

(2014) 02 BOM CK 0139

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 399 of 1999

Vatsala and Others

APPELLANT

Vs

Divisional Railway Manager
(Works), The Estate Officer,
Government of India and
Ramesh Shinde

RESPONDENT

Date of Decision: Feb. 21, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 3, Order 8 Rule 4, Order 8 Rule 5
- Public Premises (Eviction of Unauthorised Occupants) Act, 1971 - Section 5 5(1)
- Transfer of Property Act, 1882 - Section 53A

Citation: (2014) 2 ABR 725 : (2014) 5 ALLMR 137 : (2015) 1 BomCR 601 : (2014) 4 MhLj 864

Hon'ble Judges: A.P. Bhangale, J

Bench: Single Bench

Advocate: M.R. Joharapurkar, for the Appellant; N.P. Lambat, for the Respondent

Final Decision: Dismissed

Judgement

A.P. Bhangale, J.

This Second Appeal was admitted on 30.10.2001 on the substantial question of law as stated below:

Whether the Courts below failed to consider the admission in view of Order VIII, Rules 3, 4 and 5 of the Code of Civil Procedure?

This appeal arises out of the Judgment and Order dt. 12.7.1999 passed by the learned 6th Additional District Judge, Nagpur in Regular Civil Appeal No. 192 of 1992, which was dismissed. The Regular Civil Appeal arose out of the Judgment and Order dt. 24.2.1992 passed in Regular Civil Suit No. 996 of 1987 whereby the suit was partly decreed granting refund of a sum of Rs. 50,050/- along with interest @ 18 % p.a. from the date of deposit till realisation of the whole amount.

2. The facts, briefly stated, are as under:

The original plaintiff namely Bhika S/o. Antu Kale had filed Regular Civil Suit No. 996 of 1987 against the Railways for possession and perpetual injunction and costs of the suit. According to the plaintiff, he is a retired Railway servant. In the year 1981, he came across a proposal from the Divisional Railway Manager (Works), Central Railway, Nagpur for giving plots on licence. The plots were belonging to the Railways at various places and the Railways had invited applications from the members of public desirous of taking such plots on licence. The plaintiff, since he is a retired servant of Railways and as, according to him, he belongs to the Scheduled Caste community, he applied for grant of a plot on the basis of licence for yearly charges of Rs. 7512.50, which were to be deposited before taking possession of the plot in question. According to the plaintiff, he had deposited a sum of Rs. 15,025/- plus Rs. 25/- towards the process fee to the Railways and an agreement dt. 31.1.1982 was entered into. The plaintiff requested the defendant/Divisional Railways Manager (Works), Central Railway, Nagpur to hand over possession of plot no. 8 to the plaintiff for running a hotel pursuant to the agreement. But, defendant no. 1 did not do so despite issuance of letters to the defendant to give vacant possession of plot no. 8 to the plaintiff for running hotel business. According to the plaintiff, after retirement from the Railways, the plaintiff was in a most difficult situation, but the defendant did not give possession of the plot to him, though the plaintiff had made payment. Thereafter, the plaintiff came to know that plot no. 8 was unlawfully occupied by defendant no. 4 Ramesh Shinde to the extent of its 3/4th portion and defendant no. 4 refused to give possession of plot no. 8 to the plaintiff, though the plaintiff had signed the agreement for licence and paid the sum of Rs. 15,000/- to the defendant. However, defendant no. 2-Estate Officer, Central Railway, Nagpur issued a notice to the plaintiff on 14.9.1982 to vacate plot no. 8 on the ground that it was illegal occupation of the plaintiff although the whole of plot no. 8 was not given to the plaintiff. The plaintiff who claimed possession alternatively, had prayed for return of the sum of Rs. 15,050/- with interest from the defendant till the amount of realised.

3. The defendants/Railways resisted the suit claim by filing Written Statement (Exh. 25). According to the plaintiff, though he was not delivered vacant possession of the entire plot, he had constructed temporary shed of 10 x 8 ft. on that plot. On the pretext of encroachment detected, the plaintiff was served with notice by the Railways for eviction of the plaintiff from the piece of land which he had occupied on the ground that he was an unauthorised occupant. Notice was served by the Estate Officer of the Railways. The Railways had contended that the Civil Court has no jurisdiction to entertain the suit on the ground that the Estate Officer was authorised to evict the plaintiff.

4. The trial Court found that there was an agreement of license between the plaintiff and the defendant on 24.1.1982 and the plaintiff had already encroached upon the

open plot of land admeasuring 10 x 8 ft. adjacent to plot no. 8 in the year 1976. Thus, the trial Court found that possession of suit plot no. 8 was not handed over to the plaintiff, but he had encroached upon it to the extent of 10 x 8 ft. and by notice dt. 26.11.1982, defendant no. 2/Estate Officer, Central Railway, Nagpur had directed the plaintiff to remove himself from the encroached portion of the land or otherwise eviction proceedings will have to follow. Thus, on the finding that the plaintiff did not vacate the encroached portion of plot no. 8, the suit of the plaintiff for recovery of possession was dismissed. However, the suit for refund of amount in the sum of Rs. 15,050/- was decreed with interest @ 18 % p.a. from the date of deposit till realisation of the whole amount.

5. The unsuccessful plaintiff approached the first Appellate Court. But, the 6th Additional District Judge, Nagpur by Judgment and Order dt. 12.7.1999 was pleased to dismiss the appeal finding that the plaintiff, who continued the suit through his legal representatives and heirs, was not entitled to possession of plot no. 8 or perpetual injunction, as prayed for. Thus, R.C.A. No. 192 of 1992 came to be dismissed.

6. The learned Counsel for the appellants has made a reference to the ruling in the case of [Piru Charan Pal and Another Vs. Sunilmoy Nemo and Another](#), in order to rely upon the principle u/s 53A of the Transfer of Property Act, 1882 to argue that possession of the plaintiff over the suit plot of land needs to be protected on the ground that it was given pursuant to the agreement between the plaintiff and the Railway Administration.

7. Reference is also made to the case of [Krishna Kishore Firm Vs. The Govt. of A.P. and others](#), to argue that where lessee purchases interest of a co-lessor in undivided property in lessee's possession prior to expiry of the lease, possession by the lessee after expiry of the lease is held to be lawful. He made a reference to para 4 to argue that, in view of the provisions of Specific Relief Act, possession of a person over the suit property needs to be protected.

8. The learned Counsel also made a reference to the case of [Sambhaji Laxmanrao Pawar Vs. Abdul Wahed](#), to argue that, in the case of specific performance, presumption that damages are not adequate relief for breach of contract in respect of immovable property is not absolute. He also argued that when in a suit denial of a fact by the defendant in the Written Statement is not specific but evasive, said fact shall be taken to be admitted. In such cases, admission itself being proof, no other proof is necessary under Order VIII, Rules 3, 4 and 5 of the Code of Civil Procedure.

9. As against these submissions, the learned Counsel Mr. N.P. Lambat has submitted that, since the year 1971, the appellant is in possession of adjacent land to plot no. 8. According to the learned Counsel Mr. Lambat, the appellant as a formal Railway employee has prayed for allotment of land on licence basis and at the time of agreement dt. 21.1.1982, the appellant knew that defendant no. 4 was in actual

physical possession of plot no. 8. My attention is invited to Exh. 44 which is an order under sub-section 1 of Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 from the Office of Estate Officer, Central Railway, Nagpur holding the original plaintiff Bhiku Antu as an unauthorised occupant and calling upon him by order u/s 5(1) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and all persons who may be in occupation of suit land or any part thereof to vacate the said land within 45 days from the date of publication of the order dt. 8.12.1982 indicating that original plaintiff Bhikaji Antu Kale by reply dt. 8.10.1982 to the notice dt. 14.9.1982 received from the Estate Officer refused to vacate the suit land in question till he gets certificate from the Railways to hand over plot no. 8. Under these circumstances, it appears that the plaintiff chose to file Civil Suit. In the Written Statement, which was filed on behalf of defendant nos. 1 to 3, it was contended that, in the year 1981, the Divisional Railway Manager (Works) proposed to him to have license of plots belonging to Railways at various sites in Nagpur and invited applications for the same and the plaintiff being a retired Railway servant, had applied for plot no. 8 near S.T. stand at Nagpur. The application of the plaintiff for plot no. 8 along with the license fee of Rs. 7512.50 and water charges separately was decided by defendant no. 1, but possession of plot no. 8 could not be delivered to the plaintiff. Agreement of license was dt. 24.1.1982. Though plaintiff was not delivered possession of the plot; however, the plaintiff encroached upon the area of 10 x 8 ft. which was open land belonging to the Railways in the year 1976 and for which notices were served upon him since February, 1979 which the plaintiff did not reply. Thus, the Estate Officer was approached by the first defendant to recover possession of the plaintiff and notices were served by the Estate Officer accordingly in respect of encroached portion in the neighbouring land of plot no. 8. It is under these circumstances that the trial Court dismissed the main relief of possession and injunction and instead directed refund of amount to the plaintiff which was lying with the Railway Administration.

10. The proposed license at Exh. 39 in the trial Court would indicate that it was to be granted on yearly basis along with security deposit with restriction as to nature of articles to be sold from the licensed premises and permission to be obtained by the licensee for his business under local laws. The proposed agreement (Exh. 39) requires licensee to execute the necessary agreement for one year and requires the licensee to abide by all the conditions mentioned in the said agreement with reservation of the Railways to either accept or reject the same. The yearly rent or license fee was not paid by the licensee and he was given notice dt. 1.10.1981 to deposit the same within 85 days or else-informing the plaintiff that the plot allotted will be treated as cancelled.

11. Coming to the substantial question of law raised by the appellant as to whether the Courts below failed to consider the admission in the Written Statement, this Court cannot ignore the findings recorded by both the Courts below and the legal position in respect of the license. The agreement which was contemplated for grant

of license on behalf of the Railways in favour of the original plaintiff must be read in its entirety to gather intention of the parties thereof.

12. The ruling cited with reference to Section 53A of the Transfer of Property Act in respect of right of the proposed transferee claiming that his possession ought not to be disturbed cannot be attracted in this case as licensee is always deemed to be a licensee. It is not open for a licensee to set up title in himself or any other person once license is revoked by the licensor. It is the duty of the licensee to hand over possession or surrender possession of the property occupied by him as a licensee and seek his remedy separately if, according to him, he has acquired title to the property qua the licensor. Licensor is always entitled to proceed for recovery of possession when licensee fails to deliver possession of the property in question after termination of the licence. Only in exceptional cases wherein licensee may have claimed merger of his title with licensor's title, his possession may be protected. It is not the case here as the licensee here cannot have right to claim possession to the Railways premises. Merely because the original plaintiff had occupied 10 x 8 ft. portion of plot no. 8 or adjacent to it, it cannot be inferred that the act was done acting upon the licence with the Railway Administration or within permissible terms of licence. Protection, as claimed by the appellant, therefore, cannot be available to him merely on the basis of stray admission here or there in the Written Statement filed by the Railway Administration. Having considered the evidence led, the trial Court as well as the first Appellate Court by concurrent findings of facts decided to return the amount deposited by the original plaintiff along with interest. The original licensee (original plaintiff) expired during pendency of this proceedings. Under these circumstances, considering that the right of Second Appeal is neither natural nor inherent, but is a substantive statutory right regulated by law and when conclusion by both the Courts below appear in conformity with the legal position as to leave and license discussed above, I do not see any reason to consider the admission in the Written Statement so as to overturn the findings of facts recorded by both the Courts below in the facts and circumstances of the case in favour of legal heirs of licensee expired long back. Hence, I do not find any merit in the appeal. The appeal is, therefore, dismissed. No order as to costs. Mr. M.R. Joharapurkar, learned Counsel for the appellants states that an interim order of status quo is existing and that may be continued for a period of eight weeks since the appellants are desirous to have their remedy according to law. The parties shall maintain status-quo accordingly for a period of eight weeks from today.