

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 415 OF 2015

1] Sau Surekha Manohar Patil,
Age : 42 years, Occupation : Housework,

2] Shri. Manohar Namdev Patil,
Age : 54 years, Occupation : Agriculture,

Both above R/o : Ayodhyanagar,
Varangaon, Taluka : Bhusawal,
District : Jalgaon

.. Appellants
(Orig. Defendants)

VS.

Mrs. Sindhu Yeshwant Patil,
Age : 64 years, Occupation : Housework,
R/o : Ayodhyanagar,
Varangaon, Taluka : Bhusawal,
District : Jalgaon

.. Respondent
(Orig. Plaintiff)

Mr. Sanket S. Kulkarni, Advocate for the appellants
Mr. Shailesh P. Brahme, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 06-03-2017

ORAL JUDGMENT :

1. Heard learned counsel for the parties - Mr. Sanket Kulkarni for the appellants and Mr. Shailesh Brahme for the respondent.

2. Plot no. 6, in aggregate had been admeasuring about 507.00 square metre situated in gut no. 608 at Varangaon, Taluka : Bhusawal, District : Jalgaon. From the same, an area of 316.87 square metre was sold to plaintiff – Mrs. Sindhu Yeshwant Patil – respondent herein, by her brother Eknath Namdev Patil.

3. The plaintiff purchased the property under registered sale deed dated 02-07-1998, containing description of boundaries as under :-

East : Gut no. 609 and open talkies

West : Plot No.5

North : 9 metre wide road

South : Plots no. 7 and 8

While sale deed of the property came to be executed, property came to be referred to as western part of plot no. 6. The dispute relates to the area of land purchased by plaintiff.

4. Some time before suit plot was sold to plaintiff, Eknath, the brother of plaintiff and defendant no.2 had sold a part of plot no. 6 to another person wherein he has constructed a hotel.

5. Defendant no.2 – Manohar – appellant no.2 herein is real brother of plaintiff. It is contention of plaintiff that, since defendant no.2 had not been doing any work, plaintiff in good faith, thought about giving support to him to settle down in life, and as such had allowed him to commence hotel business in premises over the property referred to hereinabove by the boundaries, putting in the defendants as gratuitous licencees in aforesaid property.

6. Subsequently, plaintiff's son Yogesh had been intending to start a hotel business, as such, the plaintiff had requested defendants to vacate suit property.

7. Plaintiff contends, however, with a view to grab the property, had caused manufacture of certain documents and special civil suit no. 118 of 2009 had been instituted seeking specific performance of alleged agreement of sale dated 27-08-1999 by appellants (plaintiffs in said proceedings). It is the case of the plaintiff - respondent that the defendants' - appellants' fabrication had been exposed in the said suit by the defence and, ultimately, appellants had to withdraw the suit claiming specific performance, unconditionally.

8. Notice by plaintiff came to be issued to defendants terminating their gratuitous licence on 17-01-2012, referring to boundaries of the suit property as referred to above *albeit* it also came to be referred to as from western side of plot no. 6, as the sale deed had referred to the same, accordingly. The notice was responded to, by reply dated 27-01-2012 wherein, the defendants contended that they had constructed hotel in the suit premises.

9. In the circumstances, special civil suit no. 131 of 2012 ensued, at the instance of respondent – plaintiff, seeking possession of suit property.

10. The defendants, by their written statement denied the averments in the plaint. It has been contended that description of the property all along since 1998 onwards continuously continued to be as western side of plot no. 6. Even during pendency of the suit no.118 of 2009, the situation had been the same. The property has been constructed by defendant no. 2 alongwith his brother Eknath Namdev Patil with due permission in 1995 from the government and has been constructed by the defendants through their own finances. The averment with regard to them being gratuitous licencees, in order to enable him to earn by sister and, such other contentions in the plaint have been denied. Withdrawal of the suit had been justified as the plaintiff and her husband were seen to be taking the

defendants for a ride. In the circumstances, the claim now being made that the suit property being on the eastern side, through rectification, amendment, is misleading. The rectification in the sale deed and amendments to the pleadings has been after issues had been framed at exhibit – 12.

11. Trial court framed issues as to whether the plaintiff proves that she is owner of suit property; whether she proves, the defendants are gratuitous licencees; whether she has terminated licence by notice dated 17-01-2012; whether the defendants are trespassers; whether plaintiff has given proper description of suit property sufficient to identify the same and about her entitlement to possession of suit property.

12. Trial court found plaintiff to be owner and entitled to possession, and, suit property to be sufficiently identifiable. Trial court, however, held in the negative that plaintiff has proved the defendants to be gratuitous licencees and also held in the negative that the plaintiff terminated the licence through notice dated 17-01-2012. Trial court, however, considered that the defendants were trespassers. Trial court under its judgment and decree dated 11-10-2014 decreed special civil suit no. 95 of 2014, directing defendants to hand over possession of suit property and further directing enquiry into *mesne* profits.

13. The matter was carried in regular civil appeal no. 678 of 2014 by the defendants .

14. The appellate court had framed points for determination as to whether plaintiff proves to be owner of the eastern portion of plot no. 6 as described and whether defendants are gratuitous licencees and as to whether plaintiff proves the licence to be validly terminated and her entitlement to possession. Appellate court has held, as has been held by trial court, plaintiff to be the owner of suit property and entitled to possession and confirmed the decree passed by the trial court, and further held the defendants to be gratuitous licensees and license had been validly terminated.

15. Original defendants are before this court in present second appeal.

16. Learned counsel Mr. Sanket Kulkarni appearing for the appellants vehemently submits that notice had been issued terminating licence on 17-01-2012 specifically in respect of the property on the western side and which had been responded to by the defendants denying the claims therein and declining the request. The suit had been instituted in respect of property bearing the same description as had been given in the notice. It was only after the

issues had been framed, rectification in the sale deed of 1998 had taken place and, thereafter, plaint had also been amended. In the circumstances, it cannot be said that there had been any termination of licence in respect of the eastern property which is now claimed to be belonging to the plaintiff.

17. As such, he contends that there has been no valid termination of licence and the suit, as such, on that count alone ought to have failed. He submits that in the first place, the trial court had committed error granting decree to plaintiff while it found defendants to be not gratuitous licencees and the licence not been validly terminated. It ought to have dismissed the suit, yet, erroneously, the suit was decreed directing delivery of possession to the plaintiff. He submits that even more erroneously, while no appeal had ever been preferred by the plaintiff in respect of the findings of trial court holding in negative the defendants being gratuitous licencees and about validity of the notice, the appellate court under its impugned judgment and decree dated 02-04-2015 reversed the findings of trial court on these issues and has further confirmed the decree passed by trial court.

18. He submits that in the absence of any appeal by plaintiff, after the appeal had been filed by the defendants, the only point for

determination which could arrive, as to whether the trial court had committed error in decreeing plaintiff's suit and directing delivery of possession.

19. During the course of his submissions, with a view to buttress the same, he purports to place reliance on a Supreme court decision in the case of *Chimanlal Vs. Mishrilal* reported in *AIR 1985 S.C. 136*, stressing that on the basis of defective notice, relationship of licensor and licensee would not be said to be terminated.

20. The case relied on, it appears, is with reference to notice demanding arrears of rent relatable to the accommodation let to the tenant. The supreme court, in the facts and circumstances of the case, had noticed that it did not relate to the entire accommodation let to the tenant but only to lesser part of it, and, as such, considered that notice of demand is invalid, and, thus, the suit was not maintainable.

21. He submits that in the absence of appeal from the plaintiff, it is very difficult to conceive that appellate court could have reversed the findings on the two issues, referred to above. For, it may not be that the scope of appeal could be enlarged in respect of

the findings which are not challenged by filing any appeal. He, in the aforesaid background, urges to indulge into the request, either to allow the appeal or to remand the same for giving findings in respect of the points which have been determined against the defendants at the appellate stage.

22. Countering aforesaid submissions, Mr. Shailesh Brahme, appearing for the respondent – plaintiff, submits at the outset that, the two courts hitherto have rendered findings on facts concurrently that the plaintiff is entitled to possession of suit property, and, that plaintiff is owner of suit property.

23. He submits that the description about suit property being on the western side, being an error, would hardly be of any benefit to the defendants, for the description of the property by boundaries in the notice and in the sale deed had remained unaltered all through, and, as such, the same had been identified, and, therefore, arguments over the same tend to make only a fuss over the same.

24. He submits that from submissions on behalf of the appellants, it would emerge that there is no dispute about boundaries of the suit property as given in the notice, plaint and the boundaries as described in the sale deed of 1998. It is not a case

that the property is not identifiable with the boundaries given. An inadvertent error had crept in making reference to the same being western part of plot no. 6 in the sale deed. As such, reference to the property, naturally came to be made in the same way in the notice and in the plaint. The boundaries did not undergo any change nor have ever been disputed. While upon realization of the error, a proper rectification deed had been entered into and so was the plaint amended.

25. Evidence identifying suit property been led, the courts have rightly considered property to be identifiable and its location being fixed. Dispute in respect of the same although being sought to be raised, would hardly be able to affect the right of plaintiff in the *lis* initiated by the plaintiff. He submits that there are atleast seven admissions by the defendants in vital respects not confining only to description of the property.

26. He thus submits that it is difficult to consider the alternate case being submitted on behalf of the defendants that any case can be made out referable to section 60(b) of the Indian Easements Act, 1882. He submits that though it is being contended that construction over suit property has been by the defendants, no evidence whatsoever had been brought forth before the courts in

this respect. He further submits that section 61 of the Indian Easements Act, 1882, refers to that revocation of licence can be express and/or even implied. He contends that there has been sufficient evidence indicating that the licence stood revoked and, as such, the plaintiff became entitled to possession of suit property.

27. He submits that two courts having held plaintiff to be entitled to possession and defendants having failed to raise any case with reference to section 60(b) of the Indian Easements Act, in the capacity of owner, the plaintiff is entitled to possession of suit property, and, as such, the reversal of findings by appellate court on the two issues with regard to defendants being gratuitous licencees and the termination of licence, would hardly matter. Even otherwise, trial court has held that defendants' character has been that of a trespasser, therefore, the plaintiff is entitled to possession.

28. Learned counsel Mr. Shailesh Brahme, in support of his submission that notices would not be amenable to strict construction, refers to two decisions of the supreme court, one in the case of *Lalshankar Mulji Joshi v. Kantilal Mohanlal Parikh and another* reported in *AIR 1972 Bombay 373* and the other is the case of *Bhagabandas Agarwalla v. Bhagwandas Kanu and others* reported in *AIR 1977 SC 1120*, and laid stress on paragraph no. 3 from the same, reading,

thus :

“3. Now, it is settled that a notice of quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed but resmagis valeat quam pereat. “The validity of a notice to quit”, as pointed out by the Lord Justice Lindely, L.J. in Side botham v. Holland, (1895) 1 QB 278 “ought not to turn on the splitting of a straw”. It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way. See Hariahar Banerji v. Ramsashi Roy, 45 Ind App 222 – (AIR 1981 PC 102). The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation.”

29. He further refers to the case of *Ramesh s/o Raghunath and others v. Pandurangrao Ratnalikar and others* reported in 2006 (4) Mh.L.J. 83, to refer to that three ingredients which are must to be proved for a defence under section 60(b), are absent in the present case and that the defendants have not been able to show that they had brought up the structure after the licence and that they had incurred expenses.

30. He refers to yet another judgment of supreme court in the case of *S. Nazeer Ahmed Vs. State Bank of Mysore and others* reported in 2007 DGLS (SC) 1450, to contend that the plaintiff, as respondent in the appeal, had been within his right to make submissions in respect of the findings recorded against her interest.

31. With the assistance of learned counsel on the either side, I have gone through the judgments rendered by the two courts, trial as well as appellate. The trial and the appellate court concur on that the plaintiff owns the same.

32. It appears that description of the suit property by boundaries has been maintained all through in the sale deed of 1998 and upon its rectification in 2012, so is the case in respect of the notice issued on 17-01-2012 and the suit instituted thereafter. The position appears to be that plot no. 6 ademasuring 507.00 square metre underwent division in 1983 whereunder western portion of the same had been sold to one Mr. Jaiswal and eastern portion remained with the vendor of the plaintiff. While selling this eastern property of plot no. 6 admeasuring about 316 square metre, it came to be erroneously described as western side of plot no. 6, and, as such, it was referred to in the same way in the notice and the suit. However, upon realization, rectification deed had been duly entered into by the parties to the sale deed and amendment came to be caused to the plaint, referring to that it is eastern side of plot no.6. Boundaries of the property, however, remained intact as were shown in 1998 sale deed.

33. In the circumstances, so far as the location of the suit property is concerned, that does not appear to have in any way altered. It appears that plaintiff all along intended to have the property as described by boundaries.

34. The plaintiff is seeking recovery of such property from the defendants which is possessed by the defendants by the boundaries described in the sale deed, notice, suit and the rectification and amended plaint. Plaintiff has been found to be owner of the property as is described by boundaries. Notice terminating/revoking licence, as such, will have to be taking into account accordingly. The side of plot no. 6, in this case, western or eastern, is unlikely to affect in any way, the case of parties to the suit. The notice and the further proceedings give sufficient identity of the property. As such, it would not be that the description appearing in the notice about suit property and the suit property before amendment, would supplant claim of plaintiff in the suit. Aforesaid apart, the defendants do not appear to have lent credibility to their case about them having caused construction over suit property by any evidence.

35. Contention with regard to absence of any appeal by the plaintiff against the decree by findings recorded by trial court is

concerned, it does not appear that the same would affect the plaintiff in any way having regard to order XLI, rule 22, which reads, thus -

“22 . Upon hearing respondent may object to decree as if he had preferred a separate appeal — (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow.”

36. Thus, it does not appear to be incumbent that the plaintiff ought to have filed appeal/cross appeal/cross objection after the appeal had been filed by the defendants. Even otherwise, the court has ample powers under order XLI, rule 33, to consider the entire case and decide the same. Here in the present case, however, having regard to that the two courts have held the plaintiff to be the owner and the appellate court having held that the licence has been validly terminated and, further in the absence of any evidence substantiating right claimed to maintain the possession by the defendants, it does not appear to be a case wherein it can be said that the concurrent decisions rendered by the trial court and

appellate court, would deserve any interference. The plaintiff in her own capacity, as owner of the suit property, would be rightful in her claim to recover the possession.

37. Second appeal is dismissed. No order as to costs.

[SUNIL P. DESHMUKH]
JUDGE

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