

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.371 OF 2022**

Sharathkumar Narayan Shetty Applicant.
V/s
Nitin Bhagwandas Shroff and Others Respondents.

Mr. G.S. Hegde i/b Balkrishna Adyanthaya for the Applicant.
Ms. Kanchan Pandare for the Respondents.

CORAM: NITIN W. SAMBRE, J.

DATE: AUGUST 04, 2022

P.C.:-

1] This Civil Revision Application under Section 115 of the Civil Procedure Code is by the Tenant/Defendant No.1.

2] Respondent Nos. 1 to 7 are Trustees, whereas Respondent Nos. 8 and 9 are Defendant Nos. 2 and 3.

3] Respondent Nos. 1 to 7 initiated RAE Suit No.687/1111 of 2005 on 22/7/2005 against Applicant/Defendant No.1, and Defendant No.2 i.e. non-applicant No.8 on the ground of unlawful subletting, unauthorized additions and alterations, annoyance and illegal encroachment. Alleging that Defendant No.2 has vacated suit premises in 2007 which were sublet by Defendant No.1 to Defendant No.3, suit came to be amended by maintaining the case of subletting.

The suit was resisted by the Applicant/Defendant No.1 vide Written Statement-Exhibit-19, thereby denying all allegations including that of unlawful subletting. It is also urged that earlier suit being RAE Suit No. 742/2351 of 1985 was dismissed in 1991-92. Vide additional Written Statement-Exhibit-34, claim put-forth as regards subletting to Defendant No.3 and surrender by Defendant No.2 of the suit premises was also denied. Third additional Written Statement at Exhibit-64 was filed, thereby denying the claim, alleging that Plaintiffs have no authority to file the suit. Defendant No.3 vide Written Statement – Exhibit-35 denied the suit claim and also denied execution of any agreement/understanding with Defendant No.1 so also her possession over the suit property. In the light of rival pleadings, issues were framed at Exhibit-22. The said issues and findings thereon by Trial Court read as under:-

	ISSUES	FINDINGS
1.	Whether the Plaintiffs prove that Defendant No.1 has unlawfully sublet the suit premises to Defendant No.2?	In the negative.
2.	Whether they further prove that Defendants have carried out additions and alterations of permanent nature in the suit premises without their permission in writing?	In the negative.
3.	Whether they further prove that Defendant No.1 is a continuous source of nuisance and annoyance to them and other occupiers of the suit property?	In the negative.
4.	Whether suit is bad for non-joinder of necessary parties?	In the negative.

5.	Whether Plaintiffs are entitled for getting possession in respect of the suit premises?	In the negative.
6.	What order and decree?	Suit is dismissed
	<u>Additional issues</u>	
A)	Do the Plaintiffs prove that at present Defendant No.3 is illegally in possession of the suit premises and she is carrying on any business there?	In the negative.

4] In support of the suit claim, Plaintiffs have examined PW.1 – Devang at Exhibit-39, witness from the office of Mahanagar Telephone Nigam Limited (“MTNL”) i.e. PW. 2 Sadanand, Court Commissioner Nancy Pareira – P.W.3 and photographer Kunal – P.W.4. Plaintiffs have placed on record amended Schedule-I issued by the Charity Commissioner at Exhibit-42, Resolution of Trustees at Exhibit-43, Report of the Court Commissioner at Exhibit-7, Bills of the food items at Exhibit-44, letter dated 21/1/2009 received from MTNL at Exhibit-45, Bill dated 17/9/2008 at Exhibit-46 and photographs and bill at Exhibits-67 and 68 respectively.

5] Applicant/Defendant No.1 has entered into witness box and examined himself at Exhibit-89 and placed on record document Exhibit-72 medical papers, Exhibit-73 electricity bills, Exhibit-74 police license, Exhibit-75 telephone bills, Exhibit-76 shops and establishment license, Exhibit-78 – health license and Exhibit-80 photo copy of Power of Attorney.

6] Trial Court after appreciating pleadings and evidence on record, recorded findings that the Plaintiffs/non-applicant Nos. 1 to 7 have failed to prove that Applicant/Defendant No.1 has unlawfully sublet the suit premises to Defendant No.2 by parting possession. On all counts, including that of additions and alterations to the suit premises, annoyance, Trial Court dismissed the suit. The learned Judge of the Small Causes Court noticed that the conducting agreement between Applicant and Defendant No.3 entered into on 19/12/2007 is a business agreement. It is further observed that the said agreement does not transfer or assign tenancy rights in respect of suit premises to Defendant No.3.

7] Non-applicant Nos. 1 to 7 / original Plaintiffs preferred Appeal No.69 of 2017. Appellate Bench of the Small Causes Court vide judgment impugned dated 4/5/2022 allowed the appeal. As such, this Revision.

8] Mr. Hegde, learned Counsel for the Applicant would strenuously urge that the Appellate Court has committed an error in reversing the judgment of the Small Causes Court, particularly on the issue pertaining to business conduct agreement entered into between Applicant/Defendant No.1 and Defendant No.3. He has relied on documents produced by the Applicant viz medical papers, electricity bills, licenses issued by various public authorities and the photographs. According to him, merely because Defendant No.3 was permitted to run and manage business for Defendant No.1 i.e.

Applicant, it cannot be said that sub-tenancy was created in favour of Defendant No.3 as neither permanent possession was parted nor compensation or rent is received from Defendant No.3. According to him, business conduct agreement was only to overcome difficulty faced by the Applicant because of his domestic and health issues. So as to substantiate his contentions, he has relied on the judgment of this Court in the matter of *Dipak Banerjee vs Smt. Lilabati Chakraborty* reported in **1987 (2) R.C.J. 644** so also in the matter of *Bhairulal Balmukund Verma vs. Poonamchand Kasturchand Sancheti & Anr.*, reported in **1997 Bom. R.C. 270**.

9] In addition to above, Mr. Hegde, Counsel appearing for the Applicant would invite my attention to the findings recorded by the Small Causes Court. According to him, after reappreciating evidence by the Appellate Bench, merely because different view was possible, suit for eviction came to be decreed.

10] Counsel for non-applicant Nos. 1 to 7/original Plaintiffs would support the order impugned, as according to her, recitals in the conduct agreement, evidence of the Plaintiffs has sufficiently established the case of subletting.

11] I have appreciated rival submissions.

12] Fact remains that Defendant No.2 has not resisted claim by filing Written Statement or examining himself as witness of the Applicant.

Applicant denied any relation with Defendant No.2 and Defendant No.3. Defendant No.3 has specifically stated in his Written Statement that she has neither entered into agreement nor is in possession of the suit premises. As far as possession before 2007 with Defendant No.2 is concerned, P.W. 3 – Nancy Pareira has been examined as Court Commissiner who in her evidence specifically brought on record fact about management of business in the name of M/s Food Factory in the suit premises. P.W. 1 – Devang i.e. Plaintiff No.2. in his evidence has placed on record management of the said business by one Mr. Suraj Kundanraj based on the documents issued by the Sales Tax Authority. Fact remains that Defendant No.2 appears to be in exclusive possession of the suit property on the date of initiation of the suit. First appellate court in view of provisions of Order 41 Rule 27 clause (b) has rightly permitted production of documents in relation to the management of business by Defendant No.2 independently, as could be inferred from the document issued by the Sales Tax Department.

13] P.W. 3 – Nancy Pareira in her evidence has proved the report Exhibit-7. In the said report, she has stated about inquiry made by her about names and status of the employees in the suit premises when she visited on 19/08/2005. She has specifically stated that all the employees have stated that they are working with Defendant No.2. Though Applicant in his examination in chief has stated that he is maintaining muster of the employees and their salary register, said documents eventually are not produced by the Applicant on record to discharge his burden, after initial burden was discharged by the land

owners i.e. non-applicant Nos. 1 to 7.

14] Though Applicant/Defendant No.1 and Defendant No.3 have specifically denied about parting with possession and receipt of possession for managing business in the capacity of sub-tenant, however, Plaintiffs under Right to Information Act collected documents from the office of MTNL. Amongst other said documents contains business conduct agreement whereby Defendant No.3 has managed business in the name of “Dolce Vita”. The witness from MTNL’s Office i.e. P.W. 2- Sadanand has specifically deposed about providing of three landline connections as against above documents and Applications and has produced forms and copy of the agreement which was submitted by Defendant No.3 for getting landline connection. The said agreement was entered into between Applicant and Defendant No.3 on 19/12/2007. The agreement though is titled as conducting agreement, however, cumulative effect of the recitals, if appreciated viz.

“AND WHEREAS THE Conductor herein who is having sufficient experience in managing hotel business approached the owner in the 2nd week of December, 2007 and **shown her willingness to conduct the said running business and requested the owner to allow her to conduct the said running business** for a period of three (3) years with effect from 19.12.2007, on conducting basis,

as such this agreement deemed to have commenced from 19.12.2007.”

“2. That for the due observance and performance of the terms and conditions of the conducting of said running business, hereinafter incorporated, the **Conductor shall deposit** with the Owner, a sum of Rs 5,00,000/- (Rupees Five Lacs only) on or before execution of this Agreement and acknowledgment of receipt of the same the Owner acknowledges by signing a receipt which is appeared in the last page of this Agreement and further the Owner shall refund said security deposit of Rs 5,00,000/- (Rupees Five Lacs only) to the Conductor, upon the expiration of these presents by efflux of time or by earlier determination thereof, subject to always to the conditions that said security deposit of Rs 5,00,000/- shall not bear interest of whatsoever nature;

“3. The Conductor admit to pay to the Owner, the monthly royalty of Rs 30,000/- (Rupees Thirty Thousand Only) per month for first year and there **shall be 5% increase** in monthly royalty which will be for second year Rs 31,500/- per

month and for third year Rs 33,075/- per month and said payment shall be remitted to the Owner on first week of every month, without fail for any reason. In the event the Conductor is complying all terms and conditions mentioned hereinabove, then the Owner is having option to extend the period of this Agreement for the period of further three years, subject to condition that there shall be increase of 10% (ten percent) on the said monthly royalty of third year in fourth year and further 10% increase of the monthly royalty of 5th year and again 10% per cent increase of monthly royalty of 6th year.”

“4. That it has been agreed by and between the parties hereto that the Conductor shall be liable to pay the water charges, license fees, electricity charges and society’s maintenance charges in respect of the said business premises, during the subsistence of this Agreement at his own costs, in the name of the Owner and shall give the receipt of said payments to the Owner as and when demanded for;

“5. The Conductor do hereby covenant with the Owner that the Conductor shall pay the

Income Tax, as well as Sales Tax, which number obtained in her own name during the subsistence period of this agreement and shall pay the same, at any event, shall not make said business and/or said premises for whatsoever nature encumbrances and further shall pay such other charges which may be imposed by concerned authorities and may become payable in respect of said hotel business, during the subsistence of this Agreement.”

“8. That the Conductor doth hereby further covenant with the Owner that during the subsistence of these presents, the Conductor shall not sale, assign, transfer, mortgage or create any lien in respect of the said hotel together with its premises and/or the Conductor shall not do any act in any manner which is likely to affect the rights, title, interest, good-will, tenancy of the said hotel in any manner whatsoever nor shall Conductor sub-let, re-let, under-let or create any third party interest either by way of leave and license or otherwise in respect of the said hotel or its premises or any part thereof.”

gives positive impression that said agreement is of subtenancy and

not business facilitation agreement. The fact that conduct agreement was entered into between Applicant and Defendant No.3, Defendant No.3 getting three land line connections issued and installed in her name, based on the said agreement, the fact that Applicant has parted possession to Defendant No.3, the business conduct agreement was entered into at the request of Defendant No.3 and not as per the requirement of Applicant, accepting security deposit of Rs 5,00,000/-, fixed royalty of Rs 30,000/- per month to be payable by Defendant No.3 to the Applicant, 5% cumulative rise on said amount for each year, initially for three years, thereafter 10% rise in last royalty paid, sufficiently establishes agreement of subletting. The recitals in the agreement expressly provides for exclusive right to possession or interest in the suit premises of Defendant No.3 by the Applicant. Obligation in the form of royalty which will be increased every year with cumulative rise sufficiently speaks of receipt of compensation/rent with advance deposit of Rs 5 lakhs.

15] As such, agreement and telephone connections has prompted the Appellate Court to believe that Defendant No.3 is in possession of the suit premises. As such, act of the Applicant tenant that of giving possession of the tenanted accommodation to Defendant No.3, keeping the Plaintiffs in dark has rightly prompted the Appellate Court to form an opinion that the Applicant in clandestine manner transferred possession to Defendant No.3 who is a stranger to Plaintiffs/non-applicant Nos. 1 to 7. As such, Appellate Court has rightly formed an opinion of subletting of the property. Appellate

Court has drawn support from the judgment of the Apex Court in the matter of *Bharat Sales Ltd. vs. Life Insurance Corporation of India* reported in [1998] 3 SCC 1. Agreement entered into between Applicant and Defendant No.3 by no stretch of imagination can be termed as permissive possession and not subletting. Possession handed over by the Applicant is in lieu of not only deposit of Rs 5 lakhs but also for monthly rent in the form of royalty.

16] P.W. 1 / Plaintiff No.2 in my opinion has discharged burden of demonstrating sub-tenancy based on aforesaid documents. Once the Plaintiffs have discharged the burden, then same shift on the Applicant who is duty bound to prove that parting of possession to Defendant No.3 was permissive i.e. within four corners of law. Rather parting of possession was without consent of the landlord and in lieu of fixed royalty to be received by Applicant. As such, support drawn by Mr. Hegde from the aforesaid two judgments of this Court in the matter of *Dipak Banerjee* and *Bhairulal Balmukund Verma* cited supra will be hardly of any assistance. Apart from above, Apex Court in its judgment in the matter of *Celina Coelho Pereira (Ms) and Others vs. Ulhas Mahabaleshwar Kholkar and others* reported in (2010) 1 SCC 217 has already held that if a party hands over possession of tenanted premises without consent of the landlord or keeping the landlord in dark in lieu of the compensation, the issue of subletting can be inferred. Applicant through his evidence in defense has not brought anything to the contrary on record. Rather from the above discussion Non-applicant/landlord has established the case of

subtenancy.

17] In the wake of aforesaid observations, particularly when Plaintiffs have already discharged their burden of demonstrating case of subletting, Applicant was unable to explain about three landline connections provided in the suit premises.

18] In this backdrop, judgment of the Appellate Bench of the Small Causes Court appears to be just and proper and in tune with the law laid down. That being so, no error of jurisdiction could be noticed. Revision Application as such fails and same stands rejected.

19] Interim relief is extended up to 31st December, 2022.

(NITIN W. SAMBRE, J.)