

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 522 OF 1997

Madhusudan Dattatraya Joshi .. Appellant
VS.
Narendra Trivikram Khanolkar .. Respondent

Mr. Mahindra B. Deshmukh for Appellant.
Mr. Dhairsheel Sutar for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 19 January 2017
Date of Pronouncing the Judgment : 10 February 2017

JUDGMENT :

1] This appeal is directed against the judgment and decree dated 6 July 1996 made by the Bombay City Civil Court at Bombay in S. C. Suit No. 2677 of 1980 instituted by the respondent (original plaintiff) and in which, the appellant, was impleaded as a sole defendant. For sake of convenience the parties will be referred to as plaintiff and defendant, as described before the trial court.

2] The operative portion of the impugned judgment and decree reads thus :

“ORDER

The suit being No. 2677 of 1980, is decreed with costs.

The suit partnership firm is declared as dissolved with effect from 1st September, 1970.

It is held that the plaintiff is entitled to carry on business in the name and style of M/s. Cold Spot Engineering Works, from the suit premises being No. 23, Velinkar House, situated on Plot No. 10, Vile Parle (E), Bombay – 57.

The defendant, his servants and agents are hereby restrained by an order of perpetual injunction from dispossessing the plaintiff from the suit premises without following due process of law, if any and/or interfering with the use, and occupation of the suit premises by the plaintiff. The defendant, his servants and agents are further restrained by an order of perpetual injunction from interfering in the business of the plaintiff which is being carried on in the name of M/s. Cold Spot Engineering Works.

The defendant shall bear his own costs and shall pay Rs.500/- to the plaintiff.”

3] The case of the plaintiff, in brief, is as follows:

(A) The plaintiff secured tenancy of the premises bearing No. 23B, Velinkar House, Vile Parle (East), Mumbai (suit premises) from one K. G. Velinkar, in the month of June 1975, in order to undertake business of refrigeration engineering.

(B) The plaintiff deposited a sum of Rs.1,000/- with the landlord K. G. Velinkar and the monthly rental was agreed at Rs.75/- towards the tenancy of the suit premises. This amount was paid by the plaintiff in cash by withdrawing the said amount from his personal bank account on 9 June 1975.

(C) In the month of June itself, the defendant approached

the plaintiff with a proposal that they undertake the business refrigeration engineering in partnership from the suit premises. This proposal was accepted by the plaintiff.

(D) The plaintiff invested an amount of Rs.3,500/- as his capital towards the partnership business. The defendant did not invest any amount but brought in machinery viz. Vacuum pump and blower, necessary to undertake the partnership business.

(E) No partnership deed was executed in writing between the parties. The partnership business commenced somewhere in July 1975 under the name and style of 'Cold Spot Engineering Works'.

(F) Though, no partnership deed was executed in writing, a joint account was opened in the Bank of Baroda, Vile Parle (East) Branch bearing Account No. 15804 some time in the year 1977 and a current account was also opened in the name of firm with Janata Sahakari Bank, Vile Parle (East), Vile Parle (East), some time in the year 1976.

(G) The landlord K. G. Velinkar increased rent of the suit premises from Rs.75/- to Rs.100/- per month exclusive of electricity charges. Amount of rent was initially paid by cash and thereafter, by cheque from the account of the partnership firm.

(H) In 1979 or thereabouts, dispute arose between the parties. The defendant severed all relations and stated that he was desirous of dissolving the partnership business. The defendant stated that he was no longer interested in carrying on the business and requested the plaintiff to relieve him from responsibility of the same. This was agreed to by the plaintiff and consequently the partnership was dissolved.

(I) The accounts of the partnership were drawn up. The amounts invested by the plaintiff were adjusted towards the machinery brought in by the defendant. The defendant took away some material from the suit premises and vacated the same at the time of dissolution, as agreed to by and between the parties.

(J) After the dissolution of the partnership, the plaintiff has been in exclusive use, occupation and possession of the suit premises and carrying on business therefrom as sole proprietor. However, in December 1979, the defendant began visiting the suit premises and raised a dispute about the machinery items. Thereafter, this continued and the defendant even attempted to get his name entered in the municipal records in relation to the suit premises.

(K) The plaintiff has stated the defendant has no right, title and interest either in the suit premises or in the business

carried out by the plaintiff and since, dispossession was threatened, the plaintiff was constrained to institute S.C. Suit No. 1677 of 1980.

4] In the plaint, the plaintiff has prayed for the following reliefs :

“a) that it may be declared that the business in partnership in the name and style of M/s. Cold Spot Engineering Work carried on in 23 B, Velingkar House, Plot No. 10 Prarthana Samaj Road, Vile Parle (E), Bombay - 57 is dissolved on or about 1st September 1979 and that the plaintiff is entitled to carry on his business in the name of Cold Spot Engineering Works in the suit premises.

b) That the defendant his servant and agents be restrained by permanent order & injunction of this Hon'ble Court from forcibly dispossessing the plaintiff from the suit premises and/or interfering with the use and occupation of suit premises and/or carrying on business in the name and style of M/s. Cold Spot Engineering Work in the suit premises and/or bringing any article or machinery in the suit premises and/or bringing and/or inducting any third person in the suit premises and/or removing two machinery viz. vacuum pump and blower from the suit premises.

c) Interim and ad-interim relief in terms of prayer (b) above.

d) Cost of the suit be provided for.

e) For such other and further reliefs as the nature and circumstances of the case may require.”

5] On the other hand, the defence of the defendant is broadly

as follows :-

(A) The Defendant was the tenant in respect of the suit premises and has been paying the rent to the landlord N. G. Velinkar regularly at least since the year 1971. Even prior to 1971, the suit premises were in possession of the defendant since 1951;

(B) The defendant denied the case of partnership and submitted that the plaintiff was working with him as a commission agent. On this basis, the defendant submitted that the plaintiff has no right either to the suit premises or to the business carried out therein and the suit ought to be dismissed;

(C) The defendant also made reference to certain documents in support of the case, including in particular, certain licence renewals or receipts towards payment and non assessment charges.

6] Based upon the pleadings of the parties, the learned trial Judge was pleased to frame the following issues on 19 June 1996 :-

“4. The following issues came to be framed on 19th June, 1996.

1) Who has taken the suit premises on rental basis, whether the plaintiff or the defendant ?

2) Does the Plaintiff prove that there was an oral partnership between him and the Defendant?

3) Does the defendant prove that he was carrying on business under the name and style as M/s. Cold Spot Engineering Works as proprietor thereof from the suit premises?

- 4) *Does the defendant further prove that the plaintiff was working with him on commission basis as alleged in para 10 of the Written Statement?*
- 5) *If the answer to Issue No. 2 is in affirmative and to Issue Nos. 3 and 4 are in negative, does the plaintiff prove that the suit partnership was dissolved on or about 1st September, 1979 and that since then he has been in exclusive use, occupation and possession of the suit premises and has a right to carry on said business under the name of Cold Spot Engineering Works?*
- 6) *Is the Plaintiff entitled for an order of perpetual injunction in terms of prayer (b) of the plaint?*
- 7) *What order and decree?"*

7] In the impugned judgment and decree, the learned trial Judge has answered the aforesaid issues in the following manner :

"5. My findings to the aforesaid issues for the reasons stated below are as follows :-

- 1) *Plaintiff and not the defendant.*
- 2) *Yes*
- 3) *No*
- 4) *No*
- 5) *Yes on or about 1st September, 1979 and that he has been in exclusive use, occupation and possession of the suit premises and has right to carry on said business.*
- 6) *In view of the answer to Issue No. 5 Yes.*
- 7) *As per order below."*

8] Mr. Deshmukh, learned counsel appointed under the Legal Aid Scheme to appear for the appellant (defendant) has made the

following submissions in support of the appeal :-

(A) That upon the appreciation and analysis of the documents produced by the defendant, it is quite clear that it is the defendant who was the tenant in respect of the suit premises and therefore, no relief in respect of the suit premises ought to have been granted to the plaintiff;

(B) The learned trial Judge failed to appreciate that the plaintiff's case has to stand or fall on its own feet. In this case, there was hardly any evidence produced by the plaintiff in support of the case pleaded. The impugned judgment and decree, however relies, almost entirely upon the alleged weakness in the defence put-forth by the defendant. On this ground, the impugned judgment and decree is liable to be reversed.

(C) In fact there was no weakness in the defence pleaded by the defendant. The defendant had only raised defences in the alternate and without prejudice to one another. This is clearly permissible and such defences could not have been rejected outright by styling the same as '*contradictory*' or '*inconsistent*'.

(D) There is no evidence to sustain the finding that the plaintiff was the tenant in respect of the suit premises, even assuming that the case of the partnership between the parties

was to be accepted. In fact, the evidence on record establishes that it is the partnership firm which was the tenant in respect of the suit premises. Therefore, the defendant was liable to be granted share in the tenancy or at least, proper compensation in lieu of the share in the tenancy. The learned trial Judge has failed to appreciate the provisions of the Indian Partnership Act, 1932 (said Act) in matters of such nature.

(E) The finding in the impugned judgment and decree that it is the plaintiff who was found in exclusive possession of the suit premises, is patently erroneous and contrary to the weight of the evidence on record. Accordingly, no relief of perpetual injunction could have ever been granted.

9] Mr. Sutar, learned counsel for the respondent (plaintiff) submitted that the plaintiff in the present case has led evidence and proved substantially the case pleaded by him. The findings recorded in the impugned judgment and decree are quite consistent with the evidence on record. The defendant has pleaded a case which is *ex facie* false, contradictory and inconsistent. In any case, the defendant has been unable to establish his defence, in such circumstances, there is no merit in any of the grounds raised in support of the appeal and the appeal is required to be dismissed.

10] After the matter was fully argued, some time was granted to the parties to explore the possibility of some settlement. Although, the defendant expressed willingness to accept some financial settlement, the plaintiff submitted that he is not willing to offer any financial settlement. Learned counsel for the parties state that the suit premises were demolished in redevelopment scheme and the plaintiff was allotted new premises. Even the new premises, have since been demolished on account of yet another redevelopment scheme, in which, the plaintiff is due to get alternate premises. In the meanwhile, the plaintiff is in receipt of compensation in lieu of alternate premises from the developer.

11] From the pleadings, evidence on record and the perusal of the impugned judgment and decree, the main point which arises for determination is whether the plaintiff in the present case has been successful in establishing that he was the sole and exclusive tenant in respect of the suit premises and the defendant had absolutely no right or concern in the tenancy of the suit premises. This point is crucial because, this is the basis of the plaintiff's case and it is on this basis that reliefs have been granted to the plaintiff by the impugned judgment decree. Further, it is well settled that the plaintiff is required to either stand or fall on his own feet and normally cannot draw any sustenance on the basis of any

weakness in the case of the defendant.

12] In the impugned judgment and decree, the only reason indicated by learned trial Judge for accepting the case of the plaintiff that he was the sole tenant in respect of the suit premises is the documentary evidence produced by the plaintiff in the form of his statement of account which establishes that an amount of Rs.1000/- was shown to be drawn by the plaintiff from his Bank of India Account No. 10/42, which was then standing in the name of M/s.Narendra Electricals which was the partnership firm of the plaintiff's parents and the plaintiff. Admittedly, the plaintiff has deposed that the amount of Rs.1000/- was paid by him to the landlord Velinkar in cash and no receipt was ever issued by the landlord Velinkar in favour of the plaintiff. This is not a case where any cheque payment was made by the plaintiff to the landlord Velinkar as and by way of deposit of Rs.1000/- towards the tenancy of the suit premises. The entry in Bank of India account No. 10/42 to the effect that the amount of Rs.1000/- was withdrawn from the said account, is not really sufficient to establish that the plaintiff was the sole tenant in respect of the suit premises, to the exclusion of the defendant. In this case, none of the parties examined the landlord or the representatives of the landlord. Since, the plaintiff had come out with a positive case that he was the sole tenant in respect of the

suit premises to the exclusion of the defendant, it was for the plaintiff to have establish this fact at least following the test of preponderance of the probabilities. This was necessary because there is other evidence on record which suggests that the suit premises were taken on tenancy basis by the partnership firm or in any case, the tenancy right to the suit premises was always regarded as asset or right of the firm and not the sole and exclusive right of the plaintiff.

13] It is the case of the plaintiff that he secured tenancy of the suit premises from Velinkar in the month of June 1975. For this purpose, it is the case of the plaintiff that the amount of Rs.1000/- was withdrawn from his aforesaid account No. 10/42 and paid to Velinkar as security deposit. There is however, material on record in the form of deposition of the plaintiff himself that in the month of June 1975 itself, the partnership was entered into between the plaintiff and the defendant and the use of suit premises for the business of the partnership commenced. The plaintiff has further deposed that during subsistence of the partnership, which would imply from June 1975 till its dissolution in the year 1979, the rent in respect of suit premises was paid from out of funds of the partnership business. The material on record indicates that up to December 1977 the rents were paid to the landlord in cash and

from January 1978 onwards, such rents were paid by cheques drawn on current account of the partnership firm. The evidence with regard to cheque payment of rents from out of the current account of the partnership firm has been produced by the plaintiff himself by way of relevant entries in passbook which are marked as Exhibit-H and K.

14] Mr. Sutar, however, submitted that up to December 1977, it was the plaintiff who has paid the rents in respect of the suit premises in cash to the landlord. For this purpose, he invited my attention to what is recorded in paragraph '7' of the impugned judgment and decree. The said portion reads thus:

"He has further deposed (sic) that during subsistence of the parenership (sic), rent was paid initially in cahs (sic) till up to December, 1977 and since January, 1978, by cheques. The said cheques for the rent were drawn on Current Account of the Partnership firm. He has produced the relevant entries of the Pass Book which are on record as Ex.E, H & K".

15] Mr. Sutar's submission is premised upon the ambiguity as to which of the parties had paid the rents towards the suit premises in cash up to December 1977. However, such ambiguity stands explained, if the deposition of the plaintiff is adverted to. On this aspect, the plaintiff has deposed as follows:

"The rent of the suit premises as Rs. 75/- was paid incash (sic)

*for the period July, 1975 to December, 1975. As the landlord asked for increasing rent at Rs.100/- **we started paying rent at Rs.100/- since Jan.1976. We paid the said rent in cash till December, 1977 and since Jan., 1978by (sic) cheque.** The said cheque were drawn in the name of Sumati Khanderao Viligkar. The said cheques were from the current account suit firm of the Janata Sahakari Bank. The amount of said cheques were debited in the said account from time to time. The said entry are under line in red ink on the statement of account Ex.'E'."*

[Emphasis supplied]

16] Insofar as, payment of rent from January 1978 is concerned, there is no difficulty whatsoever since, such rent was admittedly paid by way of cheques from out of the current partnership account held with Janata Sahakari Bank. Insofar as the period between July 1975 and December 1977 is concerned, the plaintiff has deposed that even such rents were being paid in cash by both the plaintiff as well as the defendant. This is evident since, the plaintiff uses the expression "*we started paying rent at Rs.100/- since Jan. 1976*". Similarly, the plaintiff has deposed quite unambiguously "*we paid the said rent in cash till December, 1977 and since Jan. 1978 by cheque*". Therefore, even when it comes to cash payment of rent upto December 1977, the plaintiff has admitted and acknowledged that it is the firm or in any case, the plaintiff and the defendant together, who were paying the rent in respect of suit premises. All

such evidence, has been virtually ignored by the trial Judge in making the impugned judgment and decree and holding that it was the plaintiff who was the sole tenant in respect of suit premises, right from inception of the tenancy.

17] There is material on record that the electricity meter at the suit premises was in the name of the landlord. However, the plaintiff has admitted that the electricity charges and the rent of the suit premises were being paid out of the joint current account of the firm. The relevant extract of the plaintiff's deposition reads thus:

“The electric chargee and the rent of the suit premises were being paid from the joint account as well as the current account. The electricity meter stands in the name of landlord K.G. Velingker. I produce the bill dtd. 4th December, 1981 by consent taken on record and marked as Ex. 'H'.”

18] Despite aforesaid categorical statement made by the plaintiff in the course of his examination-in-chief, the plaintiff made the following contradictory statements in the course of his cross-examination, which read thus:

“ I have paid rent to Mr. Velinkar upto date by cheque. I produce the pass book of my account No. 16257 of the Bank of India Goregaon Branch to show that the cheques for the payment of the rent, were debited in my account. (The witness underlines the said entries debited in my account. (The witness underlines the said entries in red ink.). Taken on

record and marked as Ex. 'K' Colly. It is correct to state that as per the said entries I have paid Rs.16001/- to Mr. Velinkar towards the rent. The witness volunteers the other said entries in another pass book."

.....

"It is not correct to state that I was and am not the tenant of the suit premises. The tenancy of the suit premises is mine and that suit partnership is not concerned with said tenancy right."

19] The deposition by the plaintiff that he was paying rent to Mr. Velinkar up to date by cheque from out his account No. 16257 with the Bank of India, Goregaon Branch, is entirely inconsistent with his deposition in the course of examination-in-chief that the rents for the suit premises up to December 1977 were paid in cash and from January 1978 the rents were paid by cheques drawn on the partnership account. The material on record is, in fact, sufficient to conclude that it was the firm which was the tenant in respect of suit premises and neither the plaintiff nor the defendant were exclusive tenants of the suit premises in their personal capacity.

20] Learned trial Judge has overemphasized upon weakness in the case pleaded and deposed to by the defendant. The defendant also came out with a false case that he was the sole and exclusive tenant of the suit premises. The defendant, however, has failed to prove that he was the sole tenant in respect of the suit premises. On

basis of pre-ponderance of probabilities, it is reasonable to hold that it was the firm which was the tenant in respect of the suit premises since, the rents towards the suit premises from very inception were paid by both the parties, initially, in cash and thereafter through the current account of the partnership business. The electricity bills were also paid from out of the partnership account. The plaintiff was required to establish the case pleaded by him and learned trial Judge was not right to accept the plaintiff's case, almost entirely on the basis of weakness of the defendant's case. There are several inconsistencies in the deposition of the plaintiff as well. Such inconsistencies are not only in the context of payments of rent towards suit premises, but also in the context of return of machinery, admittedly, bought into the assets of the partnership by the defendant. At one stage, it was the case of the plaintiff that the two pieces of machinery were retained by the plaintiff, since, an amount of Rs.3500/- was paid by him to the defendant upon dissolution of the firm by way of settlement of accounts. At other stage, the plaintiff stated that the defendant left the suit premises after taking away the two items of the machinery.

21] Both parties have produced on record the documents with regard to registration under the Shops and Establishment Act, installation of PCO in the suit premises and so on. But most of such

materials are post 1979, when, according to the plaintiff, the partnership business was dissolved. Therefore, not much turns upon the appreciation of such documents.

22] The subsequent events have over taken the parties and their claim to rights in respect of the suit premises. There is no dispute that the suit premises were demolished and in lieu thereof the plaintiff was allotted alternate premises at or about the same location. Now, it is submitted that even this new premises have since been demolished and the plaintiff has been assured of alternate premises in lieu thereof. It is also reasonable to proceed on the basis that the plaintiff has been provided by the developer compensation in lieu of temporary alternate premises, pending allotment of permanent alternate premises. Obviously, the plaintiff has exclusively gained much out of the allotment of premises by the developer and by way of compensation in lieu of temporary alternate accommodation. The plaintiff, has applied for a declaration that the partnership stands dissolved and that the plaintiff was solely entitled to carry on the business in the name and style of M/s Cold Spot Engineering Works from the suit premises and that the defendant be restrained by perpetual injunction from dispossessing the plaintiff from the suit premises without following due process of law and / or interfering with the use and occupation of the suit premises by the

plaintiffs.

23] Now that the material on record establishes that the plaintiff was not the sole and exclusive tenant in respect of suit premises and that the tenancy rights in the suit premises belong to the partnership firm comprising both the plaintiff and defendant as partners, it is obvious that the plaintiff cannot get the reliefs as applied for by him in the plaint or as granted to him by the impugned judgment and decree in their entirety or unconditionally. Some provision will have to be made by the plaintiff towards interests of the defendant. With this view and taking into consideration the subsequent developments referred to by the parties, suggestion was made that the plaintiff makes a financial offer to the defendant. Though, the defendant, was willing to accept the financial offer, the plaintiff refused to make any financial offer.

24] It is permissible for the appeal court to take into consideration subsequent developments and mould the relief. The provisions of Order VII Rule 7 CPC and Order XLI Rule 33 CPC can be pressed into service by the appeal court for said purpose. At this point of time, no useful purpose will be served by simply dismissing the plaintiff's suit. The plaintiff has already gained in the meantime and full or substantial restitution, may also not be possible at this stage.

Instead, the interests of justice will be met if the plaintiff is put to some financial terms as a pre-condition for relief in terms of the impugned judgment and decree. The plaintiff can therefore be directed to pay the defendant a sum of Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand) within a period of three months from today as a pre-condition for a decree in terms of the relief consistent with the impugned judgment and decree. In case such amount is not paid by the plaintiff to the defendant within a period of three months from today, the impugned judgment and decree shall stand set aside and the suit instituted by the plaintiff shall stand dismissed. Thereafter, it will be open to the defendant to take out appropriate proceedings with regard to the premises that are to be allotted to the plaintiff in lieu of the suit premises, which the plaintiff permitted to be demolished for redevelopment project.

25] This appeal is thus partly allowed by making the following order:

(A) The plaintiff (respondent herein) is directed to pay to the defendant (appellant herein) a sum of Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand) within a period of three months from today. The plaintiff, shall also be at liberty to deposit said amount before the trial court within a period of three months from today. Upon deposit, the

defendant shall be entitled to withdraw the same, unconditionally;

(B) In case the plaintiff pays or deposits amount of Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand) as aforesaid, within a period of three months from today, this appeal shall be deemed to have been dismissed and the impugned judgment and decree confirmed;

(C) In case the plaintiff fails to pay or deposit the amount of Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand) as aforesaid within a period of three months from today, the impugned judgment and decree shall stand set aside and the civil suit no. 2677 of 1980 shall stand dismissed;

(D) If the suit stands dismissed as aforesaid, it shall be open to the defendant to take out appropriate proceedings with regard to the premises that are to be allotted to the plaintiff in lieu of suit premises by the developer. Such proceedings shall be decided by the appropriate court taking into consideration the findings now recorded that it was the partnership firm which was the tenant in respect of the suit premises;

(E) The plaintiff (respondent herein) shall pay costs of Rs.10,000/- ((Rupees Ten Thousand) to Advocate Mr. Mahindra B. Deshmukh who was appointed under the

Legal Aid Scheme to appear for the defendant (appellant herein) in the present appeal. The assistance rendered in the matter by Mr. Deshmukh is acknowledged.

(F) The drawal of the decree is expedited.

(M. S. SONAK, J.)

Chandka