

Chimanbhai Prabhudas Patel	...	Applicant
Vs.		
Mohammad Qasim Rehmat Khan	...	Respondent

Mr. M. S. Bhandari i/b. Pranjali Bhandari for Applicant.
Mr. Khan Javed Akhtar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 9, 2018

P.C. :

Heard Mr. Bhandari, learned Counsel for the applicant and Mr.Akhtar, learned Counsel for the respondent at length.

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3. The plaintiff has instituted Suit for recovery of possession of shop No.10 admeasuring about 12 sq.ft. situate at Abdul Rauf Manzil, Tank Bunder, R.B.Road, Mumbai 400 010 (for short 'suit premises') inter alia on the ground that plaintiff is a monthly tenant in respect of shops No.8 to 11 and the defendant is a sub-tenant of the plaintiff in respect of the suit premises. As against this, it is the case of the defendant that he is not a sub-tenant of the plaintiff herein and he is a direct tenant of the landlord, namely Abdul Rauf Insanali and Smt. Kaiful Abdul Rauf. In other words, there is no relationship of landlord and tenant between the plaintiff and the defendant. By order dated 24.07.2008, the learned trial Judge partly decreed the Suit and directed the defendant to handover vacant and peaceful possession of the suit premises to the plaintiff. While decreeing the Suit, the learned trial Judge referred to Deed of Assignment at exhibit-10 and rent receipt at exhibit-11 of shops No.8 to 11. The learned trial Judge observed that plaintiff has established his case that he is a tenant of shop No.10 and the question is whether the defendant is a sub-tenant of the plaintiff or not. The learned trial Judge also referred to the other documents produced by the parties. In paragraph 11, the learned trial Judge referred to the writing dated 15.11.1985 produced by the plaintiff at exhibit-16 executed by the defendant. To prove this writing, plaintiff also examined attesting witness of the said document as P.W.2. The learned trial Judge held that plaintiff did not establish contents of that writing. The learned trial Judge thereafter proceeded to hold that burden lies on the defendant to explain as to how he came into the possession of the suit premises. After considering the evidence on record and the fact that defendant did not examine owner of the building, the learned trial Judge held that the case of the plaintiff is more probable than that of the defendant coming into possession of the suit premises. The learned trial Judge held that for want of examination of the owner of the suit building, the defendant has

failed to establish as to how he came in possession of the suit premises. The learned trial Judge accordingly decreed the Suit.

4. Aggrieved by that decision, defendant preferred appeal, which as I indicated earlier, was allowed by the Appellate Court. A perusal of the impugned order shows that in the entire judgment, the Appellate Court did not advert to Deed of Assignment at exhibit-10 and rent receipt at exhibit-11. In paragraph 7, the learned Appellate Court dealt with the case of the plaintiff that he is a monthly tenant in respect of shops No.8 to 11. Mr. Akhtar relied upon the findings recorded by the Appellate Court in paragraph 8 where the Appellate Court considered the admissions of the plaintiff during the course of cross-examination. In the cross-examination, plaintiff deposed that he does not have receipt about licence fees paid by the defendant. He does not have receipt about the payment of rent by the defendant for the suit premises.

5. In so far as the application at exhibit-29 under Order XLI, Rule 27 of C.P.C. is concerned, the Appellate Court rejected that application on the ground that defendant has not given any reason that even after exercise of due diligence, he could not produce the said document before the trial Court. As noted earlier, the Appellate Court, being the last fact finding Court, ought to have considered the documents produced by the plaintiff and more particularly Deed of Assignment at exhibit-10 and rent receipt at exhibit-11. A perusal of the impugned order does not indicate that the Appellate Court has considered these documents. In view thereof, I find that the Appellate Court was not justified in disposing of the appeal without considering the documents on record. Hence, Application partly succeeds. The impugned order passed by the Appellate Court is modified in the following terms:

(a) The decree dated 14.06.2013 dismissing the Suit is set aside

and the appeal is restored to the file of the Appellate Court for deciding it afresh;

- (b) The order rejecting application at exhibit-29 is maintained;
- (c) The Appellate Court is requested to dispose of the Appeal within 6 months from the production of the authenticated copy of this order;
- (d) All contentions of the parties on merits are expressly kept open;
- (e) Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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