

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.112 OF 2011
WITH
CIVIL APPLICATION NO.444 OF 2017

1.Salim Isak Sayyed

Age:32 years, Occupation: Service

2. Sayana Isak Sayyed

Age:50 Years, Occupation: Household

3. Isak Khudahaksha Sayyed

Age:55 years, Occupation: None

All R/o 477, Guruwar Peth, Satara

...Appellants

Versus

1.Sayyad Firoza Majjid (Since deceased
thr. Heirs and Legal representatives)

1A. Sadiq Majid Sayyed

Age:Adult, Resident of

6/21/B, Plot No.5, Popkranti

Sahakari Cooperative Housing Society,

A/P, Khindwadi, Taluka Satara,

Dist-Satara

1B. Alli Majid Sayyed

Aged Adult, Resident of

88/A, Aakar Nagari, Shukrawar Peth,

Satara 415 002.

...Respondents

Mr. P. J. Thorat for the Appellants.

Mr. Sugandh B. Deshmukh for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : 22nd FEBRUARY 2024.

PRONOUNCED ON : 21st MARCH 2024.

JUDGMENT:

1. Vide order dated 10th June 2011, the Second Appeal was admitted by this Court. The Appellant before this Court are the Plaintiffs in RCS No.92/2002 seeking possession of the suit premises from the Defendant. The Suit came to be decreed by the Trial Court *vide* Judgment dated 13th May 2005. As against this, Regular Civil Appeal No.158/2005 was filed by the Defendant, which came to be allowed and the Judgment of the Trial Court was set aside resulting in dismissal of the Suit for possession.

PROCEEDINGS OF TRIAL COURT:

PLAINT:

2. The case of the Plaintiffs is that they had purchased property bearing CTS No.476 and 477 along with the structures standing thereon from the erstwhile owner Harinarayan Shivnarayan Malpani *vide* three different sale deeds dated 27th March 2000, 28th March 2000 and 29th March 2000. The suit property was described in paragraph No.1 (b) of the plaint as room admeasuring 20 x 11 sq. ft. and shed of 13 x 9 sq. ft. situated on CTS No.476 and 477. The Plaintiffs were residing in the said

property since long period of time as tenants of the erstwhile owner. About two to three years prior to the purchase of the property the erstwhile owner was residing at some other place and taking disadvantage of his absence the Defendant broke open the lock of the suit property and occupied the same illegally about which the Plaintiffs had informed the erstwhile owners who had approached the police station but his complaint was not taken by the police. After acquiring title to the property, the Plaintiffs asked the Defendant to vacate the suit property which she refused and thus the suit for recovery of possession.

WRITTEN STATEMENT:

3. The Defendant came with the defence that she was tenant of the erstwhile owner in respect of the suit property on a monthly rent of Rs.12/- per month since the last 17 years having gas connection, ration card and water connection and also that her name was entered into voters list and in the municipal records as tenant. Although rent was paid to the erstwhile owner till the year 1999, no rent receipt was issued. The Plaintiffs were residing in the property as tenants and were aware of the occupation by the Defendant as tenant.

EVIDENCE:

4. The Plaintiffs examined the co-owner of the property who deposed about the purchase of ½ share of the property by the Plaintiffs and the erstwhile owner in support of the execution of the sale deeds to prove their title to the suit property. The sale deeds were produced on record as well as the property extract of CTS No. 476 and 477. The erstwhile owner deposed that there were seven tenant inducted by him and that the Defendant and some other occupants were trespassers. In cross examination the erstwhile owner stated that he was issuing receipts to the tenants and his father was also issuing receipts to tenants.

5. The Defendant examined herself and one Shamsuddin Ali Shaikh in support of her case. She also produced documentary evidence of ration card, gas connection card, communications received at the suit address and assessment extract. In the cross examination DW 1 has admitted that he is not aware of the rent or tenancy of the Defendant or terms and conditions of tenancy.

FINDINGS OF THE TRIAL COURT:

6. The Trial Court on consideration of the oral and documentary evidence held that the Plaintiffs have proved title over the

suit property. On the issue of trespass, the Trial Court considered the evidence of the erstwhile owner who had deposed about the *bona fide* tenants of the property and that the Defendant and some other occupants are trespassers and not inducted as tenants. The Trial Court upon consideration of evidence adduced by Defendant held that the evidence only proved the long standing possession in the suit property. As regards the tenancy the Trial Court held that the long standing possession is not sufficient to prove her tenancy as no evidence to establish the same has been led.

FINDING OF THE APPELLATE COURT:

7. The Appellate Court re-appreciated the evidence and held that in view of the Defendant's case that rent receipts were not being issued, it was for the landlord to produce the vouchers of the receipts or the rent receipt books to establish that he was issuing rent receipts. The Appellate Court held that due to non production of the rent receipt adverse inference is required to be drawn. It was further held that long standing possession prior to the purchase of the property by the Plaintiffs is *per se* sufficient to negate the Plaintiff's case of encroachment or unauthorised occupation of the premises. The Appellate Court held that although the Defendant has not proved *stricto sensu* her status as tenant,

unless legal recourse under Bombay Rent Act is resorted to, the possession cannot be claimed.

SUBSTANTIAL QUESTIONS OF LAW:

8. Second Appeal has been admitted on the following substantial questions of law.

1. *Whether in a Suit filed on the basis of title under Section 5 of the Specific Relief Act, it is permissible to refuse Decree for possession merely on the ground that the Defendant/Respondent is in long standing possession without any legal right ?*

2. *Whether the Lower Appellate Court has committed an error in not taking into consideration the settled position of law that a possessory title is good only against the rest of the world except the true owner, while dismissing the Suit filed by the Appellant on the basis of title ?*

3. *Whether in the absence of producing any documentary evidence on behalf of the Respondent it is permissible to hold that Respondent is a tenant in respect of the Suit property merely on the basis of possession for some years more so when the original owner under whom the Respondent is claiming a*

right of tenancy has denied the same ?

4. *Whether the Lower Appellate Court has taken into consideration the fact that in view of the provisions of Section 91 & 92 of the Indian Evidence Act it is not permissible to consider the oral of evidence when the Registered Deed of Conveyance is produced on record ?*

5. *Whether the claim of tenancy on the basis of Oral Agreement is established by the Respondent in the present case ?*

6. *Whether the Lower Appellate Court without coming to the conclusion that Respondent is a tenant is correct in directing the Appellant to take legal recourse under the provisions of Bombay Rent Act when the Suit as filed for possession is based on title under Section 5 of Specific Relief Act ?*

SUBMISSIONS:

9. Heard Mr. P. J. Thorat for the Appellants and Mr. Sugandh B. Deshmukh for the Respondents.

10. Mr. Thorat, learned counsel for the Appellants would submit that in the suit filed under Section 5 of the Specific Relief Act, 1963, the

long standing possession of the Defendant even if proved would not disentitle the Plaintiffs to recover possession. He submits that the Defendant has failed to prove her case of tenancy. He submits that the Appellate Court after having held that the Defendant might not have proved in *stricto sensu* her status as tenant in the premises has erred in holding that recourse should be had to rent control legislation. He relies upon the following decisions:

- 1. Pandurang Dharma Gaikwad vs. Mahamudmuya Ahmadsaheb Patil, 2013(2) Mh. L.J., 949 and*
- 2. Gafoor Ali Hussain and Ors. vs. Ram Mahadik and Ors., 2000 (1) Mh. L.J. 436*

11. *Per contra*, Mr. Deshmukh, learned counsel for the Respondents would submit that on the basis of documentary evidence, the Defendant has established her possession since the year 1979 which is prior to purchase of the property by the Plaintiffs. He would further submit that the Plaintiffs were also tenants of the property and as such was aware of the tenancy of the Defendant. He submits that the Plaintiffs have come with the case of trespass and the burden is upon the Plaintiffs to prove that the Defendant has committed an act of trespass and the Plaintiffs cannot take advantage of the weakness of the Defendant's failure

to prove tenancy. He submits that there was no termination of tenancy and the long standing possession is in the nature of gratuitous license even if it is held that the tenancy is not proved. He submits that the findings of the Appellate Court as regards the long standing possession is based on evidence which is not required to be disturbed in the proceedings under Section 100 of CPC. In support thereof he relies upon the decision in the case of *Life Insurance Corporation of India and Anr. vs. Ram Pal Singh Bisen, (2010) 4 Supreme Court Cases 491*

ANALYSIS:

12. I have considered the submissions and minutely gone through the records and proceedings of the Trial Court as well as the Appellate Court.

13. The controversy lies in a very narrow compass. Whether the long standing possession of the Defendant without any legal right to the suit premises would dis-entitle the Plaintiffs to seek recovery of possession. The ownership right of the Plaintiffs over the suit property has been established by the Plaintiffs by leading cogent evidence proving the sale deed executed in their favour by the erstwhile owner. The Trial Court as well as the Appellate Court has accepted the Plaintiffs ownership over

the suit property. The Plaintiffs have come with a case that the Defendant is a trespasser having encroached upon the suit property and being the owner seeks recovery of possession. The defence set up by the Defendant is that she is the tenant of the suit property and is in long standing possession. The Trial Court has held that the Defendant has failed to prove her tenancy and the Appellate Court has also held that the Defendant might not have proved in *stricto sensu* her status as tenant. There is no cross objection filed by the Defendant and as such the finding as regards the Defendant having failed to prove her tenancy attains finality.

14. In case of trespass the initial burden is upon the Plaintiffs to prove that they have title to the property and the Defendant has no legal right to occupation of the property. Once the initial burden is discharged by Plaintiff, the onus is upon the Defendant to prove her legal right to occupy the property. Now coming to the evidence of the Plaintiffs, he has adduced the evidence of the erstwhile owner Hari Narayan Malpani who has specifically deposed that there were only 7 tenants in CTS No.476 and 477 and that the others including the present Defendant are trespassers. Much emphasis has been laid by learned counsel for Defendants on the cross examination of the erstwhile owner where he has

stated that he was issuing receipts to the tenants and prior thereto his father was also issuing receipts and contention is that as the counter receipt of payment of rent has not come on record adverse inference can be drawn that Defendant was paying rent however receipts are not issued by Malpani. The burden was upon the Defendant to prove that she is tenant of the suit property. It is difficult to accept that despite long standing possession of 17 years, there is not a single rent receipt in her name. The erstwhile owner had deposed that he was issuing rent receipts to other tenant. In face of such deposition, the Defendant ought to have called upon the erstwhile owner to produce rent receipt issued to other tenants, in absence of which adverse inference could be drawn. No evidence has been pointed out to show that the erstwhile owner was called upon to produce the rent receipts. As such, the oral evidence of the owner/landlord that he was issuing rent receipt to *bona fide* tenant remained unchallenged. In any event, the drawing of adverse inference against the erstwhile landlord for non production of the rent receipts issued to the other tenants is not sufficient to prove the tenancy of the Defendant especially when it is not claimed that subsequent to the Plaintiffs having purchased the property there was attornment of tenancy. The evidence produced by the Defendant shows her long standing possession, however Defendant has failed to show that the possession of

the suit premises was in the capacity of tenant. In the cross examination, the Defendant has admitted that she does not have any document to show that tenancy was created in her favour or that rent was paid to the erstwhile landlord or the Plaintiffs. She was unable to depose as to the date of her induction as tenancy. Even the witness examined by the Defendant has deposed that he is not aware of the tenancy of the Defendant, the terms and conditions of the tenancy and the rent between the landlord and the Defendant and the evidence proves her long standing possession and not tenancy.

15. In the present case, both the Courts have accepted that the Plaintiffs are the owner of the suit property. The evidence adduced on the erstwhile owner/landlord proves that the Defendant was not inducted by the erstwhile owner/landlord as tenant in the suit property. The initial burden has been discharged by the Plaintiffs and the onus was then upon the Defendant to prove her legal right to occupy the property. It is the specific case of the Defendant that she is tenant of the property and no case of permissive user/gratuitous licensee is set up. That being so, the evidence on record does not establish the case of tenancy.

16. The Appellate Court has also accepted that the Defendant

has not proved her case of tenancy *stricto sensu*. In that event, there was no question of adopting any proceedings under the rent control legislation. The Plaintiffs had rightly instituted the present suit under Section 5 of Specific Relief Act, 1963. It is settled position in law that the possessory title is good only against the rest of the world except the true owner. Upon the Defendant's failure to establish her claim of tenancy, the possession of Defendant could only be termed as illegal and unauthorized.

17. Learned Single Judge of this Court in the case of ***Pandurang Dharma Gaikwad vs. Mahamudmuya Ahmadsaheb Patil, 2013(2) Mh. L. J.*** was considering an identical fact situation where the submission was that encroachment is not proved by the Plaintiff and defence taken was that the Defendant was the tenant in the premises. Learned Single Judge held that in case of encroachment the initial burden is on the Plaintiff to show that he is owner of the suit property and there is encroachment by the Defendant and in paragraph Nos.13, 14 and 15 held as under:

"13. The entire case of the appellant is based on the proposition that as he was occupying the suit premises since 1979, it was with the permission of the landlord and as he was allowed to stay on the suit premises, so it is to be inferred that rent was paid by him and accepted by the landlord. It is contended that the appellant has proved that he is a tenant then

ground of encroachment as pleaded by the plaintiff goes away and the plaintiff has no right to claim possession on the ground of encroachment and so no relief either of perpetual injunction or mandatory injunction or possession can be granted in favour of the appellant. Thus, foundation of the case of the appellant is that he is a tenant of the respondent. This fundamental fact is required to be proved. Question is whether this fact can be proved in the absence of any documentary or sufficient oral evidence?

14. *Admittedly, no documentary evidence either of rent receipt or any agreement is produced by the appellant in both the suits. The appellant tried to prove this fact with the help of these three witnesses. However, he did not mention anything about obtaining the suit property with the help of any middle-man. Had this suit property been obtained with the help of Mr. Bhandilkar, then this fact ought to have been mentioned by the appellant in the written statement. Oral evidence should pass a test of credibility. It is expected that party should take a consistent stand to build up his case from the initial stage of the suit. Admittedly, the respondent had let out few shops or premises near the suit premises, to other persons. However, that evidence will not establish the fact that therefore the suit premises was also let out to the appellant by the respondent-landlord. The fact of possession is not challenged as there is a prayer of the possession and relief to that extent is prayed by the plaintiff. Thus, the fact that the appellant is in possession of the suit property since 1979 is itself not helpful to the appellant to*

establish tenancy. Long possession or even permissive long possession cannot itself establish a person is a tenant of the landlord. It can be only said that he was allowed to stay or remain on the suit property for some period and for that period, his possession was tolerated and therefore he cannot be labelled as an encroacher for that period. As soon as a permission is withdrawn, the status of an occupant is converted into an encroacher. Thus, in the absence of any tenancy, no legal right is created in favour of the appellant against the respondent.

15. *The trial court and appellate court have not committed any error on putting the burden on the Defendant to prove his status as a tenant and he was not an encroacher.”*

The decision is squarely applicable to facts of the present case.

CONCLUSION:

18. The Plaintiffs on the basis of title has filed the instant suit seeking recovery of possession by adopting due process of law. The evidence on record only establishes the long standing possession of the Defendant and unless it is shown to be legal possession the Defendant is a trespasser in the suit premises. The Appellate Court although held that the Defendant has not proved the tenancy *stricto sensu* committed an error in law by holding that recourse should be had to rent control legislation. It was necessary for the Defendant to support her long

standing possession with legal right to occupy, which in the present case, was pleaded to be one of tenancy, and the Defendant had failed to prove the same. In such a case, the possessory title could not be set up by the Defendant against the true owner to defend her possession. The Plaintiffs were thus entitled to recovery of possession from the Defendant. The substantial questions of law are answered accordingly.

19. Having regard to the discussion above, the Appeal succeeds. The impugned judgment of the Appellate Court dated 15th December, 2010 is quashed and set aside. Resultantly, the judgment of the Trial Court dated 13th May, 2005 is revived and the Suit stands decreed. In view of disposal of Second Appeal, Civil Application does not survive for consideration and the same is disposed of.

(SHARMILA U. DESHMUKH, J.)