

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.39 OF 2015

1. Abubakar s/o Jan Mohd.
Age 40 years (since deceased through
legal heirs)

1a) Nasimabanoo w/o Abubakar
Age 39 years

1b) Ruksar d/o Abubakar
Age 21 years

1c) Mohd. Sameer s/o Abubakar
Age 19 years

1d) Mohd. Juber s/o Abubakar
Age 16 years

Nos. 1(b) to 1(d) through their mother
Natural guardian Nasimabanoo w/o Abubakar
All Residing at Room No.3, Mohd. Sharif Chawl,
154/C, Agaswadi, Dharavi Cross Road,
Mumbai 400 017

2. Umar Ali s/o Jan Mohd.
Age 37 years

3. Farukh s/o Jan Mohd.
Age 39 years (since deceased)

4. Ali s/o Jan Mohd.
Age 35 years.

5. Jaitunbee w/o Jan Mohd.
Age 70 years (since deceased)
All 2 to 5 residing at Room No.3,
Mohd. Sharif Chawl, 154/C, Agaswadi,
Dharavi Cross Road, Mumbai 400 017

... Appellants

-vs-

1. Mohd. Yahyaa s/o Mohd. Ayub

age about 32 years

2. Anisa Begaum

Age 27 years

3. Mohd. Asif

Age 25 years

4. Mohd. Aftab

Age 22 years

All residing at Room Nos.1 and 2

154/C, Agaswadi,

Dharavi Cross Road,

Mumbai 400 017

5. Mohd. Nasir, Adult

Post Box No.5011

Arfelbati, Saudi Arabia

(Formal Party)

... Respondents.

Shri Nilesh Suresh Patil, Advocate for appellants.

Shri Vijay Gharat, Advocate with Ms Rupali L. Dhivar, Advocate and Suresh More, Advocate for respondent Nos.1 to 4.

CORAM : A. S CHANDURKAR, J.

DATE : December 06, 2018

Oral Judgment :

This appeal has been filed by the original defendants who are aggrieved by the decree for possession that has been passed in the suit filed by the respondents herein.

The facts in brief as per the averments in the plaint are that according the plaintiffs one Mohd. Sharif had two sons Mohd. Ayub and Fakir Mohammed. Mohd. Sharif was the owner of a single storey chawl consisting of eight rooms. According to the plaintiffs their father Mohd.

Ayub was not traceable since many years and it was thus presumed that he was dead. It is the case of the plaintiffs therefore that their uncle Fakir Mohammed, plaintiff Nos.1 to 4 and defendant No.6 are the owners of the suit property. On the death of Mohd. Sharif half share was given to Fakir Mohammed in Room Nos.1, 2, 7 and 8. Mohd. Ayub was given half share being Room Nos.3 to 6. Said Mohd. Ayub was staying along with the plaintiffs, their mother and defendant No.6 in Room No.3. The husband of defendant No.5 was stated to be the brother of the plaintiffs' mother. He started residing in the suit premises with the plaintiffs and their mother. The defendant Nos.1 to 5 continued residing in Room No.3 after the death of defendant no.5. Possession of Room No.3 was sought from the defendant Nos.1 to 5 but the same was not handed over. On this premise claiming to be the owners of the said room, the plaintiffs filed suit for declaration that they were the owners of Room No.3 and defendant Nos.1 to 5 be directed to hand over possession of the same to them. Other ancillary prayers were also made in the suit.

2. The defendant Nos.1 to 4 filed their written statement and denied the claim of the plaintiffs. It was pleaded that in the light of the plaintiff averments as a licence had been granted to the defendants to occupy the premises, the suit was one between licensor and licensee. The civil Court therefore had no jurisdiction to entertain the suit. It was further pleaded

that there was no family arrangement as pleaded by the plaintiffs with regard to allotment of shares between Mohd. Ayub and Fakir Mohammed. Room No.3 was being claimed by two rival claimants and hence unless the dispute as regards ownership was determined, no relief could be granted. An alternate plea of defendants' having acquired title by adverse possession was also raised.

3. The parties led evidence before the trial Court. After considering the same, by the judgment dated 20/06/2014 the trial Court held that the plaintiffs were entitled for the declaration as prayed for. It was held that the possession of the defendants appeared to be permissible in nature. On the ground that the defendants were claiming title on the basis of adverse possession which was contrary to the other defences as raised, the trial Court did not permit such alternate plea to be raised. It accordingly decreed the suit as prayed. Being aggrieved the original defendants have filed the present appeal.

4. Shri Nilesh Patil, the learned counsel for the appellants after referring to the pleadings of the parties and the evidence on record submitted that the trial Court committed an error in not considering the defences as raised in the written statement. According to him it was always open for the defendants to raise alternate and contrary defences and it was

for the plaintiffs to succeed on the basis of the case as pleaded. Merely because the defendants raised a plea of adverse possession the trial Court despite observing that the possession of the defendant was permissive in nature, refused to adjudicate that aspect. In support of these contentions the learned counsel placed reliance on the decision in *M/s Modi Spinning & Weaving Mills Co. Ltd. And anr. Vs. M/s Ladha Ram & Co. (1976) 4 SCC 320*.

It was then submitted that having held that the possession of the defendants was permissive in nature, it was clear that there was a relationship of licensor and licensee between the parties. A licensee would include a gratuitous licensee and the suit seeking possession from any licensee would be maintainable only before the Small Causes Court. The civil Court has no jurisdiction to entertain the suit. For said purpose learned counsel placed reliance on the decision in *Prabhudas Damodar Kotecha and ors. vs. Manhabala Jeram Damodar and ors. (2013) 15 SCC 358*. This jurisdictional aspect of the matter was not considered by the trial Court. It was then submitted that despite there being voluminous documentary evidence on record, the same has not been considered by the trial Court. The documents duly proved had not been referred to while deciding various issues as framed. Though the defendants examined about five witnesses, their deposition has not been taken into consideration. The affidavit of Mohd. Ayub as placed on record falsifies the case of the plaintiff and it

supported the defence as raised by the defendants. The subsequent death of Mohd. Ayub could not be a reason for discarding his deposition. The learned counsel further submitted that identity of the suit property as described in the plaint was not duly proved especially when another suit being R.A.E. No.1027 of 1995 had been filed in relation to room No.3 which fact was specifically pleaded in paragraph 3 of the written statement. The suit as filed in the Court of Small Causes had been dismissed and therefore entitlement of the plaintiffs to Room no.3 had not been duly proved. The alleged family arrangement was also not proved. In support of his submissions the learned counsel also placed reliance on the decisions in *Ebrahim Aboobaker and anr. vs. Tek Chand Dolwani AIR 1953 SC 298* and *Imamul Hassan Choudhary vs. State of Bihar 1982 0 AIR (Pat) 89*.

5. On the other hand Shri Vijay Dhivar, learned counsel for the respondents-plaintiffs supported the impugned judgment. According to him the trial rightly refused to go into the inconsistent pleadings raised by defendants in their written statement. The evidence on record brought by the plaintiffs was sufficient to enable the trial Court to decree the suit. On the contrary the defence as raised by the defendants was insufficient and the decree as passed for room no.3 was based on documentary evidence available on record. As the defendants had raised a plea of adverse possession in the written statement, the suit as filed in the civil Court was

maintainable and the decree for possession was rightly passed. There was no reason for the plaintiff to approach the Court of Small Causes to seek the aforesaid relief. A fact that Mohd. Ayub had expired in the year 2010 was sufficient to discard his affidavit as he was not available for cross-examination. The rent receipts placed on record related to some other properties and the defendants could not claim any rights in that regard. The plaintiffs alone were the owners of the suit property and were rightly held entitled for possession. It was thus submitted that the decree as passed did not call for any interference.

6. On the aforesaid submissions the following points arises for consideration :

- (1) *Whether the trial Court has decreed the suit after considering the entire evidence on record ?*
- (2) *Whether the decree as passed calls for any interference ?*

7. I have heard the learned counsel for the parties at length and with their assistance I have perused records of the case. As per the plaint averments it is the case of the plaintiffs that initially the entire property was owned by their grandfather. After his death the property was divided amongst his two sons Mohd. Ayub and Fakir Mohd. Room No.3 which is the suit property came to the share of Mohd. Ayub and thereafter to the share of the plaintiffs. The defendants without any right, title and interest

occupied suit premises and refused to vacate the same. On that backdrop a declaration as regards ownership and possession of the suit property came to be filed by the plaintiffs.

In the written statement the defendants raised a plea that they were occupying the suit premises by paying rent to the plaintiffs' father Mohd. Ayub till June 1999. The suit was between a licensor and licensee and the civil Court had no jurisdiction to entertain the same. A specific plea had been raised in paragraph 2 of the written statement that the other son of Mohd. Sharif, Fakir Mohd. had claimed to be the owner of the entire property consisting of eight room. Seven of those rooms were let out to the tenants. Said Fakir Mohd. had filed suit for eviction against one Hasmat Ali in the Small Causes Court. The property occupied by the defendants was one of the said seven rooms. In paragraph 5 it has been pleaded that Room No.3 was let out to said Hasmat Ali by Fakir Mohd while the plaintiff also claiming ownership to the same room. Hence unless the rival claims were adjudicated, the suit could not be decreed. The plea of adverse possession was also raised as an alternate plea.

8. The plaintiffs examined five witnesses in support of their claim and placed various documents on record. The defendants also examined five witnesses and they also placed voluminous documentary material. At Exhibit-35 a certified copy of the plaint, written statement and judgment in

R.A.E. Suit No.1027 of 1995 that was filed before the Court of Small Causes by Fakir Mohd. against Hasmat Ali was placed on record by the defendants. The plaintiff vide Exhibit-47 placed on record the evidence as recorded in that suit.

9. From the pleadings referred to herein above it becomes clear that while the plaintiffs claim ownership to Room No.3 by virtue of the family arrangement, it is the specific defence as raised in the written statement that Fakir Mohd. the brother of Mohd. Ayub was claiming to be the owner of all the eight room and he had filed a suit eviction of a tenant from Room No.3 before the Small Causes Court. That suit was R.A.E. Suit No.1027 of 1995. A cloud was thus sought to be raised on the title of the plaintiffs.

10. The plaintiffs have examined witness No.2 Fakir Mohd. at Exhibit-17 and he was cross-examined by the defendants with regard to the suit filed by him before the Court of Small Causes. Witness No.1 for the defendants at Exhibit-30 was cross-examined and he denied the suggestion that two room in the suit chawl were numbered as Room No.3. The plaint at Exhibit-19 of the aforesaid suit is brought on record wherein the suit property is shown as Room No.3. From the aforesaid it can be seen that both the parties led evidence in support of their respective stands and the effect of pleadings in R.A.E. No.1027 of 1995. The trial Court however has not adverted to any

of this evidence in its judgment nor the pleas as raised specifically in paragraphs 3 and 5 of the written statement been considered.

11. In paragraph 13 of the judgment of the trial Court it has been observed that as the defendants were not in a position to make out a better title, the plaintiffs were entitled to succeed. The trial Court has noted the two pleas taken by the defendants namely of being licensee and claiming perfection of title on the basis of adverse possession. It is then found that the pleadings in regard to adverse possession were insufficient. On the basis of relationship between the parties it has been observed that Jaan Mohd. who was the brother of the plaintiff's mother entered into the suit premises due to their relationship and hence the possession of the defendants was permissible in nature. In paragraph 14 of its judgment the trial Court has referred to the aspect of maintainability of the suit in the civil Court as raised by the defendants. It has also been noted that heavy reliance was placed by the defendants on that plea and evidence had also been led. However, it is stated that as the said plea was contradictory to the plea of adverse possession the same was not being gone into. This aspect is again reiterated in paragraph 17 of its judgment.

It is well settled that is open for the defendants to raise inconsistent pleas and merely because such inconsistent or contrary pleas have been raised, the same would not be a ground to discard the entire

defence of the defendants. Reliance in this regard has been rightly made to observations in paragraph 10 of the decision in *M/s Modi Spinning and Weaving Mills Co. Ltd. (supra)*. It is seen that though the trial Court has cursorily observed in paragraph 13 of its judgment as to the nature of defendants' permissive possession, in paragraph 14 it has observed that as that plea was contrary to the plea of adverse possession, the same has not been considered. This aspect of the matter in my view has vitiated the judgment of the trial Court.

12. In the light of the fact that both the parties had brought on record substantial documentary evidence in support of their respective pleadings, it was incumbent on the trial Court to have adverted to that material and ought to have answered the issues as framed in the light of said evidence. In the light of the documentary material available on record it was not permissible for the trial Court to have brushed aside the same on the ground that the defendants had raised inconsistent pleas. It is found from the impugned judgment that the defence has sought to be raised by the defendants has not been given its due consideration. The trial Court being the first Court of facts it was incumbent upon it to consider the defence as raised in the light of the evidence on record. Failure to do so has thus vitiated the impugned judgment.

13. It is thus found that a fresh consideration of the entire material on record is warranted. Since the trial Court has not dealt with the material evidence on record, it is found necessary to set aside its judgment and remand the proceedings to the trial Court for fresh adjudication. Point No. (1) is answered accordingly.

14. In the light of aforesaid discussion it is held that the trial Court failed to decide the suit by considering the entire material on record. The impugned judgment therefore cannot be sustained. Fresh consideration of the matter is required at the hands of the trial Court. Point No.(2) is answered accordingly.

15. In the light of the aforesaid discussion, the following order is passed :

- (i) The judgment of the trial Court in S.C.Suit no.7105 of 2000 dated 20/06/2014 is set aside.
- (ii) The proceedings are remanded to the trial Court for deciding the suit afresh in accordance with law. The record and proceedings be sent to the trial Court forthwith.
- (iii) The parties shall appear before the trial Court on 07/01/2019. As the suit is of the year 2000, the proceedings are expedited. The trial Court shall decide the suit on its own merits by the end of

December 2019.

- (iv) It is clarified that the suit shall be decided on its own merits without being influenced by any passing observations made in this judgment.
- (v) During pendency of the appeal this Court on 26/08/2015 passed an order in Civil Application No.3366 of 2014 directing the defendants to deposit an amount of Rs.5000/- per month and out of that amount 50% was permitted to be withdrawn by the original plaintiffs. The aforesaid arrangement shall continue during pendency of the suit without prejudice to the rights of the parties. The balance amount lying in deposit shall be transferred to the trial Court. These directions shall abide by the final adjudication in the suit.
- (vii) The First Appeal is allowed in aforesaid terms with no order as to costs.

(A. S. CHANDURKAR, J.)