



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 605 OF 2021 WITH
CIVIL APPLICATION NO. 12982 OF 2021
IN SA/605/2021

Jain Fertilizers And Chemical Stores Through
Its Proprietor Rajkumar Pannalal Gangwal
...Appellant

VERSUS

K. D. U. S. S. M.now Mer. Into A.bad Z. S. D. U. S. M.
Thr. Man. Dir. Pradip Bhaurao Patil
....Respondent

...

Mr. S. S. Kulkarni, Advocate for Appellant
Mr. N. D. Sonavane, Advocate for Respondents

...

CORAM : R.M. JOSHI, J
DATE : FEBRUARY 14, 2024

PER COURT :

1. This appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed in RCA No. 187/2017 dated 09.09.2021 whereby the First Appellate Court has allowed the Appeal filed by the Plaintiffs and has decreed the suit, against the judgment and decree passed in RCS No. 67/2012 dated 17.07.2017 whereby the suit was partly decreed.

2. Parties are referred to as per their nomenclature in initial proceeding for convenience.

3. There is no dispute with regard to the fact that the Plaintiff is the landlord and Defendant is the tenant in respect of suit property. Further undisputedly the Maharashtra Rent Control Act has no application to the suit property. It is the case of the plaintiff that the defendant was not paying rent, as such, notice of termination of tenancy was issued. On the basis of pleadings suit came to be filed for seeking eviction of defendant from suit property and recovery of arrears of rent.

4. Defendants by filing written statement opposed the contentions of the Plaintiff, however, it is not in dispute that the Defendant is the tenant of the suit property. It is claimed that the Defendant has paid rent till 30.01.2011 as per the rent agreement. It is his claim that the Defendant requested the Plaintiff to renew the rent agreement after 31.07.2011 but Plaintiff refused to renew the same. It is further case of the Defendant that the Plaintiff told bank not to accept the rent from the Defendant, therefore, the bank did not accept the same. Defendant has shown his readiness to pay the rent hereinafter. According to the Defendant

he is in the business of fertilizers, pesticides and etc and, therefore, it is necessary for him to stock the same in the suit property. It is the further case of the Defendant that on 12.09.2011 on behalf of the Plaintiff one person came to the suit shop and threatened to vacate the suit property. With these contentions, dismissal of the suit is sought.

5. Learned trial Court partly decreed the suit and has directed the defendants to pay arrears of rent. Defendants did not challenge the said judgment and decree, however, plaintiff challenged the same successfully before First Appellate Court to the extent of refusal of the trial Court to grant eviction of the defendants from suit property.

6. Learned Counsel for the Defendants submits that the trial Court has recorded the findings to the effect that the liquidator who has filed the suit does not have authority to do so however, it has wrongly proceeded to decree the suit though partly. It is his contention that in view of the position of law that unless there is specific extension of the order of liquidator after the expiry of period of 10 years

liquidator, even if so appointed, will not get authority to initiate proceedings on behalf of society. On the point of service of notice of termination as well as demand of arrears, it is his contention that learned trial Court has rightly taken into consideration the evidence on record and has held that the Defendant is not served with the mandatory notice as required under Section 106 of the Transfer of Property Act and resultantly trial Court has rightly refused to decree the suit for eviction. He drew attention of the Court to the findings recorded by the both Courts coupled with the relevant evidence.

7. Learned Counsel for the plaintiff supported the decree basically relying upon the findings recorded by the First Appellate Court in the impugned judgment.

8. At the outset, it needs to be recorded that the trial Court has decreed the suit partly. Meaning thereby, suit is held to be maintainable. By relying upon statements made in judgment of Trial Court that the person who has filed suit did not have authority, the defendant is now seeking to reverse the decree passed by the trial Court. Undisputedly, no appeal or

cross-objection was filed before the First Appellate Court challenging the decree of maintainability of suit. The law on the point as to in what circumstances the findings recorded by the Court can be challenged without preferring Appeal or cross-objection is fairly settled to say that as per order 41 Rule 22 of Code of Civil Procedure, the party who is not seeking reversal of the decree in such circumstance only the findings against such party can be permitted to be challenged, but not when decree is sought to be reversed. Herein this case, admittedly no appeal or cross-objection is filed with regard to the maintainability of the suit as the suit is partly decreed by the trial Court. The said finding/decreed has attained finality.

9. Plaintiff who has challenged the said decree has filed the appeal to the extent of the refusal of the trial Court to pass decree of eviction. Thus, the issue of maintainability of the suit was never in question before the First Appellate Court. In the second appeal, for the first time, it cannot be permitted to the defendant to challenge the maintainability of the suit when the decree is

specifically shown that the suit is held to be maintainable as it was partly decreed. The issue sought to be raised is not pure question of law but mixed question of facts and law. Even otherwise, First Appellate Court has rightly taken into consideration the material evidence on record which indicates that no specific order is required to be passed appointing any person as a liquidator as assistant register is ex-officio liquidator of the society. Pertinently, the contract of tenancy with the defendant has been entered into after expiry of 10 years of the first order of liquidation. Thus, it does not stand to any reason or justification that the person without specific order of appointment is permitted to enter into contract with defendant but cannot file suit, this Court therefore finds no substance in the contention sought to be raised by the defendant.

10. As far as service of notice of termination/demand is concerned, evidence on record clearly shows that notice was duly sent to the defendant on his correct address. There is admission on the part of the defendant that address mentioned on the envelop is correct. Section 27 of the General Clauses

Act needs to be referred in this context.

27. Meaning of service by post

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

11. In view of the said presumption, which is rebuttable, it was incumbent on the part of the defendant to lead evidence to disprove the same. Though defendant has examined two postmen in order to rebut this presumption, but from their testimony it is clear that they are not the one who had dealt with the said postal envelope. It has come on record through their evidence that there were three postmen working at the relevant time in post office. In such circumstances, in absence of examination of said third postman or any other evidence to show that he cannot be examined as witness, it needs to be presumed with aid of Section 27 of the General Clauses Act coupled with the evidence on

record by the plaintiff with regard to the postage of notice which is returned as unclaimed is more than sufficient to hold that the defendant is duly served with notice.

12. With regard to proof of issuance of notice under signature of then liquidator Mr. Dhote is concerned, evidence of plaintiff show that he signed the said notice in ordinary course of his work and in official capacity. The finding recorded by Trial Court about non examination of Mr. Dhote having resulted in holding that the notice is not proved is incorrect and rightly set right by Appellate Court.

13. Admittedly, tenancy is not statutory but contractual. Provision of Rent Control Act do not apply to the present case. The tenancy was for specific period and terminable. Thus, there is no justification refuse decree to the plaintiff after termination of the contract of tenancy.

14. In order to entertain second appeal, there must exist a substantial question of law. It is trite that unless substantial question of law is involved, an

appeal under Section 100 of Code of Civil Procedure cannot be entertained. What is substantial question of law is well settled by now to say that a point of law which admits of no two opinions may be a proposition of law but cannot be substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. Considering facts of the case, tested to the touchstone of evidence on record and law on the points involved, this appeal sans any substantial question of law.

15. Having regard to the aforestated facts, this Court finds no substantial question of law involved in this Appeal. Hence, appeal stands dismissed. Pending civil application is also disposed of.

(R. M. JOSHI, J.)

Malani