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Court : Mumbai Aurangabad

Decided On : Feb-17-2015

Judge : A.I.S. Cheema

Appeal No. : Civil Revision Application No. 8 of 2013

Appellant : Anil

Respondent : Jashrath and Others

Judgement :

1. The present Revision Application has been filed by Petitioner Anil Gangekar who was Defendant No.1 in Regular Civil Suit No.41 of 1986 filed by Respondent Nos. 1 to 8. On death of some of the original plaintiffs, their legal heirs were brought on record. Respondent No.9 was original Defendant No.2 who was arrayed in the suit along with the present Applicant as tenant in the suit premises. The suit was decreed against the present Applicant and Respondent No.9 original Defendant No.2 (hereafter referred as "Defendants"). Respondent Nos.10, 11 and 12 were formally arrayed as Defendant Nos.3 to 5 in the suit by the Plaintiff as they were not available to sign the plaint when the suit was filed. I will refer to contesting Landlords as Plaintiffs.

2. The suit was brought by the Plaintiffs on various grounds but came to be decreed only on the ground of non use of the suit premises without reasonable cause, for the purpose for which the same were let for continuous period of six

months preceding the date of suit (which was filed on 16th January 1986) under Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("Bombay Rent Act" in brief), against Defendant No.1. The claim of the Plaintiff that suit premises were sublet to Defendant No.2 was not accepted by the trial Court. The Applicant Defendant No.1 filed Regular Civil Appeal No.87 of 2006. The Appeal came to be dismissed and cross-objections filed by the Plaintiffs were also dismissed. Against the Judgment and orders passed by the First Appellate Court, the present Revision Application has been filed by the Applicant-original Defendant No.1.

3. Brief narration of relevant facts for deciding the present Revision Application is necessary.

(A). The Plaintiff brought the suit inter-alia claiming that initially only ground floor of the suit property was let out to the Defendant for the business of "Khanawal" i.e. eating house. Subsequently, Defendant on 15th March 1979 executed written agreement and he was given upper portion of the suit property for running a lodge. As per the agreement, Defendant was to do the necessary construction but the ownership would remain of the Plaintiffs. Defendant had agreed to vacate suit premises in eleven months. From the suit property, ground floor was given only for the business of eating house. However, Defendant without taking any written permission from the Plaintiffs, closed the eating house and illegally started permit room of liquor in the suit premises. Defendant stopped using the suit premises for the purpose for which it was let and changed the user. Notice was issued to the Defendant Nos.1 and 2 on 21st August 1985 seeking possession, but the same was not complied with. Thus the suit was brought.

(B). In the trial Court, Defendant Nos.1 and 2 resisted the suit by filing Written Statement. It was claimed that Defendant No.2 was unnecessarily made party to the litigation. It was claimed that Defendant No.2 has nothing to do with the suit premises. Defendant denied that suit premises were given on rent only for running eating house and that without permission the eating house had been closed and that illegally liquor permit room had been started. It was denied that he was not using the suit premises for the purpose for which it was let out. It was claimed that

Defendant No.1 was using the suit premises for the purpose for which it was let out. Defendant No. 1 claimed that he had right to do any business in the suit premises.

(C). The trial Court referred to various issues which were raised before it. Now, the issue relevant, which is there for decision is only Issue No. 2 framed by the trial Court. The trial Court had framed this issue as follows:

"whether Plaintiffs proved that the suit premises had not been used for the purpose for which they were let out for continuous period for six months preceding the date of suit."

The issue was answered in affirmative. The trial Court considered the suit in the context of Section 13(1)(k) of the Bombay Rent Act. Reference was made to Exhibit-91, the agreement which mentioned that ground floor of the property was let out to Respondent no. 1 for business of eating house i.e. "Jagdamba Khanawal". The trial Court discussed the evidence of Defendant where he admitted that he had closed down the business of Jagdamba Eating House and claimed that he had right to carry on any type of business in the suit property. The Defendant had deposed that at present he was running hardware shop in the suit property. The trial Court discussed the evidence of the parties and held that it was clear that ground floor of the suit property was let out to Defendant No. 1 for the purpose of running eating house and after sometime the eating house Jagdamba Khanawal was closed down and now Defendant No. 1 was running hardware shop. Trial Court found that Defendant's witness had admitted in cross-examination that in 1983 Defendant started permit room on the ground floor of the suit property and that too without permission of the land lords i.e. Plaintiffs and the witness had also admitted that after closing down the business of permit room in the suit property, he had now started the business of hardware without permission of the land lords i.e. Plaintiffs. The trial Court further discussed the evidence of Defendant where admission was given in the cross-examination that Defendants are using suit property for residential purpose also. Trial Court noted that, Defendants had not submitted address memo in the proceedings and in the Vakalatnama their address was given of Teli Khunt, Ahmednagar where suit

property was situated and the evidence showed that at Teli Khunt they were not having any other property except suit property. Trial Court concluded that sufficient evidence was brought by the Plaintiffs to show that the ground floor of the suit property which was let out to Defendant for running eating house, the Defendant had without obtaining prior permission of land lord started permit room in the suit property and after closure of permit room started hardware business. Trial Court opined that the Plaintiff had proved that suit premises had not been used for the purpose for which they were let out, for the continuous period of six months preceding the date of suit. Thus on these grounds the suit came to be decreed for possession.

(D). Regarding this dispute, in Civil Appeal No. 87 of 2006 District Judge dealt with the evidence of parties under Point No. 1

"Whether the Plaintiffs had proved that the suit premises had not been used for the purpose for which the same were let for continuous period of six months preceding the date of suit".

District Judge recorded the finding in affirmative. District Judge referred to the evidence of Plaintiff Kasturchand that the ground floor of the suit property was given for eating house and on 15th March 1979, the first floor was given for running a lodge. Defendant had stopped use and started permit room for liquor in the suit property. Defendant No. 1 Anil admitted that he had started business of lodge and stopped Jagdamba Khanawal, eating house. District Judge referred to the evidence of the Defendant where he claimed that he had right to conduct any business in the suit property. The District Judge analyzed the evidence that Defendant did admit that he had started permit room in the suit premises in 1983 and that there was also a murder in the suit premises of one Captain Vinod Rawal, for which Defendant and his brother were tried in Sessions Case. Of course they came to be acquitted. District Judge found that the Defendant had not taken permission to change the user, particularly for permit room and then hardware business. District Judge further discussed the evidence which showed that the Defendant was using the suit premises for residence also which was not the purpose for which the property was let. District Judge found that the permit room

had continued till 1986 and from 1986 the business of hardware was started. It needs to be noted that the suit was filed on 16th January 1986, that the premises were not being used for the purpose for which the same were let. Thus, the District Judge maintained the findings on this count and decree passed by the trial Court.

2. In the present Revision Application, the Applicant Original Defendant No. 1 is claiming that both the Courts below have committed error. Referring to the case of the Plaintiffs that the suit premises were let out for eating house and without obtaining permission permit room was started and then hardware shop, the Defendant claims that it can not be said to be change of user because although the Defendant was running eating house and now running shop of hardware, it can not be termed as change of user. It is not a case that instead of business purpose the Defendant is residing in the premises or using the same for any other purpose excluding business. It was not the case of Plaintiffs that the Defendant was residing in suit property. Merely in the Court proceedings the address of the Defendant was mentioned of the suit property and by that itself it can not be said that the Defendant is using the suit property for residence. Only because Defendant started hardware shop instead of eating house the same does not amount to change of user. The decree passed is not maintainable. Defendant is running hardware shop under the name and style of "VinayakTraders". Person can not reside in hardware shop and thus the conclusions drawn by the Courts below are not maintainable. The Applicant Defendant wants the decree of eviction passed against him to be set aside.

3. I have heard counsel for both sides. Counsel for the Applicant Defendant submitted that there is no dispute regarding the fact that earlier the ground floor was let out for the purpose of eating house and by subsequent agreement the Defendant was allowed to construct first floor and to use the same as lodge. According to him, as per sub-section 8A of Section 5 of the Bombay Rent Act when the premises is let out for business, the same includes practicing any profession and so Defendant had right to conduct any business in the suit premises. It has been submitted that, in the suit premises from 1979 lodge was started and later on apart from the hotel, permit room was started after 1983. According to him, eviction decree passed branding such change as change of user

was not maintainable. The counsel submitted that, for the customers staying at the lodge the Defendant was required to stay there in the suit premises turn by turn and by this itself it cannot be said that the Defendant was residing in the suit premises. The counsel submitted that, it was a fact that in the permit room murder had taken place but this fact was given undue weightage by the Courts below ignoring the fact that the Defendant was acquitted. According to the counsel, such fact could not have been held out against the Defendant.

4. Counsel for the contesting Respondents original Plaintiffs has supported the orders of the Courts below. According to the learned counsel, the case brought by Plaintiffs was of non use for the purpose for which the premises were let out, without reasonable cause for six months before filing of the suit. Counsel referred to the evidence of Defendant No. 1 Anil at Exhibit 106 in the record of the trial Court where in Para 3 he admitted that earlier Jagdamba Khanawal was being run in the suit premises and later Ganesh Lodge was started. Counsel referred to the evidence of Defendant in cross-examination where he admitted that business of lodging continued till 1987 and in 1983 he had started permit room in the premises on ground floor and it related to English liquor and Beer. The counsel further referred to the evidence of Defendant that from 1983 there was no reason to start permit room stopping the business of eating house. According to the counsel, it is admitted position that when the suit premises were let out for eating house and lodge, the premises were not being used for eating house without any reasonable cause and permit room had been started in the suit premises.

5. The counsel for Applicant Defendant relied on the case of **HariRao vs. V. Govindachari and others, reported in A.I.R. 2005 S.C. Page No.3389**, to submit that if the premises are let out for a particular trade, merely by changing of trade, it cannot be said that the premises were being used for the purpose other than for which the same were leased.

6. Counsel for Plaintiffs relied on the case of **VoraRahimbhai Haji Hasanbhai Popat vs. Vora Sunderlal Manilal and another, reported in A.I.R. 1986 S.C. Page No.174**, to submit that if the premises are not used without reasonable cause for more than six months prior to the date of suit, the tenant is liable to be

evicted. The counsel further relied on the case of **BhaskarWamanrao Rithe and another vs. Smt. Indira Iyer** , reported in **2006(1) Mh.L.J. Page No.155**, to submit that if the premises were being used by third person or for a purpose other than the one for which the same were let out, it would amount to non using the premises for the purpose for which the same were let out.

7. Point for consideration is:

Whether the impugned Judgment and order of the District Court is illegal or suffers from material irregularity?

8. Section 13(1)(k) of the Bombay Rent Act, provided that the landlord shall be entitled to recover possession of the premises if the Court is satisfied that the premises have not been used without reasonable cause for the purpose for which they were let out for a continuous period of six months immediately preceding the date of the suit.

9. Non user for the purpose would take within its sweep even change in user. Judgment in the matter of **HariRao vs. V. Govindachari and others (supra)** relied on by the learned counsel for Defendant, related to Section 10(2)(ii)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act which prohibited conversion of residential building into a non residential building except with the permission in writing of the controller, any covenant in that behalf entered into by the tenant and the nature of the tenancy. Hon'ble Supreme Court considered the matter in that context and held that:

"Merely because a tenant, who has taken a building for the purpose of running a trade, alters the commodity in which he was trading when he took the building on lease or trades in other commodities also, he could not be held to be using the premises for the purpose other than the purpose for which it was let. The purpose has to be understood, as the purpose of trade and in the absence of a covenant barring the using of it for any other trade, it will be open to the tenant to use the premises for expanding his trade or even for taking up other lines of trade as befits a prudent trader."

10. The present matter is under Section 13(1) (k) of the Bombay Rent Act, which relates to non user of the premises for the purpose for which they were let out. There is no dispute regarding the fact that the ground floor part of the suit premises was let out for running a Khanawal i.e. eating house and later on by an agreement, the tenant was allowed to construct on the first floor where he was allowed to run a lodge. No doubt the letting out was for the purpose of trade but the tenant changed the user of the part of the premises on the ground floor from Khanawal into running a permit room. The Defendant tried to avoid accepting that he was running a permit room but the evidence as discussed by both the Courts below concurrently shows is that it has been proved that the Defendant was indeed running a permit room in part of the premises on the ground floor. The Appellate Court found that the Defendant closed the business of eating house and started permit room and there was also a murder in the same, for which the Defendant No.1 and his brother faced sessions trial. It was found that the permit room continued till 1986 and from 1986 Defendant started business of hardware. The suit was filed on 16th January 1986 and in view of the findings of facts recorded by the Courts below, it is clear that in the six months prior to the date of filing of the suit, the Defendant had been running permit room in the suit premises. No reasonable cause for not using it as eating house is shown.

11. Defendant wanted to avoid accepting that he was running the permit room and in his pleadings appears to have kept silent on that count and even denied Plaintiff pleadings that he was running permit room. When there is a finding of fact that Defendant was running a permit room in the suit premises, Defendant has not brought on record any material to show that he had the necessary license to run the permit room, in his name in the suit premises in order to claim that he was entitled to conduct any other trade in the suit premises. At the time of arguments, learned counsel for contesting Respondents submitted that the permit was in the name of brother of the Defendant and the document was not proved in the trial Court. It would be illegal for the Defendant to run permit room without having excise license in his favour. Although Defendant may be able to say that he is entitled to run any other trade in place of the trade for which the premises were let out, he cannot claim that he can run a trade illegally in the suit premises.

12. Even if it was accepted for a moment that the Defendant had license to run the permit room, still running of a permit room in premises which were let out for the purpose of running a Khanawal or eating house, cannot be said to be any other trade. Looking to the nature of this trade, many landlords would be apprehensive to give their premises for such business. The trade attracts its own problems which is clear from the facts of present matter itself where it is admitted that murder took place in the suit premises and the Defendant along with his brother were sent to trial in a Sessions Case. Their acquittal does not convert a permit room into any other trade visavis "Khanawal" or eating house. It is for such reasons that landlords are apprehensive. Thus, the Courts below rightly found that the premises were not being used, without reasonable cause for the purpose for which the same were let.

13. Both the Courts below recorded another finding of fact that Defendant was using suit property for residential purpose also. Learned counsel for the Defendant argued that for serving persons residing in the lodge, it was necessary to stay at the premises turn by turn. However, the Defendant did not show in the trial Court that he was residing somewhere else. These are findings of facts of both the Courts below on this count. Looking to the findings recorded, it would be additional reason why the decree passed under Section 13(1)(k) of the Bombay Rent Act should not be disturbed.

14. For the above reasons, it cannot be said that the impugned Judgment of the Appellate Court is illegal or that it suffers from material irregularity.

15. The Revision Application stands dismissed with costs.

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