Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 309 OF 2022

M/s AISHA, REP. BY PARTNERS & 10 ORS. … PETITIONERS

VS

SAYYED IMRAN … RESPONDENT

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Mr. C.A. Coutinho with Mr. Ivan Santimano, Advocates for the Petitioners.

Mr. Nitin N. Sardessai, Senior Advocate with Mr. Neelesh Takkekar, Mr. Saish Mandrekar and Mr. K. Sabnis, Advocates for the Respondent.

WITH

WRIT PETITION NO. 303 OF 2022

WITH

CIVIL APPLICATION NO. 31 OF 2022

IN

WRIT PETITION NO. 303 OF 2022

SAYYED IMRAN … PETITIONER

VS

AISHA, A REGISTERED PARTNERSHIP FIRM, REP. BY ITS PARTNERS & 6 ORS. … RESPONDENTS

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Mr. Nitin N. Sardessai, Senior Advocate with Mr. Neelesh Takkekar, Mr. Saish Mandrekar and Mr. K. Sabnis, Advocates for the Petitioner.

Mr. C.A. Coutinho with Mr. Ivan Santimano, Advocates for the Respondents.

CORAM: SANDEEP K. SHINDE, J.
RESERVED ON: 2nd AUGUST 2022
PRONOUNCED ON: 18th AUGUST 2022

ORDER:

1. Petitioners-plaintiffs, in Writ Petition No. 309/2022 instituted Commercial Suit No. 2/2021/A, against the defendant, who is the petitioner in Writ Petition No. 303/2022. For easy understanding, I will refer the parties as to plaintiffs and defendant.

2. These two Petitions under Article 227 of the Constitution of India, challenge the order dated 10.06.2022 below Exhibit D-9 in Commercial Suit No. 2/2021/A, passed by the Senior Civil Judge, 'A' Court, Margao.

3. Briefly stated facts of the case, leading to these two Petitions are as under:

The subject matter of the suit is the first, second and third floor of the building known as "Aisha Mall" or "Aisha Centre", which premises are subject matter of deed of lease dated 12.10.2018, registered in the office of the Sub-Registrar (hereinafter referred to as the suit premises). By deed of lease, the plaintiff no. 1 with the consent of remaining plaintiffs, granted to the defendant, the lease of the suit premises for a period of nine years commencing from 15.04.2018, on terms and conditions, more particularly outlined in the said deed of lease. The defendant had taken the lease of the suit premises for setting up his business of hotel, for lodging and boarding of guests. In terms of the lease deed, the defendant was required to pay rent of Rs.3.25 lakhs per month, for the first three years, subject to revision thereafter the rent was agreed to be deposited by the defendant in the bank account of M/s Aisha with Goa Urban Co-operative Bank Limited. The defendant has paid the lease rent amounts to the plaintiff no. 1 upto 31.03.2020. Thereafter, no further amounts of rent were paid. That vide notice dated 16.07.2021, the defendant expressed his difficulties to operate the hotel on profitable basis due to strict restrictions and COVID protocols. Thus, the defendant communicated that due to lockdown the hotel premises experienced zero occupancy, which resulted in no revenue generation, but, still he was forced to incur and make payments of fixed expenses and other overhead dues, although, there was no effective business performed. As such, the defendant vide this notice conveyed that he no longer desired to continue the operation of business and requested the plaintiffs to grant three months period for vacating the suit premises. For these reasons, he terminated the lease.

4. The notice was replied by the plaintiffs on 23.07.2021 and accepted the termination notice and called upon the defendant to pay all the dues including the monthly rental amounts till he vacates the lease premises. Vide the very reply, the plaintiffs invoked clause 31 of the lease deed and terminated the lease since the defendant had failed to pay the outgoing rentals from 01.04.2020 and also failed to clear the outstanding statutory dues, including house tax, electricity and water consumption charges.

5. The notice dated 23.07.2021 issued by the defendant to the plaintiffs and reply thereto by the plaintiffs convey that;

> i. Plaintiffs-lessors represented the defendant that they have good right, full power and absolute authority to grant to the defendant the lease of the

said premises comprising of first, second and third floor of the building known as "Aisha Mall";

ii. The plaintiffs had represented to the defendant that he would be entitled to carry on commercial activities on the said three floors for accommodating his guests, and defendant that he would be entitled to refurnish and put structure in the form of masonry walls on the said three floors, based on permissions, which were availed by the plaintiffs;

iii. When the lease-deed was executed, plaintiffs represented that they had occupancy certificate issued by the Municipal Council for first three floors, having two units on each floor, which are identified as FI and F2 on the first floor; SI and S2 on the second floor and shop nos. T1 and T2 on the third floor.

iv. Pursuant to the representation, the defendant had set up 32 rooms, covering an area on 1155 square metres, on the existing structure by investing his own funds so as to enable to run it as a hotel;

vi. That after handing over the suit premises, the defendant carried out extensive refurbishment and upgradation of interior and expended a sum of Rs.3.25 crores at initial stage, which was in the nature of furnishing, fittings, flooring etc. that was necessary for operating the premises as a four star category hotel.

vii. After termination of lease, the defendant informed the plaintiffs that he would make the efforts to relocate the movables i.e. furnitures and fixtures at different location, however, due to strict conditions imposed by administration, it was difficult to complete the task of relocation;

viii. The plaintiffs upon terminating the lease, called upon the defendant to quit using the suit premises and vacate the same on or before 27.08.2021, however, the defendant neither vacated the suit premises nor cleared the outstanding rental amount or cleared the outstanding electricity, water and house tax dues;

ix. That besides the persistent default in payment of rental, the defendant had substantially damaged the suit premises and had removed all the fixtures and movable items from the suit premises.

6. In the background of the facts aforestated, the plaintiffs instituted the suit seeking cancellation of deed of lease; cancellation of trade license obtained by the defendant in his name to conduct the business in the suit premises; eviction from the suit premises; recovery of outstanding rent of Rs.55.25 lakhs for the period from 01.04.2020 to 31.08.2021 alongwith 9% interest, till actual payment; the rent of Rs.3.25 lakhs per month from 01.09.2021 to 12.10.2021; Rs.15,000/- penalty per day commencing from 28.08.2021 till suit premises is handed over to the plaintiffs.

7. Before adverting to the defence set up by the defendant and a counterclaim raised by him, a fact to be noted is, that the Chief Officer, Margao Municipal Council vide judgment dated 19.10.2021, after hearing the plaintiffs held that the plaintiffs had illegally constructed rooms on first, second and third floor of the building and had also enclosed balconies on all floors. The judgment of the Municipal Council convey that the plaintiffs had started a restaurant without taking permission from the Council as required under Section 184 of the Goa Municipalities Act, 1968 and further held that the height of the 4th floor exceeds the required norms and as such, there was no access from the rear to the high rise building. In conclusion, the Chief Officer, Margao Municipal Council directed to demolish the existing 4th floor of the building by removing all the structures, which were illegally constructed without due approvals from the Authority. As such, directed the plaintiffs to remove all the extra rooms constructed on first, second and third floor of "Aisha Mall" and which were constructed in violation of the FAR. It appears that pending Appeal, the Municipalities Appellate Tribunal stayed the operation of the demolition order dated 19.10.2021, passed by the Municipal Council, Margao.

8. Coming back to the facts of the case, pending suit, plaintiff's vide Application dated 07.09.2021, sought temporary and mandatory injunction to direct the defendant and all those claiming through the defendant, to forthwith deliver to the plaintiffs the vacant and peaceful possession of the suit premises; temporary injunction to restrain the defendant from in any manner entering or interfering with the suit premises; restraining the defendant from doing any damage to the suit premises and mandatory order directing the defendant to hand over the original trade license to Margao Municipality.

9. The learned Trial Court vide order 20.01.2022 declined to grant any relief to the plaintiffs and as such, Application for temporary injunction filed under Order XXXIX, Rules 1 and 2 and Section 151 of the CPC, was dismissed.

10. It appears from the order refusing the temporary relief that the plaintiffs did not disclose and produce order passed by the Chief Officer, Margao Municipality. May be, for that reason, the learned Trial Court noted the fact that the plaintiffs misrepresented the defendant that he could conduct business in 32 units, although, the plaintiffs were having occupancy only in respect of six premises.

11. It appears that the order dated 20.01.2022, passed by the Trial Court, declining the temporary injunction has not been challenged.

12. In any case, pending Application for temporary injunction, the plaintiffs moved another Application on 20.09.2021, seeking directions to the defendant to deposit arrears of rent alongwith future accruals, under Order XV-A of the Code of Civil Procedure. By this Application, the plaintiffs sought directions to the defendant to deposit;

> i. Rs.55.25 lakhs as outstanding rent for use of such premises from 01.04.2020 to 31.08.2021;
>
> ii. The rental amount of Rs.3.25 lakhs per month for the period from 01.09.2021 to 12.10.2021 and thereafter, the increase in rent amount by 15% after every three years;

iii. To deposit in the Court an amount of Rs.15,000/- per day as penalty commencing from 28.08.2021, till possession of the suit premises is given to the plaintiffs and the defendant be evicted from the suit premises.

13. As against the plaintiff's claim in the suit and in the Application, directing to deposit arrears of rent, it is defendant's case that while handing over the suit premises, it was an empty shell comprising of only columns and without any set up for operating the same as a hotel and he was asked by the plaintiff no. 1 to carry out the civil work for entire three floors and further, also to carry out interior works such as plastering, putting up false celling, curtains etc. at his own expense, which would be eventually paid after completion of three years from the date of signing the lease agreement. It is defendant's case that the plaintiffs had represented him that he would be entitled to carry on commercial activities, on the said three floors for the purpose of operating the said hotel and would be entitled to put a structure in form of masonry walls on the said three floors, based on permissions which were availed by the plaintiffs. The defendant's further case is that the plaintiffs had represented that they are entitled to cover the third floor with fabricated steel for operating a restaurant on the fourth floor. Thus, the defendant reposing faith and trust in the representation of the plaintiffs spent Rs.3.25 crores, which was incurred towards putting up walls, internal partitions, plastering, masonry work, flooring, electrical installation, plumbing work etc.

14. In substance, it is the defendant's case that there was a clear and categoric representation on the part of the plaintiffs, that he would be entitled to the suit premises, consisting of first, second, third floor and roof top of the building known as "Aisha" located at Colva, Margao road. His further defence is that the plaintiffs represented that, they were entitled to cover the third floor roof with fabricated steel for operating a restaurant on the fourth floor. These facts were represented to him by the plaintiffs on the strength of certain documents, however, the same were not parted with yet the defendant reposing faith and trust in the plaintiffs accepted the same. Accordingly, the defendant spent a sum of Rs.3.25 crores for putting up walls, internal partitions, plastering, masonry work and so on. To put it differently, the defendant's case is that the plaintiffs were aware, since inception of the execution of the lease deed, that they did not posses permission from the Planning Authority to convert the suit premises into 32 rooms and/or to cover the roof top of the fourth floor. However, these facts were suppressed from the defendant while executing the lease deed. On this premise, the defendant filed counterclaim against the plaintiffs for decree in the sum of ₹3.25 crores, besides the damages of ₹25 lakhs towards the loss suffered on account of incorrect representation with regards to the legality of the structures and consequently, making the defendant suffer for a loss of business and profits.

15. The learned Trial Court, upon appreciating the pleadings and documents, partly allowed the Application vide order dated 10.06.2022, by which, the defendant has been directed to deposit the rent in terms of the lease deed, for the period from April 2020 till June 2021 and restrained the plaintiffs from withdrawing the said amount. Aggrieved by this order, both, plaintiffs and the defendant, have filed Petitions under Article 227 of the Constitution of India.

16. Heard Mr. C.A. Coutinho, learned Counsel appearing on behalf of the petitioners-plaintiffs and Mr. Nitin Sardessai, learned Senior Counsel for the respondent-defendant. Perused the impugned order, plaint, written statement, lease deed, Application Exhibit D-9 and the reply of the defendant thereto.

17. The plaintiffs sought directions to the defendant to deposit the lease rent under three different categories;

i. Amount due for the period from 01.04.2020 to 31.08.2021;

ii. Amount due from 01.09.2021 to 12.10.2021 and

iii. Amount of ₹15,000/- per day as penalty from 28.08.2021 till possession is given to the plaintiffs.

18. In terms of the lease deed, rent was payable by the defendant-lease to the plaintiffs, by depositing the same in the Account held by the lessor, M/s Aisha with the Goa Urban Co-operative Bank Limited and upon deposit of the rent, lessor was to issue valid receipt, acknowledging the receipt of the rent. It is the defendant's case that he has paid the entire rent for the period from 01.04.2020 to 30.05.2021, in cash, in presence of Mr. Sebastiao D'Silva, to plaintiff no. 2. This contention was not accepted by the Trial Court, and rightly so, for want of receipts and the alleged payment being contrary to the mode of payment outlined in the lease deed. It appears that the defendant in support of the said payments of rent, relied on the audio recording, referring to the said payment. This contention of the defendant has been correctly rejected by the Trial Court. Therefore this finding calls for no interference.

19. The learned Senior Counsel appearing for the defendant-lessee, would contend that the consideration (rent) sought to be recovered by the plaintiffs-lessor, from the defendant being founded on unlawful agreement, plaintiffs have no right to the same. Learned Senior Counsel submitted that the defendant was misrepresented by the plaintiffs that they had obtained the development permission dated 06.09.2018 for internal changes on first, second and third floor of the existing building and also permission dated 17.09.2018, from Margao Municipal Council. Convinced by the representation, the lessee was persuaded to carry out civil works for three floors by expending a sum of Rs.3.25 crores for putting up walls, internal partitions, masonry work and so on. However, later lessee learnt that plaintiffs did not have necessary permission/sanction for constructing 32 rooms in the subject building. It was therefore argued that plaintiff has set out his claim to recover the rent based on illegal agreement and, therefore, it was not enforceable. Learned Senior Counsel for the defendant would rely on the provisions of Section 23 of the Indian Contract Act which speaks of what considerations and objects are lawful and what not.

20. Insofar as allegations of misrepresentation are concerned, Lease Deed neither refers to development permission dated 06.09.2018 nor permission dated 17.09.2018 from local Planning Authority, allegedly granted for making/executing civil work-internal changes for first, second and third floor. However, it may be noted that the plaintiff-lessor in reply to the counterclaim of the defendant, categorically contended that such permissions and approvals were granted by the Planning Authority. In fact, plaintiff-lessor neither produced such permissions before the Trial Court nor before the Chief Officer, Margao Municipal Council, who has directed to demolish the additional rooms constructed on first, second and third floor.

21. For these reasons, *prima facie,* it is to be held that the plaintiff-lessor consciously persuaded defendant to expend huge amount of Rs. 3.25 crores for constructing additional rooms and for renovating and redecorating the same. As a matter of fact, paragraph 3 of the lease deed, authorised the defendant-lessee, to set up hotel business in the premises and para 4 of the Deed authorised lessee-defendant to enter upon the premises prior to execution of the Deed to make all arrangements and install infrastructures for setting of the hotel. Thus, reading of paras 3 and 4 of the Lease Deed together, clearly implies that the plaintiff on false or misleading statements and/or on material omission, persuaded defendant to expend huge amount in setting up hotel business for constructing the additional rooms and refurnishing the same. For that reasons, *prima facie,* the plaintiff's case is hit by Section 23 of the Indian Contract Act.

22. Mr. Sardessai, learned Senior Counsel for the defendant-lessee, would rely on the ruling of the Supreme Court in the case of ***Sita Ram vs Radhabai & Ors.***[1] wherein the Apex Court has held that the Court will refuse to enforce an illegal agreement at the instance of a person, who is himself a party to an illegality or fraud. However, there are exceptional cases in which men will be relieved of the consequences of an illegal contract in to which he has entered. Exceptions, are :

> (a) where the illegal purpose has not yet been substantially carried into effect before it is sought

1 AIR 1968 SC 534

> to recover money paid or goods delivered in furtherance of it;
>
> (b) where plaintiff is not pari delicto (in equal fault) with the defendant;
>
> (c) where plaintiff does not have to rely on illegality to make out his claim.

In the case at hand, the plaintiff's case does not fall in either of these exceptions carved out. Reason being on the false representation, defendant reposed faith and trust in the plaintiff, accepted the same and expended a sum of Rs. 3.25 crores for putting up walls and internal partitions. Thus, defendant acted upon the representation.

23. In any case, the Municipal Council directed demolition of unauthorised construction carried out in the suit premises in October 2021. Whereas, defendant-lessee terminated the lease vide notice dated 16.07.2021. That being the case, atleast till July 2021, defendant-lessee was under contractual obligations to pay/deposit the lease rent. Therefore, that part of the order of the Trial Court directing the defendant-lessee to deposit lease rent for the period from April 2020 till June 2021, calls for no interference and thus stands confirmed.

24. Mr. Sardessai, learned Senior Counsel appearing for the defendant-lessee, vehemently contended that the material on record clearly suggests that the plaintiffs were aware since inception of execution of lease deed, that they had no permission from the Planning Authority to convert the suit premises into 32 rooms and/or to cover the roof top of the fourth floor and, therefore, the plaintiff could not have claimed/demanded or recovered the lease rent from the defendant-lessee, right from day one. Mr. Sardessai, learned Senior Counsel may be right that since the plaintiffs were not possessing the requisite permission from the local Municipal Council, yet knowingly they entered into lease deed and plaintiffs being party to unlawful contract, it could not be enforced against, the defendant. However, the fact remains that the defendant being a prudent businessman, *prima facie,* it is difficult to conclude at this stage, whether defendant unknowingly ventured, to convert the suit premises into hotel rooms by expending huge amount of Rs. 3.25 crores and that too without verifyuing building permissions.

25. Thus, having regard to facts and circumstances of the case and for the reasons stated above, the impugned order directing the defendant-lessee to deposit lease rent for the prior April 2020 till June 2021 and further refusing the plaintiffs to withdraw the same amount calls for no interference in the supervisory jurisdiction. The Trial Court has neither committed any error in exercise of its jurisdiction nor the order is arbitrary or perverse.

26. In the result, both the Writ Petitions are dismissed and disposed of.

SANDEEP K. SHINDE, J.