
(2013) 07 RAJ CK 0061

In the Rajasthan High Court

Case No : Civil Second Appeal No. 260 of 1994

Smt. Premlata Bai and Others

APPELLANT

Vs

Shri Gani Mohammed and Others

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2014) 1 CDR 98 : (2014) 1 RLW 877

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : N.K. Maloo, with Mr. Vinod Kumar Tamoliya, for the Appellant; B.L. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Mohammad Rafiq, J.—This is plaintiffs' second appeal directed against the judgment and decree dated 16.3.1994 passed by Civil Judge, Bhawani Mandi, who thereby reversed the judgment and decree passed by the Munsif and Judicial Magistrate, Bhawani Mandi dated 1.8.1990 decreeing the suit filed by the plaintiff-appellants. The plaintiff-appellants filed the suit seeking eviction and recovery of rent/mesne profit against the defendants inter alia on the premise that father-in-law of plaintiff No. 1 Bal Mukund mortgaged three shops along with other attached properties with one Mulla Khan Ali by registered mortgage deed (Ex. 2) on 19.1.1953 for a sum of Rs. 4,999. It was a usufructuary mortgage. Two shops other than the disputed shop were redeemed on 27.12.1954 by paying Rs. 3,600 and third suit shop was redeemed on 19.11.1978 by paying a sum of Rs. 1,399. Endorsement to this effect was made by the mortgagee at the back of the mortgage deed. In between, the mortgagee had let out the suit shop to defendant-Narain Kumawat. Narain in turn had sub-let the said shop and parted with possession thereof, to defendant-Gani Mohammed. Upon redemption of the mortgage, the mortgagee Mulla Khan Ali gave notice to Narain to handover possession of the shop to the plaintiff-appellants vide Ex. 3. Plaintiff gave notice to Gani Mohammed and Narain vide Ex. 6 & 9, which Narain replied by Ex. 15.

Plaintiff again through his Advocate served a notice on Gani Mohammed vide Ex. 12. Since defendant-Gani Mohammed did not handover possession of the property, plaintiffs filed suit for eviction as also for recovery of possession against him with the averment that upon redemption of mortgage, the tenancy created by the mortgagee came to an end and therefore defendant Gani Mohammed being a trespasser is liable to be evicted. In the alternative, it was submitted that since in reply to the notice by the defendant-Narain, Gani Mohammed now claimed to have executed a rent note in favour of Kalyan Mal, brother of plaintiff's husband Mohan Lal. In the alternative, but without prejudice to the main plea, it was pleaded that even if Gani Mohammed is to be treated as tenant on the basis of alleged rent note executed in collusion with Kalyan Mal, the decree of eviction under Rent Control Act may be passed because the premises were required by the plaintiffs for their bona fide and reasonable necessity. Plaintiff No. 1 being widow, had to maintain her family and bring up minor son and daughter. The prayer was made for recovery of possession and till the suit shop was not vacated, payment of compensation/damages at the monthly rate of Rs. 65.34 till filing of the suit and during pendency of suit, a sum of Rs. 20 as mesne profit per month.

2. The defendants-Gani Mohammed in the written statement substantially admitted averments of the plaint. Kalyan Mal in written statement denied that any rent note was got executed by him from Gani Mohammed. Gani Mohammed in his written statement submitted that he was in possession of the disputed premises for last 50 years and the property was purchased by his father. Thereafter, he submitted that he is its owner by adverse possession. He also denied title of the plaintiff in respect of the property as also relationship of landlord and the tenant.

3. Learned trial court on the basis of pleadings of the parties framed as many as 13 issues. Issue No. 1 was to the effect whether plaintiffs were legal heirs of deceased Bal Kumund. Issue No. 2 was whether the disputed shop was mortgaged with Mulla Khan Ali, which the plaintiffs got redeemed. Issue No. 3 was whether the disputed shop was in possession of defendant-Narain as tenant @ Rs. 6.00 per month during the pendency of the suit. Issue No. 4 was to the effect whether the defendant No. 1 Narain had sublet the shop to defendant No. 2 and if so what is its effect. Issue No. 5 was to the effect whether the plaintiffs needed the shop for bona fide and reasonable necessity. Issue No. 6 was to the effect whether the plaintiffs would face greater hardship than the defendants if the decree of eviction is not passed. Issue No. 7 was to the effect whether the plaintiffs were entitled to compensation of Rs. 65.34. Issue No. 8 was to the effect whether possession of the defendant-Gani Mohammad was adverse and what is its effect on the suit. Issue No. 9 was whether the suit did not lie within the jurisdiction of the Court. Issue No. 10 was regarding court fee. Issue No. 11 was regarding costs and Issue No. 12 was regarding relief. Issue No. 13, which was subsequently added after filing of the written statement, was regarding denial of title of the plaintiffs by the defendant-Gani Mohamed and on that basis

right of plaintiffs for decree of eviction.

4. Learned trial court decided all the issues in favour of plaintiffs and decreed the suit. The lower appellate court has however reversed the judgment and decree passed by the trial court by order dated 16.3.1994 holding that the plaintiff-appellants failed to prove their case that they got the suit property re-deemed from mortgage. Plaintiffs failed to prove the relationship of landlord and tenant between them and the defendants and that as per the case set up by the plaintiffs, defendant Gani Mohammed was trespasser, therefore, his eviction could not be sought in a suit filed under the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. It was held that defendant Gani Mohammad is in its possession for more than 25 years. His possession was hostile and adverse to the plaintiffs and, therefore, he became owner of the disputed property by way of adverse possession.

5. This appeal was admitted for hearing on 9.11.2005 on the following substantial question of law:

Whether the averments in the written statement of Gani Mohammed are sufficient to make out the plea of adverse possession and whether all the ingredients necessary for the plea of adverse possession have been mentioned?

6. Shri N.K. Maloo, learned Senior Advocate appearing for the appellants submits that the approach taken by the learned first appellate court is wholly erroneous and illegal. Even while recording finding of adverse possession, the learned first appellate court wrongly observed that pleadings in the plaint and the written statement cannot be taken as clear denial of title. The first appellate court had no jurisdiction to make out a new case in favour of the defendant Gani Mohammed. There was ample evidence on record to prove that Gani Mohammed was sub-tenant of Narain and Narain was put in tenancy of the disputed shop by the mortgagee Mulla Khan Ali. The finding of adverse possession was contrary to the own plea of Gani Mohammed because he in his statement stated that his mother told him that the property was purchased by his father from one Ram Nath for a sum of Rs. 1,200. The adverse possession presupposed denial of title of other party and thereafter acquiring title in himself by prolonged possession. One cannot take both pleas, which are self contradictory and self destructive. Reference in this connection is made to judgment of this Court in Smt. Pushpa Sharma Vs. Gopal Lal Rawat,

7. It is argued that provision of Article 65 of the Limitation Act, 1953 has not been properly appreciated by the learned first appellate court according to which whoever set up a case on the basis of adverse possession, has to further establish that he remained in possession of the property for preceding 12 years and that his possession was hostile and adverse to everyone. After amendment in Article 65 of the Limitation Act, 1963, it has been made clear that the plaintiff has to only prove his title to succeed in the suit for possession based on title and it is for the defendant to plead and prove adverse possession to defeat his case.

The defendant in the present case has failed to adduce any such evidence. Learned first appellate court has observed that the possibility of defendant acquiring title by adverse possession cannot be ruled out. In a judicial judgment a categorical finding has to be recorded by the first appellate court if it decided to reverse the finding of the trial court on that issue. The first appellate court seriously erred in law in observing that the suit cannot be decreed on the ground of denial of title specifically pleaded in written statement. The first appellate court seriously erred in law in holding that upon redemption of the mortgage, the mortgagee's tenant becomes a statutory tenant which finding is contrary to law. The finding recorded by the first appellate court that though Narain was tenant of the mortgagee, but Gani Mohammed could not be treated his tenant because plea is about sub-letting and therefore only Narain has become trespasser and not Gani Mohammed, who was the tenant of the mortgagee. Such an approach is totally perverse and against the settled proposition of law. Shri N.K. Maloo, learned Senior Advocate further argued that the first appellate court is wholly unjustified in holding that the appellants failed to prove their title whereas the fact is that the defendant Gani Mohammad has set up a plea of adverse possession. That would imply that he had acknowledged the title of the plaintiff. Even otherwise, Ex. 2-the registered mortgage deed which contained an endorsement of possession and redemption, fully proved title of the plaintiff because the plaintiff No. 1 happens to be the widow of Mohan Lal Mahajan and plaintiff No. 2 and 3 are his sons. Mohan Lal Mahajan was son of Bal Mukund, who was owner of the disputed shop and the mortgagor. Documents Ex. 19 and 20 which formed part of old municipal records, fully prove the title of the appellants. None of these documents was contradicted by any witness of the defendant Gani Mohammed. It is contended that the decree for possession on the basis of title could be passed even under the Rent Control Act because relationship of tenant and landlord is fully established. It is contended that the learned first appellate court has misconstrued and misapplied the rent note Ex. 27. Even if the said document was produced on application of the plaintiffs and has been denied by defendant Kalyan Mal, it did not defeat their rights inasmuch as in the peculiar circumstances of the case, it was necessary to bring all the relevant material on record. Kalyan Mal was made party to the suit because Gani Mohammed claimed to be his tenant. The first appellate court misread the written statement of defendant-Narain while observing that he did not admit to be tenant of the mortgagee, whereas in para 8 of the written statement, he has clearly admitted the contents of plaint that he was tenant of the mortgagee-Mulla Khan Ali.

8. Shri N.K. Maloo, learned Senior Advocate argued that the power of attorney is very much a competent witness, therefore, non-appearance of the plaintiff No. 1 in the witness box, would not be fatal to the case of the plaintiffs, particularly when plaintiff No. 1 is a widow and plaintiff No. 2 and 3 are minor. In this connection, learned Senior Advocate relied on the judgment of the Supreme Court in *Vidhyadhar Vs. Manikrao and Another*, and *Smt. Ramkubai Since*

Deceased by Lrs. and Others Vs. Hajarimal Dhokalchand Chandak and Others,

9. It was argued that the property came to the share of Mohan Lal and the plaintiff No. 1 being his widow and plaintiff No. 2 and 3, being son and daughter, would be owner of the disputed property. The suit, which was filed on the ground of default in payment of rent, bona fide and reasonable necessary, subletting as also on denial of title, ought to have been decreed.

10. Per contra, Shri B.L. Agrawal, learned counsel for the defendant-Gani Mohammed argued that plaintiffs miserably failed to prove their case. There was no evidence to prove that the plaintiffs were landlord or that they had any semblance of title in the property in dispute. There was no evidence as to the point when co-defendant Narain or for that matter, defendant-Gani Mohammed were put in possession as tenant and/or sub-tenant. There was also no evidence that either Narain made payment of rent to Mulla Khan Ali or Gani Mohammed made payment of rent to Narain. The plaintiff-appellant got the rent note dated 1.1.1979 summoned on record, which is said to have been executed by defendant Gani Mohammed in favour of Kalyan Mal, but Kalyan Mal himself has not been produced in evidence. There is no evidence of the fact that any partition took place between the brothers during the life time of Bal Mukund and that the disputed shop came to the share of Mohan Lal. Even though PW-1 Laxmi Narain has asserted that there was a written partition deed, but no such partition deed was produced.

11. In para 13 of the plaint, the plaintiff claimed that Narain was trespasser in the shop. If that was the plea, there was no way they could still describe him as their tenant or tenant of the mortgagee. Learned counsel argued that the case of the plaintiffs cannot at all be taken to have been proved because plaintiff No. 1-Premalata herself has not appeared in witness box. In support of his arguments, learned counsel relied on the judgment of the Supreme Court in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others,

12. Shri B.L. Agarwal, learned counsel further argued that the decree of eviction could be passed only if the plaintiffs were able to prove the relationship of landlord and tenant. Once the plaintiffs have failed to prove the same, the decree of eviction cannot be passed in the scope of Section 13 of the Rent Control Act, 1950.

13. Shri B.L. Agarwal, learned counsel for the respondents submits that this Court has very limited scope of interference in the second appeal. He in this connection has relied on the judgment of the Supreme Court in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, and Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, It is therefore prayed that the appeal be dismissed.

14. I have given my anxious consideration to the rival submissions and material on record.

15. It is no doubt true that the plaintiff No. 1-Prem Lata, who was widow of

Mohan Lal and plaintiff No. 2 and 3 who were sons and daughter have not been diligent enough in contesting the suit. Neither plaintiff No. 1 herself appeared as a witness, nor produced the mortgagee-Mulla Khan Ali, nor even defendant No. 2 Kalyan has appeared in the witness box. However, still the record would have to be analysed to find out whether despite all these facts, they have been on the basis of adduced evidence, able to prove themselves as landlord in the disputed premises and can maintain the suit for eviction against the defendant. And simultaneously, it has also to be seen that whether the defendant-Gani Mohammed has been able to prove the case of adverse possession satisfying the ingredients of Article 65 of the Limitation Act.

16. The plaintiffs have produced the original mortgage deed Ex. 2 which was duly stamped and registered with the Sub-Registrar, Sub-division Thalpura, Madhya Bharat on 19.1.1953. The mortgage deed also contains an endorsement by Mulla Khan Ali, the mortgagee for redemption of the mortgaged properties on payment of Rs. 3,600 in the first instance and Rs. 1,399 in second instance, thus for a total of Rs. 4,999. Third shop was redeemed by the plaintiffs on paying of Rs. 1,399 on 19.11.1978. It was a usufructuary mortgage, therefore, possession of the shop in question was also handed over to the mortgagee Mulla Khan Ali, who in the meantime put Narain as tenant in the suit shop. According to the case of the plaintiffs Narain also put Gani Mohammed as his sub-tenant in that shop. The plaintiffs have also proved service of notice dated 20.11.1978 upon Narain by the mortgagee Mulla Khan Ali Ex. A1. Plaintiff in the capacity of mortgagor gave notice to Gani Mohammed and Narain vide Ex. 6 & 9. All these documents have been proved by PW-1 Laxmi Narain.

17. It is on that basis that the plaintiffs prayed for eviction of the defendant-Gani Mohammed on the ground of default in payment of rent, her bona fide reasonable necessity, sub-letting etc. In written statement, however, the defendant denied their title. The plaintiffs got the suit amended and also added the ground of denial of title. An additional issue therefor was framed. The learned trial court decreed the suit on all the four grounds and in fact decided the issue as to denial of title in favour of the plaintiffs. The trial court thus held that the plaintiffs were the landlord and defendant-Narain was tenant and defendant Gani Mohammed was sub-tenant and thus passed a decree of eviction as also for damages and mesne profit. The learned trial court held that the suit shop was got redeemed by the plaintiffs from the mortgagee. PW-1 Laxmi Narain proved that he and Ram Chandra accompanied Kalyan Mal to Mulla Khan Ali to get the shop redeemed. The money was given by the plaintiff No. 1 and shop was got redeemed from the mortgage. PW-4 Ram Chandra has corroborated this fact in his statement. These witnesses prove that Mohan Lal was son of Bal Mukund. He has died and plaintiff No. 1 Prem Lata was his widow. PW-3 Sardar Mal also in his cross examination admitted the fact about death of Mohan Lal. The trial court therefore held that if the decree of eviction is passed against the tenant, it will also bind the subtenant. The trial court held that defendant Gani Mohammed failed to either properly plead or prove the case of adverse possession. If at all

he had to set up the case for adverse possession, why did he execute the rent note Ex. 27 in favour of Kalyan Mal.

18. The question therefore arise whether the first appellate court was justified in holding that the plaintiff-appellants were not able to prove the relationship of landlord and tenant. There is ample legally acceptable evidence to prove that the disputed shop along with two other shops were mortgaged with Mulla Khan Ali and that they were got redeemed by the plaintiffs. It is also proved that those three shops were owned by Bal Mukund, the father in law of the plaintiff-appellant No. 1 Prem Lata. One of these shops came to the share of her husband-Mohan Lal in partition. Plaintiff Nos. 2 & 3 are respectively son and daughter of plaintiff No. 1. Mere non-production of partition deed would not be fatal to the case of the plaintiffs because the defendant Gani Mohammed has not been able to show his better title. On the other hand, plaintiffs have produced the registered mortgage deed. The mortgage deed was registered on 19.1.1953 and exhibited in evidence on 24.3.1986 as Ex. 2. Thus a presumption can be drawn as to its genuineness with reference to Section 90 of the Evidence Act, being more than 30 years old document. The defendant Gani Mohammed has not produced any document whatsoever. The plaintiffs have produced number of notices served by the mortgagee on Narain, the principal tenant, then thereafter by Narain on the sub-tenant Gani Mohammed and also by the plaintiff on both of them. The plaintiff also produced documents Ex. 19 to 26 obtained from the Municipal Board proving their title in the disputed shop. As against this, the defendant Gani Mohammed has not produced a single document in evidence.

19. Coming now to the plea of adverse possession, which has found favour with the first appellate court, it is evident from the written statement filed by Gani Mohammed that all what is stated in para 10 of the written statement is that he was in possession of the disputed premises for last 50 years and that his possession was adverse as he is using the same as its owner. The plaintiffs are neither owner of the disputed premises, nor such premise is in their possession. In para 2 of the additional pleas similar averment was made. The defendant-Gani Mohammed however remained contended with that only and did not submit any evidence except appearing himself as DW-1 and producing one Banwari Lal as DW-2. Defendant-Gani Mohammed in his statement stated that this shop was in his possession ever since he gained senses. The defendant-Narain was never in possession of the shop. His parents have passed away 30-35 years ago. Earlier his father used to run his business from this shop. In his statement, he admitted that he executed the rent note Ex. 27 in favour of Kalyan Mal. But then, he sought to resile from that stand by stating that this rent note was executed in respect of adjacent shop. In cross examination, he admitted that Bal Mukund was "nagar seth" of Sunel township. He owned large properties. He had two sons Kalyan Mal and Mohan Lal. Mohan Lal has expired 15 years ago. Plaintiff No. -1- Premlata Bai was his widow and plaintiff No. 2 Purshottam was his son. Bal Mukund has also expired. He stated that his mother told him that this shop was purchased by them from Ramnath for a sale consideration of Rs. 1,200.

Therefore, he considered himself as owner of the shop. He has however failed to prove any sale deed or otherwise any other document to prove his title.

20. The trial court in view of the quality of evidence adduced on both the sides decreed the suit in favour of plaintiff. Dealing with issue No. 8 relating to adverse possession trial court relied on the judgment of Supreme Court in S.M. Karim Vs. Mst. Bibi Sakina, to hold that he, who sets up a case of adverse possession, has to specifically plead and prove the time of commencement of his possession and such possession should be continuous. It should be hostile and adverse to all and everyone. Another judgment of the Supreme Court in The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others, was also relied to hold that the possession received from permission cannot be converted into adverse possession if a period of 12 years has not expired from the date of such possession within the knowledge of the landlord. The trial court therefore held that the defendant has failed to prove his adverse possession by required standard of proof.

21. In the opinion of this Court, the first appellate court has not given weighty and convincing reasons to overturn the well discussed findings of the learned trial court. It is trite that mere pleading by itself will not prove the pleading of adverse possession. Except defendant-Gani Mohammed himself, no other witness has proved his adverse possession including DW-2 Bhanwar Lal, another witness produced by the defendant-Gani Mohammed. He has stated that he himself purchased the shop from said Bal Mukund in 1958. He had seen his father also running his business from the same shop which now the defendant Gani Mohammed occupies. In cross examination, he has stated that he has seen Gani Mohammed residing in the disputed shop for the last two to five years. This witness does not therefore prove continuous, uninterrupted and hostile possession of the defendant Gani Mohammed in the shop in question. Learned first appellate court appears to have made too much out of the plea set up by the plaintiff in para 13 of the plaint which is to the effect that once the mortgaged shop redeemed, nature of possession of the defendant Narain/Gani Mohammad became that of a trespasser. The first appellate court on that basis held that when the plaintiff himself was treating the defendant as trespasser, he could not simultaneously also claim him to be their tenants. In reaching to that conclusion, the learned first appellate court has completely lost sight of the fact that the plaintiff Bal Mukund was owner of the shop and the shop was mortgaged with Mulla Khan Ali, who let out it to defendant No. 1 Narain and, who, in turn, to defendant No. 2 Gani Mohammed, as sub-tenant. The redemption of shop shows unqualified and absolute title of the shop in the original owner Bal Mukund and therefore now in place of mortgagee Mulla Khan Ali, mortgagor would become landlord. Since original mortgagor Bal Mukund had died as per the evidence of PW-1 Laxmi Narain and PW-4 Ram Chandra, the shop in question having come to the share of Mohan Lal in partition on his death, plaintiffs, who are his widow and children, would become owner of the shop.

22. The alternative plea in para 13 that as a consequence of redemption, the defendant should now be treated as trespasser in the suit premises cannot therefore be the basis for denial of decree of eviction and recovery of possession. A Larger Bench of this Court considered this question in Pushpa Sharma, supra on a reference being made to it to the effect that whether in a suit filed on the basis of relationship between the landlord and tenant, making prayer for eviction on the grounds set forth u/s 13 of the Act, a decree for possession can be granted in favour of the plaintiff on the basis of his title and whether when the issue is framed on the basis of allegation of title also, the defendant asserts his own title and denies the plaintiff's title and both the parties lead evidence, can it be said that no prejudice is caused to the defendant if the decree for possession is based on proof of title of the plaintiff? Answering that reference, the Larger Bench held thus:

16. Our answer therefore to the questions referred is : (1) In a suit based on the relationship between the landlord and tenant, making prayer for eviction on the grounds set forth u/s 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, a decree for possession can be granted in favour of the plaintiff on the basis of his title.

(2) When any issue is framed on the basis of allegation of title of the plaintiff and the defendant asserts his own title and denies the plaintiff's title and both the parties lead evidence without raising any objection, question of prejudice caused to, the defendant may be seen if decree for; possession is to be granted on proof of title of the plaintiff.

17. It is however, made clear that, as a general rule where a suit is filed on the basis of tenancy and relationship of landlord and tenant then such suit should be decided on the basis of tenancy alone, and it should not be converted into a title suit. However, in a given case, as the present one where, the defendant herself sets up a title adverse to the plaintiff and/or does not raise an objection in framing an issue on the basis of title and leads evidence with full knowledge and the trial Court gives an adverse finding on such issue against the defendant, then the defendant cannot be permitted to advance the plea in the Appellate Court or Revisional Court that no decree for possession can be granted in such a case. It would be a different matter where the trial Court may suffer from inherent lack of jurisdiction not falling within the purview of Section 21, C.P.C. or the defendant may make out a clear case of prejudice with no fault or laches or acquiescence on his part. Such case may be rare, but it would be left to the discretion of the Court and in such rare case the Court may refuse to grant any decree for possession.

23. In view of above, it cannot be said that decree of eviction as also for recovery of possession could not be passed in the present case.

24. Next comes the argument that without the plaintiff No. 1 herself appearing in witness box, her case cannot be taken as proved on the testimony of her power

of attorney holder. In this regard, judgment of the Supreme Court in Janki Vashdeo Bhojwani, supra has been relied by learned counsel for the respondent. In that case, the Supreme Court while interpreting Order 3 Rule 1 and 2 CPC in a situation where power of attorney holder appears as a witness, held that power to depose in place of principal, held, extends only to depositions in respect of "acts" done by power of attorney holder in exercise of power granted by the instrument. Term "acts" would not include deposing in place of and instead of, the principal, for acts done by principal and not by power of attorney holder, who cannot depose for principal in respect of matters of which only principal can have personal knowledge and in respect of matters, on which principal is liable to be cross examined.

25. The contrary judgment cited is that of Ramkoo Bai, supra. In that case, it was held by the Supreme Court that eviction suit on the ground of bona fide requirement of landlord, does not require that landlord must enter the witness box to support his case because this is not a fact, which could be established only by landlord. In that case, the power of attorney holder, who was also son of the landlady, had appeared in the witness box, for whose necessity, the eviction was sought.

26. In Vidhyadhar, supra, the defendant No. 1 in the suit alleged that the sale deed executed by the defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only nominal sale consideration was paid. The defendant No. 1 did not enter into the witness box so that he did not state the facts pleaded in the written statement on oath in the trial court and avoided the witness box so that he may not be cross examined. This by itself is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction. Thus the Supreme Court has held that not entering the witness box gave rise to inference adverse against the party to suit.

27. In the present case, the original owner of the disputed property was Bal Mukund, who had mortgaged the property with Mulla Khan Ali. It was Mulla Khan Ali, who had let out the suit shop to Narain, who put the defendant Gani Mohammad as sub-tenant. Plaintiff is widow of Mohan Lal, the son of the deceased Bal Mukund. The original owner himself died long ago. The plaintiff-widow has not appeared in witness box and in her place PW-1 Laxmi Narain, her power of attorney has appeared. All that he has stated are the facts which are in his personal knowledge and in a way, he knew more than what the plaintiff No. 1 herself would have known because it was he only who at all stages, was actively involved in all the transactions. He stated that deceased Bal Mukund had two sons, one Kalyan Mal and another Mohan Lal. He had partitioned his property amongst them during his lifetime. Mohan Lal died in 1968 and was survived by the plaintiffs. Bal Mukund himself died on 16.8.1978. The old survey number of the disputed shop was 1012 and its new survey number in the records of the Municipal Board, Sunel is 704. Two out of the three mortgaged shops came to

the share of Kalyan Mal and third shop came to the share of Mohan Lal. Kalyan Mal got the mortgage in respect of two shops redeemed after paying Rs. 3,600. Plaintiff Prem Lata gave a sum of Rs. 1,399 to Kalyan Mal, elder brother of her late husband for getting the mortgage of one shop of her share redeemed. He accompanied Kalyan Mal along with Ram Chandra to Mulla Khan Ali on 19.11.1978 for getting the mortgage redeemed after giving money. The mortgage was got redeemed and Mulla Khan Ali in his presence made endorsement of redemption at the back of mortgage deed, to which he also was one of the witnesses and Ram Chandra Soni was another witness. Mulla Khan Ali told him that he had let out the shop in question to Narain on rent of Rs. 6 per month and that he would serve notice on him for vacating the shop and send a copy to him. The copy of notice is Ex. 3, postal receipt is Ex. 4 and registered A.D. is Ex. 5. Narain informed that he had sublet the shop to Gani Mohammed. Narain informed him that plaintiff Prem Lata told Gani Mohammed to vacate the shop, but he denied. Then a notice was got served on Gani Mohammed through Narain by plaintiff Prem Lata. That Prem Lata has no other shop except the disputed one, which she requires for her son Purshottam, who wants to set up a grocery shop. When the suit was filed, he was 12 years old but now he is 18-19 years old. In view of all these facts, it cannot be said that he was witness of something that was within the exclusive knowledge of the plaintiff No. 1 and not known to him.

28. There is no invariable rule that in every case where the plaintiff has not appeared in witness box, the suit has to be dismissed or where the defendant has failed to appear as witness, the suit has to be decreed. It would depend upon the qualify and kind of evidence that the power of attorney holder seeks to give on behalf of the plaintiff or the defendant, as the case may be.

29. In *Rattan Dev Vs. Pasam Devi*, the Supreme Court held that the Court would not be justified in dismissing the suit merely on the ground that plaintiff had not examined himself. Non-examination of the plaintiff had to be kept in mind while examining the other eye witnesses. It was held that the first appellate court also erred in law in dismissing the suit merely by drawing adverse inference against the plaintiff by his non examination. The matter was therefore remanded back to the first appellate court to decide it afresh.

30. The Supreme Court in *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, was dealing with a case where plaintiff purchased the property as non-resident Indian. Agreement to sale was entered into between the parties through power of attorney holders. The agreement on behalf of the plaintiff was signed by different attorney-holder and suit was filed by another attorney-holder. Earlier power of attorney-holder, who executed the agreement on behalf of the purchaser, was not examined and the subsequent one, who was examined stated unawareness about the transaction. The plaintiff could not arrange for balance amount on the day fixed. The defendant vendor contended that the plaintiff was not ready and willing to perform the contract. Agreement provided for payment

of double amount of earnest money in case of breach by vendor. It did not provide for specific performance of contract. In those facts, their Lordships while examining the legal position as to who should give evidence in regard to matters involving personal knowledge, summarised the following principles of law after considering the case of Vidhyadhar Vs. Manikrao and Another, Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, and Shambhu Dutt Shastri Vs. State of Rajasthan and Others,

(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.

31. The power of attorney holder can also be therefore a competent witness to depose on behalf of the plaintiff in respect of matters of which he has personal knowledge or all matters which he has done or of his actions or act or if he is handling transactions pursuant to power of attorney by principal or on matters which are known to him personally and not to the principal or where the principal at no point of time had personally handled or participated in the transaction and has no personal knowledge of the transaction and the entire transaction has been held by the attorney holder or where eviction is sought on behalf of the principal-landlord on the ground of bona fide and reasonable necessity or on behalf of buyer/purchaser seeking specific performance to show readiness and willingness to purchase. But for last two of the enumerated instances, most of the situation aptly apply to the present case.

32. The plaintiff is required to prove his case by his own evidence as also by evidence of other witnesses and the documentary proof. If he withhold the best evidence, the court is entitled to draw an adverse inference against him that had he produced such evidence, it would have gone against him. The failure of the plaintiff or the defendant to appear in witness box in certain situations entitles the Court to draw adverse inference against him. The principal behind drawing of adverse inference is thus based upon the "best evidence theory", which postulates that a Court can draw an adverse inference against the party, who withholds the best evidence in his possession. This is however an abstract proposition of law, applicability of which would depend on facts and circumstances of each case. The fact that the Court may draw adverse inference does not mean that Court must in all circumstances should draw adverse inference against such party. The Court may draw adverse inference only if it is satisfied that such party is willfully withholding the best evidence from coming to the Court or has not appeared to prove such facts, which are within his personal experience and knowledge. If however the necessary facts have otherwise been proved by production of cogent evidence, the Court is equally entitled not to draw adverse inference because in that case the Court has no reason to ignore the evidence if it sufficiently proves the case of the plaintiff or the defendant, as the case may be. It cannot depend on the degree of evidence that has been produced and discharge of burden of proof by such litigant. Reference may in this connection be usefully made to the judgment of the Supreme Court in Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others, The appellants in that case before the Supreme Court were asserting their right to sell the property under attachment but had failed to appear before the court below in support of their assertion and on that basis, it was contended that necessary presumption against them should have been raised by the courts

below on account of their failure to appear before the Court. In those facts, the Supreme Court rejected the contention for raising adverse inference against the appellants holding that the question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record. (emphasis supplied)

33. In the present case, most part of the transactions were carried out through power of attorney holder, which is what he has sought to prove in his statement and therefore to that extent, deposition can be validly accepted in evidence. Moreover, once it is held that the plaintiffs are the owners of the disputed land, the denial of title by the defendant No. 2 itself would be sufficient to decree the suit for his eviction.

34. Let me now analysis the other evidence of the plaintiff. PW-3 Mehmood has also proved that he was witness to rent note Ex. 7, which Gani Mohammed executed in favour of Kalyan Mal. He prepared it in the presence of Gani Mohammed and thereafter it read over to him and then Gani Mohammed signed it. He gave that rent note to Ram Narain, who was relative of Kalyan Mal. He has denied the suggestion by DW-1, defendant Gani Mohamed that this rent note was pertaining to another adjacent shop. PW-2 Badri Lal has proved that Ram Narain gave this rent note to him and at his askance, he produced the same before the Court. Ram Narain was aged 85 years old and had poor vision and therefore unable to walk as he was very weak. PW-2 Ram Chandra Soni has proved his signature on Ex. 2, the redemption deed and proved that the properties of Bal Mukund were partitioned and plaintiff Prem Lata had no other shop except this shop. PW-5 Nanu Ram has also proved that this shop was mortgaged by Seth Bal Mukund with Mulla Khan Ali and Gani Mohammed approached Narain that he should persuade Mulla Khan Ali to give this shop on rent to him. They both accompanied Narain to Mulla Khan Ali, but Mulla Khan Ali told him that he could let out the shop to Narain but not to Gani Mohammed. The evidence thus clearly proves that right from the beginning, possession of Gani Mohammed was permissive in nature in the capacity of sub-tenant of Narain, who was the tenant of the mortgagee and with the redemption, the mortgagee was substituted by the original owner as landlord. Plaintiffs as his legal heirs inherited the suit shop, therefore, they are entitled to recover the possession of the suit shop.

35. While considering the scope of interference by this Court u/s 100 CPC, it should be noted that this is not a case where the courts below have concurrently held against the appellants. The trial court decreed the suit in favour of plaintiffs, but the first appellate court has reversed the same. The core issue would be whether the first appellate court was justified in reversing the judgment of the trial court. That will have to be tested on the comparative strength of the reasonings given by two courts in support of their findings on different issues. The judgment in Kondiba Dagadu Kadam, supra is distinguishable on facts and cannot be applied to the present case. Since the findings recorded by the learned

first appellate court on the plea of adverse possession is wholly perverse, which no reasonable person of ordinary prudence in the face of available evidence on record could reach, this Court would be justified u/s 100 CPC in making interference. There can be no quarrel with the proposition of law settled by the Supreme Court in the cases of Janki Narayan Bhoir, supra and Kondiba Dagadu Kadam, supra cited by the learned counsel for the respondents. The Supreme Court in Janki Narayan Bhoir, supra held that the High Court was not justified in reversing the judgment passed by the first appellate court on finding of fact, which was based on proper and objective appreciation of evidence without indicating any substantial question of law that arose between the parties. Such is not the situation in the present case. Herein, the substantial question that is involved is whether the ingredients necessary for proving the plea of adverse possession were present. The detailed analysis of the evidence, as made above clearly show that the learned first appellate court has completely misread and unappreciated the evidence. It has overlooked the evidence on the side of plaintiffs and reversed the judgment and decree passed by the learned trial court, even when there was no evidence at all to prove the case of adverse possession. Finding on that issue in favour of the defendant was returned by the learned first appellate court without there being any evidence of his uninterrupted hostile and adverse possession. It has failed to consider the most significant aspect of the matter that possession of the defendant was presumed from the beginning.

36. As regards the registered mortgaged deed, reference should be made to the judgment of Supreme Court in Prem Singh and Others Vs. Birbal and Others, The Supreme Court therein has held that there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof thus would be on a person who leads evidence to rebut the presumption. If he has not been able to rebut his presumption, the document has to be accepted as correct. In the present case also, the defendant failed to rebut the presumption attached to the mortgage deed, which also contained the endorsement as to its redemption. In view of above discussion, the appeal succeeds and is accordingly allowed. The judgment and decree passed by the first appellate court dated 16.3.1994 is set aside and that of the trial court dated 1.8.1990 is restored. Parties are left to bear their own costs.