

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.13 OF 2012**

M/s Shantadurga Industries,
Varcodem, Ponda – Goa,
represented by its Proprietor,
Shri Navnath Tilu Shet Parkar,
Major of age, Resident of Flat
No. E-102, Mitasu Residence,
Joefil Nagar, Ponda, 403 401
(Goa).

...Appellant

Versus

1. Shri Sandip Kapdi, Son of
Keshav Kapdi, Major of age,
Married, Residing at
Varcodem, Ponda-Goa.

2. Shri Shrikant Ramchandra
Naik, Son of Ramchandra
Naik, Major of age, Married,
Business, Residing at Ponda-Goa.
(Since deceased through L.Rs.)

2-a) Sonam Shrikant Naik,
major,
residing near Ganesh Engineering,
Sai Katta,
Kodibag, Karwar,
North Karnataka.

2-b Mrs. Rekha Naik @ Vanmala K. Kapdi,
major,
residing near Ganesh Engineering,
Sai Katta,

Kodibag, Karwar,
North Karnataka.

3. Smt. Rekha Naik @ Vanamala
K. Kapdi, Major of age,
Married, Residing at Behind
St. Annes Church, Ponda-Goa.

4. Shri Keshav V. Kapdi
(since deceased)
represented by his
following heirs:-

4(a) Smt. Chitra Arvind
Dharvatkar, Major of age,
daughter of Shri Keshav V.
Kapdi (since deceased)

4(b) Shri Arvind Dharvatkar,
Major of age, Son-in-Law of
Shri Keshav V. Kapdi
(since deceased)
Both residing at Marcela,
Ponda-Goa.

4(c) Shri Santosh Keshav
Kapdi, Major of age, Son of
Shri Keshav V. Kapdi
(since deceased).

4(d) Smt. Vanamala @ Rekha
Shrikant Naik, Major of age,
Daughter of Shri Keshav V.
Kapdi (since deceased),
[Deleted]

4(e) Shri Shrikant Naik, Major
of age, Son-in-Law of Shri
Keshav V. Kapdi
(since deceased). [Deleted]

5. Smt. Pramilabai Kapdi, Major
of age, Married, Housewife,
Wife of Shri Keshav V. Kapdi
(since deceased), Residing at
Varcodem, Ponda-Goa.

... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Arur, Advocate for the
Appellant.

Mr. P. A. Kholkar with Mr. N. Shirgaonkar, Advocates for Respondent
Nos.1, 4(a) to (c) and 5.

Coram:- M. S. SONAK, J

Reserved on: 5th February 2021
Pronounced on : 9th February 2021

JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Advocate who
appears along with Ms. S. Arur, for the Appellant and Mr. P. A. Kholkar
who appears along with Mr. N. Shirgaonkar, for Respondent Nos.1, 4(a)
to (c) and 5.

2. This Second Appeal was admitted on 29th August 2013 on
the following substantial question of law.

“1. Whether, in view of the undisputed position, that the

"suit shed" was constructed by M/s Shreemala Industries of which the Respondent No. 2 was admittedly a partner, and the possession of the plot admeasuring 100 square metres, was undisputedly with the said Firm and further admitted position that the Respondent nos. 2 and 3 had started the Factory and were carrying on business therein, the execution of the Deed of Lease in respect of the "suit shed", could not be challenged by the Respondent nos. 4 and 5, nor a claim by them, to be in possession thereof, could be entertained ?

3. Mr. Lotlikar, learned Senior Advocate urged for framing of an additional substantial question of law to the following effect.

“2. Whether the counterclaim filed by the original Defendant Nos.4 and 5 seeking eviction of the Plaintiff (present Appellant) was at all maintainable in the absence of any counterclaim to seek eviction of original Defendant Nos. 2 and 3 who had leased the suit shed in favour of the original Plaintiff vide Deed of Lease dated 12th March 1993 ?”

4. Mr. Kholkar opposed the formulation of such additional substantial question of law by pointing out that such issue was never raised either before the Trial Court or the First Appellate Court at any stage. In any case, he submitted that such an issue does not even arise in the facts and circumstances of the present case.

5. Mr. Lotlikar submitted that the additional substantial question of law, as the name suggests is a pure question of law that arises in the facts and circumstances of the present case and therefore, the same

may be formulated.

6. Although indeed, such a question was never raised by the original Plaintiff (Appellant herein) either before the Trial Court or the First Appellate Court, in the interest of justice, the additional substantial question of law is formulated in the exercise of the powers under Section 100(5) of the CPC. At the same time, liberty is retained in the Respondents to urge that such a question neither arises nor is the same a substantial question of law.

7. Mr. Lotlikar submits that two Courts have misdirected themselves in law by holding that the Deed of Lease dated 12th March 1993 was executed based on power of attorney dated 27th October 1991, which had conferred no powers upon the Defendant Nos.2 and 3 to lease the suit shed. He submits that there is overwhelming evidence on record that the suit shed was constructed by Defendant Nos.2 and 3. He submits that there is overwhelming evidence on record that Defendant Nos.2 and 3 were in possession of the suit property even before the execution of the agreement for sale dated 20th March 1992. He submitted that the agreement for sale dated 20th March 1992 specifically states that Defendant Nos. 2 and 3 were put in possession of the suit property on which they had already constructed the suit shed. He submits that in such facts, Defendant Nos.2 and 3 were authorised to lease out the suit shed to the Plaintiff (Appellant herein) without having

to resort to the power of attorney dated 27th October 1991. He submits that the impugned decrees are therefore liable to be interfered with and the Plaintiff's suit decreed.

8. Mr. Lotlikar submits that the two Courts erred in non-suiting the Plaintiff on the ground that the suit property had been agreed to be sold to the partnership firm M/s Shreemala Industries and the Deed of Lease dated 12th March 1993 in respect of the suit shed situated in the suit property was executed by Shrikant Naik and his wife Rekha Naik. Mr. Lotlikar pointed out that these were only two partners of the firm and the two Courts erred in treating the partnership firm as some independent legal entity apart from partners which constituted. He, therefore, submits that two decrees are liable to be set aside and the substantial questions of law be answered in favour of the original Plaintiff (Appellant herein).

9. Mr. Lotlikar submits that there is overwhelming evidence on record that the possession of the suit property which includes the suit shed was handed over by Defendant Nos. 4 and 5 to Defendant Nos.2 and 3 in terms of the agreement for sale dated 20th March 1992. Therefore, unless and until Defendant Nos.4 and 5 were to seek a decree of eviction against Defendant Nos.2 and 3, there was no question of the two Courts virtually ordering the eviction of the original Plaintiff (Appellant herein) who claims through and under the original

Defendant Nos.2 and 3. He urges that the second substantial question of law may therefore be answered in favour of the original Plaintiff.

10. Mr. Lotlikar submits that there was evidence on record that the original Plaintiff (Appellant herein) was in possession of the suit shed from which he was operating an industry. He submits that the two Courts have unduly ignored the evidence on this aspect and the findings on the issue of possession, suffer from perversity.

11. For all the aforesaid reasons, Mr. Lotlikar submits that the present appeal be allowed and the suit instituted by the original Plaintiff (Appellant herein) be decreed.

12. Mr. Kholkar, learned counsel for Respondent Nos. 1, 4(a) to (c) and 5 defends the impugned judgment and decrees based on the reasoning reflected therein. He pointed out that there are concurrent findings of fact that the Appellant herein was never in possession of the suit shed or the suit property and that the Appellant, had only attempted to enter into the suit shed and based thereon secured an *ex-parte* injunction. Mr. Kholkar pointed out that the circumstances in which the agreement for sale dated 20th March 1992 came to be executed, but was never acted. Mr. Kholkar also pointed out that the Deed of Lease dated 12th March 1993 was a fraudulent document only to defeat the rights of Defendant Nos.4 and 5. He pointed out that none of the parties to the

Deed of Lease dated 12th March 1993 acted based on the same. He pointed out that there is neither any evidence about payment of ₹30,000/- in pursuance of the agreement for sale dated 20th March 1992 nor is there any evidence about payment of any rent in pursuance of Deed of Lease dated 12th March 1993. He relied on ***Balkrishna Dattatraya Galande Vs Balkrishna Rambharose Gupta and another***¹ to contend that the burden lies on the Plaintiff to prove the legal possession and possession cannot be inferred or presumed.

13. Mr. Kholkar submits that there was serious dispute right from the beginning about the Appellant being in possession of the suit shed and therefore, this was not at all some “*undisputed possession*” as urged on behalf of the Appellant. He pointed out that after the evidence was led and evaluated the two Courts have recorded concurrent findings that the Appellant was not in possession of the suit shed. He pointed out that the possession-based on *ex-parte* order is not some legal possession that can be protected by a permanent injunction. He pointed out the contradictory stances adopted by the Appellant in pleading and submitted that there is no case made out to interfere with the impugned judgment and decrees made by the Trial Court and the First Appellate Court based on the evidence on record.

14. Mr. Kholkar pointed out that the possession of the suit shed was returned by Defendant Nos.2 and 3 to Defendant Nos. 4 and 5. It

¹ 2019(2) All MR 492 (SC)

is only thereafter the Appellant based on the fraudulent Deed of Lease dated 12th March 1993 surreptitiously placed some of its belongings in the suit shed to create a facade of possession. Based on such facade, the Appellant secured an *ex-parte* injunction. In such circumstances, there was no obligation upon the Defendant Nos.4 and 5 seeking eviction of Defendant Nos.2 and 3. He, therefore, submits that the second substantial question of law does not arise and in any case, may be answered against the Appellant.

15. For all the aforesaid reasons, Mr. Kholkar submits that this appeal may be dismissed with costs.

16. The rival contentions now fall for my determination.

17. The Appellant is the original Plaintiff in Regular Civil Suit No.43/93 instituted on 23rd March 1993 seeking relief of permanent injunction to restrain the Defendants in the suit from interfering or entering into the suit shed or obstructing the Plaintiff in using the suit shed for industrial purposes.

18. The Plaintiff relied on the Deed of Lease dated 12th March 1993 and pointed out that on 22nd March 1993 when the Plaintiff along with the workers went to open the suit shed, Defendant Nos.1 and 5 along with some other obstructed them from so entering. The plaint

pleaded that on 22nd March 1993 a police complaint was filed and on the very next day the suit was filed and an *ex-parte* injunction secured.

19. This suit was instituted against Defendant Nos.2 and 3 since the Deed of Lease dated 12th March 1993 was executed by Defendant Nos. 2 and 3 in favour of Plaintiff. The suit was also instituted against Defendant Nos.1, 4, and 5 since Defendant Nos.4 and 5 were the owners of the suit property in which the suit shed was located. The suit was for permanent injunction simpliciter based entirely on the Deed of Lease dated 12th March 1993 and alleged possession of the Plaintiff, in pursuance thereof.

20. Defendant No.1, filed a written statement denying the entire case in the plaint.

21. Defendant Nos.4 and 5 who were the contesting parties filed a detailed written statement along with the counterclaim. These Defendants pointed out that Defendant No.3 was their daughter and she developed an unwanted friendly relationship with Defendant No.2. At her instance and only to enable Defendant No.2 to secure an industrial loan, Defendant Nos.4 and 5 executed an agreement for sale dated 20th March, 1992, purporting to sell the suit plot admeasuring only 100 square meters. They pointed out that normally no NOC was issued under the Planning Regulations for registration of any Deed in

respect of a plot admeasuring only 100 square meters. They pointed out that no payments were made by Defendant Nos.2 and 3 and the agreement was only to enable Defendant No.2 to secure an industrial loan.

22. Based on the agreement for sale, Defendant Nos. 2 and 3 constructed a suit shed in the suit property and started running a factory therefrom. However, since the factory generated noise pollution the residents in the locality opposed its working and the same had to be stopped. Defendant Nos.4 and 5 specifically averred that Defendant Nos.2 and 3 not only stopped working of the factory but handed over the suit plot along with the suit shed therein to Defendant Nos.4 and 5 sometime in August 1992 and ever since then it is the Defendant Nos.4 and 5 who were in possession of the suit shed and the suit plot.

23. Defendant Nos.4 and 5 also pleaded that sometime in December 1992, they learned that Defendant Nos.2 was trying to deal with the suit plot and the suit shed based on the power of attorney executed by them on 27th October 1991. Therefore, on 27th December 1992, Defendant Nos. 4 and 5 revoked the power of attorney. Defendant No.3, who was their daughter somewhere on 1st January 1993 returned the original power of attorney to Defendant Nos. 4 and 5 and the same was in their possession. Defendant Nos. 4 and 5 pleaded that it is only to spite them the Defendant Nos. 2 and 3 executed Deed

of Lease dated 12th March 1993 in favour of the Plaintiff without having any right or authority to do so. Further, within hardly 10 days from the date of execution of the fraudulent Deed of Lease dated 12th March 1993, a concocted cause of action was created by the Plaintiff to secure an *ex-parte* injunction.

24. Based on all such pleadings, Defendant Nos. 4 and 5 made a counterclaim to declare the Deed of Lease dated 12th March 1993 as null and void and for a mandatory injunction directing the Plaintiff to remove forthwith all the material goods, machines, etc., illegally and forcibly kept in the suit shed and restore the suit shed to its original condition. This prayer clause was amended to seek in specific terms, a decree for the eviction of the Plaintiff since it is the case of Defendant Nos.4 and 5 that the Plaintiff secured possession based on the *ex-parte* injunction.

25. In this case, both the Trial Court and the Appellate Court based on evaluation of the entire evidence on record have accepted the case of Defendant Nos.4 and 5 that the Plaintiff was never in possession of the suit shed and Deed of Lease dated 12th March 1993 was null and void. As regards the findings on possession, there is really no case made out to warrant interference with the concurrent findings of fact. No substantial question of law as to the perversity of such findings was either framed or even proposed by the Appellant in this matter.

26. In any case, if the evidence on record is perused then it must be said that Defendant Nos.4 and 5 have proved facts pleaded to by them in their written statement and counterclaim. The concurrent findings recorded by the two Courts find support from the several circumstances which are established from the evidence on record. Therefore, it was not right for the Appellant to proceed on the basis that their possession was in any manner “*undisputed*”. Not only was such possession disputed in the pleadings but the evidence on record establishes that the Appellant was never in possession of the suit shed and only a facade of possession was created a day before the suit was instituted. This facade was facilitated by the Deed of Lease dated 12th March 1993 purportedly executed 10 days earlier and that too by Defendant Nos. 2 and 3 who had no right or authority to execute the same.

27. The evidence on record establishes that by August 1992 itself Defendant Nos. 2 and 3 had surrendered the possession of the suit property and the suit shed therein to Defendant Nos. 4 and 5 who are admittedly owners of the suit plot. The circumstances in which the agreement for sale dated 20th March 1992 or power of attorney came to be executed have been explained by Defendant Nos. 4 and 5 not only in their pleadings but also in their evidence. Defendant Nos. 2 and 3 have not contested any of the pleadings. So much so that the Appellant at one stage alleged that there was some collusion. Defendant Nos. 4 and 5

have also alleged collusion between Plaintiff and Defendant Nos.2 and 3.

28. Based on the evidence on record however it is apparent that Defendant Nos.2 and 3 had returned the possession of the suit property and the suit shed therein to Defendant Nos.4 and 5 sometime in August 1992 itself and therefore, there was no question of Defendant Nos. 2 and 3 executing the Deed of Lease dated 12th March 1993 in favour of the Appellant. The two Courts have quite correctly concluded that the Deed of Lease dated 12th March 1993 was a fraudulent document aimed only to defeat the legitimate right of the defendant Nos. 4 and 5 and therefore, the same was null and void. As noted earlier, there is no perversity in the record of these concurrent findings of fact.

29. The Plaintiff filed a written statement to the counterclaim of Defendant Nos.4 and 5. The written statement contains evasive denials and does not answer various pleadings in the counterclaim. In fact, the written statement does not even deny specifically the circumstances pleaded by Defendant Nos.4 and 5, in which, the agreement for sale dated 20th March 1992 came to be executed or for that matter, the power of attorney came to be executed. Defendant Nos.4 and 5 have not only pleaded but proved their pleadings by leading cogent evidence. In contrast, there is no evidence led by the Plaintiff worth the name to establish either legitimacy of the Deed of Lease dated 12th March 1993

or so-called possession of the Plaintiff to the suit shed based on such a Deed of Lease dated 12th March 1993.

30. Plaintiff has also attempted to blow hot and cold in this matter. In the pleadings, a stance was taken that the Deed of Lease dated 12th March 1993 was executed after the Plaintiff examined power of attorney. Even arguments were advanced on behalf of the Plaintiff that the Deed of Lease dated 12th March 1993 was in pursuance of the power of attorney. In this Court, however, Mr. Lotlikar urged that the power of attorney had no nexus with the execution of the Deed of Lease dated 12th March 1993 and therefore, the reasoning of the two Courts was defective. Even if the power of attorney which admittedly did not permit the execution of the Deed of Lease dated 12th March 1993 is to be regarded as irrelevant, Defendant Nos.2 and 3 have neither pleaded nor proved authority under which they leased out the suit shed to the Plaintiff.

31. There is no evidence whatsoever on record that the Deed of Lease dated 12th March 1993 executed hardly 10 days before the alleged cause of action was intended to be acted upon or ever acted upon. There is no evidence about payment of rent of ₹800/- at any time by Plaintiff in pursuance of Deed of Lease dated 12th March 1993. Mainly based on the *ex-parte* injunction, Plaintiff has continued in the suit shed since the year 1993 i.e. for almost 27 years. Despite this, there is no evidence

whatsoever about the payment of any rent in respect of such occupation.

32. Mr. Kholkar quite correctly relied on the decision of the Hon'ble Supreme Court in *Balkrishna Dattatraya Galande* (supra). The Hon'ble Supreme Court has held that in a suit seeking permanent injunction the burden lies on the Plaintiff to prove possession by producing cogent evidence and there is no question of possession being inferred or presumed. In the case before the Hon'ble Supreme Court, there was evidence that the Plaintiff for almost 15 years had not paid any rent for occupation and the Hon'ble Supreme Court held that without payment of rent there can be no lawful possession.

33. In this case, Plaintiff did attempt to produce certain documents to the effect that the factory was functional and even the goods manufactured therefrom were sold. However, the evidence failed to establish any nexus between the goods and their manufacture from the suit shed. In any case, the evidence did not relate to any period before the institution of the suit. In a suit seeking a permanent injunction, Plaintiff has to prove that he was in possession on the date of the filing of the suit. There is no such evidence produced by Plaintiff in this matter. The first substantial question of law is required to be answered against the Plaintiff-Appellant.

34. Even the second substantial question of law is required to be

answered against the Plaintiff because there is no evidence of Plaintiff being in possession of the suit property on the date of filing of the suit. Besides, there is evidence that Defendant Nos.2 and 3 had already surrendered their possession to Defendant Nos. 4 and 5. In these circumstances, there was no necessity for Defendant Nos.4 and 5 to seek any decree of eviction against Defendant Nos. 2 and 3. The decree of eviction was quite correctly sought only against the Plaintiff by instituting a counterclaim and further, the same was quite correctly granted by the two Courts.

35. Mr. Lotlikar might be right that the two Courts ought not to have regarded a partnership firm as some sort of legal entity. However, this circumstance makes no difference because in this case, Plaintiff has failed to establish the possession on the date of filing of the suit, and further, there is evidence that Defendant Nos.2 and 3 had no right or legal authority to execute the Deed of Lease dated 12th March 1993 in favour of the Plaintiff. The evidence on record suggests that this Deed of Lease dated 12th March 1993 was executed only to create some document to defeat the rights of Defendant Nos.4 and 5 in this matter. This Deed of Lease dated 12th March 1993 was neither intended to be acted upon nor was the same acted upon. The second substantial question of law is also required to be answered against the Plaintiff.

36. Thus, both the substantial questions of law are answered against the Plaintiff-Appellant.

37. The judgment and decrees made by the Trial Court and the First Appellate Court are hereby confirmed.

38. This appeal deserves to be dismissed and is hereby dismissed with costs of ₹7500/-.

M. S. SONAK, J

39. After this order was pronounced, Mr. Kholkar invited my attention to the order dated 12th February, 2015 made in Misc. Civil Application No.87 of 2015 in Civil Application No.32 of 2012 taken out in this Second Appeal. In terms of this order, the interim relief granted in favour of the Appellant was made subject to the Appellant depositing an amount of ₹1000/- per month.

40. Mr. Karn states that such deposit has been made in this Court.

41. Now that the appeal is dismissed, the legal representatives of the original Defendant Nos.4 and 5 i.e. Respondent Nos.1, 4(a) to 4(c) are permitted to withdraw the amount so deposited. Registry to allow such withdrawal upon these parties making an application for withdrawal. The withdrawal to be permitted along with interest, if any, that may have accrued on the deposited amount.

M. S. SONAK, J

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