

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 42 OF 2015

Rajan s/o. Hiranman Bharambe
and another

**....Petitioners.
(Ori. Defendants)**

Versus

Sam Framroz Amroliwala

**....Respondent.
(Ori. Plaintiff)**

Mr. P.R. Katneshwarkar, Advocate for petitioner.

Mr. S.P. Brahme, Advocate for respondent.

CORAM : T.V. NALAWADE, J.

DATED : 23rd July, 2015.

ORDER :

1. The proceeding is filed against judgment and order of Regular Civil Appeal No. 32/2014 (Old No. 248/2005) which was pending in the Court of District Judge -1, Bhusawal, District Jalgaon. Regular Civil Suit No. 182/1989 filed by present respondent, landlord for possession of rented premises was dismissed by the trial Court and the appellate Court has set aside that decision and has granted the reliefs claimed by the landlord. Both the sides are heard.

2. The suit property is one block of ground floor of house No. 4014 and 4167 situated at Bhusawal and it's size is 24

ft. x 11 ft. It is the case of plaintiff that he has given the suit property on monthly rent to the present petitioner No. 1 for running eye clinic. It is the case of plaintiff that the defendant No. 1 stopped practicing long back as doctor and he gave the possession of the suit property to defendant No. 2, son and it is subletting. It is contended that at present defendant No. 2 is running his shop of optician in the suit premises. It is contended that the tenant has stopped using premises and there is also change of user.

3. It is the case of plaintiff that the defendant has removed the middle wall of the suit premises which had created two rooms and by doing such act, the defendant has become liable for breach of provisions of law and terms and conditions of the contract. It is contended that the act of the defendant is material alteration, making permanent construction and it has caused damage to the entire building, the property of the plaintiff. It is the case of plaintiff that he had given notice and he had asked the defendant to give vacant possession of the premises, but no response is given by the defendants to this notice.

4. Defendant Nos. 1 and 2 filed written statement and

contested the suit. They denied all the aforesaid allegations made by the landlord. It is contended that the suit premises was given for running eye clinic and also for doing the business of optician. The defendants have denied that they have materially altered the suit premises or there is subletting to the defendant No. 2.

5. The plaintiff's power of attorney holder gave evidence to substantiate his case and some documents are produced by the plaintiff. Reliance is placed on the reports of two Court Commissioners appointed by the trial Court. Defendant No. 1 examined himself for giving evidence in rebuttal.

6. On the ground of making permanent alteration, raising permanent structure and causing damage to the property, there is substantive evidence of landlord. There are two reports of the Court Commissioner which are not disputed. In both the reports, the size of the suit property is described as 24 ft. east west and 11 ft. north south. At the distance of 12.3 ft. from the eastern wall of the building, two pillars were seen adjacent to southern and northern walls of the suit property. On these two pillars, there was beam of 14 inches and beam had thickness of 8 inches below the ceiling portion and it was

separate from the ceiling portion. Thus, the north south beam was created to give support to the roof, ceiling of the suit property and the two aforesaid pillars were constructed for placing the beam on them. The building is three storied and Court Commissioner noticed that on the first floor and on the second floor, there were two north south walls dividing structure in to two rooms and these walls were exactly above the aforesaid beam portion. All the three floors had equal height of 10.10 ft. There were no pillars adjacent to north south walls of first and second floor and there was no beam similar to the beam found in the suit property. Thus, support to the ceilings, roof portion of the other two floors was given by middle walls which were north south. There was no such support to the ceiling portion of the suit premises i.e. of the wall and this support was given by making construction of two pillars and putting two beam on these pillars. Further, the building had two rooms on first floor and second floor, but on the ground floor, there was only one big hall when the size was similar.

7. The second report of the Court Commissioner shows that he did some excavation work to find out as to whether in the past, at the middle of the hall, in the suit premises, there was such wall in existence. Treach of 8 ft. length and 6 ft. depth

and 2 ft. width was dug between the aforesaid two pillars. Between aforesaid two pillars remains of wall were found in the north and south direction. The Court Commissioner noticed that the flooring for tiles was done of four inches thick lime concrete material. Below five inches of the flooring, the Commissioner noticed the broken pieces of bricks and granules of sand up to the depth of 3 fts. Below this layer there was a layer of natural clay of the depth of 2 fts. 8 inches. The Commissioner found that in that portion there were masonry piers at two places. Such structure was seen by the Commissioner only in the treach portion and it was in north south direction where there was allegedly wall in existence.

8. In the cross examination, defendant No. 1 has admitted that the aforesaid building is a load bearing building. The aforesaid facts and circumstances which can be seen in the reports of the Court Commissioner and the substantive evidence are sufficient to prove on the pre-ponderance of probability that there was a wall in existence right in the middle of the suit premises which was north south in direction and which was giving support to the ceiling of this property and also to the upper portion of the building. The evidence on record is sufficient to prove that by removing the wall, an attempt was

made to give support to the aforesaid structure from bottom. Thus, the evidence is sufficient to prove that initially there was no structure of two pillars adjacent to the north and south wall of the suit property and there was no beam and they were created subsequently, after removing the north south wall which was present in the middle of the hall. This evidence is sufficient to prove the case of the plaintiff that defendant has materially altered the suit property and he has also made construction of permanent structure and his acts fall under the provisions of section 108(o) of Transfer of Property Act and which is also covered under section 13 (1) (a) (b) of the Bombay Rent Act. There is no specific defence taken by the defendants on this ground and so, the case of the plaintiff needs to be accepted as it is on this ground.

9. The plaintiff did not produce written agreement with regard to the relationship, but the defendant produced a written agreement dated 26.12.1967, which is at Exh. 104. This document shows that defendant No. 1 was in possession for about 10 years prior to the date of agreement and he was running eye clinic and he was also doing the business of optician. However, in substantive evidence, defendant No. 1 has admitted that he was only working as medical practitioner,

ophthalmologist and he was never doing the business of optician. No Shop Act licence was obtained by defendant No. 1 for doing such business in the suit property. On the other hand, the evidence of defendant No.1 shows that the business of optician is of defendant No. 2, his son and it is the defendant No. 2, who obtained the licence under the Shop Act to do such business in the suit premises. Copy of such licence is produced on the record which shows that it was issued in the year 1974 in favour of defendant No. 2 and it was renewed from time to time. In respect of this circumstance, the Trial Court has given finding that it was the business of defendant No. 1. The aforesaid admissions and evidence on record is not considered by the trial Court and the appellate Court has considered this evidence in proper perspective.

10. The aforesaid evidence and admissions given by the defendant No. 1 are sufficient to infer that defendant No. 2 is in exclusive possession of the suit property and he has been in such possession on the date of suit and was in such possession atleast from 1974. The evidence is also sufficient to prove that the defendant No.1 stopped practicing as ophthalmologist from prior to 1974. It appears that the trial Court has committed error in appreciating the position of law laid down in the case reported

as 2001 (3) Mh.L.J. 118 [Vasant Vs. Zaibunissa]. The facts of this reported case were altogether different. The facts of the reported case show that the suit property in that case was given for residence purpose and family members had started living with the tenant and so, it was held that there was no subletting. The facts of the present case are altogether different which are already quoted. The admissions and the evidence on record are sufficient to prove that without taking permission of the landlord defendant No. 1 allowed defendant No. 2 to start such business and it is the defendant No. 2 who is in exclusive possession of the suit premises and who is doing the business of optician. Defendant No. 2 has not entered in to the witness box. This evidence is sufficient to prove the case of subletting and the case also falls under section 16 (1) (k) of Bombay Rent Act. The evidence is also sufficient to prove that from prior to 1974 the defendant No. 1 stopped using the premises and it is the defendant No. 2 who is using the premises and who is in exclusive possession.

11. The discussion made above shows that the trial Court had committed error in dismissing the suit filed by the plaintiff by not considering the position of law properly. The District Court has corrected the mistake committed by the Trial

Court. This Court sees no reason to interfere in the decision given by the appellate Court. In the result, the revision stands dismissed.

[T.V. NALAWADE, J.]

ssc/