
(1994) 09 BOM CK 0022
In the Bombay High Court
Case No : First Appeal No. 278 of 1994

Shrikrishna Bhau Parab and Others

APPELLANT

Vs

Dr. Mrs. Roshan S. Boyce

RESPONDENT

Date of Decision : 23-09-1994

Acts Referred:

Bombay Court Fees Act, 1959 — Section 6
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 5(4)
Civil Procedure Code, 1908 (CPC) — Section 21(2)
Limitation Act, 1963 — Article 65, 3

Citation : (1995) 1 BomCR 429 : (1994) 96 BOMLR 204

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : S.C. Dharmadhikari and D.A. Nalwade, for the Appellant; V.T. Walawalkar and A.V. Datar, for the Respondent

Final Decision : Dismissed

Judgement

R.G. Vaidyanatha, J.—This is an appeal against the judgement and Decree dated 29-1--1993 in Short Cause Suit No. 5638 of 1989 filed in the City Civil Court Bombay. I have heard the learned Counsel appearing for both the parties.

2. The few facts which are necessary for the disposal of this appeal are as follows: The respondent-plaintiff filed a suit in the Court below against the appellants for a declaration that the defendants/appellants are trespassers of the suit property and for possession of the suit premises. The suit premises is a temporary shed situate in property bearing No. D-3495(1) at 8-A, Carmichael Road, Bombay 400026. The plaintiff is the owner of the entire property in which the suit property is situated.

The plaintiffs case is that deceased Bhau Krishna Parab was working under the plaintiff and her husband as a servant. He was permitted to occupy and use the temporary shed . Some time in February 1980, Bhau Krishna Parab left the services of the plaintiff. Than the plaintiff and her husband called upon Bhau to

vacate the temporary shed. He took some time but did not vacate the same. Then a legal notice was issued to him. It is stated that the possession of Parab after the notice was as a trespasser without having right or interest in the property. Mr. Parab died in year 1984. The defendants/appellants who are the wife and children of Bhau Krishna Parab are continuing to stay illegally and unlawfully in the suit property as trespassers. Some other allegations are made in the plaint which are not necessary for our present purpose. In view of these allegations, the plaintiffs have filed the present suit.

3. The appellants contested the suit by filing the written statement. Their defence is as follows:

That the plaintiff has filed a suit in Small Cause Court, Bombay, in Suit No. 24 of 1992 and therefore, the present suit in the City Civil Court Bombay has to be dismissed in limine. It is stated that deceased Bhau K. Parab was a tenant in respect of the suit premises and therefore, the defendants have also become tenants of the suit premises. Then it is stated that the suit is barred by limitation. Then some challenge is made to the ownership of the property which is not pressed in this appeal and hence it is not necessary to refer to the same. It is denied that Bhau Parab was simply permitted to occupy the premises as a servant under the plaintiff without any fee. It is stated that Mr. Parab and after his death, the defendants are continuing in possession as tenants and not as trespassers. That the deceased Parab was paying rent to the plaintiff and was a protected tenant of the suit property.

It is also stated that out salary rent was being deducted. That this Court has no jurisdiction to try this suit. The defendants are protected by the Bombay Rent Act. Then it is also stated that this Court has no pecuniary jurisdiction to try this suit since the market value of the property is more than Rs. 50,000/- Hence it is prayed that the suit be dismissed with costs.

4. The learned trial judge framed the following issues:

- (1) Does the plaintiff prove that she is the owner of the suit premises?
- (2) Does the plaintiff prove that the defendants are trespassers in respect of the suit premises?
- (3) Whether the suit of the plaintiff is barred by law of limitation?
- (4) Whether this Court has jurisdiction to entertain and try the suit of the plaintiff?
- (5) Whether the suit of the plaintiff is maintainable?
- (6) Do the defendants prove that the late Bhau Krishna Parab was the tenant in respect of the suit premises?
- (7) Do the defendants prove that the suit property is owned by the Trust?
- (8) Whether the suit of the plaintiff is property valued for the purpose of the

Court fees?

(9) Does the plaintiff prove that she is entitled to get the possession of the suit premises?

(10) What relief and order ?

5. The learned trial Judge considered all the issues and negated all the contentions of the defendants and granted a decree for possession. Being aggrieved by the Judgment and Decree of the trial Court, the defendants have come up in appeal.

6. The learned Counsel for the appellant has challenged the correctness and legality of the impugned Judgment. In particular, he raised the following points in support of the appeal:

i) that the City Civil Court had no jurisdiction to try the suit on the ground of pecuniary jurisdiction;

ii) when the City Civil Court had no jurisdiction to try this suit since the dispute was between a landlord and a tenant and/or a licensor or a licensee;

iii) that the suit is barred by limitation;

On the other hand, the learned Counsel for the respondent supported the impugned Judgment.

Point No. (i)

7. As far as the question of pecuniary jurisdiction is concerned, there is a vague plea in the written statement that the market value of the property is more than Rs. 50,000/- but the defendants have not adduced any evidence to prove the alleged valuation. On the other hand, the plaintiff, has valued the suit on the basis of 150 times of the monthly rent of Rs. 5/- as recorded in the Municipal register. The Court may take judicial notice that for purpose of taxes, the Municipality prepares a statement of the actual rent or probable rent for a building. It is well settled that one of the modes of valuation of the property is on the basis of the income it fetches. In the present case, the income from the property is notionally taken as Rs. 5/- p.m. Then it is multiplied by 150 to find out the market value of the property. This is not something unknown to law. On the other hand, the matter is concluded by two decisions of this High Court, one of the Division Bench and another of Full Bench. In *Aninha D'Costa Vs. Parvatibai M. Thakur*, , the Division Bench of this High Court has held that the market value of property can be arrived at by multiplying the monthly rent by 121/2 years purchase value. The said view of the Division Bench has been approved by a Full Bench in *Prem Ratan Vohra Vs. Lalitkumar Dayalji Kakhani*, , where it has been clearly held that the market value of the property can be arrived at by multiplying the monthly rent by 121/2 years purchase value. The same thing has been adopted by the plaintiff in the Court below. Hence no fault can be found with the value of the property made by the plaintiff. On the other hand, the defendants

did not adduce any evidence to show that the market value was more than Rs. 50,000/- to oust the jurisdiction of the City Civil Court.

8. It is not disputed that the City Civil Court has pecuniary jurisdiction upto Rs. 50,000/- and if the value exceeds that amount, the suit has to be filed on the original side of the High Court section 21(1) of the CPC provides that no objection regarding territorial jurisdiction and section 21(2) provides that no objection regarding pecuniary jurisdiction shall be allowed by any Appellate or revisional Court of first instance and further "unless there has been a consequent failure of justice." In this case, no doubt, the defendants have taken the plea of want of pecuniary jurisdiction in the written statement. They have complied with the first condition of section 21(2) of the Code of Civil Procedure. They must further show that by virtue of this lack of pecuniary jurisdiction, there has been a consequent failure of justice. In this case, no such ground of failure of justice is alleged in the memo of appeal nor it was submitted at the time of arguments. For one thing the valuation given by the plaintiff appears to be correct and defendants did not adduce any evidence to show that the City Civil Court had no pecuniary jurisdiction. Even if there was any lack of pecuniary jurisdiction, it cannot be questioned in the Appellate Court unless there has been failure of justice. Hence, in my view, Point No. 1 has no merit and has to be rejected.

Point No. (ii)

9. The learned Counsel for the appellants has raised two points regarding the question of jurisdiction. One is that under the Presidency Small Cause Courts Act, 1882, it is provided that a Court of Small Causes shall have an exclusive jurisdiction to entertain and try all suits between a licensor and licensee or a landlord and a tenant u/s 41(1) of the Act and therefore, the suit in a Civil Court is not maintainable. There is no dispute on this position that such a suit should be filed in Small Cause Court and not in any Civil Court.

A perusal of the plaint allegations show that it is a case filed by the owner of the property against a trespasser. The defendants pleaded that they are tenants. They did not adduce any evidence. The plaintiff who was examined as P.W. 1 denied the allegation of tenancy. Hence, there is absolutely no material on record to show that prima facie there is any merit in the defence of the defendants that they were the tenants in the suit property. The main ingredient of tenancy is payment of rent by the tenant to the landlord. The plaintiff has asserted that no rent was paid at any time. The defendants have asserted that rent was being paid but they have not produced any evidence either oral or documentary, to prove that the rent was paid at any time. Hence, there is no difficulty to say that plea of tenancy has no meaning.

10. Then as far as the question of licensor and licensee is concerned, it has to be stated that originally, Mr. Parab was permitted to occupy the property as he was in occupation under the plaintiff. Hence, it can be said that the possession of Mr. Parab was that of a licensee. In common law, a licensee has only a personal right

or a privilege, to do something permitted by the owner of the property. It is not a heritable right. Further, it is in evidence that Mr. Bhau Parab left the services of the plaintiff during his life time. Since it was a special privilege attached to his office, he lost that privilege when he left the job. Even otherwise, that right came to an end after his death. There is no allegation nor proof that defendants were granted permission by the plaintiff to occupy or continue to occupy the premises. On the other hand in the life time of Mr. Parab a notice had been issued to him to vacate the property. Either this is a case of termination of the license or a case where the license has come to an end on the death of a licensee. In common law, this right of the licensee was something personal to him and it comes to an end on his death and the defendants cannot claim any right as a licensee. Therefore, the argument that the suit purports to be between licensor and licensee and therefore, the suit is not maintainable in Civil Court u/s 41(1) of the Presidency Small Cause Courts Act, 1882 has no merit and is accordingly rejected.

11. Now another contention is that the defendants are licensees under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and therefore, the Civil Court has no jurisdiction to try the suit and it has to be tried by the Rent Court under the provisions of the Presidency Small Cause Courts Act. If Mr. Parab was held to be a licensee under this Act, then no doubt it is a heritable right and defendants are entitled to protection under the Act. Though I have used the word that Mr. Parab was "licensee" of the suit property, in common law, the question is whether it amounts to a license within the meaning of a Rent Control Act.

12. The definition of "licensee" in the Rent Control Act u/s 5(4-A) says the licensee is a person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for license given for a license fee or charge and one of the exceptions is a person in the service or employment of the licensor.

First thing is that the agreement of license must be for consideration. In the present case, the plaintiff has sworn before the Court that Mr. Bhau Parab was permitted to occupy that premises without any fee or rent, since he was working under her and her husband. The defendants pleaded that Mr. Parab was paying rent. The defendants did not enter witness box and did not adduce any other evidence to show that rent, if any, was paid to the licensor. Hence, in view of this definition, it has to be held that there is no material to show that this agreement of license was for consideration.

Further there is an exception to this definition of "licensee" under the Act which does not apply to a person "in the service or employment of the licensor."

It is in evidence of P.W. 1 that Mr. Parab was permitted to occupy the shed since he was working as a servant under her. This is not denied in the written statement. The defendants have not adduced any other evidence to show that

this agreement of license was independent of the contract of employment, since the present license given by the owner to Mr. Parab was on the ground that he was serving under her it cannot be called as a license within the meaning of the Rent Control Act.

13. The learned Counsel for the appellants contended that even if it is so, it is only the exclusive Court under the Act which has jurisdiction to try and decide this point. The argument is not without any force. It is, however, well settled position of law that when a question of jurisdiction is raised, normally the allegations in the plaint must be looked into. Now, as per the allegations in the plaint, it is a case of oral permission to Mr. Parab while he was under service under the plaintiff and her husband and without any rent or fee and further the defendants are in possession as trespassers. If those allegations in the plaint are looked into then the Civil Court has jurisdiction to try this suit. If during the trial the defendants had placed some material to show the bona fides of their claim of either tenancy or license under the Act then the Civil Court could have returned the plaint for presentation to proper Court. The defendants adduced no evidence and the plaintiff's evidence clearly shows that it is a permission given to Mr. Parab to stay in the shed due to his working under the plaintiff. Hence it cannot be a license or a tenancy under the Act.

14. The learned Counsel for the appellants invited my attention to some decisions. In *B.M. Lall (Dead) by Lrs. Vs. Dunlop Rubber and Co. Ltd. and Others*, . It was held in that case that the servant was given occupation of a house being in the service of the owner. It was a case of license, not a case of tenancy. But that finding regarding license cannot be invoked here in view of the special definition of "license" under the Act which excludes service occupation and which excludes any license when there is no payment of fees or charge. In *Nagin Mansukhlal Dagli Vs. Haribhai Manibhai Patel*, it is observed that when a person is a licensee or a tenant, the mere termination of the tenancy or license does not make him a trespasser. There is no quarrel about this proposition, but in the present case of servant's occupation, the license came to an end on Mr. Parab leaving the service and further on his death. This is not a license within the meaning of the Act and any license is a special privilege given to a licensee and comes to an end on his death. It is not a hereditary right, though a license within the meaning the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 is heritable. For the reasons already stated this decision also does not apply since it was not a case of license within the meaning of Rent Control Act. On the other hand, in 1990 Mh.L.J. 1145 *Vishwanath v. Gandabhai*, it is stated that a gratis licensee has no right to continue in the property after the license is revoked.

In 1959 Bom.L.R. 126 *Gorakhram Gokalchand v. Raizada*, it is pointed out that for determining the jurisdiction of a Court allegations in the plaint are to be looked into.

In my view, in the present case, the alleged claim of the defendants about the

license or tenancy is not bona fide. There is no material even to prima facie substantiate their claim. On the other hand, the evidence on record clearly proves that it was a case of a servant's occupation and the permission came to an end either on Mr. Parab's leaving the job or at least on the death of Mr. Parab. They have no legal right to be in possession of the property and therefore, their possession is that of a trespasser. The learned trial Judge has considered the question in a proper perspective and has rightly held that the defendants' possession is that of a trespasser. The plaintiff as the owner, is entitled to get the possession of the suit property. I do not find any illegality or infirmity in the reasoning of the learned trial Judge. Hence, I hold that the Civil Court has jurisdiction to decide this suit. Point No. (ii) is answered accordingly.

Point (iii)

15. There is also a plea that the suit is barred by limitation. It is true that there is no specific article in the Limitation Act to cover a case of an owner or a person filing a suit for possession against a trespasser, since the plaintiff is the owner and defendants are alleged to be trespassers and suit pertains to possession of Immovable property, Article 65 of the Limitation Act applies. The period of limitation is 12 years from the date when defendants' possession becomes adverse to the plaintiff. In the present case, there is neither allegation nor proof that defendants are in adverse possession of the suit property. Hence, the suit is well within time and the plea of limitation has no merit.

16. It was also argued that plaintiff had filed another suit in the Small Causes Court, Bombay for same relief. It is true that the plaintiff has filed such a suit. The learned Counsel for the plaintiff submitted that he had filed that suit by way of abundant precaution since the defendants had raised the question of jurisdiction and the law had not been settled and hence in my view, filing of such a suit in the Small Causes Court does not affect the maintainability of the former present suit.

17. In the result, there is no merit in this appeal and the same is dismissed.

At this stage, the learned Counsel of the appellants prays that some reasonable time may be given to the appellants to vacate the suit shed. The learned Counsel for the respondent has no objection provided some conditions are imposed on the appellants and usual undertaking to be given by them. In the circumstances, the appellants are granted six months time from today to deliver vacant and peaceful possession of the suit shed to the plaintiff, subject to their filing an undertaking signed by all of them in this Court after serving a copy of the undertaking on the respondent's Counsel, which shall contain :

- a. that the defendants are in possession of the suit shed;
- b. the defendants agree to vacate and hand over peaceful possession of the suit shed before the expiry of six months from today. They will not part with possession or induct third party in possession of the suit shed;

c. the defendants shall disclose the number of and names of persons who are residing in the suit shed as on today;

d. the defendants shall deposit the arrears of damages for use and occupation of Rs. 300 per month from the date of decree of the trial Court till today to the plaintiff or to be deposited in this Court within one week and then the defendants shall go on paying the said sum of Rs. 300/- in future on or before 10th of each month to the plaintiff;

e. If such an undertaking is filed within one week from today and the amount is deposited, the appellants will have six months time to vacate the suit premises. But if no such an undertaking is filed or no such amount is deposited then the time granted to the appellants will lapse and the plaintiff will be at liberty to execute the decree according to law.

In the circumstances of the case, there is no order as to costs in this appeal.