

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO.25 OF 2018

Mr. Blaze Fernandes
son of late Joao Mariano Fernandes'
aged 69 years, occupation business,
residing at Block A, ground floor,
Rich Builders Coop. Housing Society Ltd.
Cabeca, St Cruz, Ilhas, Goa. ... Applicant

V e r s u s

1. Dr. Joaquim Herlander Coelho Pereira,
son of late Abilio Coelho Pereira,
Represented by the respondent no.3.
2. Dr. Luis Amandio Coelho Pereira,
Son of late Abilio Coelho Pereira,
Represented by the Respondent No.3.
3. Mr. J. E. Coelho Pereira,
Son of late Abilio Coelho Pereira,
r/o. E-21, Fr. Agnelo Road,
Panaji, Goa. ... Respondents

Shri F. E. Noronha, Advocate for the Applicant
Shri J. Godinho, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Order on : 10 October 2018
Order Pronounced on : 12 October 2018

ORDER

1. The applicant seeks a writ to quash and set aside the order passed by the learned Civil Judge Junior Division Panaji dated 08.03.2018 pursuant to which the application moved by the applicant for rejection of the plaint under Order

VII Rule 11 of the Civil Procedure Code came to be dismissed. The applicant is the original defendant and the respondents are the plaintiffs before the Trial Court who would be referred to as the applicant and the respondents for brevity's sake hereinafter.

2. The case of the respondents briefly was that the father and later his mother was a statutory tenant of the commercial premises of which the applicant continued in possession. The respondents had taken a plea that the applicant was in illegal possession and occupation of the suit shop and sought for a direction to deposit the mesne profits by their application under Order XV-A of the Civil Procedure Code. The applicant had filed an application under Section 18 of the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968 for the deposit of rent as a tenant which was granted by the Trial Court while the application of the respondents under Section XV-A came to be dismissed. Both these orders were not challenged by the respondents and had attained finality. It was the case of the applicant that commercial tenancy was heritable and a mere blanket statement by the respondents that he was a trespasser could not supercede the settled law on that point. The learned Trial Court had erroneously dismissed the application moved by him under Order VII Rule 11 of the Civil

Procedure Code on the ground that only if the applicant had produced any documents to establish his claim of tenancy to the suit premises, the suit would have been barred by law. The learned Trial Court had erred in the exercise of its discretion and passed the order which was liable to be interfered with in revision.

3. Heard Shri F. E. Noronha, learned Counsel appearing for the applicant who adverted to the pleadings in the plaint and submitted that there was no singular dispute at the instance of the respondents that his father and subsequently his mother were the tenants of the suit premises though disputing the right of the applicant to have inherited the same on their demise. He next adverted to the impugned order and submitted that the learned Trial Court was totally in error to cast a duty on the applicant to produce documents to establish his plea when it was only the averments in the plaint which had to be examined for the purpose of considering the application under Order VII Rule 11 of the Civil Procedure Code. He next adverted to Order VII Rule 11(d) of the Civil Procedure Code which only required the Court to reject the plaint under Rule 11(d) where the suit appears from the statement in the plaint to be barred by any law. A reference was also made to Order VII Rule 1 of the Civil Procedure Code

which dealt with the particulars to be contained in the plaint and submitted that the expression “barred by law” contained under Order VII Rule 11(d) of the Civil Procedure Code also included judicial pronouncement and in that context placed reliance in **Bharvagi Construction & anr. vs. Kothakapu Muthyam Reddy & Ors. [2018 (1) ALL MR 459(S.C.)]**.

4. Shri F. E. Noronha, learned Advocate for the applicant placed reliance in **Tulsidas Atmaram Shirodkar @ Narvekar vs Chandrakant Bhikaro Naik [2015(2) Goa L. R. 603 (Bom)(PB)]**, **Satyawati Sharma (Dead) By Lrs vs. Union of India & anr. [(2008) 5 SCC 287]**, **Gantusa H. Baddi (Dead) by L.Rs. vs. Meerabai G. Pai & Ors. [2000 AIR SCW 1564]**, **Smt. Sushilabai Dantye & Ors. vs. Ganpat Kudtarkar [1998 (2) Goa L.T. 266]**, **Smt. Hirabai Gurudas & Ors. vs. Shri Joao Manuel Santa Rita Piedade Camara & Ors. [2000 (1) Goa L.T. 378]**, **Gian Devi Anand vs. Jeevan Kumar & Ors. [(1985) 2 SCC 683]**, **Maharashtra State Electricity Board vs M/s Madhu Sudandass & Brothers [AIR 1966 Bom 160]**, **Kedar Lal Seal & anr. vs. Hari Lal Seal [AIR (39) 1952 SC 47]**, **Sansar Chand Mela Ram vs. Sham Lal Dhanpat Rai & anr. [AIR 1957 Punjab 307]**, and **Shree Steel Castings Pvt. Ltd. vs. Vasanta s/o Kundlik Kumbhare & Ors.**

[2008(4) Mh.L.J. 525], in support of his case while pressing for the grant of the application.

5. Shri J. Godinho, learned Counsel appearing for the respondents adverted to the pleadings at para 9 of the plaint and submitted that the applicant was a rank trespasser in respect of whom the reliefs were claimed by him of a decree of eviction and recovery of possession and mesne profits for its illegal occupation. He placed reliance in **Dr. Fernando Jose Mascarenhas vs. Ms. Drakshayani Appasaheb Palekar [FA 125-16]** and pressed for the dismissal of the application.

6. i would consider their submissions, the relevant provisions of the Civil Procedure Code, the judgments relied upon and in view thereof proceed to decide the application.

7. In Bharvagi Constructions (supra), the Hon'ble Apex Court held that the expression "law" occurring in Order VII Rule 11(d) of the Civil Procedure Code includes not only legislative enactments but also judicial decision after considering a Division Bench judgment of the Allahabad High Court in **Virender Kumar Dixit vs. State of U.P., [2014(9) ADJ 1506]**, **Hermes Marines Limited vs. Capeshore Maritime Partners F.Z.C. & Anr. [unreported decision in**

Civil Application (OJ) No.144 of 2016 of the Gujarat High Court], Shahid S. Sarkar & Ors. Vs. Usha Ramrao Bhojane [2017 SCC OnLine Bom 3440] and that of the Jharkhand High Court in **Mira Sinha & Ors. vs. State of Jharkhand & Ors., [2015 SCC OnLine Jhar.4377].**

8. In **Tulsidas Shirodkar** (supra), the learned Single Judge while dealing with the Second Appeal on merits found in the facts at large that there was no dispute that the commercial tenancy was heritable in view of the judgment of the Apex Court which fact had been brought to their notice in reply to the notice served on the respondent before the filing of the suit. A reference was also made to the judgment of the Apex Court in **Smt. Gian Devi** (supra) which held that commercial tenancies are heritable. A reference was also made to the judgment in **Hirabai Gurudas Talaulikar** (supra) where a learned Single Judge held that it cannot be said that commercial tenancies are not heritable in terms of the provisions of the Rent Control Act and ultimately concluding that commercial tenancies are heritable.

9. In **Satyawati Sharma** (supra), a two Judge Bench of the Hon'ble Apex Court considered the judgment in **Gian Devi** (supra) where the Supreme Court considered the question

whether the statutory tenancy in respect of the commercial premises is heritable and in para 34 of the judgment the Court highlighted the difference between residential and the commercial tenancies and concluded that the legislature could never have intended that the landlord would be entitled to recover possession of the premises or the building let for commercial purposes on the death of the tenant of the commercial tenancies, even if no ground for eviction as prescribed in the rent Act is made out.

10. In **Gantusa Baddi** (supra), the Hon'ble Apex Court once again considered the judgment in **Gian Devi** (supra) and para 34 thereof which observed thus :

“A tenant of any commercial premises has necessarily to use the premises for business purposes. Business carried on by a tenant of any commercial premises may be and often is, his only occupation and the source of livelihood of the tenant and his family. Out of the income earned by the tenant from his business in the commercial premises, the tenant maintains himself and his family; and the tenant, if he is residing in a tenanted house, may also be paying his rent out of the said income. Even if a tenant is

evicted from his residential premises, he may with the earnings out of the business be in a position to arrange for some other accommodation for his residence with his family. When, however, a tenant is thrown out of the commercial premises, his business which enables him to maintain himself and his family comes to a standstill. It is common knowledge that it is much more difficult to find suitable business premises than to find suitable premises for residence. It is no secret that for securing commercial accommodation, large sums of money by way of salami, even though not legally payable, may have to be paid and rents of commercial premises are usually very high. Besides, a business which has been carried on for years at a particular place has its own goodwill and other distinct advantages. The death of the person who happens to be the tenant of the commercial premises and who was running the business out of the income of which the family used to be maintained, is itself a great loss to the members of the family to whom the death, naturally, comes as a great blow. Usually, on the death of the person who runs the business and maintains his family out of the income of the business, the other

members of the family who suffer the bereavement have necessarily to carry on the business for the maintenance and support of the family. A running business is indeed a very valuable asset and often a great source of comfort to the family as the business keeps the family going. So long as the contractual tenancy of a tenant who carries on the business continues, there can be no question of the heirs of the deceased tenant not only inheriting the tenancy but also inheriting the business and they are entitled to run and enjoy the same. We have earlier held that mere termination of the contractual tenancy does not bring about any change in the status of the tenant and the tenant by virtue of the definition of the tenant in the Act and the other Rent Acts continues to enjoy the same status and position, unless there be any provisions in the Rent Acts which indicate to the contrary. The mere fact that in the Act no provision has been made with regard to the heirs of tenants in respect of commercial tenancies on the death of the tenant after termination of the tenancy, as has been done in the case of heirs of the tenants of residential premises, does not indicate that the Legislature intended that the heirs of the tenants of commercial

premises will cease to enjoy the protection afforded to the tenant under the Act. The Legislature could never have possibly intended that with the death of a tenant of the commercial premises, the business carried on by the tenant, however flourishing it may be and even if the same constituted the source of livelihood of the members of the family, must necessarily come to an end on the death of the tenant, only because the tenant died after the contractual tenancy had been terminated. It could never have been the intention of the Legislature that the entire family of a tenant depending upon the business carried on by the tenant will be completely stranded and the business carried on for years in the premises which had been let out to the tenant must stop functioning at the premises which the heirs of the deceased tenant must necessarily vacate, as they are afforded no protection under the Act."

11. In **Sushilabai Dantye** (supra), a learned Single Judge of this Court while dealing with the Second Appeal on merits held that statutory tenancy under the Goa Rent Control Legislation is heritable. Tenancy was heritable even before the amendment of 1978 and the amendment restricted the right

to specified class of people. In **Hirabai Talaulikar** (supra), a learned Single Judge of this Court held that even an absence of specific provision dealing with the situation of death of a tenant in respect of a commercial premises and the consequences thereof in the Rent Act, would not by itself obstruct the right for inheritance in the tenancy of the deceased in commercial premises under the law of succession in favour of the legal heirs of such tenant. Bearing in mind the said law laid down by the Apex Court and considering the fact that the Rent Act in force in the State does not make specific provision prohibiting inheritance of tenancy rights in commercial premises in favour of the legal representatives of the tenants, it was held in the facts that the late Gurudas Talaulikar being a tenant in respect of premises of commercial nature and the petitioners undisputedly being his legal representatives were legally entitled to inherit the tenancy rights in the suit premises.

12. In **Maharashtra State Electricity Board** (supra), the Division Bench of Nagpur held while interpreting Order VI Rule 2 of the Civil Procedure Code that law need not be pleaded and it is the duty of the Court to apply the law to facts proved and found. In **Sansar Chand Mela Ram** (supra) a learned Single Judge of the Punjab High Court held that the pleadings

are to state only facts and not law. In **Shree Steel Castings Pvt. Ltd.** (supra), it was observed that law was not required to be pleaded while negating the contention of the appellant that since the respondents had founded their claim on Section 25H of the Industrial Disputes Act, 1947, they could not be permitted to claim re-employment under Clause 5 of the Model Standing Order.

13. **Dr. Fernando Mascarenhas** (supra), challenged in appeal the order passed by the Senior Civil Judge whereby the application filed under Order VII Rule 11 of the Civil Procedure Code by the respondents came to be allowed and the plaint of the appellant came to be rejected. The plaint in the case was rejected on the ground that the suit was barred in terms of Section 56 of the Goa, Daman and Diu Buildings (Lease, Rent & Eviction) Control Act, 1968 without examining that the plaint filed by the appellant was on the basis that the respondents were trespassers in the subject premises. It was contended on behalf of the appellant that the learned Judge had erroneously taken a view that commercial tenancies devolved upon the respondents when no such tenancy rights devolved upon the respondents herein. Moreover it was also contended on behalf of the appellants that the judgment of the Apex Court relied upon by the learned Judge to hold that

commercial tenancies are heritable would not be applicable to the present case since the plaintiff itself contended that the appellant had not admitted the respondents to be the tenant of the subject premises. Reliance was placed on behalf of the respondents in **Gian Devi** (supra) which held that commercial tenancies are heritable. The judgment in **Tulsidas Shirodkar** (supra) was relied upon where the learned Single Judge had held that commercial tenancies are heritable to belie the contention on behalf of the appellant that no such rights devolved upon the respondents.

14. In Dr. Fernando Mascarenhas (supra), the learned Single Judge found on going through the averments in the plaint that the appellants had stated that the respondents were trespassers in the subject premises. The tenancy rights had devolved upon the respondents after the demise of the plaintiffs and had claimed the reliefs declaring the defendants as trespassers and directed them not to hand over the vacant possession of the suit shop. However, in the facts of this case, the learned Single Judge considering the averments in the plaint and particularly that the appellant had sought for a declaration that the defendants were trespassers held that the learned Trial Court was not justified to pass the order. This judgment is clearly distinguishable and does not substantiate

the contention of Shri J. Godinho, learned Counsel appearing for the respondents that the suit as filed was not barred by law. Moreover, unlike his contention, this judgment too was delivered on its merits like the judgments relied upon by Shri F. E. Noronha, learned Advocate for the applicant.

15. Coming to the case at hand, the respondents claim to be owners in possession of the building of which one shop was admittedly granted on lease to late Joao Marian Fernandes and on his death, the tenancy devolved on his widow i.e. the late mother of the applicant. It was also their case that the tenancy which was originally granted to the late father of the applicant was continued with the widow upon his death and that rent receipts were issued to her from time to time. It was otherwise the case of the respondents that upon her death i.e. the death of the mother of the applicant, he sought to pay the arrears of rent and to continue the tenancy but he was not entitled to do so as there was no devolution of statutory rights and his status was that of a trespasser entitling them to the recovery of the suit shop from him.

16. Admittedly, an application was made by the applicant for deposit of the rent in receipt of the suit shop which came to be allowed pursuant to the order of the Trial Court dated

05.10.2017. It is equally a matter of record that the application filed by the respondents under Order XV-A of the Civil Procedure Code for the deposit of mesne profits alleging illegal occupation by the applicant came to be dismissed by the Trial Court vide the order dated 21.01.2017 and both these orders attained finality in the absence of any challenge thereto at the instance of the respondents. The applicant then moved the application for the rejection of the plaint under Order VII Rule 11(d) of the Civil Procedure Code taking a specific plea that the suit as filed by the respondents was barred in view of Section 56 of the Rent Control Act. The learned Trial Judge however lost track of the fact that it was only the pleadings in the plaint which had to be looked into and on that basis to decide whether the plaint was liable for rejection or otherwise. However, the learned Trial Judge to the contrary cast the burden on the applicant holding that in case the applicant had produced any document establishing that he was the tenant of the suit premises, the suit would have been barred by law. This is despite the fact that the applicant had clearly placed reliance in **Gian Devi** (supra), **Sushilabai Dantye** (supra) and other judgments on record clearly holding that commercial tenancies are heritable and that in view of the provisions contained in Section 56 of the Rent Act, the Civil Court had no jurisdiction to entertain the suit for eviction of the party.

17. Moreover, the respondents had also not sought any relief of declaration unlike that in Dr. Fernando Mascarenhas(supra). The said judgment is also distinguishable on facts inasmuch as in the facts of the present case, the respondents clearly pleaded that the late father of the applicant was the tenant of the suit shop and that on his demise, the tenancy in respect of the suit shop devolved on his widow i.e. the late mother of the applicant who paid rent regularly and despite falling back on the definition of tenant contained in Section 2(p) of the Act proceeded to hold that there was no merit in the application and dismissed the same. The impugned order which is clearly indicative of the fact that the learned Trial Judge had failed to exercise the jurisdiction vested in it by law and otherwise acted in exercise of its jurisdiction illegally would call for an interference with the order under challenge.

18. In view thereof, the civil revision application is allowed. It goes without saying that the plaint filed by the respondents is liable for rejection in view of Order VII Rule 11(d) of the Civil Procedure Code.

NUTAN D. SARDESSAI J.

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