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

CIVIL REVN. APPLICATION NO. 34 OF 2016

with

CIVIL APPLICATION NO. 53 OF 2016

Mr. Vaidraj Ratilal Gaurishankar
(Since deceased) and Anr.

... Applicants.

V/s.

Mr. Ramdas Haridas Kapadia
(Since deceased) and Ors.

... Respondents.

Mr. Dipesh Siroya for the Applicants.

Ms. Eventa Andrea Gonsalves for Respondent 1A.

CORAM : N.M. Jamdar, J.

05 January, 2017.

Oral Order :-

The Applicants have challenged the order passed by the Appellate Bench of Small Causes Court, Mumbai dated 26 August 2015 allowing the Appeal filed by the Respondent – landlord and directing the Applicants to hand over vacant and peaceful possession of the suit premises.

2. The suit premises are situated at Room Nos. 23/24A, first floor, Morarji Velji Building, 9/15 Dr. M.B. Velkar Street, Mumbai. User of the suit premises is commercial. The suit premises were let out to the original tenant i.e. Ratilal Gaurishankar Vaidya for a dispensary for practice in ayurvedic medicine. A Suit bearing No. 651/1222 of 1998 was filed by the Respondent – landlord in the Small Causes Court, Mumbai for eviction of the Applicants from the suit premises on the ground that the original tenant had ceased to carry out any activity and he had shifted a dispensary to Walkeshwar, Mumbai and a notice board to that effect was put up in April 1998. It was the case of the Respondent – landlord that since the premises were lying unused, a case of non-user was made out. Since a partnership firm was created with strangers, case of sub-letting was also made out. The learned Small Causes Court, by judgment and order dated 17 November 2006, dismissed the suit. Thereafter, the Respondent – landlord filed an Appeal bearing No.384 of 2007, which was allowed by the impugned order dated 26 August 2015. Thereafter, the present Revision Application was filed.

3. The learned Counsel for the Applicants submitted that the burden is entirely on the landlord to demonstrate that there has been sub-letting in the suit property. He relied upon the decisions of the Apex Court in the case of *M/s. S.F. Engineer v/s. Metal Box India Ltd. and Anr.* reported in (2014) 6 SCC 780, *M/s. Mahendra*

Saree Emporium v/s. G.V. Srinivasa Murthy reported in (2005) 1 SCC 481 and *Parvinder Singh v/s. Renu Gautam & Ors.* reported in (2004) 4 SCC 794, in furtherance of his submissions. He submitted that no evidence has been led by the Respondent – landlord that there has been a parting of possession or the control over the suit premises has been given up, and in fact, it is admitted in the cross-examination that the business of dispensary is being carried out. The learned Counsel submitted that the partnership deed is only inducts a third party in the business, however from that it cannot be presumed that the control has been surrendered by the original tenant over the suit premises. The learned Counsel also submitted that the Respondent – landlord did not step in the witness box instead examined as a power of attorney holder.

4. As regard the contention that a power of attorney has been examined, the learned Counsel for the Respondents rightly drawn my attention to the finding of the Appellate Bench of Small Causes wherein the Appellate Bench has considered the law on the subject. The power of attorney holder was the son of the Respondent – landlord, who had been born in the suit building itself and was fully aware of the factual situation and he was managing the property since 1975. In view of this factual position, no error was committed by the Appellate Bench in accepting the evidence of the power of attorney holder of the original landlord.

5. As far as the ground of sub-letting is concerned, the proposition of law canvassed by the learned Counsel for the Applicants based on the decisions of the Apex Court cannot be disputed but it will depend on the fact of each case to be determined whether there has been creation of sub-tenancy looking into all aspects of the matter. In the present case a board was put up in April 1998 in the suit premises that the dispensary is being shifted. A notice was issued by the Respondent – landlord on 9 May 1998. On 15 May 1998 a temporary reply was given and a detailed reply was given on 9 June 1998. At that point of time the partnership deed of 12 May 1998 was not referred to by the Applicant. It is the contention of the Respondent – landlord that Defendant No.1 was of advanced age nearly 80 years, had ceased to practice as a ayurvedic doctor. Going by the partnership deed, which is placed on record and analyzed by the Appellate Bench, it shows the Defendant No.1, a medical practitioner of advanced age having 25% of share in the profit, daughter has 25% share and the third, a stranger has been shown to have 50% share. The business of partnership is shown as a commission agent. It is not possible to believe that such a senior medical practitioner would suddenly start the business of a commission agent and substantial amount of profit is to be given to the stranger partner. In the backdrop of this composition of the partnership, the Appellate Bench was not in error in holding that the

dispensary was shifted by Defendant No.1 – medical practitioner due to his advanced age and instead a business of a commission agent, at the behest of the stranger partner was conducted.

6. Initially a grievance was made regarding non-user of the premises. It is on 9 May 1998 that the suit notice was issued and the partnership is stated to have been entered into. Thereafter, the first reply was given on 15 May 1998 and a detailed reply was given on 9 June 1998. So called partnership was entered into on 12 May 1998. The suit is instituted on 10 August 1998. The circumstances therefore in which the partnership is stated to be executed to ascertain the genuineness thereof is of importance. It is after the suit notice was received on the ground of non-user that this exercise has been carried out. As held by the Appellate Bench, the circumstances and the composition of the partnership clearly indicates that the sub-tenancy was created in favour of the partnership firm.

7. As far as the contention of the learned Counsel for the Applicant regarding burden of proof it is not possible for the landlord to know the internal arrangement in the cases of sub-letting of this nature. Once a partnership deed is on record, it was for the tenant to explain the exact mechanics and working of the partnership. The main partner whose induction has laid to charge of

sub-tenancy for the reasons best known to him as such a way from stepping in witness box would have been the best person to cross examine as regard the exact nature of the transaction. Instead the daughter of Defendant No.1 has examined herself the exact nature of control may vary in degrees but it is for the tenant to establish the relinquishment of control or otherwise. From the bare perusal of the partnership deed wherein substantial profits are assigned to the stranger partner and a completely new business sought to be introduced is something which was dispensary leads to a conclusion that there has been sub-letting by the Defendant No.1 in favour of the partnership firm. This assessment of evidence by the Appellate Bench of Small Causes Court which is a final Court for adjudication of facts cannot be stated to be impossible or perverse so as to warrant interference in revisional jurisdiction of this Court. There is no merit in this Revision Application which is accordingly dismissed.

8. At this stage the learned Counsel for the Applicants states that for some time the decree should not be executed. The learned Counsel for the Respondents states that if the Applicants gave an undertaking / affidavit giving details who is in possession of suit property and that no further rights will be created and the possession will not be parted with that the will not take steps to execute decree for a specified period.

9. Accordingly, subject to the Applicants filing such an undertaking as above within period of two weeks from today, the decree will not be executed for period of eight weeks from today which will include the time taken for making the copy of the order available. The Applicants will also clear the arrears of rent, if any, within period of two weeks.

(N.M. Jamdar, J.)