

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 339 OF 2019

Parel Nagrik Cooperative Consumer
Society Limited

.. Applicant

vs.

Smt. Kalpana S. Kothare and ors.

.. Respondents

Mr. P.G. Karande for the Applicant.

Mr. Prabhakar K. Shetty for Respondent Nos.1 to 4

CORAM : R. G. KETKAR, J.

DATE : 24th JULY 2019.

P.C. :-

1] Heard Mr. P.G. Karande, learned counsel for the applicant and Mr. P.K. Shetty, learned counsel for respondent Nos.1 to 4 at length.

2] By this application under Section 115 of Code of Civil Procedure, 1908 (for short “CPC”), the applicant, herein referred to as defendant No.1, has challenged the judgment and decree dated 29th April 2014 passed by the learned Trial Judge in R.A.E. Suit No. 910/1445 of 2007 as also the judgment and decree dated 18th April 2019 passed by the Appellate Bench of the Small Causes Court in (2a) Appeal No.

276 of 2014. By these orders, the Courts below decreed the suit instituted by respondent Nos.1 to 4, hereinafter referred to as the plaintiffs, and directed defendant No.1 and respondent Nos.5 and 6, hereinafter referred to as defendant Nos.2 and 3, to hand over vacant and peaceful possession of Shop No.3 situate at Datta Mandir Building, Acharya Donde Marg, Parel, Mumbai -400 012 (for short “*suit premises*”). The Courts below decreed the suit on the ground of unlawful subletting under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999 (for short “*the Act*”).

3] The plaintiffs instituted the suit against the defendants, *inter alia*, contending that defendant No.1 is the tenant of the plaintiffs in respect of suit premises. In or about, July 2007, defendant No.1 had unlawfully sublet or transferred for consideration the suit premises to defendant Nos.2 and 3 who are now doing their business of Tailoring and Readymade garments in the suit premises under the name and style of M/s. Fashion Zone as owners thereof. On 1st August 2007, the plaintiffs had taken written particulars and statement as to who is in possession of various shops in the

suit premises, when defendant Nos.2 and 3 gave statement in writing that they are in possession of the suit premises and doing their business of Tailoring and Readymade garments under the name and style of M/s. Fashion Zone.

4] Defendant No.1 filed written statement dated 22nd October 2007. In paragraph 5, defendant No.1 denied the allegation of the plaintiffs as regards unlawful subletting. Defendant No.1 contended that being a Cooperative Consumer Society, it has been doing its business of Cloth Shop. Defendant No.1 is the owner of said business. Defendant No.1 had given its said running business of Cloth shop for conducting on royalty basis to one Mr. Hiralal Waghji Ghor. Even in the past, plaintiff No.1 had given legal notice to defendant No.1 making similar false allegations. Plaintiff No.1 alleged that the suit premises has been unauthorisedly sublet by defendant No.1. Defendant No.1 further contended that on 11th July 2007, it had entered into an agreement for conducting of the said running business of Cloth shop with defendant No.3. The said agreement was annexed as Exhibit-B to the written statement. Defendant

No.1 contended that from the said agreement, it was evident that defendant No.1 is in exclusive use and occupation of the loft in the suit premises wherein various records of defendant No.1 society are kept and the Shares Department is being operated from the suit premises. Even the Dividend of defendant No.1 society is being distributed to its members from the suit premises till date, as the said records are also kept on the said loft. Reference was made to clause 11 of the Conducting Agreement which recorded that the parties have not created any tenancy, sub-tenancy or license in respect of the suit premises.

5] On the basis of pleadings of the parties, learned Trial Judge framed the necessary issues. The parties adduced the evidence. After considering the evidence on record, the Courts below decreed the suit under Section 16(1)(e) of the Act and held that defendant No.1 unlawfully sublet or transferred the suit premises to defendant Nos.2 and 3. Against these orders, defendant No.1 has instituted the present Civil Revision Application.

6] In support of the application, Mr. P.G. Karande submitted that defendant No.1 is in exclusive use and occupation of the suit premises. Defendant No.1 has not parted with possession. Defendant No.1 is in control of the suit premises. He has taken me through Clauses 1,3, 4 and 7 of the Conducting Agreement dated 11th July 2007, evidence adduced by the parties and the findings recorded by the Courts below. He also relied upon the following decisions :

(i) Varden T. James vs. Farhang Azhare – 2005 (2) ALL

MR 1 and in particular paragraph 18 thereof; and

(ii) Gopal Saran vs. Satyanarayana – (1989) 3 SCC 56,

and in particular paragraphs 16 and 20 thereof;

He submitted that the Courts below misdirected themselves while decreeing the suit under Section 16 (1)(e) of the Act. The application, therefore, requires consideration.

7] On the other hand, Mr. Shetty supported the impugned orders. He submitted that the suit summons was served on defendant No.1 at the address of Vijit Niwas, Ghokhale Society Lane, Parel, Mumbai, i.e., other than suit premises. Defendant Nos.2 and 3 were served with the suit summons

at the suit premises. Defendant Nos.2 and 3 despite service did not file written statement and contest the suit. Defendant No.1 also did not examine them as witnesses. He submitted that as the Courts below after appreciating the evidence on record have concurrently decreed the suit, no case is made out for invocation of powers under Section 115 of CPC.

8] I have considered the rival submissions advanced by the parties and also perused the record. As mentioned earlier, the plaintiffs have alleged that defendant No.1 Society have unlawfully sublet the suit premises to defendant Nos.2 and 3. As against this, it is the case of defendant No.1 that defendant No.1 had entered into a Conducting Agreement with defendant No.3 on 11th July 2007.

9] Clauses 3, 7 & 12 of the Conducting Agreement read thus:

“3. The Party of the Second Part undertakes to pay regularly, as and when due the bills for good and articles purchased from the market which should not be done in the name of the Party of the First Part. The Party of the Second Part shall do so in his own name.

..
..

7] *The Party of the Second Part shall pay license fees and incidental charges for outside showcase, display and electricity bills regularly.*

..

..

12] *The Party of the Second Part shall alone pay the entire bill amount of the PCO Phone and thereafter the remaining collections of PCO Phone of the Party of the First Part in the premises shall be divided among both the parties hereto equally and the same shall be paid by the Party of the Second Part to the Party of the First Part within a week from receipt of the Telephone Bill.”*

10] It is not in dispute that defendant No. 1 was served at the address other than the suit premises and that defendant Nos.2 and 3 were served on the address of the suit premises. Despite service, defendant Nos.2 and 3 did not participate in the trial by filing written statement and adducing evidence. Even defendant No.1 did not examine them as witnesses. A perusal of written statement and in particular, paragraph 5 of examination-in-chief of witness Manohar Loke, Secretary of defendant No.1 Society shows that defendant No.1 claimed to be in exclusive use and occupation of the loft in the suit premises wherein various records of defendant No.1 Society are kept and the Shares Department is being operated from the suit premises. In other words, defendant No.1 has not even claimed to be in possession of the suit premises and

claims to be in exclusive use and occupation of the loft in the suit premises.

11] A perusal of clauses of the Conducting Agreement extracted hereinabove show that defendant No.3 undertook to pay regularly, as and when due, the bills for goods and articles purchased from the market, which shall not be done in the name of defendant No.1. Defendant No.3 was to do this in his own name. Defendant No.3 agreed to pay license fees and incidental charges of outside showcase, display and electricity bills regularly. Defendant No.3 agreed to pay the entire bill amount of the PCO Phone and thereafter the remaining collections of PCO Phone of defendant No.1 in the premises were to be divided between defendant Nos.1 and 3 equally.

12] The ground of subletting is considered by the learned Trial Judge from paragraph 6 onwards. The learned Trial Judge referred to writing dated 1st August 2007 at Exhibit-23. A perusal of writing at Exhibit-23 shows that name of shop is M/s. Fashion Zone – F.Z. Tailoring Shop/Readymade

garments and owners of the said shop are defendant Nos.2 and 3. Defendant No.1 did not examine defendant No.3 as a witness. Learned Trial Judge compared the signature of defendant No.3 on undisputed document, i.e., Conducting Agreement (Exhibit-39) with the signature appearing on Exhibit-23. In paragraph 14, learned Trial Judge has discussed the evidence adduced by DW-1 Manohar Loke. After considering the evidence on record, in paragraph 17, the learned Trial Judge has concluded that the plaintiffs have proved that defendant Nos.2 and 3 are doing the business in the name and style of Fashion Zone in the suit premises as a transferee of defendant No.1. Defendant No.1 Society have failed to prove their exclusive use and occupation of the suit premises. Defendant No.1 failed to prove that they have given their running cloth business for conducting to defendant No.3 as alleged.

13] Insofar as the Appellate Court is concerned, the Appellate Court has referred to the writing at Exhibit-23 in paragraph 14. The Appellate Court has discussed the evidence of DW-1 in paragraphs 17 and 18. After considering

the evidence on record, the Appellate Court has concluded in paragraph 19 that defendant Nos.2 and 3 are unlawful sub-tenant of defendant No.1 .

14] Mr. Karande relied upon the decision in *Varden James (supra)* and in particular paragraph 18 thereof. Paragraph 18 reads thus:

*“18. Let me consider the case from twin angles. Firstly, the case of the plaintiff was that the agreement clearly shows that it was an agreement for conducting business as defendant was only a licensee. It was an arrangement for the defendant to hold possession as licensee and on termination of licence the defendant was liable to be evicted. There was and is no protection to the defendant under Rent Legislation. A conductor of running business of a licensor is excluded from the purview of the Rent Legislation as such the civil suit in the civil Court was the only remedy available to the plaintiff. Considering from another angle, the defendant was permitted to run business of the licensor. It was only a personal right or privilege given to the defendant, as understood in common law to do something permitted by the owner of the running business i.e. permission to conduct or run business. The premises was handed over to the defendant merely as an incident of main contract of conducting business. The dominant agreement of the parties is of conducting business. In cases where the party who had entered into an agreement giving his business to another wants to take possession on the expiry of the time, his remedy is to file suit in civil Court and not by approaching the Small Causes Court under section 41 of the Small Causes Court Act, 1980. Therefore, the suit was rightly filed in the City Civil Court at Mumbai (See **1998(5) Bom.C.R. 686**(690).*

15] In my opinion, in the aforesaid case, the Court was not called upon to examine whether the Conducting Agreement was camouflage or not. In view thereof, the said decision does not advance the case of defendant No.1.

16] Insofar as the decision of *Gopal Saran (supra)* is concerned, the Apex Court in paragraph 16 observed that whether in a particular case there was subletting is substantially a question of fact. In paragraph 20, the Apex Court referred to the decision in ***Associated Hotel of India Ltd., Delhi. Vs. S.B. Sardar Ranjit Singh – AIR 1968 SC 933***, wherein it was held that on the question whether the occupier of a separate apartment in a premises is a licensee or a tenant, the test is whether the landlord retained control over the apartment. In the present case, after appreciating the evidence on record, the Courts below have concluded that defendant No.1 is not in exclusive possession of the suit premises.

17] In view thereof, no case is made out for invocation of powers under Section 115 of CPC. Defendant No.1 are not in

a position to demonstrate that the findings recorded by the Courts below are contrary to the evidence on record or that they are based upon no evidence. In other words, defendant No.1 have not demonstrated that the findings recorded by the Court belows are perverse. Hence, the Civil Revision Application fails and is hereby dismissed.

18] At this stage, Mr. Karande orally applies for continuation of ad-interim order dated 4th June 2019 for a period of 8 weeks from today. He assures that within one week from today undertaking will be filed on behalf of defendant No1 incorporating therein that:

- (i) Defendant No.1 is in possession and nobody else including defendant Nos.2 and 3 are in possession in the suit premises;
- (ii) Defendant No.1 have neither created any third party interest nor parted with possession of the suit premises;
- (iii) Defendant No.1 will hereafter neither create third party interest nor part with possession of the suit premises;

(iv) Defendant No.1 will go on deposit compensation at the rate of Rs.19,000/- per month for a period of 8 weeks from today;

(vi) In case, defendant No.1 are unable to obtain suitable orders from the higher Court within 8 weeks from today, defendant No.1 will hand over vacant and peaceful possession of the suit premises to the plaintiffs;

19] In view thereof and subject to defendant No.1 filing an undertaking within one week from today, the ad-interim order dated 4th June 2019 shall remain in force for 8 weeks from today. However, it is made clear that in case the undertaking is not filed within stipulated period or that defendant No.1 commit breach of any of the conditions of the undertaking, the ad-interim order shall stand vacated without any further reference to the Court.

20] List the application for reporting compliant on 6th August 2019.

(R. G. KETKAR, J.)