

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

CIVIL REVN. APPLICATION NO. 120 OF 2015

Mr.Mohammaed Yusuf Wali Mohammed Khan ... Applicant

v/s

1. Smt.Khan Talamunnissa w/o
Maqbool Ahmed
2. Khan Zulfiquar Ahmed s/o
Maqbool Ahmed Khan ... Respondents

Mr.P. S. Dani, senior advocate along with Asit K. Singh for the applicant.

Mr.N.V. Walawalkar, senior advocate along with Mr.A.R. Shaikh for the respondent Nos.1 and 2.

CORAM: NITIN M. JAMDAR, J.

DATED : 23RD MARCH, 2015

P.C.:

Heard learned counsel for the parties.

2. By this application, the applicant challenges the judgment and order passed by the Appellate Bench of the Small Causes Court, Mumbai, dated 19 January 2015, confirming the judgment and order passed by the learned Small Causes Court Judge, Mumbai, dated 19 April, 2012 directing the applicant to hand over the possession of the suit premises. The premises in question admeasure 600 sq.ft. and are situated at Kurla, Mumbai.

3. Respondent Nos.1 and 2 are husband and wife. It is their case that, the respondent No.1 had acquired the property on 5 May 2000. The respondent No.2 also acquired 648 sq.ft. on 3 August 2000. According to the respondents, a leave and license agreement was executed in favour of the applicant on 1 December 2004. This agreement was for a period of 11 months. On expiry of this agreement on 31 October 2005, the applicant handed over possession of 648 sq.ft. to the respondents and another leave and license agreement was executed on 1 November 2005 in respect of the suit property. This agreement was to come to an end on 30 September 2006. There were certain other civil and criminal proceedings in respect of the property. Ultimately, the respondents filed L.E.Suit No.146/165 of 2007 in the Small Causes Court, Mumbai, seeking eviction of the applicants.

4. It was the case of the applicant before the Small Causes Court that the applicant is not licensee of the property but he is owner thereof. The Small Causes Court Judge framed an issue as to the existence of licensor and licensee relationship and held that the relationship existed. The learned Small Causes Court came to the conclusion that the license has been validly terminated and directed eviction of the applicant by an order dated 19 April 2012. The applicant thereafter filed an appeal before the Appellate Bench of the Small Causes Court, Mumbai. This appeal was dismissed on 19 January 2015.

5. I have heard Mr.Dani, learned senior counsel for the applicant and Mr.Walawalkar, learned senior counsel for the respondents.

6. First ground raised by Mr.Dani is that, both the Courts proceeded on the basis that the agreement dated 1 November 2005 was admitted by the applicant when the applicant had in fact categorically denied this agreement. He submitted that the applicant was not cross-examined and, therefore, no statement made by him in the examination-in-chief could have been accepted. The learned counsel submitted that the basis of the suit was the leave and license agreement dated 1 November 2005, which not having been proved, no eviction could have been ordered. He also submitted that, the case of ownership has not been correctly appreciated.

7. The learned Small Causes Court, in paragraphs 12 and 13 of the order dated 19 April 2014, dealt with argument regarding the existence of the leave and license agreement, and the conduct of the applicants.

Paragraphs 12 and 13 read as under :

“12. It was contended by learned counsel for defendant that plaintiffs have not taken any steps to recall defendant to cross-examine him further and the evidence of defendant on the material facts has gone unchallenged therefore evidence of defendant should be believed but there is no force in this contentions of learned counsel for defendant, for the reason

that further cross-examination of defendant came to be adjourned to next date 9.3.2011 for whatever reason it was the duty of the defendant to make himself available for cross-examination from the side of the plaintiff. But this is not happened in this case. Since the defendant was found absent most particularly when the matter was fixed for his cross-examination, his cross-examination by plaintiff came to be closed. No steps had been taken by defendant to set aside the said order. No sound explanation is coming forward from the side of defendant for this on his part and as such only inference can safely be drawn had been defendant faced the cross-examination from the side of the plaintiff his entire evidence would have gone against him. Moreover, defendant has admitted in his cross-examination that shop No.1 is the subject matter of present suit.

13. During the course of argument, it was also contended by learned counsel for defendant that leave and licence agreement Exh.35 signed by PW-1 as constituted attorney of plaintiffs, but no document produced by him to show that plaintiff had authorised him to enter into leave and license agreement on their behalf. It is further contended that plaintiff have not examined themselves. According to him, the constituted attorney cannot depose as witness for them. On the other hand, it is contended by learned counsel for plaintiffs. It is PW-1 who entered into leave and license agreement dated 1.11.2005 Exh.35 with defendant and also signed the same on behalf of plaintiff and constituted attorney of plaintiff and therefore he could depose about the acts which he has rendered in pursuance to the power of attorney.

8. As stated earlier, the respondents are husband and wife. Respondent No.2 was instrumental in overseeing the execution of the leave and license agreement, stepped in witness box and he was cross-examined. The learned Judge, therefore, rightly came to the conclusion that the agreement stood proved. Once that be so,

whether it was admitted by the applicant or not, becomes a secondary issue. Once the agreement was admitted in evidence by the respondents, it was for the applicant to disprove the said fact. The learned Appellate Bench has rightly relied on sections 91 and 92 of the Evidence act, to extend presumption of validity in support of this agreement. This presumption is not displaced by the applicant. Nothing stopped him from offering himself for cross-examination, and he cannot seek an advantage from his own omission.

9. The main ground on which the eviction decree was resisted was that the applicant is the owner of the premises. Nothing was produced in the Court below, nor in this Court to show that the applicant is owner of the premises. Both the Courts concurrently found that the applicant failed to prove the case of ownership. There is no error or perversity in this finding.

10 Thus, both the Courts below have rightly appreciated the evidence to come to the conclusion that leave and license agreement dated 1 November 2005 existed and so also the relationship of licensor and licensee, and the agreement is validly terminated. No perversity or error can be found in both the orders.

11. The civil revision application is accordingly dismissed.

(NITIN M. JAMDAR, J.)