

Sri. M. Somashekar vs Sri. M.R. Shivarudriah on 16 April, 2020

Author: Nataraj Rangaswamy

Bench: Nataraj Rangaswamy

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF APRIL 2020

BEFORE

THE HON'BLE MR.JUSTICE NATARAJ RANGASWAMY

REGULAR FIRST APPEAL NO.1356 OF 2015
C/ W

REGULAR FIRST APPEAL NO.1381 OF 2015

IN RFA NO.1356 OF 2015

BETWEEN:

SRI. M. SOMASHEKAR
AGED ABOUT 60 YEARS,
S/O SRI.RUDRAPPA,
RESIDING AT NO.198,
GROUND FLOOR,
FIRST STAGE, 6TH A MAIN ROAD,
MIG A SECTOR,
YELHANKA NEW TOWN,
BENGALURU-560106.

...APPELLANT

(BY SRI. G.KRISHNAMURHTY, SR. ADVOCATE FOR
SRI.PURUSHOTHAM R., ADVOCATE)

AND:

SRI. M.R. SHIVARUDRIAH
AGED ABOUT 47 YEARS,

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S/O SRI. RUDRAPPA,
RESIDING AT NO.198, FIRST FLOOR,
FIRST STAGE, 6TH A MAIN ROAD,
MIG A SECTOR,
YELHANKA NEW TOWN,
BENGALURU-560106.

...RESPONDENT

(BY SRI. D.L.N.RAO, SR. ADVOCATE FOR SRI.ASHOK
KUMAR B.G., ADVOCATE)

THIS REGULAR FIRST APPEAL IS FILED UNDER
SECTION 96 READ WITH ORDER XLI RULE 1 OF CODE OF
CIVIL PROCEDURE, 1908 AGAINST THE JUDGMENT AND
DECREE DATED 09.07.2015 PASSED IN O.S.NO.4177/2009
ON THE FILE OF THE XII ADDL. CITY CIVIL AND SESSIONS
JUDGE (CCH. NO.27) AT BANGALORE, PARTLY
DECREEING THE SUIT FOR RECOVERY OF RENT, VACANT
POSSESSION AND DAMAGES.

IN RFA NO.1381 OF 2015

BETWEEN:

SRI. M.R. SHIVARUDRAIAH
SON OF SRI. RUDRAPPA,
AGED ABOUT 46 YEARS,
RESIDING AT NO.198,
1ST FLOOR, 1ST STAGE,
6TH 'A' MAIN ROAD,
MIG 'A' SECTOR,
YELAHANKA NEW TOWN,
BENGALURU-560106.

...APPELLANT

(BY SRI. D.L.N.RAO, SR. ADVOCATE FOR SRI.ASHOK
KUMAR B.G., ADVOCATE)

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AND:

SRI. M. SOMASHEKAR
SON OF SRI. RUDRAPPA
AGED ABOUT 62 YEARS
RESIDING AT NO.198,

GROUND FLOOR, 1ST STAGE,
6TH 'A' MAIN ROAD,
MIG 'A' SECTOR,
YELAHANKA NEW TOWN,
BENGALURU-560106.

...RESPONDENT

(BY SRI. G.KRISHNAMURHTY, SR. ADVOCATE FOR
SRI.PURUSHOTHAM R., ADVOCATE)

THIS REGULAR FIRST APPEAL IS FILED UNDER
SECTION 96 OF CODE OF CIVIL PROCEDURE, 1908
AGAINST THE JUDGMENT AND DECREE DATED
09.07.2015 PASSED IN O.S.NO.4177/2009 ON THE FILE OF
THE XII ADDL. CITY CIVIL AND SESSIONS JUDGE (CCH.
NO.27) AT BANGALORE, PARTLY DECREERING THE SUIT
FOR RECOVERY OF RENT, VACANT POSSESSION AND
DAMAGES.

THESE APPEALS HAVING BEEN HEARD AND
RESERVED FOR JUDGMENT ON 22.01.2020, THIS DAY
THE COURT DELIVERED THE FOLLOWING:

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JUDGMENT

Regular First Appeal No.1356/2015 is filed by the defendant challenging the Judgment and Decree dated 09.07.2015 passed by the XII Additional City Civil and Sessions Judge (CH No.27), Bengaluru in O.S. No.4177/2009, by which the Trial Court directed the defendant to quit and deliver vacant possession of the ground floor premises of the suit schedule property.

2. Regular First Appeal No.1381/2015 is filed by the plaintiff challenging the Judgment and Decree dated 09.07.2015 passed by the XII Additional City Civil and Sessions Judge at Bengaluru in O.S. No.4177/2009, by which the Trial Court refused to grant the relief of ejectment of the defendant from the first floor of the suit schedule premises.

3. Since both the appeals, arise out of the Judgment and Decree in O.S.No.4177/2009 and as common question of law and fact are involved, these two appeals are taken up for disposal by this common Judgment.

4. Before the facts of the present cases are considered, it is relevant to note that there were two prior suits filed in O.S. Nos.1209/2009 and 3773/2009 concerning the suit schedule property.

5. In O.S. No.1209/2009, the father of the plaintiff and the defendant had sought for partition in respect of the property involved in the present suit. He contended that he was one of the co-owners of M/s. Rudreshwara Enterprises which was the owner of the property bearing No.15 at H.I.G 'A' Sector, Yelahanka New Town, Bengaluru-560 064, which was purchased out of the funds of the joint family and thereafter, the joint family constructed a building thereon and had let out the constructed portions to various tenants. He contended that out of the income generated from business of M/s. Rudreshwara Enterprises, the property bearing No.198, 6th 'A' Main, 'A' Sector, MIG, Yelahanka New Town, Bengaluru-560 064 was purchased. He contended that he was entitled to a share in the suit schedule property.

6. Another suit in O.S. No.3773/2009 was filed by the wife of the plaintiff for partition and separate possession of her half share in the property bearing No.15, H.I.G 'A' Sector, Yelahanka New Town, Bengaluru-560 064 which was in the joint names of the wife of the plaintiff and the wife of the defendant. It was thereafter, that the present suit in O.S. No.4177/2009 is filed by the plaintiff for ejectment of the defendant from the suit schedule premises on the ground that he was a tenant.

7. During the pendency of O.S. No.4177/2009, an application in I.A.7 was filed for staying of further proceedings until disposal of O.S. Nos.1209/2009 and 3773/2009. The Trial Court in terms of the order dated 12.08.2011 had allowed the application which was challenged before this Court in W.P.No.34405/2011. This Court in terms of the order dated 24.10.2011 allowed the aforesaid writ petition and directed that all the three suits should be proceeded independently. Later, Misc.No.164/2012 was filed by the defendant herein for clubbing all the three suits filed in O.S. Nos.1209/2009, 3773/2009 and 4177/2009. The Principal Court had clubbed all the three suits in terms of the order dated 21.04.2012. The Order passed by the Principal Court in Misc.No.164/2012 was challenged before this Court in CRP No.355/2012. This Court in terms of the order dated 11.03.2013 allowed the revision petition and directed that all the three proceedings should be separately dealt with.

8. Following the above, the proceedings in the suit in O.S. No.4177/2009 was taken up for consideration by the Trial Court and disposed off by the Trial Court. The plaintiff and the defendant have filed separate appeals before this Court challenging the Judgment and Decree of the Trial Court.

9. The parties shall henceforth be referred to as they were arrayed before the Trial Court in O.S.No.4177/2009.

10. The facts as stated that lead to the filing of O.S. No.4177/2009 are that the plaintiff claimed to be the owner of the suit schedule property, wherein he had constructed ground, first and second floors and had reserved the basement for parking. He claimed that he had rented out the ground floor premises to the defendant in terms of a rent agreement dated 02.11.2004. He claimed that the defendant had failed to pay the monthly rent from November, 2007 which compelled the plaintiff to cause a notice of termination of tenancy followed by the present suit for ejectment of the defendant from the suit schedule premises.

11. The defendant filed his written statement and contended that the suit property was not purchased by the plaintiff, but was purchased from out of the profits earned from the "co-owner business". He reiterated that at the time of purchase, the defendant had availed a loan from the Vijaya Bank, Yelahanka Branch and the defendant had stood guarantee for the repayment of the loan. In so far as the rent agreement dated 02.11.2004 is concerned, the defendant contended that "the defendant made an agreement dated 02.11.2004 and produced the same before the Vijaya Bank, Yelahanka Branch to avail loan for the purpose of building the house". He further contended that the construction of the building was commenced in the year 2004 and the building was inaugurated in the year 2006 and thus, the defendant could not become a tenant under the plaintiff as there was no such house that was constructed in the year 2004. He further contended that in the income tax returns, it was shown that the suit property was purchased out of the profits earned from the joint co-ownership business. He therefore, contended that he was never a tenant under the plaintiff and that he had never agreed to pay monthly rent of Rs.12,000/- as contended by the plaintiff.

12. Based on the aforesaid rival contentions, the Trial Court framed the following issues:

- "1) Whether the plaintiff proves that the defendant is his tenant over the suit property on a monthly rent of Rs.12,000/-?
- 2) Whether the notice of termination is valid?
- 3) Whether the plaintiff is entitled for damages?
- 4) Whether the defendant proves that he is also the co-owner of the suit property?
- 5) What Order or decree?"

13. Before the Trial Court, the plaintiff was examined as PW1 and his brother Sri.M.R.Chandrashekar as PW2 and his two brothers- in-law as PWs.3 and 4. PWs.5 and 6 are two acquaintances of the plaintiff who deposed about the plaintiff running photo copying business Centre at Cunningham Road, Bengaluru. For the plaintiffs, Exs.P1 to P7 were marked.

14. The defendant was examined as DW1 and he examined the accountant at M/s.Sharavathi Hotel as DW2 and a contractor who constructed the building in the suit schedule property as DW3 and he marked Exs.D1 to D128.

15. The Trial Court after considering the evidence on record and more particularly in view of the admission of the defendant about the lawful execution of Ex.P2, decreed the suit and directed the defendant to quit and deliver the vacant possession of the ground floor premises to the plaintiff. The Trial Court noticed that the plaintiff had issued the notice of termination of tenancy only in respect of the ground floor premises but had filed the suit in respect of the ground floor and first floor of the premises and therefore, the Trial Court restricted the relief only to the ground floor premises.

16. Feeling aggrieved by the Judgment and Decree of the Trial Court, both the plaintiff and the appellant have filed separate appeals.

17. Heard the counsel for the appellant in both the appeals and the respondents. I have perused records of the Trial Court and its Judgment and Decree. The learned Senior Counsel Sri.G.Krishnamurthy appearing for the defendant/ appellant in RFA 1356/2015 canvassed the following contentions;

i) That there was an ongoing dispute between the father on the one hand and the plaintiff, defendant and others on the other in O.S.No.1209/2009 for partition and separate possession of his share in the suit property as well as other properties. Consequently, any finding in the present suit would adversely impact the outcome in O.S.No.1209/2009.

ii) That the case of the plaintiff/ respondent is entirely based on Ex.P2 which was the rent agreement executed by the defendant. This rent agreement was nominal and therefore unenforceable. It is contended that the building plan was sanctioned during August 2004 and electrical installation in the suit property was serviced on 18.04.2007. Thus, it is contended that as on the date of Ex.P2 there was no building constructed and thus the same was executed for a nominal purpose namely to demonstrate that the suit property is capable of generating rental income and thus it was viable to sanction a construction loan. That existence of a building was a sine qua non for the execution of a lease and thus Ex.P2 was unenforceable. The learned Senior Counsel contended that oral evidence could be adduced to unravel the true intent of Ex.P2. The learned Senior Counsel placed reliance on the following;

a) Smt.Gangabai vs Chhabubai reported in 1982(1) SCC 4

b) Gurdial Singh and others vs Raj Kumar Aneja and others reported in 2002(2) SCC

c) Tukaram vs Hemalatha and others reported in 2010(3) KLJ 202

d) Roshanlal vs Kuldeep Rai Nagpal

e) Abdul vs Arlin reported in AIR 1926 Rangoon 94

iii) That the monthly instalments for the payment of the loan raised for purchasing the suit property were credited from the account of Rudreshwara Enterprises into the Savings Bank account of the plaintiff from where the payments were routed and thus, it should be construed that the possession of the defendant in the suit premises was not of a tenant but as a sharer

iv) That there were innumerable bills and vouchers which demonstrated that the expenses for construction of the building was borne from out of the business income of Sharavathi Hotel. The learned Senior Counsel relied upon the re-assessment Order passed by the Income Tax Department which indicated that a sum of Rs.16,77,640-00 was utilised for meeting the expenses of construction of the building at the suit property and this amount was claimed as an expenditure. It is contended

that since the suit property was an asset that belonged to Sharavathi Hotel, the expenses incurred in the construction of the hotel was shown as the expenditure in the IT returns that was filed for the assessment year 2007-2008.

v) That the rental agreement at Ex.P2 was in respect of the ground floor and the notice of termination of tenancy was in respect of the ground floor and therefore, the plaintiff / respondent could not pursue his suit for ejectment of the defendant from the first floor and his remedy is to sue for possession based on title.

vi) That the rental agreement (Ex.P2) was inadmissible in evidence since it contemplated renewal of the agreement beyond a period of 11 months and was therefore compulsorily registrable. The

learned Senior Counsel relied upon the following;

a) S.K.Jameel Ahmad vs Naseem Gulab

SK reported in 1981 Mah.LJ 847

b) Relangi Nageshwara Rao and another

vs Tatha Chiranjeeva Rao by Lrs reported in 2003 (3) APLJ 64

vii) That Ex.P2 contemplated termination of tenancy by issuing three months prior notice and therefore the termination of the tenancy in terms of Ex.P3 by 15 days notice is improper and thus it is contended that there is no valid termination of lease. The learned Senior Counsel relied on the following Judgments;

a) Burma Shell Oil Storage and Distributing Co of India Ltd Vs State of Uttar Pradesh reported in AIR 1984 All 89(FB)

b) Suraj Mal vs Sita Ram and others

c) Rawat Hardeo Singh vs State of Rajasthan reported in AIR 1981 Raj 280

18. On the contrary, the learned Senior Counsel Sri.D.L.N.Rao appearing for the plaintiff / appellant in RFA 1381/2015 contended as follows:

i) The defendant having admitted the execution of Ex.P2 cannot claim that the agreement was nominal as there was a ground floor that existed in the suit property. The schedule mentioned in Ex.P2 clearly indicated that there was a house comprised of Four bed rooms, kitchen, drawing room, a kitchen and a sump and a overhead tank.

Even in the sale deed at Ex.P1 there is a mention of the existence of a two square building which was provided with water and electricity connection. It is contended that admittedly, the defendant was residing in a tenanted house at No.2043, HIG, Ist B main, 4th B cross, New town Yelahanka and as the suit property was in Yelahanka and as the plaintiff was residing at Palace Guttahalli, the defendant took the suit property on rent. The Learned Senior Counsel contended since the defendant had admitted that he entered the suit premises as a tenant, his status as a tenant would continue until the tenancy is terminated and possession is delivered. The learned Senior Counsel relied on the following;

a) Apollo Zipper India Ltd vs W.Newman and Co Ltd reported in 2018(6) SCC 744

b) Boorugu Mahadev and Sons and another vs Sirigiri Narasing Rao and others reported in 2016 (3) SCC 343

ii) The learned Senior Counsel contended that the concept of ownership in landlord-tenant litigation governed by rent control legislation must be distinguished from that in a title suit. He relied upon the Judgment reported in Sheela and others vs Firm Prahlad Rai Prem Prakash reported in 2002 (3) SCC 375.

iii) Further, it is contended that oral evidence to explain Ex.P2 was not permissible since there was no ambiguity and he relied on the Judgment reported in Raj Kumar Rajinder Singh vs State of Himachal Pradesh and others reported in 1990 (4) SCC 320.

iv) That the agreement in terms of Ex.P2 came to an end within 11 months and therefore the question of issuing three months prior notice did not arise.

v) That the right if any of the defendant is only to seek accounts of Sharavathi Hotel if the plaintiff had drawn funds for purchase and construction of the building in the suit property. Thus in the absence of any documents to show that the suit property was ever treated as the property of the firm, the defendant is bound to quit and deliver vacant possession of the suit property.

vi) That the Defendant was inducted into the premises as a tenant initially into the ground floor and later into the ground and first floor. Therefore, in the absence of any separate agreement of lease/ rent in respect of the Ground and First floor, the notice of termination, even if defective cannot deprive the plaintiff to seek eviction from the first floor.

19. Having considered the above contentions, the following points arise for my consideration;

- i) Whether the plaintiff proves his ownership of the suit property and that the defendant was a tenant in respect of the suit schedule property?
- ii) Whether the plaintiff had validly terminated the tenancy of the defendant?
- iii) Whether the defendant proves that the rent agreement at Ex.P2 was nominally executed?
- iv) Whether the defendant proves that he is not a tenant in the suit property but a sharer?
- v) Whether the plaintiff was entitled to seek ejectment of the defendant from the first floor?
- vi) Whether the defendant proves that the suit was not maintainable?
- vii) What Order?

My answers to the above are as follows:

- i) Point No.1: In the affirmative
- ii) Point No.2: In the affirmative
- iii) Point No.3: In the negative
- iv) Point No.4: In the negative
- v) Point No.5: In the affirmative
- vi) Point No.6: In the negative
- vii) As per final Order

20. In order to avoid duplicity and as the contentions of the learned counsel for the plaintiff and defendant are inextricably linked with the points framed by this Court, all of them are dealt together.

21. I have given my anxious consideration to the pleadings, evidence on record, grounds urged in support of the appeal memorandums and also the submissions made by the learned Senior Counsel for the parties. This Court is conscious of the fact that this is an appeal that arises out of an action for ejectment of a tenant and therefore the only two things that need to be considered is whether the plaintiff had valid title and whether there is a jural relationship of land lord and tenant between the plaintiff and the defendant. The contours of the case are thus plain and simple and cannot transcend the barriers imposed in law. Since the defendant has placed humongous documentary evidence in defence that he was not a tenant in the suit premises but a sharer in possession, I am perforced to

record findings in that regard. However, the findings arrived at in this case, except the finding relating to the jural relationship of landlord and tenant between the plaintiff and defendant, are restricted only for the limited purpose of adjudication of this dispute and nothing else. These findings shall not operate as an issue estoppel in any other proceeding between the parties based on title.

22. What turns out from the oral and documentary evidence on record is that the plaintiff, defendant, their two brothers and two sisters constituted a joint Hindu family with their father as the Kartha and their joint abode was at Marasandra in Doddaballapur Taluk. The family possessed ancestral agricultural land measuring 6 acres in Sy.No.29 of Bisuvanahalli village, Doddaballapura Taluk and 1-10 acres in Sy.No.47/2A of Maskur village, Hessarghatta Hobli. It is seen that even while the family was joint, the defendant was employed with Hotel Ashok, Bengaluru between 1976 and 1988 and was staying in a residential accommodation at No.2(479), 5th main, Palace Guttahalli, Bengaluru between 1981 to 1992. He later joined Zenith computers and continued there till 1997. Concurrently, the plaintiff had established business under the name and style of Rudreshwara Xerox Center at Cunningham Road, Bengaluru as is evident from Ex.D53 and D55 and he was perhaps residing with the plaintiff at Palace Guttahalli as the addresses of the plaintiff as found in the indemnity bond at Ex.D44 dated 27.11.1996 indicated that both the plaintiff and defendant were residing at Palace Guttahalli in the same house where the defendant was residing.

23. It is evident from Ex.D3 that 5 acres out of 6 acres in Sy.No.29 was agreed to be sold by the plaintiff, defendant, his brothers and their father for a total sale consideration of Rs.28,00,000-00 and one acre of land was made over to the share of PW2 in terms of a declaration dated 02.08.1995 in terms of Ex.P6. The execution of Ex.P6 is admitted by the defendant and a reading of this document indicates that there was a severance of the joint family. The father of the plaintiff/defendant who was allotted land in Sy.No.47/2A sold the said land in terms of Ex.D123. Thus, the plaintiff, defendant, their two brothers and their father were divided and there no longer existed a joint family and there were no joint family properties that were in the possession of either the plaintiff or the defendant and their father and brothers.

24. After the joint family properties were sold, the plaintiff and the defendant purchased a corner site bearing number 15, HIG A Sector, Yelahanka New Town, Bengaluru in the names of their spouses on 27.11.1996. The spouses of the plaintiff and the defendant raised a loan from Vijaya Bank, Yelahanka branch under the name and style "Rudreshwara Enterprises". The spouses of the plaintiff and defendant constituted as partners of Rudreshwara Enterprises as is evident from Ex.D47 (Bank account extract) and they availed a loan for construction of a building thereon from Vijaya Bank, Yelahanka. It was then that the defendant shifted to a rented accommodation bearing number 2043, MIG Layout, Yelahanka while the plaintiff continued to stay at Palace Guttahalli. The plaintiff and defendant and their spouses constructed a commercial complex at property number 15, at Yelahanka, Bengaluru named "Rudreshwara Chambers" and a larger part of this complex was rented out to the Sub-Registrar, Bengaluru North and to the Tahsildar, Bengaluru North Taluk. A space on the terrace was rented out to Spice Telecom for installation of a tower. The rent was paid by the Government of Karnataka, Spice Telecom and other tenants to both the wives of the plaintiff and defendant in equal shares. The cheques were deposited in the account of Rudreshwara

Enterprises at Vijaya Bank, Yelahanka. This property shall henceforth be referred to as "Rudreshwara chambers".

25. The basement of Rudreshwara chambers was taken on rent by "Sharavathi Hotel" which was a partnership firm constituted amongst plaintiff, defendant and their spouses.

26. When things stood thus, the plaintiff availed loan from Vijaya Bank to purchase the house property bearing No.198. In the loan application at Ex.D53, the dimension of the site is mentioned as 40 x 75 feet and the built up area is mentioned as 3100 square feet. The wife of the plaintiff was a co-obligant for the loan while the defendant stood guarantee for the repayment of the loan. The loan of Rs.8,00,000-00 was sanctioned during September 2003 which was utilised to purchase the site bearing No.198 in terms of a sale deed dated 03.10.2003. The property that was purchased by the aforesaid sale deed was connected with electricity and water in view of the following covenant contained therein.

"The vendor has no objection for the purchaser to transfer the khatha of the said property in his name and also to transfer whatever the deposit amount paid to KEB authority, BWSSB departments and other departments in respect of the schedule property...."

27. Further what was purchased by the plaintiff in terms of the sale deed dated 03.10.2003 (Ex.P1) was the property along with a two square residential building with all amenities and is described as follows:

"All that piece measuring East to West 70 feet and North to South 45 feet in all 3150 sq feet along with Two square RCC roofed house built thereon of red-oxide flooring, doors and windows are jungle wood with all civic amenities".

28. The plaintiff has thus established his ownership of the suit property. Since defendant had admitted the execution of Ex.P2, Point No.1 framed by this Court is answered in the affirmative and in favour of the plaintiff.

29. Later, in terms of a rental agreement dated 02.11.2004 (Ex.P2), the plaintiff rented out the premises that existed on the suit property and the property so rented out was "Independent residential house bearing No.198 in Ground floor, situated at 6th A main, Ist stage, MIG A sector, Yelahanka New Town, Bengaluru-560064 comprising one hall, Four bedrooms, One Kitchen, Four Bathrooms and Two Toilets with sump and overhead tank".

30. The execution of this rental agreement is not disputed by the defendant. But the defendant contended that this rental agreement was nominally entered into so as to demonstrate the rent potential that the premises commanded so that the bank could be convinced to sanction a loan to construct a building on the suit property. The plaintiff as owner of the suit property and his wife as a co-applicant sought the sanction of a construction loan of Rs.23,00,000-00 from Vijaya Bank. The defendant stood guarantee for the repayment of the loan. In the application for loan at Ex.D55, it is

mentioned that by the time the construction loan was availed in December 2004, the plaintiff had already spent a sum of Rs.16,00,000-00 on the construction. The loan of Rs.23,00,000-00 was sanctioned during December 2004. A building comprised of basement and three upper floors was constructed in the suit property. The plaintiff occupied half of the first floor and the entire second floor and the defendant and his family members occupied the other half of the first floor and the ground floor. This property shall henceforth be referred to as "Suit Property"

31. The business of Sharavathi Hotel was closed down in November 2007 and DW1 admitted that there was no transaction in the account of Sharavathi Hotel subsequent to November 2007. Further DW1 admitted that the premises of Sharavathi Hotel was let out to Annappa by the spouses of the plaintiff and defendant and the premises was later let out to Radhakrishna Adiga by both the spouses of the plaintiff and defendant.

32. Till then there seemed to be bliss in the family of the plaintiff and the defendant. However, the father of the plaintiff and defendant who was then 81 years old and who was admittedly living with the defendant filed a suit in O.S.No.1209/2009 for a partition and separate possession of his share in not only Rudreshwara Chambers but also the house property that was constructed by the plaintiff in the suit property. It was claimed in the said suit that the said properties were purchased out of the co-ownership business of Rudreshwara Enterprises of which he was a co-owner. The plaintiff and his wife emboldened by the suit filed in O.S.No.1209/2009, filed another suit in O.S.No.3773/2009 for partition of her half share in Rudreshwara Chambers. Later, the plaintiff filed the present suit for ejectment of the defendant from the suit property.

33. It is now trite that in a suit for ejectment, proof of title of a plaintiff need not be of the same degree that is expected in a suit for title. It is equally well settled that once a tenant, always a tenant and he cannot challenge the title of his landlord. It is equally settled if a tenant has any inchoate right in the tenanted property then he has to first quit and deliver possession and enforce his inchoate right.

34. The Apex Court in Sant Lal Jain vs Avtar Singh reported in AIR 1985 SC 857 held as follows:

"The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him? during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from some one else lawfully claiming under him, in which case there would be clear merger. The respondent has not surrendered possession of property to the appellant even after the termination of the licence and the institution of the suit. The appellant is, therefore, entitled to recover possession of the property. We accordingly allow the appeal with costs throughout and direct the respondent to deliver possession of the property to the appellant forthwith failing which it will be open to the appellant to execute the decree

and obtain possession".

35. The defendant claimed that he was not a tenant in the suit property but was in possession of the property in his capacity as a partner of Sharavathi Hotel which had funded the construction of the building while some amount was transferred to the savings bank account of the plaintiff by Rudreshwara Enterprises to enable the plaintiff to clear off the monthly loan instalments to Vijaya Bank.

36. It is relevant to note that both Rudreshwara Enterprises and Sharavathi Hotel are not registered firms. The plaintiff had marked Ex.P1 which is the sale deed by which, he purchased the suit property. He also marked Ex.P3 which is the rent agreement entered into between him and the defendant in respect of the "independent residential accommodation in the ground floor with a sump and an overhead tank". He also terminated the tenancy by a notice under Section 106 of the Transfer of Property Act.

37. In terms of Ex.D3, which is the Order of re- assessment of Income of Sharavathi Hotel, it is found that the partners of Sharavathi hotel had declared that a sum of Rs.16,77,640-00 was utilised for meeting the expenses of construction of the building at the suit property and this amount was claimed as an expenditure. The Income Tax Department in terms of the re-assessment Order had disallowed the same as the expenditure did not relate to the business of Sharavathi Hotel.

38. The defendant has placed on record bills and corresponding cash vouchers (Ex.D-6 to D43) which relate to the expenses incurred towards construction of the building and which were paid by Sharavathi Hotel. The payments as found in the cash vouchers find corresponding entry in Ex.P48 which is the account extract of Sharavathi Hotel. Some vouchers such as Ex.D16, D18, D-26 are clearly concocted as the dates mentioned therein do not match. The defendant has also placed on record an articles of agreement (Ex.D4) entered into between the plaintiff and DW3 regarding the construction of the building in the suit property. This document except stating that the plaintiff had engaged the services of DW3 to construct the building, does not mention any other details such as cost of construction, specifications etc. The evidence of DW3 indicates that he used to get payments from Sharavathi Hotel by cash and cheque but no statement of account is placed on record and there are no corresponding cash vouchers. However, there are entries found in Ex.D-48, D-52 which indicate that certain monies are paid to a person named Shivaprakash. However it is not clear whether the said Shivaprakash is the witness -PW3.

39. However, none of the parties have placed on record the balance sheet of Sharavathi Hotel for the assessment years 2003-04 and 2004-05, 2005-06 and 2006-07. It is not known whether the amount paid allegedly towards construction of the building in the suit property or towards payment of instalments were debited to the profit and loss account of each of the partners of Sharavathi Hotel. If we look at the re- assessment order by the IT department for the assessment year 2007-08, the income of Sharavathi Hotel was close to the tune of Rs.30,45,382-00. There is no material placed on record that the suit property was ever treated to be the property belonging to the partnership firm Sharavathi Hotel. It would have been beneficial if the audited balance sheets of the firms were placed on record and in the absence of such documents, it is impossible to hold that the

defendant had any right, title or interest. As a matter of fact, DW1 in his deposition stated as follows:

"It is true to suggest that whatever amount paid through the account of Sharavathi Hotel was used for House No.198, but with consent. I do not know whether the amount was debited to the profit and loss account of Sharavathi Hotel".

40. The evidence of DW2 is not reliable as she admitted that she was not maintaining the books of accounts of Sharavathi Hotel and that there was an auditor Mr.Amarnath Reddy who was preparing all the statements. Thus her evidence has no probative value and is not reliable.

41. The evidence of DW3 discloses that he was engaged by the plaintiff to construct the building in the suit property. He was examined to demonstrate that the building comprised of Ground, First and Second floor in the suit property was not constructed as on the date of the rental agreement at Ex.P2.

42. In the light of the above, let me consider the contentions urged by the learned Senior counsel for the parties.

43. In so far as the first contention of the learned Senior Counsel for the defendant, the suit in O.S.1209/2009 definitely relates to a claim for partition in respect of the suit property. However, this Court in W.P.No.34405/2011 had set aside the Order staying the further proceedings in the suit for ejectment and this Court in CRP.355/2012 had directed the Trial Court to independently proceed with the suit for ejectment. The Order in W.P.No.34405/2011 has attained finality as the challenge to this Orders before the Apex Court in SLP(Civil) 36239/2011 failed. Even otherwise, in the light of the fact that the defendant admits Ex.P2 and since the plaintiff has established his ownership of the suit property in terms of Ex.P1, it is not wise to keep the adjudication of this suit at abeyance. The adjudication of this suit would not decimate the rights, if any, of the defendant in O.S.No.1209/2009. The learned Senior Counsel for the plaintiff would not dispute this legal position. This is also the law declared by this Court in a catena of decisions.

44. In so far as the second contention that Ex.P2 was nominal and not enforceable as there was no building that existed on the suit property as on the date of Ex.P2, the defendant marked Ex.P121 which is the service certificate issued by BESCO which shows that the electrical installation in the suit property was serviced on 18.04.2007. Further Ex.D119 indicates that the telephone connection that stood in the name of the wife of the plaintiff was installed at No.2043, HIG, Ist main, 4th B cross, Yelahanka and later this phone was transferred to the suit property which was evidenced by Ex.D120. Further the evidence of PW1 and DW3 is relied upon to contend that the building plan to construct the building on the suit property was sanctioned during August 2004 and the loan to construct the building on the suit property was sanctioned in December 2004. It is thus contended that a rental agreement as at Ex.P2 could not be entered into on 02.11.2004 and it was nominally entered to meet a different objective.

45. It is relevant to note that the defendant had marked Ex.D53 which was the application for loan submitted by the plaintiff to purchase the suit property. In the said application, the plaintiff had

declared that the built up area in the suit property was 3100 square feet. The defendant stood guarantee for the repayment of the loan as per Ex.D54. However, for reasons that are obvious namely to avoid payment of stamp duty, the plaintiff had declared that the suit property comprised of a 2 square red oxide floor building. Ex.P2 clearly discloses that what was rented out to the defendant was an "independent house with 4 bed rooms, 4 toilets, a hall and a kitchen with sump and an overhead tank." Thus, it is clear that the building which matched the description of the schedule mentioned in Ex.P2 did exist on the suit property as on the date of Ex.P2 and that the defendant entered possession of the suit property as a tenant. It is also probable that the defendant took possession of the suit property as a tenant as his business interest was at Rudreshwara Chambers and Sharavathi Hotel at Yelahanka and the family of the defendant was already residing at Yelahanka. Thereafter, the plaintiff constructed the building and the defendant continued to occupy the suit premises. The fact that the mother of the plaintiff/defendant died on 27.05.2006 at #2043, HIG, Ist Main, 4th B Cross, Yelahanka and the gruhapravesham was later organised makes it all the more probable that the defendant entered possession of the suit property as a tenant after vacating the premises #2043, HIG, Ist Main, 4th B Cross, Yelahanka. In order to cover up, the defendant relied upon Ex.D57 to D116 which are the rent receipts issued by the owner of the premises at Palace Guttahalli to contend that the defendant was residing there till April 2007. He also marked Ex.D117 which is the receipt issued by the owner of the Palace Guttahalli house acknowledging the receipt of Rs.50,000-00 as advance from the defendant under the rent agreement dated 06.04.2002. These documents clearly contradict Ex.D118, 119 and 120.

46. It is no doubt true as contended by the learned Senior Counsel for the defendant and as declared by the Apex Court in the Judgments relied upon that oral evidence is permissible under Section 92 of the Indian Evidence Act, 1872 to explain the contents of any document and or to prove that the document was not intended to be acted upon or was a nullity. Contrarily, the learned Senior Counsel for the plaintiff contended that oral evidence is permissible only when the terms of a written document are ambiguous or unclear. However, the present case is one for ejectment and thus the Trial Court rightly did not traverse beyond the realm of the suit to roll out findings that could impinge upon the rights of the parties or create a right that never existed. Conversely, it would have been difficult for the Trial Court to have decreed the suit for ejectment if the defendant had not admitted the execution of Ex.P2 and the Court would have invariably directed the plaintiff to seek appropriate declaration of title and recovery of possession of the suit property. Further, the contention that Ex.P2 was executed to demonstrate the rent potential that the premises could earn is not outrightly believable as the plaintiff and the defendant were dealing with Vijaya Bank, Yelahanka since the year 1996 and it is obvious that the bank would be aware of the relationship between the plaintiff and the defendant. Thus, a rental agreement between the plaintiff and the defendant would have definitely raised eye brows within Vijaya Bank about the genuinity of the document. Even otherwise, if this document was intended to be given to Vijaya Bank, either there must have been a reference of Ex.P2 in the loan application form or Ex.P2 must have been given to the bank. Having regard to the number of accounts that the plaintiff/ defendant/ their spouses/ firms had with Vijaya Bank and having regard to the fact that the plaintiff had already spent Rs.16,00,000-00 on the construction of the house by the time the loan was raised, it is quite improbable that Ex.P2 was created nominally. Thus Point No.3 framed by this court is answered in the negative.

47. As regards the contention that the monthly instalments for the payment of the loan raised for purchasing the suit property were credited from the account of Rudreshwara Enterprises into the Savings Bank account of the plaintiff from where the payments were routed and therefore, it should be construed that the possession of the defendant in the suit premises was not of a tenant but as a sharer, it is no doubt true that in terms of various entries found in ExD47, monies were transferred to the savings account of the plaintiff from where the monthly instalments were appropriated by Vijaya Bank. There is nothing to indicate that the defendant had any subsisting interest in Rudreshwara Chambers but his wife had an interest therein. There is also nothing to indicate that the defendant was a partner of Rudreshwara Enterprises and thus any transfer of funds by Rudreshwara Enterprises into the savings account of the plaintiff cannot arm the defendant with any right over the suit property.

48. It is true as contended by the learned Senior Counsel, a sum of Rs.16,77,640-00 was found to be routed from the account of Sharavathi Hotel to meet the expenses of construction of the building in the suit property, as per the Income Tax returns filed by the plaintiff and defendant as partners of Sharavathi Hotel. If the suit property was brought into the partnership firm of Sharavathi Hotel, then the expenses incurred on the suit property would have been an allowable expenditure. To a notice issued by the Income Tax Department calling upon the plaintiff and defendant to produce documents in proof of the expenditure, they failed to produce any. The department was therefore compelled to treat the expenditure so incurred as the income and arrived at the income of Sharavathi Hotel at Rs.30,45,382-00. The question whether the suit property was brought into as the asset of Sharavathi Hotel would be pivotal for the defendant to sustain his claim that he was in possession of the suit property as a partner of Sharavathi Hotel.

49. Section 14 of the Partnership Act reads as follows:

"Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm"

50. The Apex Court in Arjun Kanoji Tankar vs Santaram Kanoji Tankar reported in 1969(3) SCC 555 held;

"Under Section 14 of the Partnership Act 1932, property exclusively belonging to a person, in the presence of an agreement to the contrary, does not, on the person entering into partnership with others, become a property of the partnership merely because it is used for the business of the partnership. Such property will become property of the partnership only if there is an agreement - express or implied- that the property was, under the agreement of the partnership, to be treated as the

property of the partnership".

Unfortunately for the defendant, he has failed to place any documentary evidence in this regard to indicate that the suit property was acquired out of the money belonging to Sharavathi Hotel. If payments to meet the expenses of construction were routed from the account of Sharavathi Hotel where the plaintiff was admittedly a partner, that in itself cannot amount to bringing the suit property into the capital of the firm. The defendant ought to have placed on record the balance sheet which would have indicated the share of the plaintiff that he was entitled to in the profits of Sharavathi Hotel and whether the payments made to his personal account were set off against the account of the plaintiff. In view of the admission of DW1 that these payments were made with consent, without the defendant placing on record any material to show that the suit property was brought into the firm and or that the profits of the firm were not separately assigned to the plaintiff, it cannot be construed that the defendant had any share in the suit property. Further, the Income Tax Department in order to pass a provisional order of reassessment, called upon the plaintiff/defendant to produce documents to sustain that the suit property was owned by Sharavathi Hotel. However, neither the plaintiff nor the defendant placed any material in this regard. The plaintiff/ defendant did not produce the Balance Sheet of Sharavathi Hotel which could have thrown some light on the transaction amongst the parties. The defendant also marked Ex.D126 - pass book of Sharavathi Hotel which indicated that a sum of Rs.1,00,000-00 was transferred to the account of plaintiff on 07.10.2004. Ex.D127 is the pass book of Defendant's wife which shows that a sum of Rs.1,00,000-00 each was paid to the plaintiff on 18.08.2004 and 11.09.2004. Ex.D128 is the pass book of the joint account of the defendant and his wife which show payments to the plaintiff. Except indicating that certain monies were paid to the plaintiff, these pass books being stand alone documents cannot indicate any further.

51. The Apex Court held in Shashi Kapila vs R.P.Ashwin reported in AIR 2002 SC 101 as follows:

"A partnership firm is an association of persons. But in spite of that unity between themselves, every partner can have his own separate existence from the firm. Any right which a partner has over any property, other than the partnership property, would remain as his individual asset. The mere fact that the particular person has chosen to include himself as a partner of a firm will not result in incorporation of all his individual properties as the assets of the partnership. Section 14 of the Indian Partnership Act 1932 says: Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business."

At any rate the legal postulation adumbrated in Section 116 of the Evidence Act is so well settled that no decision be cited to further consolidate the same. A Judgment of the Apex Court in the case of Kamaljit Singh vs Sarabjit Singh reported in 2014(16) SCC 472 is noticeable and the following passage is extracted "17. A three-Judge of this Court in Sri Ram Pasricha v. Jagannath and Ors. (1976) 4 SCC 184 reiterated the principle that a tenant in a suit for possession was estopped from

questioning the title of the landlord under Section 116 of the Evidence Act. The title of the landlord, declared this Court, even otherwise irrelevant in a suit for eviction of the tenant. The only exception to the rule of estoppel as stated in Section 116 (supra) may be where the tenant is validly attorned to the paramount title holder of the property or where that the plaintiff-landlord had, during the intervening period, lost his title to the property. We are not, however, dealing with a case where the respondent-tenant claims that the property is vested in anyone else who could be described as the paramount title holder or there was any extinction of the title of the appellant on any count whatsoever since the induction of the respondent as a tenant into the premises. We need not, therefore, be detained by any one of those considerations. What is important is that so long as a jural relationship exists between the respondent-tenant and the appellant and so long as he has not surrendered the possession of the premises in his occupation, he cannot question the title of the appellant to the property. The inevitable inference flowing from the above proposition would be that (viz-a-viz the respondent) the appellant was and continues to be the owner of the premises in question since the year 1992 when the respondent was inducted as a tenant. Reckoned from the year 1992 the appellant has established his ownership of the premises for a period of five years before the filing of the eviction petition thereby entitling him to invoke the provisions of Section 13-B of the East Punjab Urban Land Restriction Act, 1949. Estoppel is a rule of equity which is sanctified by statutory incorporation in the Evidence Act under Section 116 and therefore should be given full play, unless there are glaring evidence to the contrary, which in the present case are conspicuously absent. Therefore, the contention of the plaintiff that he was in possession of the suit property as a sharer cannot be accepted. Thus Point No.4 framed by this Court is held in the negative.

52. Now turning to the next contention that Ex.P2 was in respect of the ground floor and the notice of termination of tenancy was in respect of the ground floor and therefore, the plaintiff/ respondent could not pursue his suit for ejectment of the defendant from the first floor and his remedy is to sue for possession based on title, this argument was subject to the defendant admitting his tenancy over the suit property. However, what has to be considered is that the notice of termination is based on Ex.P2 which invariably referred to the premises in the ground floor. It is not the case of the defendant that the premises as described in Ex.P2 still exists in the suit property. On the contrary, it is his case that a three storey structure is constructed thereon after removing the structure that existed in the suit property. Therefore, describing the tenancy of the defendant as only in the ground floor in the notice of termination of tenancy can best be described as faulty drafting and nothing else. Since ground and first floor of the suit property constituted one unit that was occupied by the defendant, the defendant cannot split it up. Thus, the contention of the defendant is negated and consequently Point No.5 framed by this Court is answered in the affirmative and in favour of the plaintiff.

53. As regard the next contention that the rental agreement (Ex.P2) was inadmissible in evidence since it contemplated renewal of the agreement beyond a period of 11 months and was therefore compulsorily registrable, a reading of Ex.P2 makes it apparent that the renewal was based on mutually acceptable terms and not automatic. Thus, the rental agreement had to be construed as one limiting to 11 months and therefore did not require registration under Section 17 of the Registration Act. Be that as it may, the execution of Ex.P2 was not disputed by the defendant and he did not raise any objection when it was marked. It is undoubtedly true that mere marking of the

document does not make it admissible and admissibility can be checked later, yet in order to ascertain the nature of possession of the defendant, Ex.P2 had to be marked for collateral purpose. Therefore, this contention of the defendant also fails and is thus rejected.

54. As regards the next contention, it is evident that the notice of termination of tenancy was in respect of the ground floor but the suit is filed in respect of the ground and the first floor. The learned Senior Counsel contended that the possession of the first floor premises could not be recovered in an action for ejectment but that the same has to be recovered based on title. This argument was available if the defendant had accepted the tenancy and had proved that the tenancy of the ground and first floor were separate and distinct. In the present case as discussed in the foregoing paragraph, mentioning the schedule in the notice of termination was wholly unwarranted. The defendant could have leveraged this to his advantage by showing that the tenancy of the ground and first floor were distinct and separate. However, that is not the situation in this case. The tenancy of the defendant is to be treated as a composite tenancy and the plaintiff was entitled to sue the defendant for ejectment of the ground and first floor in the suit property.

55. As regards the last contention urged by the learned Senior counsel that Ex.P2 contemplated termination of tenancy by issuing three months prior notice and therefore the termination of the tenancy in terms of Ex.P3 by 15 days notice is improper, this defence too was available if the defendant had admitted the tenancy. Be that as it may as stated earlier, Ex.P2 is a document that had spent in itself after the building as described in Ex.P2 was demolished and new construction was put up thereon. There is no document of tenancy in respect of the ground and first floor and therefore the duration of tenancy as prescribed under Section 106 is fifteen days notice, which the plaintiff has rightly done. Hence the point No.(2) framed by this Court is answered in the affirmative.

In view of the aforesaid findings the following order is passed:

ORDER Regular First Appeal No.1356/2015 filed by the defendant challenging the Judgment and Decree dated 09.07.2015 passed by the XII Additional City Civil and Sessions Judge (CH No.27), Bengaluru in O.S. No.4177/2009 is dismissed. Consequently, the defendant is directed to quit and deliver vacant possession of the suit schedule property within three months from the date of this Order.

Regular First Appeal No.1381/2015 filed by the plaintiff challenging the Judgment and Decree dated 09.07.2015 passed by the XII Additional City Civil and Sessions Judge (CH No.27), Bengaluru in O.S. No.4177/2009, in so far as rejecting the relief of ejectment of the First floor of the suit property is allowed. Consequently, the plaintiff / appellant is entitled to eject the defendant from the entire suit schedule property.

The office is directed to draw a decree in terms of this Judgment.

Any rents deposited by the defendant before this Court shall be released to the plaintiff after proper verification.

No Order as to costs.

Sd/-

JUDGE GH