

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 40 OF 1998**

Mr. Harish Chandra Singh Gour

.....*Appellant*

: *Versus* :

Mrs. Juliana Serphis

(since deceased through legal heirs)

....*Respondents*

Mr. Chaitanya Nikte with Mr. Prajit Sahane for the Appellant.

None for *the Respondent*.

CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON : 01 September 2026.

JUDG. PRON. ON : 16 September 2026.

JUDGMENT:

1) The present Appeal is preferred by the Appellant challenging the judgment and decree dated 2 March 1996 passed by the 9th Additional District Judge, Pune allowing Civil Appeal No. 720 of 1989 and setting aside the decree passed by the Trial Court in Regular Civil Suit No. 2272 of 1984. The Trial Court had decreed the suit filed by the Appellant/Plaintiff by directing the Defendant to handover vacant possession of the suit premises with further directions to recover future mesne profits from the

date of institution of the suit by conducting an inquiry under Order XX Rule 12 of the Code of Civil Procedure, 1908 (**the Code**).

2) A garage admeasuring 10 ft x 20 ft situated at Plot No.4, Survey No.78, Divyanagar, Wanowrie, Pune-40 is the '**suit premises**'. Plaintiff is the owner of land bearing Plot No.4, Sector No. 78, Divyanagar, Wanowrie, Pune-411040, on which he built the main bungalow, a servant's quarter and a garage. Plaintiff was away from Pune most of the times in a year and constituted his wife Mrs. Dagma Gour as his attorney for looking after the suit premises and the bungalow. Plaintiff's wife is distantly related to the Defendant and her family. The Defendant was required to leave her previous residence in Netajinagar, Wanowrie, Pune and therefore she requested Plaintiff's wife to occupy the suit premises temporarily. Relying on the representation, Plaintiff's wife permitted the Defendant to occupy the suit premises temporarily. This is how Defendant started occupying the suit premises from 9 September 1984. On 24 October 1984, Plaintiff came to Pune and visited the premises along with his wife in connection with the complaint received from their servant who was being prevented from using the bathroom and the lavatory. Plaintiff approached the suit premises and requested the Defendant's children: Wallace, Dorothy and Lincoln not to obstruct Plaintiffs servants from using the bathroom and the lavatory. According to the Plaintiff, children of the Defendant abused and assaulted the Plaintiff. On 28 October 1984, Plaintiff issued notice to the Defendant calling her upon to vacate the suit premises along with her children.

However, Defendant refused to act on the notice and issued a reply claiming that they were tenants of the suit premises.

3) In the above background, Plaintiff instituted Regular Civil Suit No. 2272 of 1984 in the Court of Civil Judge Junior Division, Pune. The Defendant appeared in the Suit and filed Written Statement resisting the same. She claimed having paid amount of Rs.17,500/- to the wife of the Plaintiff towards deposit and claimed monthly tenancy at the rate of Rs.125/-. Based on pleadings, the Trial Court framed the issues and the parties went to trial. Plaintiff examined himself and his wife. The Defendant examined herself and one Maddi Ahmed to prove payment of amount of Rs.17.500/-. After evaluating the evidence, the Trial Court rejected the theory of the Defendant being the monthly tenant and held her to be a mere gratuitous licensee. The Trail Court decreed the suit by judgment and order dated 19 November 1988 directing the Defendant to handover possession of the suit premises within 3 months with further direction for conduct of inquiry into mesne profits from the date of institution of the suit.

4) The Defendant preferred Civil Appeal No. 720 of 1989 before the District Court. By judgment and order dated 2 March 1996, the District Court allowed the appeal setting aside the decree passed by the Trial Court.

5) Aggrieved by the decree of the Appellate Court dated 2 March 1996, the present Appeal has been filed by the Original Plaintiff. By order

dated 19 February 1998, the Appeal has been admitted on following substantial question of law:

“Whether the Appellant proves that the Respondent was allowed to reside in the suit premises as gratuitous licensee.”

6) During pendency of the Appeal, Respondent-original Defendant passed away and her children were brought on record as legal heirs. The legal heir, Wolley Serphis also passed away during pendency of the appeal and accordingly, Mrs. Nagarathnamma Serphis and Mr. Keith Serphis were brought on record. When the Appeal came up for final hearing, this Court noticed that notices to the legal heirs of Respondent No.2 were not issued for want of spare copies. Therefore, this Court directed issuance of fresh notices in addition to private service. Since the service report in respect of the notices issued to Respondent Nos. 2(a) and 2(b) was not received, this Court issued fresh notices to Respondent Nos.2(a) and 2(b) by order dated 14 March 2024. This time, the notices got served on Respondent Nos. 2(a) and 2(b) and there is an office report to that effect. However, this Court once again directed issuance of notices on Respondents Nos. 1, 2(a), 2(b) and 3 by order dated 19 July 2024. Respondent No. 3 was found to be dead and the order dated 9 August 2024 records that Respondent Nos. 1, 2(a) and 2(b) were served with the notice of final hearing of the appeal. However, none appeared on behalf of Respondent Nos. 1, 2(a) and 2(b). One more opportunity was granted to them by deferring final hearing of the appeal by order dated 30 August 2024. Since none appeared, the appeal was heard and closed for orders on

13 September 2024. However, this Court observed by order dated 2 December 2024 that daughter, Dorothy and son-Wallace were not brought on record as legal heirs and clarifications were sought. It was informed to the Court that Mr. Wallace Charles and Respondent No.1-Lincoln Serphis are the same.

7) Mr. Nikte, the learned Counsel appearing for the Appellant has submitted before me that only Respondent Nos. 2(a) and 2(b) are actually occupying the suit premises and therefore he does not desire to bring on record legal heirs of Respondent No. 1. This was recorded by order dated 13 February 2025.

8) The appeal was fixed for final hearing on 1 September 2026 and has accordingly been heard. Though not required, the Appellant has served private notices on Respondent Nos. 2(a) and 2(b) indicating the date of hearing of the appeal as 1 September 2026. The private notices are also duly served on the Respondents. Affidavit of service dated 1 September 2026 to that effect is placed on record. Thus, despite grant of repeated opportunities, none has appeared on behalf of Respondent Nos.2(a) and 2(b), who are reportedly occupying the suit premises. Accordingly, this Court has proceeded with final hearing of the Appeal, which is pending for the last 28 long years.

9) Mr. Nikte, the learned counsel appearing for the Appellant submits that the Appellate Court has grossly erred in reversing the well considered decree of the Trial Court. That the Defendant did not produce

any documentary evidence in support of the claim for creation of tenancy. That the Appellate Court erred in assuming that Plaintiff's wife allowed the Defendant to occupy the premises behind the back of the Plaintiff, who was at Karnataka and that therefore his evidence was irrelevant and only the wife's evidence was relevant. That the Appellate Court unnecessarily raised a query as to why Plaintiff's wife allowed the Defendant to occupy the premises for a temporary period. That the Appellate Court erroneously held that the time gap arrangement after leaving previous premises did not exist. That the Appellate Court erroneously relied on letter at Exhibit 28 for concluding that there was payment of deposit by the Defendant.

10) Mr. Nikte further submits that there is absolutely no proof of payment of Rs.17,500/-. Admittedly, no rent receipt was ever issued by the Plaintiff or his wife. That the defence raised by the Defendant was wholly improbable and was not supported by any evidence. That this is a case of a pure gratuitous license, which is erroneously assumed by the Appellate Court as tenancy. On the issue of jurisdiction, Mr. Nikte submits that Chapter-IV-A1 in the form of Section 26 was introduced in the Provincial Small Causes Court Act, 1887 w.e.f. 1 January 1985, whereas the suit was instituted in the year 1984. That therefore the suit was filed well within the jurisdiction of Small Causes Court. He prays for setting aside the decree of the Appellate Court.

11) I have considered the submissions. I have gone through the findings recorded by the Trial and the Appellate Courts. I have also

perused the evidence, as well as the documents on record. The Plaintiff approached the Trial Court with the case that the Defendant was permitted to use and occupy the suit premises temporarily. On the other hand, it was the Defendant's case that she had been inducted as a tenant in respect of the suit premises upon payment of a sum of Rs.17,500/- and at a monthly rent of Rs.125/-.

12) In the present case, there is no documentary evidence in the form of tenancy agreement or rent receipt. Since the Defendant came with the case of creation of tenancy, the burden was entirely on the Defendant to prove existence of such tenancy. The Trial Court held that the defense of the creation of a tenancy raised by the Defendant was unbelievable and upheld the contention of the Plaintiff that the Defendant had been granted a mere gratuitous license. The Appellate Court has reversed the finding and has accepted the defence of the Defendant of creation of tenancy. Perusal of the findings recorded by the Appellate Court would indicate that it completely misdirected itself while conducting the inquiry. Rather than recording positive findings supported by evidence, the Appellate Court went on raising surmises. To illustrate, in para-13 of the judgment, the Appellate Court has raised a surmise '*the material point is why she has allowed to stay the defendant in the premises for a temporary period*'. On the basis of such an irrelevant question, the Appellate Court proceeded to uphold the defence of creation of tenancy raised by the Defendant.

13) The Appellate Court has grossly erred in ignoring the evidence of the Plaintiff, who is the owner of the suit premises. It is Plaintiff's case that he granted permissive use of the suit premises to the Defendant. However, merely because the Plaintiff was posted at Karnataka and his wife was maintaining and looking after the suit premises, the Appellate Court has totally ignored the evidence of the Plaintiff. This is clear from the following findings in paragraphs 11 and 12 of the judgment of the Appellate Court:

11. The evidence of the wife of the plaintiff and the defendant is most material. Admittedly there is no documentary evidence in the form of agreement in relation to the suit premises. Only the oral evidence of the plaintiff's wife and the defendant is on record.

12. What P.W.2 Damareita, who is the wife of the plaintiff has deposed that previously the defendant was residing in Netaji Nagar, Pune. Defendant requested her to allow her to occupy the suit premises for a period of two months and accordingly she permitted or allowed the defendant to occupy the premises without any charge. As against this, the defendant has deposed that she has occupied the suit premises on 1.9.84 rent of Rs.125/-p.m. Before that she paid Rs.17500/- in presence of D.W.2 Meddi Ahmed, at the house of mother of P.W.2.

14) The above findings recorded by the Appellate Court are clearly unsustainable. Merely because the owner of the premises is posted at outstation in relation to job/occupation/business, it does not mean that he cannot have any personal knowledge about creation of licence. The licence is always granted by the owner. There is nothing on record to indicate that Plaintiff was totally oblivious about presence of the Defendant in the suit premises. That there is no evidence of the Plaintiff's wife solely creating license/tenancy in favour of the Defendant. In my view, therefore, the Appellate Court has grossly erred in discarding the evidence of the Plaintiff and holding that the evidence of the Plaintiff's

wife alone could be taken into consideration. The manner in which the Appellate Court has conducted the inquiry was itself faulty, resulting in recording of egregiously erroneous conclusions.

15) The Appellate Court has rejected the case of the Plaintiff about permitting Defendant to occupy the suit premises as a time gap arrangement by holding in paragraphs 13 and 14 as under:

13. The evidence of the plaintiff's wife shows that she allowed the defendant to stay in the suit premises. for two months, without charge. Admittedly before coming to reside in the suit premises, the defendant was staying in tenanted premises at Netajinagar, Pune. The evidence of P.W.2 shows that the defendant was allowed to stay in the suit premises for a temporary period. The material point is why she has allowed to stay the defendant in the premises for a temporary period. The pleadings of the plaintiff shows that as the defendant and her family members had to leave their earlier tenanted premises they require the premises immediately for residence. By this pleading, the plaintiff means to say that as the defendant was forced or was compelled to leave her tenanted premises and had no other place to stay, she was accommodated for a limited period in the suit premises. Now let us scrutinise this evidence from all possible angles in order to find out whether the case of the plaintiff is regard to permitting the defendant to stay in the suit premises for a limited period is probable or not.

14.It appears from the evidence of the wife of the plaintiff that a time gap arrangement was made and in pursuance thereof, the defendant was temporarily allowed to stay in the suit premises. This sort of time gap arrangement takes me to the circumstances existed before occupying the premises by the defendant. The inquiry in regard to those circumstances in necessary in order to find out whether there existed circumstances which required the plaintiff's wife to make a time gap arrangement for the residence of the defendant being her sister, Nowhere it has come in the evidence of the plaintiff's wife that the defendant had to vacate the premises suddenly and no place to stay and therefore, she being a sister was required to make an time gap arrangement for the residence of the defendant. If at all such was the case or the case that the defendant before occupying the premises had no roof over her head and no suitable place for residence, then allowing the defendant to stay in the suit premises for a limited period would be a probable . Thus I find that the

circumstances leading to make a time gap arrangement for the residence of the defendant in the suit premises are totally missing.

16) The above findings are again perverse to the core. The Appellate Court has gone on the principle of probabilities for the purpose of holding that there was no possibility of permitting the Defendant to occupy the suit premises as a time gap arrangement. In my view, whether there was a time gap arrangement or not is totally irrelevant. The Defendant's reason for entry into the premises may also not be of much relevance so long as it is established that a gratuitous license was granted. In absence of existence of any document and in the light of defence raised by the Defendant about creation of tenancy, the Appellate Court was only required to verify whether the tenancy was indeed created or not. Why and how the Defendant was put in occupation is not of much relevance. If there is a rent receipt or a rent agreement or concrete evidence of creation of tenancy, the purpose for which entry was made in the premises takes a back seat. The relevant inquiry is about grant of license or creation of tenancy.

17) Coming to the aspect of defence of the Defendant about creation of tenancy, it appears that no positive finding is recorded by the Appellate Court that Defendant was inducted as tenant. Without recording a positive finding as to whether Defendant is a tenant, the Appellate Court has proceeded to discard the theory of gratuitous license by invoking the principles of probabilities. Once again, it is held in paragraph 16 of the judgment as under :

16. There is not a single circumstance on record to show that the defendant was compelled to vacate her earlier premises and because of that she was required to take help from the Plaintiff's wife in regard to her residence. In the absence of this circumstance, it is improbable that the defendant would go for time gap arrangement. Similarly, there is no circumstance on record to show that the defendant had decided to shift herself outside Pune. Therefore, time gap arrangement was made. If that is so, then the defendant had intention to stay permanently at Pune. Assuming that the defendant decided to vacate her tenanted premises and particularly when she had intention to stay in Pune itself, then normally she would go for a place where she can stay for number of years to come. The normal and natural conduct of any person, who is required to vacate the tenanted premises, would be to find out a place where he or she can stay for number of years to come. The said person would not normally go for time gap arrangement. Considering the probabilities from this angle, it is improbable that the defendant would go for this time gap arrangement and further would agree to stay in the suit premises for a temporary period and that too for two months. For this reason, I find that the case of the defendant that she agreed to take the suit premises on rent becomes more probable.

18) Coming to the document in the form of letter at Exh-28, the same is relied upon by the Defendant to prove payment of amount/deposit of Rs.17,500/-. I have gone through the said letter and the same does not indicate in any manner that Rs.17,500/- was paid to the Plaintiff or his wife towards deposit. The evidence of the witness, Gajanan Balkrishna Dabhade, also does not establish any nexus between the refund of the deposit of Rs.20,000/- by him and the alleged payment of Rs.17,500/- to the Plaintiff. Gajanan Balkrishna Dabhade was apparently the landlord in respect of the premises earlier occupied by the Defendant. He was examined to prove that he had returned deposit of Rs.20,000/- for the purpose of proving that Rs.17,500/- out of the same were paid to the Plaintiff. However, mere return of deposit by Mr. Dabhade does not automatically prove demand of Rs.17,500/- by the Plaintiff. The letter at Exh-28 refers to earlier 'landlady' who owned the flat, whereas Mr.

Gajanan Dabhade is a gentleman. Thus, Exh.-28 does not support the attempt on the part of the Defendant to link the said letter with the deposit allegedly refunded by Mr. Dabhade. Even otherwise, Mr. Dabhade has contradicted himself by admitting that he had not issued any rent receipts to the Defendant. He was not even able to state the name of the Defendant but was able to identify her by her face. Thus, admissions in the cross clearly makes evidence of DW4- Gajanan Balkrishna Dabhade unbelievable.

19) Defendant also examined Mr. Maddi Ahmad to prove that Rs.17,500/- was paid to the Plaintiff in his presence. However, while cross examination the Plaintiff or his wife, suggestion was never put to them that Mr. Maddi Ahmad was present at the time of payment of deposit of Rs.17,500/-. The witness was subsequently introduced to fill up the gaps in the evidence. When Defendant did not make a suggestion to Plaintiff's witness about presence of Maddi Ahmad at the time of alleged deposit of Rs.17,500/, introduction of D.W.2 clearly appeared to be an afterthought. D.W.2 in his deposition stated that he was a family friend, which suggestion was denied by D.W.1. This contradiction makes the evidence of D.W.2 unbelievable. Furthermore, D.W.2 himself claimed that he was residing in Plaintiffs bungalow. The Trial Court had rightly held that when the case involved close relatives dealing with alleged transaction, presence of D.W.2 (*complete stranger*) was quite unnecessary. Thus, the evidence of D.W.2-Maddi Ahmad does not inspire confidence.

20) In my view, once the Defendant attempts to demolish the claim of gratuitous licensee by setting up a theory of creation of tenancy, the entire burden is on the Defendant to prove such defence. For proving creation of tenancy, proof of payment of rent is must. Additionally, one must also produce additional supporting documents such as tenancy agreement etc. However, in absence of tenancy agreement also, creation of tenancy can be inferred if payment of rent is proved. Ordinarily, the best document to prove tenancy is to produce the rent receipts. In a case where landlord deliberately does not issue rent receipts, payment of rent can be proved by other means such as money order, cheque, bank statements etc. In rare circumstances, where the documentary evidence does not exist to prove payment of rent, such payment can also be proved by leading oral evidence of witnesses.

21) In the present case, there is no iota of evidence that Defendant ever paid rent to the Plaintiff. The Defendant thus thoroughly failed to prove creation of tenancy. Mere attempt made to prove payment of Rs.17,500/- is not sufficient. What must also be proved is that the rent was demanded and the rent was paid. In the present case, even payment of deposit is not proved by the Defendant. Thus, the Defendant has thoroughly failed to prove her defense of creation of tenancy.

22) The first Appellate Court erred in not appreciating the position that failure to prove creation of tenancy, automatically proves the case of creation of gratuitous license. There is no denial to the fact that Defendant is related to Plaintiff's wife. If the case does not involve

creation of tenancy, the same would naturally involve the case of permissive use granted by one relative to another. Without appreciating this position, the Appellate Court went on believing the theory of probabilities and disbelieved the case of the Plaintiff of grant of gratuitous license. In my view, Plaintiff clearly proved permissive use by the Defendant in respect of the premises. She had no authority to remain in possession of the suit premises, the moment gratuitous license, as well as permission was withdrawn. Her continued presence in the premises, after withdrawal of the permission/licence, amounted to unauthorized occupation. The Trial Court had rightly decreed the suit of the Plaintiff and the Appellate Court has egregiously erred in reversing the decree of the Trial Court by recording findings, which are clearly unsustainable.

23) The issue of jurisdiction was not involved either before the Trial Court or before the first Appellate Court. Mr. Nikte, has sought to clarify the issue of jurisdiction since the law has been subsequently developed where only a Court of Small Causes can decide the issue of eviction of a gratuitous licensee. Chapter-IV-A1 was inserted in the Provincial Small Causes Court Act, 1887 w.e.f. 1 January 1985 i.e. after the date of institution of the suit. Under Section 26 of the Amended Act, the suits between licensor and licensee for recovery of possession of immovable property now lie before the Court of Small Causes Court. However under Section 26C, it was provided that all suits cognizable by the Small Causes Courts under Chapter-IV-A1 pending in Civil Courts shall be continued and disposed of by the Civil Courts. This Court subsequently clarified in **Prabhudas Damodar Kotecha Versus.**

Manharbala Jeram Damodar and ors.¹ that the Presidency Small Causes Court Act, 1882 gives the Small Causes Court exclusive jurisdiction to entertain eviction suits filed by a licensor against a gratuitous licensee. In the present case, since the suit was instituted before coming into force of the Amending Act, in my view, the jurisdiction is rightly exercised by the Civil Court.

24) The question of law is accordingly answered by holding that the Plaintiff has proved that Defendant was permitted to reside in the suit premises as a gratuitous licensee.

25) Appeal accordingly succeeds and I proceed to pass the following order:

- (i) Judgment and decree dated 2 March 1996 passed by the 9th Additional District Judge, Pune in Civil Appeal No. 720 of 1989 is set aside.
- (ii) The decree of the Trial Court dated 19 November 1988 passed in Regular Civil Suit No. 2272 of 1984 is confirmed.

26) The Appeal is **allowed** with costs in above terms.

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[SANDEEP V. MARNE, J.]

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