

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 12 OF 2016**

Shri Chogaram Dargaji Tak
Son of Dargaji Tak,
Aged about 42 years, married,
Businessman,
r/o H.No.478, Dongorim,
Navelim, Salcete Goa.

..... Appellant

V e r s u s

Smt. Shanta Nagappa Pathanshetty
Aged about 66 years,
housewife, r/o H.no.204,
Calcondem, Margao Goa.

.... Respondent

Mr. R. J. Pinto, Advocate for the appellant.

Mr. A. Kakodkar, Advocate for the respondent.

Coram:- F. M. REIS, J.

Order reserved on : 06.05.2016

Order pronounced on : 23.09.2016

ORDER

Heard Mr. R. J. Pinto, learned counsel appearing for the appellant and Mr. A. Kakodkar, learned counsel appearing for the respondent.

2. The above Second Appeal challenges the judgments passed by the Courts below whereby the suit filed by the appellant was dismissed and the counter claim filed by the respondent was decreed thereby the appellant is directed to vacate the suit shop and hand over the vacant possession to the respondent besides granting mesne profits from October, 2011 to July, 2012 and directing to hold an enquiry in terms of Order 20 Rule 12 of the Civil Procedure Code for mesne profits for the subsequent period.

3. Briefly, it is the case of the appellant that he has filed Regular Civil Suit No. 355/2011 for permanent injunction against the respondent who is the original defendant. The respondent filed a counter claim seeking a direction to the appellant to vacate the suit shop as well as for mesne profits. By judgment and decree dated 02.12.2014, the learned Civil Judge Senior Division, at Margao, dismissed the suit for permanent injunction and decreed the counter claim filed by the respondent. Being aggrieved by the said judgment, the appellant preferred an appeal before the learned District Judge which came to be dismissed by judgment dated 15.07.2015. Being aggrieved by the judgments passed by the Courts below, the

appellant has preferred the above Second Appeal.

4. The learned counsel appearing for the appellant has submitted that both the Courts below have misconstrued the documents on record to come to the conclusion that the appellant was a mere licensee of the subject shop. It is further pointed out that the appellant is a tenant of the subject shop which can be gathered from the agreement itself executed between the parties and consequently, the decree in the counter claim is without jurisdiction. The learned counsel further pointed out that both the Courts below have failed to appreciate that the husband of the respondent used to carry out grocery business in the suit shop which business was never carried out by the respondent therein as vacant and exclusive possession of the suit shop was with the appellant. The learned counsel further pointed out that the appellant was a sub-lessee of the subject shop and as per the agreement dated 05.08.1999, the appellant continued to be a statutory tenant. The learned counsel further pointed out that applying the ratio of the judgments relied upon by the appellant to the facts of the present case, the decree passed by the Courts below deserves to be quashed and set aside. The learned counsel further

pointed out that the very fact that the appellant is occupying the subject shop after the expiry of the period of the agreement would itself suggest that the appellant was a statutory tenant of the subject premises. He has further submitted that the agreement dated 05.08.1999 expired on 31.07.2004 and it was pleaded in the counter claim by the respondent that the said agreement was never renewed and as such according to him this itself suggest that the relationship between the parties was a landlord tenant relationship. The learned counsel further submits that as such the decree directing the appellant to vacate the subject shop is without jurisdiction and consequently, deserves to be quashed and set aside. The learned counsel further pointed out that merely because the appellant did not accept the payment of higher royalty as claimed by the respondent, the respondent stopped accepting such royalty. The learned counsel has extensively taken me through the findings of both the Courts below to point out that both the Courts have misconstrued the evidence on record as well as the documents produced by the parties to erroneously come to the conclusion that the respondent is entitled to the relief sought in the counter claim. The learned counsel as such submits that there are substantial questions of law which arise in the

present appeal for consideration. In support of his submissions, the learned counsel has relied upon the judgments reported in **1971(1) SCC 276** in the case of **Sohan Lal Naraindas V/s Laxmidas Raghunath Gadit**; **2006(4) Bom. C.R. 653** in the case of **Jayant L. Shah V/s Naranji Lalji Khona**; the judgment of the Apex Court reported in **1999(3) Supreme 485** in the case of **Delta International Ltd., Vs Shyam Sundar Ganeriwalla & Anr.**; the judgment of Delhi High Court reported in **AIR 2003 Delhi 214** in the case of **Vidya Securities Ltd.; Comfort Living Hotels Pvt. Ltd.**, another judgment of Delhi High Court dated 30.01.2014 in passed in **RFA No.250/2013** in the case of **Pushpa Sharma V/s V. V. Gujral & Ors**; the judgment of the Apex Court passed in **Appeal (Civil) No. 7160 of 2005** dated 28.03.2008 in the case of **Nirmal Kanta (Dead) through Lrs. V/s Ashok Kumar & Anr.**; and judgment dated 22.03.2004 passed in **Appeal (Civil) 1548 of 1999** in the case of **C. M. Beena and Anr., V/s P. N. Ramachandra Rao**; **1960(1) SCR 368** in the case of **Associated Hotels of India Ltd., V/s R. N. Kapoor**; and the judgment of Patna High Court dated 08.07.1975 in the case of **Thakur Prasad V/s The State Iron & Steel Co. Ltd**; and judgment of the Apex Court dated 02.03.2011 in the case of

Bharat Petroleum Corp. Ltd., V/s Chembur Service Station.

5. On the other hand, Mr. A. Kakodkar, learned counsel appearing for the respondent has pointed out that both the Courts below upon appreciating the evidence on record have concurrently come to the conclusion that the appellant is a licensee of the subject shop. The learned counsel further pointed out that the writing which was duly executed clearly discloses that the appellant is not entitled to continue in the subject shop. The learned counsel further submits that the respondent who is a widow is a tenant of the subject premises and as such by no stretch of imagination could have an intention to create a tenancy in respect of the subject premises. The learned counsel further pointed out that on examining the terms of licence and based on the material on record both the Courts below have come to the conclusion that the claim of the appellant that he is a tenant of the subject premises deserves no consideration. The learned counsel as such points out that there are no substantial questions of law arise in the present appeal for consideration. In support of his submissions, the learned counsel has relied upon the judgment of this Court reported in **2013(2) Bom.C.R. 842** in the case of **Joao Necessidade**

**Roque Antonio AS (deceased by his legal representatives) & Ors
V/s Vaman Govind Lotlikar (Dr.) & Ors.** and the judgment of the
Apex Court reported in **(1999) 4 SCC 545** in the case of **Delta
International Ltd., V/s Shyam Sundar Ganeriwalla and another.**

6. I have considered the submissions of the learned counsel and I have also gone through the records. Before I proceed to examine the rival contentions based on the judgments relied upon by the respective counsel, on perusal of the judgment of the learned Trial Judge dated 02.12.2011, the learned Judge while examining the relief claimed by the appellant for permanent injunction, has noted that to obtain a permanent injunction it is essential to first prove the existence of a right whose violation is threatened by the defendant. The learned Judge also noted that the appellant has admitted that previously he was paying royalty of Rs.2000/- to the respondent and that in the agreement the consideration is referred to as royalty and that he has been referred to as a conductor of the business. The learned Judge has further found that the right which was conveyed by way of the subject agreement was a right to use the premises for the purpose of conducting business. In such circumstances, the transfer of occupation was only for the purpose of conducting business and

not an absolute transfer of possession which is contemplated in a lease. The learned Judge also noted the recitals in the agreement which only disclose that what was permitted was a right to conduct business and that the legal possession continued with the respondent. The learned Judge also found that the receipts signed by the respondent clearly disclose that the amount received was towards royalty whereas the receipts produced at Exhibit 35/C showing that the amount was towards rent were unclaimed receipts of money order and were not signed by the respondent. The learned Judge as such noted that there is no material on record to show that the respondent has acknowledged that the consideration payable towards the agreement was in the nature of rent. The learned Judge also took note of Exhibit 37 Colly wherein the appellant has agreed to vacate the subject premises. The contention of the appellant that he was deceived by force has been disbelieved by the learned Judge. The learned Judge on perusal of such declaration noted that the stamp paper for the declaration is in the name of the appellant which clearly shows that the appellant has voluntarily brought the stamp paper and signed the declaration. The learned Judge as such found that the claim of the appellant that he is a tenant cannot be accepted.

The learned Judge consequently decreed the counter claim filed by the respondent and dismissed the suit filed by the appellant.

7. On perusal of the judgment passed by the learned Lower Appellate Court, the learned Judge upon reappreciating the evidence on record has noted that the appellant had admitted the validity of all the clauses in the agreement including Clause no.9 wherein it is stated that the agreement will not come under the purview of the Rent Control Act. The learned Judge also took note of the said declaration at Exhibit 37 Colly dated 19.10.2011 which clearly shows that the appellant agreed to receive the security amount after deducting monthly royalty and that he would vacate the suit shop after three months and hand over the keys of such shop to the owner. The learned Judge also took note that the stamp paper was also purchased by the appellant himself. The learned Judge also noted that in case the signatures were forcibly obtained as contended by the appellant he would have lodged a police complaint or issued a notice to that effect. The learned Judge further found that the appellant dishonestly and in breach of Clause 9 of the agreement has claiming the right of tenancy though the occupation of the appellant was for a particular purpose of carrying out business and consequently found that the

learned Trial Judge had correctly appreciated the material on record and found that the appellant is neither lessee nor sub-lessee of the subject shop and is not entitled to remain in occupation thereof and consequently, dismissed the appeal filed by the appellant.

8. On going through the agreement executed between the parties, I find that the recitals clearly indicate that the husband of the respondent was a lessee of the suit shop situated on Station Road belonging to Dr. Caetano D'Souza. It further states that consequent upon the death of the said husband, his widow - the respondent and the children due to family difficulties are unable to continue with the business and as such decided to permit the conductor - the appellant herein to conduct business for a period of five years. It further provides that the appellant would pay a sum of Rs.2000/- per month as royalty. The operative part of such document clearly suggest that the agreement was only to conduct business therein. The amount of Rs.1,50,000/- has also been deposited by the appellant with the respondent. Reading such agreement as a whole, it clearly reveals that it was only an agreement to conduct business in the subject premises. There is nothing in the agreement which could even remotely disclose that any interest was created by the respondent in

favour of the appellant in respect of the subject premises to claim that he was a lessee thereof. A person who conducts business is in permissive occupation of such premises. Admittedly, the husband of the respondent who had deceased was a tenant of the owner of the suit shop. In such circumstances, the question of the appellant claiming that he was a tenant of the shop is totally misplaced. There is nothing on record to suggest that such agreement was executed with the consent of the original owner of the subject premises and as such the foundation of the claim of the appellant that he is a tenant of the subject premises deserves no consideration. Apart from that, on perusal of the declaration, it clearly states that it is agreed by the respondent herein to pay to the appellant the deposited amount of Rs.1,50,000/- after three months and to hand over the keys of the business shop to the owner. The signatures on the said document and the writing therein has not been disputed by the appellant. That the amount received by the respondent is also acknowledged in such document. The contention of the appellant that such signatures were obtained forcibly has been rejected by both the Courts below. The Courts below have noted that the stamp paper itself was purchased by the appellant. The concurrent findings of fact arrived at by the Courts

below on this count cannot be reappreciated by this Court in the present Second Appeal under Section 100 of the Civil Procedure Code as there is no perversity pointed out by the appellant. The findings arrived at by the Courts below are on the basis of appreciation of the evidence on record and as such the question of interfering in such findings in the present Second Appeal would not at all be justified. The appellant himself has accepted in the said declaration dated 19.10.2011 that he would hand over the keys to the respondent on or before October, and in breach thereof chose to file the suit for injunction on 29.12.2011. This itself disclose the conduct of the appellant to resile from his commitment to vacate the subject premises in terms of the said declaration which the Courts below have rightly held that the respondent is entitled for occupation of the subject shop. On going through the material on record, the agreement as well as the document at Exhibit 37/C Colly, I find that the conclusion drawn by the Courts below cannot be faulted. The declaration executed by the appellant itself displaces the contention of the appellant that the parties had intended to create a tenancy on the basis of the agreement executed between the parties.

9. With regard to the contention of the learned counsel appearing for the appellant that the respondent has continued occupation of the subject premises inspite of the expiry of the original agreement, this Court in a judgment dated 28.02.2014 passed in Second Appeal No. 68 of 2009 has observed at para 9 thus :-

“9. Another contention of Mr. Thali, learned counsel appearing for the respondent is that the appellant allowed such relationship to continue for a period of 24 years which according to him suggest that the parties intended to create a lease. It has already been held on the basis of document as well as the other material on record that the intention of the parties was in fact to create a licence, nevertheless, merely an act of tolerance on the part of the appellant in allowing the respondent to occupy such premises by itself would not suggest that he had acquiesced or permitted such relationship or create any change in the

colour of his occupation by such extension.

In fact, it was the case of the respondent that he became a statutory tenant in the year 1980. There is nothing on record to show how and in what circumstance the respondent became a statutory tenant in the year 1980. It is not the case of the respondent that there is a new agreement which changed the intention of the parties to occupy the disputed premises on the basis of the licence agreement at Exhibit 25. In such circumstances, the said contention of Mr. Thali, does not deserve any consideration. The learned Single Judge of this Court in the judgment reported in **2013(1) ABR 853 (Goa Bench)** in the case of **Joao Necessidade Rooque Antonio by Lrs and others V/s Dr. Vaman Govind Lotlikar and Ors** has relied upon the judgment of the Apex Court and observed at paras 21, 22,

23, 24, 25, 26 and 27 thus :

“21. In the case of Captain B. V. D'Souza (AIR 1989 SC 1816) (supra), the Apex Court held that in order to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form. Exclusive possession of the party is relevant but at the same time it is not conclusive. The intention of the parties and whether the document creates any interest in the property or not, are important considerations.

In the facts of the case the Apex Court held that document created lease and not leave and licence as has been held by three Courts below.

22. In the case of Lillawati Hiranandani (AIR 1996 SC 441) (supra), the Apex Court after considering the facts of that case observed that the agreement was unambiguous and it was only a licence. The appellant sought permission of the original applicant to occupy the portion of the flat belonging to the original applicant. No right, or interest whatsoever in the said premises or any part thereof was created in favour of

the original respondent. The appellant also undertook to vacate the building and to give quiet possession to the applicant at any time when required to do so. The only condition was that notice of one month was to be given. The Apex Court held that document was clear and as such it was not necessary to look further. Both the parties were aware as to what was the prevailing state of law and entered into the agreement. In this background, the Apex Court held that the label or nomenclature of the agreement and the contents of the communication should conclude the matter. Consequently, the Supreme Court dismissed the appeal.

23. In the case of *Suhas Chopde* (1999 AIR SCW 4948) (supra), the Apex Court held that mere use of word "rent" in a document executed by the licensor by itself would not mean that the relationship between the parties was that of lessor and lessee. The Apex Court held that undue importance could not have been given to the word "rent" in the agreement and also in some receipts. Consequently, the Supreme Court set aside the judgment of this Court holding

that the relationship between the parties was that of landlord and tenant.

24. In the case of Vayallakath Muhammadkutty (AIR 1996 SC 3288) (supra), the Apex Court, after referring to the judgment in the case of Captain B.V. D'Souza (AIR 1989 SC 1816) (supra), held that normally in a case of licence the question of sub-letting does not arise but simply on the ground that there is such a clause in the agreement, the agreement cannot be held to be an agreement for lease. Pith and substance of document are required to be considered for the purpose of finding out true import of a document, namely whether the document creates a lease or licence. In the fact of the case, the Apex Court upheld the finding of the High Court that defendant was not inducted in the premises as lessee and consequently, dismissed the appeal.

25. In the case of Delta International Ltd. (AIR 1999 SC 2607) (supra), after considering several judgments, the Apex Court in paragraph 15 has observed as

follows:-

From the aforesaid discussion what emerges is:

(1) To find out whether the document creates lease or license, the real test is to find out 'the intention of the parties'; keeping in mind that in cases where exclusive possession is given, the line between lease and licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other

evidence which may be available on record, and in such cases exclusive possession of the property would be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the subtenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position

where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation.

(5) Prima facie, in absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act inter alia provides that leases of immoveable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the

lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.

In the said case the Apex Court has further observed that the agreement was not entered into by illiterate layman or poor person in need of some premises for his residence or business, but it was executed by two companies and as such, it could be presumed that the terms were incorporated after full understanding and to avoid any wrong inference or intention. The agreement had specifically mentioned that only licence was created and not lease. The said clause was in positive and negative forms

providing that the agreement was a licence and should not be treated or used or dealt with or construed by the parties in any way as lease or to confer any relationship as landlord or tenant between the parties. The Apex Court further held that when the parties are capable of understanding their rights fully agreed and declared that the document should not be construed in any manner creating any relationship between the landlord and the tenant, it would be impermissible to conjecture or infer that their relations should be construed as that of landlord and tenant because of certain terms mentioned in the deed and can have double intentment. The intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning. In this factual background, the Apex Court held that the learned Single Judge of Calcutta High Court was right in holding that relationship between the parties was that of licensor and licensee.

The Apex Court further observed that mere use of words "demised premises" would not mean that relationship of landlord was accepted. Exclusive possession was not

sole inditia to establish the relationship of landlord and tenant between the parties. The Apex Court further held that mere fact that the agreement provided for giving notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Heavy reliance has been rightly placed by Mr. Usgaonkar upon this judgment.

26. In the case of C.M. Beena (AIR 2004 SC 2103) (supra), the Apex Court held that the parties to a document can show that what was intended was to create landlord and tenant relationship, although the deed was styled as deed of licence. In the facts of the case, the Apex Court held that the relationship of the parties was of landlord and tenant.

27. In the case of Maria Piedade (supra), learned Single Judge of this Court after considering several judgments of the Apex Court and also several agreements entered into between the parties, held that last agreement dated 1.9.1990 entered into between the parties created relationship of

licensor and licensee and not lessor and lessee as held by the First Appellate Court and consequently, allowed second appeal. In the said case also there was a break in between the agreements and the first agreement was drawn on 1.6.1981 whereas last agreement was drawn on 1.9.1990. Learned Single Judge held that what was required to be considered was the last agreement for the purpose of finding out the relationship between the parties. I do not deem it necessary to refer to the judgments of the Apex Court in the case of East India Hotels (supra) and the Division Bench judgment of this Court in the case of Bento de souza (supra), since the facts in both these cases are clearly different.”

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10. Taking note of the said observations and the concurrent findings of fact that the agreement between the parties was only for the purpose of conducting business, I find that the Courts below were justified to grant the relief in favour of the respondent in the counter claim.

11. The judgment in the case of **Bharat Petroleum Corp. Ltd.** (supra) is not at all applicable to the facts of the present case. The facts therein are substantially different as the subject agreement herein was purely an agreement to conduct a business. The judgment of the learned Single Judge of this Court in the case of **Jayant L. Shah** (supra) is not applicable to the facts of the present case. The claim of the respondent therein was that he was a protected licensee under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 in view of the amendment protecting a licensee as on 01.02.1973. The said Act is not applicable to the facts of the present case. Consequently, the said judgment is not applicable to the facts of the present case as the relationship between the parties were not governed by the said Bombay Rents Act. The judgment of the Apex Court in the case of **Delta International Ltd., V/s Shyam Sundar** (supra) is also not applicable to the facts of the present case. The clause therein clearly stipulated that the parties had agreed to execute a lease deed of the sub- tenancy after obtaining the consent of the landlord. In the present case, no such term is recorded in the agreement between the parties.

12. The agreement is purely an agreement to conduct business which stands corroborated by the declaration executed by the appellant himself. Apart from that, the agreement also stipulates that furniture items of the respondent continued in the shop premises when the agreement was executed between the parties. On perusal of the substantial questions of law proposed by the learned counsel appearing for the appellant, I find that the substantial questions of law are essentially in the realm of seeking reappreciation of the evidence on record. The questions proposed would entail reappreciation of evidence which is not permissible in a Second Appeal under Section 100 of the Civil Procedure Code. The appellant is illegally occupying the subject premises despite of signing the declaration. The declaration and also the notings therein clearly show that the appellant had committed himself to vacate the subject premises within three months from the date thereof. In such circumstances, I find that there are no substantial questions of law which arise in the present appeal for consideration. The appeal stands accordingly rejected.

F. M. REIS, J

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