

(1994) 08 BOM CK 0071
In the Bombay High Court
Case No : Writ Petition No.142 of 1990

Anthony Carvalho

APPELLANT

Vs

Hubert Fernandes and Others

RESPONDENT

Date of Decision : 31-08-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Evidence Act, 1872 — Section 106, 58

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 22

Citation : (1995) 3 BomCR 595

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : S.G. Dessai, for the Appellant; V.B. Nadkarni, S.A. and A.C. Navelkar, for the respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

E.S. Da Silva, J.—The challenge in this writ petition is the judgment and order of the Administrative Tribunal dated 29th September, 1989 in Eviction Appeal No.11/82 which has affirmed the judgment and order of the Additional Rent Controller, Goa North Division, Panaji, dated 21-11-1981 in Case No. Rent 71/89.

2. By the aforesaid judgment the Rent Controller has allowed an application of the late father of the respondent No.1 (hereinafter called "the respondent"), the original applicant, for eviction of the petitioner from a portion of the house belonging to him situated at Mapusa, Bardez, on the ground of illegal sub-letting of the suit premises to the respondent No.2 without his consent as a result whereof the petitioner was directed to hand over the vacant possession of the suit premises to the respondent within three months from the date of the receipt of the order.

3. The case of the petitioner is that one Cristalina Fernandes, wife of Lourenco Tomas Fernandes, was the landlady of the suit premises registered in the Land

Registration Office of Bardez under No.2160. Vide lease agreement dated 19-10-1972 the premises were leased by Cristalina through her attorney, Benjamim Fernandes, the late father of the respondent, on a monthly rent of Rs.150/- payable at the residence of the said Benjamim. The lease was granted only for business purposes, i.e. for restaurant and bar.

Pursuant to the said lease the petitioner started the business in the premises running therein a restaurant and bar in the name and style of "M/s. Vailankani"

In the year 1973-74 Cristalina expired leaving behind heirs and legal representatives. Somewhere in the year 1979 the petitioner fell sick and on account of his health he had to face difficulties in running the business as he had to leave for Bombay for medical treatment. Therefore vide deed dated 5-4-1979 the petitioner entered into a partnership with the respondent No. 2. Shri Niranjana Hegde, resident of Mangor Hill, Vasco-da-Gama.

It was the case of the petitioner that Benjamim expired on 31-12-1988 leaving behind the respondent as his sole legal representative. Prior to his death he had filed the Eviction Application against the petitioner alleging that he was the statutory tenant in respect of the demised premises. In the said petition which was filed u/s 22(2)(b) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968, (hereinafter called "the Act"), Benjamim had alleged that the petitioner had sub-let the premises to Hegde without his consent. The petitioner resisted this application and alleged that he was still running the restaurant in partnership with Hegde and denied that he had transferred his rights to him. However, by judgment and order dated 21-11-1981, the application for eviction was allowed by the Rent Controller which judgment and order was upheld by the Appellate Court vide judgment and order dated 29-9-1989 which both orders are impugned in this writ petition.

4. The first grievance of Shri Dessai, learned Counsel for the petitioner, is that the Eviction Application filed by the late Benjamim was not maintainable, he being a mere power of attorney for his principal, the late Cristalina. The learned Counsel submitted that this application was to be seen in the background of the admission of the petitioner that the late original applicant Benjamim was the landlord because he was the power of attorney for his principal Cristalina. It was urged that such admission in paragraphs 1 and 2 of his written statement had to be read in connection with the actual position emerging from the lease deed dated 19-10-1972 from which it is clear that Benjamim executed the agreement of lease merely on behalf of Cristalina and as her power of attorney. However these averments made by the petitioner in the written statement had to be understood also in the light of the statement given by him on oath at the time his deposition was recorded by the Rent Controller which again suggests that the admission on his part that Benjamim was the landlord of the suit premises was due to the fact that the lease agreement has been executed by the petitioner with the said Benjamim in his capacity of power of attorney of Cristalina, the owner of the building in question. In this respect the learned Counsel took me

through the definition of the word "landlord" in section 2(j) of the Act which, according to him, is a wide definition which includes even a person who is not the owner but a person who is receiving or is entitled to receive the rent of any building whether on his own account or on account of, or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant.

5. The learned Counsel invited my attention to the opening words of section 2 from which it is seen that the definition is to be read in the terms provided in Clause (j) of section 2 unless the context otherwise requires. Thus, the learned Counsel urged, the definition of the "landlord" in section 2(j) is not applicable in each and every case but everything depends upon the context of the circumstances arising in each case. It was stated that the Tribunal has no inherent jurisdiction and as such has to function within the bounds of the very Act which is the source of its creation. This being the position the lack of the inherent jurisdiction of the Tribunal should put on it a bar to entertain any application for eviction filed by a person claiming to be the landlord on the strength of a power of attorney when this instrument has ceased to exist consequent upon the death of the principal. It was contended by the learned Counsel that in the instant case the Eviction Application was filed by Benjamim after the death of Cristalina. Therefore even assuming that the petitioner in spite of that had admitted Benjamim as being the landlord of the premises, however, this admission has been qualified by the petitioner in the first lines of his oral deposition before the Rent Controller. The learned Counsel insisted that in none of the paragraphs of his application for eviction Benjamim has explained or clarified as to how he became the owner of the premises after the death of Cristalina. Hence the Rent Controller despite this formal admission on the part of the petitioner was always bound to enquire as to the title of Benjamim, in the eviction proceedings with regard to the claim of his being the landlord of the premises.

It was further submitted that this being a point of law and going to the very root of the jurisdiction of the Rent Controller to entertain an eviction application, the same could be raised for the first time even in this petition so much so the foundation of this ground has been already laid down by the petitioner during his deposition before the Rent Controller wherein it was stated by him that Benjamim was the landlord because he had entered into an agreement or executed a lease deed with him.

6. With due regard it is difficult to appreciate the submissions of the petitioner's learned Counsel on the challenge sought to be made by him on the very maintainability of the Eviction Application moved by the late Benjamim against the petitioner. First of all on the perusal of the said application it is seen that Benjamim has filed the eviction proceedings not in his capacity of power of attorney of Cristalina but on his own right. In paragraph 1 of the application

Benjamim has expressly averred that he is the landlord in respect of the suit premises while in its paragraph 2 he has stated that the petitioner is the statutory tenant in respect of the said premises. This shows that for all purposes Benjamim has based the relationship between him and the petitioner as landlord and tenant not on the lease agreement dated 19-10-1972 at the time the application for eviction was filed by him when admittedly the said agreement had been executed for a period of less than one year and in the words of the petitioner had not been renewed. However, once the lease agreement was over that does not mean that the petitioner ceased to be the tenant having only become a statutory tenant as averred by Benjamim in paragraph 2 of his pleadings. In reply to this application the petitioner has not only admitted in his written statement that Benjamim was his landlord but also during his deposition before the Rent Controller admitted that he was also the owner of the suit premises. Therefore as rightly contended by Mr. Nadkarni, learned Counsel for the respondent, the only inference to be drawn in the circumstances is that by belatedly raising this type of objection in this petition against the very maintainability of the application for eviction filed by Benjamim against him, petitioner is ostensibly playing the game of hide and seek which by itself would be sufficient to disentitle him from seeking any discretionary relief from this Court in the exercise of its extraordinary writ jurisdiction.

7. The learned Counsel appears also justified in submitting that apart from this aspect of the petitioner's conduct which becomes always relevant while dealing with this type of applications, one has to bear in mind that when anybody approaches the Writ Court under Articles 226 and 227 of the Constitution there should be no suppression of facts or false representation. Therefore if the Court comes to the conclusion that the conduct of the petitioner is such or a wrong representation is done in that case no discretionary relief is to be granted and the petition is bound to be dismissed. In the instant case the records show that the petitioner is not raising in this petition for the first time the question of the late Benjamim not being the owner of the suit premises. Indeed by his application dated 19-6-1985 the petitioner had moved the Administrative Tribunal during the pendency of his appeal stating that Benjamim had not filed the power of attorney either before the Controller or produced it before the Tribunal, in spite of his being served a show cause notice stating that the premises had been let out to him in his capacity of power of attorney. In the said application the petitioner has further averred that in such circumstances he could defend the proceedings only if Benjamim had disclosed the existence of the power of attorney and the right to represent the original owner, that is to say, the principal. He therefore sought a direction of the Tribunal to Benjamim to produce the power of attorney. This application, which after a say was given to Benjamim, was dismissed by the Tribunal on the ground that since the petitioner had admitted before the Rent Controller that Benjamim was his landlord, there was no force in the application to seek at that stage production of any power of attorney on behalf of the principal. This dismissal order was not challenged by

the petitioner and as such became final. In spite of that the petitioner suppressed in the writ petition the existence of such order when he raised the plea of non-maintainability of the eviction application by Benjamim in his capacity of power of attorney for Cristalina after the death of the principal.

8. Further and apart from this circumstance of the petitioner having by his failure to challenge the order rejecting the move to bring on record the power of attorney granted by Cristalina to Benjamim, which practically means that the petitioner has accepted the said position which he had otherwise acknowledged in paragraph 1 of his written statement, the petitioner has also positively accepted the implication of the said order which he has failed to challenge and in this respect the record of the Tribunal also shows that after the death of Benjamim during the pendency of the Appeal the petitioner vide his application dated 24th February, 1989 brought to the notice of the Court that Benjamim expired on 31-12-1988 leaving behind him his son Hubert, now the respondent, as his sole legal representative. He therefore prayed that Hubert be ordered to be brought on record in the Appeal in place of the original respondent Benjamim. Being so it is obvious that by acknowledging Hubert as the sole legal representative of Benjamim in the appeal proceedings filed by him against the order of his eviction at the instance of the said Benjamim while claiming to be the landlord of the suit premises the petitioner has given up any plea which he could raise to the effect that Benjamim was neither the landlord of the premises nor entitled to file eviction proceedings after the death of Cristalina. In other words, this application of the petitioner to get Hubert impleaded in the proceedings as legal representative of Benjamim appears to negatively the case sought to be now made before this Court that Benjamim having executed the lease agreement with him as power of attorney of Cristalina and on her behalf no eviction application would lie or was maintainable when moved by him after the death of Cristalina, that is to say, after the death of his principal. If the petitioner had regarded Benjamim as landlord only in his capacity as power of attorney of Cristalina when he admitted in his written statement the said Benjamim being the landlord it is obvious that he could not have sought to make Hubert a party in the proceedings of appeal after the death of Benjamim. Thus, the very fact that the respondent Hubert was brought on record as the legal representative of Benjamim indicates that for all purposes the petitioner has always dealt with his late father in his capacity of the real landlord and the owner of the building and not as power of attorney of the original owner Cristalina Fernandes. Further it is not also the petitioner's case that at any stage of the eviction proceedings he remained unaware of the death of Cristalina.

9. Thus, it flows that if the petitioner was ignorant about Cristalina's death when the application for eviction was filed by Benjamim at the time when Cristalina was no more, there was no reason for the petitioner not to implead Cristalina in the Appeal proceedings once he admittedly came to know of the death of Benjamim purportedly occurred on 31-12-1988. It is thus seen that the petitioner has also suppressed from this Court all these circumstances not only

with regard to his unsuccessful attempt to bring on record the power of attorney granted by Cristalina to Benjamim but also the fact of his having impleaded Benjamim's son Hubert as a party in the proceedings after his death. Therefore ruling out any case of the said late Benjamim having filed eviction application in his capacity of Cristalina's power of attorney, in my judgment, this conduct of the petitioner appears to justify, as contended by learned respondent's Counsel, the dismissal of the petition on this count alone irrespective of the learned petitioner's Counsel's next submission that the weakness of the petitioner's stand in defence of the application was immaterial for the purpose of establishing the case of the landlord while seeking the tenant's eviction from the leased premises.

10. It was next submitted by the learned Counsel that the statutory onus to prove a ground of eviction lies always on the landlord and the same onus shifts on the tenant only after the basic ingredients of the grounds of eviction pleaded by the landlord are proved. In the instant case, according to the learned Counsel, there is no evidence to suggest that this onus or burden has been substantially discharged by the respondent either directly or remotely. The learned Counsel has urged that the allegations of the respondent that the petitioner has illegally sub-let the suit premises to respondent No.2 or transferred the right in his favour has been strongly denied by the petitioner and hence in view of the denial the burden would remain on the respondent's shoulder. In spite of that the Rent Controller and the Tribunal as well have based their impugned orders on inadmissible evidence mainly relying on the failure on the part of the petitioner to substantiate his defence plea that he was running the business in the suit premises in partnership with the respondent No. 2. The said orders appear to have been passed on the strength of the petitioner's so-called admission in his written statement that Benjamim was the landlord of the premises in spite of the fact that this admission has been explained and qualified by him during his oral deposition recorded by the Administrative Tribunal.

11. The learned Counsel submitted that in the circumstances it was incumbent on the part of the Rent Controller to go first through the evidence produced by the landlord in order to find out as to whether Benjamim had succeeded to prove his case on behalf of his principal instead of discussing and assessing the inherent weakness of the evidence led by the petitioner in order to come to the conclusion that the respondent had proved his case of illegal sub-letting by the petitioner. In this regard the learned Counsel contended that since there was no question of the Rent Controller going through the defence evidence of the petitioner tenant once the initial burden of proving his case had not been discharged by the respondent landlord, the failure of the petitioner to produce the partnership deed would become immaterial. It was submitted that the very factum of the existence of the partnership was not even contested or denied by the landlord after the same was pleaded by the petitioner in his written statement as well as during the course of his evidence. The learned Counsel urged that the stand taken by the landlord in this regard was that the very fact

of the partnership would amount to a sub-lease which means that the landlord had not denied that the petitioner has entered into a partnership with the respondent No.2. It was also stated by the learned Counsel that although ordinarily in writ jurisdiction, the Court would not entertain a document which was not produced before the courts below, a writ Court while entertaining original jurisdiction could accept a document not produced earlier and look into the same in the interest of justice. It was further urged that the evidence given by the petitioner in his defence in contradiction to what he had pleaded in the written statement with regard to the partnership entered into by him with the respondent No. 2. could not also be looked into by the trial Court once the basic principle is that a party cannot lead evidence on facts which had not been pleaded. In the instant case admittedly the petitioner has pleaded that the respondent No.2 was his partner in the business of the restaurant run by him while in his deposition he has sought to make a case that the said respondent was only a manager or employee under his pay roll. Therefore this circumstance should not have been given weight by the Rent Controller being only impermissible evidence which was not being based on any pleadings and hence the findings arrived at by the Courts below on the strength of such evidence are obviously misconceived and perverse.

12. The learned Counsel further contended that with regard to the case of sub-letting mere physical possession of the restaurant on the part of the respondent No.2 was only one of the facets of the sub-lease and for the purpose of qualifying the said respondent as sub-lessee the respondent was required to prove and establish the exclusive possession of the said respondent No.2 in regard to the running of the restaurant and bar. According to the learned Counsel the circumstantial evidence considered by the Courts below for the purpose of arriving at the conclusion that sub-lease of the suit premises had been established by the landlord was no legal evidence at all.

13. In my view, it is impossible to accede to the submissions advanced by the learned Counsel for the petitioner on this count also. Indeed there cannot be any dispute on the basic principle that the burden of proving a cause of action in an application for eviction filed by the landlord lies always on him and that therefore a landlord is supposed and required to establish whatever ground of eviction has been laid down as foundation of his case against the tenant. However, in the instant case I have gone through the evidence on record and perused the impugned orders assailed by the petitioner. The question which arises is what is the extent of proof which the Courts below were required to consider in this regard in the special facts and circumstances of the case. Admittedly the landlord's allegation is that the petitioner has inducted the respondent No.2 in the suit premises and had put him in control of the business which he was running in the leased premises consequent upon the execution of the agreement dated 19-10-1972. In reply the petitioner has raised a defence plea of partnership entered into by him with the respondent No. 2. thus clearly acknowledging the physical participation of the said respondent in the business

run in the premises and indirectly the physical occupation of the premises wherein the business was being run under his own and exclusive management. Despite all this stand taken by the petitioner in his defence the petitioner has failed to produce the partnership deed on record which in other words means that he has failed to substantiate his plea that the physical presence of the respondent No. 2. in the premises was justified in terms of his mere association with the petitioner in the running of the business.

14. But even assuming that the said partnership deed had been produced it is clear that this by itself would not be sufficient to establish the existence of a real relationship with regard to the alleged partnership of the petitioner with the respondent No. 2. However, contrary to the case pleaded by the petitioner during the evidence the petitioner has stated that the respondent No. 2 was his manager to whom he was paying Rs. 30/- per day to help him to run his business of restaurant and bar. Therefore by his own say the petitioner has falsified his defence plea in the written statement, thus ruling out the possibility of claiming any real relationship with the respondent No. 2 as his partner in the business. On the other hand admittedly and consequent upon the fact that the petitioner has not pleaded that the respondent No. 2. was his manager or employee and instead has averred that he was his partner it was not open for him to lead any evidence in this regard to prove a fact which he had not pleaded. Against this evidence, the evidence of the respondent clearly indicates that the respondent No. 2 is a stranger in the suit premises and was inducted by the petitioner therein to exclusively run the business which he had started in the premises consequent upon the lease executed with the respondent. In this respect the findings given by both the courts below clearly suggest that the same have been based on the intrinsic evidence available on record and brought home not only by the respondent himself in his deposition as well as through his witnesses but also from the very admissions of the petitioner and his witnesses as well. In this regard both the Courts below came to the conclusion that from the facts and circumstances of the case it was clear that the petitioner had run a restaurant in the suit premises let out by the landlord to him under the name and style of "Hotel Vailankani" from 9-6-1972 to 9-6-1979. Thereafter the same Hotel was closed for some period and re-opened on 18-6-1979, this time under the name and style of "Smeeta Restaurant".

15. The petitioner has also admitted in his written statement that he had taken the respondent No. 2 as a partner in his business although in his evidence he has deposed that he was looking after the business only as its manager. During the evidence the landlord has brought on record that on 18-6-1979 the respondent No. 2 while inaugurating the Smeeta Restaurant has performed a Satyanarayan puja in the premises and invited the public by printing invitation cards on behalf of the new Management and staff members of the said Smeeta Restaurant disclosing prominently at the bottom of the invitation his own name, while the name of the petitioner was conspicuously absent in the said invitation card. On this ground the Courts below were of the opinion that this fact clearly showed

that the said respondent No. 2 had been inducted in possession of the premises by the petitioner without the permission and consent of the landlord. It was observed by the courts that otherwise an outsider or even a manager could not afford to omit the name of the proprietor of the business in such an invitation. The petitioner was not able to deny in his deposition both the facts of the invitation and also the circumstance of the Satyanarayan puja having been performed in the Smeeta Restaurant wherein he was admittedly running the restaurant under the name and style of "Vailankani Restaurant". This change of name is also another indication which has been borne in mind by the courts below while arriving at their findings with regard to the transfer of his rights by the petitioner in favour of the respondent No. 2 in the running of his business irrespective of the alleged partnership which the petitioner has failed to prove and establish and instead got negatived through his own say to the extent of the averments made by him during the evidence that the respondent No. 2 was his manager and a paid employee to help him run the business. This being the position it is difficult to say that the findings arrived at by the courts below are based on no evidence or that the conclusions reached by these courts are perverse so as to justify interference on the part of this Court in the exercise of its writ jurisdiction.

16. Mr. Dessai has relied on several rulings in support of his submissions which in my view need not require to be referred in detail in view of the observations made by me on both the grounds raised by him in this petition. In this regard the learned Counsel has invited my attention to the case of Somnath Sahu Vs. State of Orissa and Others, . This was for the purpose of showing that a Writ Court in exercise of its jurisdiction could look into any of the documents referred to in the order itself or in the pleadings which initiated the proceedings. The learned Counsel has stated that in the instant case the landlord has never said that the partnership deed was a fabricated or a bogus one and the lease deed also was clearly admitted by him. Therefore the Court could perfectly look into the partnership deed even assuming that the petitioner had failed to produce it before the Rent Controller or the Tribunal itself. However, as already said it is not the failure of the partnership deed which became relevant in this case but instead the inability of the petitioner to establish the real relationship allegedly existing between him and the respondent No. 2. Besides the case of the landlord appears to have been found to be proved by the courts below on the strength of material evidence available on record which in my judgment cannot be said as impermissible or perverse.

17. My attention was also drawn by the learned Counsel to the case of Chander Kishore Sharma and Another Vs. Kampa Wati, . This was for the purpose of showing that a landlord had to prove the ground of eviction and the tenant could not be asked to prove the negative.

18. Reliance was also placed in the case of Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, . This was for the purpose of showing that parting

with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself or, in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession.

19. Another ruling cited by the learned Counsel is the case of *Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others*, . This was for the purpose of showing that if there was a partnership firm of which tenant of the premises in which the business of the firm was carried on was a partner, the fact of carrying on of business of the partnership in the premises would not amount to subletting leading to the forfeiture of the tenancy.

20. All these rulings have been given in the peculiar facts of each case and in view of the findings given by this Court on the issues raised, the same do not appear to be attracted although there can be no dispute on the general principles laid down by the same. On the other hand in view of the concurrent findings given by the Courts below on the basis of evidence produced by the landlord and also on the strength of the admission of the petitioner himself it is difficult for this Court to entertain this petition in the exercise of its extraordinary jurisdiction under Articles 226 and 227 of the Constitution.

21. In the case of AIR 1975 1297 (SC) it has been laid down that the power of superintendence of the High Court under Article 227 being extraordinary is to be exercised most sparingly and only in appropriate cases. This power, as in the case of certiorari jurisdiction, cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory power as a Court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate Court or tribunal final on facts. The High Court cannot, while exercising jurisdiction under Article 227, interfere with findings of fact recorded by the subordinate Court or tribunal. Its function is limited to seeing that the subordinate Court or tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and reappreciating it.

22. In the case of *Mohd. Yunus Vs. Mohd. Mustaqim and Others*, the Supreme Court has reiterated that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High courts under Article 227 of the Constitution is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record much less an error of law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior Court or tribunal purports to be based or to correct errors of law in the decision.

23. In the latest ruling in the case of Om Prakash and another v. Smt. Suhari Devi and other, J.T 1993 (3) 641, the Supreme Court once again has laid that even in a second appeal the High Court must restrict itself to questions of law; all the more so in a writ petition. In the said case the Supreme Court after referring to the findings of the High Court has observed that they leave no doubt that the High Court reassessed the evidence and went beyond its legitimate jurisdiction.

24. It thus follows that the findings arrived at by the courts below are not required to be unsettled as prima facie no case of error of jurisdiction or perversity has been made out by the petitioner to justify interference. Nothing survives in this petition which is therefore bound to be rejected.

25. In the result the petition fails and is hereby dismissed. Rule accordingly discharged with however no order as to costs.