

**(2007) 06 BOM CK 0047**

**In the Bombay High Court**

**Case No : Second Appeal No. 165 of 1989**

Tulsabai Ramkrishna Telrandhe and Others

APPELLANT

Vs

Champalal Khemchand Jain, Dead through L.R. and Another

RESPONDENT

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**Date of Decision : 05-06-2007**

**Acts Referred:**

Transfer of Property Act, 1882 — Section 105

**Citation :** (2007) 5 ALLMR 578 : (2007) 5 BomCR 373 : (2007) 5 MhLj 886

**Hon'ble Judges :** Naik Vasanti A., J

**Bench :** Single Bench

**Advocate :** M.D. Samel, for the Appellant; R.L. Khapre, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Naik Vasanti A., J.—This second appeal is preferred by the original defendant against the judgment and decree passed by the 11th Joint Civil Judge, Jr. Dn., Nagpur, in Regular Civil Suit No. 163 of 1982 on 27-4-1983, as also the judgment and decree passed by the Additional District Judge, Nagpur, in Regular Civil Appeal No. 466 of 1983 on 7th October, 1986.

2. The brief facts giving rise to this second appeal and to the controversy in question are stated as under:

The respondent is the original plaintiff. The plaintiff had filed a suit for declaration that the agreement dated 22-3- 1979 was, in fact, an agreement of tenancy and the plaintiff was the lawful tenant of the defendant in respect of the suit premises. It is not in dispute that the defendant was the owner and the plaintiff was the tenant of the suit premises. The plaintiff was paying monthly rent of Rs. 100/- to the defendant. The defendant filed proceedings against the plaintiff under the provisions of C.P. & Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as the Order for the purpose of brevity). The Rent Controller, by the order dated 22nd February, 1971, granted permission to the defendant to terminate the tenancy of the plaintiff. In view of the grant of

permission, the defendant filed Regular Civil Suit No. 1417 of 1973 for ejectment and possession of the suit premises in the occupation of the plaintiff. The suit filed by the defendant was decreed vide judgment and decree dated 9th August, 1976. The plaintiff preferred an appeal against the judgment and decree. The appeal was partly allowed. The appellate Court held that the defendant was entitled to mesne profit " Rs. 100/- per month instead of Rs. 150/- per month granted by the trial Court. The decree in respect of ejectment and possession was, however, maintained. The plaintiff preferred second appeal before this Court bearing Civil Appeal No. 664 of 1978. It is not in dispute that during the pendency of the second appeal parties settled the matter out of Court on 22nd March, 1979 and in view of the compromise, the second appeal was withdrawn by the plaintiff on 26th March, 1979.

3. It is pleaded by the plaintiff in the instant suit that the defendant had agreed to accept Rs. 300/- per month from the plaintiff towards the rent from 1st February, 1979 and the defendant allowed the plaintiff to remain in the premises as a tenant till 31st January, 1982. According to the plaintiff, the compromise dated 22nd March, 1979, in fact, created a new tenancy though the word Harjana (compensation) was used in the compromise deed. It was further pleaded that the defendant also used to receive Harjana from 1st February, 1979 onwards. It was the case of the plaintiff that though the tenancy was continued in view of the compromise dated 22nd March, 1979, the plaintiff apprehended that the defendant would execute the decree passed in Civil Suit No. 1417/1973 and take the possession of the suit property and, therefore, the plaintiff approached the Court seeking the aforesaid declaration.

4. The defendant filed his written statement and denied the claim of the plaintiff. The ownership of the defendant over the suit premises was admitted. The facts about the filing of the Rent Control proceedings as well as the civil suit were also admitted. It was pleaded by the defendant that the premises were permitted to be retained by the plaintiff only till 31st January, 1982, at the request of the plaintiff so as to enable him to establish his business. It was further pleaded that the plaintiff had agreed to pay Rs. 10/- per day as mesne profit. The defendant pleaded that the word "Harjaja" was not used as a substitute for the word "rent" and the defendant cannot be prevented from executing the decree passed against the plaintiff.

5. On the pleadings of the parties, the trial Court framed the necessary issues and held that the plaintiff proved that he was the tenant of the suit property, as per the agreement dated 22nd March, 1979. The trial Court further held that the plaintiff proved that he had paid the rent though the word "Harjana" was used in the agreement executed between the parties as also in the receipts. In view of the aforesaid findings, the trial Court decreed the suit of the plaintiff for the declaration and injunction as prayed for. In an appeal preferred by the defendant against the judgment and decree passed by the trial Court, the Additional District Judge, Nagpur, upheld the findings recorded by the trial Court and consequently

dismissed the appeal filed by the defendant.

6. Shri Samuel, the learned Counsel for the appellant, submitted that both the Courts committed a gross illegality in reading the document Exh.29 i.e. the compromise deed. It is submitted on behalf of the appellant that both the courts have misconstrued the document Exh. 29 as also wrongly interpreted the word "Harjana" to hold that while incorporating the word "Harjana" in the agreement Exh. 29, the parties had intended that the payment of amount of Rs. 300/- was not towards damages, but was towards the payment of rent. The Counsel for the appellant submitted that a combined reading of Exhs. 21, 30, 31, 32 and 33 clearly shows that the plaintiff was merely permitted to occupy the suit premises till 31st January, 1982, and the defendant was entitled to receive the amount stipulated in the agreement not towards the rent, but towards mesne profits or damages. According to the Counsel for the appellant, suit filed by the plaintiff was liable to be dismissed as the terms of Exh. 29 were clear and unambiguous and there was hardly any scope for the Court to hold that the agreement intended the continuation of the lease when the payment of an amount of Rs. 10/- per day was towards the damages or mesne profits. The counsel for the appellant relied on the decisions reported in Bai Chanchal and Others Vs. Syed Jalaluddin and Others, and Supreme General Films Exchange Private Limited Vs. Durgaprasad Jannath Tiwar, to substantiate his submissions.

7. Shri Khapre, the learned Counsel for the respondent, on the other hand supported the judgment passed by both the Courts and submitted that the Courts were justified in granting the declaration as prayed by the plaintiff. According to the learned Counsel for the respondent, the courts rightly considered that the word "Harjand" did not mean "Mesne Profit" but meant "rent". According to the learned Counsel for the respondent, the original rent payable by the plaintiff was Rs. 100/- per month. The trial Court directed the plaintiff to pay Rs. 150/- per month towards mense profits. The decree was modified by the Appellate Court and the plaintiff was directed to pay an amount of Rs. 100/-towards mesne profits. According to the respondent, since mesne profits were already determined by the appellate Court to be only Rs. 100/- per month, there was no occasion for the plaintiff to pay an amount of Rs. 300/- to the defendants towards the mesne profits. It is submitted on behalf of the respondents that Rs. 300/- was agreed to be paid to the defendant as monthly rent and not towards the mesne profits. It was then submitted on behalf of the respondent that the agreement executed between the parties on 22nd March, 1979 was in conformity with the provisions of Section 105 of the Transfer of Property Act and was indeed a lease deed. It was submitted that in any case, the agreement dated 22nd March, 1979 was merely an agreement executed between the parties and could not be given the status of a compromise decree. The counsel for the respondent relied on the decision reported in (Ratilal Narbheram v. Welji Nagji) 1975 Mh.L.J. 136 to substantiate his aforesaid submissions and further pointed out that the facts of the case in hand and the case in the aforesaid reported decisions are almost identical except for the use of the word

"rent" in the reported case instead of the word "Harjana" in the present case.

8. When this matter came up for admission before this Court, this Court, by the order dated 30th June, 1989, admitted this second appeal by the following order:

Heard Shri Samel, Admit. Construction of document marked Exh. 29 would be the substantial question of law involved in this appeal.

Since the entire case rests on the construction of the document marked at Exh. 29 and since the plaintiff has sought declaration in view of the agreement dated 22-3-1979, the question of interpretation of the document would be the sole substantial question of law involved in this second appeal. The substantial question of law is, therefore, re-framed as under:

Whether the execution of the document Exh. 29 resulted in the continuation of the tenancy or a creation of a new tenancy and whether the word "Harjana" in Exh. 29 means or constitutes "rent" or "mesne profit" ?

9. In the backdrop of the aforesaid facts which are admitted by the parties, it would be necessary to peruse the documents Exhs. 29, 30 to 33, to answer the substantial question of law involved in the instant case. The document, Exh. 29 reveals that the matter was compromised between the plaintiff and the defendant on 22-3- 1979. Clause 1 of the compromise deed recites that the defendant would not execute the decree passed in Regular Civil Suit No. 1417/1973 till 31st January, 1982. It was then mentioned in clause 2 of the compromise deed that the defendant had received the compensation towards occupation of the property and the litigation charges from the plaintiff. Clause 3 recited that the plaintiff would pay an amount of Rs. 10/- per day towards the mesne profits. It was also recited in the same clause that the plaintiff would be liable to pay the aforesaid amount of mesne profits " Rs. 10/- per day at the end of each month and in case the plaintiff fails to pay the amount of damages consistently for a period of two months, the defendant would have a right to seek the possession of the property prior to 31st January, 1982. It was then stated that in such a case, the plaintiff would be liable to pay an amount of Rs. 17/- per day to the defendant. The deed further recited that the plaintiff would withdraw the second appeal filed by the plaintiff and the defendant would also withdraw the execution proceedings filed before the executing Court according to the terms and conditions stipulated in the compromise deed. Exhs. 30, 31, 32 and 33 are the acknowledgments/receipts issued by the defendant to the plaintiff acknowledging the payment of certain sum towards the occupation charges/damages.

10. The terms of Exh. 29, agreement executed between the parties are clear and unambiguous. As rightly pointed out on behalf of the appellant, there was hardly any scope for the Courts for interpreting the terms of the compromise deed. The compromise terms merely permitted the plaintiff to occupy the premises till 31st January, 1982 on payment of a particular amount towards damages or mesne profits. The terms of the compromise deed clearly supported the plea of the

defendant that he had merely permitted the plaintiff to remain in the property till a stipulated future date so as to give an opportunity to the plaintiff to establish his business elsewhere. The terms of the compromise deed clearly showed that the plaintiff agreed to pay Rs. 10/- per day to the defendant towards damages or mesne profits and for the sake of convenience instead of paying the amount on a daily basis, it appears that by the terms of the compromise, the plaintiff was required to pay the amount at the end of each calendar month. The compromise deed further stipulated, as noted herein above, that in case of default by the plaintiff to pay the per day damages at the aforesaid rate, the defendant was entitled to seek the execution of the decree for eviction even prior to 31st January, 1982 though by the compromise deed, there was a postponement of the execution of the decree till 31st January, 1982 if the conditions stipulated in the compromise deed were complied with. In view of the aforesaid compromise, it clearly appears that the defendant had permitted the tenant to occupy the premises for a couple of years on the payment of a particular amount towards mesne profits. The compromise deed merely gives a concession to the plaintiff to use the premises for some more time on the conditions stipulated in the compromise deed. By no stretch of imagination, it can be said that by the compromise deed Exh. 29, the tenancy rights were once again created in favour of the plaintiff or that the tenancy was continued. Section 105 of the Transfer of Property Act would not be applicable to this compromise deed which, in clear terms, merely defers execution of the decree till 31st January, 1982 and permits the plaintiff to occupy the premises on certain terms and conditions and on payment of certain amount towards mesne profits. The substantial question of law is, therefore, answered in the negative and in favour of the defendant/appellant.

11. The word "Harjana" means "damages" or "mesne profit" and the word "Harjana" was also incorporated in Exh. 29 by the parties, knowing fully well that the word "Harjana" means "damages" and was not the substitute for the word "rent". In fact, Clause 2 of the compromise deed itself records the word "damages" and mesne profits. Not only is the word "rent" conspicuously absent in the compromise deed, but, in fact, a clear mention of the words "damages" and "mesne profits" is made in the compromise deed. The acknowledgment receipts at Exhs. 30 to 33 also do not use the word "rent" but use the word "Harjana" or damages. The case of the appellant is fortified by the judgment reported in Bai Chanchal and Others Vs. Syed Jalaluddin and Others, and Supreme General Films Exchange Private Limited Vs. Durgaprasad Jannath Tiwar, . In fact, the case in hand is covered by the decision reported in Bai Chanchal and Others Vs. Syed Jalaluddin and Others, . In an identical set of facts, the Supreme Court observed that the terms of the consent decree in that case neither constituted a tenancy nor a license and all that the decree-holder did was to allow the judgment debtor to continue in possession for five years on payment of mesne profits as a concession for entering into a compromise. The judgment reported in Ratilal Narbheram v. Welji Nagji 1975 Mh.L.J. 136 would

not be of much assistance to the plaintiff as the facts in the reported case were not only not identical or similar, but were totally converse to the facts in hands. In the aforesaid reported decision, the defendant therein had agreed to pay the rent to the plaintiff from 1-7-1995 " Rs. 25/- per month and in case of default in payment of rent for three months, the plaintiff was at liberty to obtain possession of the suit shop by applying for the execution. In the reported decision, what was payable by the defendant therein was the rent and not damages or mesne profits as found in this case. Further, there was no time or date fixed for delivery of possession as fixed in this case as 31st January, 1982. It is also notable that in the facts of the reported decision, the decree was executable only on default in the payment of rent for a period of three months and the execution of the decree was not deferred to a particular date as has happened in the instant case. The case in the reported decision is clearly distinguishable on facts and, therefore, the ratio laid down therein cannot be made applicable to the facts of this case.

12. For the reasons aforesaid, the second appeal succeeds and is allowed with costs. The judgment and decree passed by the 11th Joint Civil Judge, Jr. Dn., Nagpur, in Regular Civil Suit No. 163 of 1982 on 27-4-1983, as also the judgment and decree passed by the Additional District Judge, Nagpur, in Regular Civil Appeal No. 466 of 1983 on 7th October, 1986, are hereby set aside. The suit filed by the plaintiff bearing Regular Civil Suit No. 163 of 1982 is hereby dismissed.