
(2002) 06 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No. 2032 of 1987

Chandrakant Yeshwant Pardeshi and Another

APPELLANT

Vs

Laxminarayan Theatres Pvt. Ltd.

RESPONDENT

Date of Decision : 21-06-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1), 13(1)

Evidence Act, 1872 — Section 101

Transfer of Property Act, 1882 — Section 108, 15(1), 52

Citation : (2003) 1 BomCR 588

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : P.K. Dhakephalkar, for the Appellant; Kiran Bhagalia, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This writ petition, under Article 227 of the Constitution of India, takes exception to the judgment and decree passed by the IV Additional District Judge, Pune dated September 12, 1986 in Civil Appeal No. 403 of 1984.

2. The subject matter of the present petition is property bearing Survey No. 1256/2-A of final Plot No. 621/2-A admeasuring about 1100 sq.ft. situated at Pune. The said property was originally owned by one Vasundhara Gharpure. The said Vasundhara Gharpure leased the open plot of land to the original petitioner No. 1 Chandrakant Yeshwant Pardeshi by a written lease deed dated 9th August, 1950 (Exhibit 58) for a period of 20 years. The subject property was subsequently purchased by the respondents herein on 15th March, 1972 by a registered sale deed from the said Vasundhara Gharpure. The respondents accordingly became the owners of the property but the said Chandrakant Yeshwant Pardeshi continued to occupy the property. It is relevant to note that though the lease in favour of said Chandrakant Pardeshi had expired in the year 1970, the original owner allowed him to occupy the said property. In that sense,

the said Chandrakant Pardeshi became the statutory tenant. After the subject property was purchased by the respondents, they issued notice to the said Chandrakant Yeshwant Pardeshi on 11th December, 1976 and terminated his tenancy in respect of the subject property. The respondents thereafter instituted the suit being Suit No. 3016 of 1977 against the said Chandrakant Pardeshi for possession on the ground of default, bona fide and reasonable requirement for construction work for business and on the ground of breach of terms and conditions of the tenancy agreement on account of change of user of the premises for residential purpose. As mentioned earlier, when the property was leased out to the said Chandrakant Pardeshi, the same was an open plot of land. The lease however, permitted him to start a Motor Service Station thereon and for that purpose he could construct structure on the suit property. According to the landlords, therefore, the said Chandrakant Pardeshi committed breach of the terms and conditions of the tenancy by using the subject property for residential purpose as well. While the said suit was pending before the Rent Court, the said Chandrakant Pardeshi executed a deed of assignment dated June 18, 1979 in favour of one Prabhakar Purshottam Joshi original petitioner No. 2 (hereinafter referred to as the petitioner) where under the said Chandrakant Pardeshi purported to transfer his business of Motor Service Station alongwith tenancy rights to the petitioner. In view of this development, the respondents-landlords instituted another suit before the Rent Court for recovery of possession of the subject property being Civil Suit No. 2117 of 1979 against both i.e. Chandrakant Pardeshi and the petitioner. The present writ petition emanates from the later suit filed by the respondents. In the subject plaint as presented before the Rent Court, it is averred that the said Chandrakant Pardeshi at the relevant time was a statutory tenant and, therefore, he had no right to transfer or assign. It is further averred that the said Chandrakant Pardeshi tenant has acted contrary to the terms and conditions of the tenancy agreement which prohibited him from transferring and/or creating any assignment. In the plaint, it is further averred that, subject document titled as "assignment deed" is a bogus and fraudulent document created under the guise of transferring the business and goodwill alongwith the suit property. It is averred that the same is void ab initio. It is further averred that on the relevant date there was no subsisting goodwill. Both the defendants filed written statement. The petitioner defendant No. 2 in his written statement took a specific stand that, even as a statutory tenant, the tenant-defendant No. 1 had a right to assign the running business alongwith stock in trade and goodwill and interest in the premises. In support of this plea reference is made to a decision of this Court. The specific case made out by the petitioner is that the tenant defendant No. 1 has assigned a running business alongwith stock in trade and goodwill and the interest in the premises in his favour. On the basis of above pleadings the parties went to the trial before the Rent Court. As observed earlier, the former suit filed against the tenant-Chandrakant Pardeshi was also pending before the same Rent Court and therefore, both the suits were tried and heard together. In so far as the present suit is concerned, the trial Court framed the following issues: "1) Whether the

assignment dated 18-6-1979 by the defendant No. 1 in favour of the defendant No. 2 is in contravention of terms and conditions in the rent note? 2) Whether said assignment is hit by section 52 of the Transfer of Property Act? 3) Whether the plaintiffs are entitled to possession of the suit premises? 4) What is due to the plaintiffs? 5) Relief and costs? 6) Whether the suit is bad for non-joinder of the necessary parties?"

3. The trial Court by its judgment and decree dated February 27, 1984, was pleased to decree the suit preferred by the respondents and ordered that the defendants do deliver the vacant possession of the property in suit to the plaintiffs and defendant No. 1 to pay Rs. 5375/- with proportionate costs of the suit to the plaintiffs. The trial Court, relying on the legal position as it obtained then, reported in *Tatoba Krishna Hargude*, since deceased by his legal heirs & legal representative v. *Dikkaya Mottaya Pujari*, 1980 Bom.C.R. 1, *Atlas Trading Co. v. Official Assignee of Bombay*, 1983 Mh.L.J. 740, *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, , and *Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others*, , held that a statutory tenant had no right to transfer or create any assignment. This decision was assailed by the petitioner alongwith the tenant Chandrakant Pardeshi by filing appeal being Civil Appeal No. 403 of 1984. The Appellate Court by the impugned judgment and decree dated September 12, 1986 has dismissed the said appeal and affirmed the order passed by the trial Court decreeing the suit against the defendants. The appeal Court, inter alia, found that there was absolutely no evidence to hold that the subject assignment was created in respect of a running business or a going concern with stock in trade and goodwill. Besides that, the Appellate Court found that the transfer or assignment was contrary to the stipulation contained in the tenancy agreement between the tenant and the erstwhile owner which prohibited him (tenant) from transferring and/or creating assignment in the suit property. Accordingly, the Appellate Court has returned a clear finding of fact that the purported transfer or assignment was not in respect of a running business alongwith stock in trade and goodwill. Consequently, the Appellate Court has affirmed the decree for possession passed by the trial Court. The above said concurrent decisions are the subject matter of challenge in the present petition under Article 227 of the Constitution of India.

4. To complete the narration of events, it is relevant to point out that even the former suit preferred against the tenant-Chandrakant Pardeshi for eviction came to be decreed by the trial Court and that decree has been affirmed by the Appellate Court. In the circumstances, the tenant Chandrakant Pardeshi had filed a separate petition challenging the said decree passed in the former suit being Writ Petition No. 2033 of 1987. What is relevant to note is that, during the pendency of both these writ petitions in this Court, the tenant-Chandrakant Yeshwant Pardeshi expired on 11th November, 1989. However, no steps were taken to bring his legal representatives on record in either of these writ petitions. Accordingly, the said Writ Petition No. 2033 of 1987 came to be dismissed for non-prosecution on 23rd January, 1998. Incidentally ,no application has been

filed even in the present writ petition for bringing the legal representatives of deceased tenant on record and therefore, the name of the original petitioner No. 1 Chandrakant Pardeshi has been deleted from the array of parties. Accordingly, the present writ petition is pursued only by the petitioner-original defendant No. 2. No doubt, an application was filed by the petitioner being Civil Application No. 3714 of 2000 in the dismissed Writ Petition No. 2033 of 1987 for recalling the order dated 23rd January, 1998 dismissing that petition and to implead him as petitioner in that writ petition. That application was listed alongwith the present writ petition for hearing on 17th June, 2002. On that date, the hearing of the matter commenced when the said application was taken up for consideration and after hearing the rival submissions, that application came to be dismissed for the reasons recorded in the said order. As a consequence of that order, the decree for possession passed against the tenant in respect of the land and the structure thereon has become final. Regardless of that, the hearing of the present writ petition was continued as according to the petitioner, he could contest the matter in his own rights. However, the hearing of this petition was required to be deferred at the request of the Counsel to enable the Counsel to place the relevant decisions before the Court.

5. Be that as it may, the main argument canvassed by Mr. Dhakephalkar for the petitioner in this writ petition is that the legal position as it obtained then has now undergone change and it is settled law that even a statutory tenant has a right to transfer and/or to create assignment. In this behalf reliance is placed on the decision of the Apex Court in *Kalyanji Gangadhar Bhagat v. Virji Bharmal* and another, reported in 1995(4) Bom.C.R. 273 : 1995 BRC 219 and also on the unreported decision of the Division Bench of this Court in Writ Petition No. 3582 of 1990 decided on July 13, 2001 in the case of *M/s. Swastik Rubber Products Ltd. v. Vasantrao Mahadeo Dhatingan*. The argument proceeds on the premise that deceased tenant Chandrakant Pardeshi was undoubtedly a statutory tenant when the assignment was created in favour of the petitioner, however, he had a right to create assignment and having created one in favour of the petitioner, the petitioner was protected by the provisions of section 15 of the Act. He contends that on close examination of the abovesaid two decisions, the position that emerges is that; the statutory tenant by virtue of the proviso to section 15(1) of the Act read with the notification issued thereunder is entitled to transfer and assign the premises held under the lease so notified; and that the demised premises were covered by such notification. The argument is that, the assignment in favour of the petitioner is as a consequence of a right derived by the tenant, who was the statutory tenant, by operation of law i.e., the proviso to section 15(1) of the Act; and in such a case, inspite of the express condition in the lease agreement, the statutory tenant would still be entitled to assign or transfer the interest in the premises held by him. He has placed reliance on the legislative changes pointing out the original section 15(1) as it stood prior to its amendment in 1959 which did not incorporate the expression "but subject to any contract to the contrary". That expression came to be inserted in the wake of the

observations made by the Apex Court in the decision of Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., . He, therefore, submits that prior to the insertion of the said expression there was an absolute bar of sub-letting or transfer of any premises. However, certain class of leases have now been saved by virtue of the proviso to section 15(1) and the notification issued thereunder. According to him, the effect of the legislative changes is that, inspite of a contract between the landlord and the tenant prohibiting the tenant from assigning or transferring the demised premises, the tenant or for that matter the statutory tenant can create assignment or transfer his interest in the premises held under the lease or class of leases notified by the State Government permitting so to do in exercise of power under the proviso to section 15(1) of the Act, for such transaction would be permitted and authorised by the statute and the contract between the parties cannot control such a right. According to him, therefore, the deceased statutory tenant could legitimately transfer and create assignment and the petitioner has derived right under the statutory provision notwithstanding the express stipulation to the contrary in the agreement between the landlords and the original tenant.

6. Per contra, according to Mrs. Kiran Bagalia learned Counsel for the respondents, a statutory tenant in absence of contract to the contrary may legitimately create an assignment, but when there is an express agreement between him and the landlord prohibiting him to create an assignment or transfer, then such a statutory tenant would be governed by the stipulation of the tenancy agreement even after the lease period is over and cannot create assignment or transfer in any manner and that transaction is not saved by the provisions of the Act. On the other hand, according to the learned Counsel, that transaction would be plainly in contravention of the condition of the tenancy and therefore, the tenant as well as the assignee will be liable to be evicted in view of the provisions of section 12(1) of the Bombay Rent Act. Besides, it is contended that, the present transaction is hit by the provisions contained in section 13(1) (e) of the Act as it is not protected by the proviso to section 15 of the Act. The learned Counsel has placed reliance on V. Dhanapal Chettiar Vs. Yesodai Ammal, ; Chandavarkar Sita Ratnarao v. Ashalala S. Guram, reported in 1986(3) Bom.C.R. 304 : 1986 MhLJ 955; Sau, Kusum Bhimrao Patil and Another Vs. Javahar Lalchand Katariya and Another, ; Suleman Haji Abdul Satara v. Miya Mahammed Haji Pirmohmed Silkawala and others, reported in 20 GLR 182 (Gujarat) and S.J. Pande Vs. P.K. Balakrishnan, . The learned Counsel distinguished the decision of the Apex Court in Kalyanji's case (supra) on the ground that it was not a case of prohibition to transfer or assign by virtue of the contract or agreement between the parties. It is further contended that, since the assignment created in favour of the petitioner is during the pendency of the suit for possession filed against the tenant, the original petitioner will also be bound by the decree of eviction passed against the tenant and will have to walk out alongwith the tenant during the execution of such decree. It is next contended that the petitioner has failed to prove that it was a lawful assignment

within the meaning of section 15 of the Act as contended by the defendants. This submission proceeds on the premise that when the demised premises were transferred in favour of the petitioner herein at that point of time, the subject business was closed and was not a running business. And since it was not an assignment of a running business alongwith stock in trade and goodwill and the premises, the same was not covered by the notification or the proviso to sub-section 15(1) of the Act. It is, therefore, contended that taking over all view of the matter, there is no reason to interfere with the ultimate order passed by the two courts below decreeing the suit for eviction against the defendants on the ground of unlawful transfer and assignment.

7. Having considered the rival submissions, to my mind, it will not be necessary to examine the wider questions posed by the respective Counsel before this Court. Going by the decision of the Supreme Court in *Kalyanji Gangadhar Bhagat v. Virji Bharmal and another* (supra) and the decision of the Division Bench of this Court in *Swastik Rubber Products Ltd.* (supra) we will have to proceed on the premise that the tenant, who was the statutory tenant at the relevant time, could legitimately transfer or create assignment provided the transfer or assignment is incidental to the sale of a business as a going concern together with the stock in trade and the goodwill thereof as required by virtue of the proviso to sub-section (1) of section 15 of the Bombay Rent Act and the notification issued thereunder. However, the moot question is; whether the purported assignment in the present case is incidental to the sale of a business as a going concern together with the stock in trade and goodwill thereof? Before we advert to this question, it will be apposite to take note of the relevant provisions. Section 15(1) reads thus:

"15. In absence of contract to the contrary tenant not to sub-let or transfer or to give on licence - (1) Notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging Houses Rates Control (Amendment Act), 1973, for any tenant to give on licence the whole or part of such premises: Provided that the State Government may, by notification in the Official Gazette permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification."

8. It is seen that by virtue of the proviso the State Government is authorized to issue notification permitting in any area transfer of interest in the premises held under leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification. In exercise of powers under the said proviso, the State Government has issued Notification No. 5975/33. Clause (2) of the said notification would be of some relevance for

our purpose. The same reads thus:

"(2) Transfer or assignment incidental to the sale of a business as a going concern together with the stock-in-trade and the goodwill thereof provided that the transfer or assignment is of the entire interest of the transferor or assignor in such leasehold premises together with the business and the stock-in-trade and goodwill thereof."

9. No doubt, it is contended on behalf of the petitioner that the subject assignment deed was in relation to the assignment which was incidental to the sale of the business as a going concern together with the stock in trade and the goodwill thereof of the original tenant Chandrakant Yeshwant Pardeshi. However, the Appellate Court on analyzing the evidence on record has returned a finding of fact that there is absolutely no evidence to indicate that the assignment was in respect of the going concern with stock in trade and goodwill. In paragraph 16 the Appellate Court has adverted to the entire evidence on record. It has noted that the plaintiff's witness Dileep deposed that the tenant (defendant No. 1) without his consent and "illegally transferred" the property to petitioner (defendant No. 2), but this witness has not been cross-examined on behalf of the petitioner (defendant No. 2). Moreover, there was no cross-examination on this aspect by the defendant No. 1 either. Further, both the defendants were cross-examined and they have admitted that they had no evidence or produced any documentary evidence to show that at the time of transfer of the premises the business was running business, except their bare words. In paragraph 17, the Appellate Court has adverted to the pleadings of the defendants and in particular that of the petitioner-defendant No. 2 wherein he had positively contended that the defendant No. 1 had transferred his running business alongwith goodwill and stock in trade and that the assignment was therefore not illegal. In paragraphs 19 and 20, the Appellate Court then proceeded to observe thus:

"On going through the evidence on record it shows that stock in trade was transferred to defendant No. 2. On the other hand, defendant No. 2 in his cross-examination admitted that he did not produce any document to show that running business was transferred. Moreover, his evidence is so cryptic that it is only of denials and that is on the point of fair rent of the premises. Thus defendant No. 2 did not discharge the burden which was cast upon him to show that running business and stock in trade alongwith goodwill was transferred. Defendant No. 1 who was examined on commission also did not produce any record to show that stock in trade was given to defendant No. 2. The submission of Mr. Shah was that defendant No. 2 could have produced on record the evidence showing that petrol pump was running and the petrol was delivered by the company and it was also at the petrol pump. No cash books or receipts are produced on record. So when best of evidence was available defendant No. 2 nor defendant No. 1 produced that evidence. This circumstance therefore goes against the defendants in this case. I thus find that there is no evidence to show that defendant No. 1 transferred the business going concern to defendant No. 2

in this case. 20. In the same ruling, that is, reported in Paikamma and Another Vs. Maroti, , it is held that when the tenant's transfers his lease hold rights and interest in the tenanted property alongwith goodwill and if it is against the terms of lease and if he is prohibited from transferring the property or creating sublease, then it is against the provisions of section 15(1) of the Bombay Rent Act. Therefore, considering this ruling cited by Mr. Shah I find that in this case also there is no evidence to show that defendant No. 1 at the time of execution of assignment actually transferred his going concern with stock in trade and goodwill."

The Appellate Court has accordingly not only analyzed the pleadings of the parties but has also considered the oral evidence and other materials on record to conclude that there is no evidence to show that the defendant No. 1 Chandrakant Pardeshi at the time of execution of the assignment actually transferred his going concern with stock-in-trade and goodwill. If this finding of fact is to be accepted, which this Court will have to in writ jurisdiction under Article 227 of the Constitution of India, as it has not been demonstrated to be perverse or manifestly wrong then, no other enquiry would be necessary. It would necessarily follow that the purported assignment in favour of the petitioner is not the one protected by the notification, for it is not an assignment or transfer incidental to the sale of a business "as a going concern" together with the stock-in-trade and the goodwill thereof. If this requirement is lacking then, the Court will have no option but to hold that the subject assignment in favour of the petitioner is hit by section 13(1)(e) read with section 15 of the Bombay Rent Act.

10. Mr. Dhakephalkar for the petitioner however, contends that in fact there was no dispute between the parties that the defendant No. 1 had transferred the premises incidental to the sale of business as a going concern premises alongwith goodwill and stock-in-trade in favour of the defendant No. 2 under the assignment deed dated 18th June, 1979. He has drawn my attention to the observation made in this behalf by the trial Court in paragraph 7 of its decision wherein it is recorded that: "It is an admitted fact that the defendant No. 1 has transferred the premises in the suit alongwith his right and interest and goodwill, stock in trade in favour of the defendant No. 2 by virtue of the document dated 18-6-1979". It is however, not possible to continuance this plea. No doubt, the trial Court has recorded so, however, to my mind, the same will have to be understood in the context of the fact that the trial Court adverts to the fact that the said assignment deed was produced on record by the plaintiff. Merely because the plaintiffs have produced the assignment deed on record that would not mean that the contents of the said deed have been admitted by the plaintiffs. On the other hand, the plaint as filed before the trial Court takes a specific stand that the said assignment deed was a bogus document and transaction has been labelled as an assignment under the guise of transfer of a running business. Notably, while controverting this position, the petitioner herein original defendant No. 2 in his written statement positively asserts that the defendant No. 1 was a statutory tenant and had right to assign his running business alongwith stock in

trade and goodwill in the premises; and that such assignment has been done in his favour which was protected by law. Whereas, when the matter went for trial the plaintiffs witness P.W. 1 Dilip Narayanrao Borawake (paragraph 5) deposed that the defendant No. 1 has transferred the suit premises to defendant No. 2 without consent and knowledge in 1979. In paragraph 6 he has categorically deposed that the defendant No. 1 was not running any business in the suit premises when he had transferred the same in favour of defendant No. 2. This witness was cross-examined only by the defendant No. 1 and not by defendant No. 2 (petitioner) and the only suggestion put to him was whether he knew that petrol pump business was going on at the time of transfer of the premises in favour of the defendant No. 2 or not. That suggestion has been denied by him. This witness in paragraph 17 has plainly deposed that at the time of transfer of the premises the service station was closed down. He further deposed that he does not know whether there were employees of defendant No. 1 at the service station or not. On the other hand, the defendant No. 1 was examined on commission. He admits that on account of his health problem he decided to transfer the business with goodwill in favour of defendant No. 2. He however, asserts that he had right to transfer the running business though he was a statutory tenant. He has also denied in his examination-in-chief that assignment deed was a bogus document as suggested by the plaintiff. He has also denied in the examination-in-chief that the goodwill was not subsisting at the time of transfer. This witness-defendant No. 1 was cross-examined. During cross-examination he admits that he has no documentary proof except his bare words to show that he had transferred the running business in favour of defendant No. 2. Suggestion was also put to him that business in the suit premises was closed long before the transfer, which of course he has denied. Besides, the defendant No. 2 (petitioner) entered the witness box. But he has not deposed anything about the transfer of running business in the examination-in-chief. His examination-in-chief consists only of one sentence, which reads thus: "It is not true that income from the property in suit would be Rs. 2000/- per month by way of rent."

It is in the cross-examination at the instance of defendant No. 1 that the defendant No. 2 (petitioner) has stated that at the time of purchase of the property by goodwill the defendant No. 1 Chandrakant Pardeshi was carrying on his business. He further deposed that petrol pump business was functioning. Similarly the service station was working. The defendant No. 2 was cross-examined by the plaintiffs (respondents) when he has admitted that he has not produced on record any documentary evidence to show that at the time of transfer of the premises in his favour business of defendant No. 1 was a running business. It was also suggested to him that prior to the transfer in his favour defendant No. 1's business was closed down, which of course he has denied. Apart from the pleadings and evidence on record which was brought on record before the trial Court, even before the Appellate Court one of the main plea taken by the respondent, as can be discerned from paragraph 8 of the judgment

of the Appellate Court, is that the subject assignment was not legal and valid as there was no evidence that at the relevant time the defendant No. 1 was having a running business in the suit premises and that was transferred alongwith the stock in trade and goodwill thereof. In this view of the matter, there is absolutely no force in the submission of the petitioner that the factum of transfer of a running business was not in dispute. The Appellate Court was therefore, right in adverting to all the relevant matters to record a finding of fact on this aspect. While discussing point No. 1 that whether the assignment dated 18-6-1979 by defendant No. 1 in favour of defendant No. 2 is legal. As observed earlier, the Appellate Court has adverted to all these materials while taking the view that there was no evidence to show that the defendant No. 1, at the time of execution of assignment had transferred the demised premises incidental to the sale of a business as a going concern together with the stock in trade and the goodwill thereof. Accordingly, it is not possible to find fault with the finding of fact recorded by the Appellate Court in this behalf. If this finding of fact cannot be doubted then it necessarily follows that the transfer or the so-called assignment in favour of the petitioner herein is hit by section 13(1)(e) read with section 15 of the Act because it is not protected by Clause (2) of the notification issued by the State Government under the proviso to sub-section (1) to section 15 of the said Act.

11. Mr. Dhakephalkar next contends that the plaintiffs have failed to specifically allege and also to prove the fact that when the business was transferred in favour of the petitioner it was not a going concern. There is no substance in this submission. In the plaint the respondents have specifically alleged that the alleged assignment deed is a bogus document and has been falsely termed as assignment deed when in fact there was no subsisting goodwill that could be transferred. Besides, the plaintiffs witness plainly deposed that at the time of the transfer there was no running business. The petitioner has not cross-examined that witness. Moreover, the fact that it was a running business alongwith good will, stock-in-trade when transferred or assigned in favour of the defendant No. 2, is a fact which were stated by the defendant No. 2 in his written statement. Even otherwise, it was for the defendants to take up that plea by way of defence that the transaction was one covered under the statutory provisions. Obviously, therefore, the defendant No. 2 took that specific stand in the written statement. Once that plea was taken, the onus was on the defendants to establish that fact. It is only on establishing that fact could they succeed in claiming that the subject transaction was protected under the notification and/or legal. However, the defendants miserably failed to bring home this fact which was the quintessence of the defence.

12. The next grievance made by the petitioner before this Court that the petitioner was prejudiced because no issue on the factum of transfer of a running business was framed by the trial Court. Even this plea is without any substance. No such grievance was made before the Appellate Court. On the other hand, one of the argument pressed before the Appellate Court was on this factum which

has been duly considered by the Appellate Court. At no point of time any grievance was made regarding the prejudice. Even before this Court, no specific ground has been taken by the defendants in the memo of writ petition that they were misled or for that matter they were prevented from adducing evidence on that matter. This plea is obviously an after thought. No doubt, Mr. Dhakephalkar relied on Ground Nos. 31, 32 and 33 of the writ petition. On plain reading of the said grounds, it is not possible to accept that such a grievance has been made. On the other hand, Mrs. Bagalia rightly pointed out that Ground Nos. 14, 15, 16 and 17 in the writ petition, the petitioner (s) in substance have contended that there was sufficient evidence on record to hold that at the time of transfer in favour of defendant No. 2 it was of a running business alongwith stock in trade and goodwill etc. As observed earlier, the fact that the transfer was of a running business is the sine qua non of the defence that the transaction is protected by virtue of the proviso to section 15(1) read with the notification issued thereunder. And, therefore, the onus was on the defendants to not only allege but also to prove that fact so as to legitimately contend that the transaction was legal and protected. This would be framing of that issue notwithstanding, for the legality of the transaction is dependent on that fact. To my mind, in this case, the parties went to the trial and had clearly understood the case of each other. It will be preposterous to non suit the plaintiffs in exercise of writ jurisdiction on such technical plea. In this view of the matter, I see no reason to entertain the grievance now made by the petitioner for the first time before this Court that too across the bar at the time of argument.

13. Accordingly, this petition fails and the same is dismissed with costs. Rule discharged forthwith.

14. At this stage, the Counsel for the petitioner prays that ad interim order granted by this Court be continued to enable the petitioner to take out appropriate proceedings if so advised. This prayer is opposed by the Counsel for the respondents essentially on the ground that the proceedings have remained pending almost for last 30 years and the landlords have been deprived of the fruits of the decree passed in their favour for so long. Moreover, it is pointed out that the petitioner has not paid any compensation to the landlords for several years inspite of the grievance made in this behalf in the past, the petitioner has not shown willingness to offer any amount without prejudice to his rights and contentions. Moreover, it is contended that the premises are being used for the purpose other than the purpose for which the original lease was granted. In view of the objection taken by the respondents, I see no reason to extend the ad interim order. That prayer is, therefore, rejected.