

(2005) 03 MP CK 0072
In the Madhya Pradesh High Court
Case No : Second Appeal No. 385 of 1990

Bhagchand

APPELLANT

Vs

Administrator, Municipal Corporation and Others

RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Limitation Act, 1963 — Section 5
Municipal Corporation Act, 1956 — Section 25, 403, 403(4)
Transfer of Property Act, 1882 — Section 105, 106

Citation : AIR 2005 MP 159 : (2005) 2 JLJ 93 : (2005) 2 MPHT 410 : (2005) 2 MPLJ 262

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : S.R. Saraf, for the Appellant; Anand Agrawal and M.G. Upadhyaya, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This second appeal has been preferred by plaintiff against the judgment of reversal passed by Appellate Court dismissing his suit.

A suit for declaration, mandatory injunction and for possession has been filed by the plaintiff who is appellant here in this appeal. According to the plaintiff, he is in possession of a shop situated in a Gumti for several years. Defendant No. 1 gave plot No. 6 to defendant No. 2 on lease so that defendant No. 2 may construct a Gumti and may open the Co-operative Store of Municipal Employees Union. Thereafter defendant No. 2 constructed the Gumti on the said land. Defendant No. 2 did not open the Co-operative Store and the said Gumti remained vacant up to the year 1961. At the relevant point of time, the President of Union (defendant No. 2) was Narain Singh who in December, 1961 inducted plaintiff as sub-tenant at the rate of Rs. 35/- rent per month apart from payment

of the tax. The plaintiff thereafter started carrying on business of public typing and drafting institute in the said Gumti and the possession of the said Gumti remained with him.

Defendant No. 1 sent notice to defendant No. 2 terminating the tenancy and the said notice was served on defendant No. 2 on 11-5-1966. The said notice terminating the lease was sent on the ground that defendant No. 2 had inducted plaintiff as sub-tenant in the said Gumti. The plaintiff against the said notice of defendant No. 1 filed an appeal (Appeal No. 441/66), before the Appellate Committee which was dismissed on 25-8-69. However, after the dismissal of the appeal, defendant No. 1 did not take any action against defendant No. 2.

Defendant No. 1 framed a scheme to construct the Pacca shops and according to the scheme the persons who were possessing the Gumti on the M.G. Road, it was decided, to allot the shops to them and the shop will not be allotted to those persons who were not possessing the Gumtis. Accordingly the plaintiff, since he was possessing Gumti, submitted application for the allotment of the shop and also deposited the requisite amount. It has also been pleaded by the plaintiff in Para 8 of his plaint that the Municipal Corporation also gave shops to some other persons who were sub-tenant whose names are referred in this paragraph. According to him, since he was also inducted as sub-tenant by defendant No. 2, he is also entitled for the allotment of the shop.

The Municipal Corporation instead of giving the shop to the plaintiff, directed to allot the shop to defendant No. 2. Initially the suit was filed for declaration, and mandatory injunction, however, during the pendency of the suit since Gumti was removed in order to widen the M.G. Road of Indore town. The plaintiff thereafter by amendment prayed for the allotment of shop, the possession of which has been given to defendant No. 2. The plaintiff also prayed decree of possession against defendants.

The defendants resisted the suit by filing written statement. In nut-shell it has been contended in the written statement that the plaintiff is not having any right, title and interest in the Gumti in question since his possession was unauthorised and he was trespasser and, therefore, he is not entitled for the allotment of any shop nor he is entitled to the possession of the shop which has been allotted to defendant No. 2. It has been prayed that suit be dismissed.

The Trial Court after framing issues and recording the evidence declared that plaintiff is entitled to get allotted shop No. 35/555 in his name and is also entitled to obtain possession of the said shop from the defendants. The Trial Court further declared that the suit shop No. 35/555 which has been allotted by defendant No. 1 to defendant No. 2 by allotment order No. 243 dated 3-6-71, is illegal and contrary to law, the Trial Court further decreed the suit of mandatory injunction directing defendant No. 1 to execute the lease deed in favour of plaintiff by obtaining vacant possession of suit shop from defendant No. 2.

Both the defendants preferred separate appeals against the impugned judgment

and decree, decreeing the suit of plaintiff. But the Appellate Court by common judgment allowed both the appeals and dismissed the suit of plaintiff, hence this second appeal.

This second appeal was admitted on 16-1-1991 on the following substantial questions of law :

"(1) Whether, the inference that Ex. P-1 is a licence in the facts and circumstances of the case, is correct ?

(2) Whether the appellant is entitled to get the allotment of the Pacca-shop under policy and resolution of respondent No. 1, the appellant being in de facto possession of the Gumti ?"

A preliminary objection has been raised by Shri Upadhayaya, learned Counsel for respondent No. 2 that the single appeal which has been filed by appellant is not maintainable for the simple reason that both the defendants preferred separate appeal and though, a common judgment was passed, however, there being two decrees, the plaintiff ought to have filed two separate appeals assailing each decree passed by Appellate Court. Since this has not been done, the present appeal is not maintainable.

In reply to the preliminary objection of Shri Upadhayaya, Shri Saraf, learned Counsel for appellant by placing reliance on the decision of the Apex Court in the case of Narhari and Others Vs. Shankar and Others, , has submitted that since the suit of plaintiff has been dismissed by common judgment, though on two different appeals filed by the two defendants, it was not necessary to file two separate appeals. Learned Counsel has further placed reliance on the decision of Appa and Ors. v. Kachai Bayyan Kutti and Ors. AIR 1932 Mad 689 and P.N. Kesavan and Another Vs. Lekshmy Amma Madhavi Amma and Others, .

Considered the preliminary objection. According to me, single appeal preferred by plaintiff-appellant is valid. The Apex Court in the case of Narhari (supra) faced similar type of situation and in that context it was held by the Apex Court that it was not necessary to file two separate appeals because there was one suit and both the decree were in the same case and passed on the same judgment. It would be relevant to re-write Para 4 of the said decision :--

"4. In the judgment of the High Court, though reference is given to some of these decisions, it is merely mentioned that the appellant relies on these decisions. The learned Judges perhaps thought that in the presence of the Hyderabad Judicial Committee decision in 17 DLR 322, they need not comment on these decisions at all. There is also a later decision of the Judicial Committee of the State in Bansilal v. Mohanlal 33 DLR 6023 (F-G), where the well known and exhaustive authority of the Lahore High Court in Mst Lachmi v. Mst. Bhuli AIR 1927 Lah 289 (H), was followed. In the Lahore case, there were two cross suits about the same subject matter, filed simultaneously between the same parties, whereas in the present case, there was only one suit and the one

judgment was given by the Trial Court and even in the first appeal to the Sadar Adalat, there was only one judgment in spite of there being two appeals by the two sets of defendants. The plaintiffs in their appeal to the High Court have impleaded all the defendants as respondents and their prayer covers both the appeals and they have paid consolidated Court fee for the whole suit. It is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand, J. in his learned judgment in AIR 1927 Lah 289 (H), mentioned above the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously can not be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment can not remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one. Besides, the High Court was wrong in not giving to the appellants the benefit of Section 5 of the Limitation Act because there was conflict of decisions regarding this question not only in the High Court of the State but also among the different High Courts in India."

In this context decision of Madras High Court Appa (supra) also throw sufficient light wherein it has been categorically held that in one original suit against the decree in favour of the plaintiff, two appeals were preferred to the Lower Appellate Court by two sets and defendants. The result of the appeals was that the suit was dismissed by the Lower Appellate Court and a decree dismissing the suit was passed. It was held that in such circumstances, the plaintiff need not file two second appeals. It would be enough if the plaintiff file one second appeal. The decision of Kerala High Court in the case of Kesavan (supra) is also on the same line. Thus, filing of one second appeal by plaintiff is enough and it was not necessary to him to file two separate appeals. The preliminary objection, which is raised by learned Counsel for respondent No. 2, is hereby rejected.

Regarding substantial question of law No. 1 :

In order to decide the controversy involved in the present suit, though it is not necessary to decide the substantial question of law No. 1. However, since it has been framed, it is to be answered. The contention of learned Counsel for appellant is that Ex. P-1 is a lease deed and not a licence. Though the contention of learned Counsel for respondent No. 2 is that it is a licence which has been revoked. The document (Ex. P-1) is perused. The lease has been defined u/s 105 of the Transfer of Property Act which reads thus :--

"105. A lease of Immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on any specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share service or other thing to be so rendered is called the rent."

On going through document (Ex. P-1), it is revealed that the land, the description of which is given in the document, was given to Narayan in the capacity of President, Indore Municipal Corporation Employees Union, on lease. Though it has been mentioned in the document that it is being given on licence. However, merely the word "licence" is used in the document would not be enough in order to hold that the document is a licence. Indeed the contents and fashion in which it is written is to be seen. Whether an instrument operates as a lease or as a license is a matter not of words but of substance. There have been larger number of decisions on this question. The decisive consideration is the intention of the parties, but the intention must be gathered on a true consideration of the agreement and not merely from the description given by the parties. The mere use of words appropriate to a license will not preclude it is being held to be a lease and vice versa. The determining factor is that whether in fact the interest is created in the property alongwith the possession. If it does, then it is a lease. If it only gives the use of the property in a particular way on certain terms while it remains in the possession and control of the owner, it will only be a license. In other words for a lease, there must be a power and intention to hold the property to the exclusion of the grantor.

The Supreme Court in the case of Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others, has held as under :--

"Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement."

The Apex Court in the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, , has observed that exclusive possession is not conclusive evidence of a lease. If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. Another decision of the Apex Court on the point which has been placed reliance by learned Counsel for appellant is Lakhi Ram v. Vidyut Cable and Rubber Industry 1970 MPLJ 69. Thus in order to ascertain whether the transaction is a lease or licence, the following propositions may, therefore be taken as well established : (1) the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or a licence; (3) if the

document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

On going through the document (Ex. P-1), it is revealed from various clauses mentioned in it that not only exclusive possession of the land was entrusted to the President of the Union but the interest therein was created. In the document there are certain clauses which shows that apart from giving exclusive possession of the land to the President of the Union, certain obligations are assigned to him which would come under the ambit of the creation of the interest, they are, that he will not transfer the land to anybody, would keep the property in habitable condition; he would do necessary arrangement to get the property insured from fire etc.; would not keep any folding furniture adjoining to the property; will not induct any sub-tenant; and a notice of one month would be given by either side in case the land is to be vacated. Thus, since exclusive possession has been transferred and certain interest is also created in the property, though the document is written as license deed, as a matter of fact, it is a lease deed. Apart from this, it would be germane to refer Para 22 which is a notice. This notice dated 11-5-66 is a quit notice and by this notice the tenancy of the respondent No. 2 was terminated by the end of 30-6-1966. If the document (Ex. P-22), the quit notice, is X- rayed in proper perspective and is kept in juxta position to Section 106 of the Transfer of Property Act, one could say easily that it is the quit notice u/s 106 of the Transfer of Property Act terminating the lease. Thus for all purpose the document (Ex. P-1) was considered to be a lease deed. The substantial question of law No. 1 is accordingly answered.

Regarding substantial question of law No 2 :

In the lease deed (Ex. P-1) there is a clause that respondent No. 2 will not induct any sub-tenant. The Municipal Corporation sent the quit notice u/s 106 of the Transfer of Property Act to respondent No. 2, terminating his tenancy on the ground that he has inducted plaintiff Bhagchand Gangwal as sub-tenant. Against the said notice (Ex. P-22) the plaintiff preferred an appeal u/s 403 of the Municipal Corporation Act to Appellate Committee indicating therein that he is carrying on the business of typing in the Gumti. The appeal of plaintiff was dismissed vide Ex. P-24 by the Appellate Committee of the Municipal Corporation on 25-8-1969. It be noted that the appeal was dismissed on the ground that plaintiff has been inducted as sub-tenant. Against the order of dismissal of his appeal, plaintiff submitted a review petition on 24-11-1969, copy of which is Ex. P-27 and the review petition of plaintiff- appellant was dismissed on 15-10-1971 (Ex. P-28) affirming the order passed by the Appellate Committee (Ex. P-24). A very important document has been placed on record which is the resolution of

Public Works Committee of the Corporation (Ex. P- 29). By this resolution, it was resolved by the Municipal Corporation, Indore that pacca-shops will be constructed on M.G. Road where the Gumti, leased out to defendant No. 2, is also situated. Certain other Gumtis were also kept on the said M.G. Road. It was resolved by the Municipal Corporation that the shops shall be allotted to those persons who are possessing the gumti today. In this regard, Clause 8 of the Resolution is quite relevant. It would be relevant to quote that clause which reads thus :--

“8? xqerh vkt ftuds dCts esa gS] mUgsa gh nqdku vykV dh tkosaxhA ijUrq ,slh xqeVh ftlds ekydh vkfn ckcr dksVZ esa okn py jgk gks] mldk fu.kZ; ftlds i{k esa gks] mls nqdku dk dCtk fn;k tkos] ijUrq mijks? fy[ks vuqlkj #i;s 3500@&nksuksa i{k ls fy;k tkosA dksVZ dk fu.kZ; nsjh ls gksus ij nksuksa dks ekgokjh fdjk;k ?xqeVh dk? tek djokuk gksxkA ftlds foi{k esa fu.kZ; gksxk mldk fdjk;k rFkk vU; iwjh jde okfil dj nh tkosA

The resolution (Ex. P-29), dated 19-6-70 was accepted by Mayor Municipal Corporation, Indore which apparent on bare perusal of this document. The acceptance of Mayor is Ex. P-30. The Mayor by exercising power conferred to it u/s 25 of the Municipal Corporation Act, 1956, passed such order (Ex. P-30) that in terms of the resolution (Ex. P-29), dated 19-6-70 tender be issued. Thus, by accepting the resolution (Ex. P-29) by the Mayor vide its acceptance (Ex. P-30), he had accepted the clause that the persons who are possessing the Gumtis, the shops shall be allotted to them only. There is overwhelming documentary evidence that appellant was possessing the Gumti. In this regard at the repetition of the cost, I am again referring Ex. P-22 which is a quit notice issued by Municipal Corporation, Indore addressed to respondent No. 2 terminating the tenancy on the ground that he had inducted present plaintiff/appellant as sub-tenant and he is possessing the Gumti as sub-tenant. The appeal which was preferred by appellant, the same was dismissed by Appellate Committee on the ground that present plaintiff/appellant has been inducted as sub-tenant by respondent No. 2. Thus, according to the resolution of Public Works Committee of the Corporation (Ex. P-29), which recommended to allot the shops to those persons only who were possessing the Gumtis, is applicable to the present plaintiff also because, as per own documents on the Municipal Corporation, the plaintiff was possessing the Gumti. The resolution (Ex. P-29) was accepted by the Mayor u/s 25 of the Municipal Corporation Act.

The administrator of the Municipal Corporation issued an order No. 119, dated 11-5-71 (Ex. P-31) that in terms of the resolution dated 19-6-1970 shops be allotted to those persons only who were possessing gumtis and the order which was issued to allot the shops to the owner of the gumti dated 20-1-71, is hereby cancelled. Thus, again from the document of the Corporation, it is revealed that the shops are required to be allotted to those persons only who are actually possessing the Gumtis. The order No. 746, dated 20-1-1971 which has been cancelled vide Ex. P-31 by the Administrator of the Corporation is Ex. D-1 and,

therefore, it is luminously clear that in order to give effect to the resolution (Ex. P-29) which was accepted by the Mayor vide Ex. P-30 u/s 25 of the Municipal Corporation Act, is to be give effect. Even if Ex D-1 which is an order of administrator No. 746, dated 20-1-1971 is considered in proper perspective, it is revealed that the resolution (Ex. P-29) and the acceptance of the Mayor (Ex. P-30) has not been set aside.

Learned Counsel for appellant has also invited my attention to Ex. P-37 which is an order No. 243, dated 3-6-1971 and has contended that this order has been issued by the Administrator after considering the application of plaintiff dated 25-5-71, the opinion of the law officer dated 1-6-71, note of Mal Padadhikari, dated 2-6-71 and also the letter of the Union of Municipal Corporation were taken into consideration. In this order, though it is mentioned that the Gumti was in possession of plaintiff, but according to Administrator the plaintiff was possessing the Gumti as an employee of the Union of the Municipal Corporation, and therefore, the possession of plaintiff can not be treated as sub-tenant. According to Administrator, merely on the basis of possession, the shop can not be allotted to the plaintiff and therefore the earlier order of Administrator No. 119, dated 11-5-71 is not applicable, and thus the Administrator passed order that the shop be allotted to Union of Municipal Corporation (defendant No. 2). The Municipal Commissioner was directed to do accordingly. Learned Counsel for respondent No. 2 is also placing reliance on this document. The contention of learned Counsel for appellant is that in this document the possession of plaintiff has been admitted though in different capacity, and if that is the position, according to me, in terms of Ex. P-29 which is the resolution of the Public Works Committee of Corporation and accepted by the Mayor by exercising statutory powers, can not be set aside. It has already been held that vide Ex. P-29, it was resolved to allot the shops only to those persons who were in possession on the date of the passing of the resolution. This is an admitted fact that on the date of passing of the resolution (Ex. P-29), dated 19-6-1970 which was accepted by the Mayor, the plaintiff is entitled for obtaining the shop as he was possessing the Gumti. Apart from this, by exercising the statutory powers by the Mayor, the resolution was accepted and therefore, the administrative order issued by Administrator of the Corporation can not supersede the resolution. Otherwise also, it is the case of Municipal Corporation itself that the plaintiff was inducted as sub-tenant by respondent No. 2 and for that the Corporation issued quit notice terminating the tenancy of respondent No. 2 (Ex. P-2). A statutory appeal u/s 403 of the Municipal Corporation Act was filed by the plaintiff-appellant and it was decided by the Appellate Committee constituted under the Municipal Corporation Act u/s 403(4) of the said Act. The Appellate Committee dismissed the appeal of plaintiff/appellant by exercising the statutory powers conferred to it u/s 403 of the said Act by holding that appellant was a sub-tenant and in that capacity he was possessing the Gumti. Thus, the administrative order issued by the Administrator (Ex. P-37) can not override the statutory order. By exercising the statutory powers u/s 403 of the Municipal Corporation Act, while dismissing

the appeal of appellant, it was held that he is a sub-tenant, therefore, the order of Administrator in Ex. P-37 issued in administrative capacity holding that appellant is not a sub-tenant, can not be accepted and can not be said to be a valid order.

It has been vehemently contended by learned Counsel for respondent No. 2 that the land was allotted to Union of Municipal Corporation (respondent No. 2) and the resolution was passed in that regard and in pursuance to the said resolution letter dated 25-3-1959 (Ex. D-4C) was issued. In pursuance to this document, the possession was delivered to respondent No. 2 and the receipt of possession is Ex. D-5C. According to the learned Counsel these are the basic document and the defendant No. 2 is deriving the right from these documents. It be seen that there is no quarrel in regard to these documents. It is also no more in disputed that the land was not allotted to the Union on which the Gumti was installed. Indeed, the land was allotted to defendant No. 2 vide Ex. D-4C and the Union installed a Gumti. But, as discussed hereinabove, defendant No. 2 inducted plaintiff/appellant as his sub-tenant and, therefore, on the said Gumti the possession was of appellant.

Learned Counsel for respondent No. 2, has invited my attention to the order passed by this Court in Civil Revision No. 26/73 (Administrator Municipal Corporation, Indore v. Bhagchand and Anr.) and Civil Revision No. 720/72 (President, Karmachari Union, Municipal Corporation, Indore v. Bhagchand), decided by the common order dated 30-1-1973 and has submitted that the plaintiff submitted an application of temporary injunction which was allowed by the Trial Court and the appeal preferred by the defendants were dismissed. Defendants assailed both the orders by filing these two revision petitions which were allowed by this Court and in that order it has been mentioned that though the plaintiff is possessing the Gumti but he is not having any right since he is an encroacher. This Court while deciding civil revision in order to decide the application of temporary injunction filed by plaintiff under Order 39 Rules 1 and 2, CPC, also held that the status of plaintiff is that of licensee of the Union. Learned Counsel for respondent has also invited by attention that in the said order it was held that plaintiff became rank trespasser, his sub-tenancy came to an end and therefore it has been submitted by the learned Counsel for the respondent that the order passed in civil revision would operate as res-judicata.

In reply to this submission, learned Counsel for appellant has placed reliance on the decision of the Apex Court in the case of Arjun Singh Vs. Mohindra Kumar and Others, , in which the Apex Court has held that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation. They do not in that sense decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief. The Apex Court further came to hold that as these findings do not impinge upon the legal rights

of parties to the litigation the principle of res judicata does not apply to the findings of which these orders are based. Thus, there is no merit in the contention of learned Counsel for the respondent No. 2 that the order passed by this Court in above said two civil revisions, rejecting the application of temporary injunction, filed by plaintiff, would operate as res-judicata. It is well settled in law that while determining the issues in the suit a Court is not justified in making use of the order on the application for temporary injunction. Obviously no final verdict can be given at the stage of the proceedings in respect of the prayer of temporary injunction and any observations made during such proceedings have no relevance whatever in passing the final verdict after the trial of the suit. Thus, there is no merit in the contention of learned Counsel for respondent No. 2 that whatever the reasons are assigned while deciding civil revisions, should be made applicable while deciding the suit. There is no force in the contention of learned Counsel for respondent No. 2 that the District Judge erred in holding that the decree passed by the Trial Court is barred by res-judicata.

According to learned Counsel for respondent No. 2, the decisive factor is not the words which are used in several documents of the Corporation, according to him, it is the legal right which flows from the document. According to the learned Counsel the basis documents are Ex. D-4 and D-5 by which ink respondent No. 2 was given the land on which he put the gumti. It be seen that the resolution of the Public Works Committee (Ex. P- 29) which was accepted by the Mayor vide Ex. P-30 was aware of the situation and even then the resolution was passed that the persons who are actually possessing the gumtis, irrespective of the fact, in which capacity they are possessing, the shops be allotted to them only. Similar type of situation also arose in the case of Usman Gani v. The Indore Development Authority and Ors., Miscellaneous Petition No. 963/90, decided by the Division Bench of this Court on 25-11-1991. In that case, the Indore Development Authority resolved a resolution to construct the shops by removing the gumtis which are built on the land of Municipal Corporation. It was resolved by Indore Development Authority that the persons who are actually keeping the Gumtis and are carrying the business there the shops will be allotted to them. In that case the land was allotted by Municipal Corporation to petitioner Usman while he sub-let it to respondent No. 3 of that petition and he was possessing the Gumti and was carrying on the business. The action of Indore Development Authority was challenged by the petitioner on the ground that the land was allotted to him and respondent No. 3 of that case was his sub- tenant and, therefore, the shop should be allotted to petitioner. The Division Bench of this Court turned down the contention and held that since there was a resolution to allot shops only to those persons who were actually possessing the gumtis and therefore, the respondent No. 3 was rightly allotted the shop. The petition was dismissed. If the ratio decidendi of the case of Usman Gani (supra) is tested on the touchstone of the present case, it would reveal that the said decision decides the fate of this case. In the present case also the land has been allotted to respondent No. 2 and he inducted plaintiff as sub- tenant and in the present case

also there is a resolution to give shops to only those persons who were actually carrying on the business in the gumtis. According to me, the decision of Division Bench of Usman Gani (supra) the plaintiff is entitled for the allotment of the shop.

For the reasons stated hereinabove, the substantial question of law No. 2 is answered that the appellant is entitled to get allotment of the pacca-shop under the policy and resolution of respondent No. 1.

In the result, this appeal succeeds and is hereby allowed. The judgment and decree passed by the First Appellate Court is hereby set-aside and the judgment and decree passed by the Trial Court is hereby restored by decreeing the suit of plaintiff. The cost shall be borne by respondents. Counsel fee Rs. 3,000/-, if pre-certified.