

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1654 OF 2024

1. Bhau Raoji Shelar

Since deceased, through his LR.

1(a) Laxman (Balu) Bhau Shelar

2. Jayant Balkrishna Lonandkar

3. Santosh Balkrishna Lonandkar

4. Laxman (Balu) Bhau Shelar

...PETITIONERS

V/S.

Trilochan Singh Sant Singh Sahney

...RESPONDENT

Ms. Pushpa Ganediwala with Mr. Sandeep Batavia, Ms. Anshu Agrawal, Ms. Arwa Lunawadawala and Mr. Ankit Rathod i/by. Mr. Chaitanya Punarkar, for the Petitioners.

Ms. Asha M. Bhambwani, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved On : 4 March 2024.

Judgment Pronounced On : 12 March 2024.

JUDGMENT :

1. **Rule.** Rule made returnable forthwith. With the consent of the learned counsel appearing for parties, Petition is taken for hearing.

2. Petitioners have filed this petition challenging the Judgment and Order dated 14 December 2023 passed by the

Appellate Bench of Small Causes Court dismissing their P. Appeal No. 438 of 2015 and confirming the Decree dated 6 August 2015 passed by the Small Causes Court in L.E. Suit No. 55/72 of 2010. The Small Causes Court has directed the Petitioners to deliver open, vacant and peaceful possession of the suit premises to the Plaintiff with further direction to conduct enquiry under Order XX Rule 12 of the Code of Civil Procedure (**the Code**) for determining the mesne profits.

3. Briefly stated, facts of the case are that Room No.2 (also known as 2-A) admeasuring 290 sq.ft on CTS No. 185 situated at 1st Floor, Kumud Villa, 321, Vithalbhair Patel Road, Paper Mills Lane, Opera House, Mumbai-400 004 (**suit premises**) is the subject matter of dispute between the parties. Respondent/Original Plaintiff is undisputed owner of the suit premises. There is a dispute about the nature of induction of Defendant No. 1 in the suit premises. It is Plaintiff's case that Defendant No.1-Bhau Raoji Shelar was in service of the Plaintiff in his office and that the Plaintiff permitted him to reside in the suit premises free of charge. Plaintiff terms Defendant No.1 as gratuitous licensee. On the contrary, it is the case of the Defendants that a monthly tenancy was created in favour of Bhau Raoji Shelar, who has been in occupation of the suit premises since 1972. Plaintiff alleged that Defendant No.1 unlawfully permitted one Moti Maharaj to carry on business in the suit premises by accepting license fees. It is further alleged that Defendant No.1 thereafter transferred possession of the suit premises to Defendant Nos.2 and 3.

4. Plaintiff filed police complaint and thereafter instituted L.E. Suit No. 55/72 of 2010 against the Defendants seeking recovery of possession of the suit premises. The Small Cause Court held Defendant No.1 to be Plaintiff's gratuitous licensee and that transfer of possession by Defendant No.1 in favour of Defendant No.2 was without Plaintiff's permission. The Small Causes Court decreed the suit by Judgment and Order dated 6 August 2015 and directed Defendants to handover open, vacant and peaceful possession of the suit premises to the Plaintiff within three months. The Small Causes Court also directed conduct of enquiry into mesne profits under Order XX Rule 12 of the Code.

5. Aggrieved by the Decree dated 6 August 2015 of the Small Causes Court, the Defendants filed P. Appeal No. 438 of 2015 before the Appellate Bench of the Small Causes Court. By Judgment and Decree dated 14 December 2023, the Appellate Bench proceeded to dismiss the Appeal. Accordingly, the Petitioners have filed the present petition challenging the decisions of the Small Causes Court and its Appellate Bench.

6. Ms. Ganediwala, learned counsel appearing for the Petitioners would submit that the Small Causes Court has committed a grave error in assuming the theory of the Plaintiff as correct without the Plaintiff or a person in knowledge of facts stepping into the witness box. That the suit was instituted by the Plaintiff through his constituted attorney. That it came to the fore during evidence that the Major Bhagwan Singh (Plaintiff's constituted attorney) did not have personal knowledge of facts.

That the constituted attorney repeatedly admitted during the course of his cross-examination that he had no personal knowledge about the employment of Defendant No.1 with the Plaintiff. That till 9 July 2007, he was not even aware about the use of the said premises by any person. That he had not visited the suit premises prior to 9 July 2007 before which one, Mr. Gaikwad was looking after the affairs of the building. That thus Plaintiff's constituted attorney did not have knowledge about the factual position and therefore was not in a position to depose about existence or otherwise of tenancy in favour of Defendant No.1. That if Plaintiff was shying away from deposing in the suit, atleast Mr. Gaikwad, who was admittedly having knowledge about the suit premises prior to 2007, ought to have been examined as a witness. She would therefore submit that the entire evidence of Plaintiff's constituted attorney is liable to be discarded, which leaves absolutely no evidence on record to prove Plaintiff's assertion in the plaint that Defendant No. 1 was his gratuitous licensee. She would further submit that during course of cross-examination, Plaintiff's constituted attorney infact admitted that Defendant No.1 is the monthly tenant in respect of the suit premises.

7. Ms. Ganediwala would rely upon the Judgment of the Apex Court in **Man Kaur V/s. Hartar Singh Sangha**, (2010) 10 SCC 512 in support of her contention that the Attorney who has no personal knowledge of the transaction can only give formal evidence about the validity of Power of Attorney and filing of suit and he cannot depose or give evidence in place of his principal, about which the principal alone has personal knowledge. She would therefore

submit that the Plaintiff failed to prove the case of induction of Defendant No.1 as gratuitous licensee. That the Small Causes Court and the Appellate Bench erroneously expected the Defendants to disprove Plaintiff's case, when infact it was the complete responsibility of the Plaintiff to prove his own case. That the burden of proving his case rested solely on the shoulders of the Plaintiff, who has failed to discharge the same by adducing cogent evidence in support of his case. That on the other hand, the Defendants led sufficient evidence to prove that Defendant No.1 has been in possession of the suit premises right since 1971 and that his induction was in capacity as monthly tenant. That the rent receipts were deliberately not issued by deducting the rent from his salary. That transfer of tenancy in favour of Defendant Nos. 2 and 3 was with the consent of the Plaintiff.

8. Ms. Ganediwala would further submit that the issue of limitation has not been decided by the Appellate Bench. That the suit filed by the Plaintiff was clearly barred by limitation. That no cause for filing the suit was pleaded and no notice for eviction was issued before filing of the suit. She would submit that the suit itself was not maintainable and that the Small Causes Court has erred in decreeing the suit.

9. Lastly, Ms. Ganediwala would further submit that the Defendants have paid the occupancy charges during the pendency of the Appeal in view of judgment of the Apex Court in **State of Maharashtra & Anr. V/s. Super Max International Private Limited & Ors.** (2009) 9 SCC 772 and **Atmaram Properties**

(P) Ltd. V/s. Federal Motors (P) Ltd. (2005) 1 SCC 705. She would therefore submit that the Defendants be permitted to occupy the premises on payment of occupancy charges as was done by the Appellate Bench of the Tribunal.

10. Ms. Bhambwani, the learned counsel appearing for the Respondent would oppose the petition and submit that the decree of eviction is well supported by evidence on record. That the suit premises belong to Plaintiff and not to the Company, in which Defendant No.1 was employed. She would invite my attention to the admission given by Defendant No.1 in his Affidavit of Evidence that he was permitted by the Plaintiff to occupy the suit premises out of love, affection and generosity at the time of his retirement. That the said admission proves beyond any doubt that Defendant No.1 continued to occupy the suit premises merely as gratuitous licensee. That Defendants did not produce any evidence to prove creation of tenancy. That Defendant No.1 unlawfully inducted Defendant Nos.2 and 3 in the suit premises without the consent of the landlord. That the landlord was not aware about the manipulations in records created by the Defendants till the year 2009. That issuance of notice was not mandatory for instituting a Suit for seeking recovery of possession. She would pray for dismissal of the petition.

11. Rival contentions of the parties now fall for my consideration.

12. There is dispute between the parties about the nature of induction of Defendant No.1 in the suit premises. While Plaintiff claims that the induction was in the capacity as a gratuitous licensee, Defendants claim that Defendant No.1 was a monthly tenant of Plaintiff in respect of the suit premises. Both the Small Causes Court and the Appellate Bench have held that Defendant No.1 was a mere gratuitous licensee in respect of the suit premises. The said findings are recorded after considering the evidence on record. In exercise of jurisdiction under Article 227 of Constitution of India, the scope of interference by this Court on findings of fact is extremely limited. Keeping in mind, the limited scope of interference in concurrent findings of fact, I proceed to examine the contentions raised by Ms. Ganediwala.

13. The sheet anchor of Ms. Ganediwala is absence of personal knowledge of Plaintiff's attorney to depose about the capacity in which Defendant No. 1 inducted in the suit premises. Lack of personal knowledge of Plaintiff's attorney is attributed to repeated admissions given by him about lack of personal knowledge of the transaction. Ms. Ganediwala is not entirely wrong in contending so, particularly in view of some of the admissions given by the witness that he had never visited the suit premises prior to 9 July 2007 or that he had no personal knowledge of the suit property or occupation thereof by Defendant No.1 prior to 9 July 2007. Her reliance on the judgment of the Apex Court in ***Man Kaur*** (supra) also appears to be apposite. In ***Man Kaur***, the Apex Court has summarised the legal position of persons who can give evidence in regard to matters involving personal knowledge as under :

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/

daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

14. It is by relying on the principles enunciated by the Apex Court in ***Man Kaur*** (supra) that Ms. Ganediwala contends that the evidence of Plaintiff's attorney having no personal knowledge must be discarded. However what she misses is the point that Plaintiff came with a case that Defendant No. 1 was in his service and allowed him to occupy the suit premises in that capacity and Defendants admit that Defendant No. 1 was in Plaintiff's service. Thus, the relation between Plaintiff and Defendant No., 1 as employer and employee got established on account of Defendants' admission. Defendants then set up a case that though Defendant No. 1 was in Plaintiff's employment, he was inducted as a tenant and the rent was deducted from salary. The defence of deduction of rent from salary was taken possibly because no rent receipt was ever issued in the name of Defendant No. 1. Thus once employer-employee relationship is established and a preponderance of probability is created that first Defendant's induction in suit premises could be in his capacity as employee, the burden then shifted on Defendants to prove that notwithstanding the employer-employee relationship, he was still a tenant by producing cogent evidence to that effect. Defendants however failed to produce single piece of evidence to show first Defendant's induction as tenant or that there was deduction of rent from his salary at any point of time. Therefore, even if the evidence of Plaintiff's attorney is to be discarded, still burden rested on shoulders of Defendants to prove tenancy of Defendant No. 1. Therefore, even if Ms. Ganediwala's

strenuous submission for discarding evidence of Plaintiff's attorney is accepted, the same does not enure to the benefit of Defendants.

15. Apart from leading any evidence to prove first Defendant's tenancy in respect of suit premises, there is yet another factor which completely demolishes the theory of tenancy. There is an admission on the part of Defendant No.1 in his deposition that he was in service of the Plaintiff upto the year 1997 and that, being a rich person, Plaintiff allowed Defendant No.1 to continue in the suit premises out of love, affection and generosity. If Defendant No.1 was indeed a tenant in respect of the suit premises since 1972, there was no question of his continuation after retirement on account of love, affection and generosity on the part of the Plaintiff. If he was a tenant, he had right to continue in the premises and there was no necessity for depending on love, affection or generosity of Plaintiff. First Defendant's use of words 'retirement' and 'generosity' clearly establishes relationship between his service and occupation of suit premises. The said admission given by Defendant No.1 in his Affidavit of Evidence clearly proves that he was merely a gratuitous licensee and not a tenant in respect of the suit premises.

16. The Defendants thus could not prove before the Small Causes Court that the first Defendant was a monthly tenant in respect of the suit premises. The transfer of possession by him vide surrender letter dated 22 January 1999 was thus clearly unauthorised. He had no authority to create any rights in respect of

the suit premises in favour of third parties. The Small Causes Court has rightly passed the decree of eviction against the Defendants.

17. The contention of lack of cause of action for the Plaintiff to file the suit sought to be raised on behalf of Petitioners is difficult to fathom. Plaintiff in his capacity as owner of the suit premises desired recovery of possession from Defendant Nos. 2 and 3, who were found to be in unauthorised possession thereof. I do not see any reason why the Plaintiff lacked cause of action to file a suit for recovery of possession from a trespasser. The contention is thus raised, only for being rejected.

18. So far as the issue of limitation is concerned, the same is answered in favour of the Plaintiff by the Small Causes Court. Ms. Ganediwala accuses the Appellate Bench of not framing the issue of limitation. The grounds of Appeal filed before the Appellate Bench are not placed before me and it is not known as to whether the findings of the Small Causes Court on limitation were challenged before the Appellate Bench. However, perusal of the grounds raised in the present petition would indicate that no grounds with regard to limitation is raised in the memo of petition. Therefore, no cognizance of this objection sought to be raised by the Petitioners can be taken. Even otherwise, it is difficult to comprehend as to how Plaintiffs' suit for recovery of possession from his gratuitous licensee and trespassers inducted by such licensee can be barred by limitation. First Defendant's possession was permissive as he admitted in his evidence that he was permitted to occupy suit premises after his retirement by Plaintiff out of his love, affection

and generosity. Thus Defendants' possession was never adverse to Plaintiff and Article 65 of the limitation Act would have no application.

19. Considering the overall conspectus of the case, I am of the view that, after considering the material on record in exercise of limited jurisdiction under Article 227 of Constitution of India, no patent error can be traced in the approach adopted by the Small Causes Court and its Appellate Bench. The decree for recovery of possession does not suffer from any palpable error. The Writ Petition, being devoid of merits, is dismissed without any orders as to costs. Rule is discharged.

[SANDEEP V. MARNE, J.]

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