropriate proceedings. Order accordingly.

4. Mr. Shukla assures that by tomorrow i.e. 26.06.2018, he will apply for certified copy of the order dated 07.04.2017 and will furnish undertaking before the Registrar, Judicial-I for filing certified copy of that order in the Registry immediately upon receipt of the same. He further assures that on or before 29.06.2018, he will file appropriate proceedings in this Court.

5. In view thereof, notwithstanding dismissal of the Appeal from Order, subject to the appellant neither creating third party interest nor parting with possession of the suit premises, the eviction decree shall not be executed till 04.07.2018.

6. All parties, including the Executing Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

Minal Parab