

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 SECOND APPEAL NO.230 OF 2019
WITH CA/4993/2019 IN SA/230/2019

Girdharilal S/o Hiralalji Agrawal
Age : 74 years, Occ : Agri.,
R/o New Mondha, Sadar Bazar,
Jalna.

..APPELLANT

(Ori. Objection petitioner)

-VERSUS-

1. Kishanprasad S/o Motilal Devidan
Age : 92 years, Occ : Business,
R/o Nathani Oil Mill Compound,
Deulgaon Raja Road, Jalna,
Taluka & District-Jalna.

..ORI.DECREE HOLDER

2. Chandrulal S/o Hiralalji Agrawal
Age : 71 years, Occ : Business,
R/o Dana Bazar, Jalna,
At present – gopalpura,
Jalna, Taluka & Dist-Jalna.

..RESPONDENTS

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Mr.S.S. Rathi, Advocate for the appellant.
Mr.A.S. Bajaj with Mr.R.S. Wani, Advocate for
respondent no.1.

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CORAM: V.L. ACHLIYA,J.

DATE : 25.09.2019

ORAL ORDER:

The appellant/objector has filed
this Second Appeal challenging the judgment

and decree dated 13.03.2019 passed by the learned Adhoc District Judge-3, Jalna in Regular Civil Appeal No.61/2018. By the impugned judgment and decree dated 13.03.2019, the first appellate Court has dismissed the appeal and confirmed the order dated 06.03.2018 passed by learned 2nd Joint Civil Judge, Junior Division, Jalna in Regular Darkhast No.88/2015. By order dated 06.03.2018, the executing Court rejected the objection raised by the appellant/objector to the execution of decree passed in Regular Civil Suit No.179/2011.

2. Heard learned counsel for the appellant and respondents. Perused the order dated 06.03.2018 passed in Regular Darkhast No.88/2015 and confirmed in Regular Civil Appeal No.61/2018. Also perused the certified copies of the depositions of witnesses examined in the case as well as copies of

rent receipts referred and relied by the Courts below.

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

4. The respondent no.1/original plaintiff had filed suit bearing R.C.S. No.179/2011 against the respondent no.2 seeking decree of eviction and possession in respect of suit premises i.e. shop premises in possession of respondent no.2 as a tenant. The suit came to be decreed in favour of respondent no.1 and as against the respondent no.2 by the judgment and decree dated 11.07.2014 passed by Joint civil Judge, Junior Division, Jalna. Being aggrieved the respondent no.2 preferred appeal. The same was registered as Rent Appeal No.2/2014. By

the judgment and decree dated 15.04.2015 passed by learned Principal District Judge, Jalna the appeal came to be dismissed and judgment and decree passed by the trial Court confirmed in appeal. Being aggrieved, the respondent no.2 preferred Revision Application No.171/2015 before this Court. By judgment and order dated 15.03.2016 passed by this Court, the Civil Revision Application No.171/2015 was dismissed.

5. The respondent no.1/decreed holder filed application seeking execution of judgment and decree dated 11.07.2014 passed in Regular Civil Suit No.179/2011 by filing Regular Darkhast No.88/2015. The respondent no.2/judgment debtor sought time to vacate the premises. He filed undertaking to vacate premises and hand over vacant possession of suit premises on and before 20.04.2016. However, the respondent no.2 failed to comply

the undertaking given before the executing Court. On 21.04.2016, the appellant/objector (the brother of respondent no.2/judgment debtor) appeared before executing Court and filed application vide Exhibit-17 thereby raised an objection to execution of decree. The appellant-objector raised an objection that after the demise of Hiralal Dagdu Agrawal (original tenant) the father of the appellant and respondent no.2 in the year 1984, they are carrying the business from the suit premises. In brief it is contended that, after the demise of his father in the year 1984, he along with respondent no.2 become the tenant of the suit premises as per Section 7(15)(d) (ii) of Maharashtra Rent Control Act, 1999. The respondent no.1 has filed suit without joining him as a party defendant. It is claimed that the appellant/objector is carrying business from suit premises along with respondent no.2

after the demise of their father. He has paid rent of the suit premises to respondent no.1 and in acknowledgment of rent from appellant the respondent no.1 has issued rent receipts under his signatures. In the year 1997, due to family dispute between the appellant and respondent no.2, the appellant is residing separately. After conducting elaborate inquiry and considering the oral as well as documentary evidence adduced by the appellant and respondent no.1, the Executing Court vide order dated 06.03.2018 rejected the objection. Being aggrieved, the appellant/objector preferred appeal before the District Court, Jalna. By the judgment and decree dated 13.03.2019, the appellate Court dismissed the appeal and confirmed the order passed by the Executing Court. Being aggrieved the appellant/objector has preferred this appeal.

6. Learned counsel for the appellant contended that appeal raises substantial questions of law. It is submitted that the Courts below have not considered the evidence adduced in its proper perspective. It is submitted that the evidence adduced by the appellant/objector duly establish the case of appellant that after the demise of his father, the appellant and respondent no.2 together carrying business jointly and thereby the appellant become the tenant of premises as per Section 7(15)(d)(ii) of the Maharashtra Rent Control Act, 1999. It is further contended that the Courts below also erred in relying upon the testimony of the Power of Attorney holder of the respondent no.1. It is contended that in absence of respondent no.1 step in to witness box, the objection of the appellant ought to have been upheld.

7. On the other hand, learned counsel for the respondent supported the order passed by the Executing Court confirmed in appeal. In the background of overall facts of the case, learned counsel submits that the objection filed by the appellant is nothing but an attempt made on the part of the respondent no.2 to protract the possession and delay the execution of the decree passed in favour of respondent no.1 and confirmed by the first Appellate court as well as this Court by raising objection through appellant/objector. It is submitted that, there is absolutely no evidence to establish that after demise of Hiralal, the appellant was using the premises for the purpose of business along with respondent no.2 and both of them were carrying the business from the suit premises together. It is submitted that the appellant has admitted in cross examination that he has not obtained any

licence under the Shop and Establishment Act to run the business from the suit shop premises. He has also admitted that he has no documentary evidence in the nature of books of account to show that he was carrying the business from the suit premises. He has also admitted that he is not in possession of any rent receipts issued in his name and showing the payment of rent to respondent no.1 after the demise of his father in the year 1984. He has also admitted that the rent receipts are issued only in the name of respondent no.2 as a tenant of suit premises after the demise of his father. He has also admitted that in the assessment register maintained by the Municipal Corporation, the name of respondent no.2 alone shown as person occupying the premises as a tenant. He has also admitted that he never made any grievance nor raised objection as to issuance of rent receipts in the name of respondent no.2.

8. By referring the testimony of Sayyed Rafiq Sayyed Samir – PW-2 and Shamgopal Gajbhiye – PW-3 examined by appellant/objector, it is submitted that the testimony of these witnesses can not be relied in view of material admissions brought through their cross-examination. It is pointed out that though the plaintiff has claimed that the rent receipts issued by respondent no.1 bears the signature of the appellant as a person who paid rent to respondent no.2, but it is established that on the rent receipts issued in the name of Chandulal the respondent no.2, the appellant has endorsed his signature to create false evidence. After lost the battle upto this court and decree of eviction confirmed the respondent no.2/judgment debtor has acted hand in gloves with appellant and raised false and frivolous objection to eviction of decree. It is submitted that the

respondent no.1 has produced the original counterfoils of the rent receipts issued in the name of Chandulal i.e. respondent no.2. On the counterfoil of original rent receipts, only Chandulal i.e. respondent no.2/judgment debtor has signed the rent receipts as a tenant as well as person tendering rent to respondent no.1. On the rent receipts issued to respondent no.2, the signature of appellant has been endorsed to create false evidence to any how establish that appellant used to pay rent of the premises.

9. In the background of overall facts of case, learned counsel submits that there is absolutely no perversity in the reasons and findings recorded by the Courts below and the order passed by the Executing Court is fully in consonance with the pleadings and evidence on record. The appellate Court has closely scrutinize the evidence and confirmed

the order passed by the trial Court.

10. It is submitted that in order to make out a case for admission of Second Appeal, it is incumbent upon the appellant to make out a case that the findings on facts recorded by the Courts below are not only perverse but they are absolutely perverse. In this context, learned counsel has referred and relied the decision of Hon'ble Apex Court in the case of **Ramathal V/s Maruthathal @ Ors** reported in **2017 SCC Online 1100**. It is submitted that respondent no.2/judgment debtor after lost the battle upto this Court and given an undertaking to vacate the premises in fact instrumental in filing objection to execution of decree. After taking time to vacate the premises, the objection has been raised through appellant to avoid execution of decree as an attempt to start fresh round of litigation. It is

contended that such practices needs to be deprecated. In this context, the learned counsel referred and relied upon the decision in the case of **Atmaram Builders Private Limited V/s A.K. Tuli and others** reported in (2011) 6 SCC 385.

11. It is further submitted that in order to make out a case to claim the person has acquired status of "tenant" under Section 7(15)(d)(ii) of the Maharashtra Rent Control Act, 1999, it is obligatory on the part of such person to establish that the said person was using the premises and continued to use the tenement for same purpose as was done by the deceased tenant. No deeming effect can be given to status of such person. By referring the evidence adduced in case, learned counsel contended that there is no evidence much less to prove that the appellant was using the suit premises and continued to use for the

same purpose as that of the deceased tenant. In this context, the learned counsel has referred and relied upon the decision of this Court in the case of **Parashram Tuljaram Belhekar (deceased through L.Rs.) V/s Tejmal @ Kankamal Mulchand Jain (deceased through L.Rs.)** reported in 2007(3) All M.R. 657.

12. I have carefully considered the submissions advanced in the light of impugned judgment and order under challenge. In my view, the appeal raises no substantial question(s) of law. The order passed by the executing Court and confirmed in appeal is well reasoned and suffers from no perversity. While dealing with the objection raised by the appellant/objector, the executing Court has closely scrutinized the oral and documentary evidence adduced by the objector as well as decree holder.

13. In my view, there is no force in the contention of learned counsel for the appellant that the Courts below have not considered the evidence in its proper perspective. Perusal of the judgment and order passed by the trial Court and confirmed in appeal spell out that the Courts below have closely scrutinized the evidence adduced by both the sides. The judgment and order passed by the executing Court is well reasoned and suffers from no perversity. The executing Court while dealing with issue framed in the light of objection raised by the appellant/objector that he is joint tenant of the suit premises, considered the rival pleadings and evidence adduced by the appellant/objector as well as the respondent no.1/decree holder. After closely analyzing the evidence, the trial Court has reached to the conclusion that the objection raised by the appellant/objector is false and

frivolous. It is observed that there is no iota of evidence to show that the appellant/objector was carrying the business from the suit premises along with the judgment debtor after demise of his father so as to claim the status of tenant in contemplation of section 7(15)(d)(ii) of the Maharashtra Rent Control Act. In the judgment and order passed by the executing Court, the executing Court has noted as under :-

"12) It is specific case of the objection petitioner that he is the tenant and carrying the joint business in the suit shops along with judgment-debtor after the demise of his father. According to him sometimes he and sometimes judgment-debtor was paying the rent to the decre-holder. However, I would like to mention that there is no single documentary evidence with the objection petitioner to show that he is carrying the business along with judgment-debtor Chandulal. There is no shop Act licence, no account extract in the name of the objection petitioner to show that he is carrying business in the suit shops. Also judgment-debtor is paying tax assessment of Municipal Council. Thus there is no evidence to show that objection petitioner is carrying the

business in the suit shops. The objection petitioner has filed the rent receipts at Exh. 51 to 59 which shows that there is signature of decree-holder as receiver of the rent and the signature of objection petitioner regarding paying the rent. However, I would like to mention that the said rent receipts are issued in the name of judgment-debtor Chandulal. Therefore, mere payment will not amount that objection-petitioner is the tenant, particularly when the rent receipts are issued in the name of judgment-debtor Chandulal Hiralal Agrawal. The rent receipts only show that the rent was given through the hands of the objection-petitioner for the tenant i.e. for judgment-debtor Chandulal. If the objection petitioner was tenant along with judgment-debtor Chandulal then the name along with Chandulal should have been mentioned along with the judgment-debtor. However, the rent receipts are issued only in the name of the judgment-debtor. Therefore, in absence of any proof regarding business, these rent receipts are not sufficient to hold that the objection petitioner is carrying the business in the suit shop along with judgment-debtor.

13) Objection petitioner has examined his second witness Sayyed Rafiq. According to him he is acquainted with objection-petitioner, judgment-debtor and decree-holder. He was working in the suit shops of judgment-debtor and objection petitioner. According to him the father of judgment-debtor and objection petitioner namely Hiralalji Agrawal was carrying the business in the suit shops and after his death the

judgment-debtor and objection-petitioner carrying the business there. However, since there is no evidence in the name of objection petitioner to show that the objection petitioner is carrying the business along with judgment-debtor or he is having separate business, evidence of this witness is not helpful to the objection petitioner.

14) Also objection petitioner has examined the witness Shamgopal Gajbhiye who has testified that the objection petitioner is carrying business along with judgment-debtor in the suit shops. It is came in the cross-examination of the said witness that decree-holder had also filed the suit against the said witness for eviction. Though the said witness is testified that the objection petitioner is carrying the business in the suit shops, it is important to note that there is no documentary evidence to show that the objection petitioner has separate/independent business or joint business along with the judgment-debtor. It is not case of the objection petitioner that the business is partnership firm. On the other hand, according to him, the business is separate. However, there is no documentary evidence to that respect. Hence the evidence of this witness is also not helpful to the objection petitioner.

15) Admittedly the suit is filed in the year-2011 and came to be confirmed up to the Hon'ble High Court on 18/03/2016. The present execution proceeding is filed in the year-2015. According to the objection petitioner on 08/04/2016 he

came to know by one Shri. Sandip Gopal Agrawal that Judgment-debtor is giving possession to the Decree-holder. The said witness Sandip Gopal Agrawalis examined at Exh. 71. According to him, he told to the objection petitioner that the judgment-debtor is going to handover the possession of the shop to the decree-holder. The said fact came to know him by Bunty Agrawal. However, the objection petitioner did not examine the said Bunty Agrawal to clarify as who is he and as how he came to know the said fact that the judgment-debtor is going to give the possession of the suit shop to the decree-holder. From perusal of evidence of Sandip Agrawal, it is seen that he is resident of Bhusawal. Also it is seen that he is relative of objection petitioner and Chandulal. Therefore, it seems that only to help the judgment-debtor he is deposing in his favour. Hence his evidence is not trustworthy. Therefore I do not accept it.

16) Further more, according to the objection petitioner on 08/04/2016 he came to know the fact that judgment-debtor is going to vacate the possession of the suit shops. In the cross-examination he has admitted that he came to know about the suit before one year ago. His evidence is recorded on 30/06/2017. If according to the objection petitioner he is carrying the business in the suit shops along with judgment-debtor then it is hard to believe that since filing of the suit i.e.since-2011 till 08/04/2016 he did not came to know about the suit, particularly when it is gone up to the Hon'ble High Court. According to him

he and judgment-debtor are carrying the business in the same suit shops. If really he is carrying the business in the same suit shops along with the judgment-debtor then definitely he should have got the knowledge of the suit from the judgment-debtor or any one else during the period of five years. Therefore, the case of the objection Petitioner cannot be believed that he is doing the business in the suit shop and he came to know about the suit before one year i.e. on 08/04/2016. Therefore, all these circumstances show that entire case of the objection-petitioner is false and frivolous. In the circumstances, I hold that objection-petitioner has failed to prove that he is carrying the business in the suit shop after the demise of his father and he is joint tenant along with judgment-debtor in suit shops. Therefore, I answer issue No.1 in the negative"

14. The appellate Court has reappreciated the evidence and reached to the conclusion that there was no perversity in any of the reasons and findings recorded by the trial Court. In my view, there is absolutely no perversity in the judgment and order passed by the trial Court and confirmed in appeal. Appeal raises no substantial question(s) of law.

15. So far as the contention raised by the learned counsel for the appellant that the Courts below erred in relying upon the testimony of power of attorney holder of respondent no.1, in my view, the same is devoid of merit. On behalf of respondent no.1, the son holding power of attorney stepped into the witness box and deposed on the basis of his personal knowledge in respect of the facts of the case. The contention raised by the appellant has been thoroughly dealt with by the first Appellate Court. In para no.18 and 19, the appellate Court has noted as under :-

*"18. It is pertinent to note that case of Humberto Luis (Supra) is **overruled** by the Hon'ble Supreme Court in Janki Vashdeo Bhojwani and another Vs Indusind Bank Ltd and others AIR 2005 (s.c.) 439. It has been held in para no.21 that the view taken by Rajasthan High Court in the case of Sbambhu Dutt Shastri Vs. State of Rajasthan 1986(2) WLL 713 followed and reiterated in the case of Ramprasad Vs. Harinarain and others AIR 1998 Rajasthan 185 is the correct view. The view taken in case*

of Floriano Armando Luis cannot be said to have laid down a correct law and is accordingly overruled. Therefore, it appears that learned Counsel for D.H. is not aware about the said overruled judgment and has cited the same in support of his contention and accordingly the same cannot be relied upon.

19 The sum and substance of the observations laid down in the case laws cited above is that normally if power of attorney holder has personal knowledge of the acts done, he or she can certainly stepped in to witness box to depose as to commission of such acts. In the present case admittedly, power of attorney holder is the son of D.H. and his evidence reflects that he is aware about tenancy rights of J.D. which has been terminated in R.C.S. No.179/2011 and the said has been reached finality up to Hon'ble High Court. He has also identified the signatures of his father/D.H. on the rent receipts at Exh.80 to 87. Therefore, it can be inferred that he has personal knowledge about the proceedings between D.H. and J.D. and that the suit property was in possession of J.D. as tenant thereof. Therefore, his evidence can be relied upon and thus I do not find substance in the submission of learned Counsel for objection petitioner that since the permission to lead the evidence through power of attorney holder was not obtained, his evidence cannot be considered. As rightly submitted by learned Counsel for D.H. that even if

entire evidence of power of attorney holder of D.H. is brushed aside, the evidence adduced on behalf of objection petitioner is insufficient to conclude that at any point of time objection petitioner was joint tenant in the suit property with J.D. Considering the facts and evidence on record, I am of the opinion that objection raised by appellant is not based on bonafide and genuine reason, but it has been raised in order to delay the execution of decree. Accordingly, point Nos. 1 and 2 are answered in negative."

16. Thus, the appeal filed by the appellant is devoid of merit. There is no perversity in the judgment and order passed by the executing Court and confirmed in appeal. Appeal raises no substantial question(s) of law. In that view, the appeal deserves no consideration. Accordingly, the appeal is dismissed. Civil Application, if any, pending stands disposed of in terms of order in appeal.

[V.L. ACHLIYA]
JUDGE