

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS.218 and 552 of 2015****WRIT PETITION NO.218 of 2015**

- 1 Smt. Rama Ben V. Zaveri,
r/o. Mansukh, Near
Sagelkar Super Market,
St. Pedro, Ilhas, Goa.
- 2 Shri Damodar B. Zaveri,
r/o. St. Pedro, but having
its business at Gujarat
Lodge, 18th June Road,
Panaji, Goa.
- 3 Shri Narendra B. Zaveri
- 4 Shri Navnit V. Zaveri
- 5 Shri Kirit B. Zaveri,
All 3 r/o. St. Pedro.
- 6 Smt. Meenakshi D. Zaveri
(deceased) through LR's
- 6(a) Abhijeet D. Zaveri, and his
wife
- 6(b) Mrs. Zankhana A. Zaveri,
- 6(c) Mr. Dhaval Zaveri and his
wife
- 6(d) Mrs. Mitisha D. Zaveri
- 6(e) Mr. Rohan D. Zaveri
All r/o. "Ashutosh",
Esmeralda Greens,
Kadamba Plateau, NH-4,

Bypass Road, Old-Goa,
Goa.

7 Smt. Nalini N. Zaveri

8 Smt. Manish Kirti Zaveri
all 3 r/o. Mansukh,
St. Pedro, Ilhas, Goa.

.... Petitioners.

V/s

1 Ms. Meharoonisa
Farooqui,

2 Mr. Aziz Farooqui,
since deceased
through his LR's

2(a) Mazhar Khan Farooqui,
wife of Jamal Farooqui

2(b) Jamal Farooqui

2(c) Aftab Khan Farooqui

2(d) Marion Farooqui
wife of Aftab Khan
Farooqui
all r/o. A-21, Sand Dunes,
Miramar, Panaji-Goa.

2(e) Mrs. Tasmeen Sheikh,
wife of Khalifa Sheikh,

2(f) Khalifa Sheikh
both c/o Neptune Hotel,
Panaji, Goa.

.... Respondents

Mr. S. G. Dessai, Senior Advocate with Mr. K. Noorani and Mr. J.

Supekar, Advocates for the petitioners.

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the respondents.

WITH
WRIT PETITION NO.552 OF 2015

- 1 Ms. Meharoonisa
Farooqui,
- 2 Mr. Aziz Farooqui,
(since deceased)
through his LR's
- 2(a) Mazhar Khan Farooqui,
wife of Jamal Farooqui
- 2(b) Jamal Farooqui
- 2(c) Aftab Khan Farooqui
- 2(d) Marion Farooqui
wife of Aftab Khan
Farooqui
- 2(e) Mrs. Tasmeen Sheikh,
wife of Khalifa Sheikh,
- 2(f) Mr. Khalifa Sheikh

Both of major age,
residents of c/o Neptune
Hotel, Panaji, Goa.

.... Petitioners

V/s

- 1 Smt. Rama Ben V. Zaveri,
of major age, resident of
Mansukh, Near Sagelkar
Super Market,
St. Pedro, Ilhas, Goa.
- 2 Shri Damodar B. Zaveri,
of major age, resident of
St. Pedro, but having its
business at Gujarat Lodge,
18th June Road, Panaji,
Goa.
- 3 Shri Narendra B. Zaveri
- 4 Shri Navnit V. Zaveri
- 5 Shri Kirti B. Zaveri,
All of major age, residents
of St. Pedro, Ilhas - Goa.
- 6 Smt. Meenakshi D. Zaveri
(deceased) through LR's
- 6(a) Abhijeet D. Zaveri, and his
wife
- 6(b) Mrs. Zankhana A. Zaveri,
- 6(c) Mr. Dhaval Zaveri and his
wife
- 6(d) Mrs. Mitisha D. Zaveri
- 6(e) Mr. Rohan D. Zaveri
All r/o. "Ashutosh",
Esmeralda Greens,
Kadamba Plateau, NH-4,

Bypass Road, Old-Goa,
Goa.

7 Smt. Nalini N. Zaveri

8 Smt. Manish Kirti Zaveri

All of major age, residents
of St. Pedro, Ilhas - Goa.

.... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the petitioners.

Mr. S. G. Dessai, Senior Advocate with Mr. K. Noorani and Mr. J.
Supekar, Advocates for the respondents.

Coram :- M. S. SONAK, J.

Reserved on :- 11th May, 2017

Pronounced on :- 19th May, 2017

JUDGMENT :-

Heard the learned Senior Advocates for the parties. At their request, both the writ petitions are taken up for consideration together and disposed of by a common judgment and order.

2. The petitioners in W.P.No.218/2015 are the tenants of the tenanted premises and the respondents are their landlords. Similarly, the petitioners in W.P.No.552/2015 are the landlords of the very same tenanted premises, of which the respondents are

the tenants.

3. The challenge in both these writ petitions is to the impugned judgment and order dated 29/12/2014 made by a District Judge-I, North Goa, Panaji (Appeal Court). The tenants, vide W.P.No.218/2015 challenge the impugned judgment and order to the extent it orders their eviction on the ground prescribed under Section 22(2)(c) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (R. C. Act) i.e. on the ground of commission of acts which constitute damage as is likely to impair materially the value and utility of the tenanted premises. The landlords, vide W.P.No.552/2015 challenge the very same impugned judgment and order to the extent it dismisses their eviction petition on grounds prescribed under Section 22(2)(b)(i) i.e. transfer of leasehold rights or subletting and under Section 22(2)(b)(ii) i.e. user for a purpose other than that for which the tenanted premises were leased. Accordingly, it is only appropriate that both these petitions are considered and disposed of by a common judgment and order.

4. Mr. S. G. Dessai, the learned Senior Advocate has made the following submissions for and on behalf of the tenants i.e. the petitioners in W.P.No.218/2015 and respondents in W.P.

No.552/2015 :-

a) That rule 9 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Rules 1969 (said Rules) read along with Section 4 of the Goa, Daman and Diu Mamlatdar's Court Act, 1966 (M.C. Act) provide for a period of limitation of one year from the date of first accrual of cause of action to institute an eviction petition. From the bare reading of averments in paragraph 12 of the eviction petition dated 16/01/1999, it is clear that the alleged cause of action to seek eviction under Section 22(2)(c) of the R. C. Act arose for the first time in the year 1994. Mr. Dessai submits that the material on record, in fact, establishes that the alleged cause of action arose before the year 1979. In such circumstances, the Eviction Petition was hopelessly barred by the law of limitation and neither Rent Controller nor the Appeal Court was competent to make the order of an order of eviction therein.

b) Mr. Dessai submits that the contrary view in the decisions of the learned Single Judges of this Court in the case of **Shri Premanand Rajadhyakha Vs. M/s. Menezes and Cia**; 1996(2) GLT 144 and **Shri Vinayak Ranum D. P. Loundo Vs. Ms. Amira Razaq**; W.P.No.777/2011, decided on 05/03/2014, do not represent the correct position in law, particularly since the law laid down by the Supreme Court in the case of **Thirumalai**

Chemicals Ltd Vs. Union of India; (2011)6 SCC 739 that law of limitation is a part of procedural law, has been ignored. He submits that the two decisions require reconsideration and, therefore, if necessary, a reference can be proposed to the Division Bench.

c) There is no finding that the tenants committed any acts of damage to the tenanted premises. In any case, the inference that the acts of the tenants were likely to impair materially the value or utility of the tenanted premises is not at all supportable from the material on record. He submits that the findings, in this regard, are vitiated by clear perversity in the sense the same are based upon no evidence. In any case, Mr. Dessai submits that relevant evidence on record has been ignored and irrelevant circumstances have been excessively emphasized upon. In particular, he submits that mere affixation of kadappa stone on the flooring of the tenanted premises, in place of the earlier cemented flooring, can never be construed as any act of damage, much less any act of damage likely to impair materially the value and utility of the tenanted premises. He submits that there is absolutely no material on record to suggest any demolition of toilet block as was vaguely alleged. He submits that the toilet block is still existing and even a Court Commissioner may be appointed to verify this position. For these reasons, Mr. Dessai submits that there was

absolutely no case made out for order of eviction under Section 22(2)(c) of R. C. Act.

d) Mr. Dessai submits that in order to attract eviction under Section 22(2)(c) of R. C. Act, the landlords have to plead and establish the acts of damage by the tenants. Further, the landlords have to plead and establish that such acts of damage are likely to materially impair the value and utility of the tenanted premises. He submits that in the present case, there are neither any sufficient pleadings nor is there any sufficient material to sustain any such inference. He relies upon **Waryam Singh Vs. Baldev Singh**; (2003)1 SCC 59, **G. Reghunathan Vs. K. V. Varghese**; (2005)7 SCC 517, **Om Pal Vs. Anand Swarup**; (1988)4 SCC 545, **Anil Kumar Vs. Hazari Lal**; (2004)138 PLR 238, **Dinesh Khandelwal Vs. Kundanlal Perumal**; (2010)1 BCR 728, **Associated Hotels Vs. R. N. Kapoor**; AIR 1959 SC 1262, in support of his submissions.

e) Mr. Dessai submits that there are neither any pleadings nor any material to suggest that the tenants have transferred their rights under the lease or sublet the tenanted premises or any portion thereof. The partnership to which the landlords claim, the tenants have sublet portion of the tenanted premises, is a firm comprising the wives of the tenants as partners. There is ample material on record which establishes

that it is the tenants, who are actually undertaking the activity in the tenanted premises. In such circumstances, the Appeal Court was right in declining eviction under Section 22(2)(b)(i) of the R. C. Act. He relies upon the decisions in the case of **Parvinder Singh Vs. Renu Gautam**; (2004) 4 SCC 794 and **Hari Rao Vs. N. Govindachari**; (2005) 7 SCC 643, in support of his submissions.

f) Mr. Dessai submits that the tenanted premises were leased out by the landlords to the tenants some time in the year 1933 for operating *Hospedaria*. In terms of Article 5 of the Legislative Diploma No.1.420, such *Hospedaria* includes Hotel, Boarding House, Guest House in Restaurants, Cafes, Bars, Tea Shops, Pubs and Taverns and Chip Houses. He submits that the purpose for which the lease was created, was a commercial purpose. The tenanted premises were never exclusively let out for the purpose of lodging only. He submits that the tenants after discontinuing the lodging activity, have continued with an activity of sale of sweets and sweetmeats prepared in the tenanted premises. Mr. Dessai submits that this act can hardly be regarded as any change of purpose and may, at the highest, be regarded as change of trade. For these reasons, Mr. Dessai submits that the Appeal Court rightly declined the order of eviction of the tenants on the ground of change of user of the tenanted premises for the purpose other than for which it was leased. He relies upon the

Legislative Diploma No.1.420 and certain decisions to indicate that mere change of trade does not attract eviction under Section 22(2)(b)(ii) of R. C. Act.

g) Mr. Dessai submits that the tenanted premises leased by the landlords to the tenants in the year 1933 or thereabouts. Since the lease deed was executed in the year 1953, even assuming that the year 1953 is taken as starting point, it is clear that the tenanted premises were in need of some reasonable repairs and upkeep, including tiling of the old flooring. He submits that the landlords initially attempted to secure the eviction of the tenants on the ground that they require the tenanted premises for reconstruction of a commercial building. After this attempt failed, a civil suit was instituted to restrain the alleged alterations. Upon denial of a relief of temporary injunction, the landlords abandoned the suit, which was eventually dismissed. Mr. Dessai submits that the landlords seek to evict the tenants even though there are no grounds to secure such eviction. He submits that the husband of the landlady has deposed in the matter on the basis of Power of Attorney, despite having no personal knowledge about the matter. He submits that even in terms of the deposition of the Attorney, it is clear that the existence of the toilet block is reflected in Survey of the year 1979. The eviction petition was hopelessly barred by the law of limitation

and warrants dismissal on the ground of limitation itself. For all these reasons, Mr. Dessai submits that W.P. No.218/2015 may be allowed and W.P. No.552/2015 may be dismissed.

5. Mr. S. D. Lotlikar, the learned Senior Advocate has made the following submissions for and on behalf of the landlords i.e. the respondents in W.P. NO.218/2015 and the petitioners in W.P. No.552/2015 : -

a) The issue of limitation was never raised by the tenants either before the Rent Controller or the Appeal Court. The issue does not arise since no period of limitation has been prescribed under the R. C. Act for instituting eviction petition before Rent Controller. At highest, issue of limitation is a mixed question of law and fact and therefore, cannot be raised for the first time in this Court. The issue of applicability of period of limitation to eviction petition under the R. C. Act stands answered against the tenants not only in the decisions of the learned Single Judges of this Court referred by Mr. Dessai, but also, the decision of the Division Bench of this Court in the case of ***Shri Jose M. Nunes Since Deceased, through Legal Heir & another Vs. Dr. Subhash Kalangutkar***; (1999)3 BCR 663. He submits that none of these decisions require reconsideration on the ground urged by Mr. Dessai since, there can be no blanket proposition that law of

limitation is always a part of the procedural law or never a part of the substantive law. He too relies upon ***Thirumalai Chemicals Ltd.*** (supra) and ***Balwant Singh vs. Jagdish Singh***; AIR 2010 SC 3043 to submit that law of limitation can be regarded as a part of the substantive law. Therefore, he submits that there is no question of introducing any period of limitation, by relying upon certain rules, which again, do not directly provide for any period of limitation. He submits that the period of limitation can never be provided by implication.

b) That there are concurrent findings of facts recorded by the Rent Controller and the Appeal Court that the tenants committed acts of damage as are likely to impair materially the value and utility of the building. He submits that the affixation of tiles upon the cement flooring, has resulted in reduction of size of doors and windows. This, coupled with construction of sheds, has resulted in diminishing the quantity or a light to portions of the tenanted premises. So much so that such portions, which were earlier used for lodging purposes, are now being used as godown. He submits that the demolition of toilets is a serious matter and same is bound to impair materially the value and utility of the tenanted premises. He submits that these findings of facts are supported by the evidence on record. He relies upon ***Celina Coelho Pereira and others Vs. Ulhas Mahabaleshwar***

Kholkar; (2010)1 SCC 217, **Hindustan Petroleum Corporation Ltd Vs. Dilbahar Singh**; (2014)9 SCC 78 and **C.C. Yi Vs. Jankidevi Anantlal Gupta**; (2001)4 BCR 834, to submit that the findings of facts may not be interfered with in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

c) Mr. Lotlikar submits that there are admissions on record to the effect that the portions of the tenanted premises were under the exclusive possession and control of partnership firm comprising of the wives of the tenants. He submits that the tenants were never partners in such partnership firm, but it is only their wives, who were the partners but not themselves the tenants. These admissions, Mr. Lotlikar submits, were sufficient to infer that there was a transfer of right under the lease or sublease of a portion of the tenanted premises in favour of the firm comprising the strangers or at least persons, who were not tenants. He submits that the parties in this case, are from Gujarat and, therefore, were not governed by the Portuguese regime of communion of assets. In such circumstances, the ground for eviction in terms of Section 22(2)(b)(i) of R. C. Act was clearly made out and the Appeal Court, seriously erred in reversing the finding of the Rent Controller, who had rightly made the order of eviction on the said ground as well.

d) Mr. Lotlikar submits that in this case, the landlords had pleaded that the tenanted premises were let out for the purpose of lodging only. Such pleading was never denied by the tenants. In the course of evidence, the tenants have admitted that they have discontinued the activity of lodging. Mr. Lotlikar submits that such admission by itself, was sufficient to order eviction in terms of Section 22(2)(b)(ii) of R. C. Act, on the ground of change of user of the tenanted premises for a purpose other than for which it was leased. In the alternative, Mr. Lotlikar submits that the tenanted premises were leased out for the purpose of lodging and boarding. In this case, lodging was discontinued and accordingly, there was no question of mere boarding. He submits that instead, the tenants virtually commenced a factory or at least manufacturing unit in the tenanted premises for the purpose of production/ manufacture of sweetmeats on large scale and sale of the same to the members of public. He submits that this is a case of change of purpose and not merely a case of change of any trade, as held by the Appeal Court. He submits that the Appeal Court has clearly misread the decision of the Division Bench in the case of **Dr. Francisco Maria de Jesus Lopes Vs. Caetano Jose de Souza**; (1992)2 BCR 698, in the context of true and correct meaning of the term "*Hospedaria*". For these reasons, Mr. Lotlikar submits that the

Appeal Court was not justified in not upholding the eviction ordered by the Rent Controller under Section 22(2)(b)(ii) of R. C. Act.

e) Mr. Lotlikar finally submitted that W.P.No.218/2015 instituted by the tenants may be dismissed and W.P.No.552/2015 instituted by the landlords may be allowed, so that the eviction is ordered on all the three grounds urged by the landlords in their eviction petition.

6. Rival contentions now fall for my determination.

7. The issue of bar of limitation was never raised by the tenants, either before Rent Controller or before the Appeal Court. In the facts and circumstances of the present case, it cannot be said that the issue of limitation is a pure question of law. There are some pleadings that the landlords were staying abroad for a considerable period. There are some averments in relation to the date of knowledge. At best therefore, the issue of limitation involves mixed questions of law and fact. Ordinarily therefore, the tenants cannot be permitted to raise such issue for the first time in this Court. There is however, no necessity to reject the contention based upon limitation on this ground alone. This is because it does appear that the very issue of applicability of law of limitation

to the institution of eviction petition before a Rent Controller stands answered against the tenants in the decision of the Division Bench of this Court in **Jose M. Nunes** (supra).

8. In **Jose M. Nunes** (supra), the Division Bench, after detailed considerations of the provisions of the R. C. Act, the rules made thereunder and the M. C. Act has held that there is no merit in the submission that limitation of one year would apply to the institution of eviction petition before the Rent Controller. The Division Bench has held that rule making power does not authorise the rule making authority to prescribe time limit for filing eviction petition and therefore, the rule of limitation in the M. C. Act cannot be read into the R. C. Act by implication. Besides this, section 4(3) of M. C. Act deals with the situations in respect of which the party affected is required to approach for seeking remedy promptly in respect of which immediate relief is sought. It is in this background that one year's limitation from the date of cause of action is prescribed in the suit before the Mamlatdar. Moreover, restricted meaning to cause of action has been given in section 4(4) of M. C. Act for the purpose of the Act. Accordingly, the provision of section 4 of M. C. Act cannot be imported into the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 by having resort to Rule 9(2) of the said Rules.

9. In addition to the aforesaid, two learned Single Judges of this Court in the case of **Premanand Rajadhyaksha** and **Vinayak Ranum D. P. Loundo** (supra), have also rejected identical contentions based upon the applicability of the bar of limitation to the institution of Eviction Proceedings before Rent Controller. Accordingly, there is no case made out to revisit such issue or propose reference to the Division Bench, particularly, since the decision in the case of **Jose M. Nunes** (supra), is a decision rendered by the Division Bench of this Court. Mr. Dessai's submission that such revisitation is necessary because, the decided cases have ignored the circumstance that the law of limitation is a procedural law and not a substantive law also cannot be accepted.

10. Even in **Thirumalai Chemicals Ltd.** (supra), upon which considerable reliance was placed by Mr. Dessai, it is held that limitation provisions can be procedural in the context of one set of facts, substantive in the context of different set of facts because rights can accrue to both the parties. In such a situation, test is to see whether the Statute, if applied retrospectively to particular type of case, would impair, existing rights and obligations. An accrued right to plead a time bar, which is

acquired after the lapse of statutory period, is nevertheless a right, even though it arises under the Act, which is procedural and a right, which is not to be taken away pleading retrospective operation unless the contrary intention is discernible. Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention, a Statute divesting vested rights is to be construed as prospective.

11. Further, in **Balwant Singh** (supra), the Hon'ble Supreme Court, at para 13, has held that the law of limitation is a substantive law and has definite consequences of the right and obligation of a party to the *lis*. In the facts and circumstances of the present case, it is also not possible to accept Mr. Dessai's contention that the issue of limitation is a pure question of law and not mixed question of law and fact. Taking into consideration such circumstance and the ruling of the Division Bench in the case of **Jose M. Nunes** (supra), Mr. Dessai's first contention that the landlords' Eviction Petition before the Rent Controller was barred by limitation, is required to be rejected.

12. In order appreciate Mr. Dessai's second contention in the context of eviction ordered under Section 22 (2)(c) of R. C. Act, reference is necessary to the provision itself, which reads thus :

“22. Grounds of eviction.— (1) *A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf.*

(2) *If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied —*

[(a) that the tenant is in arrears in payment of rent due by him in respect of the building for a total period of three months and has failed to pay or tender such arrears of rent as are legally recoverable from him within thirty days of the receipt of or of the refusal of a registered notice served on him by the landlord for such arrears; or];

(b) that the tenant has without the written consent of the landlord—

(i) transferred his right under the lease or sub-let the entire building or any portion thereof, or

(ii) used the building for a purpose other than that for which it was leased; or

(c) that the tenant has committed such acts of damage as are likely to impair materially the value or utility of the building; or

(d);

(e)

(f)

(g)”

[Emphasis supplied]

13. The landlord in order to secure eviction of his tenant

under Section 22(2)(c) of R. C. Act, is therefore, required to plead and establish that the tenant has committed such acts of damage as are likely to impair materially the value or utility of the tenanted premises. Provisions, quite similar to the provisions under Section 22(2)(c) of R. C. Act, have been interpreted by the Hon'ble Supreme Court and, therefore, such interpretation will be relevant for appreciating the submissions of the learned Counsel for the parties, in the context of the facts and circumstances of the present case.

14. In **Waryam Singh** (supra), East Punjab Urban Rent Restriction Act, 1949 provided for eviction of a tenant, where Controller was satisfied that the tenant has committed such acts as are likely to impair materially the value or utility of the building or a rented land. In the said case, the premises let out were a shop with verandah. The alteration there, was covering of the verandah by construction of walls on two sides, removal of the original door and affixation of rolling shutter in the front. The Hon'ble Supreme Court, upon analysis of its earlier decisions on the issue has held that merely because some addition/ alterations have been made to the tenanted premises, that by itself, would not amount to impairment in the value or utility of the premises, much less material impairment. The issue of impairment or material

impairment is an inferential fact to be deduced from the proved facts. Further, impairment of value or utility must be judged from the point of view of the landlord and no one else. Finally, it was held that the landlord in the said case had failed to prove that addition/ alterations in question constituted material impairment of value or utility of the tenanted premises and the proof of the facts alleged, was not sufficient to draw the inference of material impairment of the value or utility of the tenanted premises.

15. In ***G. Reghunathan*** (supra), the Supreme Court was called upon to interpret the provisions of Section 11(4)(ii) of the Kerala Buildings (Lease and Rent Control) Act, 1965, empowering the Rent Controller to put the landlord in possession of the tenanted premises if the tenant uses the building in such a manner as to destroy or reduce its value or utility materially and permanently. The allegation against the tenant was that he removed the door and three windows from the walls of the room and closed up those openings. He cut off the rafters in the front to a length of 2 feet. He lowered the level of the floor by one foot. He erected two pillars touching the wall and fixed rolling shutters in front of the shop. All these acts were done without written permission of the landlord. The Hon'ble Supreme Court held that even if the user by the tenant leads to some reduction in the value

and utility of the tenanted premises, eviction cannot be ordered unless it is established that the value or utility of the tenanted premises is materially reduced. This means that the destruction or reduction of utility or value of the building must be of “*reasonably substantial magnitude*”. Some minor destruction or alteration, even if it has resulted in marginal reduction of the value or utility, was not sufficient to secure an order of eviction in favour of the landlord under Section 11(4)(ii) of the Kerala Act.

16. The Supreme Court in the case of **G. Reghunathan** (supra), in the context of the proven facts and after noting that the destruction or damage has to be adjudged from the standpoint of the landlord, held that there was no basis to infer that the tenant has materially or permanently destroyed or reduced the value or utility of the building. In this regard, it was held that the age of the building and the purpose for letting, cannot be ignored. The relevant observations in paragraphs 13 and 14 read thus :

*“13. From the above, it is clear that the question depends on the facts of the case. **The nature of the building, the purpose of the letting, the terms of the contract and the nature of the interference with the structure by the tenant, are all relevant. The destruction or damage has to be adjudged***

from the stand point of the landlord. Let us look at the facts in the present case. The building is 75 years old. According to the tenant, it is 80 years old. The difference is not of any significance. It is the northern room in a building consisting of a number of rooms. It is let out for 15 years for a jewellery trade. The term has, of course, not come into effect for want of registration of the deed. The door in the western wall has been bricked up. The windows on the northern, western and southern walls have also been bricked up. Obviously, the bricked up portions can be removed and the doors and windows restored without weakening the structure. But more importantly, the level of the floor was lowered, the rafters cut, two concrete pillars erected and a rolling shutter fixed. The lowering of the floor and the tampering with of the roof, is of some significance. They could lead to impairment of the value or utility of the building, materially and permanently. That again has to be judged in the light of the surrounding circumstances. But a rolling shutter has been fixed. That provides more security to the premises. **The height of the floor can be restored without impairment to the structure.** Here, we find that the landlord has not even pleaded that the alterations made by the tenant have destroyed or reduced the value or utility of the building materially and permanently. No doubt, he has stated so in his evidence. But the tenant has stated that, considering that it was a jewellery business that was being started, these things had to

*be done. Securing of the premises was essential. He had given to the landlord Rs. 85,000/- as security to be returned, when he vacated the building. The value of the building, if at all, has only been enhanced. In this state of the record, it is not possible to infer that the acts of the tenant have materially and permanently destroyed or reduced the value or utility of the building. **The age of the building cannot be ignored. The purpose of the letting cannot be ignored.***

14. We find that the Authorities below have not approached the question from the proper perspective. They have not given sufficient emphasis to the statutory requirement of the effect being material and permanent. It is "material and permanent". The words are not disjunctive, like in some other Acts. Here the landlord had not proved the material and permanent impairment in value or utility. One suspects that the value and utility are enhanced. The landlord admits that he will get a higher rent if the room is again let out. We are, therefore, satisfied that interference is justified. We hold that the landlord has failed to prove that the acts of the tenant constitute the user of the building in such a manner as to destroy or reduce the value or utility of the building materially and permanently. We set aside the order for eviction under Section 11(4) (ii) of the Act."

[Emphasis supplied]

17. In ***Om Pal*** (supra), the Hon'ble Supreme Court was again concerned with the provision contained in Section 13(2)(iii) of the East Punjab Urban Rent Restriction Act, 1949, which provided for eviction of a tenant for commission of acts as are likely to impair materially the value or utility of the building. In this case, a *Parchhati* was put up by the tenant in the shop, which was leased to him for running Dry Cleaning Laundry for storing clothes before or after their cleaning. The *Parchhati* was made to rest on the walls by means of wooden *ballis* inserted in the wall through holes made therein. There was no dispute on the facts, but the tenant had contended that these alterations were made with the consent of the landlord and in any case, these alterations did not weaken or impair the utility or the value of the shop in any manner. The Rent Controller, Appeal Court and the High Court held that the alteration was not some minor alteration, but substantial structural change in the building and on such basis, ordered the eviction of the tenant. The Hon'ble Supreme Court, however, reversed the Rent Controller, Appeal Authority and the High Court and held that even on the basis of proven facts, no inference can be drawn that the tenant had materially impaired the value or utility of the tenanted premises. The Counsel for the tenant had made reference to the definition of the word "impair" in *Law Lexicon* of P. Ramanatha Aiyar, (Reprint Edition), 1987 at

548, which reads thus :

“Impair. To diminish in quality, value, excellence or strength of a thing.

The word `impair' means to make worse; to weaken; to enfeeble. To make or become worse or less; to lessen reduce or diminish the quantity or quality.”

18. The Hon'ble Supreme Court, in **Om Pal** (supra) considered its earlier decisions in **Om Prakash Vs. Amar singh**; (1987)1 SCC 458, where the words used by the legislation were “materially altered” to hold that the reasonings adopted for considering these words would logically be attracted for considering the words “materially impaired” as well.

19. In **Om Prakash** (supra), it was held that raising of temporary wall of six feet height in a hall in the demised premises without digging any foundation in the floor of the hall so as to convert the hall in to two portions for convenient use without a consent of the landlord and the extension of a preexisting tin sheet on the open land adjacent to the accommodation by constructing a wall made by bricks or mud and enclosing it by bamboo tatters, would not amount to making of any structural change of substantial character either in the form or structure of the accommodation and as such, the construction did not materially

alter the accommodation. It was observed that the expression “materially altered” means a substantial change in the character, form and the structure of the building without destroying its identity. It was further pointed out in the decision that the findings of the Court regarding constructions would be findings of facts, but the question whether the construction materially altered is a mixed question of fact and law, which should be determined on the application of correct principles.

20. The Hon'ble Supreme Court also made reference to its earlier decision in the ***Brijendra Nath Bhargava V. Harsh Wardhan***; (1988)1 SCC 454, where the tenant had constructed a wooden structure inside the showroom, making the showroom a cabin and balcony or *dochhati* on the roof of the cabin with wooden structures inside the cabin to go to the balcony. The Court held that even such construction would not constitute in law, material alterations to the tenanted premises, so as to give cause of action to the landlord for filing a suit for eviction.

21. Following and reiterating the aforesaid principles, the Hon'ble Supreme Court, in ***Om Pal*** (supra) reversed the Rent Controller, Appeal Authority and the High Court and held that the proven facts were not sufficient to infer that the acts complained

were likely to impair materially the value or the utility of the tenanted premises.

22. The Division Bench of this Court in ***Dinesh Khandelwal*** (supra), has discussed in detail the scope of provisions in Section 16(1)(a) of the Maharashtra Rent Control Act, 1999 as well as Section 108(o) of the Transfer of Property Act, 1882 and held that before a construction or an act is alleged to have materially impaired the value and utility of the tenanted premises, the construction or the act should be of such nature as to substantially diminish the value of the tenanted premises either from commercial or monetary point of view or from the utilitarian aspect of the building. For this purpose, it is necessary to examine various factors, such as the age of the tenanted premises, the purpose for which the premises were let out, the perspective of how the act complained of affects the enjoyment and durability of the premises, etc. The decision makes reference to several decisions in the context of determining whether the act complained of really impairs materially the value or utility of the tenanted premises.

23. In ***Gurbachan Singh Vs. Shivalak Rubber Industries***; 1996 2 SCC 626, the Supreme Court in the context of

the provisions in Section 13(2)(iii) of the East Punjab Rent Restriction Act, 1949, which provided for eviction where the tenant committed such acts as are likely to impair materially the value or utility of the building or the rented land, has made the following observations at paragraph 12 :-

"12. Section 13(2)(iii) of the Act which provides a ground for eviction of tenant reads as under :-

"13(2)(iii) - that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land".

A plain reading will go to show that it contemplates that a tenant is liable to eviction who has committed such acts as are likely to impair materially the value or utility of the building or rented land. The meaning of the expression "to impair materially" in common parlance would mean to diminish in quality, strength or value substantially. In other words to make a thing or substance worse and deteriorate. The word "impair" cannot be said to have a fixed meaning. It is a relative term affording different meaning in different context and situations. Here in the context the term "impair materially" has been used to mean, considerable decrease in quality which may be measured with reference to the antecedent state of things as it existed earlier in point of time as compared to a later stage after the alleged change is made or affected suggesting impairment. Further the use of the word "value" means intrinsic worth of a

thing. In other words utility of an object satisfying, directly or indirectly, the needs or desires of a person. Thus, the ground for eviction of a tenant would be available to a landlord against the tenant under Section 13(2)(iii) of the Act, if it is established that the tenant has committed such acts as are likely to diminish the quality, strength or value of the building or rented land to such an extent that the intrinsic worth or fitness of the building or the rented land has considerably affected its use for some desirable practical purpose. The decrease or deterioration, in other words the impairment of the worth and usefulness or the value and utility of the building or rented land has to be judged and determined from the point of view of the landlord and not of the tenant or any one else.”

24. In **Rafat Ali Vs. Sugni Bai and others**; 1999 1 SCC 133, the Supreme Court was concerned with Section 10(2)(iii) of the A. P. Building (Lease, Rent and Eviction) Control Act, 1960 which provided for eviction where the tenant has committed such acts waste as are likely to impair materially the value or utility of the building. In this context, it was held that all acts of waste do not amount to a ground for eviction. It is only those acts of waste which would very probably impair the value of the building or its utility. The word “likely” must be understood as a condition, which is reasonably probable that such acts would cause

impairment to the value or utility of the building. However, it is not enough that some impairment is caused to the building. The value of the building or utility thereof should have been lessened in a reasonably substantial degree. Then only it can be said that the acts of waste are likely to impair the value or utility of the building "materially". Applying such construction, the Hon'ble Supreme Court, reversed the eviction order without disturbing the finding of fact that the flooring of the tenanted premises was rendered uneven, there was a hole in the flooring on the eastern side for inserting a pipe and the affixation of a lathe machine and its operation did induce very slight vibration on the parapet walls on the first floor.

25. Applying the aforesaid principles, it will have to be examined whether the acts complained of by the landlords or established to have been committed by the tenants warrant an inference that they are such acts of damage as are likely to impair materially the value or the utility of the tenanted premises.

26. The landlords, in their application for eviction, in the context of the ground contemplated under Section 22(2)(c) of the Rent Control Act, have basically alleged the following :

- a) The tenants by adding cement on the existing floor and

placing thereon a "*Kadappa stone*", have reduced the 'cubic space' of the tenanted premises. Such reduction of 'cubic space' amounts to reduction in the value and utility of the rooms (see para 11(e) at page 79 of paper book);

b) The raising of the floor as aforesaid, consequently, results in the reduction of the size of the windows and doors, which '*had to be cut at the bottom.*' This was unauthorised and has further materially impaired the value and utility of the tenanted premises;

c) In the Plan of 1968 submitted for the purposes of effecting repairs to the tenanted premises, existence of toilet and bathroom block was clearly depicted. However, taking advantage of the absence of the landlords from 1978 to 1994, such toilet and bathroom block was demolished unauthorisedly by the tenants and in its place, another long structure was put up. This long and unauthorised structure is shown existing in Chalta No.79 of P.T. No.61;

d) In the open space between Chalta No.79 and the main house shown in the Chalta No.80, the tenants put up illegal construction in form of a shed. The open space was paved with Kadappa stone and tiles and the same was covered with a roof of asbestos sheets placed on columns. This has changed the identity of the tenanted premises completely;

e) The rooms of the main house, which earlier faced the open space behind have been deprived of light and air by the aforesaid illegal construction in the open space. This is yet another example of “*impairment*” of utility and value of the said premises.

f) In the verandah in the front, unauthorisedly, a room has been constructed enclosing the part of verandah and making it into a shop by which the use and value of the verandah has been materially impaired;

g) The walls of the illegal construction to the rear of the plot have been heightened without necessary foundations;

h) The premises have been rendered unfit for residence and “have been given a new face and form unauthorisedly by the respondents”;

i) A part of premises has been unauthorisedly used as godown.

27. The Rent Controller and the Appeal Court have mainly relied upon the circumstance that the tenants have raised the flooring of the tenanted premises by adding cement on the existing flooring and placing thereon kadappa stones and held that 'cubic space' of the tenanted premises is reduced and further even, there is reduction in the size of doors and windows, thereby affecting

the flow of light and air to certain portion of the tenanted premises. On the basis of this, an inference has been drawn that such acts amount to materially alterations and, therefore, a case has been made out for grant of eviction under Section 22(2)(c) of the Rent Control Act. In so far as the other allegations are concerned, the Appeal Court has merely referred to certain portions of the depositions of the landlords and has vaguely observed that such evidence has gone unrebutted. The Rent Controller and the Appeal Court have also placed reliance upon the deposition of Malik Arjun Badami, AW2, a Diploma Civil Engineer, who was examined as an expert on behalf of the landlords.

28. There is really no evidence on record in respect of the allegations like demolition of the toilet and bathroom block, which allegations, if proved, might have possibly constituted ground for eviction as contemplated by Section 22(2)(c) of the Rent Control Act. There is also no evidence to establish any significant or material reduction in the above space or the flow of air and light to the tenanted premises or any portion thereof, on account of any of the acts alleged. Aziz Farooqui, the Power of Attorney holder with the landlady and her husband, has deposed that the tenanted premises, as existed in 1968, are depicted in the plan prepared

with the approval of the Municipality for the purpose of repairs. In the plan, besides the house, there is reference to the open space behind where there were toilets and bathrooms for the occupiers of the house. He has deposed that such toilets and bathrooms have been demolished and in their place a long structure has been constructed by the tenants. He has deposed that the house structure, as in existence at the time of the survey in late 70s, shows that the house under Chalta No.80 *"shows the said illegal structures in Chalta No.79."*

29. From the aforesaid, it is clear that it is the case of the landlords that the so called demolition of the toilet and bathroom block and the erection of a new long unauthorised structure in its place has taken place before the late 70s, since Aziz Farooqui has deposed that the existence of the said illegal structure in Chalta No.79 is seen in Survey made in the late 70s. The present landlords, who have instituted the eviction proceedings have stated that the tenanted premises were gifted to them by Deed of Gift dated 08/09/1978. The Eviction Petition alleging the acts of damage was instituted on 16/01/1999. Apart from the bare statement of Aziz Farooqui that some time before late 70s, there existed toilet and bathroom block and that such toilet and bathroom block was demolished by the tenants and in its place, a

long unauthorised structure has been raised, there is no other evidence to suggest any such demolition of toilet and bathroom block. In contrast, the tenants have deposed that there was no demolition and the long structure, which is reflected in the survey and admitted as existing by the landlords, themselves, is the toilet and bathroom block. The Rent Controller and Appeal Court, have not recorded any specific finding on the issue of demolition of toilet and bathroom almost 20 to 25 years prior to institution of the eviction petition. In such circumstances, it is difficult to hold that there is any legal material on record to suggest any demolition of toilet and bathroom block in the late 70s, so as to afford any cause of action for instituting the eviction petition in the year 1999 on the ground as contemplated by Section 22(2)(c) of R. C. Act.

30. There is, however, material on record to sustain the finding that the tenants have slightly increased the height of the flooring by adding cement on the existing flooring and covered with kadappa stone. As a result of this although there is no direct evidence, it is possible to infer some reduction in the cubic space or some reduction in the size of the doors and windows of some of the rooms of the tenanted premises. There is also some evidence on record, which suggests that some temporary sheds were put up

in the open space between the main house (Chalta No.80) and long structure (Chalta No.79), which contains the toilet and bathroom block and the flooring has again covered with kadappa or tiles. However, the question is whether such acts can be regarded as acts of damage as are likely to impair materially the value or utility of the tenanted premises ?

31. There is really nothing in the evidence of Aziz Farooqui to sustain an inference that the ground as contemplated by Section 22(2)(c) of R. C. Act has been made out on the basis of the established facts. Some marginal increase in the height of the flooring, when considered from the perspective that the tenanted premises are quite old and according to the tenants, were let out to them in the year 1933 or in any case in the year 1953, is, inevitable and may technically constitute, some alteration. However, such alteration or such acts cannot be regarded as acts of damage as are likely to impair materially the value or utility of the tenanted premises. Although the issue has to be examined from the perspective of the landlord, it does not mean that any and every alteration, constitutes material impairment to the value and utility of the tenanted premises, merely because the landlord is of the opinion that it does so. In fact, there is no direct evidence that the doors or windows of certain rooms of the tenanted

premises were actually cut down on account of the increase in the height of the flooring, consequent upon further cementing and covering it with kadappa stone. However, even assuming that such an act can be inferred, applying the principles laid down by the Hon'ble Supreme Court and the Division Bench of this Court in the various decisions referred to earlier, it cannot be said that such acts constitute acts of damage as are likely to impair materially the value or utility of the tenanted premises. There is also no independent evidence on the aspect of material impairment to the value or utility of the tenanted premises.

32. The landlords examined Malik Arjun Badami as an expert to depose on the aspect of the material impairment to the value and utility of the tenanted premises on account of the acts undertaken by the tenants. In examination-in-chief, Mr. Badami has stated that he possessed a Diploma in Civil Engineering and he was working for last 8 years Mathias Constructions, as Chief Engineer. He has deposed generally and not with any specific reference to the tenanted premises that when the cubic space of the structure is reduced, its utility is impaired. So also, when light and ventilation is reduced, the value of the structure is also reduced. He has deposed that when ventilation is adversely affected, it causes health hazards. When utility of the residential

premises is adversely affected, it impairs the utility as a result, the value is reduced. In fact, it would be appropriate if the entire examination-in-chief of Malik Arjun Badami, who came to be examined as an expert on behalf of the landlords is reproduced verbatim, in order to appreciate as to whether such deposition at all constitutes legal evidence to sustain any finding that the tenants committed acts of damage as are likely to impair materially the value or utility of the tenanted premises. The same reads thus :

“STATEMENT OF AW2

Name : Malik Arjun Badami

Age : 38 years

r/o : Sangolda H.No.179/23 Bardez Goa.

Occupation : Civil Engineer.

Oath administered

I am holding Diploma in Civil Engineering. I passed Diploma in Civil engineering in the year 1984. I have have been working for last 8 years for Mathias Constructions as a Chief Engineer. I was working for N.K. Naik Associates at Margao for the G.M.C. project at Bambolim prior to working with Mathias Constructions. When the Cubic space of the structure is reduced the utility is impaired the light and ventilation is reduced as a result of which the value is also reduced. When the ventilation is adversely affected it causes health hazards. When the utility of

the residential premises is adversely affected it impairs the utility and as a result the value is reduced. Chief over."

33. Malik Arjun Badami, in his aforesaid examination-in-chief, has really made no reference whatsoever to any acts of the tenants, much less any acts of damage attributable to the tenants, as are likely to impair materially the value or utility of the tenanted premises. The so called expert, in his examination-in-chief makes no reference whatsoever to any "material impairment" to the value or utility of the tenanted premises. The vague and general statements that when the cubic space of a structure is reduced, its utility is impaired or that when the light and ventilation is reduced, the value of the tenanted premises is reduced, are not statements, which constitute any legal evidence to establish that the tenants in the present case, have committed any acts of damage as are likely to impair the value and utility of the building.

34. In the course of cross-examination, Malik Arjun Badami, has again, assumed hypothetical positions and consequently, given hypothetical answers. He has very clearly stated that his deposition is not with reference to any specific house or premises and that he has made general statements. He

has himself admitted that in case he has to make a statement regarding impairment to a specific house or building, it will differ from house to house depending upon the design of the house. The so called expert has ended his cross-examination with the following answer to the question posed :

“Question : In an old house having a tiled roof does it impair the utility of the room if a false ceiling is put in?

Answer : It will depend on the design and requirement of the room. I state that whatever I stated in my deposition is not with reference to any specific house or premises. I have stated generally. I state that if I have to make a statement regarding the impairment to a specific house or building it will differ from house to house depending on the design of the house.

Cross examination over.”

35. Accordingly, there is no legal evidence to sustain the inference that the tenants in the present case, have committed acts of damage as are likely to impair materially the value or utility of the tenanted premises. This is really not a case of interference with findings of fact or for that matter concurrent findings of fact. Even if the facts as recorded by the Rent Controller and the Appeal Court that the tenants marginally increased height of the flooring by adding cement and covering the same with kadappa stone is accepted as finding of fact borne

out from the evidence on record, the inference, which two Courts have drawn therefrom is an inference, which is not consistent with the legal provisions under Sections 22(2)(c) of R. C. Act as interpreted by various decisions of the Supreme Court and this Court in matters of this nature and therefore, the same warrants interference.

36. Besides, perversity in the record of finding of fact does not only mean record of finding of fact based upon "*no evidence*" in the sense that there is total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding or where relevant and material evidence is excluded from consideration or where irrelevant material is taken into consideration for the purposes of arriving at the decision in question. As held in **Waryam Singh** (supra), the issue of impairment or material impairment is an inferential facts to be deduced from the proved facts. Further, as held in **G. Reghunathan** (supra), it is not any and every act, which reduces the value or utility of the tenanted premises that offers a cause of action for instituting the Eviction Petition, but it is only such act, which is likely to materially impair the value and utility of the tenanted premises, which will really afford a cause of action to maintain a Eviction Petition. This means that the act of

damage must be such of reasonably substantial magnitude. Applying the principles laid down by the Hon'ble Supreme Court in the case of **Waryam Singh** (supra) and **G. Reghunathan** (supra), **Om Pal** (supra), **Om Prakash** (supra), **Brijendranath Bhargava** (supra), **Gurbachan Singh** (supra) and **Rafat Ali** (supra) to the facts of the present case, the impugned judgment and order to the extent it orders eviction of the tenants on the ground specified under Section 22(2)(c) of R. C. Act is liable to be set aside.

37. The decision in the case of **British Motor Car Co vs. Madan Lal Saggi**; (2005)1 SCC 8, upon which reliance was placed by Mr. Lotlikar, is distinguishable since in the said case, the tenants constructed sheds of permanent nature, which could not be removed without doing damage to the tenanted premises as they were embedded in the floor and also in the side wall. Such construction of three sheds on almost whole of the courtyard, which obstructed significantly the ventilation to courtyard and reduced the area of courtyard, was held to constitute alteration or damage materially impairing the value and utility of the tenanted premises. Since such facts are not found established in the present case, the decision in **British Motor Car Co** (supra) is distinguishable. Further, the decision in **British Motor Car Co** (supra) has been distinguished by the Hon'ble Supreme Court

itself in ***Hari Rao*** (supra) to which reference shall be made in course of this judgment and order.

38. In ***Celina Coelho Pereira*** (supra), it is held that the High Court cannot, in guise of exercising its jurisdiction under Article 227 of the Constitution, convert itself into a Court of appeal when the legislature has not conferred the right of appeal and made the position of subordinate Court or the Tribunal final on facts. In the present case, the real issue is the inference to be drawn from the proven facts. Applying the principles laid down by the Hon'ble Supreme Court in its various decisions on what constitutes material impairment to the value and utility of the tenanted premises, it is required to be held that on the basis of the proven facts, no such inference could have been drawn, warranting an order of eviction under Section 22(2)(c) of R. C. Act.

39. The next question, which arises is whether the landlord in the facts and circumstances of the present case, has made out a case for eviction of the tenant on the ground that the tenants had transferred their rights under the lease or sublet the entire building or any portion thereof. The Appeal Court, in the impugned judgment and order, has dismissed the landlord's eviction petition on this ground. Accordingly, the landlords have

instituted W.P. No.552/2015 to question the impugned judgment and order made by the Appeal Authority by urging that the evidence on record is sufficient to sustain an order of eviction upon the said ground.

40. Mr. Lotlikar, in support of such ground, had laid considerable emphasis on the following portion of the cross-examination of Damodar Zaveri, one of the legal representatives of the original tenants in the course of his cross-examination :

“Question : I put it to you that the sweetmeats are prepared or manufactured in the separate portion of the house, they are sold in another portion of the house which is also separate though in the same house and the restaurant being run is also in a separate portion though in the same house what you have to say?

Answer : yes

It is true that the kitchen where the sweetmeats are prepared is independent the portion where the sweet meats are sold is independent and the portion where the restaurant is run is independent. The restaurant which is being run is in the name of Gujarat Lodge.

Question : You have stated in the last occasion that the restaurant is being run in the name of Gujarat Boarding House. Is that statement false?

Answer : I say that my statement that it was called

Gujarat Boarding House is not false however on the administrative grounds we have made that arrangement.

Question : What do you mean by administrative purposes?

Answer : I say that the said arrangement was done for the purpose of involving my other family members.

Question : Was it not possible to involve you family members without using the name Gujarat Boarding House?

Answer : I say that in order to help me I had taken the separate name.

Question : How a separate name would help you?

Answer : I have given the separate name so that my family members can help me in my business. We show the income of the Gujarat Boarding house separately for the purpose of Income tax. It is true that the income of Gujarat Boarding House is shown in the Income Tax returns as being income of the respondents 6,7 and 8. It is not true to suggest that my statement that the restaurant being run is run in the name of Gujarat Lodge is false. It is not true to suggest that although the respondents 6,7 & 8 operate the restaurant under the name of Gujarat Boarding House I have deliberately depose today that it is run in the name of Gujarat Lodge to mislead the Court. My father is from Gujarat."

41. On the basis of the aforesaid, there is no reason to

fault the Appeal Court, which has held that there was no case made out of transfer of right under the lease or sublease of the entire or portion of the tenanted premises. The allegation of the landlords was based upon the existence of a Partnership Firm comprising the wives of the legal representatives of the tenants (present tenants) as partners. It was alleged that this firm has filed income tax returns stating that they undertake the business of sale of sweetmeats from out of a portion of the tenanted premises. There is really no evidence on record to suggest that the wives of the tenants whether in partnership or otherwise, were actually carrying on the business of sale of sweetmeats exclusively from out of any portion of the tenanted premises. The evidence on record, as held by the Appeal Court, suggests that it is the tenants themselves, who are involved in the day to day business activity from out of the tenanted premises and that the partnership deed was a measure of tax planning. The Appeal Court has rightly relied upon the decisions in the case of ***Mahendra Saree Emporium (II) Vs. G. V. Srinivas Murthy;*** (2005(1) SCC 481 and ***Helper Girdharbhai Vs. Saiyed Mohmad;*** (2004)4 SCC 794. ***Parvinder Singh*** (supra) in which, it is held that if a tenant has actively associated with the partnership business and retains the use and control over the tenancy premises with him along with the partners, the tenant may not be said to have parted with

possession of the tenanted premises. The landlords were not at all clear whether they allege any transfer of tenancy itself or sub lease. The evidence on either aspect was very shaky and was rightly rejected by the Appeal Court. Accordingly, there is no case made out to interfere with such finding of fact recorded by the Appeal Court in the matter of transfer of right under the lease or sublease any portion of the tenanted premises.

42. In the aforesaid regard, the statement of Mr. Dessai is required to be noted that the tenants or their predecessors, have been residing in the State of Goa since 1930's and even their marriages were solemnised under the Portuguese regime of communion of assets. There is also no clear material on record in this regard. However, in the facts and circumstances of the present case, there is also no material on record to suggest that the tenants have either transferred their rights under the lease to their wives or that they have parted with the possession or sublet any portion of the tenanted premises to their wives. In such circumstances, there is no case made out to interfere with the impugned judgment and order made by the Appeal Court dismissing the landlords' application for eviction on the ground prescribed at section 22(2)(b)(i) of R. C. Act.

43. The next question is whether the Appeal Court was justified in dismissing the landlords' eviction petition on the ground that the tenants in the present case, had used the tenanted premises for a purpose other than for which it was leased.

44. The landlords in eviction petition at paragraph 3, had pleaded that the tenanted premises were leased to the tenants by agreement dated 23/09/1953, which was renewed from time to time solely for the purpose of running therein a lodging house. Mr. Lotlikar has stressed upon the response of the tenants in paragraph 3 of their reply. Therein, the tenants have stated that the contents of the paragraph 3 of the eviction petition are admitted. However, it is added that the tenanted premises were also used for boarding as well as manufacturing of sale of sweetmeats in the tenanted premises. Upon a conjoint reading of the pleadings in paragraph 3 of the eviction petition and paragraph 3 of the reply to the eviction petition, it cannot be said that there is any categorical admission that the tenanted premises were leased solely for the purposes of running therein a lodging house only. In fact, the very reading of lease deed dated 23/09/1953, militates against any such construction. Aziz Farooqui, the power of attorney of the landlord, in his deposition, has categorically stated that the tenanted premises were leased

“to be used for lodging and boarding.”

45. The Appeal Court, in the impugned judgment and order, has rightly noted that there is absolutely nothing in the lease dated 23/09/1953 to suggest that the tenanted premises were leased only for the purposes of lodging and no other purposes. The Appeal Court has noted that there was no negative covenant or the use of the word “only” in the third clause of the lease deed dated 23/09/1953, in which, it is stated that the tenanted premises were leased for the purposes of *“Hospedaria”*.

46. The Appeal Court has also made reference to Legislative Diploma No.1.420 dated 17/04/1952, which was in force when, the tenanted premises were leased out vide lease deed dated 23/09/1953. Article 5 of Legislative Diploma defines what activities are included in the term *“Hospedaria”* and they include :-

- “a. Hotel, Boarding House, or Guest House and Inn,*
- b. Restaurants and cheap houses,*
- c. Cafes, Bars, Tea Shops, Public Pubs and Taverns.”*

47. The Appeal Court has also rightly relied upon the decision of this Court in ***Dr. Francisco Maria de Jesus Lopes*** (supra), wherein, it was held that opening of a bar in the premises,

which were leased for running of “*Hospedaria*” did not constitute a change of user, as contemplated by Section 22(2)(b)(ii) of R. C. Act.

48. Mr. Lotlikar, however, emphasized upon the admission on the part of the tenants that they had discontinued the business of lodging and submitted that the activity presently undertaken by the tenants in the tenanted premises is that of a factory or at least “manufacturing unit” for the manufacture and sale of sweets and sweetmeats. Mr. Lotlikar submits that the entire identity of the tenanted premises has been changed from “lodging and boarding” to a factory or manufacturing unit for the sale of sweetmeats. Relying upon the decision of this Court in the case of ***Goa Urban Cooperative Bank Ltd Vs. Noor Mohd. Sheikh Mussa and another***; (2004)6 SCC 166, Mr. Lotlikar submits that if change of user from “office” to “godown”, constitutes change of purpose as contemplated by Section 22(2)(b)(ii) of R. C. Act, then finally the ground of user of the tenanted premises for a purpose other than that for which it was leased, has been made out and, therefore, the Appeal Court, erred in dismissing the eviction petition on the said ground.

49. On the other hand, Mr. Dessai submits that there is no

change of purpose taking into consideration the definition of the term "*Hospedaria*" in terms of Article 5 of the Legislative Diploma No.1.420. Mr. Dessai makes reference to Article 6 of the Diploma, which provides that the shops referred to in clause (a) of Article 5 are meant to receive guests, provide them with accommodation and food or only one of them for a fixed or unlimited period. Mr. Dessai relies upon certain observations in the case of ***Hanumanta Arsekar Vs. Upendra Katkar***; (2014)6 All M R 165, to submit that in the absence of any negative covenant in the deed of lease, there can be no prohibition for a tenant to change the trade as long as the tenanted premises continue to be used for commercial purposes, where they were let out for use as commercial premises.

50. In the facts and circumstances of the present case, the reasoning of the Appeal Court, need not be faulted taking into consideration the scope and amplitude of the term "*Hospedaria*", which is used in the lease deed dated 23/09/1953. The definition of this term as contained in Article 5 of the Legislative Diploma No.1.420 dated 17/04/1952 was taken into consideration by the Division Bench of this Court in ***Dr. Francisco Maria de Jesus Lopes*** (supra) precisely for the purposes of considering whether the ground of eviction as contemplated under Section 22(2)(b)(ii) of R. C. Act was at all made out. There is no material on record to

infer that the basic purpose for which the tenanted premises were let out, has been changed by the tenants and that some factory or manufacturing unit has been established in the tenanted premises in place of "*Hospedaria*". The Appeal Court has relied upon certain decisions in which, it has been held that mere change of trade as opposed to change of purpose, cannot afford cause of action for maintaining the eviction petition on the ground that the tenant has used the tenanted premises for a purpose other than that for which it was leased.

51. In ***Hari Rao*** (supra), eviction was ordered by the Rent Controller and High Court on the ground of change of user as well as material impairment to the utility and value of the tenanted premises. The premises were let out for the purpose of shoe trade and trade in leather goods by the tenant. The allegation was that the purpose was changed and used to carry on a trade in ready made garments and that this amounted to a user for a purpose other than that for which it was leased within meaning of Section 10(2)(ii)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Further, it was alleged that the tenant had fixed name boards outside and drilled two hole in the walls for fixing racks for the purpose of his trade and had taken independent three phase electricity connection and for that purpose he had made holes in

the walls and that these acts of the tenants amount to commission of such acts of waste as are likely to impair materially, the value or utility of the building within meaning of Section 10(2)(iii) of the Tamil Nadu Act.

52. There is no material difference between the aforesaid provisions in the Tamil Nadu Act and the corresponding provision in the Rent Control Act with which we are concerned. Therefore, the interpretation of Section 10(2)(ii)(b) of the T. N. Act which concerns user of the premises for a purpose other than that for which it was leased, assumes importance. In paragraphs 6 and 8, the Supreme Court has interpreted the said provision in the following terms :

“6. On the plain terms of the statute, uninfluenced by authorities, it appears to us that user of the building for a purpose other than that for which it was leased, has to be considered in the context of Section 21 of the Act which prohibits conversion of a residential building into a non- residential building except with the permission in writing of the Controller, any covenant in that behalf entered into by the tenant and the nature of the tenancy. In other words, when the lease is granted for the purpose of a trade, in the absence of any covenant in the contract between the parties prohibiting a user different from the particular one mentioned in the

*lease deed, the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. **In a case where the premises let out for a commercial purpose, is used by the tenant for a residential purpose, it would be a user for a purpose other than that for which it was leased attracting Section 10(2)(ii) (b) of the Act. Similarly, if a building had been let out for the purpose of a trade, but a tenant uses the premises for the purpose of manufacture or production of materials after installing machinery, that would be a user other than the one for which the building was let. User of a building let out for a trade as a godown may attract the provision.** Ultimately, the question would depend upon the facts of a particular case, in the context of the terms of the letting and the covenants governing the transaction and the general spirit of Section 108(o) of the Transfer of Property Act, 1882. Merely because a shop let out for trade in shoes and other leather goods, is used by the tenant also for the purpose of trading in readymade garments, it could not be held to be a user by the tenant of the premises for a purpose other than that for which it was leased. It has to be noted that even now, the tenant is carrying on the business of trading in shoes, which according to the landlord was the purpose for which the building was let. The trade in shoes has not been stopped by the tenant. All that*

has happened is, that he has also diversified into selling some readymade garments or T-shirts, the manufacture of which even some of the manufacturers of shoes have taken up.

8. *It is true that this Court has held in Malpe Vishwanath Acharya Vs. State of Maharashtra [(1998) 2 SCC 1], that the rent control legislation is enacted in the larger interest of the society as a whole and it is not intended to confer any disproportionately larger benefit on the tenant to the disadvantage of the landlord. **But that does not mean that the Rent Control Legislation should not be approached as a beneficial piece of legislation and with the recognition that reasonable protection to the tenant is one of the objects of that legislation. While construing a provision of law imposing a liability, for eviction, like Section 10(2)(ii)(b) of the Act, one must see whether there has been such a change of user of the premises as to make it alien to the purpose for which the building was let and deny eviction when the basic activity remains the same and there is only a variation in the manner or mode of carrying on of that activity. Therefore, the interpretation placed on Section 10(2)(ii)(b) of the Act by the High Court in the decision under appeal and in some other decisions of that Court referred to in the orders of the Rent Controller and the High Court, has to be held***

to be not warranted or justified. *The order of eviction passed by the High Court under Section 10(2)(ii)(b) of the Act has, therefore, to be reversed."*

[Emphasis supplied]

53. Similarly, the Hon'ble Supreme Court, in paragraph 9, after analysing its earlier decisions on the subject, has held that on the basis of the alterations alleged, no case was made out of material impairment to the value and utility of the tenanted premises. It was held that fixing of racks inside the premises even by drilling holes in the walls or the beams cannot be said to be acts which are themselves acts of waste as are likely to impair materially the value and the utility of the building. Broadly a structural alterations, however, slight should be involved to attract Section 10(2)(iii) of the Tamil Nadu Act. The decision in the case of ***British Motor Car Co*** (supra), was distinguished on facts by holding that in the lease deed in that case, there was a covenant that the lessee will not make any addition or alteration or change in the building during the period of tenancy. The Supreme Court reiterated the position that when construction is alleged to have materially impaired the value and utility of the premises, the construction should be of such a nature as to substantially diminish the value of the building either from commercial and

monitory point of view or the utilitarian aspect of the building.

54. In the case of ***Goa Urban Cooperative Bank Ltd*** (supra), the premises were let out for user as an office for the purposes of the bank. Banking business was discontinued and the tenanted premises were used as a godown. The Hon'ble Supreme Court, upon taking cognizance of the provisions under the Banking Regulation Act, 1949, held that the shifting of activities from office purpose to godown purpose is a change of purpose and not mere shifting of business from one trade to the other. The facts in the said case are not comparable to the facts in the present case, particularly considering the definition of the term "*Hospedaria*" and the admitted position that the tenanted premises were leased by the landlords to the tenants for the purposes of "*Hospedaria*." Accordingly, no ground is made out to interfere with the order of Appeal Court dismissing the eviction petition on the ground contemplated under Section 22(2)(b)(ii) of R. C. Act.

55. Mr. Dessai has submitted that the landlords, initially instituted proceedings for eviction on the ground that they wish to demolish and reconstruct the tenanted premises. No offer was made to the tenants for providing tenanted premises consequent upon demolition and reconstruction. The eviction proceedings

were dismissed. Thereafter, the landlords instituted a suit to injunct the tenants from undertaking the alleged material alteration to the tenanted premises. Ad interim orders were also obtained on the basis of this statement. Interim relief was ultimately denied and the landlords abandoned the suit, which was ultimately dismissed. On the basis of some statements made in the course of deposition in the civil suit bearing No.3/1997, the present eviction proceedings came to be instituted by alleging that the tenants have committed acts of damage, which are likely to materially impair the value and utility of the tenanted premises. The statement in the deposition in the dismissed suit, were attempted to be construed out of context and some illusion of cause of action was attempted to be created. Now that the eviction petition is being dismissed in its entirety, there is no need to address the aforesaid issues raised by Mr. Dessai.

56. In the result, these petitions are disposed of with the following order :

- (a) Rule is made absolute in W.P. No.218/2015 and the impugned judgment and order dated 29/12/2014 made by the Appeal Court ordering eviction of the petitioners/tenants on the ground contemplated under Section 22(2)(c) of R. C. Act is hereby set aside;

(b) Rule is, however, discharged in W.P. No.552/2015 and consequently, the impugned judgment and order dated 29/12/2014 made by the Appeal Court, dismissing the landlords petition for eviction on the grounds contemplated under Section 22(2)(b)(i) and (ii) is not interfered with.

(c) In view of the aforesaid, M.C.A. No.877/2015 does not survive and the same is disposed of .

(d) In the facts and circumstances of the present case, there shall be no order as to costs.

SMA

M. S. SONAK, J.