

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12276 OF 2017

M/s. Abdul Karim Dadabhai & Sons
And Anr.

...Petitioners

Versus

Ganpat Trimbak Dhole
And Ors.

...Respondents

....

Mr.Praveen K. Hushing, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 03rd JULY, 2018

P.C.

1. Heard Mr.Praveen K. Hushing, learned counsel for the petitioners, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants' have challenged the judgment and order dated 30.1.2016 passed by the learned 6th Additional Judge, Small Causes Court, Pune below Exhibit-16 in Regular Civil Suit No.269/2015 as also the judgment and order dated 20.7.2017 passed by the learned District Judge-15, Pune in Civil Revision No.23/2016. By these orders, the Courts below partly allowed the application Exhibit-16 made by defendants No.1 and 2 under Order

XIV Rule 16 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') and framed additional issue. Defendants No.1 & 2 are aggrieved as the Courts below did not frame said issue as a preliminary issue.

3. In support of this Petition, Mr.Hushing has invited my attention to paragraphs-1, 6 and prayer clause (b) of the plaint. He submitted that in paragraph-1 the plaintiff alleged that open piece of land admeasuring 5616 sq. ft. was let out to the defendants No.1 and 2. In paragraph-6, the plaintiff alleged that the defendant had erected patrashed and patra-compound at their expenses. By prayer clause (b), the plaintiff has sought possession of the open piece of land together with patrashed and patra-compound. He submitted that after defendants No.1 and 2 filed their written statement on 2.11.2015 at Exhibit-12, issues were framed. Defendants No.1 and 2 filed application under Order XIV Rule 16 and Order XIV Rule 2(2) of C.P.C. for framing following issue as a preliminary issue :

“Whether the suit is maintainable under the provisions of the Maharashtra Rent Control Act, 1999.”

4. Defendants No.1 and 2 referred to the description of the suit premises in paragraph-1 of the plaint and contended that as the plaintiff had let out open piece of the land together with tin-shed and

compound, the provisions of the Act are not applicable and consequently the suit is liable to be dismissed on the ground of maintainability. He submitted that the learned trial Judge rejected the application *inter alia* observing that the plaintiff came with the case that what was let out to defendants No.1 and 2 was open piece of land and without plaintiff's consent defendants have made construction. Said fact can be gone into after the parties adduce evidence. The same cannot be considered as a preliminary issue.

5. As against this, the learned District Judge in paragraph-5 observed that the plaintiff had issued notice on 20.5.2015 which was replied by the defendants on 15.6.2015 stating therein that open land admeasuring 108 ft. x 52 ft. along with structure (tin shed) standing thereon and compound wall was let out to defendants No.1 and 2 as per lease agreement. Mr. Hushing submitted that the Courts below were not justified in not framing the issue as a preliminary issue.

6. I have considered the submissions advanced by MrHushing. I have also perused the material on record. As noted earlier, the plaintiff has come with the case that he has let out open piece of land to defendants No.1 & 2. Defendants No.1 & 2 on the other hand came with the case that open piece of land along with structure was let

out to them. In my opinion, this cannot be considered as a pure question of law. The parties will have to adduce evidence to substantiate their respective case. The Courts below were, therefore, justified in framing the issue as suggested by defendants No.1 & 2. The Courts below were also equally justified in not treating this issue as a preliminary issue. Hence, Petition fails and the same is dismissed.

7. It is made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)