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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.96 OF 2017

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| 1. Mhatu s/o Rakhma Shinde
Age - 51 years, Occ - Labour | APPELLANTS |
| 2. Alka w/o Mhatu Shinde
Age - 43 years, Occ - Labour | |
| Both R/o Janata Nagar (West)
Lane No. 3, Sangamner,
District - Ahmednagar | |

VERSUS

- | | |
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| Satyabhama w/o Jijaba Gunjal
Age - 60 years, Occ - Household
R/o Khandgaon, Taluka - Sangamner
District - Ahmednagar | RESPONDENT |
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Mr. Satyajeet S. Dixit, Advocate for the appellants
Mr. K. N. Shermale, Advocate for the respondent
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 10th AUGUST, 2017

ORAL JUDGMENT :

1. Appellants, who are original defendants in Regular Civil Suit No. 21 of 2004 instituted by present respondent – plaintiff seeking possession of properties, aggrieved by two concurrent decisions rendered by two courts hitherto, are before this court in second appeal.

2. Mr. Dixit, learned advocate appearing on behalf of the appellants passionately urges this court to consider grounds being agitated as substantial questions arising in the matter firstly – while the respondent – plaintiff had approached the court pleading that it is only one room which was given in occupation of defendants – appellants, yet, entire suit property is directed to be handed over and suit has been decreed in totality, whether the same would be possible; Since, for such a relief, there is no cause of action, which can be said to have been pleaded by plaintiff – respondent. Secondly, if at all his occupation is as contended by respondent, in such a case it gives rise to relationship of licensee and licensor and as such, the matter could not have been entertained by civil court in civil suit and ought to have been assigned to competent authority pursuant to section 24 of the Maharashtra Rent Control Act. His another leg of submissions is, trial court has considered for failure to discharge burden of proof by the defendants, plaintiff's case stands proved, since such an approach is not compatible whether suit could be decreed.

3. With clutch of decisions of courts, particularly the Supreme Court in the cases of *“State of Madhya Pradesh V/s Nomi Singh and*

Another” reported in (2015) 14 SCC 450; *“Union of India and Others V/s Vasvi Co-operative Housing Society Limited and Others”* reported in (2014) 2 SCC 269, he purport to buttress his submissions. As regards his submission with regard to cause of action, he refers to and relies on a judgment of the Supreme Court in the case of *“Church of Christ Charitable Trust and Educational Charitable Society V/s Ponniamman Educational Trust”* reported in (2012) 8 SCC 706, particularly laying stress on head note “B” thereof, for according to him, the plaint falls short of cause of action for claiming eviction from whole of the property. He refers to paragraphs No. 13 to 15 of said citation.

4. Learned advocate further refers to a decision in the case of *“S. C. Basavraja and Another V/s Boraiah”* reported in 1987 (Supp) SCC 123 to submit that in case of failure of party to disclose material facts before court, a decree passed by court renders itself without jurisdiction. He also for aforesaid purpose refers to and relies on a judgment of the Supreme Court in the case of *“Mayar (HK) Ltd and Others V/s Owners & Parties Vessel M. V. Fortune Express and Others”* reported in (2006) 3 SCC 100 and refers to paragraph No. 18 therein to buttress that for want of adherence to requirements under Order VI, Rule 2 of the Civil Procedure Code, which in present case, is absent with regard to whole of the property, it

cannot be said that there is any cause of action for the plaintiff to claim relief as prayed for in the plaint.

5. Background to be succinctly referred to would be – plaintiff is a relative, appears to be paternal aunt of appellant No. 1 in the sense she happens to be sister of father of appellant No. 1. She has purchased property under a registered deed of sale in 1995 and had been occupying the same, by constructing over some portion of it. While she started to be away from the place for some time, since 2001, defendants had approached and requested to let them occupy a room in the premises till such time they would get a proper tenanted premises. While letting defendants occupy the property, respondent – plaintiff had given them to understand that they will be required to vacate the premises as and when she needs the same for re-construction, since subsisting construction had not been a permanent one.

6. It is her case that while she requested the defendants to vacate the room, which was being allowed to be occupied they had shown reluctance and had refused to vacate the property and thus the suit ensued.

7. In defence, the appellants – defendants denied the claim made by the respondent – plaintiff and claimed to be owners

under a purchase from plaintiff for a consideration of Rs.20,000/- and further claiming construction over the property having been by them and not by plaintiff.

8. Issues were framed by trial court as to whether plaintiff proves that the construction had been made by her; whether suit premises had been given without any consideration for occupation; whether defendants had been avoiding to give back possession; whether the defendants could prove to have purchased said property and had caused construction over the same.

9. Trial court recorded findings that plaintiff had constructed property and had given the same free of consideration to the defendants to reside in. Looking at evidence on record, trial court judged that while it is the case of the defendants that they had been till 2001 occupying rented premises, as such, their contention that they have constructed property before nine years does not inspire confidence. Whereas the plaintiff has purchased property under a registered sale deed and further that may be, there is no documentary evidence with regard to construction having been raised by the plaintiff, however, looking at the totality of circumstances, the probability and per-ponderance

favour the plaintiff. So far as municipal taxes are concerned, trial court has considered that tax payment cannot be an evidence about construction having been raised by the defendants. On appreciation of evidence as has been tendered on record, trial court has come to a conclusion that it is the plaintiff who can be said to have constructed the property. She is the owner and that there is no evidence with regard to that occupation of property had ever been charged or any consideration was ever been received by her. So far as issues as regards burden of which had been on defendants to prove, they could not prove purchase of property as claimed by them. Nor could they adduce any evidence that construction had been by them over suit property.

10. Overall, trial court considered that while plaint refers to suit property as entire land purchased by the plaintiff along with construction thereon, cause of action has been referred to as refusal to vacate property allowed to be occupied and in the circumstances entire property had been claimed back to be placed in possession of plaintiff. Trial court had considered that plaintiff's case is far more credible than the one which is sought to be raised by defendants and as such, decreed the suit.

11. Appellate court, in respect of points for determination has

observed that the plaintiff had examined herself and had given elaborate evidence about construction having been over the open plot by her. For the reason that she could not give names of carpenter or for that matter electrician it has been considered that it would not disprove her case of having raised construction over the property. Further, in support of her claim in respect of construction, she has adduced evidence of one Bhausahab Kasar. Appellate court did not find any substance in the case about construction by defendants, since the receipts, which are being tried to be relied on had been receipts of 1997. Evidence, which had been led on behalf of the defendants does not inspire confidence, for, there are various discrepancies and fallacies in the evidence, as has been referred to in paragraph No. 17 of the judgment. Appellate court has observed in paragraph No. 13 that plaintiff had been running a tea stall. Defendants had admitted that plaintiff had purchased suit plot. The court had also found that defendant could not tell four boundaries and city survey number of the suit property and he was further found to be a labourer and had been residing at Pune-Nashik road by making encroachments. His encroachment had been removed.

12. Overall, both the courts considered that the defendants had been occupying suit property under a permission from

plaintiff and that said occupation had been without any consideration. Defendants purported to claim whole of the property to have been purchased by them. The plaintiff, as such, would be seen claims back the suit property. Cause of action has have been spelt out for institution of suit and the entitlement to the relief is claimed to have emerged. Decisions rendered so far do not give rise to the questions sought to be raised as aforestated on behalf of the appellants for, the plaint refers to suit property to be entire property purchased by the plaintiff and that cause of action of refusal to vacate room given in occupation of the defendants and it is the case of the defendants that they are purchasers of whole of the property and had been in occupation of the same and as such, it may not be proper to say that a cause of action for the entire relief claimed has not been spelt out. A cause of action for the suit for possession had arisen as has been referred to and the entitlement to relief as has been claimed was with regard to entire property. Relief in fact gets support from the pleadings of defendants, who claim to have occupied whole of the property.

13. Even it may be taken into account that plaint has to be read as a whole and the plaint contains several averments which indicate that plaintiff all along intended to get back entire

property from possession of defendants and in the circumstances it would not be proper to look the matter pedantically.

14. So far as question of defendants being licensee has been sought to be raised that is sought to be raised for the first time in second appeal. That apart, the term "*licensee*" has been defined under section 7 (5) of the Maharashtra Rent Control Act. In respect of such defined licensee, a provision is appearing under section 24. So far as present matter is concerned, it had not been the case of defendants that that defendants claim status of a licensee as defined under section 7 (5) of the Maharashtra Rent Control Act. Nor such a claim had ever been made hitherto in pleadings of the parties. As such, facts and circumstances of the case would not give rise to such a question for being answered in present second appeal.

15. So far as burden of proof is concerned, plaintiff to a substantial extent appears to have discharged her burden and that it may not be said that burden on defendants had been wrongly placed on them to be discharged. Defendants' evidence in respect of burden has not been discharged by the defendants and in the circumstances, it has been observed that with the material as has been placed by the plaintiff on record coupled

with failure of defendants to discharge their burden has strengthened case of plaintiff.

16. In the circumstances, the citations which have been relied on in this respect, which are with reference to different fact situation, analogy from the same would not apply to the present case. Two courts hitherto have concurrently held that plaintiff is entitled to reliefs by giving a finding of facts on the basis of evidence and probable and possible view has been taken, which cannot be said to be not in accordance with evidence. Second appeal, as such, does not give rise to the questions as sought to be raised and fails. Second appeal stands dismissed.

17. In view of dismissal of second appeal, civil application No. 1743 of 2017 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]