

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.276 OF 1994

Ramu Bhalsing Rathod

..... Appellant

VERSUS

Moreswar Purshottam Divkar & Ors.

..... Respondents

Mr.K.K.Malpathak for the Appellant.

CORAM : R.D. DHANUKA, J.

DATE : 22nd SEPTEMBER, 2016

P.C.

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the order and judgment dated 9th February, 1994 passed by the first appellate court dismissing the Civil Appeal No.35 of 1991 filed by the appellant. The appellant has impugned the judgment and decree dated 11th December, 1990 passed by the learned Civil Judge, Junior Division, Vasai thereby decreeing the suit filed by the respondent and thereby directing the respondent to handover possession of the suit premises to the plaintiff within 60 days from the date of the said order and to pay Rs.5/- per month from the date of the suit till delivery of the possession, by way of damages towards unlawful use and occupation of the property. The parties in this judgment are described as per their status before the learned trial court.

2. The appellant herein was the original defendant and the respondents were the original plaintiffs.

3. The plaintiff no.1 is a public trust registered under the Bombay Public Trust Act and is the owner of old House No.23 and new House No.44 situated at Ward No.19 within the area of Municipal Corporation, Vasai. Advocate Mr.C.R.Rajani was the Managing Trustee of the plaintiff trust till January 1984 and after his death, i.e. after January 1984, no managing trustee was appointed by the trust to look after the property of the trust.

4. It was the case of the plaintiff no.1 that taking advantage of the death of Mr.C.R.Rajani and trust not having appointed any other trustee, the defendant has forcibly and illegally entered in the suit premises. When the trust appointed managing trustee Mr.Maruti Chavan, he came to know about the illegal possession of the defendant in the suit property by the defendant. The said trustee issued a notice dated 13th June, 1985 to the defendant asking him to deliver the possession of the suit property. Since the defendant did not handover possession of the suit property, the plaintiff filed a suit bearing Regular Civil Suit No.233 of 1985 inter alia praying for recovery of the possession of the suit premises and for claiming compensation against the defendant.

5. The suit was resisted by the defendant by filing written statement. It was the case of the defendant that since the father of the defendant was in occupation of the suit property as a tenant, no decree for possession can be passed in favour of the plaintiff. He denied that he had made forcible entry over the suit premises. He also contended that he has paid rent to the plaintiff trust but no rent receipt was issued by the plaintiff to the father of the plaintiff. The learned trial judge framed four issues. The plaintiff trust examined the managing trustee who led documentary as well as oral evidence. The defendant examined three witnesses.

6. By the judgment and decree dated 11th December, 1990 the learned trial judge decreed the suit filed by the original plaintiff and directed the defendant to handover possession of the suit premises to the plaintiff within 60 days from the date of the order and further directed the defendant to pay Rs.5/- per month from the date of the suit till delivery of the possession of the suit property to the plaintiff trust by way of damages.

7. Being aggrieved by the said judgment dated 11th December, 1990 passed by the learned trial judge, the defendant filed Civil Appeal No. 35 of 1991 in the Court of Additional District Judge, Thane. The first appellate court framed four issues and rendered a finding that the plaintiff had proved that the defendant had obtained forcible possession of the suit premises. The defendant failed to prove that he was a tenant of the suit premises. The first appellate court also rendered various findings of fact after considering the oral and documentary evidence and dismissed the appeal filed by the original defendant. This judgment and decree delivered by the first appellate court has been impugned in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

8. Mr.Malpathak, learned counsel for the applicant invited my attention to the findings recorded by the learned trial judge and also by the first appellate court. He submits that though the plaintiff has failed to prove the prior possession of the suit property, the learned trial judge as well as the first appellate court passed a decree of possession against the defendant. He submits that though the father of the defendant used to pay rent in respect of the suit premises to the trustees of the plaintiff trust, the first appellant court has rendered erroneous finding that the defendant had failed to prove tenancy in respect of the suit premises.

9. Learned counsel for the original defendant placed reliance on the judgment of Delhi High Court in case of ***Debi Singh vs. Bhim Singh & Ors., AIR 1971 Delhi 316*** in support of his submission that the person who seeks possession of the property from another has to prove that he was in prior possession of the suit property. A perusal of the order passed by the learned trial judge indicates that the learned trial judge has considered the oral and documentary evidence led by the parties and has come to the conclusion that the plaintiff trust had not denied possession of the suit premises over the suit premises but has urged that the possession of the defendant was not lawful. The learned trial judge has held that the witness examined by the defendant could not prove that the father of the defendant was a tenant in respect of the suit premises. The witness examined by the defendant had deposed that the father of the defendant was a tenant of one Mr. Prakash. No payment alleged to have been made by the defendant in respect of the suit premises was proved. The defendant could not prove that the plaintiff trust had refused to issue any rent receipts or had alleged to have been received any rent from the defendant. The learned trial judge accordingly decreed the suit for possession of the plaintiff trust and for compensation.

10. A perusal of the order passed by the first appellate court indicates that the first appellate court has also independently rendered findings of fact in favour of the plaintiff and against the defendant. The appellate court also found that the defendant had obtained forcible possession of the suit premises. The appellate court has held that the defendant has failed to prove the payment of rent or tenancy in respect of the suit premises in favour of the father of the defendant or in favour of the defendant. In my view the concurrent findings of fact rendered by the two courts below are rendered after considering the oral and documentary evidence and not being perverse cannot be interfered with by this court in this appeal filed under

section 100 of the Code of Civil Procedure, 1908.

11. In my view there is no substance in the submission of the learned counsel for the original defendant that the courts below have not considered the issue that the plaintiff trust was not in prior possession of the suit property. The first appellate court has clearly recorded a finding that the defendant was in forcible possession of the suit premises. Insofar as judgment of Delhi High Court in case of **Debi Singh** (supra) relied upon by the learned counsel for the defendant is concerned, in my view the said judgment does not even remotely assist the case of the defendant. Reliance placed on the said judgment is thoroughly misplaced. In my view no substantial question of law arises in this appeal.

12. Appeal is totally devoid of merits and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]