
2012 eGLR_HC 10006333,2013 AIR Guj. 58

Before the Hon'ble MR. C L SONI, JUSTICE

VASANT NATURE CURE HOSPITAL AND PRATIBHA MATERNITY HOSP. TRUST AND 4 - APPELLANT(S)
Vs. NATHIBEN WD/O UKABHAI KAMABHAI AND 1 - DEFENDANT(S)

SECOND APPEAL No: 84 of 1997 , Decided On: 11/10/2012

M.C.Bhatt, M.A.Parekh, Nanavati Associates, A.J.Desai

MR. C.L. SONI 1. This appeal under section 100 of the Code of Civil Procedure ("the Code" for short) is filed by the original plaintiffs with original defendants No.2,5 and 6 against the judgment and decree dated 31.3.1997 passed by the learned Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur in Regular Civil Appeal No. 67 of 1988 whereby the learned appellate Judge allowed the appeal and set aside the judgment and decree passed by the learned Trial Judge in Regular Civil Suit No. 525 of 1979 dated 30th July, 1988. The suit was filed by the appellants No.1 and 2 for recovery of possession of the suit property from the respondent No.1 (Original defendant No.1). For the sake of convenience, the parties shall be referred to as per their original status before the learned trial Judge.

2. The case of the plaintiffs in their suit was that the defendant No.1 was employed as watchman to look after the trust properties including the hospital and nursing home run by plaintiff no.1, that to facilitate the defendant No.1 to properly perform his duty as watchman, he was given one room to reside therein as licensee till he was in service, that on the request of the defendant No.1 to provide more space because of increase in the family members, defendant No.1 was permitted to use iron sheets and some wooden material for the purpose of making change in the suit premises to reside with his family members during the service period but unfortunately, he started illegal activities by attempting to occupy more space by constructing bore well and since such activities of defendant no.1 were against the interest of the trust, defendant No.1 was relieved from service with effect from July, 1979, that for the purpose of getting suit premises vacated, notice dated 25.6.1979 was served to defendant No.1. It is further case of plaintiffs that defendant No.1 therefore filed one suit being Regular Civil Suit No. 306 of 1979 on 25.6.1979 praying for declaration that the suit premises was of his ownership and for permanent injunction restraining the plaintiffs from interfering in the possession of the suit premises. In the said suit, the Court had given interim protection to the defendant No.1

only for the room wherein defendant No.1 was residing but refused to grant any interim protection for extra space over, that in the said suit, the plaintiffs appeared and contended by filing their written statement that the defendant No.1 was holding the room only as an employee of the plaintiffs and he was entitled to retain the possession of the room till he remained in service, that his services were put to an end and, therefore, he was not entitled to continue with possession of the room as the defendant No.1 was given the room on leave and license basis because of his employment with the plaintiffs. The plaintiffs have thus averred in the plaint that since the defendant No.1 was unauthorizedly holding the suit premises and since the defendant No.1 had not vacated the suit premises even after service of the notice, the suit was required to be filed seeking possession from defendant No.1 and for mesne profit for interim period.

3. The suit was resisted by defendant No.1 by filing the written statement wherein amongst other legal contentions, defendant No.1 came out with the plea that the defendant No.1 was not given the suit premises by the plaintiffs as an employee but he was in fact owner and in possession of the suit premises which was 800 square yards as described in his earlier suit being Regular Civil Suit No. 306 of 1979 and the said 800 square yards comprised of residential house. The superstructure of the residential house is of the defendant No.1 for which he was paying taxes to the panchayat. Defendant No.1 had also stated in his written statement that his services were illegally terminated by the plaintiffs for which he had already filed application before the labour court. In this very written statement, defendant No.1 had taken alternative plea that he had become owner of the suit property by adverse possession and, therefore, suit of the plaintiff was required to be dismissed.

4. On the basis of the above said pleadings of the parties, following issues were framed at Exh. 23 :

"(A) Whether the plaintiff is a trust and registered as such bearing No.E/720, Ahmedabad?

(B) Whether the plaintiff No.2 is the Managing Trustee?

(C) Whether the plaintiff proves that the defendant was engaged as watchman?

(D) Whether the plaintiff proves that a room was allotted to the defendant for residential purpose to leave and licence based during the tenure of his service?

(E) Whether the plaintiff proves that other room built in 1976-77 was given to the defendant or his request to accommodate his family on leave and licence basis during his tenure of service in the plaintiff and that roof corrugated iron sheets etc. were given to him?

(F) Whether it is proved that the defendant's services are terminated and dismissal from service from July 1979 for reason stated in para 4 of the plaintiff?

(G) Is the plaintiff entitled to room possession on the reasons and the land these wada face the

defendant?

- (H) Is the plaintiff entitled to mesne profits from 1.7.79 for the said reasons and the rate of Rs.15/- P.M.?
- (I) Is the plaintiff entitled to injunction as prayed to para 8(c) of the plaintiff?
- (J) Whether the court has no jurisdiction to try the said?
- (K) Whether the court fees paid is inadequate?
- (L) Whether the said as filed is not maintainable?
- (M) Whether all the trustees should be joined as parties?
- (N) Whether the paid as not maintainable as permission of Charity Commissioner is not obtained?
- (O) Whether the said is hit by the provisions of section 63 and 64 of the Bombay Tenancy and Agri. Lands Act, 1947 as contended by the defendant?
- (P) What order and decree?
- (Q) Whether the suit is barred under Order 7 Rule 1 and 3 of CP Code as contended in the written statement?
- (R) Whether the defendant is the owner of the said property by adverse possession?
- (S) Whether the said is properly value for purpose of jurisdiction and pleader fees?
- (T) Whether the plaintiff proves that the trustees as impleaded were trustees of the plaintiff trust at the time when the suit as filed?"

5. The trial Court answered issues as under:

- "(A) In the affirmative.
 (B) In the affirmative.
 (C) In the affirmative.
 (D) In the affirmative.
 (E) In the affirmative.
 (F) In the affirmative.
 (G) In the affirmative.
 (H) In the affirmative.
 (I) In the affirmative.
 (J) In the negative.
 (K) In the affirmative.
 (L) In the negative, maintainable.
 (M) In the affirmative.
 (N) In the negative, suit is maintained.

(O) In the negative

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- (P) As per final order below.
 (Q) In the negative.
 (R) In the negative.
 (S) In the negative.
 (T) In the affirmative. "

6. On appreciation of the evidence, the learned trial Judge came to the conclusion that the defendant No.1 was engaged by the plaintiff as watchman and room was allotted to him for residential purpose on the basis of leave and licence during the tenure of his service and since his services were terminated, he was not entitled to occupy the suit premises. Accordingly, the learned trial Judge decreed the suit and held the plaintiffs entitled to recover the possession of the suit premises from defendant No.1-A to 1-E being the heirs of original defendant No.1 and also granted permanent injunction against the said defendants from making any construction or any activities on the land of survey No.29 as prayed for in prayer clause 8(c) of the plaint.

7. Heirs of defendant No.1 challenged the judgment and decree passed by the trial court by filing the Regular Civil Appeal No. 67 of 1988 before the lower appellate court raising various contentions including the contention that defendant No.1 did not hold the suit property on the basis of leave and licence but he having incurred expenses in the suit premises, licence was irrevocable licence; that the notice issued by the plaintiff was not legal one as the same was not issued by the trustees and the description of the property was not given therein and it did not provide sufficient time to defendant no.1 for vacating the suit premises under section 63 of the Act; that the suit of the plaintiff was not maintainable as the licence was not legally terminated and the defendant No.1 had become owner by adverse possession, that all the trustees were not joined in the suit.

In the appeal, learned appellate Judge raised following points for determination

"(1) Whether the appellants prove that the suit is not maintainable one for non joinder of trustees as necessary Party?

(2) Whether appellants prove that the learned Civil Judge (S.D.) has erred in coming to the conclusion that licence is not legally and validly terminated by the plaintiff?

(3) Whether appellants prove that they are in adverse possession of the suit land? (4) What order and decree?"

8. The learned appellate Judge came to the conclusion that the suit of the plaintiff was not maintainable for non-joinder of all the trustees as necessary parties. Learned appellate Judge also came to the conclusion that the case of the defendant No.1 was governed by the exception of section 60 of the Act and defendant No.1 could be said to have held irrevocable licence and such licence could be terminated only by giving one month notice and no such notice was given and, therefore, the judgment and decree passed by the trial court was required to be set aside. However, so far as the plea of adverse possession of defendant no.1 was concerned, learned trial judge came to the conclusion that the defendant No.1 had

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totally failed to prove the adverse possession for the period of 25 years preceding the date of filing of the suit and, therefore, the finding of the learned trial Judge on the issue of adverse possession was not required to be disturbed. Accordingly, the learned appellate Judge negated the plea of adverse possession. Ultimately, on reaching the above conclusion on two issues, the learned appellate Judge set aside the judgment and decree passed by the learned trial Judge. It is this judgment and decree passed by the learned Appellate Judge which is under challenge in this second appeal before this Court.

9. In this appeal, by order dated 5.5.1997, following substantial questions of law were framed:

- (1) Whether the lower appellate court has erred in law in holding that the suit is time barred because certain trustees are joined as parties to the suit subsequently?
- (2) Whether the lower appellate court has erred in permitting respondent contention that with reference to section 63 of Indian Easement Act, no such contention is raised in the trial court and no such issue is pressed in the trial court?
- (3) Whether the lower appellate court has erred in holding that sufficient time to vacate the suit property is not given by the trustees of the plaintiff trust on termination of licence?
- (4) Whether the lower appellate court has erred in holding that as the original defendant no.1 had approached labour authority or labour court, the suit could not have been filed?
- (5) Whether the lower appellate court has erred in allowing the respondents to raise contention of facts and law for the first time at the stage of hearing of appeal?
- (6) Whether the lower appellate court has erred in holding that the notice regarding termination of licence is required to be given by all the trustees and their addresses must also be stated in the notice?
- (7) Whether the lower appellate court has erred in interfering with the judgment of the trial court?
- (8) Whether the lower appellate court has erred in setting aside the judgment of the trial court?

10. However, in my view, to which the learned advocate for the appellants, Mr. Bhatt also agreed, out of the above substantial questions of law, only below mentioned substantial question needs be considered:

- (1) Whether the lower appellate court committed error in permitting the respondents defendants for the first time to raise the contention in reference to section 60 of the Indian Easement Act though no such contention was raised by defendant No.1 and no such issue was framed in the trial court?

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(2) Whether in the facts and circumstances of the case and on admitted evidence, the learned appellate Judge was right in holding that the original defendant No.1 was holding irrevocable licence in respect of the suit premises?

(3) Whether the suit of the appellants was time barred by non joinder of all the trustees?

(4) Whether the suit of the appellants was not maintainable for non joinder of all the trustees?

(5) Whether the lower appellate court was right in holding that the notice terminating the licence was not legal and valid?

11. At this stage, it is required to be noted that this second appeal, when was taken up for hearing on 25.9.2012, this court passed following order :

"When this appeal is taken up for hearing, learned advocate Shri M.C. Bhatt for the appellants is present but no one is present for the respondents. However, in the interest of justice, this matter is now adjourned to 3rd October 2012, giving last opportunity to the learned advocate for the respondents to appear before the Court, if they so wish to appear. Learned advocate Shri Bhatt states before the Court that he would also inform the learned advocate for the respondents about the next date of hearing. Adjourned to 3rd October 2012."

12. Learned advocate for the appellants placed on record communication dated 27.9.2012, copy whereof was served to the learned advocate for the respondents, whereby learned advocates for the respondents were informed about the order dated 25.9.2012. In spite of the above intimation by the learned advocate for the appellants, today, when the matter is taken up for hearing, none for the respondents has remained present. This Court was, therefore, left with no option but to decide the appeal after hearing the learned advocate for the appellants.

13. Mr. M.C. Bhatt, learned advocate for the appellants has submitted that the learned trial Judge has recorded finding that the original defendant No.1 was employed as watchman by the appellant trust and he was given the suit premises to reside therein as employee of the appellant trust till he was in service of the appellant trust. The defendant No.1 was therefore holding the suit premises on leave and licence basis as an employee of the appellant trust and it was never his case that he was holding irrevocable licence for the suit premises. Mr. Bhatt submitted that in fact, prior to the filing of the suit by the appellants, defendant No.1 had filed one suit being Regular Civil Suit No. 306 of 1979 wherein his entire case was that he was owner of the suit premises. He in fact defied the authority and the ownership of the appellants and never raised claim that he was holding irrevocable licence nor even put forth the plea of adverse possession. Mr. Bhatt submitted that in the said suit, after the appellants filed their written statement and pointed out that defendant NO.1 was holding the suit premises under permissible use of leave and licence, as employee of the appellants, defendant had withdrawn the said suit. He had not sought any permission or leave of the court to file fresh suit. Therefore, he would be estopped from

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taking the plea of ownership or of holding irrevocable licence. Mr. Bhatt thus submitted that the learned appellate Judge was not justified in permitting such plea of defendant no.1 of holding irrevocable licence for the suit premises and on such basis, learned appellate Judge ought not to have held that the defendant No.1 was having irrevocable licence in his favour. He submitted that such finding of the learned appellate Judge cannot be allowed to stand and the same is required to be reversed as contrary to the pleadings and admitted evidence. Learned advocate Mr. Bhatt then submitted that if the plea of the defendant about irrevocable licence was not permitted to be raised and if the finding recorded by the appellate Judge on such plea cannot stand scrutiny of law, then, the issue about the legality or otherwise of the notice for terminating the licence would fall into the insignificance. He, however, submitted that the appellants had still issued notice and such notice even if signed by some of the trustees, same was on behalf of the trust and such notice, therefore, could not be termed as illegal. He submitted that if the property belonged to the trust and names of all the trustees were not written in the notice with their addresses, such notice would not become illegal especially when the defendant No.1 was put to the notice that he was not entitled to hold the suit premises as he was having no right except to hold the suit premises as servant of the appellants. Learned advocate Mr. Bhatt therefore submitted that the appellate Judge was not justified in holding that the suit notice was not legal and valid.

14. Learned advocate Mr. Bhatt submitted that the suit was initially filed by some of the trustees wherein the plaintiff no.1 was trust itself. The suit was not for claim of any independent right qua management or properties of the trust but it was for recovery of the suit premises from a person who was employed as watchman of the trust. The suit was therefore essentially a suit filed by the trust itself to recover its property, therefore, even if such suit was filed only by one trustee, then also, suit was maintainable but as recorded by the courts below subsequently, other trustees have also been joined in the suit as plaintiffs. Learned appellate Judge has also taken note of such fact but still however, the learned appellate Judge has come to the conclusion that joining of the other trustees subsequently in the suit would make the suit as having been filed from the date of joining such trustees in the suit and, therefore, was time barred. Mr. Bhatt submitted that when the suit was initially filed, same was not time barred and simply because other trustees were subsequently joined, it would not make the suit time barred. Mr. Bhatt submitted that the suit can also not be said to be barred because of non joinder of other trustees. Mr. Bhatt submitted that the principles of suit being barred by non joinder of parties could not be made applicable to the present suit as the suit was not filed for the right between the trustees, therefore, even if the some of the trustees were not joined, since no relief was claimed against the trustees but the relief was sought by and on behalf of the trust and trustees against defendant no.1 for recovery of the suit premises, such suit could neither be said to be barred by non joinder of trustees nor could it be said to be time barred. He submitted that the learned Judge on this count also committed serious error in holding that the suit was barred because of non joinder of all the trustees. He thus urged that on the above said substantial question of law, this court may allow the appeal.

~~15. At this stage, learned advocate Mr. Bhatt also pointed out that the heirs of~~

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defendant No.1 had filed proceedings of special civil application no. 9318 of 2000 against the Ahmedabad Urban Development Authority and the said petition was withdrawn and it was recorded that the defendants No.1-A to 1-E being heirs of defendant no.1 shall hand over possession to the Town Planning Authority on or before 1st February, 2001. He pointed out that in view of the above, heirs of defendant No.1 had already lost interest in the present proceedings and, therefore, nobody has appeared on their behalf in this appeal. Be that as it may, since this court is called upon to decide the substantial questions of law in this second appeal, this appeal is being decided on its own merits.

16. As regards first two substantial questions of law, it is required to be noted that it was neither case of the defendant No.1 in his own suit nor even in the written statement filed by him in the present suit that he was holding the irrevocable licence. Therefore, the learned trial Judge also rightly not framed such issue and therefore such issue was not decided by the learned trial Judge. Therefore, in my view, learned appellate Judge was not justified in raising such issue for the first time in the appeal especially when such issue was not arising either on the pleadings or admitted evidence. Even apart from this, the defendant No.1 was holding the suit premises on simple permissible licence as an employee of the appellant. He had no other right to occupy the suit premises. There was no any independent agreement entered into between the appellant and the defendant No.1 permitting the defendant No.1 to hold the suit premises other than simple permission to occupy it as an employee during his service tenure. At this stage, reference of the latest judgment of Honble the Supreme Court in the case of A. Shanmugam versus Ariya Kshatriya Rajakujla Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others, reported in (2012) 6 SCC 430 is required to be made wherein it is held by Honble the Supreme Court in para in para 43.6 and 43.7 as under: "43.6 Watchman, caretaker or a servant employed to look after the property can never acquire interest in the property irrespective of his long possession. The watchman, caretaker or a servant is under an obligation to hand over the possession forthwith on demand. According to the principles of justice, equity and good conscience, Courts are not justified in protecting the possession of a watchman, caretaker or servant who was only allowed to live into the premises to look after the same. 43.7 The watchman, caretaker or agent holds the property of the principal only on behalf the principal. He acquires no right or interest whatsoever in such property irrespective of his long stay or possession.

17. As per the principles of law laid down by Honble the Supreme Court in the said decision, a watchman or serving person of the owner of premises has no right to hold the premises beyond the service tenure. In light of the above, the learned appellate Judge has committed substantial error in holding that the defendant No.1 was holding the suit premises under irrevocable license.

18. On the pleadings as also on the evidence, when it is not the case of the defendant No.1 himself that he was holding the suit premises under irrevocable licence or with a status as tenant or licensee and since the claim of the defendant No.1 was that of holding the suit premises as owner, simply because the defendant No.1 was permitted to use iron sheets and wooden material to facilitate his expanded family, was not a ground to hold that the permissible use of the suit premises was in the nature of irrevocable licence, therefore, finding of the learned appellate Judge that the defendant No.1 was holding the irrevocable licence in respect of the suit premises cannot stand scrutiny of law especially when such was not the case of the defendant No.1 before the trial court, therefore, such finding of the learned appellate Judge is required to be reversed and the judgment and decree passed by the learned appellate Judge on such finding is required to be quashed and set aside.

19. When I have held that the defendant No.1 was not holding the irrevocable licence in respect of the suit premises, legality or otherwise of the notice terminating the licence would, in fact, pale into insignificance. It is required to be noted that the learned appellate Judge had found that the notice was issued but the learned appellate Judge came to the conclusion that since the notice was not issued by all the trustees and since the notice did not provide description of the property and since one month period was not given, such notice was not legal and valid. In my view, when the defendant No.1 was holding the suit premises by way of permissible use as employee of the appellants, his permissible licence stood automatically terminated on expiry of his service tenure. It is the case of the defendant No.1 himself that his services were terminated and he had already approached the labour court. Whether the action of terminating services of the defendant No.1 was legal or not could not be the issue to be decided in the present appeal. However, the fact remains that the defendant No.1 did not continue in service of the appellant. If the defendant No.1 did not continue in the service of the appellant and if the defendant No.1 held the suit premises by way of permissible use simply as servant of the appellant, in my view, in fact, no notice for terminating such licence was required. Still however as observed by the learned appellate Judge, such notice was issued. Therefore, even if the notice was not issued by all the trustees and even if the description of the property was not provided, such could not be the ground to hold that the licence of the defendant No.1 was not validly terminated. When the defendant No.1 did not hold the irrevocable licence in respect of the suit premises, no issue had arisen about legality or otherwise as regards termination of such licence. Therefore, in my view, the learned appellate Judge was not justified in reversing the judgment and decree passed by the learned trial Judge on the ground that the notice terminating licence was not legal and valid. Then remains the question as to whether the suit was bad and time barred on account of non joinder of all the trustees in the suit. At this stage, reference is required to be made to a decision of this court in the case of Nadiad Nagarpalika, Nadiad v. Vithalbhai Zaverbhai Patel & Ors., reported in 1980 GLR 792 as also in the case of Trustees of Hareshwar Mahadev Trust v. Trustees of Shri Jasvantsinhji Audichya Brahman Boarding Vidyarthi Bhavan reported in 1998(1) GLR 434, wherein this Court has held that section 50 authorizes Charity Commissioner or two or more persons having interest in the trust by obtaining consent in writing of the Charity Commissioner may institute suit for recovery of the trust property but it does not restrict the right of the trustees in whom the legal ownership of the trust property vest

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to file a suit for recovery of the trust property or protect the property in exercise of their own right without obtaining permission of the Charity Commissioner as for exercising of ownership by person in whom the right of legal ownership vest, no permission is required. Thus, when the trustees are held to be legal owners of the trust property, in my view, any of the trustees is entitled to file the suit for recovery of the trust property against the person holding adverse to the trust including the tenant as also the licensee, therefore, even if the suit is filed by only one trustee, if the suit is filed for the purpose of recovering suit property in the interest of trust, such suit cannot be said to be barred by non-joinder of other trustees. At this stage, it is required to be noted, as observed by the learned appellate Judge, that even the other trustees were also joined subsequently. As discussed above, if the suit was not bad for non-joinder of the other trustees, the substantial question of law as to whether the suit was time barred because of non-joinder of trustees at the initial stage would be of no consequence. But still such being one of the ground for allowing appeal of the defendant No.1 by the learned appellate Judge, question whether the suit was time barred because of non-joinder of all the trustees when the suit was filed also needs to be dealt with and decided. On this question, no much discussion is required because when I have held that the suit was, in no way, barred by non-joinder of the other trustees, even if the other trustees are subsequently joined, time for filing the suit could not be said to be reckoned from the date of joining of the other trustees in the suit. Therefore, in my view, learned appellate Judge was not justified in holding that the suit was time barred because of non-joinder of the trustees at the initial stage of filing of the suit. Therefore, on the above two substantial questions of law, I hold that not only the suit was maintainable having been filed by the trust with only one trustee but the suit also could not be said to be time barred on account of non-joinder of all the trustees at the inception of the suit. The defendant No.1 has also failed to prove his alternative plea of adverse possession.

20. In view of the above stated facts and circumstances and the view expressed by me on all the substantial questions of law, this appeal is required to be allowed.

21. In the result, this appeal is allowed. The judgment and decree dated 31.3.1997 passed by the learned Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur in Regular Civil Appeal No. 67 of 1988 is hereby quashed and set aside. The judgment and decree passed by the learned Trial Judge in Regular Civil Suit No. 525 of 1979 dated 30th July, 1988 is hereby restored.

Appeal allowed.

