IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 584 OF 2015

Alfa Info Technology Pvt Ltd ..Applicant

Vs

Gajanan Keshav Utekar and Ors .. Respondents

WITH

CIVIL REVISION APPLICATION NO. 1156 OF 2014

Shri Vikas B. Sabale, Managing Director, ...Applicant

Vs

Gajanan Keshav Utekar and Ors .. Respondents

Mr. V.P.Sawant, Advocate a/w Mr. Prabhakar M. Jadhav, for Applicant in CRA/1156/2014.
Mr. S. A. Rajeshirke, Advocate for Applicant in CRA/584/2015.
Mr.P.J.Thorat a/w P.B.Gujar, Advocate for Respondent no.1 in both Applications.

CORAM : R.G.KETKAR,J.
DATE : 19/07/2016

PC:

1. Heard Mr. V. P. Sawant, learned counsel for the applicant in C.R.A. No.1156 of 2014, Mr. S.A.Rajeshirke, learned counsel for applicant in C.R.A. No.584 of 2015 and Mr. P.J.Thorat, learned counsel for respondent no.1 in both the applications at length.

2. By these Applications filed under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), defendant no.1 and defendant no.3 respectively challenge the Judgment and decree

dated 31.7.2014 passed by the learned Adhoc District Judge-3, Satara in Regular Civil Appeal No.339 of 2010. By that order, the learned District Judge allowed the Appeal preferred by respondent no.1-plaintiff and decreed the suit instituted by him. The learned District Judge directed defendants no. 1 to 3 to pay an amount of Rs. 5,28,000/- towards arrears of rent from December, 2000 to August 2003 to the plaintiff along with interest at the rate of 9% per annum from 3.3.2003 till its realization. Defendants no. 1 to 3 were directed to deliver vacant possession of commercial premises bearing No.H-1 admeasuring 745 sq.ft and H-2 admeasuring 805 sq.ft, situate in a building known as 'Govind Plaza', more particularly described in paragraph 1 of the Plaint, (for short, 'suit premises') to the plaintiff within three months from the date of the order.

3. Rule. Mr.Thorat waives service on behalf of the respondent no.1-original plaintiff. Service on rest of the respondents is dispensed with as respondent no.1 being the original plaintiff is the only contesting respondent. Parties shall, herein after, be referred to as per their status in the trial Court.

4. Respondent no.1-plaintiff instituted suit against defendant no.1-Alfa Info. Technology Pvt Ltd, a company registered under the Companies Act, through its Chairman Ashok G. Gondhalekar, defendant no.2 Executive Director Dr. Baliram Dadasaheb

Utekar, since deceased, defendant no.3 Managing Director through Vikas Sabale, defendant no.4 – M/s. Soham Enterprises through (a) Ashok Gondhealekar and (b) Sachin A. Gondhalekar, inter alia, contending that he had purchased commercial premises bearing no. H-1 for Rs.4,33,000/- and commercial premises bearing no.H-2 for Rs. 4,67,000/- (total Rs. 9 lacs) on 7.12.2000. He had let out the suit premises to Alfa Info. Technology Ltd (for short, 'company'). Tenancy commences as per British calender on 1st day of month and ending on last day of the month. Area of the suit premises is 1550 sq.ft and situate opposite Zilla Parishad on Satara-Pandharpur main Road. The plaintiff contended that after due deliberation between the parties, monthly rent was fixed at Rs. 16,000/- and deposit of Rs. 1 lac. The plaintiff alleged that from December 20000, no rent was paid as also no deposit was given to the plaintiff. Thus, the defendants are willful defaulters as contemplated by Section 15 of the Maharashtra Rent Act, 1999 (for short, 'Act'). In paragraph 5, the plaintiff set up ground of bonafide requirement as per Section 16(1)(g) of the Act. On 10.3.2003, the plaintiff issued demand notice claiming rent for the period December 2000 to February 2003 of Rs. 4,16,000/- as also deposit amount of Rs.1,00,000/- lac.

5. On behalf of the defendants, Written Statement was filed at

Exhibit-14 on 27.8.2004. The defendants contended that after floating the company, the plaintiff and his family including defendant no.2 was not in a position to pay their capital, they suggested the defendants that the Company should start working in the premises offered by the plaintiff. The defendants contended that the company was incorporated and came into existence on 9.11.2000. It was registered with Registrar of Companies and duly numbered. The defendants contended that out of the capital amount agreed, defendant no.1 Dr. Gondhalekar offered his plot in MIDC Satara where there was a building with all amenities of electricity and water. Valuation of the same was Rs. 18 lacs. Defendant no.2- Dr. Baliram Utekar along with his friends and relatives was to invest Rs. 13 lacs in cash. Defendant no.3- Vikas Sabale was to invest Rs. 11 lacs. Out of Rs. 11 lacs, defendant no.3 was supposed to pay cash of Rs. 1 lac. He had offered his entire technical know-how and expertise worth Rs.10,00,000/-. The plaintiff-Gajanan Utekar was to invest Rs. 10 lacs in cash. Defendant no.2 invested only Rs. 1 lac in cash and his son Amit Utekar and his family invested Rs. 1 lac along with Rejandra Mohite, a friend of Dr.Baliram Utekar invested Rs. 3 lacs. In short, the defendants contended that as against the share capital of Rs. 10 lacs agreed to be paid by the plaintiff, he paid Rs.3,10,000/- As he did not pay the entire amount, the suit premises was his contribution towards share capital. Thus, there is no relationship of landlord and tenant between the plaintiff and the company.

6. On the basis of pleadings of the parties, the learned trial Judge framed necessary issues. Parties led oral and documentary evidence. After considering the evidence on record, the learned trial Judge dismissed the suit on 22.10.2010. Aggrieved by that decision, the plaintiff preferred Appeal which is allowed, as indicated earlier. It is against this order, defendant no.3 has instituted C.R.A. No.1156 of 2014 and defendant no.1-company has instituted C.R.A. No. 584 of 2015.

7. In support of C. R. A. No.1156 of 2014, Mr. Sawant has strenuously contended that there is no written agreement of tenancy between the parties. In view of Section 55 of the Act, the responsibility of getting the tenancy agreement registered is on the landlord and in the absence of written registered agreement the contention of the tenants about terms and conditions subject to which the premises have been given to him by the landlord on leave and licence or have been let out to him, shall prevail, unless prove otherwise. He submitted that the plaintiff came with the case that he had inducted defendant no.1 company as a tenant in December 2000. However, from December, 2000 neither rent was paid nor deposit of Rs. 1 lac

was given to the plaintiff. The plaintiff did not raise any claim towards rent as also deposit till institution of the present suit. He submitted that share capital consists of monetary capital what is popularly known as sweat equity. In the present case, the plaintiff agreed to pay Rs. 10 lacs towards his contribution of share capital. However, the plaintiff paid Rs. 3,10,000/- and did not pay balance Rs. 6,90,000/- and, therefore, the suit premises was treated as share capital of the plaintiff and thus formed asset of defendant no.1 company.

8. Mr.Sawant has taken me through trial Court's judgment and in particular paragraphs 26, 36 and 39. He has also taken me through plaint, affidavit of evidence dated 21.1.2006 filed by the plaintiff under Order 18, Rule 4 as also affidavit of evidence filed by defendant no.3 Vikas Sabale and in particular order dated 20.4.2007 passed by the learned trial Judge. Mr. Sawant also invited my attention to affidavit of evidence of Dr. Ashok Gondhalekar and in particular order dated 12.9.2008 passed by the learned trial Court on his affidavit of examination in chief. Inviting my attention to the orders dated 20.4.2007 below affidavit of examination in-chief of defendant no.3 and also dated 12.9.2008 passed by the learned trial Judge below affidavit of examination in chief of defendant no.1, he submitted that basically the affidavit of examination in chief filed by the plaintiff

itself was not admissible in evidence. He relied upon the decision of the Apex Court in the case of Ameer Trading Corporation Ltd Vs. Shapporh Data Processing Ltd (2004) 1 SCC 702 and in particular paragraph 31. He contended that admittedly this is an appealable case. In the appealable cases, though the examination-in-chief of witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath is to be recorded by following the procedure prescribed under Rule 5 of Order 18. In non-appealable cases, however, the affidavit in relation to the examination in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order 18. He submitted that in the present case, the learned trial Judge passed order on 21.1.2006 on the affidavit in examination in chief of the plaintiff to the following effect:

> “Deponent appeared and confirmed contents. Hence, affidavit is read and recorded.
>
> Sd/-
> 21.1.2006.”

He submitted that in view of paragraph 31 of Ameer Trading

Corporation Ltd (supra) as this is an appealable case and affidavit of examination in chief could not have been admitted in evidence noncompliance of requirements stipulated therein.

9. Mr.Sawant further submitted that no evidence is adduced by the plaintiff to substantiate that monthly rent was Rs.16000/-. On mere ipse dixit the learned District Judge has held that monthly rent was Rs. 16000/-. In that regard he has invited my attention to paragraphs 40 to 42 of the impugned order. In particular he invited my attention to clause 4 of the operative part of the order. He contended that defendants no.2 and 3 are Directors of defendant no.1 company. They cannot be held personally liable on behalf of defendant no1. Company. The learned district Judge was not justified in directing defendants no.1 to 3 to pay arrears of rent from December 2000 to August 2003.

10. Mr. Sawant submitted that basically burden is on the plaintiff to establish that their is relationship of landlord and tenant between the parties. The plaintiff has failed to discharge the said burden. Burden is not on the defendants to establish that the suit premises was the contribution of the plaintiff towards share capital and that it became asset of defendant no.1 company. He submitted that approach adopted by the learned District Judge was totally perverse. He has taken me

through the impugned order.

11. Mr. Rajeshirke has substantially adopted the submissions advanced by Mr Sawant. In addition, he submitted that the decision of the Apex Court in Ameer Trading Corp.Ltd (supra) is followed subsequently by this Court. In other words, he submitted that the affidavit of evidence of the plaintiff itself was not admissible. Once that affidavit of evidence is not admissible, the learned District Judge ought to have ignored evidence of the plaintiff and ought to have dismissed the suit.

12. On the other hand, Mr. Thorat supported the impugned order. He has invited my attention to paragraphs 3 and 4 of the plaint and paragraph 4 of the written statement and submitted that the defendants did not plead in the alternative that assuming that the plaintiff is landlord of the suit premises and defendants are tenants, the suit premises will not fetch Rs.16000/- per month. He has also invited my attention to paragraphs 35 and 36 of cross examination of defendant no.3 and submitted that except bare words that the suit premises is contribution of share capital of the plaintiff, the defendants have not established the said fact. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

13. I have considered the rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute and is matter of evidence on record that defendant no.1 company was incorporated on 9.11.2000. The plaintiff has produced agreements of sale at Exhibits 97 and 98 dated 7.12.2000. By these agreements dated 7.12.2000, the plaintiff has purchased the suit premises. Mr.Sawant relied upon section 55 of the Act. Section 55 lays down that tenancy agreement is compulsorily registered. Sub-section (2) thereof lays down consequences of non registration and reads thus:

> "(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise."

14. Mr. Sawant tried to contend that contention of the defendants that the suit premises was given in lieu of share capital contribution of the plaintiff, has to be accepted in view of Section 55(2). It is not possible to accept this submission. Perusal of sub section (2) of Section 55, extracted herein above, shows that relationship between the parties will essentially be that of landlord and tenant or licensor and licensee, as the case may be, and that the contention of the tenant about terms and conditions

subject to which the premises have been given to him by landlord on leave and license have been let out to him shall prevail unless proved otherwise. In the absence of registered tenancy agreement or leave and licence agreement, the terms and conditions subject to which the premises have been given to tenants/licensees, the said contention shall prevail, unless it is rebutted by the landlord. The submission of Mr Sawant that the suit premises was given towards share capital contribution of the plaintiff, therefore, must fail and accordingly is rejected.

15. Mr. Sawant further submitted that the affidavit of examination in chief filed by the plaintiff could not have been admitted in evidence. He relied upon the decision of the Apex Court in the case of Ameer Trading Corp. Ltd (supra) and in particular paragraph 31 thereof which reads thus :

> “31. On the other hand, in F.D.C. Ltd. (2001) 1 SCC 284 it has been held:
>
> "The harmonious reading of Rules 4 and 5 of Order XVIII would reveal that while in each and every case of recording of evidence, the examination-in-chief is to be permitted in the form of affidavit and while such evidence in the form of affidavit being taken on record, the procedure described under Rule 5 is to be followed in the appealable cases. In non-appealable cases, the affidavit can be taken on record by taking resort to the provisions of law contained in Rule 13 of Order XVIII. In other words, mere production of the affidavit by the witness will empower the court to take such affidavit on record as forming part of the evidence by recording the memorandum in respect of production of such affidavit taking resort to Rule 13 of Order XVIII in all cases

except in the appealable cases wherein it will be necessary for the Court to record evidence of production of the affidavit in respect of examination-in-chief by asking the deponent to produce such affidavit in accordance with Rule 5 of Order XVIII. Undoubtedly, in both the cases, for the purpose of cross- examination, the Court has to follow the procedure prescribed under Sub-rule (2) of Rule 4 read with Rule 13 in case of non- appealable cases and the procedure prescribed under Sub-rule (2) of Rule 4 read with Rule 5 in appealable cases.

In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non- appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of Rule 5, where as in case of non-appealable cases the Court would be empowered to exercise its power under Rule 13"

16. In the present case, I have already extracted order dated 21.1.2006 passed by the learned trial Judge on the affidavit made by the plaintiff. The learned trial Judge specifically recorded that deponent (plaintiff herein) appeared and confirmed contents. Hence, affidavit is read and recorded. In my opinion, even if this is appealable case, there is substantial compliance of Order 18, Rule 5 of C.P.C. It cannot be said that the affidavit of examination in chief is inadmissible for want of specifically recording finding to

the following effect: “that the contents of the affidavit are as per his say and the affidavit is under his signature”. Apart from that, no such contention was advanced either in the trial Court or in the District Court. In fact, the defendants cross examined the plaintiff’s witness and even did not raise objection for taking on record and admitting affidavit in examination in chief of the plaintiff. I, therefore, do not find any merit in the submissions advanced by Mr Sawant and Mr. Rajeshirke based on the decision of Ameer Trading Corp Ltd (supra).

17. As noted earlier, defendant no.1 company was incorporated on 9.11.2000. It has come on record that by agreements dated 7.12.2000 at Exhibits 97 and 98, the plaintiff had purchased the suit premises. Perusal of admissions given by defendant no.3 during the course of cross examination in paragraphs 35 and 36, shows that the suit premises was not treated as share capital of the plaintiff. Defendant no.3 admitted that the plaintiff had paid Rs.3,10,000/- and upon such payment, the plaintiff was appointed as additional Director of defendant no.1 company. There is no document to show that the plaintiff agreed to pay Rs. 10 Lacs as his share capital. There is no agreement, promise or acknowledgment on the part of the plaintiff to pay Rs. 10 lacs as his share capital in defendant no.1 company. In paragraph 36, he admitted that there is no document to show that the plaintiff

offered suit property in lieu of share capital. There is no resolution passed in the record of defendant no.1 company to show that the plaintiff agreed to give suit property in lieu of his share capital. The plaintiff offered suit property to defendant after the plaintiff became director of the company.

18. In my opinion, the learned trial Judge totally misconstrued Section 7(3) and Section 55 of the Act while holding that there is no relationship of landlord and tenant between the parties. As against this, the learned District Judge has considered this aspect from paragraphs 19 to 39. The learned District Judge considered agreements for sale at Exhibits 97 and 98. In paragraph 26, the learned District Judge referred to audit report Exhibit-99 prepared by M/s S.C. Mehta and Company, Chartered Accountant of defendant no.1 wherein it is specifically mentioned that defendant no.1 company sold leasehold rights of the suit premises. In other words, this audit report clearly shows that the suit premises were taken on lease basis by defendant no.1-company. Thus oral and documentary evidence clearly spells out that there is relationship of landlord and tenant between the plaintiff on one hand and defendants on the other and that the plaintiff is landlord of the suit premises. That apart, the defendant did not establish that the suit premises has become asset of defendant no.1 company as the plaintiff had given the

suit premises as contribution towards his share capital. That apart, in paragraph 22 the learned District Judge has recorded that D.W 2 Ashok Gondhlekar admitted in the cross examination that none of the Directors made contribution of Rs. 10 lacs each in defendant no.1 company. The plaintiff contributed Rs. 3,10,000/- towards share capital while other directors, Rajive Mohite, defendant no.2 Baliram Utekar since deceased, defendant no.1 Dr. A.G. Gondhalekar made contributions of Rs. 3,50,000/-, 1,10,000 and 25000/- respectively. Other Directors have not contributed Rs.10 lacs and consequently it cannot be expected that the plaintiff alone will contribute Rs. 10 lacs towards share capital.

19. Mr. Sawant submitted that the learned District Judge has directed defendants no.1 to 3 to pay an amount of Rs.5,28,000/- towards arrears of rent from December, 2000 to August, 2003. Though no evidence was adduced by the plaintiff to substantiate that the monthly rent was Rs.16,000/-. On mere ipse dixit of the plaintiff, the learned District Judge has held that monthly rent was Rs.16000/-. He has invited my attention to paragraphs 40 to 42 of the impugned order. As against this, Mr. Thorat has invited my attention to paragraph 3 of the plaint and paragraph 4 of the written statement filed by the defendants. In paragraph 3 of the plaint, the plaintiff has contended that the suit premises is

situate opposite office of Zilla Parishad and is on Satara–Pandharpur main road. Area of the suit premises is 1550 sq.ft. The suit premises is admittedly commercial premises situate on Govind Plaza which is a commercial complex. Perusal of paragraph 4 of the written statement shows that the defendants admitted that the suit premises is situate just adjacent to Satara Pandharpur main road in front of Zilla Parishad. Rest of the contents are denied by the defendants. In paragraph 41, the learned District Judge has noted that the suit premises are situate in commercial area. There are shops, offices located near the suit premises. Area of the suit premises is about 1500 sq.ft. In the absence of any contrary evidence produced by the defendants, the learned District Judge held that the contention of the plaintiff that the suit premises were let out to defendant no.1 at agreed rate of Rs.16000/- per month will have to be accepted. The learned District Judge further observed that there is probability that the agreed rent of the suit premises is Rs.16000/-. I do not find any compelling reason to take a different view. I, therefor, do not find any merit in the submission of Mr. Sawant.

20. After considering the evidence on record, I do not find that the learned District Judge has committed any error in decreeing the suit. The defendants were not in a position to

demonstrate that the findings recorded by learned District Judge are based on no evidence or that they are contrary to evidence on record. For all these reasons, No case for invocation of powers under Section 115 of C.P.C. is made out.

21. Mr. Sawant and Rajeshirke submitted that the learned District Judge was not justified in directing the defendants no.2 and 3 to pay an amount of Rs. 5,20,000/- towards arrears of rent from December 2000 to August 2003 to the plaintiff along with interest at the rate of 9% per annum from 3.3.2003 till its realization. They submitted that defendants no.2 and 3 being Directors of defendant no.1 company, cannot be held personally liable. Mr.Thorat did not dispute this proposition.

22. In view thereof, clause (4) of operative part of the impugned order is modified. Instead of defendants no.1 to 3, Defendant no.1-Alfa Information Technology Pvt. Limited shall pay an amount of Rs. 5,20,000/- towards arrears of rent from December 2000 to August 2003 to the plaintiff along with interest at the rate of 9% per annum from 3.3.2003 till its realization. Hence, Rule is partly made absolute, with no order as to costs.

(R.G.KETKAR, J.)