HIGH COURT OF MADHYA PRADESH

BENCH GWALIOR

SINGLE BENCH:

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

Second Appeal No.350/2003

.....Appellant: Tarunveer Singh

Versus

.....Respondent : Mahesh Prasad Bhargava

Shri K.S. Tomar, Senior Advocate with Shri D.D. Bansal,Counsel for the appellant.

Shri V.K. Bhardwaj, Senior Advocate with Shri Anand Bhardwaj and Shri Rohit Batham, Counsel for the respondent.

J U D G M E N T

(21/12/2017)

Per Justice G.S. Ahluwalia

1. This Second Appeal under Section 100 of Civil Procedure Code, has been filed against the judgment and decree dated 11-7-2003 passed by VIIth A.D.J., Gwalior in Civil Appeal No. 29A/2002 reversing the judgment and decree dated 2-8-2002 passed by IVth Civil Judge, Class II, Gwalior in Civil Suit No. 126A/1998.

2. This appeal has been filed by the tenant. The appeal was admitted on the following Substantial Questions of Law:-

> "(i) Whether the deposit of the arrears of rent by the defendant (served with the summons on 27-2-97) on 1-4-97 will be deemed to be in compliance of Section 13(1) of the M.P. Accommodation Control Act on account of non-acceptance of rent by the C.C.D. Section on 29th,30th, and 31st March, 97 due to closure?
> (ii) Whether the discretion exercised by the learned trial judge in condoning the delay has

been illegally interfered with by the learned Lower Appellate Judge?
(iii) Whether the accompanying application under Section 13(1) of the M.P. Accommodation Control Act deserves to be allowed in the peculiar facts and circumstances of the case and consequently the delay caused in the initial deposit is liable to be condoned?

3. The respondent also filed a cross-objection which has been admitted on the following Substantial Question of Law :

Whether the learned Courts below erred in not decreeing the suit on the ground under Sections 12(1)(c) and 12(1)(f) of the M.P. Accommodation Control Act?

4. The necessary facts for the disposal of the present appeal in short are that the respondent filed a suit for eviction on the ground of arrears of rent and bonafide requirement for non-residential purposes. The appellants are the Legal Representatives of the deceased Original Defendant Harbhajan Singh.

5. A suit was filed on the ground that plaintiff is the owner of the shop situated in front of the Hospital, Mall Road, Morar, Gwalior (Shall be referred as "suit shop" in short). The appellant/defendant is the tenant in the suit shop at monthly rent of Rs. 700/- per month. The tenancy is oral and starts from 1st day of every calender month and ends on the last day of the month. The appellant/defendant is the tenant from July 1986 and is running a business in the name and style Sachdeva Medical Hall. The son of the plaintiff/respondent is major and is aged about 20 years and is unemployed. The plaintiff/respondent was working in Jiyaji Rao Mills Limited, however, due to closure of the Mill in the year 1992, he too has become unemployed. In order to earn livelihood, the plaintiff/respondent has become agent of Life Insurance Corporation Limited and Unit Trust of India. The

plaintiff/respondent, bonafidely require the suit shop for running his own business as well as for the business of his son for starting S.T.D., P.C.O., Fax and Electro-stat, and the plaintiff/respondent does not have any alternative non-residential accommodation within the limits of Municipal Corporation, Gwalior and therefore, he is entitled to get vacant possession of the suit shop. It was further pleaded that the appellants/defendant is habitual of committing default in payment of rent. The appellants/defendant is in arrears of rent from May 1996 and the plaintiff/respondent had issued a notice through his Counsel on 14-10-1996, but the same was received back due to non-availability of the defendant. Therefore, another notice was sent through his Counsel on 8-11-1996 by registered post, which has been received by the defendant on 12-11-1996 and by this notice, the plaintiff/respondent has demanded the arrears of rent as well as for handing over the vacant possession of the shop. The defendant sent his reply on 28-11-1996 which was based on incorrect facts. After receiving the notice, the defendant had sent Rs. 1,400/- by money order towards rent of two months, which was received by the plaintiff/respondent under protest, without prejudice to his rights. It was also pleaded that the defendant was in arrears of rent from May 1996, but it was falsely mentioned in reply, that no rent is outstanding and he is sending the rent for the month of December 1996 and January 1997. Even if the rent of two months is adjusted towards the rent for the month of May and June 1996, then it is clear that the defendant is in arrears of rent from July 1996 and the defendant has not paid the same, even after receiving the notice, thus, the plaintiff/respondent is entitled for decree of eviction on the ground of arrears of rent and also on the ground of bonafide requirement for non-residential purposes.

6. The defendant filed his written statement and except

denying the boundaries of the shop, did not dispute that he is the tenant in the suit shop. It was pleaded that the defendant is in possession of the suit shop as a tenant from the year 1966. The suit shop was let out by Late Leelavati, the mother of the plaintiff on monthly rent of Rs. 60/-. The mother of the plaintiff/respondent had taken Rs. 20,000/- by way of security. After the death of Late Leelavati, the plaintiff/respondent is collecting the rent and gradually the rent has been enhanced to Rs. 700/- per month. It was denied that the son of the plaintiff is major and is unemployed. The fact of closure of Mill in the year 1992 was denied and it was also denied that the plaintiff had become unemployed after the closure of Mill. The plaintiff is already running the business of Life Insurance Corporation Limited and U.T.I. in a shop, which is adjoining to the suit shop, and is also running the business of S.T.D., P.C.O. It was further pleaded that two more shops of the plaintiff are lying vacant and therefore, the bonafide requirement of the son of the plaintiff as well as that of the plaintiff was denied. It was further denied that the plaintiff does not have any other alternative accommodation for non-residential purposes within the limits of Municipal Corporation, Gwalior. It was further pleaded that the defendant is not in arrears of any rent. The plaintiff is in habit of issuing receipts as per his sweet will. The contents of notice dated 8-11-1996 were denied and it was pleaded that suitable reply to notice dated 8-11-1996 was sent on 28-11-1996. It was denied that no rent has been paid even after the receipt of the notice. In additional statement, it was pleaded that on the first floor of the suit accommodation, a big shop is situated in which the clinic of Dr. Rajni Jain was situated which was vacated by her in the year 1996 and has been again let out by the plaintiff to Mahakaushal Finance Company Limited in the year 1997 after enhancing the rent. The advance amount of Rs. 20,000 which was taken by late

Leelawati has not been adjusted towards the rent. The plaintiff is still having two vacant shops. The plaintiff was interested in enhancing the rent from Rs. 700/- per month to Rs. 900/- month and the suit has been filed in order to pressurize the defendant for enhancing the rent.

7. The issues were framed and the evidence of the plaintiff was recorded. The plaintiff thereafter amended the plaint and further pleaded that, under compulsion, the son of the plaintiff has started business of S.T.D., P.C.O. after taking a shop on rent in Balwant Nagar in the house of one Ramadhar at monthly rent of Rs. 1000/-. It was further pleaded that after the closure of the Mill, the plaintiff became unemployed and has become the agent of Life Insurance Corporation Limited and U.T.I. Since, the plaintiff was not able to earn sufficiently to meet the household expenses, therefore, after the first floor was vacated by Dr. Ashok Jain, the same was let out to meet household expenses. Even otherwise, the said accommodation is not suitable for running the business of L.I.C., U.T.I. Or S.T.D., P.C.O.

8. The defendant denied the amended pleadings but did not file reply to the amended pleadings that the son of the plaintiff has started doing business of S.T.D.,P.C.O in a rented premises situated in Balwant Nagar in the house of one Ramadhar.

9. The plaintiff witnesses were recalled and they were further examined and cross examined on the amended pleadings.

10. The evidence of the defence witnesses was recorded and the Trial Court after hearing both the parties, came to conclusion that the plaintiff has failed to prove bonafide need for non-residential purposes either for himself or for his son. It was further held by the Trial Court, that as per the provisions of Section 13(1) of M.P. Accommodation Control Act, if the defendant deposits the entire arrears of rent within a period of

one month from the date of receipt of summons of the suit, then no decree of eviction on arrears of rent, can be passed as provided under Section 12(3)/13(5) of the M.P. Accommodation Control Act. In the present case, although there is delay of few days in depositing the entire arrears of rent, but looking to the short period of delay, the same is liable to be condoned. Accordingly, the suit was dismissed.

11. Being aggrieved by the judgment and decree passed by the Trial Court, the plaintiff/respondent, filed a Civil Appeal, which has been partly allowed and decree under Section 12(1)(a) of M.P. Accommodation Control Act has been granted, however, the decree on the ground of 12(1)(f) of M.P. Accommodation Control Act was denied.

12. The defendant/appellant being aggrieved by the decree of eviction under Section 12(1)(a) of M.P. Accommodation Control Act has filed the present appeal. The plaintiff/respondent has also filed cross objection against the dismissal of his suit under Section 12(1)(f) of M.P. Accommodation Control Act.

Substantial Questions of Law

(i) Whether the deposit of the arrears of rent by the defendant (served with the summons on 27-2-97) on 1-4-97 will be deemed to be in compliance of Section 13(1) of the M.P. Accommodation Control Act on account of non-acceptance of rent by the C.C.D. Section on 29th,30th, and 31st March, 97 due to closure?

(iii) Whether the accompanying application under Section 13(1) of the M.P. Accommodation Control Act deserves to be allowed in the peculiar facts and circumstances of the case and consequently the delay caused in the initial deposit is liable to be condoned?

For the sake of convenience, the Substantial Questions of Law No. (i) and (iii) shall be considered jointly.

13. Section 13(1) of M.P. Accommodation Control Act reads

as under :

> **"13 : When tenant can get benefit of protection against eviction :** (1) On a suit or any other proceeding being instituted by a landlord on any of the grounds referred to in section 12 or in any appeal or any other proceeding by a tenant against any decree or order for his eviction, the tenant shall, within one month of the service of writ of summons or notice or appeal or of any other proceeding, or within one month of institution of appeal or any other proceeding by the tenant, as the case may be, or within such further time as the Court may on an application made to it allow in this behalf, deposit in the Court or pay to the landlord, an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made; and shall thereafter continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding, as the case may be."

14. Section 13(5) of M.P. Accommodation Control Act reads as under :

> "(5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord."

15. Section 12(3) of M.P. Accommodation Control Act reads as under :

> "12(3) No order for the eviction of a tenant shall be made on the ground specified in clause (a) of sub-section (1), if the tenant makes payment or deposit as required by section 13:

> Provided that no tenant shall be entitled to the benefit under this sub-section, if, having obtained such benefit once in respect of any accommodation, he again makes a default in the payment of rent of that accommodation for three consecutive months."

16. The factual dispute lies in a very narrow compass. There is no dispute that the appellants/defendant were in arrears of rent at the time of institution of suit. The undisputed facts are that the defendant was served with the summons of the suit on 27-2-1997 and he deposited the entire arrears of rent on 1st of April 1997.

17. The moot question for determination is that whether the appellants are entitled for protection from decree of eviction under Section 12(1)(a) of M.P. Accommodation Control Act, as provided under Section 12(3) and 13(5) of M.P. Accommodation Control Act or not?

18. Along with the memo of appeal, an application under Section 13(1) of M.P. Accommodation Control Act (I.A. No. 1202/2003) has been filed by the appellant for extension of time/condonation of delay in deposit of rent vide receipt No. 62/1976 dated 1-4-1996. This application reads as under :

> "1. That the appeal is being duly submitted which deserves to be allowed on the facts and grounds mentioned therein.
> 2. That, the defendant/appellant was served with the summons in the trial Court on 27-2-1997 and was required to deposit whole of the arrears of rent within 30 days thereafter. Thus, he was required to deposit the rent upto 29th March 1997 which was a holiday followed by Sunday on 30th March 1997. The next day i.e., 31st March 1997 was the last day of the financial year and amount of rent offered by the Counsel for the defendant was not accepted by the C.C.D. Section of the District Courts, Gwalior on the ground of closure of money transactions. Although the counsel for the defendant had obtained the permission on 31-03-1997 from

the trial court to deposit the rent, the same was not accepted by the C.C.D. Section. Consequently, the amount of rent was deposited vide receipt NO. 62/1076 on 1-4-1997 which was the first day after reopening of the C.C.D. Section for money deposits after three days closure (29th,30th,31st March 1997). Thus, the defendant/appellant did not commit any default in the matter of deposit of rent in compliance of Section 13(1) of the M.P. Accommodation Control Act. In view of this, the plaintiff was not entitled and is not entitled to a decree under Section 12(1)(a) of the said Act. However, the learned trial judge ignoring it, gave a benefit of Section 12(3) and 13(5) of the Act to the defendant/appellant and dismissed the suit on ground under Section 12(1)(a) after condoning the delay in the initial deposit of rent after service of summons.

3. That an advance of 3 months was already deposited at the time of dismissal of the suit by the learned trial judge and an advance rent of 4 months was also deposited at the time of judgment by the lower appellate court. Thus, the defendant/appellant has been sincere in depositing the rent timely and without any default.

4. That the learned lower appellate court again overlooking the closure of C.C.D. Section on the aforesaid days reversed the decision of the trial court on the ground under Section 12(1)(a) and has granted a decree for eviction on this ground.

5. That the appellant has got inspected through is counsel Miss Gurusharan Kaur, the record of the C.C.D. Section pertaining to the year 1997 and it is found that the C.C.D. Section did not allow the deposits to be made on the last working day of every calendar month during the year 1997 as a practice in the courts on account of monthly audit and balancing.

6. That, the appellant has deposited the rent regularly during the pendency of the suit as well as the civil appeal and has committed no default. However, if the delay is found in the initial deposit of rent on 1-4-1997, the

same is bonafide in the facts and circumstances stated hereinabove and deserves to be condoned.

7. That there was neither malafide nor contumacy in the deposit of rent on 1-4-1997 especially in the peculiar facts and circumstances stated hereinabove. Since, the suit was dismissed by learned trial judge also on ground under Section 12(1)(a) of the Act there was no earlier occasion to submit the application for condonation of delay. However, the suit having been now decreed incorrectly and illegally by the lower appellate court, the present application is being submitted with the memo of appeal in the alternative by way of abundant precaution.

It is, therefore, prayed that this Hon'ble Court may kindly be pleased to allow the application and treat the deposit of rent vide receipt No. 62/1076 dated 1-4-1997 in compliance of Section 13(1) of the M.P. Accommodation Control Act, after condoning the delay and/or by extending the time upto 1-4-1997.

The application is supported by an affidavit of Miss Gurusharan Kaur, who claims herself to be the Counsel of Original defendant who is her brother also. The affidavit reads as under :

"AFFIDAVIT

Name : Miss Gurusharan Kaur
Father's Name : Shri G.S. Sachdeva
Age : 39 years
Occupation : Advocate
Residence : Azad Nagar, Morar, Gwalior (M.P.)

I state on oath that :-

1. That I was one of the Counsels of defendant/appellant in the courts below who is my brother.

2. That, I am also acquainted to the facts of the case. The summons of the civil suit was served upon my brother on 27-2-1997. On 29th and 30th March 1997, the Courts were closed on account of Saturday and Sunday. I on behalf of the defendant obtained permission from the trial Court to deposit the whole of the arrears of rent

for a period of 11 months. However, the C.C.D. Section refused to accept the amount of rent on the ground that it was the last day of financial year and the money transactions were not allowed due to the work of audit and balancing. Accordingly, I deposited the amount of rent on 1-4-1997 vide receipt No. 62/1076.

3. That, I have inspected record of C.C.D. Section pertaining to the year 1997 and found that money deposits were not allowed on last working day of every calendar month as usual practice on account of the work of monthly audit and balancing.

4. That, during the pendency of the litigation all the deposits of rent were made by me. The chart containing the particulars of deposits is being submitted herewith which reveals that no default was committed and the rent was deposited in total compliance of Section 13(1) of the Act in a regular manner.

5. That the deposit made on 1-4-1997 was bonafide and there was neither malafide nor contumacy in the initial deposit of whole of the arrears of rent on 1-4-1997.

Deponent"

19. Thus, the case of the appellants is that the last date for depositing the arrears of rent under Section 13(1) of M.P. Accommodation Control Act was 29th of March 1997 and since, it was a holiday and 30th of March 1997 was also holiday being Sunday, therefore, the next opening day was 31st of March 1996. Since, it was closing day of the financial year, therefore, the C.C.D. did not accept the rent and accordingly the arrears of rent were deposited on 1st of April 1997 and thus, there was no delay on the part of the appellant in depositing the entire arrears of rent and it was prayed that the deposit of rent vide receipt No. 62/1076 dated 1-4-1997 in compliance of Section 13(1) of M.P. Accommodation Control Act, may be either treated within a period of one month or the time may be extended till 1-4-1997, after condoning the delay.

20. In reply, the contentions were denied. It was denied that

29th of March 1997 was the last date for depositing the arrears of rent. It was prayed that in fact 27th of March 1997 was the last date for deposit of arrears of rent and on the said date, the Courts as well as the C.C.D. Section were functioning. Secondly, the ground of non-acceptance of arrears of rent by C.C.D. Section of the District Court on 31st of March 1997 has been raised for the first time in the Second Appeal, therefore, the same cannot be allowed to be raised belatedly.

21. This Court by order dated 25-7-2008 observed as under :

> "M.C.P. No. 1202/2003, an application for condonation of delay in depositing of rent shall be consider at the time of final hearing of the appeal."

22. Therefore, I.A. No. 1202/2003 shall be considered before proceeding further with the appeal.

23. It is the claim of the appellant that 29th of March 1997 was the last date for depositing the arrears of rent as the defendant had received the notice of suit on 27-2-1997 and under Section 13(1) of M.P. Accommodation Control Act, the arrears of rent can be deposited within a period of 30 days from the date of receipt of summons of suit.

24. The words "30 days" are no where mentioned in Section 13(1) of M.P. Accommodation Control Act and only if the tenant deposits the arrears of rent within "one month" from the service of summons or notice, then as provided under Section 13(5) of the Act, 1961, he is entitled for protection against eviction.

25. Thus, it is clear that the arrears of rent are required to be deposited within a "period of one month" and not "30 days" as suggested by the appellant.

26. The word "Month" has been defined under Section 2(23) of M.P. General Clauses Act which reads as under :

> "2(23) "month" means a month reckoned according to the British calendar."

27. In the case of **Mistry Bhikhalal Bhovan** Vs. **Sunni Vora Noormamad Abdul Karim and others** reported in **AIR 1978 Gujarat 149**, it has been held as under :

> "4. In common parlance, the term 'month' is hardly understood as a calendar month according to the Gregorian calendar, but it by and large means "space of time from a day in one month to the corresponding day in the next". This is the meaning of the term 'month' given in the Concise Oxford Dictionary, 1964 Edition. The term 'month' has been explained also in the Bombay General Clauses Act, 1904. The term 'month' as defined in S. 2 (30) of the Bombay General Clauses Act, means "a month reckoned according to the British Calendar." The term "reckoned" is equivalent of the term "calculated" or "counted". If the legislature wanted the month to mean only a compact unit of a calendar month, the normal definition would have been as a British Calendar month or a calendar month. The elaborate explanation given in the definition of the term 'month' and particularly the reference to calculation clearly and pointedly suggest that what is intended to be referred to by the term is a space of time between the two dates of the two contiguous months."

28. Therefore, if one month from the date of service of summons is calculated, then according to the appellant themselves, the summons were served on 27-2-1997, therefore, 27th of March would be the last date for depositing the entire arrears of rent. It is not the case of the appellant that 27th of March 1997, was a holiday or closed, therefore, there was no impediment for the appellant/defendant to deposit the entire arrears of rent on 27th of March 1997, in order to claim protection from eviction on the ground of arrears of rent. However, the arrears of rent were not deposited on 27th of March.

29. Further more, it is the case of the appellant that 29th March 1997 was the last date and since, it was a holiday therefore, the next opening day was 31st of March 1997 as 30th of March 1997 was also a holiday. It is pertinent to mention here that no application whatsoever, was filed by the defendant before the Trial Court for extension of time in depositing the arrears of rent under Section 13(1) of M.P. Accommodation Control Act. No such application was filed before the Lower Appeal Court also, and the application under Section 13(1) of M.P. Accommodation Control Act has been filed for the first time, before the High Court in this appeal. It is mentioned in the application that on 31st of March 1997 the amount of rent offered by the Counsel for the defendant was not accepted by the C.C.D. Section inspite of the permission given by the Trial Court. An affidavit of Ms. Gurusharan Kaur has also been filed in this regard. The application (I.A. No. 1202/2003) is not supported by an affidavit of the appellant, but it is supported by an affidavit of Ms. Gurusharan Kaur who claims herself to be the Counsel for the defendant before the Trial Court as well as the sister of the defendant.

30. Before considering the application (I.A. 1202/2003) at such a belated stage, it would be proper to consider that whether the defendant had laid down any foundation before the Trial Court pointing out that the arrears of rent were sought to be deposited on 31st of March 1997, but the same were not accepted by the C.C.D. Section.

31. In the entire written statement, there is not a single whisper with regard to the attempt of depositing arrears of rent on 31st of March 1997. It is submitted by the Counsel for the appellant that Harbhajan Singh (D.W.1) in his evidence has stated that he has deposited the rent subsequently in the Court, which should be construed that an attempt was made on 31st of March 1997 and thereafter it was deposited on 1st of

April 1997. The submission made by the Counsel for the appellant cannot be accepted. Harbhajan Singh (D.W.1) has stated in para 2 of his examination in chief as under :

> "2..... मेरे द्वारा 31 अक्टूबर 2001 तक का किराया अदा किया जा चुका है। मेरे द्वारा जो किराया मनीआर्डर से भेजा गया उसके बाद से कोर्ट मे जमा किया गया है।''

32. Thus, the interpretation of the above mentioned evidence, as suggested by the Counsel for the appellant cannot be accepted. Further more, the burden to prove that the arrears of rent were deposited within "a period of one month" from the date of service of summons is on the tenant. Sections 102 and 106 of Evidence Act reads as under :

> **"102. On whom burden of proof lies.**—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> **106. Burden of proving fact especially within knowledge.**—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

33. Thus, it was obligatory on the part of the defendant to laid down a foundation to the effect that the amount of entire arrears of rent were given to his Counsel and an attempt was made to deposit the same on 31st of March 1997 and later on it was deposited on 1st of April 1997. There is no evidence, even to the effect that the defendant had ever instructed his counsel or had given any money to his counsel to deposit the arrears of rent. In view of Section 106 of Evidence Act, it was well within the knowledge of the defendant that whether he had given any amount to his Counsel or not, therefore, the burden to prove this fact was on the defendant. It is not out of place to mention here that even the I.A. No. 1202/2003 which is an application seeking extension of time under Section 13(1) of M.P. Accommodation Control Act, is not supported by an affidavit of

the appellant/defendant. Thus, it is clear that the defendant never came forward to submit that any attempt was ever made by him through his Counsel to deposit the arrears of rent. The affidavit filed by Ms. Gurusharan Kaur cannot be accepted, because She herself has stated in the affidavit that the defendant is her brother. Therefore, Ms. Gurusharan Kaur is personally interested in the matter and in absence of any foundation at any point of time, this Court is of the considered opinion that the reasons mentioned in the application for extension of time under Section 13(1) of M.P. Accommodation Control Act (I.A. No. 1202/2003) is an after thought and in fact the appellant/defendant did not try to deposit the arrears of rent on 31st of March 1997.

34. After the hearing of the appeal was concluded, the Counsel for the appellant has filed a letter dated 14-10-2017 issued by the Office of Nazrat, District Court, Gwalior under the Right of Information Act, informing the Public Information Officer, District Court, Gwalior that on 31-3-1997, as per the C.C.D. Income Register, no amount was deposited

35. By filing this letter, the appellants want to establish that no cash amount was accepted by the C.C.D. Section of District Gwalior on 31-3-1997, therefore, the appellants are right in submitting that their deposit of the entire arrears of rent on 1-4-1997 should be treated as within the period of one month. The document so filed by the appellants cannot be accepted, for the simple reason, that the said document has not been filed along with an application under Order 41 Rule 27 of C.P.C. but has been filed along with a printed list of document. At the appellate stage, if any party wants to file any additional evidence, then the same can be done only along with an application under Order 41 Rule 27 of C.P.C. and any document cannot be filed without there being any proper application. A printed list of document, cannot be treated as an application

under Order 41 Rule 27 of C.P.C. An additional evidence cannot be filed at the appellate stage by way of right, but leave has to be obtained explaining the reason for not filing the said evidence at the earliest. Order 41 Rule 27 of C.P.C. reads as under:

> **"27. Production of additional evidence in Appellate Court**.— (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—
>
> (*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (*aa*) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
>
> (*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
>
> the Appellate Court may allow such evidence or document to be produced or witness to be examined.
>
> (2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission
>
> MADHYA PRADESH STATE AMENDMENT.— After sub-rule (1)(*a*), *insert* the following as clause (*b*) and *renumber* the existing clause (*b*) as clause (*c*):
>
> "(*b*) the party seeking to adduce additional evidence satisfies the appellate court that such evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at or before the time when the decree or order under appeal was passed or made; or"

36. Thus, it is also obligatory on the part of the party intending to file additional evidence at appellate stage, to

satisfy the Court that notwithstanding the due diligence, such evidence was not within his knowledge or could not be produced by him at or before the time, when the decree under appeal was passed. In the present case, not even an application under Order 41 Rule 27 of C.P.C. has been filed. No explanation has been given as to why such a document was not produced at the initial stage. Even no such defence was taken by the appellant at the initial stage. Further more, the question is that whether any attempt was made by the appellant/defendant to deposit the arrears of rent on 31st of March 1997 or not? It is submitted by the Counsel for the respondent, that no money can be deposited in the C.C.D. Section without obtaining permission from the Court and an application is necessary for obtaining permission. Had the appellant approached the Court for seeking permission to deposit the rent, then the defendant could have produced the copy of the application which was made to the Court seeking permission to deposit the arrears of rent.

37. Rule 466(2) under Chapter XXII of Rules under M.P. Civil Court Act, 1958 reads as under :

> "466(2) When an application for leave to deposit money is received, the Court will pass an order that the sum be accepted as a deposit. The reader or the clerk concerned should thereupon endorse on the application an order to the Nazir to receive the money. The application should then be given to the applicant to be presented with the money to the Nazir. The Nazir will receive the money, take it into his account and endorse a report of having done so on the application which will be immediately returned through his peon to the Court."

38. In the case of **Bhagwandas Tiwari Vs. Gayaprasad and others** reported in **1973 JLJ 469,** it has been held by the High Court, as under :-

> "2..... According to the Rules and Orders, Chapter XXII paragraph 466, a person intending to make a deposit in Court has to make an application on which the presiding officer has to pass an order before a deposit can be accepted by the cashier. An order of the presiding officer is, therefore, necessary for making a deposit in Court....."

39. As no document has been filed by the appellant to show that permission was sought by the appellant from the Court, therefore, it is clear that the claim of non-acceptance of the arrears of rent by the C.C.D. Section on 31st of March 1997 is nothing but an afterthought. A co-ordinate bench of this Court in the case of **Shri Bhagwan Gupta and another Vs. Dilip Kumar Gupta,** passed in **S.A.No. 260/1999** has held as under :

> "10. In the said facts of the case, it is held that rent has not been deposited within time and the provisions of Section 13(1) of M.P. Accommodation Control Act were not complied with. As such Courts have committed error in not passing decree under Section 12(1)9a) of M.P. Accommodation Control Act. Question of law No.3 is answered accordingly. Since, rent was not deposited within time and defendant can not take advantage of depositing rent at his pleasure or at his sweet will. He is bound to deposit rent according to law. On his failure to deposit the rent in time and without seeking leave of the Court for condoning the delay in payment of rent, he is entitled to suffer decree for eviction. Question of law No.3 is answered in affirmative ....."

40. The Counsel for the appellant has relied upon the judgment passed by a Co-ordinate bench of this Court in the case of **Ram Kishan Vs. Baburam Jain** reported in **1979 MPRCJ 131** and submitted that where the Nazir has refused to deposit the arrears of rent, then decree of eviction cannot be passed. The facts of the said case are distinguishable and

hence not applicable. In the case of **Ramkishan (Supra),** the tenant approached the Nazir with the amount, but the Nazir expressed his inability to get the amount deposited in the treasury or the State Bank of India on that date for the reason that 31st March was the account-closing-day and financial transactions on the aforesaid date were not being effected according the rules and practice adopted by the treasury and the Bank. The Nazir accordingly made a note that under these circumstances, the amount will be actually deposited on 2nd April, the next working day. Considering the factual matrix of the case, it was held by the Court, that the defendant had substantially done all efforts on his part and has complied with the requirements and it can safely be held that he had deposited the amount on 31st March irrespective of the fact that due to certain rules and practice of the treasury and the Bank, the actual deposit could take place on 2nd April. However, in the present case, neither any application seeking permission to deposit the arrears of rent on 31st of March 1997 is on record, nor there is any factual foundation in this regard. It is only in the second appeal, the appellant has come up with a plea that since, 31st of March was closing day of the financial year, therefore, the amount could not be deposited. As already mentioned that such an application is neither supported by an affidavit of the appellant, nor there is any whisper in this regard in the evidence of Harbhajan Singh (D.W.1).

41. The Supreme Court in the case of **Sayeda Akhtar Vs. Abdul Ahad** reported in **(2003) 7 SCC 52** has held as under :

> **"5.** Section 13 of the M.P. Accommodation Control Act, 1961 reads as under:
>
> "13. (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further

> time as the court may, on an application made to it, allow in this behalf, deposit in the court to pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.
>
> * * *
>
> (6) If a tenant fails to deposit or pay any amount as required by this section, the court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."
>
> **6.** A bare perusal of the aforementioned provision would clearly go to show that although the court has the jurisdiction to extend the time for depositing the rent both for the period during which the tenant had defaulted as well as the period subsequent thereto but an application is to be made therefor. The provision requiring an application to be made is indisputably necessary for the purpose of showing sufficient cause as to why such deposit could not be made within the time granted by the court. The court does not extend time or condone the delay on mere sympathy. It will exercise its discretion judicially and on a finding of existence of sufficient cause."

42. The Supreme Court in the case of **R.C. Tamrakar and another Vs. Nidi Lekha** reported in **2002 (2) JLJ 69** has held as under :

> "8..... In the first appellate Court, rent was deposited and it was not clear whether he continued to deposit the rent as per sub-section (1) of Section 13. The first appellate Court set aside the findings of defaulter on the ground that the rent was deposited in the appellate Court. The High Court was of opinion that after the trial Court passed the

> decree holding that the tenant was in arrears of rent, mere depositing the amount without filing an application for extension of time for payment of all the arrears of rent due, the finding of the appellate Court that tenant was not a defaulter is not sustainable. The High Court further recorded that the first appellate Court did not give any finding that entire amount of arrears of rent was paid. This finding of the High Court cannot be faulted in view of clear provision of sub-section (1) of section 13 and therefore, tenant is not entitled to get protection under sub-section (5).”

43. A co-ordinate Bench of this Court in the case of **Rajendra Kumar Vs. Smt. Kasturibai** reported in **ILR 2009 MP 1067** has held that application for condonation of delay cannot be entertained after a lapse of a long period of time of committing the default.

44. As the defendant did not file an application before the Trial Court for extension of time, nor laid down any foundation in this regard, therefore, the application for extension of time, filed for the first time before this Court cannot be accepted. The reason for not filing the application before the Trial Court, cannot be accepted. Thus, the application for extension of time filed under Section 13(1) of C.P.C. (I.A.No.1202/2003) is hereby rejected.

45. Even otherwise, as already held by this Court that the last date for depositing the arrears of rent under Section 13(1) of M.P. Accommodation Control Act was 27th of March 1997 and on the said date, the Court as well as the C.C.D. Section of the District Gwalior were working. No explanation has been given as to why the rent was not deposited on 27th and 28th of March 1997.

46. The necessary consequence of dismissal of application for extension of time (I.A. No. 1202/2003) would be that the provision of Section 13(1) of M.P. Accommodation Control Act

was not complied with and the arrears of rent were not deposited within "a period of month" from the date of service of summons, therefore, the appellant cannot seek protection from the decree of eviction under Section 12(1)(a) of M.P. Accommodation Control Act, 1961.

47. Thus, the Substantial Questions of Law No. (i) and (iii) are answered in **Negative.**

(ii) Substantial Question of Law

(ii) Whether the discretion exercised by the learned trial judge in condoning the delay has been illegally interfered with by the learned Lower Appellate Judge?

48. The Trial Court has condoned the delay of few days in depositing the arrears of rent by the defendant and had extended the protection from the eviction decree under Section 12(1)(a) of M.P. Accommodation Control Act. As already pointed out, no application was made by the defendant seeking extension of time in depositing the arrears of rent. No foundation was laid down by the defendant before the Trial Court to point out that whether 31st of March of 1997 was the last date for depositing the arrears of rent, and whether any attempt was made by the defendant to deposit the arrears on a day which according to him was the last date of month. Section 13(1) of M.P. Accommodation Control Act provides, that the Court on an application may extend the time. Thus, it is clear that an application seeking extension of time is must. Once, the arrears of rent are not deposited within "a period of one month" from the date of service of summons, then the tenant is not entitled for protection which means, that the plaintiff becomes entitled for a decree of eviction under Section 12(1)(a) of M.P. Accommodation Control Act, thus, the Trial Court without issuing notice and hearing the plaintiff, and without there being any application for extension of time,

should not have condoned the delay of few days in depositing the arrears of rent. The valuable right of a decree of eviction under Section 12(1)(a) of M.P. Accommodation Control Act, which had accrued in favor of the plaintiff cannot be taken away without following the procedure as provided under the law. It appears that the Trial Court got impressed by the fact that there was a delay of few days and there after the tenant did not commit any default in depositing the rent, therefore, suo moto condoned the delay in depositing the rent under Section 13(1) of M.P. Accommodation Control Act.

49. The Supreme Court in the case of **Sayeda Akhtar (Supra)** has held as under:

> **"7.** In *Nasiruddin* v. *Sita Ram Agarwal [(2003) 2 SCC 577]* this Court noticed the said provision as well as the decision in *Shyamcharan Sharma* v. *Dharamdas [(1980) 2 SCC 151]* and observed that the court has been conferred the power to extend the time for deposit of rent but on an application made to it."

As the Trial Court did not have suo moto power to extend the time in depositing the rent, therefore, the Trial Court did not have any discretion to condone the delay without there being any application for the said purpose. Therefore, this Court is of the considered opinion that in absence of any application seeking extension of time, the Trial Court did not have the power to condone the delay in depositing the arrears of rent and thus, the appellate Court did not commit any mistake in setting aside the condonation of delay by the Trial Court. Accordingly, the second Substantial Question of law is also answered in **Negative.**

50. Whether the learned Courts below erred in not decreeing the suit on the ground under Sections 12(1)(c) and 12(1)(f) of the M.P. Accommodation Control Act?

51. The Trial Court as well as the Appellate Court did not

grant decree under Section 12(1)(f) of M.P. Accommodation Control Act. Although in the Substantial Question of Law, 12(1)(c) is also mentioned, but the suit was never filed, seeking eviction on the ground of Section 12(1)(c) of M.P. Accommodation Control Act. It is contended by the Counsel for both the parties, the in fact the Substantial Question of Law, in respect of ground under Section 12(1)(c) of M.P. Accommodation Control Act, has been incorrectly framed.

52. So far as the eviction on the ground of bonafide requirement for non-residential purposes is concerned, it is submitted by the Counsel for the respondent, that during the pendency of the suit, the plaintiff/ respondent, had amended the pleadings, and the appellants/defendant did not file reply to Para 4A of the plaint, therefore, it should be presumed, that the said pleadings are admitted by the appellants/defendant and therefore, the Courts below committed manifest error in not granting decree under Section 12(1)(f) of M.P. Accommodation Control Act.

53. *Per contra*, it is submitted by the Counsel for the appellants/ defendant that the plaintiff/respondent has failed to prove his bonafide requirement for non-residential purposes. Further, both the Courts below have given a concurrent findings of fact, and since, the same are not perverse therefore, cannot be interfered with, merely on the ground that another view was possible.

54. Heard the learned Counsel for the parties.

55. *Bona fide* requirement for non-residential purpose, is a findings of fact and both the Courts below have given a concurrent findings of fact.

56. The Supreme Court in the case of **Damodar Lal Vs. Sohan Devi and others** reported in **(2016) 3 SCC 78** has held as under :

> **"8.** "Perversity" has been the subject-matter

of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In *Krishnan* v. *Backiam*, it has been held at para 11 that: (SCC pp. 192-93)

"*11*. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In *Gurvachan Kaur* v. *Salikram*, at para 10, this principle has been reiterated: (SCC p. 532)

"*10*. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

57. The Supreme Court in the case of **Pakeerappa Rai Vs. Seethamma Hengsu Dead by L.R.s and others** reported in **(2001) 9 SCC 521** has held as under :

"2..... But the High Court in exercise of power under Section 100 CPC cannot interfere

with the erroneous finding of fact howsoever gross the error seems to be.....”

58. The Supreme Court in the case of **Gurdev Kaur Vs. Kaki** reported in **(2007) 1 SCC 546** has held as under :

> **“46.** In *Bholaram* v. *Ameerchand* a three-Judge Bench of this Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.
>
> **47.** In *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* a three-Judge Bench of this Court held: (*a*) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (*b*) reasons for permitting the plea to be raised should also be recorded; (*c*) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The Court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.
>
> **48.** This Court had occasion to determine the same issue in *Dnyanoba Bhaurao Shemade* v. *Maroti Bhaurao Marnor*. The Court stated that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law.
>
> **49.** A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 CPC only on the

basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this Court, some of them being, *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* and *Sheel Chand* v. *Prakash Chand* that the judgment rendered by the High Court under Section 100 CPC without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

50. In *Kanai Lal Garari* v. *Murari Ganguly* this Court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In *Panchugopal Barua* v. *Umesh Chandra Goswami* and *Santosh Hazari* v. *Purushottam Tiwari* the Court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of *K. Raj* v. *Muthamma*. A statement of law has been reiterated regarding the scope and interference of the Court in second appeal under Section 100 of the Code of Civil Procedure.

51. Again in *Santosh Hazari* v. *Purushottam Tiwari* another three-Judge Bench of this Court correctly delineated the scope of Section 100 CPC. The Court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the Court. In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the Court the word substantial, as qualifying "question of law",

means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code and Article 133(1)(*a*) of the Constitution.

52. In *Kamti Devi* v. *Poshi Ram* the Court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

53. In *Thiagarajan* v. *Sri Venugopalaswamy B. Koil* this Court has held that the High Court in its jurisdiction under Section 100 CPC was not justified in interfering with the findings of fact. The Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

54. In the same case, this Court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court further observed that the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

55. This Court again reminded the High Court in *Commr., HRCE* v. *P. Shanmugama* that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

56. Again, this Court in *State of Kerala* v. *Mohd. Kunhi* has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

57. Again, in *Madhavan Nair* v. *Bhaskar Pillai* this Court observed that the High Court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

58. Again, in *Harjeet Singh* v. *Amrik Singh* this Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 CPC. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

59. In *H.P. Pyarejan* v. *Dasappa* delivered on 6-2-2006, this Court found serious infirmity in the judgment of the High Court. This Court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This Court found that the impugned judgment of the High Court was vulnerable and needed to be set aside."

59. The Supreme Court in the case of **Municipal Committee, Hoshiarpur Vs. Punjab SEB,** reported in **(2010) 13 SCC 216** has held as under:-

> **"16.** Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari* v. *Purshottam Tiwari*; *Sarjas Rai* v. *Bakshi Inderjit Singh*; *Manicka Poosali* v. *Anjalai Ammal*; *Sugani* v. *Rameshwar Das*; *Hero Vinoth* v. *Seshammal*; *P. Chandrasekharan* v. *S. Kanakarajan*; *Kashmir Singh* v. *Harnam Singh*; *V. Ramaswamy* v. *Ramachandran* and *Bhag Singh* v. *Jaskirat Singh*.)
>
> **17.** In *Mahindra & Mahindra Ltd.* v. *Union of India* this Court observed*:

> "*12*. … it is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be 'satisfied' that the case involves a 'substantial question of law' and not a mere 'question of law'. The reason for permitting the substantial question of law to be raised, should be 'recorded' by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded." [*Kshitish Chandra Purkait* v. *Santosh Kumar Purkait*, (1997) 5 SCC 438, pp. 445-46, para 10]

18. In *Madamanchi Ramappa* v. *Muthaluru Bojjappa* this Court observed: (AIR pp. 1637-38, para 12)

> "*12*. … Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in

second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

19. In *Jai Singh* v. *Shakuntala* this Court held as under: (SCC pp. 637-38, para 6)

"*6*. … it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible — it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

20. While dealing with the issue, this Court in *Leela Soni* v. *Rajesh Goyal* observed as under: (SCC p. 502, paras 20-22)

"*20*. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.

21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:

* * *

22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations: (*1*) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (*2*) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

21. In *Jadu Gopal Chakravarty* v. *Pannalal Bhowmick* the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103 CPC to go into the question. (See also *Achintya Kumar Saha* v. *Nanee Printers*.)

22. In *Bhagwan Sharma* v. *Bani Ghosh* this Court held that in case the High Court exercises its jurisdiction under Section 103 CPC, in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(*b*) CPC and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under: (*Bhagwan Sharma case*, SCC p. 499, para 5)

"*5*. … The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to

the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment."

23. In *Kulwant Kaur* v. *Gurdial Singh Mann* this Court observed as under: (SCC pp. 278-79, para 34)

"*34*. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the *issue of perversity vis-à-vis the concept of justice*. Needless to say however, that perversity itself is *a substantial question* worth adjudication — what is required is a categorical finding on the part of the High Court as to *perversity*. …

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 *since the issue of perversity will also come within the ambit of substantial question of law as noticed above*. The legality of finding of fact cannot but be termed to be a question of law. We

> reiterate however, *that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with*."

60. The Supreme Court in the case of **Sarvate T.B. Vs. Nemichand** reported in **1965 JLJ 973** has held as under :

> "6..... The burden of proving that he genuinely requires non-residential accommodation within the meaning of Section 4(h) therefore, lies upon the landlord. Whether in a given case, that burden is discharged by the evidence on the record is a question of fact."

61. In Second Appeal, the reappreciation of evidence and interference with the findings of fact is not permissible. This Court can interfere with the concurrent findings of fact, only when a Substantial Question of law arises. If the Courts below have neither ignored any material fact, nor has considered any inadmissible evidence, then this Court cannot interfere with the concurrent findings of fact.

62. In the present case, the plaintiff/respondent, amended the plaint, even after recording of his evidence and inserted the following paragraph :

> "4(अ) यह कि वादी ने अपने बेरोजगार पुत्र को मजबूरीवश बलवंत नगर मे रामाधार के मकान मे एक दुकान 1000 रूपये माहवार से किराये पर ले ली है और उसे व्यवसाय करा रहा है। उपरोक्त परिस्थिती से स्पप्ट है कि वादी का अपने पुत्र के व्यवसाय हेतु विवादित दुकान की सद्भावना पूर्वक अति आवश्यक है।''

63. It is submitted by the Counsel for the respondent/plaintiff that since, the amended pleadings were not denied by the appellants/defendant, therefore, the Trial Court should have granted decree on the ground of bona fide requirement for non-residential purposes.

64. In para 4A, the plaintiff/respondent, did not mention that from what date, the son of the plaintiff had taken a shop on rent at Balwant Nagar, belonging to Ramadhar. Even the Landlord of the said shop was not examined. The son of the plaintiff was re-examined after the amendment was allowed. Prashant (P.W.2) is the son of the plaintiff. He had produced a rent receipt, Ex. P8-A. The said rent receipt was challenged by the appellants/defendant and Prashant (P.W.2) was cross examined in detail in this regard. Prashant (P.W.2) has admitted that the similar receipt books are available in the market. The number of the receipt is also not mentioned. He also admitted that Ramadhar is hale and hearty and is resident of Gwalior itself. Thereafter, certain questions were put to Prashant (P.W.2) with regard to his business. This witness has stated that he has taken a connection of Airtel Company, but admitted that he has not filed any document in this regard. Even Mahesh Prasad (P.W.1)/plaintiff has admitted in his evidence, that no document was filed by him in order to show that his son has taken a connection of Airtel Company, so as to run his business of S.T.D. and P.C.O. However, certain receipts, which were of period subsequent to the date of cross-examination of the plaintiff Mahesh (P.W.1) and Prashant (P.W.2), allegedly issued by Airtel Company, were shown to Harbhajan Singh (D.W.1) and he denied the same for want of knowledge. Although the defendant had denied the documents, but still the receipts were marked as Ex. P.9 to P.18. In the considered opinion of this Court, the documents were wrongly marked as Ex. P.9 to P.18. When a specific question was put to the Counsel for the respondent/plaintiff, that when the defendant had not admitted the receipts, then whether the receipts marked as Ex. P.9 to Ex P.18 can be treated as proved or not? Then it was rightly replied, that in such a situation, the receipts were to be proved in accordance with law. This Court

in the case of **Narain and others Vs. State of M.P. And others** reported in **1996 JLJ 509** has held as under :

> "3. I take this opportunity to mention another fact which has come to the notice of this Court. When the document is sought to be proved, it is not proved generally in accordance with law. Provisions of Section 47/67 of the Indian Evidence Act are completely ignored. What the Courts do is that documents sought to b e proved are shown to the witness and exhibits are put without any evidence is laid, without pointing out about the person who executed it and whether document was in his hand is signed before him or executed before him or without asserting that the witness is acquainted with his writing or signatures, as case may be. The Courts can mark exhibit immediately it is proved in accordance with law. Documents are to be exhibited when they are proved in accordance with law. They cannot be exhibited merely because, y are shown to the witness. If the law is not followed in this connection, it creates problems to the parties as well as to Higher Courts with respect to proof or disproof of the document."

65. Thus, this Court is of the considered opinion that the Trial Court committed manifest error in marking the receipts Ex. P.9 to P.18, even when the same were denied by the defendant. The plaintiff had not examined any body to prove the said receipts which were marked as Ex. P.9 to P.18. In fact the receipts were shown to the defendant and were thereafter marked as Ex. P.9 to P.18, even when the same were not admitted by the defendant. Thus, it is clear that the plaintiff has failed to produce any documentary evidence in support of his pleading that he had taken a shop on rent in Balwant Nagar and has started his business in the rented accommodation.

66. Thus, it is clear that the arguments advanced by the Counsel for the respondent/plaintiff with regard to the bonafide requirement for non-residential purposes, requires re-

appreciation of fact and the same is not permissible while considering Second Appeal under Section 100 of Civil Procedure Code. The bonafide requirement for non-residential purposes is a finding of fact and since, no substantial question of law arises, therefore, the Substantial Question of Law with regard to the bonafide requirement of the plaintiff for non-residential purposes is answered in **Negative.**

67. Hence, the appeal filed by the appellant against the judgment and decree dated 11-7-2003 passed by VIIth A.D.J., Gwalior in Civil Appeal No. 29A/2002, by which a decree of eviction on the ground of arrears of rent under Section 12(1)(a) of M.P. Accommodation Control Act, has been passed, is hereby **Dismissed**. Similarly the cross objection filed by the respondent/plaintiff against the dismissal of his claim for a decree of eviction under Section 12(1)(f) of M.P. Accommodation Control Act is also **Dismissed** and consequently, the judgment and decree dated 11-7-2003 by VIIth A.D.J., Gwalior in Civil Appeal No. 29A/2002 is hereby affirmed.

68. The appeal as well as the cross objection fail and are hereby **Dismissed.**

69. A decree be drawn in accordance with law.

(G.S. AHLUWALIA)
Judge
(21/12/2017)

(alok)

ALOK KUMAR
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