

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 294 OF 2008

1. Shri Rohidas Harischandra N. Shirodkar,
(since deceased)
 - 1(a) Shri Sarvesh Rohidas Naik Shirodkar,
major in age, business, married,
and his wife,
 - 1(b) Smt. Sujata Sarvesh Naik Shirodkar,
wife of Shri Sarvesh R. Naik Shirodkar,
major in age, housewife, married,
Both residing at Kamaxi Building,
Budhwar Peth, Upper Bazar,
Ponda Goa.
- ... Appellants

V e r s u s

1. Shri Devrai Sagun Bandodkar,
Son of late Shri Sagun Yeshwant Bandodkar,
aged 50 years, married, business,
r/o flat no.1, Kamakshi Niwas,
Budhwar Peth, Upper Bazar,
Ponda Goa.
 2. The Assistant Engineer,
Office of the Assistant Engineer,
Electricity Department,
Sub-Div. I (O & M), Div. X,
Curti, Ponda Goa.
 3. The Executive Engineer,
Electricity Department,
Vidhyut Bhawan,
Panaji Goa.
 4. The Chief Secretary,
Govt. of Goa,
Secretariat,
Porvorim Goa.
- Respondents

Mr. A. D. Bhobe, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for respondent no.1.

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Ms. S. Linhares, Additional Government Advocate for respondent nos. 2 to 4.

CORAM : F. M. REIS, J

DATE : 12th February, 2016

ORAL JUDGMENT

Heard Mr. A. D. Bhobe, learned counsel appearing for the appellants and Mr. S. D. Lotlikar, learned Senior Counsel appearing for the respondent no.1.

2. The above appeal challenges the judgment and decree dated 30.09.2008 passed in Civil Suit No.23/2006 whereby the suit filed by the respondent no.1 and the counter claim filed by the appellants came to be disposed of by decreeing the suit partly and the appellant no.1 was permanently restrained from disconnecting the electricity connection of the suit shop M/s Sagun Shet Jewellers situated in the building known as "Kamakshi Niwas" at Budhwar Peth, Upper Bazar, Ponda Goa. The appellant no.1 is also restrained from evicting the respondent no.1 from the said shop otherwise than by due process of law. The counter claim of the appellant no.1 came to be rejected.

3. Mr. A. D. Bhobe, learned counsel appearing for the appellants has assailed the impugned judgment on the ground that the

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learned Judge has misconstrued the agreement executed between the appellants and the respondent no.1 in the year 2001 at Exhibit 62 which clearly shows that the shop given to the respondent no.1 bears shop no.3. The learned counsel further pointed out that according to the appellants the injunction sought by the respondent no.1 is in respect of shop no.1 which has nothing to do with the subject matter of the said agreement. The learned counsel further pointed out that the said agreement at Exhibit 62 was a leave and licence agreement and the learned Judge has misconstrued the said document to come to the conclusion that the respondent no.1 was a tenant of the suit shop. The learned counsel further pointed out that the relief granted by the learned Judge in the impugned judgment is as such untenable as the respondent no.1 has failed to establish any right to the subject shop bearing no.3. The learned counsel further pointed out that the findings on tenancy would gravely jeopardize the interest of the appellants as according to him the respondent no.1 is not a tenant of the suit shop. The learned counsel further pointed out that the learned Judge has also relied upon some rent receipts in respect of the year 1988 which according to him cannot be attributed to be the rent receipts in respect of the suit shop as according to him the shop which was the subject matter of the said rent receipts in fact was surrendered by the respondents in favour of the appellants. The learned counsel further submitted that there is no subsisting tenancy in favour of the respondent in respect of shop no.1 and as such the suit shop which

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according to the appellants bears shop no.3 and consequently, the decree passed by the learned Judge cannot be sustained. The learned counsel has thereafter taken me through the impugned judgment, pleadings in the suit as well as the evidence to point out that the learned Judge has mis-appreciated the evidence on record and has erroneously decreed the suit and rejected the counter claim filed by the appellants. The learned counsel further submitted that the counter claim was essentially on the ground that the suit shop bears shop no.3 which has nothing to do with the subject matter of the document at Exhibit 62 and as such the relief sought in the counter claim deserves to be granted. The learned counsel further pointed out that as the respondent no.1 was a defaulter in terms of the said agreement and as such, the appellants were entitled for the reliefs sought in the counter claim.

4. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel appearing for the respondent no.1 has supported the impugned judgment. The learned Senior Counsel pointed out that the whole exercise on the part of the appellants is to indulge in an expedient to defeat the tenancy rights of the respondent no.1 by contending that the subject matter of the said agreement is shop no.3. The learned Senior Counsel further submitted that the building belonging to the appellants has three shops on the ground floor bearing nos. 1, 2 and 3 and according to him the shop no.1 has been

erroneously shown as shop no.3 in the said agreement. The learned Senior Counsel further submitted that the rent receipts of the year 1988 clearly disclose that the respondent no.1 was a tenant of a shop in the building belonging to the appellants and consequently, the learned Judge was justified on the basis of the admission of the appellants themselves in the deposition that the said shop is the shop which was tenanted to the respondent no.1. The learned Senior Counsel further pointed out that the respondent no.1 was carrying out his business in the suit shop much prior to the year 1988 and the appellants were illegally interfering with such occupation and possession of the disputed shop by trying to disconnect the electricity supply to such shop. The learned Senior Counsel has thereafter taken me through the judgment of the learned Trial Judge as well as the material on record and the agreement between the parties to point out that the learned Judge was justified to come to the conclusion that the suit shop no.1 was tenanted to the respondent no.1. The learned Senior Counsel further pointed out that as the Court has come to the conclusion that the respondent no. 1 is a tenant of the suit shop, the question of granting eviction of the respondent no.1 on the basis of the finding in the counter claim was not at all justified. The learned Senior Counsel has thereafter taken me through the evidence on record to point out that the learned Trial Judge has rightly appreciated the evidence on record and taken note of the admission of the appellants/defendant to hold that the respondent no.1 was a tenant of

the subject shop. The learned Senior Counsel further pointed out that in case the allegations of the appellants are to be accepted, the respondent no.1 would be in possession of two shops namely shop no.1 and shop no.3 but however, according to him the respondent no.1 is occupying only one shop where he is carrying out business in the name of M/s Sagun Shet Jewellers. The learned Senior Counsel as such submits that there is no merit in the above appeal which deserves to be rejected.

5. I have considered the submissions of the learned counsel and with their assistance, I have also gone through the records. Based on such submissions, the following point for determination arises in the present appeal for my consideration.

POINT FOR DETERMINATION

Whether the respondent no.1 has established that he was in possession of the disputed shop which the appellants cannot interfere or dispossess otherwise than due process of law ?

6. On perusal of the allegations in the plaint and findings of the learned Judge in the impugned judgment, the learned Judge has come to the conclusion that the subject shop is a shop which was

leased to the respondent no.1 by the appellants much prior to 1988. This finding arrived at by the learned Judge is on the basis of the rent receipts which are produced on record. The appellants have not been able to bring any evidence to rebut the presumption as far as the rent receipts are concerned of the subject shop. The learned Judge has also examined the evidence of DW1 to hold that the shop which was leased to the respondent no.1 to carry out business is the same shop which was the subject matter of the said agreement at Exhibit 62. On perusal of the evidence of DW1 and the document which has been produced on record, I find that the findings of the learned Judge on that count cannot be faulted. The learned Judge has rightly appreciated the evidence on record and based on admission of DW1 has come to the conclusion that the respondent no.1 was a tenant of the subject shop. The contention of Mr. Bhobe, learned counsel appearing for the appellants that the subject shop is shop no.3 and not shop no.1 which was originally leased to the respondent no.1 cannot be accepted. Though it was contended by the appellants that the respondent no.1 had surrendered the lease in respect of the shop no.1 before he took over the shop no.3 in terms of the said agreement at Exhibit 62, there is no cogent material on record to substantiate such claim. In fact, on perusal of the agreement at Exhibit 62, there are no recitals therein to co-relate the occupation of the respondent no.1 based on the rent receipts to the fact that the respondent no.1 had surrendered the shop no.1 before entering into such shop no.3 which

was the subject matter of the said agreement at Exhibit 62. The learned Judge has rightly appreciated the evidence on record to hold that the shop which has been leased is in fact a shop which was the subject matter of the said agreement and I find no infirmity in the findings of the learned Judge on that count. The contention of Mr. Bhobe, learned counsel that the two shops are different cannot be accepted. Once the findings of the learned Judge that the respondent no.1 was a tenant of the subject shop premises is accepted, the counter claim filed by the appellants would not survive as in any event the Civil Court has no jurisdiction to pass such decree. In such circumstances, once it has been found that the respondent no.1 was in settled possession of the disputed premises, the appellants cannot dispossess the respondent no.1 otherwise than due process of law. In such circumstances, the decree passed by the learned Judge cannot be faulted as I find no infirmity in the findings rendered therein. On perusal of the plaint, it is the case of the respondent no.1 that he is running business under the name and style as M/s Sagun Shet Jewellers for the last 32 years and that he used to pay the rent from time to time together with rent of the flat no.1 on the first floor of the building. It is further the case of the respondent no.1 that behind the suit shop there exists a portion admeasuring 12 square metres near the staircase which is the part of the suit shop wherein the respondent no.1 and his workers are doing the jewellery work which is also in his possession since the time of leasing of the shop. It is also contended

that the shop has a telephone connection and the licence has been issued by the Municipality. It is further his case that in March, 2006 some persons came to the shop to disconnect the electricity connection on the basis of the application filed by the appellant no.1. Thereafter, a legal notice was sent to the original defendant nos. 2, 3 and 4 and ultimately filed the suit. The appellants filed the written statement along with the counter claim. It is their case that the respondent no.1 has defaulted the payment of the monthly compensation for which due notice was issued and action taken by the respondent nos. 2 and 3 herein is on account of non payment of electricity charges. It is also their case that the respondent no.1 is not a tenant of the suit shop no.1 but was allowed to occupy the same by an agreement of leave and licence dated 11.07.2001 which was duly registered before the notary. It is further their case that the respondent no.1 has malafidely paid the electricity charges though the appellants had already effected such payment. In the counter claim filed by the appellants, it is stated that by leave and licence agreement dated 11.07.2001 the appellants were allowed to occupy a shop no.3 along with store room attached to the said shop on monthly compensation though in the reply to the notice of the advocate stated that the respondent no.1 had no knowledge about such agreement. It is also their case that the leave and licence agreement was terminated since 10.03.2006 and the occupation of the respondent no.1 is that of trespasser and consequently, sought for the relief of payment of licence fees and other claims as referred to in the

counter claim and also to vacate the shop no.3. A written statement has also been filed by the respondent no.1 to the said counter claim wherein it is disputed that he has signed the agreement dated 11.07.2001 and denied all the contentions raised in the counter claim. A written statement has also been filed on behalf of the respondent nos. 2 to 4. On perusal of the evidence on record and the findings therein, the material suggest that DW1 in the cross examination has admitted on the basis of the documents of the electricity bills at Exhibit 48 Colly that the amount referred to therein had been paid by the appellants and prior to that he has not paid the electricity bills of the suit shop. The learned Judge as such rightly come to the conclusion that the electricity bills in respect of the suit shop are being paid by the respondent no.1 herein. The main aspect as such to be examined is whether the respondent no.1 is occupying the shop no.1 or shop no.3 as claimed by the appellants herein. The respondent no.1 has clearly stated in the plaint that he was occupying shop no.1 in the subject building where he was running the business. It is not the case of the appellants that the respondent no.1 is occupying two shops namely shop no.1 and shop no.3 though it was sought to be contended earlier that the shop was surrendered, nevertheless, there is no material produced on record on that count. The said fact gets clear as the electricity bills on record suggest that the respondent no.1 was paying electricity bill in respect of only one shop. As pointed out herein above, the respondent no.1 is occupying only one shop and the counter claim

filed by the appellants is in respect of the shop which is the subject matter of the suit. This itself shows that the subject matter of the suit is the same shop which the respondent no.1 has been occupying since its inception. As pointed out herein above, even on perusal of the written statement, the allegations that the respondent no.1 had surrendered the shop no.1 and occupied shop no.3 is not even pleaded in the written statement nor in the counter claim. DW1 himself has admitted that in the subject building there is only one shop by name M/s Sagun Shet Jewellers belonging to the respondent no.1. It is also pointed out that the father of the respondent no.1 had taken the said shop on rental basis since the year 1975. The deposition of DW1 is beyond the pleadings cannot be looked into and as such the said contention of the appellants deserves to be rejected. As such, the findings of the learned Trial Judge that the rent receipts which are at Exhibit 47 Colly have been signed either by the appellant no.1 or DW1 or wife of DW1 have been clearly admitted and proved. As the respondent no.1 was already a tenant of the suit shop, the subsequent agreement of leave and licence sought to be relied upon by the appellants cannot in any way defeat the tenancy right which are created in favour of the respondent no.1 when the suit shop was given on rental basis to the father of the respondent no.1 by the appellants. As such, the learned Trial Judge was justified to come to the conclusion that the appellants have failed to establish that the respondent no.1 was occupying the suit shop on the basis of leave and licence

agreement. The material on record clearly suggests that the respondent no.1 has been exclusively in possession of the shop carrying jewellery business since the year 1975 nor there was any material on record to show that any such control has been retained by the respondent no.1 herein. As such, the findings of the learned Trial Judge that the appellants have failed to establish that the respondent no.1 is occupying the disputed premises on leave and licence basis cannot be faulted.

7. Considering the evidence on record and admission of DW1 himself, the respondent no.1 is in exclusive possession of the suit shop, the contention of the appellants that the suit shop originally leased was a different from the shop which was given on leave and licence has been rightly rejected by the learned Trial Judge. The payment of rent has also been duly proved on the basis of the rent receipts on record and as such the question of seeking eviction of the respondent no.1 before the Civil Court does not arise at all. As the Civil Court has no jurisdiction to evict the respondent no.1, the question of directing the payment of any amount as claimed by the appellants in the counter claim has been rightly rejected by the learned Trial Judge. As such, I find that no case is made out for any interference in the impugned judgment and decree passed by the learned Trial Judge. The point for determination is answered accordingly to the effect that the appellants cannot dispossess the respondent no.1 from his occupation

in the subject property without following the due process of law. The learned Judge as such was justified to grant permanent injunction restraining the appellants from disconnecting the electricity connection of the suit shop as well as from evicting the respondent no.1/original plaintiff from the said shop otherwise than due process of law. The counter claim also has been rightly rejected. Once it is established on the basis of the material on record that the respondent no.1/original plaintiff is in settled possession of the subject shop, the question of the appellants taking law in their hands and creating hurdles in such occupation is not at all justified. The learned Judge as such was pleased to grant the relief to the respondent no.1. As such, I find that no case is made out for any interference in the impugned judgment.

8. In view of the above, the appeal stands dismissed with no order as to costs.

F. M. REIS, J

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