

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 811 OF 1986

Yashwant Chandrakant Patil (since deceased)

Through legal heirs

1(a) Hanmant Chandru Patil (since deceased)

Through legal heirs

1(a)1 Kamlabhai Hanmant Patil

1(a)2 Ashok Hanmant Patil

1(a)3 Dattatray Hanmant Patil

1(a)4 Sanjay Hanmant Patil

having address at 183, Raut Lane,
Village - Shittur Tarf Varun, Taluka-Shahuwadi,
District - Kolhapur 416214

1(b) Baburao Chandru Patil, Age 70 years
residing at Baibhav Apartments, Building No. 3
4th Floor, Block No. 402, Sanghani Estate, LBS
Marg, Mumbai - 400086

..Appellants

Versus

Mukund Nethaji Shelke (since deceased)

Through legal heirs

1(a) Anusaya Mukund Shelke (deceased)

1(b) Manish Mukund Shelke, Age 38 years.

Occ: Business, residing at B-31, Hit-Niketan Co-

operative Housing Society Ltd. S.P.S. Road, Kokan

Nagar, Bhandup (West), Mumbai – 400078

...Respondent

WITH
CIVIL APPLICATION NO. 517 OF 2017
IN
CIVIL APPLICATION NO. 656 OF 2016
WITH
CIVIL APPLICATION NO. 656 OF 2016
WITH
INTERIM APPLICATION NO. 2906 OF 2020
WITH
INTERIM APPLICATION NO. 12982 OF 2023
WITH
INTERIM APPLICATION NO. 16634 OF 2022
IN
FIRST APPEAL NO. 811 OF 1986

Manish Mukund Shelke .

..Applicant

IN THE MATTER BETWEEN

Yeshwant Chandrakant Patil (deceased) Thr. Lrs.

Shri. Hanmant Chandru Patil (deceased) Thr. Lrs.

Kamlabhai Hanmant Patil And Ors.

...Appellants

Vs

Mukund Nethaji Shelke (since deceased)

Through Lrs. Manish Mukund Shelke

....Respondents

Mr. Ajay Panicker i/b Ajay Law Associates for the Appellants.

Mr. Balkrishna Joshi a/w. Adv. Virendra Pethe for the Respondents and for Applicant in all Applications.

CORAM : M. M. SATHAYE, J.

RESERVED ON : 18 December 2023

PRONOUNCED ON : 14 MARCH 2024

JUDGMENT :

1. This Appeal is filed challenging the judgment and decree dated 7 March 1986 passed by the Judge, City Civil Court, Bombay in S. C. Suit No. 6153 of 1980. The Appeal is filed by the Plaintiff. By the said Judgment and Decree, the suit filed by the Appellant/Plaintiff is dismissed. For the sake of convenience the Appellant is hereinafter referred to as the Plaintiff and the Respondent is hereinafter referred to as the Defendant in their original capacity in the suit.

2. The Plaintiff filed the said suit claiming to be the owner of the business of a printing press, which he has been carrying in the name and style of "*Yeshwant Printing Press*" in the suit premises ("the suit business" for short). The description of the suit premises given in the Plaint is only the description of the plot on which the suit building is standing. It is stated to be plot No. 8, Sai Niwas Plot, Netaji Baug, Agra Road, Opposite A.P.I. Company, Bhandup, Bombay - 400078. The Plaintiff claims to be the owner of the machinery, furniture, fixtures and other connected things with the said printing press. He claims to have all relevant licenses required for carrying on the suit business. He claims that due to his ill health, he was medically advised to take rest and the Defendant was known to him as he had earlier conducted and managed the Plaintiff's printing press business. The Plaintiff further claims that the Defendant requested the Plaintiff to allow him to conduct and manage the suit business for a certain period. It is claimed that after due negotiations, the Plaintiff gave the suit business to the Defendant for conducting under the Conducting Agreement dated 1 October 1977. It is worth mentioning at this stage that the suit premises involved are in fact described in this Conducting Agreement, being premises admeasuring about 20 feet by 10 feet construction on the suit plot as mentioned in the

plaint. It is further contended that the term of the said Conducting Agreement was of 3 years, which expired on 30 September 1980. It is contended that by efflux of time the said Conducting Agreement came to an end and therefore, 10 days prior to the term-end, the Plaintiff sent a letter-cum-notice dated 20 September 1980 to the Defendant requesting to hand over the suit business back to the Plaintiff. It is contended that the said letter-cum-notice was not complied with and hostile stand was taken. Thereafter despite repeated requests and personally meeting with Defendant, he acted rudely and refused to hand over the suit business and possession of the suit premises. It is contended that on 24 October 1980, Plaintiff found that many of the articles and parts of machinery of the suit business were not in the suit premises and when the Plaintiff confronted the Defendant, the Plaintiff was driven out by the Defendant.

3. It is contended that the Defendant damaged the articles and paraphernalia of the business badly and the Plaintiff came to know that the Defendant was actually doing business under the name and style of "*Kumud Printers*" in the suit premises and had spread rumors in the market that the Defendant has purchased the suit business from the Plaintiff. It is contended that on 25 October 1980, when the Plaintiff tried to meet the Defendant in the suit premises, the Defendant threatened him with conversion of suit premises into restaurant and hotel or passing it to some 3rd party. It is contended that therefore, the suit is filed, since the Defendant's occupation is merely of trespasser after efflux of time provided in the Conducting Agreement.

4. The Plaintiff prayed for recovery of charge and management of the suit business and delivery of the possession of the suit premises along with

all the machinery, articles fixtures etc. The Plaintiff further prayed for payment of royalty and *mesne profit*. The Plaintiff further prayed for appointment of the Court Receiver and for injunction, restraining the Respondent from conducting the suit business.

5. The Defendant filed written statement and resisted the said suit. At the outset, the Defendant has raised objection to the jurisdiction of the Civil Court to try and entertain the said suit in as much as according to the Defendant he is the protected licensee or deemed tenant in respect of the suit premises under the provisions of section 15A the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("the Bombay Rent Act" for short). It is contended that Small Causes Court has exclusive jurisdiction to entertain the dispute between the parties like the Plaintiff and Defendant. Without prejudice to this contention, the Defendant contended that the said Conducting Agreement was nothing but prototype of earlier agreements, which was procured by the Plaintiff from the Defendant from time to time since the inception of the Defendant's occupation of the suit premises in August, 1970. The Defendant admitted signing on the said Conducting Agreement. He further contended that he was always carrying on business in the name and style of "Kumud Printers" and was not having printing press of his own and used to get job work done from various printing presses. He contended that sometime in middle of 1970 the Plaintiff approached him and allowed him to occupy the suit premises on leave and license basis for the purpose of the Defendant's printing business with NOC obtained in the name of Plaintiff.

6. The Defendant further contended that at that time the suit premises were lying vacant and on his request Plaintiff allowed him to occupy the

same. It is contended that on monthly compensation of Rs.275/- per month, he was permitted to occupy the suit premises. The Defendant claims that he was put in exclusive possession of the suit premises since inception and the Defendant has brought his own machinery and materials and has been carrying on his business of 'Kumud Printers' of which he is the sole proprietor. It is contended that he has not been carrying out the suit business in the name of Yeshwant Printing Press but the Plaintiff has forced him to sign the Conducting Agreement from time to time to suit his own purpose. It is contended that he had received the letter-cum-notice dated 20 September 1980, which was duly replied by the Advocate's letter dated 6 October 1980. It is further contended that since he was the protected licensee or deemed tenant of the suit premises, the question of asking of extension of time did not and does not arise. It is contended that all the machinery, articles and fixtures lying in the suit premises belonged to the Defendant as being part of 'Kumud Printers'. The Defendant denied the allegations about the Plaintiff's apprehension. It is contended that the case about Defendant threatening to convert the suit premises into restaurant and passing it over to 3rd party etc. is nothing but false and concocted story to prejudice the mind of the Court. On these grounds, the Defendant resisted the suit.

7. Issues were framed and parties led evidence. The Plaintiff examined himself and one more witness P.W.2 - Narendrasingh Pratapsingh Budhiraja, who was dealing in the printing machinery business. The Respondent examined himself and two more witnesses. D.W. No. 2-Prabhakar Sitaram Karambelkar, is the officer of the Bank of Maharashtra and D.W. No. 3-Gundopant Shantaram Kurodkar is a person who had permitted the Defendant to keep his printing machinery in his place for some months.

Apart from the oral evidence, parties relied upon the documentary evidence which will be referred to in the following paragraphs as and when occasion arises. After hearing of the parties and on appreciation of the oral and documentary evidence, the Trial Court has dismissed the suit with cost. It is in these circumstances, that the Plaintiff has come before this Court in the First Appeal.

SUBSEQUENT EVENTS

8. Unfortunately, this Appeal has languished in this Court since 1986 and is being finally heard after almost 38 years. Obviously in the meantime, much water has flown and subsequent events have taken place, which have been placed on record by the parties, which are summarized below.

8.1) Appeal was admitted on 8 January 1987. During the pendency of the Appeal both the Plaintiff and Defendant expired and their legal heirs are brought on record. One of the legal heirs of Plaintiff has also expired and his heirs are also brought on record.

8.2) By order dated 25 March 1988, Civil Application No. 3391 of 1986 filed by the Plaintiff was allowed thereby restraining the Defendant and anybody claiming through him from in any way dealing with / disposing of / creating any 3rd party interest in the suit premises and in the suit machinery, articles etc. On the same day, by another order passed in Civil Application No. 5393 of 1986, the Defendant was directed to pay arrears of royalty amount up to the month of March, 1986 and to continue to pay the Appellant Rs.290/- per month by way of royalty from the

month of April, 1986 onwards and depositing with the Court an amount of Rs. 850/- towards *mense profit* and the Plaintiff was allowed to withdraw the amounts of royalty and *mense profit* so deposited and it was directed that in the event the Defendant fails to comply with the orders of the payment of arrears, the Defendant was ordered to hand over the possession of the suit premises to the Court Receiver of this Court. It is an admitted position that the suit premises were never handed over to the Court Receiver and the same has continued in possession of Defendant and after his death, with his heir/s.

- 8.3) The Defendant and his legal heir has deposited the amount of royalty and other amounts as directed, albeit with some breaks. During the course of the hearing, at the request of learned Counsel for the Defendant, a statement was produced by the Registry showing that out of total amount of royalty deposited by the Defendant, certain amount was withdrawn by the Plaintiff and balance amount lying with the Registry is Rs.5,55,090/- as on 20 January 2024.
- 8.4) This Appeal was allowed on 14 June 2005 ex parte without hearing the Respondent and the suit was decreed. It appears that within short time thereafter the sole Respondent died on 4 July 2005.
- 8.5) Thereafter, by order dated 14 October 2009 passed in the Restoration Application (CA/3828/2009) the ex-parte order was recalled and this First Appeal was restored and the legal

heirs of the deceased Respondent was allowed to be brought on record.

- 8.6) The Defendant's heir has filed Civil Application No. 656 of 2016 placing on record that there has been declaration of slum in respect of the suit plot in the year 1979 (on which suit premises is situated). A copy of notification dated 26 February 1979 is placed on record. It is contended that the suit having been filed in the year 1980, which is after such declaration, the same is barred under section 22 of the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (for short "the Slum Act"). It is further contended that by following procedure of law, final Annexure-II has been prepared in which name of Defendant's heir appears. A copy of Annexure II dated 5 March 2010 is placed on record.
- 8.7) It is also contended that during pendency of the appeal, the original landlord Mr. Narvekar has accepted the Defendant as his tenant and has executed rent receipts in his favour from 1 January 1994 till 31 March 2002. It is further contended that in the meantime, a slum society is formed, who has executed a registered document dt. 23 December 2002 in favour of the Defendant as occupant of the suit premises, allotting shop no. 8. Copies of rent receipts and this registered document are placed on record.
- 8.8) The Defendant's heir has filed Civil Application No. 517 of 2017 for seeking exemption from the payment of rent/royalty and for

return of the amount already deposited.

- 8.9) The Defendant's heir also filed Interim Application No. 2906 of 2020 and Interim Application No. 16634 of 2022 requesting to consider the subsequent development of the notice issued by the Municipal Corporation dated 2 July 2018 demonstrating that the suit premises has been affected by the line of expansion / road widening of Lal Bahadur Shastri Marg under the development plan and another old notice dated 17 August 2012 issued under section 56 of the Maharashtra Regional Town Planning Act 1966, pleading the factual aspect that the suit premises are in fact partly demolished during the road widening exercise and as such, they are not of the same measurement as on date.
- 8.10) The Defendant's heir has also filed Interim Application No. 12982 of 2023 seeking directions to pay the rent/royalty from February 2020 onwards in the Court.
- 8.11) Learned Counsel for the Plaintiff has placed on record documents to show that the Defendant had filed R.A.D. Suit No. 66 of 1981 seeking declaration that he is the protected licensee or deemed tenant in respect of the suit premises on the same stand as taken in the present suit. It has come on record that this suit was stayed at the instance of the Plaintiff by order dated 3 April 1996, by which it was directed that the hearing of the R.A.D. Suit No. 66 of 1981 is stayed till final hearing of the present First Appeal pending in this Court.

- 8.12) It has further come on record that by the order dated 7 September 2013 the Defendant withdrew the said suit (R.A.D. Suit No. 66 of 1981) because a co-operative society was formed where the suit premises are located.
- 8.13) It has further come on record that one Slum Society by name Netaji Baug SRA Co-operative Society was formed and in the Application No. 487 of 2011, the High Power Committee (HPC) of the Government of Maharashtra has set aside the LOI dated 13 October 2011 issued in favour of the said slum society holding that it was not competent to execute any authority in favour of the developer. It is, however, clarified therein that SRA shall be at liberty to grant fresh LOI after compliance of the NOC from the Superior Lessor or getting the name of said slum society incorporated in the property register card as a sub-lessee, by following due process of law.
- 8.14) It has further come on record that this order of HPC is challenged by filing Writ Petition No. 2322 of 2014, which is pending in this Court as on today.
- 8.15) It has further come on record that the legal heirs of the Plaintiff have taken objections on 27 June 2016 to a public notice dated 30 May 2016, which is issued by the Slum Rehabilitation Authority in respect of area and land on which the suit premises are situated.

Submissions about subsequent events and its effect

9. So far as the aspect of suit property being declared as slum area and

the bar under section 22 of the Slum Act is concerned, learned Counsel for the Plaintiff, Mr. Panicker submitted that there are no necessary pleadings or evidence in support of said allegations about slum declaration. He submitted that the Plaintiff's objection to the notice issued by the Slum Authority is pending. He also submitted that the issue about High Power Committee order and competence of slum society is pending before this Court in Writ Petition No. 2322 of 2014. He submitted that there is nothing to indicate whether proper survey is conducted or any map is prepared or whether the suit premises are indeed included in the survey or not. He further submitted that whether suit premises are partially demolished or fully available is a matter of evidence and cannot be adjudicated on mere affidavit. He submitted that therefore, these disputed questions should not be and cannot be considered for the first time in the First Appeal. In support of this submission, he relied upon a Division Bench judgment of this Court in the case of *Chandrashekar s/o Manohar Tanksale vs. Pandharinath s/o. Vithobaji Neware* reported in *2013(6) Mh.L.J. 377* Alternatively, he submitted that assuming without admitting that the suit premises is declared as slum, even then the suit for return of business, recovery of business machinery and articles and recovery of royalty amount is not barred and as such that prayer can be very well considered. He further submitted that section 22 of the Slum Act does not bar recovery of the royalty amount and what is barred is only the proceedings for the recovery of arrears of rent or compensation or possession of the slum premises.

10. Per contra, learned Counsel for the Defendant, Mr. Joshi submitted that there is enough material on record to indicate that the suit premises is already declared as slum in the year 1979 and the suit filed in the year 1980

is clearly hit by Section 22 of the Slum Act. He submitted that the aforesaid applications are directed to be decided at the time of final hearing and therefore the subsequent events must be taken cognizance of. He further submitted that the Defendant's name is already included in the Annexure-II under the procedure contemplated under the Slum Act and as such, no decree or order can be passed about recovery of possession without the permission of the competent authority as provided under section 22 of the Slum Act. He submitted that copies of both slum notification and annexure II are placed on record. Mr. Joshi further submitted that the suit premises is not even completely in existence as per its original measurement because during road widening, part of the suit property was demolished and notices received by the Defendant during the process, are already placed on record.

11. Learned Counsel for the Petitioner Mr. Panicker then submitted that in view of the interim order dated 25 March 1988 passed by this Court, restraining the Defendant from creating 3rd party interest in respect of the suit premises, the Defendant could not have got himself involved in the process of Slum Society formation or becoming its member or entering in the agreement with the slum society. He submitted that interim order passed by this Court has sanctity and this act of the Defendant in defiance thereof must be considered seriously. He further submitted that the registered document entered between the Slum society and the Defendant in respect of suit premises is executed in the breach of interim order passed by this Court and therefore the same will have to be ignored.

12. Mr. Joshi countered by submitting that although the interim order was passed in March 1988, when the Appeal was earlier allowed ex-parte on 14 June 2005, this Appeal was disposed of and with it the interim order also

came to an end. He submitted that when the Defendant's restoration application was heard and allowed, the First Appeal was restored but there is no specific order, restoring the order of interim injunction and therefore, as on today registered document in favour of the Defendant cannot be considered as illegal. For this submission, Mr. Joshi, relied upon the judgment of *Vareed Jacob vs. Sosamma Geevarghese and Others* reported in (2004) 6 SCC 378, *Kanchan Bai vs. Ketsidas and Others* reported in AIR (1991) Rajasthan 94 and *Ranjit Singh Vs. Dr. Sarda Ranjan Prasad Sinih* reported in AIR 1981 Patna 102. He submitted that in case of interim injunctions, such orders are not automatically revived on restoration of Appeal, unless specific order of revival is passed.

13. Per contra, Mr. Panicker, learned Counsel for the Plaintiff relied upon the judgment of *Vareed Jacob vs. Sosamma Geevarghese (supra)*, *Nandipati Rami Reddi and Others vs. Nandipati Padma Reddy and Others* reported in AIR (1978) Andra Pradesh 30 and *Radhey Bai vs. Savitri Sharma* reported in 1975 RLR 234 (Delhi High Court) to canvass that when the suit is restored, all interlocutory orders are revived.

14. Mr. Joshi, learned Counsel for the Defendant submitted that from January 1994 Defendant has been accepted as direct tenant of landlord Mr. Narvekar and therefore Plaintiff has no locus left with him. He submitted that Defendant has produced 3 rent receipts Exhibit A1, A2 and A3 in support of the said contentions. He further submitted that in the teeth of aforesaid subsequent developments much water has flown and the rights and liabilities between the parties have undergone substantive change and as such, if any decree is passed, the same would not be executable.

15. Mr. Panicker learned Counsel for the Plaintiff in rebuttal submitted that in view of the notice reply dated 6 October 1980 issued on behalf of Defendant, wherein it is clearly stated that the Defendant was at all time tenant of the Plaintiff and not licensee, there is no gain saying that now the Defendant has become direct tenant of the owner as subsequent event. He submitted that declaratory suit filed by the Defendant was also withdrawn by him and it was never the case of the Defendant that he was direct tenant of the owner.

Submissions on original case facts :

16. Mr. Panicker, learned Counsel for the Plaintiff submitted that in the suit agreement dated 01 October 1977, the Defendant has clearly agreed that he will not claim any tenancy in the suit premises and therefore, the argument of the protected licensee or deemed tenant should be rejected. He submitted that assuming that the Defendant had any tenancy rights, those are waived under the clauses of suit agreement of 1977. He relied on the rent receipts issued by original owner Mr. Narvekar to contend that Plaintiff was the holder of the suit premises. He submitted that there is no evidence lead by the Defendant to indicate that only the suit premises was lent to him without printing business. He submitted that Defendant having admitted that the suit Conducting Agreement was prototype of earlier agreements, he is clearly covered under exception carved out in section 5(4A) of Bombay Rent Act and therefore there is no merit in argument of Defendant being protected licensee and lack of jurisdiction. He submitted that despite findings that the Plaintiff is the owner of the machinery and articles, no decree to that extent is passed.

17. Learned Counsel for the Plaintiff, Mr. Panicker further submitted that in the written statement, the Defendant has not disputed the factual aspect of list of machinery and articles specifically mentioned at the end of Conducting Agreement and therefore, he is barred from leading any contrary evidence. He further submitted that Defendant is barred from contending contrary intention about the conducting agreement. He relied on Sections 91 and 92 of the Indian Evidence Act, 1872 contending that no oral contradiction is permitted, if the evidence in the written form is available. In support of this submission, he relied upon the judgment of the ***V Anantha Raju & Anr. vs. T. M. Narasimhan & Ors (2021) 11 SCR 860*** especially paragraph 22 to 25 thereof. He submitted that the Defendant has not fully paid the arrears of amount of royalty as per the said interim order and this non-compliance should be held against the Defendant.

18. Mr. Joshi, learned Counsel for the Defendant submitted that under section 15A of the Bombay Rent Act, all the occupants of the tenanted premises whether inducted as sub-tenant or licensee, even without the permission of the landlord, got protection of law and were treated as deemed tenant or protected licensee from 1 February 1973.

19. He submitted that the Defendant has produced his passbook in the name of Kumud Printers issued by the Bank of Maharashtra showing the address of the suit premises, which shows that he was running his own business and not the suit business of Yeshwant Printing. He submitted that the Defendant has produced receipts in the name of Kumud Printers indicating purchase of printing machinery and allied articles. He submitted that he is challenging the findings of the issue no. 3 in as much as the printing machinery and articles belong to the Defendant. Relying on the

various judgments, Mr. Joshi submitted that even if there are is no cross Appeal or cross objection filed by the Defendant, he can challenge the findings in the Appeal filed by the Plaintiff. He submitted that since the suit was dismissed and there was no executable decree against the Defendant, he had no occasion to file an Appeal or cross objections but he can certainly assail the findings against the Defendant in the present Appeal.

20. Inviting Court's attention to the admission about induction of the Defendant in the suit premises/business in the year 1970 itself, learned Counsel for the Defendant submitted that this fact was suppressed by the Plaintiff and to circumvent the statutory protection available to the Defendant, the Plaintiff got the suit agreement of 1977 executed from the Defendant by force. Relying on Section 23 of the Indian Contract Act 1872, he submitted that such contracts entered into defeat the provisions of law are illegal and therefore, the suit agreement deserves to be ignored. He submitted that the Defendant has produced documents in support of his ownership about machinery, but they are not believable by the Trial Court.

21. It must be noted that issue nos. 1 & 2 framed by the Trial Court are not happily worded and they miss the bone of contention of jurisdiction of the Civil Court and entitlement to recovery of suit business with machinery, articles etc. as well as recovery of suit premises. In that view of the matter, considering rival submissions, following points are framed for my consideration:

POINTS

FINDINGS

(I) Whether the Civil Court has jurisdiction Partly Yes, only for the

to try and entertain the suit ?

prayers of return of
business, recovery of
machinery and royalty.

(II) Whether the Plaintiff is entitled to recovery of business along with its machinery, articles etc. and royalty amount ?

Yes.

(III) What is the effect of subsequent events on prayer of recovery of possession of suit premises along with mesne profits as claimed in the said suit?

Can not be conclusively decided in absence of Trial, hence matter remanded to that extent.

REASONS & CONCLUSIONS

AS TO POINT NO. (I)

22. Strangely enough, the Trial Court has not framed any issue regarding jurisdiction. The reason given for not framing such issue by the Trial Court is to be found in paragraph 5 of the impugned Judgment. Learned Judge has stated that issue of jurisdiction is not framed '*probably because parties might not have pressed for it*' and secondly, because learned Judge did not find any force in the contention of the Defendant about lack of jurisdiction because it depends on the allegations made in the plaint and not on the stand taken by the Defendant.

23. This reasoning is erroneous for two reasons. Firstly, because the objection to jurisdiction taken by Defendant was objection to inherent jurisdiction and therefore, learned Judge was duty bound to consider it. Secondly, because in the facts of this case, it was a mixed question of fact

and law requiring the Court to consider law and evidence both. Be that as it may. Now let us consider the same in the teeth of aforesaid facts and subsequent events.

24. Section 15A of the Bombay Rent Act has to be read with Section 5(4A). The said sections were introduced at the same time, by Mah. 17 of 1973. They are reproduced below for ready reference :

Section 15A. Certain licensees in occupation on 1st February 1973 to become tenants

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid.

Section 5 Definitions

(4A) "licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in service or employment of the licensor, or a person conducting a running business belonging to the licensor, or a person having any accommodation for rendering or carrying on medical or

para-medical services or activities in or near a nursing home, hospital or sanitorium, or a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanitorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution; and the expressions "licence", "licensor" and "premises given on licence" shall be construed accordingly;

(emphasis supplied)

25. From para 3 of the Written Statement, it is admitted position that the Defendant had executed the said conducting agreement dated 1 October 1977. This fact is also admitted by the Defendant in cross examination. Defendant has himself come with a case that the said conducting agreements is prototype of earlier agreements which were procured by the Plaintiff from Defendant from time to time, since inception of Defendant's occupation in suit premises in August 1970. If that be so, then Defendant accepted that even in 1970 he was inducted under a conducting agreement. The Defendant's case that the conducting agreement of 1977 (suit agreement) was executed by the Defendant under force of Plaintiff is unbelievable, to say the least. It is not Defendant's case that he is an uneducated person, not knowing implication of signing legal documents. Defendant claims to be a

businessman, who pleads that suit premises was given to him to run his business. Apart from Defendant's bare words that the conducting agreement was executed by him under force, no clear or cogent evidence showing such use of force has been produced. The Court cannot read what is not pleaded. Having held so, in my view the document of conducting agreement of 1977 will have to be considered with its full force. There is clear recital in paragraph 11 of the said conducting agreement that the Defendant is merely a conductor of the suit business and he has expressly undertaken not to claim any interest whatsoever in the suit premises and not to claim any tenancy or sub-tenancy therein. Defendant in his cross examination has admitted that both licence and permit to run the suit business stands in the name of Yeshwant Printing Press. He has also admitted that in the receipts issued by the Plaintiff to Defendant, amounts paid are noted as 'Royalty' towards suit business.

26. Conjoint reading of above sections 15A and 5(4A) clearly shows that 'licensee' does not include 'a person conducting a running business of the licensor'. In the present case, as narrated earlier, the Defendant was inducted as licensee to conduct the Plaintiff's running business of Yeshwant Printing Press and as such, Defendant has no protection under section 15A as licensee in occupation on 1 February 1973. The fact that in Conducting Agreement of 1977, which was renewal of earlier prototype, the Defendant has agreed not to claim tenancy/sub-tenancy also indicates intention of the parties. I am fortified in my view by the judgments of -

- (a) Abdul Razak Faujdarkhan (Deceased) through Lrs vs. Smt. Sharada R. Adyanthaya reported in 2015 SCC OnLine Bom 4187.
(See paragraphs 24, 25 & 26)

(b) Rasiklal Kumbha Gala vs. Manilal Ravji reported in 2005 SCC OnLine Bom 931. (See paragraphs 6, 8 & 9)

(c) Fatimbai Noor Mohamed vs. M. Khallil Ahmed and Another reported in 1992 Mh.L.J. 1605. (See paragraphs 6 & 7).

In this respect, the judgments relied upon on behalf of Defendant viz. (a) Ludhichem Agencies etc vs. Ahmed R. V. Peer Mohamed and another reported in AIR 1981 SC 1998 (b) Waman Shriniwas Kini vs. Ratilal Bhagwandas and Co reported in 1959 Supp(2) SCR 217 (C) Sarwan Kumar and Another vs. Madan Lal Aggarwal reported in (2003) 4 SCC 147 (d) Saurav Jain and Anr vs. M/s. A. B. P. Design and Anr reported AIR 2021 SC 3673 do not advance his case, in as much as issue about exclusion of person conducting a running business, was not involved therein. So also, the case law of Prabhudas Damodar Kotecha & Anr. vs. Smt. Manharbala Jeram Damodar & Ors. reported in 2007(4) ALL MR 651 is also distinguishable, in as much as in that case, issue involved was about gratuitous licensee and not about person in occupation under conducting business agreement, as in the present case.

27. The said conducting agreement is also found to be not in contravention of Section 23 of the Contract Act, because, a person in occupation for conducting business was excluded from the definition of 'licensee' in the year 1973. If that be so, in 1970, under a prototype agreement of conducting business there was nothing to gain for the Plaintiff by making Defendant execute / agree to such terms. Even otherwise I do not find the terms of conducting agreement to be falling within any of the categories provided in section 23 to make it unlawful.

28. In the aforesaid fact situation, the Defendant is not protected licensee / deemed tenant and hence Civil Court has jurisdiction to decide the prayer of recovery of suit business, its machinery, articles etc. and royalty amount. Even in the teeth of subsequent events as narrated above, Mr. Panicker is right in his submission that suit for recovery of suit business, its machinery, articles etc. and royalty amount is not barred by section 22 of the Slum Act. Therefore I hold Point No. I in affirmative

AS TO POINT NO. (II)

29. Now I proceed to consider abovesaid prayers on merits. The Plaintiff has produced 3 delivery challans of machinery purchased by him for running the suit business and the Plaintiff has also examined PW-2, who is a dealer in printing machinery business from 1962. The said witness clearly stated that the name of his concern is Standard Machinery Corporation and that 3 delivery challans Exh. 'K' (Colly) are issued by his concern. He has further clearly stated that first two challans are signed by his father and the third one is signed by his sister's son. He has stated that as he was working with his father and since his sister's son was also working with him, he knows their signatures. He has stated that these persons used to sign in his presence every day and his father was partner while his sister's son was looking after sales and he has clearly stated that machinery noted in the said delivery challans were sold to the Plaintiff. He has further stated that machinery sold by him were fixed at the place of the Plaintiff.

30. The learned counsel for the Defendant Mr. Joshi objected to this piece of evidence on the ground that invoices are not produced by the Plaintiff and further on the ground that PW-2's sister's son is not examined despite

being available. The said argument has no force. Non production of invoices cannot be considered as fatal to ownership of the Plaintiff in respect of printing machinery, for the simple reason that in the transactions of sale of movable property / goods such as suit machinery and articles etc., they are delivered in the usual course of business based on relationship between the parties, even on credit or on partial payment. The fact that printing machinery was actually delivered to the Plaintiff is clearly established by delivery challans. Perusal of the delivery challans shows that they are of March-April, 1963 and the oral evidence is recorded on 14.02.1986. In that view of the matter, there is sufficient evidence to conclude that the machinery of the suit business was belonging to the Plaintiff. On the other hand, receipt produced by Defendant of purchase of second hand machine and receipts showing purchase of printing articles are not supported by any oral evidence of supplier / seller. The Defendant has not examined anybody who has supplied or sold machinery / articles allegedly owned by him. D.W.3 who has stated that he had permitted Defendant to keep his machinery in his place, can hardly be said as any evidence about ownership.

31. The learned counsel for the Plaintiff is right in his submission that along with the plaint, the Plaintiff has produced and is relying upon the said conducting agreement, which has a list of articles showing as many as 30 articles of machinery that was given to the Defendant for conducting the suit business. It is seen that the Defendant has not denied this fact in his written statement specifically. There is no denial about this list which is part of the conducting agreement. It is material to note that the execution of the conducting agreement is specifically admitted by the Defendant and therefore, if it was Defendant's case that the machinery belonged to him, he

ought to have denied specific list of articles given in the conducting agreement. That not being done, precludes the Defendant from not only disputing the Plaintiff's evidence about such machinery, but also takes away the foundation on which Defendant can possibly lead evidence in support of his case that he was using his own machinery. Merely taking stand that Defendant was using his own machinery is not sufficient. Non denial of specific list of machinery stated in an admittedly executed conducting agreement has created a situation of confusion, of which Defendant can not be permitted to take advantage. In the result, I hold that the machinery and articles in the suit premises which was given to the Defendant for conducting suit business, belonged to the Plaintiff and as such he is entitled to recover the same along with suit business.

32. Since the said conducting agreement had a term of 3 years which got over in the year 1980, the Plaintiff has sent suit notice demanding possession of the business and machinery, which was not complied by the Defendant. Once it is proved that the machinery belonged to the Plaintiff and both the suit business and its machinery, articles etc. was given under the conducting agreement, which has come to an end by efflux of time, Defendant had no authority to keep the business or machinery with him and it ought to have been returned.

33. In this respect, it is interesting to note that even the Trial Court had come to a positive conclusion under Issue No.3 that Defendant could not prove that all the machinery and articles belonged to him as part of his own business of 'Kumud Printers'. Even then, learned Judge of the Trial Court has dismissed the suit about return of machinery. This is clear perversity and as such not sustainable. In that view of the matter, the Defendant will have

to be directed to return the suit business and the machinery with articles etc. to the Plaintiff. So also the Defendant had agreed to pay royalty amount under the said Conducting Agreement, which he was directed to continue to pay under the interim order of this Court, as detailed above. Admittedly the possession of the suit business and its machinery, articles etc has remained with Defendant and therefore the Defendant must pay full amount of royalty from the date of suit till its full payment, including pendency of this appeal. Hence I hold Point No. II as 'Yes'.

AS TO POINT NO. (III)

34. The documents produced on record by both sides, especially copies of the slum notification, final annexure II prepared under the Slum Act including the name of the Defendant / his heirs, and rent receipts executed by the landlord Narvekar directly in favour of the Defendant and the copy of objection taken by the Plaintiff's heir to notice issued under the Slum Act in respect of the suit premises and the copy of the High Power Committee order and the detail of Writ Petition in which that issue is pending, as produced by the Plaintiff (as detailed in paragraph 8.2 to 8.15 above) are too overwhelming for me to brush aside. It is a fact that these subsequent events and documents have come on record for the first time in this Appeal and none of the parties have pleaded or counter pleaded anything about it. It is also a fact that none of the parties have got any opportunity to lead evidence or cross-examine each other on these aspect.

35. Learned Counsel Mr. Panicker for the Plaintiff is right in his submissions that these clinching facts having direct effect on the jurisdiction of the Civil Court as well as on the substantive rights between the parties,

cannot be decided for the first time in this Appeal, without there being any basis of pleadings and supporting evidence, which is duly tested at the time of Trial. He is right in his submissions that objections about suit premises being declared as slum or the Defendant being treated as direct tenant of the landlord, are the issues which require adjudication, which can be done only after leading evidence and giving opportunity to both sides to cross examine each other and contest it in the trial. Such factual issues cannot be permitted to be raised for the first time in this Appeal.

36. It is indeed a fact that this is a very old dispute started in 1980 and therefore, it is painful to relegate the parties to the Trial Court again on remand for determination of these issues. But, I am unable to find any other just way to deal with this situation. I say so because if these issues are to be considered for the first time in this Appeal, the issues will have to be concluded on the basis of xerox copies and supporting affidavits without cross examination or weighing the evidentiary value as contemplated during the trial. If I undertake that exercise, it will not only be contrary to law but it will result in taking away substantive right of one Appeal available to the parties. Needless to mention that these subsequent events have direct bearing on the issue of jurisdiction of the Civil Court as also on substantive rights of parties. If such course is adopted, the parties will lose an opportunity of full fledged trial and the findings being tested by the First Appellate Court I cannot countenance such situation under law.

37. In a similarly situated case, the Division Bench of this Court in case of *Chandrashekar vs. Pandharinath (Supra)* has held that objection based on Section 22 of the Slum Act cannot be permitted to be raised for the first time in execution, since they require determination on examination of facts,

which can be done only after leading evidence.

38. I am conscious of the fact that remanding the matter partially for decision on these issues will give lease of life to the litigation, which is indeed painful in the present set of facts. But as stated earlier, I cannot countenance a situation where such crucial issues are decided without a proper trial. It is imperative to afford an opportunity to both the sides to establish facts with an opportunity to cross examine.

39. So far as the argument of the Plaintiff about the entitlement to recovery of possession of the suit premises as a 'consequential prayer' is concerned, I am afraid the prayer being dependent on substantive rights of the parties *vis-a-vis* occupation of the suit premises, it cannot be considered as mere consequential prayer. Considering the fact that the subsequent events encompass the aspect of slum declaration, its effect on the rights of the Plaintiff seeking possession and the case of Defendant being treated as direct tenant of landlord, these are all the matters that would be decided only after a trial on these issues. The prayer of recovery of possession of the suit premises is inseparably connected on the decision of these issues. In light thereof, the only course left open to me is to hold that the effect of subsequent events on the prayer of recovery of suit premises cannot be conclusively decided in this Appeal in absence of trial and therefore, remand is necessary. Therefore Point No. (III) is decided accordingly.

40. Since the matter is being remanded for decision on issues arising out of subsequent events, I am refraining from commenting anything about documents executed in favour of Defendant or his heir/s during pendency of interim injunction granted by this Court or on the arguments whether such

interim injunction stood revived or not when the appeal was restored. These aspects shall be decided by the Trial Court on remand. For the same reason, it is not necessary to deal with all the case laws relied upon by both sides on this aspect.

41. In the net result, the Appeal is partly allowed by passing following order.

(A) The impugned Judgment and decree dated 7 March 1986 passed in S.C. Suit No. 6153 of 1980 by the Judge, City Civil Court, is quashed and set aside.

(B) The suit is partly decreed thereby directing the present legal heir of Respondent/ original Defendant to return the suit business of Yeshwant Printing Press along with all the machinery and articles as stated in the conducting agreement dated 1 October 1977 to the present legal heirs of Appellant/Original Plaintiff within a period of 8 weeks from today.

(C) The present legal heir of Respondent / original Defendant is also directed to pay to the present legal heirs of Appellant/Original Plaintiff, arrears of Royalty amount @ Rs.290/- p.m. as per the conducting agreement dated 1 October 1977 from the date of filing of suit till today along with mesne profits of Rs.850/- per month from 1/10/1980 till today with interest @9% p.a. on unpaid / arrears within a period of 8 weeks from today. It is clarified that the amount already deposited in this Court shall be adjusted and will not carry interest from the Respondent. The present legal heirs of Appellant/Original Plaintiff are at liberty forthwith to withdraw the

amount already deposited in this Court alongwith accrued interest thereon, if any.

(D) The suit is remanded to the Trial Court for fresh consideration of claim of recovery of possession of the suit premises, as on today, in the light of all the subsequent events. The Trial Court shall permit parties to amend the pleadings about subsequent events and then frame necessary issues and permit parties to lead evidence thereon. The Trial Court shall be at liberty to add necessary and proper parties in the light of subsequent events. All contentions of both the parties about subsequent events are kept open to be decided as on date, in accordance with law.

(E) It is clarified that issue of recovery of business along with its machinery, articles etc. and royalty amount is concluded.

(F) In view of really old dispute involved herein pending since 1980, the Trial Court is requested to decide the suit expeditiously, considering the exigency of its work.

(G) All pending civil/interim applications are disposed off.

(H) No order as to costs. Decree be drawn accordingly.

42. At this stage, learned Counsel for the Respondent seeks stay to this order to enable the Respondent to challenge the order. Considering the fact that 8 weeks time is already granted for executable part of this order, stay is not necessary.

(M.M. SATHAYE, J.)