

Sequeira

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (St.) NO. 29639 OF 2015
Along with
CIVIL APPLICATION NO. 1859 OF 2015**

Harbhajan Gurudayal Singh

.. Appellant

Vs.

Shri Shashikant Hareshwar Thakur & ors.

.. Respondents

Mr.V.S.Kapse, for the Appellant and Applicant.

Mr.S.M.Gorwadkar-senior Advocate a/w Mr.S.H.Joshi, for
Respondent No.5.

**CORAM: N.M. JAMDAR, J.
Friday, 18 March 2016.**

PC. :

By this Appeal, the Appellant challenges the Judgment and order dated 19 September 2015 passed by the District Judge, Palghar, in Civil Appeal No.19 of 2015 setting aside the Judgment and Decree passed by Civil Judge, Junior Division, Palghar on 6 July 1992, in Regular Civil Suit No.55 of 1983.

2. The Respondent who is the original Plaintiff filed a suit bearing Regular Civil Suit No.55 of 1983 in the Court of Civil Judge, Junior Division Palghar, for possession of the suit property. A lease was entered into between the Appellant and the Respondent on 26 April 1982 under which part of the property bearing Survey No.91, situated at Village Dhekale Palghar was let

out to the Appellant for period of 10 years. The Appellant used the said property for running a hotel business. The suit was filed by the Respondents for recovery of the property from the Appellant on the ground that the Appellant committed breaches of the conditions of the lease. The suit was initially dismissed by the learned Civil Judge Junior Division, Palghar. On 6 July 1992, the Respondents-Plaintiffs filed a Civil Appeal No.224 of 1992 which was allowed by the learned District Judge, on 9 August 1995. The learned District Judge allowed the appeal primarily on the ground that by that time, time period of lease had come to an end. Second Appeal No.538 of 1995 filed by the Appellant challenging the order passed by the learned District Judge, Thane came up for hearing before this Court and by Judgment and Order dated 11 July 2014, an order passed by the learned District Judge, Thane was set aside and the appeal was remanded back to the District Court, Thane for fresh consideration. Thereafter the learned District Judge, Palghar to whom the Appeal was transferred, by the impugned Judgment and Order has allowed the Appeal and decreed the suit directing the Appellant to hand over the possession of the property by removing construction if any.

3. Heard learned counsel for the parties.

4. The learned counsel for the Appellant firstly submitted that in view of provisions of Section 60(b) of The Indian Easements Act, 1882 and in view of clause 10 of the lease deed, an irrevocable license is created in favour of the Appellant and therefore, the

impugned Judgment and Order cannot be sustained. The argument is advanced across the bar. The litigation between the parties is pending since the year 1983. Firstly, the suit was disposed of thereafter the matter was heard twice by the appellate Court and once by this Court earlier and it is for the first time in this litigation, that too without taking this point in the Appeal memo of this appeal, the argument is sought to be advanced across the bar. This cannot be considered as a pure question of law going to the root of the case that it can be permitted at this stage.

5. The learned counsel for the Appellant then submitted that the finding that the Appellant has committed breaches of the lease is not correct as the Appellant had deposited the amount of arrears in the Court. As it has been pointed out by the learned senior Advocate for the Respondent, the amount was deposited in the Court after period of seven years and that too, when this Court had directed to deposit the amount. In any case, unlike the provisions of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 which permits such deposits, no statutory provision is shown, which cures the defect of breach of lease by making a deposit subsequently, after a period of seven years, as in this case.

6. The learned counsel for the Appellant then submitted that the breach of the condition regarding non-agricultural permission is also wrongly held against the Appellant by the learned District Judge as it was the responsibility of the Respondents to take this permission. This aspect has been considered by the learned

District Judge, and rightly observed by the learned District Judge that taking non-agricultural permission to raise a structure and start commercial activity was one of the essential condition of the lease. No evidence is placed on record by the Appellant that any attempts were made by the Appellant to secure the non-agricultural permission from the authorities. The lease did not contemplate that the Appellant would unilaterally start commercial activity without any permission. Therefore, the argument advanced by the learned counsel also cannot be accepted.

7. The learned counsel for the Appellant then submitted that the Respondents had not pointed out that an amendment to the plaint was already made when this Court remanded the Appeal at the first instance, as regarding the expiry of the lease. It is pointed out from the roznama by the learned senior counsel for the Respondent No.5 that the Appellant was fully aware of the said amendment application and also filed reply to the application. In any case, the amendment was only regarding the lease having expired by efflux of time. This fact was known to the Appellant also in view of the clear terms of the lease. Therefore, as correctly held by the learned District Judge, the Appellant was not taken by surprise.

8. Learned counsel for the Appellant has sought to rely upon renewal clause in the lease. There is no such renewal. After the expiry of the lease in the year 1992, the Appellant has continued in the suit premises only because of the pendency of the litigation. In

any other case, I would have considered grant of exemplary cost commensurate to the loss of business to the Respondents however, the litigation remained pending after the year 1995 because the learned District Judge while passing the Judgment at the first instance had not considered all the aspects of the matter and therefore, the remand was necessary.

9. In the circumstances, there is no substantial question of law in this Appeal. The Appeal is dismissed. Ad-interim relief granted in this Appeal stands vacated.

(N.M. JAMDAR, J.)