

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.345 OF 2018

Pravinchandra Meghji Varia ... Applicant
Vs.
Vithaldas Laxmidas Bhatia and others ... Respondents

Mr. Ranjit A. Thorat, Senior Advocate i/b. Ms Pratibha D. Shelake for Applicant.
Mr. Sharan Jagtiani with Mr. Sumeet Nankani i/b. Mr. Maulik Tanna for Respondents No.1 and 2.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 4, 2018

P.C. :

Heard Mr. Thorat, learned Senior Counsel for the applicant and Mr. Jagtiani, learned Counsel for the respondents No.1 and 2 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant No.1', has challenged the judgment and decree dated 09.03.2018 passed by the Appellate Bench of the Small Causes Court in 2(a) Appeal No.235 of 2014. By that order, the Appellate Court allowed the appeal preferred by the respondents No.1 and 2, hereinafter referred to as 'plaintiffs', and set aside the judgment and decree dated 11.04.2014 passed by the learned Judge, Court Room No.15 of the Court of Small Causes at Bombay in R.A.E. Suit No.725/1099 of 2009.

3. The Appellate Court partly decreed the Suit instituted by the plaintiffs and directed defendant No.1 and respondent No.3, hereinafter referred to as defendant No.2, to deliver quiet, vacant and peaceful possession of shop No.6 on the ground floor, Neemchhya Building, Sheth Bhimji Bhanji Estate, M. G. Road, Ghatkopar (East), Mumbai –

400077 (for short 'suit premises') to the plaintiffs within 3 months from the date of the order.

4. In support of this Application, Mr. Thorat submitted that plaintiffs instituted Suit against the defendant No.1 and defendant No.2 invoking grounds under Sections 16(1)(e) [unlawful subletting by defendant No.1 to defendant No.2] and Section 16(1)(n) [non-user of the suit premises by defendant No.1-tenant] of the Maharashtra Rent Control Act, 1999 (for short 'Act'). He has taken me through paragraphs 1, 2 and 3 of the plaint where the plaintiffs have pleaded grounds of unlawful subletting under Section 16(1)(e) and non-user under Section 16(1)(n) of the Act and paragraphs 8 and 9 of the written statement. Relying upon paragraphs 8 and 9 of the written statement, Mr. Thorat submitted that defendant No.1 has explained presence of defendant No.2 in the suit premises. He submitted that initially defendant No.1 was carrying on business of tailoring. As he was not getting sufficient income from the said business, defendant No.1 simultaneously started business of selling eatables. Defendant No.1 has obtained licence from the Health Department of the Municipal Corporation of Greater Mumbai (for short 'Corporation'). He invited my attention to the findings recorded by the learned trial Judge while dismissing the Suit. The learned trial Judge extensively considered exhibit-52 collectively produced by the defendant No.1. As against this, the Appellate Court ignored exhibit-52 collectively. He has taken me through paragraphs 33 to 36 of the trial Court's judgment where the learned trial Judge has considered exhibits - 38 and 39 relied by the plaintiffs as also exhibit-52 collectively relied by defendant No.1. After considering the material on record, the learned trial Judge held that plaintiffs did not establish the ground of non-user and unlawful subletting.

5. Mr. Thorat submitted that plaintiffs have not established that defendant No.1 is not in legal possession of the suit premises. They have also not established that defendant No.2 is in exclusive possession of the suit premises after defendant No.1 parted with the possession. Thus, the basic ingredient of unlawful subletting is not established by the plaintiffs. As defendant No.1 has not parted with possession of the suit premises, the Appellate Court was not justified in decreeing the Suit on the ground of unlawful subletting. The Appellate Court, after holding that plaintiffs established unlawful subletting, held that as the defendant No.1 is not in possession of the suit premises, plaintiffs have also established the ground of non-user. As the Appellate Court has failed to consider relevant documents namely, exhibit-52 collectively as also plaintiffs failed to establish that defendant No.1 has lost control of the suit premises, application requires consideration. In support of these submissions, Mr. Thorat relied upon the following decisions:

1. ***Jagdish Prasad Vs. Angoori Devi*, (1984) 2 SCC 590**, and in particular paragraph 2 thereof;
2. ***Mahendra Saree Emporium Vs. G. V. Srinivasa Murthy*, (2005) 1 SCC 481**, and in particular paragraph 16 thereof; and
3. ***Jagan Nath Vs. Chander Bhan*, 1988 (3) SCC 57**.

6. On the other hand, Mr. Jagtiani supported the impugned order. He submitted that after appreciating the entire evidence on record, the Appellate Court held that plaintiffs have established both the grounds. He submitted that plaintiffs came with the case that defendant No.1 had unlawfully sublet the suit premises to the defendant No.2 and the relevant period is from January 2008 to March 2010. He submitted that the Appellate Court has considered exhibit-52 collectively as is evident from paragraphs 29 to 33. He invited my attention to the findings recorded by the learned trial Judge in paragraph 17. In paragraph 17, the

learned trial Judge referred to the documents produced by the plaintiffs at exhibit-23 collectively under the Right to Information Act, 2005. The plaintiffs had produced the information supplied by Senior Inspector as per the copy of 'C' register (extract) of M/s. Surani Designer Wear. The said establishment is entered in the 'C' register in the year 2009. He submitted that defendant No.1, during the course of cross-examination, admitted that he did not obtain any Registration Certificate of his establishment under the Shop and Establishment Act for the period from September 2008 to March 2010. He, therefore, submitted that as the plaintiffs have established parting of possession by defendant No.1 and unlawfully inducing defendant No.2 in the suit premises, the Appellate Court was justified in passing the impugned order. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of the C.P.C.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. During the course of cross-examination, defendant No.1 admitted that he did not obtain any Registration Certification under the Shop and Establishment Act for the period from September 2008 to March 2010. The Suit was instituted some time in the year 2009. In paragraph 13, the Appellate Court noted that when the bailiff went to serve the suit summons, defendants No.1 and 2 were not present at the suit premises. Husband of the defendant No.2, namely Mr. Ketan Surani was present. He accepted the suit summons on behalf of his wife-defendant No.2. The son of defendant No.1 also approached the bailiff present at the suit premises and he also received the suit summons on behalf of his father-defendant No.1. In paragraph 17, the Appellate Court referred to the application submitted by the defendant No.2 for obtaining certificate under the Shop and Establishment Act and the

undertaking given by her for that purpose, which were produced at exhibits 38 and 39. Defendant No.2 had applied to start the business of ready made garments in the suit premises under the name and style “Surani Designer Wear”. She also gave undertaking that she is the employer of the said business. The Appellate Court, therefore, drew inference that not the defendant No.1 but the defendant No.2 is occupying the suit premises and running the business of ready made garments under the name and style “Surani Designer Wear”.

8. In paragraph 22, the Appellate Court noted that the nature of business of “Surani Designer Wear” was of ready made garments and the date of commencement of the said business was 11.05.2008. Undertaking exhibit-39 disclosed that establishment which was being run in the suit premises was an establishment of defendant No.2 and she gave undertaking to that effect. The Appellate Court, therefore, held that these two documents are more than sufficient to show that the business by name “Surani Designer Wear” were run in the suit premises by none other than defendant No.2. In paragraph 23, the Appellate Court observed that there is absolutely no evidence to show that the defendant No.1 had any control over the said business. If at all defendant No.1 is in possession of the suit premises, he would have produced some sort of documents regarding purchase and sale of the ready made garments in addition to his tailoring business. In paragraph 24, the Appellate Court noted that defendant No.2 did not file written statement contesting the Suit. In paragraph 27, the Appellate Court referred to the suggestion given to P.W.1 during the course of cross-examination that defendant No.2 is running business under the name and style “Surani Designer Wear” and the signboard of “Surani Designer Wear” is displayed at the suit premises. P.W.1 admitted the said fact. In paragraph 29, the Appellate Court referred to the admission given by the defendant No.2

in cross-examination to the effect that there is no Shop Act licence standing in the name of defendant No.1 for the period from 2008 to 2009. The Appellate Court dealt with exhibit-52 collectively, namely licences issued by the Health Department of the Corporation. The licence was renewed in the year 2007 and remained valid till 2011.

9. In paragraph 30, the Appellate Court observed that merely because licence from Health Department was in force during the period from 2008-2009, that will not lead to infer that the defendant No.1 actually carried on business during that period. The licence issued by the Health Department is nowhere concerned with the ready made cloth business. In paragraph 32, again, the Appellate Court dealt with exhibit-52 collectively and observed that these documents are not relevant for disproving the alleged subletting. The Appellate Court also noted that the defendant No.1 was initially carrying on business as ladies tailor from 1968 to 1981. In the year 1987, he added business of general stores and ready made. In the year 1990 till 2002, he further added business of dry fruits by name “Varia Tasty Foods” and changed his business name “Varia Dry Fruits”, which he continued till 2008. The Appellate Court thereafter noted that there was no Shop Act licence in the name of defendant No.1 in the year 2008-2009 and after institution of the Suit in the year 2009, defendant No.1 again obtained Shop Act registration for his tailoring business by name “Varia Tailors” in 2010. In paragraph 33, the Appellate Court noted that defendant No.1 admitted that there is a business conducted by name “Rangili” in shop No.7 adjacent to the suit premises and the same is now renamed as “Sunlight Cleaners Laundry”.

10. Thus, after appreciating the evidence on record, the Appellate Court had decreed the Suit. Though the Appellate Court did not consider exhibit-23 colly., the learned trial Judge has considered exhibit-23 colly.,

which clearly depicts that the information supplied by Senior Inspector as per 'C' Register (extract) of M/s. Surani Designer Wear shows that the establishment is entered in the 'C' register in the year 2009.

11. Mr. Thorat invited my attention to paragraphs 8 and 9 of the written statement. A perusal of paragraph 8 shows that defendant No.1 contended that in or about 2009, he had taken help of his friend Ketan R. Surani to do some business in ready made garments. In paragraph 9, defendant No.1 contended that with the assistance of his son, it was opted to take the friend's goods from the friend's shop and sell them from the suit premises. Relying upon paragraphs 8 and 9, Mr. Thorat submitted that defendant No.1 has explained the presence of defendant No.2 in the suit premises and has discharged the onus on him. At the highest, it can be said that defendant No.1 and defendant No.2 are in joint possession of the suit premises. In other words, defendant No.1 continues to be in possession of the suit premises and therefore, the Appellate Court was not justified in passing decree on the ground of unlawful subletting. A perusal of paragraphs 8 and 9 does not indicate that defendant No.1 accepted presence of defendant No.2 in the suit premises. All that he contends that he had taken help from husband of defendant No.2. In fact in paragraph 9, no reference is made to the husband of defendant No.2 at all. All that in paragraph 9 of the written statement, defendant No.1 contends is that he was selling goods of his friend from the suit premises.

12. In the case of ***Joginder Singh Sodhi Vs. Amar Kaur, (2005) 1 SCC 31***, the Apex Court has held that the burden of proof of subletting is on the landlord but once he establishes parting of possession by the tenant with the third party, onus shifts on the tenant. After perusing the evidence on record as also the impugned order, I do not find that

defendant No.1 has established that he is in exclusive possession of the suit premises. Defendant No.1 has not proved his possession from January 2008 to March 2010 in the suit premises at all. In view thereof, I do not find that the Appellate Court has committed any error in passing the impugned order.

13. Mr. Thorat relied upon paragraph 2 of **Jagdish Prasad's case** (*supra*). A perusal of paragraph 2 shows that the ground of unlawful subletting was based upon the contention of the landlord that photograph showing presence of the son of the proprietor of Pavan Trading Company within the room amounted to subletting. In the present case, the Appellate Court, after appreciating the evidence on record, has held that defendant No.1 was not in possession of the suit premises. I, therefore, do not find that the said decision, in any way, advances the case of the defendant No.1. He also relied upon paragraph 16 of **Mahendra Saree Emporium** (*supra*). The said decision arose out of Section 21(1)(f) of the Karnataka Rent Control Act, 1961 (Old Act). The Apex Court, in that context, observed that a transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is sine qua non of a lease. Under Section 21(1)(f) of the Old Act, the phraseology employed is quite wide. It embraces within its scope, subletting of the whole or part of the premises as also assignment or transfer in any other manner of the lessee's interest in the tenancy premises. In view thereof, the said decision is also not applicable to the facts of the present case.

14. Lastly, Mr. Thorat relied upon the decision in **Jagan Nath's case** (*supra*) to contend that defendant No.1 never parted with possession of the suit premises and is in control of the suit premises. For the reasons recorded earlier, in my opinion, the said decision is also not applicable in the facts of the present case.

15. Defendant No.1 was not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendant No.1 was also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

16. At this stage, Ms Shelake orally applies for continuation of the ad-interim order dated 21.06.2018 for a period of 8 weeks from today. She assures that defendant No.1 and all the adult members using the suit premises will file usual undertaking in this Court within two weeks from today, with advance copy to the other side, incorporating therein that,

(a) they are in possession and nobody else is in possession of the suit premises;

(b) they have neither created third party interest nor parted with possession of the suit premises;

(c) they will hereafter neither create third party interest nor part with possession of the suit premises;

(d) they will pay arrears of rent, if any, to the plaintiff within two weeks from today.

(e) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiff;

17. In view thereof, notwithstanding dismissal of the Application, subject to the defendant No.1 filing undertaking in the aforesaid terms with advance copy to the other side as also clearing arrears of rent, if

any, within two weeks from today, the ad-interim order dated 21.06.2018 shall remain in force for a period of 8 weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendant No.1 commits breach of any of the conditions of the undertaking, ad-interim order shall stand vacated without further reference to the Court. In case, defendants are unable to obtain suitable orders from higher Court within a period of eight weeks and do not hand over possession of the suit premises to the plaintiffs, the plaintiffs will be at liberty to execute the decree in accordance with law. Order accordingly.

18. List the Application for 'reporting compliance' on 25.09.2018 at 3.00 p.m.

(R. G. KETKAR, J.)

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