

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 204 OF 1994

Warunkasha Sanjiva Shetty

..... Appellant

VERSUS

Smt.Shantabai Ramchandra Mohite

..... Respondent

Ms.Rajashri Walkar, i/b. Mr.Ramchandra Apte for the Appellant.

Mr.Rohan Sawant, i/b. Mr.P.B.Naiknaware for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 1st 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 2nd April, 1994 passed by the IXth Additional District Judge, Pune in Civil Appeal No.662 of 1990 which was filed by the appellant against the judgment and decree dated 29th June, 1990 passed by the learned Civil Judge, Junior Division, Pimpri thereby decreeing the suit filed by the respondent (original plaintiff) for possession of the suit property. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The parties had entered into a leave and licence agreement dated 1st September, 1980 in respect of two rooms which forms part of House No.181 situated in the survey no.470(A), Hissa No.6(A)/2, situated at Phugewadi, Pimpri, Chinchwad within the territorial jurisdiction of the Pimpri Chinchwad Municipal Corporation for a period of 11 months. Under the said leave and licence agreement, the defendant was to pay Rs.200/- per month by way of licence fee and

had agreed to handover the possession of the suit property to the licensor after expiry of 11 months. The said leave and licence agreement expired on 31st July, 1981. The plaintiff thereafter demanded the possession of the suit property from the defendant by issuing notice on 31st August, 1981. The defendant however did not comply with the said notice and did not handover the possession of the suit premises.

3. The plaintiff accordingly filed a suit before the learned Civil Judge, Junior Division, Pimpri inter alia praying for the possession of the suit premises and for mesne profit. The suit was resisted by the defendant by filing a written statement. The defendant however did not raise any issue in the written statement that the agreement of leave and licence executed between the parties was a camouflage agreement and actually the plaintiff had created a tenancy in favour of the defendants in respect of the suit premises. It was also not the case of the defendants that the plaintiff had accepted the defendant as tenants right from the beginning however the agreement of leave and licence was executed by the plaintiff with the defendant so as to be out of preview of the provisions of the Rent Act. It was urged by the defendants that after expiry of the leave and licence agreement, the plaintiff had accepted the defendant as a tenant.

4. The learned trial judge framed three issues which are extracted as under :-

- 1 Whether the plaintiff has accepted the defendant as her tenant, after the expiry of the leave and licence agreement ?
- 2 Whether this court has jurisdiction to entertain and decide this suit ?
- 3 Whether the plaintiff is entitled to possession of the suit premises and also mesne profits ?

5. The plaintiff examined her power of attorney holder, Mr.Namdeo Laxman Kapse and Mr.Shankar Ramchandra Mohite. The defendant examined his father and did not enter the witness box.

6. The learned trial judge passed a judgment and decree on 29th June, 1990 directing the defendant to deliver actual possession of the suit premises to the plaintiff on or before 30th July, 1990 and to pay cost to the plaintiff. The learned trial judge also directed for an enquiry under Order 20 Rule 12(i) (c) of the Code of Civil Procedure in respect of the future mesne profit. The learned trial judge held that the plaintiff had not accepted the defendant as a tenant after expiry of the leave and licence agreement and that he had jurisdiction to entertain and try the said suit and to grant the reliefs as prayed.

7. Being aggrieved by the judgment and decree dated 29th June, 1990 passed by the learned trial judge, the defendant filed an appeal (662 of 1990) before the Additional District Judge, Pune. The learned Additional District Judge, Pune framed five points for determination and after recording detail reasons dismissed the appeal filed by the defendant by an order and judgment dated 2nd February, 1994.

8. Learned counsel appearing for the defendant submits that the defendant had produced the rent receipts issued by the plaintiff before the learned trial judge which would clearly indicate that there was relationship of landlord and tenant between the plaintiff and the defendant and thus the suit filed by the plaintiff before the Civil Judge, Junior Division for recovery of the possession under a leave and licence agreement was without jurisdiction. She submits that both the

courts below have wrongly rejected this contention of the defendant and has erroneously held that the learned Civil Judge, Junior Division had jurisdiction to entertain the suit filed by the plaintiff for recovery of the possession. Learned counsel invited my attention to the findings recorded by the learned trial judge and also by the lower appellate court and would submit that the findings recorded by both the courts are perverse.

9. I have perused the findings recorded by the learned trial judge and also the findings recorded by the appellate court. It is not in dispute that it was not the case of the defendant in the written statement that agreement of leave and licence was camouflage agreement and the plaintiff had actually created a tenancy in favour of the defendant. It was not the case of the defendant that right from beginning of the leave and licence, the tenancy was created in favour of the defendant by the plaintiff. It was however argued by the defendant before the trial judge that after expiry of the leave and licence agreement, the plaintiff had accepted the defendant as a tenant. The learned trial judge accordingly held that the said submission of the defendant was contrary to the stand taken in the written statement and the case before the learned trial judge. The learned trial judge has held that the defendant had failed to prove that there was any fresh agreement of lease between the plaintiff and the defendant after expiry of the leave and licence. The defendant also failed to prove the proof of novation of the agreement.

10. This court while admitting this appeal has formulated following substantial questions of law :-

- 1) Whether the trial court had jurisdiction to entertain the suit in view of Section 28 of Bombay Rent and/or Section 26 of Provincial Small Causes Act ?

- 2) Whether there was cause of actions for filing of suit ?
- 3) Considering various admissions given by the witness if the respondent and the rent receipts the lower courts ought to have held that there is relationship of landlord and tenant ?

11. A perusal of the order and judgment delivered by the learned Additional District Judge, Pune indicates that the learned judge has held that after expiry of the period of leave and licence agreement, the plaintiff had not accepted the defendant as a tenant. The defendant himself was not examined. The father of the defendant was examined as a witness who did not depose in the evidence that after expiry of the leave and licence, the plaintiff had accepted the defendant as a tenant.

12. Insofar as submission of the learned counsel for the defendant that the defendant had produced rent receipts for the month of August 1981 to October 1981 before the learned trial judge and thus the learned Civil Judge, Junior Division had no jurisdiction to entertain for recovery of the possession is concerned, the appellate court has rendered a finding that similar receipts were also issued by the licensor during the period of licence. There was no such plea raised by the defendant that there was a tenancy between the plaintiff and the defendant during the subsistence of licence agreement. It is held by the appellate court that merely on the basis of such receipts alone, the defendant could not establish any tenancy alleged to have been created by the plaintiff in favour of the defendant after expiry of the licence or even prior thereto.

13. The appellate court has considered the entire evidence including the documentary evidence afresh and independently and has rightly held that the defendant has failed to prove tenancy. In my view since the defendant had failed

to prove that there was a tenancy created in his favour, the learned Civil Judge, Junior Division had jurisdiction to entertain and try the said suit for recovery of the possession and for mesne profit. The findings recorded by the two courts below are concurrent findings and are not perverse and thus cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

14. For the reasons recorded aforesaid, insofar as substantial question of law at serial no.1 is concerned, the same is answered in affirmative. Suit was not for recovery of possession from a tenant. Substantial question of law at serial no.2 is answered in negative. Substantial question of law at serial no.3 is answered in negative.

15. In my view the appeal is devoid of merits and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]