

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 1070 OF 2016

SHRI. NARAYAN WALAWALKAR
AND 2 ORS.,

... PETITIONERS

Versus

SHRI. VENCTEXA MANGUESH
KAREKAR (DEC) AND 23 ORS.,

... RESPONDENTS

Shri J.P. Mulgaonkar, Advocate for the Petitioners.

Shri Deepak Gaonkar, Advocate for Respondent Nos. 1(a), 1(b), 1(i), 2, 3(a), 3(b), 4(a), 4(c), 4(f) and 5.

CORAM:- C.V. BHADANG, J.

DATE:- 8th JUNE, 2017.

ORAL ORDER:

The challenge in this petition is to the concurrent finding recorded by the Courts below, directing eviction of the petitioners from the suit premises, on the ground of subletting.

2. The brief facts necessary for the disposal of the petition may be stated thus:

The suit premises were let out to now deceased, Gajanan Dhond, under a lease deed dated 09.07.1949. After his death, Laximibai Dhond being the widow of Gajanan Dhond, continued to be the tenant of the suit premises. The petitioners

are the legal heirs of Gajanan and Laximibai Dhond. The lease deed prohibited transfer of the right under the lease and/or subletting. The said lease was renewed from time to time. After the death of Gajanan Dhond, his wife, an unmarried son and daughters were running a hotel in the suit premises in the name and style as 'Hotel Shri Krishna Bar and Restaurant'.

3. The respondent no. 1 sublet the suit premises to now deceased Nandalal Samant (respondent no. 6 before the learned Rent Controller). For the sake of convenience, the petitioners are referred to as the tenants, while the respondents, except respondent no. 24-Vaishali Samant (who is the daughter-in-law of late Nandalal Samant), are referred to as landlords/applicants. The original applicant no. 1-Venkatesh Karekar came to know that the petitioners/tenant had sublet the suit premises to now deceased Nandalal Samant. Hence, a lawyer's notice was sent, to which the tenants, sent reply dated 01.11.1976.

4. It has consistently been the case of the petitioners that the original respondent no. 6-Nandalal Samant, was a nephew of Laximibai Dhond and was staying all along with her. After the death of Gajanan Dhond, Laximibai Dhond continued with the hotel business with the help of her son, Sham Dhond

and her daughters. Sham Dhond met with an accidental death, after which, help of Nandalal Samant was taken in managing the affairs of the hotel, however, no subtenancy, as such, was created in his favour. In short, it was denied that the petitioners/tenant have parted with the possession or control of the suit premises at any time in favour of Nandalal Samant.

5. The landlords/applicants approached the learned Rent Controller with an application under Section 22(2)(b) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (Act, for short), for eviction of the petitioners/tenant on the ground of subletting.

6. The application was resisted on behalf of the petitioners/tenant on the grounds as set out above.

7. Before the Rent Controller, the original applicant no. 2-Baburao Karekar examined himself, while on behalf of the petitioners/tenant, Laximibai Dhond and Nandalal Samant were examined. Two agreements, one dated 17.11.1975 (RW-1/A) and the other dated 31.10.1990 (RW-1/B), were produced before the Rent Controller.

8. The learned Rent Controller came to the conclusion that now deceased-Laximibai Dhond, without the consent of the landlords/applicants, has transferred her right under the lease and has sublet the suit premises to Nandalal Samant and consequently, directed eviction of the petitioners. Feeling aggrieved, the petitioners/tenant filed Rent Appeal No. 13/2013 before the learned District Judge, who concurred with the findings recorded by the learned Rent Controller vide judgment and order dated 18.06.2002, which brings the petitioners to this Court.

9. I have heard Shri Mulgaonkar, the learned Counsel for the petitioners/tenant and Shri Gaonkar, the learned Counsel for the respondents/landlords. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment of the Courts below.

10. It is submitted by Shri Mulgaonkar, the learned Counsel for the petitioners that the finding recorded by the Courts below that the two agreements with Nandalal Samant were a camouflage, is beyond the pleadings of the parties. It is submitted that the landlords/applicants had not set up a case that the said agreements were by way of camouflage. It is thus

submitted that the finding to that effect is perverse. Secondly, it is submitted that Nandalal Samant being the nephew of Laximibai Dhond was helping Laximibai Dhond and others in managing the hotel business, particularly, in view of the tragic death of her son, Sham Dhond.

11. It is submitted that the agreements executed in favour of Nandalal Samant are only for the purpose of “managing and running the business” and neither any interest as such was created in the suit premises nor possession of the same was parted with, which is a sine qua non to infer creation of a subtenancy. It is submitted that the Courts below have failed to properly appreciate the oral and documentary evidence on record. It is submitted that the contents of the agreement do not indicate creation of subtenancy. It is submitted that merely because Nandalal Samant was paying Rs.1,500/- every month to the petitioners and was accounting for the profits of the business and paying taxes, is not sufficient to hold that there was subtenancy created.

12. On behalf of the petitioners, reliance is placed on the following decisions:-

(i) *Md. Salim Vs. Md. Ali (since deceased through His LRs) Md. Assim & Others*, (1987) 4 SCC 270;

(ii) *M/s Shalimar Tar Products Ltd. Vs. H.C. Sharma & Others*, AIR 1988 SC 145;

(iii) *Delta International Ltd. Vs. Shyam Sundar Ganeriwalla & Another*, AIR 1999 SC 2607;

(iv) *Peter Alex D'Souza Vs. Prithi Paul Singh*, AIR 2002 Bombay 471;

(v) *Joao Necessidade Roque Antonio AS (deceased by his LRs) & Others Vs. Vaman Govind Lotlikar (Dr.) & Others*, 2013(2) Bom.C.R. 842 and

(vi) *Smt. Vidya Wati (deceased) through her LRs Vs. Hans Raj (deceased) through his LRs*, AIR 1993 Delhi 187.

13. On the contrary, it is submitted by Shri Gaonkar, the learned Counsel for the respondents/landlords that the two agreements clearly set out that there was subletting in favour of Nandalal Samant. It is submitted that the Courts below have correctly appreciated evidence on record, to hold that there was subtenancy created. The learned Counsel has taken me through the evidence in order to demonstrate that this is a clear case of subtenancy.

14. On behalf of the respondents, reliance is placed on the following decisions:-

(i) *M/s Shalimar Tar Products Ltd. Vs. H.C. Sharma & Others*, AIR 1988 SC 145;

(ii) *K. Achyuta Bhat Vs. Veeramaneni Manga Devi & Another*, (1989) 1 SCC 9;

(iii) Bharat Sales Ltd. Vs. Life Insurance Corporation of India, (1998) 3 SCC 1 and

(iv) Ms. Celina Coelho Pereira & Others Vs. Ulhas Mahabaleshwar Kholkar & Others, 2009 ALL SCR 2558.

15. It is submitted by the learned Counsel for the respondents/landlords that admittedly, no consent of the landlords was obtained before the creation of subtenancy.

16. The learned Counsel for the respondents/landlords have raised an interesting contention on the basis of the phraseology used under Section 22(2)(b)(i) of the Act. It is submitted that Section 22(2)(b)(i), not only provides, 'subletting', as a ground for eviction, but, also where, the tenant has transferred his rights of lease in favour of the third party. It is pointed out that the Rent Controller has rightly found that the petitioners/tenant have 'transferred their rights under the lease' and have sublet the premises in favour of Nandalal Samant.

17. I have carefully considered the submissions made and gone through the record. The eviction was claimed and has been granted on the sole ground of subletting. Section 22 of the Act to the extent relevant reads as under:-

"22. Grounds of eviction - (1) A landlord who seeks to evict his tenant shall apply to the

Controller for a direction in that behalf.

(2) If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied-

(a)

(b) that the tenant has without the written consent of the landlord -

(i) transferred his right under the lease or sub-let the entire building or any portion thereof, or

(ii)"

18. Thus, the only question which falls for determination is whether, the petitioners/tenant have created a subtenancy in favour of Nandalal Samant, within the meaning of Section 22(2) (b)(i) of the Act. The question whether, any particular premises have been sublet or not and the principles governing the determination of such question, are no longer *res integra*. There are several decisions, both, of the Supreme Court and of the High Courts, on the point. However, the question whether, in a particular case, the premises have been sublet or not, would depend upon facts and circumstances of each case. Thus, the question has to be decided on the basis of the facts and the evidence obtaining and in the context of the relevant principles.

19. At this stage, it would be worthwhile to reproduce the relevant terms of the agreement dated 17.11.1975, as under:

“1. That this agreement shall be deemed to have commenced with effect from 1st November 1975 and it will be for an initial period of three (3) years.

2. That the second party shall pay to the first party a sum of Rs.1,500/- (Rs. One Thousand Five Hundred only) every month being the consideration for allowing the former to manage and run the said hotel.

3. That the said amount of consideration shall be paid on or before 5th day of each subsequent calendar month at the residence of the first party.

4. That the second party shall pay all the taxes viz. sales tax, income tax and other taxes relating to the business of the said hotel. Similarly water charges, electricity charges and other charges, fees, etc. relating to the said hotel, shall be paid by the second party.

5. That the rent of the premises of the said hotel shall be paid by the first party.

6. That the second party shall take proper care of and keep in good condition the articles, fixtures and furnitures, a list of which is given in the

schedule hereto.

7. That the first party shall be entitled to enter the premises of the said hotel at any time and also shall be entitled to inspect the same.

8. That this agreement is entered into on the understanding and it is intended between the parties that nothing herein shall be deemed to constitute or create a lease or any right or interest under the provisions of any law in force.

9. That the second party shall pay the amount of loan i.e. Rs.15,000/- (Rs.13,000/- to the Mhapsa Urban Co-operative Bank and Rs.2,000/- to the other creditors) which amount was taken by the said Laxmi Dhond for the renovation of the said hotel, within one and half years.

10. That the first party shall at the request and cost of the second party at the end of the term of 3 years hereby granted and so on, from time to time thereafter at the end of each such successive further period as shall be granted execute a fresh agreement by way of renewal for the term of 3 years on such terms and conditions contained in this agreement except that relating to the amount of the consideration which shall be increased or decreased as per index of prices officially announced by the Government."

The terms of the agreement dated 31.10.1990 are identical.

20. It can thus be seen that under the agreements, Nandalal Samant (who was the second party) was allowed to manage and run the said hotel on payment of sum of Rs.1,500/- to the first party. The first party in the agreement was Laximibai Dhond and her daughters Heera and Manik Dhond. Nandalal Samant was to pay all the taxes including sales tax, income tax and other taxes and all the other charges such as water charges, electricity charges and other charges and fees. The rent of the premises was continued to be paid to the landlords by the petitioners/tenants. Clause 7 of the agreements is material to decide whether the possession of the premises was actually parted with or not. Under Clause No. 7, the tenants (first party) was entitled to enter the premises of the said hotel and to inspect the same. It may be mentioned at this stage that had the physical possession of the suit premises not been parted with, as claimed by the petitioners/tenant, there was no reason for the petitioners/tenant to have reserved their right to enter into the premises of the said hotel. Under Clause 9, the subtenant had taken over the responsibility of paying Rs.15,000/-, which

comprised of an amount of Rs.13,000/- to the Mhapsa Urban Co-operative Bank and Rs.2,000/- to the other creditors, which amount Laximibai Dhond had availed of, for renewal of the said hotel. Under Clause No. 10, the parties had agreed that after the initial term of three years, a fresh agreement by way of renewal would be executed from time to time, on such terms and conditions as may be agreed upon. It is true that under Clause 8, it was stipulated that the agreement was not deemed to constitute or create a lease or right or interest under the provisions of any law in force. However, we have to look to the agreement as a whole. No term of the agreement can be considered or appreciated in isolation. It is in this regard that the Courts below have found and to my mind rightly so, that the agreements are in fact one, of creating subtenancy in favour of Nandalal Samant. The Rent Controller has also held that the agreements are by way of a camouflage to the real transaction of transfer of the business.

21. It has been the consistent case of the landlords/applicants that the premises have been sublet. Thus, it is not necessary for a specific case, of the agreements being camouflaged, needs to be set up. Once the Court finds that the agreements in effect create a subtenancy, the necessary

corollary is that the agreement is tried to be camouflaged, as the one not creating such subtenancy. In other words, the finding that the agreements are camouflaged, is a necessary corollary to the finding that it in effect creates subtenancy.

22. In the case of **Vaman Lotlikar** (supra), the appellants had filed a suit against the defendants for eviction and for demolition of the garage and the fence constructed by the defendants and to restore the land to its original condition. The case made out was that the appellants and the defendants were lessees under the agreement dated 02.02.1979. The defendant contested the suit saying that he was a tenant. It was in the context of these facts that it was held that the defendant had merely claimed that he was a tenant without setting up a case that the agreement dated 04.02.1979 or the earlier agreement, were by way of camouflage or were entered into under coercion.

It can thus be seen that the defendant, who was the party to the agreement has failed to set up a case that the agreement is by way of camouflage or is the outcome of coercion, which was the reason for refusing to accept the said plea. In my considered view, the present case is distinguishable on facts.

23. In the case of **Md. Salim** (supra), the question was whether the agreement was one of subtenancy or an agreement for management of Tenant's business. The Hon'ble Apex Court found that in the absence of the provision in the agreement for parting of exclusive possession of the premises, the agreement was for management of Tenant's business only. As noticed earlier, the question whether, it is an agreement to create subtenancy or a mere agreement to manage the business of the tenant, would depend upon facts and circumstances of each case. In the present case, as noticed earlier, the oral evidence and Clause 7 of the agreements, would indicate that there was parting of exclusive possession.

24. In the case of **M/s Shalimar Tar Products Ltd.** (supra), it has been inter alia held that the parting of the legal possession by a lessee is essentially for reaching a conclusion that it creates a subtenancy. It would appear that there was a dispute as to whether, there was a previous consent of the landlord, which was obtained in writing. The question was whether, the consent should be in writing. It has inter alia been held that the requirement that the consent should be in writing, cannot be regarded as directory. In the present case, there was no dispute that there was no consent obtained. In fact, it is the

case of the petitioner that there is no subletting.

25. In the case of **Delta International Ltd.** (supra) again on facts, it was held that the agreement was a deed of leave and licence and not a lease.

26. In the case of **Peter Alex D'Souza** (supra), before a Division Bench of this Court, there was a recital in the deed providing that the premises would be deemed to be in possession of the licensor. On facts, it was held that it was a leave and licence and not a document creating lease.

27. In the case of **Smt. Vidya Wati** (supra), the learned Single Judge of Delhi High Court found that the dominant intention of the parties as gathered from the terms of the agreement was that the business was leased and not the shop. In that case, the shop was equipped with special tools, equipments, furniture suitable for running a barber's shop.

At the cost of repetition it needs to be stated that the question would invariably depend upon the facts obtaining in each case. The dominant test is whether, the exclusive possession is parted with or not.

28. A brief reference to the judgments relied upon by the respondents/landlords would be necessary at this stage. A useful reference in this regard may be made, to the judgment in the case of **K. Achyuta Bhat** (supra), which has a startling resemblance to the facts as obtaining in the present case. In the case of **K. Achyuta Bhat** (supra), there was an agreement purporting to transfer the business to the second respondent initially for 11 months, subject to renewal or extension by mutual consent. Thus, the agreement in substance, allowed the second respondent to run the business for any length of time and to have all the benefits exclusively for himself (as in the present case). The Hon'ble Supreme Court having regard to the terms of the agreement and also the conduct of the parties, held that the agreement was one camouflaging the real transaction of transfer of the business in toto, together with the leasehold right and the interest of the lessee in the leased premises. The Apex Court thus upheld the order of eviction on the ground of unauthorised subletting (see paras 7 to 10 of the judgment).

29. In the case of **Bharat Sales Ltd.** (supra), the Hon'ble Apex Court has reiterated the principle of parting of physical and actual possession by the tenant in favour of the third party, behind the back of the landlord, which is indicative of subletting.

It has been held that proof of payment of monetary consideration by the sub-lessee to the tenant is not always necessary to establish subletting. Here in the present case, the agreements also set out the monetary consideration of Rs.15,000/- to the petitioners/lessees.

30. Lastly, the case of **Ms. Celina Coelho Pereira** (supra) is arising out of the Goa, Daman and Diu Buildings (Lease, Rent & Eviction) Control Act, 1968. It has been held that parting of possession, of the tenanted premises of the tenanted premises in favour of the third party with exclusive right of possession and such parting being without consent of the landlord and in lieu of compensation, was a sufficient ground for eviction under Section 22(2)(b)(i) of the Act. It has also been held that although, initial burden of proving subtenancy is on the landlord, but, when the third party is in exclusive possession of the premises (as in the present case) and the tenant has no legal possession of the tenanted premises, the onus shifts on the tenant to prove the nature of occupation of such third party and to show that the tenant continues to hold legal possession of tenanted premises. The legal position has been set out in para 28 of the judgment. Clauses 5 and 6 of para 28, which are relevant are reproduced thus:

“(v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.”

31. I find that in the present case, the petitioners have not discharged the said onus. I have gone through the order of the learned Rent Controller and the learned District Judge and I do not find that they suffer from any infirmity.

32. At this stage, it is necessary to mention that Section 22(2)(b)(i) not only speaks of sub-letting, but also of the tenant transferring right under the lease to a third party as a ground for eviction. The order of the Rent Controller (page 72 of the compilation) shows that the Rent Controller has come to the conclusion that Laximibai Dhond, without the written consent of

the landlord transferred her rights to Nandalal Samant. I do not propose to go into the question, as to whether, the transfer of any of the rights in the tenancy, would be something lesser than creating a subtenancy and whether it is actionable under the Rent Act, because the parties have not addressed the Court on that issue. The fact remains that a clear case of creation of subtenancy has been established in this case and the concurrent finding of the Courts below, do not require any interference.

The petition is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

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