

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

**SECOND APPEAL NO.304 OF 2019
WITH
INTERIM APPLICATION NO.3097 OF 2021
IN
SECOND APPEAL NO.304 OF 2019**

Shri. Vijay Purushottam Kadam and Ors. ...Appellants
Versus
Shri. Purushottam Kanji Thakkar ...Respondent

- Mr. Aditya Pimpale i/b. Chandrashekhar Patil, for the Appellants.
- Mr. G.S. Godbole, Senior Advocate a/w Ms. Shruti Tulpule, for the Respondents.

**CORAM : VINAY JOSHI, J.
DATE : 12th SEPTEMBER 2023**

P.C.:

1. Heard both the learned counsel.
2. This is defendants Second Appeal challenging the judgment and order passed in First Appeal No.321 of 2016.
3. Appellants were defendants in Reg. Civil Suit No.1091 of 1995 whilst Respondent was the plaintiff. The said suit was filed by the Respondent seeking possession of suit property by claiming that the defendants' predecessor was serving as a watchman and after leaving the service, he did not vacate the premises.
4. In said suit, defendants took a plea that their predecessor - Purushuttam was monthly tenant of plaintiff – Thakkar. The Trial Court

held that the defendant's predecessor was occupying the premises as watchman, as well as negated the defendants claim of tenancy and passed eviction decree. Though the defendants have preferred Civil Appeal No.321 of 2016 the eviction decree was confirmed.

5. Learned counsel appearing for the Appellants/ defendants would primarily canvass that both the Courts below seriously erred in relying on the certified copy of written statement of earlier suit to hold that the defendants' predecessor was serving as a watchman. It is argued that certified copy of written statement is not a public document and thus, despite proving the same in accordance with the Evidence Act, it cannot be relied. Secondly, it is canvassed that as per plaintiff's case, the suit was for possession against gratuitous licensee and therefore, it was not maintainable in the Civil Court but ought to have filed in the Court of Small Causes. In other words, the jurisdictional defect has been canvassed in Second Appeal.

6. Per contra, learned counsel appearing for the Respondent/ Plaintiff by supporting both the judgments would submit that in earlier suit, the defendants' predecessor has filed a written statement. The plaintiff has produced a certified copy which was duly proved by examining the Court clerk who has prepared the copy. It is submitted that the original written statement was destroyed as per the provisions of Civil Manual and thus, secondary evidence could be well adduced.

The clerk who prepared the certified copy has lead evidence and therefore, the same can be well relied as a secondary piece of evidence. Besides that, it is argued that the original suit was for possession against the unauthorised occupant and not against the gratuitous licensee.

7. With the assistance of both sides, the entire material has been examined. The suit property was initially owned by one Joshi. The plaintiff's father was initially using the same in the capacity of licensee and then owner for doing Onion business. It is the plaintiff's case that the defendants' predecessor – Shankar was employed by them as a watchman and purely on account of service he was permitted to reside at the subject property. The plaintiff came with a case that after demise of Shankar, his son Purushottam continued to work as a watchman and after the service was over the property was not vacated. Plaintiff does not disclose the pleadings that defendant was permitted to remain in the suit property, *dehors* the service, rather it discloses that it was a simpliciter suit for possession from the unauthorised occupant.

8. The learned counsel for the Appellant relied on the decision of the Supreme Court in the case of **Prabhudas Damodar Kotecha and Ors. Vs. Manhabala Jeram Damodar and Anr.**¹ to contend that the suit against gratuitous licensee would lie before the Small Causes Court, however, there is no material to support the contention that it was a suit against gratuitous licensee. Moreover, the said aspect was not canvassed

¹ (2013) 15 SCC 358

before the Courts below.

9. As regards the facts are concerned, the original owner Shri Joshi had earlier filed Reg. Civil Suit No.167 of 1967 against the plaintiff as well as the defendants' predecessor Purushottam for possession. In the said suit, written statement (Exh.12) was filed by Purushottam specifically stating that he was employed by co-defendant i.e. the plaintiff as a watchman and in the said capacity he was residing there. The certified copy of said written statement was produced before the Trial Court on which the Court relied by taking the same as an admission to negate the defendants claim of tenancy. The Appellants learned counsel relied on the decision in the case of *Om Prakash Berlia and Anr. Vs. Unit Trust of India and Ors.*² to contend that in absence of proof signature and handwriting, the secondary evidence cannot be relied.

10. It reveals that certified copy was obtained in the year 1985. The Court clerk who has prepared the copy has been examined who gave evidence before the Trial Court that he himself has personally prepared the said copy. It is not denied that the original record was destroyed as per the provisions of Civil Manual. Both the Courts have rightly held that in the situation, certified copy can be read in evidence.

11. Considering the overall material, it is evident that concurrent finding recorded by both the Courts below call no interference. No

² 1982 SCC OnLine Bom 148

substantial question of law arises.

12. In view of that, Second Appeal being devoid of merit, dismissed. In view of dismissal of the Second Appeal, pending Interim Application does not survive and stand disposed of.

13. After the disposal of Appeal, the learned counsel appearing for the Appellant requested to stay the execution of Trial Court Judgment by stating that the Appellants are in possession of the subject property since 1946. Only having regard to said fact, the possession warrant shall not be executed for a period of two weeks from today.

[VINAY JOSHI, J.]