
(1999) 05 BOM CK 0022

In the Bombay High Court

Case No : Civil Revision Application No. 644 of 1990

Shri Nandlal Govindram Gunwani

APPELLANT

Vs

Ashok Balram Bedekar

RESPONDENT

Date of Decision : 07-05-1999

Acts Referred:

Constitution of India, 1950 — Article 136

Citation : (1999) 4 ALLMR 333 : (2000) 2 BomCR 772 : (2000) 1 MhLj 23

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : B.B. Lakhkar, for the Appellant; V.P. Muley, for the Respondent

Judgement

S.B. Mhase, J.—The petitioner has approached to this Court by filing this Civil Revision Application in view of the provisions of section 26 of the Hyderabad Houses (Rent, Eviction and Lease) Control Act of 1954 (hereinafter referred to as the said Act, for short) challenging the judgment delivered by the Rent Controller, Aurangabad in Case No. 81/RC/CR/15 decided on 20-6-1989 which is confirmed in Rent Appeal No. 18 of 1989 decided by the District Judge, Aurangabad, by the judgment dated 4-6-1990, as a result of which the petitioner has been directed to deliver the possession of ground floor of the house C.T.S. No. 4560 equal to Municipal No. 2-10-26 (old) new Municipal No. 4-11-18, situated in Mohalla Kumbharwada in Aurangabad city. The respondent had filed an application u/s 15 of the said Act on various grounds. However, the Rent Controller directed the petitioner to deliver the possession of the suit premises as the petitioner was found a defaulter, as provided u/s 15(2)(i) of the said Act. The District Judge, who decided the Rent Appeal No. 18 of 1989 on 4-6-1990 has also found the petitioner as a defaulter and confirmed the finding and order of the Rent Controller. Therefore, the order passed against the petitioner is only on account of default being committed by him in payment of rent, Rest of the grounds even though raised in initial proceeding for getting possession, have been rejected by both the authorities below and as the same have not been

challenged by the respondent by appropriate proceeding they are not open for consideration before this Court. Therefore, the only question which this Court is required to consider is whether the findings recorded by the courts below holding that the petitioner is defaulter in view of the provisions of section 15(2)(i) of the said Act are justified or not?

2. The petitioner is a tenant inducted in the premises on monthly rent of Rs. 325/- per month in the year 1971. Even though the agreement of tenancy was entered in between the brother of the present respondent namely Dilip Bedekar and the petitioner, however, the rent was being collected by any member of the family and the petitioner used to pay the rent to any member of the joint family of said Dilip Bedekar. By an agreement dated 9-7-1973 executed in between the members of the family of Dilip Bedekar, namely his mother Yamunabai and three brothers namely, (i) Dilip (ii) Kishore and (iii) Ashok, it was agreed that the rent is to be collected or paid to Yamunabai and accordingly the petitioner was directed to pay the rent. It also appears, as a result of letter dated 11-7-1973 that the father of the respondent was directed to receive the rent and accordingly the same was conveyed to the petitioner. It appears that in the year 1977, the property was entered in the name of the respondent and his brother Kishore as per the letter given by their brother Dilip and thereafter it is the case of the present respondent that since 1-2-1977 onwards, the rent has not been paid by the tenant petitioner. Therefore, proceeding was instituted before the Rent Controller in the year 1981. It is to be noted that prior to this institution of the proceeding for eviction, Regular Civil Suit Nos. 521 of 1977, 804 of 1978, 149 of 1979, 288 of 1979, 468 of 1979 and 700 of 1980 were filed for recovery of the rent amount by the respondent and the day on which the Rent Controller decided the matter i.e. on 20-6-1989, Regular Civil Suit No. 700 of 1980 was pending. In all these suits, the decree for rent was passed as claimed in the said suits. Apart from the aforesaid six suits, of which the numbers have been quoted above, it is an admitted position that in all 10 suits were instituted for recovery of the rent. It is also an admitted position that after the decrees were passed in those suits, the amount was tendered by the present petitioner. The notice reply dated 12-1-1984 issued by the respondent shows that the respondent accepted the amount of Rs. 13, 286/- tendered by Cheque No. 004811 dated 28th December, 1983 under protest and appropriated that amount as against the rent for the period 1-12-1981 to 31-12-1983, decree passed in R.C.S. No. 728 of 1981 dated 14-9-1983, the suit claim in R.C.S. No. 700 of 1980 and R.C.S. No. 182 of 1982 and so also the cost of the M.R.J.I 100 of 1980. This is being pointed out for the purpose that even though the petitioner claimed that he has paid the amount later on while pending the dispute before the District Court and/or this Court, they were all subsequent payments. But this Court is required to look into whether the petitioner is a defaulter as per the provisions of section 15(2)(i) of the said Act, on the date of the application before the Rent Controller. These facts will point out, therefore, that the rent from 2-2-1977 onwards till the date of filing of the application before the Rent Controller was not paid by the

petitioner and that various civil proceedings as stated above were decided and pending for recovery of the said amount of rent.

3. The defence of the petitioner is that;

(i) there is no relationship of the landlord and tenant with the respondent. Ashok;

(ii) Dilip Bedekar is the landlord as the agreement of tenancy executed on 7-3-1981 was with Dilip Bedekar;

(iii) rent which was paid to Yamunabai was as per the instructions of Dilip Bedekar;

(iv) respondent Ashok is owner of the premises was not known to him because the fact of partition was not reported to him;

(v) the another owner of the suit house namely Kishore was minor and his guardian has not instructed to pay rent to the respondent, and therefore, the petitioner was in confusion and has not paid the rent;

(vi) the amount of Rs. 13,286/- has been paid on 28-12-1983 by cheque which was accepted by the respondent, and therefore, there is no default;

(vii) benefit of proviso to section 15(1) of the said Act should have been given to the petitioner having found that the petitioner is not a wilful defaulter;

(viii) That there was practice to make payment of accumulated rent for 4 to 6 months or 9 to 11 months and he relied upon the rent receipt for the month of September, 1975 to March, 1975 for Rs. 2275/- and another receipt from April, 1976 to January 1977 for Rs. 3250/-. On the basis of these receipts, it is submitted that there was practice to pay accumulated rent, and therefore, it cannot be said that the petitioner has committed default.

4. The District Judge, has found that the statement of Dilip Bedekar and this letter issued on 10-4-1980 and 24-1-1990 cannot be accepted because at that time Dilip Bedekar was residing as a tenant in the said premises belonging to the petitioner and thereby has switched over his side and therefore, in order to defeat the claim of the respondent brother, Dilip must have give those letters, and therefore, they were rejected by the courts below. The District Judge also refused to believe the payment to Dilip Bedekar as Dilip Bedekar was aware of the fact that in the year 1977 the property was transferred in the name of the respondent and this brother as per the application given by Dilip Bedekar, and therefore, it is impossible that he would accept the rent. Apart from that, even if we assume that the rent was accepted by Dilip, it was of no consequence because thereafter the suits have been filed and in the said suits, the said defence was available to the petitioner. However, decrees have been passed in respect of the rent by the Civil Courts, and therefore, it is not now necessary to consider whether the said payment was given by the petitioner to Dilip. The findings of the Civil Court in respect of the arrears of rent in each of the suit puts an end to this point and gives finality to the findings that the rent was due and

not paid by the petitioner till passing of the decrees in those suits. Even the petitioner has admitted in rent proceeding that he has paid the rent after decrees have been passed by the Civil Court, and therefore, now it is not necessary to go into inquiry and record a finding as to whether the rent was due and was not paid by the petitioner. The only inquiry which is required to be done in the present matter is as to whether the petitioner was not a wilful defaulter. One of the grounds which have been stated is that the petitioner was not aware of the partition, and therefore he could not pay the rent to the respondent. However, the District Judge has found that in a suit bearing R.C.S. No. 521 of 1977 itself, in written statement, the petitioner himself has admitted that the respondent is owner of the said premises, and therefore, the contention raised by the petitioner that he came to know the fact of partition only when the statement of Dilip was recorded by City Survey Officer was shown to him in civil proceedings, cannot be accepted. The District Court has thoroughly gone into this aspect of the matter and recorded the finding that the said contention raised by the petitioner is baseless and the petitioner was aware of the fact of partition. Apart from that, one more aspect requires to be pointed out that this was a tenancy of the joint family property and the petitioner himself has made out a case that the petitioner was making payment of rent to any member of the joint family including the respondent Ashok, and therefore, the respondent Ashok was also a landlord within the meaning of definition (c) of section 2 of the said Act. Clause (c) of section 2 of the said Act provides that:

"Landlord" means any person who is receiving, or entitled to receive, rent in respect of any premises, whether on his own account, or on account or on behalf of for the benefit of any other person, or on behalf of himself and others or as an Agent, Trustee, Executor, Administrator, Receiver, Guardian or who would so receive or entitled to receive rent if the house were let to a tenant."

This definition is sufficient to satisfy that present respondent was entitled to recover the rent and not only that but he was actually receiving the rent prior to the so called partition, and therefore, it was obligatory for the petitioner to satisfy that either he paid rent to the respondent and/or to any other member of the joint family as he was earlier paying. However, it is the case of the petitioner that as the property was standing in the name of Kishore, who was minor at that time, he was in confusion as to whom the rent should be paid and has categorically admitted that therefore, the rent was not paid by him. Therefore, the fact remains that rent was actually not paid, and therefore, the ground that the petitioner was not in know of fact of partition is a baseless ground made out by the present petitioner. These two grounds cannot co-exist together, namely that the petitioner was not in know of fact that the property was standing in the name of the respondent and his minor brother Kishore and Kishore was minor and his guardian has not instructed to pay rent to Ashok and, therefore, the petitioner was in confusion and has not paid the rent. These two defence are self contradictory. However, as the courts below have found that actually the rent was not paid, it cannot be inferred that rent was paid even though not to the

respondent but to any other member, especially when the theory developed by the petitioner that the rent was paid to Dilip Bedekar has been disbelieved by the courts below. Therefore, the only defence that requires to be tested is that the fact of partition was known to the petitioner and that the petitioner was in confusion as result of the minor being one of the landlords of the said property, and therefore, the petitioner did not pay the rent. However, this will not be sufficient to say that the petitioner was not a wilful defaulter, because if the petitioner was really in such dilemma then in that eventuality the course open to the petitioner was to file an application u/s 14(3) of the said Act. Said section deals with the right of tenant to deposit the rent in certain cases. Subsection (3) of section 14 of the said Act specifically states that:

"Where any bona fide dispute arises as to the person who is entitled to receive the rent for any house, the tenant may with the permission of the Controller, deposit such rent before the Controller and shall report to him the circumstances under which such deposit was made and may in accordance with the direction of the Controller, continue to deposit any rent which may subsequently become due in respect of the house, until the dispute is settled by a competent Court or by settlement between the parties."

However, the petitioner has failed to take recourse to this provision, and therefore simpliciter a ground of confusion made out cannot be a valid defence to state that the petitioner was not a wilful defaulter. It is further to be noted that in reality there was no dispute between the parties. It is only the respondent who was claiming the rent of the said premises and as he was co-owner with his minor brother, he was entitled to recover the rent on his behalf. At the most, he was liable to explain it or was answerable to his brother. Factually guardian of minor brother Kishor has never demanded and claimed the rent of the said premises from the petitioner, and therefore, the so called confusion was conjecture in the mind of the petitioner and that is only defence invented to frustrate the present cause. Therefore, that cannot be considered a ground to state that the petitioner was not wilful defaulter of the said premises as is required to be scrutinised under the proviso to section 15(2)(i) of the said Act.

5. The above discussion will further point that the contention of the petitioner that the respondent was not a landlord, is baseless and without any merit. Equally the contention that Dilip Bedekar was landlord of the said premises after 1977 is also baseless in view of the facts as stated hereinabove. It is one of the defences made out by the petitioner that there was practice to make payment of accumulated rent for 4 to 6 months or 9 to 11 months and he relied upon the rent receipt for the month of September, 1975 to March, 1976 for Rs. 2275/- and another receipt from April 1976 to January 1977 for Rs. 3250/-. On the basis of these receipts, it is submitted that there was practice to pay accumulated rent and therefore, it cannot be said that the petitioner has committed default.

6. In support of the aforesaid contention, the learned Counsel for the petitioner has relied upon the judgments reported in *Rashik Lal and Others Vs. Shah*

Gokuldas, ; 1991(1) S.C.C. 370 in the case of D.C. Oswal v. V.K. Subbiah; 1995(2) Mh.L.J. (S.C.)241 in the case of Swami Ratanbabu v. Wamanrao; 1997(3) Bom.C.R. 1 : 1996(1) Mh.L.J. 507 in the case of Laxmikant v. Pratapsing; Smt. Sugarbai Mohamad Siddiq and Others Vs. Ramesh Sundar Hankare deceased by LRs., ; 1993(1) Bom.C.R. 2 : 1993 Mh.L.J. 567 Mangalbhai v. Dr. Radhyeshyam. It requires to be mentioned that all these cases are not under The Hyderabad Houses (Rent, Eviction & Lease) Control) Act, 1954, but these cases are under the provisions of C.P. and Berar Letting of Houses and Rent Control Order (1949). What is required to be noted is that the said Clause requires that the tenant has committed habitual default in making the payment of rent. Therefore, in order to show that he is a habitual defaulter, it is necessary to point out multiple defaults in payment of rent. But if there is a practice to pay rent after 3/4 months after rent being accumulated and if such mode of payment is consented to by landlord then in that eventually tenant cannot be said to be habitual defaulter in making payment of rent. However, the provisions of The Hyderabad Houses (Rent, Eviction & Lease) Control Act, 1954 are not the same as like that of the C.P. and Berar Letting of Houses and Rent Control Order (1949), and therefore, the cases which have been cited by the learned Counsel for the petitioner are not applicable to the cases covered under the provisions of The Hyderabad Houses (Rent. Eviction & Lease) Control Act, 1954.

7. In fact, in order to assess the correct position in respect of default under this Act, it is necessary to make reference to the judgment of the Apex Court reported in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, . It requires to be mentioned that the above referred judgment of the Apex Court has considered the A.P. Building (Lease, Rent and Eviction) Control Act, 1960, Orissa House Rent Control Act, 1958, Pondicherry Building (Lease and Rent Control) Act, 1969 in order to consider the provisions providing for a wilful default committed by the tenant and eviction. This provision has been considered with the more emphasis with the provision of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. What is pertinent to be noted is that Andhra Pradesh Act is having following proviso:

"Provided that in any case falling under Clause (i), if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may notwithstanding anything in section 11, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender, the application shall be rejected."

The proviso to section 7(2) of the Orissa Act runs thus:

"Provided that in any case falling under Clause (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful..."

Similar is the case with Pondicherry Act. The Tamil Nadu Act is having following proviso and explanation:

"Provided that in any case falling under Clause (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in section 11, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender, the application shall be rejected."

Explanation : For the purpose of this sub-section, default to pay or tender rent shall be considered as wilful if the default by the tenant in the payment or tender of rent continues after the issue of a two months notice by the landlord claiming the rent." Thus, ultimately considering these provisions and especially Tamil Nadu provisions, the Apex Court expressed view in para 63 as follows:

"(1) Where no notice is given by the landlord in terms of the Explanation, the Controller, having regard to the four conditions spelt out by us has the undoubted discretion to examine the question as to whether or not the default committed by the tenant is wilful. If he feels that any of the conditions mentioned by us is lacking or that the default was due to some unforeseen circumstances, he may give the tenant a chance of locus poenitentiae by giving a reasonable time, which the statute puts at 15 days, and if within that time the tenant pays the rent, the application for ejectment would have to be rejected.

(2) If the landlord chooses to give two months notice to the tenant to clear up the dues and the tenant does not pay the dues within the stipulated time of the notice then the Controller would have no discretion to decide the question of wilful default because such a conduct of tenant would itself be presumed to be wilful default unless he shows that he was prevented by sufficient cause or circumstances beyond his control in honouring the notice sent by the landlord."

8. The four conditions spelt out by the Apex Court are in paragraph 43 of the said judgment. To sum up, a proviso may serve four different purposes:

(1) Qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

9. The provision of section 15(2)(i) of the Hyderabad Houses (Rent, Eviction & Lease) Control Act, 1954 is as follows:

landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity

of showing cause against the application, is satisfied (i) that the tenant has not paid or tendered the rent due by him in respect of the house, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day for which the rent is payable, (vi)... the Controller shall make an order directing the tenant to put the landlord in possession of the house, and if the Controller is not so satisfied, he shall make an order, rejecting the application;

Provided in any case falling under Clause (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful he may, before making an order as aforesaid give the tenant a reasonable time, not exceeding 15 days to pay or tender rent to the landlord upto the date of such payment or tender."

10. Therefore, it is necessary to consider the scope of this provision and more specifically the scope of the proviso in the light of the above referred judgment of the Apex Court. It can be safely that there is no explanation added to this Hyderabad Act as it is added to Tamil Nadu Act, and therefore, the question of a wilful and/or not a wilful default will have to be considered as provided in item (i) of the above referred to para 7 of this judgment as if the notice to pay the rent has not been given.

11. It will be also evident that the provisions are in pan materia and/or substantially akin to the Andhra Pradesh Act which is reproduced above. On a proper appreciation of this provision, it will be seen that the obligation to pay and/or tender the rent due is on tenant. This contemplates that if there is an agreement to pay and/or tender the rent due on a fixed time, that the rent due shall be paid within fifteen days from the time specified in the agreement or contract and on such a failure the tenant will be defaulter. If there is no time specified in the agreement for the payment of the rent due, then in that eventuality the tenant shall pay the rent by the last day of the month next following that for which the rent is payable and if the rent is not paid by the last day of the month next following that for which rent is payable, then the tenant becomes a defaulter. Thus, in the first contingency tenant becomes a defaulter on completion of fifteen days from the time specified for the payment of the rent due in the agreement and in the absence of such agreement a tenant becomes a defaulter on completion of 30 days of the next following month of the due rent of earlier month.

12. The Act contemplates that if such a default is committed, the Controller shall make an order directing the tenant to put the landlord in possession. However, if the Controller is not satisfied in respect of such default, he shall reject the application. The proviso states that in any case falling under Clause (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful he may, before making an order as aforesaid, give the tenant a reasonable time, not exceeding 15 days to pay or tender the rent to the landlord upto the date of such payment or tender. Thus the proviso comes into play in following circumstances.

(a) that the landlord has proved the default as provided under Clause (i), (b) that the Controller is satisfied that the tenant's default to pay or tender the rent was not wilful.

Thus if the simpliciter first circumstances is proved but if there is no second circumstances proved, the proviso does not come into play and the Controller has to pass an order of evicting the tenant and/or directing the tenant to put the landlord in possession. Thus, before tenant could ask for benefit of the proviso, the tenant must claim and prove to the satisfaction of the Controller that the tenant's default to pay or tender rent was not wilful and, therefore, in a case of default the tenant has to come forward with an explanation and prove the said explanation so that the Controller can be said to be satisfied that the tenant's default to pay or tender the rent was not wilful, in the absence of such a plea and the explanation and proof of the same, the Controller has to pass an order directing the tenant to put the landlord in possession of the premises and, therefore, on a proper analysis of the provision in respect of the default and wilful default, it will be evident that the proviso in the present case qualifies main enactment and it is so embodied in the Act itself to become an integral part of the enactment and thus acquires a tenor and colour of substantive" enactment. The ultimate analysis, therefore, is that whenever the Rent Controller finds that the default as provided under Clause (i) of sub-section 15(2) is established, the Rent Controller shall find out as to whether the tenant has offered any explanation and/or has pointed out any facts which may point out that the tenant's default to pay or tender the rent was not wilful and whether the said explanation of the facts have been proved and established by the tenant and thereafter the Controller will have to consider whether such explanation and the established fact is sufficient to satisfy the Controller that the tenant's default to pay or tender the rent was not wilful. Therefore, the burden to prove that the tenant's default to pay or tender the rent was not wilful is on the tenant, because the circumstances and/or the facts as a result of which the tenant failed to pay rent and/or tender it are within the knowledge of the tenant which tenant can only allege and prove. Therefore, even though prima facie it appears to be negative burden, factually and in reality it is a positive burden on the tenant. This Court in the matter of Sashikant James Patole Vs. Mohd. Naeemuddin Siddiqui and Another, has observed after re-producing the relevant part of the proviso, as under:

"In the instant case there is clear proof that the tenant committed default in the payment of rent and hence, it was the duty of the Rent Controller to get himself satisfied that the tenant's default was not wilful. The wording of the proviso clearly goes to show that the burden lies upon the tenant to show that his default is not wilful."

All the above discussion thus will find out that in order to get an order of eviction of a tenant and/or a direction to the tenant to put the landlord in possession, the landlord shall prove that the tenant has committed default as stated in Clause (i)

and has not pleaded and/or offered any explanation to the satisfaction of the Controller that his default to pay or tender the rent was not wilful. Secondly, the landlord has proved the default as per Clause (i) but the tenant having satisfied the Controller that his default to pay and/or tender the rent was not wilful, failed to tender and pay the rent to the landlord within reasonable time not exceeding 15 days as offered by the Controller. Thirdly, having proved the default as per Clause (i) and the tenant having pleaded the grounds that the default to pay or tender the rent was not wilful, failed to establish the said grounds and/or failed to satisfy the Controller.

13. The landlord's application for getting the possession of the premises on account of default will fail if landlord fails to prove default as per Clause (i), landlord proves the default as per Clause (i) of section 15(2) but tenant satisfies the Controller that his default to pay or tender the rent was not wilful and that he deposited the amount of rent or tendered the same to the landlord within a reasonable time not exceeding 15 days as per the direction of the Controller. This is analyzed for the purpose to show that how the proviso is embodied in the Act itself to become an integral part of the enactment and thus, is a substantive provision. As per the Apex Court, the Controller is required to look into the matter as referred to earlier. Thus, I find that only in the above circumstances the application for eviction on count of default can be allowed and/or rejected.

14. In the present matter, as earlier stated, the payment of the rent due and payable from 1-2-1977 onward as per decrees passed in civil suits referred to above. The petitioner states that he has paid the said but only after passing of the decrees. However, having found that the petitioner has failed to prove the payment as observed earlier, the only inference follows that the landlord has established the default. The other explanation that there was a practice of payment after 5 to 6 months cannot be accepted because the petitioner has not established the said practice. Two receipts which are referred to by the petitioner cannot establish a practice as there is no consistency of an act so as to term a practice. Apart from that this cannot be accepted because the case of a payment being made and that there was a practice to pay the rent after 5 to 6 months are inconsistent and self-contradictory. Moreover, as observed earlier that the provisions of the Hyderabad Act and Andhra Pradesh Act are in pari materia same, the ratio of the Full Bench judgment of the Andhra Pradesh High Court in the matter of Pallapothu Narshimha Rao and Another Vs. Kidanbi Radhakrishnamacharyalu, has application wherein it is observed-

"Under section 10(2)(i) the Controller shall make an order directing the tenant to put the landlord in possession of the building if the Controller is satisfied that the tenant had not paid or tendered the rent due by him in respect of the building within 15 days after the expiry of the time fixed in the agreement of tenancy or in the absence of any such agreement by the last day of the month next following that for which the rent is payable. On a plain reading of this section, it is clear that all that the Controller has to see is whether the rent due was not

paid or tendered within 15 days after the expiry of the time fixed in the agreement. If there is no such agreement he has to see whether the rent was not paid before the last day of the month next following that for such the rent is payable. If that condition is satisfied the Controller has no option but to direct the tenant to put the landlord in possession of the building unless the matter is one which falls within the proviso. Under the proviso, if the tenant's default was not wilful, the Controller may give the tenant a reasonable time not exceeding 15 days to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender, the application shall be rejected. The moment the tenant fails to pay the rent within 15 days after the expiry of the time fixed in the agreement or if there is no such agreement before the last day of the month next following that for which rent is payable there is a default and a right on the part of the landlord to have the tenant evicted arises subject only to the proviso. There is nothing in this section which enables the tenant to contend that the right is lost merely because he pays or tenders the rent due by him subsequently."

Therefore, the ultimate analysis of the above facts coupled with the provisions and following the ratios referred to above is that the petitioner is a defaulter and that the petitioner has failed to prove that the default on his part in payment of rent and/or tendering the rent was not wilful.

15. In earlier part of the judgment the tenant's explanation that there was a practice of making payment of accumulated rent for 4 to 5 months has been considered and has been negatived. It further requires to be considered that such an explanation cannot be accepted and is not fit within the scheme of the provision pertaining to default as discussed above. The obligation to pay the rent and/or tender the rent is of tenant and, therefore" the tenant will not pay the rent for 2 to 3 months and will come forward for accumulated rent. In that eventuality, if the rent is not accepted, it will be a case of rent tendered and not accepted and if the landlord accepts the rent it leads to a practice of accepting the accumulated rent and thereby the landlord is put upto an adverse position and on either count the landlord suffers. The net result of this is that the statutory provisions are negatived. Because in that eventuality Clause (i) of section 15(2) of the Hyderabad Houses (Rent, Eviction & Lease) Control Act, 1954, which has been considered thoroughly above will not come into play in any eventuality. It is further necessary to mention that once the Court accepts that there is a practice of paying accumulated rent, then in future the landlord will never be entitled to get the possession of the property even if the defaults as contemplated under Clause (i) of section 15(2) of the Act have been committed by the tenant. Because, whenever the landlord comes for a possession on such a ground, the explanation will be such practice. Net result, therefore, is that the practice of payment of accumulated rent cannot be accepted by way of explanation or defence to infer that the default was not wilful default. If such practice is accepted for any defence covered under the proviso, the main provision is permanently defeated, and therefore, such a practice which defeats

the main provision permanently and makes the law nugatory cannot be accepted as an explanation for inferring the tenant as not a wilful defaulter. If a man claims the benefit of the statutory provisions, then he is equally under an obligation to discharge his statutory duty initially. However, the plea of practice of a payment of accumulated rent to be paid by the tenant shows that basically the tenant fails to discharge his statutory duty as provided under Clause (i) section 15(2) of the Act, but claims the benefit of the proviso, which is against the settled principles of law.

16. This will point out that there is no substance in the contention raised by the petitioner that there was a practice of accepting rent after 5 to 6 months or 9 to 11 months. Above all it requires to be mentioned that so far as the present respondent is concerned, after partition, there was no such practice, and therefore, the petitioner was under obligation and duty bound to make payment of rent as per Clause 15(2)(i) of the said Act.

17. The learned Counsel for the petitioner tried to make reference to 1998(1) Bom.C.R. 304 : 1997(3) Mh.L.J. 274 in the case of Mahendra v. Vishwanath Bhikaji, and insisted that in the absence of attornment of the relationship of the tenant and landlord, the suit by the landlord was not possible and it cannot be said that the petitioner is a defaulter. However, on proper reading of the said judgment, it will be revealed that the Supreme Court has observed that:

"It is well settled that a transferee of the landlord's right steps into the shoes of the landlord with all the rights and liabilities of the transferor landlord in respect of the subsisting tenancy. The section does not require that the transfer of right of the landlord can take effect only if the tenant patterns to him. Attornment by the tenant is not necessary to confer validity of the transfer of the landlord's right. Since attornment by the tenant is not required a notice u/s 106 in terms of the old terms of lease by the transfer or landlord would be provided and so also the suit for ejectment."

Therefore, it is not essential condition or necessity that before the suit for ejectment is filed by the transferee landlord, there should be attornment of the tenancy. It is further necessary to state that present matter is not exactly a case of transfer. The respondent was already landlord being a member of the joint family and was recovering the rent on some occasions from the petitioner. Only as a result of partition the property is given to him and his brother. The other members of the family thereafter have not claimed the rights in the said property. Therefore, the person who was already landlord in part and entitled to recover the rent on behalf of others, his exclusive right has been crystalised as a result of partition, and such partition is permissible among Hindus even by the oral agreement between the parties. Therefore, the attornment as expected by the learned Counsel was not necessary, and therefore, there is no substance in the said contention also.

18. The subsequent payments as discussed above, have been appropriated by

the respondent by giving reply notice dated 12-1-1984 as against the dues, and various decrees passed in various suits and pending suits, so also deposits made in this Court pending the suit cannot relieve and/or absolve the petitioner from statutory provisions of section 15(2)(i) of the said Act namely holding him as a defaulter. Therefore, I do not find that there is any substance in this Civil Revision Application.

19. The Civil Revision Application is hereby dismissed, However, the petitioner is hereby granted time of six months to vacate the premises, failing which the respondent to proceed for the execution of the orders confirmed. costs in the cause.

20. At the stage of pronouncement of the judgment, Mr. Lakhkar, learned Counsel for the petitioner submitted that leave to approach the Supreme Court may be granted. As this Court has found that the landlord initially has filed suits for recovery of rent and after the decrees were passed in those suits, the rent has been deposited by the present petitioner which shows that the petitioner is not only a defaulter, but the petitioner has also failed to prove that he is not a wilful defaulter and therefore, the leave to approach the Apex Court is hereby rejected.

21. Petition dismissed.