

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 638 OF 1993

**Kailaswasi Pandit Kallappa Bharmappa
Nitveshastri & Ors.**

..... Appellants

VERSUS

Smt. Ratnabai w/o Anna Savalwade & Ors.

..... Respondents

Mr.Surel Shah for the Appellants.

None for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 1st SEPTEMBER, 2016

P.C.

None appeared for the respondents when the matter was called out twice.

2. By this second appeal, the appellants have impugned the order and judgment dated 29th August, 1992 passed by the Additional District Judge, Kolhapur allowing the appeal filed by the original defendants thereby setting aside the judgment and decree passed by the IInd Joint Civil Judge, Senior Division, Kolhapur in Special Civil Suit No.9 of 1987 dated 31st December, 1990. Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. The appellants in this second appeal are the original plaintiffs whereas the respondents are the original defendants. The suit property is consisting of 10 rooms constructed on the plot bearing City Survey No.2195, C-Ward, Kolhapur. The suit property was originally owned and possessed by Mrs.Champabai alias Laxmibai w/o. Devgounda Patil. On 5th February, 1968, the said Champabai Patil created a Trust in respect of a property including the suit property. The said trust

was duly registered under the provisions of Bombay Public Trust Act. The main aim and object in creating the trust was to further the cause of imparting religious, social and other education and to fulfill the same i.e. to create schools, hotels and Jain Temples.

4. Mr. Annappa Savalvade was managing the affairs of the house property and agricultural lands of the said Mrs. Laxmibai Patil. Till her demise in the year 1975, the said Mrs. Laxmibai Patil was a trustee and was managing the trust properties. The said Mrs. Laxmibai Patil had sought assistance of Mr. Savalvade to look after the said property and thus allowed the said Mr. Annappa Savalvade and his family members to reside in the said property. After the demise of Mrs. Laxmibai Patil also, the said Savalvade family continued to assist the trustees of the plaintiffs trust to manage the trust properties. It was however found by the plaintiffs that since last 7-9 years prior to the date of filing of the suit, members of the Savalvade family started refusing to assist the trustees and managing the property and started creating trouble and harassment to the trustees.

5. The plaintiffs accordingly after issuing a notice to the defendants filed a suit for recovery of the possession alongwith mesne profits and cost. The defendants filed written statement and resisted the said suit. The defendants denied all the averments made in the plaint. It was the case of the defendants in the written statement that since last more than 16 years, the defendants were possessing the said property as a tenant i.e. prior to the date of filing suit and thereafter. The defendants also pleaded that the suit was bad for non-joinder of all the parties and that the suit was barred by law of limitation and was without jurisdiction.

6. During the pendency of the suit, the plaintiffs applied for amendment to the

plaint and impleaded the plaintiff nos. 2 to 6 who were then trustees of the trust. The trial court permitted the defendants to amend the written statement. The trial court thereafter framed additional issues. In all there were eight issues framed by the learned trial judge.

7. The plaintiff no.1 trust examined its secretary, Mr.Shirodkar as the sole witness. The defendants examined Mr.Arun Sutar, the Sub Registrar Officer, Karvir and one Mr.Bhalchandra Savalvade before the learned trial judge. Both the parties produced several documents before the learned trial judge.

8. The learned trial judge passed a judgment and decree on 31st December, 1990 and permitted the plaintiffs to recover the possession of the suit premises on behalf of the defendants to handover the suit premises to the plaintiffs. It was also declared that the plaintiffs were entitled to recover future mesne profits from the defendants to be determined under Order 20 Rule 12 of the Code of Civil Procedure, 1908. The learned trial judge granted time to the defendants to vacate and handover the vacant possession of the suit premises before 30th April, 1991.

9. Being aggrieved by the said judgment and decree dated 31st December, 1990, the defendants filed Regular Civil Appeal No.106 of 1991 before the District Judge, Kolhapur. By an order and judgment dated 29th August, 1992, the learned Additional learned District Judge, Kolhapur allowed the said appeal filed by the defendants and was pleased to set aside the original decree dated 31st December, 1990 passed by the learned IInd Joint Civil Judge, Senior Division, Kolhapur. Being aggrieved by the said order and judgment dated 29th August, 1992, the original plaintiffs preferred this second appeal under 100 of the Code of Civil Procedure, 1908.

10. Mr.Shah, learned counsel for the plaintiffs invited my attention to some of the documents forming part of the record before the learned trial judge and also the findings recorded by the two courts below. It is submitted by the learned counsel that the title in respect of the suit property of the plaintiffs was not disputed by the defendants. The defendants had claimed tenancy in respect of the suit property in their written statement. He submits that the learned trial judge after considering the oral and documentary evidence had rendered a finding that the defendants had failed to prove their tenancy in respect of the suit property and were in permissive possession simplicitor. He submits that the claim of the tenancy raised by the defendants was afterthought.

11. It is submitted by the learned counsel that the learned trial judge also rendered a finding that the plaintiffs had proved that defendants were not co-operative and were not looking after the suit property for which purpose they were allowed to reside in the suit property and were causing nuisance and harassment to the plaintiff no.1. The learned trial judge has held that the plaintiffs had proved that they had right to file the suit in the present form and were entitled to possession of the suit property.

12. Learned counsel for the plaintiffs invited my attention to the findings recorded by the appellate court. He submits that even the appellate court has rendered a finding that since the plaintiffs were a trust, the tenancy was not applicable to the properties under charitable trust in view of section 4 of the Bombay Rent Act and found that the defendants were not tenants over the suit premises but were in permissive possession. He submits that though the appellate court has rendered a finding that the defendants were not the tenants in respect of the suit property and were holding the permissive possession, the learned trial

judge allowed the appeal filed by the defendants on erroneous premise. He submits that conclusion drawn by the Additional District Judge is contrary to the findings rendered by him.

13. It is submitted by the learned counsel for the plaintiffs that once it was held by the appellate court that the defendants had failed to prove their tenancy and were only permissive user, the plaintiffs being owner of the suit premises were entitled to have possession thereof from the defendants. In support of this submission, learned counsel for the plaintiffs placed reliance on the judgment of Supreme Court in case of ***Maria Margarida Sequeira Fernandes and others vs. Erasmo Jack De Sequeira (dead) through LRs.*** (2012) 5 SCC 370 and in particular paragraph 97 which reads thus :-

97. Principles of law which emerge in this case are crystallized as under:

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.

14. It is submitted by the learned counsel for the plaintiffs that since the defendants were protecting the possession of the suit property as caretaker, no interest of any nature whatsoever was created in their favour by the plaintiffs, the plaintiffs being owners of the suit property were entitled to recover possession of the suit property from the defendants. He submits that the impugned order passed by the appellate court is contrary to the principles of law laid down by the Supreme Court in case of ***Maria Margarida Sequeira Fernandes and others***(supra).

15. It is submitted by the learned counsel for the plaintiffs that since there was misuse of the suit property and that the defendants were not found in actual possession of the suit property during the pendency of the present proceeding, the plaintiffs have put their lock in the suit premises.

16. This court while admitting this second appeal on 18th January, 1994 has formulated the following substantial questions of law which reads as under :-

(F) Having held that Savalwade family is not a tenant and having further held that their possession is merely in permissive possession, whether the Lower Appellate Court was justified in law in allowing the appeal by dismissing the suit, especially when there is no protection of the provisions of Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called as 'Bombay Rent Act')?

(G) Whether the lower appellate court has properly

considered and/or construed the relevant provisions of the Transfer of Property Act, especially Section – 105, 106, and Chapter -V thereof as well as the provisions of Bombay Public Trusts Act, 1950 and pleadings of the parties and the evidence on record ?

17. A perusal of the record indicates that the predecessor of the defendants was engaged for the purpose of taking care of the suit property by the original owner Mrs.Laxmibai Patil. After demise of the said Mrs.Laxmibai Patil, the trustees of the trust continued to accept the services of the said Mr.Annappa Savalvade and his family members for some time. The plaintiffs has proved by leading oral evidence before the learned trial judge that since last several years prior to the date of filing of the suit by the plaintiffs for possession, the defendants had stopped looking after and had started nuisance and harassment to the trustees.

18. A perusal of the written statement filed by the defendants indicates that the defendants had claimed tenancy in respect of the suit property. After considering the oral and documentary evidence of both the parties, the learned trial judge has rendered a finding that the defendants had failed to establish the tenancy in respect of the suit property. It is held that the claim of tenancy pleaded by the defendants was afterthought. It is held that the defendants were thus permissive user of the suit premises and no interest of any nature whatsoever was created in their favour by the plaintiffs. The plaintiffs were entitled to recover possession of the suit property since they required the same for the activities of the trust.

19. A perusal of the order passed by the appellate court indicates that though the appellate court also rendered a finding in favour of the plaintiffs that in view of

section 4 of the Bombay Rent Act, the provisions of the said Act were not applicable to the charitable trust and that the defendants were not tenants of the suit properties and their possession was clearly permissive possession, the appellate court passed a decree in favour of the defendants and allowed the said appeal.

20. In my view once the appellate court had rendered a finding that the defendants were not the tenants in respect of the suit property and were merely in permissive possession, the appellate court could not have allowed the appeal filed by the defendants. The finding of the appellate court that the defendants were not the tenants of the suit properties have not been impugned by the defendants by filing any cross objections. In my view the impugned order passed by the learned Additional District Judge is contrary to the findings recorded by the learned District Judge in the impugned order.

21. Supreme Court in case of ***Maria Margarida Sequeira Fernandes and others***(supra) has held that even by long possession of years or decades such person would not acquire any right or interest in the said property if he is allowed to stay in the premises gratuitously. It is held that the caretaker or servant has to give possession forthwith on demand. The court is not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for sometime either as a friend, relative, caretaker or as a servant. It is held that the protection of a court can be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour. 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. In this case the concurrent finding is

rendered by two courts below that the defendants have failed to prove their tenancy in respect of the suit property and that there were in permissive possession. In my view the judgment of Supreme Court in case of ***Maria Margarida Sequeira Fernandes and others***(supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment. In my view the view taken by the appellate court is directly contrary to the principles laid down by the Supreme Court in case of ***Maria Margarida Sequeira Fernandes and others***(supra) and thus deserves to be set aside.

22. For the reasons recorded aforesaid, the substantial questions of law as formulated aforesaid are answered in negative.

23. I, therefore pass the following order :-

- (a) Impugned order and judgment dated 29th August, 1992 passed by the Additional District Judge, Kolhapur is set aside.
- (b) Regular Civil Appeal No.106 of 1991 filed by the defendants is dismissed.
- (c) The judgment and decree passed by the learned trial judge dated 31st December, 1990 is upheld.
- (d) No order as to costs.

[R.D. DHANUKA, J.]