
(2015) 09 BOM CK 0103

In the Bombay High Court

Case No : Writ Petition Nos. 5339, 5247, 5337, 5338 and 5340 of 1993

Bijaysingh Mansingh Baid and Others

APPELLANT

Vs

Biharilal L. Raheja and Others

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13, 13(1) (3), 13(1)(e), 13(1)(l), 14
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 106, 114

Citation : (2015) 09 BOM CK 0103

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : Vivek R. Walavalkar, Sameer Bhalekar and Preeti Brahmania i/b S.M. Kazi, for the Appellant

Final Decision : Dismissed

Judgement

M.S. Sonak, J—The learned counsel for the parties agree that these petitions can be disposed of by common judgment and order.

2. In all these petitions, the challenge is to the common judgment and order made by the Division Bench of the Small Cause Court at Bombay (Appeal Court) reversing the decree dated 8 September 1989 made by the Small Causes Court (Trial Court) and dismissing the suits instituted by the petitioners-landlords, seeking eviction of the respondents from the suit premises. The common issues of law and fact arise in these matters. Accordingly, it would be appropriate if these batch of petitions are disposed of by common judgment and order. The learned counsel for the parties urged that Writ Petition No. 5339 of 1993 be treated as the lead petition.

3. The petitioners-landlords are the present owners of the building known as "Sagar Bhavan" (formerly known as "Shastri Building") bearing street No. 147,

situated at Princes Street, Bombay-400 002, which is acknowledged as one of the prime commercial locations in Mumbai. V.S. Kalelkar, the former owner of the building, sometime prior to 1966, let out to one Lachmandas C. Raheja (Raheja), two rooms on second floor of said building (suit premises).

4. The petitioners-landlords purchased the building Sagar Bhavan, including the suit premises therein by Deed of Conveyance dated 15 April 1971. Even prior to such purchase, the former owner V.S. Kalelkar, by notice dated 26 November 1966 had purported to terminate the tenancy of the Raheja, inter alia on the ground that Raheja had changed the user from residential to non-residential; that Raheja had acquired alternate residential premises in the adjoining building known as Zaveri Building; and that Raheja had unlawfully divided the suit premises comprising two rooms into four compartments and sub-let the same.

5. In response to termination notice dated 26 November 1966, addressed an evasive letter dated 7 January 1967 claiming that circumstances were explained to Kalelkar and Kalelkar expressed satisfaction at the explanation. Kalelkar, rejoined by letter dated 20 January 1967 denying expression of any satisfaction and substantially reiterating the contents of notice dated 26 November 1966.

6. The petitioners-landlords, consequent upon purchase of the building Sagar Bhavan, including the suit premises, caused legal notice dated 27 October 1971 to be served upon Raheja, once again alleging change of user, acquisition of alternate residential premises and unlawful sub-letting and demanded the possession of the suit premises. Similarly, by notice dated 28 October 1971, the petitioners-landlords, through their advocate, called upon respondent Nos. 2 to 5 to explain under what arrangement or writing they have been occupying the suit premises. Inquiry was also made with regard to rents, which the said parties have been paying and to whom.

7. As there was no response, the petitioners-landlords instituted R.A.E. Suit No. 5/15 of 1972 before the Trial Court seeking recovery of possession of the suit premises.

8. Raheja (Respondent No. 1), who was impleaded as defendant No. 1 in the suit, raised the following defences in the written statement filed on 19 September 1972:

"(a) That Raheja had taken up the tenancy in respect of suit premises on behalf of Partnership Firm M/s. Khemchand Tolaram, of which, Raheja and his two brother Khemchand and Tolaram were the partners;

(b) Without prejudice, it was urged that the Firm M/s. Khemchand Tolaram are the sub-tenants in respect of the suit premises, prior to coming into force of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act);

(c) That the suit premises were let out for business purposes and not for purposes of residence. Accordingly, the allegation of change of user was denied;

(d) That Raheja had acquired no alternate residential premises as alleged. In any case and without prejudice, one of the partners of M/s. Khemchand Tolaram, prior to coming into force of the Rent Act, had acquired alternate premises and Raheja had no nexus with such acquisition;

(e) That Raheja had not acquired any alternate residential accommodation in the building known as "Crystal" or that Raheja was not residing with his family in the building known as "Crystal";

(f) That Raheja has never sub-let the suit premises or received any amounts by way of rent or compensation;

(g) That Raheja has not been profiteering in rents. In any case and without prejudice, since sub-letting is alleged to be unlawful, ground of profiteering is unavailable to the landlords;

(h) That defendant No. 5 Madhavlal & Co. is a Proprietary concern of which Madhavlal Khemchand, son of Khemchand, Partner of M/s. Khemchand Tolaram is the Proprietor and therefore, has right in the suit premises; and

(i) That the other defendants, i.e., defendant Nos. 2 to 4 are in occupation of the suit premises as gratuitous licensees and no amount of rent or compensation is recovered from them. Such defendants are also relatives of the family of the partners of M/s. Khemchand Tolaram."

9. Defendant No. 2 R.W. Raheja (Respondent No. 2) filed written statement on 21 August 1972. His defence is broadly as follows:

"(a) That defendant No. 2 is lawful sub-tenant in respect of portion of suit premises which is in his exclusive use and occupation. Therefore, defendant No. 2 is a protected tenant under the Rent Act;

(b) That defendant No. 2 admitted that the receipt of letter dated 28 October 1971 inquiring about his status qua the suit premises, but offered no explanation for the lack of response;

(c) That the allegation of change of user, acquisition of alternate residence by defendant No. 1 were denied; and

(d) That defendant No. 2 amended the written statement in June 1977 to raise a claim of being "protected licensee".

10. Defendant No. 3 Girdharidas M. Lakhi, the Proprietor of R.G. Lakhi Mfg. Co. (Lakhi) (Respondent No. 3) filed written statement on 18 September 1972, which is virtually identical to written statement filed by defendant No. 2- R.W. Raheja. There is, however, no record that Lakhi amended the written statement to raise a claim being "protected licensee".

11. Defendant No. 4 Vasudev R. Bajaj (Respondent No. 4) filed written statement on 21 August 1972. His defence was that he was the lawful sub-tenant prior to 21 May 1959 and on termination of the tenancy of defendant No. 1-Raheja, he

has become the direct tenant of the landlords in respect of portion of the suit premises in his exclusive possession. Defendant No. 4 has claimed to be fully protected under the provisions of Rent Act.

12. Defendant No. 5 Madhavlal & Co (Respondent No. 5) filed written statement on 19 September 1972 claiming to occupy the suit premises as heir of Khemchand, the Partner of M/s. Khemchand Tolaram, who were the tenants of the suit premises. This defendant also claimed that other defendants are the relatives of defendant No. 1- Raheja and are allowed to use the suit premises as licensee. In para 10, it was specifically pleaded that defendant Nos. 2 to 4 are neither charged rent nor compensation. Accordingly, the claim of unlawful subletting was denied. The status of protected tenant under the Rent Act was also claimed.

13. Defendant No. 1 alongwith his written statement, filed a list of documents, which included correspondence, books of accounts, counter foils cheque, electric bills, telephone bills and income tax return. Defendant No. 2 merely relied upon the correspondence received at the suit premises. Defendant No. 3 also relied upon correspondence received at the address. Neither of the defendants specified the nature of contents of such correspondences. Defendant No. 4 had relied upon Deed of Partnership dated 3 April 1964, Deed of Dissolution dated 11 April 1969, postal and other documents and papers, including income tax receipts and correspondence. Defendant No. 5 relied upon books of account. All this is relevant, because ultimately, except for defendant No. 1-Raheja none of the defendants examined either themselves or any witnesses in their support. None of the documents, upon which reliance was placed by at least, defendant Nos. 2 to 5, were ever produced on record or proved.

14. The Trial Court, framed the following issues:

"1. Do the plaintiff's prove the change of user of the suit premises by the defendant No. 1 as alleged by them?

2. Do the plaintiffs prove that deft.no.1 has unlawfully sub let the suit premises to other defendants?

3. Do the plaintiffs prove that the defendant No. 1 has put in permanent wooden partition in the suit premises?

4. Do the plaintiffs prove that the defendant No. 1 got alternative suitable accommodation for his residence?

5. Whether the tenancy of the defendant No. 1 is validly terminated?

6. Whether the defendant No. 1 proves that the suit premises were let out to him for business purpose since inception?

7. Whether the plaintiffs are entitled for possession of the suit premises?

8. What order?"

15. Mansingh Baid (PW-1), the father of Bijaysingh (plaintiff No. 1) was examined on behalf of the landlords and was cross-examined on behalf of all the defendants. Biharilal Raheja (DW-1), son of defendant No. 1-Raheja was examined on behalf of defendant No. 1- Raheja and was cross-examined on behalf of the plaintiffs-landlords. Defendant Nos. 2 to 5 neither examined themselves nor any other witnesses in their behalf.

16. The Trial Court, by judgment and decree dated 8 September 1989 decreed the landlords suit, inter alia, on the ground of acquisition of alternate residential accommodations by defendant No. 1-Raheja and unlawful subletting.

17. Each of the defendants instituted separate appeals being Appeal Nos. 396 (496?), 497, 498, 499 and 500 of 1989 before the Appeal Court. The Appeal Court by common judgment and order dated 14 December 1992 has reversed the Trial Court. The Appeal Court has held that there was no conclusive material on record to establish that the suit premises had been let out only for the purposes of residence. In absence of such material, the ground regards acquisition of alternate suitable residential accommodation, was inapplicable. Further, since sub-letting of the portions of the suit premises was prior to 1 February 1973, by virtue of the provisions contained in Section 15(2) of the Rent Act, such sub-tenancies were regularised and such sub-tenants were protected tenants, who could not be evicted under the provisions of Rent Act. It is against this common judgment and order dated 14 December 1992, that the present petitions have been instituted by the petitioners-landlords.

18. Mr. Vivek Walavalkar, learned counsel for the petitioners-landlords, made the following submissions in support of these petitions:

"a] That the material on record, which establishes that the suit premises had been let out to defendant No. 1 Raheja for residential purposes, has been overlooked by the Appeal Court. The reversal of eviction decree on the ground of acquisition of alternate residential premises by defendant No. 1-Raheja is, therefore, in excess of jurisdiction;

b] That in absence of any material on record that defendant Nos. 2 to 5 were paying any rent or compensation to defendant No. 1-Raheja, the said defendant Nos. 2 to 4 could have never claimed status of either sub-tenant or licensee, much less the status of protected sub-tenants or protected licensees. In fact, there is positive evidence, emanating from defendant No. 1-Raheja that defendant Nos. 2 to 5, were not paying any rent or compensation to him. Inasmuch as such vital material has been overlooked and the legal position arising therefrom misconstrued, there is clear jurisdictional error in the making of impugned judgment and order by the Appeal Court;

c] The onus of establishing that they were sub-tenants or licensees, was squarely upon defendant Nos. 2 to 5, who had raised such claim. The onus was of a considerably higher degree, considering the defence of defendant No. 1-Raheja (original tenant) that defendant Nos. 2 to 5 were not the subtenants or licensees,

but merely some relatives of the partners of M/s. Khemchand Tolaram, who according to defendant No. 1-Raheja, was the original tenant in respect of suit premises. Defendant No. 5, one of the legal heirs of the partners of said Firm, in the written statement, had made a categorical statement that no rents or compensation was ever accepted from defendant Nos. 2 to 4 in respect of suit premises. Defendant Nos. 2 to 5 did not even bother to step into witness box to discharge such onus. Mr. Walavakar submitted that the facts which are specifically within the knowledge of party, have to be proved by the said party, failing which, adverse inference is required to be drawn against such party; and

d] The defendants in the suit raised multifarious, contradictory and mutually inconsistent defences. However, the defendants failed to establish any of the defences. Only the son of defendant No. 1, on behalf of defendant No. 1-Raheja, stepped into witness box and admitted that defendant No. 1-Raheja is no longer in possession of the suit premises. Defendant Nos. 2 to 5 did not even bother to step into witness box. In such circumstances, the Appeal Court, clearly exceeded its jurisdiction in reversing the Trial Court, which had made the decree for eviction."

19. Mr. P.S. Dani, learned senior advocate for respondent No. 2-R.W. Raheja, submitted that the petitioners-landlords in their plaint had themselves alleged that defendant Nos. 2 to 5 in the suit were sub-tenants in respect of suit premises and that defendant No. 1 Raheja (original tenant) was indulging in profiteering of the rent. In terms of Section 15(2) of the Rent Act, sub-tenancies prior to 1 February 1973, were accorded statutory protection and therefore, the Appeal Court was right in extending such statutory protection to defendant Nos. 2 to 5. Mr. Dani also submitted that there was no material on record to establish that the suit premises were initially let out to defendant No. 1-Raheja (original tenant) for residential purposes. The Trial Court, in fact, incorrectly declined to answer the issue as to the purpose for which the suit premises were initially let out. The decree on the ground of acquisition of alternate accommodation was incorrectly made, inasmuch as the provisions contained in Section 13(1)(I) of the Rent Act apply only in respect of residential premises. In any case, Mr. Dani submitted that even if the tenancy of defendant No. 1- Raheja may have been validly terminated, in terms of provisions contained in Section 14 of the Rent Act, defendant Nos. 2 to 5 become the direct tenants of the petitioners-landlords. For all these reasons, Mr. Dani submitted that there is no case made out to interfere with the decisions taken by the Appeal Court, particularly considering the limits of supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

20. The rival contentions now fall for determination.

21. The Appeal Court, in the impugned judgment and decree dated 14 December 1992 has almost entirely relied upon the contents upon the notices dated 26 November 1966 and 27 October 1971, in which, the landlords had alleged that defendant No. 1-Raheja (original tenant) had partitioned the suit premises into

four compartments and had sublet each of such compartments to defendant Nos. 2 to 5 and thereby indulged into profiteering. Relying upon such allegations in the two notices, the Appeal Court has concluded that defendant Nos. 2 to 5 were indeed the subtenants or in any case licensees in respect of suit premises prior to 1st day of February 1973 and therefore, were entitled to the protection by Section 15(2) of the Rent Act and consequently were not liable to be evicted under Section 13(1)(e) of the Rent Act.

22. The Section 15 of the Rent Act, reads as under :

"15. [In absence of contract to the contrary tenant not to sublet or transfer] [or to give on licence].--

[(1)] Notwithstanding anything contained in any law, [but subject to any contract to the contrary,] it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein [and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises]

[Provided that the [State] Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such [leases or class of leases [or the giving on licence any premises or class of premises] and to such extent as may be specified in the notification].

[2] The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section, be deemed to have had no effect [before the 1st day of February 1973] in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in Sub-section (1), as purported sub-lease, assignee or transferee and has continued in a possession [on the date aforesaid], shall be deemed to be valid and effectual for all purposes, and any tenant who has sublet any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the [date aforesaid]."

23. The Section 15A of the Rent Act, reads thus:

"15A. Certain licensee 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 come, for the purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section(1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid.

(emphasis supplied)

24. Although, there is no definition of the expression "subtenant" contained in the Rent Act, Section 5(11) of the Rent Act defines the expression "tenant" to mean any person by whom or on whose account rent is payable for any premises and includes such subtenants and other persons as have derived title under a tenant before the 1st day of February 1973. The expression tenant also includes any person to whom interest in premises has been assigned or transferred as permitted or deemed to be permitted, under Section 15. The expression tenant also includes such licensees as are deemed to be tenants for the purposes of Rent Act by Section 15A. Suffice to note at this stage that one of the essential ingredient to be fulfilled before a person can claim to be a tenant or a subtenant for the purposes of Rent Act is that, such person should be one by whom or on whose account rent is payable for any premises.

25. The expression "licensee" is defined under Section 5(4A) of the Rent Act in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge and includes several persons specifically referred to in the definition clause. Thus, before a person can claim status of a licensee, such person has to establish that he is in occupation of the premises or part thereof under a subsisting agreement or licence given for a "licence fee" or "charge".

26. Section 15(2) of the Rent Act, no doubt, exempts from the prohibition against the subletting of the whole or any part of the premises, which have been let out to any tenant, provided, such subletting, assignment or transfer has taken effect before 1st February 1973 in the area in which the Rent Act was in operation and further provides that any sub-lease, assignment or transfer before such date shall be deemed valid and effectual for all purposes and any tenant who has sublet any premises or part thereof assigned or transferred any interest therein, shall not be liable to eviction under Section 13(1)(3) of the Rent Act.

27. So also, Section 15A of the Rent Act provides that 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 be come, for the purposes of the Rent Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

28. Thus, on the basis of provisions contained in Section 15(2) and Section 15A of the Rent Act, if, a person is in occupation of any premises or part thereof any area to which the Rent Act applies prior to 1st February 1973 as a sub-lessee or a licensee, then such person can claim the status as a tenant for the purposes of Rent Act. In order to sustain such a claim, however, it is imperative that such a person has to establish that he was indeed occupying the premises or any part thereof as a sub-tenant or a licensee as such terms are understood and defined for the purposes of Rent Act. It follows therefore, that such person, if he claims to be a sub-tenant, has to establish that he was a person by whom or on whose account rent was payable for such premises. If such person claims to be a licensee, then he has to establish that license was given for a license fee or a charge. Unless, these vital ingredients are satisfied, no person merely on the basis of his occupation of the premises prior to 1st February 1973 can claim the protection under Section 15(2) or Section 15A of the Rent Act.

29. The aforesaid position is no longer res integra.

30. In the precise context of Section 15A of the Rent Act, the learned Single of this Court in case of Shashikant G. Mehta of Mumbai Indian Inhabitant Vs. Soonoo Minoo Khajotia, Hosidar Minoo Khajotia, Shiraz F. Chokshi and Jegangir M. Khajotia, heirs and legal representatives of Minoo Jahangir Khajotia, (2011) 4 ALLMR 1 : (2011) 3 BomCR 519 : (2011) 4 MhLj 247 : (2012) 1 RCR(Rent) 50 , has held that a gratuitous licensee, i.e., a licensee in occupation of suit premises without obligation to pay license fee or charge is not entitled to protective cover of Section 15A of the Rent Act. Upon analysis of the facts and other relevant circumstances, the learned Single Judge of this Court held that the licensee from the 3 June 1970 for a further period of five years was without payment of any rent and compensation by the petitioner. It was, therefore, held that on 1 February 1973, the petitioner was not a licensee as defined under sub-section (4-A) of Section 5 of the Rent Act and consequently the protection of Section 15A of the Rent Act was denied to the petitioners.

31. In case of Punnakatu Chery Joseph Thankappan Vs. Pyarali Hirji Hamid, (2005) 2 ALLMR 11 : (2005) 2 BomCR 786 , the Division Bench of this Court has held that in absence of pleading and evidence on record that the defendant was in occupation of the suit premises in lieu of payment of rent or compensation, there was no question of such defendant being entitled to the protection under Section 15 of the Rent Act. It was held that the fixation and payment of rent is absolutely essential element in order to evidence existence of tenancy/sub-tenancy.

32. In case of Delhi Stationers & Printers v. Rejendra Kumar 1990 Mah. R.C.J. 517, the Hon"ble Apex Court, in the context of Section 13(3)(e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, held that "subletting" means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. Thus the component of compensation or rent is an essential ingredient for

determining whether the transaction in question amounted to a sub-lease or a license.

33. Applying the aforesaid principles to the facts and circumstances of the present case, it needs to be at once noted that defendant No. 1-Raheja (original tenant), who was perhaps, in the best position to explain the circumstances in which defendant Nos. 2 to 5 were found to be in possession of parts of the suit premises, has categorically stated in his written statement that defendant Nos. 2 to 5 were not the sub-tenants in respect of suit premises and that Raheja has never received any amounts by way of rent or compensation from defendant Nos. 2 to 5. A vague plea was taken that defendant Nos. 2 to 4 are relatives of the partners of the Firm M/s. Khemchand Tolaram and are in occupation of portions of the suit premises, in the said capacity. Biharilal Raheja, son of Raheja, who has deposed in the matter as DW-1 and has deposed that he does not know in what circumstances defendant Nos. 2 to 4 are occupying the suit premises.

34. The next best persons who could have thrown some light upon the status of defendant Nos. 2 to 5 qua the suit premises, are obviously, defendant Nos. 2 to 5 themselves. However, they chose not to even step in the witness box.

35. As noted earlier, defendant No. 2 took up a bald plea in the written statement that he is the lawful sub-tenant or a protected licensee qua the portion of the suit premises in his exclusive use. There are, however, no pleadings whatsoever in the written statement filed by defendant No. 2 as to whether any rent or compensation was being paid by defendant No. 2 and to whom. Further, the defendant No. 2 failed to step into the witness box and make good his bald assertion about being a sub-tenant or a protected tenant. The status of sub-tenancy or protected tenancy, is basically a legal status. In order to achieve the same, the material facts are required to be pleaded and established. Mere assertion of a legal status, would not suffice, particularly when material facts to sustain such status are neither pleaded nor established.

36. In fact, Order VI Rule 2 of the Code of Civil Procedure, 1908 (CPC) provides that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. In the present case, the statement that defendant No. 2 is a sub-tenant or protected tenant, is more in the nature of a legal submission or at the highest some conclusion which defendant No. 2 seeks to draw for his own benefit. The material facts to sustain such a legal submission or conclusion, however, are singularly absent. In the entire written statement, defendant No. 2 has not pleaded as to how and in what capacity, he entered into portion of suit premises. If, defendant No. 2 is indeed a sub-tenant or protected tenant, then to whom the defendant No. 2 was paying rent or compensation, what are the terms of sub-tenancy. The written statement is completely bereft of such material facts. In particular, it is not even the statement of defendant No. 2 that he is paying any rent or

compensation to either defendant No. 1-Raheja (original tenant) or for that matter to any other party having any nexus with the suit premises or part thereof.

37. The written statement filed by defendant No. 3 (Lakhi) is virtually identical to written statement of defendant No. 2, except that Lakhi has not raised any plea of his being "protect licensee".

38. The defendant No. 4 has also pleaded that he was the lawful sub-tenant prior to 21 May 1959 and that upon termination of tenancy of defendant No. 1 - Raheja (original tenant), defendant No. 4 has become direct tenant of the landlords in respect of portion of the suit premises in his exclusive possession. Defendant No. 4 has claimed to be fully protected under the provisions of Rent Act. Again, the same vice which attaches pleadings of defendant Nos. 2 and 3, attaches to the pleadings of defendant No. 4. There are no particulars whatsoever as to the manner in which defendant No. 4 was inducted in part of the premises. There are no particulars with regard to payment of rent or license fees.

39. Finally, defendant No. 5 in his written statement has set up a case that it is the heir of one Khemchand, the Partner of M/s. Khemchand Tolaram, who were the tenants of the suit premises. Defendant No. 5 has stated that defendant Nos. 2 to 4 are relatives of defendant No. 1-Raheja and were allowed to use the suit premises by Raheja as licensees and they were never charged rent or compensation.

40. Significantly, defendant Nos. 2 to 5 did not even bother to step into witness box. Thus, apart from there being no pleadings to sustain the claim of said defendants, there is absolutely no evidence on record to establish the precise status of defendant Nos. 2 to 5 qua the suit premises. In any case, defendant Nos. 2 to 5 have failed to establish that they were paying any rent or compensation to defendant No. 1-Raheja (original tenant) in respect of their occupation of the suit premises, which according to them was exclusive occupation. In fact, defendant No. 1-Raheja (original tenant) in his pleading, had denied that defendant Nos. 2 to 5 were sub-tenants, but had suggested that they were gratuitous licensees, placed in occupation of portions of the suit premises, in their capacity as relatives of the partners of Firm M/s. Khemchand Tolaram. To the same effect, there are the pleadings of defendant No. 5. In these circumstances, the essential ingredients with regard to payment of rent or compensation by defendant Nos. 2 to 5 have neither been established nor proved. In such circumstances, there was no question of defendant Nos. 2 to 5 claiming any status of subtenancy or licensee. In the absence of any such status, obviously, defendant Nos. 2 to 5 could not claim the protective benefits of Sections 15 and 15A of the Rent Act.

41. In matters of sub-letting or parting with exclusive possession of the suit premises by the original tenant, initially burden may be upon the landlord.

However, once the landlord demonstrates that some third person is in occupation of the suit premises and the tenant is not himself in occupation of the suit premises, burden of proving the nature of occupation of such third person shifts upon the original tenant or at least upon such third party in occupation. The landlord is not expected to know about terms between his tenant and the occupants. He can inferentially make some averments from the conduct of parties and the apparent state of things. However, the precise nature of occupation or the status of occupants are matters within the special knowledge of the original tenant and the third party occupant. The onus is, therefore, obviously upon the original tenant and or at least, third party occupants to explain their position.

42. Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The principle underlying this section is that the burden to establish those facts, which are within personal knowledge of any person, is cast upon such person and if he fails to discharge such burden, then adverse inference may be drawn against him. As per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the Court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. True, that the presumption under Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. However, whether such inference should be drawn or not, depends upon the nature of the fact required to be proved, its importance in the controversy, the usual mode of proving it, the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account¹. In the present case, defendant No. 1 Raheja and defendant Nos. 2 to 5, who are third parties in occupation of the suit premises, were in the best position, to lead evidence and produce material on record that they were paying rent or compensation to defendant No. 1 Raheja (original tenant). This, they have miserably failed. In fact, defendant Nos. 2 to 5 did not even step into witness box. Defendant No. 1, in his written statement, has stated that he has not received any rent or compensation from defendant Nos. 2 to 5. In fact, the same position is reiterated by defendant No. 5 in his written statement. In the absence of element of payment of rent or compensation, defendant Nos. 2 to 5 could never have claimed the status of sub-tenants or licensees. Further, in the absence of any status of sub-tenant or licensee, there was no question of said defendants claiming protection under Sections 15 and 15A of the Rent Act.

43. The Appeal Court was not right in relying solely upon the statements made in the notices issued by the landlords to the original tenant-defendant No. 1-Raheja. In the notices issued by the landlords to defendant Nos. 2 to 5, the landlords had merely made enquiries as to the status and capacity of the said defendants qua the suit premises. Significantly, defendant Nos. 2 to 5 had submitted no response in the matter. At the stage of issue of notice, the

landlords had really no option, but to hazard an inference that defendant Nos. 2 to 5 might be unlawful sub-tenants or unlawful licensees qua the portions of suit premises. The same position continued at the stage of institution of the suit. However, what was precisely the status of defendant Nos. 2 to 5, was a matter for the defendant No. 1 (original tenant) or for that matter defendant Nos. 2 to 5 to explain. This, they have failed. In such circumstances, there was no question of granting them the benefit of protected tenancy or protected license in respect of suit premises relying solely upon the statements in the legal notices or in the pleadings. Obviously, the landlord had no means to ascertain the precise status of defendant Nos. 2 to 5 qua the suit premises except that they were found to be in occupation of the same. On this basis, if allegation is made that this was a case of unlawful subletting, it is impermissible to tie down the landlords, in the peculiar facts and circumstance of these cases and on the said basis to grant defendant Nos. 2 to 5 the protection of Sections 15 and 15A of the Rent Act. In these cases, as noted earlier, defendant Nos. 2 to 5 have failed to establish that they were paying any rent or license fees to defendant No. 1. Defendant Nos. 2 to 5 have failed to establish that they were subtenants or licensees in respect of suit premises. Defendant Nos. 2 to 5 even failed to step into witness box and further, in their pleadings there was not even an assertion that they were paying any rents or compensation to defendant No. 1. The defendant Nos. 1 and 5 have asserted that they were not receiving any rent or compensation from defendant Nos. 2 to 4. In the absence of all such jurisdictional facts, certainly, the defendant Nos. 2 to 5 could not have been granted the protection of Sections 15 and 15A of the Rent Act. The Appeal Court has misdirected itself both in law as well as fact in granting such benefit to defendant Nos. 2 to 5. The Appeal Court has not even discussed whether or not defendant Nos. 2 to 5 fulfilled the essential ingredient of payment of rent or compensation so as to enable them to claim the status of subtenancy or licensee. Relying merely upon the position that defendant Nos. 2 to 5 were in occupation prior to 1 February 1975, such benefit has been extended. This constitutes a jurisdictional error.

44. The Trial Court had ordered eviction of defendant No. 1-Raheja on the ground that defendant No. 1-Raheja had acquired alternate suitable residence and therefore, the ground under Section 13(1)(I) of the Rent Act was made out. There is overwhelming evidence on record that defendant No. 1-Raheja had indeed acquired alternate suitable residence. However, the Appeal Court has reversed the Trial Court mainly on the ground that the Trial Court itself had recorded a finding that there is no sufficient evidence on record to come to the conclusion whether the suit premises were let out to defendant No. 1-Raheja only for residential purposes or whether they were let out for both residential and business purposes. The Appeal Court, however, did not independently examine the material on record for the purposes of determining whether the suit premises had indeed been let out to defendant No. 1-Raheja for residential purposes. In fact, if the Appeal Court were to have undertaken this exercise, would be clear that even this issue had to be decided in favour of the landlords.

45. Even the Trial Court, by placing reliance upon the extract from Municipal Electrol Roll, recorded a finding that during period between 28 December 1960 to 19 December 1964, defendant No. 1-Raheja was residing in suit premises alongwith his family members. The Trial Court has, in fact, observed that this fact was not disputed by both the parties and that this fact is supported by the deposition of DW-1 Biharilal, son of defendant No. 1-Raheja. PW-1, father of plaintiff No. 1 (landlord) has deposed that the suit premises were given to defendant No. 1-Raheja for residential purposes. Although, DW-1 was extensively cross-examined, there is no direct suggestion put to PW-1 to the effect that the suit premises were not let out for residential purposes. Instead, a suggestion was put to him that the residents of second floor were using bathrooms and latrine on the first floor. DW-1 Biharilal, son of defendant No. 1-Raheja has deposed that his father, mother, sister and himself moved into the suit premises, when DW-1 was about 13 years old. DW-1 has admitted that they came to reside in the suit premises and stayed therein for about three years. DW-1 has also deposed that there was a staircase connected with second floor with first floor and the staircase was used by them for approaching the toilet on the first floor as there was no toilet on the second floor. At one stage, DW-1 has stated that the suit premises comprised of four rooms and one room was used for office and rest of the rooms were used as residences. The rooms were used as bedrooms and kitchen. DW-1 has also admitted that Lakhi, i.e., defendant No. 3 was later on occupying the room which was formerly used as a kitchen, though DW-1 has denied the suggestion that the suit premises were let out for purposes of residence. The aforesaid admissions are sufficient to record a finding that the suit premises had been let out to defendant No. 1-Raheja for residential purposes.

46. There is absolutely no dispute that defendant No. 1-Raheja had acquired alternate suitable residences. In fact, DW-1 Biharilal, son of defendant No. 1-Raheja has in terms admitted that Rahejas, after residing in the suit premises for about three years, shifted to Zaveri Building, where they began to reside. Thereafter, DW-1 has deposed that they left Zaveri Building premises, because the accommodation was short, i.e., there is only two rooms and two kitchen in Zaveri Building. Such admissions, were sufficient to make out a ground contained in Section 13(1)(I) of the Rent Act. The Appeal Court, therefore, was not justified in reversing the finding of fact recorded by the Trial Court in the context of ground of eviction under Section 13(1)(I) of the Rent Act.

47. From the material on record, it is clear that defendant No. 1-Raheja, after parting with the possession of suit premises to defendant Nos. 2 to 5 has virtually no truck with the suit premises. DW-1 Biharilal has deposed that during lifetime of his father he never paid rent in respect of suit premises. He has deposed that he does not know whether his father was maintaining any accounts. He has deposed that he does not know who was actually tending the rent in respect of suit premises to the landlords, during lifetime of his father. He has admitted that he has never seen any rent receipt towards rent paid by his father. No doubt, he has made statement that after the death of his father,

paying the rent in respect of suit premises, he does not have any rent receipt to prove the same. DW-1 has claimed no knowledge as to circumstances in which defendant No. 2 or defendant No. 3 have been occupying the portions of the suit premises. From all this, it is clear that neither is defendant No. 1-Raheja paying any rents in respect of suit premises nor are the remaining defendants paying any amount either to defendant No. 1-Raheja or to any other persons towards occupation of the suit premises. There is no dispute, however, that the suit premises indeed belong to the petitioners.

48. Upon cumulative consideration of all the aforesaid facts and circumstances, case is made out for interference with the common judgment and decree dated 14 December 1992 and to set aside the same. Accordingly, the common judgment and decree dated 14 December 1992, which is challenged in all the petitions is set aside.

49. In each of these petitions, there is an endorsement that the petitions stand dismissed as against Respondent NO.3 (Lakhi) vide Additional Registrar's order dated 31 October 1996. If this order continues, then obviously, the Appeal Court's judgment and order dated 14 December 1992 stands confirmed in so far as Respondent No. 3 (Lakhi) is concerned. However, since respondent No. 3 (Lakhi) was in occupation of a distinct portion of the suit premises, the decree of eviction can always been made against the remaining respondents. The same is made and directed accordingly.

50. The petitions stand already dismissed as against Respondent No. 3 (Lakhi) vide Additional Registrar's order dated 31 October 1996. However, insofar as the remaining Respondents are concerned, the petitions are allowed, Rule is made absolute in terms of prayer to (a) in all the petitions. There shall, however, be no order as to costs.

51. At this stage, Mr. Kunal Bhanage, learned Counsel for Respondent No. 2, prays that the execution of the eviction decree be stayed for a period of eight weeks, as the Respondent No. 2 seeks to take recourse against this Judgment and Order before the Hon'ble Apex Court. The request is reasonable and therefore, subject to the Respondent No. 2 filing the usual undertaking in this Court within a period of two weeks from today, the eviction order shall not be put into execution as against Respondent No. 2. The Respondent No. 2 to furnish a copy of the undertaking to the learned Counsel for Petitioners, before the same is filed with the Registry.

52. Mr. Bhanage who now says that he has instructions to appear on behalf of the remaining Respondents as well, seeks a stay on the execution of the eviction decree on behalf of the remaining Respondents as well, for a period of eight weeks. Subject to the terms as aforesaid, the execution of the eviction decree shall stand stayed in respect of the remaining Respondents as well. The copies of the undertaking/s of the remaining Respondents i.e. Respondent Nos. 1, 4 and 5, to be furnished to the learned Counsel for Petitioners before the same are filed

with the Registry.

1 Tomaso Bruno Vs. State of U.P.(2015) 4 AD 1 : (2015) CriLJ 1690 : (2015) 1 Crimes 105 : (2015) 2 JCC 884 : (2015) 1 RCR(Criminal) 678 : (2015) 1 SCALE 498 : (2015) 2 SCJ 328