

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 SECOND APPEAL NO.252 OF 2019
WITH CA/5380/2019 IN SA/252/2019

Kailash S/o Shankar Joshi
Age : 39 years, Occ : Business,
R/o M.C. House No.4, Ward No.1,
Hadgaon, Tq. Hadgaon,
Dist. Nanded.

..APPELLANT
(Ori. defendant)

-VERSUS-

Shantabai W/o Rampal Sarda
Age : 70 years, Occ : Household,
R/o Hadgaon, Tq. Hadgaon,
Dist. Nanded.

..RESPONDENT
(Ori. Plaintiff)

...

Mr.M.V. Ghatge, Advocate for the appellant.
Mr.A.A.Pimpalwadhar, Advocate for respondent.

...

CORAM: V.L. ACHLIYA,J.
DATE : 26.09.2019

ORAL ORDER:

Being aggrieved by the concurrent
decisions rendered by the Courts below, the
appellant – original defendant has preferred
this Second Appeal.

2. Heard the learned counsel for the appellant – original defendant and the respondent- original plaintiff.

3. Before advertng to deal with the submissions advanced, it is useful to refer few facts leading to filing of this appeal.

4. The respondent-plaintiff herein filed Civil Suit against the appellant-defendant for possession of the suit premises as well as the recovery of Rs.32,400/- as arrears of the rent and further claimed to direct inquiry for future mesne profits from the date of suit till delivery of the possession under Order XX Rule 12 of the Code of Civil Procedure. The plaintiff has approached with a case that the suit premises was let out to the defendant on monthly rent for the purpose of carrying on hotel business. The premises is taken on rent in

the year 1992 in the name of defendant by the father of the defendant. At the time of taking premises on rent, the defendant was minor. The premises was taken on rent for 10 years and the period was expired in the month of June, 2002. The defendant continued to occupy the premises after expiry of period for which the premises was let out. In the year 2002, the defendant has filed suit for injunction as against the respondent – plaintiff and her son, wherein he has described himself as a tenant of the suit premises and the plaintiff is claimed to be a landlady. Since the defendant has not vacated the premises and not handed over the possession of the suit premises after expiry of tenure for which the premises was let out, the plaintiff got issued the notice U/Sec. 106 of the Transfer of Property Act to the defendant. The notice was issued on 28.09.2007. It was duly received by the

defendant on 29.09.2007 thereby terminating the monthly tenancy of the appellant – defendant on expiry of 15 days period from the date of receipt of notice. On receipt of the notice, the defendant has not vacated the premises nor paid outstanding dues, therefore, the plaintiff has filed the suit seeking possession, recovery of arrears of rent, inquiry as to the mesne profits. The suit was presented in the month of March, 2012. The defendant appeared in the matter and filed written statement. The defendant has not disputed the fact regarding existence of relationship between the plaintiff and defendant as that of landlord and tenant. It is also not disputed that the suit premises was taken on rent in the year 1992 as pleaded by the plaintiff. The defendant has taken stand that after receipt of notice on 29.09.2007, the defendant has vacated the suit premises and separated from his father

and other members of his family. It is claimed that w.e.f. 01.10.2008, the father of the defendant Shankar Joshi is in possession of the suit premises as a tenant of the suit premises. It is claimed that though this fact was known to the plaintiff, still the false suit has been filed against the defendant claiming possession and arrears of rent.

5. On due appreciation of the rival pleadings and evidence adduced in the case, the trial Court has dismissed the suit. The appellate Court has confirmed the judgment and decree passed by the trial Court. Being aggrieved, the appellant – defendant has preferred this Second Appeal.

6. The learned counsel for the appellant strenuously contended that the Courts below erred in not properly appreciating the evidence adduced in the

case. It is submitted that the trial Court as well as the first appellate Court has failed to take into consideration that the defendant has given up the possession of the suit premises much prior to filing of suit. In absence of possession of the suit premises with the defendant, the Courts below erred in passing the decree in favour of the plaintiff. It is submitted that the premises in question is in possession of the father of defendant and occupying the premises as a tenant thereof. Although the defendant has specifically pleaded that the premises is in possession of the father of the defendant and defendant has surrendered the tenancy, still the plaintiff has not made father of the defendant as party defendant in the suit. In absence of proper party to the suit, the trial Court ought to have dismissed the suit. It is further contended that the vital admissions brought through the cross-

examination of plaintiff – landlady were ignored by the Courts below while appreciating the evidence. It is contended that the observations recorded by the trial Court that there appears to be collusion between the defendant and his father are without any pleadings to that effect and issue framed to that effect by the Courts below.

7. By referring the testimony of the plaintiff – landlady, learned counsel submits that in cross-examination, the plaintiff has not specifically denied that the suit premises is continued to be in occupation of the father of the defendant. This vital piece of evidence has been ignored by the Courts below while passing the decree. It is submitted that in absence of pleading as to the collusion between the defendant and his father, there was no lis exists between the

plaintiff and defendant, which required to have been determined by the Court. In support of this submissions, the learned counsel referred and relied upon the decision of the Apex Court in the case of ***Rajgopal (Dead) by Lrs. V/s Kishan Gopal*** reported in ***2003(10) SCC 653***.

8. The learned counsel further contended that though there are concurrent findings on facts recorded by Courts below still the appeal deserves admission for the reason that there is perversity in the judgments and orders passed by the Courts below, as the Courts below have erred in appreciating the evidence and ignoring the vital evidence brought on record through the admission of the plaintiff. In support of this submissions, the learned counsel referred and relied upon the decision of the Apex Court in the case of ***Hero Vinoth (Minor)***

V/s Seshammal reported in ***2006(5) SCC 545***.

9. On the other hand, learned counsel for the respondent supported the judgment and decree passed by the Courts below and submits that the appeal raises no substantial questions of law to entertain the appeal. By referring the over all facts of the case, the learned counsel submits that the existence of relationship between the plaintiff and defendant as that of the landlady and tenant has not been disputed. So also the defendant has not disputed the issuance of statutory notice U/Sec. 106 of the Transfer of Property Act and service thereof before institution of the suit. There is no challenge as to validity of issuance of a notice and termination of tenancy. It is submitted that if we examine the rival pleadings then the defendant has approached with a case that he has vacated the premises on 30th September,

2007, and therefore, no decree of possession is liable to be passed against him. It is the case of the defendant that he was separated from his father and other family members and w.e.f. 01.10.2007 the father of the defendant is occupying the premises as tenant thereof and in absence of possession of the suit premises lying with the defendant, the Courts below erred in passing the decree of possession as well as the arrears of rent and mense profits. In this background, learned counsel submits that in the light of rival pleadings, the entire burden rest upon defendant to prove that there was express or implied surrender of tenancy. By inviting attention to the testimony of the defendant, learned counsel submits that the defendant has failed to prove his defence. It is pointed out that if the testimony of the defendant is taken into consideration then he has only deposed to the effect that on 30th

September, 2007, he was separated from his father and other members of the family and voluntarily left the suit premises. It is pointed out that even by way of evidence, the plaintiff has not specifically deposed that he has surrendered the tenancy of the suit premises in favour of the landlady and the landlady has accepted the possession thereof. In that view, there is neither any express or implied surrender of tenancy and vacation of suit premises as well as handing over possession of suit premises to plaintiff on the part of the defendant.

10. It is submitted that the act of surrender of tenancy cannot be unilateral act and surrender is always an intervivous act and surrender must be in favour of the landlord. It is pointed out that there is no pleading made in the plaint itself that the tenancy has been surrendered in favour of

landlord and landlord has accepted the possession. In absence of such case being proved the Courts below were perfectly justified to turn down the plea of surrender of tenancy by the defendant.

11. The learned counsel submits that in order to entertain the suit for termination of tenancy and securing tenanted premises, the plaintiff is required to only implead the tenant as a party defendant in such suit. In support of submissions advanced, the learned counsel referred and relied upon the decision of this Court in the case of *Chaganbhai Patel V/s Lilabai G.M. Jathar and others* reported in *2008(5) Mh.L.J. 520* and the decision of Delhi High Court in the case of *Balasubramania Iyer V/s Subbiah Thevar and another* reported in *AIR 1965 Madras 417*.

12. I have carefully considered the

submissions advanced in the light of rival pleadings and oral as well as documentary evidence adduced in the case. So also thoroughly examined the reasons and findings recorded by the Courts below. In my view, there is absolutely no perversity in the concurrent findings on facts recorded by the Courts below. Appeal raises no substantial questions of law to be decided in this Appeal.

13. If we consider the rival pleadings, the relationship between the plaintiff and defendant as a landlord and tenant not in dispute. So also there is no dispute that the tenancy of the defendant has been legally terminated by issuing statutory notice as contemplated under Section 106 of the Transfer of Property Act. The defendant has not disputed the relationship as well as issuance of statutory notice and service

thereof. On the contrary, the defendant has approached with a case that on receipt of the notice on 29.09.2007, the defendant has left the suit premises leaving behind his father and other family members to occupy the premises. It is nowhere specifically pleaded that there was talk between the plaintiff and defendant about surrender of tenancy and pursuant to such undertaking the defendant has surrendered the tenancy in favour of the plaintiff on 30th September, 2007 and handed over the possession of the suit premises to the plaintiff and thereafter, the father of defendant admitted as tenant by plaintiff.

14. If we consider the pleadings of the defendant then the defendant has only pleaded that he has vacated the premises after separating from his father and other family members and went to stay at another premises on 30.09.2007. According to the defendant

from 1st October, 2007, the suit premises is occupied by his father Shankar as a tenant thereof. Thus, from the pleadings itself the case of the defendant is that he has left the premises and started residing elsewhere w.e.f. 01.10.2008 and his father and other family members are occupying the premises as tenant. It is nowhere the case of the defendant that there was tripartite agreement or mutual understanding between plaintiff and defendant and father of defendant whereby the defendant has vacated the premises in favour of the plaintiff and immediately thereafter the plaintiff/landlord has accepted the father of the defendant as a tenant of the suit premises. In absence of any agreement/understanding between the plaintiff and defendant, the defendant cannot claim that he has surrendered the tenancy of the suit premises in favour of the plaintiff w.e.f. 1st October, 2008. So also defendant

cannot claim that he has handed over the possession of the suit premises to plaintiff and not liable to satisfy the decree passed in favour of plaintiff.

15. If we consider the evidence adduced by the defendant then the defendant has not uttered single word in his examination in chief that he has surrendered the vacant possession of the suit premises on 30th September, 2007 in favour of the plaintiff. The unilateral act on the part of defendant to separate from his family and to start residing separately itself not amounts to surrender of tenancy in favour of landlord and creation of tenancy in favour of the father of the defendant, so as to claim that he is no way concern with the suit premises and the father of the defendant become tenant of the suit premises. The trial Court has decreed the suit after due scrutiny of rival

pleadings and evidence adduced in the case. There is no perversity in any of the reasons and findings recorded by the trial Court.

16. The observation recorded by the trial Court that there appears to be collusion between the defendant and his father requires no specific pleadings on the part of the plaintiff nor any issue in that respect was required to be framed by trial Court. The observations as recorded in the judgment are based on the inference drawn on the basis of the rival pleadings and evidence adduced in the case. For drawing the inference, it is not necessary that there should be pleadings on the part of plaintiff about collusion between defendant and his father. The observations made in that respect are based upon the case put up by defendant as to surrender of tenancy on 30.09.2008. While appreciating the case of the defendant

that he has vacated the premises on 30.09.2008 and his father become tenant in that limited context the trial Court has observed that there appears to be collusion between the defendant and his father. In that view, the reasons and findings recorded by the Courts below suffers from no perversity.

17. I have thoroughly examined the evidence adduced in the case. There is absolutely no evidence elicited though the cross-examination of the plaintiff to find favour to the case of the defendant. The defendant has examined himself vide Exhibit-74. In cross-examination, the defendant has admitted that he has no document to show that he has paid the amount of Rs.52,500/- towards rent on 30.09.2007 and surrendered the tenancy and handed over vacant possession of the suit premises to the plaintiff.

18. Thus on due consideration of rival submissions advanced, oral as well as documentary evidence on record, I am of the view that there is absolutely no perversity in the concurrent findings on facts recorded by the Courts below. Appeal raises no substantial questions of law so as to entertain the same. I am therefore, not inclined to entertain this appeal. Accordingly, the appeal is dismissed.

19. In view of dismissal of the appeal, no cause survives to prosecute Civil Application No.5380 of 2019. Hence the same is disposed of as dismissed in terms of order in appeal.

[V.L. ACHLIYA]
JUDGE

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