

(2014) 03 BOM CK 0143

In the Bombay High Court

Case No : Second Appeal No. 675 of 2013 with Civil Application No. 12386 of 2013

Vishwanath Hiralal Joshi

APPELLANT

Vs

Vimalabai Magangal Joshi and Ramchandra Chaganlal Joshi

RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2
Evidence Act, 1872 — Section 100 101

Citation : (2014) 5 ALLMR 561 : (2014) 5 BomCR 353

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : G.V. Wani, for the Appellant; V.T. Choudhari, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and decree of R.C.A. No. 259/2007 which was pending in the Court of District Judge-2, Jalgaon. The appeal was filed by present respondent/owner against judgment and decree of R.C.S. No. 71/2001 which was pending in the Court of Civil Judge, Junior Division, Jalgaon. The suit was filed by present respondent for relief of possession of some premises and the suit was dismissed by the Trial Court. The First Appellate Court has set aside that judgment and decree and the decision is given in favour of owner. Both the sides are heard. It is the case of respondent/owner that the defendant is a son of sister of her mother-in-law. It is contended that the defendant was in dire need of some premises for starting business as he was unemployed. It is contended that considering his need and relationship, the plaintiff allowed him to use plat-form portion (Ota portion) of her house for the business. It is contended that defendant was in financial crises and so, such permission was given and it was gratuitous license. It is her case that when she made demand to vacate the premises, the defendant refused to do so and so, she was required to file suit for possession.

2. The defendant/present appellant took many defences in the suit. He tried to defend the suit by contending that the plaintiff has no title and she is not absolute owner of the property. He took the defence that he is in possession as a tenant and not as a licensee. He contended that the premises was given to him for monthly rent of Rs. 50/- and this amount was increased from time to time and on the date of suit, the monthly rent was Rs. 350/-. It is his case that he runs a Sweet Mart in the premises and he has earned reputation and goodwill. He prayed for dismissal of the suit.

3. The plaintiff examined her husband, who was holding general power of attorney for the plaintiff. She examined one more witness to prove that it is the relationship of licensor and licensee. The defendant examined himself and he produced some record to show that he is a tenant.

4. The Trial Court dismissed the suit on the ground that plaintiff had not stepped in the witness box and in view of nature of dispute, the evidence given by general power of attorney holder of plaintiff cannot prove the case. It is observed that the plaintiff has failed to prove that the defendant is licensee. However, it is also held that the defendant has not proved that he is a tenant. The Trial Court placed reliance on the case reported as Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, and the Trial Court has held that the evidence of power of attorney cannot be used to prove that the defendant is licensee.

5. The First Appellate Court has observed that there is the evidence of power of attorney, husband of plaintiff to prove that defendant is licensee and the evidence also shows that he has personal knowledge about the permission given by the plaintiff in that regard. The evidence of one Shri. Pande (PW 2), a tenant of plaintiff occupying some portion of the same house, is also believed by the First Appellate Court. The First Appellate Court has considered the circumstance that there is no documentary evidence with the defendant like rent receipt and it is held that the defendant has failed to prove that he is a tenant. In view of these circumstances, the decree of possession is given in favour of the plaintiff.

6. In the appeal memo, following grounds are mentioned and the learned counsel for the appellant submitted that these grounds need to be considered as substantial questions of law, which are as under:-

(i) That, the relevant material is not considered by the Courts below and that material includes the deposition given in previous proceeding and data register viz. assessment record of the Municipal Council and the license under the Shop Act.

(ii) That, wrong inference is drawn by the Appellate Court that the defendant is licensee, and

(iii) That, the evidence of general power of attorney holder of plaintiff is used by the First Appellate Court and that is the error committed as the evidence is not admissible.

Arguments were advanced on these grounds by both the sides.

7. It was mainly submitted for the appellant that in a previous suit filed against other tenant by plaintiff No. 2, so called co-owner of the house, plaintiff No. 2 had admitted that present appellant was occupying some portion as tenant. It was submitted that copy of deposition from the previous proceeding of plaintiff No. 2 was produced and the Court ought to have read that deposition. It appears that initially the suit was filed by only plaintiff No. 1 and the defence was taken that suit is not tenable as the co-owner has not joined. After that, plaintiff No. 2 was added. This defence cannot be considered for many reasons. Firstly, the pleadings in written statement show that the defendant is admitting that plaintiff No. 1-Vimalabai had given the premises to him. In such a circumstance, the so called admission of plaintiff No. 2 could not have been used against the plaintiff No. 1. Further, no steps were taken by defendant to confront plaintiff No. 2 with this record. Unless that procedure was followed, the previous statement, admission could not have been used.

8. The circumstance that the name of defendant is shown as tenant in data register, assessment record of Municipal Council cannot help the defendant to prove his case. The purpose of creating such record is to make assessment of general tax. As per the procedure, the information is collected from the occupants and on that basis ratable value is fixed for assessment of general tax. So, only on the basis of such entry inference cannot be drawn that occupant is tenant. It appears that a license for starting shop was obtained by the defendant, but he did not take steps to bring on record the consent which must have been given by plaintiff No. 1 for issuing license to defendant. The record with regard to consent would have thrown sufficient light for proving the relationship. Such step was also not taken. The Trial Court held that the defendant failed to prove that he is a tenant and this finding is confirmed by the First Appellate Court.

9. So far as the evidence of the husband of plaintiff is concerned, it can be said that there is the evidence of husband to the effect that the talk with regard to giving of premises had taken place in his presence and such evidence is brought on the record during his cross examination. It is not disputed that in case of Janki cited supra, the Apex Court has laid down that in view of the provisions of Order 3, Rule 1 and 2 of C.P.C., the general power of attorney holder can depose only in respect of "acts" done by him in pursuance to the power of attorney, but he cannot depose in respect of the matter which is within personal knowledge of the principal. It is observed that for proving the facts which are within personal knowledge of principal, the principal needs to be examined and he needs to be subjected to cross examination. There cannot be any dispute over this proposition. The facts of this reported case were altogether different. There was specific defence taken by the wives of the debtor that they had share in the property. The property standing in the name of husband was subjected to attachment for recovery of debt taken by their husband. In view of these circumstances, the Apex Court held that it was necessary for the persons, raising

objection, the wives, to step in witness box and to give evidence about independent source of income and to show that they had contributed towards the purchase of property which was standing in the name of their husband. On the aforesaid point, one more case reported as S. Kesari Hanuman Goud Vs. Anjum Jehan and Others, was cited. This suit was filed for relief of specific performance of contract and similar observations are made by the Apex Court.

10. On the other hand, the learned counsel for respondent placed reliance on the case reported as Smt. Ramkubai Since Deceased by Lrs. and Others Vs. Hajarimal Dhokalchand Chandak and Others, . In this case, when the suit was filed for possession on the ground of bonafide requirement for personal use under the Rent Legislation, son of the landlady had given evidence as general power of attorney holder, the Apex Court held that the bonafide requirement is not such a fact that can be established only by landlord. In the case reported as Nathulal Gangabaks Khandelwal and Others Vs. Nandubai and Others, , when the landlord had not entered the witness box to depose his need, but bonafide requirement was established by the landlord by putting on record circumstances sufficiently indicating his requirement, the Court held that there was sufficient material and the non examination of the landlord cannot affect his case.

11. The aforesaid discussion made by the Apex Court and this Court shows that not in each and every case, it is necessary for the plaintiff to step in the witness box to prove his case. The plaintiff can put on record sufficient material with regard to his case. In the present case, it is already observed that general power of attorney holder is husband of the plaintiff and there is the evidence on his personal knowledge. Further, there is one more witness to prove that the defendant is licensee.

12. With regard to the propositions made in the cases cited supra, it needs to be observed that it is up to the Court to decide whether it was necessary for the plaintiff to examine himself to prove his case. When there is case like present one, it becomes necessary for the Court to ascertain the intention of the parties. The intention can be ascertained from oral evidence and also from surrounding circumstances. Only on the basis of possession of defendant and the circumstance mentioned above, the inference cannot be drawn that the possession of the defendant is as tenant. There is difference between concepts of "lease" and "license". If statutory provisions with regard to these concepts are seen, it can be said that for proving that defendant is tenant, the statutory requirement mentioned in Rent Legislation needs to be fulfilled. For license no record is required to be created, but when there is tenancy, some record like rent receipt is required to be created. When the plaintiff comes with the case that defendant is a licensee, in view of the statutory provisions with regard to "licence" (mentioned in Indian Easements Act, 1982) and "lease" (mentioned in Rent Legislation) and in view of provisions of section 100 and 101 of Evidence Act, when there is such dispute, the burden lies on the defendant to prove that he is a tenant. In the present case, the defendant has failed to discharge this

burden. There are concurrent findings on this point against the defendant of both the Courts below. Thus, no arguable case at all is made out and appeal cannot be admitted. This Court holds that no substantial question of law exists as contended in the appeal memo.

13. In the result, the appeal stands dismissed. In view of dismissal of appeal, application filed for stay does not survive and same is disposed of accordingly.