

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 753 OF 2015**

1. Mr. Adelmo Braz Fernandes, Shop No. 3, 'Laxmi Narayan Niwas Building', Vasco-da-Gama, Goa, duly represented by his Constituted Attorney, Mrs. Josephine Fernandes (since deceased), through legal representatives:
- 1a) Mrs. Mauricia Josefina Franco E. Fernandes,
1b) Mrs. Luzia Assumption Julie Fernandes,
1c) Mr. Vicente Ferrao,
1d) Mr. Leo Eusebio Fernandes,
1e) Mrs. Sarita Fernandes,
1f) ~~Mr. Aires Virgilio Domingos Fernandes,~~
(deleted as per Order dated 22.06.2005)
1g) Mr. Eusebio Luis Fenandes,
1h) Mrs. Sonia Fernandes Petitioners

Versus

Mrs. Deepa Anant Bandekar, Usnori Building, Kharwada, Vasco-da-Gama, Goa. Respondent

Shri Chaitanya Padgaonkar, Advocate for the Petitioners.

Shri Esperdiao Dias, Advocate for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 4th SEPTEMBER 2018.

ORAL JUDGMENT:

The challenge in this petition is to concurrent orders of the Courts below, directing eviction of the petitioners, from the suit shop, on the ground of subletting.

2. Shop No. 3, situated on the ground floor of building known as “Laxmi Narayan Niwas”, situated at Vasco-da-Gama, is the subject matter of dispute (hereinafter referred to as the suit shop).

The respondent, Mrs. Deepa Anant Bandekar is the owner/landlord in respect of the suit shop. The suit shop was let out to the father of A. Braz Fernandes (since deceased). The petitioners are the successors of Mr. Fernandes and the tenants in respect of the suit shop. A business of photo studio was being conducted in the suit shop.

3. The respondent filed an application under Section 22(2)(a)(b)(i) and (ii) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (Act, for short), on 03.05.1988, seeking eviction of the tenant Mr. A. Braz Fernandes, on the ground of arrears of rent, change of user and subletting. The respondent subsequently gave up the ground of arrears of rent and change of user and restricted only to the ground of subletting of the suit shop in favour of one Jeronimo Cardozo. It was contended that the suit shop was sublet to Mr. Jeronimo Cardozo, during the period from 1983 to 1988 and Mr. Jeronimo Cardozo was running business of electrical goods, under the name and style as “M/s Vasco Electricals”.

4. The application was resisted by the original tenant Mr. A. Braz Fernandes. It was contended that the suit shop was not sublet as alleged.

5. The parties led oral and documentary evidence.

6. The learned Rent Controller found that the ground of subletting is established and hence, by an order dated 31.12.2001, directed eviction on the ground of subletting. The petitioners, feeling aggrieved, challenged the same in Rent Appeal No. 3/2013/I. The learned District Judge by judgment and order dated 20.02.2015 has dismissed the appeal. Hence, this petition.

7. I have heard Shri Padgaonkar, the learned Counsel for the petitioners and Shri Dias, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

8. It is submitted by Shri Padgaonkar, the learned Counsel for the petitioners that the respondent has not established that there was actual parting of possession of the

suit shop in favour of any third party, which is sine qua non for directing eviction on the ground of subletting. It is submitted that there is no finding recorded by the Courts below that the original tenant had parted possession of the suit shop in favour of Mr. Jeronimo Cardozo. It is submitted that the findings recorded by the Courts below on subletting, suffers from perversity, inasmuch as, the evidence led by the respondent is contradictory, as to the knowledge of the respondent about the alleged possession of the suit shop by Mr. Jeronimo Cardozo.

On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **Celina Coelho Pereira & Others Vs. Ulhas Mahabaleshwar Kholkar and Others, (2010) 1 SCC 217** and the decision of the Punjab and Haryana High Court in the case of **Krishan Lal Vs. Kamaljit & Others, MANU/PH/2877/2017**, in order to submit that in the absence of there being evidence or finding, about parting of the possession, eviction cannot be ordered. It is submitted that the respondent has failed to discharge initial burden or onus to show that the suit shop was sublet to Mr. Jeronimo Cardozo. It is submitted that even assuming that the petitioners had failed to show that Mr. Cardozo was their employee, would be of no avail.

Reliance is then placed on certain documents, which were produced before the learned District Judge, during the

course of the appeal, namely the letters dated 05.09.1986 and 22.02.1988 and certain rent receipts, in order to submit that the documents will establish that the possession of the suit shop was never parted with and the original tenant continued to pay rent to the respondent. It is submitted that the learned District Judge failed to consider the effect of these documents.

9. On the contrary, it is submitted by Shri Dias, the learned Counsel for the respondent that the Courts below have rightly found that the ground of subletting has been established. It is submitted that the original tenant, in the written statement, did not plead that Mr. Jeronimo Cardozo was their employee. It is submitted that in the evidence, it was claimed for the first time that Mr. Jeronimo Cardozo was their employee, which the petitioners failed to establish. The learned Counsel has pointed out para 34 of the judgment of the learned District Judge, in order to submit that there is a finding about Mr. Cardozo being in exclusive possession of the suit shop. It is submitted that the act of subletting is more often than not of a surreptitious nature and it is essentially a matter of inference on the basis of the evidence led. He submitted that the concurrent findings, as recorded are based on appreciation of evidence on record and does not call for any interference. It is submitted that the

documents, on which reliance was placed, at the appellate stage, have no bearing on the issue.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. Undisputedly, the suit shop was let out to the father of Mr. A. Braz Fernandes, wherein business of photo studio was being conducted in the name and style as “Fernandes & Filhos”. It was contended that the suit shop was illegally sublet, without prior consent, to one Jeronimo Cardozo, who was carrying on business of electrical goods, under the name and style as “M/s Vasco Electricals”.

11. There cannot be any manner of dispute with the proposition that for establishing the ground of subletting, it has to be shown that the tenant has parted possession in favour of a third party, without the consent of the landlord. The Hon'ble Supreme Court in the case of **Celina Coelho Pereira** (supra) has held that in order to prove mischief of subletting, as a ground for subletting, two ingredients have to be established (i) parting with the possession of tenancy or part of it in favour of the tenant with exclusive right of possession and (ii) that such parting of possession is without the consent of the landlord and

in lieu of compensation or rent. The initial burden of proving subletting is on the landlord. However, once he is able to establish that a third party is in exclusive possession of the premises and that the tenant has no legal possession, the onus would shift to the tenant to prove the nature of occupation of the third party and that the tenant continues to hold the legal possession of the suit premises. It has categorically been held that the initial burden, lying on the landlord, would stand discharged by adducing *prima facie* proof of the fact that a party, other than the tenant was in exclusive possession of the premises. Once the landlord succeeds in adducing the *prima facie* proof, the presumption of subletting may then be raised, which would amount to proof unless rebutted (see para 25 of the judgment).

12. Coming to the present case, the respondent made out a specific case that the subtenancy was created in favour of one Jeronimo Cardozo, who was running a business in electrical goods, under the name and style as “M/s Vasco Electricals” during the period from 1983 to 1988. The original tenant disputed the same in the written statement. However, in the cross examination of Josephine Fernandes, the wife of the tenant, did not dispute that the business of Vasco Electricals was being

conducted in the suit shop since the year 1983, which business was stopped in the year 1988. Thus, the fact that the business of electrical goods under the name and style as “M/s Vasco Electricals” was being conducted in the suit shop from the year 1983 to 1988 has been admitted by Josephine Fernandes (RW-1). It was for the first time claimed in the cross examination that Mr. Cardozo was their employee. She specifically claimed that Mr. Cardozo continued in the employment, only during the period when the electrical goods business was conducted. It can thus be seen that the fact that Mr. Cardozo was in the suit shop has clearly come on record.

13. On behalf of the respondent, her Power of Attorney Mr. Ramesh K. Shenoy (AW-1) alongwith Keshav P. Digde (AW-2) and one Rajaram S. Sawant (AW-3) came to be examined. The learned Counsel for the petitioners has referred to the evidence of these witnesses in order to point out certain discrepancy as to whether, AW-1 learnt from AW-2 or whether, AW-2 learnt from AW-1 about the conduction of the business of “M/s Vasco Electricals” in the suit shop. In my considered view, any such discrepancy would fall into insignificance, once Josephine Fernandes (RW-1) did not dispute that Mr. Cardozo was there in the suit shop from the year 1983 to 1988, although, it was

claimed that he was there as an employee. The question is whether, the petitioners have succeeded in establishing that Mr. Cardozo was their employee. However, before considering that, it is necessary to make reference to the evidence of Rajaram S. Sawant (AW-3), who claimed to have purchased two tube starters from the suit shop, which the said witness stated that it was sold to him by Mr. Cardozo, who also issued a cash memo. The cash memo/bill no. 501 dated 19.02.1988 was bearing the signature of Mr. Cardozo. This witness has also stated that he had seen Mr. Cardozo selling electrical goods from the suit shop.

14. Now coming to the evidence of Josephine Fernandes (RW-1), she has admitted that the name of Mr. Cardozo was not registered as an employee with the labour department, nor there is any evidence to show that the name of Mr. Cardozo was shown in the record of shop and establishment department. She admitted that the cash memo dated 19.02.1988 was in the handwriting of Mr. Cardozo and the said bill had the telephone number 2146, which she admitted was not belonging to her. She claimed that the said telephone number was standing in the name of one Mr. Victor Dias. She stated that there were no sales tax return of the business carried in the suit shop being filed. In any event, the claim that Mr. Cardozo was an employee is not

pleaded in the written statement. Thus, in my considered view, the respondent having *prima facie* shown that the party, other than the tenant, was in possession of the suit shop, a presumption of subletting may be drawn as held by the Hon'ble Supreme Court in the case of **Celina Coelho Pereira** (supra), which would amount to proof, inasmuch as, the same is not rebutted by showing that Mr. Cardozo was indeed an employee and was carrying on business of electrical goods. The contention on behalf of the petitioners that there is no finding recorded about the parting of exclusive possession also, cannot be accepted. The learned District Judge in para 34 of the impugned judgment has in categorical terms held that Mr. Jeronimo Cardozo was in exclusive possession of the suit shop. The learned District Judge while coming to the said finding has considered the entire evidence led, including the fact that the petitioners chose not to examine Mr. Jeronimo Cardozo in support of their contention that he was a mere employee. The learned District Judge has also taken note of the fact that the original tenant did not even enter into the witness box, instead examined his wife. The finding recorded by the learned District Judge is based on appreciation of evidence and cannot be said to be perverse as contended on behalf of the petitioners.

15. Reliance placed on the decision of the Punjab and Haryana High Court in the case of **Krishan Lal** (supra), to my mind, is misplaced. In that case, on facts, it was found that the original tenant continued to be in possession and therefore, the appellate authority was found justified in refusing eviction on the ground of subletting. The principles apart, which are otherwise well settled, the question whether, there is subletting or not, would depend upon facts and circumstances of each case. In the case of **Krishan Lal** (supra), the learned Rent Controller had come to the conclusion that the original tenant had parted with the suit premises or a part of it and hence, the Appellate Court had set aside the order of eviction, which was eventually confirmed by the High Court. It is now well settled that a contract of subtenancy is entered into, in a surreptitious manner and behind the back of the landlord and as such, direct evidence of creation of subtenancy is seldom available and cannot be insisted upon. As held by the Hon'ble Supreme Court in the case of **Celina Coelho Pereira** (supra), when the landlord *prima facie* shows that a party, other than the tenant was in exclusive possession of the premises, a presumption arises, which can be rebutted by showing as to in which capacity the stranger is in possession. In the present case, it was claimed that Mr. Cardozo was an employee, which the petitioners failed to establish.

16. Now coming to the documents, which are produced at the appellate stage. There is a letter dated 05.09.1986, which reads thus:

"September 5, '86

To

All Residents of Laxmi Narayan Niwas

Vasco Da Gama.

I wish to inform you that Mr. Antonio Colaco (Civil Engineer) has been entrusted the work of drawing plans of plinth and carpet area of all the Flats, Shops etc. at Laxmi Narayan Niwas, as the same are required by the Mormugao Municipal Council for their records.

All are hereby requested to extend their kind cooperation to him whilst the work is in progress on 9.9.86 from 10 a.m. onwards.

Sd/-

Deepa A. Bandekar

Mr. A. Braz Fernandes"

17. The letter dated 05.09.1986 is addressed to the tenants of Laxmi Narayan Niwas, requesting for co-operation to the Civil Engineer, who was entrusted with the work of drawing plan of plinth and carpet area of all the flats and shops in the said building, which were required by the Mormugao Municipal Council. The letter dated 22.02.1988 is about certain complaints

received from the other tenants on account of unhygienic condition because of the personnel working in the suit shop urinating at the backside of the suit shop. It is difficult to envisage as to how, these documents can come to the aid of the petitioners. Even assuming that the landlord is aware of subletting of the tenanted premises, he is not bound to deal with the sub-tenant, which according to the landlord is an unauthorised occupation. Thus, the fact that the landlord asked the tenant to ensure that there is no nuisance due to unhygienic condition, near the suit shop, is not sufficient to hold that there was no subletting.

18. Now coming to the rent receipts. It was contended by the learned Counsel for the petitioners that even during the period from 1983 to 1988, the rent was being paid by the original tenant, which has been acknowledged. Here again, it is not possible to accept that this would lead to any different conclusion. This is because the relationship between the parties as landlord and tenant is not snapped on account of subletting. It only affords a ground for eviction, which if proved, leads to eviction order. In a given case, the tenant would continue to pay the rent to the landlord, just to gloss over the issue of subtenancy. Thus, the documents which were sought to be

produced at the appellate stage, in my considered view, have no bearing on the finding as to subletting of the suit shop.

19. It is now well settled that the jurisdiction under Article 227 of the Constitution of India is neither appellate nor revisional, but, supervisory in nature and is aimed at keeping the subordinate Courts and the Tribunals within the bounds of their authority and to ensure that the order passed does not result into any manifest injustice. In the exercise of such jurisdiction, this Court cannot interfere with the finding of fact on re-appreciation of the evidence, unless and until the findings are based on no evidence or are arbitrary or perverse. In the present case, the finding as recorded by the Courts below cannot be said to be perverse and as such, no case for interference is made out. Thus, in my considered view, the respondent has discharged the initial burden, by *prima facie* showing that the possession of the suit shop was not with the tenant, but, with Mr. Jeronimo Cardozo.

20. This Court on 04.11.2015, had directed the petitioners to deposit in this Court compensation at the rate of Rs.20,000/- per month w.e.f. 01.03.2015 and to continue to deposit the same on or before 5th day of each succeeding month. This order was

based on the decision of the Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705** and in the case of **State of Maharashtra & Another Vs. M/s Super Max International Pvt. Ltd. & Others, 2009(5) ALL MR 1001.**

21. Miscellaneous Civil Application No. 386/2016 was filed by the respondent for enhancement of the said amount to Rs.38,500/- per month, while the petitioners have filed Miscellaneous Civil Application No. 139/2016 for reducing the amount to Rs.8,000/- per month. This Court by an order dated 05.02.2016 in Miscellaneous Civil Application No. 139/2016 found that it would be appropriate that the main petition itself is taken up for final hearing and accordingly, the hearing of the petition was expedited.

22. By a subsequent order dated 25.02.2016, the petitioners were permitted to deposit 50% of the amount, as directed by the order dated 04.11.2015. The petitioners are accordingly depositing an amount of Rs.10,000/- per month before this Court. The Hon'ble Supreme Court in the case of **M/s Super Max International Pvt. Ltd.** (supra) has held that the amount so deposited alongwith accrued interest should only

be paid after the final disposal of the civil suit, depending upon the result of the case. In view of the fact that the order of eviction is being confirmed, the amount will have to be paid to the respondent-landlord.

In the result, the petition is dismissed. Rule is discharged with no order as to costs.

23. The petitioners are granted four months time to vacate the suit shop. The amount deposited before this Court, alongwith interest, if any, shall be paid to the respondent, after four months from today.

C. V. BHADANG, J.

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