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Hardev Vs. Jaidev

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Court : Rajasthan

Decided On : Dec-02-1999

Reported in : AIR2000Raj142; 2000(1)WLC675

Judge : R.R. Yadav, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 100; Rajasthan Premises (Control of Rent and Eviction) Act, 1950 - Sections 3, 13 and 13(1); Hindu Succession Act, 1956 - Sections 8

Appeal No. : Civil Second Appeal No. 50 of 1986

Appellant : Hardev

Respondent : Jaidev

Advocate for Def. : M.L. Chhangani, Adv.

Advocate for Pet/Ap. : P.K. Bhansali, Adv.

Disposition : Appeal allowed

Judgement :

R.R. Yadav, J.

1. The tenant-defendant-appellant has filed the present second appeal against the judgment and decree dated 28-1-1986 passed by learned Additional Civil Judge

No. 4, Jodhpur whereby he affirmed the judgment and decree of eviction dated 8-9-1982 passed by Additional Munsiff Magistrate No. 2, Jodhpur. The learned trial Court has decreed the suit for eviction on the ground that the tenant has parted with the possession of the premises in dispute to his mother and his brother's wife within the meaning of Clause (e) of Sub-section (1) of Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act 1950 (hereinafter referred to as Act No. 17 of 1950).

2. For effective disposal of the present appeal I consider it expedient to refer certain factual aspects of the matter in brief which are borne out from perusal of the record.

3. The landlord-plaintiff-respondent Shri Jaidev instituted the suit against the tenant defendant-appellant on 6-9-1976 alleging that he is the owner of plot No. 569 situated at 11 'C' Road. Sardarpura, Jodhpur which he gave on rent to tenant defendant-appellant Shri Hardev for carrying on business of coal and wood Tal at the monthly rent of Rs. 25/-. The terms of the tenancy have been agreed as given on the back of the rent receipt, it is alleged in the plaint that the tenant-defendant-appellant, after closing his business of coal and wood Tal has given the premises to his mother and his brother's wife, who are carrying on business of coal and wood Tal. Thus the tenant-defendant-appellant has parted with the possession of the premises in question. It is averred in the plaint that after closing his business of coal and wood Tal, the tenant-defendant-appellant is carrying on another businessof scooter repairs under the name and style of M/s Kishore Auto Repairs at 12th 'B' Road, Sardarpura. Jodhapur. In view of the fact that the tenant defendant-appellant has now started another business of scooter repairs it is alleged in the plaint that the premises in question is not required by him for his business of coal and wood Tal.

4. After service of summons on the tenant defendant-appellant he filed his written statement denying the averments made in the plaint. The tenant-defendant-appellant in his written statement denied to have taken on rent the disputed premises on monthly rent of Rs. 25/- insted it was stated that the premises in dispute was initially let out to him at monthly rent of Rs. 20/-. It is further denied by

the tenant-defandant-appellant that he is not carrying on his business on the disputed premises and that he has parted with the possession of the premises taken by him on rent. It is averred in the written statement by the tenant-defandant-appellant that as a matter of fact in his absence the business of coal and wood Tal is being looked after by his father, mother, brother, brother's wife and his wife as they are the members of a joint Hindu Family. It is also denied in the written statement that he ceased to be in possession of the suit premises and that his mother and brother's wife are in exclusive possession of the premises. It was averred in the written statement that he himself is in possession of the suit premises and carrying on his business of coal and wood Tal. The tenant-defendant-appellant denied the fact of his being owner of M/s Kishore Auto Repair Works, Jodhpur. It is clearly stated in the written statement that Shri Rana Ram is the Proprietor of M/s Kishore Auto Repair Works. Jodhpur which is situated in the near vicinity of the tenant-defandant-appellant's coal and wood Tal shop. As and when the tenant defendant appellant has no business he used to go to the shop of Rana Ram and in case of need he helps him in carrying out his work of repairs of scooters as he knows some repair work. It is categorically denied in the written statement that the tenant-defandant-appellant does not need the suit premises for his business.

5. It is borne out from the record that after filing of the written statement the landlord-plaintiff-respondent filed a replication in which he raised some new pleas but these new pleas raised by the landlord plaintiff respondent in his replication need no discussion as these please are not relevant for just decision of the present appeal.

6. On the aforesaid pleadings of the parties the learned trial Court framed as many as 6 Issues. In support of his case, the plaintiff examined in all three witness namely PW-1 Shri Jaideo (the plaintiff himself) PW-2 Shri Sreenath and PW-3 Shri Vishnu Deo. The tenant defendant-appellant in support of his case examined five witnesses namely, DW-1 Shri Hardeo (the defendant himself). DW-2 Shri Narayan, DW-3 Shri Abdul Hafij, DW-4 Shri Rana Ram and DW-5 Shri Madanlal.

7. It is significant to mention here that during the course of arguments, the learned counsel appearing for the landlord plaintiff respondent prayed before the learned trial Court that the landlord-plaintiff-respondent did not want to press Issue No. 3 and 4, therefore on the issues arguments were not advanced by him and issues No. 3 and 4 were not decided by the learned trial Court as these issues and pleas were relinquished by the landlord-plaintiff-respondent.

8. After hearing the learned counsel for the parties on the remaining issues the learned additional Munsif Magistrate No. 2, Jodhpur arrived at a conclusion that the tenant defendant-appellant Shri Hardeo has parted with the possession of the premises in dispute to his mother and his brother's wife within the meaning of Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 and as such he passed the decree for eviction against the tenant-defendant-appellant.

9. Aggrieved against the judgment and decree passed by the learned trial Court the tenant defendant-appellant filed an appeal before learned District Judge which was transferred for disposal in accordance with law to the learned Additional Civil Judge No. 4, Jodhpur. The learned first appellate Court affirmed the findings recorded by the learned trial Court and maintained the decree for eviction against the tenant-defendant-appellant by its judgment under appeal dated 8-9-1986.

10. Dissatisfied with the aforesaid judgment and decree passed by the learned first appellate Court, the tenant-defendant-appellant has filed the instant second appeal. The present second appeal was admitted on 23-7-1986 on the following substantial questions of law :--

'1. Whether a tenant, who allows his mother and brother's wife to look after his business in the premises in question can be said to have parted with the possession of the premises so as to entail the liability of eviction under Section 13 (1) (e) of Act No. 17 of 1950 ?

2. Whether the Courts below have failed to take into consideration the presumption under the Hindu Law that the brothers are joint ?'

11. I have heard the learned counsel for the parties on the questions of law at length and perused the judgments passed by both the Courts below. Since the aforesaid substantial questions of law are interlinked. I propose to deal these questions together.

12. The learned counsel for the appellant vehemently urged that mere user of a premises by a person or persons, other than the tenant, does not mean that the possession of the premises has been parted with by the tenant within the meaning of the expression 'otherwise parted with the possession' used under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 so long as the tenant to whom the premises has been rented out retains the legal possession. It is further urged by the learned counsel for the appellant that even if the tenant has permitted use of the premises to other persons he cannot be said to have parted with the possession if he retains the control of the demised premises. According to the learned counsel for the appellant for fulfilling the condition that the tenant has parted with the possession there must be vesting of possession by such tenant in another person by divesting himself not only of physical possession but also of legal possession.

13. As regards the question No. 2 it is submitted by the the learned counsel for the appellant that the principles of Hindu Law are well settled that normally every Hindu Family should be presumed to be joint unless contrary is proved. In case of brothers, as in the present case, such presumption gets more weightage unless otherwise is proved by the landlord plaintiff-respondents. Indisputably, in the present case, the landlord plaintiff-respondent has failed to discharge his burden of proof that brother of the tenant-defendant-appellant is living separately by adducing cogent and convincing evidence on this point. In support of his aforesaid contention he placed reliance on the decision rendered by the Supreme Court in the case of Indranarayan v. Roop Narayan reported in AIR 1971 SC 1962. The learned counsel for the appellant also urged with emphasis that the word Family ' used under Section 3 (vii) (b) of Act No. 17 of 1950 includes a person's wife and their children as also the persons constituting a joint Hindu Family. According to him the word 'Family' is to be given wider connotation so as it includes not only the Head of Family but it includes all members of descendants from the entire

ancestor who are actually living under one roof. The learned counsel for the appellant vehemently urged that keeping in view the aforesaid legal position . In the present case, the mother and brother's wife of the tenant-defendant-appellant should be treated to be members of Joint Hindu Family and if it is held that they are members of joint Hindu Family it can safely be held that the tenant-defendant-appellant has not parted with the possession of the suit premises. It is submitted by the learned counsel for the appellant that one cannot part with possession to his own family members and both the Courts below have commited substantial error of law in holding otherwise, therefore, the judgments passed by both the Courts below and decree for ejectment against the tenant -defendant appellant is not sustainable.

14. The aforesaid arguments advanced by the learned counsel for the tenant-defendant-appellant are refuted with equal vehemence by the learned counsel for the landlord plaintiff respondent Mr. M.L. Chhangani. It is urged by Mr, Changani that the scope of amended Section 100 CPC is very limited. There are Inherent limitations in exercise of jurisdiction in second appeals specially where there are concurrent findings of fact recorded by both the Courts below. According to Mr. Chhangani now under amended Section 100CPC interference in second appeal by this Court cannot be made only because the judgment under appeal is contrary to law unless its illegality partakes the shape of substantial question of law. The learned counsel for the landlord plaintiff respondent vehemently submitted that the instant second appeal is concluded by concurrent findings of fact recorded by both the Courts below to the effect that the tenant-defendant-appellant has parted with the possession of the premises in dispute to his mother and his brother's wife hence the decree for eviction under appeal against him cannot be interfered under the limited scope of Section 100 CPC. In support of his aforesaid contentions the learned counsel for the landlord plaintiff respondent relied on the ratio of the decisions of the Supreme Court reported in (1997)2 J.T. (SC) 554 : (AIR 1997 SC 1041) (Panchugopal Barua v. Umesh Chandra Goswami), (1998) 5 J.T.(SC) 540 : (AIR 1998 SC 2730) (Ram Prasad Rajak v. Nand Kumar & Bros.), (1997)5 J.T. (SC) 202 : (AIR 1997 SC 2517) (Kishitish Chandra Purkait v. Santosh Kumar Purkit), (1999)3 J.T. (SC) 163 : (AIR 1999 SC 2213) (Kondlba Dagadu Kadam v. Savitribai Sopan Gujar) and (1999) 6 J.T. (SC) 489 : (AIR 1999 SC 3325) (Hari

Singh v.Kanhaiya Lal).

15. I have given my thoughtful consideration to the rival contentions raised at the Bar. It is true that under amended Section 100 CPC existence of substantial question of law is sine qua non for exercise of power by the High Court in second appeals and such appeals can be heard on the question so formulated at the time of admission after affording opportunity to the respondent to argue that the appeal does not involve such question. I am fortified in taking the aforesaid view from the decisions rendered by the Supreme Court in the cases of Panchugopal Barua (AIR 1997 SC 1041) (supra). Ram Prasd Rajak (AIR 1998 SC 2730) (supra), Kishitish Chandra Purkait (AIR 1997 2517) (supra), Kondiba Dagdu Kadam (AIR 1999 SC 2213) (supra) and Hart Singh (AIR 1999 SC 3325) (supra) cited by the learned counsel for the respondent Shri Chhangani.

16. As regards the second limb of the argument of the learned counsel for the respondent to the effect that the instant second appeal is concluded by concurrent findings of fact recorded by both the Courts below that the tenant-defendant-appellant has parted with the possession of the disputed premises to his mother and his brother's wife hence decree for eviction under appeal is not assailable is not acceptable to me for the reasons discussed hereinbelow.

17. It is to be noticed that the learned trial Court and the learned first appellate Court have made a legally wrong approach and have committed substantial and patent error of law in interpreting the scope and ambit of the words 'otherwise parted with the possession' used under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 and overlooked the definition of 'tenant' as defined under Section 3 (vii) (a) and 3 (vii) (b) of the said Act leading to a grave and substantial injustice in the present case which requires ironing out the creases of the aforesaid Section by this Court in the backdrop of legislative history of these Section s. I am of the view that illegality committed by both the Courts below in the case on hand makes the questions formulated by this Court at the time of admission to be substantial questions of law.

18. Before starting threadbare discussion on the substantial questions of law No. 1 and 2 formulated at the time of admission and legal principles applicable to the

present case, for deeper and better understanding of the controversy involved in the present appeal the relevant provisions envisaged under Section 3 (vii) (a) and 3 (vii) (b) together with the mandatory provisions envisaged under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 are reproduced herclnbelow : --

'3. (vii) 'tenant' means

(a) the person by whom or on whose account or behalf rent is, or, but for a contract express or implied would be. payable for any premises to his landlord including the person who is continuing in its possession after the termination of his tenancy otherwise than by a decree for eviction passed under the provisions of this Act ; and

(b) In the event of death of the person as is referred to in Sub-clause (a) his surviving spouse, son, daughter and other her 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 pur-poses, are ordinarily carrying on business with him in such premises as member of his family up to his death.

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13. Evict ion of tenants. -(1) Notwithstanding anything contained in any law or con-tract, no Court shall pass any decree or make any order, in favour of a landlord, whether in execution of a decree or otherwise. evicting the tenant so long as he is ready and willing to pay rent th.crefor.to.the full extent allowable by this Act, unless it is satisfied. (a) to (d) xxxxx

XXX XX

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(e) that the tenant has assigned, sub-let or otherwise parted with the possession of the whole or any part of the premises without the permission of the landlord ; or...

19. From perusal of the definition of tenant under Section 3 (vii) (a) and 3 (vii) (b) of Act No. 17 of 1950 I am of the view that it can be used as a key to open the lock of the ambiguity of the expression 'otherwise parted with the possession' used under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950. The exhaustive definition of tenant given under Section 3 (vii) (a) and 3 (vii) (b) of Act No. 17 of 1950 is not mutually exclusive but complementary to each other. The definition of tenant given under Sub-clause (a) of Clause (vii) of Section 3 cannot be read in isolation with the definition of tenant given in Sub-clause (b) of Clause (vii) of the said Section If the definition of tenant is taken separately under Section 3 (vii) (a) and Section 3 (vii) (b) In the light of the expression 'otherwise parted with the possession' used under Clause (e) of Sub-section (1)of Section 13 of the said Act then the hereditary tenant envisaged under Section 3 (vii) (b) of Act No. 17 of 1950 would never be born and such separate interpretation would defeat the very object of the legislative enactment which provides under Section 3 (vii) (b) that in the event of death of either contractual tenant or statutory tenant as referred under Section 3 (vii) (a) his surviving spouse. son, daughter and other heirs in accordance with his personal law applicable to him who had been in the case of premises leased out for residential purpose prdonarily residing and in the case of premises leased out for commercial or business purposes are ordinarily carrying on business with him in such premises as member of his family upto his death are entiled to inherit the tenancy right of the deceased.

20. It is apparent from perusal of Section 3 (vii) (a) and Section 3 (vii) (b) of Act No. 17 of 1950 that in the event of death of a tenant referred to in Sub-clause (a) all his surviving heirs in accordance with his personal law applicable to him as members of his family are not entitled to inherit the tenancy right of the deceased in Sub-clause (b) but only those surviving heirs who had been in the case of premises leased out for residential purposes ordinarily residing with him as his family members and in the case of premises leased out for commercial or business purposes ordinarily carrying on business with him in such premises as members of his family upto his death are entitled to Inherit the tenancy right of the

deceased tenant. Therefore, it is clear that for inherit ing the tenancy right under Sub-clause (b) of Clause (vii) of the said Section possession and user of the rented premises by surviving heirs of deceased tenant referred under Sub-clause (a) during his lifetime is a condition precedent whether the premises is leased out for residential or for commercial purposes. However if such surviving heirs and family members of a tenant are evicted on the plea of 'otherwise parted with the possession' used under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 during the lifetime of such tenant then it would tantamount embryonic death of a hereditary tenant envisaged under Sub-clause (b) of Clause (vii) of Section 3 of the said Act which would make the aforesaid Sub-clause (b) to be redundant. I am of the view that under any canon of interpretation making whole statutory provisions of Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 to be inoperative meaningless and superficial is impermissible. In the instant case the provisions of Sub-clause (b) of Clause (vii) of Section 3 of the said Act provides consequences and conditions for inheriting tenancy right of a tenant in the event of his death, therefore, such statutory requirement must be interpreated as mandatory.

21. From the aforesaid analysis of definition of 'tenant' given in Clause (vii) of Section 3 of Act No. 17 of 1950 in two parts under Sub-clause s (a) and (b) It is held that the State Legislature has infused three kinds of tenants within the fold of definition of tenant i.e. contractual tenants, statutory tenants as referred to under Clause (a) and hereditary tenants who are to be born on the ashes of contractual or statutory tenants as the case may be referred to under Sub-clause (a) with limited inheritable tenancy right in respect of both residential and commercial premises as family members of the deceased. In order to give force and life to the definition of 'tenant' envisaged under Sub-clause (a) and Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 this Court must supplement the words 'posthumous tenant' before birth of hereditary tenant under Sub-clause (b) on the ashes of contractual tenant or statutory tenant as referred to under Sub-clause (a) of Clause (vii) of the aforesaid Section to protect the defeat of social object and remedy the exploitation of tenants by unscrupulous landlords for which the beneficial Act No. 17 of 1950 was passed by the State Legislature.

22. It is true that during the lifetime of contractual or statutory tenant reckoned under Sub-clause (a) of Clause (vii) of Section 3 of Act No. 17 of 1950 and before birth of the hereditary tenant under Clause (b) of the said Section such 'posthumous tenant' being heir and member of family of the tenant referred to under Sub-clause (a) will have no independent or separte right except to reside in the premises if it happens to be residential or to carry on business with contractual or statutory tenant as member of his family during his lifetime in order to make him entitled to inherit the tenancy right in the event of death of either contractual tenant or statutory tenant in accordance with the personal law applicable to them. It is made clear that 'posthumous tenant' as a family member of tenant during his lifetime will have no other right or interest except to remain in possession along with him and he has to vacate the premises if a decree for eviction is passed against the tenant on any of the grounds enumerated under Clause (a) to (1) of Sub-section (1) of Section 13 of Act No. 17 of 1950. The protective umbrella of right of possession to 'posthumous tenant' as a member of family of the tenant either contractual or statutory referred under Sub-clause (a) of Clause (vii) of Section 3 of the aforesaid Act would be co-extensive with the subsisting tenancy right of tenant and the protective umbrella of possession and user would be unfolded if tenancy right of a tenant ceases to exist on any of the grounds enumerated under Clause s (a) to (1) of Sub-section (1) of Section 13 of Act No. 17 of 1950.

23. It is important to mention here that a contractual tenant is a true tenant recognised de jure and de facto whereas a statutory tenant under Sub-clause (a) of Clause (vii) of Section 3 of the Act is created by legal fiction after the termination of his tenancy right otherwise than by a decree for eviction passed under the provisions of Act No. 17 of 1950. It is further to be noticed that initially under Sub-clause (a) of Clause (vii) of Section 3 of the said Act only contractual tenant was contemplated but later on the State Legislature by amendment included the statutory tenant within the definition of tenant and whole of Clause (vii) of Section 3 was substituted and replaced by Rajasthan Amending Act. No. 14 of 1976.

24. An identical question came up for consideration before Lord Denning L.J. (as he then was) In the case of Seaford Court Estates Ltd. v. Asher in (1949)2 KB 481

wherein it was ruled which reads thus :--

'When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ..... and then he must supplement the written word so as to give 'force and life' to the intention of the legislature .... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.'

25. The aforesaid rule of interpretation is quoted with approval by Supreme Court in the case of M. Pentiah v. Muddala Veeramallappa reported in AIR 1961 SC 1107 in paragraph 27 of its decision.

26. From the above discussion it is clear that whenever a Court of law is railed upon to interpret a beneficial piece of legislation it is to be construed liberally so as to give it a wider meaning rather than a restrictive mean-ing which would tend to defeat the very object for which it is enacted upon. To my mind in order to advance legislative intent in the case on hand this Court has no option except to supplement 'posthumous tenant' by creating legal fiction in the definition of the tenant denned under Sub-clause (a) and Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 with limited right to him to remain in possession over the premises let out to a tenant during his lifetime as member of his family.

27. Let us examine the true import of the expression 'as member of family' used under Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 which has not been defined under the Act. In general sense 'member of family' used under aforesaid Sub-clause (b) denotes a person who may be a heir as mentioned in the aforesaid Sub-clause (b) i.e. spouse, son, daughter and other heir in accordance with the personal law applicable to the deceased tenant provided he / she was residing or carrying on business with the tenant referred to under Sub-clause (a) during his life time as a member of his family. Every heir of deceased tenant who was not residing or carrying on business during lifetime of deceased tenant as member of his family is not entitled to inherit in spite of the fact that he is one of

the heirs in accordance with' the personal law applicable to the deceased tenant. Thus, the interest and welfare of family is the core of the expression 'as member of family' used under Sub-clause (b) of Clause (vii) of Section 3 of the Act. Broadly speaking, the expression 'as member of family' used under Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 would include a person's wife and husband and the children or his or her parents, his or her brothers and sisters, brother's wife a widowed daughter or her children, a deceased brother's wife or children being dependent on the contractual tenant or statutory tenant having joint proprietary Interest. The aforesaid list of family members is only illustrative and not exhaustive as no one can perceive who would be heir under Section 8 of the Hindu Succession Act or under Mohammedan personal law or in any other personal law in the event of death of a tenant inasmuch as the succession opens upon the death of tenant.

28. Now the time is ripe to apply the principles of law discussed hereinabove to the facts and circumstances of the present case. Indisputably, in the present case, tenant-defendant-appellant's mother, to whom the possession is alleged to have been parted by him entailing his eviction under Section 13 (1) (e) of Act No. 17 of 1950, is a heir being a relative specified in class I of the Schedule of the Hindu Succession Act, 1956 whereas although his brother's wife, to whom, also the possession is alleged to have been parted by the tenant defendant-appellant, is not a heir being a relative either in Class I or in Class II of the Schedule within the meaning of Section 8 (a) and (b) of the Hindu Succession Act, 1956 today yet the possibility cannot be ruled out that she may become heir when the succession opens in the present case as brother's widow under class II of the Schedule. Be that as it may the brother's wife can also be a heir of tenant-defendant-appellant at the time when the succession opens in future under Clause (c) and (d) of Section 8 of the Hindu Succession Act being related by blood to the tenant defendant appellant, therefore, in the present case I have no hesitation to hold that both mother and brother's wife of the tenant defendant appellant being his prospective heirs in accordance with his personal law applicable to him are entitled to remain in possession over the disputed premises let out to him as members of his family during his lifetime in order to qualify to inherit his tenancy right in future under Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950, and the act of the

tenant defendent appellant allowing them to look after his business in the premises in question cannot be termed to have parted with the possession so as to entail upon him the liability of eviction under See. 13 (1) (e) of the said Act.

29. The aforesaid question can be viewed from another angle as well. In so far as the principles of Hindu Law are concerned it is a legal presumption that every Hindu family is Joint unless contrary is proved. In the present case both the Courts below failed to raise a presumption that the tenant -defendant appellant being Hindu is living in joint family with his mother, father, brother and with his brother's wife. Although the old concept of joint Hindu family is continuously loosing its importance in the present social conditions yet a presumption of living in the state of jointness of mother, father, real brothers and brother's wife can be easily drawn and both the Courts below have committed substantial error of law in not raising presumption in favour of the tenant defendant appellant in this regard. The landlord plaintiff-respondent has failed to adduce an iota of evidence to establish that the tenant-defendant-appellant is living separately with his real brother, his brother's wife, father and mother, therefore, his mother and his brother'swife are not members of joint Hindu family. Contrary to it, the tenant defendant appellant has averred in his written statement that he is living in joint Hindu family and in his absence the business on the disputed premises is being looked after by his father, mother, brother, brother's wife and his wife. The tenant-defendant appellant has also examined himself as DW 1 and in his deposition before the trial Court he has categorically stated that his father, mother, brother, brother's wife are taking food and shelter under one roof jointly. It is further stated on oath by him that his father Mohan Lal is the Karta of his family.

30. The aforesaid plea of joint Hindu family raised by the learned counsel for the tenant-defendant-appellant is being opposed by the learned counsel Mr. Chhangani appearing on behalf of the landlord plaintiff respondent on the ground that neither the tenant defendant appellant has examined the karta of his family Shri Mohan Lal-his father-nor his mother nor his brother's wife to corroborate his statement on oath hence his statement on oath on this point is not believable. Suffice it to say in this regard that, where a Court is required to raise a presumption about a particular fact the burden of proof in such cases lies on a

person who is denying its existence. Hence in the present case the landlord plaintiff-respondent was to prove by adducing cogent and convincing evidence that the tenant-defendant-appellant is living seperately with his father, mother, brother and his brother's wife. Since he failed to discharge the burden of proof by adducing cogent and convincing evidence to establish that the tenant defendant appellant is living separately with his father, mother, brother and his brother's wife, both the Courts below have committed substantial error of law in not raising presumption in favour of the tenant-defendant-ap pellant that he is living jointly with his father, mother, brother and brother's wife.

31. I am buttressed in taking the aforesaid view from the decision rendered by the Supreme Court in the case of Indranarayan (AIR 1971 SC 1962) (supra) cited by the learned counsel for the appellant Shri P.K. Bhansali during the course of his arguments wherein it is held that the presumption that the members of Hindu family are joint is stronger in the case of a father and his sons and in such cases one who pleads that a member has separated himself from the family has to prove it satisfactorily. It goes without saying that in the present case the landlord plaintiff respondent, on whose behalf the plea of separation is being raised, has failed to adduce an iota of evidence that the tenant-defendant appellant was living separately with his father, mother, brother and his brother's wife hence the mother and brother's wife of the tenant defendant appellant are held to be members of joint Hindu family. In such a situation jt cannot be held that the tenant defendant appellant has parted with the possession to his own family members namely his mother and his brother's wife and both the Courts below have committed substantial error of law in holding otherwise.

32. It is next contended by the learned counsel for the landlord plaintiff respondent that the definition of the tenant as provided under Sub-clause (b) of Clause (vii) of Section 3 of Act No. 17 of 1950 would be attracted in those cases where the classes of persons enumerated therein would become tenants in the event of death of persons referred as tenant under Sub-clause (a) of Clause (vii) of Section 3 of the said Act. In order to avoid repetition and to maintain brevity it is sufficient to say that the aforesaid argument of the learned counsel for the landlord plaintiff respondent is not acceptable for the reasons given in detail hereinabove in the

preceding paragraphs of this judgment. However, in abundant caution at the risk of repetition it is held that Act No. 17 of 1950 is a benificial enactment to save the tenants from exploitation of unscrupulous landlords. Before enactment of the aforesaid Act, the tenants were suffering at the hands of land-lords and for tenants' benefit the said Act has been enacted to mitigate and remove their sufferings. To my mind the definition of 'tenant' under Section 3 (vii) (a) and {b) of Act No, 17 of 1950 has created a law of its own, therefore, it is to be interpreted keeping in view the social conditions which gave rise to its enactment and of the mischief to which it was passed to remedy. The decision citied at the Bar on the point of parting with the possession arising out of various Rent Control enactments of different States are not shown to be part materia to the provisions of Sub-clause (a), Sub-clause (b) of Clause (vii) of Section 3 and Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950, therefore, in order to maintain brevity I do not consider it expedient to refer all those decisions.

33. The bottomline arguments of the learned counsel for the landlord plaintiff respondent is that as the tenant defendant appellant has started a new business of 'Auto Repairs' under the name and style of 'M/s. Kishore Auto Works' at 12th Road Sardarpura, Jodhpur, he has wilfully inducted his mother and brother's wife to do his own business independenly on the premises in dispute without consent of the landlord plaintiff respondent and by this way he has parted with the possession of the premises in dispute so the decree under appeal deserves to be sustained.

34. It is true that the provisions of Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 prohibits a tenant from assigning, subletting or otherwise parting with the possession of the whole or any part of the premises without the permission of the landlord. In fact it is enacted to protect the interest of landlord and put restrictions on the right of the tenant to make profit out of the problem of scarcity of the housing accommodation for residential or commercial purposes but because in the present case the tenant defendant appellant allows his own mother and brother's wife to look after his business in the premises in question who happen to be his prospective heirs in Accordance with the personal law applicable to him and also happen to be members of a joint Hindu family cannot be said to have parted with the possession of the premises in dispute so as to entail on him

the liability of eviction under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950. Hence in the present case, mere looking after the business of the tenant defendant appellant by his mother and his brother's wife , who are his heirs and also members of his joint Hindu family, does not tantamount otherwise parting with the possession of the premises in dispute within the meaning of Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 as he retains the control of the demised premises. The tenant-defendant-appellant in the present case has not divested himself from actual possession of the disputed premises merely by doing a part timejob at 'M/s. Kishore Auto Works' which belongs to Rana Ram DW4. The tenant-defendant-appellant is entitled to augment his income by doing a part time job or any other business. To my mind, Hablity of entailing eviction under Section 13 (1) (e) of Act No. 17 of 1950 on the ground of 'otherwise parting with possession' is extendable to strangers parting exclusive possession for consideration who are neither heirs nor family members of the tenant referred to under Sub-clause (a) within the meaning of Sub-clause (b) of Clause (vii) of Section 3 of the said Act.

35. In the present case an application under Order 41 Rule 27 CPC for taking additional evidence on record has been moved on behalf of the tenant defendant-appellant. In pursuance of my detail order dated 15-7-1999, the learned counsel for the tenant-defendant-appellant Mr.Bhansali stated that he had made sincere efforts in the office of District Supply Officer, Jodhpur but it is reported by the said officer that since the original record is not available with him, he is not in a position to issue an authenticated copy within the meaning of Rule 10 of the Rajasthan Foodgrains and other Essential Articles (Regulation of Distribution) Order 1976. In view of the aforesaid facts and circumstances, exercise of power under Rule l(b) of Rule 27 of Order 41 CPC does not arise and the application moved under the aforesaid order is accordingly rejected.

36. Before concluding the discussion on the point of parting with the possession by a tenant within the meaning of Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 it is held that such parting with the possession must be exclusive for consideration leading to an inference to pecuniary benifits to the tenant to whom the premises is rented out I which is required to be proved by landlord by

adducing cogent and convincing evidence. Thus the burden of proof to establish exclusive possession for consideration within the meaning of Clause (e) of Sub-section (1) of Section 13 of the said Act lies on the landlord. Indisputably, in the present case the landlord plaintiff respondent has failed to prove mother and brother's wife of the tenant defendant appellant to be strangers to his family and their exclusive possession over the premises in dispute let out to him for pecuniary benefits therefore, the decree for eviction passed against him within the meaning of Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 is not sustainable..

37. I am fortified in taking the aforesaid view from a recent decision rendered by the Supreme Court in the case of Resham Singh v.Raghbir Singh reported in (1999)7 SCC 263, : (AIR 1999 SC 3087). From the discussion made hereinabove it is held that in the present case the tenant defendant appellant who allows his mother and his brother's wife to look after his business on the premises in question cannot be held to have parted with the possession of the premises in dispute so as to entail on him the liability of eviction under Section 13 (1) (e) of Act No. 17 of 1950. It is also held that both the Courts below have committed substantial error of law in not raising presumption under the Hindu Law to the effect that the brothers are presumed to be living jointly unless otherwise is proved by cogent and convincing evidence by the landlord-plaintiff-respondent. The substantial question No. 1 and 2 are answered accordingly.

As a result of aforementioned discussion the instant second appeal is allowed and judgments passed by the both the Courts below are hereby set aside. The suit filed by the landlord-plaintiff- respondent for eviction of the tenant-defendant-appellant from the premises in dispute on the ground of otherwise parted with the possession of the premises in dispute without the permission of the landlord under Clause (e) of Sub-section (1) of Section 13 of Act No. 17 of 1950 is hereby dismissed. In the peculiar facts and circumstances of the case both the parties are directed to bear their own costs.

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