

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

**SECOND APPEAL NO. 700 OF 2014
WITH
CIVIL APPLICATION NO. 1637 OF 2014 IN SA/700/2014**

Prakash Ganpat Darange ..Appellant

Vs

Amrut Bhikaji Darange .. Respondent

Mr P.B.Shah i/b Abhijeet Gosavi, Advocate for Appellant.

Mr. Kishor S. Patil, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 22/04/2015

PC:

1. Heard Mr. P.B.Shah, learned counsel for the appellant and Mr. Kishor S. Patil, learned counsel for respondent at length.
2. By this Appeal under section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the original plaintiff has challenged the Judgment and decree dated 16.1.2012 passed by the learned Civil Judge, Sr.Dn., Thane, in Special Civil Suit No.29 of 2009 as also the Judgment and decree dated 28.8.2014 passed by the learned Ad-hoc District Judge-1, Thane, in Civil Appeal No.43 of 2012. The learned trial Judge dismissed the suit instituted by the appellant, hereinafter referred to as 'plaintiff', for declaration that he is the owner of

the property, namely 5/33, Shivai Nagar, Adarsh Cooperative Housing Society Ltd, Pokhran Road No.1, Shivai Nagar, Thane (W)-400 606, (for short, 'suit property') and for perpetual injunction restraining the respondent, hereinafter referred to as 'defendant', from dispossessing the plaintiff from the suit property as also restraining him from sitting at the door of the suit property along with his belongings. The plaintiff also sought permanent injunction restraining the defendant from creating third party interest in the suit property. The learned trial Judge allowed the counter claim made by the defendant for recovery of vacant and peaceful possession of the suit property. The learned trial Judge, however, rejected the relief of compensation of Rs.3500/- per month for illegal use of the suit property from the date of the counter claim till handing over possession to the defendant.

3. Aggrieved by that decision, the plaintiff preferred Appeal. The defendant preferred cross objections. The learned District Judge dismissed the Appeal with costs and allowed the cross objection and directed the plaintiff to pay compensation of Rs. 3000/- per month from the date of counter claim to the defendant till the defendant gets possession of the suit property.

4. In support of this Appeal, Mr. Shah strenuously

contended that the Courts below committed serious error in dismissing the suit. He submitted that though the suit property stands in the name of the defendant, the entire consideration was paid by the plaintiff. This is evident from the statement of the defendant dated 8.1.2009 recorded by Vartak Nagar Police Station, Thane. He submitted that the said statement is duly proved by the plaintiff. He further submitted that the plaintiff was in the employment as also he was driving Autoriksha. Thus, he had sufficient source of income for paying installments to the Maharashtra Housing Area Development Authority (for short, 'MHADA'). He also invited my attention to paragraphs 15,16 and 17 of the Plaint. He submitted that the very fact that in October 2001, the plaintiff demolished the structure and constructed the suit property and the defendant did not raise any objection, is also indicative of the fact that the defendant also accepted ownership of the plaintiff. Thus, though the property stands in the name of the defendant and the defendant is a member of Cooperative Housing Society, the entire consideration was paid by the plaintiff. The plaintiff had also raised loan and the said loan was also repaid by him alone.

5. Mr. Shah further submitted that the defendant came out with the case that the plaintiff is a gratuitous licensee. The

very fact that the plaintiff made permanent construction indicates that in terms of Section 60 of the Indian Easements Act, 1882, (for short, 'Act'), the licence is irrevocable. He submitted that there are sufficient pleadings and evidence on record that spell out that the plaintiff has based his case of irrevocable licence in terms of Section 60 of the Act. In support of this submission, he relied upon the decision of the Apex Court in the case of Ram Sarup Gupta (dead) by LRs Vs. Bishun Narain Inter College, (1987) 2 Supreme Court Cases 555.

6. Mr.Shah further submitted that in terms of Section 103 of C.P.C. in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal (a) which has been wrongly determined by lower appellate court or both by the Court of first instance and the lower appellate Court, or (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100. He submitted that having regard to the necessary pleadings made by the plaintiff as also evidence on record, even if the Courts below have not decided issue of irrevocability of licence, this Court in Second Appeal will exercise powers under section 103 and can

decide that issue. In support of this submission, he relied upon the decision of this Court in the case of Agarwal Minerals (Goa) Pvt Ltd Vs. Smt Arcangela Cabral, 2012 (119) Bom.L.R 1848. Mr. Shah submitted that since the Appeal raises substantial questions of law, it requires consideration.

7. On the other hand, Mr. Patil supported the impugned orders. He submitted that the Courts below after appreciating the evidence on record, have concurrently held that the entire consideration was paid by the defendant. The suit property stands in the name of the defendant. The defendant is a member of the Co-operative Housing Society. The plaintiff is a gratuitous licensee and that he has no right, title and interest in the suit property. He submitted that for the first time the plaintiff had advanced the contention based on Section 60 of the Act. No foundation is laid in the pleadings. No evidence is adduced in that regard. He, therefore, submitted that issue based on Section 60 of the Act cannot be decided in vacuum and in the absence of necessary pleadings and evidence in that regard. He submitted that no case is made out for invoking Section 100 of C.P.C.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has

instituted suit for declaration of ownership as also for perpetual injunction. The Courts below, after appreciating the evidence on record, have concurrently held that the plaintiff has failed to establish payment made by him. Mr, shah submitted that in fact all the original receipts of payments to MHADA are produced by the plaintiff. However, perusal of the plaint does not indicate that any such case is made out by the plaintiff. The plaintiff did not plead that though the receipts stand in the name of the defendant, in fact payment was made by him. The learned trial Judge has considered this aspect in paragraph 8. After considering the evidence on record, the learned trial Judge recorded a categorical finding that the plaintiff has no documentary evidence to show that he has paid entire consideration amount, maintenance charges, installments of payment to MHADA. Mr, Shah submitted that the Courts below committed serious error in ignoring the oral evidence which clearly establishes that the plaintiff had made payments. The learned trial Judge has also considered this aspect in paragraph 8 and observed that oral evidence of witnesses in that regard will have no value. As against this, the evidence of the defendant is in consonance with his case as also documentary evidence shows that the defendant was allotted the suit property by MHADA and he is

a member of Shivai Nagar Co-op. Hsg. Society. Evidence of Ramesh Sarode, Secretary of the Society examined by the plaintiff shows that the defendant had made application to the society for cancellation of associate membership and nomination of the plaintiff. The plaintiff admitted that the associate member has no right or interest in the suit property and he is only entitled to represent the member in meetings of the society.

9. As far as the appellate court is concerned, the learned District Judge noted in paragraph 14 that at the time of application for allotment of the suit premises made by the defendant, the plaintiff was jobless. The plaintiff also admitted that MHADA allotted the suit premises to the defendant. The receipts on record at Exhibits 35 to 37 about payments show that the same were made by defendant to MHADA. The receipts are also in the name of the defendant. The plaintiff further admitted that the MHADA delivered the possession of the suit property in the year 1981 to the defendant. There is no documentary evidence or correspondence indicating that the plaintiff made payment to MHADA. The learned District Judge, therefore, held that as the plaintiff has not proved his ownership he is not having title in the suit property. The documents at Exhibits 35 to 39

support the case of the defendant. The plaintiff does not have any evidence except his possession over the suit property. The learned District Judge, therefore, held that the possession of the plaintiff is permissive and of gratuitous in nature. Such person cannot get any title and he has to vacate the premises of which possession is demanded.

10. In paragraph 15, the learned District Judge also dealt with the statement of the defendant made before Vartak Nagar Police Station. It was further observed that the defendant had given shelter to the plaintiff in his house and he is not giving possession of the disputed premises to the defendant. The learned District Judge accordingly concurred with the trial Court's reasoning.

11. Mr. Shah submitted that he had carried out permanent construction and the defendant never objected. He submitted that even assuming that the plaintiff has not established his title and that he is a licensee, nonetheless the defendant cannot revoke the licence as the plaintiff acting upon the licence had executed work of a permanent character and incurred expenses in the execution. He submitted that the defendant did not object when the plaintiff had carried out construction of permanent character. The licence is, therefore, irrevocable and the Courts below committed serious error in

dismissing the suit. In support of this submission, Mr. Shah relied upon the decision of the Apex Court in the case of Ram Sarup Gupta (*supra*).

12. I do not find any merit in the submission for more than one reason. In the first place, perusal of the plaint shows that the plaintiff has claimed declaration of his ownership right. The plaintiff nowhere pleaded that he is a licensee in the suit premises. Secondly, in the case of Ram Sarup Gupta (*supra*), in paragraph 7 of that report the Apex Court considered paragraph 18 of the Written Statement. The defendants pleaded that the licence was coupled with a grant and in any case it was a permanent and irrevocable licence in favour of the school and the same could not be revoked by the plaintiff. After considering the pleadings, the Apex Court observed that it abundantly clear that the defendants had raised a specific plea that the licence was coupled with grant, it was a permanent and irrevocable license and in pursuance of the licence the licensee had carried out work of permanent character incurring expenses for the advancement of the purpose for which the licence had been granted. On the basis of pleadings of the parties, the learned trial Judge had framed issues 4,5 and 6 relating to the question whether licence was irrevocable. It was further observed that the plaintiff went to

trial knowing fully well that the defendants' claim was that the licence was irrevocable, on the ground that they had made permanent constructions and incurred expenses in pursuance of the licence granted for the purpose of school. This was reiterated in paragraph 10 of that report.

13. In paragraph 13, the Apex Court after considering the material on record observed that Raja Ram Kumar Bhargava had permanently donated the property in dispute to the school and in lieu thereof the institution was named after his father to perpetuate his memory. The purpose of the grant was to enable the school to carry on its activity of imparting education to the students. The school progressed and it required additional building. Management of the school which was headed by Raja Ram Kumar himself constructed additional buildings to provide for classrooms and other amenities to the students. Raja Ram Kumar Bhargava himself never raised any objection against the school making additional constructions on the disputed land. These facts and circumstances point out the terms and conditions of the licence, that the school was permitted to occupy and enjoy the land permanently for the purpose of education.

14. At the same time, the Apex Court also observed in paragraph 6 of the report that "It is well settled that in the

absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case, it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the inquiry should not be so much about the form of the pleadings; instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case

and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.”

15. With the assistance of the learned counsel for the parties, I have gone through the pleadings and evidence on record. Applying these principles to the facts of the present case, perusal of the entire plaint shows that the plaintiff did not assert that he is a licensee. On the other, he claimed that he had paid entire consideration and he is the owner of the suit property. The plaintiff has also sought declaration that he is the owner of the suit property. Considering the substance of the pleadings, I do not find even remotely that the plaintiff claimed that he is licensee and that as he executed work of permanent character, the licence is irrevocable. Even no evidence is led for making out the case based on Section 60 of the Act. Thus, there is no pleadings. No evidence is adduced by the plaintiff based on Section 60 of the Act. In view thereof, reliance placed by Mr. Shah on the decision of the Apex Court does not advance the case of the plaintiff. On the other hand, the case, in my opinion, supports the defendant's case that for the first time in absence of any pleadings or evidence, the plaintiff cannot raise the issue based on Section 60 of the Act.

16. Mr. Shah relies upon the decision of this Court in the case of Agarwal Minerals (Goa) Pvt Ltd (supra) as also Section 103 of C.P.C. and submitted that for the first time the High Court can decide the issue of fact. I also do not find any merit in this submission. Power under Section 103 is circumscribed by condition (a) or (b) stipulated therein. It lays down that “in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

- (a) which has been wrongly determined by lower appellate court or both by the Court of first instance and the lower appellate Court, or
- (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.”

In the first place, Section 103 gives discretionary power to the High court to determine issue of fact. Secondly, unless and until condition (a) or (b) is satisfied as also there is sufficient evidence on record, the High Court will not determine issue of fact for the first time. Thus, I do not find any merit in the submission based on the decision of this Court as also Section 103 of the Act.

17. Before parting, it is also necessary to record that this is

case of a ungrateful nephew. After obtaining allotment in favour of the defendant, the defendant permitted the plaintiff to occupy the suit property without charging any amount. When the defendant called upon the plaintiff to hand over possession, the plaintiff instituted suit and raised all types of frivolous contentions. Not only that, during the course of hearing of the Second Appeal, the plaintiff also raised contention based on Section 60 of the Act which was not even pleaded, no evidence was adduced in support thereof. To say the least, the said contention is palpably dishonest. The proceedings instituted by the plaintiff are nothing short of abuse of process of court and abuse of process of law.

18. In the case of Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria (Dead) through L.Rs, AIR 2012 Supreme Court 1727, the Apex Court, after exhaustively considering the law on the subject, crystallized the following principles of law in paragraph 101.

“1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."

19. In the same Judgment, the Apex Court observed in paragraphs 84 and 85 as under:-

False claims and false defences

84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in Ramrameshwari Devi and Ors. (AIR 2011 SC (Civ) 1776:2011 AIR SCW 4000) (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled

for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

Grant or refusal of an injunction.”

20. Applying the principles laid down by the Apex Court to the facts of the present case, in my opinion, the Appeal deserves to be dismissed by imposing exemplary costs quantified at Rs.25,000/-. The said costs shall be paid by the appellant to the respondent within 12 weeks from today, failing which Collector, Thane, shall recover the same as land revenue.

21. The plaintiff was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to evidence on record. I, therefore, do not find that the Appeal involves any substantial questions of law. Hence, Appeal fails and the same is dismissed with exemplary costs quantified at Rs.25,000/-. Costs shall be paid by the appellant to the

respondent within 12 weeks from today, failing which Collector, Thane shall recover the same as land revenue.

12. In view of dismissal of the Appeal, Civil Application No.1637 of 2014 for stay does not survive and the same is disposed of.

13. At this stage, Mr. Shah orally applies for continuation of ad-interim order dated 15.12.2014 for a period of 12 weeks from today. He states that within two weeks from today, the appellant and all adult family members residing with him shall file usual undertaking in this Court incorporating therein :

- (i) that they are in possession and nobody else is in possession of the suit property;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;
- (vi) that in case they are unable to obtain suitable orders from higher Court within 12 weeks from today, they will hand over vacant and peaceful possession of the suit property to the plaintiff.

14. Before filing the undertaking, the appellant shall serve copy of the undertaking on the other side and if the undertaking in above terms is filed, the same shall stand

accepted by this Court.

15. Subject to the appellant filing undertaking in the aforesaid terms within two weeks from today, the ad-interim order dated 15.12.2014 shall remain in force for a period of 12 weeks from today. Liberty is reserved to the respondent in case the appellant does not file the undertaking in the above terms and in that event, the ad-interim order shall stand vacated without further reference to court. In case, the appellant does not obtain suitable interim order from higher Court, he will serve copy of that order to Collector, Thane. In case the appellant does not file undertaking at all, the ad-interim order shall stand vacated without reference to the Court. Order accordingly.

(R.G.Ketkar, J.)