

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 581 OF 1991
WITH
CIVIL APPLICATION NO. 10447 OF 2003

1. Indubeg Imambeg Mirza
Since deceased through his
Heirs & Legal Representatives.
- 1A. Marubeg Indubeg Musalman
Age 38 years,
- 1B. Mangubeg Indubeg Musalman,
Age 36 years,
- 1C. Hasambeg Indubeg Musalman
Age 30 years,
- 1D. Armanibai w/o. Lalbeg Musalman
Age 42 years,
- 1E. Kubrabi w/o. Jalaloddin Musalman
Age 32 years,
- 1F. Saidabi w/o. Mushir Musalman
Age 32 years,
- 1G. Shemshadbi w/o. Indubeg Musalman
Age 60 years.

All R/o. Sonwat Budruk,
Taluka Erandol, District Jalgaon.

**....Appellant.
(Ori. Plaintiffs)**

Versus

1. Husenabi Shaik Ayub
Age 46 years, Occu. Household,
R/o. Amalner, Taluka Amalner,
District Jalgaon.
2. The Chief Officer,

Municipal Council,
Amalner, Dist. Jalgaon.

**....Respondents.
(Ori. Deft. Nos. 1&2)**

Mr. U.S. Malte, Advocate for appellants.

Mr. P.R. Patil, Advocate for respondent No. 1.

CORAM : T.V. NALAWADE, J.
DATED : 20th July, 2016.

JUDGMENT :

1. The appeal is filed against judgment and decree of Regular Civil Appeal No. 591/1989, which was pending in the Court of Additional District Judge, Amalner. The appeal filed by original defendant No. 1, present respondent No. 1 against the judgment and decree of Regular Civil Suit No. 54/1985, which was pending in the Court of Civil Judge, Junior Division, Amalner is allowed by the District Court and decree of possession given by the Trial Court is set aside. Both the sides are heard.

2. The suit was filed for possession of two rooms, which are part of Municipal House no. 2960/387 and situated within local limits of Amalner Municipal Council, Tahsil Amalner. It is the case of plaintiff that in the year 1970 the suit property was given in possession of defendant No. 1 by way of mortgage. It was contended that no rent was to be paid by defendant and no interest was to be charged on this amount by the defendant. It is

contended that the period of mortgage was two years. It is contended that after two years, when he approached defendants, she requested for giving time as she was in search of alternate accommodation. It is contended that when the defendant started giving one or other excuse for avoiding to return back the possession, due to mediation of some persons, compromise was made. It is contended that it was settled that defendant was to keep possession and she was to be charged with rent of Rs. 20/- p.m. and she was to keep possession till the amount of Rs. 500/- was adjusted in the rent amount. It is contended that as per this agreement, the amount of Rs. 500/- was to be by plaintiff by the end of 30th November 1975.

3. It is the case of plaintiff that he had filed Regular Civil Suit No. 132/1996 for possession, but it was dismissed for default. It is contended that the possession of defendant No. 1 is unauthorised. It is contended that behind his back, the property is now entered in the name of defendant No. 1 and defendant No. 2 had joined hands for making such entry with defendant No. 1. It is contended that notice was given to defendant No. 1, but even after notice, defendant did not vacate the premises and so, cause of action took place for the suit.

4. Defendant No. 1 filed written statement and denied everything including the ownership of plaintiff over the suit property. Defendant No. 1 contended that she is entitled to protection of possession under the provision of section 53-A of Transfer of Property Act. She contended that the suit is not filed for redemption of mortgage if the property was mortgaged with defendant No. 1. She contended that if it is the case of plaintiff that defendant No. 1 is tenant and she was paying monthly rent of Rs. 20/-, then the tenancy ought to have been terminated under the provisions of Bombay Rent Act.

5. On the basis of aforesaid pleadings, issues were framed by the Trial Court. The Trial Court held that plaintiff is owner of the property, but there was no mortgage. The Trial Court held that defendant No. 1 was not owner of the property and so, relief of possession was given. The First Appellate Court has held that there was one document showing that some amount was taken by the plaintiff and by way of security, the possession was given and document was executed, but that document cannot be used as it was not registered as mortgage deed. In view of the case of the plaintiff that defendant was to pay monthly rent of Rs. 20/- and payment of rent started from November 1973, it was necessary for plaintiff to first terminate

the tenancy as provided under Bombay Rent Act. As there was no such termination of tenancy, the First Appellate Court has set aside the decision given by the Trial Court and suit is dismissed.

6. There is oral evidence from both the sides, but the aforesaid pleadings show that plaintiff was not sure about the nature of case which he wanted to prove in the Court. In view of the decision given by the First Appellate Court and also the Trial Court that plaintiff is owner and as the said finding is not challenged by the defendant, it will be open to the plaintiff to take appropriate steps as observed by the District Court. Defendant No. 1 has failed to prove her title and ownership over the suit property. In the pleading, she has taken the defence that she is entitled to protection under section 53-A of Transfer of Property Act. As the case of defendant of ownership is not accepted by the Courts, but case of tenancy is accepted by the District Court, it will be open to the plaintiff to take steps under rent legislation. In view of nature of suit, which was filed by present appellant, this Court holds that it is not possible to interfere in the decision of the District Court. In the appropriate suit which can be filed under rent legislation, the entitlement of the defendant No. 1 to recover the amount of Rs. 500/- can be considered.

7. This Court had admitted the appeal without formulating substantial questions of law. The aforesaid discussion shows that only one point could have been considered in this matter like the entitlement of plaintiff to recover the possession on the basis of title. Due to the stand taken by plaintiff that tenancy rights were created in favour of defendant and as the property is situated within local jurisdiction of Municipal Council which is covered by rent legislation, the decree of possession could not have been given on the basis of title to the plaintiff. Thus, interference is not possible in the decision given by the District Court. In the result, appeal stands dismissed. Civil Application is disposed of.

[T.V. NALAWADE, J.]

ssc/