

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 730 OF 2014
WITH CA/13110/2014 IN SA/730/2014

SUNIL JAWARILAL KOTECHA
VERSUS
VIJAY SUGANCHAND LODHA

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Advocate for Appellant : Mr. Bhokarikar Madhav M
Mr. S.B.Yawalkar, Adv. For Respondent.

CORAM : R.G.KETKAR, J.
DATE : 24th December, 2014.

PER COURT:

1) Heard Mr. M.M.Bhokarikar, learned Counsel for appellant and Mr. S.B.Yawalkar, learned Counsel for Respondent, at length.

2) By this appeal under Section 100 of Code of Civil Procedure, 1908 (for short, C.P.C.), original defendant has challenged the judgment and decree dated 27th June, 2007 passed by learned Joint Civil Judge, Junior Division, Jamner in Regular Civil Suit No. 82/2002 as also judgment and decree dated 18th May, 2013 passed by learned District Judge-1, Jalgaon in Regular Civil Appeal No. 246/2007. By these orders, the courts below decreed the suit instituted by the respondent (hereinafter referred to as plaintiff) for recovery of possession of two shops from Shopping complex bearing village panchayat house No. 1119/1, as more

particularly described in para 1 of the plaint (for short suit premises). The courts below directed the appellant (hereinafter referred as defendant) to deliver possession of the suit premises to the plaintiff within 60 days from the date of the order. The courts below further directed the defendant to pay Rs.15,400/- towards arrears of rent for the period 1.10.2000 to 31.7.2002 with interest @ 6% p.a.

3) In support of this appeal, Mr. Bhokarikar submitted that the defendant is tenant of the suit premises and the said fact is not in dispute. The plaintiff claims to be a landlord. There is no dispute about the description of the suit premises. There is also no dispute that the suit premises was let out to the defendant by late Parasmal. Parasmal died on 29th May, 2000 leaving behind, Rajkuwarbai, his widow as sole legal representative. The plaintiff claimed to be owner on the basis of Will executed by Parasmal in his favour. He submitted there was dispute about ownership between Parasmal's widow Rajkuwarbai and the plaintiff. Plaintiff issued a notice on 22.06.2002 terminating w.e.f. 31st July, 2002. He submitted that, the Courts below committed serious error in decreeing the suit as the plaintiff is not owner/landlord. Rajkuwarbai is the only heir of the Parasmal. The notice issued by the plaintiff is, therefore illegal. This aspect was not considered properly by the Courts below. He further submitted that, plaintiff did not lead sufficient evidence to prove his title. Plaintiff must stand or fall by his case.

4) Mr. Bhokarikar further submitted that, the suit is bad for non joinder of necessary party namely; Rajkuwarbai. He submitted that, in fact, specific assertion was made in the written statement that suit is bad for non joinder of necessary party i.e. Rajkuwarbai and, therefore, is liable to be dismissed. However, no issue was framed in that regard. The Courts below did not properly consider the pleadings. The Judgments rendered by the Courts below are perverse.

5) He further submitted that, tenancy was yearly tenancy and on this ground also notice to quit the suit premises is illegal. In the present case, notice was issued on 22.06.2002, terminating the tenancy w.e.f. 31st July, 2002. He submitted that, the parties are governed by the provisions of Transfer of Property Act, 1882 (for short 'Act'). Since the tenancy is the yearly tenancy, the notice, which is less than six months is vitiated.

6) He relied upon Order 20 Rule 1 of C.P.C. and submitted that the learned District Judge delivered the Judgment on 18th May, 2013, i.e. during Summer Vacation. He therefore submitted that, the decision of the District Court is a nullity. He submitted that, the appeal raises substantial question of law and, therefore, requires consideration.

7) In support of his submissions he relied upon

following decisions, -

I) Anil Rai Vs. State of Bihar – AIR 2001 SC 3173, and in particular head note I thereof.

II) Kashmirsingh Vs Harnamsingh and anr – AIR 2008 SC 1749, to contend that the general rule is that the High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. 'Decision based on no evidence', not only means cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

III) Boodireddy Chandraiah and Ors. Vs. Arigela Laxmi and Anr. – AIR 2008 SC 380., to contend that to be substantial a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.

8) On the other hand, Mr. Yawalkar supported the impugned orders. He submitted that, after appreciating evidence on record, the Courts below have concurrently decreed the suit. The findings recorded by the Courts

below are based upon appreciation of evidence on record. He therefore submitted that, no case is made out for invoking powers under section 100 of C.P.C.

9) It is not possible to accept these submissions. In the first place, suit premises were let out for commercial purposes, namely; shop premises. The learned Trial Judge has considered this aspect in paragraph 6. Learned Trial Judge observed that, lease of the immovable property in question in the present suit is neither for agricultural nor for manufacturing purpose, but it is for commercial purpose namely; sell of goods, it falls within the ambit of subsequent part of Section 106 of the Act i.e. lease for any other purpose. The tenancy of immovable property for any other purpose is monthly by operation of law, whereas it could be yearly only if parties by their choice enter into a contract to the contrary or by local law or usage to the contrary. The defendant has not invoked local law or usage, but claims to be yearly tenancy on the basis of contract entered with deceased Parasmal. Learned Trial Judge considered the evidence of defendant and observed that, defendant did not establish that the contract was for yearly tenancy between him and Parasmal. He did not examine any witness in support of his plea of yearly tenancy. The learned Trial Judge therefore, held that the tenancy was monthly tenancy.

10) As far as appellate Court is concerned this aspect was considered in paragraph 11 of the Judgment.

The learned District Judge also considered that, defendant during cross-examination, admitted that there was agreement to pay monthly rent of Rs.700/-. The admission of defendant supports the case of plaintiff about monthly tenancy. I, therefore, do not find that, the notice dated 22nd June, 2000 is bad on this count.

11) Mr. Bhokarikar submitted that, plaintiff has no locus to maintain the suit as he is neither landlord nor owner. Notice to quit is, therefore, illegal. The Courts below committed error in decreeing the suit on that basis. It is not possible to accept the submission also. In paragraph 4 of the written statement, defendant admitted that, in view of compromise between Rajkuwarbai and plaintiff, plaintiff is sole owner of the suit premises. It was further observed defendant was claiming adjustment of outstanding amount against plaintiff towards rent. That apart, plaintiff had issued a notice of attornment at Exhibit 50, wherein it was mentioned that, after death of Parasmal plaintiff became landlord by virtue of will executed by Parasmal, Defendant admitted in his cross-examination about his signature at Exhibit 51, which is a notice issued by plaintiff to defendant wherein it was specifically mentioned that, dispute between plaintiff and Rajkuwarbai was settled and the plaintiff was entitled to recover the rent. The Courts below, after appreciating evidence on record, have concurrently held that, there is relation ship of landlord and tenant. I, therefore, do not find any merit in this submission.

12) Mr. Bhokarikar further submitted that, the suit is bad for non-joinder of necessary parties as Rajkuwarbai was not made party to the suit. He submitted that, though specific case was made out in the written statement, no issue was framed on that basis. As Rajkuwarbai was not made party, the Courts below ought to have dismissed the suit on the ground of non-joinder of necessary party. I do not find any merit in this submission as well. Basically, plaintiff is a landlord of suit premises and, therefore, he has locus to maintain the suit. That apart, though defendant averred that suit is bad for non-joinder of necessary party, no issue was framed. Nothing precluded the defendant from applying to the trial court for recasting the issue, including that of non-joinder of necessary party. No such application was made. In view of Order 1 rule 13 of C.P.C., it has to be held that defendant has waived objection of non-joinder of necessary party. In any case, I do not find that the suit is bad for non-joinder of necessary party. As the plaintiff is the landlord of the suit premises and being one of the owners, he can maintain the suit.

13) Mr Bhokarikar submitted that, the learned District Judge had delivered the judgment during Summer Vacation i.e. on 18th May, 2013, and therefore, it is contrary to Order 20 Rule 1 of C.P.C. and is therefore liable to be set aside. He submitted that, provisions of Order 20 Rule 1 are mandatory and failure to comply this provision will render the judgment nullity. It is not possible to accept this submission. Order 20 Rule

1 of C.P.C. lays down, after the case has been heard, the Court shall pronounce judgment in open Court, either at once, or as soon thereafter as may be practicable and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders. Mr. Bhokarikar was unable to point out any fault in the judgment based on Order 20 Rule 1 of C.P.C. I, therefore, do not find any merit in the submission.

14) As noted earlier, the Courts below, after appreciating evidence on record have concurrently decreed the suit. The defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence and that they are contrary to the evidence on record. The defendant was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. It is also not demonstrated by the defendant that the findings recorded by the Courts below are ignoring material evidence or that the Courts below have drawn wrong inference by applying the law erroneously. In view thereof, the appeal does not raise any question of law, much less substantial question of law. The appeal fails and is accordingly dismissed.

15) In view of dismissal of appeal, Civil Application No. 13110/2014, for stay does not survive and the same is disposed of.

16) At this stage, Mr. Bhokarikar orally applies for stay of this order for eight weeks from today. He assures that, the appellant and all the adult family members using the suit premises will file usual undertaking in this Court within two weeks after serving a copy thereof on other side, incorporating therein that -

- (I) they are in possession of the suit premises and nobody else is in possession,
- (II) they have neither created third party interest nor parted with possession,
- (III) they will hereinafter neither create third party interest nor part with possession,
- (IV) they will clear all the arrears of rent, if any, within four weeks from today,
- (V) in case, they are unable to obtain suitable orders from higher Court within eight weeks from today, they will hand over vacant and peaceful possession to the plaintiff.

17) In view thereof, notwithstanding dismissal of the appeal, subject to the appellant filing undertaking in the aforesaid terms within stipulated period, after service of copy on the other side in advance, decree of eviction shall not be executed for a period of eight weeks from today.

18) It is made clear that in case the appellant fails to file the undertaking within stipulated period and/or commits breach of any of the conditions of the undertaking, respondent-plaintiff will be at liberty to

proceed with execution of the decree. Order
accordingly.

(R.G.KETKAR, J.)

bdv/