IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1079 OF 1991
WITH
CIVIL APPLICATION NO.5244 OF 1991
IN
FIRST APPEAL NO.1079 OF 1991

John Joseph George … Appellant/Applicant (Org.Plaintiff)

vs.

Shahjad Khan & Anr. … Respondents (Org.Defendants)

Mr. V. S. Kapse with Mr. Pramod Kathane, Ms.Tejashree Gawde and Mr.Kunal Rane i/by Mr.Pramod Kathane, for the Appellant/Applicant.
Mr. G.C.Singh a/w. Ms. Sweta Singh for Respondent No.1.
Mr. N.B.Khan for Respondent No.2.

CORAM : MRS.MRIDULA BHATKAR, J.
DATE : 10th SEPTEMBER, 2015.

ORDER

. In this First Appeal, the Judgment and order dated 20th March, 1991 passed by the Principal Judge, City Civil Court, Bombay in Small Causes Suit No.4547 of 1987 is challenged. The original Plaintiff/Appellant has filed the suit for declaration and injunction against the Defendant Nos. 1 and 2, who are the present respondents. As per the case of the original Plaintiff/Appellant, he is a absolute owner of the property, i.e., a house situated on plot bearing C.T.S. No.982, Ward No. K-11119, situated at Marol Village, Andheri (East), Bombay (hereinafter referred to as the “Suit Property”). Defendant No.3 Mr. Oswald George is the real brother of the original Plaintiff/Appellant, who was taking care of the house of original Plaintiff/Appellant on or about 27th May, 1987.

2. The original Plaintiff/Appellant, who was staying in Dubai, was informed that some third persons have occupied his suit house and thereby he rushed immediately to India on 31st May, 1987 and found that Defendant Nos.1 and 2 were occupying the suit property. So, after enquiry, he lodged a complaint on 4th June, 1987 with M.I.D.C. Police Station at Andheri against the respondents/Defendant Nos.1 and 2 for the offence of house breaking and trespass. The police removed the Defendants from the suit house and after the original Plaintiff/Appellant filed a suit for declaration and injunction that the Defendants have no right, title and interest in respect of the suit property and thereby, they have no right to interfere with the suit house for occupation. He prayed for permanent injunction against the Defendants, their servants and agents from trespassing/ dispossessing in any manner. It is also the case of the appellant/original Plaintiff that the suit property has been inherited to

him & his brother/Defendant No.3 and his two sisters after the death of their mother. The original Plaintiff/appellant was doing a job at Dubai and so he was residing there continuously for many years, and used to visit India intermittently. In February 1987, Defendant No.3 i.e. brother of original Plaintiff/Appellant and his two sisters executed a Release Deed in favour of the appellant in respect of the suit property. They relinquished their right in the suit property and thus the appellant/original Plaintiff claimed that he became an absolute owner of the suit property.

3. All the Defendants and contesting Defendant Nos.1 and 2 appeared and all of them filed their written statements. According to Defendant Nos.1 and 2, Defendant No.3 had put them in possession of the suit property as monthly tenants by executing a tenancy agreement dated 1st September, 1981, so also Defendant No.3 has issued many rent receipts of the suit property in favour of the Defendant Nos.1 and 2. Defendant Nos.1 and 2 thus claimed that they are in possession of the suit property since September, 1981 and, therefore, no such prayers can be granted in favour of the original Plaintiff/Appellant. The learned trial Judge framed issues. The original Plaintiff/Appellant adduced his evidence alongwith his

sisters and Defendant No.3 stepped into the box as a witness for the original Plaintiff/Appellant. The Defendants also adduced their evidence. The documents were produced by the original Plaintiff/Appellant and the Defendants. After assessing oral as well as documentary evidence on record, the learned trial Judge dismissed the suit. Hence this Appeal.

4. The learned counsel for the original Plaintiff/Appellant Mr. Kapse has submitted that the appellant was working in Dubai since 1976 and Defendant No.3, who is his real brother, along with his two sisters executed Release Deed on 11th February, 1987 in favour of the appellant. As all the siblings had relinquished the rights, the original Plaintiff/Appellant became the owner of the suit property. However, as he was having job in Dubai immediately thereafter on 14th February, 1987 he went to Dubai. At that time, he appointed his brother/Defendant no.3 as a caretaker of the suit property. On 27th May, 1987 he received a message that some people have encroached the suit property. Therefore, on 31st May, 1987 he returned to India. He found Defendant Nos.1 and 2 residing in the suit property. He took immediate steps of lodging F.I.R. with the Police Station on 4th June, 1987. The police arrested Defendant

Nos.1 and 2 on 10th June, 1987 and gave notice under section 145 of the Cr. P.C. to the Defendant Nos.1 & 2, and evicted the Defendant Nos.1 and 2 from the suit property. The claim of the original Plaintiff/Appellant in respect of the ownership and the possession was found valid. Thereafter the appellant/original Plaintiff filed suit bearing Small Causes Suit No.4547 of 1987 in the month of June, 1987 for declaration and perpetual injunction. He submitted that during the pendency of the suit, a Court Receiver was appointed by the trial Court and Defendant Nos.1 and 2 were appointed as the agents of the Court Receiver. He submitted that the learned trial Judge has erred in observing that the police did not follow the law. He argued that the Court Receiver continued as a stop gap arrangement, though the appellant was having legal possession of the suit premises. He argued that the learned Judge has committed an error in not taking into account Release Deed dated 11th February, 1987 and not holding the appellant as an absolute owner of the suit property. He further submitted that the learned Judge has erred in believing the tenancy agreement between Defendant Nos.1 and 2 and his brother/Defendant No.3 dated 1st September, 1981. The documentary evidence ought to have been discarded by the trial Court and so also he should have appreciated and ought to have been given proper weightage to the evidence of Defendant No.3, who has deposed as a witness for the original Plaintiff/Appellant. He argued that rent receipts are produced, which are marked as Exhibit (4) collectively, however, these rent receipts are bogus. The report of Handwriting Expert ought not to have been relied by the trial Judge. He submitted that in the evidence, Defendant No.3 denied his signature on the tenancy agreement and so also on the rent receipts. Therefore, these documents ought not to have believed by the learned Judge of the trial Court. He further submitted that the original Plaintiff/Appellant was having the possession of the suit property, the learned Judge ought to have allowed the relief of declaration and perpetual injunction in favour of the original Plaintiff/Appellant. The Judgment and order passed by the learned Judge of the trial Court needs to be set-aside.

5. The learned counsel Mr. Singh for Respondent No.1 and the learned counsel Mr. Khan for Respondent No.2 have supported the Judgment of the learned Principal Judge of the City Civil Court, Mumbai. The learned counsel for respondent No.1 submitted that the prayer in the suit are faulty. The suit is based on the assumption of the possession of the original Plaintiff/Appellant, which is entirely

factually incorrect position. When the appellant filed the suit, he was not in possession of the suit premises and therefore he cannot pray for declaration and injunction in respect of the suit premises. Whereas he submitted that respondent Nos.1 and 2 are in possession of the suit premises. On account of the tenancy created in favour of them by Defendant No.3, they further argued that the tenancy agreement is rightly believed and the report of Handwriting Expert is on record and marked as Exhibit 'C-1', wherein it is held that the natural signature of Defendant No.3 Mr.Oswald George and the signatures appearing on the tenancy agreement and the rent receipts are of one and the same person. Therefore, the finding of the learned Judge based on the tenancy agreement and the rent receipts that the Defendants were in possession of the suit premises is correct and legal.

6. The learned counsel for Respondent No.1 has further submitted that Release Deed of 12th February, 1987 cannot be considered in evidence because it is unregistered document. He relied on sections 17 and 49 of the Registration Act, 1908. He submitted that by this Release Deed, Defendant No.3 and other two sisters of the Appellant have relinquished their respective rights in the

suit property in favour of the appellant, so it amounts to transfer of immovable property in favour of the appellant. Under these circumstances, under section 17 of the Registration Act, the documents need to be registered. Section 49 of the Registration Act puts a bar on accepting and reading such unregistered document in the evidence. Hence, the learned trial Judge has rightly not considered the said document in evidence. Mr. Khan, the learned counsel for respondent No.2 submits that Defendant No.3 was having Power of Attorney of his brother i.e. Appellant, therefore the original Plaintiff/Appellant should not have right to file the suit and hence, the appeal should fail.

7. The points of determination are framed as follows:

(i) Whether the trial Court has erred in not declaring the respondents/defendants as trespassers.

(ii) Whether the trial Court has committed any error in holding defendant nos. 1 and 2 as tenants.

(iii) Whether the possession of the suit premises can be given to the appellant?

8. While deciding these points, it is necessary to look into two

documents on which case of the original plaintiff and the defence of the defendants stand. The appellant has relied on the release deed i.e. Exhibit A. It is the case of the appellant that his siblings, i.e., defendant no. 3/brother and two sisters, relinquished their right in the suit property by executing release deed dated 11th February, 1987. This was produced before the Court. However, the learned trial Court refused to look into the said document mainly on the ground that release deed is not registered and in view of sections 17 and 49 of the Registration Act, this cannot be read in evidence. The submissions of learned counsel Mr. Kapse for the appellant that as the trial Court has not acted pursuant to Section 33 of the Bombay Stamp Act are not convincing. In support of his submissions, he has relied on the ruling of Bombay High Court in the case of **Arjun Sitaram Nitinwar vs. Rama Sakharam Parad & Ors., reported in 2014 (2) Mh. L.J. 390** in which a development agreement was executed, however, the document was not duly stamped and therefore, it was held that the Court before whom the document was produced, is required to impound the document if it is not duly stamped and send it to the authority for adjudication. In the said case, the Court has also observed that the part of the order where the trial Court held the document to be inadmissible in evidence on account of its non-registration, cannot be faulted with. Admittedly, after going through the evidence of PW-1 George, though he has stated about his right as an absolute owner in the suit property, he did not give any reason for its non-registration. In his evidence, he has stated that his brother and sisters on 11th February, 1987 had executed the release deed in his favour and though it was lodged for registration, he did not receive it back. He also produced the receipt of the lodging for registration. It appears that since 1987 though there was nothing from the office of the Registrar, the appellant did not care much for getting it registered or finding out what objections were raised in respect of non-registration. There can be other reasons or objections for non-registration of the document and deficit stamp can be one of them. Though the appellant did not lead evidence to that effect especially on the point of objections, therefore, it is not correct to jump on the conclusion that deficit stamp was the only reason for non-registration of the document and therefore, though steps were not taken by the Court of impounding the document under section 33 it cannot be said that it was an error committed by the trial Court. It was necessary on the part of the appellant to lead evidence in respect of objections of non-registration and show his willingness to pay deficit stamp fees and then the Court would have taken the steps. I am of the view that the trial Court has rightly considered the provisions of sections 17 and 49 of the Registration Act which unambiguously state that a document which requires registration, if not registered, cannot be read in evidence by the Court.

9. Besides, the release deed, though the appellant cannot prove that he is the absolute owner, other evidence, i.e., his sisters' and brother's evidence is required to be considered and the possession was handed over to him in the year 1987 cannot be disputed. The sister of appellant Vini D'mello PW-2 has stated that those all sisters and brother relinquished 1/4th share of each of them in favour of plaintiff and thus, the plaintiff became a full owner. Further she stated that after exclusive possession was given to the appellant, he locked the house and left for Dubai in February, 1987. There is also evidence of defendant no. 3 Oswal George and he adopted the evidence of plaintiff and expressed that he has nothing to add. Therefore, it shows that evidence of these two witnesses corroborate the evidence of plaintiff on the point of execution of the release deed and they have relinquished their right in favour of appellant. Under such circumstances, though the release deed itself cannot be read in

evidence, the evidence of sister and brother corroborate the evidence of appellant and this ought to have been taken into account by the trial Court to its entirety. This evidence shows that the appellant was in exclusive possession of the suit premises when he left for Dubai. Thus, when the appellant was in absolute possession of the suit premises and there is no evidence to show that the defendants got tenancy or they were in possession in any manner by the appellant. There is no conferment of Power of Attorney by plaintiff to defendant no. 3 in respect of suit premises. Defendant no. 3 was also not having any power to dispossess the plaintiff by creating tenancy in favour of any party. The occupation of the suit premises by the defendants is not legal either as a tenant or as a lawful occupier.

10. The defendants case is based on the Tenancy Agreement, which is marked as Exhibit 2. Defendant nos. 1 and 2 claim possession through defendant no. 3, who is the brother of plaintiff. In the evidence, defendant no. 2 has stated that defendants are in possession of the suit premises in 1981. Sherali Khan, son of defendant no. 2, who stepped in the witness as power of attorney holder of defendant no.2, deposed that he was residing in the suit

house along with defendant no. 1 Shahjad Khan since 1st September, 1981 as a tenant and defendant no. 3 Oswal George gave the premises to them on tenancy and then Agreement of Tenancy dated 1st September, 1981 is relied. The witness produced rent receipts which are marked collectively as Exhibit 3, 4 and 5. The Trial court has accepted this Tenancy Agreement and I am of the view that the trial Court has committed a mistake in believing this document as genuine. This document is disputed by the appellant and defendant no. 3 i.e. Oswal George. Though Oswal George has taken a different stand in his oral evidence than this written statement before the Court, he denied the execution of this Tenancy Agreement. It appears from the evidence that defendant no. 3 was addicted to drinking and he was employed with defendant nos. 1 and 2 and by taking advantage of the situation, defendant nos. 1 and 2 put themselves in the suit premises. It appears that it is a case of forcing tenancy on defendant no. 3. The learned Judge has called the evidence of handwriting expert. The report of handwriting expert dated 5th October, 1989 is marked as Exh. C-1. In paragraph 34 of the judgment it is observed that the signatures disputed by defendant no. 3 on various documents and the signatures which are natural signatures of defendant no. 3 are of one and the same person. It is true that on record, the appellant has not challenged the report of handwriting expert, however, the Court is not bound to accept and rely each and every document though it is not challenged by the other side. The fact of tenancy agreement itself is under challenge. Defendant no. 3 on oath has denied his signature on this Tenancy Agreement. Under such circumstances, it is necessary for the trial Court to minutely peruse the Tenancy Agreement, i.e., disputed signatures of defendant no. 3 and his natural signatures which are appearing on the release deed. The signatures of defendant no. 3 is available for the Court for comparison. When I perused the signatures of defendant no. 3 appearing on the Tenancy Agreement so also on the rent receipts and compared it, one can easily with naked eyes mark difference between the signatures. The signature on the release deed and other documents and disputed signature on the tenancy agreement are completely different. Such comparison is permitted under section 73 of the Indian Evidence Act, 1872. The Agreement claiming the tenancy from 1st September, 1981 is a bogus document especially in the light of evidence of witness PW-3 i.e. sister Vini who has stated that she herself, her sister and brother have relinquished the right by executing release deed in favour of appellant in 1987. She also mentioned that her brother locked the house thereafter in February, 1987 and left for Dubai. Her evidence is found absolutely reliable and on this background and especially when the signature on the Tenancy Agreement and other natural signatures do no match, I am of the view that the trial Court has committed an error in accepting this document as genuine and true by relying on the report of handwriting expert. Handwriting expert was not put in box. He has given report under section 45 of the Evidence Act. It is upto the Court to accept or reject the evidence of the expert depending on its inbuilt credit. It is not binding on the Court to accept the experts opinion when Court has doubt that the evidence is not creditworthy. Science of handwriting is not a perfect science and handwriting expert who gave the report is not put in the box. The rent receipts also, therefore, cannot be relied. Exhibit 3 is one rent receipt of 1981. Exhibit 4 collectively are the rent receipts of the year 1987 and Exhibit 5 collectively are the rent receipts of years 1981 and 1987. In between, no receipts of any year are produced. The signatures of Oswal George/defendant no. 3 appearing on these receipts vary from each other and this evidence of tenancy, therefore, ought to have been discarded toto as it is not at all creditworthy. Thus, the learned trial Court has committed error in accepting these persons as tenant and that is also from 1981. I hold that they are not tenants but they are rank trespassers. As mentioned earlier, defendant no. 3 was working with defendant nos. 1 and 2. He was addicted to drinking and by taking advantage of the situation, defendant nos. 1 and 2 have forced this tenancy and put themselves in possession of the suit premises keeping plaintiff/appellant in dark.

11. Admittedly, the appellant was not residing here but he was in Dubai. He went to Dubai in February, 1987. When he learnt on 29th May, 1987 about somebody entered in the room, he immediately came to India on 31st May, 1987 and visited the suit premises. He found that defendant nos. 1 and 2 and his family in the suit premises, so he gave complaint to police station and initiated action under section 145 of the Cr. P.C. In the record, there is a show cause notice sent to the defendants by Magistrate, as they initiated action under section 145 of Cr. P.C. However, no record is produced before the trial Court as to what order was passed by the learned Magistrate in the said proceedings. Under such circumstances, the action of the police taking possession of the suit premises cannot be justified.

12. In the suit, the plaintiff has not prayed for possession of the suit premises but has prayed only declaration that he is the owner of the

suit premises and injunction against the defendants. In order to grant injunction that the defendants shall not obstruct and disturb the possession of the plaintiff in respect of suit premises, it is necessary for the plaintiff to prove his possession of the suit premises. In the present case, though the defendants are in possession, as per this Court, they were illegaly in possession, as they are trespassers. It is also necessary to mention that on 11th February, 1987 the siblings of the plaintiff put him in possession of the suit premises, at the relevant time, he exclusively was in possession of the suit premises and the possession of the suit premises was not taken from him by the defendants legally but they have forced themselves in the suit premises. Therefore, there is no such tenancy. The plaintiff is to be declared as a person having exclusive possession of the suit property being co-sharer. If release deed is duly stamped and registered, then that is to be recognized and he becomes an absolute owner. There is no prayer of possession in the suit. It is not a suit under section 6 of Specific Relief Act. This is the suit for declaration and injunction. A declaration as having exclusive possessory right in the suit is to be granted to the plaintiff, similarly, the defendants are declared as trespassers, however, as the appellant failed to show the possession, injunction cannot be granted. The learned counsel has submitted that under Order 41 Rule 33 of the Code of Civil Procedure, this Court is empowered to grant relief more than the trial Court has granted. This position of law cannot be disputed. In the case of **Arumugha Gounder vs. Ardhanari Mudaliar, reported in AIR 1975 231**., a receiver was appointed by the Court. It was a matter of tenancy where the respondents were put in possession by the Court Receiver as a cultivating tenant under Tanjore Pannaival Protection Act of 1953. The Court receiver has given the possession to the tenant. The Full bench laid down the ratio that the whole purpose of the Court taking possession through the Receiver appointed by it is to protect the property for the benefit of the ultimate successful party and that is the essence and purpose of appointment of a Court receiver. Though the said ruling is binding but it cannot be helpful in the present case because there is no prayer for possession in the suit itself and moreover, the possession of the suit premises was admittedly taken by the respondents by force before the suit was filed. The case of the plaintiff that at the time of filing of the suit, he resided in the suit premises or was in the possession of the suit premises cannot be believed. The Court Receiver's report dated 13th June, 1987 discloses that the family members and other household items of defendant nos. 1 and 2 were found in the suit premises along with plaintiff's articles. Under such circumstances, the First Appeal is partly allowed. On the point of declaration as exclusive possession of the appellant as a co-owner is granted, the defendants/respondents are declared as a trespassers, however, no injunction is granted.

13. The original documents, i.e. Exhibits A and B (release deed and lodging receipts) are to be sent to the office of Sub-Registrar IV, Bandra, Mumbai by keeping photocopies of the same in the record. Sub-Regisrar, Bandra to verify whether these documents are of his office or not. If the documents are of his office, then Sub-Registrar is directed to receive it and take necessary action. If the documents are not of this office, then Sub-Registrar is directed to send these documents to the appropriate office of the Sub-Registrar and concerned office to take steps for registration of the deed.

14. The learned counsel for the appellant makes statement that he wants to file a suit for possession and other reliefs before appropriate Court and in order to protect the suit property, the order of Court Receiver which is continued till today may be continued for another 6 weeks.

15. In view of submissions of learned counsel for the appellant, the order of Court receiver to continue till 21st October, 2015.

16. First Appeal along with Civil Applications are disposed of.

(MRIDULA BHATKAR, J.)

CERTIFICATE

Certified that the Judgment/Order uploaded is a true and correct copy of the original signed Judgment/Order.