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Court : Mumbai Nagpur

Decided On : Apr-07-2014

Judge : A.P. Bhangale

Appeal No. : Second Appeal No. 389 of 2008

Appellant : Sudhakar

Respondent : Shripat

Judgement :

Oral Judgment:

1. This second appeal was admitted on 19.11.2088 by formulating the question of law as under “

œWhether the Courts wrongly assumed jurisdiction to try the suit when the suit was filed on the basis of a relationship of licensor and licensee in view of the provisions of Section 26 (2) of the Provincial Small Causes Courts Act??

2. Section 26 (2) is in Chapter IV-AI of the Act relating to recovery of possession of certain immovable property and certain licence fees and rent. Section 26 of the Act provides that suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except those to which other Acts apply, shall lie in Court of Small Causes. The non obstante clause in sub-section (1) of Section 26 of the Act provides that

the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in the area within the local limits of the jurisdiction of the Court of Small Causes, or relating to the recovery of the licence fee or charges of rent therefor, irrespective of the value of the subject-matter of such suits or proceedings. Sub-section (2) of Section 26 of the Provincial Small Causes Courts Act, 1887 makes exception to sub-section (1) in the following terms “

œ(2) Notwithstanding contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Provincial Municipal Corporations Act, 1949, or the Maharashtra Housing and Area Development Act, 1976, or any other law for the time being in force, apply.?

3. Reading the above provisions, now let us consider the averments made in the plaint. In Civil Suit No. 935 of 2003 instituted in the Court of Civil Judge, Junior Division, Nagpur, respondent herein (original plaintiff) averred that he had purchased suit plot Bidpeth locality of Nagpur in the year 1976 and constructed kacchatwo rooms. He averred that defendant who is his distant relation, approached him and requested plaintiff to give him the said two rooms for a temporary period. Considering his difficulty, plaintiff allowed defendant to use and occupy suit premises for a period of six months. After six months when plaintiff asked defendant to vacate the premises, defendant avoided on the ground that he was searching for suitable accommodation but could not get it. After waiting for a long time since defendant was not vacating the suit premises, plaintiff issued legal notice dated 24.3.2003 calling upon him to vacate the suit premises. Defendant received the notice, but failed to comply with the demand made therein. Hence, plaintiff filed the suit based on his title alleging defendant as trespasser and claiming possession of suit premises and consequential relief of mesne profits etc.

4. Defendant by filing Written Statement opposed the suit. He stated that plaintiff did nothing for twelve years from 1980 till 24.3.2003 when the legal notice was issued and thus, he has become owner by virtue of adverse possession. Without prejudice to that defence, he stated that he had paid Rs. 60,000/- to plaintiff for purchase of plot. Defendant denied suit claim on all counts. He filed counter-claim for specific performance of contract. According to defendant, he paid Rs. 30,000/- to plaintiff on 15.4.1987 and Rs. 30,000/- on 15.5.1988 towards full consideration of suit property including execution expenses and he had constructed three rooms on the suit plot. However, defendant failed to execute sale deed in his favour. Plaintiff opposed counter-claim by filing written reply.

5. Learned trial Judge by judgment and order dated 20.1.2006 decreed the suit of plaintiff and dismissed counter-claim filed by defendant. Learned trial Judge decreed the suit and directed defendant to hand over possession of suit property to the plaintiff within six months. Unsuccessful defendant filed Regular Civil Appeal No. 121 of 2006. However, learned 1st appellate Judge by judgment and order dated 8.4.2008 dismissed the appeal.

6. Heard learned counsel for appellant (defendant). I had no advantage to hear learned counsel for respondent (plaintiff) as he was absent when the second appeal was called out for final hearing.

7. Learned counsel for appellant pressed into service only one ground before me and that is, that the Court of Civil Judge, Junior Division had no jurisdiction to entertain and try the suit and the jurisdiction vested with the Small Causes Court.

8. Looking into the nature of averments made in the plaint, it appears that the plaintiff had allowed by way of sympathy his distant relation (defendant) to occupy a room temporarily for about six months on the plot which plaintiff purchased. After expiry of such period of permissive occupation, the defendant became trespasser or was in wrongful possession without any legal right or status in the suit premises. That being so, one cannot overlook the legal position that jurisdiction of the trial Court must be determined on the basis of averments made in the plaint and not on the basis of defence taken or Written statement filed by the defendant. Plaintiff runs the risk of dismissal of his suit when he approaches the Civil Court alleging

that the defendant is a trespasser. When such averments are made in the plaint, claiming possession from the defendant alleging him as trespasser ordinary civil court will have jurisdiction to entertain and try the suit irrespective of defence taken by the defendant alleging tenancy; holding over past licence. However, if the defendant succeeds in proving what he has averred in the Written Statement, the court tryng that suit, can dismiss the suit on the ground that the plaintiff had failed to prove jurisdictional fact that the defendant is a trespasser or in wrongful possession of suit property without any title. Both the courts below by their concurrent findings of fact, upheld the case of plaintiff on the basis of plaintiffs title under a registered sale deed and the averment that after a period of six months, permissive occupation of the defendant became a wrongful possession without any legal right and that the defendant was a trespasser. The defendant in such case on the pretext of some title or agreement to sell or in the alternative, ownership by virtue of adverse possession cannot compel the plaintiff to go to a forum suggested by him to prove his case. Plaintiff may fall or stand on the strength of his own averment made in the plaint.

9. In **SanwarmalKejriwal v. Vishwa Cooperative Housing Society and ors** reported in **(1990) 2 SCC 288**, the Apex Court has observed in paragraph 24 thus “

œMoreover, the jurisdiction of the court in which the action is originated must be determined on the averments in the plaint or claim application and not on the defence taken by the adversary party. If the plaintiff goes to court alleging that the defendant is a trespasser, the ordinary court will have jurisdiction and its jurisdiction will not be taken away merely because the defendant pleads tenancy. If, however, the defendant succeeds in proving that he is a tenant in respect of premises, possession whereof is sought, the court trying the case would dismiss the suit on the ground that the plaintiff had failed to prove the jurisdictional fact that the defendant was a trespasser.....?

10. Thus, allegations or averments made in the plaint would determine the forum or jurisdiction of the civil court, because defendant by his plea in Written statement, cannot compel the plaintiff to go to another forum to which he cannot

go on the basis of averments made in the plaint. Hence, there is no merit in the appeal and substantial question of law formulated is answered accordingly. Trial of the civil suit by civil court in the present case is without any fault as to its jurisdiction.

11. Learned counsel for the appellant lastly contended that the defendant became owner of suit premises by adverse possession. This plea, even assuming it can be considered at this stage, has to fail because permissive occupation does not become adverse merely by change in mental attitude of a person in possession. Such person must plead and prove as to from which time and date his possession became hostile to claim title by adverse possession qua owner of the suit property which must be adequate in continuity, in publicity to the sufficient extent of 12 years or more. This submission would not come to the aid of the appellant.

12. In the result, appeal is dismissed with costs.

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