

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

SECOND APPEAL NO.841 OF 2018

WITH

SECOND APPEAL NO.842 OF 2018

WITH

SECOND APPEAL NO.843 OF 2018

Sheetal s/o Sureshkumar Nahar and another

... **Versus** ...

Dr. Deelip s/o Prabhakar Rao Kharwadkar

...

Mr. A.N. Kakade, Advocate for the appellants

Mr. G.K. Thigale (Naik), Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 07th MARCH, 2019

PRONOUNCED ON : 02nd MAY, 2019

ORDER :

1 All these appeals have been filed by original defendants. Second Appeal No.841 of 2018 challenges the Judgment and Decree passed in R.C.A. No.7/2016 dated 21.08.2018 by learned Adhoc District Judge-3, Beed,

whereby the appeal filed by the original plaintiff for enhancement of compensation came to be allowed. The said appeal was filed by the original plaintiff challenging the Judgment and Decree passed in Special Civil Suit No.46/2006 by learned Civil Judge Senior Division, Beed dated 20.04.2010 which was the suit for possession and compensation. The defendants were directed to hand over the possession to the plaintiff and the compensation was awarded for three years prior to the suit to the extent of Rs.1,44,000/- and the compensation is also awarded @ Rs.4,000/- per month from the date of the decree till actual realization of the possession.

2 Second Appeal No.842 of 2018 is filed by original defendants challenging the Judgment and Decree passed in R.C.A. No.8/2016 passed by learned Adhoc District Judge-3, Beed on 21.08.2018, whereby the appeal filed by them was dismissed. Defendants were directed to hand over the possession of the suit property to the plaintiff and mesne profits to the extent of Rs.2,16,000/- and further direction to pay @ Rs.6,000/- per month from the date of the suit till actual possession. Defendants had challenged the Judgment and decree passed in Special Civil Suit No.46/2006 by learned Civil Judge Senior Division, Beed dated 20.04.2010 which was the suit for possession and compensation. The defendants were directed to hand over

the possession to the plaintiff and the compensation was awarded for three years prior to the suit to the extent of Rs.1,44,000/- and the compensation is also awarded @ Rs.4,000/- per month from the date of the decree till actual realization of the possession.

3 Second Appeal No.843 of 2018 has been filed by the original plaintiffs challenging the concurrent findings in Regular Civil Appeal No.164/2012 by learned Adhoc District Judge-3, Beed dated 21.08.2018, wherein the Judgment and decree passed by learned Civil Judge Senior Division, Beed in Special Civil Suit No.68/2006 dated 20.04.2010 was challenged. The said suit was filed by the present appellants for specific performance of the contract.

4 Since the basic pleadings of the parties in all the matters is one and the same, at this stage of admission they are commonly dealt with.

5 Heard learned Advocate Mr. A.N. Kakade for the appellants in all the three matters and learned Advocate Mr. G.K. Thigale (Naik) for respondent in Second Appeal Nos.841 of 2018 and 842 of 2018. He has made submissions in Second Appeal Nos.842 of 2018 and 843 of 2018, also though he made submissions in respect of Second Appeal No.841 of 2018 he

has not filed his appearance. It will not be out of place to mention here that Second Appeal Nos.841 of 2018 and 842 of 2018 are arising out of same Judgment of the Trial Court, but then plaintiff as well as defendants had filed the appeal and those two separate appeals have been decided by two separate Judgments and therefore, there will not be any hurdle to observe that learned Advocate Mr. G.K. Thigale (Naik) has argued for the respondent in Second Appeal No.841 of 2018 also.

6 Learned Advocate for appellants has vehemently submitted that respondent in all the matters was plaintiff in Special Civil Suit No.46/2006 and defendant in R.C.S. No.48/2006. It is not in dispute that he i.e. the present respondent is the owner of House No.2-12-7 situated at Subhash Road, Beed admeasuring 1200 sq.ft.. Respondent had come with the case, in his suit that he had given the said suit property to one Indarchand Jain in March, 1999 on rent @ Rs.6,000/- per month. Indarchand Jain had given some advance rent but then in March, 2003 it was noticed by plaintiff that said Indarchand Jain had illegally inducted defendant in the suit property. On inquiry, Indarchand Jain promised that defendant will vacate the suit premises. Thereafter, defendants promised that they will vacate the suit premises and prolonged the handing over of the possession to the plaintiff. It

is stated that defendant is occupying the suit premises and illegally and unauthorizedly and they are conducting the shop in the same. Plaintiff had asked Maharashtra State Electricity Distribution Company Limited, Beed to cut the electricity supply to the suit property. However, the defendants approached Consumer Forum and it was falsely contended that defendants have purchased the suit property for Rs.7,00,000/-. With this case, when the plaintiff-respondent had come before the Court, then without going into the aspect, as to whether defendant had become tenant or not, both the Courts have decided the matter. Further, the suit for possession only against defendant will not be maintainable. The suit was not filed under the Maharashtra Rent Control Act. Further, the First Appellate Court has absolutely not applied its mind to the facts as well as legal aspects involved in the case. There is absolutely no compliance of Order 41 Rule 33 of CPC. Points for determination were not framed, instead of that 'issues' were framed. This shows non application of mind. He relied on the decision in **Vishwas Balu and others vs. Ghasiram Ramratan Jajum and others, AIR 1975 Bom. 278**, wherein it has been held that -

“In a suit by the landlord for ejectment under Bombay Rent Act, the Trial Court framed as many as 11 issues of fact and found almost all of them in favour of the landlord, but in appeal against the

decree by the tenant, the District Judge considered only one issue and affirmed the decree without recording its decision on the other grounds covered by S. 12 or 13 of the Act, its judgment cannot be said to be a judgment of the first appellate Court at all within the meaning of O. 41 R.31, and there is no alternative for the High Court in a petition under Art. 227 of the Constitution but to remand the matter, with a direction to the District Judge to hear the appeal on merits and to decide the same according to law by riveting his attention not only on the points of controversy but by scrutinizing the evidence led thereon.”

7 It was further argued that, the learned Courts below have not considered that there was absolutely no evidence adduced by the plaintiff to for grant of compensation. Oral evidence has not been considered at all. Therefore, the matters deserve admission. Further, in respect of Second Appeal 843 of 2018, he submitted that both the Courts below have not considered the evidence that was led in suit for specific performance filed by the appellants. The specific performance of the contract was based on oral agreement, which is allowed by law to be executed and therefore, oral evidence ought to have been scanned properly to arrive at conclusion, as to whether really such agreement to sell existed or not. The possession was handed over to the plaintiffs therein i.e. present appellants and thereafter by way of such agreement to sell it was confirmed and therefore the discretion

ought to have been used in favour of the plaintiffs in that matter.

8 Per contra, the learned Advocate for the respondent submitted in respect of Second Appeal Nos.841 of 2018 and 842 of 2018 that plaintiff had come with a specific case that defendants are the 'trespassers'. Though he had handed over the property to Indarchand Jain as tenant, yet said Jain had parted with the possession of the property unauthorizedly in favour of the present appellants and therefore, the said Court had the jurisdiction to try and entertain the matter. He relied on the decision in Shaikh Jaber Abdulah JAI Sabah vs. Ravindra Mukund Chafe and another, 2014(4) Mh.L.J., 132. In this case it was held that when the suit was filed for possession against trespasser and not against tenant, defendant is a 'stranger' then the provisions of Maharashtra Rent Control Act do not apply to such relationship. Jurisdiction of the Civil Court is not barred. Further reliance has been placed on Praful Manohar Rele vs. Krishnabai Narayan Ghosalkar and others, (2014) 11 Supreme Court Cases 316, wherein it has been held that -

“The general rule regarding inconsistent pleas raised in the alternative is settled by a long line of decisions rendered by the Supreme Court. The law is that there is no absolute bar against taking of inconsistent pleas by a party. In cases where there is no inconsistency in the facts alleged a party is not prohibited from taking alternative pleas available

in law. If the plea raised by the tenant in his written statement is clear and unambiguous in a suit where one party alleged the relationship between the two to be that of licensor and licensee, while the other alleged the existence of a tenancy, only two issues arise for determination, namely, whether the defendant is tenant of the plaintiff or is holding the property as a licensee. If the court comes to the conclusion after the parties have lead their evidence that the tenancy has not been proved then the only logical inference is that the defendant was in possession of the property as a licensee. The case of the defendants in the present case was that they were in occupation of the suit premises not as licensees but as tenants. The appellant-plaintiff was, therefore, entitled on that basis alone to ask for an alternative relief of a decree for eviction on the grounds permissible under the Rent Control Act. Such an alternative plea did not fall foul of any of the requirements/tests laid down by the Supreme Court.”

9 He further relied on the decision in Jacinta De Silva vs. Rosarinho Costa and others, (2014) 4 Supreme Court Cases 534, wherein it was held that denial of title results in extinction of tenancy. He further submitted that as regards the suit for specific performance of contract filed by the appellant, the oral agreement was not proved by them which was stated to have been concluded on 15.12.2001. Plaintiff says that he paid entire consideration amount and possession was given in pursuant to the oral agreement. Under such circumstance, the defendant/plaintiff/appellant cannot get the possession protected under Section 53-A of Transfer of

Property Act, because it requires written agreement that too on the date of the said alleged contract i.e. 15.12.2001, when the possession was also handed over. Such written agreement required registration. No evidence has been led by the appellants to prove that payment of consideration was made by them and no explanation is given as to why they had not obtained any receipt. Conduct of the plaintiff therein is also required to be considered only after the plaintiff-respondent had filed Special Civil Suit No.46/2006 at that time, thereafter, suit for specific performance of the contract has been filed by the appellants. Therefore, as regards Second Appeal No.843 of 2018, there is absolutely no necessity to change the concurrent findings given by both the Courts below.

10 He relied on the decision in Raghavendra Swamy Mutt vs. Uttaradi Mutt, (2016) 11 Supreme Court Cases, 235, wherein it has been observed that the appeal under Section 100 of CPC is required to be admitted only on substantial question/questions of law which is the fundamental imperative. Further, in Dnyanoba Bhaurao Shemade vs. Maroti Bhaurao Marnor, (1999) 2 Supreme Court Cases 471, it was held that -

“Keeping in view the amendment made in 1976 High Court can exercise its jurisdiction under Section 100 of CPC only on the basis of

substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. A judgment rendered by the High Court under Section 100 of CPC without following the aforesaid procedure cannot be sustained”.

11 Though the stand taken by the parties and the story is basically same, it would be appropriate at this stage to segregate Second Appeal Nos.841 of 2018 and 842 of 2018 from Second Appeal No.843 of 2018 for discussion. In Second Appeal Nos.841 of 2018 and 842 of 2018, the original plaintiff i.e. present respondent himself had come with the case that he as a owner/landlord of the suit property had given the suit property/premises to one Indarchand Jain in March, 1999 on rent @ Rs.6,000/- per month. He has also stated that he accepted the rent from Indarchand Jain in advance, but then when plaintiff came to know that Indarchand Jain had handed over the property unauthorizedly to defendant in March, 2003 then he asked Indarchand Jain to vacate the premises, Indarchand Jain promised, so also the defendant promised but actual possession was not given. The basic question that was before the Trial Court, as to what was the relationship and whether the suit before ordinary Civil Court was maintainable. Though a specific issue has been framed that, whether plaintiff has proved that

defendant is a trespasser, has been answered in the affirmative and so also the issue No.1 which was framed as, whether plaintiff has proved that Indarchand Jain had inducted defendant without the permission of the plaintiff in suit property, is also answered in the affirmative. According to plaintiff-respondent, the relationship between him and Indarchand Jain and himself was that of tenant and landlord. Therefore, it was incumbent on both the Courts below to see what is the relationship between Indarchand Jain and defendant (present appellant). Whether he can be said to be trespasser or a sub-tenant. At the same time, the defendants' contention was also required to be considered. Defendants denied that they were inducted by Indarchand Jain, but it was contended that they obtained the possession on the basis of agreement to sell. It is important to note that said Indarchand Jain has not been examined at all by the plaintiff. But when he himself is coming with a case that he had inducted some other person as tenant and from that tenant the defendant has taken possession, then it ought to have been considered by the Courts below as to whether the suit ought to have been brought under Maharashtra Rent Control Act and whether the jurisdiction of Civil Court would have been barred. There is absolutely no discussion from this angle by both the Courts below. The ratio laid down in **2016 11 SCC 235** and **1999 2 SCC 471** cannot be denied. But the fact

remains is that if it is shown that both the Courts below have not appreciated the evidence properly and the legal points involved in the same are not considered properly, then definitely a Second Appeal under Section 100 of CPC is maintainable. No doubt, as a general rule, where there is concurrent findings, this Court would be slow in proceeding with the matter. However, at the costs of repetition, it can be said that if it is shown that both the Courts below have not considered the evidence as well as legal points correctly, then the Second appeal is maintainable. The ratio laid down in **Gurnam Singh (D) by LRs. & Ors. vs. Lehna Singh (D) by LRs. in Civil Appeal No.6567 of 2014** decided by the Apex Court on 13.03.2019 is required to be considered, wherein it has been observed that the existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of CPC. Reliance can also be placed on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable

law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence.

12 The plaintiff has come with a case that said Indarchand Jain has unauthorizedly and illegally inducted defendant in the suit premises. Then the basic question is, as to whether without making Indarchand Jain as a party to the proceeding and getting the premises from his possession whether independently suit for possession against defendant would lie, that too before a Civil Court (not a Court under Maharashtra Rent Control Act). A note can also be taken of a recent decision by Apex Court in **C.A. No.11086 of 2018, Dr. R.S. Grewal and others vs. Chander Prakash Soni and another** delivered on 16.04.2019, wherein Apex Court has held that, “the protection offered to a statutory tenant by rent control laws can only be overcome by following the procedure laid down in such laws, such a statutory tenant can be evicted only by following procedure applicable in Rent Control Act and not by filing suit for possession against him or her”. In that case also one Shivdev Kaur had let out a property to Chander Prakash Soni for rent. The life estate granted to Shiv Dev Kaur enabled her to create a tenancy and receive the rent

from the tenants on the property. After Kaur died, the other heirs became owners of the property. They filed the suit for possession against tenants on the basis that tenant was trespasser after the death of Kaur. The Trial Court had decreed the suit, but in Second Appeal the High Court had dismissed the suit. The said decision in the Second Appeal was challenged before the Apex Court, but then Apex Court has dismissed the appeal. Apart from this, the other points, those are involved in this case is, as to whether the Civil Judge Senior Division can be said to be a proper Court to try and entertain the said suit, if at all it can be held that the defendant is held to be not a trespasser. Therefore, definitely though there is a concurrent finding, case is made out to admit the appeal. As regards compensation is concerned, definitely it would be related to the question, as to whether defendant can be termed as trespasser and as regards quantum is concerned, it being question of fact it will not be within the scope of Section 100 of CPC. Therefore, the substantial questions of law would be limited to the entitlement only. Following are the substantial questions of law :

- 1 Whether the possession of the defendant over the suit premises was as 'trespasser' or 'sub-tenant', being unauthorizedly inducted by tenant Indarchand Jain ?

2 Whether both the Courts below failed to consider the provisions of Maharashtra Rent Control Act to the suit property and whether the suit was maintainable before Civil Court, that too before Civil Judge Senior Division ?

3 Whether original plaintiff was entitled to get compensation?

4 Whether interference is required in the findings given by the Courts below ?

13 Now turning towards the Second Appeal No.843 of 2018 it is to be noted that the appellants were the original plaintiffs. They had come with the case that there was oral agreement dated 15.12.2001 and they had paid amount of Rs.1,00,000/- to the defendant on that day and thereafter, further amount of Rs.6,00,000/- was also paid. It is also stated that the possession of the property was taken on 15.01.2001. Interesting point to be noted is that in the plaint, when the plaintiffs had come with the case that entire amount of consideration was paid to the defendant, then there ought to have been explanation, as to why no sale deed was got executed on that day itself. There is absolutely no explanation as to why any agreement to sell or written document was not got executed, in respect of receipt of amount of

Rs.1,00,000/- plus Rs.6,00,000/- was not taken. No doubt, oral agreement to sell is admissible, but then it has to be proved properly. Further, there is substance in the submission on behalf of respondent that when it is stated that as per the oral agreement possession was also handed over, then it cannot be said to be a legal transaction. If possession is obtained by way of agreement, then there has to be an agreement in writing, that too on a sufficient stamp paper and it should be a registered instrument. In absence of these the plaintiffs were not entitled to get protection of possession under Section 53-A of Transfer of Property Act.

14 As regards the factual aspect is concerned, both the Courts below have held that plaintiffs have failed to prove that they had handed over in all Rs.7,00,000/- to the defendant. Furthermore, plaintiffs cannot be said to be ready and willing to perform their part of consideration, taking into consideration that as per their own say entire amount was paid on 15.12.2001 and till 18.11.2006 no steps were taken by the plaintiffs to get the sale deed executed in their favour. The oral evidence does not give any kind of explanation for inaction for so many days. Merely by saying that plaintiffs had performed their part of the contract and nothing was remained to be performed by them, does not bring the suit within limitation. It is for the simple reason that basically there was no document with them to support

the alleged transaction. Under such circumstance, the diligent person would not have kept quiet for such a long time and therefore, definitely they cannot be said to be ready and willing to perform their part of contract, even if for the sake of moment if it is accepted that there was an agreement of sale. Therefore, as regards this suit i.e. R.C.S. No.68/2006 the learned Trial Court has taken appropriate view and findings have been correctly given. As regards appellate Court in R.C.A. No.164/2014 is concerned, no doubt, it is stated that the appellate Court is framing 'issues', but they are in fact points for determination, different nomenclature given to the same and the style in which those points have been framed would be similar to the issues. It cannot be stated that there is absolutely no compliance of Order 41 Rule 31 of CPC. No substantial question of law has been pointed out in respect of Second Appeal No.843 of 2018 and therefore that appeal deserves to be dismissed. For the above said reason following order.

ORDER

1 Second Appeal Nos.841 of 2018 and 842 of 2018 are '**admitted**' for the substantial questions of law stated in para No.12 above.

2 Learned Advocate Mr. G.K. Thigale waives notice for respondent after admission for both the cases.

3 Printing of paper book is dispensed with as the record and proceeding is available before the Court.

4 The paper book prepared before the First Appellate Court is sufficient.

5 Second Appeal No.843 of 2018 is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi, J.)

agd