IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.961 OF 2010

Pradeep Gajanan Rane .. Appellant
(Orig. Plaintiff)

Vs.

Mohan P. Shetty & Ors. .. Respondents
(Orig. Defendants)

ALONG WITH

INTERIM APPLICATION NO.1703 OF 2021

Mohan P. Shetty & Ors. .. Applicants
(Orig. Defendants)

Vs.

Pradeep Gajanan Rane .. Respondent
(Orig. Plaintiff)

…

Mr. Sandeep Bhagwat for the appellant.

Ms. Sunanda Kumbhat for the respondents.

…

CORAM : SMT. BHARATI DANGRE, J.

DATED : 25TH NOVEMBER, 2021.

ORDER:-

1. The appellant is the unsuccessful plaintiff, who has filed the present first appeal being aggrieved by the judgment and

decree dated 05/03/2010 passed by the City Civil Court at Bombay in Short Cause Suit No.3853 of 2007.

2. The appeal came to be admitted on 20/09/2011 and the stay came to be granted on Civil Application No.2667 of 2010 under which the appellant was directed to deposit Rs.45,000/- per month till disposal of the appeal with liberty to the respondents to withdraw compensation of Rs.30,000/- per month for the period commencing from 13/10/2007 till 31/07/2010 and as far as the compensation to be deposited in future, the respondents were granted liberty to withdraw Rs.30,000/- per month, the withdrawal being made subject to the final outcome of the appeal. Rest of the amount deposited by the appellant was to remain invested in fixed deposit till the final disposal of the first appeal.

3. The appellant/plaintiff was engaged in hotel business in the name and style of "Malwani Kinera" from 1997 to 2002 on the ground floor of Chandra Mansion, Gokhale Road, Dadar Mumbai. He claimed to have acquired goodwill and reputation of Malwani food and since his requirement was for a larger premises for expansion of business activity, he was on the lookout of a premises on the same vicinity. Defendant No.4 approached him and offered to carry on the hotel business in the premises located on the ground floor of the building known as Jilani Manzil, 120, Gokhale Road, Dadar, Mumbai –

400 028.

4. Pursuant to the said offer, an agreement was entered with defendant No.1 on 14/10/2002 through her constituted attorney, defendant No.4 in the form of a conducting agreement for conducting the business. The plaintiff was put in possession of the suit premises on the basis of the said agreement and changed the name of the hotel under operation to “Hotel Malwani Kinara” and he claimed that he was running the said business till he was asked to deliver the vacant possession of the premises, in which the hotel was being run by him.

5. The case of the plaintiff is that he secured two telephone connections by removing the earlier telephone connections belonging to the defendants and he also paid the electricity bills and have also cleared dues of the sales tax department. It is his case that he invested an amount of Rs.10,31,000/- in refurbishing the premises by including new furniture, fixtures along with cash-counter, kitchen room, civil works, plastering, drainage line, etc. It is the case of the plaintiff that in October, 2004, he was diagnosed with a medical condition which compelled him to undergo the treatment and keep himself away from the business. During his absence, his wife continued to run the hotel business though it could not generate enough turnover and profit to enable the plaintiff to recover the investment. It is the case of the plaintiff that in October, 2006, the plaintiff along with his wife

met defendant Nos.1 to 4 and made a request to continue with the business for another 66 months from 14/10/2007, which was the timeline prescribed in the conducting agreement and he requested that he may be permitted to continue the business on same terms and conditions, which were agreed as on 01/12/2006. According to the plaintiff, defendant Nos.1 to 4 accorded their approval to the plaintiff and promised to execute the necessary conducting agreement at a future point of time, acting upon which, two cheques were delivered by the plaintiff in the name of defendant No.1. It is the case of the plaintiff that on the assurance given to him, to make good of the extension, he again invested Rs.4,56,000/- in refurbishing, adding false ceiling, canopy roller and furniture and fixtures, etc. However, in spite of the investment, on 06/10/2007, he was asked to vacate the suit premises and on failure to do so, was threatened to be thrown out and, therefore, he instituted a police complaint. He also received summons from the Small Causes Court in Suit No.852/1360 of 2007, which was filed by the landlord of the suit premises against defendant Nos.1 to 5 and the plaintiff for recovery of rent and possession of the suit premises on the ground of sub-tenancy.

6. This constrained the plaintiff to bring an action against the defendants by filing Suit No.3853 of 2007, which was based on the premise that an oral assurance was given by the defendants to extend the period of conduct agreement and upon their promise,

the plaintiff had altered his position and invested money to expand his business, and, hence, the termination of agreement is bad in law and the plaintiff is ready to abide by the terms and conditions of the agreement by depositing the monthly amount towards the royalty as per its original terms.

7. In the suit, the plaintiff sought the following relief:

> *"a) This Hon'ble Court be pleased to hold and declare that the purported termination of the agreement dated 14.4.2002 (Exhibit "B" hereto) by the Defendants by their Advocate's letter dated 13.10.2007 (Exhibit "I" hereto) is illegal, arbitrary, unjustified, malafide, null and void ab-initio and not binding on the Plaintiff, inter alia, being in breach of the oral agreement made in October 2006 (pleaded in Para. 5 of the plaint) by and between the Plaintiff and Defendants No. 1, 2 and 4.*
>
> *b) This Hon'ble Court be pleased to issue a permanent order and injunction thereby restraining the Defendants including their servants, agents, subordinates etc. from interfering with / disturbing the Plaintiff's possession of the suit premises (described in Exhibit "A" to the Plaint) and / or interfering / obstructing the Plaintiff including his wife, staff of the hotel "Malvan Kinara", from carrying business of the hotel Malvan Kinara i.e. Shop No.2, 2A, Shed situated at Groun floor, Jilani Manzil, Gokhale Road (N), Dadar, Mumbai and causing interference in the business until 13.10.2013 in the suit premises as per the said oral agreement."*

In the alternative, an order of injunction was sought against the defendants from interfering with, disturbing his possession over the suit premises.

8. The defendants contested the suit by traversing the pleadings in the plaint and it is pleaded that on the assurances and promises of the plaintiff to run the hotel business as conductor and as an agent and caretaker, for a fixed period, by agreement dated 14/04/2002 defendant No.2 allowed the plaintiff to conduct the hotel business for the period commencing from 14/04/2002 to 13/04/2007. It was pleaded that the time was the essence of the contract and the plaintiff agreed to that effect. The specific stand of the defendants is that on expiry of the period, the plaintiff ought to have vacated the premises and handed over the possession of the hotel business to the defendants but instead, he gave threat to defendant No.1 and she suffered the shock and died on 05/11/2007. The written statement pleads that the plaintiff was informed about the outstanding royalty as per the conducting agreement, but he was in arrears of the electric bills and water bills. Further, the telephone connections were also disconnected due to non-payment of bills, but it is alleged that he obtained two telephone numbers in his name to grab the business. It is denied that the plaintiff invested any amount to refurbish the hotel premises and the correspondence exchanged between the parties after the

expiry of the conduct agreement was also brought on record with reference to the notices exchanged between them. Denying the cause of action, it was pleaded that the plaintiff is legally and contractually duty bound to perform his part of contract by handing over the hotel business back to the defendants when the agreement has expired and it is terminated by issuing of a notice. A counter claim was also pleaded for declaring the plaintiff as a trespasser and with a relief of appointing the Court Receiver to take charge of the hotel.

9. In the backdrop of the pleading, the City Civil Court at Bombay framed the following issues:

> *"1. Whether this court has pecuniary jurisdiction to try the suit ?*
>
> *2. Does the Plaintiff prove that in 2nd week of December, 2005 the Defendant nos. 1, 2 and 4 agreed to allow the Plaintiff to continue the business in the suit premises for another period of 66 months?*
>
> *3. Does the Plaintiff prove that he is entitled to declaration that termination by Defendants vide letter dated 13/10/2007 through his advocate is illegal and not binding on the Plaintiff ?*
>
> *4. Does the Plaintiff prove that he is entitled for injunction claimed ?*
>
> *5. What order and decree ?"*

10. In support of the claim, the plaintiff examined himself, one Sheetal Chavan and Siddharth Chavan and Dr. Advait Patil. He also filed documents, which included agreement dated 14/04/2002, telephone bills as well as the electricity bills, the registration certificate of VAT Act, ESIC challans, advocate notice, police complaint, etc. Defendant No.2 also stepped into the witness box along with Yogesh Kosambi, official of MTNL, Madhukar Shinde, Assistant Police Inspector, Arvind Visaria and Satyaranjan Das Rai.

11. Learned Judge by referring to the agreement filed at Ex-6 noted that the defendants had terminated the agreement vide letter dated 13/10/2007 in contemplation of a clause that the plaintiff has not paid the royalty and the arrears thereof and since the agreement (Ex-6) permitted the termination of agreement in case of default, the conduct agreement itself was put to an end. Clause 16 of the agreement gave powers to the defendants to terminate the agreement in case of failure to pay the dues. Recording that this justified the termination letter dated 13/10/2007 (Ex-8) and the agreement itself has come to an end on 03/10/2007 by efflux of time, after expiry of 66 months, and since the plaintiff has failed to prove that there was extension of period of the agreement for conducting the business by the defendants, the plaintiff was held not entitled for a declaration

that the letter dated 13/10/2007 is illegal and not binding upon the plaintiff. With the similar reasoning being adopted in the wake of the termination as well as termination by efflux of time, the defendants were held entitled to take possession of the suit premises. Recording that admittedly, the plaintiff is not paying the royalty to the defendants and yet continuing to conduct the business of the defendants in the suit premises, on a statement being recorded that the plaintiff is ready to deposit royalty in the court, but he has failed to deposit a single rupee, the plaintiff was held disentitled to any relief and by judgment and order dated 05/03/2007, the suit was dismissed with costs.

12. The appeal filed by the appellant is premised on the oral extension and permission on part of the defendants in extending the conducting agreement for further period of 66 months after October, 2007 i.e. 13/10/2013. The appeal is filed by raising a ground that the learned Judge has erred in recording that there is no documentary evidence filed by the plaintiff to say that the agreement was extended for further period of 66 months, when the case of the plaintiff was that the respondents have orally renewed the said conducting agreement and gave assurance to execute all documents for extension of conducting agreement. The appeal is premised on another ground that in absence of such an oral agreement, there was no reason for the appellant to invest Rs.4,36,000/- for renovation after expiry of the initial period of 66 months. It is also sought to be pleaded that the

learned Judge did not give any weightage to the suit instituted by the original owner against the respondents in the Small Causes Court also indicative that the defendants cannot dispossess the appellant without due process of law. The impugned judgment is, therefore, pleaded to be based on incorrect appreciation of facts and the evidence brought on record and it is sought to be set aside by exercising the powers in appeal.

13. Heard Mr. Sandeep Bhagwat, learned counsel appearing for the appellant/plaintiff and Ms. Sunanda Kumbhat, learned counsel appearing for the respondents/defendants. With their able assistance, I have perused the record and the proceedings.

14. My attention is invited to the plaint in Suit No.2201 of 2009 filed by defendant Nos.1 to 4 (the respondents herein) against the present appellant in this court in its ordinary original civil jurisdiction, where a decree was sought against the defendants for handing over peaceful possession of the hotel premises to the plaintiff therein and arrears of compensation as per agreement for the last 14 months along with interest. Prayer clause No.1 came to be deleted whereas prayer clause No.2 was retained along with a prayer of appointment of the Court Receiver to ascertain arrears of tax payable to the Government and municipal fees and other liabilities in respect of the hotel premises occupied by the defendants therein. The said suit was transferred to the City Civil Court at Bombay, wherein an

application was moved for withdrawal of the suit and the plaintiff was permitted to withdraw the suit. In any case, on 16/10/2019, an application was moved for withdrawal of the suit in the wake of the pendency of the present first appeal.

15. The core question which calls for determination in the present appeal is whether the trial court has held that the plaintiff has proved that the termination of the agreement by the defendants vide letter dated 13/10/2007 is illegal and not binding upon the plaintiff and whether defendant Nos.1 to 4 had agreed to allow the plaintiff to continue the business in the suit premises for another period of 66 months.

16. The plaintiff filed his evidence affidavit, wherein he reiterated his pleadings in the suit and projected his case that defendant Nos.1 to 4 being confronted with the problems of his health, on his request, permitted him to continue the business for further period of 66 months from 14/10/2007 at the agreed rate of royalty of Rs.30,000/- per month as per the original agreement. He has reiterated his stand in the plaint that the defendants agreed that they would execute the necessary documents in near future.

17. The conduct agreement is brought on record through the plaintiff and on perusal of the said agreement, it becomes clear that on 14/04/2002, the party of the first part Sundari P. Shetty,

"the owner" and the party of the second part Pradeep Gajanan Rane, "the conductor", agreed to the stipulations contained therein. The party of the first part being the sole and absolute owner of the hotel business and carrying and running the hotel in the name and style of 'Hotel Poo-Sun' being in exclusive, use, occupation and possession of the said shop, agreed to allow the conductor to conduct the said hotel business in the said shop temporarily for a period of 66 months from 14/04/2002 subject to the terms and conditions stipulated in the agreement. Paragraph Nos.1 and 2 of the agreement are relevant, which reads thus:

> *"1. The owner has allowed the conductor to conduct the hotel business at Shop No.2, Zilani Manzil, Gokhale Road (North), Dadar, Mumbai - 400 028, temporarily for the period of 66 months commencing from 14th April 2002 to 13th October 2007, along with the articles belonging to the owner, a list whereof is annexed herewith to this Agreement.*
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> *2. The Conductor has deposited with the Owner the amount of Rs. 5,00,000/- (Rs. Five Lakh only) as and by way of Security deposit for the performance and observance of the terms and conditions of this agreement. The said deposit amount shall remain with the Owner during the continuance of this agreement without any interest and the same shall be refunded to the Conductor by the Owner on termination of this agreement and/or at the time the Conductor delivers back*

> *the possession of the said business and the premises to the Owner at the expiry of the period i.e. 13th October 2007, however subject to the deductions if any, allowed under this agreement."*

18. The agreement stipulated that for a period of first 33 months, the conductor shall pay to the owner, a monthly royalty of Rs.20,000/- per month and, thereafter, for a period of 22 months, the royalty amount was fixed at Rs.25,000/- and for the last 11 months, the amount to be paid was Rs.30,000/- per month for conducting the hotel business. Clause No.7 of the said agreement reads as under:

> *"7. The Conductor shall not claim any title and interest of whatsoever nature over the said shop premises and/or any part or portion thereof, such as tenant, sub-tenant or License etc."*

19. In addition to the royalty, the conductor has agreed to pay the electricity charges, telephone and water charges, renewal fees of all the licenses, salary and wages of the employees, bonus, ESIS, provident fund, sales tax and such incidental expenses during the continuation of the agreement. Clause No.16 of the said agreement contemplated the liberty to the owner to terminate the agreement without notice and take possession of the articles and furnitures along with the keys of the said hotel

premises if the conductor failed and neglected to pay monthly royalty for a continuous period of two months. In that event, the owner was held liable to refund to the conductor the remaining balance of security amount after deducting the outstanding arrears and dues if any. In the cross-examination, the plaintiff admitted that he had not paid any amount of royalty since 13/07/2007 as the defendants had not executed any agreement in writing. He denied the suggestion that the defendants never agreed to continue the business in the suit premises for a period of 66 months from 14/10/2007 or that they agreed that necessary agreement will be executed. PW-2, the brother in law of the plaintiff, has been examined to corroborate the assertion about the oral assurance of the defendants that the agreement would be extended for a further period of 66 months. Another witness Sheetal Chavan has been examined to bring on record the vandalism adopted by the defendants when they attempted to forcibly evict the plaintiff from the premises.

20. Defendant No.2 filed his affidavit in lieu of examination-in-chief, where he reiterated his defence in the written statement and, on being cross-examined, maintained his stand that the terms of the agreement did not permit any extension and the case of the plaintiff that there was an oral assurance given to extend the agreement was denied by stating that there was no oral agreement for continuation of the conducting agreement. The other witnesses examined by the defendants are the official of

MTNL, who produced on record the disconnection receipt of the telephone connection on account of non-payment of bills, another witness being DW-3, the Assistant Police Inspector, who had made enquiry in the matter on the complaint being filed by defendant No.4 against the plaintiff.

21. In the backdrop of the material brought on record, learned Judge has rightly laid his emphasis on the conducting agreement (Ex-6), which clearly reflects that the owner has allowed the conductor to conduct the hotel business temporarily for a period of 66 months from 14/04/2002 till 13/10/2007 and that the conductor shall not claim any title or interest of whatsoever nature over the shop premises and/or any part or portion thereof. The agreement permitted the owner to terminate the agreement before its expiry, if there was a failure and neglect on the part of the conductor to pay the royalty as agreed. In order to establish the case of the plaintiff that there was an extension granted for conducting the business beyond the period of 66 months, the plaintiff has not brought anything on record, except his relative, who deposed that there was an oral agreement. Merely because, the plaintiff has invested some further amount on the oral assurance, did not impliedly lead to an extension of the conduct agreement beyond the period of 13/10/2007. In view of the failure on part of the plaintiff to prove that there was an extension of further period of 66 months, it can be safely assumed that the conduct agreement has come to an end on

13/10/2007. The plaintiff remained in arrears and, therefore, by invoking clause 16 of the agreement, the owner sent a termination notice highlighting the default on the part of the occupant and the said notice dated 13/10/2007 exhibited before the court which gave the details of the default, including the payment of royalty and an amount of Rs.3,45,000/- shown as due and payable to the owner. The arrears of water charges, electricity and telephone bills, default of ESIS payment and sales tax dues, constrained the owner to invoke clause 16 of the agreement and terminate the same with effect from 13/10/2007. There is no denial by the plaintiff that he has committed the default and, therefore, his case becomes worst on the second footing since the owner has invoked clause 16 of the agreement, which permitted him to take action after termination of the agreement. In any contingency, the agreement did not subsist on its expiry/termination and the plaintiff has failed to prove that the termination of the agreement is illegal and not binding on him. Learned trial court has rightly answered the issue against the plaintiff and dismissed the suit by recording detailed reasons based on the material facts placed before him. The impugned judgment does not warrant any interference and deserves to be upheld. Necessarily, the first appeal filed by the appellant deserves a rejection. While dismissing the appeal, it is also clarified that since the possession of the appellant in the suit premises is protected by an interim order and he was directed to deposit Rs.45,000/- per month by order dated 20/09/2011 and the amount of Rs.30,000/- was permitted to be withdrawn every month, the said withdrawal is confirmed. The remaining amount, which is deposited by the appellant and which has been invested in the fixed deposits in terms of order dated 20/09/2011 shall also be made over to the respondents in this appeal, who are the owners of the suit premises. On dismissal of the appeal, the decree is directed to be drawn up accordingly.

[SMT. BHARATI DANGRE, J.]

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