

(2005) 12 BOM CK 0034

In the Bombay High Court

Case No : Second Appeal No. 316 of 1996

Michael Herisuasai Joseph since dead, through his LRs. Areen Joseph and Others APPELLANT

Vs

Carmal and Others RESPONDENT

Date of Decision : 13-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : (2006) 2 ALLMR 639 : (2006) 6 BomCR 444 : (2006) 3 MhLj 161 : (2006) 2 MhLj 161

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : K.V. Sirpurkar, for the Appellant; A.M. Rizwy, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—Being aggrieved by the dismissal of his suit as well as appeal challenging the said dismissal, the plaintiff in Regular Civil Suit No. 131 of 1987 before the learned 2nd Joint Civil Judge, Junior Division, Nagpur, has preferred this appeal. The appeal is now being prosecuted by the legal representatives of the deceased-plaintiff, who died during the pendency of this appeal.

2. The plaintiff claimed to have purchased the suit house for a sum of Rs. 6,000/- from one John Michael Carvelho under a registered sale-deed dated 28th January, 1964. The plaintiffs brothers Anthony and Chouri were also occupying the suit house with their families when the house was purchased. Anthony died in 1981 and Chouri died on 8th November, 1986. Even after their deaths, their families continued to occupy the portions of the house. The defendants are heirs of deceased Anthony. Since the plaintiffs family had expanded, the plaintiff found the accommodation with him insufficient and hence he requested the family members of his brother Anthony to vacate the premises. Though they assured to do so after securing other accommodation, they avoided and hence the plaintiff issued a notice on 29th April, 1985 revoking the defendant-respondents' licence

to occupy the premises. They refused to accept the notice. The plaintiff again issued the said notice under certificate of posting, to which they replied, claiming that they were the co-owners of the property. The plaintiff, therefore, filed the said suit contending that the defendants had no right to occupy the premises and, after revocation of licence with effect from 1-6-1985, they are trespassers in the property. He, therefore, prayed for a decree of ejectment and possession with a sum of Rs. 5,270A plus notice charges of Rs. 10/- per day for the wrongful occupation. He also prayed for an enquiry into mesne profits and interest on the sums claimed.

3. By written statement at Exhibit 18 before the trial Court, the defendants contended that the house was purchased with equal contribution from each of the three brothers. Therefore, they claimed to have become owners of the portion, which is in their possession. They claimed that they had been contributing to the payment of taxes also. Further, they submitted that the suit house is situated on municipal nazul land and the plaintiff too is a tenant of the municipal nazul land and, therefore, had no right to file the suit. They, therefore, prayed for dismissal of the suit.

4. The learned trial Judge framed necessary issues and upon consideration of the evidence tendered before him, held that the plaintiff failed to prove that he was exclusive owner of the suit premises and that, therefore, there was no question of his revoking the defendants' licence. He, therefore, dismissed the suit. On appeal by the plaintiff, the learned Extra Joint District Judge affirmed the finding that the appellant failed to prove that he was the exclusive owner of the house or that the respondents/defendants were the licensees and, therefore, dismissed the appeal. Aggrieved thereby, the plaintiff has appealed to this Court. As already adverted, on the death of the plaintiff, his legal representatives are prosecuting the appeal.

5. The appeal was admitted on the following substantial question of law framed by S. P. Kulkarni, J.:

A substantial question of law, therefore, that arises is whether in the facts and circumstances as pleaded and proved the documentary evidence in the form of the registered sale deed should have been allowed to be wiped out by the oral evidence led by the parties in dismissing the suit claim.

6. Notice was issued to the respondents, who were represented by Advocates S/ Shri M. H. and A. M. Rizwy. However, when the appeal came up for hearing, none appeared for the respondents. With the help of Smt. K. V. Sirpurkar, the learned Counsel for the appellants, I have, therefore, gone through the record to examine whether the learned Trial Judge and the learned Judge of the First Appellate Court ought to have allowed the documentary evidence of the registered sale-deed to be wiped out by oral evidence. The plaintiff had proved the sale-deed executed in his favour by vendor John Michael Carvelho. This document is at Exhibit 47. It does not show that it had been executed in favour

of the plaintiff and his two brothers or that there was any contribution of the brothers in purchasing the property.

7. The learned trial Judge observed that the plaintiff had produced a certificate from his employer showing that he had taken an advance of Rs. 2,000/- on 1st January, 1964 for purchasing the house for Rs. 6,000/-. According to the learned trial Judge, because the plaintiff proved that he had taken an advance of Rs. 2,000/-, it must be presumed that the other two brothers of the plaintiff also had contributed Rs. 2,000/- each. This logic is strange. It is not the plaintiffs case that he had only Rs. 2,000/-, which he had borrowed from the employer. He had specifically stated that he had Rs. 4,000/- with him and he had borrowed Rs. 2,000/- from his employer. There is nothing wrong in making such an arrangement. It is not shown that the plaintiff could not at all have a saving of Rs. 4,000/-. There is no reason not to mention the names of brothers in the sale-deed if they too had contributed for purchasing the house. The parties are Christians and there is no notion of any joint family. In any case, it is not shown that the plaintiff was the eldest brother or the most active member of the family, more well-versed in worldly ways and, therefore, looking after all the affairs of the property, to justify sale-deed in his favour though the other brothers had contributed. It has been stated that one of the brothers was in Airlines and other was in Hislop College. The evidence of Albert as DW 1 shows that his father was working as Head Assistant (Avval Karkun). Therefore, if his father had contributed anything, it would have been more appropriate for purchasing the property in his father's name, since the plaintiff was a mere Mechanic. DW 2 Alexendar stated that when the plaintiff purchased the property, his father was working in Airlines and his father's income was highest in the family. Therefore, there is nothing to show that the plaintiff, a Mechanic, was preferred by the brothers for the purchase on their behalf, rather than purchasing the house in the names of all, if all had contributed.

8. If the story that the three brothers had jointly purchased the property was indeed true, it is enigmatic as to how the third brother has not raised any dispute of the type, which the defendants have raised.

9. DW 1 Albert further stated that his father used to pay money per month to his uncle, that is the plaintiff. Now if his father had purchased the property by contributing a third share in the consideration, there would have been no question of paying anything to the plaintiff every month. This is inconsistent with the story of joint purchase. In view of this, in the absence of any evidence about the actual contribution by the two brothers towards the consideration for purchase of the house, the learned trial Judge or the learned Judge of the First Appellate Court should not have concluded that the respondents' father had contributed for such purchase on the basis of surmises. There was no warrant to allow recitals in the documentary evidence in the form of registered sale-deed to be wiped out by oral evidence by the parties. In view of this, it has to be held that both the Courts below erred in dismissing the plaintiffs suit by holding that

the plaintiff had failed to prove his title and that the respondents/defendants were mere licensees. Hence, the following order:

10. The appeal is allowed.

The judgments and decrees passed by the learned Extra Joint District Judge and the learned 2nd Joint Civil Judge, Junior Division, Nagpur, are set aside and instead the suit is decreed.

The defendants shall deliver possession of the suit premises to the plaintiff.

An enquiry be held under Order 20, Rule 12 of the CPC into mesne profits from the date of the suit till the possession is recovered. The defendants shall also pay to the plaintiff costs throughout and shall also bear their own.