



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4701 OF 1997

Chandrakant C. Patel

(since deceased, through Legal Heirs)

1) Hasumati Chandrakant Patel

2) Mayuri Chandrakant Patel

3) Shital Chandrakant Patel

} ...Petitioners

: Versus :

1. Suryakant Shivilal Parmar

2. Shri. R.R. Gandhi,

Chief Judge, Court of Small Causes
at Bombay

3. Shri. A.G. Kolte,

Judge Court of Small Causes at Bombay

} ...Respondents

Ms. Mamta Sadh with Mr. Jeetendra Ranawat and Ms. Devika K. i/by. Mr. Sudhakar G. Lakhani, for the Petitioners.

Mrs. J.A. Sarkhot with Mr. Ganesh Narula, for the Respondents.

CORAM: SANDEEP V. MARNE, J.

Judgment Reserved on : 12 December 2024.

Judgment Pronounced on : 17 December 2024.

JUDGMENT :

1) Petitioner-Defendant No.1 has filed this petition challenging the judgment and decree dated 23 July 1997 passed by the Appellate Bench

of the Small Causes Court allowing Appeal No.491/1988 filed by Plaintiff No. 2 and setting aside the judgment and decree dated 30 June 1988 passed by the Small Causes Court in L. E. & C. Suit No. 41/50 of 1978. The suit was instituted seeking eviction of legal heirs of Chhaganlal Motilal Patel, who according to the Plaintiffs, was a mere licensee in respect of the suit premises. The Small Causes Court had dismissed the suit by decree dated 30 June 1988. The Appellate Bench has reversed the decision of the Small Causes Court and has decreed L. E. & C. Suit No.41/50 of 1978 directing the Defendants to vacate the suit premises with liberty to the Plaintiffs to apply for future mesne profits from the date of the suit by filing separate proceedings under Order 20 Rule 12 of the Civil Procedure Code (**Code**).

2) Brief facts of the case, as pleaded in the Plaint, are that Harjivan Sunderji Mistry (**Plaintiff**) was a monthly tenant in respect of Gala-5A admeasuring 23 ft. X 10 ft. (230 sq.ft.), 6th Kharva Cross Lane, Trimbak Parshuram Street, Bombay-400 004 (**suit premises**). Plaintiff was carrying on carpentry business in the suit premises and allowed Chhaganlal Motilal Patel and Suryakant Shivilal Parmar to occupy some undivided and undemarcated portion of the suit premises to carry on their respective business. Accordingly, Chhaganlal Patel installed two lathe machines in the southeast portion of the suit premises and operated the same with the help of his son. Shri. Suryakant Parmar worked on his own machines installed in other portion of the suit premises. Plaintiff used to open the suit premises at 8.30 a.m. and shut the same at 5.30 p.m. Plaintiff alleged that in August 1977, Chhaganlal Motilal Patel installed one more drilling machine besides the original lathes without the consent of the Original Plaintiff, which led to Plaintiff serving notice dated 6 September 1977 on Chhaganlal Motilal Patel and terminated his license/permission and called him upon to remove his machines. Chhaganlal Motilal Patel gave reply dated 21 September 1977

denying the contents of the notice. Original Plaintiff sent Rejoinder dated 13 October 1977.

3) Plaintiff accordingly instituted L. E. & C. Suit No.41/50 of 1978 on 20 April 1978 seeking recovery of southeast portion of the suit premises from the Defendant-Chhaganlal M. Patel. In the plaint, original Plaintiff pleaded that the Defendant-Chhaganlal Patel had failed and neglected to pay monthly compensation at the rate of Rs.180/- per month from 1 August 1977 to 31 January 1978. He further pleaded that the Defendant did not have right to remain in possession of the southeast portion of the suit premises after termination of the license/permission. This is how the suit was filed for eviction of the Defendant-Chhaganlal by branding him as a mere licensee.

4) Defendant-Chhaganlal Patel filed Written Statement contesting the suit and taking a position that he was a protected tenant under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**Bombay Rent Act**) and that therefore Plaintiff is not entitled to recover possession of the suit premises from him. Defendant pleaded that Plaintiff had sublet the entire shop bearing Gala No.5A to him in 1953 and that he exclusively possessed the same. During pendency of the suit, Suryakant Parmar, who according to the Plaintiff, was also permitted to use balance portion of the suit premises to operate his machines, purchased the business of the original Plaintiff-Harjivan Sunderji Mistry by Indenture of Assignment dated 2 January 1981 together with stock-in-trade, fittings, fixtures, implements, machinery with goodwill, business etc and accordingly started claiming tenancy rights in respect of the suit premises bearing Gala No.5A.

5) Plaintiff No.1 took out Injunction Notice No.384/1983 seeking injunctive reliefs against the Defendant. He also took out Contempt Notice No. 429/1983 alleging breach of earlier injunction order. Both injunction as well as the contempt notice was discharged by the Small Causes Court by orders dated 14 February 1984. The Appeal against the said order was dismissed and Writ Petition filed before this Court was also dismissed. Shri. Suryakant Parmar complained that Defendant-Chhaganlal Patel had started putting his own lock on the door of Gala No.5A and was preventing Shri. Parmar from entering the same. With this and other grievances, Suryakant Parmar filed S. C. Suit No. 5283/1985 in City Civil Court seeking a declaration that he was entitled to use, occupy and possess the portion of Gala No.5A, which he was occupying and to restrain Chhaganlal Motilal Patel from putting his own lock on the door of Gala No.5A. Notice of Motion taken out by Suryakant Parmar seeking temporary injunction was dismissed by order dated 13/14 February 1986 and Appeal from Order No.347 of 1986 challenging the order of rejection of temporary injunction was also dismissed by this Court on 17 June 1986.

6) Initially application filed by Suryakant Parmar for his impleadment as Plaintiff No.2 in L.E. & C. Suit No. 41/50 of 1978 was rejected by the Small Causes Court by order dated 12 August 1986 and subsequently, he was permitted to be joined as Plaintiff No.2 by order dated 16/17 October 1987. This is how Suryakant Parmar, who was described by the original Plaintiff as another permissive user in respect of the portion of the suit premises became the tenant of the suit premises in place of Harjivan Sundarji Mistry and sought ouster of the Defendants from the suit premises. During pendency of the suit, original Defendant-Chhaganlal Motilal Patel passed away and his legal heirs were brought on record as Defendant Nos. 1 to 10.

7) Issues were framed by the Small Causes Court in L.E. & C. Suit No.41/50 of 1978 on 1 September 1986. At that time, Suryakant Parmar was yet to be added as Plaintiff No. 2 and accordingly Original Plaintiff led his evidence through his Constituted Attorney, Suryakant Parmar on 9 September 1986. Additionally, Original Plaintiff-Harjivan Sundarji Mistry also led his own evidence by examination through Court Commissioner on 15 January 1987. After Suryakant Parmar was impleaded as Plaintiff No.2 to the suit on 17 October 1987, further witnesses P.W. Nos. 3, 4, 5 and 6 were examined, which included one Mr. Arvind Rathod who gave evidence that he was also in possession of part of the suit premises upto 1975, in addition to Defendant and Suryakant Parmar. On behalf of the Defendants, Venilal Chhaganlal Patel (Defendant No.4) was examined. Chandrakant Chhaganlal Patel (Defendant No.1) was also examined as a witness. It appears that an additional Written Statement was filed by the legal heirs of Chhaganlal Patel on 21 April 1988.

8) After considering the pleadings, documentary and oral evidence, Small Causes Court proceeded to dismiss the suit by judgment and decree dated 30 June 1988. Plaintiffs filed Appeal No.491/1988 before the Appellate Bench of the Small Causes Court challenging the decree dated 30 June 1988. The Appeal was allowed by the Appellate Bench of the Small Causes Court by judgment and decree dated 23 July 1997. The Appellate Court has decreed the suit of the Plaintiffs and has directed the Defendants to vacate possession of the suit premises. The Appellate Court has further held that Plaintiffs would be entitled to mesne profits in respect of the suit premises from the date of filing of the suit by filing separate proceedings under Order 20 Rule 12 of the Code.

9) Aggrieved by the judgment and decree dated 23 July 1997 passed by the Appellate Bench of the Small Causes Court, Defendant No.1- Chandrakant Chhaganlal Patel has filed the present petition. By order dated 3 October 1997, this Court admitted the petition and stayed the decree passed by the Appellate Court subject to the condition of the Petitioner paying entire arrears of rent, not creating third party rights in the suit premises etc.

10) After the petition was admitted on 3 October 1997, S. C. Suit No. 5283/1985 filed by Suryakant Parmar came to be decreed *ex-parte* on 18 October 1997 by the City Civil Court holding that Suryakant Parmar was in joint possession of Gala No.5A with Chhaganlal Motilal Patel. The City Civil Court accordingly decreed the suit in terms of prayer clauses- 29(a) and (b) of the plaint declaring that Suryakant Parmar was entitled to use, occupy and enjoy the portion of Gala No.5A as described in the plaint. It was declared that Chhaganlal Patel was not entitled to lock the door of Gala No.5A and restrained him therein from disturbing possession of Suryakant Parmar in respect of portion of Gala No.5A. Suryakant Parmar took out execution application in the year 2009. Original Petitioner- Chandrakant Patel passed away on 11 May 2010 and his legal heirs are brought on record. Petitioners took out Notice of Motion for setting aside *ex-parte* decree in S. C. Suit No.5283/1985 which was dismissed by order dated 17 August 2012. Petitioners filed Appeal from Order against the dismissal of the application taken out under Order 9 Rule 13 of the Code which also came to be dismissed by this Court by order dated 2 November 2012. This is how the decree passed in SC Suit No. 5283/1985 has attained finality.

11) On application taken out by the Respondents herein for enhancement of rent/payment of interim compensation as per the judgment of the Apex Court in Atmaram Properties (P) Ltd. Versus. Federal Motors (P) Ltd.¹ this Court passed order dated 27 January 2012 and directed deposit of interim compensation at the rate of Rs.4,500/- per month by Petitioners from the date of filing of the Civil Application i.e. from July 2011. The petition is called out for final hearing.

12) Ms. Sadh, the learned counsel appearing for the Petitioners would submit that the Appellate Bench of the Small Causes Court has erred in reversing well considered decision of the Small Causes Court. That the suit filed by the Original Plaintiff and contested further by Suryakant Parmar was rightly dismissed by the Small Causes Court after appreciating the entire evidence on record. She would submit that Plaintiff came out with a false case of carrying out his carpentry business in the suit premises as well as permitting Suryakant Parmar to use portion of the same. That the factual position is that the original Defendant-Chhaganlal Parmar exclusively possessed the entire suit premises being Gala No.5A since 1953. That the suit premises admeasures only 230 sq. ft. and it is impossible to install or operate multiple lathe machines of Defendant, Plaintiff No.2, Arvind Rathod as well as conduct carpentry business of Plaintiff No. 1. That a new twist was added by examining one, Arvind Rathod, who claimed that he was also in possession of part of Gala No.5A, though no such pleading was raised in the plaint. That Plaintiff therefore painted a picture as if four different persons could carry on their respective business by operating heavy machinery in area admeasuring just 230 sq.ft. That the Appellate Court has completely based its judgment by relying on evidence of Mr. Arvind Rathod which ought to have been discarded in absence of

¹ (2005) 1 SCC 705

any foundational pleadings. That Plaintiff never pleaded in the plaint that Shri. Arvind Rathod ever possessed any portion of the suit premises. That since there is a jurisdictional error committed by the Appellate Court in relying upon evidence of Shri. Arvind Rathod, the decree passed by the Appellate Court warrants interference by this Court in exercise of jurisdiction under Article 227 of the Constitution of India.

13) Ms. Sadh would further submit that since the original Plaintiff came out with a case that the suit premises were jointly possessed by himself, Parmar and Chhaganlal Patel, the burden was on him to prove his claim. That after alleged purchase of business of original Plaintiff by Suryakant Parmar, who drove the suit further, the burden of proving joint possession was on Plaintiff No.2. That Plaintiffs thoroughly failed to lead reliable evidence to prove joint possession of the suit premises by any person other than Chhaganlal Patel. Ms. Sadh would take me through the evidence on record to demonstrate several admissions and contradictions therein in favour of the Defendants. She would particularly highlight the covenants of the Deed of Assignment executed in the year 1981 not making any reference to Suryakant Parmar possessing any portion of the suit premises. That if indeed Suryakant Parmar was occupying any part of Gala No.5A, the same ought to have been reflected in the Deed of Assignment. That Plaintiffs' witness admitted that the Deed of Assignment did not refer to pendency of any *lis* which was contrary to the factum of lodging of eviction suit in the year 1978.

14) Ms. Sadh would further submit that *ex-parte* decree in S. C. Suit No.5283/1985 would have no consequence on the decision of the present proceedings. That the said *ex-parte* decree is otherwise without jurisdiction

as the issue of possession of any portion of the suit premises by Suryakant Parmar was also subject matter of suit pending before the Small Causes Court and therefore the City Civil Court could not have decided the same issue in the Short Cause Suit. That in any case the issue before the Small Causes Court was about exclusive possession of Defendant-Chhaganlal Patel of entire suit premises bearing Gala No.5A as on 1 February 1973 whereas the issue before the City Civil Court was about joint possession of the suit premises by Suryakant Parmar as on the date of institution of the Short Cause Suit in the year 1985. That therefore even if joint possession of suit premises by Mr. Parmar in the year 1985 is admitted, the same would have no effect on the finding recorded by the Small Causes Court. That Defendant-Chhaganlal Patel was in exclusive possession of the entire suit premises as on the datum line of 1 February 1973.

15) Ms. Sadh would submit that on account of his exclusive possession of the suit premises bearing Gala No.5A as on the datum line of 1 February 1973, original Defendant-Chhaganlal Patel became protected tenant in respect of the suit premises and therefore the suit filed for his eviction by branding him as a licensee itself was not maintainable and liable to be dismissed. She would further submit that Plaintiffs did not produce any iota of evidence to prove joint possession of the suit premises either by Mistry or Parmar and in any case by Arvind Rathod at any point of time. That documents marked as Exhibit-J and K (Sales Tax Certificates) relied upon by Parmar do not pertain to suit premises as Gala No.5A is not reflected thereon and the certificates reflect an altogether different address of business of Parmar. She would therefore submit that Plaintiffs thoroughly failed to discharge their burden of proving joint possession of the suit premises. That since presence of original Defendant-Chhaganlal Patel in the suit premises as on 1 February 1973 is not even disputed, in

absence of discharge of burden to prove joint possession by Mistry, Parmar or Rathod, Defendant is deemed to have become a protected tenant of the suit premises under the provisions of Section 15A of the Bombay Rent Act. She would accordingly pray for setting aside the decree passed by the Appellate Court.

16) The petition is opposed by Mrs. Sarkhot, the learned counsel appearing for Respondent No.1. She would submit that the Appellate Court has correctly held that the original deceased Defendant-Chhaganlal Motilal Patel was a mere licensee being in possession of only southeast portion of the suit premises. That the findings of fact recorded by Trial and Appellate Court, after re-appreciation of evidence cannot be disturbed by this Court in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India. She would submit that the entire burden of proving exclusive possession of entire Gala No.5A was on the original deceased-Defendant, who has failed to discharge the same. She would rely upon judgment of this Court in Anwarali Ashrafali Versus. Abdul Aayyum Abdul Khaliqui², in support of her contention that failure to discharge burden of proof to demonstrate exclusive possession by original deceased-Defendant must necessarily result in passing of an eviction decree against him. She would submit that the deceased-Defendant did not produce even a single document to prove his exclusive possession of the suit premises. That he was merely permitted to keep and operate two lathe machines in the southeast corner of the suit premises. That the license for the operation of said lathe machines was also procured by the original Plaintiff, which itself demonstrates mere permissive use of the suit premises by the Original Plaintiff. That on the other hand, several documents are produced to prove that Suryakant Parmar, as well as Mr. Arvind Rathod also occupied some portion of the

2 1986 (1) Bom.C.R. 581

suit premises at the relevant time. She would rely upon writing dated 1 January 1973 by which the original Plaintiff-Harijivan Sunderji Mistry permitted M/s. Bina Electricals for operation of business after accepting deposit of Rs.2,500/-. She would also rely upon Certificate of Registration under the Bombay Sales Tax Act, 1959 issued in the name of Suryakant Shivilal Parmar on 18 March 1970 and Certificate of Registration under The Central Sales Tax (Registration and Turnover) Rules, 1957 on 31 January 1970 indicating his factory address as that of the suit premises. She would submit that additionally several documents were produced to prove occupation of Suryakant Parmar of suit premises.

17) Mrs. Sarkhot would also rely upon the decree passed by the City Civil Court in S. C. Suit No.5283/1985 to demonstrate joint possession of Suryakant Parmar in respect of the suit premises. She would submit that the said decree has attained finality as Defendant's application for setting aside the decree has been rejected upto this Court. She would further submit that the deceased-Defendant and his heirs are attempting to secure a declaration of tenancy in an eviction suit lodged by the Plaintiff. That independently, the deceased Defendants/his heirs have not instituted any declaratory suit in respect of his alleged tenancy rights. That if Defendant really was the tenant in respect of the suit premises, he ought to have challenged the Deed of Assignment executed in favour of Suryakant Parmar. She would accordingly submit that on account of failure of the Defendant to secure a declaration of his tenancy, he has rightly been held to be a mere licensee for ordering his eviction in the suit instituted by the Plaintiffs. She would pray for dismissal of the petition.

18) Rival contentions of the parties now fall for my consideration.

19) Plaintiff-Mistry instituted L.E. & C. Suit No.41/50 of 1978 seeking recovery of possession of the suit premises from the original deceased-Defendant-Chhaganlal Motilal Patel contending that he was merely permitted to use southeast portion of Gala No.5A for operating his 2 lathe machines and did not have any right to remain in occupation of any portion of the suit premises after termination of the license by letter dated 6 September 1977. The suit was thus plainly for eviction of a licensee. It is the Defendant who added twist in the proceedings by filing Written Statement contending that he was a protected tenant in respect of entire Gala No.5A as he exclusively possessed it since the year 1953. Ordinarily, since Plaintiff treated the original deceased-Defendant to be a merely licensee in respect of some portion of Gala No.5A, the Defendant ought to have filed a declaratory suit seeking a declaration that he acquired the status of protected tenant under the provisions of Section 15A of the Bombay Rent Act on the basis of his assertion that he occupied the entire Gala No.5A as on the datum line. It would apposite to refer to the provisions of Section 15A of the Bombay Rent Act which provided thus:

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

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

20) Thus, under the provisions of Section 15A of the Bombay Rent Act, if a person is in occupation of any premises or part thereof as on 1 February 1973 as a licensee, he acquires the status of a 'protected tenant'. The definition of the term 'tenant' under Section 5(11) of the Bombay Rent Act includes, *inter-alia*, persons who are declared as deemed tenants under

Section 15A. However, for claiming the status of a deemed tenant under Section 15A of the Bombay Rent Act, the twin conditions need to be satisfied, viz (i) such person must be in possession of the premises as a licensee as on 1 February 1973 and (ii) if he occupies only part of the premises, such part shall not be less than a room. Thus, Section 15A of the Bombay Rent Act does not contemplate recognising multiple persons occupying one room as licensees for being declared as deemed tenants. In other words, if it is found that multiple persons share a room as licensees as on 1 February 1973, none of them will acquire the status of a deemed tenant.

21) In the light of these peculiar provisions of Section 15A of the Bombay Rent Act, the moot issue that arose for consideration before the Trial and the Appellate Courts and which once again arises for consideration before this Court is whether the original deceased-Defendant occupied as a licensee the entire Gala No.5A or he occupied only portion thereof with remaining portion occupied by Plaintiff No. 2-Suryakant Parmar and Mr. Arvind Rathod as on 1 February 1973. There is no dispute to the position that there is a permissive use or a license granted to the Defendant by the original Plaintiff to occupy the premises. Thus presence of the Defendant as a licensee in the suit premises as on the datum line of 1 February 1973 is not seriously disputed. The real dispute is whether he occupied the entire Gala or only portion thereof.

22) Plaintiff pleaded in the plaint that *'The plaintiffs due to his stringent financial condition, allowed the deceased Chhaganlal original defendant and one Mr. Suryakant Parmar now the Plaintiff No.2 to use and occupy some un-defined and un-demarcated portions of the said shop to*

carry on their work of business'. Additionally, Plaintiff also pleaded in para-2 of the plaint that 'The original deceased defendant abovenamed accordingly brought and installed with the 1st plaintiff's said permission two Lathes (5'2') in the South-east portion of the said shop. The original deceased defendant renovated the said lathes with the help of his son, while said Suryakant Parmar now Plaintiff No.2 worked his own machines installed with the like permission of the plaintiff No.1 in another portion of the Plaintiff's said shop'. These are the averments in the original unamended plaint.

23) Thus, Plaintiff specifically pleaded in the plaint that original deceased Defendant-Chhaganlal, as well as Suryakant Parmar were permitted to use un-defined and un-demarcated portions of the suit shop for operation of their respective machines. The Plaintiff however maintained silence about the date on which said permission was granted to Chhaganlal Patel and Suryakant Parmar. On the other hand, Chhaganlal pleaded in his Written Statement that *'The plaintiff has suppressed the fact that the suit shop was sublet by the plaintiff to the defendant since 1953 and that the defendant is in possession of the suit shop since 1953'*. He further pleaded that *'The plaintiff had sublet the entire suit shop to the defendant since 1953 and the defendant is in possession since 1953 and the defendant keeps machines like Lathe Machines, grinder and drilling machine for his dye making business in the suit shop as required by him'*. He further pleaded that *'The plaintiff had sublet in 1953, the entire shop to the defendant as stated above'*.

24) Thus, there was direct contest between the Plaintiff and Defendant as to whether the license in respect of the suit shop was granted

or whether the Defendant was a licensee only in respect of some portion of the suit shop. Coming to the aspect of burden of proof, since Plaintiff did not dispute Defendant's presence in the suit premises as a licensee, nothing was required to be proved by him. In fact, though Plaintiff maintained silence about the date of induction of the Defendant as a licensee in respect of the suit premises, he or Suryakant Parmar who later became Plaintiff No.2 did not seriously dispute the position that Chhaganlal was a licensee as on 1 February 1973. In my view, therefore for deciding the suit for eviction of licensee, nothing really was required to be proved by the Plaintiff once he proved termination of license by letter dated 6 September 1977. On the other hand, since Defendant-Chhaganlal contended that the entire suit shop was sublet to him, the entire burden of proving that he was sub-tenant/licensee in respect of the entire suit shop clearly rested on his shoulders.

25) Prior to filing of the suit, Plaintiff served a notice dated 6 September 1977 on Defendant-Chhaganlal, the contents whereof more or less match with the contents of the plaint. However, what is interesting is the contents of Reply issued by the Deceased-Chhaganlal on 21 September 1977. In para-4 of the reply dated 21 September 1977, Defendant-Chhaganlal contended thus:

The premises mentioned in your letter under reference are in possession of our client since the year 1953.In the said premises our client has placed two lathe machines, one grinder and one drill machine. In the said premises at the request of our client, our client has allowed Suryakant Parmar to keep his two machines.'

(emphasis added)

Thus, there is direct admission given by Defendant-Chhaganlal in the reply dated 21 September 1977 that Suryakant Parmar also occupied some portion

of the suit premises through his two machines. The Defendant did not disclose the date on which Suryakant Parmar was permitted to keep his two machines in the suit premises. His contention that the suit premises were in his possession since 1953, coupled with admission of permission granted to Suryakant Parmar to keep his 2 lathe machines creates a serious doubt about the claim of the Defendant-Chhaganlal of being exclusive occupier of the entire suit shop as on 1 February 1973.

26) The Defendant, on his own, did not produce a single document to prove this exclusive possession of the entire suit premises as on the datum line of 1 February 1973. On the contrary, Plaintiffs produced plethora of documents to show joint possession of both, the Plaintiffs and Chhaganlal. Plaintiffs relied upon Shop Act license issued in the name of Plaintiff No.1-Harijivan Sunderji Mistry at the address of the suit premises and valid since the year 1978. They also relied upon license issued by the Municipal Corporation in the name of Harijivan Sunderji Mistry issued on 31 December 1978 and 26 June 1980. Thus, all the licenses for operation of machines were always issued in the name of the original Plaintiff No.1-Harijivan Sunderji Mistry and not a single license was issued in the name of Defendant-Chhaganlal. It is an admitted position that Chhaganlal operated his machines under the license issued in the name of the Original Plaintiff No.1. It therefore appears quite unbelievable that Defendant-Chhaganlal who claims to have exclusively occupied the entire suit premises as a sub-tenant since 1953, would operate his machines under the licenses issued in the name of original Plaintiff No.1. The fact that Plaintiff No.1 procured licenses for operation of machines by various users would by itself show non-exclusivity of possession of Defendant-Chhaganlal.

27) To make the case of Defendant-Chhaganlal worse, Plaintiffs relied upon certificate issued under Section 22 of the Bombay Sales Tax Act, 1959 issued in the name of Suryakant Shivilal Parmar on 18 March 1970 and Certificate of Registration under The Central Sales Tax (Registration and Turnover) Rules, 1957 on 31 January 1970 which are marked in evidence at Exhibits-J and K respectively. In the said Certificates issued in the name of Suryakant Parmar, the address of his factory is indicated as '*6th Kumbharwada, Cross Lane, Kharwa Galli, Bombay.4*'. This shows occupation of the suit premises by Suryakant Parmar as on 18 March 1970 by utilising the same as his factory. Ms. Sadh has attempted to suggest that 'Gala No.5A' is not reflected in the factory address of the said Certificates and that the address of business of '*M/s. Bina Electricals*' of Shri. Suryakant Shivilal Parmar is indicated as '*Near Round Temple, Bhandari St. Bombay.4*'. However, there are variety of factors why the said contention of Ms. Sadh cannot be accepted. Firstly, no suggestion is given to the Plaintiffs' witness that he had any other premises either at Khumbharwada or at Kharwa Galli. Similarly, in various other licenses issued under the Shop Act or by Municipal Corporation, the address of the suit premises is stated as '*6, Khumbharwada, Kharwa Lane*'. Therefore, mere failure to mention 'Gala No.5A' in the said Certificates dated 18 March 1970 and 31 January 1970 cannot be a reason for drawing a conclusion that the said Certificates are not issued in respect of the suit premises.

28) Thus, there is documentary evidence in addition to specific admission by Defendant-Chhaganlal in Reply dated 21 September 1977 that he also possessed the suit premises. The Certificate dated 18 March 1970 proved, beyond any shadow of doubt, that Suryakant Parmar was also occupying some portion of the suit premises as on the datum line of

1 February 1973. Thus, though the burden was on the Defendant to prove his exclusive possession of the suit premises as on the datum line of 1 February 1973, he failed to discharge the said burden and on the other hand, Plaintiffs conclusively proved that the deceased-Defendant did not exclusively occupy the suit premises as on 1 February 1973.

29) There is yet another factor which clearly suggests non-exclusive possession of the suit premises by deceased-Chhaganlal. The business of Original Plaintiff No.1- Harijivan Sunderji Mistry was purchased by Suryakant Parmar by Indenture of Assignment dated 2 January 1981 together with stock-in-trade, goodwill etc. The tenancy rights of Harijivan Sunderji Mistry also got transferred in the name of Suryakant Parmar in view of Notification issued by the State Government under the provisions of Section 15 of the Bombay Rent Act and Suryakant Parmar claims to have become the tenant in respect of the suit premises as on 2 January 1981. If Defendant-Chhaganlal indeed was a protected tenant after 1 February 1973, he ought to have objected to Harijivan Sunderji Mistry assigning his business together with tenancy to Suryakant Parmar. He ought to have challenged the Indenture of 2 January 1981 and in any case ought to have sought a declaration that execution of the said Indenture did not have the effect of transmission of tenancy rights in favour of Suryakant Parmar. In such proceedings, he ought to have pleaded and proved that Mistry himself never occupied any portion of the suit premises and therefore transfer of business would not entail transmission of tenancy of the premises. When his alleged status as protected tenant got disturbed by the Indenture dated 2 January 1981, the Defendant - Chhaganlal did not take any steps to seek a declaration of his tenancy rights by filing any proceedings. This is yet another factor which clearly destroys the alleged claim of Defendant-

Chhaganlal of being a protected tenant in respect of the suit premises on the strength of alleged exclusive possession thereof as on 1 February 1973.

30) The conduct of Defendant-Chhaganlal and his heirs after institution of the suit by Suryakant Parmar in City Civil Court again completely destroys their claim of being a protected tenant in respect of the suit premises. Suryakant Parmar filed S.C. Suit No.5283/1985 in City Civil Court against the heirs of Defendant-Chhaganlal. The suit was filed by Suryakant Parmar complaining about the conduct of the Defendants therein in denying access to him to his portion of the suit premises by locking the same. It appears that initially temporary injunction was not granted in favour of Suryakant Parmar when the proceedings travelled upto this Court. However ultimately the suit came to be decreed in favour of Suryakant Parmar on 18 October 1998. The suit has been decreed in terms of prayer clauses-29(a) and (b) in the plaint which read thus :

(a) That this Hon'ble Court be pleased to declare that the Plaintiff is entitled to use, occupy, possess and enjoy the portion of the premises shaded in green colour on Ex.A hereto and the loft in the said premises and is further entitled to enter into, remain upon and carry on his business and factory therefrom and that the defendant, his servants, agents and/or representatives are not entitled to disturb, interfere with, stop, obstruct in any manner whatsoever to use, occupation, possession and enjoyment of the said premises of the plaintiff and the defendant is not entitled to put his lock on the door of the said premises being premises situated at Gala No.5A, Gojaria Shop No.1, bearing C.S. No.1/952, Kharwa Galli, Cross Lane, Bombay-400 004.;

(b) That this Hon'ble Court be pleased to restrain the defendant, his servants, agents and/or representatives by a perpetual order and injunction of this Hon'ble Court from in any manner disturbing, obstructing, stopping, interfering with the peaceful and quiet use and occupation, possession and enjoyment of the said premises, being the portion of the premises shaded in gree colour on Ex.`A' hereto and the loft situated therein in any manner whatsoever.

31) The decree passed by the City Civil Court in S.C. Suit No.5283/1985 though *ex-parte*, has attained finality on account of rejection of application filed by the Petitioners to set aside *ex-parte* decree under the provisions of Order 9 Rule 13 of the Code. Thus, as of today, Suryakant Parmar has right to occupy his portion of the suit premises in view of the decree passed in S.C. Suit No.5283/1985. This is yet another reason, though not the main reason, why deceased-Chhaganlal or his heirs cannot be treated as 'protected tenants' in respect of entire portion of the suit premises. The same would otherwise lead to passing of conflicting decrees. On the contrary, decree passed by the Small Causes Court in L. E. & C. Suit No. 41/50 of 1978 directing ejectment of the Defendant-Chhaganlal and decree passed by the City Civil Court in S. C. Suit No. 5283/1985 preventing Chhaganlal from disturbing possession of Parmar go in tune with each other where Defendant-Chhaganlal and his heirs will get ousted from the suit premises and Suryakant Parmar will get an entry therein.

32) Much is argued by Ms. Sadh about the Appellate Court relying on evidence of Arvind Rathod claiming joint possession of the premises as on the datum line of 1 February 1973. Though the evidence of Arvind Rathod also convincingly disproves the claim of Chhaganlal about exclusive possession of the entire suit premises, in my view, his evidence is required to be ignored as there is no foundational pleadings in the Plaint averring that Arvind Rathod also occupied part of the premises at the relevant time. Therefore, though Plaintiff conclusively proved Arvind Rathod's joint possession as on the datum line, the mistake committed by Plaintiff in not raising foundational pleading about his presence in the premises in the Plaint, would necessarily result in discarding Arvind Rathod's evidence, however convincing the same may be. However unfortunately, even if evidence of Mr. Arvind Rathod is completely discarded, discarding of such

evidence still does not come to the assistance of Defendant as it is conclusively proved that Suryakant Parmar was also jointly possessing the suit premises as on the relevant date.

33) Ms. Sadh has strenuously submitted that if indeed, Suryakant Parmar was in possession of any portion of the suit premises, the same ought to have been reflected in the Deed of Assignment of 1981. In my view mere absence of any covenant in the Deed of Assignment about possession of Suryakant Parmar of part of the suit premises, would not *ipso facto* lead to a conclusive presumption that Suryakant Parmar did not possess any portion of the suit premises as on the date of execution of the Deed of Assignment. By that Deed, what is purchased by Suryakant Parmar is the entire business of original Plaintiff-Mr. Mistry along with the stock in trade, goodwill etc and the tenancy rights of Mr. Mistry have incidentally delved upon Mr. Suryakant Parmar in view of Notification issued by the State Government under provisions of Section 15 of the Bombay Rent Act. Therefore, for purchase of the business and for incidental transmission of tenancy by virtue of purchase of the business, it was not at all necessary for Plaintiff-Mr. Mistry to reflect any covenant about joint possession of some portion of the premises by Mr. Parmar. Therefore, absence of any reference to joint possession by Mr. Parmar in the Deed of Assignment is inconsequential.

34) As observed above, Defendant-Chhaganlal and his heirs cannot seek a declaration in ejectment suit filed by the Plaintiff about their alleged tenancy rights. They ought to have filed a declaratory suit seeking declaration of their status as 'protected tenants'. Though a defence was raised in L. E. & C. Suit No. 41/50 of 1978 that Defendant-Chhaganlal was a protected tenant in respect of the suit premises, he has failed to prove the

said defence. The status of Defendant-Chhaganlal thus remained as a mere licensee in respect of some portion of the suit premises. Since the license was terminated by notice dated 6 September 1977, Defendant-Chhaganlal or his legal heirs did not have any right to remain in occupation of any portion of the suit premises. The suit thus has rightly been decreed by the Appellate Court. I do not see any valid reason to interfere in the findings recorded by the Appellate Court in absence of an element of perversity.

35) What remains now is to deal with the judgments relied upon by Ms. Sadh:

- (i) The judgment in Chandavarkar Sita Ratna Rao Versus. Ashalata S. Guram³ is relied upon in support of her proposition that High Court cannot interfere in a finding unless the same is perverse or is based on no evidence or has resulted in manifest injustice. Far from assisting the case of the Petitioners, the judgment actually militates against them. The other proposition in the judgment is about creation of license either by landlord or tenant before 1 February 1973 and occupation of at least single room for being conferred the status of a 'deemed tenant' under the Bombay Rent Act. Since Defendant-Chhaganlal failed to prove that he is in exclusive possession of the entire suit premises as on 1 February 1973, even that proposition does not support the case of the Petitioner.
- (ii) The judgment in Ram Sarup Gupta (dead) by LRS Versus. Bishun Narain Inter College & Ors.⁴ is relied upon in support of the

3 AIR 1987 SC 117

4 SCR 1987 (2) 805

contention that any evidence *dehors* the pleadings cannot be considered by the Court. There can be no dispute to this proposition and following the said proposition, I have completely ignored the evidence of Shri. Arvind Rathod about his alleged possession of part of the suit premises as on the datum line of 1 February 1973. Since, Plaintiff did not plead possession by Arvind Rathod in the suit, his evidence ought to have been discarded by the Appellate Court. Here, I am in full agreement with Ms. Sadh. However, even after ignoring the evidence of Arvind Rathod, exclusive possession of Defendant-Chhaganlal in respect of entire Gala No.5A is not proved in the present case.

- (iii) The judgments in *S.P. Chengalvaraya Naidu (Dead) by LRS Versus. Jagannath (Dead) by LRS. and others*⁵ and *Kiran Singh Versus. Chaman Paswan and others*⁶ are relied in support of the proposition that any judgment or decree obtained by fraud is required to be treated as nullity and can be questioned even in collateral proceedings. The judgment is apparently relied upon to get over the decree passed by the City Civil Court in S. C. Suit No.5283/1985. I do not see how the said decree has been secured by Suryakant Parmar by fraud. In any case, the said decree is not challenged in the collateral proceedings before the Small Causes Court. The judgment therefore does not have application to the facts of the present case.
- (iv) The judgment in *Shyam Behari Lal Versus. Lalla Jageshwar Prasad*⁷ is relied in support of the proposition that the plea of *res-*

5 (1194) 1 SCC 1

6 AIR 1954 SC 340

7 1970(3) SCC 591

judicata on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction. In my view, the judgment would have no application to the facts of the present case as this Court has not invoked the principle of *res-judicata* by relying on the decree passed in S.C. Suit No.5283/1985. The issue involved in L. E. & C. Suit No.41/50 of 1978 is being decided based on the pleadings and evidence of parties in that suit alone. The judgment rendered in SC Suit No. 5283/1985 by the City Civil Court merely bolsters up the claim of Plaintiff about non-exclusive possession Defendant.

36) The conspectus of the above discussion is that the Petitioners have failed to make out any valid ground warranting interference by this Court in the findings recorded by Appellate Bench of Small Causes Court as the findings do not suffer from the vice of perversity. There is no error in exercise of jurisdiction.

37) The Writ Petition is thus devoid of merits and it is accordingly **dismissed.**

38) Considering the facts and circumstances of the case, Petitioners are granted time upto 28 February 2025 to vacate the possession of the suit premises. Plaintiff shall be at liberty to withdraw the deposited amount in this Court with accrued interest.

Digitally
signed by
NEETA
SHAILESH
SAWANT
Date:
2024.12.17
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+0530

[SANDEEP V. MARNE, J.]