

(2016) 06 BOM CK 0011

In the Bombay High Court

Case No : Second Appeal No. 24 of 2002

Ganesh Ramkisan Bairagi

APPELLANT

Vs

Parwatabai

RESPONDENT

Date of Decision : 16-06-2016

Acts Referred:

Citation : (2016) 4 AIRBomR 699 : (2016) 6 MhLJ 393

Hon'ble Judges : R.K. Deshpande, J.

Bench : Single Bench

Advocate : Shri V.V. Bhangde, Advocate, for the Appellant; Shri H.S. Chitaley, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.(Oral)—Regular Civil Suit No.63 of 1986 filed for eviction and possession of the suit property from the tenant on the basis of the notice issued under Section 106 of the Transfer of Property Act, 1882 was dismissed by the Trial Court on 23-7-1993. The plaintiff preferred Regular Civil Appeal No.172 of 1993, which has been allowed by the learned Joint District Judge, Amravati, on 7-11-2001 by setting aside the judgment and decree passed by the Trial Court and granting a decree for eviction and possession of the suit property in favour of the plaintiff along with the arrears of Rs. 810/- and ordering an enquiry under Order 20, Rule 10 (1) of the Code of Civil Procedure for determination of the future mesne profits from the date of filing of the suit till the delivery of the possession. Hence, the original defendant No.2 is before this Court in this second appeal.

2. The Trial Court recorded a finding that the tenancy between the plaintiff and the defendant No.1 in respect of the suit property created on 16-4-1984 has not been proved by the plaintiff, so also the claim regarding arrears of rent of Rs. 810/- for the period from 15-7-1985 to 14-4-1986. The lower Appellate Court has reversed this finding and it is held that the plaintiff has established the relationship of "Landlord and Tenant" between him and the defendant No.1, and

the tenancy was validly terminated, and hence the decree for possession as well as for arrears of rent of Rs. 810/- has been passed.

3. This Court framed the following substantial questions of law while admitting this second appeal on 7-7-2015

"1. Whether the document styled as agreement of lease (Ex.50) is sufficient to hold that the present appellant surrendered his tenancy and therefor his father i.e. original defendant No.1 became tenant of suit property.

2. Whether Ex.50 was inadmissible in evidence.

3. Whether evidence of P.W.2 - Govindrao Dharam can be relied upon to hold that the agreement of lease at Ex.50 is proved."

4. The plaintiff came up before the Trial Court with the case that an agreement was entered into for creation of monthly tenancy between him and the defendant No. 1 Ramkisan Motidas Bairagi on 16-4-1984 on rent of Rs. 90/- per month. The defendant No.1 failed to make the payment of rent for the period of nine months from 15-7-1985 to 14-4-1986 at the rate of Rs. 90/- per month, and hence by issuing the notice under Section 106 of the Transfer of Property Act on 26-2-1986, the tenancy of the defendant No.1 was terminated. The suit was filed on 16-4-1986. The defendant No.2 Ganesh Bairagi is the son of the defendant No.1, and as per the averment made in the plaint, he was joined as the party to avoid the further complications.

5. The defendant No.2 filed his written on 30-10-1986 denying the case of the plaintiff and taking the stand that he is the tenant and in possession of the suit property since the year 1977 on the monthly rent of Rs. 60/- (Rs. 30/- to be paid towards rent and Rs. 30/- to be paid towards supply of electricity and water). The defendant No.2 came up with the stand in one place in his written statement that since last two years, he is paying the rent of Rs. 90/- per month, and in another place, that from the month of February 1986, he is compelled to pay the rent of Rs. 90/-, as the water and electricity supply to the premises was stopped. However, the money order sent came back to him.

6. The defendant No.1, who is the father of the defendant No.2, filed his written statement on 28-11-1986 denying the averments made in the plaint and also the tenancy, as was alleged by the plaintiff. It was the specific stand taken by the defendant No.1 in the written statement that it is the defendant No.2, who is the tenant in respect of the suit property and the defendant No.1 is not at all concerned with it.

7. The original plaintiff died during the pendency of the suit and his daughter-in-law came on record and entered the witness-box to depose that the agreement dated 16-4-1984 was at Exhibit 50 was entered into between the plaintiff and the defendant No.1. The plaintiff proved the notice at Exhibit 47 and its acknowledgement by the defendant No.1 at Exhibit 48. The plaintiff also examined PW 2 Govindrao Waindeshkar, the attesting witness, to agreement of

lease at Exhibit 50. The defendant No.1 did not enter the witness-box, but the defendant No.2 entered the witness-box and stated that in the month of February 1986, the rent was increased to Rs. 90/-, which was sent by money order and accepted by the plaintiff. The said receipt is produced on record at Exhibit 55. He further stated that in the month of March 1986, he sent Rs. 60/- by way of money order to the plaintiff, because the plaintiff stopped the supply of water and electricity, which returned to him, as it was refused.

8. Before the Trial Court, the following issues were framed and answered as under :

Sr.No.

Issues

Findings

i

Does the plaintiff prove that he leased out the suit premises to the defendant no.1 on 15.4.1984 and deft. executed the agreement to that effect.

No

ii

Does he further prove that the deft. no.1 is in arrears of Rs. 810/- towards the rent for the period 15.7.85 to 14.4.86?

No

iii

Does he prove that he validly and legally terminated the tenancy of the defendant with effect from the midnight of 14.4.86?

No

iv

(Deleted) Does the deft. 2 prove that the deft. no.1 alone is the tenant of suit premises?

Deleted

v

Does the deft. no.2 prove that he paid Rs. 1000/to the plaintiff as Pagdi (Advance)?

No

vi

Does he prove that he paid the rent upto the month of February 1986?

Yes

vii

Does he further prove that the rent was enhanced to Rs. 90/- from Rs. 60/- p. m. from the month of February 1986?

Yes

viii

Is plaintiff entitled to claim the possession of suit premises?

No

ix

Is he entitled to reliefs claimed?

No

x

What decree, order and costs?

As per final order

Issue No.(iv) was deleted by consent of the parties. The Trial Court answered Issue No.(v) in the negative to the effect that the defendant No.2 has failed to prove that he has paid Rs. 1,000/- to the plaintiff as Pagdi (Advance). The Trial Court also recorded the finding in the affirmative on Issue No.(vi) holding that the defendant No.2 has proved that he paid the rent upto the month of February 1986. The defendant No.2 denied in his written statement the enhancement of rent from Rs. 60/- to Rs. 90/- per month, and the Trial Court recorded the finding that the rent was at the rate of Rs. 90/- per month.

9. On the substantial question of law at Serial No.1, though the Trial Court recorded the finding that the tenancy between the plaintiff and the defendant No.1 with effect from 16-4-1984 has not been established, the lower Appellate Court reverses this finding and it is held that such a tenancy between the plaintiff and the defendant No.1 has been established. The reliance is placed upon Exhibit 50, the agreement of lease. The plaintiff was not alive to lead evidence to prove the document at Exhibit 50. The daughter-in-law, who came on record, could not depose about the execution of this document. PW 2 Govindrao Deshkar, the attesting witness, has deposed that the agreement bears his signature and the defendant No.1 has also signed the said document in his presence and he identifies the signature of the defendant No.1. He says that the rent note was written by one scribe Bapu Deshmukh and it bears his own signature, the signature of the plaintiff, and that of the defendant No.1. Shri V.V. Bhangde, the learned counsel appearing for the appellant/defendant No.2, has invited my attention to the cross-examination of this witness where he states that at the

time of writing the document at Exhibit 50, he was present along with the plaintiff and the scribe Bapu Deshmukh. He states in the cross-examination that except Bapu Deshmukh, no other person has signed the document in his presence.

10. The lower Appellate Court has recorded the finding that the defendant No.1 has not entered the witness-box to refute the document at Exhibit 50. The execution of this document has been spoken about by the plaintiff in her evidence at Exhibit 46 and the document goes to show that from 16-4-1984 onwards, it is the defendant No.1, who represented the leasehold rights in respect of the suit property. The lower Appellate Court has taken into consideration the evidence of the attesting witness. It has also taken into consideration that the defendant Nos. 1 and 2 are the father and son and this relationship cannot be forgotten. On such findings, the lower Appellate Court has held that the document at Exhibit 50 has been proved. Apart from this, the Trial Court has recorded the finding that the defendant No.2 has failed to prove that he has paid Rs. 1,000/- to the plaintiff as Pagdi (Advance) and the rent at the rate of Rs. 90/- per month was paid upto the month of February 1986. It is not the case of the defendant No.2 that he paid the rent at the rate of Rs. 90/- till February 1986. Thus, there is other evidence available on record in support of the findings of the lower Appellate Court. The findings are based on evidence available and its appreciation. At any rate it is a possible view of the matter and no substantial question of law arises for consideration out of such findings.

11. It is no doubt true that the plaintiff has pleaded in his plaint by way of amendment that the defendant No.2 was initially the tenant, who surrendered his tenancy on 15-4-1984, and with effect from 16-4-1984, the defendant No.1 was considered as the tenant in respect of the suit property. This was introduced in view of the stand taken by the defendant Nos. 1 and 2 in their separate written statement that it is the defendant No.2 who is the tenant and not the defendant No.1. In fact, the Trial Court deleted the issue as to whether the defendant No.2 proves that the defendant No.1 alone is the tenant of the suit property. Since the defendant No.2 has surrendered such an issue, the consequential amendment of pleadings by the plaintiff loses its significance. It was, therefore, not necessary for the lower Appellate Court to decide the question as to whether the surrender of tenancy was proved or not. The substantial questions of law at Serial Nos. 1 and 3 are, therefore, answered accordingly.

12. So far as the substantial question of law at Serial No.2 regarding admissibility of document at Exhibit 50 in evidence is concerned, though such document is an unregistered document, it can be used for collateral purposes and the decision of the Apex Court in the case of *Anthony v. K.C. Ittoop & Sons and others*, reported in (2000) 6 SCC 394, throws light in para 16 thereof on such issue, which is reproduced below :

"16. Taking a different view would be contrary to the reality when parties clearly

intended to create a lease though the document which they executed had not gone into processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non-registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains un-rebutted."

In view of above, the non-registration of document would not come in the way of the Court to hold that the relationship of "Landlord and Tenant" between the plaintiff and the defendant No.1 in the present case has been established, coupled with the other evidence available on record. The substantial questions of law at Serial No.2 is answered accordingly.

There is no substance in this second appeal, and the same is dismissed. No order as to costs.

13. At this stage, Shri V.V. Bhangde, the learned counsel for the appellant/defendant No.2, submits that his arguments that the document at Exhibit 50 has not been proved, the view taken by the lower Appellate Court is not even a possible view of the matter, and the findings recorded by the lower Appellate Court are perverse, have not been dealt with in this judgment, which is dictated in open Court. He, therefore, insisted that the said points be dealt with. I think whatever arguments have been understood are dealt with in this judgment. If any points are left out, Shri Bhangde was asked to place on record the written notes of arguments, which can be dealt with subsequently while checking the judgment. Since there is insistence on the part of Shri Bhangde to deal with such points now, I make it clear that the consciousness of this Court about such admissions of the attesting witness is reflected in the judgment. This Court has held that it is a possible view of the matter which is taken by the lower Appellate Court and such, the argument that the findings of the lower Appellate court are perverse, has also been dealt with. There is no other point which Shri Bhangde has urged.

14. Again, at this stage, Shri V.V. Bhangde, the learned counsel for the appellant/defendant No.2, submits that the office be given direction not to list the matters in which he is appearing for any of the parties before this Court. In other words, he submits that I should recuse from taking up the matters wherein Shri V.V. Bhangde is appearing for any of the parties. The submission shocks my conscience, particularly when it suddenly came from a regular practitioner from this Court, who was being looked at as an experienced and responsible officer of the Court. The entire arguments in this matter went on smoothly, patiently and with interest. After conclusion of the arguments, both the learned counsels were asked as to whether they intend to make any additional submissions, and thereafter the dictation commenced as per the usual practise. I need not delve upon any further and I refrain from making any comments against Shri V.V.

Bhangde. However, the increasing trend need to be commented upon; so as to caution the lawyers and the litigants about the consequences of it, which can be avoided.

15. A lawyer has his own choice of appearing before the Court presided over by a particular Judge to conduct the matter. If his matter is listed before the Court where he does not want to appear, he is at liberty to return such matter and/or fees to his client and can ask him to engage some other lawyer or he may refuse to accept the matter if he has not already filed his vakalatnama. A Judge may also recuse himself from taking up the matters of the lawyers with whom he is closely related or where his conscience does not permit him to take up the matters of some lawyers. In these situations, there may not be any problem either with a Judge or a lawyer, but where the Court passed an order against a particular lawyer not to appear in his Court, it takes a colour of penalty or punishment to such a lawyer, which may result in taking some disciplinary action against him by the Bar Council of India or of State, which issued him a Sanad of Practise. Such a stage by a Court may be construed of blacklisting of a lawyer. Seldom, such event occurs, and the Courts also normally avoid it.

16. A tendency has started growing amongst lawyers to dictate a Judge to recuse from taking up his matters when the decision goes against his client or his wavelength does not match with the Judge or he does not find comfort in conducting the matter or for some such reasons. This is an insult personally to a Judge. Such reactions are normally experienced when the lawyers take heavy fees from their clients with an assurance to bring the result of the cases in their favour or to impress upon the clients sitting in the court room during the course of hearing, the boldness which he possesses to browbeat the Court. If a lawyer exercises his choice of not conducting the matter, he loses his client and fees, which he does not want to do. If a Judge accedes to such demand of a lawyer for recusal, the effect is threefold (i) the confidence of a lawyer to browbeat the Court is boosted, (ii) a lawyer gets rid of the Court where he finds discomfort in conducting the matter, and (iii) it creates an additional source of income for him, from the other lawyers and the litigants, who do not want their matters listed or dealt with by such a Judge. This promotes the practise of bench-hunting. No system of justice can tolerate such practise by a lawyer and the same is required to be curbed and deprecated.

17. Recently, in the judgment, which I have delivered in Civil Revision Application No.26 of 2016 on 6-6-2016 (Satish Mahadeorao Uke v. The Registrar, High Court of Bombay, Bench at Nagpur, Nagpur), I have observed in para 25 thereof as under :

"25. A Judge may recuse at his own choice from a case entrusted to him by the Chief Justice and it would be a matter of his own choosing. But recusal at the asking of the litigating party, unless justified, must never be acceded to. This is what the Apex Court has held recently in NJAC case instituted by the Supreme Court Advocates on Record Association and another v. Union of India, reported in

2015 (11) Scale 1. The question of recusal is normally decided by a Judge on the basis of his personal or private interest in the subject-matter of the litigation, his intimacy with the party/parties to a lis before him, his perception about conflict of interest in taking up the matter, and his own conscience. Such decision does not depend upon the dictates of lawyers or litigants. ..."

18. Recusal to take the matters to be conducted by some lawyers, is a matter of Judge's own choosing and it cannot be at the dictates of the lawyers. What a Judge has to see is that he performs his duty of deciding the matters before him without fear or favour, affection or ill will. He has to keep in mind the principle that the justice should not only be done, but it must appear to have been done. The decision of recusal to take the matters of lawyers, depends upon the Judge's personal relations or intimacy with such lawyers, and his own conscience to decide a case by observing the oath which he has taken while occupying the position as a Judge. Ultimately, a Judge is also a human being and the Judges come from different strata of the Society, having their own views, ideas, angle or perception, based on the varied individual experience in life, which may or may not match with each others or with some lawyers or litigants. However, this cannot be a reason to avoid conducting the matters listed before such a Judge or the Judges. Once the constitutional authority of a Judge or the Judges to adjudicate the matters is accepted, it cannot be lowered down by asking him or them to recuse to hear and decide the matter.

19. To prevent a Judge or the Judges from performing his or their duties in this fashion causes distraction of attention in the judicial proceedings, which amounts to interference in the course of justice. Merely because a lawyer, litigant or public at large feels that the approach adopted or a decision is wrong, the authority or the force of the decision does not get eroded. A wrong decision in the matter is equally enforceable like a correct decision. If the Constitution and the laws provide a remedy to get such decision corrected in a higher forum, such a remedy can be availed. Even a wrong decision becomes final, binding and enforceable like a correct decision, if there is no remedy available. The lawyers, litigants or public at large cannot run away from such decision and they have to be cautioned about the authority of the Courts.