

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION [STAMP] NO.13240 OF 2019

Manjula Pratapray Vaidya and others.	]	Applicants
Vs.		
M/s. Patil & Bhoir Brothers and Ors.	]	Respondents

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Mr. Balasaheb Deshmukh i/b Kalpesh J. Nansi a/w Ms. Farhana Khan, Advocate for the Applicants.

Mr. Jaydeep J. Thakkar, Advocate for the Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 1st AUGUST, 2019.

P.C.

Heard Mr. Deshmukh, learned Counsel for the applicants and Mr. Thakkar, leaned Counsel for the respondents, at length.

2. Leave to amend as per draft handed in is granted. Amendment shall be carried out within one week from today.

3. By this Application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, who are legal heirs of defendants No.1 and 2 have challenged the judgment and decree dated 5th March, 2016 passed by the learned trial Judge in Regular Civil Suit No.16 of 2004 as also the

judgment and decree dated 23rd January, 2019 passed by the learned District Judge-1, Kalyan in Regular Civil Appeal No.82 of 2016. By these orders, the Courts below decreed the suit instituted by the respondents under section 16 (1) (e) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed applicants and respondent No.2, hereinafter referred to as 'defendant No.3' to hand over vacant and peaceful possession of Shop No.3, on the ground floor of the building known as "Patil & Bhoir Apartment" in property bearing Survey No.379/A, Hissa No.6/A, 1/A and 1/B situate at Mouje Thakurli, Opp. Municipal House, Bhagat Singh Road, Dombivali (East), Dist Thane within the area of Kalyan Dombivali Municipal Corporation (for short 'suit premises') to the plaintiffs.

4. Respondent No.1, hereinafter referred to as 'plaintiffs' instituted suit, inter alia, contending that defendants No.1 and 2 Yogeshkumar P. Vaidya and Pratapray G. Vaidya are the tenants in respect of the suit premises. The plaintiffs and defendants No.1 and 2 entered into tenancy agreement on 1st November, 1983. Defendants No.1 and 2 entered into Memorandum of Understanding with defendant No.3, Bharat Keshrimal Chopada and has given the suit premises on leave and licence basis for a period of three years commencing from 1st March, 2003 to 28th February, 2006 without obtaining permission in writing from the plaintiffs. Defendants No.1 and 2 have contravened the terms and conditions of agreement dated 1st January, 1983 and the provisions of the Act. Defendants No.1 and 2 are making profit out of the same. Defendants No.1 and 2 had no right to sublet the suit

premises to defendant No.3. Defendant No.3 is in illegal occupation of the suit premises. The plaintiff further contended that notice was issued through Advocate on 25th April, 2003 on defendants No.1 and 2 terminating their tenancy in respect of the suit premises. Defendants No.1 and 2 replied the notice through Advocate on 26th June, 2003. They denied to have let out the suit premises to defendant No.3.

5. Defendants No.1 and 2 filed written statement, inter alia, contending that partners of the plaintiff, firm Mr. Baban Patil and Sonu Patil had discussions with defendant No.2. The said discussions took place in the presence of wife of defendant No.2. During the discussions, the plaintiffs assured defendant No.2 that they will accord their consent in writing to the proposed leave and licence to be granted to defendant No.3. Relying on such assurance, defendant No.2, defendant No.1 and wife of defendant No.2 as the licensee executed Memorandum of Understanding on 26th February, 2003 whereby the licensors agreed to grant leave and licence to the licensee for conducting the licensor's business of M/s. Balaji Medical Stores and use the suit premises with furniture and fixtures. They also handed over photo copy of Memo of Understanding to the plaintiffs in order to enable them to accord their consent to the same as they had assured to do. Defendants No.1 and 2 waited for about four weeks, but the plaintiffs did not accord their consent in writing as they had assured. On the contrary, the plaintiffs by their conduct refused to accord their consent. Consequently, defendants No.1 and 2 and wife of defendant No.2 and defendant No.3 were obliged to cancel

the said Memorandum of Understanding and the proposed grant of leave and licence in favour of defendant No.3. Accordingly, Memorandum of Understanding was cancelled by making endorsements thereon on 4th April, 2003. Thus, the intended grant of leave and licence did not materialize at all. Defendants No.1 and 2, therefore, denied that they gave on licence the suit premises to defendant No.3 in any manner or for any period as alleged. They denied that they contravened the terms and conditions of the tenancy agreement dated 1st January, 1983 and the provisions of the Act.

6. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the Courts below decreed the suit under section 16 (1) (e) of the Act. It is against these orders, defendants No.1 and 2 had instituted the present application.

7. In support of this application, Mr. Deshmukh has taken me through the assertions made in paragraphs 3 to 7 of the plaint. He has also taken me through the impugned orders passed by the Courts below. In so far as the trial Court's judgment is concerned, he has invited my attention to paragraphs 12, 14 to 17 and 20 as also paragraphs 17 to 25 of the District Court's judgment. He submitted that basically the plaintiffs have not established that defendants No.1 and 2 have parted with possession of the suit premises in favour of defendant No.3. The plaintiffs have not established that defendant No.3 is in exclusive

possession of the suit premises. The plaintiffs have failed to establish that defendants No.1 and 2 have no control over the suit premises. He also submitted that without recording any conclusive finding on these aspects, the Courts below have decreed the suit.

8. Mr. Deshmukh relied on the decisions in **Jagdish Prasad Vs. Smt. Angoori Devi, AIR 1984 Supreme Court 1447 and Dipak Banerjee Vs. Smt. Lilabati Chakraborti, AIR 1987 Supreme Court 2055** wherein it was held that mere presence of a person other than tenant in the shop is not sufficient to infer subletting. Exclusive possession of the sub tenant along with payment of rent is required to be proved. Mr. Deshmukh further submitted that in fact after the plaintiffs declined to give consent in writing for entering into leave and licence agreement with defendant No.3, Memorandum of Understanding was cancelled by defendants No.1 and 2. Memo of Understanding was never acted upon by defendants No.1 and 2.

9. Mr. Deshmukh relied on paragraph 10 of decision of **Parubai Vithal Kamble Vs. Girdharilal Agarwal, 2019 (4) Mh. L.J, 67** to contend that in the present case the plaintiffs have not established parting with possession by defendants No.1 and 2 and exclusive possession of defendant No.3. He, therefore, submitted that the application requires consideration.

10. On the other hand, Mr. Thakkar supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below have concurrently decreed

the suit. He, therefore, submitted that no case is made out for interfering with the impugned orders.

11. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the material on record indicates that tenancy agreement dated 1st January, 1983 was executed by the plaintiffs with defendants No.1 and 2. Tenancy agreement specifically provided that tenant shall not assign or in any other manner transfer interest therein or shall not keep a licensee except with the prior consent in writing from the landlords. After appreciating the evidence on record, the Courts below have found that defendants No.1 and 2 without obtaining permission in writing of the plaintiffs have executed leave and licence agreement in favour of defendant No.3. After considering the evidence on record, the Courts below also found that defendant No.3 was running a business. The Courts below also noted that defendants No.1 and 2 have not established act of cancellation of Memorandum of Understanding. The best available witness to this leave and licence agreement Exhibit 71 viz defendant No.3 was also not examined. In paragraph 16, the learned trial Judge noted that evidence on record shows presence of defendant No.3 in the suit premises. It is, therefore, necessary for defendants No.1 and 2 to explain under what capacity defendant No.3 was in exclusive possession of the suit premises. Defendants No.1 and 2 have not discharged the burden on their shoulders. The Courts below also found that subletting was done by defendants No.1 and 2 on the terms of compensation of Rs.4000/- per month with security

deposit of Rs.2,00,000/-. The evidence also shows that defendants No.1 and 2 were unable to run medical shop in the year 2003. In these circumstances, they entered into leave and licence agreement with defendant No.3. Accordingly, defendant No.3 was running medical shop in the suit premises. Defendants No.1 and 2 received consideration for sub tenancy.

12. A perusal of paragraph 10 of the decision relied on by Mr. Deshmukh in **Parubai Vithal Kamble** (supra) shows that in fact the learned District Judge recorded that defendant No.1 (tenant) and alleged sub tenants (defendants No.2 and 3) all were residing in the suit premises. In that context, it was observed that the learned District Judge did not record any finding as regards exclusive possession of the alleged sub tenancy and the matter was remitted to the learned District Judge for recording finding on the question of unlawful subletting. Keeping in mind the principles laid down in **Joginder Singh Sodhi Vs. Amar Kaur**, (2005) 1 SCC 31 and **Shama Prashant Raje Vs. Ganpatrao**, (2000) 7 SCC 522, in my opinion, the said decision is not applicable to the facts of the present case.

13. The Courts below after appreciating the evidence on record have concurrently held that the plaintiffs have established ground of unlawful subletting. After considering the material on record, I do not find that the Courts below committed any error in decreeing the suit. Defendants No.1 and 2 are not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to

the evidence on record. Defendants No.1 and 2 are not in a position to demonstrate that on the basis of the evidence on record, no reasonable or prudent person would have reached conclusions arrived at by the Courts below. Hence, no case is made out for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

14. At this stage, Mr. Deshmukh orally applies for extension of interim arrangement recorded by this Court in the order dated 2nd May, 2019 for a period of eight weeks from today. He assures that within four weeks from today, defendants No.1 and 2 and all the adult family members using the suit premises will file usual undertaking in this Court with advance copy to the other side incorporating therein that;

- (a) they are in possession and nobody else including defendant No.3 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 go on depositing compensation @ Rs.12,000/- per month for a period of 8 weeks subject to obtaining suitable orders from higher Court during this period;
- (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 plaintiffs;
- (f) they will not seek further extension.

15. In view thereof, notwithstanding dismissal of the C.R.A, eviction decree shall be executed for a period of 8 weeks from today subject to defendants No.1 and 2 filing undertaking in the aforesaid terms within four weeks from today. It is expressly made clear that in case the undertaking is not filed by defendants No.1 and 2 in the aforesaid terms within four weeks from today and/or defendants No.1 and 2 commit breach of any of the conditions of the undertaking, this interim order shall stand vacated without further reference to the Court. In case, defendants No.1 and 2 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 proceed with the matter in accordance with law. Order accordingly.

16. List the Application for reporting compliance on 5th September, 2019.

[R.G. KETKAR, J.]