

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 508 OF 2019

Purushottam Dhondiba Rajadne (Since. Decd. Thru Lrs.)

Smt. Kusum Purushottam Rajadne & Ors.

... Applicants

Versus

Vilas Vimalnath Deshmane And Anr.

... Respondents

Mr. Drupad Patil a/w Ms. Srushti Chalke for the Applicants.

Mr. Siddharth Shitole a/w Mr. Akshay Kulkarni i/b Mr. Ashutosh M. Kulkarni for the Respondents.

CORAM : SANDEEP V. MARNE, J.

DATE : 19 JULY 2024.

P.C. :

1) Revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure, 1908 is invoked challenging the judgment and decree dated 21 July 2018 passed by Extra Joint District Judge, Barshi allowing Regular Civil Appeal Suit No. 12 of 2014 and reversing the decree dated 11 February 2004 passed by Joint Civil Judge, Junior Division, Barshi in Regular Civil Suit No. 272 of 1993.

2) An Agreement dated 30 October 1987 came to be executed between Petitioner/Plaintiff and Respondent/Defendant by which, the suit land came to be granted to the Defendant on monthly rent of Rs. 280/- for

operating grocery shop. It appears that the Defendant was permitted to carry out construction in the open land and the construction cost was to be adjusted partly against the rent. The tenure of the agreement was till 30 April 1992 after which, Defendant was supposed to vacate the demised land with or without structure.

3) Plaintiff filed Regular Civil Suit No. 272 of 1993 in the Court of Civil Judge, Junior Division, Barshi seeking recovery of the suit premises by describing the Agreement dated 30 October 1987 as mere licence. The main ground for recovery of possession was expiry of licence. Additionally, Plaintiff also pleaded the grounds of change of user as well as default in payment of rent. It appears that the Defendant filed application for fixation of standard rent after receipt of the suit summons. The Trial Court proceeded to decree the suit by Judgment and Order dated 11 February 2004 holding that the Agreement dated 30 October 1987 was a mere licence and that Defendant No. 1 was not a tenant in respect of the suit premises. The Trial Court however rejected the ground of subletting by Defendant No. 1 in favour of Defendant No. 2. However, the Trial Court accepted the ground of change of user. This is how the suit came to be decreed by directing Defendant No. 1 to handover possession of the suit premises to the Plaintiff with further directions to conduct inquiry into mesne profits under Order 20 Rule 12(c) of the Code of Civil Procedure, 1908. The application for fixation of standard rent came to be dismissed.

4) Defendant No. 1 filed Civil Appeal No. 64 of 2004 before District Court, Barshi, which has been allowed by the Appellate Court vide Judgment

and Order dated 21 July 2018 by reversing the decision of the Trial Court. The Appellate Bench held that Defendant No. 1 is a tenant. The Appellate Bench has further rejected the ground of change of user. Accordingly Suit filed by Plaintiff has been dismissed and standard rent in respect of the suit premises is fixed at Rs. 280/- per month. Aggrieved by the reversal by the Appellate Court, Plaintiff has filed the present Revision Application.

5) I have heard Mr. Patil, the learned counsel appearing for Applicants. He would submit that the agreement was for specified period upto 30 April 1992 and the same was only in respect of vacant land. He would submit that thus the intention between the parties was not to create tenancy but merely to grant license in favour of the First Defendant. Mr. Patil would further submit that even if the first Defendant is treated to be a tenant, the ground of change of user is clearly made out. He would submit that sufficient evidence was produced by Plaintiff to demonstrate that the first Defendant was operating cloth shop in the suit premises. That written agreement executed between the parties permitted operation of only grocery shop and in the light of specific covenant in the agreement, it was impermissible for the first Defendant to change the use as cloth shop. Relying on the Judgment of the Apex Court in ***Dasharath Baburao Sangale & Ors. Vs. Kashimath Bhaskar Data***¹, Mr. Patil would contend that if there is clear stipulation in the lease deed for use of premises to run a particular business, even change in nature of business would amount to change of user. He would also rely upon Judgment of Gujarat High Court in ***Harshadbhai Gordhanbhai Amin Vs. Vanmalidas Parmananddas Pate***². Mr. Patil would

1 1994 Supp (1) SCC 504

2 (1998) 3 GUJ LR 2427

further submit that once *prima facie* material was produced by Plaintiff by examining photographer and showing photographs of cloths kept for sale in the suit shop, the burden shifted on the first Defendant to prove that he was indeed operating a grocery shop in the suit premises. That in the cross-examination, Defendant stated that he was in possession of shop license for running grocery shop, but he never produced the same. That in the light of discharge of initial burden by the Plaintiff and failure to produce any evidence by the first Defendant, the Appellate Bench has erroneously accepted the defence of the first Defendant about running of grocery shop. He would submit that the Appellate Court has mixed the photographs produced by the first Defendant at Exhibit 157 and 158 with the photographs of the suit shop produced by Plaintiff at Exhibit 85 and 86 and has recorded an erroneous finding of fact that the photographs at Exhibit 85 and 86 pertained to cloth store in another premises. He would, therefore, submit that the judgment of the Appellate Bench suffers from perversity and deserves to be set aside.

6) *Per contra*, Mr. Shitole the learned counsel appearing for Respondent No. 1 would oppose the Application and support the Order of the District Court. He would submit that the Plaintiff came out with a false case of first Defendant's brother (Defendant No.2) running cloth shop in the suit premises. That it got proved during the course of the Trial that Defendant No. 2 has been operating Prakash Cloth Stores in altogether different premises. That even if it is assumed that photographs at Exhibit 85 and 86 pertain to the suit premises, mere hanging of few clothes in the suit premises is not sufficient to draw an inference that the first Defendant was

not operating grocery shop in the suit premises. He would pray for dismissal of the Civil Revision Application.

7) Having considered the submissions canvassed by the learned counsel appearing for parties, the first dispute is about the nature of transaction between the parties. The Agreement dated 30 October 1987 clearly uses the term 'rent'. That apart, Section 6 of the Bombay Rents, Hotel and Lodging, House Rates Control Act, 1947 (in short "**Rent Act**") provides for application of provisions of the Act to even premises given on license in areas specified in Schedule I for any purpose. Therefore, even if it is assumed that the Agreement dated 30 October 1987 is a license, provision for the Bombay Rent Act would be applicable in respect of the premises in question. Once the provisions of Bombay Rent Act become applicable, the First Defendant automatically becomes tenant and gets protection under provisions of Section 12 thereof. Therefore, irrespective of expiry of tenure of the so-called license agreement, the first Defendant became entitled to continue in possession of the suit premises by regularly paying the rent and by observing the terms and conditions of the tenancy. Therefore, mere expiry of the tenure of the agreement did not entitle Plaintiff-landlord to seek a decree of eviction against the First Defendant.

8) So far as the ground of change of user is concerned, the allegation is that the agreement provided for use of the suit premises only for running of grocery shop whereas the first Defendant was running a cloth shop in the suit premises. Here the allegation of change of user must be considered in the light of the case that was set up by the Plaintiff. In the

Plaint, it was Plaintiff's case that the first Defendant allowed Defendant No. 2 (Brother) to use the suit premises and that the second Defendant started operating 'Prakash Cloth Stores' in the suit premises. The assertion on the part of the Plaintiff about second Defendant using the suit premises for operation of cloth stores got disproved before the Trial Court itself. The Trial Court accordingly rejected the ground of subletting. This left the allegation of non-user to be proved on standalone basis without any connection with the second Defendant. To prove operation of cloth shop in the suit premises, apart from deposition of his attorney, Plaintiff relied upon photographs at Exhibit 85 and 86. The Trial Court was persuaded to accept the said photographs for the purpose of holding that cloth shop was being operated in the suit premises. I have gone through the said photographs at Exhibit 85 and 86, which are taken from some distance and which do depict hanging of some garments kept for sale in suit premises. However, mere display of some garments for sale in the front portion of the suit premises would not *ipso facto* lead to a presumption that the entire suit premises were being used exclusively for the purpose of sale of garments. It was for Plaintiff to produce concrete evidence in support of the assertion that the suit premises were being used exclusively for sale of garments. No such evidence was produced by Plaintiff. I am unable to accept the contention of Mr. Patil that there was any initial burden on Plaintiff or that the initial burden was discharged by Plaintiff by production of photographs or that the burden then shifted on to the first Defendant. It was Plaintiff's assertion that cloth shop was being run in the suit premises and it was for the Plaintiff to prove the same on account of denial of such assertion by the first Defendant. In my view therefore, though the Appellate Court has committed a possible error

by referring to photographs at Exhibit 157 and 158 for arriving at conclusion that the said photographs are not in respect of the suit premises, such an error on the part of the Appellate Court would not be reason enough to set aside its decision.

9) Even otherwise, I find myself difficult to convince that keeping articles (cloth and clothes) different than the articles agreed in the agreement (grocery items) to be sold in the premises would by itself constitute change of user. The suit premises undoubtedly were to be used for operation of grocery shop in which usually grocery items are usually displayed for retail sale. It may happen that in a given case, the shop operator may sale items which may not be strictly classified as grocery items. Such sale may be exclusively of such items or in conjunction with the grocery items. In the facts of the present case, even if it is assumed that some garments were kept by the first Defendant for sale in the suit premises, it is difficult to hold that there was any change of user on the part of the first Defendant.

10) Reliance of Mr. Patil on the Judgment of the Apex Court in ***Dashrath Baburao Sangale*** (supra) does not cut any ice. In that case the open land was let out for the business of sugarcane crushing whereas, the tenant therein set up a shop for sale of cloth and ready-made cloths. In the light of facts of that case the Apex Court held that there was change of user. Similarly, in ***Harshadbhai Gordhanbhai Amin*** (supra) the Gujrat High Court has dealt with a case where the premises let out for operation of grocery and general merchandise shop was converted into scooter repair shop.

Therefore, in the facts of that case the Gujrat High Court held that there was change of user.

11) In the present case, the Plaintiff neither proved that the suit shop was being used exclusively for sale of cloth/ready-made clothes or that the first Defendant was not selling even a single grocery item in the suit shop. Even otherwise in the facts of the present case, it is difficult to infer that there was change of user even if cloth or ready-made clothes were displayed for sale in the suit shop.

12) After considering the overall conspectus of the case, I am of the view that the Appellate Court has not committed any serious error in reversing the decision of the Trial Court, so as to warrant exercise of revisionary jurisdiction by this Court under Section 115 of the Code of Civil Procedure. The Civil Revision Application is accordingly **dismissed** without any order as to costs.

13) After the Order is pronounced, Mr. Patil would submit that since the initial agreement was for open land, Plaintiff desires to file a fresh suit seeking eviction of the Defendant after coming into effect of the provisions of Maharashtra Rent Control Act 1999, which, according to him, does not cover open piece of land within the definition of the term 'premises'. If such suit is maintainable in law, the Plaintiff would obviously be entitled to prosecute such fresh suit. No opinion is expressed about maintainability of such fresh suit. All contentions of the parties in such fresh suit are kept open.

[SANDEEP V. MARNE, J.]