

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

14. SA/64/2016

MAHESH SOMNATH KHAIRNAR

V/S

KRISHNARAO GOPINATH CHAVAN
AND ANR.

.....

Mr. A.V.Hon, Advocate for Appellant.

Mr. S.P.Chapalgaonkar, Advocate for R 2

.....

CORAM : T.V.NALAWADE, J.

DATE : 3rd MAY, 2016

ORDER :-

. The Appeal is filed against the Judgment and Decree of R.C.S. No. 249/2009 which was pending in the Court of the Civil Judge [Jr. Division], Kopargaon and also the Judgment and Decree of R.C.A. No. 89/2013 which was pending in the Court of the District Judge - 2, Kopargaon. The Suit filed by present appellant for relief of declaration that he is tenant over the suit property and for relief of injunction for protecting the possession is dismissed by the trial Court and the counter claim filed by the respondents for relief of possession is decreed. Both sides are heard.

2. The suit property is the part of S.No. 109 [A-2-A] 78/27. The total area of this property is 4 H. 81 R. The Suit was filed in respect of piece of land admeasuring 10 x 8 ft.

which is situated at East – South corner of the property. It is contended by the plaintiff that he has made construction of shop, kiosk on this open space and he is tenant of defendant No. 1. It is contended that there was oral lease agreement and agreed rent was of ₹ 250/- per month. It is contended that there was no practice of issuing rent receipt and this circumstance is being mis-used by the defendants. The land is sold by defendant No. 1 to defendant No. 2 and it is contended that defendant No. 2 is trying to take back the possession.

3. Defendant No. 1 filed Written Statement and also counter claim. He denied the claim of plaintiff. He contended that due to cordial relationship, he had permitted plaintiff to use small piece of land for doing some business to earn livelihood but it was not given on rent basis. It is contended that plaintiff had agreed to vacate the premises whenever the premises was required for own use by defendant No. 1 or for making construction. It is contended that he had asked the plaintiff to vacate the premises as the construction was to be made, but the plaintiff refused to vacate the premises. Defendant No. 2 has adopted this Written Statement and contended that he has purchased the property and so he is entitled to get back the possession. Counter claim in that regard was filed.

4. The plaintiff has examined himself and he has relied on the record viz. notice given to the defendant and tax receipt showing that he had paid tax to the local body. On the other hand, defendant No. 2 has examined himself and

they examined clerk of the Municipal Council to show that some persons had made encroachment over the property and the construction was illegal. Some record like notice given by the Collector is also produced.

5. Admittedly there is no document of lease with the plaintiff and he has not come with the specific case that for particular period the property was given on lease. In view of the provisions of Transfer of Property Act, if there is lease for the period of more than 11 months, then it needs to be registered if there is handing over of the possession. There is no record of rent receipt with the plaintiff. On the contrary, there is letter of permission at Exh. 75 dated 11/01/2002 and it shows that defendant No. 1 had permitted plaintiff to use that portion, but the condition was imposed that as soon as possession was asked for by the defendant No. 1, the plaintiff was to hand over the possession. No rent was to be paid by the plaintiff to defendant No. 1 as per this letter. It can be said that on the basis of this letter, plaintiff started doing some business on this piece of land.

6. The Trial Court has placed reliance on the case reported as **AIR 1959 SC – 1262 [Associated Hotels of India Ltd. Vs. R.M.Kapoor]**. The Apex Court has made following observations.

[i] To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form.

- [ii] *The real test is the intention of the parties – whether they intended to create a lease or licence.*
- [iii] *If the documents creates an interest in the property, it is a lease, but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence.*
- [iv] *If under the document a party gets exclusive possession of the property, prima-facie, he is considered to be tenant; but circumstances may be established which negative the intention to create the lease.*

7. In the present case also it can be said that there was no intention to give the suit property on lease basis and it was only permission, licence given to the plaintiff to use the open space. On this point, the findings of the Courts below are concurrent and they are on question of fact. No substantial question of law as such is involved in the matter. As the title of the defendants is not disputed, they are entitled to get back the possession.

8. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. No. 1639 of 2016 does not survive and stands disposed of.

[T.V.NALAWADE, J.]

