

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 189 OF 2015

KHURSHED R. PRINTER

...Applicant

Versus

CHARLES CARVER

...Respondent

....

Mr. Uday Bobade i/b. A.Z. Mookhtiar, Advocate for the Applicant.

Mr. Ketan Parekh i/b. K.R. Parekh & Co, for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 27th JANUARY, 2016

PC.

1. Heard Mr. Bobade, learned Counsel for the applicant and Mr. Parekh, learned Counsel for the respondent, at length.
2. By this application filed under Section 115 of Code of Civil Procedure, 1908 (for short, "CPC"), the applicant has challenged the judgment and decree dated 3.1.2013 passed by learned Judge, presiding over Court Room No.34 of the Court of Small Causes, Mumbai in L.E. & C. Suit No.43/53 of 2011 as also judgment and decree dated 21.2.2015 passed by the Appellate Bench of the Small Causes Court at Bandra, Mumbai in Appeal No.3/2013. By these orders, the Courts below decreed the Suit instituted by respondent, hereinafter referred to as 'plaintiff', and directed the applicant, hereinafter referred to as 'defendant', to deliver vacant

possession of Flat No.4, admeasuring 610 sq. ft., ground floor, Kajal Apartment CHS Ltd., 1st Hasnabad Lane, Santacruz (West), Mumbai – 400 054 (for short, 'suit premises") to the plaintiff and further ordered enquiry into future mesne profits as per Order XX Rule 12 of CPC.

3. Mr. Bobade, strenuously contended that the plaintiff was gainfully employed in United Kingdom (for short, "UK") and there was no one in his family to look after the suit premises. He wanted to lease out the suit premises on tenancy basis so as to gain some rent. As the plaintiff was not interested in leasing out the suit premises to any stranger, he inducted the defendant being his friend as a tenant. The defendant has paid Rs.5000/- towards the deposit. There was understanding between the plaintiff and the defendant to pay rent @ Rs.1000/- per month. As the plaintiff was resident of UK, the defendant was regularly depositing the rent @ Rs.1000/- per month in the account of the plaintiff. The defendant is occupying the suit premises from 1.1.1993 onwards. Since then the defendant is regularly depositing the rent @ Rs.1000/- per month.
4. Mr. Bobade submitted that the plaintiff instituted the Suit alleging that the defendant is a gratuitous licensee. Having regard to the

fact that for more than 15 to 20 years the defendant was regularly depositing the rent in the bank account of the plaintiff, it cannot be said that he is a gratuitous licensee. He further submitted that the plaintiff himself did not enter into the witness box and preferred to examine power of attorney holder PW-1 Ansar Ahmed Nisar Ahmed Qureshi. He submitted that the power of attorney was given by the plaintiff to him on or about 9.4.2011. In the first place PW-1 did not produce the original power of attorney and produced notarized true copy of the power of attorney. Secondly, PW-1 has no personal knowledge of transaction in question between the plaintiff and the defendant. PW-1 deposed in the cross-examination that he knows the plaintiff since 1995, whereas the plaintiff inducted the defendant as a tenant from 1.1.1993..

5. Mr. Bobade further submitted that the Courts below committed serious error in accepting the evidence of PW-1. The Courts below failed to appreciate that the burden is on the plaintiff to establish that the defendant was inducted as a gratuitous licensee. As PW-1 did not have any personal knowledge, the Courts below committed error in relying upon his evidence. He submitted that the power of attorney holder can depose in place and instead of

principal provided he has personal knowledge of transaction in question. He relied upon the decision of Apex Court in the case of *A.C. Narayanan vs. State of Maharashtra and Anr. AIR 2014 SC 630*, and in particular paragraph-19. In paragraph-19, Apex Court referred to its earlier decision in the case of *Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd. and Ors. 2005(2) SCC 217*. He also relied upon the decision of this Court in the case of *Punjabrao v. Himmatrao, 2015(1) ALL MR 292*, and in particular paragraph-18(a) and (c) to contend that the power of attorney who has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit. He cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge. Mr. Bobade has taken me through the evidence of PW-1 as also evidence of DW-1.

6. On the other hand Mr. Parekh supported the impugned order. He invited my attention to the written statement filed by the defendant and in particular paragraph-4(e). In paragraph-4(e) of the written statement, defendant came with the case that the plaintiff showed his desire/offered to his (defendant's) wife to

accept the suit premises on tenancy basis with a deposit of Rs.5000/- along with monthly rent @ of Rs.1000/- and provided his account number of State Bank of Mysore so that the defendant's wife can deposit the monthly rent in his account number. He submitted that though the defendant came with the case that his wife was inducted as a tenant, the wife did not initiate any proceedings. In fact, the notice dated 18.12.2010 was served on the wife of the defendant, however, no reply was given to that notice. He further submitted that the defendant has shifted to Jogeshwari and presently the suit premises is locked.

7. I have considered the rival arguments advanced by learned Counsel for the parties. I have also perused the material on record.
8. As noted earlier, the plaintiff came with the case that he has inducted the defendant as a gratuitous licensee. As against this, the defendant came with the case that he has been inducted as a tenant and he paid deposit of Rs.5000/- and was depositing Rs.1000/- per month in the bank account of the plaintiff. In short, the defendant's case is that he is not a gratuitous licensee, but, is a tenant. The Courts below have considered the evidence on record. In particular, learned trial Judge in paragraph-13

observed that when the defendant is claiming that he is inducted as a tenant, there would be written agreement with the defendant and the defendant would insist to the plaintiff to issue the rent receipt. As there is no agreement and the defendant has not insisted for the rent receipt from the plaintiff, it is a case of the licence. During the cross-examination, DW-1 admitted that the documents produced by him do not show that he has paid Rs.5000/- to the plaintiff as a deposit towards letting out the suit premises to him.

9. In order to substantiate the plea that there was understanding between the plaintiff and the defendant that the defendant should deposit Rs.1,000/- per month in the bank account of the plaintiff, in my opinion, the defendant should have examined the Officer attached to the State Bank of Mysore to establish that the payment was deposited by him towards the rent and that amount was withdrawn by the plaintiff and the said account was operated by the plaintiff. In fact, PW-1 in paragraph-6 of the examination-in-chief specifically deposed that the defendant was depositing a sum of Rs.1000/- per month in the bank account of the plaintiff with State Bank of Mysore, Santacruz Branch without the knowledge and consent of the plaintiff. In order to destroy this case, the

defendant should have examined the Officer from said bank. The defendant also could not establish that the plaintiff was regularly withdrawing the amount from that bank. The defendant also did not produce any correspondence between the parties about understanding. He also did not produce any recording letter to that effect. In view thereof, it has to be inferred that the defendant was depositing the amount of Rs.1000/- per month without the knowledge and consent of the plaintiff. It has also come on record that the plaintiff and the defendant were close friends and because of this acquaintance, the plaintiff had inducted the defendant in the suit premises. Section 52 of the Indian Easements Act, 1882 (for short, 'said Act') defines the expression 'license', which reads thus :

“52. “License” defined. - Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”

10. The defendant did not produce the tenancy agreement. He did not insist for rent receipt as also did not substantiate the understanding between the parties as regards depositing Rs.1000/- per month towards the rent, I do not find that the

Courts below committed any error in holding that the defendant was a gratuitous licensee.

11. Mr. Bobade submitted that the plaintiff did not enter into the witness box. He has not discharged the burden. PW-1 Ansar Qureshi has no personal knowledge and in fact he has purchased the suit premises from the plaintiff and therefore the plaintiff executed power of attorney in his favour.
12. Learned trial Judge has considered the submissions from paragraphs-12 onwards and has also referred to the decision of the Supreme Court in the case of *Manmohan Singh v. Smt. Narinder Kaur, 2008(2) RCR 210 (P & H)*, and *Gopal Ketkar v. Mohamed Latif, AIR 1968 SC 1413* and thereafter has observed that during the cross-examination of DW-1, the defendant has admitted all the facts and such admissions cannot be thrown away. Learned trial Judge further observed that the parties to the Suit has not disputed most of the facts and no prejudice is caused to the defendant as the plaintiff have not entered into the witness box. Perusal of the evidence of PW-1 shows that in paragraph-2 of the affidavit in examination-in-chief, he stated that he is the close friend of the plaintiff and as such is also personally aware of the facts of the case and is prepared to depose the same. In

paragraph-6 it is stated that the defendant got married in 1990 and since his wife did not go well with the parents of the defendant, the defendant requested to the plaintiff being a very close friend to permit him and his wife to temporarily reside in the suit premises. At the material time, the defendant had no means to have alternate premises and since his wife was expecting a baby, on humanitarian ground, the defendant was permitted to occupy the suit premises. The defendant avoided to vacate the suit premises on one pretext or other. The plaintiff at that time had gone to UK for the purpose of employment and continued to stay there for reasons of employment. The defendant continued to occupy the suit premises as gratuitous licensee of the plaintiff. The plaintiff mischievously and malafidely went on depositing a sum of Rs.1000/- per month in the bank account of the plaintiff with State Bank of Mysore, Santacruz Branch without the knowledge and consent of the plaintiff. Perusal of the cross-examination by the defendant that PW-1 was not confronted with the statements in paragraph-2 and 6 of the examination-in-chief. As against this, DW-1 admitted in cross-examination that the documents produced by him do not show that he paid Rs.5000/- to the plaintiff.

13. The Courts below after considering the evidence on record concurrently held that the defendant has not established the plea of tenancy. The defendant has not disputed the ownership of the plaintiff in view of the definition of “license” in the Section 52 of said Act, one has to proceed on the premise that the defendant was inducted as a licensor. It is also relevant to note that before instituting the suit the plaintiff had issued notice dated 18.12.2010. That notice was duly served on the defendant. In that notice the plaintiff specifically asserted induction of the defendant as a licensee. It was also asserted that during his visit to Mumbai it was noticed by him that the defendant was depositing a sum of Rs.1000/- per month in his account in State Bank of Mysore, Santacruz Branch. It was further asserted that the defendant being gainfully employed with Oil and Natural Gas Commission, has shifted with his family at Behram Baug, Jogeshwari (W). No reply was given by the defendant disputing the assertions. This was the first opportunity to the defendant to assert that he is inducted as a tenant and not as a licensee. However, the defendant did not give reply to this notice. Thus after considering the evidence on record, the Courts below have concurrently held that the defendant is a gratuitous licensee. Mr.

Bobade was not in a position to demonstrate that the findings recorded by the Courts below are contrary to the evidence on record or that they are based on no evidence. In view thereof, it cannot be said that the impugned orders are pervers requiring interference of this Court in exercise of powers under Section 115 of CPC and hence application fails and the same is rejected. Order accordingly.

14. At this stage, Mr. Bobade orally prays for stay of this order for a period of six weeks from today. Mr. Parekh opposed this application on the ground that the defendant is not staying in the suit premises.
15. As the defendant intends to challenge this order in the higher Court, notwithstanding rejection of Civil Revision Application this order shall remained stayed for a period of six weeks from today subject to her filing undertaking incorporating therein (1) that he is in possession and nobody else is in possession, (2) he has so far not created third party interest and he will hereinafter neither create third party interest nor part with possession thereof, (3) in case the applicant does not get suitable orders from higher Court within six weeks from today, he will hand over vacant and peaceful possession of the suit premises to the plaintiff. Let the

undertaking be given to the aforesaid terms within two weeks after serving advance copy on the other side. List the application for compliance on 18.2.2016.

(R. G. KETKAR, J.)

Deshmane (PS)