

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Revision Application NO. 501 OF 2016

Prakash Chandulal Kekade
and another

...Applicants

Versus

Shri. Solapur Panjarapol Va Sheth
Virchand Deepchand Anathalaya and Others

...Respondents

....

Mr.G.S. Godbole, Senior Advocate i/b. Atharva A. Dandekar, for
the Applicants.

Mr.R.S. Alange, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 02nd SEPTEMBER, 2016

P.C.

1. Heard Mr.G.S. Godbole, learned Senior Counsel for the applicants and Mr.R.S. Alange, learned Counsel for the respondents, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants hereinafter referred to as the 'defendants' have challenged the judgment and decree dated 9.4.2013 passed by the learned 2nd Joint Civil Judge, Junior Division, Solapur in Regular Civil Suit No.770/2007 as also the judgment and decree dated 19.8.2015 passed by the learned District Judge-5, Solapur in Regular Civil Appeal No.196/2013. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as the 'plaintiffs',

under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999 (for short, 'Act').

3. The plaintiffs instituted the suit against the defendants for recovery of possession of shop No.3, admeasuring 242 sq. ft. situate at Panjarpol Bhawan, Municipal House No.112, City Survey No.8832 and 8833, Budhwar Peth, Solapur (for short, 'suit property') on the grounds of (i) un-lawful sub letting, (ii) change of user and (iii) default in payment of rent. It is the case of the plaintiffs that defendant No.1 tenant had unlawfully sub-let the suit property to defendant No.2. Defendant No.1 was inducted as a tenant on the basis of rent agreement dated 14.5.1987. Defendant No.1 was to carry on business of grocery shop. However, defendant No.1 unlawfully sub-let the suit property to defendant No.2 for running a electric spare-parts at monthly rent of Rs.4,000/-. As there was change of user and unlawful sub-letting, the plaintiffs issued legal notice dated 29.9.2006 terminating the tenancy and called upon the defendants to hand over possession of the suit property by 31.10.2006.

4. The defendants resisted the suit *inter alia* contending that initially defendant No.1 was running a grocery shop. The rent agreement never precluded him from changing the business to any other profitable business. On 1.4.1997, defendant No.1 started the business relating to

sale of electric goods from the suit property. For want of technical knowledge in dealing electric goods, he took defendant No.2 as a partner. It was denied that there was unlawful sub-letting and that defendant No.1 is charging Rs.4000/- to defendant No.2. Defendant No.1 is in possession and in control of the suit property. It was further contended that the partnership deed was handed over to the plaintiffs in the year 1997. The plaintiffs went on accepting rent from 1.4.1997 till 31.8.2006. In other words, the plaintiffs were fully aware of defendants carrying on business of sale of electric goods and never objected the same. The defendants, therefore, prayed for dismissal of the suit.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led oral and documentary evidence. After considering the evidence on record, the learned trial Judge decreed the suit under Section 16(1)(e) of the Act. Aggrieved by that decision, the defendants preferred appeal which was dismissed by the learned District Judge. It is against these decisions, the defendants have instituted the present application under Section 115 of C.P.C.

6. In support of this application, Mr. Godbole has taken me through

(i) tenancy agreement dated 4.6.1987 and in particular

clause 2[c] thereof;

(ii) plaintiffs evidence to contend that the plaintiffs were aware of presence of defendant No.2;

(iii) partnership deed dated 22.3.1993 between defendant No.1 and mother of defendant No.2; and

(iv) partnership deed dated 1.4.1997 between defendant No.1 and defendant No.2 and in particular clauses (5), (8) and (10) thereof.

7. Mr. Godbole submitted that in clause (11) of the partnership deed dated 1.4.1997, it is specifically provided that the suit property is tenanted premises of defendant No.1. The possession of the suit property will remain with defendant No.1 as a tenant. Defendant No.2 will have no right, title and interest in the suit property. Mr. Godbole submitted that the partnership deed between the defendants is registered under the Bombay Shops and Establishments Act, 1948. Mr. Godbole also relied upon following decisions :

- [i] Helper Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri and others, (1987) 3 SCC 538 and in particular paragraphs-10, 11 and 19 thereof;
- [ii] Sudarshan Kumar v. Bhola Nath and another, PLR (2000) 124 P & H 8 and in particular paragraph-19 thereof;
- [iii] Madras Bangalore Transport Co. (West) v. Inder Singh and others, (1986) 3 SCC 62 and in particular paragraphs-5 and 6 thereof.

8. Mr. Godbole further submitted that the Appellate

Court is a last fact finding Court. Appellate Court, however, has not discussed the entire evidence on record and recorded its independent conclusions on the basis of the evidence on record. In any case, he submitted that the matter requires to be remanded to the District Court.

9. On the other hand, Mr. Alange supported the impugned orders. He submitted that the Courts below after appreciating the evidence on record, have concurrently decreed the suit. He has taken me through the impugned orders and submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have decreed the suit under Section 16(1)(e) of the Act. As far as the trial Court judgment is concerned, the learned trial Judge has considered this aspect from paragraphs-14 to 27. The learned trial Judge noted that it was admitted position that since 1993 business of electrical goods under name and style "Singhvi Electricals" is being carried out by the defendants. He also referred to clause 2(c) of rent agreement dated 4.6.1987 at Exhibit-53. Clause 2(c) specifically provided that defendant No.1 will carry on the business of grocery and that he will not use it for any other purpose. Without permission of the plaintiffs, he will not

sub-let the suit premises to anyone or will not hand over possession to any one. The learned trial Judge noted that initially defendant No.1 entered into partnership with mother of defendant No.2 who had absolutely no technical knowledge in respect of electrical spare parts. Subsequently in 1997, the partnership deed was executed between defendants No.1 and 2. The learned trial Judge observed that defendant No.2 is totally a stranger to the initial business of grocery for which shop was let out and his entry in the suit property was without authorization by the plaintiffs. The learned trial Judge referred to the admissions given by DW-1 during the course of cross-examination in paragraphs-18, 19, 20, 21 and 23. After considering the evidence on record as also surrounding circumstances, the learned trial Judge specifically recorded a finding that the partnership deed dated 1.4.1997 at Exhibit-64 is sham, colourable and camouflaged document made with object of giving appearance of legality to subletting. The learned trial Judge accordingly decreed the suit under Section 16(1)(e) of the Act.

11. As far as the District Court judgment is concerned, the learned District Judge has dealt with the issue of unlawful sub-letting from paragraph-10 onwards. It discussed the evidence of PW-1 as also the documents produced on record. The learned District Judge has referred to the cross-examination of DW-1 Prakash Kekade. The

learned District Judge has referred to various admissions given by DW-1 during the course of cross-examination. In paragraph-15, the learned District Judge referred to the rent agreement Exhibit-53 dated 4.6.1987 and in particular clause 2(c) thereof. In paragraph-16, the learned District Judge dealt with evidence on record and in particular cross-examination of DW-1. The learned District Judge held that DW-1 was unaware of the basic terms and conditions of a partnership firm and made contradictory statements regarding the capital and ratio of profit etc. In paragraph-17, the learned District Judge dealt with the admission of defendant No.2 that he is paying Rs.5,000/- per month to defendant No.1.

12. Mr. Godbole submitted that the learned District Judge has not discussed the entire evidence on record and also did not record his independent conclusions on the basis of evidence on record. In the case of **H. Siddiqui (dead) by Lrs. v. A. Ramalingam, (2011) 4 SCC 240** and in particular paragraph-21 thereof, Apex Court has held that it is mandatory for the Appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment

rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions.

13. Perusal of the discussion of the learned District Judge from paragraphs-10 to 17 clearly indicates that the learned District Judge has applied his mind to the evidence on record. It, therefore, cannot be said that the learned Appellate Court being a last fact finding Court did not record findings independently and after appreciating the evidence on record.

14. Applying the tests laid-down by the Apex Court to the facts of the present case, it is evident from the judgment of the Appellate Court that the learned District Judge has properly appreciated the facts/evidence, applied his mind and decided the case considering the material on record. In my opinion, it amounts to substantial compliance of Order XLI Rule 31 of C.P.C. as the Appellate Courts judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing.

15. Mr. Godbole relied upon the decisions referred in paragraph-7 above. In **Helper Girdharbhai (supra)**, Apex Court referred to various clauses of partnership deed in paragraph-10. In paragraph-11, Appellate Court opined that there was nothing intrinsically wrong in law in constituting a partnership in the manner it was done. In paragraph-19, Apex Court referred to various decisions and also observed that sharing of profits and contributing to losses were not the only elements in a partnership, existence of agency was essential and whether there was a partnership or not is a mixed question of law and fact, depending upon the varying circumstances in different cases, and thereafter referred to various decisions.

. In the present case after appreciating the evidence on record, the Courts below have concurrently found that the deed of partnership was a camouflaged document. In view thereof, the decision in the case of **Helper Girdharbhai (supra)** does not assist the defendants.

16. In the case of **Sudarshan Kumar (supra)**, the learned Single Judge of Punjab and Haryana High Court dealt with the criticism that was levelled against the statement of the respondent Bhola Nath that he has not invested in the partnership firm. After considering the entire statement of the respondent, the learned Single Judge observed that he had clearly stated that he had the control

over the premises. A partner may not be in a position to tell as to what amount he had actually invested in the partnership firm. In my opinion, the decision in that case rested on the facts found to be established on record. As against this, in the present case the plaintiffs have established unlawful sub-letting. In view thereof, the decision in the case of **Sudarshan Kumar (supra)** does not advance the case of the defendants.

17. In the case of **Madras Bangalore Transport**, Apex Court on facts found that the premises continued in possession of one of the tenants. In paragraph-6, Apex Court referred to its earlier decision in **G. Rangamannar v. Desu Rangiah, AIR 1954 Mad 182** and observed that there cannot be a sub-letting, unless and until lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. At the cost of repetition, in the present case the Courts below found that the partnership deed is a camouflaged document and it was entered into with a view to getting over ground of sub-letting.

18. After considering the evidence on record, I do not find that the Courts below committed any error in decreeing the suit. Defendants were not in a position to demonstrate that the findings recorded by the Courts below are perverse

being based on no evidence or that they are contrary to evidence on record. Defendants were not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

19. At this stage, Mr. Godbole orally applies for stay of this order for a period of twelve weeks from today. He states that the applicants are present in Court. Upon taking instructions from them, he states that the applicants are in possession and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. Mr. Godbole states that the applicants and all adult family members residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

20. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of twelve weeks from today subject to the applicants and all adult members residing with them giving usual undertaking. Mr. Godbole states that the applicants

will file usual undertaking incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any to the respondents within two weeks from today; and
- (v) that in case the applicants are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

18. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of 12 weeks from today, subject to the applicants filing undertaking in the aforesaid terms, with copy in advance to the other side. In case the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)