

IN THE HIGH COURT OF BOMBAY AT GOA

Civil Application (Review) No. 16 of 2014.

In

Second Appeal No.43 of 2004

Shri Upendra N. Katkar

(since deceased Through Legal

Heirs).

..... Applicant

V e r s u s

Shri Hanumannta Vissu Arsekar

(since deceased Thr. Legal

Representatives)

..... Respondent

Mr. S. D. Lotlikar, Senior Advocate with Mr. P. Lotlikar,
Advocate for the Applicant.

Mr. S. Usgaonkar, Advocate for Respondent.

CORAM: N. M. JAMDAR, J.

DATE: 5TH FEBRUARY, 2015.

ORAL ORDER:

By this application, the applicant-original respondent in the Second Appeal seeks review of the judgment and order passed by this Court (R. S. Dalvi, J) on 7th February,

2014.

2. The suit was filed by the review applicant who is the landlord of the premises against the respondents for injunction. According to the applicant, the respondents under the terms lease executed between the parties was required to carry out business of paint only, however, they were proceeding to do business of manufacturing toys and therefore, an injunction needed to be granted. Both the trial Court and the appellate Court had granted relief of injunction in favour of the applicant.

2. The second appeal filed by the respondent came up for consideration of this Court on 7th February, 2014. This Court considered the factual matrix of the case where the respondent had changed the business of paints to business of toys. Substantial question of law was framed as under:

“Whether the appellants intending to conduct the other business in the leased premises in addition to the business specified in the lease agreement, would amount to committing breach of the term of the lease agreement and consequently whether the Courts below were right in granting injunction restraining the appellants from starting other business in the shop”

3. The learned Single Judge came to the conclusion that there was no negative covenant in the lease which restricted the right of the respondent to carry out the business of toys. The learned Single Judge also held that irrespective of this position, unless the nature of business is changed for something other than commercial, no case for eviction is made out and consequently no case for injunction.

4. Mr. S. D. Lotlikar, the learned Senior Counsel appearing for the applicant submitted that as regards the finding that there was no negative covenant in the lease and therefore, injunction could not have been granted, the applicant will seek his remedy as per law by challenging the order before appropriate forum. He however, submitted that the general proposition laid down that unless there is a change from commercial to non-commercial use, no eviction can be sought and therefore, no eviction can be granted, is contrary to the decision of the Apex Court in the case of **Goa Urban Cooperative Bank Ltd. Vs. Boor Mohd. Sheikh Mussa and another** reported in (2004) 6 Supreme Court Cases 166. He relied upon paragraph 23 in the said decision, which reads as under:

“23. Letting out the premises for commercial purpose can have different colours and hues depending upon the purpose for which they are let out. For example, a non-residential premises can be

let out for commercial purpose for running a shop, office, restaurant, hotel, cinema and godown for storing of the goods, etc. If it is specified in the lease deed that the premises be used for a particular commercial purpose than the change of use of the premises falling in another category of purpose would amount to change of user of the building falling within the four corners of Section 22(2)(b)(ii) of the Act and the landlord would be entitled to seek eviction of the tenant for having changed the use of the suit premises for a purpose other than for which it was let out. When the use of the building is identified in the lease deed as an “office”, it would be taken that the parties had used the expression “office” in the sense in which the “office” is understood in common parlance or as indicated by its dictionary meaning. appellants have admitted that they have started using the building as a godown and the High Court has concluded that the suit premises were used as a godown after the shifting of banking activities of the appellant to Navelkar Building in the year 1982 and continued to be so used till the date of filing the eviction petition in the year 1992. Considering that the suit

premises were let out for office use, mere storage of the books of accounts would not amount to use of premises for office purpose especially when the appellant has admitted that it has shifted its business of banking to Navelkar Building. When the building is let out as an “office” then the same can be used only as an office and not as a godown where the goods are stored and that would tantamount to change of user.”

5. Mr. Lotlikar, the learned Senior Counsel further submitted that, considering the question of law posed before the Court, it was not necessary to determine this larger issue.

6. Mr. Sudesh Usgaonkar, the learned counsel appearing for the respondent submitted that the judgment in the case of **Goa Urban Co-operative bank (supra)** is distinguishable on facts and is not applicable to the present case. He submitted that observations of law are made in view of the submissions made by the applicants themselves.

7. Considering the limitations of the review jurisdiction, I am not inclined to exercise the same in the facts of the present case. It is always open to the applicants to challenge the judgment and order in an appropriate forum. However, the observations that unless the user is changed from commercial to non-commercial, no eviction could be

sought were not necessary for consideration of the appeal once on the first issue regarding interpretation of lease the respondent succeeded. Further more, in view of the decision of the Apex Court in the case of ***Goa Urban Cooperative bank*** (supra) interpreting the very Act in question, it is debatable whether the view taken is proper.

8. The appropriate course of action, therefore, will be to clarify that the observations laid down in paragraphs 10 and 14 to the effect that no change of user can occur unless change is made from commercial to non-commercial use, need not be taken as proposition of law laid down by this Court in its judgment. This issue is kept open to be decided in appropriate case. With this clarification, the review application is dismissed.

N. M. JAMDAR, J.

Ap/-