



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO.273 OF 2013

1. Shaikh Zaffar Abid s/o. Mohd. Hussain
Age : 53 years, Occu : Business,
2. Shaikh Afzal s/o. Mohd. Hussain
Age : 50 years, Occu : Business,
3. Abdul Latif s/o. Mohd. Hussain
Age : Major, Occu : Business,
4. Abdul Khaleel s/o. Mohd. Hussain
Age : 53 years, Occu : Business,

All R/o. Municipal House Old No.3-81-42,
New 1-27-34, Manzoorpura,
Aurangabad.

...Applicants

Versus

Iteqar Ahmed s/o. Ehtesham Ahmed Razzaqui
Age : 54 years, Occu : Business,
R/o. Manzoorpura, Aurangabad.

...Respondent

Mr. Hrishikesh A. Joshi, Advocate for Applicants;
Mr. Namit Sunil Muthiyan, Advocate for the Respondent.

CORAM : S.G. MEHARE, J.
RESERVED ON : 26.09.2023
PRONOUNCED ON : 29.11.2023

JUDGMENT :-

1. The applicants who were the original defendants had preferred this revision against the judgments and decrees of the eviction of the suit shop, passed by the learned Civil Judge Junior Division, Aurangabad, in Rent Suit No.13 of 2005 dated 16.09.2011

and the judgment confirmed by the learned Principal District Judge, Aurangabad in Rent Appeal No.17 of 2011, dated 08.10.2013.

2. Applicants nos. 1 and 2 will be referred to as 'tenants', applicants nos.3 and 4 will be referred to as "sub-tenants", and the respondent will be referred to as 'landlord'.

3. A few material facts to adjudicate the dispute were that the landlord had filed a suit for eviction against the tenants and sub-tenants. The tenants and the sub-tenants are the real brothers. The suit shop was situated at Manzoorpura, Aurangabad, bearing Municipal House No. 1-27-34 (New) and 3-81-42. Syed Ehtesham Ahmed Razzaqui was the original landlord. He rented the suit shop to the tenants to run a business. They were running the workshop in the suit shop. The present respondent/landlord was one of the legal heirs of the original landlord. After the demise of the original landlord, the present landlord claimed that the tenants were paying him rent. Hence, he is the landlord as defined under the Maharashtra Rent Control Act, 1999 ("M.R.C. Act" for short). Therefore, the other legal heirs of Ehtesham were not necessary parties to the suit. Initially, it was projected that sub-tenants were the tenants' employees. However, on making detailed enquiries, the landlord learnt that the tenants had sublet the suit shop. Both tenants had separated their business at another place for the last 20-25 years. They do not have control over the business run in the suit shop.

Hence, he claimed the eviction under Section 16 (1) (e) Clause (ii) of the M.R.C. Act.

4. Before filing the suit under the M.R.C. Act, the eviction proceeding was also filed before the Rent Controller in the year 1999 under the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954. While the suit under M.R.C. Act was pending, he withdrew the said proceeding.

5. The tenants and sub-tenants resisted the suit by a joint written statement. They came with a case that the original landlord had rented out the suit shop to their father. He was running the workshop under the name and style of 'Pune Engineering Works'. The tenants, as alleged by the landlord, were never his tenants. They did not have any lease agreement with the original landlord. They have inherited the tenancy from their father. Hence, they are protected under sub-clause (ii) of Section 7(15) Clause (c) of the M.R.C. Act. They did not illegally induct their brothers as sub-tenants. All of them were running the business jointly. The shop establishment registration stands in the name of tenant no.1. He is paying the electricity charges regularly. They have opposed the eviction on the ground that the legal heirs of the original landlord – Ehtesham have not been arraigned as parties to the suit. Therefore, the suit is bad for non-joinder of necessary parties. There was no subletting. The

landlord has no right to claim the eviction. He is not entitled to seek eviction.

6. Heard the respective counsels at length.

7. The following points fall for consideration :

(i) Is the plaintiff a landlord?

(ii) Were all the legal heirs of the deceased landlord – Ehtesham, the necessary parties to the suit?

(iii) Does Rule 4 of Order XXIII of the Civil Procedure Code bars the subsequent suit before the Civil Court under the M.R.C. Act?

(iv) Did the defendants inherit the tenancy after the death of their father?

(vi) Should the sub-tenant enter the witness box?

8. Both Courts held that the plaintiff was the landlord and the applicants nos.1 and 2 tenants in the suit shop, and they had illegally sub-let suit shop to applicants nos. 3 and 4. It was also held that the earlier proceeding before the Rent Controller under the Rent Control Act, 1954 does not bar the subsequent suit under the M.R.C. Act. It has also been held that defendants nos.3 and 4 were inducted as sub-tenants illegally without the permission of the landlord.

9. Learned counsel for the tenants and sub-tenants has vehemently argued that a similar ground of subletting was raised

before the Rent Controller, and the said proceeding was pending when the suit was filed. The Court should not have proceeded with the subsequent suit in such a situation. The Court did not frame the specific issue of the tenability of the suit. The Court also did not consider the admission of the plaintiff given in another Rent Suit No.29 of 2005 filed against one tenant Aboodin, and another that he did not claim that the said shop belongs to him and stated that the said shop belongs to his brother and his brother executed the power of attorney in his favour to file the suit. After bringing this material fact regarding his status, the learned Court of first instance illegally allowed the landlord to amend the plaint that the plaintiff is a landlord. The statement of the plaintiff in cross-examination in another rent case regarding the brother and General Power of Attorney by the brother of the premises was given in confusion and without proper understanding the question put to him. Such amendment was washing the material admissions affecting the locus of the plaintiff. These aspects have not been considered correctly. He would submit that sub-section 2(a) of Section 58 of the M.R.C. Act provides that all applications, suits and other proceedings under the said Acts, pending, on the date of commencement of the M.R.C. Act before any Court, Controller, Competent Authority or other office or authority shall be continued and disposed of, in accordance with the provisions of the Acts so repealed, as if the said Acts had continued in

force and this Act had not been passed. He wanted to argue that the proceedings pending in Rent Control or other Courts under the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 were saved. Therefore, their proceedings ought to have been continued or should have been withdrawn, obtaining the leave of the Rent Controller to seek the remedies under the Maharashtra Rent Control Act.

10. He also argued that before the First Appellate Court, the plaintiff did not rely upon the alleged lease agreement (Exhibit-40). Therefore, it ought to have been considered that the suit shop was leased to their father, and they have inherited the same. Even otherwise, the lease agreement Exhibit-40 was invalid as defendant no.2 was minor at the time of execution of the so-called lease deed. Since the plaintiff realized the mistake, he did not rely upon the lease deed dated 01.01.1978. The adverse inference ought to have been drawn against the plaintiff that defendants nos.1 and 2 were not tenants, but all the defendants had acquired the tenancy as the legal heirs of their deceased father. He also argued that in the absence of Exhibit 40, the case ought to have been weighed on the preponderance of probabilities. All the defendants, brothers, were running the business jointly in the suit shop at the time of the death of their father. Hence, it could be said that the plaintiff proved that defendants nos.3 and 4 were illegally inducted as sub-tenants. He

would rely on the case of Jagan Nath (Deceased) through, Lrs. Vs. Chander Bhan and others, A.I.R. 1988 SC 1362, and further argue that assuming the case of the plaintiff that defendants nos.1 and 2 were the tenants unless it is proved that they had parted with the possession of the suit premises, it cannot be said that it was a subletting.

11. Per contra, learned counsel for the landlord submits that defendant no.1 accepted that he was paying rent to the plaintiff for the last 7-8 years. He being one of the legal heirs of the original landlord is entitled to receive the rent for himself and on behalf of other legal heirs. Therefore, he was the landlord, as defined under Section 7(15) of the M.R.C. Act. The defendants utterly failed to prove that their father was the tenant in the suit shop. No evidence has been produced that after the death of their father, they were jointly running the business in the suit shop. On the contrary, it is evident that defendant nos.1 and 2 are running their separate business at another place and have no control over the business run in the suit shop. Evaluating the evidence, both Courts have correctly concluded that defendants nos.1 and 2, who were the tenants, parted with the possession of the suit premises and have control over the business run in the suit shop. They have completely divested from the suit premises. He would submit that the proceeding pending before the Rent Controller was withdrawn after filing the present suit.

Hence, Order XXIII of the Civil Procedure Code would not bar the present suit. To bolster his arguments, he relied on the case of Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Another in Appeal (Civil) No.2976 of 2004 dated 05.02.2008 and the judgment of this Court in Civil Revision Application No.465 of 2007 (Mr. Dattatray Sadashiv Damle Vs. Vinayak Ramkrishna Vaidya) dated October 18, 2007. He would also argue that the earlier proceeding was withdrawn before its adjudication; hence, there was no bar to file the present suit under the new Act. There was absolutely no bar to file a similar suit under the new Act. Therefore, both Courts correctly entertained the suit. In both suits, the causes of action were different. Therefore, the suit was well maintained. Both Courts have correctly appreciated the evidence. There is nothing to interfere with the impugned judgment and decree.

12. In reply, learned counsel for the applicants submitted that the effect of the repeal of the Act should be read with Section 6 of the General Clauses Act. In both cases, the causes of action were the same. Therefore, this suit was barred under Order II Rule 2 of the Civil Procedure Code.

13. It is not disputed that the father of the plaintiff was the owner of the suit premises. Undisputedly, he is one of the legal heirs of the original landlord and the other legal heirs were not impleaded in the suit. The landlord claimed that tenant no.1 has been paying

him for the last seven to eight years; hence, he is a landlord and entitled to file a suit for eviction against the tenants and sub-tenant.

14. The term 'landlord' has been defined in Section 7(15) of the M.R.C. Act. It provides that a person receiving or entitled to the rent is a landlord. This term has been interpreted in various judicial pronouncements. The definition is not restricted to the ownership of the property. Therefore, if the tenant is inducted by a person to whom the tenant has been paying the rent for a long period, he will be the 'landlord' within the meaning and definition, irrespective of whether he is the owner or a person deriving a title from the owner and he will be entitled to maintain an action for eviction. It is evident that defendant no.1 admitted that he has been paying the rent to the plaintiff for about 7-8 years. He never complained that he was not authorized or entitled to receive the rent. The person claiming the landlord does not need to strictly prove that he is the owner. The landlord/plaintiff has proved that he has been receiving rent from the tenant. Considering the definition of the landlord in various judicial pronouncements and peculiarly in the facts that defendant no.1 was paying the rent to him for the last 7-8 years, the Court has no hesitation in holding that the plaintiff was the landlord and, hence, entitled to file the eviction suit against the tenant under the grounds provided under Section 16 of the M.R.C. Act.

15. It has been vehemently argued by the learned counsel for the tenants/defendants that earlier, in another suit, there was an admission that the brother of the plaintiff had an interest in the properties belonging to their father. It is evident that the interests of all the legal heirs in the suit premises were admitted. However, the question is whether such admission disentitles the landlord from filing a suit for eviction without joining other legal heirs of the original landlord – Ehtesham.

16. The tenants and sub-tenants did not deny that the plaintiff was one of the legal heirs of the original landlord. Once it is established that the plaintiff is a landlord and entitled to receive the rent, and a person deriving the title from the original landlord, he is entitled to file the eviction proceedings. In such a situation, it would be difficult to accept the arguments of the learned counsel for the tenants and sub-tenants that the suit is bad for non-joinder of legal heirs of the original landlord.

17. It has been vehemently argued that two simultaneous proceedings would not lie against similar parties. It is not in dispute that prior to this suit, a proceeding for eviction on the same ground was pending before the Rent Controller under the Rent Control Act, 1954. However, during the pendency of that proceeding, the M.R.C. Act came into force. The landlord filed the eviction suit on the same grounds under the M.R.C. Act without disclosing the pendency of the

proceedings before the Rent Controller. However, it is admitted that after filing this suit, the said rent control proceeding was withdrawn. No doubt, the proceedings under the old Act were saved under Section 58 of the M.R.C. Act.

18. Learned counsel for the landlord has vehemently argued that the withdrawal of the earlier proceeding after filing the present suit would not bar the plaintiff from filing the present suit as provided under Order XXIII Rule 1 of the Civil Procedure Code. He relied on the case of Vimlesh Kumari (cited supra) in which the Hon'ble Supreme Court held that, admittedly, the second suit was filed before filing the application for withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the appellant in regard to payment of the proper court fee. We, therefore, are of the opinion that Order XXIII Rule 1 of the Code was not applicable to the facts and circumstances of the present case. In the case of Dattatray Damle (cited supra), this Court reiterated a similar view on the withdrawal of the earlier suit after filing the subsequent suit. It has been held that in terms, this rule does not apply where the subsequent suit has already been instituted, and the two suits have been pending simultaneously. It has been further held that this is not to say that several suits may be instituted by a plaintiff on the same subject matter with impunity. If they are, their continuance would be subject to the provisions of Order II Rule 2, Sections 10, and 11 of the Code

of Civil Procedure, depending on the stage of the suits. However, a subsequent suit is not liable to be dismissed even if it does not disclose that an earlier suit was instituted, if the earlier suit has been withdrawn.

19. The ratio laid down in the above cases is squarely applicable to the case at hand. However, the objection was raised, but the defendants did not apply for the stay of the subsequent suit under Section 10 of the Civil Procedure Code. The suit proceeded ahead. In view of the fact that during the pendency of the eviction proceeding before the Rent Controller, the new Rent Control Act was enacted, the landlord preferred to withdraw the earlier suit filed under the Rent Control Act, 1954 and filed a fresh suit under the new Act, the Court is of the view that there shall be no bar to file such a fresh suit under Order II Rule 2 of the Civil Procedure Code. As has been observed by this Court in the case of Dattatray Damle (cited supra), the continuance of the earlier suit would be subject to the provisions of Order II Rule 2, sections 10 and 11 of the Code of Civil Procedure depending on the stage of the suits. The stage of the earlier suit was important. None of the sides argued about the stage of the earlier proceeding before the Rent Controller when the present suit was filed. In the absence of any such material, it is presumed that the said proceeding was not concluded finally. Hence, it could also not be said that such a subsequent suit was hit by Section 11 of the Civil

Procedure Code. Therefore, it could not be said that only for filing the suit during the pendency of the proceeding before the Rent Controller on similar grounds, the suit of the landlord was not bad.

20. The landlord's learned counsel has vehemently argued that the sub-tenant should have entered the witness box to prove that there was no sub-tenancy.

21. The M.R.C. Act prohibits illegal sub-tenancy and is not allowed unless the landlord consents. The landlord admitted the applicants nos.1 and 2. They allegedly violated the terms of the lease. So, the dispute was between the landlord and tenant, not the sub-tenant. The defendants had a case that they inherited the tenancy after the death of their father. They did not admit that there was any sub-tenancy. The burden was on the plaintiff to prove that the tenants had illegally inducted the sub-tenants and parted with the possession of the suit shop. Considering the common defence of the defendants, the Court believes that it was not essential for the sub-tenant to enter the witness box.

22. The tenants and the sub-tenants had a specific case that their father was the tenant of the original landlord. The lease deed Exhibit-40 was pressed into service to prove that tenants nos.1 and 2 were the tenants of the original landlord. However, during the appeal, the landlord did not press into service the said lease agreement. The First Appellate Court has specifically observed in its judgment that the

landlord did not rely upon the lease deed Exhibit-40. It is also evident that at the time of the alleged lease deed, defendant no.2 was minor. The document was read in the open Court by a lawyer who knew Urdu language, and its translation was confirmed. A separate order was passed to that effect. The burden was on the tenants and sub-tenants to prove that they had inherited the tenancy after the death of their father. It was the burden on them to prove that the landlord-tenant relationship was created between their father and the original landlord. However, no evidence has been placed on record to *prima facie* believe that their father was running the business in the suit shop. Under Section 7(15) sub-clause (ii) of the M.R.C. Act, after the demise of the tenant, any member of the tenant's family was using the premises in case of tenancy for commercial purposes, such a family member is a tenant, in the absence of such member, the legal representatives of the deceased is a tenant. The burden was on the defendants to establish that at the time of the death of their father, they were using the premises for running the business in the suit shop. However, they did not produce any cogent and reliable evidence to believe that they were using the suit premises at the time of the death of their father. In the light of the evidence on record, the Court concludes that the tenants and sub-tenants failed to establish that they inherited the tenancy on the death of their father.

23. It was not disputed that the shop establishment certificate stands in the name of tenant no.1. The electric connection also stands in his name. They have had other shops at different places for the last 20-25 years, which is also not disputed. The landlord admitted that tenants were running the business jointly. On the basis of these facts and the admission of tenant no.1 that sub-tenants purchased the raw material in their name, the landlord claimed that the suit shop was sublet to them.

24. The initial burden of proving an unlawful sub-letting lies on the landlord. Once the landlord shows that a third person is in occupation and the tenant himself is not in the premises, the burden of proving the nature of the occupation of the third person shifts on the tenant. The Hon'ble Supreme Court in the case of Shri Dipak Banerjee V Smt Lilabati Chakroborty, AIR (1987) SC 2055, has held that in order to prove the tenancy or the sub-tenancy, two ingredients had to be proved, viz. (i) the tenant or sub-tenant must have exclusive right of possession or interest in the premises or part of the premises in question, and (ii) that right must be in lieu of some payment of rent or compensation.

25. As per the case of Gopal Saran Vs. Satyanarayana, AIR (1988) SC 1141, sub-letting means the transfer of an exclusive right to enjoy a part of the property in favour of a third party for consideration. In the case of Shalimar Tar Products Vs. H.C. Sharma

and Ors, AIR (1989) SC 145, the Hon'ble Supreme Court held that mere act of letting other persons into possession by the tenant and permitting them to use premises for their own purposes will not amount to sub-letting so long as the tenants retain legal possession and control to exclude others.

26. The Bombay High Court in the case of Parvatibai @ Hansabai Narayan Sawant (Since deceased through LRs.) Vs. Subash Vishwanath Todankar and Ors, 2011 (4) All MR 180, in paragraph no.8 it has been observed that it has been consistently held by this Court and by the Apex Court that for the purpose of establishing the ground of subletting, it is not sufficient to prove mere occupation of the premises by the third party. It has been held that the landlord has to establish that the possession was delivered to the sub-tenant and the tenant was receiving some compensation from the sub-tenant.

27. Learned counsel for the applicants also relied on the case of Jagan Nath (cited supra), in which it has been held that it is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant. User by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right

of possession. So long as the tenant retains the right to possession, there is no parting with possession in terms of clause (b) of section 14(1) of the Delhi Rent Control Act. Further, it has been observed that where the tenanted premises were residential cum commercial and the tenant was carrying on the business with his sons, and the family was a joint Hindu family, it was difficult to presume that the tenant had parted with possession legally to attract the mischief of S.14(1) (b) of the Act. Even though the tenant had retired from the business and his sons had been looking after the business, it could not be said that the tenant had divested himself of the legal right to be in possession.

28. The evidence of tenant no.1 was that after the demise of their father, all of them were doing business jointly in the suit premises. It was brought in his cross-examination that the shop licence and electricity bills was in his name. A separate admission that the sub-tenants do the business in the suit premises was also brought in his cross-examination. The rule is that evidence is to be read as a whole. Only some part of the evidence could not be picked and chosen. However, taking the benefit of his admission that sub-tenants run the business in the suit shop and tenants also run the business at another place, the landlord claimed that he had proved that the suit shop was sub-let to the sub-tenant.

29. The Courts have to appreciate the admissions in reference to the facts. The tenants and sub-tenants essentially had a defence that their father was the tenant, and on his demise, they inherited the tenancy. Hence, all brothers were running the business jointly for 20-25 years. Reading the admissions which the landlord wish to make its capital, the Court is of the view that such admissions do not prove that the tenants have parted the possession with sub-tenants and they had no control over the business run in the suit shop.

30. Barely having the other shops in the names of the tenants is insufficient to draw the inference that they had parted the possession of the suit shop. Opening another business or a similar business may be an expansion of the business. This Court is not satisfied that the landlord has established that the tenants had sub-let the suit shop to the sub-tenants, who are their real brothers. The landlord did not whisper that the tenants were receiving the rent or compensation from the sub-tenants. Waiving the reliance on the rent agreement during the appeal creates doubt about the relationship between the landlord and tenant.

31. The learned counsel for the landlord argued that the parties are Muslim. The jointness in property is foreign to Muslim law. Therefore, the defence of the tenants and the sub-tenants that

they acquired the tenancy on the demise of their father has no legal force.

32. It was a case between landlord and tenant. Such disputes are handled under the M.R.C. Act. The term "landlord" and "tenant" have been defined in the M.R.C. Act. Both these definitions departed the personal laws of the landlord and tenant. Therefore, there is no force in the arguments of the learned counsel for the landlord that the parties being Muslim cannot claim joint rights in the tenancy on the demise of their father, who was the original tenant.

33. Considering the facts and the law, this Court is of the view that both Courts have incorrectly held that the landlord had established that tenants nos.1 and 2 have parted with the possession of the suit shop and had no control over the business run in the suit shop and they have illegally inducted the sub-tenants nos.3 and 4 as sub-tenant.

34. In view of the above discussion, the points fallen for consideration are answered that the plaintiff was a landlord. The suit is not bad for non-joinder of legal heirs of the original landlord as a party to the suit. The subsequent suit filed before the Civil Court under the M.R.C. Act is not barred under Order II Rule 2 of the C.P.C. as the earlier proceeding was withdrawn before its conclusion. In view of the ratio laid down in the case of Vimallesh Kumari and Dattatray Damle (cited supra), withdrawal of earlier proceeding after

filing the present suit is not barred under Order XXIII Rule 4 of the Civil Procedure Code. The landlord failed to establish that tenants nos.1 and 2 illegally inducted tenants nos.3 and 4 as sub-tenants. The sub-tenants were not needed to enter the witness box.

35. In view of the discussion on facts and law and going through the impugned judgments and decrees, the Court is of the view that both Courts erred in holding that the landlord had established that tenants nos.1 and 2 illegally sublet the suit shop to the sub-tenants nos.3 and 4. Hence, both judgments are liable to be quashed and set aside. Thus, the Court passes the following order :

ORDER

- (I) The civil revision application is allowed.
- (II) The suit for eviction filed by the plaintiff stands dismissed.
- (III) No order as to costs.
- (IV) R and P be returned to the Court of the first instance.
- (V) Rule is made absolute in above terms.

(S.G. MEHARE, J.)