

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 94 OF 2018**

Vijay Kisan Sabale

.....Appellant

V/s.

Janabai Shivaji Shitole

....Respondent

Mr. Vivek Patil i/by. Mr. Vaibhav R. Gaikwad, Advocate for the appellant.

Mr. Vishwanath S. Talkute Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

Wednesday, 10th April, 2019.

ORAL JUDGMENT :

1. *This Second Appeal is preferred by the defendants against the judgment and decree passed in Regular Civil Appeal No. 98 of 2014.*

2. *I shall refer the parties by their nomenclature in the suit.*

3. *The facts in brief are as under :*

. *The plaintiff-respondent, is owner of the Shop No.8 ("the suit property") for short. Defendant was inducted in the suit shop as a licensee in the year 2007 for 11 months. The license was renewed in 2008 and further in 2009 for the period of eleven months each. By efflux of time, the license period expired on 17th August, 2010 and thereafter the plaintiff vide notice on 3rd September, 2010, called upon the defendant to handover possession of the suit property alongwith outstanding license fees payable from June, 2010 to October, 2010. The defendant did not accede to his request, which compelled the plaintiff to file suit for possession and for consequential reliefs.*

4. *The evidence on record reveals that, the plaintiff has proved three leave and license agreements; dated 25th July, 2007 (Exhibit-40), 16th September, 2008 (Exhibit-41), 18th September, 2009 (Exhibit-42). It may be stated that the execution of these leave and license agreements has not been disputed by the*

defendant. However, defendant would contend that, he was inducted in the suit premises as a “lessee”, in the year 2007 for a period of seven years. He thus pleaded oral lease in his favour. However, both the Courts upheld the plaintiff's case and rejected the defendant's defence.

5. *I have gone through the evidence and leave and license agreements. Now the question is, in view of evidence on record, whether both the Courts were justified in fact and law in upholding status of the defendant as licensee as against that of lessee.*

6. *The apparent tenor of the documents i.e. leave and license agreements at Exhibits-40, 41 and 42, show a clear intention to deprive the defendant (licensee) of an interest in the property. The covenants of leave and license agreements do not show that the defendant was left in exclusive occupation of the suit property. Evidence reveals, that during the subsistence*

*of third leave and license agreement, plaintiff had constructed loft in the suit property. It clearly shows no interest in the suit property was created in his favour and he had mere right to occupy the suit property. Intention assumes importance in differentiating between the two transactions. This is made clear by the Apex Court in the case of **Puran Singh Sahni v. Sundari Bhagawandas Kriplani reported in (1991) 2 SCC 180.***

"The intention of the parties in making the agreement is determinative of the question whether it was a lease or licensee. The test of exclusive possession though of significance, is not decisive. By mere use of the word lease or 'licensee' the correct categorisation of an instrument under law cannot be affected. While interpreting the agreement the court has also to see what transpired before and after the agreement.... The best interpretation is made from the context. The intention of the parties to an agreement has to be gathered from the terms of the agreement construed in

the context of the surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended. If in fact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a licensee.... What was given to the licensee was the use of the flat with furniture, fittings etc., which could not be said to have created any interest in the flat though in effect the use continued for a stipulated period of time."

7. *The learned Counsel for the appellant has relied on the evidence of PW2 in support of his contention. However, his evidence does not even suggest that in the year 2007, defendant was inducted as a lessee in the suit property.*

8. *As against the leave and license agreements, the appellant-defendant has set up the defence of oral lease. Both the Courts rejected this defence upon appreciating the evidence and also in view of the provisions of Section 107 of*

Transfer of Property Act. Section 107 reads as under :

“107. Leases how made

A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

. In the case in hand, I am concerned with an oral lease which is hit by the first para of Section 107 of the Transfer

of Property Act. Under Section 107, parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, such a lease has to be only by a registered instrument. In the absence of a registered instrument, no valid lease can be created.

9. *Thus, in view of the provisions of Section 107 of the Transfer of Property Act, both the Courts correctly rejected the defendant's stand of oral lease. Besides, both the Courts recorded correct finding of fact which is consistent with the evidence. Neither agreements nor other evidence has established that defendant was left in exclusive occupation of the suit property. The Appellate Court, in its judgment in para-3 has dealt with all covenants of Leave and License Agreement and*

thereupon concluded that Defendant was inducted as a licensee and his license has been validly terminated.

10. *Thus, taking into consideration the evidence on record and such other evidence led by the parties, the findings rendered by the Courts below are not perverse. Both the Courts have not ignored any piece of evidence and therefore Appeal does not give rise to any substantial question of law. The Appeal is dismissed. All Civil Applications also stand disposed of.*

11. *The learned Counsel for the appellant, requests that, the ad-interim relief granted by this Court whereby the parties were directed to maintain status-quo, be continued for a reasonable period. In view of the facts aforesaid and for the reasons stated hereinabove, I am not inclined to continue the protection.*

(SANDEEP K. SHINDE, J)