

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.831 OF 2013
WITH
CIVIL APPLICATION NO.2538 OF 2013

Mataprasad Mahavir Pande

... Appellant
Ori. Defendant No. 1

vs.

Matadin Mahavir Pande and Others

... Respondents/
Ori. Plaintiff

Mr. Atul Damle, Senior Advocate i/b. Mr. Mahesh Tiwari, for the Appellant.

Mr. G.S. Godbole, Senior Advocate i/b. Mr. J.B. Mishra, for Respondent No. 1.

Mr. M.D. Naik, for Respondent No. 4-MHADA.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 21st JANUARY, 2016

P.C.:

. Admit. Heard and decided finally at the stage of admission by consent.

2. This Appeal is directed against the judgment and order dated 30th April, 2013 passed by the learned Judge, Bombay City Civil Court in suit No. 2179 of 2004. By the said judgment and order the learned Judge decreed the suit and declared that the Plaintiff is the

eligible person to occupy the suit premises and Defendant No. 1 is restrained from causing obstruction to the possession of suit premises of the Plaintiff.

3. The facts of the case in nutshell are as follows:

The Plaintiff and Defendant No. 1 i.e. present Appellant are the real brothers. The Plaintiff came to Mumbai from his native place at U.P. in the year 1991 and started residing with his cousin Kamalakant in Flat No. 408, Dighe Nagar Co-Operative Housing Society Ltd., Fitwala Road, Elphinstone, Mumbai- 400 013. Kamalakant was occupying the premises as a tenant and was holding the photo-pass. The Plaintiff was contributing rent and municipal taxes of the suit premises when Kamalakant decided to go back to his native place. Thereafter, Kamalakant by executing an affidavit dated 6th November, 1991 transferred the original premises in the name of the Plaintiff and handed over the photo-pass to the Appellant with his no objection for transfer. Thereafter, the Appellant along with his family members started residing in the suit premises. In the year 1993 Defendant No. 1 in search of job arrived at Mumbai. The Plaintiff accommodated him in the suit premises as a family member. The

Defendant No. 1 continued to stay in the said room along with his children and wife. Original Defendant No. 3 is Dighenagar Co-Operative Housing Society Limited and there was a proposal for redevelopment of the building with the developer Defendant No. 2 M/s. Shivsal Construction Company. Kamalakant was occupying room No. 17-1/10, Jupiter Mill compound. He entered into an agreement with the developer and in lieu of the said room, a flat No. 408 was allotted to him. After taking possession, he allowed Plaintiff No. 1 to stay in the said flat with his family members. However, Defendant No. 1 i.e. Appellant as per the case of the Plaintiff tried to fabricate the agreement with Defendant No. 2 and therefore Plaintiff asked him to vacate the premises. The Appellant/Defendant No. 1 refused to vacate the premises and threatened him that he would forcefully dispossess the Plaintiff and his family members from the suit premises. Hence, he filed the suit for declaration and injunction. The Defendants appeared in the matter and filed written statement denying the contention raised and averments made in the Plaint. It is his case that he came to Mumbai in the year 1989 and started business and purchased the premises in the year 1991 i.e. the suit premises Room No. 17-1/10 from Kamalakant for Rs. 1 lac. It is

contended that Plaintiff had taken undue advantage and prepared documents for alternate accommodation in his name and has played a fraud with the Defendants. He also had lodged complaint against the Plaintiff for the theft of the documents in the year 1999. He made a counter claim in the written statement and claimed his right in the suit premises. The trial Judge framed the issues and the parties tendered oral as well as documentary evidence. The Plaintiff stepped in the box and so also Defendant No. 1 tendered his evidence. Considering the documentary as well as oral evidence, the trial Court decreed the suit. Hence, this Appeal.

4. In the present Appeal, though the issue of jurisdiction of the City Civil Court was not raised at the time of the trial, the said issue was raised at the time of arguing the Appeal by the learned senior counsel for the Appellant. A law point can be raised even at the Appellate stage though not contended during the trial and therefore, it is to be dealt with. It was argued by the learned senior counsel for the Appellant that as per the case of the Plaintiff and admission given by him in the cross examination, the Appellant was residing in the suit premises as a '*gratuitous licensee*' hence this is to be tried by the

Small Causes Court not by the City Civil Court. On the point of jurisdiction, he relied on the judgment of the full bench in the case of “Prabhudas Damodar Kotecha and Ors. vs. Manhabala Jeram Damodar and Anr.”¹ which was confirmed by the Hon'ble Supreme Court (In SLP (Civil) No. 20763-764 of 2007). He submitted that the gratuitous licensee is covered under the definition of Section 41(1) of the Presidency Small Causes Courts Act, 1882 (PSCC Act). Hence, there is bar to try and entertain such matters by the Civil Court and it is to be tried only by the Small Causes Court. He also relied on the judgment of the Hon'ble Supreme Court in the case of “Laxmi Ram Pawar vs. Sitabai Balu Dhotre and Anr.”² in respect of definition of 'Occupier'. He submitted that in the said case the Hon'ble Supreme Court held that 'trespasser' is included in the definition of 'occupier' in Section 2(e)(v) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. He further submitted that under such circumstances, if it is said that the Plaintiff is an occupier, he has right under the SRA Act.

5. Per contra, the learned senior counsel Mr. G.S. Godbole

1. Civil Appeal Nos. 6726-6727 of 2013, S.C., Dated 13/08/2013.
 2. Civil Appeal No. 2789 of 2005, S.C., Dated 01/12/2010.

for Respondent No. 1 placed reliance on the judgment of “Conard Dias vs. Joseph Dias”³. So he submitted that the family member is not a licensee because no exclusive possession is given to the family member as he resides with the Plaintiff and other family members. He submitted that exclusiveness of premises is contemplated in a case of *licensee* which is completely absent in the present case as parties were living jointly. He submitted that this case cannot be covered under the case of “*Prabhudas Kotecha*” (supra) and relied on the judgment and order of this Court (Shri R.M. Savant, J.) dated 25th April, 2014 in Writ Petition No. 6260 of 2013 in the case of “Sarika w/o. Mahendra Sureska vs. Kusumlata w/o. Rajkumar Sureka”. The learned single Judge has considered the judgment of the full bench in the case “*Prabhudas Kotecha*”(supra) and also the judgment of “*Conard Dias*”(supra) and the learned Judge has taken a view that the family member cannot be considered as *licensee* and held that suit under Section 34 of the Specific Relief Act for injunction is maintainable in a Civil Court.

6. Considering the facts and law laid down in the various

3. 1995(3) Bom. C.R. 218.

judgments relied by both the parties, I am of the view that the case of a brother who is treated as a family member throughout, cannot fall under the meaning of “*gratuitous licensee*”. In the case of “*Conard Dias*”(supra) the dispute was between the father and the son in respect of the suit. The learned single judge of this Court held that a person who is residing with the parents in the house cannot claim any legal character much less, the character of a licensee as defined in Section 52 of the Easements Act, but he is residing simpliciter as a member of the family and nothing more and nothing less”.

7. On the same line, a brother who is related by blood and staying with the Plaintiff along with his family members not only sharing a room but all family related things. Thus when both the such parties are sharing the room together, he cannot be labeled as *gratuitous licensee*. It is also rightly pointed out by the learned counsel for the Respondent/original Plaintiff that in the Plaint nowhere Plaintiff has called him as *licensee* in the suit premises. It is true that in the cross examination, the Plaintiff gave admission that Respondent is a gratuitous licensee but this admission cannot be foisted in his mouth that he really treated his brother as a *gratuitous licensee* and

not a family member. At the time of recording cross examination whether the meaning of word 'gratuitous' was understood by the Plaintiff is doubtful, it was subsequently translated in English by the Court. This isolated admission does not give any colour of *gratuitous licensee* to the Appellant. In fact, Respondent has been living as a family member throughout and shared the possession of the room with the Plaintiff. Hence, the objection of jurisdiction of the City Civil Court is not sustainable and is overruled.

8. The second point is argued on facts. It is submitted by the learned senior counsel for the Respondent that the Plaintiff could not bring any document on record to show that he has paid Rs. 1 lac as a consideration while purchasing suit room to Kamlakant. He submitted that there is no mention of Rs. 1 lac in the alleged affidavit (Exhibit 10). Therefore, Exhibit 10 is to be discarded. He further submitted that prior to 1991 the Appellant was residing in the suit premises. He pointed out that in the cross examination, the Plaintiff has admitted that he and the Appellant paid maintenance charges and other expenses of the premises jointly. He submitted that in the cross examination the Plaintiff Matadin Pande admitted that he has

purchased the old premises for Rs. 1 lac, however admitted that this fact is not mentioned in the affidavit Exhibit 10 and no agreement or sale deed was registered in his name.

9. In reply, the learned senior counsel for the Respondent submitted that evidence of the affidavit is not rebutted by tendering further evidence by the Appellant. He relied on Exhibit 11 the photo pass of Kamalakant. The photo-pass of Kamalakant was produced from the possession of the Plaintiff as it was handed over by Kamalakant to him. He further relied on the documents given in the cross examination by the Appellant Mataprasad Pande that when he gave complaint against the Plaintiff in the Court of Metropolitan Magistrate, Bhoiwada in the year 1991 nowhere it is mentioned that Kamalakant sold the premises to him in the year 1991. He further submitted that if the case of Defendant is that the affidavit Exhibit 10 was fraudulently obtained by the Plaintiff, he should have lodged the complaint against the Plaintiff. He pointed out that the Appellant had knowledge about this affidavit in the year 1993.

10. The claims of the Plaintiff and the Defendant are based on

the transaction with Kamlakant of getting room transferred independently in their respective name for Rs. 1 lac. Both of them admitted that the room initially belonged to Kamlakant and they were residing there jointly. However, the question of fact before the Court is in whose favour Kamlakant has transferred the suit room. The Appellant could not produce any documentary evidence in support of his contention that Kamalakant has transferred the suit room in his favour. On the other hand, the Plaintiff produced and relied on the affidavit dated 6th November, 1991 wherein Kamlakant has stated that he has allowed Plaintiff to occupy the said room. None of them brought Kamlakant as a witness to prove the transaction. The learned counsel Mr. Godbole for Respondent No. 1 submitted that when the documentary evidence in the form of an affidavit is produced then the oral evidence is excluded. Section 92 of the Evidence Act states about exclusion of oral evidence on production of documentary evidence however it is always open under Sections 91 and 92 of the Evidence Act for the other party to lead oral evidence to explain the ambiguity or rebut the contents in the document. Thus the Respondent if could have brought such oral evidence like evidence of Kamalakant himself then, the evidentiary value of this affidavit would have been diluted.

However, no such attempt is made by the Respondent except mere denial. The rule of evidence is "*he who asserts must prove it*". The initial burden is always on the Plaintiff to prove his case. In the present case, the affidavit Exhibit 10 shows that it was executed by Kamlakant the owner of the room and it is produced by the Plaintiff. On the basis of this affidavit, the Plaintiff claimed his right over the suit room. One more supporting evidence i.e. photo-pass Exhibit 11 is tendered by the Plaintiff. The production of photo-pass from the custody of the Plaintiff is a fact which corroborates the fact that Kamlakant has handed over this room to the Plaintiff. Though there is complaint of theft of the photo-pass made by the Defendant, he did not say anything about the purchase of the room for Rs. 1 lac from Kamlakant at the time of giving said complaint.

11. Thus, it appears that Plaintiff proved that he is having better claim than Defendant/Appellant. In the absence of affidavit and the production of photo-pass, the case of the Plaintiff would have been collapsed. However, as soon as Plaintiff adduced oral evidence along with these two documents produced in corroboration, the onus shifted on the Appellant to bring some evidence to dislodge the claim

of the Plaintiff. However, it was not done. Therefore, the learned trial Judge has properly appreciated the evidence and rightly accepted the claim of the Plaintiff over the suit property. Hence, no interference is required in the order of the trial Court.

12. The order dated 30th April, 2013 passed by the trial Court is hereby maintained.

13. Accordingly, First Appeal No. 831 of 2013 is rejected.

14. In view of the above, Civil Application does not survive and accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)