

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1680 OF 2025

Hindurao Baburao Thorat and anr. ...Petitioners

Versus

Vijay Daulatsing Madan ...Respondent

Mr. Ajay Basutkar, a/w Vijaysingh Salunkhe and Flavia
Fernandes, for the Petitioners.

Mr. Shashank Mangale, a/w Saurabh Butala, for the
Respondent.

CORAM: N. J. JAMADAR, J.

DATED : 29th APRIL, 2025

Order:-

1. Heard the learned Counsel for the parties.
2. The challenge in this petition is to an order dated 18th November, 2024 passed by the learned District Judge, Pune, whereby an application preferred by the petitioners – appellants to remand the matter to the trial court under Order 41 Rule 25 of the Code of Civil Procedure, 1908 (“the Code”) came to be rejected.
3. The petitioners are the defendants. By a judgment and order dated 13th April, 2017 in Special Civil Suit No.2348 of 2011, the trial court had decreed the suit and, *inter alia*, directed the petitioners to deliver possession of the suit flat to the plaintiffs.

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4. Being aggrieved, the petitioners preferred an appeal before the District Court. In the said appeal, the petitioners filed an application seeking remand of the suit to the trial court under Order 41 Rule 25 on the premise that the trial court had omitted to frame and try the issue of jurisdiction. It was the contention of the petitioners that the petitioners were the gratuitous licensees and, therefore, the Civil Court had not jurisdiction and the suit ought to have been instituted before the Court of Small Causes in view of the provisions contained in the Provincial Small Cause Courts Act, 1887.

5. The learned District Judge was of the view, that the trial court had already framed and decided issue of jurisdiction (4B) in favour of the plaintiffs. Whether the determination by the trial court was correct, could be decided at the stage of final hearing of the appeal and, thus, remand by invoking the provisions contained in Order 41 Rule 25 was not warranted.

6. The learned Counsel for the petitioners invited attention of the Court to a finding recorded by the trial court that, the plaintiff had established that he had allowed the defendant to use and occupy the flat gratuitously. In the face of this finding, according to the learned Counsel for the petitioners, the Civil Court had no jurisdiction to entertain, try and decide the suit.

7. The learned Counsel for the petitioners placed reliance on the judgment of the Supreme Court in the case of *R. Kandasamy (since dead) and others vs. T.R.K. Sarawathy and another*¹, wherein the Supreme Court has *inter alia*, observed, that any failure or omission on the part of the trial court to frame an issue on maintainability of a suit touching jurisdictional fact by itself cannot trim the powers of the higher court to examine whether the jurisdictional fact did exist for grant of relief as claimed, provided no new facts were required to be pleaded and no new evidence led.

8. I am unable to persuade myself to accede to the submissions canvassed on behalf of the petitioners. The learned District Judge has, in terms, recorded that the trial court had framed and determined the issue of jurisdiction. The submission on behalf of the petitioners was that issue of jurisdiction was framed and determined by the trial court with regard to the objection as to the maintainability of the suit before the Civil Court in contradistinction to a dispute before the Co-operative Court, and not in the context of the bar to entertain the suit by the Civil Court in respect of a gratuitous licensee.

1 2024 SCC OnLine SC 3377.

9. Indeed the trial court did frame and decide the issue of jurisdiction. Correctness of the said determination can be examined by the Appeal Court, at the time of decision of the appeal. This issue of bar of subject matter jurisdiction to entertain a suit against gratuitous licensee can also be examined by Appellate Court at the stage of final adjudication of the appeal. Since the learned District Judge has specifically observed that, the issue of the jurisdiction will be examined by the Appellate Court, at this stage, there is no propriety in entertaining the petition.

10. Keeping open the issue of jurisdiction of the trial court, in the context of the contentions that the petitioners – defendants were the gratuitous licensees and, thus, the suit ought to have been instituted before the Court of Small Causes, to be decided by the learned District Judge, the petition stands dismissed.

11. The learned District Judge is requested to hear and decide the appeal as expeditiously as possible.

[N. J. JAMADAR, J.]