

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.235 OF 2016

Prabhakar s/o Narayan Lokare, since deceased, thr. his Legal
Representatives Arun s/o Prabhakar Lokare and anr

..VS..

Himmatlal s/o Manjibhai Chauhan

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

Shri P.V. Vaidya, Counsel for the appellant.

Shri Rohan Chandurkar, Counsel for the respondent.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 8, 2017.

1. Heard learned counsel Shri P.V. Vaidya for the appellant and learned counsel Shri Rohan Chandurkar for the respondent, *in extenso*.

2. The present appeal is filed by plaintiff.

3. A suit for ejectment and possession was filed against the respondent/defendant and his father Manjibhai. The suit was dismissed. An appeal carried against such dismissal was also dismissed by the Appellate Court, which gives cause to the plaintiff to approach to this Court.

4. According to learned counsel Shri P.V. Vaidya for the appellant/plaintiff, Manjibhai's other son by name Shashikant was tenant in tenanted premises which consists of 3

rooms. Shashikant vacated one room in October 2000 with a promise to the appellant/plaintiff that within 2-3 days remaining two rooms will be vacated. It is further submission of learned counsel for the appellant/plaintiffs that Shashikant started residing in his own house construed on plot No.77-A, Krishna Palace, Pande Layout, Khamla at Nagpur. He submits that in fact the case before the Trial Court that subsequent to October 2000 present respondent Himmatlal and his father Manjibhai occupied the remaining two rooms and started asserting that they are tenants. During pendency of the suit, as per the submission of learned counsel for the appellant/plaintiff, Shashikant expired.

5. An application Exhibit 14 was presented in the suit seeking directions against the defendants that since they are claiming status of tenants, they should deposit the rent amount. According to learned counsel for the appellant/plaintiff, the said application was allowed sometime in the year 2006 and the defendants were directed to pay rent @ Rs.550/- per month during the pendency of the suit. Such rent amount was not deposited. Consequently, defence of the defendants was struck-off in view of the application in that behalf.

6. Learned counsel for the appellant/plaintiff further submits that the suit was dismissed and, therefore, the appellant/plaintiff was required to file an appeal before the

Appellate Court under Section 96 of the Code of Civil Procedure, 1908. During the pendency of the said appeal, defendant No.2 Manjibhai expired and to that behalf a Pursis was filed on behalf of the defendants under Order XXII Rule 10-A of the Code of Civil Procedure. However, appellant/plaintiff failed to bring legal representatives of Manjibhai on record. The appeal was also dismissed. While dismissing the appeal, the Appellate Court also noticed that the appeal itself was abated at the time of dismissing the appeal on its merits also.

7. It is clear from the submissions of learned counsel for the appellant/plaintiff and learned counsel for the respondent/defendant and from the impugned judgment, there was no written rent note in between the appellant/plaintiff and Shashikant. It is also not in dispute that Himmatlal and Shashikant are sons of Manjibhai.

8. A primary burden is always on the plaintiff. The burden never shifts. There is always shifting of onus.

9. In the present case, it was a specific case of the appellant/plaintiff that Shashikant was his tenant and not Himmatlal and Manjibhai. Therefore, burden firmly rests on the shoulder of the appellant/plaintiff. Even, in absence of rent note it was always open for the plaintiff to prove that it was only Shashikant who was his tenant by adducing evidence in respect of attaining circumstances. Nothing that sought was brought.

10. It is the submission of learned counsel for the appellant/plaintiff that since Shashikant has shifted his residence to house constructed at plot No.77-A, Krishna Palace, Pande Layout, Khamla at Nagpur, that is indicative that he has surrendered his tenancy. I am afraid that such submission could be accepted.

11. As observed above, respondent/defendant No.1 Himmatlal and Shashikant are sons of defendant No.2 Manjibhai. There is nothing on record by which it could be conclusively proved by the appellant/plaintiff that the suit block was let out only to Shashikant. Further, it would be useful to refer to Notice Exhibit 31 issued by the appellant/plaintiff to Shashikant. The Lower Appellate Court, in my view, has correctly reproduced the relevant portion of the said Notice in its judgment. Perusal of the relevant portion of the Notice authored by the appellant/plaintiff is conspicuous in its silence that Shashikant surrendered his tenancy. The Notice shows that it was for demand of rent which was accumulated from November 1999. Further, as per the submission of learned counsel for the appellant/plaintiff, only one room was vacated in October 2000 and two rooms were kept in his possession with a promise that it will be vacated within 2-3 days. Notice is dated 6.11.2000.

12. What is important to note is that no specific date

or surrender is also coming on record. As per the submission, in October 2000 the tenancy was surrendered. Since the appellant/plaintiff has failed to point out the date on which the tenancy was surrendered, in my view, it assumes importance in the light of Notice Exhibit 31 which is for demand of rent. Had Shashikant surrendered the tenancy, assertion to that effect would not have been missed in Notice Exhibit 31 which was given by the appellant/plaintiff through his counsel. Therefore, it is hard to digest the submission of learned counsel for the appellant/plaintiff that Shashikant surrendered his tenancy and in his place the respondent and his father entered into the suit house.

13. Further, it is not in dispute that Manjibhai at the time when he left for his heavenly abode, was only having survived legal representative i.e. Himmatlal who was already on record. Therefore, the Appellate Court has rightly proceeded to decide the appeal on its own merits.

14. No substantial question of law is involved in the present second appeal. The second appeal is dismissed.

JUDGE

!! BRW !!

...../-