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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 299 OF 2017
WITH
CIVIL APPLICATION NO. 5029 OF 2017
WITH
REVIEW APPLICATION NO. 191 OF 2017
WITH
CIVIL APPLICATION NO. 7545 OF 2017
WITH
CIVIL APPLICATION NO. 5903 OF 2017
WITH
CIVIL APPLICATION NO. 5008 OF 2017**

Ravindra s/o Vithalrao Songire,
Age: 47 years, Occu: Business,
R/o Bansilalnagar, Aurangabad,
Dist. Aurangabad

..APPELLANT

VERSUS

M/s Labhshetwar and Sakkarwar
Constructions a registered firm under
Partnership Act, with
Registrar of Firm, Aurangabad
Through its Partner,
Vittlal s/o Ganpatrao Labhshetwar,
Age: 61 years, Occu: Business,
R/o 214, Labh Chambers,
Station Road, Aurangabad

..RESPONDENT

Mr V. J. Dixit, Senior Advocate i/b Mr Sachin
Deshmukh, Advocate for appellant;
Mr A. P. Bhandari, Advocate for respondent;
Mr S. G. Sangle, Court Receiver appointed

CORAM : N.W. SAMBRE, J.

DATE : 11th JULY, 2017

(2)

ORAL ORDER :

Present appellant is plaintiff in Regular Civil Suit No.1001 of 2009, which was filed for simplicitor perpetual injunction against the respondent-defendant. The subject matter of the proceedings is, property bearing CTS No.18349/14 Complex.

2. First leave and licence agreement was entered into between the parties on 20th April, 2004, which was for the period of 33 months and s Second agreement was entered on 19th January, 2007 for the period 20th January, 2007 to 19th April, 2007. Both these agreements are at Exhibits-137 and 138 of the suit.

3. Since there arose dispute between the parties, present appellant-original plaintiff filed suit for simplicitor injunction without praying any declaration that he is tenant of the suit property. The suit came to be dismissed by judgment and order

(3)

dated 20th February, 2013, which was further confirmed in Regular Civil Appeal No.66 of 2013 decided by District Judge-2, Aurangabad on 14th November, 2016. As such, this second appeal.

4. Mr Dixit, learned Senior Counsel appearing for the plaintiff-appellant would urge that present appeal needs to be entertained on the following ground.

Whether agreement at Exhibits-137 and 138 could be termed as tenancy agreement or leave and licence agreement?

5. While countering the above referred submissions, Mr. Bhandari, learned Counsel for the respondent would invite attention of this Court to the provisions of Section 116 of Evidence Act, which reads thus :

"116. Estoppel of tenant; and of licensee of person in possession.—No tenant of immovable property, or person claiming

(4)

through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

6. Once present appellant-plaintiff having admitted the relationship between the appellant and respondent, according to him, is now estopped from disputing the said issue and would rely upon the pleadings to that effect raised by the appellant in the plaint. He would then urge that perusal of the recitals in both the agreement i.e. Exhibits-137 and 138 in clear manner speak of leave and licence agreement and not tenancy agreement. He would harp upon clause-5 of the agreement at Exhibit-137 for the said purpose. In the aforesaid background, he submits that the appeal lacks any merit and as such, deserves to be dismissed.

(5)

7. Having considered rival submissions, it is required to be noted that though Mr. Dixit, learned Senior Counsel had taken me through recitals of document at Exhibit-137 and 138 so as draw conclusion that the property was put in exclusive possession of the appellant-plaintiff and there exists tenancy agreement and not leave and licence agreement, however, it is required to be noted from the evidence of both the parties that present appellant was required to establish before both the Courts below that he remained in lawful possession of the suit property, by virtue of these two agreements. The Courts below have proceeded to evaluate the recitals of these two agreements at Exhibits-137 and 138. From the language employed therein and also in view of past conduct of the parties in the backdrop of recitals, pleadings in the proceedings, both the Courts below have inferred that the agreement in question by virtue of which the appellant was put in possession of the suit property was held to be leave and licence agreement.

(6)

8. While doing so, the trial Court was conscious of the law laid down by the Apex Court in the matter of ***Khalil Ahmed Bashir Ahmed vs Tufelhussein Sambasbhaji Sarangpurwala***, reported in ***1987 DGLS (Soft) 825***, which has concurrent view expressed by Kerla High Court in the matter of ***Velaludhan Kesaza Panicker vs Ibrahim Ismail Sait***, reported in ***1963 Vol.I Ker.L.R. (453)***.

9. Once the Courts below having appreciated the recitals and the contents thereof, in the backdrop of respective pleadings and conduct of the parties recorded findings of fact that the document in question is leave and licence agreement. I hardly see any material on record to infer that present appellant was in possession of the suit property being tenant.

10. Apart from above, it is required to be noted that the parties to the proceedings have approached before learned District Judge in MARJI

(7)

No. 133 of 2009 under the provisions of Section 9 of Arbitration and Consolidation Act, 1966. In the said proceedings, there appears to be order passed against the present appellant in the matter of deposit of licence fees. Parties are also litigating in another proceedings being Regular Civil Suit No.527 of 2009, which is initiated by present respondent for recovery of amount towards damages, in which, it is informed that present appellant has also filed counter claim, which matter is subjudice before competent civil Court.

11. So far as the issue of ownership of the present respondent over the suit property is concerned, the said issue was neither raised nor looked into by both the Courts below and as such, in my opinion, the said issue no more required to be looked into or gone into by this Court at this stage of the proceedings. The aforesaid observations are made mainly keeping in mind that the suit of the present appellant is for simplicitor injunction.

(8)

12. In the wake of above referred observations, in my opinion, the appeal lacks merit, stands dismissed.

13. Consequently, all pending civil applications stand disposed of.

14. It will be open for the appellant to initiate such proceedings as are advisable and permissible in law.

(N.W. SAMBRE, J.)

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