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**(2014) 12 AHC CK 0228**  
**In the Allahabad High Court**  
**Case No : Rent Control No. 47 of 2011**

Prem Trading Company

APPELLANT

Vs

Court of Additional District Judge

RESPONDENT

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**Date of Decision :** 04-12-2014

**Acts Referred:**

Transfer of Property Act, 1882 — Section 106

**Citation :** (2014) 12 AHC CK 0228

**Hon'ble Judges :** Mahendra Dayal, J

**Bench :** Single Bench

**Advocate :** Pritish Kumar and Santosh Kr. Tripathi, Advocate for the Appellant;  
M.A. Khan, Manish Kumar and Aslam Khan, Advocate for the Respondent

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## Judgement

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Mahendra Dayal, J.—The petitioner by means of the instant writ petition has prayed for quashing of the judgment and order dated 31.01.2011, passed by the Additional District Judge, Court No. 9, Faizabad in Civil Revision No. 241 of 1999, whereby the revision has been allowed and the cross objection filed by the dependents was rejected. The learned revisional court while setting aside the judgment and order dated 03.07.1999 passed by the Judge Small Causes, Faizabad, decreed the suit ex parte and directed the petitioner and opposite parties No. 3 to 12 to vacate the disputed shop within two months.

2. The brief facts are that the opposite party No. 2 (now deceased) filed a suit for ejectment against the petitioner and the opposite parties No. 3 to 12 on the ground that they have sublet the disputed shop to the petitioner and opposite party No. 8 without the consent and permission of the opposite party No. 2. It was asserted in the plaint that the original tenant of the shop in question was Roornmall who at the time of taking the shop on rent executed an agreement on 13.03.1946. After the death of Roornmall, his sons, namely, Hira Lal and Vidyadhar continued with the business and the rate of rent was Rs. 100/- per month. The opposite party No. 2 who was land lady of the shop in question was

residing at Jaipur since 1961. When she visited Faizabad, she found that Hira Lal and Vidyadhar have divided the shop into two portions and have thus disfigured the same. She also found that one portion was sublet to the petitioner while the other portion was sublet to the opposite party No. 8. The sons of Roornmall, namely, Hira Lal and Vidyadhar had no connection with the sub tenant. The opposite party No. 2 then issued a notice to the sons of Roornmall on 14.10.1980 which was served upon them on 15.10.1980.

3. The petitioner and the respondents No. 3 to 12 contested the suit and admitted the opposite party No. 2 as the owner and the land lady of the shop in question. They also admitted having taken the disputed shop on rent by Roornmall. However, they admitted the partition of the business on the death of Roornmall and stated that the shop was partitioned by the sons of Roornmall and as per the mutual agreement, Hira Lal was the tenant. It was further stated that Hira Lal continued with the business of his late father for some time, but since his son had settled outside Faizabad and he was also not physically fit to run the business he in the year 1974, entered into partnership with Mussadi Lal and started business in the name of Prem Trading Company. He further stated that the permission to constitute the firm and start a new business was orally taken from the brother of the opposite party No. 2 who used to realize the rent. He was having full knowledge that the business was being run in the name Prem Trading Company, but he did not object to it at any point of time. When the opposite party No. 2 visited Faizabad, the rent was enhanced from Rs. 75/- to Rs. 100/- per month and thus there was implied permission to run the business. On these grounds, it was submitted that suit was liable to be dismissed.

4. Learned Judge Small Causes framed four issues and while deciding issue No. 1, the trial court found that Hira Lal and Vidyadhar sons of Roornmall had sublet the shop in question, but found that the notice sent to them was not a valid notice and on this ground the suit was dismissed. It also needs mention here that during the pendency of suit Hira Lal died and his widow and sons were substituted. The partner of the petitioner, namely, Mussadi Lal Agarwal also died and in his place the opposite parties No. 6 and 7 were substituted.

5. Feeling aggrieved by the dismissal of the suit, the opposite party No. 2 filed Civil Revision No. 241 of 1999 in the Court of District Judge, Faizabad which was heard and decided by the Court of Additional District Judge, Court No. 9, Faizabad by the judgment and order dated 31.01.2011, whereby the learned revisional court while dismissing the cross objection allowed the revision and the suit for ejectment was decreed with cost.

6. I have heard Sri Prithish Kumar learned counsel for the petitioner and Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Mohd. Aslam Khan on behalf of the contesting opposite parties.

7. During the pendency of the writ petition, the opposite party No. 2 also and her heirs were substituted.

8. The learned counsel for the opposite party No. 1 has submitted that although both the courts below have recorded a concurrent finding with regard to subletting of the shop, but from the material on record it was not proved that the shop in question was ever sublet. According to him, subletting can be proved only by showing that the chief tenant has delivered the possession of the tenanted premises to the sub tenant for consideration and is also accepting rent from him. Unless it is proved that the possession has been transferred for some consideration, subletting can not be found to have been proved.

9. In support of his argument, he has relied upon several pronouncements of this Hon"ble Court as well as Hon"ble Supreme Court.

10. One of such cases relied upon by him is reported in 1990 (16) ALR, 186, in which a Coordinate Bench of this Hon"ble Court has held that onus to prove subletting is on the landlord, unless it is shown that possession has been transferred to the sub tenant for valuable consideration, the allegation of subletting can not be found to have been proved. It has further been held that as long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, subletting flowing from the possess of a person other than a tenant in the shop can not be assumed.

11. Another case law relied upon by him is reported 2009 (27) LCD 1740 in which the Hon"ble Supreme Court has held that in the case of subletting, the onus is on the landlord and the same would stand discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises and was holding a right to enjoy the same. Mere fact that another person is allowed to use the premises while the original tenant retains the legal possession, is not enough to create sub tenancy. The Hon"ble Supreme Court has further clarified that in order to prove subletting as a ground for eviction, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

12. Similar view has been expressed by this Hon"ble Court in the case reported in 1997 (31) ALR 123.

13. It has further been submitted on behalf of the petitioner that even if it is presumed that the sons of Roornmall allowed some other person to occupy the tenanted shop, the same was done prior to the inclusion of the provision of Section 14 of the Rent Control Act which provides that if a person is an occupation of the premises either as unauthorized occupant or sub tenant with the consent of the landlord on the relevant date, he is entitled to get the benefit of Section 14 of the Act and his tenancy would stand regularized. Learned counsel submits that admittedly the alleged sub tenancy was created before 1976 and as such the petitioner is entitled to get the benefit of Section 14 of the Act and his tenancy stood regularized.

14. Another submission on behalf of the petitioner is that the opposite party No. 2 (now deceased) filed a suit for ejectment in her personal capacity, but she never came to the Court and did not enter into the witness box. Thus, the allegation made in the plaints were not proved for want of evidence of the opposite party No. 2. According to him, any other person except the plaintiff himself is not competent witness to prove the averments made in the plaint. The law is that if a plaintiff is not examined to prove the contents of the plaint, it would be presumed that the material evidence has been withheld and in such cases the court can draw adverse inference against such person. In this case also, opposite party No. 2 was very much alive when the suit was being heard, but she was not examined as a witness. Learned counsel has also justified the finding of the learned trial court with regard to the notice and has submitted that the learned trial court has rightly held that the notice was invalid for want of any proof as to whether the tenancy was yearly or a monthly tenancy.

15. The learned revisional court has rejected the cross objection filed against the finding recorded with respect to sub tenancy and reversed the finding recorded by the trial court with regard to notice and found that the notice was a valid notice. The revisional court was not competent to reverse the finding of fact recorded by the trial court. The law is that if the revisional court had found that the findings of fact recorded by the trial court was not correct, the revisional court ought to have remanded the matter back to the trial court instead of recording a fresh finding of fact.

16. Mohd. Arif Khan, learned Senior Advocate appearing on behalf of the contesting respondents has submitted that the fact of sub tenancy has been admitted by the petitioner in the written statement as well as in the oral evidence, therefore, there was no need to adduce any evidence with regard to sub tenancy. It has been admitted by the original defendants No. 1 and 2 in the written statement that after the death of their father, the defendant No. 1 Hira Lal started carrying on business but when he found himself unable to continue with the business, he entered into a partnership agreement with a distant relative and constituted a new firm in the name of Prem Trading Company. The only assertion was that the same was done with the oral permission of the deceased opposite party No. 2. The learned Senior Advocate has submitted that it has been held by the trial court that when the disputed shop was let out to Roornmall the original tenant, a tenancy agreement was also reduced into writing in which one of the conditions was that the shop in question would not be sublet to any one without the written permission of the landlord. There is admittedly no written permission of the landlord and the alleged oral permission is not at all proved. In these circumstances, the case law relied upon by the petitioner does not help him.

17. With regard to the notice, the submission of the learned Senior Advocate is that it was nobody's case that the tenancy was an yearly tenancy. The learned trial court without any pleading found the notice invalid on the ground that the

opposite party No. 2 did not prove that the tenancy was a monthly tenancy. The submission of the learned Senior Advocate is that the agreement of the tenancy executed by Late Roornmall clearly shows that the tenancy was a monthly tenancy and the rent receipts on record also show that monthly rent was paid by the tenant. The petitioner never disputed that the tenancy was not a monthly tenancy. The finding of the trial court in this regard was beyond pleadings and since it was a legal point, the revisional court was well within its jurisdiction to reverse the finding recorded with regard to notice and correctly found that the notice was a valid notice and its receipt by the tenant was not disputed.

18. In reply to the arguments that the opposite party No. 2 was not examined, the submission on behalf of the petitioner is that any person who is well conversant with the facts of the case is a competent witness and can give evidence. The petitioner never objected that the opposite party No. 2 was not produced before the trial court and also did not take it as a ground before the revisional court. Even in this writ petition, no such ground has been taken that the opposite party No. 2 was not examined.

19. In the aforesaid background, I have gone through the pleadings of the parties and the evidence on record and find that the finding of both the courts below with regard to the subletting of the premises in question is a concurrent finding of fact based on appraisal of evidence and there is no perversity in the finding. I am, therefore, not inclined to interfere with the finding of fact recorded by both the courts below. So far as, the validity of the notice is concerned, the learned trial court only on assumption found the notice invalid simply for the reason that it was not disclosed in the notice that the tenancy was a monthly tenancy. It is established from the pleading as well as from the record that it is admitted between both the parties that the tenancy was a monthly tenancy and as such 30 days notice under Section 106 of the Transfer of Property Act was a valid notice and the tenancy stood validly terminated. In the aforesaid circumstances, the writ petition is devoid of merit and is liable to be dismissed.

20. The writ petition is dismissed. However, in the circumstances of the case, the petitioner is given three months time to vacate the shop in question and handover its vacate possession to the landlord opposite-parties, failing which, they shall have liberty to execute the decree according to law.