

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 781 OF 2019

GOVIND P. NAIQUE (DEC) BY THEIR LRS.
AND ANR. Petitioners.
VERSUS
DAMASCENO SIMOES (DEC) BY HIS LRS. Respondents.

Mr. Rohan Dessai, Advocate for the petitioners.

Mr. Joaquim Godinho, Advocate for the respondent.

CORAM: PRAKASH D NAIK, J

DATED: 28th September 2023

JUDGMENT :

1. This Petition is preferred under Article 227 of the Constitution of India challenging the order dated 18.7.2018 passed by Court of Civil Judge, Junior Division at Panaji, in Rent Case No.117/2014/D and order dated 3.7.2019 passed by District Judge-1, North Goa Panaji in Rent Appeal No.8/2018.

2. Damasceno Simoes filed an application for eviction under Goa Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968. Mr. Govind P. Naique was Respondent. The application was filed under Section 22(2)(b)(ii) and 22(f) of the said Act.

3. The case of the original applicant in the application for eviction is as follows:

- i. The applicant is the owner and landlord in respect of the building situated at St. Inez, Panaji, Goa consisting of shops on the ground floor and residential tenements on the upper floor. It is multi-storied building. One of the shops on the ground floor was rented to the original respondent. The suit shop was leased to original respondent Govind Naique (hereinafter referred to as opponent) on monthly rent of Rs.300/- exclusive of house tax.
- ii. Suit shop was leased to opponent right from the inception only for the purpose of running a hotel and restaurant therein and for no other purpose and the same was found stipulated in the lease agreement.
- iii. Opponent had stopped running the restaurant business since last three years which he used to run in the suit premises. It was continuously kept closed from February 1992 and from April 1993 it was converted into residential premises by closing the business of restaurant. Certain alterations were made which impaired the value of building.
- iv. Without the consent and authorization of the original applicant, the opponent unilaterally started using the suit premises for the purpose of other than for which it was leased to opponent and as such liable to be evicted from the suit premises interns of Section 22(2)(P)(ii) of the Rent Control Act. The opponent committed such acts of damage which are likely to

impair materially the value and utility of the building, namely the suit premises.

v. The opponent kept the premises closed from February 1992 permanently for a period of 13 months and liable to be evicted.

4. The opponent filed written statement denying the case set out by the applicant. It was contended that the landlord failed and neglected to keep the suit shop in good and tenable repair and the requisite maintenance and as such repair works were carried out by the opponent. The corporation of the city of Panaji conducted inspection of the suit shop and instructed the opponent to carry out the renovation works in the suit shop. The work of renovation and maintenance have improved the get up, value and utility. The opponent was under bona fide belief that no licence from the Municipal Corporation was necessary to carry out the said improvement work. By way of abundant caution, the opponent obtained a repair licence from the corporation on 31.8.2005 for re-flooring, re-plastering, false ceiling and portion with hard board.

5. The original applicant filed an application for amendment to the said application stating that during pendency of the proceedings certain events have taken place which are required to be incorporated in the eviction application. The amendment application was allowed.

6. Vide amendment in the application the original applicant added the following factual aspects.

a. During the pendency of the proceedings on 24.08.2005 the opponent without the consent and authorisation of applicant started carrying out illegal and unauthorised works in the suit premises by engaging labourers.

b. The opponent dug the entire floor of the shop, made holes to walls, removed plaster of the walls and in the process caused damage to the suit premises by doing the illegal and unauthorised work within suit premises which impaired materially the value and utility of the suit premises and the building wherein the suit premises are situated.

c. The applicant instituted Regular Civil Suit No.81 of 2005 in the Court of Civil Judge, Junior Division Panaji for injunction to restrain the opponent, his family members, agents, servants, labourers etc. from in any manner carrying out work of whatsoever nature without consent of applicant.

d. The applicants filed complaint to commissioner of corporation to stop opponent from carrying out illegal works. Another application was made to commissioner of corporation asking for NOC if any granted to opponent by the corporation. The corporation issued copies of NOC and supporting documents.

e. From the documents obtained by applicant which were filed before corporation, the applicant for the first time learnt that the opponent sublet the suit premises to Vinayak Pandurang Kundaikar and that the latter was paying the sign board tax to the Panjim Municipal Council for the year 2003-2004 and he obtained licence in his name of the restaurant business which was being carried out in the suit premises. On the death of said Vinayak Kundaikar his widow Ashwini Vinayak Kundaikar filed affidavit-cum-declaration before the corporation of the city of Panaji stating that her husband was running restaurant by name Uday boarding at St. Inez and that the licence issued by Panaji Municipal Council in respect of said restaurant stands in the name of her late husband and that she authorised her brother-in-law (opponent) to take permission of corporation of city of Panaji to repair the restaurant and that she had no objection if repair licence issued in the name of respondent.

f. The business in suit premises was being conducted by Vinayak Kundaikar and the opponent had sublet the suit premises to him and presently widow of Vinayak Kundaikar, Mrs. Ashwini is conducting the said business.

g. The opponent by carrying out illegal and unauthorised works in the suit premises without consent of applicant and subletting the premises has held liable for eviction from suit

premises in terms of Section 22(2)(b)(i) and 22(2)(c) of Goa Daman and Diu buildings (Lease, Rent and Eviction) Control Act, 1968.

7. The original respondent/opponent filed additional reply stating that the landlord failed and neglected to keep the suit premises in good tenantable repair and the requisite maintenance and repair works were carried out by opponent. The corporation conducted inspection of premises and instructed the opponent to carry out renovation works in suit premises. The opponent put up false ceiling of plaster of paris without causing damage to watts and fixed glazed tiles to the watts of kitchen. The opponent was under bona fide belief that no licence from corporation was necessary to carry out improved work. Vinayak Kundaikar has expired on 11.06.2001. He was brother of opponent and he used to assist the opponent in the conduct of business.

8. Original applicant Damasceno Simoes expired. His daughter Giang Lourdes Simoes filed affidavit in evidence. She has produced on record lease agreement dated 5.5.1970 at Exhibit A/1, Photograph at Exhibit A/2, Judgment passed in case No. 60/83 at A/3, power of attorney at Exhibit-AW₁(e)/1 colly, letter dated 25/08/2005 at Exhibit-AW₁(e)/2, letter dated 6/08/2005 at ExhibitAW₁(e)/3, License issued by Corporation of the City Panaji Exhibit-AW₁(e)/4, Two Receipts issued by Panjim Municipal Council at Exhibit-AW₁(e)/

5 colly, License issued by Panjim Municipal Council at Exhibit-AW1(e)/6, photographs at Exhibit-AW1(e)/7 and Affidavit cum Declaration at Exhibit AW1(e)/8.

9. In the affidavit of evidence it was stated that during pendency of proceedings the opponents started illegal and unauthorised works in suit premises on 24.8.2005. The applicants filed suit before Civil Court for injunction to restrains the opponent from carrying out works without consent of applicants. Documents obtained from the Corporation of the City Panaji, the applicant learnt that respondent sub let the suit shop to Mr. Vinayak Kundaikar and said person was paying sign board tax for Panaji Municipal Corporation for the year 2003-2004. Mr. Vinayak Kundaikar also obtained licence in his name of the restaurant business which was carried out in suit shop. She also deposed that upon the death of Vinayak Pandurang Kundaikar his widow Ashwini Kundaikar filed affidavit cum declaration before the Corporation of the City Panaji stating that her husband was running restaurant by name “Uday Boarding” at St. Inez and that the licence issued by Panaji Municipal Council in respect of the said restaurant stands in the name of her late husband and that she authorised her brother in law to take permission from the Corporation of the City Panaji for repairs of restaurant and that she had no objection if repairs licence is issued in the name of respondent therein. She also deposed that on inquiry

made, it was confirmed that business in the suit shop was conducted by Vinayak Kundaikar and the opponent had sub let the suit shop to Mr. Vinayak Kundaikar and presently widow of Mr. Kundaikar is conducting the business. Said shop was sub let to Mr. Kundaikar without the consent of the original applicant. Opponent denied of sub-letting the suit shop to Mr. Kundaikar. It was contented that Mr. Kundaikar was younger brother of the opponent and used to assist her in conducting business.

10. She was cross-examined by Advocate for respondents.

11. The opponents examined RW1 Uday Naik. He deposed that Ashwini Kundaikar is wife of Vinayak Kundaikar. Repairs licence were obtained in 2005. When the respondent applied for repairs licence, Ashwini Kundaikar gave an affidavit cum declaration to the municipality asking for giving licence in the name of respondent. He admitted contents of affidavit cum declaration. He admitted lease in respect of the suit was not in the name of Vinayak Kundaikar or Ms. Ashwini Kundaikar. Licences are in the name of Vinayak Kundaikar. He was cross-examined at the instance of opponent. He admitted that repairs were carried out without permission of the landlord. Ashwini Kundaikar is wife of Vinayak Kundaikar who is his uncle. Ashwini gave affidavit to the municipality for giving licence in name of his father. In the said affidavit she had stated that the licence in respect of restaurant stands in the name of her late husband and the trade tax

and sign board tax is paid up to the year 2003-2004. His uncle was helping his father in the business and all the work of paying bills, taxes was done by him. Hence, the name of his uncle was mentioned in the trade tax record which was not objected by them as they were staying in joint family. The lease in respect to premises was never in the name of Vinayak or Ashwini.

12. Learned Civil Judge Junior Division, Panaji vide order dated 18.7.2018 allowed the application in Rent Case no.117/2004/D and directed the respondent therein to vacate the suit shop and handover the vacant peaceful possession of the suit shop to the original applicant within one month. It was held that the original applicant failed to prove that the acts of opponents caused damage to the suit shop. Relying upon the receipts of payment of Sign Board Tax and Trade Tax, license issued to Vinayak Kundaikar to operate restaurant in the name of Uday boarding, Affidavit/Declaration of Ashwini Kundaikar, stating that her husband Vinayak was running restaurant by name Uday boarding situated at St. Inez and evidence of RW1 Uday Naik, presumption of Sub-letting will have to raised. The issue whether the applicant proved that the opponent sublet the premise to Vinayak Kundaikar was answered in Affirmative. The issues whether the applicant proves that opponent ceased to occupy the suit premises for continues period of four months without reasonable cause and whether the applicant proves that suit premise

was used for the purpose other than that for which it was leased were answered in negative.

13. Judgment and order dated 18.7.2018 was challenged by Petitioners before the District Judge-1 North Goa by preferring Rent Appeal No. 8/2018. Cross objections/cross appeal was preferred by original applicants challenging issues answered in negative by learned Civil Judge. Vide Judgment and order dated 3.7.2019 the appeal preferred by Petitioners was dismissed and the cross objections/cross appeal was partly allowed. Respondent had filed cross appeal/cross objection which was partly allowed. Impugned judgment by which it was held that original respondent/opponent sub let the said suit shop to Vinayak Kundaikar and directing the respondent to vacate the suit and hand over vacant and peaceful possession of the same to the original applicant was confirmed. The impugned Judgment to the effect that it holds that original applicant failed to prove that the said respondent caused damages to the suit shop and that the original applicant failed to prove that the suit shop remained closed from February 1992 for a continuous period of 4 months, was quashed and set aside. The impugned Judgment to the effect that it holds that the original applicant has failed to prove that the suit shop was used for purposes other than that for which it was leased, was confirmed. The respondent was directed to vacate the suit shop and hand over vacant and peaceful possession of the same to the

applicant within a period of 60 days.

14. Learned Advocate for the petitioners submitted that findings of both Courts are contrary to law. The appellate Court could not have decided cross objection in favour of the respondent at the most could have been against decree and not findings. Cross objections/Appeal was not maintainable. Appeal could be filed against the decree and not findings. Tenant is entitled to carry out repairs. Trial Court came to the conclusion that the petitioners have sub let premises to Mr. Vinayak Kundaikar only on the basis of the trade licence which was issued in the name of said person. As per Trade Licence bye laws, it is important that before trade licence is issued NOC of the owner is obtained. It is difficult to accept that the Panaji Municipal Council could issue no objection certificate to the petitioners in the name of Mr. Vinayak Kundaikar without the consent of the owner. Respondent was aware that the petitioners were running the business along with his brother and family and at no point of time Mr. Vinayak Kundaikar was in exclusive possession of the premises. It was improper for the trial Court to come to the conclusion that the petitioners have sub let the premises to Vinayak Kundaikar. Sub lease of the premises should be for monetary consideration. Respondent has failed to plead and prove or establish such monetary consideration. Appellate Court committed an error in entertaining cross objection by relying on Rule 9(3) of the Goa

Daman and Diu Building (Lease, Rent and Eviction) Rules 1969. The appellate Court failed to take into consideration that provision for cross objection under the Code of Civil Procedure was introduced for the first time by way of amendment in 1976. Rules came into force in 1969 and it was impossible that Rule would refer to the provisions of cross objection which were not even in force at the relevant time. The appellate Court has relied upon the licence issued by the Municipal Council without considering the aspect of sub tenant being in exclusive possession of the premises. The appellate Court has committed error in holding that petitioners have carried out repairs which could damage the building or impair its value. Repairs which were being carried out by the petitioners were pursuant to the direction of the municipality and would upgrade the habitability of the premises. The appellate Court committed error in concluding that petitioners have carried out unauthorised repairs to the premises without any finding whether alterations have impaired the value or utility of the building. The appellate Court have wrongly held that the petitioners have ceased to occupy premises for a continuous period of four months from February 1992. The landlord has failed to establish that the premises were closed for four months. Although the trade licence was issued in the name of Mr. Vinayak Kundaikar, respondent was aware that the petitioners were running the said business along with brother and his wife i.e Vinayak Kundaikar and Ashwini

Kundaikar. Petitioners have produced records from electricity department which demonstrates that units are consumed during the alleged closer of business which sufficiently indicates that conclusion arrived at by the appellate Court is erroneous. Goa Daman and Diu Building (Lease, Rent and Eviction) Act, is a beneficial legislation and it meant to protect the tenants from illegal eviction. Heavy burden was on the landlord and not on tenant to establish the case for eviction.

15. Mr. Dessai relied upon following decisions:-

- i. Nirmal Kanta(Dead) through Lrs Vs Ashok Kumar and another¹*
- ii. Poona Herald Pvt. Ltd and others Vs Smt. Urmila Vinod Motee and others²*
- iii. Gulabchand Ramchand Jain Vs. Noorbeg Umarbeg Mirza³*

16. Learned Advocate Mr. J. Godinho, appearing for the respondent submitted that no interference is warranted in the impugned orders. There are concurrent findings in respect of sub letting. This is not a fit case to exercise jurisdiction under Article 227 of the Constitution of India. Evidence of AW1(e) Ms. Giana Lourdes Simoes was taken into consideration by the trial Court. Said witness has deposed from the documents obtained from Corporation of the City Panaji. The applicant for the first time learnt that the

1 . (2008) 7 SCC 722

2. 2008(4) Mh. L. J.

3. AIR 1980 Bom 307.

respondent had sub let the suit shop to Mr. Vinayak Kundaikar and he was paying sign board tax to the Panaji Municipal Council for the year 2003-2004. He obtained licence in his name of restaurant business which was carried out in the said shop. She also stated that upon death of Vinayak Kundaikar, his widow Ashwini Kundaikar filed affidavit cum declaration before Corporation of the City Panaji stating that her husband was running restaurant by name “Uday boarding” St. Inex and the licence issued by Panaji Municipal Council in respect of the said restaurant stands in the name of her late husband and she authorised her brother in law i.e respondent to take permission from Corporation of the City Panaji to repair the restaurant and she has no objection, if repairs licence is issued in the name of the respondent. Said witness has also deposed that on inquiries made it was confirmed that the business in the suit shop was conducted by Vinayak Kundaikar and that the respondent sub let the suit shop to Mr. Kundaikar and presently widow of Mr. Kundaikar is conducting the business. She also deposed that respondent sub let the suit shop to Mr. Kundaikar without the consent of the applicant. Respondent had produced on record receipts from Panaji Municipal Council showing that Mr. Kundaikar was paying sign board tax and trade tax. Licence issued to Mr. Kundaikar to operate restaurant in the name of “Uday Boarding” was also produced. Affidavit cum declaration of Ashwini Kundaikar stating that Vinayak Kundaikar was running the

restaurant was produced. Mr. Uday Naik admitted that licence was issued in the name of Vinayak Kundaikar. Suit shop was lease to petitioner.

17. It is further submitted that there is no infirmity in the findings of the learned Civil Judge Junior Division allowing the application preferred by the respondent. In Paragraph 12 of the order passed by the appellate Court it was observed that AW1 has reiterated from the documents obtained by them from the corporation it was learnt that respondent had sub let premises to Vinayak Kundaikar. Reference is made to the deposition of AW1. Paragraph 13 of the said decision refers to the documents produced by AW1. Learned counsel for the respondent referred to the documents annexed at page 68, 69 and 70 of this petition which are receipts issued by the Panaji Municipal Council about sign board tax in the name of Vinayak Pandurang Kundaikar and licence fees paid by Vinayak Pandurang Kundaikar with respect to the Restaurant “Uday Boarding” and affidavit cum declaration executed by Ashwini Kundaikar stating that she is widow of Vinayak Kundaikar and her husband was running the restaurant “Uday Boarding” situated at St. Inez Panaji.

18. It is submitted that both the Courts below has passed well reasoned orders which does not call for any interference. The appellate Court was empowered to give findings on the basis of the cross objections and cross appeal. Even otherwise there is concurrent

findings with regard to sub letting the premises which is established on the basis of the oral and documentary evidence.

19. Mr. Godinho has relied upon following decisions:-

- i. *Garment Carft Vs Prakash Chand Goel*,⁴
- ii. *Mrs. Labhkuwar Bhagwani Shaha Vs Janardhan Mahadeo Kalan and another*,⁵
- iii. *Ram Murti Devi Vs Pushpa Devi and others*,⁶
- iv. *A. Mahalakshmi Vs. Bala Venkatram(dead) through Legal Representatives and another*,⁷
- v. *Prem Prakash Vs Santosh Kumar Jain and sons(HUF) and others*,⁸

20. Factual analyses of the proceedings would indicate that Mr. Damasceno Simoes filed an eviction application no. 12/1995 before the Court of Rent Controller, Goa North Division at Panaji under Section 22(2)(b)(ii) and 22(f) of the Goa, Daman and Diu Buildings(Lease, Rent, and Eviction) Control Act, 1968. Petitioner no.1 was impleaded as respondent in the said application. The applicant stated that he is owner and landlord of building situated at St. Inez, Panaji Goa consisting of shops on the ground floor and residential tenements on the upper floor. One of the shops on the ground floor is rented to the respondent therein which was referred to as suit shop. It was leased to the respondent on payment of

4. (2022) 4 SCC 181

5. (1982) 3 SCC 514

6. (2017) 15 SCC 230

7. (2020) 2 SCC 531

8. (2018) 12 SCC 637

monthly rent of Rs.300/- per month exclusive of house tax. In 1983 respondent committed default in payment of rent and the applicant instituted eviction proceedings under Section 22(a) of the Goa, Daman and Diu Buildings(Lease, Rent, and Eviction) Control Act, 1968. In the said eviction proceedings respondent took benefit of Section 22(3) by paying entire arrears of rent. Vide judgment and order dated 23.3.1990, application was disallowed. The suit shop was leased to the respondent therein for the purpose of running hotel and restaurant. However, respondent stopped running restaurant business since last three years. It was continuously kept closed. Without the consent of the applicant respondent therein unilaterally started using the premises for some other purpose. Eviction application was filed on 28.3.1995. subsequently amendment application was filed on 9.12.2005. By way of amendment it was pleaded that respondent therein had dug the entire floor of the suit shop and made holes to the wall of the premises and caused damage to the premises. Respondent committed such acts of damage by carrying unauthorised work over the suit premises which impaired the value or utility of the premises. It was also pleaded that from the documents obtained by the applicant which were filed before the Corporation of the City Panaji, for the first time it was learnt that respondent therein had sub let the suit premises to Mr. Vinayak Pandurang Kundaikar and that he had paid sign board tax to Panaji

Municipal Council for year 2003-2004 and he has obtained licence in his name of the restaurant business which was carried out in the premises. On the death of Vinayak Kundaikar his widow Ashwini Kundaikar filed affidavit cum declaration before the Corporation of the City Panaji stating that her husband was running restaurant by name “Uday Boarding” at St. Inez Panaji and the licence issued by council in respect of the restaurant stands in the name of her late husband and she has authorised her brother in law i.e respondent therein to take permission of the Corporation to repair the said restaurant and she has no objection if required licence is issued in the name of said respondent. Hence, the respondent has made himself liable for eviction from the premises in terms of Section 22(2)(b)(i) and 22(2)(C) of the Goa Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968. Amendment was allowed. Evidence of respective parties were recorded.

21. Considering the evidence on record, learned Civil Judge, Junior Division vide order dated 18.7.2018 allowed the application and directed the respondent/petitioner to vacate the suit shop and handover vacant possession to the applicant.

22. Perusal of the judgment and order passed by learned Civil Judge, Junior Division, it is apparent that the Court held that applicant has proved that respondent sub let the suit premises to Vinayak Kundaikar. However, other issues are whether the applicant

therein proved that respondent has committed the act of damage that is likely to impair materially the value or utility of the suit premises, whether the applicant proves that respondent ceased to occupy the suit premises for continuous period of four months without reasonable cause and whether the applicant proves that suit premises were used for the purpose other than that for which it was leased, were answered in the negative.

23. By way of amendment original applicant has incorporated additional ground of eviction i.e sub letting and pleading in support of the grounds that the original respondent has caused damages to the suit shop. Amendment was allowed and the said order has attained finality. Record indicate that Vinayak Pandurang Kundaikar was paying sign board tax to the Municipality. He obtained licence in his name of the restaurant business which was carried out in the suit shop. Upon the death of Vinayak Kundaikar his wife filed affidavit cum declaration before the Corporation of the City Panaji stating that her husband was running the restaurant by name “Uday Boarding” at St. Inez. Licence issued by Panaji Municipal Council in respect of said restaurant stands in the name of Mr. Vinayak Kundaikar. Contention of the opponent is that Vinayak Kundaikar was younger brother and he used to assist him in conducting business. There was denial of sub letting. However, there was sufficient evidence to establish that the petitioner had sub let the

suit shop. Receipts from Panaji Municipal Council shows that Vinayak Kundaikar was paying sign board tax and trade tax. Licence issued to Vinayak Kundaikar was produced in indicate that he was operating restaurant in the name of “Uday Boarding”. Uday Naik admitted that the licence was issued in the name of Vinayak Kundaikar. It is pertinent to note that suit shop was leased to original respondent. Explanation of the respondent that shop was not sub let and Vinayak Kundaikar was the younger brother of original respondent and he used to assist respondent in conducting the business was rejected by Court. Original applicant by producing documents had discharged initial burden by showing proof of fact that parties other than the tenant was in exclusive possession of the suit shop. The first Court has already observed that presumption of sub letting will have to be raised and would amount to proof as the respondent has failed to prove by leading cogent evidence.

24. The appellate Court confirmed the findings with regard to sub letting and has also given finding in favour of the original applicant on the other issues. It is pertinent to note that there are concurrent findings in respect of sub letting by both the Courts below. Even if other findings of the appellate Court which was negated by first Court are brushed aside, petitioner could not get over the findings of sub letting which has been established by cogent evidence. The appellate Court has observed that AW1 has produced several

documents. Case of the original applicant of sub letting is not established only on oral evidence but it is supported by documentary evidence. RW1 has stated in cross examination that he does not have any licence for the year 1992 to 1995 for the restaurant. He was unable to produce NOC by health department, electricity bill, income tax returns, water bill and documents regarding gas connection for the said period. RW1 who is son of original respondent ought to have been in possession of the documents if his father was running the restaurant. He could have applied to the authorities for documents to establish that it was his father who was running the restaurant. It was observed that landlord is required to adduce prima facie proof of the fact that sub tenant as in exclusive possession of the premises and when this is done, a presumption of subletting can be drawn.

25. In the present case, evidence on record does not show that the possession of the premises was with original tenant. There is no evidence suggestive of the fact that family of the original tenant was a joint family which included his brother and his brother's family. Wife of Vinayak Kundaikar would not have stated in her affidavit cum declaration that her husband was running the restaurant. In the cross examination of RW1 it was suggested to him that Ashwini Kundaikar has stated in affidavit that she and her husband were running the restaurant by name "Uday Boarding" to which he replied that she does not known English. Ashwini

Kundaikar has not been examined by original respondent. Original applicant has examined notary before whom affidavit cum declaration was executed. He identified the affidavit cum declaration and stated that Ashwini Kundaikar was aware of the contents of the affidavit as he explained it to her and she has signed it in Devanagari script. Original respondent did not cross examine this witness. The appellate Court observed that though documentary evidence establish the fact that it was Vinayak Kundaikar who was running the restaurant, original respondent had not examined wife and children of Vinayak Kundaikar to establish that he was helping the respondent in the business and that they were living in joint family. Though RW1 in cross examination stated that they were staying in joint family, such statement cannot be accepted as it is not backed by pleadings. The Appellate Court referred to several decisions on the point of sub letting the premises by the tenant and held that sub letting of the premises is proved. The appellate Court also observed that licence to run the restaurant is in the name of Vinayak Kundaikar, tax receipts are also in his name and his wife has stated that restaurant was run by Vinayak Kundaikar. Not a single document is produced in evidence to show that original respondent was running the restaurant prior to affidavit cum declaration of Ashwini Kundaikar. Thus, sub tenancy was created with money consideration in mind.

26. The appellate Court also dealt with the other issues which were answered in the negative by the first Court. The appellate Court observed that eviction was also on the ground that tenant made certain alterations/modification to the suit shop which impaired its value and that the tenant ceased to occupy the suit shop for a period of four months without a reasonable cause and utilized it for the purpose other than it was lease. Landlord had filed cross objection/cross appeal being aggrieved by the fact that the trial Court has held that landlord has failed to prove that respondent committed such act to damage that are likely to impair materially the value and utility of the suit shop and that landlord failed to prove that respondent ceased to occupy the suit shop for continuous period of four months without reasonable cause and that it was used for some other purpose other than it that for which it was leased. The appellate Court observed that combined reading of Sub Rule 1 and Sub Rule 2 of Rule 9 of the Goa Daman Diu Buildings (Lease, Rent Eviction) Control Rules 1969 will make it manifest that these two provisions relate to proceeding before Controller or Rent Tribunal and not to the Appellate Board. The procedure to be followed by the Appellate Board is dealt with under Sub Rule 3 of Rule 9 and hence cross appeal and cross objection can be entertained by said Court as an Appellate Board under the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968. Learned Judge dealt with objection of

the tenant that the original applicant cannot file cross objection to mere finding in the impugned order. Referring to the Judgments relied upon by the appellants in the case of **Municipal Corporation of Delhi and others Vs. Intl. Security and Intelligence Agency Ltd⁹** and discussion in the case of ***Gulabchand Ramchand Jain Vs Noorbeg Umarbeg Mirza, (supra)*** the Appellate Court has observed that observations in the judgment referred to herein above will make it clear that cross objections are maintainable by landlord when eviction is sought for by the landlord on more grounds than one but the eviction is ordered on one of such grounds.

27. The appellate Court has passed well reasoned order by appreciating the evidence and analysing the legal precedent. It does not warrant interference. The cross objections/Appeal was maintainable. Even otherwise there is concurrent finding of subletting which has been established by evidence and does not call for interference. Additional findings of the Appellate Court also does not call for interference. Said findings are based on appreciation of evidence and the factual aspect of case. The appellate Court held that trial Court had erred in holding that landlord has failed to prove the act of respondent that caused damage to the suit shop. Suit shop was closed for continuous period from 1992 to 1993. Issue that whether the tenant had converted suit shop into residential premises was rightly negated by trial Court.

9 JT 2003(2) SC 103

28. The evidence of AW1 Ms. Giana Simoes is Cogent. She deposed that from documents obtained from corporation it was first time learnt that premises was sublet to Vinayak Kundaikar. He was paying sign board tax to Municipal Corporation. He obtained license in his name of the restaurant business carved out in shop. Wife of Vinayak filed Affidavit/declaration stating that her husband was running the restaurant and sicense stands in name of husband. She authorised her brother-in-law to repair the restaurant. Admissions of RW1 Uday Naik confirmed the claim of Applicants. The documentary evidence corroborates version of AW1. Receipts from Panaji Municipal Counsel about payment of Sign Board Tax and trade tax were produced. Affidavit of Ashwini Kundaikar was produced. The Evidence was considered by first Court and Appellate Court. No case is made out to interfere in exercise of powers under Article 227 of the Constitution of India.

29. In the case of ***Nirmal Kanta(Dead) through Lrs Vs Ashok Kumar and another*** (supra), it was held that the main ingredients of sub tenancy i.e parting with exclusive possession of the tenanted premises having not been established, it may at best be said that the alleged sub tenant was a licensee as a tenant and landlord is not entitled to obtain decree for eviction on the ground of subletting.

30. In the case of ***Poona Herald Pvt. Ltd and others Vs Smt. Urmila Vinod Motee and others***, 2008(4) Mh. L. J.(supra), it is held

that merely because the tenant has accepted two others as partners for carrying on business it cannot be said that they do not require the suit premises for themselves or that the possession is required for somebody else.

31. In the case of *Gulabchand Ramchand Jain vs Noorbeg Umarbeg Mirza*(supra) it was held that decree passed by the Courts below cannot be reversed even when higher Court holds in favour of the petitioner on the question of default in payment of rent because decree passed on the ground mentioned in Section 13(1)(g) read with Section 32 of the Bombay Rent Act is valid.

32. In the *Garment Craft Vs Praksh Chand Goel* (supra), it is observed that High Court exercising supervisory jurisdiction under Article 227 of the Constitution of India does not act as a Court of first Appeal to re appreciate, reweigh evidence or facts upon which determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when final finding is justified or can be supported. High Court is not to substitute its own decision on facts and conclusion, for that of inferior Court or Tribunal. Jurisdiction exercised is in nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. Power under Article 227 of the Constitution of India is exercised sparingly in appropriate cases, like when there is no evidence at all to

justify, or finding is so perverse that no reasonable person can possibly come to such a conclusion that Court or Tribunal has come to.

33. In the case of *Mrs. Labhkuwar Bhagwani Shaha and others vs. Janardhan Mahadeo Kalan and another* (supra), it is held that concurrent findings of fact, whether relating to jurisdictional issue or otherwise, of lower Court are not open to interference by High Court under Article 227 of the Constitution of India. The question regarding actual date of sub letting is a pure question of fact, even if it is relevant for determining sub tenant's entitlement to statutory protection. Concurrent findings of lower Courts on such questions arrived at on appreciating the entire material, cannot be reappreciated by the High Court under Article 227 of the Constitution of India.

34. In the case of *Ram Murti Devi Vs Pushpa Devi and others, (supra)*, it was held that in a suit by landlord for eviction of tenant on the ground of sub letting the landlord had to prove by leading evidence that third party was found to be in exclusive possession of the whole or part of the rented property, parting of possession thereof was for monetary consideration. The onus to prove sub letting is on the landlord and if he establishes parting of possession in favour of a third party either wholly or partly, the onus shifts to the tenant to explain the same. In the event, possession of

the sub tenant wholly or partly is proved and the particulars and the instances of the transactions are found acceptable, it is not impermissible for the Court to draw an inference that the transaction was entered for monetary consideration.

35. In the case of *A. Mahalakshmi Vs Bala Venkatram (Dead) through Legal representatives and another* (supra), it is held that when the eviction is sought on the ground of sub letting, the onus to prove sub-letting is on the landlord and if landlord prima facie shows that the third party is in exclusive possession of premises let out for valuable consideration, it would then be for tenant to rebut the evidence.

36. In the case of *Prem Prakash Vs Santosh Kumar Jain and Sons(HUF) and others* (supra), it is held that initial burden to prove that sub tenant is in exclusive possession of property is on landlord. However such proof is based on preponderance of probability. Once landlord succeeds in establishing factum of sub tenancy, burden to rebut it lies on the tenant.

37. Considering the factual aspects, evidence on record, judicial precedent, I do not find any reason to deviate from the view expressed by the Courts below and to interfere in the impugned judgment. Petition is required to be dismissed.

ORDER

(i) Writ Petition No.781/2019 is dismissed.

(ii) At this stage, learned counsel for the petitioners seeks eight weeks time to vacate the subject suit shop. Prayer for grant of time to vacate premises is opposed by the learned counsel for the respondent. Petitioners are granted eight weeks time to vacate the suit shop subject to filing an undertaking before this Court that the suit shop will be vacated and possession will be handed over to the respondent on expeditiously within a period of 8 weeks.

(iii) Writ Petition is disposed of.

PRAKASH D. NAIK, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK
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