

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 256 OF 2019

Smt. Savitridevi Dukhana Shaymsunder
Pasi (Gujar) (deleted since deceased)
and others

...Applicants

Versus

Ishwar Nagar Co-operative Housing
Society Ltd.

...Respondent

....

Mr. R.P. Singh, Advocate for the Applicants.

Mr. P.S. Dani, Senior Advocate i/b. Vinod K. Chauhan, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 27th JUNE, 2019

P.C.

1. Heard Mr. R.P. Singh, learned Counsel for the applicants and Mr.P.S. Dani, learned Senior Counsel for the respondent, at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, who are the legal representatives of Shyamsunder Pasi (for short, 'Shyamsunder'), hereinafter referred to as the 'defendants', have challenged the judgment and decree dated 31.8.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai in [P] Appeal No.35/2014. By that order, the Appellate Court allowed the appeal preferred by the

respondent, hereinafter referred to as the 'plaintiff' and set aside the order dated 28.11.2013 passed by the learned trial Judge in L.E. & C. Suit No.126/171 of 2009. The Appellate Court partly decreed the suit instituted by the plaintiff and directed the defendants to hand over vacant possession of room No.1 which is shown in red colour boundary line on the sketch annexed at Exhibit-B to the plaint, more particularly described in paragraph-1 of the plaint, (for short, 'suit premises').

3. In support of this application, Mr. Singh submitted that the Appellate Court committed serious error in decreeing the suit. He submitted that in paragraph-2 of the plaint, the plaintiff alleged that Shyamsunder was employed with the plaintiff society as a watchman in or around 1970. By virtue of his employment as a watchman with the plaintiff society, he was permitted to use and occupy the suit premises i.e. watchman rest room while on duty. The permission granted to Shyamsunder was gratuitous and without payment of any charges and that he was allowed to use and occupy the suit premises for better performance and discharge of his duties so that he would be available at any time by the plaintiff society.

4. Mr. Singh submitted that the defendants filed written statement and in paragraph-6 contended that Shyamsunder was tenant of the suit premises of Ishwarbhai Shah (for short, 'Ishwarbhai').

Ishwarbhai had granted tenancy of the suit premises to Shyamsunder, somewhere in 1962 and since then he was residing and paying monthly contractual rent at Rs.11/- to the landlord in respect of the suit premises. The landlord has issued rent receipt of the suit premises against the payment of rent but same has been damaged while there was water flow in the city in July, 2005. Reference was made to the tenancy agreement executed in the year 1964 by Ishwarbhai in favour of Shyamsunder. He submitted that basically there is not relationship of landlord and tenant between the plaintiff and Shyamsunder. As there is no relationship of landlord and tenant between the parties, the suit instituted by the plaintiff against the defendants is not maintainable.

5. Mr. Singh further submitted that Ishwarbhai migrated to America in the year 1977. He invited my attention to paragraph-15 of the trial Court's judgment to contend that the learned trial Judge after appreciating the evidence on record held that the defendants have consistently taken stand that Ishwarbhai is their landlord who had created tenancy in favour of Shyamsunder. Thus, the plaintiff was aware of denial of title of the plaintiff society. However, the plaintiff did not prove the ownership in respect of the suit premises by leading cogent evidence.

6. Mr. Singh has submitted that Shyamsunder was inducted in

the suit premises in the year 1962. The defendants have produced birth certificate of daughter of Shyamsunder. She was born in the year 1969 and the address in the birth certificate is of the suit premises. The plaintiff came with the case that Shyamsunder was employed as a watchman in the year 1970. As against this, Shyamsunder was occupying the suit premises from 1962. This also substantiates the case of the defendants that there is no relationship of landlord and tenant between the parties.

7. Mr. Singh has invited my attention to the finding recorded by the Appellate Court in paragraph-17. The Appellate Court observed that the defendants failed to prove their tenancy right. When they fail to prove their tenancy right in respect of the suit premises then it can be assumed unless contrary is proved that their occupation in the suit premises is gratuitous licensee. He submitted that the said finding is based upon surmises and conjectures. It is a well settled principle of law that the plaintiff must stand or fall on his own legs and cannot take advantage of weakness in the case of the defendant. He invited my attention to the Registration Certificate dated 31.8.1966 issued by the Assistant Registrar (I) Cooperative Societies, Bombay. The address of the plaintiff society is plot No.236, near Wadala Post Office, Bombay – 31. As against this, the suit premises is situate at Bhandup (West). In short he submitted that

the plaintiffs have not established ownership.

8. Mr. Singh has invited my attention to paragraph-19 where the Appellate Court observed that it has come on record that after the building is constructed the ownership is transferred to the plaintiff society which is registered under the Maharashtra Co-operative Societies Act, 1960. The copy of Certificate of Registration dated 31.8.1966 placed on record shows that the plaintiff society is the owner of the building including the suit premises. He submitted that said finding is not supported by Certificate of Registration. Thus, the finding recorded by the Appellate Court is perverse and based upon no evidence. He, therefore, submitted that the application requires consideration.

9. On the other hand, Mr. Dani has invited my attention to the description of the suit premises given in paragraph-1 of the plaint and paragraphs-8 and 10 of the written statement filed by the defendants. In paragraph-1, the plaintiffs have given description of the suit premises. In paragraph-8 of the written statement, the defendants contended that the suit premises is independent premises constructed by Shyamsunder in the year 1962 with his own funds and he is paying monthly contractual rent to Ishwarbhai @ Rs.11/- per month, as he was the owner of land who gave permission to Shyamsunder to stay there and look after his property. The defendants further contended that Ishwarbhai had

constructed the building somewhere in 1966 and thereafter the plaintiff approached Shyamsunder and requested him to serve with them as a watchman.

10. In paragraph-10, the defendants contended that there was separate boundary of the suit premises which was illegally demolished by the plaintiff recently before filing of the suit just to give cause of action of filing suit.

11. Mr. Dani submitted that in the written statement, the defendants contended that the structure is owned by Shyamsunder and the land beneath the suit premises was let out to him by Ishwarbhai at the monthly rent of Rs.11/-. They improved the case. The defendants came out with the case that Shyamsunder is tenant of the suit premises and their landlord is Ishwarbhai.

12. Mr. Dani invited my attention to affidavit-in-examination of DW-1 Rakesh Pasi. In paragraph-13, DW-1 Rakesh deposed that the suit premises is an independent premises constructed by Shyamsunder in the year 1962 with his own funds and paying monthly contractual rent to Ishwarbhai @ Rs.11/- per month as he was the owner of the who gave permission to Shyamsunder to stay there and look after his property. As against this, in cross-examination DW-1 Rakesh admitted that his statement in the affidavit-in-examination in paragraph-13 that

the suit premises is independent premises constructed by Shyamsunder in 1962 with his own funds is not correct. Insofar as the case made out by the defendants that Shyamsunder was tenant of the suit premises of Ishwarbhai is concerned, he invited my attention to cross-examination of DW-1 where DW-1 admitted that he has never seen Ishwarbhai. He does not know whether Ishwarbhai had expired many years prior to his birth. Neither Shyamsunder nor any of the defendants have filed RAD suit against Ishwarbhai or his legal representatives for declaration of tenancy right. He does not know whether Ishwarbhai had gone for residence when the building was constructed and society was formed. He did not make any attempt to find out the residential address of Ishwarbhai. He did not make any enquiry about the heirs and legal representatives of Ishwarbhai and where they reside. He, therefore, submitted that the story improved during the trial that they are tenant of Ishwarbhai is not only afterthought but is not substantiated by any evidence. He submitted that basically Shyamsunder was employed as a watchman in the society and he was occupying the suit premises as gratuitous licensee. The Appellate Court, after considering the evidence on record has decreed the suit. He, therefore, submitted that no case is made out for interfering with the impugned order.

13. I have considered the rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted suit on the ground that Shyamsunder was employed as a watchman in their society and he was permitted to occupy the suit premises without charging any compensation. Paragraphs-1 and 2 of the plaint read thus :

- “1. The Plaintiff is a Co-operative Housing Society registered under the provisions of Maharashtra Co-operative Societies Act and is having its office at the address mentioned in the cause title. Hereto annexed and marked Exhibit “A” is the copy of the Registration Certificate of the Plaintiff's society. The building of the Plaintiff's society has five wings namely 'A', 'B', 'C', 'D' and 'E' and there is a structure consisting of two rooms and one open room and a well in the compound of the Plaintiff Society. Hereto annexed and marked Exhibit “B” is the sketch showing the location of different wings and the three rooms, out of which one room, is the suit premises situated in the compound of the Plaintiff's society. The said three rooms for the sake of convenience are numbered as 1, 2 and 3 on the sketch out of which Room No.1 which is shown in red colour boundary line on the said sketch is the “suit premises”. The suit premises are situated on C.T.S. No.619 and bounded on the East by “E” building of the Society, on the West by fencing wall of the society, on the North by Society's 2nd room and on the South by Pump house of the society.
2. One Shri Shyamsunder Pasi was employed with the Plaintiff's society as a watchman in or around year 1970. By virtue of his employment as a watchman with the Plaintiff's society, the said Shyamsunder Pasi was permitted to use and occupy the suit premises i.e. watchman rest room while on duty. The permission granted to

the said Shyamsunder Pasi was gratuitous and without payment of any charges and he was allowed to use and occupy the suit premises for better performance and discharge of his duties, so that he would be available at any time by the Plaintiff's society."

14. The defendants filed written statement. Paragraphs-6, 8 and 10 thereof read thus :

- "6. The Defendants state that the deceased husband of the Defendant No.1 and father of the Defendant No.2 to 4, late Shri Shyamsunder Pasi was the tenant of the suit premises Mr. Ishwarbhai Shah. The Defendants say that the said Ishwarbhai Shah has granted tenancy of the suit premises to Mr. Shyamsunder Pasi, somewhere in the year 1962 and since then he was residing in the suit premises and paying the monthly contractual rent @ Rs.11/- per month to the landlord in respect of the suit premises. The Defendants state that the landlord has issued the rent receipt of the suit premises against the payment of rent but same has been damaged while there was water flow in the city in July, 2005. The Defendants say that said Mr. Ishwarbhai Shah has executed Tenancy Agreement in respect of the suit premises adm. 11 x 14 sq. ft. in the year 1964 in favour of the deceased tenant. These Defendants crave leave to refer and rely upon the said agreement as and when produced.
8. These Defendants say that the suit premises is a independent premises constructed by the deceased Shyamsunder Pasi in the year 1962 with his own fund and paying monthly contractual rent to Ishwarbhai Shah at the rate of Rs.11/- per month, as he was the owner of land who gave permission to the deceased Shyamsunder to stay there and look after his property. These Defendants further states that the said Ishwarbhai Shah has constructed the

building somewhere in the year 1996 and thereafter the plaintiff approached to the deceased and requested him to serve with them as a Watchman.

10. With reference to para-1, it is true that the plaintiff is a registered society, but these defendants do not admit the authenticity and correctness of the plan as relied by the plaintiff. These defendants further deny that suit premise is in the compound of the society. However these defendants say that there was separate boundary of the suit premises which was illegally demolished by the plaintiff recently before filing this suit just to give cause of the present suit and claim the suit premises. These defendants also deny the plan attached to the suit as the same are incorrect.”

15. On behalf of the defendants, DW-1 Rakesh Pasi was examined. He filed affidavit of examination-in-chief. Paragraph-13 thereof reads thus :

“13. I say that the suit premises is a independent premises constructed by the deceased Shyamsunder Pasi in the year 1962 with his own fund and paying monthly contractual rent to Ishwarbhai Shah at the rate of Rs.11/- per month, as he was the owner of land who gave permission to the deceased Shyamsunder to stay there and look after his property. I further states that the said Ishwarbhai Shah has constructed the building somewhere in the year 1966 and thereafter the plaintiff approached to the deceased and requested him to serve with them as a Watchman.”

16. In cross-examination DW-1 Rakesh admitted that his statement in the affidavit-in-examination in paragraph-13 that the suit

premises is independent premises constructed by Shyamsunder in 1962 with his own funds is not correct. DW-1 admitted that the suit premises is inside the compound wall of the plaintiff's society. The compound wall is there since beginning in the same condition. Thus, from the assertions made in paragraph-1 of the plaint and the assertions made in paragraphs-6, 8 and 10 of the written statement as also admissions of DW-1 referred hereinabove, it is absolutely clear that the suit premises is situate in the compound of the plaintiff's society. Initially the defendant came with the case that Shyamsunder had constructed the suit premises out of his own funds on the land belonging to Ishwarbhai. However, said case was improved by contending that Shyamsunder is the tenant of the suit premises and it is owned by Ishwarbhai.

17. The Appellate Court has considered the case made out by the defendants and in paragraph-16 held that the defendants have neither examined the original landlord nor proved the alleged agreement executed by Ishwarbhai. The defendants came with the case that the landlord used to issue rent receipt of the suit premises against the payment of rent, all the rent receipts have been lost while there was water flow in the city in July, 2005. It is material to note that the suit is instituted in the year 2009. Even if I accept the case made out by the defendants that all the rent receipts were lost due to flood of July, 2005

in Mumbai, there is no explanation worth the name as to why the defendants did not produce rent receipts post July, 2005. In fact in view of the admissions given by DW-1 Rakesh in the cross-examination as regards Ishwarbhai, I do not find that the Appellate Court committed any error in holding that the defendants failed to establish their tenancy rights. As mentioned earlier, Shyamsunder was employed as a watchman with the plaintiff's society. It is in that context the Appellate Court held that the occupation of Shyamsunder is that of gratuitous licensee. For the reasons recorded in paragraph-16 to 20 of the Appellate Court's order, I do not find that the Appellate Court committed any error in passing the impugned order.

18. In the case of **Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria (dead) through L.Rs., AIR 2012 SC 1727**, the Apex Court observed in paragraphs-97 to 100 thus:

- “97. This Court in *Puran Singh v. The State of Punjab* : (1975) 4 SCC 518 : (AIR 1975 SC 1674) held that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession.
- 98. This Court in *Mahabir Prasad Jain* (AIR 1999 SC 3873 : 1999 AIR SCW 3957) (supra) has held that the possession of a servant or agent is that of his master or principal as the case may be for all purposes and the former cannot maintain a suit against the latter on the basis of such possession.
- 99. In *Sham Lal v. Rajinder Kumar and Ors.* 1994 (30)

DRJ 596, the High Court of Delhi held thus:

“On the basis of the material available on record, it will be a misnomer to say that the Plaintiff has been in 'possession' of the suit property. The Plaintiff is neither a tenant, nor a licensee, nor a person even in unlawful possession of the suit property. Possession of servant is possession of the real owner. A servant cannot be said to be having any interest in the suit property. It cannot be said that a servant or a chowkidar can exercise such a possession or right to possession over the property as to exclude the master and the real owner of the property from his possession or exercising right to possession over the property.

Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider (i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession. A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact

of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and & master.”

100. The ratio of this judgment in Sham Lal (supra) is that merely because the Plaintiff was employed as a servant or chowkidar to look after the property, it cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master from staying away from his own property.”

19. In paragraph-101, the principles of law were crystallized.

Clauses-2, 3 and 5 read thus :

- “2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
- 3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
- 4. xxxxx
- 5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession. ”

20. In the light of the aforesaid discussion, I do not find any merit in this C.R.A.. The defendants are not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being

based upon no evidence or that they are contrary to the evidence on record. The defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. No case is made out for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)