
(2008) 10 BOM CK 0111

In the Bombay High Court

Case No : Writ Petition No's. 4381, 4382 and 4383 of 1994

Shantaram Vithoba Pathare, Proprietor Sharmila Welding Works

APPELLANT

Vs

Ramchandra Ganesh Chitale and Others

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Citation : (2008) 6 ALLMR 892 : (2009) 2 BomCR 475 : (2009) 1 MhLj 381

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : P.K. Dhakephalkar, for the Appellant; R.S. Datar, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—Heard. By consent of all the parties, all these matters are tagged together. The basic facts are common, the Petitioner is common and the main premises in question is common, therefore, this common Judgment.

2. The Writ Petition No. 4381 of 1994 is filed by Petitioner-Original Defendant No. 2. The Original Plaintiffs filed Regular Civil Suit No. 88 of 1983 in the Court of Civil Judge, Junior Division, Chiplun, District Ratnagiri for the possession of the Suit premises under the Bombay Rent Act on the ground of change of user in the Suit premises by Defendant No. 2.

3. The Writ Petition No. 4382 of 1994 is also filed by the Petitioner- Original Defendant No. 2. The Original Plaintiffs filed Suit No. 87 of 1983 in the Court of Civil Judge, Junior Division, Chiplun, District Ratnagiri for possession of the suit premises against Defendant Nos. 1 to 3 on the ground of subletting portion of the Suit premises by Defendant No. 1 to Defendant Nos. 2 and 3.

4. The Writ Petition No. 4383 of 1994 is filed by the Petitioner-Original Defendant No. 2. The Original Plaintiffs filed Regular Civil Suit No. 86 of 1983 in the Court of Civil Judge, Junior Division, Chiplun District Ratnagiri, for possession of the Suit premises against Defendants on the ground of subletting of portion of Suit

premises by Defendant No. 1 to Defendant No. 2 and 3.

5. As there is eviction decree passed, therefore, challenge the impugned Judgment and Order only by Defendant No. 2 and not by other Defendants i.e. Original Tenants.

6. The basic common facts are as under:

7. The disputed suit premises situated at Chiplun, District Ratnagiri Municipal House No. 1769, City Survey No. 5470 at Bazaar Peth admeasuring 56' x 22' and adjoining open space.

8. Before 1940, the Suit premises was owned by one late Narayan Ramchandra Chitale and was leased out by him to one late Shri Sakharam Hari Khare.

9. Before 1958 the business in the name and style as Union Motor Transport Service was run on the said disputed Suit premises till nationalization of the passengers transport services. After nationalization of the passengers Transport services, business of good transport services was started.

10. In the year 1958, the said business came to Shri Anant Sakharam Khare, after demise of his father Shri Sakharam Hari Khare.

11. In the year 1969, thereafter, Original Defendant No. 1 Anant Sakharam Khare and present Petitioner Defendant No. 2 Shri Shantaram Vithoba Pathare, started a welding business namely "Sharmila Welding Works" in the Suit premises by way of partnership.

12. In the month of March, 1982 Defendant Nos. 1 and 2 have paid rent of the Suit premises upto 31/12/1982.

13. On 21/06/1982, the Original Plaintiffs issued notice to Petitioner- Defendant No. 2 and Defendant No. 1 Anant Sakharam Khare for eviction from the suit premises on the ground of change of user and subletting.

14. On 21/07/1982, Original Defendant No. 1 and the present Petitioner replied the notice through their Advocate and denied the allegations.

15. The Plaintiffs alleged that the Suit premises was in possession of Defendant No. 1 on rent of Rs. 40 per month for his transport business known as "Union Motor Service". After nationalization of transport business Defendant No. 1 started business of goods transport and There after, without permission of L/L started business of welding works by name "Sharmila Welding Works" with Defendant No. 2 and the said business being different nature there is change of user of the same illegally and unauthorizedly and therefore, Plaintiffs are entitled for eviction of them and ask for possession.

16. The Plaintiffs also alleged that some portion of Suit premises also given to Defendant No. 3 illegally and unauthorizedly who is carrying the business of "Sonali General Store" which is also different nature of business.

17. Defendant No. 1 by filing written statement resisted the Suit and according to him description of the Suit premises given by Plaintiff is incorrect and denied that the suit property was taken on rent for transport business on monthly rent. According to him suit premises was taken on yearly rent of Rs. 480/- and after the death of his father Original Tenant Defendant No. 1 has carried out various sorts of business and even Plaintiff has accepted rent without complaining and the said fact also within the knowledge of Plaintiff. Since, 1969 Defendant No. 1 is carrying business of "Sharmila Welding Work" with Defendant No. 2 in a partnership and Defendant No. 3 was servant of Defendant No. 1 appointed as Manager to look after the shop "Sonali General Stores". It was denied that Defendant Nos. 2 and 3 are sub-tenants.

18. On 25/11/1987, during the pendency of the suit the Original Defendant No. 1 Anant Sakharam Khare reported to be died and Defendant Nos. 1-A to 1-F his legal heirs and representatives brought on record in the Suit.

19. On 23/03/1984, Petitioner Original Defendant Nos. 2 and 3 filed their pursis & adopted written statement filed by Defendant No. 1 and resisted the Suit for possession.

20. On 18/04/1989, the learned Civil Judge, Junior Division, Chiplun dismissed all three suits by Judgment and Decree dated 18/04/1989 by holding that the Plaintiffs failed to prove that Defendant No. 1 has sublet the suit premises to Defendant Nos. 2 and 3 and also failed to prove that there is change of user of the suit premises.

21. On 05/06/1989, being aggrieved by the Judgment and Decree passed by the Trial Court the Original Plaintiffs preferred Civil Appeal Nos. 39, 40 and 42 of 1989 before District Court, Ratnagiri.

22. On 23/08/1994, the Joint District Judge, Ratnagiri allowed the Appeal and set aside the Judgment and Decree passed by the Trial Court and decreed the suits directing Defendant Nos. 1-A to 1-F and 2 to handover possession of the Suit premises to the Plaintiffs.

23. On 19/10/1994, being aggrieved by the Judgment and Decree passed by the Lower Appellate Court, the Petitioner Original Defendant No. 2 filed present Writ Petitions.

24. Admittedly, all these Petitions are filed by sub-tenant and not by Original tenant; there is nothing on record to show written consent/ permission from the landlord so far as the sub-tenancy is concerned; no partnership deed of any kind placed on record. The Suit premises was given for transport business of passengers. The same was stopped by the Original tenant, Defendant No. 1. He had allegedly lease out the Suit premises to the Petitioner Defendant No. 2 for "Sharmila Welding Works". This business was altogether different. Thus, there was a change of user. These facts are clear on the records which justifies the order and reasoning that the premises was used other than let out, originally.

25. There is nothing to justify on record that there was partnership with the Original tenant by the Petitioners to this new business. Defendant No. 1 Original tenant died in the year 1987. The deceased tenant's legal heirs and representatives are brought on record but all remained absent. Therefore, the averments made against Defendant No. 1 and his legal heirs remained unchallenged. Therefore, due to death, the firm dissolved unless agreement to the contrary. Therefore, partnership get dissolved. In the present case, for want of contrary documents, the present Petitioner's sub-tenancy on the premises, in these background, rightly taken note of in the interest of justice.

26. Defendant Nos. 2 and 3, therefore, cannot say anything about the premises which was in possession of Defendant No. 1. The open site in possession of Defendant No. 1 excluding the site of "Sharmila Welding Works" and "Sonali General Stores", therefore, rightly directed to be vacated. Though, there are some documents prepared by Municipality, yet fact remains that there is nothing to show registered partnership and or such partnership.

27. As recorded, the Original tenant changed the use of the premises than it was originally let out. There is no dispute/ denial to this fact also by the legal heirs. The evidence of Plaintiff, therefore, support his case. The allegations of subletting is also remained unchallenged. Therefore, merely because the rent was received even after the termination of tenancy, that is not a sufficient reason not to grant decree of possession in the present facts and circumstances of the case.

28. In view of above, the order directing the legal heirs of original tenant, Defendant No. 1 vacated the premises is, therefore, need no interference specifically at the instance of Petitioner Defendant No. 2.

29. The submission based upon the Judgment in Arvind Narhar Wagh v. Chintaman Ganesh Khare 1985 M.L.J. 11 that the sub-tenancy is not applicable as the sub-tenancy was not created lawfully. There is nothing to justify the valid sub-tenancy. Therefore, the impugned order needs no interference. Admittedly there is nothing on record to show that acceptance of rent by the landlord and/or by the original tenant/defendant No. 1 from petitioner/defendant No. 2 (Arun). There is nothing further to show the relationship of landlord and tenant accepted by the landlord. Therefore, there was no right whatsoever created in favour of such defendant No. 2. Therefore merely he was doing business since 1989 along with defendant No. 1, who, admittedly not challenged and/or denied the averments made by the plaintiff/respondent and as there is no relationship of landlord tenant proved and/or in existence at any point of time between the original landlord and defendant No. 2/petitioner, the eviction decree on the ground of subletting as alleged by the plaintiff, needs to be accepted.

30. In Writ Petition No. 4383/1994, in view of the above facts and reasons need no interference in the impugned order. Here again, as noted, the original tenant Arun has not challenged the impugned order. The challenge is by sub-tenant Shantaram/petitioner. As noted, the Suit was filed for recovery of possession

from the defendants on the ground of creation of unauthorised sub-tenancy by defendant No. 1/original tenant by the suit premises to Defendant Nos. 2 and 3. Considering the material placed on record and as recorded, the plaintiff/landlord proved that defendant No. 1 has sub-let the suit premises to defendants 2 and 3 unauthorizedly without any consent. With the above reasoning itself, there is no case made out by the petitioner to interfere with the order of eviction as ordered against all defendants including the petitioner. This petition is also challenged only sub-tenant and not by original tenant.

31. In Writ Petition No. 4382/1994, in view of above facts and circumstances and as admittedly challenge is by the petitioner/original defendant No. 3 on the ground of subletting. In this case there is ample material and evidence to show that the original plaintiff entered into the witness box and stated that original defendant No. 1 leased out the western portion of the suit property admeasuring 6'x8' to defendant No. 2 exclusively who made wooden structure and started running General Stores under the name and styled as "Sonali General Stores". Defendant No. 1 had no concern with the business of defendant No. 2 in the said portion. There is no substantial document to establish the relationship between the parties. Merely because defendant No. 2 had adopted written statement of defendant No. 1 that itself is not sufficient as that is not the evidence. The contents of the written statement needs to be proved by the parties. Therefore, the defendants failed to prove the contents of the written statement itself specifically when the oral evidence led by the plaintiff remained unrebutted. Defendant No. 2 (Arun) did not cross-examine the plaintiff. Neither he proved his written statement. Defendant No. 2 avoided to enter the witness box. He failed to prove the relationship as employer and servant when he was carrying on the business in the suit premises. Therefore, the plaintiff's case that he was occupying the premises through defendant No. 1 remained intact. Therefore, admittedly, sub-tenancy is without prior consent of the owner. The possession of defendant No. 2 therefore is unlawful.

32. In view of this, the impugned order dated 23.08.1994 decreeing the suit against original defendant No. 1 (now the legal heirs) and defendant No. 2 to remove wooden structure from the suit premises therefore also needs no interference. As noted, there is no challenge made by defendants 1 and 2 to this order. The challenge is by defendant No. 3 only.

33. Taking all this into account, therefore, all these petitions are dismissed with no order as to costs.

34. The learned Counsel appearing for the Petitioner, on instructions seeks time to vacate the premises.... Considering the fact that the Petitioner is in occupation since long, time is granted upto 31st May, 2009 on filing usual undertaking by Petitioners and L.Rs. of the Petitioners on or before 20/11/2008.