

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 6<sup>th</sup> July, 2017.**

+ **C.R.P. 152/2008, CM No.13597/2008 (for condonation of 82 days delay in filing the petition) & CM No.13598/2008 (for stay)**

**SHAM LAL KAPOOR**

**..... Petitioner**

Through: Mr. Nitin Gupta and Mr. Vikas Singh,  
Advs.

Versus

**JOGINDER LAL KUTHIALA & ORS.**

**..... Respondents**

Through: Mr. Bharat Deepak, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. This Civil Revision Petition under Section 115 of the CPC impugns the order dated 7<sup>th</sup> March, 2008 of the learned Additional District Judge of dismissal of an application filed by the petitioner under Order VII Rule 11 of the CPC for rejection of the plaint in a suit for recovery of arrears and future *mesne profits* filed by the respondents.

2. The petition was entertained and notice thereof issued. Vide subsequent order dated 15<sup>th</sup> October, 2009 which is stated to be continuing in force, further proceedings in the suit from which this petition arises were stayed.

3. The counsels have been heard.

4. The respondents No.1 to 3 namely Joginder Lal Kuthiala, Jitender Lal Kuthiala and Late Smt. Harvansh Kumari Kuthiala instituted the suit from which this petition arises against the respondents No.4&5 namely Tilak

Kumar and Baldev Kumar and the petitioner for recovery of Rs.10,80,000/- on account of damages/*mesne* profits for wrongful use and occupation of immovable property and for recovery of future *mesne* profits/damages for use and occupation of the immovable property till the date of delivery of possession thereof, pleading (i) that Sh. Fakir Chand Wadhera father of the respondents No.4&5 Tilak Kumar and Baldev Kumar was a tenant under the respondents No.1 to 3 in property No.B-2, Connaught Place, New Delhi at a monthly rent of Rs.60/-; (ii) that on demise of Sh. Fakir Chand Wadhera, the respondents No.4&5 namely Tilak Kumar and Baldev Kumar did not take any care of the demised premises and abandoned the same and allowed the petitioner to occupy the same exclusively; (iii) that the petitioner since the demise of the tenant Sh. Fakir Chand Wadhera is in unauthorised use and occupation of the premises; (iv) that the petitioner alleges himself to be a partner of M/s Tilak Hosiery business of the deceased tenant Sh. Fakir Chand Wadhera; (v) that the respondents No.4&5 filed a suit for accounts against the petitioner and in which a collusive decree was obtained; (vi) that the respondents No.1 to 3 had filed a petition for eviction of respondents No.4&5 namely Tilak Kumar and Baldev Kumar from the aforesaid tenancy premises on the ground of subletting under Section 14(1)(b) of the Delhi Rent Control Act, 1958 i.e. of respondents No.4&5 having unauthorisedly sublet, assigned or parted with possession of the tenancy premises to the petitioner and which was pending consideration; (vii) that the petitioner and the respondents No.4&5 thus being in wrongful possession of the premises are liable to pay *mesne* profits to the respondents No.1 to 3 therefor.

5. The respondents No.4&5 did not contest the said suit and the petitioner only contested the same.

6. The petitioner filed an application under Order VII Rule 11 of CPC for rejection of the plaint contending that till an order of eviction from the premises was passed, the suit for *mesne* profits was not maintainable.

7. The learned Additional District Judge has vide the order impugned in this petition dismissed the said application of the petitioner observing as under:

*“4. So far as the plaint is concerned, the plaintiff has described the defendant as unauthorized occupant and has claimed mesne profits in the form of use and occupation charges. The pendency before the Addl. Rent Controller, which being not a civil Court otherwise can not be any ground for maintaining an application under Order 7 Rule 11 CPC. Moreover, the mesne profits is being asked for use and occupation charges and it can not be said that the plaintiff can ask for the use and occupation charges only after the decision by the Court of Addl. Rent Controller in as much as if the petition is decided say after two years from now an appeal can be preferred and still the same ground can be taken which will bar the claim of the plaintiff by limitation for mesne profits in case the eviction proceedings are decided in his favour. The Court can not be a party by rejecting the petition to debar a party from claiming a relief making the relief barred by limitation.”*

8. The counsel for the petitioner has referred to (A) ***Smt. Chander Kali Bail Vs. Jagdish Singh Thakur*** AIR 1977 SC 2262, though in the context of M.P. Accommodation Control Act, 1961, holding that even after termination of his contractual tenancy, a tenant does not become an unauthorised occupant of the accommodation but remains a tenant and that once on such

termination his possession does not become wrongful, until and unless a decree for eviction is passed, he cannot be held liable for *mesne* profits/damages for use and occupation; and (B) ***Atmaram Properties Vs. Federal Motors*** (2005) 1 SCC 705 holding that owing to the *pari materia* provisions of the Delhi Rent Control Act, what was held in ***Smt. Chander Kali Bail*** supra was good under the Delhi Rent Control Act also and that a tenant becomes liable for *mesne* profits only with effect from the date when the eviction order is passed against him.

9. Per contra, the counsel for the respondents No.1 to 3 has contended (a) that the aforesaid dicta is applicable to tenants; (b) that according to the respondents/plaintiffs, the petitioner is not a tenant but is a rank trespasser of the premises; (c) that in the eviction proceedings, the respondents No.4&5 namely Tilak Kumar and Baldev Kumar have in their written statement stated that the petitioner is an unauthorised occupant; (d) that thus the suit for recovery of *mesne* profits against the petitioner at least, if not against the respondents No.4&5 namely Tilak Kumar and Baldev Kumar, is maintainable.

10. I may at this stage record that the eviction petition under Section 14(1)(b) of the Act filed by the respondents No.1 to 3 was dismissed by the Court of the Additional Rent Controller (ARC) and the appeal preferred by the respondents No.1 to 3 before the Rent Control Tribunal has also been dismissed and which order is assailed in CM(M) No.938/2012 which is also listed today. However, need to decide the two proceedings by a common judgment has not been felt inasmuch as the outcome of this Revision Petition

has to be irrespective of the outcome of the challenge to the dismissal of the petition for eviction.

11. I will first take up the aspect of claim in the plaint of future *mesne* profits. Ordinarily, a claim in a suit is confined to that for which cause of action has accrued to the plaintiff. A cause of action for recovery of *mesne* profits/damages for use and occupation can accrue only for the period of unauthorised occupation till the date of institution of the suit. The cause of action for recovery of *mesne* profits for a period after the institution of the suit cannot accrue on the date of institution of the suit. Thus, a suit for *mesne* profits can be filed only for the past period and not for future. However the Legislature, to obviate the difficulty of an owner/landlord of repeatedly filing such suits till the unauthorised occupation continues, has in Order XX Rule 12 carved out an exception and permitted a suit for future *mesne* profits to be filed when accompanied with the relief of recovery of possession of immovable property.

12. The suit from which this petition arises is not for recovery of possession but only for recovery of arrears and of future *mesne* profits. I have thus enquired from the counsel for the respondents No.1 to 3 the maintainability of the suit insofar as for recovery of future *mesne* profits.

13. No provision permitting institution of such a suit has been cited.

14. This Court in ***Santosh Arora Vs. M.L. Arora*** 2014 SCC OnLine Del 3005 (DB) and in ***Cosmos Infra Engineering (I) Ltd. Vs. Tirupati Buildings & Offices (P) Ltd.*** 2016 SCC OnLine Del 6378 has held that such a suit for future *mesne* profits unaccompanied with a relief of possession cannot be filed. In view of the question being no longer *res integra*, need to elaborate

further is not felt. Thus, the relief in the suit, insofar as for future *mesne* profits, has necessarily to be rejected.

15. That brings me to the core question, whether a landlord can recover *mesne* profits from an unauthorised sub-tenant.

16. Supreme Court in ***Smt. Chander Kali Bail*** supra has noticed the definition of tenant in the M.P. Accommodation Control Act and found therein the sub-tenant to be also included. The same is the position under the Delhi Rent Control Act in Section 2(1) defining tenant and which expression has been held to include a sub-tenant.

17. The provisions of the Delhi Rent Control Act permit eviction of a tenant or even an unauthorised sub-tenant only in accordance with the procedure prescribed therein and bar the jurisdiction of the Civil Court. Thus, even if the tenancy premises are in the exclusive occupation of an unauthorised sub-tenant, it is not open to the landlord to institute a suit in the Civil Court for recovery of possession of the premises from the unauthorised sub-tenant and the landlord is required to institute a petition for eviction under Section 14(1)(b) of the Act.

18. I have in ***Chitra Garg Vs. Seema Bansal*** 2009 (112) DRJ 545 (FAO(OS) NO.567/2009 preferred whereagainst was dismissed on 23<sup>rd</sup> December, 2009 and SLP(C) No.021203-021204/2010 preferred whereagainst was dismissed on 9<sup>th</sup> August, 2010) held that an owner/landlord cannot be held entitled to approach the Civil Court on the plea of tenancy premises being in occupation of a sub-tenant and there thus being no need to approach the Rent Controller. It was reasoned that the same can become a tool in the hands of unscrupulous litigants to obtain

decrees for possession without impleading the tenants as parties and in pursuance thereto dispossessing tenants from the premises.

19. The respondents No.1 to 3/plaintiffs, in paras 2 to 13 of the plaint have stated as under:

“2. That one Shri Fakir Chand Wadhera, father of Defendants No.1 and 2 was a tenant in respect of a big showroom situated at B-2, Connaught Place, New Delhi, measuring 15.3” X 27” 4 ½’ at a monthly rent of Rs.60/-, besides other charges. The said showroom is situated in the most prestigious commercial place of Delhi where the offices of multinational companies, foreign banks, airlines etc. are located. He was carrying on the business under the name and style of M/s Tilak Hosiery, as a sole proprietor in the said premises. Shri Fakir Chand Wadhera died on 30.12.1983 and Defendant No.1 and 2 are his sons who are residing in America and are permanently settled over there. It is respectfully submitted that even during the life time of Shri Fakir Chand Wadhera, his sons i.e. Defendants No.1 and 2 never used or occupied the said premises nor carried on any business from that place. It is submitted that the tenancy of Shri Fakir Chand Wadhera was duly terminated during his life time by a valid legal notice dated 04.01.1974. However since this was a commercial tenancy Defendants No.1 and 2 being the sons of Shri Fakir Chand Wadhera became joint tenants being the only legal heirs left by Fakir Chand Wadhera.

3. That on the demise of Shri Fakir Chand Wadhera Defendants No.1 and 2 did not take any care of the demised premises and rather abandoned the same. Since the premises under the tenancy of their late father were of no use to them, except greed of getting premium over it. It is submitted that Section 192 of the Indian Succession Act specifically provides for the preventive measures for safeguard of the property by the heirs of a deceased person. The Defendants No.1 and 2 did not take any action under the law and allowed the Defendant No.3 to occupy the property exclusively for ulterior purposes or for some forbidden deal.

4. Thus after the death of Shri Fakir Chand Wadhera the Defendant No.3 Shri Sham Lal Kapoor illegally occupied the premises and is carrying on his business in connivance with other Defendants. It is submitted that Defendant No.1 and 2 are not likely to return to India since they are settled in America for a very long time and they have no interest whatsoever in India.

5. It is submitted that immediately after the death of Shri Fakir Chand Wadhera father of the Defendants No.1 and 2, the Defendant No.3 occupied the demised premises and the Defendant No.1 and 2 allowed him to occupy the premises without any hitch. The Defendants No.1 and 2 did not take any action against the Defendant No.3 under the law to restrain him from doing so as stated in para No.3 hereinabove. The Defendants colluded with each other in order to strike a better deal of premium from the Plaintiffs.

But later on after some time it appears that the Defendants fell out amongst themselves and the Defendants No.1 and 2 on the one hand and the Defendant No.3 on the other tried to throw out each other from the premises, in order to devour the demised premises. The Defendants No.1 and 2 filed a suit for permanent injunction and rendition of accounts against Defendant No.3 in the Hon'ble High Court of Delhi being Suit No.1239 of 1985 on or around 15<sup>th</sup> June, 1985. On the other hand Defendant No.3 filed a petition under Section 276 of the Indian Succession Act for grant of probate of the Will and Codicil dated 21.02.1983 and 11.11.1983 respectively. It is submitted that so far as the question of parting of possession of the premises, unlawfully, was concerned that was immediately completed on the demise of Shri Fakir Chand Wadhera. It is not out of place to mention here that even if there is no positive act of the Defendants No.1 and 2 in parting with possession in favour of the Defendant No.3, such a transfer falls within the ambit of Section 14(1)(b) of the Delhi Rent Control Act, which provides for unlawful subletting, assigning or parting with possession of the property without the consent of the landlords.

6. That Defendants No.1 and 2 allowed the Defendant No.3 to occupy the premises without the consent of the Plaintiffs, who are the owners and landlords of the said premises, and are liable to be evicted therefrom besides other remedies of the landlords / plaintiffs. It is submitted that the Plaintiffs have

already filed a petition No.492 of 1986 in the Court of Rent Controller, Delhi for eviction of the Defendants from the demised premises under Section 14(1)(b) of the Delhi Rent Control Act which is being unnecessarily prolonged by the Defendants and the Defendants have not adduced any evidence as yet.

7. That the Defendant No.3 alleges himself to be a partner of M/s Tilak Hosiery. It is submitted that the premises had been let out to Fakir Chand Wadhera as stated in para No.2 of the plaint. Without prejudice to this plea it is submitted that even if Defendant No.3 who illegally alleges himself to be a partner in the business of Late Fakir Chand Wadhera, cannot have any right of tenancy in the demised premises nor Late Fakir Chand Wadhera was entitled under law to pass on the tenancy rights to the Defendant No.3 under the will / codicil as alleged by Defendant No.3 in the written statement filed to the eviction petition.

8. That Shri Fakir Chand Wadhera was inducted as a tenant prior to the purchase of the demised premises by the Plaintiffs from the Custodian in the public auction and the actual date of letting of the property by the previous owners to late Shri Fakir Chand Wadhera is not within the knowledge of the plaintiffs. Suffice is to say that Shri Fakir Chand Wadhera had been inducted as a tenant before the partition of the country and the Plaintiffs became the owners thereof, after the purchase of the demised premises Shri Fakir Chand Wadhera paid the rent to the Plaintiffs and thus attorned to the Plaintiffs.

9. That the Defendant No.3 claims himself to be a partner of M/s Tilak Hosiery vide Partnership Deed since 1972. It is submitted that the Defendant No.3 had filed a petition for probate / letter of administration in the Hon'ble High Court of Delhi being Probate Case No.32/1984 under Section 276 of the Indian Succession Act. It is also submitted that the Defendant No.3 claimed the right in the said shop under the Will dated 21.02.1983 and Codicil dated 11.11.1983 alleged to be executed by Fakir Chand Wadhera.

10. That the above petition of the Defendant No.3 was dismissed by the Hon'ble High Court of Delhi vide orders dated 07.07.1998.

11. That the Hon'ble High Court of Delhi held that the Will and Codicil propounded by the Defendant No.3 are fabricated documents and also did not accept the Partnership Deed as set up by the Defendant No.3 in that suit and passed a decree against the Defendant No.3.

12. That the Defendants No.1 and 2 had also filed a suit against the Defendant No.3 in the Hon'ble High Court of Delhi being suit No.1239/1985 on 15.06.1985 which was decreed 07.07.1998. It is submitted that those proceedings have been filed in the High court in collusion with each other in order to defeat the right of the Plaintiffs of possession of the property. It is not out of place to mention here that the R.F.A./F.A.O. filed by the Defendants against the orders of the Hon'ble High Court shall take at least twenty years to be decided and in the meanwhile the Plaintiffs shall continue to be entangled in the legal battle.

13. The fact remain that after the death of Shri Fakir Chand Wadhera who had been carrying the business under the name and style of M/s Tilak Hosiery as a sole proprietor, the Defendant No.3 occupied the premises with the consent of the Defendants No.1 and 2. It is also submitted that even if a tenant is deprived of the possession of the premises involuntarily he is said to have been sub let, assigned or otherwise parted with the possession of the premises. It is submitted that the Defendants No.1 and 2 did not take any preventive action against the Defendant No.3 to occupying the property since they were in connivance with him as also submitted in para No.3 hereinabove.

*(emphasis added)*

20. It would thus be seen that it is not as if it is the case of respondents No.1 to 3/plaintiffs that the respondents No.4&5/tenants abandoned the tenancy premises and the petitioner, of his own volition and without any assistance from respondents No.4&5/tenants has occupied the tenancy premises and in which case it could have been possibly urged that the ground of eviction under Section 14(1)(b) of the Act as under:

*“(b) that the tenant has, on or after the 9<sup>th</sup> day of June, 1952, sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.”*

is not made out because the respondents No.4&5/tenants are not responsible for the unauthorised occupation of the petitioner. However the respondents No.1 to 3/plaintiffs in the plaint have expressly pleaded that the respondents No.4&5/tenants have allowed the petitioner to occupy the tenancy premises. In the face of such averments in the plaint, a ground of eviction under Section 14(1)(b) supra is made out and which respondents No.1 to 3/plaintiffs have expressly pleaded having invoked. Once that is so, Section 50(1) of the Act as under:

***“50. Jurisdiction of civil courts barred in respect of certain matters.—(1) Save as otherwise expressly provided in this Act, no civil court shall entertain any suit or proceeding in so far as it relates to the fixation of standard rent in relation to any premises to which this Act applies or to eviction of any tenant therefrom or to any other matter which the Controller is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Controller under this Act shall be granted by any civil court or other authority.”***

will kick in and the jurisdiction of Civil Court, before which suit from which this petition arises has been filed, to grant the relief of eviction of respondents No.4&5/tenants and/or the petitioner inducted by them, would be barred. It cannot be lost sight of that eviction of a sub-tenant or assignee

of tenant or of person to whom tenant has parted with possession amounts to eviction of tenant also from the premises.

21. If it were to be held that though a landlord cannot recover possession from an unauthorised sub-tenant till satisfies the Controller in this regard but can recover *mesne* profits by instituting a suit in the Civil Court, the same would amount to penalising the so called unauthorised sub-tenant/tenant, even prior to the Controller has found him/them liable for eviction.

22. In the present case, there are concurrent findings of the Controller and of the Tribunal of no ground of eviction under Section 14(1)(b) of the Act having been made out on account of the petitioner being in unauthorised possession/occupation of the premises. Though the same are subject matter of challenge but the petitioner cannot be held liable for *mesne* profits till the order of the Tribunal is set aside and in which case also the liability of the petitioner even as an unauthorised sub-tenant or rank trespasser for *mesne* profits shall be with effect from the order of eviction only.

23. The impugned order dismissing the application under Order VII Rule 11 of CPC cannot thus be sustained and is set aside.

24. Resultantly, this petition is allowed. The application of the petitioner under Order VII Rule 11 of CPC is allowed and the plaint in the suit from which this present appeal arises is rejected. However, no costs.

**RAJIV SAHAI ENDLAW, J.**

**JULY 06, 2017**

‘gsr/bs’