

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

*SECOND APPEAL NO. 385 OF 2014
Along with
CIVIL APPLICATION NO. 894 OF 2014
Along with
SECOND APPEAL (St.) NO. 18172 OF 2014
Along with
CIVIL APPLICATION NO. 1924 OF 2015*

M/s Wayking Auto Garage. .. Appellant / Applicant
Vs.
Mrs. Jetunbi Jafar Hussain & ors. .. Respondents

Mr. P.K. Dhakephalkar, Senior Advocate a/w Mr. Sachin Dhakephalkar, for the Appellant in both Appeals and Applicant in both Applications.

Mr. G.S. Godbole a/w Mr. Akshay Petkar, for Respondent Nos. 1 to 3 in S.A. No. 385 of 2014 and Respondent Nos. 1 to 7 in S.A. (St.) No. 18172 of 2014.

*CORAM : N.M. Jamdar, J.
Tuesday, 19 July 2016.*

Oral Order :

The First Appeal as well as Suit were tried together. These Second Appeals also have been argued together and therefore, they are disposed of by this common order.

2. The Second Appeal No. 385 of 2014 arises from Judgment and Order dated 10 April 2014 passed by the learned District Judge,

Thane in Civil Appeal No.227 of 2012 and Judgment and Decree dated 10 February 2006 passed by Civil Judge Senior Division, Thane in Special Civil Suit No.76 of 1999. The Second Appeal (Stamp) No.18172 of 2014 arises from the order passed in Civil Appeal No.55 of 2006 and Regular Civil Suit No.241 of 1993. Dates of disposal of this Suit and Appeal are same as the other.

3. The four proceedings were taken up for consideration by the learned Civil Judge. Those are Special Civil Suit No.76 of 1999, Regular Civil Suit No.241 of 1993, Miscellaneous Application No.301 of 2002 and Miscellaneous Application No.476 of 1993. The Suit bearing No.241 of 1993 was filed by the Appellant seeking an order of injunction against the Respondents. The Miscellaneous Application No.476 of 1993 was filed by the Appellant for fixing standard rent. The Special Civil Suit No.76 of 1999 was filed by the Respondents seeking possession of the suit premises from the Appellant. The Miscellaneous Application No.301 of 2002 was filed by the Appellant for a direction to Respondents to restore electricity supply.

4. The disposal of the Suits led to filing of first appeals in the District Court and disposal of the Miscellaneous Applications led to filing of revision applications in the District Court. As regards the decision of the District Court in the first appeals present Second

Appeals have been filed and against the disposal of the revisions, Writs have been filed which are pending.

5. The suit property is a garage situated at Naupada, Thane with open space and certain structure on it. In the Suit filed by the Appellant for injunction it was his contention that the Appellant is a tenant of the suit premises and after the death of the landlord in the year 1989, Respondents who were his wife and sons started obstructing his possession and therefore grant of injunction was necessary. This Suit was defended by the Respondent by filing Written statement contending that the Respondent is not a tenant, but father of the Respondents had permitted the Appellant to run a garage and to give regular accounts and there is no relationship of any landlord and tenant. In the Suit filed by the Respondents, seeking possession, the Appellant reiterated the case taken in the Written statement to the Suit for injunction in the plaint and in the Written statement filed by the Appellant to this Suit, the Appellant reiterated his case that he was a tenant of the premises.

6. The Suit filed by the Appellant was dismissed and the Suit filed by the Respondents was decreed by the learned Civil Judge and the Appellant was directed to hand over peaceful possession of the property to the Respondents. The Appeals filed by the Appellant were dismissed by the learned District Judge.

7. I have heard Mr.Dhakephalkar – learned Senior Advocate for the Appellant and Mr.Godbole, learned Advocate for the Respondents.

8. The main issue that arises for consideration is whether the Appellant has been able to demonstrate that he has any right in the suit property. As regards the ownership of the Respondents is concerned, it is not disputed. The original owner and landlord was one Lala Majid Khan. The Respondents are his wife and sons. It is not the case of the Appellant that by any deed, ownership rights have been created in his favour. The specific case of the Appellant is that he is the tenant of the suit premises. If he is not a tenant and mere licensee and after the Suit is filed for recovery of possession, license is terminated, then there is no question of grant of an injunction. Therefore, the fate of both appeals will depend on a finding as to whether the Appellant has proved his case as a tenant.

9. Mr. Dhakephalkar contended that both the Courts have concurrently held that the Appellant failed to produce any document or oral evidence to conclusively prove that there exists a tenancy. Mr. Dhakephalkar did not dispute that there is no written document or any rent receipt in the present case and contended that if all the facts are cumulatively considered, they would demonstrate that the

relation of landlord and tenant exist between the parties. It was also his contention that the case with which the Respondents came to the Court was completely bogus and not believable. Mr. Dhakephalkar submitted that merely because the Appellant has not been able to produce rent receipts, which were not issued by the landlord, both the Courts have refused to look into any other circumstance. He submitted that the first Appellate Court has failed to consider the evidence in proper perspective, which is required as per the law laid down by the Apex Court in the case of *Union of India and another vs Ranchod and others* - (2007) 14 Supreme Court Cases 326.

10. It was strenuously urged by Mr. Dhakephalkar, that the Appellant is in possession almost since the year 1972, and the license under Shop and Establishment Act, 1948 has been issued in favour of the Appellant. He submitted that the Appellant had instituted suits against the Municipal Corporation for grant of compensation and for challenging the action of demolition. He contended that the Appellant, in full knowledge of the Respondents-landlord, was running a garage and till the death of the original landlord, no action was taken. He submitted that it was in the year 1993 that the Appellant moved an application for fixation of standard rent and filed a Suit for injunction and it was much later in the year 1999 that the Suit for eviction was filed. Mr. Dhakephalkar submitted that in all the earlier proceedings, the Appellant had asserted his

right as a tenant with no action taken by the Respondents. He also contended that the entire basis of the Suit filed by the Respondents that the Appellant was only given the premises on conducting basis is not believable as admittedly, the Appellant never gave any accounts. He submitted that, it is not possible that any person will tolerate a business being conducted by other person without there being any payment. He submitted that it cannot be believed that the Respondents would take no steps for 20 years. According to Mr.Dhakephalkar therefore, all these facts would show that the theory put up by the Appellant of tenancy is more believable.

11. The first issue that needs to be kept in mind is there cannot be creation of tenancy by implication. For establishing the factum of tenancy ingredients for proving the tenancy must be proved. They are relationship of landlord-tenant, payment of rent and certain basis rights and obligations. As far as payment of rent is concerned, Mr. Godbole, learned counsel for the Respondent pointed out that in all the earlier proceedings varying stands have been taken by the Appellant. In the earlier Suit filed in the year 1991, the rent stated is completely different than in the Written statement filed in the present Suit. The Suit filed for injunction from which Second Appeal arises, there are no pleadings of any tenancy or from which date tenancy was created. Even though it is a Suit filed for injunction based on possession, it was expected of the Appellant to assert his

tenancy or atleast make a mention of the same. In the Suit filed by the Appellant bearing No.512 of 1990 against Municipal Corporation, surprisingly the Appellant took a stand that he was inducted as a tenant by Farooque Jafar Hussain @ Farooque Majid Khan in the year 1972 when Farooque Khan was not even a major in the property and had no rights. In the cross-examination, the Appellant accepted the position that except unilaterally showing the rent in the tax returns, he has no other document to show that rent was paid. He also admitted that whenever cash payments were made his manager would take receipts / vouchers for the same. If rent receipt was not issued the Appellant could have called upon the landlord to issue the same or take action under Section 26 of the Bombay Rent Act 1947. Nothing has been done by the Appellant. Merely because there is a possibility of the existence of landlord and tenant relationship, it cannot crystalize in any right in favour of the Appellant. The Rent Act provides adequate measures, if the crucial document, such as the rent receipt, is not issued by the landlord. The tenant can send the money by money order or by registered post and produce evidence to that effect. Once the Appellant failed to prove his tenancy then there is no right left in the Appellant to resist the decree for possession based on title. Even assuming the Respondent's explanation as to how the Appellant came in possession is not to be believed, still the Suit which is based on title cannot be defeated by a person who has no right in the property. Mr.

Godbole rightly relied upon decision of the Apex Court in the case of *Dnyaneshwar Ranganath Bhandare and another Vs Sadhu Dadu Shettigar (Shetty) and anr. -(2011) 10 Supreme Court Cases 433*. The Apex Court has laid down that there is a particular methodology laid down to establish tenancy and it cannot be inferred only from possession of the property. The finding of fact rendered by both the Courts after assessing evidence that the Appellant was not tenant therefore, cannot be faulted with.

12. The learned counsel for the Appellant made a grievance that the learned District Judge has not considered the matter as a first appellate Court. This grievance is not justified. The learned District Judge has considered evidence led by each of the witnesses, including the documentary evidence. The learned District Judge had also considered position as to whether the Appellant has been able to show any payment of rent. Even though the issue was narrow, in as much as existence of tenancy, the learned District Judge has considered all the aspects of the matter. Once the Appellant failed to prove that he was a tenant of the suit premises and that even assuming there was a license in his favour, which stood terminated by instituting the Suit, the decree based on title would follow in favour of the Respondent. Therefore, the reliance placed by learned counsel for the Appellant on the decision in the case of *Union of India v/s. Ranchod*, is misplaced as the learned District

Judge did consider the matter in detail and did not commit any error.

13. In the circumstances, the finding rendered by both the Courts that the Appellant has no right in the premises and will have to hand over possession to the Respondents as rightful owner and no injunction can be granted in favour of the Appellant suffer from no infirmity or error. No substantial question of law arises. Both the Second Appeals are accordingly dismissed.

14. The learned counsel for the Appellant, at this stage seeks continuation of the statement made by the learned counsel for the Respondents. The learned counsel for the Respondents opposes. Considering the facts and circumstances, if the Appellant files an undertaking that he has not created any third party rights as on date and that he will not create third party rights or part with possession and hand over the peaceful possession of the property to the Respondents after the stipulated period as envisaged, the statement made by the learned counsel for the Respondents would continue for a period of six weeks from today.

15. In view of the above, the Civil Applications also stand disposed of.

(N.M.Jamdar, J.)