

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

FIRST APPEAL NO.1233 OF 2015

M/s Shirish Ratilal & Co. & Ors. Petitioner

Vs.

M/s Naraindas Mathuradas Narielwala Respondent

* * * *

Mr. Shyam V. Walve for the Petitioner.

Mr. K.D. Shah, Advocate for the respondent.

Coram : **Smt. R.P. SondurBaldota, J.**

Date : 9th June, 2016.

P.C.

1 This First Appeal is directed against the judgment and decree dated 2nd November, 2015 passed in S.C. Suit No.174 of 1990. The appellants are the original defendants and the respondent is the original plaintiff.

2 The brief statement of facts alleged by the respondent in the suit filed by it is that, it is the monthly tenant in respect of the suit premises which is Shop No.1, situate at Pranjiwan Bhavan, Duncan Road, Mumbai 400 003 from where it was carrying on business of

selling coconuts, copra, garlic and other commodities for 57 years prior to the year 1965. One Ratinal, father of appellants no. 2 to 4 was employed with the respondent as Manager for several years. In the month of June, 1965, Ratilal offered to conduct and manage the business as hirer of the business for a period of one year from 1st July, 1965 to 30th June, 1966. Accordingly, the respondent entered into conducting agreement with Ratilal on 4th October, 1965 for conducting the business of the respondent on payment of royalty of Rs.1,300/- per month and security deposit of Rs.7,000/-. Under the agreement, Ratilal was permitted to use the furniture, fittings, other articles and also stock in trade as on the date of the agreement for the purpose of business to be carried out from 1st July, 1965 till 30th June, 1966. The amount of security deposit of Rs.7,000/- was to be returned to Ratilal on return of the possession of the business, premises and furniture, fixtures and articles in the suit premises. Under the agreement, Ratilal was to be responsible for discharge of all the liabilities incurred in respect of the business by the respondent even prior to 1st July, 1965. As regards the purchases, during the period of conducting the business, Ratilal was to make the same in his own name without pledging the credit of the respondent. Ratilal was permitted to use cash memos in the name of "Shri. Ratilal & Company" with a footnote "Independent Contractors of M/s Naraindas Mathuradas Narielwala" i.e. the respondent.

the conducting agreement, the respondent was to recover a sum of Rs.40,000/- from its several customers. Ratilal recovered that amount but failed to hand the same over to the respondent. According to the respondent, after the conducting agreement expired by efflux of time on 30th June, 1966, the respondent had requested Ratilal repeatedly to handover possession of the business. He had, however, requested to allow him to continue in the premises for some period. Ratilal expired in May, 1970. Thereafter, appellants no. 2 to 4 started conducting the respondents business without its consent and without entering into any agreement with it. They installed a telephone in the suit premises without permission from the respondent. They started illegal business of selling liquor from the rear portion of the suit premises and also removed the signboard showing the name of the respondent's business as "M/s Naraindas Mathuradas Narielwala" affixed to the suit premises. Later, by the letter dtd. 13th July, 1972 appellants no. 2 to 4 claimed that they were in exclusive possession of the suit premises and had been carrying on business for the last several years. The respondent, had, by its advocate's letter dtd. 19th August, 1972, called upon appellants no. 2 to 4 to replace the signboard of the respondent on the shop premises, handover possession of the business alongwith the premises and stop business of illicit liquor therefrom forthwith. When appellants no. 2 to 4 failed to comply with the requisition in the notice, the respondent in the year 1973, filed a suit being L.C. Suit No.3719 of 1973 in the Bombay City Civil Court at Bombay. In the year 1989, it was realised by the respondent that the Bombay City Civil

Court at that time, did not have pecuniary jurisdiction to entertain and try the suit. It therefore, sought return of the plaint. By the order dtd. 22nd February, 1989 the Bombay City Civil Court returned the plaint to the respondent to present it before the Competent Court. Thereafter, the respondent presented the plaint to this Court on 17th July, 1990 and the suit was numbered as “High Court Suit No.3569 of 1990”. Later, when the pecuniary jurisdiction of the Bombay City Civil Court was enhanced, the suit was transferred back to Bombay City Civil Court for trial.

4 The appellants contested the suit contending that the agreement between Ratilal and the respondent was not a conducting agreement but a leave and license agreement. They also claimed that, Ratilal was in fact tenant of the respondent and sub-tenant in respect of the suit premises. He had continued to occupy the suit premises as the sub-tenant until his demise on 28th May, 1970. Thereafter, appellants no. 2 to 4 had continued the business in the suit premises. As members of the family of Ratilal and using the suit premises alongwith Ratilal, appellants no.2 to 4 claimed to have become lawful sub-tenants in respect of the premises under Section 5(11)(c) of the Bombay Rent (Lodging and Boarding) Rates Control Act (for short “the Rent Act”). After 1st February, 1973, they became the protected tenants in respect of the premises. The appellants disputed all the statements of fact made by the respondent in respect of their business, understanding and agreement with Ratilal and the other allegations against Ratilal. The

appellants on 19th September, 1972 had tried to pay monthly compensation by tendering cheque in the sum of Rs.2,600/- to the respondent, who refused to accept the same.

5 On the pleadings between the parties, the Bombay City Civil Court framed nine issues for its consideration. The respondent examined its partner, Mr. Niranjan Manohardas Narielwala. The appellants examined appellant no.2, one Kiran Gala, one Rajesh Panchal and one Rashmi Shivankar in support of their case.

6 The Bombay City Civil Court while deciding the suit, noted that since the agreement dtd. 4th October, 1965 between Ratilal and the respondents is not disputed by the appellants and since the appellants have been occupying the suit premises and carrying on the business therefrom without any express permission or authority from the respondent, it was necessary for the appellants to establish their right to occupy the suit premises and carry on business therefrom. It also noted that, since the respondent's suit was filed in the year 1973, the only documents that were relevant for consideration in the suit were the documents of the dates prior to filing of the suit i.e. During the period 1965 to 1973. Any subsequent document was irrelevant. It noted that, appellant no.2, in his cross-examination admitted that, Niranjanbhai is the partner of the respondent. He further admitted that, Niranjanbhai had carried Ratilal to hospital for treatment during his illness. This admission, according to the Bombay City Civil Court

demonstrated that, the relations between the respondent and Ratilal, during his lifetime, were cordial and therefore Ratilal was permitted to carry on business even after expiry of the conducting agreement on 30th June, 1966. It was also admitted that, Ratilal was a close relative of Niranjanbhai and Ratilal was suffering from cancer. The Bombay City Civil Court, inferred from these admissions that, if keeping in mind this situation, the respondent had permitted Ratilal to conduct the business for further period, it did not mean that any tenancy was created in his favour. Appellant no.2, had further admitted in his cross-examination that the respondent had been running the business since last several years and that Ratilal was working with the respondent for many years. He further admitted that, Ratilal had obtained furniture, fixtures, accounts books, cash-book etc. from the respondent at the time of obtaining possession of the suit premises and the business. Therefore, the Bombay City Civil Court inferred that, the agreement executed between the parties was a conducting agreement and the respondent had handed over its business to Ratilal for conducting.

7 The Bombay City Civil Court was perfectly correct in holding that, once execution of the conducting agreement is admitted, the entire onus of establishing that the transaction between the parties was not of giving the business for conducting was entirely upon the appellant. The best evidence of this claim would have been the deposition of Ratilal. He was no more, having died as far back as May,

1970. In the absence of such direct evidence, the only course available to the appellants was to establish such circumstantial evidence as to indicate that Ratilal was the owner of the business and the suit premises had been let out to him by the respondent. In the face of the written argument, the circumstances had to be extremely strong leaving no possibility of the transaction other than that claimed by the appellants. For this purpose, the appellants examined appellant no.2 who at the relevant time, was barely 19 years old. The other three witnesses are formal witnesses for proving the documents of (i) the receipt dated 12th September, 1999 issued by Pranjiwan Building Associates, (ii) certificate under the Shops and Establishment Act, and (iii) the certificates issued by Sales Tax Office. All the three documents are of the dates much subsequent to the period of 1st July, 1965 to 30th June, 1966 i.e. the period of the conducting agreement. The Bombay City Civil Court has discarded the evidence of these documents on the ground that any document subsequent to the period of the conducting agreement, would be of no relevance in deciding the transaction between Ratilal and the respondents under the agreement. The Bombay City Civil Court has taken a correct view as regards the three documents sought to be proved by the appellants and the evidence of the three witness for proving the three documents. This leaves the evidence of only appellant no.2 for the consideration of the Court. His evidence has been extensively discussed by the Bombay City Civil Court in the impugned judgment and order. The Court found that the scrutiny of the conducting agreement clearly established that the

dominant intention of the parties was to give license to Ratilal for conducting the business of selling coconut, Kopra and other commodities. Appellant no.2, admitted in his evidence that prior to handing over the business to his father, the respondent was carrying on the same business for several years. Ratilal had already been serving with the respondent for several years in the very business. He admitted that, Ratilal had received furniture, fixtures, Accounts and cash-books etc. from the respondent at the time of obtaining possession of the suit premises and the business under the agreement. The admission of these circumstances, support the claim of the respondent that the agreement between the respondent and Ratilal was a conducting agreement and not an agreement of tenancy.

8. It was the evidence of the respondent that, Ratilal was a close relative of partners of the respondent. Prior to his death, he was suffering from cancer. In that circumstance, on expiry of the conducting agreement on 30th June, 1966 the respondent did not immediately take back possession of the business and the premises from him as at the relevant time, he was terminally ill. The fact of the relationship between Ratilal and the partners of the respondent and of terminal illness of Ratilal is admitted by appellant no.2 in his cross-examination. He admitted that, Nirajanbhai used to carry his father to hospital for treatment during his illness. This admission indicated the close relationship between the respondent and Ratilal. Therefore, it was highly probable that after expiry of the conducting agreement the

respondent did not take immediate steps to recover possession of the business and the premises. The nature of the agreement between the respondent and Ratilal is thus established to be a conducting agreement. Hence, there is no substance in the First Appeal. The same is accordingly dismissed.

(Smt. R.P. SondurBaldota, J)