

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 541 OF 2015
ALONGWITH

CIVIL APPLICATION NO. 3800 OF 2014
IN
FIRST APPEAL NO. 541 OF 2015

Praful Umarshi Thakkar

.....Appellant

V/s.

Smt. Hamida Md. Mustakin
Shaikh and anr.

.....Respondent

* * * * *

Mr. Uday P. Warunjikar, Advocate for the appellant.

Mr. R.A. Thorat, Senior Advocate i/by. Mr. B.S. Shukla, Advocate for respondent no.1.

Mrs. M.R Bhoir, Advocate for respondent no.2, BMC.

Coram :- Smt. R.P. SondurBaldota, J.

7th June, 2016.

P.C. :-

1). This appeal is directed against the judgment and decree dated 13th October, 2014 by which the Bombay City Civil Court decreed L.C. Suit No. 1579 of 2009 declaring the appellant as the trespasser in respect of the suit premises and directing him to vacate the same. He is also permanently restrained from transferring or creating any third party

rights over the suit premises.

2). Respondent no.1 filed the suit herein, inter-alia, for a declaration that, the appellant is the trespasser in respect of the suit premises, for its possession and for permanent injunction to restrain the appellant from creating any third party rights over the same. The suit premises as described in the plaint is "Stall No.20 admeasuring 2 mts x 1 mtr situate near TM, Dadasaheb Phalke Road, Dadar (East), Mumbai". Respondent no.2, Municipal Corporation is the owner of the structure. It had issued license under Sections, 313, 313A and 313B of the Municipal Corporation Act to the husband of respondent no.1 for carrying on the business of hair cutting saloon therefrom. The husband of respondent no.1 died on 19th April, 2005 leaving respondent no.1 as his legal heir and representative. Later, the license in respect of the suit stall came to be transferred to the name of respondent no.1. It was her allegation that, by the conducting agreement dated 1st April, 2006 she permitted the appellant to carry out business therefrom for a period of 11 months on payment of monthly compensation of Rs.5,000/- and security deposit of Rs.3,00,000/-. It was agreed between the two that, the monthly compensation would be paid by the appellant by way of deduction of Rs.3,000/- from the security deposit every month and by payment of Rs.2,000/- to respondent no.1. After the agreement expired, the appellant sought time from respondent no.1 to vacate the suit premises. He gave an assurance to respondent no.1 that, he would pay compensation of Rs.8,000/- per month out of which Rs.4,000/- was to be adjusted from the deposited amount and Rs.4,000/- to be paid every month. Thereafter, the appellant allegedly obtained signature of respondent no.1 on some blank papers stating that, he would get fresh conducting agreement prepared. Thereafter, from January, 2009 the

appellant failed to pay monthly compensation to respondent no.1. Therefore, by the advocate's notice dated 4th July, 2009 she called upon him to vacate the premises. Instead of vacating the suit premises, the appellant attempted to get the same transferred to his name by making an application to respondent no.2. He also made an application to BEST Authority for transfer of electric meter in his name without any intimation to respondent no.1. Thereafter, respondent no.1 filed the present suit.

3). The suit was contested by respondent no.2, Municipal Corporation admitting the fact of issuance of license in respect of the suit premises under Section 313, 313A and 313B of Municipal Corporation Act to the husband of respondent no.1 for carrying on his activity as a Barber. Later, the license came to be transferred to the name of respondent no.1. It contended that, in view of the Circular dated 29th March, 2008 bearing No. SS/LL/21/2007 issued pursuant to an order of the Apex court dated 12th February, 2007, a hawkers license is not transferable by way of sale. Transfer of the license is allowed only to the direct heirs of the license holder. On 27th April, 2009 the appellant had applied for transfer of the license on the ground that, he had purchased the suit premises from respondent no.1. His application was rejected and the rejection was communicated to him by the letter dated 4th July, 2009.

4). The appellant resisted the suit alleging that, he had purchased the suit premises for the total consideration of Rs.8,75,000/- and as such he cannot be said to be a trespasser in respect of the suit premises. He also contended that, the relationship between respondent no.1 and him was that of a licensor and licensee and as such the Court of Small Causes at Bombay had exclusive jurisdiction to entertain the suit.

The appellant claimed that, by the Leave and License agreement dated 26th October, 2005 and by the conducting agreement signed on 11th November, 2005, the husband of respondent no.1 had inducted him in the suit premises by giving him vacant possession thereof for the period 20th November, 2005 to 19th October, 2006 by accepting a sum of Rs.1,50,000/- from him. After the death of the husband, respondent no.1 executed conducting agreement dated 20th February, 2006 after accepting an amount of Rs.2,60,000/- towards deposit and gave credit to the amount of Rs.1,50,000/- paid to her husband to permit the appellant to occupy the suit premises for a period of 33 months commencing from 20th October, 2005 until 19th July, 2008. The appellant also contended that, the first respondent on 2nd May, 2006 executed agreement of sale of the suit premises for the total consideration of Rs.8,75,000/-. According to the appellant, respondent no.1 had already received Rs.3,00,000/- under conducting agreement dated 1st April, 2006 and he was required to pay only the balance amount of consideration to respondent no.1. By his advocate's letter dated 30th September, 2008 the appellant called upon respondent no.1 to transfer the suit premises in his name by accepting the balance consideration of Rs.4,75,000/-. Respondent no.1 failed to reply to the notice. Then, a reminder was sent on 16th March, 2009. The appellant claimed to have been carrying on business of handloom material from the premises under the name and style of "Om Handlooms" since 28th November, 2005 till 19th October, 2006 and contended that respondent no.1 was not entitled to receive possession of the premises from him

5). Respondent no.1 examined herself in support of her case. Respondent no.2 examined its License Inspector, Shri. Gosavi. The appellant examined himself and Advocate Mr. M.D. Yadav. The

appellant produced conducting agreement dated 1st April, 2006 between him and respondent no.1 (Exhibit-23)/conducting agreement dated 20th February, 2006 between him and respondent no.1 (Exhibit-26), agreement for sale dated 2nd May, 2006 (Exhibit-27), Leave and License agreement dated 26th October, 2005 between him and husband of respondent no.1 (Exhibit-38), conducting agreement dated 11th November, 2005 between him and husband of respondent no.1 (Exhibit-39) and agreement for sale dated 2nd May, 2006 (Exhibit-40).

6). The undisputed facts of the case are that, the suit premises belong to respondent no.2, Corporation. The husband of respondent no.1 was issued license under Section 313, 313A and 313B in respect of the premises for the purpose of business of hair cutting saloon. He carried out that business from the premises during his lifetime. After his death, respondent no.1 had changed the nature of the activity carried out from the premises which was objected to by respondent no.2. Later, the license came to be transferred to respondent no.1 as the direct heir of her husband. The license issued in respect of the premises is not transferable. The transfer can be effected only by respondent no.2 and that too only to the direct heir of the license holder. The claim of the appellant to the premises is not as the direct heir of the license holder but as a purchaser of the premises.

7). In the circumstances, the entire onus of proving that he has an independent right to occupy the suit premises was upon the appellant and as will be seen hereinafter, the appellant failed to discharge that onus. According to respondent no.1, the only agreement that had been executed with the appellant was the conducting agreement dated 1st April, 2006 (Exhibit-23). She did not execute any other agreement. The appellant, on the other hand, claimed that, as many as 5 more

agreements had been executed in respect of the suit premises with him, 2 agreements by the deceased husband of respondent no.1 during his lifetime and 3 more agreements by respondent no.1. By stating reasons in detail, the Bombay City Civil court has held that, the appellant has failed to establish execution of the remaining five agreements, the reasons therefor are stated in detail in the impugned judgment. The Bombay City Civil Court found that, the leave and license agreement dated 26th October, 2005 with the husband of respondent no.1 (Exhibit-38) which was allegedly signed by respondent no.1 as a witness did not bear her signature. The last date of the document carried no date of execution of the agreement. The appellant also did not examine any witness to show that, the husband of respondent no.1 had executed the agreement and respondent no.1 had witnessed the agreement. Thus, the document was held to be not proved. As regards the agreement at Exhibit-39, the appellant admitted in his cross-examination that, it was not in his name and also in the name of the husband of respondent no.1. The third agreement with the husband of respondent no.1 is Exhibit-40 which was noticed to be on stamp paper, neither in the name of the appellant nor the husband of respondent no.1. It states incorrect address of respondent no.1 for which no explanation is offered. The appellant deposed that, he visited the office of Advocate Mr. Mohanlal Yadav but had not gone to the office of the notary. Therefore, this document also cannot be believed. The fourth document is the conducting agreement with the husband of respondent no.1 (Exhibit-36). The stamp paper of this document also was purchased in the name of a third person. Advocate Yadav, who claimed to have prepared this document and signed it as a witness did not put date below his signature. One of the papers was not even signed by him. Hence, this document

was also not believed. The Bombay City Civil Court, has infact held that, these documents are false documents. On the above assessment of the evidence, the Bombay City Civil Court held that, the appellant has no right to occupy the suit premises and as such he is a trespasser in respect thereof and decreed the suit.

8). I have carefully perused the documents relied upon and produced in evidence by the appellant for establishing his right to occupy the suit premises. In my opinion, the assessment of the evidence by the Bombay City Civil Court of these documents is the correct assessment. None of the agreements relied upon by the appellant can be believed. Therefore, the only agreement between the parties that can decide their rights to the suit premises and the suit business is the conducting agreement dated 1st April, 2006 (Exhibit-23) relied upon by both the sides. The terms of the agreement clearly and expressly indicate the transaction between the parties. The transaction was of giving the business carried on in the suit premises for conducting by respondent no.1 to the appellant. The appellant has not been able to establish that, the business carried on therein was his independent business or that the suit premises would be given to him on leave and license basis for conducting his independent business therefrom. In the circumstances, on expiry of the agreement by efflux of time, the status of the appellant was reduced to a trespasser in respect of the suit premises. Hence, there is no infirmity in the finding of the Bombay City Civil Court as regards the status of the appellant, qua the suit premises.

9). Even if the appellant were to establish that, there was infact a transaction of sale of the suit premises by respondent no.1 to him, the same would not have been of any avail to him. This is because of the policy adopted by respondent no.2 in view of the orders passed by the

Apex Court as regards the transferability of the licenses under Section 313, 313A and 313B of the M.M.C. Act. Under the policy, transfer of a hawker's license by way of sale is not permitted and the transfer is allowed only to the direct heirs of the license holder. In the circumstances, there was no question of respondent no.2 transferring the three licenses in favour of the appellant regularizing his occupation thereof. Hence, there is no substance whatsoever in the First Appeal and the same is dismissed.

10). In view of dismissal of the First Appeal, Civil Application No. 3800 of 2014 does not survive. The same is accordingly disposed off.

11). At the request of the learned Advocate appearing for the appellant, the ad-interim order dated 13th October, 2014 is continued for a period of 4 weeks from today.

(SMT. R.P. SONDURBALDOTA, J)