

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.105 OF 2019

Rajesh Shivaji Savla and others.	]	Applicants
Vs.		
M/s. S.S. Patil and Brothers	]	
through partner;	]	
Baban Shankar Patil and Anr.	]	Respondents

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Mr. Vishal Kanade with Monil Punjabi i/b Manish P. Jagani, Advocate for the Applicants.

Mr. Jaydeep Thakkar, Advocate for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 18th JULY, 2019.

P.C.

Heard Mr. Kanade, learned Counsel for the applicants and Mr. Thakkar, learned Counsel for respondent No.1, at length.

2. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, hereinafter referred to as defendants No.1-A to 1-C have challenged the judgment and decree dated 27th March, 2014 passed by the Joint Civil Judge, Junior Division, Kalyan in Regular Civil Suit No.581 of 1995 as also the judgment and decree dated 20th August, 2018 passed by the learned District Judge-6, Kalyan in Regular Civil Appeal No.53 of 2014. By these orders, the Courts below decreed the suit instituted by respondent No.1, hereinafter referred to as 'plaintiff' under sections 13 (1) (b) and 13 (1) (e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the applicants, who are heirs and legal representatives of defendant No.1 and respondent

No.2, hereinafter referred to as 'defendant No.2' to hand over vacant and peaceful possession of Shop No.5, Patil Bhuvan situate in Revenue Survey No.102, Revenue Village G.B. Patharli, Dombivali (East) (for short 'suit premises') to the plaintiff.

3. In so far as ground of permanent additions and alternations under section 13 (1) (b) of the Act is concerned, Mr. Kanade submitted that during pendency of the suit, Court Commissioner/Architect Shri Bhide was appointed. He submitted report at Exhibit 42. The plaintiff, however, did not prove the contents of the report by examining the Commissioner. Thus, the plaintiff has not proved report Exhibit 42 prepared by the Court Commissioner.

4. Mr. Kanade further submitted that witness examined by the plaintiff did not establish construction of Potmala in the suit premises. Defendant No.1 was not inducted in the suit premises since inception. In short, he submitted that even before induction of defendant No.1, Potmala was in existence in the suit premises. He invited my attention to paragraph 13 of the District Court's judgment. In paragraph 13, the learned District Judge referred to the deposition of defendant No.1 at Exhibit 83. Defendant No.1 contended that the suit premises is at is, as it was at the time of taking of possession. Potmala is in existence since beginning. As Potmala is in existence since beginning, it cannot be said that the plaintiff made out ground under section 13 (1) (b) of the Act.

5. In so far as the ground of unlawful subletting under section 13 (1) (e) of the Act is concerned, it is submitted that the plaintiff did not establish that defendant No.1 parted with possession of the suit premises and that defendant No.2 is in exclusive possession of the suit premises. As the plaintiff did not establish parting with possession by defendant No.1 and that defendant

No.2 is in exclusive possession, the Courts below were not justified in passing decree on the ground of unlawful subletting. In support of his submission, he relied on the following decisions;

[1] Joginder Singh Sodhi Vs. Amar Kaur, (2005) 1 SCC, 31.

[2] Parubai Vithal Kamble Vs. Girdharilal Agarwal, 2019 (4) Mh. L.J.67.

He, therefore, submitted that the Courts below were not justified in passing the eviction decree under section 13 (1) (e) of the Act.

6. On the other hand, Mr. Thakkar supported the impugned orders. He has taken me through the impugned orders to contend that after appreciating the evidence on record, the Courts below have concurrently found that the defendant has constructed Potmala without written permission of the plaintiff and accordingly decreed the suit under section 13 (1) (b) of the Act.

7. In so far as the ground of unlawful subletting under section 13 (1) (e) of the Act is concerned, he submitted that defendant No.1 came with a case that defendant No.2 is his employee. However, defendant No.1 has not substantiated the said fact. He submitted that once the plaintiff has established presence of stranger in the suit premises, burden is on defendant No.1/tenant to establish in what capacity defendant No.2 is occupying the suit premises. He submitted that it has come on record that defendant No.2 is managing the business. He, therefore, submitted that the Courts below were justified in passing eviction decree under section 13 (1) (e) of the Act. Hence, there is no need to interfere with the impugned orders.

8. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In so far as ground of permanent additions and alternations under section 13 (1) (b) is

concerned, the learned trial Judge has considered this from paragraphs 32 to 41. The learned District Judge has considered this ground from paragraphs 10 to 14. The learned District Judge observed in paragraph 11 that in the written statement defendant No.1 did not plead that Potmala was already in existence. Defendant No.1, however, in evidence deposed that the suit premises is as it is as it was at the time of taking of possession. In the cross-examination, he admitted that there is Potmala and further stated that it is in existence since beginning. The question is whether the said fact is established by defendant No.1. The Courts below have disbelieved the case of defendant No.1 that Potmala was in existence since beginning by considering the following circumstances:

- [1] in the written statement, defendant No.1 did not plead that Potmala was in existence since beginning.
- [2] agreement was executed between defendant No.1's wife and the plaintiff. The Agreement is silent as regards existence of Potmala.
- [3] the plaintiff had produced plan which does not show existence of Potmala.
- [4] defendant No.1 did not adduce evidence by examining any witness to prove existence of Potmala in the suit premises prior to his induction.

In view thereof, I do not find the Courts below committed any error in decreeing the suit under section 13 (1) (b) of the Act.

9. In so far as the ground of unlawful subletting under section 13 (1) (e) is concerned, the trial Court has considered this ground from paragraphs 42 to 67. The learned District Judge has considered this ground from paragraphs 15 to 20. In paragraph 64, the learned trial Judge observed that from the evidence adduced by the parties, it is clear that defendant No.2 is

manging the business from the suit premises. Defendant No.1 came with the case that defendant No.2 is managing his business as an employee. In paragraph 66, the learned trial Judge observed that once the plaintiff has established that third person is sitting in the suit premises to run business, the burden is on the tenant to establish what is nature of transaction between himself and the third person. In paragraph 67, the learned trial Judge referred to the documents at Exhibit 114 to 122. The learned trial Judge observed that these documents show that since the year 1995, defendant No.2 Ramniklal Shah is being paid salary. These documents also reveal transaction other than the payment of salary. The loan amount of Ramniklal Shah is shown in the liabilities column of the balance-sheet. This loan amount has increased every year. In the year 1997-1998, it is shown to be Rs.38,364/- (Exhibit 118), in the year 1998-1999, it is shown to be Rs.1,71,105 (Exhibit 119), in the year 1999-2000, it is shown to be Rs.1,92,030/- (Exhibit 120), in the year 2000-2002, it is shown to be Rs.1,42,200/- (Exhibit 122). Defendant No.1 has not explained the transaction of loan between defendant No.1 and 2. Defendant No.1 also failed to produce actual income tax documents. Thus, relationship of employer and employee is just camouflage to hide real transaction between defendants No.1 and 2.

10. In so far as the judgment of the learned District Judge is concerned, the learned District Judge has considered this aspect in paragraphs 15 to 20. In paragraph 15, the learned District Judge noted that the plaintiffs came with the case that defendant No.1 has sublet the premises to defendant No.2 who is carrying out his own business in the Steel in the name and style as "Pooja Steel". On the other hand, defendant No.1 denied the contentions of plaintiffs and submitted that defendant No.2 is his employee. Defendant No.2 is looking after the said business as his Manager only.

11. In paragraph 16, the learned District Judge referred to the decision in **Smt. Rajbir Kaur Vs. M/s. S. Chokasiri & Co, 1983 (2) RCJ, 316**. In paragraph 17, the learned District Judge referred to the decision of **K. Achyutta Bhat Vs. Manga Devi, AIR 1984 Supreme Court 93**. In that case, the tenant took defence that he had only transferred the managing rights of hotel business and had also produced the agreement to that effect. The Apex Court held that it was clear that the tenant and sub tenant had used all ingenuity at their command to camouflage the real nature of transaction and make it appear that there is only a transfer of managing rights of business and not a transfer of the business in toto with the right to occupy the leased premises. In paragraph 20, the learned District Judge noted that defendant No.2 did not enter into the witness box. In the cross-examination, defendant No.1 deposed that licence was taken in the name of 'Pooja Collection'. He did not produce the same. The learned District Judge also observed that at one place it is shown that salary is paid to defendant No.2 and at the same time, loan is shown to have been received along with interest.

12. The learned District Judge also noted that burden is on defendant No.1 to substantiate transaction between defendant No.1 and defendant No.2. The learned District Judge concluded that defendant No.1 did not establish transaction between defendant No.1 and defendant No.2 or that he is employee of defendant No.1. The learned District Judge confirmed the finding of the learned trial Judge. After considering the material on record, I do not find that the Courts below committed any error in passing the eviction decree under section 13 (1) (e) of the Act.

13. In view thereof, it cannot be said that the findings recorded by the Courts below while decreeing the suit under Section 13 (1) (b) and 13 (1) (e) of the Act are contrary to the material on record. The defendants are not in a

position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of the material on record, no reasonable or prudent person would have come to the conclusion arrived at by the District Court. Defendants are not in a position to show that the findings are contrary to the evidence on record. Merely because on the basis of the material on record, another view is possible that, by itself, is no ground for exercising the powers under section 115 of C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

[R.G. KETKAR, J.]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 105 OF 2019
Rajesh Shivji Savla and ors
vs.
M/s. S.S. Patil & Bros & anr.

Office Notes, Office
memorandum of Coram,
appearance, Court's
orders or directions &
Registrar's orders.

Court's or
Judge's orders.

Mr. Monil Punjabi i/b Mr. Manish Jagani for the Applicant.
Ms Namita Shirke i/b Jaydeep Thakkar for Respondent No.1.

CORAM : R.G. KETKAR, J.

DATE : 22nd JULY 2019.

P.C. :-

1] Not on board. At the request of Mr.Monil Punjabi, the matter is taken in the production board.

2] Heard Mr. Monil Punjabi, learned counsel for the applicant and Ms Namita Shirke, learned counsel for the respondent No.1.

3] Mr. Punjabi assures that he will not seek extension of time and that within one week from today, defendant Nos.1(a) to 1(c) will file undertaking with advance copy to the other side, incorporating therein that,

(i) The applicants are in possession and nobody else including respondent No.2 is in possession of the suit premises;

(ii) The applicants have neither created third party interest nor parted with possession of the suit premises;

(iii) The applicants will hereafter neither create third party interest nor part with possession of the suit premises;

(iv) The applicants will clear the arrears of rent, if any, including compensation within two weeks from today ;

(v) 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 respondents;

(iv) Mr. Punjabi has also tendered undertaking of respondent No.2, which is taken on record and marked as “A” for identification. Undertaking of respondent No.2 is accepted.

4] In view thereof, notwithstanding dismissal of C.R.A, eviction decree shall not be executed for a period of 8 weeks from today, subject to applicants No.1(a) to 1(c) filing undertaking in the aforesaid terms. It is expressly made clear that in case the undertaking is not filed by applicants No.1(a) to 1(c) in the aforesaid terms within one week from today and/or commits breach of any of the clauses of the undertaking, ad-interim order shall stand vacated. In case, applicants No.1(a) to 1(c) 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.

5] **List the Application for reporting compliance on 6th August, 2019.**

(R. G. KETKAR, J.)