

(2009) 01 BOM CK 0047

In the Bombay High Court

Case No : Second Appeal No. 48 of 1993

B.K. Sharma (since deceased through LRs Ashok Sharma,
Pradeep Sharma and Kuldip Sharma)

APPELLANT

Vs

Sitaram Sakharam Thote (since deceased through LRs
Prabhakar Shankar Bondre)

RESPONDENT

Date of Decision : 06-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Transfer of Property Act, 1882 — Section 111

Citation : (2009) 2 BomCR 25 : (2009) 111 BOMLR 559 : (2009) 2 MhLj 467 :
(2011) 1 RCR(Rent) 165

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.V. Purohit, for the Appellant; N.W. Sambre, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Heard Shri Purohit, learned Counsel for the appellants and Shri Patil, learned Counsel holding for Shri Sambre, learned Counsel for the respondent.

2. By this Second Appeal, the original defendant in Regular Civil Suit No. 439 of 1983 is challenging the concurrent judgments and decrees delivered by the Courts below directing his eviction from suit premises. The judgments delivered are common judgments in two suits and two appeals. Regular Civil Suit No. 350 of 1983 was filed by present appellant against the respondent for specific performance of contract. The present respondent (defendant No. 2) in that suit filed Regular Civil Suit No. 439 of 1983 for possession along with other incidental reliefs. The suit filed by present appellant for specific performance was dismissed with costs while suit filed by the respondent was decreed and the appellant was directed to handover vacant possession. Against this judgment dated 3.5.1985 delivered by 23rd Joint Civil Judge, Junior Division, Nagpur, the present appellant filed two separate appeals u/s 96 of Civil Procedure Code, which were registered as Regular Civil Appeal Nos. 367 of 1985 and 509 of 1985 by common judgment

delivered on 8.10.1992, 7th Additional Sessions Judge, Nagpur, dismissed both the appeals. Thereafter this Second Appeal has been filed. The Second Appeal has been admitted on 15.3.1993 without formulating any question as substantial question of law. However, it appears that in pursuance of earlier orders dated 10.11.2006, the appellant has filed a pursis mentioning total eight questions as substantial questions of law. During arguments, however, questions No. 3, 4 & 5 were only pressed into service as substantial questions involved. The questions are reproduced below for immediate appreciation.

3. Whether the Judgment and decree impugned in the instant appeal is without jurisdiction as the Civil Court does not have the jurisdiction to entertain the suit for ejectment and possession without following the due process of law i.e. without first obtaining the permission of the Rent Controller for issuing quit notice ?

4. Whether the findings to the effect that the appellant/ tenant had renounced his character or had disclaimed his character as a tenant and that he became a trespasser are perverse ?

5. Whether assuming but not admitting that the appellant/ tenant had renounced his character as a tenant and had incurred forfeiture, the suit for ejectment and possession at the behest of the respondent/ landlord was tenable without giving a proper notice of forfeiture of tenancy as contemplated u/s 111(g) of the Transfer of Property Act?

3. In order to show that these questions arise for consideration, Shri Purohit, learned Counsel has invited attention to both plaints and respective written statements filed therein and also to the issues as formulated in Regular Civil Suit No. 439 of 1983. His contention is, the application of mind by both the Courts below while delivering common judgment has been in the background of issues as framed in Regular Civil Suit No. 350 of 1983. He contends that this has seriously prejudiced the present appellant because the question whether the present respondent (original plaintiff in eviction suit) proves that the present appellant is licensee has not been gone into by any of the Courts. He for that purposes invites attention even to both the judgments as delivered and he contends that if the said issue was examined by the Courts below, they could have recorded a finding either way. He points out that a licensee like present appellant paying Rs. 32/- per month is covered by the protection extended by provisions of Rent Control Order, 1949, and admittedly in present case, there is no permission obtained from the Rent Controller. He, therefore, states that suit for eviction itself could not have been entertained. He further states that the appellant had specifically stated that amount of Rs. 32/- was being accepted directly from him and therefore, he became the tenant and hence not only provisions of Rent Control Legislation but then the provisions of Section 111(g) of Transfer of Property Act, were also applicable and as there was no notice of forfeiture, the decree for eviction could not have been passed. He has invited attention to relevant provisions of Rent Control Order, 1949, and also to

provisions of Section 111(g) of Transfer of Property Act, for that purpose.

4. Shri Patil, learned Counsel holding for Shri Sambre, learned Counsel for the respondent, on the other hand, contends that none of the questions sought to be urged as substantial questions of law arise for consideration. He points out that as suit for specific performance was first suit filed, both the suits have been considered together and while deciding the suit, the trial Court has answered 10 issues which also examined the status of present appellant as tenant or sub-tenant. He contends that the Court found that the oral agreement for sale and purchase between the present appellant and defendant No. 1 Gangadhar in Regular Civil Suit No. 350 of 1983 could not be proved and present respondent proved that he had purchased the suit block from defendant No. 1 . Gangadhar. Defendant No. 2 (present respondent) had also contended that suit filed by present appellant was false. He invites attention to consideration of issues No. 1 to 4 by trial Court to urge that the trial Court has correctly applied the law.

5. After hearing both the learned Counsel and after perusing the judgments delivered by both the Courts, it is apparent that one Ramdulare Mahure was tenant of first owner viz. Shri Buty and rent receipts were being issued in the name of Ramdulare Mahure even after his death. The present appellant accepted that said Mahure died in the year 1966-67 and he has tried to contend that because he was paying rent on behalf of Mahure, he was a tenant. The trial Court has correctly appreciated the position in this respect to conclude that the appellant did not acquire status of tenant merely by paying rent on behalf of Mahure. It has also found that in para 1 of the plaint, the present appellant has stated that he is in occupation of one block as sub-tenant of Shri Mahure with the consent of landlord. It further found that such consent of landlord was not proved. It is to be noticed that as per provisions of Rent Control Order, 1949, mere consent of landlord is not sufficient and sub tenancy can be created only with his written permission. It is settled law that this requirement of written permission is mandatory. The trial Court also found that Diwanjee (Agent) of Buty who used to collect the rent was not examined by the tenant. In view of this position, it found that the claim of appellant before it as tenant of suit premises was misconceived.

6. In this background, when the issues framed in Regular Civil Suit No. 439 of 1983 filed by present respondent for eviction of appellant are perused, the trial Court framed issue No. 2 which read .Does the plaintiff prove that the defendant is licensee?. and issue No. 3 which read .Whether the Plaintiff prove that the defendant used to pay Rs. 32/- per month to Shri Mahure ?. It is to be noticed that in his plaint filed in Regular Civil Suit No. 439 of 1983, the present respondent did not accept the appellant as his tenant. He also nowhere stated that he was recovering Rs. 32/- per month as occupation charges from the appellant. He has mentioned that after filing of suit for specific performance by the appellant, he terminated the licence and called upon him to vacate and in that notice he demanded amount of Rs. 32/- per month as compensation as said

amount was being paid by the appellant to Shri Mahure.

7. Though Shri Purohit, learned Counsel has tried hard to bank upon this legal notice Exh. 63 to urge that because of this demand, the appellant became a contractual licensee of the premises. It is difficult to accept this argument. After death of Shri Mahure, no contract with Diwanjee or Shri Buty or then with defendant No. 1 . Gangadhar in Regular Civil Suit No. 350 of 1983 or then with present respondent has either been pleaded or pointed out to show that by virtue of said contract, the respective owner either accepted the appellant as tenant or licensee. In the absence of such plea, the arguments as mentioned above, being advanced by Shri Purohit, learned Counsel are unsustainable.

8. Shri Purohit, learned Counsel has tried to point out that the lower appellate Court while answering Point No. 5 in para 12 of its judgment has taken recourse to provisions of Section 111(g) of Transfer of Property Act. He has tried to show that even if it is to be presumed that by filing a suit for specific performance, there was denial of title of present respondent, a notice as contemplated by said provision was essential. He contends that the reliance upon the judgment of this Court in the case of Ashwinikumar v. Gangadhar reported at 1990 Mh. L.J. 18, is misconceived.

9. However, for the reasons disclosed above, it is clear that said exercise undertaken by lower appellate Court is unwarranted. The present respondent nowhere relied upon the forfeiture due to denial of his title or ownership by the appellant. His plaint shows that he pointed out that the present appellant was sub-tenant of Shri Mahure. He further stated that he was occupying the premises contrary to provisions of Rent Control Order as he was not allotted the same under Chapter III of said Order (then in force), he was only a licensee. It is to be noticed that this licence which he pointed out is at the most a gratuitous licensee or a licence coming into operation because of provisions of law. He did not at any point of time plead any contract of licence or contract of tenancy. On the contrary, he stated that the appellant was paying Rs. 32/- per month to Shri Mohure. It is, therefore, obvious that in these circumstances the suit as filed was maintainable and was not hit either by Rent Control Order, 1949, or provisions of Section 111(g) of Transfer of Property Act. The application of mind by the trial Court to relevant aspects is, therefore, in accordance with law and I do not find that any of the questions tried to be raised by Shri Purohit, learned Counsel as substantial questions of law are involved in present Second Appeal.

10. Though, Shri Purohit, learned Counsel may be right in his contention that merely by filing a suit for specific performance, the present appellant cannot be presumed to have denied the title of respondent, the said contention is not substantiated and not relevant at all in present controversy. I, therefore, find that no substantial question of law arises in this Second Appeal. Second Appeal is, therefore, dismissed. However, in the circumstances of the case, there shall be no order as to costs.

11. Shri Purohit, learned Counsel at this stage states that there is interim order operating which protects the possession of the appellant and same should be continued for a minimum period of eight weeks so as to enable the appellant to take further appropriate steps in the matter. Shri Patil, learned Counsel strongly opposes the prayer. He states that the respondent . landlord, who has purchased the premises, is waiting since last 26 years for occupation thereof. However, in the interest of justice, time of six weeks is given to the appellant to take further appropriate steps and interim order shall remain in operation till 11th February 2009 and shall cease to operate automatically thereafter. Certified copy expedited.