

IN THE HIGH COURT OF BOMBAY AT GOA

Second Appeal No.105/2006

1. SHRI. SONU SITARAM VERENKAR,
(since deceased) represented by his legal heirs:

(a) MANIK VERENKAR [wife], since deceased
represented through her LR's Appellant nos.1(b) to 1(i)

(b) RAJU VERENKAR [son]

(c) SURAT VERENKAR [daughter]
Deleted as per order dt. 10.7.2002.

(d) MEERA VERENKAR [daughter]

(e) VIDYA VERENKAR [daughter]

(f) DEEPALI DANGI [daughter]

(g) DATTARAJ DANGI [son-in-law]

(h) SHEETAL AMONKAR [daughter]

(i) DAMODAR AMONKAR [son-in-law]
[Amendment as per M-4]

2. MRS. MILY SONU VEREKAR;

3. MISS SURAT SONU VEREKAR;

4. RAJU SONU VEREKAR;
All of Goa, Indian Inhabitants,
residing at Taliwado, Mapusa Goa.

5. RAMESH M. VEREKAR;

6. GURUDAS M. VEREKAR;

7. SANTOSH ALIAS BABA M. VEREKAR;

All of Goa, Indian Inhabitants,
residing at Apte Bungalow, Near Santeri
Temple, Khorlim, Mapusa Goa.

... Appellants

Versus

SHRI NISHITH M. PRABHU VERLEKAR
of Goa, Indian Inhabitant,
residing at Gurukripa, 2nd floor,
Alto Duler, Mapusa, Goa.

... Respondent

Mr. P. Talaulikar, Advocate for the Appellants.

Mr. Shivan Desai along with Mr. Varun Bhandankar, Advocates for the Respondent.

Coram:- M.S. SONAK, J.

Reserved on:- 11th February 2021

Pronounced on:- 16th February 2021

JUDGMENT:

Heard P. Talaulikar for the Appellants and Mr. Shivan Desai who appears along with Mr. Varun Bhandankar for the Respondent.

2. This appeal was admitted on 08.03.2007 on the following substantial questions of law:

“(a) Whether the purported points for determination framed by the Appellate Court in para 9 of the impugned judgment are not at all points for determination in true sense as mandated by Order 41 Rule 31(a) of Civil Procedure Code?

(b) Whether the main point for determination was whether in the light of specific clause 4 of the agreement dated 04/05/1977 (Exh.PW1/A), the Plaintiff proves that there was agreement’ dated 04/05/1977 ?

(c) Whether the Appellate Court failed to follow the mandate of Sections 91 and 92 of the Indian Evidence Act, 1872 according to which, it was mandatory to have agreement in writing as per Clause 4 of the agreement, no oral evidence could be looked into except the lease in writing, which does not exist in the present case ?

(d) Whether the Appellate Court failed to address to the issue of the consent of the wife (Defendant No.2) to the lease instead addressed to the implied consent of the wife to the construction of the building ?

(e) Whether the findings recording by the lower Appellate Court are not based on the evidence on record, but only on the conjectures and surmises and therefore, the findings are perverse ?”

3. By way of interim relief it was directed that the Assistant Registrar of this Court be appointed as the Receiver of the property in dispute. The Assistant Registrar was directed to take possession of the property and appoint such party to the dispute as her agent, who was willing to pay a higher royalty on usual terms and conditions and thereafter place such party in possession of the property in dispute. However, on 30.03.2007, the learned counsel for the parties stated that none of the parties were interested in entering into possession of the property in dispute as agents of the Court Receiver. Therefore, by order dated 30.03.2007, the interim order made on 08.03.2007 was recalled and it was directed that there shall be status quo as regards the suit property, which was admittedly under the locks of both the parties as on the said date.

4. Learned counsel for the parties submit that the position as obtained on 30.03.2007 continues till date. This means that the suit property is under the lock and key of both the appellants and the respondent.

5. The appellants are the original defendants or the legal representatives of some of the original defendants who expired during the pendency of the proceedings. The respondent is the original plaintiff in Civil Suit No.328/1983 instituted in the court of the Civil Judge, Senior Division, Bardez at Mapusa, Goa (Trial Court). As a convenience, the appellants will be referred to as the “defendants” and the respondent as the “plaintiff”.

6. The plaintiff, in this case, instituted a suit for mandatory injunction, permanent injunction, and damages. The plaint was amended and the relief of recovery of possession was also applied for.

7. The plaintiff has pleaded that he was in the business of distributing pharmaceutical and electronic products and defendant no.1 was the owner of a plot of land described in paragraph 2 of the plaint.

8. The plaintiff has pleaded that defendant no.1 wished to demolish the house existing in the plot and construct a two-storied building thereon. However, defendant no.1 did not have sufficient

funds to undertake such a project. The plaintiff has pleaded that he also required accommodation for expansion of his business activity and therefore offered to incur necessary expenses in the first instance for the construction of the ground floor of the proposed new building in consideration of the defendant no.1 granting to the plaintiff a monthly tenancy of two shops on the ground floor. The plaintiff has pleaded that the offer was that the 2/3rd of the expenses which the plaintiff would incur should be adjusted against the amount of rent payable in respect of the two shops on the ground floor.

9. The plaintiff has pleaded that an agreement dated 04.05.1977 was executed between the plaintiff and defendant no.1 “*incorporating therein generally the terms and conditions of the Agreement between them*”.

10. The plaintiff has further pleaded that in pursuance of the agreement, it is the plaintiff who carried out the construction of the ground floor and completed the same in September 1979 incurring costs of ₹87,656.72. The plaintiff has then pleaded that defendant no.1 thereafter leased to the plaintiff shop nos.2 and 3 on the ground floor in pursuance to the agreement dated 04.05.1977. The plaintiff has pleaded that defendant no.1 placed him in possession of shop nos.2 and 3 in October 1979 as a tenant paying rent of ₹150/- per shop per month as stipulated in the agreement dated 04.05.1977.

11. The plaintiff has pleaded that there was never any wall separating shop nos.2 and 3 and both the shops constituted a single room. The plaintiff has pleaded that since it was already agreed that these two shops would be leased to the plaintiff, the plaintiff, who constructed the premises on the ground floor had not put such wall separating shop nos.2 and 3.

12. The plaintiff has then pleaded that in or about September 1979, the plaintiff also took on lease shop no.4 from defendant no.1 as no other person was willing to take the same on the conditions stipulated in Clause 5 of the agreement dated 04.05.1977. This was again on a monthly rent of ₹150/- per month and the plaintiff has pleaded that the possession of the said shop no.4 was delivered by the defendant no.1 to the plaintiff in October 1979 “*along with the shops Nos.2 and 3*”. The plaintiff has pleaded that the monthly rentals were to be adjusted against the sum of ₹87,656.72 spent by the plaintiff for the construction of the ground floor premises.

13. The plaintiff has then pleaded that in or about October 1979, with the consent of defendant no.1 and assistance of defendants no.2 and 4, the plaintiff opened an “*interconnecting door*” in the wall existing between shop nos.2 and 3 on one hand and shop no.4 on the other, so that all three shops would form a single unit. The plaintiff has then pleaded that he commenced his business in shop no.4 after October 1979 but stored his goods in shop nos.2 and 3 “*by virtue of*

the said tenancy in respect of the said three shops subsisting in his favour upto about 25th December". The plaintiff has pleaded that up to November 1980, the plaintiff appropriated/adjusted an amount of ₹6,300/- against the amount of ₹81,656.72 payable by defendant no.1 towards the construction cost incurred by the plaintiff, thereby leaving a balance of ₹75,356.72 receivable by the plaintiff by adjustment and/or appropriation of rents in respect of the three shops.

14. The plaintiff has then pleaded that on or about 25.12.1980 at 11.00 a.m. the defendants no.1 to 7 forcibly entered into shop no.4 and with the help of the masons closed the interconnecting door between shop nos.2 and 3 on one hand and shop no.4 on the other. The plaintiff has then pleaded that he protested and even lodged a police complaint. The plaintiff has pleaded that on the next day i.e. 26.12.1980 the plaintiff found that the defendants had illegally put locks on the three rolling shutters covering shop nos.2 and 3 over the locks placed on these three shutters by the plaintiff, the previous night.

15. The plaintiff has pleaded that his stocks valued at approximately ₹12,000/- were lying in shop nos.2 and 3 along with some coconuts, cement, etc., and the plaintiff was prevented from accessing the same on account of such acts by the defendants.

16. The plaintiff has then pleaded that attempts were made for settlement through common friends and after the same failed, the suit

was instituted on 23.12.1983 seeking several reliefs including a mandatory injunction to remove locks and restore the access from shop no.4 failing which possession of shop nos.2 and 3 which was stated to be leased to the plaintiff.

17. The defendants denied the case set out by the plaintiff in his plaint. They pleaded that the shop nos.2 and 3 were neither leased to the plaintiff nor was the possession thereof ever delivered to the plaintiff. They pleaded that the possession of shop no.4 was taken by the plaintiff surreptitiously stating that he wished to start his pharmacy on the day of Diwali. The defendants pleaded that the construction of the ground floor premises was never completed and neither was any occupancy certificate issued for the occupation of the ground floor premises. The defendants have pleaded that on Christmas day of 1980, the plaintiff attempted to open a door in the wall between shop nos.2 and 3 on one hand and shop no.4 on the other without any permission from the defendants. Upon hearing the hammering sounds, the defendants noticed the attempt and prevented the same. The defendants have pleaded that the masons were called and the opening was closed. The wall was plastered from inside shop no.3. The defendants have pleaded that it is the plaintiff who put his locks over the locks already put by the defendants on the shutters of shop nos.2 and 3. The defendants have specifically pleaded that there was no lease created in respect of shop nos.2 and 3 in favour of the plaintiff and neither was the possession of these shops ever delivered to the plaintiff.

18. The defendants also pleaded that defendant no.2 i.e. the wife of defendant no.1 was a necessary party in matters of any agreements concerning the immovable property. Therefore, in her absence, even the agreement dated 04.05.1977 had no legal validity or efficacy, and based on the same there was no question of the plaintiff claiming any rights or reliefs.

19. Based upon the pleadings of the parties the Trial Court cast and answered the following issues:

<u>ISSUES</u>	<u>FINDINGS</u>
1. Whether plaintiff proves that the defendant no.1 granted to him lease of the shop no.2 and 3 ?	No
2. Whether plaintiff proves that he with the consent of the defendant Nos.1 and 2 opened the door interconnecting the shop no.2 and 3 on one hand and shop no.4 on the other hand ?	No
3. Whether plaintiff proves that he carried his business in shop no.4 and stored his goods in the shop no.2 and 3 ?	No
4. Whether plaintiff proves that on 25.12.1980 at about 11:00 A.M. the defendants no.1 to 7 forcibly entered shop no.4 with maison and labourers erected a wall which partly close interconnecting door between shop nos.2, 3 and 4 ?	Partly proved.
5. Whether plaintiff proves that on 26.12.1980 (wrongly typed as 25.2.1980)	

the defendants illegally put the locks to the rolling shutter of the shop no.2 and 3 ? No

6. Whether plaintiff proves that the cement, coconut and stock of goods which was lying in the shop no.2 and 3 belongs to him? and the same was lying in the said shops on the date of filing of the suit ? No

7. Whether plaintiff proves that he is in physical possession of the shop no.2 and 3 and his access to the said shops was illegally prevented by the defendants by affixing their locks over and above the locks of the plaintiff ? No

8. Whether the plaintiff states that the defendants approached the plaintiff through their common friends who assured the plaintiff that the dispute between them would be settled amicably with their intervention and requested the plaintiff to ask the police authorities not to take any further action in the matter as regards to the complaint lodged by the plaintiff ? No

9. Whether the plaintiff proves that he is entitled for a sum of Rs.1000/- per month in respect of each of the shops from the date he was deprived from using the Shops ? No

10. Whether the plaintiff proves that he is entitled for possession of the shops no.2 and 3 ? No

11. Whether the defendants prove that relief for recovery of money is time barred ? Does not arise.

12. Whether plaintiff is entitled to the relief? As per order below.

20. The Trial Court rejected the defendants' contention about defendant no.2 being a necessary party to the agreement dated 04.05.1977 but ultimately held that there was neither any lease created in favour of the plaintiff in respect of shop nos.2 and 3 nor was the possession of the said shops ever delivered to the plaintiff. Based on such findings, the Trial Court, by the impugned judgment and decree dated 19.04.2002, dismissed the suit.

21. The plaintiff appealed to the First Ad-hoc Additional Judge at Panaji (First Appellate Court), which has by the impugned judgment and decree dated 27.04.2006 reversed the Trial Court and decreed that the plaintiff be put in possession of the shop nos.2 and 3 i.e. the suit shops and the defendants were restricted from interfering with the plaintiff's possession in respect of the suit shops without due process of law. Hence this Second Appeal on the aforesaid substantial questions of law.

22. Mr. Talaulikar, the learned counsel for the appellants has at the outset submitted that the First Appellate Court failed to frame the points for determination and consequently there was a breach of the provisions of Order 41 Rule 31 of the Code of Civil Procedure (CPC). He points out that the points framed by the First Appellate Court are

defective and based thereon the impugned judgment and decree is quite unsustainable. He submits that the First Appellate Court virtually proceeded on the basis that the agreement dated 04.05.1977 was itself the lease deed or in any case it was virtually an accepted position that the lease had been created in respect of the suit shops. He submits that the first substantial question of law is required to be answered in favour of the defendants and the impugned judgment and decree, reversed.

23. Mr. Talaulikar submits that the agreement dated 04.05.1977 did not constitute any lease in respect of the suit shops particularly since clause 4 thereof had very clearly provided that separate lease agreements were to be entered into between the parties after completion of the ground floor of the building. He submits that the construction of the ground floor was neither completed nor was any such separate lease agreement ever entered into between the parties. He submits that the First Appellate Court has misconstrued the clauses of the agreement dated 04.05.1977 and therefore, even the second substantial question of law is required to be answered in favour of the defendants and against the plaintiff and based thereon, the impugned judgment and decree, reversed. He relied on *Food Corporation of India and others v. Babulal Agrawal - (2004)2 SCC 712* in support of this contention.

24. Mr. Talaulikar, on a demurer submitted that there were neither any pleadings nor any proof to sustain the theory of “oral lease” now

sought to be canvassed by the learned counsel for the plaintiff. He pointed out that the sketchy pleadings and in any case the arguments referred to a lease of immovable property for a term exceeding one year and therefore, the same, could be brought about only by a registered instrument as provided under Section 107 of the Transfer of Property Act. He pointed out that there was no such registered instrument and therefore, it was inconceivable that nevertheless a lease had been created in respect of shop nos. 2 and 3 for a term exceeding one year. He submits that this is yet another reason to answer the second substantial question of law in favour of the defendants and against the plaintiff.

25. Mr. Talaulikar submits that the First Appellate Court has breached the mandate of Section 91 and 92 of the Evidence Act, 1872 since it is relied on the oral evidence to vary the terms of the return agreement dated 04.05.1977, which, according to Mr. Talaulikar is impermissible. He, therefore, submits that even the third substantial question of law is required to be answered in favour of the defendants and against the plaintiff.

26. Mr. Talaulikar submits that there was no consent given by defendant no.2 for entering into any agreement with the plaintiff. He pointed out that defendant no.2, who is the wife and moiety holder in respect of the properties held by defendant no.1, was a necessary party to any transactions with the plaintiff. He pointed out that in the

absence of defendant no.2, there was no question of the plaintiff claiming any rights or relief in respect of the suit shops. Mr. Talaulikar submitted that the First Appellate Court has confused the issue of implied consent to the construction of the building with the issue of implied consent to lease shop nos.2 and 3. For all these reasons, Mr. Talaulikar submits that even the fourth substantial question of law is required to be answered in favour of the defendants and against the plaintiff.

27. Mr. Talaulikar finally submitted that certain findings recorded by the First Appellate Court are based only on surmises and conjectures. He, therefore, submits that even the fifth substantial question of law is required to be answered in favour of the defendants, since, some of the findings recorded by the First Appellate Court suffer from perversity.

28. For all the aforesaid reasons Mr. Talaulikar submitted that this appeal may be allowed and the impugned judgment and decree made by the First Appellate Court be set aside.

29. Mr. Shivan Desai, the learned counsel for the plaintiff submits that there is more than substantial compliance with the provisions of Order 41 Rule 31 of the Civil Procedure Code. He submits that even though the points for determination at paragraph 9 of the impugned judgment and decree may not have been very happily worded, the First

Appellate Court has considered all the points which actually arose for determination in this matter and therefore, the first substantial question of law may be answered against the defendants. He relied on *G. Amalorpavam and others v. R. C. Diocese of Madurai and others – (2006) 3 SCC 224* in support of his submission.

30. Mr. Desai submits that the agreement dated 04.05.1977 spelled out the relationship of lessor and lessee between the parties and based on the same, it was more than evident that the plaintiff was the lessee in respect of shop nos.2 and 3. He pointed out that based on the very same agreement dated 04.05.1977, a tenancy was created in respect of shop no.4 and therefore, it is not open to the defendants to take some contrary stand when it comes to the tenancy in respect of shop nos.2 and 3. He submitted that the facts in *Babulal Agrawal (supra)* are incomparable to the facts in the present case.

31. Mr. Desai submits that in any case there are pleadings about the creation of any oral lease in respect of shop nos.2 and 3 and such pleadings have been duly proved by the plaintiff by leading cogent evidence. He submits that all the ingredients necessary for the constitution of a lease have been pleaded and proved by the plaintiff and therefore, there is no warrant to interfere with the impugned judgment and order. Mr. Desai submits that Section 107 of the Transfer of Property Act does not apply to a lease having a duration of less than one year. He, therefore, submits that at least to this extent the

existence of a lessor-lessee relationship between the plaintiff and defendants will have to be accepted. He submits that there is evidence about the delivery of possession in pursuance of such lease. He, therefore, submits that the First Appellate Court was quite justified in granting reliefs to the plaintiff.

32. Mr. Desai submits that there is clear and cogent evidence on the aspect of possession of the plaintiff in relation to shop nos.2 and 3. He submits that even today the locks put up by the plaintiff are existing on the shutters of shop nos.2 and 3. He submits that the First Appellate Court has evaluated the evidence correctly and there is no case made out to interfere with the findings of fact recorded by the First Appellate Court in the absence of defendants making out any case of perversity. He submits that provisions of Sections 91 and 92 of the Evidence Act were not at all attracted in the present case.

33. Mr. Desai submits that the Trial Court has itself held that there was implied consent from defendant no.2 to the entire transaction between the parties. This finding was never challenged by the defendants before the First Appellate Court by instituting cross-objections or otherwise. He submits that the First Appellate Court has also affirmed this finding by evaluating the evidence on record. He submits that there is no perversity in the concurrent record of such finding. He, therefore, submits that the fourth substantial question of law will have to be answered in favour of the plaintiff and against the

defendants.

34. Mr. Desai submits that in this case the contesting defendants i.e. defendant no.1 failed to step into the witness box and depose in the matter. He submits that the daughter of defendants no.1 and 2 was not a very material witness. He relies on ***Vidhyadhar v. Manikrao and another - (1999) 3 SCC 573*** to submit that an adverse inference ought to have been drawn against the contesting defendants in this matter.

35. Mr. Desai submits that the plaintiff has pleaded and proved his case on the test of preponderance of probabilities. The findings recorded by the First Appellate Court suffer from no perversity and therefore this second appeal may be dismissed.

36. The rival contentions now fall for my determination.

37. In this case, the plaintiff's pleadings in the plaint are not quite clear. This is the reason why there was no clarity in the contentions raised on behalf of the plaintiff, both before the Trial Court as well as the First Appellate Court.

38. Firstly, the plaintiff alleges that the agreement dated 04.05.1977 itself constitutes a lease or at least evidence of lease in respect of shop nos.2 and 3. Secondly, the plaintiff suggests that there was an "oral

lease” constituted between the parties, in pursuance to which the defendants put the plaintiff in possession of shop nos.2 and 3. Mr. Desai pointed out that the pleadings in the plaint make out a case of an oral lease on terms reflected in the agreement dated 04.05.1977 and therefore, on either counts the plaintiff has established that he was the lessee in respect of shop nos.2 and 3.

39. Now the agreement dated 04.05.1977 records that the plaintiff was like an investor cum contractor who agreed to construct the ground floor premises at his own cost. Mr. Desai in the course of his submissions even referred to the plaintiff as an “investor” in the project. No doubt, the agreement dated 04.05.1977 also provided for how the plaintiff was to recover the expenses to be incurred by him for the construction of the ground floor premises.

40. The agreement makes it clear that the plaintiff, upon completion of the construction of the ground floor premises, was to be granted a lease in respect of shop nos.2 and 3 at a monthly rent of ₹150/- per shop. This amount of monthly rent was then to be adjusted by the plaintiff towards 2/3rd of the expenses incurred by him for the project. The balance 1/3rd was to be recovered by the plaintiff either renting out shop no.4 in favour of some third party.

41. In the present appeal, we are not directly concerned with the fate of shop no.4. However, suffice to note that the plaintiff could not

secure any tenant and therefore, offered to take shop no.4 himself on lease for a monthly rent of ₹150/-. The defendants have also not denied in clear terms the transactions concerning shop no.4. Though, the defendants have pleaded that the possession of this shop was taken stating that the plaintiff wished to inaugurate pharmaceutical business on Diwali day, 1979.

42. Now the agreement dated 04.05.1977, insofar as it relates to shop nos.2 and 3 is concerned provides for the following:

“3. The second party shall be entitled for a lease of two shops bearing nos.2 and 3 of the ground floor at a monthly rent of Rs.150.00 (Rupees one hundred and fifty only) per shop for such a period only till two third of the total expenses spent by the second party is reimbursed by adjusting from the rent for the said two shops.

4. Separate lease agreement shall be entered into between the parties after completion of the ground floor of the building.

8. After the reimbursement of two third of the total expenses made by the second party for the construction of the ground floor, the first party shall continue the lease in respect of the shop no.2 and 3 in favour of second party at a monthly rent as per the Rent Act for such a period as may be granted by the first party.”

43. Now Clause 8 of the agreement dated 04.05.1977 is not quite relevant at this stage because this clause concerns the possible relationship between the parties after the reimbursement of the 2/3rd of the total expenses made by the plaintiff.

44. Clause 3 of the agreement dated 04.05.1977 at the highest suggests that the plaintiff would be entitled to the lease of shop nos.2 and 3 for a monthly rent of `150/- per shop and such lease would be only for the period till the plaintiff recovers 2/3rd of the total expenses by adjustment of the monthly rents.

45. Clause 4, in clear terms provided for execution of a separate lease agreement between the parties after the completion of the ground floor premises of the building.

46. A conjoint reading of Clauses 3 and 4 of the agreement dated 04.05.1977 makes it clear that the said agreement did not in praesenti create any lease in favour of the plaintiff in respect of shop nos.2 and 3. The clause refers to an agreement to create a lease. The clauses suggest an executory contract subject to completion of the ground floor premises by the plaintiff. The agreement had also stated that the general terms were being incorporated therein which means that the detailed terms were to be incorporated in the separate agreements upon completion of the construction of the building.

47. The evidence on record bears out that in the year 1979 there was neither any completion certificate nor any occupancy certificate issued in respect of the ground floor premises. Such occupancy certificate was ultimately issued only in the year 1995 or thereabouts. Therefore, the issue of whether the building was completed in the year 1979 or not is

itself debatable. The Trial Court has answered this issue against the plaintiff and the First Appellate Court has answered this issue in favour of the plaintiff.

48. However, even if it is assumed that the construction of the ground floor premises was completed in the year 1979, Clauses 3 and 4 of the agreement dated 04.05.1977, at the highest, given a right to the plaintiff to insist upon the execution of the lease deed in respect of shop nos.2 and 3. The plaintiff was not entitled to regard the agreement dated 04.05.1977 itself as some sort of a lease deed in respect of shop nos.2 and 3. This aspect has been missed by the First Appellate Court. This is possibly on account of the unclear pleadings as well as the unclear contentions raised by the plaintiff on this issue.

49. In *Babulal Agrawal (supra)*, the litigating parties had entered into an agreement dated 12.02.1986 having terms similar to those set out in the agreement dated 04.05.1977. Particular reference can be made to Clauses 8 and 12 of the agreement dated 12.02.1986 which read as follows:

“8. Upon completion of the construction of plinths and other facilities referred to above in all respects and after obtaining a completion certificate from Party 2 or any of its officers nominated by Party 2 in this behalf, Party 1 would hand over the plinths and other facilities to Party 2 under lease agreement to be executed between the parties in the prescribed pro forma

prescribed by Party 2. The necessary stamp duty as per requirement for execution of lease deed shall be borne by Party 1.

12. The period of lease will be three years from the date of taking possession of the lease property. Party 2 will be entitled to extend it by a further period up to one year on the same rates, terms and conditions applicable to the lease.”

50. As in the case of the agreement dated 04.05.1977 which is the subject matter of the present case, even the agreement dated 12.02.1986 which was the subject matter of the dispute between the parties before the Hon'ble Supreme Court, was not registered. Therefore, the issue before the Hon'ble Supreme Court was whether, in the absence of registration of the alleged lease for three years, the tenancy between the parties was monthly and not liable to termination by notice.

51. The Hon'ble Supreme Court referred to the provisions under Section 2(7) and clause (v) of sub-section 2 of Section 17 of the Registration Act, 1908 and held that the agreement dated 12.02.1986 would be squarely covered by clause (v) of sub-section 2 of Section 17 of the Registration Act since it merely created a right to obtain another document which when executed would create such a right. The Hon'ble Supreme Court referred to Clause 8 of the agreement as clearly providing that upon completion of the plinths, etc. the premises

would be handed over to the defendant under a lease agreement to be executed between the parties in the prescribed proforma. The necessary stamp duty was to be borne by the plaintiff. It was held that the agreement dated 12.02.1986 itself was not a lease deed requiring registration. The agreement only created a right of getting another document executed creating rights and liabilities in respect of the immovable property.

52. The Hon'ble Supreme Court in the context of the aforesaid agreement held that there must be a demise of the property in praesenti. But an agreement for securing another agreement or deed in the future would not be such an agreement or document which may require registration. Clause 8 of the agreement did not create any right in praesenti nor was there any immediate demise of the property. It was only an executory agreement. Hence, it was evident that no possession, right, or title had passed on in praesenti at the time of execution of the agreement, and the agreement in question was only an executory agreement and not an agreement creating rights in the immovable property.

53. Applying the principles in *Babulal Agrawal (supra)* to the facts of the present case, including in particular to the agreement dated 04.05.1977, it is apparent that the agreement, by itself did not create any lease in favour of the plaintiff in respect of shop nos.2 and 3. The agreement was only executory and subject to completion of the ground

floor premises, the plaintiff was entitled to insist upon a lease in respect of shop nos.2 and 3. Therefore, if the plaintiff was confident that he had completed the construction of the ground floor premises following the agreement, then, the plaintiff could have sued for specific performance insisting that the defendants executed a lease in respect of shop nos.2 and 3. However, the plaintiff was not entitled to proceed on the basis that the agreement dated 04.05.1977 had, by itself, created a lease in his favour in respect of shop nos.2 and 3.

54. There are no clear pleadings on the aspect of the oral lease. There is a total variance between the pleadings and the proof when it comes to the aspect of the delivery of possession. There are no pleadings that the alleged delivery of possession was in pursuance of the oral lease. Rather, the pleadings suggest that the plaintiff regards the agreement dated 04.05.1977 itself as the deed of lease and claims to have been placed in possession of shop nos.2 and 3 in pursuance to the agreement dated 04.05.1977.

55. In any case, assuming that there are some pleadings concerning the oral lease in respect of shop nos.2 and 3, it is the plaintiff's case that the duration of such lease was until the 2/3rds of the expenses incurred by him were recovered by him through the rentals of shop nos.2 and 3 which were determined at ₹150/- per month per shop. From this, it is evident that the duration of the lease was to extend beyond one year. Now Section 107 of the Transfer of Property Act

provides that a lease of immovable property for any term exceeding one year can only be made by a registered instrument. Therefore, no credence can be given to the theory of oral lease in respect of shop nos.2 and 3 having a duration exceeding one year.

56. Mr. Desai's contention that the lease ought to be regarded as valid for at least one year commends no acceptance. Plaintiff's pleadings were that the lease was to extend way beyond one year. To such pleadings, the provisions of Section 107 of the Transfer of Property Act were attracted and therefore, no case was made out of any oral lease in respect of shop nos.2 and 3.

57. The First Appellate Court has unnecessarily focused on the issue as to whether defendant no.2 had impliedly consented to the execution of the agreement dated 04.05.1977. There was no necessity of going into this issue in such great detail because the Trial Court had decided this issue against the defendants and there were no cross-objections filed before the First Appellate Court. In any case, the issue raised by the defendants was not that there was no implied consent for the construction of the ground floor premises by the plaintiff but the issue raised was that there was no consent whether express or implied for entering into any lease with the plaintiff. In any case, the First Appellate Court has misconstrued the provisions of the agreement dated 04.05.1977 and regarded the said agreement itself as the deed of lease. In doing so, the First Appellate Court failed to take notice of the

provisions of Section 107 of the Transfer of Property Act as also the distinction between an executory contract and an executed contract. The agreement dated 04.05.1977, at the highest, could have been construed as an agreement to enter into an agreement for lease upon the plaintiff completing the construction of the building. This is clear from the conjoint reading of clauses 4 and 5 of the agreement dated 04.05.1977. For all these reasons the second substantial question of law is required to be answered in favour of the appellants (defendants) and against the respondent (plaintiff).

58. As noted earlier, there is a variance between the pleadings and the proof on the aspect of possession. The plaintiff pleaded that he was put in possession by the defendants sometime in October 1979. However, in his evidence, the plaintiff deposed that he “*retained*” the possession of shop nos.2 and 3. The learned counsel for the appellants before the First Appellate Court had also contended that the possession of the entire ground floor construction was with the plaintiff, since, the plaintiff was the contractor constructing the ground floor premises. Apart from the variance in the pleadings and proof, it is a settled position that a contractor never holds any independent possession as such. His so-called possession is on behalf of his principal i.e. the defendants in the present case. Therefore, the findings recorded by the First Appellate Court on the issue of possession suffer from perversity, and the First Appellate Court was not justified in reversing the findings recorded by the Trial Court on this aspect.

59. Even if it is held that defendant no.2 had impliedly consented to her husband defendant no.1 entering into the agreement dated 04.05.1977 with the plaintiff, from that, it cannot be inferred that there was any implied consent of creation of tenancy in respect of shop nos.2 and 3. In any case, even if such implied consent is to be presumed, since the agreement dated 04.05.1977 did not itself create any lease in favour of the plaintiff nor is this the case where an oral lease has been clearly pleaded and proved by the plaintiff, any decision on this issue is only academic. Accordingly, the fourth substantial question of law is not required to be answered in this case.

60. Again, in the facts of the present case, there is no necessity of resorting to the provisions of Sections 91 and 92 of the Evidence Act to hold that the agreement dated 04.05.1977 did not itself constitute a lease in respect of shop nos.2 and 3. Therefore, it is not necessary to answer the third substantial question of law as formulated in this appeal.

61. As noted earlier the findings particularly on the aspect of the creation of a lease as well as delivery of possession are vitiated by perversity. The finding on the aspect of the creation of lease is based on a misconstruction of the agreement dated 04.05.1977 as also the applicable legal provisions under Section 107 of the Transfer of Property Act and the provisions of the Registration Act, 1908. The findings on the aspect of possession are not backed by evidence on

record and in any case, the evidence which travels beyond the pleadings could not have been looked into by the First Appellate Court. Accordingly, even the last substantial question of law is required to be answered in favour of the appellants (defendants) and against the respondent (plaintiff).

62. This is not a case where adverse inference is warranted against the defendants because defendant number 2 failed to step into the witness box. His daughter was a competent witness and the main issue was the construction of the agreement dated 4th May 1977. Besides, the onus was primarily upon Plaintiff to plead and prove his case and not to seek to derive any advantage from the shortcomings, if any, in the defendants' defence. The ruling in *Vidhyadhar (supra)* on facts not at all comparable to the facts in this case.

63. Since, Mr. Desai made submissions on the aspect of the preponderance of probabilities, it is necessary to record that the version of the defendants, in this case, appears to be more probable than the version of the plaintiff as found by the learned Trial Judge. This is because by October 1979 there was no occupancy certificate in respect of the ground floor premises and despite the same, the plaintiff claims to have entered into possession of not only shop no.4 but also shop nos.2 and 3. The defendants alleged that on 25.12.1980, the plaintiff attempted to open a door in the wall separating shop no.4 on one hand and shop nos.2 and 3 on the other. The defendants have pleaded and

even proved that this attempt was thwarted by them that very night and the attempted opening was re-plastered. Significantly, the suit was instituted only on 23.12.1983 i.e. hardly a day or two before the expiry of the limitation period. The Trial Court in this case appears to have correctly evaluated the evidence on record applying the touchstone of preponderance of probabilities.

64. Having said all this, the evidence on record also bears out that the plaintiff expended an amount of ₹81,656.72 in the year 1979 for the construction of the ground floor premises. It is the case of the plaintiff that out of this amount, the plaintiff has already recovered some amount thereby leaving a balance of ₹75,356.72 receivable in the year 1983 or thereabouts. The plaintiff is already in possession of shop no.4 and Mr. Talaulikar points out that no rents are being paid in respect of the occupation of shop no.4. The lease in respect of shop nos.2 and 3 was intended to cover 2/3rd of the construction expenses, which would come to approximately ₹50,000/- or thereabouts. This means that in the year 1983, the defendants were due and payable a sum of ₹50,000/- to the plaintiff on account of the expenses incurred by him for the construction of the ground floor premises.

65. Though, there was some dispute about the non-completion as well as other deficiencies, the record bears out that at least by the year 1995 the occupancy certificate was issued in respect of the ground floor premises. Mr. Desai pointed out that the defendants have

constructed two additional floors on the ground floor premises. Therefore, taking into account all these circumstances, it is safe to proceed on the basis that the defendants were due and payable an amount of ₹50,000/- to the plaintiff as in the year 1983. Though the plaintiff has failed to make out a case of tenancy in respect of shop numbers 2 and 3, it is not as if the plaintiff must be denied the amounts expended by him for the construction of the ground floor of the building. The investment made by the plaintiff must earn some returns and the defendants must also not unjustly enrich themselves at the cost of the plaintiff. The court, in such a situation, has the power to mould the reliefs and do equity.

66. Equity requires that this amount of ₹50,000/- is paid by the defendants to the plaintiff together with suitable appreciation now that the litigation has consumed so much time and effort. Even if the amount of ₹50,000/- is taken to be doubled after every 7 to 8 years, as in the year 2021, the defendants ought to pay an amount of at least ₹8 to ₹9 lakhs to the plaintiff. This would constitute sufficient returns on the investment made by Plaintiff in the 1980s. this will constitute almost a twentyfold increase in the investment made four decades ago.

67. Therefore, Mr. Talaulikar was requested to obtain instructions as to whether the defendants will pay this amount to the plaintiff without prejudice to their rights and contentions. Mr. Talaulikar, on

instructions, made a statement that the defendants will pay an amount of ₹10 lakhs, which represents a twenty-fold increase on the amount of ₹50,000/- as in the year 1983. Mr. Talaulikar, on instructions of the defendant (appellant no.4) Raju Verekar stated that this amount will be paid within 15 days if ordered.

68. Therefore, although this appeal is hereby allowed and the impugned judgment and order dated 27.04.2006 made by the First Appellate Court is hereby set aside, the appellants are directed to pay to the plaintiff a sum of ₹10,00,000/- within four weeks from today failing which this amount will carry interest @ 5% p.a. till the date of effective payment. The decrees made by the two Courts to stand modified to this extent.

69. The defendants are at liberty to deposit the amount of ₹10,00,000/- in the executing Court within four weeks from today after giving a written intimation to the learned counsel for the Plaintiff. Thereafter, the defendants will be entitled to apply to the executing Court for a direction to the Plaintiff to remove his locks on shop numbers 2 and 3 so that the defendants can use the said two shops unhindered by the Plaintiff. The executing Court to permit the Plaintiff to withdraw the amount of ₹10,00,000/- only after the plaintiff removes the locks on shop numbers 2 and 3 or after the executing Court causes the locks to be removed through a suitable execution process.

70. The appeal is disposed of in the aforesaid terms. There shall be no order as to costs.

M. S. SONAK, J.

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