

ORDER BELOW EXH. 5

1. The plaintiff's suit is for declaration and injunction and he has filed an application below exh. 5 praying for mandatory injunction that the defendant be directed to restore his original tenanted premises.

2. The subject matter of the suit property is C.T.S.no. 85 in Vakharbhag in the municipal limits of Sangli Miraj Kupwad Corporation. He further states that the said property admeasures 108.7 sq. mts. out of which they are in possession of 5.50 mts. East west and 13.94 north-south and C.T.S.No. 85/1 he is in possession of property east-west 5.50 mts. and north-south 13.94 sq. mts. The plaintiffs further state that the total area in their possession was 139.40 sq. mts. They further state that the property was used for commercial purpose. The plaintiff admits that all the portion was demolished by the defendants except the wall on the southern side adjacent to the road.

3. The plaintiffs further state that the said property originally belonged to Mallappa Gheware. Mallappa Gheware in the year 1970-71 had let out the said property to late Baburao Yashwant Chougule for commercial purposes. They further state that in the said property the predecessor-in-title has started the

business of selling oil and oil cakes. As per the municipal assessment record, Baburao Yashwant Chougule is shown to be the tenant in the said property. They further state that they were paying rent of Rs. 1,801/- to the defendants. The plaintiff further states that on 8.12.1997 Baburao Yashwant Chougule died. He further states that the plaintiff nos. 1 and 2 are the sons of Baburao Chougule and plaintiff no. 3 is his wife. They further state that they had another brother namely Rajkumar who died and defendant no. 3 is his widow.

4. The plaintiff further states that Mallappa Gheware died in the year 1974-75. After his death, his son Chandrakant became the sole owner of the suit property. The plaintiff further states that after the death of their father Baburao they inherits the rights in the said tenanted property and they started paying rent regularly by cheques, demand drafts etc. They further state that after the death of their father they carried out various businesses in the said premises and continued the possession. They further state that the defendant no. 2 refused to accept the rent from the plaintiff since 1997-98. But they kept on sending the rent by money orders till 2005. They further state that they refused to accept money orders only because the intention of the defendant no. 2 was to increase the rent. But however, the plaintiff did not agree to it and therefore, the defendant did not accept the rent.

5. The plaintiffs further state that in the year 2002 late

Rajkumar was ill. His physical condition day by day started deteriorating and so he could not carry on his business and therefore, according to the plaintiff, the defendant no. 3 wife of said Rajkumar continued the said business. The plaintiff further states that plaintiff no. 1 had gone out for a long tour as he is doing the business of tourist. The defendant no. 1 with malafide intention purchased the said property from the defendant no. 2. The plaintiffs further state that the defendants did not give prior notice to the plaintiff and terminated the tenanted right and hence, the sale-deed and transfer of interest to the defendant no. 1 is null and void.

6. The plaintiffs further state that the defendant with malafide intention has demolished the said structure and deprived the plaintiffs with tenanted rights and therefore, the plaintiffs in present suit pray that they are the contractual tenants in the suit property and they be put in possession of the property admeasuring 139.40 sq. mts. as per previous construction.

7. The plaintiffs by filing an application below exh. 5 pray that the defendants be directed to construct the ground floor to the extent 139.40 sq. mts. and present plaintiff and the defendant no. 3 be put in possession of the said premises as a tenant. They further pray that the defendants 1 and 2 be restrained from creating any third party interest in any form on the ground floor admeasuring 139.40 sq. mts. till the decision of

the suit.

8. Defendant no. 1 has filed his W.S. at Exh.24. He has denied all the averments of the plaint. The case of the defendant no. 1 is that the plaintiff is praying possession which they have lost after 28.12.2005. The suit is filed in the year 2007 and as per Specific Relief Act Section 6 the suit should be within the period of 6 months from the date of dispossession. Hence, the suit is barred by limitation. The defendant no. 1 further states that the defendant no. 3 had filed earlier suit which is pending in the Court for injunction bearing No. 400/2006. The plaintiff further states that in that suit also they had claimed injunction against him. Said injunction application was rejected. Defendant no. 3 had filed appeal. The said appeal is also rejected. At that time certain observations were made in the order. The defendant states that to make good the lacunae pointed out in the said order. The present plaintiff has filed a malafide suit. It is the case of the defendant that the plaintiffs were never in possession of the suit premises. They had left the possession of the suit premises after the death of Rajkumar in the year 2002. So actually in the year 2002, the defendant no. 3 has surrendered the said tenanted right. The defendant no. 1 further states that one of the plaintiffs is staying permanently at Solapur and other plaintiffs are also not staying in the suit premises. So during the life time of Late Baburao the defendant no. 3 and her husband were staying with

him. So as per the provisions of the Bombay Rent Act, the tenanted rights were inherited by Rajkumar and his wife defendant no. 3 and not the plaintiffs as averred by them.

9. The defendant further states that as the property was not in use and defendant no. 3 did not take any attempts to continue with the possession of the said property, she after the death of her husband shifted to her parental place and impliedly handed over the possession of the tenanted premises. So now they are estopped from claiming further tenanted rights in the suit premises. Defendant further stated that as he was also the tenant in the suit premises he subsequently purchased the property from defendant no. 2 after paying due consideration and has become the owner of the said suit premises. The defendant no. 1 therefore, prays that plaintiffs have no right, title, interest in the said suit premises and therefore, no order of mandatory injunction can be passed.

10. Defendant no. 2 filed his written statement at Exh.33 and has adopted all the averments of the defendant no.1. He has stated that he has sold out the said property to the defendant no. 1 and that the money orders he had accepted were towards the payment of house rent and not towards the rent of commercial premises. Hence, the suit be dismissed with costs.

11. Following points arise for my consideration. My

findings to the same are as under for the following reasons --

<u>POINTS</u>	<u>FINDINGS</u>
1) Do plaintiffs prove that they have prima-facie case to grant injunction ?	No.
2) Do plaintiffs prove that they would suffer irreparable loss if injunction is not granted in their favour ?	No.
3) In whose favour balance of convenience lies ?	Defendant no.1
4) What order ?	As per order below.

REASONS

12. POINT NO. 1 -

The plaintiffs in support of their contention have produced the various documents on record along with Exh. 4. He has produced 7x12 extract of the suit property. He has also produced various notices given by Baburao Yashwant Chougule in Form 'E' to Shop Inspector. The said notices are dated from 10.1.1968 to 3.6.1978. The death certificate of Baburao Yashwant Chougule is at Exh.8 and other miscellaneous letters received from Excise Department for paying excises etc. He has also produced Shop Act licence dated 13.9.1983,23.11.1984, 1.4.1985, and 11.9.1985 and also a partnership registration of 20.8.1985. So from all these record it can be seen that the said so

called alleged businesses were conducted in the suit premises at the most up to 24.1.1994. Then there are certain other documents to show that husband of defendant no. 3 was doing some business of screen printing up to 2002. After the death of the husband of plaintiff Rajaram, there is no evidence is coming on record to show that there was any such business carried out in the said premises. It is an admitted fact that the defendant no. 2 is in service and staying at Solapur before the death of his father. Plaintiff no. 1 is doing the business in another premises at Inam Dhamani, Tal-Miraj, Dist. Sangli. So from on these records it can be seen that the plaintiffs or defendant no. 3 could not prima facie prove that they continued working in the said premises even after 2002. The plaintiff no. 2 himself has produced a notice dated 26.5.2006 sent by him to defendants 1 and 2. He states that his brother Rajkumar died on 28.12.2005. He has visited the funeral of his brother. At that time he visited the said premises. He found that all the fixtures etc. has been removed from opening the shop and go-down in the suit premises. He further alleges that the defendants 1 and 2 have taken the forcible possession of that premises. Learned advocate on behalf of the plaintiffs pointed out the observations made by the Supreme Court in 2004 SC.C.L.Com. page – 706 Sudhir Jaggi and another Vs. Sunil Akash Sinha Choudhary and others person cannot be evicted after following due process of Law.

13. So from the contentions of the plaintiff itself, it can be seen that plaintiffs and defendant no. 3 have lost their possession well back in the year 2005 i.e. on 28,12,2005. To this notice the defendant no. 1 has categorically replied and have denied the tenancy rights of the plaintiffs and defendant no. 3 on 5.6.2006.. So according to me the cause of action arose to the plaintiff on 5.6.2006. From the contents of the notice itself it can be seen that Rajkumar was in possession of the suit premises and he carried out the business in continuation of possession of his father after his death.

14. So as per the provisions of the Rent Control Act, the person who continues the business with the predecessor in title get the right of tenancy by inheritance. So actually the tenanted right was inherited by said Rajkumar and said tenanted rights is not a joint family property which everybody can succeed.

15. So according to me, after the death of the father, the tenanted rights were inherited by Rajkumar and after the death of Rajkumar the said were inherited by the defendant no. 3. Hence, according to me, the plaintiffs have no locus-standi to file the present suit.

16. It is the case of the plaintiffs that in the present case mandatory directions were given to the defendants not to alienate or create any third party interest on the ground floor of the suit

property to the extent of their shares. For the purposes of mandatory injunction at this prima facie case, there must be a strong case. In the present case, firstly, the plaintiffs pray a declaration of their tenanted rights in the suit premises, and in case they succeed for the said declaration, then the cause of action would arise for putting the plaintiffs in possession of the suit premises to the extent they had occupied earlier. So at this prima facie stage when there is no such strong presumption in favour of tenancy, no such mandatory orders can be passed.

17. The defendant no. 1 further states that the defendant no. 3 had filed earlier suit which is pending in the Court for injunction bearing No. 400/2006. The plaintiff further states that in that suit also they had claimed injunction against him. Said injunction application was rejected. Defendant no. 3 had filed appeal. The said appeal is also rejected. At that time certain observations were made in the order. The defendant states that to make good the lacunae pointed out in the said order. It was also submitted that the subsequent suit is barred by O-2 R-2 (3) of the Code of Civil Procedure.

18. The learned advocate on behalf of the plaintiffs has pointed the ruling reported in A.I.R.1991 Supreme Court 1756 Shri.Inacio Martine Vs. Narayan Hari Naik and others. It is observed that -

“Civil P.C. -S.11, O.2, R.2(3) – applicablity – Earlier suit for injunction dismissed on technical ground – Subsequent suit for declaration of title and recovery of possession not barred by res-judicata – Not barred under O.2 R. 2(3) since causes of actions in both suits were distinct.”

19. The learned advocate on behalf of the plaintiffs also emphasised on observations made by the S.C. In 2001 SAR (civil) 90 Supreme Court – Vannattankandy Ibrayi Vs. Kunhabdulla Hajee. In that case it has been held that even if the tenanted premises are vacant, even then the Landlord has to file a suit for recovery of possession. In the said observations the S.C. has observed only because the said rights of the parties were protected as per the State Rent Act . In the present case the plaintiff has failed to show that there is any such type of protection to him as per the provisions of Bombay Rent Act. So according to me this observation do not hold good in the present case.

20. It is also an admitted fact that plaintiffs and defendant no. 3 have already lost their possession long back in the year 2005, since then they have not taken any action for restoration of possession by filing a suit for possession, then no remedy in the form of injunction can be granted. Hence, I answer issue no. 1 in the negative.

21. POINT NO. 2 & 3 -

The defendants have started reconstructing the said premises. The reconstruction is done, according to me, at their own risk. In case the tenanted rights are established, then the defendant no.1 has to part with the possession of the said premises to the plaintiff. Therefore, according to me, no irreparable loss would be caused to the plaintiffs, because they would get possession, in case they succeed in the case. But however, at this juncture if the construction work is stopped, great irreparable loss would be caused to the defendant no. 1. Hence, I held that the balance of convenience is in favour of the defendant no. 1 if no order of injunction is passed. Hence, I pass the following order.

ORDER

The application stands dismissed with no order as to costs.

sd/-

Date – 20.10.2007

(V.A.dixit)
Jt. Civil Judge Jr.Dn.Sangli.