

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA
ON THE 13th OF JANUARY, 2023
SECOND APPEAL No. 848 of 2022**

BETWEEN:-

**DHEERAJ ROHRA S/O LATE SHRI DAYAL DAS
ROHRA, AGED ABOUT 34 YEARS,
OCCUPATION: MOBILE SHOP (BUSINESS) R/O
BEHIND VIVEKANAND SCHOOL, KATRA
BAZAR, MAIHAR, DISTRICT SATNA (MADHYA
PRADESH)**

.....APPELLANT

(BY SHRI SHREYAS PANDIT-ADVOCATE)

AND

**SHYAM BIHARI PANDEY S/O LATE SHRI LAL
BIHARI PANDEY, AGED ABOUT 75 YEARS,
OCCUPATION: BUSINESS AND
AGRICULTURIST R/O STATE BANK CHOWK,
CHANDI DEVI ROAD MAIHAR DISTRICT
SATNA (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI DHARMENDRA SONI-ADVOCATE)

This appeal coming on for admission this day, the court passed the following:

JUDGMENT

This second appeal, under section 100 of CPC, has been filed against the judgment and decree dated 23.02.2022 passed by the First District Judge, Maihar, District Satna in Regular Civil Appeal

No.600031A/2017, arising out of the judgment and decree dated 17.03.2017 passed by Second Civil Judge, Class-I, Maihar, District Satna in Civil Suit No.4-A/2016, by which the suit filed by the respondent for eviction on the ground of 12(1)(a)(f) and (G) of Accommodation Control Act, has been decreed.

2. The facts, necessary for disposal of present appeal in short, are that the plaintiff is the owner of House No.77/2014 in which the shops are situated. Earlier the house was in the ownership of Smt. Sumitra Bai, the mother-in-law of the plaintiff and on 01.08.1982 the shop in question was let out to Ram Dayal, father of the appellant. The father of the defendant started the business of sale and repair of watches and the rent was increased from time to time. The father of the defendant died in year 2008 and, thereafter, the defendant continued as a tenant of the shop. In the month of July, 2013, the plaintiff informed the defendant that roof of the shop has become weak and it is unsecured, therefore, he should vacate the same so that the reconstruction can be done. But the defendant did not vacate the shop and also stopped making payment of rent. The defendant has also filed a suit for permanent injunction against the respondent. The plaintiff is in need of disputed shop for the bonafide need for non-residential purposes for his children and accordingly, it was prayed that the defendant may be evicted from the shop in question and the arrears of rent may be paid.

3. This appeal has been filed by defendant. The appellant filed his written statement and admitted that the father of the appellant had taken the said shop on rent in the year 1978. The respondent wants to get the shop vacated without there being any bonafide requirement. The

respondent had also beaten the appellant and had also damaged the belongings and accordingly, a report was also lodged in Maihar Police Station, but no action was taken. Therefore, a suit for permanent injunction has been filed. The monthly rent of the shop is Rs.1000/- but neither the shop is in dilapidated condition nor unsuitable for carrying on business. It was further pleaded that the respondent does not have any bonafide requirement and the suit has been filed on incorrect facts.

4. The trial Court after framing issues and recording evidence, decreed the suit on the ground that the respondent is in bonafide need for non-residential purposes as well as the shop is required to be reconstructed and the appellant is in arrears of rent.

5. Being aggrieved by the judgment and decree passed by the trial Court, the appellant preferred an appeal which too has been dismissed by the appellate court.

6. Challenging the judgments and decrees passed by the courts below, by referring to the evidence of Jai Prakash Dwivedi (P.W.2) it is submitted by the counsel for the appellant that in paragraph No.13 of his cross-examination, he had admitted that one shop of the respondent is lying vacant, which at present is being used as drawing room. Thus, it is submitted that the respondent is in possession of alternative and suitable accommodation and the burden is on him to prove that the said alternative accommodation is not suitable/conducive to meet out the bonafide requirement.

7. It is further submitted that after having come to the conclusion that the shop in question is in a dilapidated condition, the courts below

should have given an option of re-entry and, therefore, filed this appeal on the following proposed substantial questions of law:

“A. Whether in absence of any document to prove the rate of monthly rent, the Courts below were justified in holding arbitrarily that the monthly rent of the suit accommodation is Rs.1000/- per month and the defendant is liable to pay arrears of rent @ Rs. 1000/- per month?

B. Whether in absence of any documentary proof regarding the dilapidated condition of the suit accommodation, the Courts below were justified in holding that the suit accommodation is in a dilapidated condition and is unfit for human habitation and the same cannot be repaired without being vacated?

C. Whether in the facts and circumstances of the case, the Courts below were justified in decreeing the plaintiff's claim under Section 12(1)(f) of the Accommodation Control Act, 1961?

D. Whether in view of the admission made by the plaintiff's witness (PW 2) that one shop of plaintiff is lying vacant, the plaintiff is entitled to get decree of eviction under Section 12(1)(F) of the Act of 1961?

E. Whether the failure on the part of the plaintiff to explain non-suitability of alternate accommodation available with him is fatal and disentitles him for grant of decree of eviction under Section 12(1)(f) of the Act of 1961?

F. Whether in view of the fact coupled with the admission of the plaintiff that he is possessed of other shop in the town, the burden is upon the plaintiff to prove that he is not having any other alternate accommodation or the same are not suitable for starting the business as pleaded?

G. Whether the Courts below erred in law and procedure in decreeing the plaintiff's claim relying upon the evidence of power of attorney holder of the plaintiff ignoring the fact that the plaintiff himself has not entered the witness box to prove his case?

H. Whether the present suit for starting business of his nephew is maintainable under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 ?”

8. *Per contra*, the counsel for the respondent has supported the findings recorded by the courts below.

9. Heard the learned counsel for the parties.

10. The Coordinate Bench of this Court in the case of ***Gyasi Nayak Vs. Gyanchandra Jain***, reported in ***2010 (3) MPLJ 203*** has held as under:-

“20. It is apparent from the aforesaid admission of the respondent that he is in possession of some vacant alternate non-residential accommodation of his own in the same building but the same has not been stated in the pleadings of the application. In order to show the bona fide for the alleged need the landlord is duty bound to plead the available vacant accommodation with him and also the circumstance how the same are not suitable to him for the alleged need. It is settled proposition of law that no evidence can be led on a plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings as laid down by the Apex Court in the matter of *Ravinder Singh vs. Janmeja Singh*, reported in (2000) 8 SCC 191.

21. The law is well settled on this question that the landlord is obliged under the law to put forth the account of available alternate accommodation of his own and regarding unsuitability of the same for the alleged need in his pleadings. In the absence of such pleading in view of availability of such alternate accommodation with the landlord the alleged need of the landlord regarding disputed premises could not be held to be bona fide or genuine for passing the decree of eviction against the tenant. Long back taking into consideration the provision of section 12(1)(f) of the Act, which is pari materia of section 23-A(b) of the Act, the Apex Court in the matter of *Hasmat Rai and others vs. Raghunath Prasad*, reported in 1981 *MPLJ (SC) 610 = 1981(3) SCC 103*, has answered the aforesaid question in following verdict:

"10. Section 12 starts with a non-obstante clause thereby curtailing the right of the landlord to seek eviction of the tenant which he might have under any other law and the right of eviction is made subject to the overriding provision of section 12. It is thus an enabling section. In order to avail of the benefit conferred by section 12 to seek eviction of the tenant the landlord must satisfy the essential ingredients of the section. The landlord in this case seeks eviction of the tenant under section 12(1)(f). He must, therefore, establish (i) that he requires bona fide possession of a building let for non-residential purpose for continuing or starting his business; and (ii) that he has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned. The burden to establish both the requirements of section 12(1)(f) is squarely on the landlord. And before an

allegation of fact to obtain the relief required is permitted to be proved, the law of pleadings require that such facts have to be alleged and must be put in issue. Ordinarily, therefore, when a landlord seeks eviction under section 12(1)(f) the Court after satisfying itself that there are proper pleadings must frame two issues namely (i) whether plaintiff landlord proves that he bona fide requires possession of a building let to the tenant for non-residential purpose for continuing or starting his business, and (i) whether he proves that he has no other reasonably suitable non-residential accommodation of his own in the city or town concerned. Without elaborating we must notice a well established proposition that any amount of proof offered without pleading is generally of no relevance."

22. On arising the occasion the aforesaid principle is also followed by this Court in the matter of *Banarsi Devi Jain vs. M. P. Transport Company and another*, reported in 2008(2) *MPLJ* 155 in which it was held as under:

"12. Coming to the question of section 12(1)(f) of the Act regarding bona fide, genuine requirement of disputed premises to the appellant for business and godown of her son is concerned, it is apparent from the plaint that on the date of filing the suit or subsequent to it, at any point of time, the available alternate accommodation, was neither pleaded nor any application in this regard was moved by the appellant. Although in the written statement of the respondents, the plea regarding availability of alternate accommodation is taken by the respondent and on vacating the premises by the tenant of adjoining

premises under execution of the decree from the tenant New Delhi-MP Transport Company, the written statement was amended and such alternate accommodation is also pleaded. In spite of such pleadings, the appellant did not take any steps to put forth the explanation and the accounts regarding unsustainability of such available accommodation by amending the suit. Although in support of the pleadings of alternate accommodation, the witnesses of the respondents did not state anything in their deposition but the witnesses of the appellant were cross-examined on this count. Jai Kumar Jain (PW-1) son of the appellant admitted in para-6 of his deposition that her mother has got possession of the adjoining premises from the other tenant. In view of the settled preposition of the law that the plaintiff like appellant is bound to built-up her case with all probabilities to get the decree she could not be benefited on the weaknesses of the respondent/defendant, the aforesaid admission is sufficient to draw an inference that the appellant has got adjoining alternate accommodation during pendency of the suit and as per available evidence in the lack of any evidence regarding unsuitability of such accommodation for the alleged need, the suit could not be decreed at this stage on this ground by setting aside the findings of the trial Court in this regard. My aforesaid view is fully fortified by the dictum of the Apex Court announced in the matter of *Hasmat Rai and another vs. Ragunath Prasad, 1981 MPLJ (SC) 610 = AIR 1981 SC 1711*.

11. If the facts and circumstances of the case in hand are considered, then it is clear that neither the plaintiff pleaded in his plaint with regard

to availability of alternative vacant shop nor the appellant pointed out the availability of any such shop in his written statement. However, the counsel for the appellant has tried to develop his arguments on the basis of admission made by Jai Prakash Dwivedi (P.W.2) in paragraph No.13 of his evidence.

12. If the evidence of Jai Prakash Dwivedi (P.W.2) is considered, then it is clear that only a suggestion was given to him, which was accepted by him that in one shop the respondent is having drawing room. However, no suggestion was given to any of the plaintiff witness that the said shop was lying vacant on the date of filing of the suit. Even the date on which the said shop fell vacant, has not been clarified by the appellant but one thing is clear that in view of the admission made by Jai Prakash Dwivedi (P.W.2) one shop situated in the same premises, had fallen vacant during the pendency of the suit.

13. Now the next question for consideration is as to whether the said shop is suitable for meeting out the bonafide requirement for non-residential purposes of the sons of the plaintiff or not?

14. Undisputedly, the plaintiff has four sons. The appellant has filed I.A. No.13997/2022, an application under Order 41 Rule 27 CPC. Alongwith the said application, the appellant has filed photographs of the shops. The shop, which is in possession of the appellant, is also clearly visible in the said photographs. From the photographs it is clear that the appellant has extended the shop by installing tent in front of the suit shop and even his sale-counter has been kept out of the shop in question. The another shop, which is visible in the photographs, is that of Hariyana Special Jalebi. It is clear from the said photograph also that

the said shopkeeper has also kept his sale counter outside the shop. Thus, it is clear that the appellant is in possession of a very small shop, which is insufficient for the appellant himself to run his business decently and accordingly, he has been compelled to install a tent in front of the shop and has also kept his sale counter outside the shop. If one shop had fallen vacant during the pendency of the suit, then the only question is that whether the said shop is sufficient to cater the need of non-residential purposes of four sons of the plaintiff or not?

15. Undisputedly, the plaintiff has more shops in the same building and it is his case that after demolishing the shop, he wants to reconstruct a shop for the non-residential purposes for his sons and nephew. The plaintiff cannot be compelled to squeeze himself in a small premises specifically when the said small premises is not sufficient for the appellant himself to run his business in a decent manner. Thus, even if one shop had fallen vacant during the pendency of the suit, still the appellant has failed to prove that the said alternative accommodation is suitable for meeting out the requirement of the sons of the plaintiff for non-residential purposes.

16. Under these circumstances, this court is of the considered opinion that the respondent cannot be non-suited only on the ground of non-disclosure of an alternative but unsuitable accommodation, which fell vacant during the pendency of the suit.

17. So far as the bonafide need for non-residential purposes for his sons and nephews is concerned, no argument is advanced by the counsel for the appellant.

18. It is not the case of the appellant that nephew or sons of the plaintiff are gainfully employed or are running their business. Only a suggestion was given to Santosh Kumar Pandey (P.W.1) that his brother Vipin is doing online business. Both the Courts below have recorded concurrent findings of fact with regard to the bonafide need of the plaintiff. So far as the arrears of rent are concerned, both the Courts below have come to a conclusion that the monthly rent of the shop in question is Rs.1000/- and the same has not been paid from July, 2013.

19. It is well established principle of law that this Court in exercise of power under Section 100 of CPC cannot interfere with the findings of fact unless and until they are perverse and without any record. The Supreme Court in the case of *S.Subramanian Vs. S. Ramasamy and others* reported in (2019) 6 SCC 46 has held as under:

“7.3. As per a catena of the decisions of this Court, while deciding the second appeal under Section 100 CPC, the High Court is not required to reappraise the entire evidence on record and to come to its own conclusion and the High Court cannot set aside the findings of facts recorded by both the courts below when the findings recorded by both the courts below were on appreciation of evidence. That is exactly what is done by the High Court in the present case while deciding the second appeals, which is not permissible under the law.”

20. The Supreme Court in the case of *Thimmaiah and others Vs. Ningamma and another*, reported in (2000) 7 SCC 409 has held as under:

“13. But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal “on the ground of an erroneous finding

of fact however gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie.

15. We have already noted the findings of the trial court as well as the first appellate court on the question of consent. These observations clearly show that there was some evidence in support of the findings of the lower courts. In the circumstances, the High Court was not entitled to reassess the evidence and arrive at a different conclusion. Besides, the onus was on the respondents to prove the fact of Appellant 1's consent. When Items 3 to 6 were being claimed by the respondents to be the self-acquired property of Hiri, it could hardly be contended in the same breath that Appellant 1 had consented to the gift of Items 3 to 6 on the basis that it was coparcenary property and Appellant 1 the only other coparcener."

21. No substantial question of law arises in the present case.

22. *Ex-consequenti*, the judgment and decree dated 23.02.2022 passed by the First District Judge, Maihar, District Satna in Regular Civil Appeal No.600031A/2017 as well as the judgment and decree dated 17.03.2017 passed by Second Civil Judge, Class-I, Maihar, District Satna in Civil Suit No.4-A/2016 are hereby affirmed.

23. The Appeal fails and is hereby **dismissed in limine**.

(G.S. AHLUWALIA)
JUDGE

TG/-