

(2012) 05 RAJ CK 0002
In the Rajasthan High Court
Case No : Civil First Appeal No. 370 of 2007

Neon Lawrie and Another	Vs	APPELLANT
O.R. Properties and Builders (P) Ltd. and Others		RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10, Order 22 Rule 9, Order 41 Rule 22, Order 41 Rule 33
Transfer of Property Act, 1882 — Section 52

Citation : (2013) 1 RCR(Rent) 348 : (2013) 3 RLW 2647

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : R.K. Agrawal and Mr. Alok Chaturvedi, for the Appellant; S.M. Mehta and Mr. Ashok Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Bela M. Trivedi, J.—The appeal is directed against the judgment and decree dated 3.5.2007, passed by the Additional District & Sessions Judge No. 4 Jaipur City, Jaipur, (hereinafter referred to as the trial court) in Civil Suit No. 88/02 (170/98), whereby the trial Court has decreed the suit of the respondent No. 1 (original plaintiff), against the appellants and the respondent Nos. 2 and 3 (original defendants), directing the defendants to hand-over vacant possession of the premises in question to the plaintiff and further restraining the defendants from transferring, assigning or parting with the possession or subletting the said premises to any third party, and further directing the defendants to pay the mesne profits at the rate of Rs. 2375/- p.m. till the possession was handed-over to the plaintiff. In the instant case, there are certain undisputed facts which may be narrated as under:-

1(i) Initially Smt. D. Lawrie, the mother of the appellant No. 1 and the respondent No. 2 and 3, had taken the suit premises, being the Plot No. 37, Bhagwan Das Road, C-Scheme, Jaipur, with building having construction of two

floors, on rent from the original owner one Shri Manohar Lal Oberai, at Rs. 1200/- p.m. plus house tax. The said Manohar Lal sold out the said suit premises to one M/S. Phool Chand Virendra Kumar, HUF by a registered sale deed on 18.1.1973. The said M/S. Phool Chand Virendra Kumar had filed one suit being No. 240/80 in the court of District & Sessions Judge, Jaipur for eviction against Smt. D. Lawrie and Smt. Sheela Khanna. During the pendency of the said suit, the said M/s. Phool Chand Virendra Kumar further sold out the suit property to M/S. O.R. Properties i.e. the present respondent No. 1-original plaintiff, by executing the registered sale deed on 24.6.1994. The said original tenant Smt. D. Lawrie expired on 7.10.1994. The plaintiff of the said suit had submitted an application for bringing on record the legal representatives of the said Smt. D. Lawrie, however the court did not grant the same, and thereafter the said suit was dismissed by the said court as having been abated vide the order dated 19.1.1996.

1(ii) Thereafter, the present respondent No. 1 (original-plaintiff) M/S. O.R. Properties filed the suit being No. 170/98 (88/02), before the trial court seeking possession of the suit premises from the present appellant No. 2, the respondent No. 2 and the respondent No. 3 (original defendant Nos. 1 to 3) alleging inter-alia that Smt. D. Lawrie was staying at U.S.A. where she had expired in 1994 and that none of her sons had ever stayed with her or run the school in the suit premises, as they were also permanent residents of U.S.A. It was also alleged that the tenancy rights in respect of the suit premises had not devolved upon the defendant Nos. 1 and 2, and that the defendant No. 3 Smt. Sheela Khanna was in possession of the suit premises and was running a school therein as the sub-tenant. The possession of the suit premises was also sought by the plaintiff on the ground of bona fide necessity and of nonpayment of arrears of rent, invoking Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as the said Act). Since the present appellant No. 1, Shri Neon Lawrie though was one of the sons of the deceased Smt. D. Lawrie, was not made party-defendant in the suit, he had moved an application under O.1 R. 10 of C.P.C. on 9.5.2000 for being impleading him as the party-defendant, on the ground that until the death of his mother Smt. D. Lawrie, he was looking after and managing the affairs of the school in the suit premises along with his mother and therefore was a necessary party to the suit. The said application was allowed by the trial court and the appellant No. 1 was impleaded as the party-defendant No. 4 in the suit.

1(iii) The suit was not contested by the present respondent Nos. 2 and 3 (original defendant Nos. 1 and 2), however was contested by the present appellants (original defendants Nos. 4 and 3 respectively), raising various contentions. It further appears that during the pendency of the suit, the plaintiff M/S. O.R. Properties filed another suit for fixation of standard rent of the suit premises u/s 6 of the said Act. The said suit was subsequently dismissed for default.

1(iv) In the suit in question, the trial court had framed as many as fifteen issues

out of which issue Nos. 1, 8, 10, 11, 12 and 14 were answered in favour of the plaintiff, and rest of the issues in favour of the defendants, while decreeing the suit of the plaintiff, vide the impugned judgment and decree. Being aggrieved by the same, the appellants have preferred the present appeal u/s 96 of C.P.C.

2. In the present appeal, both the learned senior counsels Mr. R.K. Agarwal for the appellants and Mr. S.M. Mehta for the respondent No. 1 have made their respective submissions at length and relied upon plethora of decisions of the Apex Court and of the High Courts, which shall be dealt with hereinafter as found necessary.

3. Having regard to the rival contentions raised by the learned counsels for the parties in the light of the evidence on record, following broad points arise for consideration before this court.

(i) Whether the suit of the respondent No. 1-plaintiff was barred under Order XXII, R. 9 of CPC?

(ii) Whether the suit of the respondent No. 1-plaintiff was barred by the principles of res-judicata or constructive res-judicata?

(iii) Whether the suit of the respondent No. 1-plaintiff invoking the provisions contained in the Rajasthan Rent Control Act was not maintainable?

(iv) Whether the tenancy rights had devolved upon the sons of Smt. D. Lawrie after her death as contemplated u/s 3(vii)(b) of the said Act?

(v) Whether the respondent No. 1-plaintiff was entitled to recover possession of the suit premises from the appellants-defendants?

4. First of all, let us advert to the two-fold arguments made by learned counsel Mr. R.K. Agrawal as regards the bar against the filing of the suit by the respondent No. 1-plaintiff. Relying upon the provisions contained in Order XXII Rule 9 and 10 of CPC read with Section 52 of the Transfer of Property Act, he had submitted that the earlier suit filed by M/s. Phool Chand Virendra Kumar against M/s. D. Lawrie and Smt. Sheela Khanna seeking eviction on the ground of bona fide necessity and sub-letting was dismissed by the court as abated on 19.1.96. During the pendency of the said suit the said M/s. Phool Chand Virendra Kumar had sold out the suit premises to M/s. O.R. Properties i.e. the plaintiff. According to him Order XXII Rule 10 CPC postulates continuation of suit by or against a person who has by devolution, assignment or creation acquired any interest during the pendency of suit, by leave of the court. Thus in view of the said provision contained in Order XXII Rule 10 CPC and applying the doctrine of lis pendency contained in Section 52 of the TP Act, the decision of earlier suit filed by M/s. Phool Chand Virendra Kumar was binding on the subsequent purchaser i.e. M/S. O.R. Properties. He also submitted that in view of Rule 9 of Order XXII, when the suit abates or is dismissed under the said Order, no fresh suit could be brought on the same cause of action. Mr. Agrawal relying upon the decision of Apex Court in case of Bhag Mal (alias) Ram Bux and Others Vs. Munshi (Dead)

by Lrs. and Others, also submitted that the decision on merits is not the only test to determine the finality of decision and that the finality gained due to the abatement is an illustration to the said proposition. Pressing into service the principles of res-judicata as contemplated u/s 11 of CPC, in the second fold of his submission, Mr. Agrawal had submitted that the matter in issue in earlier suit filed by M/s. Phool Chand Virendra Kumar seeking eviction on the ground of bona fide necessity and subletting being also the matter in issue in the subsequent suit filed by the plaintiff, who was successor in title was barred under the said provision.

5. Though the submissions made by the learned counsel Mr. Agrawal prima facie may be found attractive, on the closer scrutiny of evidence and the legal position, the court does not find any substance in the same. There cannot be any disagreement with the legal position envisaged in Order XXII Rule 9 of CPC to the effect that where a suit abates or is dismissed under the said Order, no fresh suit could be brought on the same cause of action but what is material for barring the fresh suit when the suit has abated or has been dismissed under the said Order, is to determine whether the subsequent suit was filed on the same cause of action or not. Hon"ble Supreme Court in case of Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others, has interpreted the expression "cause of action" as under:-

The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the plaintiff-respondent to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, is comprised in "cause of action."

6. So far as the facts of the present case are concerned, as transpiring from the record, the earlier suit was filed by M/s. Phool Chand Virendra Kumar against the original tenant Smt. D. Lawrie, and alleged subtenant Smt. Sheela Khanna, in which the eviction was sought on the ground of bona fide necessity and subletting, whereas the present suit was filed by M/s. O.R. Properties against the sons of Smt. D. Lawrie and Smt. Sheela Khanna. Apart from the fact that the cause of action in earlier suit and in the subsequent suit was absolutely different, even the parties in both the suits were different. Even if it is construed that M/s. O.R. Properties was the successor in title after M/s. Phool Chand Virendra Kumar and the decision of earlier suit was binding on M/s. O.R. Properties, then also it could not be said by any stretch of imagination that causes of action in both the suits were same for the reasons set out hereinafter. No doubt, it might prima facie appear that the earlier suit was filed seeking eviction on the ground of bona

bona fide necessity and sub-letting and the subsequent suit was also filed on the ground of bona fide necessity and sub-letting, over and above on the ground of arrears of rent and therefore the causes of action in both the suits were same. However, the most important aspect in the subsequent suit was that the plaintiff M/s. O.R. Properties had alleged in the suit in question that after the death of original tenant Smt. D. Lawrie, the tenancy rights had not devolved upon any of her sons i.e. the defendant Nos. 1, 2 and 4. Therefore, the filing of subsequent suit by the plaintiff M/s. O.R. Properties was on the subsequent event having taken place i.e. death of original tenant Smt. D. Lawrie, and the material issue in the subsequent suit was as to whether the tenancy rights had devolved upon the sons of Smt. D. Lawrie after her death, as contemplated in Section 3(vii)(b) of the said Act, which was not the matter in issue in the earlier suit.

7. It is further significant to note that as per the settled legal position, the bona fide need of the plaintiff is a recurring cause of action and has to be considered with reference to the time and the necessity which existed at the time of filing of the earlier suit and at the time of filing subsequent suit. The very issue was considered by the Apex Court in Case of N.R. Narayan Swamy Vs. B. Francis Jagan, in which the Apex Court considering the provisions of the Karnataka Rent Control Act qua Section 11 of CPC held as under:-

6. In our view, the High Court ought to have considered the fact that in eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, the landlord is not precluded from instituting fresh proceeding. In an eviction suit on the ground of bona fide requirement the genuineness of the said ground is to be decided on the basis of requirement on the date of the suit. Further, even if a suit for eviction on the ground of bona fide requirement is filed and is dismissed, it cannot be held that once a question of necessity is decided against the landlord; he will not have a bona fide and genuine necessity even in future. In the subsequent proceedings, if such claim is established by cogent evidence adduced by the landlord, decree for possession could be passed [K.S. Sundararaju Chettiar v. Mr. Ramachandra Naidu (SCC para 10) and Surajmal v. Radheyshyam].

8. In view of the above settled legal position, it could not be said that merely because earlier suit of the landlord on the ground of bona fide necessity was dismissed by the court, the landlord could not file subsequent suit on the ground of bona fide necessity in the changed circumstances. In the instant case earlier suit was filed by M/s. Phool Chand Virendra Kumar on the ground of bona fide necessity as one of the grounds for eviction whereas the subsequent suit was filed by the successor in title M/s. O.R. Properties on the ground of bona fide necessity as one of the grounds for eviction. The bona fide requirements of both the landlords being different, the subsequent purchaser M/s. O.R. Properties was not precluded from filing the suit in question, let apart the earlier suit was not decided on merits.

9. The argument made by the learned counsel Mr. Agrawal that in earlier suit

also the ground of sub-letting was invoked against the tenant Smt. D. Lawrie and therefore the same ground of subletting could not have been invoked in the instant suit, is also misplaced. In this regard, the learned counsel Mr. Agrawal has sought to rely upon the provisions contained in Section 11 of the CPC. However, the said submission has no legs to stand for the simple reason that for the purpose of applying the principles of res-judicata, it is very much necessary that the matter in issue in the earlier suit must be directly and substantially in issue in the subsequent suit between the same parties or litigating under the same title, and that the such issue must have been heard and finally decided by the court competent to try such suits. There cannot be any disagreement with the proposition of law laid down by the Apex Court in case of Bhagmal v. Munshi (supra) relied upon by Mr. Agrawal, to the effect that when the suit abates, the same may not amount to adjudication by a decree on merits but it would attend finality. However, so far as the application of principles of res-judicata is concerned, it is very much essential that the former suit must have been heard and finally decided on merits and if the former suit was dismissed on technical grounds without any adjudication on merits on the matter in issue, such dismissal would not operate as res-judicata so as to bar of subsequent suit. In this regard the decision of the Apex Court in case of State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, , clinches the issue. It has been held therein as under:-

The important words are "has been heard and finally decided". The bar applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res-judicata.

10. It is not disputed that the earlier suit filed by M/s. Phool Chand Virendra Kumar against Smt. D. Lawrie and Smt. Sheela Khanna was dismissed by the court as abated, the legal representatives of Smt. D. Lawrie having not been permitted to be brought on record. Therefore, the said court had not heard and finally decided the matter directly and substantially in issue involved in the said suit and the said suit was dismissed purely on technical grounds. The issue whether the said Smt. D. Lawrie had illegally sub-let or parted with the possession of the suit premises to the sub-tenant Smt. Sheela Khanna or not was not heard and finally decided by the court in the said suit and, therefore, it was very much open for the plaintiff in the subsequent suit to re-agitate the said issue of sub-letting in the subsequent suit i.e. the suit in question. In that view of the matter the submissions made by the learned counsel Mr. Agrawal that the suit filed by the respondent No. 1 M/s. O.R. Properties was barred under Order XXII Rule 9 of CPC and also on the principles of res-judicata contained in Section 11 of the CPC cannot be countenanced.

11. In his further submissions, Mr. Agrawal had argued that the appellant No. 1 Mr. Neon Lawrie though was one of the three sons of Smt. D. Lawrie, initially he was not joined as the party-defendant in the suit by the plaintiff and it was the appellant No. 1 himself who had submitted an application under Order I Rule 10 of CPC for being impleaded him as the party-defendant in the suit. The submission was also made to the effect that the said application filed by the appellant No. 1 was not resisted by the respondent No. 1-plaintiff and that after joining him as party-defendant No. 4, the plaintiff had not made any substantive amendment in the plaint. According to Mr. Agrawal by not contesting the application filed by the appellant No. 1 under Order I Rule 10 CPC, the respondent No. 1-plaintiff had accepted the averments made in the said application, and the court having allowed the said application permitting the appellant No. 1 to be joined as party-defendant No. 4 in the suit, the issue that the tenancy rights had devolved upon the defendant No. 4 after the death of his mother, was also impliedly decided by the court, and it was not open for the court to decide the said issue qua the defendant No. 4 in the suit, as the principles of res-judicata applied to the subsequent stage of same proceedings also. Mr. Agrawal has relied upon the decision of the Apex Court in case of U.P. State Road Transport Corporation Vs. State of U.P. and Another, , in which it has been observed as under:-

The principle of res-judicata is based on the need of giving a finality of judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of the CPC in this respect. Res judicata applied also as between two stages in the same litigation to this extent that a court, whether the trial court or a high court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

12. There is also no substance in the said submissions made by the learned counsel Mr. Agrawal. Though the principles of res-judicata would apply as between the two stages in the same litigation, it may be noted that the issue must have been heard and decided by the court at the earlier stage so as to preclude the party from re-agitating the same at the subsequent stage in the same proceedings. When the application filed by Mr. Neon Lawrie for being impleaded him as party-defendant under Order I Rule 10 of CPC was decided by the trial court, the only issue in the said application was whether the said applicant was a necessary or proper party in the suit or not as contemplated under Order I Rule 10 of CPC. The issue whether the tenancy rights had devolved upon him for being considered him as tenant u/s 3(vii)(b) of the said Act or not was neither heard nor decided by the trial court at the relevant stage of deciding the said application. It is also pertinent to note that a specific issue i.e. the issue No. 1 was also framed by the court from the pleadings of the parties, as to whether the tenancy rights had devolved upon the defendant No. 1, 2 and 4 after the death of Smt. D. Lawrie, however no such objection against framing of such an issue was raised by the appellant No. 1, as is now being sought to be raised in

the present appeal. Not only that, both the parties had led the evidence keeping in view the said issue framed by the court. The court also does not find any substance in the submission made by the learned counsel Mr. Agrawal that the plaintiff had not carried out substantive amendment in the plaint after impleading Mr. Neon Lawrie as the party-defendant No. 4. The plaintiff at the time of instituting the suit had already made allegations in the plaint that the tenancy rights in respect of the suit premises had not devolved upon the sons of the original tenant Smt. D. Lawrie after her death, and the prayers seeking recovery of possession of the suit premises against the defendants were also made. After impleading Mr. Neon Lawrie as the party-defendant No. 4, the plaintiff had amended the cause-title of the suit and incorporated para 11(ka) in the plaint. As rightly submitted by the learned counsel Mr. Mehta for the respondent No. 1, when the parties went to the trial with full knowledge of ambit of the case of each other, in such circumstances the pleadings were required to be construed liberally. In this regard a very pertinent observations made by the Apex Court in case of Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, are required to be reproduced as under:-

... Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

13. The learned counsel Mr. Agrawal further developing his arguments on the issue of devolvement of tenancy rights upon the defendant Nos. 1, 2 and 4 and on the issue of maintainability of the suit had submitted that when the plaintiff had denied the relationship of the parties as that of landlord and tenant, the suit was not maintainable under the provisions of the Rent Act and that the plaintiff was required to file a regular suit for recovery of possession of the suit premises by making payment of court fees based on the market value of the property. Mr. Agrawal has placed heavy reliance on the decision of the Supreme Court in case of Laxmidas Morarji (Dead) by LRs. Vs. Miss Behrose Darab Madan, to buttress his submission. However, the said decision has no application to the facts of the present case. The Apex Court, while considering the issue of jurisdiction u/s 28 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, had observed inter alia that by Section 28 of the said Act, the legislature has designated certain courts to entertain and try any suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of the premises to which the said Act applies. In the light of the said provision it was held that

that suit before such designated court would be maintainable, if a landlord-tenant relationship is established. Now, so far as the Rajasthan Rent Control Act, 1950 applicable to be instant case is concerned, there is no provision contained therein like Section 28 of the Bombay Rent Act, designating special courts/Tribunals for deciding the disputes between the landlord and tenant. The suits therefore seeking recovery of possession of the disputed premises, whether invoking the provisions of Rajasthan Rent Control Act, 1950 or not, or whether landlord-tenant relationship had existed or not, were being filed and entertained by the civil courts only. In absence of any special courts having been established under the said Act of 1950, the question of civil court not having jurisdiction would also not arise. Mr. Agrawal had also failed to point out any provision from the said Act of 1950, ousting the jurisdiction of the civil court from entertaining the suit for recovery of possession filed invoking the provisions of the said Act. It is also pertinent to note that it was not a matter of dispute that the demised premises was let out to Smt. D. Lawrie, the mother of the defendant Nos. 1, 2 and 4, and therefore the issue whether the tenancy rights had devolved upon them or not after her death, was an issue to be decided by the trial court u/s 3(vii)(b) of the said Act. It was also alleged in the suit by the respondent No. 1-plaintiff that during the life time of Smt. D. Lawrie, the possession of the suit premises was parted with the defendant No. 3 Smt. Sheela Khanna for running the school, and that the suit premises was sublet to her. The respondent No. 1-plaintiff therefore had rightly invoked the provisions of the said Act for the recovery of the possession of the suit premises and the suit was maintainable before the trial court.

14. This takes the court to the next question as to whether the tenancy rights had devolved upon the sons of Smt. D. Lawrie after her death and whether they had become the tenants within the meaning of Section 3(vii)(b) of the said Act. The relevant part of Section 3(vii)(b) of the Rajasthan Rent Control Act, 1950 reads as under:-

3(vii) "tenant" means--

(a)....

(b) in the event of death of the person as is referred to in sub-clause(a), his surviving spouse, son, daughter and other heir in accordance with the personal law applicable to him who had been, in the case of premises leased out for residential purposes, ordinarily residing and in the case of premises leased out for commercial or business purposes, ordinarily carrying on business with him in such premises as member of his family up to his death.

15. In this regard, before discussing the evidence led by the parties on this issue, it would be beneficial to refer to the decision of the Apex Court in case of Tara Chand and Another Vs. Ram Prasad, , in which, the Apex Court while dealing with the amendments made in the definition clause of "tenant" in Section 3(vii)(b) of the Rajasthan Rent Control Act, has made very precise observations which

are reproduced as under:-

A reading of the amendment to the definition of "tenant in Section 3 sub-clause (vii)(b) makes the legislative intent manifest that from the date the Amendment Act came into force, on the death of the tenant, his surviving spouse, son, daughter and other heir, in accordance with personal law as applicable to him, who had been, in the case of the premises leased out of residential purposes, ordinarily residing and, in the case of premises leased out for commercial or business purposes, ordinarily had been carrying on business with him/her in such premises as members of his/her family up to his/her death would be the tenant. Therefore, under the amended definition of tenant, if one seeks to make avail of the benefit of statutory tenancy under the Act, he must establish to the satisfaction of the court that the surviving spouse, son or daughter and other heir, in case of residential premises, he/she/they-ordinarily had been residing in the premises alongwith the tenant and continued to do so till date of death of the tenant. Similarly, in respect of premises leased out for commercial or business purposes it must be established that the surviving spouse or son or daughter and the heir as the case may be ordinarily had been carrying on the business during the lifetime of the tenant as members of the family in the demised premises and continued to do the business till date of the death of the tenant. In other words to avail of the statutory right u/s 3(vii)(b) there must continue to subsist the unity of action and continuity of membership of the family between the deceased tenant and the spouse etc. The break in either of the links snaps off the right denuding the continuity of the statutory tenancy.

16. The above referred ratio laid down by the Apex Court, has also been followed by this court in number of cases. In the light of said legal position let us examine the evidence adduced by the parties before the trial court. So far as oral evidence is concerned, the plaintiff O.R. Properties had examined as many as four witnesses to prove its case and the defendants had examined only the defendant No. 3 Smt. Sheela Khanna. Out of the four witnesses examined by the plaintiff, three were the Directors of the plaintiff-company and one was Shri Virendra Kumar S/o Phool Chand, who had sold the suit premises to the plaintiff by executing the registered sale-deed on 24.6.1994 (Ex. 3). All the witnesses have deposed in support of the case of the plaintiff to the effect that none of the sons of Smt. D. Lawrie was managing the affairs of the school in the suit premises and that they all had settled themselves in America. They had also deposed that the suit premises was in possession of Smt. Sheela Khanna, who was illegally sublet the same by Smt. D. Lawrie. As against this evidence, it is very pertinent to note that none of the sons of deceased Smt. D. Lawrie i.e. the defendant Nos. 1, 2 and 4 had stepped into the witness box to prove that any of them or all of them were carrying on the business i.e. were running school in the suit premises during the life time of Smt. D. Lawrie till her death and even after her death. It is also pertinent to note that the defendant No. 1 and 2 had not even contested the suit. The defendant No. 4 had filed the application under Order 1 Rule 10 of CPC through his power of attorney holder, the defendant No.

3 Smt. Sheela Khanna and subsequently she only had filed the joint written statement for herself and the defendant No. 4. Even the present appeal has been filed with the signature of appellant No. 2 Smt. Sheela Khanna only for both the appellants. The power of attorney on the basis of which the said application under Order 1 Rule 10 CPC was filed by Mr. Neon Lowrie i.e. the defendant No. 4 in the trial court and the present appeal before this court was dated 5.10.96. The copy of the said power of attorney was exhibited as Ex. A/14 before the trial court and has also been produced in the present appeal alongwith the Vakalatnama filed on behalf of the appellants, which Vakalatnama has been signed by the appellant No. 3 Smt. Sheela Khanna for herself and as power of attorney of appellant No. 1 Neon Lawrie. In the said power of attorney dated 5.10.96, the address of appellant No. 1 Neon Lawrie has been shown as of USA and in which it has been stated inter alia that Smt. D. Lawrie had died on 7.10.94 and Mr. Neon Lawrie had inherited the school in the name and style of St. Anne's Academy for children situated in the suit premises, by virtue of the will dated 7.12.84 executed by his mother Smt. D. Lawrie. It has been further stated in the said power of attorney that he i.e. Neon Lawrie was unable to attend the affairs connected with the said school and, therefore, had nominated Smt. Sheela Khanna, the Principal of the said School, as his lawful attorney to do and execute the acts mentioned therein. By virtue of the said general power of attorney dated 5.10.96, Smt. Sheela Khanna, the appellant No. 2 herein was prosecuting the suit proceedings and also the present appeal.

17. As stated earlier, in the suit proceedings she alone was examined for the defendants. It cannot be gainsaid that the power of attorney holder cannot depose on behalf of the Principal for the acts done by the Principal, however can depose on the facts personally known to him or her in any suit proceedings. Beneficial reference of the judgment of the Apex Court in case of Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha, , be made in this regard. Hence in the instant case it is required to be construed that what the defendant No. 3 Smt. Sheela Khanna had deposed before the trial court was only with regard to the facts which were known to her in her personal capacity and not for the acts and deeds of the defendant No. 4 Mr. Neon Lawrie. The position, therefore, which emerges is that it was only Smt. Sheela Khanna, the defendant No. 3 who was examined on behalf of the defendants and that none of the sons of Smt. D. Lawrie i.e. the defendant Nos. 1, 2 and 4 had examined themselves by stepping into the witness box to prove that they had become the tenants u/s 3(vii)(b) of the Act. In the light of this factual and legal position let us examine the evidence of Smt. Sheela khanna.

18. In the examination in chief filed on affidavit, Smt. Sheela Khanna, the defendant No. 3 (appellant No. 2 herein) had stated inter alia that she was the Principal of the School run in the name and style of St. Anne's Academy since 1964 and that Smt. D. Lawrie was the owner of the said school, and that after the death of Smt. D. Lawrie her son Mr. Neon Lawrie was running the school. She has further stated that the suit premises in which the said school was being run,

was not sub-let to her and that Mr. Neon Lawrie was legally in possession of the said premises. She had also stated that Mr. Neon Lawrie had executed one power of attorney in her favour which was on record at Ex. A/14. In the cross-examination, she had admitted that the lease-deed was executed between the original owner Mr. Oberoi and Smt. D. Lawrie in respect of the suit premises and that Mr. Oberoi had subsequently sold out the said premises to M/s. Phool Chand Virendra Kumar, who in turn had sold out the same to the plaintiff M/s. O.R. Properties. She had also admitted that Smt. D. Lawrie had left India for America in the year 1992 and thereafter had once come to India in 1994, however thereafter had never come back to India. She had further stated that Mr. Neon Lawrie had executed the power of attorney in her favour, which was on record and that no other power of attorney was executed by him. She further admitted that Mr. Neon Lawrie was an American citizen; and that during the life time of Smt. D. Lawrie none of her sons had managed the affairs of the school; and that none of them had come to the suit premises since last many years. She had further stated that earlier Smt. D. Lawrie was filing the income tax returns for the school and subsequently on the basis of the power of attorney she (i.e. Smt. Khanna) was filing the income tax returns for the school.

19. From the afore-discussed evidence of Smt. Sheela Khanna it clearly emerges that Smt. D. Lawrie had already left India for settling down at USA, about two years prior to her death, and that during her life time none of her sons had ever managed the affairs of the school run in the suit premises. It also clearly emerges that all the three sons had also permanently settled down in America and had never managed or looked after the affairs of the said school run in the suit premises. The appellant No. 1 Mr. Neon Lawrie, claiming to have inherited the rights in the suit premises on the basis of some Will executed by his mother Smt. D. Lawrie in his favour, had also executed the power of attorney (Ex. A/14) in favour of the appellant No. 2 Smt. Sheela Khanna for looking after the affairs of the school in the suit premises, as he had settled down in USA and was not in a position to come to India. Thus, apart from the oral evidence of the witnesses examined by the plaintiff, from the evidence of the defendant No. 3 Smt. Sheela Khanna herself, it was clearly established that the sons of Smt. D. Lawrie had never managed the affairs of the school in the demised premises either during the life time of Smt. D. Lawrie or after her death. On the contrary, it was established that since the year 1992 when Smt. D. Lawrie left India for USA, it was the defendant No. 3 Smt. Sheela Khanna who was running the school and was in possession of the suit premises. Therefore, the defendants and more particularly the defendant No. 4 Mr. Neon Lawrie had miserably failed to prove that he had become the "tenant" within the meaning of Section 3(vii)(b) of the said Act, after the death of Smt. D. Lawrie.

20. It was sought to be submitted by Mr. R.K. Agrawal for the appellants that during the pendency of the suit, the plaintiff had filed one separate suit against the sons of Smt. D. Lawrie for the fixation of standard rent u/s 6 of the said Act, impliedly accepting them as the tenants for the suit premises. In this regard, the

learned counsel Mr. Mehta for the respondent No. 1 had drawn the attention of the court to the plaint of the said suit and submitted that though such a suit for fixation of standard rent was filed by the plaintiff against the sons of Smt. D. Lawrie, it was specifically stated in the said suit that Smt. D. Lawrie was the tenant of the suit premises but she had expired in the year 1994 and that her all the three sons i.e. the defendant in the said suit, were permanently residing at USA. In the entire body of the plaint of the said suit, there was not a single averment made by the plaintiff accepting the said sons of Smt. D. Lawrie as the tenants in respect of the suit premises. On the contrary, the prayer was made therein to fix the standard rent of the suit premises considering the market value thereof.

21. At this juncture, the language of Section 6(1) of the said Act is very much necessary to be looked into. As per Section 6(1) of the said Act, where no rent has been agreed upon or where for any reason the rent agreed upon is claimed to be low or excessive, the landlord or the tenant may institute a suit in the lowest court of competent jurisdiction for fixation of standard rent for any premises. The definition of "landlord" has been contained in Section 3(iii) and the definition of "tenant" is contained in Section 3(vii) of the said Act. The "standard rent" has been defined in Section 3(vi), according to which "standard rent" used in relation to any premises means the rent therefor determined in accordance with the provisions of the said Act. From the close reading of the said definition clauses in the light of Section 6(1), it clearly transpires that the landlord or the tenant could institute the suit for fixation of standard rent for the premises in question, meaning thereby the suit u/s 6 could be filed for fixation of standard rent for the premises in question, if no rent was agreed upon or where the rent agreed upon was low or excessive. By mere filing of suit by the landlord u/s 6 could not be said by any stretch of imagination that the plaintiff-landlord had accepted the defendants as the tenants of the suit premises. Mr. Mehta has rightly relied upon the decision of the Apex Court in case of *M/s. Rawal & Company v. K.G. Ramchandranan & Ors.* 1975 All India RCJ 180, in which the Apex Court while interpreting the scheme of Madras (Now Tamilnadu) Buildings Lease & Rent Control Act had observed that:-

A close reading of the Act shows that the fair rent is fixed for the building and it is payable by whoever is the tenant whether a contractual tenant or statutory tenant. What is fixed is not the fair rent payable by the tenant or to the landlord who applies for fixation of fair rent but fair rent for the building, something like an incident of the tenure regarding the building.

22. In view of the above, the court does not find any substance in the submission of the learned counsel Mr. Agrawal that the plaintiff had impliedly accepted the sons of Smt. D. Lawrie as the tenants in respect of the suit premises after her death by filing the suit u/s 6 of the said Act. In view of the specific provision contained in Section 3(vii)(b) of the said Act, the onus to prove that the defendant Nos. 1, 2 and 4 or any of them had become the tenants in

respect of the demised premises, was on the said defendants and they had miserably failed to discharge such onus. It is true that normally it is the plaintiff who has to prove his case and could not succeed on the weaknesses of the defence of the defendants, however, so far as the devolvement of the tenancy rights is concerned, as per the settled legal position it is for the defendants who are claiming the tenancy rights have to prove that they were ordinarily carrying on business with the original tenant in the demised premises as the members of his/her family between his/her death.

23. In the instant case, it was not only proved that the tenancy rights in respect of the suit premises had not devolved upon the defendant Nos. 1, 2 and 4 after the death of Smt. D. Lawrie within the meaning of Section 3(vii)(b) of the said Act, but it was also proved that Smt. D. Lawrie had sublet and had parted with the possession of the suit premises to Smt. Sheela Khanna without the permission of the landlord, rendering herself liable to be evicted from the suit premises u/s 13(e) of the said Act. Smt. Sheela Khanna in her evidence had specifically admitted that Smt. D. Lawrie had settled down in America about 2 years prior to her death, and that her sons had also settled down in America and had never visited the suit premises since last many years. She had also admitted that she herself was running the school and was looking after the affairs of the school including filing of income tax returns etc. on behalf of the school. It was clearly established from the said evidence of Smt. Sheela Khanna that she was in exclusive possession of the suit premises prior to the death of Smt. D. Lawrie and was running the school in the suit premises under the guise of power of attorney executed by Smt. D. Lawrie during her life time and after her death, under the guise of the power of attorney executed by Mr. Neon Lawrie. It is true that in order to prove sub tenancy two ingredients have to be established, firstly the subtenant must have exclusive right of possession and secondly that right must be in lieu of the payment of some consideration. However, it has been held by the Apex Court in catena of decisions that exclusive possession of the subtenant of the demised premises was sufficient ground for eviction as sometimes it is difficult to prove by direct evidence the second ingredient of consideration. A beneficial reference of the observations made by the Apex Court in case of *Rajbir Kaur and Another Vs. S. Chokesiri and Co.*, may be made, in which it has been observed as under:-

If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the

party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that, appellants having been forced by the Courts below to have established exclusive possession of the ice-cream vendor of a part of the demised-premises and the explanation of the transaction offered by the respondent having been found by the Courts below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary consideration.

24, It is also pertinent to note that u/s 13(e) of the Rajasthan Rent Control Act, the landlord could evict the tenant, if he had sublet or parted with the possession of the suit premises without the permission of the landlord. Thus, even if the subtenancy in stricto sensu is not established by the landlord, the tenant-subtenant could be evicted from the suit premises if it was established that the possession of the suit premises was parted with by the tenant without the permission of the landlord. The said fact has been duly established by the plaintiff-landlord in the instant case that Smt. D. Lawrie had parted with the possession of the suit premises to Smt. Sheela Khanna for running the school therein and that Smt. Khanna was in possession of the suit premises during the life time of Smt. D. Lawrie and also after her death, without the permission of the plaintiff.

25. It is true that the trial court had framed the Issue No. 5 as regards the sub-letting or parting with the possession of the suit premises in favour of the defendant No. 3, and that the trial court had decided the said issue against the plaintiff, for which no cross-objections have been filed by the respondent No. 1-plaintiff in the present appeal. However, Mr. Mehta, learned counsel for the said respondent has rightly relied upon the provisions contained in Order 41 Rule 22 read with Rule 33 of CPC and also rightly pressed into service the decisions of the Apex Court in case of S. Nazeer Ahmed Vs. State Bank of Mysore and Others, , and in case of Shri Ravinder Kumar Sharma Vs. The State of Assam and Others, , to contend that the respondent in an appeal is entitled to support the decree of the trial court without challenging a particular finding rendered by the trial court against him, without filing memorandum of cross-objections. In view of the settled legal position, this court has no hesitation in holding that though the Issue No. 5 was decided by the trial court against the respondent No. 1-plaintiff, the said finding could be assailed by the respondent No. 1 in the appeal filed by the appellants, without filing the cross-objections challenging the said finding recorded against the respondent No. 1.

26. In that view of the matter, and in view of the afore-discussed reasonings and

findings, this court does not find any substance in the present appeal. The appeal being devoid of merits deserves to be dismissed and the decree of eviction passed by the trial court deserves to be confirmed. The appeal stands dismissed accordingly.

FURTHER ORDER

27. After the pronouncement of the judgment, it has been submitted by the learned Sr. Counsel Mr. R.K. Agrawal for the appellants that the appellants are ready and willing to handover vacant and peaceful possession of the suit premises to the respondent No. 1, however some reasonable time be granted to the appellants, as the appellants are running the school in the suit premises, where about 400 children are studying. According to him, lot of hardship would be caused to them if appellants are directed to handover the possession in the midst of academic session and therefore time upto 30.4.2013 be granted to the appellants to vacate the suit premises. He also submitted that the appellants shall pay the mesne profits as may be directed by the court.

28. Such a submission made by Mr. Agrawal, has been opposed by the learned Sr. counsel Mr. Mehta. According to Mr. Mehta the time sought to vacate the suit premises is too long and in case the court is inclined to grant the time, the respondent No. 1 be compensated by directing the appellants to pay the mesne profits looking to the location and area of the suit premises.

29. Having regard to the submissions made by the learned counsels for the parties, and considering the fact that the school is being run in the suit premises, it appears that the hardship which would be caused to the appellants and the students could be mitigated if some reasonable time to vacate the suit premises is granted to the appellants. In the facts and circumstances of the case, it is directed that both the appellants shall file an undertaking on oath within a week from today before the trial court to the effect that they shall handover the vacant and peaceful possession of the suit premises to respondent No. 1 by 30.4.2013 and shall not create any third party interest in the suit premises till then. The appellants are further directed to pay the mesne profits @ Rs. 25,000/- per month from the date of this order till handing over of the possession of the suit premises. Under the circumstances, the respondent No. 1 is restrained from executing the decree in question till 30.4.2013. It is clarified that the appellants shall not be granted any further time for vacating the suit premises thereafter, and if the undertaking as directed is not furnished by the appellants, then the stay shall stand vacated forthwith without any further order from the court.