

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 525 OF 2017****ALONG WITH****CIVIL APPLICATION NO. 898 OF 2017**

Mackey F. Engineer and another

...Appellants

Vs.

Bhagirath Shivgovind Shukla, deceased by LRs

....Respondents

Mr. A.G. Damle, Senior Advocate, instructed by R. Lanjewar, for the Appellants/Applicants.

Mr. Mangal Bhandari along with Chirag Oswal, instructed by Dharmesh Jain for the Respondents.

CORAM: S. J. KATHAWALLA, J.**DATE: 14th July, 2017****P.C.:**

1. Regular Civil Suit No. 13 of 2009 was filed by Bhagirath Shivgovind Shukla (original Plaintiff -now deceased) before the Court of IInd Joint Civil Judge, Junior Division at Palghar, Dist. Thane (trial Court) against one Mackey Faroodin Engineer (Original Defendant) for peaceful and vacant possession of the suit shop and for rent from Defendant No. 1 for the period August, 2008 to October, 2008 at the rate of Rs. 225/- per month amounting to Rs. 675/- and compensation of Rs. 225/- per month till the possession of the suit property.

After the demise of the original Plaintiff, his heirs have come on record who are the present Respondents to the above Second Appeal. The suit filed by the Plaintiff was by a judgment and order dated 8th December, 2014 partly decreed by the trial Court i.e. the heirs of Defendant No. 1 were directed to deliver peaceful and vacant possession of the suit shop described in paragraph 2 of the Plaint to the Plaintiff within 30 days from the date of the order.

2. Being aggrieved, the Appellants/heirs of the original Defendant No. 1 impugned the judgment and decree of the trial Court dated 8th December, 2014 before the District Judge-I, Palghar (Appellate Court) which too was dismissed with costs by a detailed judgment and decree dated 13th April, 2017. The Appellants/heirs of original defendant once again being aggrieved therefrom have preferred the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908.

3. For the sake of convenience, the Appellants and Respondents are referred to hereinafter as per their original status.

4. The original Plaintiff – Bhagirath Shivgovind Shukla filed R.C.S. No. 14 of 2009 against the original Defendant –Mackey Faroodin Engineer wherein the Plaintiff contended that he is the owner of shop No. 4 situate at S. No. 31 of village Salwad on Boisar-Tarapur Road, Chitralaya, Boisar (the suit shop); that

he had lent the said suit shop to the Defendant for temporary period since 1st June, 1979 on monthly rent of Rs. 225/-; that the said suit shop was lent to the Defendant to carry out business of photo studio only and for no other business; that an Agreement dated 7th May, 1979 was executed between the Plaintiff and the Defendant and all the terms and conditions set out therein were binding on the Defendant; that the Defendant was not paying the rent regularly and had also carried out structural changes in the suit shop which is in breach of the terms and conditions agreed upon between the parties; that the Plaintiff served a notice on the Defendant dated 15th September, 2008 and terminated the tenancy on and from 31st October, 2008 and demanded peaceful and vacant possession of the suit shop from the Defendant; that the said notice was sent to Defendant through Registered Post A.D. and UPC; that the Plaintiff personally went to the suit shop on 16th September, 2008 along with Manohar Devya Kadu and Jayesh Bhagwandas Kansara and affixed the notice on a conspicuous portion of the suit shop and prepared panchanama on the same day to that effect as per the provisions of Section 106 (4) of the Transfer of Property Act; that the notice sent by Registered Post was returned back to the Plaintiff with an endorsement that the addressee is not residing on the address but the notice sent by UPC was duly served upon Defendant to which the Defendant did not respond; that on 14th October, 2008, when he went to the suit shop for inspection, he came to know

that Defendant No.2 was carrying out dry fruit business from the Suit Shop in the name and style of A to Z Dry Fruits; that on enquiry with Defendant No. 2 the Plaintiff came to know that Defendant No. 1 had sublet the suit shop to Defendant No. 2 without seeking permission from the Plaintiff. The Plaintiff was therefore constrained to file the Suit seeking peaceful and vacant possession of the suit shop and recovery of rent from Defendant No.1.

5. Upon the suit summons being served upon Defendant Nos. 1 and 2, Defendant No. 1 appeared and resisted the suit by filing his written statement. Defendant No. 2 also appeared in the matter but did not file any written statement to the suit. Defendant No. 1 in his written statement contended that the Plaintiff has filed the suit against him only to cause harassment to him; that though it is correct that he had taken the suit shop on rent from the Plaintiff, it is incorrect that the suit shop was taken for a limited period; that it is true that the rent of the suit shop was agreed at Rs. 225/- per month; that it is incorrect to contend that the suit shop was given to him on rent by the Plaintiff only to carry out the business of photo studio; he had not made any structural changes in the suit shop; it is also incorrect that the tenancy is terminated by the Plaintiff since 31st October, 2008; that he had not sublet the suit shop to Defendant No.2; that since there are drastic changes in the field of photography he was suffering

loss by carrying on photo studio business and therefore he started running dry fruit business with which the Defendant No.2 is not connected; that Defendant No. 1 has on the first date of his appearance paid rent along with interest of Rs. 108/- amounting to Rs. 675/- along with cost of the suit totally amounting to Rs. 2,756/- in the Court and shall henceforth continue to pay the rent; that therefore the suit filed by the Plaintiff be dismissed.

6. After considering the rival pleadings, the trial Court framed the following issues:

(i) Does the Plaintiff prove that the demand notice was duly served upon Defendant No.1 in the manner provided under Section 106 of the Transfer of Property Act? (ii) Does the Plaintiff prove that Defendant No. 1 was not and is not ready and willing to pay standard rent and permitted increases? (iii) Does the Plaintiff prove that Defendant No. 1 has sublet the suit shop to Defendant No.2 without consent of Plaintiff ? (iv) Does the Plaintiff prove that Defendant No.1 without the consent of the plaintiff in writing erected permanent structure in the suit shop? (v) Whether the Plaintiff is entitled to relief as claimed?

7. After considering the oral as well as documentary evidence relied upon by the parties, the trial Court came to the conclusion that the notice (Exh. 59) was

served on Defendant No. 1 through U.P.C. Plaintiff also took the additional efforts of serving the notice by registered post which was returned with the remark “the Defendant is not found at the said address”. The Plaintiff has also affixed notice on the conspicuous portion of the suit shop vide panchanama (Exhibit-63). The learned Trial Court has noted that it is not only not the case of Defendant No. 1 that the address of the suit shop is not his address but he has failed to ask even a single question in this regard during the cross-examination. The trial Court therefore held that the Plaintiff has succeeded in proving that he has served the deceased Defendant No. 1 with the notice (Exhibit-59). However, the trial Court answered issue Nos. 2 and 3 in the negative. As regards the issue whether the Plaintiff has proved that Defendant No. 1 has without the consent of the Plaintiff erected permanent structure in the suit shop, the trial Court has answered the same in the affirmative. The trial Court has partly decreed the suit by directing the heirs of Defendant No. 1 (who had during the trial passed away) to deliver peaceful and vacant possession of the suit shop mentioned in paragraph 2 of the Plaint to the Plaintiff within 30 days from the date of the said order. The trial Court rejected the prayer of the Plaintiff regarding compensation but granted liberty to the Plaintiff to withdraw the rent amount deposited by deceased Defendant No. 1 and his legal heirs.

8. Being aggrieved by the said judgment and decree passed by the trial Court, the heirs of Defendant No. 1 filed an appeal being Civil Appeal No. 16 of 2015 before the District Judge-1, Palghar at Palghar. The Appellate Court by its detailed judgment, after appreciating the oral and documentary evidence filed by the parties, dealt with the contentions of the parties and dismissed the Appeal with costs. The Appellate Court did not agree with the finding of the trial Court that the Plaintiff has proved that the Defendant No. 1 constructed permanent structure in the suit shop without the consent of the Plaintiff. However, the Appellate Court held that as the Plaintiff has proved service of demand notice and termination of tenancy, he is entitled for possession of the suit premises. The Appellate Court therefore directed the heirs of Defendant to deliver peaceful and vacant possession of the suit shop mentioned in paragraph 2 of the Plaint to the Plaintiff within 60 days of the date of the order dated 13th April, 2017.

9. In the Second Appeal, the Senior Advocate appearing for the Appellant has once again submitted that service of the demand notice and termination of tenancy was not served on the original Defendant. In my view, the trial Court as well as the Appellate Court, after appreciating the oral as well as documentary evidence led/placed before the Courts by the parties have by their detailed

reasoned judgments given concurrent findings on facts viz. that the Plaintiff has proved that the demand notice was duly served upon Defendant No. 1 in the manner provided under Section 106 of the Transfer of Property Act. Therefore, in my view, no substantial question of law arises in the matter and the above Second Appeal is dismissed. In view of the dismissal of the Appeal, nothing survives in the Civil Application and the same is accordingly disposed off.

(S.J. KATHAWALLA, J.)