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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.647 OF 2019
WITH
CIVIL APPLICATION NO.1375 OF 2019
IN
SECOND APPEAL NO.647 OF 2019**

Lalitkumar Shriram Pandey ... Appellant/Defendant
Versus
Ramanand Bhagwatiprasad Harlalka ... Respondent/Plaintiff

Mr. Sandeep Mishra for the Appellant/Applicant.
Mr. Shreepad Murthy i/b Mr. Abhishek Patil for the Respondent.

CORAM : S. M. MODAK, J.

DATED : 21ST JULY 2022

JUDGMENT :

1. By consent heard learned Advocate for the Appellant/Defendant and learned Advocate for the Respondent/Plaintiff at admission stage finally.
2. The arguments are heard on the point of admission. The suit of the Plaintiff for possession was decreed by the trial Court. The Defendant was directed to handover possession of the property to the Plaintiff within prescribed time limit. Inquiry as to mense profits was also ordered. The Defendant was not satisfied with the said judgment, preferred the First Appeal. However, there also he has not succeeded. That is how he has filed present Appeal.
3. The suit property is Shop No.5 admeasuring 275 sq. ft. at Shreeji Park Building, Village Khari, RNP Park, Bhayandar (East), Thane. The Defendant is in possession of the suit shop as licensee. There was written Leave and License Agreement dated 1st August 2001. Time and again the period of license was extended and finally after 31st March 2005, the

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Defendant refused to handover possession and that is why the suit for possession was filed. Admittedly, there is no dispute in between the relationship of the Plaintiff and Defendant as licensor and licensee. Apart from defending the suit, the Defendant has taken a plea that the Plaintiff has agreed to sell the suit shop for total consideration of Rs.4,50,000/-. From time to time the Defendant has paid Rs.1,83,000/-. As there was appreciation in valuation of the suit shop, out of greediness the Plaintiff has not completed the said transaction. The payment made by the Defendant ranges from 13th February 2003 upto 24th April 2004.

4. Both the parties have adduce evidence before the trial Court. The Plaintiff examined himself and one Vijay Kumar and also relied upon the documentary evidence. Apart from usual issue, the trial Court has also framed issue about plea raised by the Defendant about Agreement for Sale of the suit shop to the Defendant. After evidence the trial Court has negatived that issue. There was also the issue framed by the trial Court on the point of mis-joinder and non-joinder of necessary parties. According to the Defendant, one Dorji L. Tshering was also required to be joined as a necessary party to the suit. This was for the reason that the Plaintiff has agreed to sell the suit shop to Dorji Tshering vide agreement for sale dated 7th July 2005. The trial Court has not felt it necessary to join said Tshering. Finally, the suit was decreed.

5. With the assistance of both learned Advocates, I have perused the judgments passed by both the Courts below. During the arguments, the learned Advocate for the Appellant invited my attention to one application filed by the Appellant before the First Appellate Court. It was filed under the provisions of section 107 and under the provisions of Order XLI Rule 25 of the Code of Civil Procedure. The Defendant has suggested the First Appellate Court to frame three additional issues and then to remand the matter to the trial Court. The First Appellate Court as per the order dated

7th November 2017 was pleased to decide that application after hearing the arguments of both sides on the Appeal.

6. Learned Advocate for the Respondent also submitted that time and again the present Appellant has sought for adjournment and he has played dilatory tactics. He submitted that even mandatory requirement of submitting substantial questions of law was not followed. The Appellant has raised 11 grounds and the Appellant has suggested that these are substantial questions of law.

7. Today, during the arguments learned Advocate for the Appellant has suggested two substantial questions of law and it is filed along with praecipe which is taken on record and its copies is served on the Respondents.

8. During arguments, it is also submitted that as per the Defendant, in fact the Plaintiff was not having right to file a suit, when the suit was filed and it is for the reason that the Plaintiff has already agreed to sell the suit shop to said Tshering. It is submitted that suit was filed on 31st March 2008 and the Agreement for Sale was executed on 7th July 2005. On the basis of these facts it is submitted that the Defendant has filed an Application for amendment in the written statement before the trial Court. When it was rejected, the Appellant has approached this Court and it is submitted that the Appellant was granted liberty to challenge the said order in the First Appeal to be filed, in case the trial Court decreed the suit. On this background there is a grievance that though the trial Court has observed “that application preferred under the order 41 Rule 25 of the Code of Civil Procedure was to be heard along with final hearing of the Appeal”, neither there is order passed on it nor there are separate observations either.

9. The substantial questions of law suggested by the Appellant are as follows :

- “(i) Whether the Courts below were right in allowing the suit considering the point of title of original Plaintiff in the suit premises on the day of filing the suit ?
- (ii) Whether the original Plaintiff has legal right and title over the suit property as an owner on the day of filing the suit ?”

10. I have heard both sides on the point of admission and on the point whether the facts and circumstances of the case warrant framing of these substantial questions of law.

11. Even though it may be true that the Defendant was not allowed to carry out amendment in the written statement, when I read the judgment of the trial Court and more specifically paragraph 11 (while answering the issue No.5) what I find is that the trial Court has already come to the conclusion that the suit is not bad for non-joinder of said Tshering. While arriving at that conclusion the trial Court has also discussed evidence adduced by both the parties. It reveals that property tax bills at Exhibit-43 and electric bill at Exhibit-44 of the suit shop appears to be in the name of said Tshering. The trial Court further noted that “there is deed of cancellation at Exhibit-54 in between the Plaintiff and said Tshering”. In view of that the issue was answered in the negative.

12. Whereas the First Appellate Court has also dealt with this issue and observations find place in paragraphs 21, 22 and 29. The First Appellate Court has also taken note of the fact that even though the property tax bill and electric bill stands in the name of Tshering there was deed of cancellation dated 22nd December 2008 and hence said Tshering is not necessary party.

13. The learned Advocate for the Appellant tried to rely upon the meaning of contract for sale given in section 54 of the Transfer of Property

Act. According to him the consideration can be paid fully or partly. He went on to suggest that there was Agreement for Sale in between the Plaintiff and said Tshering and as such the Plaintiff had no right to file the suit. But at the same time it is material to note that there was deed of cancellation thereby the said transaction is cancelled. Nothing is pointed out from the record that the Defendant has challenged the said deed of cancellation.

14. So from the above, it is clear that both the parties were aware about the case pleaded by them. Even though there are no averments in the written statement, there was a case put up by the Defendant. However, the parties have taken upon themselves to adduce evidence before the trial Court and the First Appellate Court has also given finding on that. So I do not think that for this reason there was any necessity for the First Appellate Court to frame the issues suggested by the Appellant and to remand matter back. The said grievance was sufficiently been dealt with by the First Appellate Court. So that contention cannot be accepted.

15. In proposed substantial question of law No.1, the Appellant had suggested that whether the Courts below were right in allowing the suit considering the point of title of original plaintiff whereas the 2nd question mentions as to whether the original Plaintiff had legal right and title over the suit property as owner on the date of filing of the suit.

16. Learned Advocate for the Respondent/Plaintiff submitted that there is difference in between owner of the property and licensor. The owner may be different than licensor. The suit was based on admitted relationship of licensor and licensee. He wants to suggest that for deciding that suit as such the issue of ownership is not material as suggested by the Defendant.

17. From the above discussion I feel that from the facts and circumstances of the case and evidence on record does not warrant framing of any substantial question of law as suggested. I do not find that

the findings given by both the Courts below about non-joining Tshering is perverse. I do not find that the Courts below have wrongly appreciated the evidence and not considered the principles of appreciation of evidence. Nothing is pointed out to me that both the Courts below have not considered particular piece of evidence. So I do not think that these substantial questions of law are required to be framed. I do not find any substance in admitting the Appeal. Hence the Appeal stands dismissed.

18. At this stage learned Advocate appearing for the Appellant prayed for staying operation of the order passed today as the Defendant may challenge the said order. It is opposed on behalf of the Respondent/Plaintiff for the reason that execution is already filed and the Appellant as licensee is in arrears of more than Rs.16,00,000/-. So far as that quantum is concerned, there is no document on record. Furthermore, before the First Appellate Court even the Plaintiff has not asked for putting certain conditions as it is not pointed out to me from the record. Even if we consider the amount of Rs.1,83,000/- alleged to be paid by the Defendant to the Plaintiff being as earnest money and even if Rs.16,00,000/- as arrears is not accepted still Defendant needs to deposit certain amount. So subject to deposit of Rs.5,00,000/- by the Appellant within a period of two weeks before the Executing Court, the effect and operation of this order is stayed for a period of eight weeks. Second Appeal is disposed of accordingly.

19. In view of disposal of the Second Appeal, Interim Application is disposed of.

(S. M. MODAK, J.)