

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

SECOND APPEAL NO. 195 OF 2017

1 Sk.Nayeem s/o Sk.Karim
Age : 40 years, Occu : Driver,
R/o H.No.750, Pensionpura,
Cantonment, Aurangabad.

2 Sk.Nadeem s/o Sk.Karim
Age : 34 years, Occu : Driver,
R/o As above.

...APPELLANTS

-Versus-

Akhtar Nasir Fatima Gani
Age : 50 years, Occu : H.H.,
R/o Kohinoor Colony,
Aurangabad.

...RESPONDENT

WITH
CIVIL APPLICATION NO.3344 OF 2017
IN SA/195/2017

SK. NAYEEM SK. KARIM AND ANOTHER
VERSUS
AKHTAR NASIR FATIMA GANI

...

Advocate for Appellants : Shri Saiyed Rahatali Jafarali (Jahagirdar).
Advocate for Respondent : Shri Vivek Bhavthankar.

...

CORAM: SUNIL P. DESHMUKH, J.

DATE :- 17th April, 2017

Oral Judgment :

1 Heard the learned counsel appearing for the parties.

2 This is plaintiffs' second appeal against decree of possession granted against them passed by trial court dated 23.01.2014 in counter claim filed by defendant against plaintiffs in regular civil suit No.1043 of 2009 and confirmed by appellate court under judgment and order dated 02.07.2016 in regular civil appeal No.42 of 2014. (Parties hereinafter are referred to by their original status in the suit).

3 Plaintiffs had been to trial court, contending that suit house belonged to one Gulam Mohammad Nasir (father of defendant) and that the same had been rented out to their (plaintiffs') father Shaikh Karim since 1960. Both the aforesaid persons had cordial relations and as such, no written document had been executed about tenancy being created. After death of Shaikh Karim, plaintiffs became tenants of suit house and had been regularly paying rent. It is further averred that rent receipts were not issued by defendant, nor there was practice of passing rent receipts due to cordial relationship between the fathers of the respective parties. However, with a view to evict the plaintiffs, the defendant had intercepted necessary amenities being provided to suit house and had disconnected supply of electricity in December, 2009. The defendant has her money and muscle power and had been trying to get the suit house vacated. As such, the suit for perpetual injunction against defendant was

instituted.

4 In response, defendant, by her written statement, has denied relationship of the landlord-tenant and further denied that either Shaikh Karim or after him, present plaintiffs, were tenants of suit house. There was no question of passing rent receipts to plaintiffs. According to the defendant, the plaintiffs have illegally occupied suit house about four to five years back taking advantage of the defendant being a lady and residing away from suit house. In the written statement, defendant had lodged counter claim against plaintiffs, contending that plaintiffs are encroachers and be directed to handover possession of suit house to defendant.

5 The trial court framed issues as to, whether plaintiffs were inducted as tenants, whether defendant is trying to dispossess plaintiffs without following due process of law, whether defendant proves plaintiffs to be encroachers and whether defendant is entitled to counter claim of possession.

6 Trial court held in the negative that plaintiffs are inducted as tenants and that defendant has been trying to dispossess plaintiffs without following due process of law and further held that defendant has proved

that plaintiffs were encroachers. Trial court considered defendant to be entitled for the counter claim of possession. As such, the trial court dismissed the suit and partly decreed the counter claim directing possession to be handed over to defendant. The suit of the plaintiffs for injunction incidentally came to be dismissed.

7 In the appeal therefrom at the instance of plaintiffs, appellate court had framed points for consideration as to whether plaintiffs prove their father or them to be tenants, whether defendant is trying to dispossess plaintiffs without following due process of law, whether defendant proves that plaintiffs have encroached upon suit house, and whether defendant is entitled to decree in counter claim for possession. Answering aforesaid points as had been answered by the trial court and in the process, holding in the negative the claim of plaintiffs of being tenants and defendant were trying to dispossess the plaintiffs without due process of law. Further, in the same way as did the trial court, appellate court held in the affirmative that defendant is entitled to possession under the counter claim.

8 Shree Jahagirdar, learned counsel for plaintiffs, vehemently submits that there are hosts of aspects which have not been considered by the courts hitherto. According to him, the counter claim of defendant

itself has not been maintainable. Furthermore, according to him, even if it is assumed to be maintainable, yet no proper court fees on the same has been paid. The learned counsel contends that as a matter of fact there is no cause of action for counter claim by defendant. Moreover, defendant had not been owner of suit house having sold the same to her son. He submits that there is evidence of plaintiffs being tenants, particularly of PW-3 who stated that he had seen rent being paid by father of plaintiffs to father of defendant. In the circumstances, according to him, burden to prove that aspect, has been sufficiently discharged by plaintiffs. He submits that even otherwise, counter claim of defendant has been time barred as it was not filed within the period prescribed under relevant articles of the Limitation Act, 1963.

9 Opposing aforesaid contentions, Shree Bhavthankar, learned counsel appearing for defendant, contends that majority of arguments in Second Appeal are outside the scope of litigation instituted against defendant. According to him, it emerges to be an admitted position about ownership of defendant having been accepted and acquiesced in by plaintiffs. He submits that it had never been pleaded by plaintiffs in their Written Statement or in defence to counter claim that defendant has not been owner or for that matter, the property has been sold by her. He submits that proper court fees on the counter claim has been paid. Apart

from above, this was not the objection taken at all during pendency of litigation hitherto. He submits that having regard to ownership of the defendant having been emerged on record under the pleadings as well as being an admitted position, it was within her right to seek recovery of possession and as soon as it has emerged that plaintiffs are not willing to give back possession of suit house, the counter claim has been filed within prescribed period of limitation. It is an admitted position that defendant is owner. Plaintiffs' possession of suit house, the courts have found the same to be permissive. Institution of the counter claim can in no way said to be outside the period of limitation being based on the title. He further points out that so called evidence of the plaintiffs' witness No.3 that he had seen father of defendant receiving rent from father of plaintiffs, was a tutored evidence and there is no substance in the same. Said witness has been completely exposed under the cross-examination. Besides, said evidence having been examined twice, once at the trial and at the appellate stage, it cannot be said that appreciation of the same is perverse. He, therefore, prays for dismissal of the Second Appeal.

10 Perusal of judgments and decrees of the courts hitherto, shows that plaintiffs have accepted devolution of suit house from Gulam Mohammad upon the defendant. Further, it does not appear that any credible material has been placed on record or for that matter, pressed

into service showing that the defendant had no right to seek recovery of possession. On the other hand, the plaintiffs did not appear to have placed any credible material on record to substantiate their case about rent being tendered to defendant about them being tenants. The Courts hitherto have found plaintiffs' possession to be permissive. Documents produced on record like the ration card or for that matter, the election identity card or voter's identity card, in the absence of establishment of relationship of tenant-landlord between the fathers of the parties, would not assist the plaintiffs. Appreciation by courts has been after examining the evidence of witnesses and the record, does not appear to be impeachable. The position emerges that the defendant has right to recover possession. It does not appear that any ground at the second appellate stage being taken about the counter claim being outside limitation, carries any substance, the suit being based on title.

11 In the circumstances, it does not appear that the Second Appeal raises any substantial question to be considered. The Second Appeal stands dismissed. The pending Civil Application does not survive and the same also stands disposed of.