

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (ST.) NO. 11103 OF 2018
WITH
CIVIL APPLICATION NO. 732 OF 2018**

Hasmatara Sen & Anr.	...	Appellants
V/s.		
Jehanara Shabbeer & Anr.	...	Respondents

- Mr.Rafique A. Shaikh a/w. Ms.Seema Prakash & Mr.Sharif Khan for the Appellants.
- Mr.A.V. Bukhari, Sr. Advocate a/w. Mr.Burhan V. Bukhari & Ms.Fauzia T. Bukhari for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 26th JUNE, 2018.

P.C. :

1] Heard learned counsel for the Appellants and learned counsel for the Respondents.

2] This Second Appeal is directed against the judgment and decree dated 30th January, 2018 passed by the Adhoc District Judge-1, Thane, thereby dismissing Civil Appeal No.16 of 2016, which was preferred against the judgment and decree dated 19th September, 2007 passed by the Civil Judge, Senior Division, Thane in Special Civil Suit No. 156 of 2001.

3] The said suit was filed by the Respondents herein seeking possession of the suit premises and for declaration that they are the absolute owners of the suit flat. According to them, they had purchased the said flat from their own income and they had allowed the present Appellants to remain in possession thereof as gratuitous licensee, as they had to leave for Tanzania (East Africa) for the purpose of their job. After their return to India, the Appellants avoided to handover possession of the said flat to them. Hence, Respondents were constrained to file the suit for declaration, possession and also for compensation.

4] The suit was resisted by the present Appellants contending *inter-alia* that they had contributed the amount of Rs.4,00,000/- for purchase of the said flat and therefore, they are also the equal owners of the said flat. It was further contended that they were paying amount of Rs.3,750/- per month as rent towards the society charges and hence, their possession is that of tenant and not of a gratuitous licensee.

5] On these respective pleadings of the parties, trial Court has framed necessary issues. One of the issue which was framed at the time of hearing was pertaining to the jurisdiction of the Civil Court to

entertain the said suit. The trial Court has, after having regard to the pleadings of the parties; especially considering that the present Appellants had nowhere pleaded in the written statement that their possession is that of tenant but conversely they had raised the contention that as they have contributed the money for the purchase of the suit flat, they had also become joint owners of the suit flat, rejected their contention of it being a dispute between tenant and landlord. The trial Court thus held that the possession of the Appellants is that of a gratuitous licensee; hence the Civil Court has jurisdiction to entertain the suit.

6] The trial Court further held that as the possession of the Appellants is that of a gratuitous licensee and the Appellants had failed to prove their ownership over the suit flat, they are not entitled to any protection and accordingly, directed them to handover the possession of the said flat to the Respondents along with the amount of compensation.

7] This finding of the fact, as recorded by the trial Court was confirmed by the Appellate Court and the Appellate Court has also dismissed the First Appeal.

8] While challenging this concurrent finding of fact, the only

submission advanced by learned counsel for the Appellants is that both the Courts have not considered the presumption which is laid down under Section 55 (2) of the Maharashtra Rent Control Act, 1999 that the possession of the Appellants, in the absence of any written contract, is that of a tenant. In order to advance this submission, learned counsel for the Appellants has placed reliance on the two letters i.e. Exhibit 50 and Exhibit 52, which were written by Respondent No.1 to the Appellants when she was in Tanzania.

9] It is submitted that in the letter at Exhibit-52 it is stated by Respondent No.1 as follows:-

“About your contribution of Rs.3,00,000/-, I will refund Rs.1,50,000/- by December 1995. The remaining Rs.1,50,000/- will be adjusted against the rent or can be refunded, if so desired.”

10] It is submitted that the word used here is “rent” and there is also the acknowledgment of contribution and therefore, the presumption needs to be raised.

11] Learned counsel for the Appellants has then also relied upon the letter at Exhibit-50, in which there is an averment as follows:

“How much you are depositing in our account as rent (it is for the kids expenditure and for payment of

society bills) and since when?”

12] The submission of learned counsel for the Appellants is that these letters clearly make out a case of tenancy and both the trial Court and the Appellate Court had not considered the same and therefore, this is a substantial question of law.

13] Even assuming it to be a question of law, in my considered opinion, it can be seen that both the trial Court and the Appellate Court had perused the written statement of the Appellants and had categorically held that no case of tenancy was pleaded as such. Conversely, since beginning, the case of the Appellants was that they are the joint purchasers of the suit flat as they had contributed the amount of Rs.4,00,000/- for the purchase of the suit flat. Both the trial Court and the Appellate Court had also found on the basis of the evidence adduced before it, including the evidence of the builder examined by the Respondents that, there was no evidence to prove such contribution of Rs.4,00,000/-. Both the trial Court and the Appellate Court had also recorded concurrent finding of fact that there is no evidence either in the form of Bank Statement or any other document to show that this amount of Rs.3,750/- was contributed towards the society charges as rent.

14] Now in the Second Appeal this Court cannot become a “third Court of fact finding” and disturb the concurrent finding of fact recorded by the trial Court and confirmed by the Appellate Court.

15] As pointed out by learned counsel for the Respondents, the Appellants have not entered into witness box, nor produced any documentary evidence. As regards the reliance placed on the averments in the letter, it does not show that this amount of Rs.3,00,000/- was contributed for the purchase of the suit flat. Mere use of the word “rent” does not prove that the Appellants have entered into possession of the suit premises as tenant; especially when the Appellants themselves have not taken that plea in their written statement.

16] Thus, both the trial Court and the Appellate Court had rightly come to the conclusion that as the possession of the Appellants is that of a gratuitous licensee and in the absence of any leave and license or in the absence of any plea of tenancy proved from the documents on record, the suit for possession had to be decreed. The decree of possession therefore passed by the trial Court and confirmed by the Appellate Court does not call for any interference in the Second Appeal. The Second Appeal hence stands dismissed.

17] In view of dismissal of the Second Appeal, the Civil Application has become infructuous and hence, it stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]