

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 45 OF 2018
AND
CIVIL APPLICATION NO. 12233 OF 2017

Uday S/o Madhukarrao Sabnis,
Age : 53 years, Occu. : At present Nil,
R/o : Madhumalti Behind Nupur Cinema,
Opposite to Mahatma Gandhi Mission,
Aurangabad

.. Appellant
(Plaintiff)

VERSUS

Dilmohansingh S/o Hardyalsingh Ghai,
Age : 58 years, Occu : Business,
R/o : Plot No. 7, "Meet", Shankarnagar,
Aurangabad

.. Respondent
(Defendant)

...
Mr. M.M. Joshi, Advocate for the appellant
Mr. P.F. Patni, Advocate for the respondent
...

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 21 FEBRUARY 2022
PRONOUNCED ON : 22 MARCH 2022

JUDGMENT :

This is plaintiff's second appeal.

2. I have heard the learned advocates of both the sides.

3. The plaintiff averred that the suit premises which is a shop was originally owned by Laxman Ingle and after his demise his wife Sumanbai (PW3) became the landlady. The respondent was her tenant in the suit premises. He, however, sub-let it to the plaintiff for monthly rent of Rs.6,000/- since 01-07-1994. Sumanbai filed suit for

eviction against the respondent under the Hyderabad Houses (Rent, Eviction & Lease) Control Act, 1954 on various grounds. They entered into a compromise. He paid the rent to her till 2004. Thereafter, he informed the plaintiff about having surrendered the tenancy and he could directly deal with her. Accordingly, since 2004 from time to time he is in possession of the suit premises on periodical lease with agreed rent which he paid to her from time to time till June 2009. The respondent did not assert any right or claim over the suit premises. The plaintiff surrendered the tenancy to the landlady - Sumanbai whereupon the respondent started demanding an amount of Rs.50,000/-. On his failure to pay, he started disturbing his possession and, therefore, he filed the suit for perpetual injunction simplicitor.

4. The respondent contested the suit. He admitted initial tenancy in his favour and also about he having sub-let it to the appellant. He denied that there was any compromise in the eviction proceedings initiated by the landlady against him. He flatly denied about having surrendered the tenancy. He contended that the appellant was in arrears of rent to him to the tune of Rs.1,20,000/- out of which the appellant paid Rs.20,000/- in cash and issued a cheque for Rs.1,00,000/-. Since thereafter i.e. for the period 01-04-2007 to 31-07-2009, for 28 months, the appellant was in arrears of Rs.1,68,000/-. In spite of his demand, the appellant has not cleared the arrears which accumulated to the tune of Rs.2,68,000/-. He, therefore, prayed for dismissing the suit and also preferred a

counter claim styled as one filed under section 33 of the Maharashtra Rent Control Act, 1999, for recovery of arrears of rent of Rs.2,68,000/-.

5. The trial court decreed the suit and dismissed the counter claim.

6. In the appeal under section 96 of the Code of Civil Procedure by the respondent, by the judgment and order under challenge the lower appellate court allowed the appeal, decreed the counter claim and dismissed the suit. Hence this second appeal.

7. Having heard the afore-mentioned facts and circumstances, number of substantial questions of law arise for determination in this appeal which with the consent of both the sides were formulated as under :-

- I) Whether the counter claim of the respondent filed under section 33 of the Maharashtra Rent Control Act, 1999, was maintainable in appellant's suit invoking the ordinary jurisdiction of civil court merely because it is the selfsame court which is conferred with the jurisdiction to decide any dispute between the landlord and a tenant under section 33 of that Act ?
- II) Whether the counter claim of the respondent exceeding the pecuniary jurisdiction of the civil court was maintainable only because it was also a forum exercising jurisdiction under section 33 of the Maharashtra Rent Control Act, 1999 which permits such a court to decide a dispute notwithstanding the amount of the claim ?

- III) Whether the respondent once having invoked the jurisdiction of the civil court under section 33 of the Maharashtra Rent Control Act, 1999, could have preferred the appeal under section 96 of the Code of Civil Procedure instead of invoking the provisions of appeal under section 34 of that Act even if the forum for preferring appeals is the same i.e. the district court ?
- IV) Whether the lower appellate court has committed gross illegality in overlooking all the afore-mentioned intricate questions of law ?

8. The learned advocate Mr. Patni for the respondent vehemently submitted that all the afore-mentioned issues were never raised before any of the courts below and, therefore, the appellant is estopped from raising any dispute with regard to them. By referring to following judgments, he would submit that the question of jurisdiction cannot be raised for the first time in the second appeal.

i) Om Prakash Agarwal since deceased through legal representatives and others Vs. Vishan Dayal Rajpoot and another; (2019) 14 SCC 526

ii) Central Ware-housing Corporation New Delhi represented by Chief Executive Officer and Secretary at Hyderabad V. Central Bank of India Ltd. Hyderabad and another; AIR 1973 ANDHRA PRADESH 387

9. He would also submit that so long as no prejudice can be said to have been caused to the appellant by invoking wrong remedies by the respondent even if it is held that the counter claim was not maintainable on any ground, the judgment and decree passed by the

lower appellate court does not call for any interference. He relied upon following decision :

i) Dr.K.P. Ranga Rao V. K.V. Venkatesham; AIR ONLINE 2014 SC 99

10. Per contra, learned advocate Mr. Joshi for the appellant submitted that all the afore-mentioned questions are pure questions of law and can be agitated at any stage of the proceeding. This being an appeal which is nothing but continuation of the suit, those can be raised and decided at any stage.

11. True it is that the appellant never seems to have raised any of the afore-mentioned issues before either of the courts below. However, it is quite conspicuous that both the courts below were oblivious of the fact that the afore-mentioned issues, in-fact, arose. Those ought to have been addressed, at least by the lower appellate court.

12. Be that as it may, it is trite that as has been submitted by the learned advocate Mr. Patni, objection to the pecuniary and territorial jurisdiction can be waived by a party. However, same is not the case with a jurisdiction especially created for deciding a specific subject matter. The present scenario clearly demonstrates that it was not merely a dispute pertaining to the territorial or pecuniary jurisdiction that was arising between the parties but even the question of

jurisdiction to be exercised subject matter-wise was a point to be considered by the courts below.

13. *Ex facie*, the lower appellate court does not seem to be alive to such legal aspects. It would, therefore, be utmost necessary that the lower appellate court is now called upon to consider the rival submissions and decide the afore-mentioned questions. It is only then its judgment would be complete in all respects.

14. There is one more aspect. As can be seen from the stand of the respondent throughout he has been asserting that he had never surrendered the tenancy and consequently has been contending that the relationship of landlord and tenant still subsists between the landlady - Sumanbai and him. Conspicuously he has not arrayed her as a defendant in his counter claim and still both the courts below were called upon and obliged him by entering into the controversy. The lower appellate court even affirmed his stand even in the absence of she being a party to the counter claim. Even the lower appellate court will have to consider this aspect as well while deciding the appeal afresh.

15. I, therefore, am of a sincere view that instead of deciding these points at this stage by invoking the provisions of section 100 of the Code of Civil Procedure, it would be appropriate to allow the lower appellate court to ponder upon and decide those first.

16. The second appeal is partly allowed, the impugned judgment and order passed by the lower appellate court is quashed and set aside. The matter stands remanded to the lower appellate court for decision afresh on all the points including the points formulated herein-above, by extending the opportunity of being heard to both the sides.

17. The parties shall appear before the lower appellate court on 18-04-2022 and there shall be no need for it issue any notice to them. The lower appellate court shall decide the appeal as early as possible.

18. The amount which stands deposited in this court, be remitted to the lower appellate court.

19. The appeal is expedited.

20. R & P be sent back immediately.

21. Pending civil application stands disposed of.

[MANGESH S. PATIL]
JUDGE

arp/