

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Raja Basu Chowdhury

FA 147 of 2018

Bhargav Chatterjee & Another
versus
Infinity & Associates & Another

For the Appellants : *Mr. Probal Kumar Mukherjee,*
Mr. S. N. Dutta.

Hearing is concluded on : *15th September, 2022.*

Judgment On : **8th December, 2022.**

Tapabrata Chakraborty, J.

1. The present appeal is directed against the judgment and decree dated 22nd December, 2017 passed by the learned Civil Judge (Senior Division), 10th Court, Alipore in Title Suit No.7 of 2012.

2. The plaintiffs, being the appellants herein, preferred a suit for recovery of possession, *mesne* profits, injunction and other reliefs against the defendants, being the respondents herein, stating, *inter alia*, that though the plaintiffs have their permanent residence in the suit property but

ordinarily they used to reside at Bangalore and that in early January of 2010, defendant no.2, the sole proprietor of defendant no.1, approached the plaintiffs for taking the suit flat in Schedule 'A' on leave and license basis for a period of 11 months commencing from 1st March, 2010 along with fixtures and fittings and car parking space as detailed in Schedule 'B' for the purpose of establishing his business and for carrying on his business therefrom and the plaintiffs agreed to allow the defendants to occupy the suit flat temporarily for 11 months commencing from 1st March, 2011 on conditions that the defendants would pay Rs.30,000/- only per month and an amount of Rs.1,20,000/-, as security deposit to be refunded on determination or termination of license and that the fittings and fixtures mentioned in Schedule 'B' would be used by the defendant no.2 with all reasonable care for a period of 11 months commencing from 1st day of March, 2010 and that the defendant no.2 would be allowed to use the car parking space between 8.00 a.m. to 8.00 p.m. and that defendant no.2 would pay a fixed sum of Rs.10,000/- only per month in advance within 7th of each month. Incorporating such conditions an agreement for leave and licence was entered into by the plaintiff no.1 with the defendant no.2 and an agreement of hire was entered into by the plaintiff no.2 with the defendant no.2. However, after expiry of the full term of the said agreements though defendant no.2 by his letter dated 31st December 2010 assured the plaintiffs to hand over vacant possession on surrendering the license, he neglected to hand over the possession of the suit flat and the possession of the fittings and fixtures together with the car parking space and furthermore, in breach

of his obligation, defendant no.2 converted the suit flat in an '*Archies Gallery*' and in such circumstances, the plaintiff no.1 by a letter dated 6th June,2011 called upon the defendants and particularly the defendant no.2 to quit and vacate the suit properties within 15 days from the date of receipt of such letter but the defendants wilfully failed and deliberately neglected to vacate the suit flat and neglected to pay license fees and hiring charges and as such the suit.

3. The defendants initially entered appearance and filed a written statement stating that the plaintiffs have no right to file the suit. The defendants claimed themselves as lawful tenant under the plaintiffs stating that they had deposited a huge amount to the plaintiffs for taking the suit property for the purpose of running their business and as a result, the defendants started a business of food for commercial exploitation of the suit property and decorated the suit schedule property by spending Rs.60,00,000/- and they started their business after taking prior permission from the plaintiffs but immediately thereafter the plaintiffs started raising objections before different authorities and also did not issue any consent letter for obtaining the license from the competent authority and such acts destroyed the defendants' entire effort and money. The said amount of Rs.60,00,000/- is due and payable by the plaintiffs and the defendants are not defaulters in payment of rent.

4. Records would reveal that the respondents did not file the written statement within time and preferred an application under Order 8 Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as CPC). The

said application was disposed of by an order dated 18th March, 2015 observing inter alia that *'although the defendant no. 1 can bring no defence, he is permitted to cross examine the witnesses for the plaintiff'*.

5. During trial the plaintiff no.1 deposed as PW-1 for himself and for the plaintiff no.2 by filing evidence-on-affidavit and proved the leave and license agreement dated 1st March, 2010, the agreement for hire dated 26th February, 2010, letter dated 31st December, 2010, letter dated 6th June, 2011, postal receipts, downloaded copy of track record, certified copy of order dated 1st October, 2013 passed in TS 295 of 2013, record of proceedings, written complainant dated 26th November, 2014 and letter dated 1st December, 2014, marked as Exhibit no.1 to Exhibit no.9 respectively. The defendants did not adduce any evidence for themselves. Though they started cross – examination of PW 1 but did not complete the same even after grant of reasonable opportunity.

6. The learned Court below framed the following issues:

- i. Whether the suit is maintainable in its present form and law?*
- ii. Whether the plaintiffs have any cause of action to file this suit?*
- iii. Whether the defendants are licenses or tenant under the plaintiffs?*
- iv. Whether the plaintiffs are entitled to get a decree as prayed for?*
- v. Whether the plaintiffs are entitled to get any other relief or reliefs?*

7. Upon hearing the learned advocate appearing for the plaintiffs and upon considering the materials on record the learned Court below was pleased to dismiss the suit observing *inter alia* that ‘in the instant case though in the written statement defendants have claimed themselves as tenants but in support of that contention no positive evidence had been adduced and therefore, as such this Court does not find it necessary to enter into the said discourse but at the same time the absence of any evidence on the part of defendant does not itself prove the case of the plaintiff and the plaintiff is not exonerated from his/her bounden duty to prove his/her case with substantial evidence and in the instant case before the plaintiff no.1 claims himself as licensor of the suit flat had the duty to prove his title over the suit property’. The learned Court below also took exception to the fact that the notice of termination was issued by the plaintiff no.1 for himself and also for the plaintiff no.2 though admittedly there were two separate agreements, one executed by the plaintiff no.1 and the other by the plaintiff no.2. The learned Court below further observed that plaintiffs could not even establish that the defendants had changed the mode of user of the suit property.

8. Mr. Mukherjee, learned advocate appearing for the appellants argued that the impugned judgment had been delivered being oblivious of the order dated 18th March, 2015 and the fact that as there was no defence in the suit by way of written statement, the averments in the plaint stood proved by non-traverse and the evidence adduced on behalf of the plaintiff remained uncontroverted as there was no cross examination.

9. He further argued that the learned Court below did not take into consideration Exhibit 3, being the letter dated 31st December, 2010 wherein the respondent no.2 stated that '*I, Mr. Sushavan Das Proprietor of Infinity & Associates residing at A9/3, Purbasha Housing Estate, Kolkata – 700054 the licensee for the flat in the front portion in the ground floor 26/2, Hindustan Park, Kolkata – 700 029 is handing over the vacant possession of the flat and surrender the licensee agreement to the licensor Mr. Bhargav Chatterjee residing at 26/2, Hindstan Park, Kolkata – 700029, 2nd floor on 31st January, 2011*'. The respondent no.2 thus admitted that he was a licensee in respect of the suit property and that he was willing to surrender the licence and hand over vacant possession of the suit property.

10. According to Mr. Mukherjee the learned Court below materially erred in overlooking the provisions of Section 116 of the Evidence Act which *inter alia* provides that the licensor is not required to prove his title or ownership by documents to evict a licensee inducted by him.

11. He submits that the learned Court below failed to note that though the agreements with the plaintiff nos.1 and 2 were separate, the contents of the same specifically provided that both the agreements would run concurrently.

12. Answering our query, he, however, submits, upon instruction, that the appellants do not want to press their claim towards arrear license fees, hiring charges, *mesne* profits and damages.

13. Records would reveal that upon removal of all defects the appeal along with the application for injunction being CAN 9199 of 2018 came up for hearing on 7th March, 2019 and the appellants were directed to serve copies of memorandum of appeal and the application upon the respondents. Thereafter the matter again came up for hearing on 20th June, 2019 when none appeared on behalf of the respondents in spite of service and the Hon'ble Court was pleased to pass an order of injunction. The said order was communicated to the respondents by the department *vide* memo no.1240F dated 5th July, 2019. The appeal and the connected application again appeared before a co-ordinate Bench of this Court on 9th January, 2020. Even on the said date no one appeared on behalf of the respondents in spite of service. Upon hearing the learned advocate appearing for the appellants and considering the materials on record, the application for injunction was disposed of and the hearing of appeal was expedited with necessary direction towards service of notice of appeal and filing of paper books upon arrival of lower court records. The requisites, as directed, were put in by the appellants and notices were issued to the respondents by the department through registered post and as such service upon the respondents was complete. Upon arrival of lower court records the paper book was also filed and the appeal came up for final hearing on 1st July, 2022. As none appeared on behalf of the respondents on the said date, the matter was adjourned. Even thereafter the respondents did not appear and contest the appeal.

14. Heard Mr. Mukherjee and considered the materials on record.

15. A scrutiny of the judgment impugned would reveal that in spite of arriving at a finding that no positive evidence had been adduced on behalf of the respondents to dislodge the appellants' contention that the respondents are actually licensees in respect of the suit property, the learned Court below dismissed the suit as the appellants had failed to prove title over the suit property by producing documents as regards such ownership.

16. The key to unravel the complexities of the problem posed lies in the pleadings and the deposition tendered by the respective parties. The precise degree of imperfections needs to be investigated and categorised on the rudiments of preponderance of probabilities. Standard of proof cannot be put in a strait-jacket formula. No mathematical formula could be laid on degree of proof. The probative value needs to be gauged from facts and circumstances in a given case.

17. A perusal of Exhibit 3 being the letter dated 31st December, 2010 reveals that there has been an admission that the respondent no.2 was a licensee in respect of the suit property under the appellant no.1 and that he was willing to surrender the licence and hand over vacant possession of the suit property to the said appellant. It is needless to emphasize that admission of a party in the proceedings is the best evidence and the same does not need any further corroboration. The learned Court below ought to have noted such admitted relationship between the parties. In view of such admission there can be no two opinions in the matter that the respondents are estopped from disputing the title of appellant over the suit premises.

18. Section 116 of the Indian Evidence Act provides that no tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given. He cannot deny the same during the pendency of such license or sub-lease, however defective the title of such landlord may be. The significant words under it are '*at the beginning the tenancy*'. Such estoppel continues to operate so long as licensee or sub-tenant has not openly restored possession by surrender to such person. This rule of estoppel would cease to operate only after such licensee or sub-tenant has been evicted. In view thereof, respondents cannot be permitted to contend that the property was not belonging to the appellants.

19. For the reasons discussed above, the appeal is allowed and the judgment and decree passed by the learned Court below are set aside directing recovery of possession of the suit flat being the entire south-eastern side flat on the ground floor of premises no.26/2, Hindustan Park, Police Station- Gariahat, Kolkata – 700029 measuring more or less 1000 square feet fully described in Schedule 'A' together with the fixtures and fittings in the suit flat along with the car parking space as detailed in Schedule 'B' in favour of the plaintiff no.1.

20. The appeal being FA 147 of 2018 is disposed of.

21. Let a decree be drawn up, accordingly.

22. Urgent xerox certified copy, if applied for, be given on priority basis upon completion of all requisite formalities.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)