

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.142 OF 2017

WITH

CIVIL APPLICATION NO.2692 OF 2017

1. Sau. Usha Dattatraya Pachpande
Age : 61 years, Occ.: Household,
2. Dattatraya Sampat Pachpande
Age : 74 years, Occ.: Agriculture,
3. Lalit Dattatraya Pachpande
Age : 40 years, Occ.: Mechanic
Both resident of Plot No.2,
Jyoti Nagar, Near Dr. Bendre
Hospital, Iccha Devi Square,
Jalgaon, Taluka & Dist. Jalgaon.

... APPELLANTS

VERSUS

Late Manoj Eknath Chaudhary
since deceased,
through his legal heirs

1. Smt. Priya Manoj Chaudhary
Age : 35 years, Occu.: Household,
2. Viraj Manoj Chaudhary
Age : 11 years, Occu.: Education
since minor, through his natural
guardian, mother
Smt. Priya Manoj Chaudhary
Age : 35 years, Occu.: Household

3. Sau. Yamunabai Eknath Chaudhary
Age : 68 years, Occu.: Household,
All R/o. 48, Jai Nagar, Jilha Peth,
Jalgaon, Tal. & Dist. Jalgaon.

... **RESPONDENTS**

.....
Mr. S.B. Yawalkar, Advocate for appellants.
Mr. M.M. Bhokarikar, Advocate for respondent No.3.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 21st September, 2019.**

**Date of pronouncing
the judgment : 29th November, 2019.**

JUDGMENT :

. Present appeal has been filed by the original defendants challenging the concurrent judgment and decree passed in Regular Civil Appeal No.188 of 2011 dated 17.11.2016, thereby their appeal came to be dismissed in which they had challenged the judgment and decree passed in Special Civil Suit No.134 of 2003 by learned 4th Joint Civil Judge, Senior Division, Jalgaon dated 30.08.2011, thereby the suit for possession and mesne profits filed by the present respondents came to be decreed.

2. Heard learned Advocate Shri. S. B. Yawalkar for appellants/original defendants and learned Advocate Mr. M. M. Bhokarikar

for respondent No.3. Respondent Nos.1 and 2 were served, but remained absent.

3. It has been vehemently submitted on behalf of the appellants that both the Courts below have not properly appreciated the evidence as well as the law points involved in the case. Both the Courts below have not framed proper issues and points for consideration respectively. The defendants had come with the case that they are the tenants of the suit property inducted by the father of the original plaintiffs and defendant No.2 had made the construction in the suit premises with the consent of father of the plaintiffs. Both the Courts below failed to consider the admission given by the father of the plaintiffs that he has not issued any rent receipts to other tenants. By applying the same rule, it could have been inferred that he had not issued rent receipt to the defendants also. Both the Courts below have blamed the defendants for not producing the rent receipts. When in fact the rent receipts were not issued at all, there was no question of production of the same or giving any reason for not producing them on record. Both the Courts below failed to consider that the plaintiffs had not produced on record that the defendants were the gratuitous licensee as they were inducted on the health ground of

defendant No.1. Defendant No.2 was serving with the partnership firm “Auto Point”; wherein the original plaintiff was the partner and the rent amount of Rs.200/- per month was deducted from his salary. There was no proper refutation by the plaintiff in that respect. It was the specific pleading of the defendants that though the land belonged to the father of the plaintiff which was, in fact, purchased when the plaintiff was a minor and could not have any income, it was given on rent at the rate of Rs.200/- per month. The defendants made construction on the same by spending about Rs.35,000/- and under the said circumstance, they had the entire control/exclusive possession over the property. Therefore, proper distinction ought to have been drawn between either it was lease as defined in Section 105 of the Transfer of Property Act, 1882 or it was a licence defined in Section 82 of the Indian Easements Act, 1882. Reliance has been placed on the decision in **C. M. Beena and another Vs. P. N. Ramchandra Rao**, [AIR 2004 SC 2103], wherein following are the observations :

“8. The crucial issue for determination is as to whether there is a lease or licence existing between the parties. Though a deed of licence may have been executed it is open for the parties to the document to show that the relationship which was agreed

upon by the parties and was really intended to be brought into existence was that of a landlord and tenant though it was outwardly styled as a deed of licence to act as a camouflage on the Rent Control Legislation. 'Lease' is defined in Section 105 of the Transfer of Property Act 1882 while 'licence' is defined in Section 52 of the Indian Easements Act 1882. Generally speaking the difference between a 'lease' and 'licence' is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (See Associated Hotel's of India Ltd. v. R. N. Kapoor, AIR (1959) SC 1262). The decided cases on the point are legion. For our purpose it would suffice to refer to a recent decision of this court in Corporation of Calicut v. K Sreenivasan, [2002] 5 SCC 361.

9. *A few principles are well settled. User of the terms like 'lease' or 'licence', 'lessor', 'rent' or 'licence fee' are not by themselves decisive of the nature of the right created by the document. An effort should be made to find out whether the*

deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

10. *Given the facts and circumstances of a case, particularly when there is a written document executed between the parties, question arises as to what are the tests which would enable pronouncing upon the nature of relationship between the parties. Evans and Smith state in The Law of Landlord and Tenant (Fourth Edition)- "A lease, because it confers an estate in land, is much more than a mere personal or contractual agreement for the occupation of a freeholder's land by a tenant. A lease, whether fixed-term or periodic, confers a right in property, enabling the tenant to exclude all third parties, including the landlord, from possession, for the duration of the lease, in return for which a rent or periodical payment is reserved out of the land. A contractual licence confers no more than a permission on the occupier to do some act on the owner's land which would otherwise constitute a trespass. If exclusive possession is not conferred by an agreement, it is a licence". "...the fundamental difference between a tenant and a licensee is that a tenant, who has exclusive possession, has an estate in land, as opposed to a personal permission to occupy. If, however, the owner of land proves that he never intended to accept the*

occupier as tenant, then the fact that the occupier pays regular sums for his occupation does not make the occupier a tenant.” (at page 33).

11. *In Hill and Redman's Law of Landlord and Tenant (Seventeenth Edition, Vol.1) a more detailed discussion also laying down the determinative tests, is to be found stated as follows : "It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. It was probably correct law at one time to say that the right of exclusive possession necessarily characterized the grant as that of a lease; but it is now possible for a licensee to have the right to exclusive possession. However, the fact that exclusive possession is granted, though by no means decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. Further, a grant of exclusive possession may be only a licence and not a lease where the grantor has no power to grant a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the relationship between the parties is determined by the law and not by the label which they choose to put on it. It has been said that the law will not impute an intention to enter into the legal relation of landlord*

and tenant where circumstances and conduct negative that intention; but the fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the guarantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease such as 'rent' or 'rental' will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor." (at pages 14-15)."

4. It has been further submitted that on the basis of the fact that it was in fact the tenancy that was created by the act of the parties, which will have to be gathered from the conduct of the parties, taking into consideration the admitted position that there was no document entered into when the defendants were inducted in the suit premises, the substantial questions of law are arising in this case.

5. Per contra, the learned Advocate appearing for respondent No.3 by placing reliance on the decisions in **Boodireddy Chandraiah and Ors Vs. Arigela Laxmi and Anr**, [AIR 2008 SC 380], **Kashmir Singh Vs. Harnam Singh and Anr**, [AIR 2008 SC 1749], **Gurnam Singh (D) by Lrs. and Ors. Vs. Lehna Singh (D) by Lrs.**, [AIR 2019 SC 1441] submitted that unless the appellants in a Second Appeal under Section 100 of Civil Procedure Code shows substantial question of law, the cognizance of the Second Appeal cannot be taken. Mere question of law cannot be said to be a 'substantial' and therefore, reliance has been placed on the observations in **Boodireddy's** case (Supra) as well as **Kashmir Singh's** case (Supra), which are as follows :

“To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law “involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first

time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.”

and further in **Gurnam Singh’s** case (Supra) it is specifically observed that :

“jurisdiction of the High Court, in an appeal under Section 100 of the CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 of the CPC, it is not permissible for the High Court to reappreciate the evidence on record and interfere with the findings recorded by the Courts below and/or the First Appellate Court and if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal.”

It was submitted that both the Courts have given concurrent findings by appreciating the evidence properly. It is an admitted position that the suit plot was owned by original plaintiff. Plaintiffs had contended that defendant No.1 was mentally ill and therefore, for treatment, she was

brought to Jalgaon as it was to take long time for the treatment, they all shifted to Jalgaon and the expenses of the treatment were in fact borne by the father of the plaintiff. Thereafter, the father of the plaintiff had constructed temporary shade in the suit plot and then the defendants shifted to that premises. What was offered to the defendants was a permissive possession, thereby they were the licensee and after the revocation of the licence by the plaintiff, by issuing notice, the plaintiff is entitled to get the possession of the suit premises. The defendants in turn took defence that they are the tenants and in fact defendant No.2 had made construction on the premises by spending Rs.35,000/-. However, the said defence was not supported by any documentary evidence. Therefore, on the basis of facts the law was applied and both the Courts below have come to the conclusion that the defendants are the licensee and since it has been properly revoked, the plaintiff is entitled to get possession. The said finding and decree requires no interference.

6. Taking into consideration the legal position as regards the interference of this Court in the concurrent findings in a Second Appeal under Section 100 of Civil Procedure Code, it is now required to be seen as to whether any substantial questions of law are arising in this case. It is not

in dispute that suit property out of survey No.427/2/A/B/C bearing plot No.2, admeasuring 57.72 sq.ft. to the extent of western-southern portion admeasuring east-west 14 ft. and south-north 25 ft., is owned by original plaintiff. Though the plaintiff had come with the case that his father had erected temporary shade consisting of two rooms, defendants disputed that. It is not in dispute that defendant No.1 is a maternal aunt, defendant No.2 is her husband and defendant No.3 is maternal cousin brother of the plaintiff. It is also not in dispute that earlier the defendants used to reside at Dombivali. Now, according to the plaintiffs, the defendants shifted to Jalgaon due to the mental illness of defendant No.1. Though the plaintiffs could not bring proper evidence on record by examining Dr. Vishal Bhendale who was stated to be the treating Doctor of defendant No.1, yet, the said fact has been stated by P.W.-3 Santosh who is the brother of defendant No.2. There is no reason for him to depose against his brother. Even if we may not give importance to the reason why defendants shifted to Jalgaon, the fact is that they shifted and the further fact is important for us that as to whether the relationship between the plaintiff and defendants is that of landlord and tenant. As regards the plaintiffs' ownership is concerned, there is no dispute. According to the defendants, they were inducted in the year 1992 and according to defendant No.2, with the

consent of plaintiffs' father, he constructed two rooms of temporary shade. He could not produce any documentary evidence to support his contention. So also, he could not produce any rent receipts. Now, merely because the plaintiffs' father was not giving rent receipts to his other tenants, the defendants cannot claim parity on that ground. They will have to give their own reasons as to why they had not entered into any document in the form of rent note and issuance of rent receipts. According to him, he had paid rent till March 2001. A money order coupon of Rs.200/- Exhibit-95 has been produced by the defendants. It is to be noted that the dispute appears to have started around 29.09.2002 when complaint was filed. It is the contention of the plaintiffs that the electricity connection was taken by the defendants without his consent. The documents on record would definitely show that the property number for obtaining electricity given by the defendants is different than that of the suit property, yet, it appears that the electricity has been provided to the suit property. The electricity bills from 1988 have been produced. If the structure was constructed by defendant No.2 out of his own funds in the year 1992, then the question arises as to how he could have paid the electricity bills and taken the electric meter from 1988. The certified copy of the affidavit Exhibit-130 executed by defendant No.1-Usha indicates that the defendants applied for electric

meter by giving description of the different property. Another important fact to be noted that the defendants have not taken a defence that they are the tenants of the land only and they are the owners of the super structure, this clear distinction has not been made. If they were the owners of super structure and only the land beneath the same was let out to them, then the points for consideration would be very much different. The difference between lease and licence that has been explained in **C. M. Beena's** case (Supra) will have to be borne in mind and even by applying the same, it cannot be stated that the defendants are the tenants of the suit property.

7. The defendants have tried to challenge the title of the plaintiff over the suit property by even contending that he was the Benami owner. However, even for the sake of arguments it is accepted that the defendants intended to take the defence of tenancy, they could not have challenged the title of their landlord.

8. Issuance of notice revoking the licence issued by the plaintiff is not in dispute. Therefore, when the licence which was definitely gratuitous as per the contention of the plaintiff which has been proved, the plaintiff is entitled to get possession of the suit property upon the revocation of the same.

9. Both the Courts below have correctly appreciated the evidence so also the law points involved in the same and therefore, taking into consideration the catena of judgments relied by the learned Advocate appearing for the respondent No.3, no substantial questions of law are arising in this case. Hence, the Second Appeal deserves to be dismissed. Accordingly, it is dismissed.

10. Pending Civil Application stands disposed of.

11. It is clarified that the interim relief granted by this Court earlier stands revoked.

(SMT. VIBHA KANKANWADI, J.)

29-11-2019

. Learned Advocate for the appellants prays for continuation of interim relief for a period of four weeks as he intends to approach the Hon'ble Apex Court. Pertinent to note that the suit filed by the respondent – plaintiff was decreed, the appeal filed by the present appellants before the first Appellate Court as well as this Court has been dismissed, thus, there is concurrent findings of all the Courts. Under such circumstance, no case is made out to continue any interim relief granted earlier. Hence, prayer is rejected.

(SMT. VIBHA KANKANWADI, J.)

SCM