

20th May, 2020

## POWERS OF SUB-LETTING UNDER THE MAHARASHTRA RENT CONTROL ACT

**1. Veetrag Investments and Finance Company v. Premier Brass and Metal Works Private Limited, 09.10.2002, [2002 SCC OnLine Bom 992], Relevant para 14, 15, 16**

- Section 26 of Maharashtra Rent Control Act is a non-obstante provision.
- Bar to sub-tenancy is not absolute but subject to any contract to the contrary
- A sub-tenant can, with the consent of the landlord and/or the head tenant enter into a contract to sublet or give on licence the whole or any part of the said premises let out to him or to assign or transfer in any other manner his interest therein.

A copy of the judgment attached hereto at **page no. 2 to 11.**

**2. Union Bank of India v. Mittersain Rupchand, 20.03.1995, [(1995) 2 Mah LJ 481], Relevant para 6**

- Prohibition on sub-letting is not absolute because it is always open to the parties to contract to the contrary as provided by the section.
- It is always open for the lessor and the lessee to contract that the lessee can sub-let the premises or assign or transfer in any other manner his interest therein.
- Therefore, clear that even the legislature never contemplated that the lessee of non-residential premises cannot transfer or assign the interest in the leasehold rights.

A copy of the judgment attached hereto at **page no. 12 to 20.**

**3. Tangerine Electronics Systems Pvt. Ltd. v. Indian Chemicals, 04.03.2004, [(2004) 2 Mah LJ 305], Relevant para 15, 16, 23, 24, 25, 29,**

- The contract contrary to the prohibition provided in section 26 can be executed at any time, either before or after the sub-tenancy
- The landlord can always ratify the action of the tenant in subletting or giving on licence or assigning or transferring in any other manner his interest in the premises let to him.
- If the tenant acts in contravention of the prohibition contained in section 26 by voluntary transferring or assigning the interest of tenancy, the tenant exposes himself to eviction as unlawfully subletting or transfer or assignment by the tenant is a ground for eviction.

A copy of the judgment attached hereto at **page no. 21 to 39.**

**4. Goppulal v. Thakurji Shriji Shriji Dwarakadheeshji, 12.03.1969, [(1969) 1 SCC 792], Relevant para 4, 5, 6**

- Absence of any pleading as to the permission of the landlord for sub-letting is fatal to the case.
- The permission of the landlord for the sub-letting is not established from the mere fact that the landlord realised rent after the sub-letting in the absence of proof that the landlord had then clear knowledge of the sub-lease.

A copy of the judgment attached hereto at **page no. 40 to 44.**

458

[2003(1) Mh.L.J.]

MAHARASHTRA RENT CONTROL ACT, SECTIONS 26 AND 56 :  
CIVIL PROCEDURE CODE, SECTION 60

(S. J. Vazifdar, J.)

VEETRAG INVESTMENTS AND FINANCE COMPANY *Plaintiff.*

vs.

PREMIER BRASS AND METAL WORKS  
PRIVATE LIMITED *Defendant.*

And

MRS. SUSHILABEN C. SHAH *Applicant.*

**(a) Maharashtra Rent Control Act (18 of 2000), S. 26** — *Bar against sub-letting — Bar is not absolute but subject to any contract to the contrary.*

Section 26 of the Maharashtra Rent Control Act bars the tenant from sub-letting or giving on licence, premises let to him or to assign or transfer in any other manner his interest therein. However, this bar is subject to any contract to the contrary and not absolute. A sub-tenant can, with the consent of the landlord and/or the head tenant enter into a contract to sublet or give on licence the whole or any part of the said premises let out to him or to assign or transfer in any other manner his interest therein. 1995(2) Mh.L.J. 481 = (1996) 3 CCC 52. (Paras 14 and 16)

**(b) Maharashtra Rent Control Act (18 of 2000), S. 56 and Civil Procedure Code, S. 60** — *Tenancy rights of tenant constitute saleable property and gives tenant disposing power in respect thereof — Can be attached and sold in execution of a decree.*

Section 56 of the Maharashtra Rent Control Act now permits a tenant to claim or receive any sum or any consideration as a condition for the relinquishment, transfer of assignment of his tenancy of any premises let to him. It also permits the landlord to receive any fine, premium or other like deposit of any consideration in respect of grant, or renewal of a lease of any premises, or for giving his consent to the transfer of a lease to any other person. Section 56 thus gives a valuable right and creates a further interest in respect of premises let to a tenant. In view of section 56 a fortiorari tenancy rights of a tenant constitute saleable property and give tenants a disposing power in respect thereof and the same are therefore, liable to be attached and sold in execution of a decree. However, this cannot affect the rights of the landlords/head tenants in any manner, for the right of a tenant under section 56 can only be exercised with the consent of the landlord. In execution of a decree against the tenant/sub-tenant, the Court cannot force an unwilling landlord/head tenant to enter into such a agreement. But if such an agreement is entered into by the landlord or head tenant with a tenant or sub-tenant as the case may be, the consideration received by the latter is liable to be attached and sold. If the landlord and/or the head tenant is willing to enter into an agreement as contemplated in section 26 and section 56, it would be possible for the executing Court to force the tenant or sub-tenant to enter into an agreement contemplated therein. Needless to say, the

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Chamber Summons No. 903 of 2001 in Execution Application No. 445 of 2000 in Summary Suit No. 4150 of 1997 decided on 9-10-2002. (O.O.C.J. Bombay)

2003(1) Mh.L.J.] VEETRAG INVESTMENTS vs. PREMIER BRASS 459

executing Court at that stage would not confirm the agreement, sale, assignment or transfer unless it is satisfied that the same was reasonable, fair and genuine. In this regard such a sale would be no different from a sale of any other property. Chamber Summons dismissed. 1995(2) Mh.L.J. 481 = (1996) 3 CCC 52, 2002(3) Mh.L.J. 544, Rel. (Paras 17, 19, 20 and 23)

For applicant in support of Chamber Summons : *M. C. Palan with M. K. Khatri*  
For plaintiff : *V. B. Naik* instructed by *Y. P. Yagnik*

**ORAL JUDGMENT** :— The Chamber Summons is to set aside the attachment levied pursuant to a warrant of attachment dated 17th November, 2000 insofar as it relates to the goodwill and suit premises and incidental reliefs.

2. On 16th February, 2002 the suit was decreed in the sum of Rs. 24,00,000/- with interest at 36% per annum from the date of the promissory note on which the suit was filed i.e. 3-11-1994 till the date of filing of the suit and further interest at 18% per annum from the date of the suit till realisation on the sum of Rs. 24,00,000/- along with costs.

3. On 17-11-2000 a warrant of attachment was issued by this Court. The plaintiff had applied for execution of the decree by attachment of the moveable property belonging to and in the possession of the defendant including the defendant's right, title and interest in the goodwill of the business together with tenancy rights of the said business as a going concern. The attachment in respect thereof was levied on 12th December, 2000. The plaintiff, by its advocate's letter dated 13th December, 2000 informed the applicant of the said decree and the warrant of attachment dated 17th November, 2000 and the fact that the tenantable premises of the defendant along with their right, title and interest to use, occupy and possess the same were attached by this Court. The defendant, by her advocate's letter dated 21st December, 2000 replied to the aforesaid letter. As the contents of the letter form the basis of her case in the present Chamber Summons, it is not necessary to narrate the same at this stage.

4. The applicant took out the present Chamber Summons on 24th July, 2001.

The applicant's case is that she is a tenant of the said premises. By an agreement dated 1st June, 1970 the applicant entered into an agreement of leave and licence for 11 months with the defendant. Thereafter, the applicant and the defendant entered into a further leave and licence agreement dated 1st March, 1973. On 1st June, 1978 the applicant filed R.A.E. Suit No. 308/5183 in the Small Causes Court at Bombay. On 25th/26th July, 1996 the learned Single Judge of the Small Causes Court passed a decree for ejectment against the defendant. In 1996 the defendant filed an appeal being Appeal No. 486 of 1996 challenging the decree dated 25th/26th July, 1996. The Appeal is pending. By an order dated 17th April, 1998 the Division Bench of the Small Causes Court stayed the execution of the decree till further orders. The stay is presently in operation.

5. On 8th January, 2001 the plaintiffs herein made an application to be joined as a party in Appeal No. 486 of 1996. The application was allowed by an order dated 20th April, 2001 passed by the Small Causes Court. Being aggrieved by the said order, the applicant filed Civil Revision Application No. 988 of 2001

460 VEETRAG INVESTMENTS vs. PREMIER BRASS [2003(1) Mh.L.J.]

before this Court which was permitted to be withdrawn with liberty to the applicant to agitate their contentions in appropriate proceedings after the present Chamber Summons is finally decided. It is in these circumstances that the applicant filed the present Chamber Summons.

6. Mr. Palan, the learned counsel appearing on behalf of the applicant submitted that as the defendant was the applicants sub-tenant it has no disposing power over the said premises. Accordingly, he submitted, the same cannot be attached and sold in execution of the said decree. The attachment according to him is therefore liable to be set aside under Order XXI, Rule 15 of the Code of Civil Procedure. He further submitted that the proviso to section 60 of the Civil Procedure Code was not exhaustive and, if the execution and sale of any property is barred under statute, the same also could not be attached and sold in execution despite the fact that it is not one of the properties mentioned in the proviso to section 60. Lastly, Mr. Palan submitted that the defendant did not have any saleable goodwill or tenancy rights in respect of the said premises.

7. Mr. Palan's submission that the tenancy rights of the defendant in the property are not saleable and that the Judgment-debtor/sub-tenant has no disposing power over the same, is not well-founded. Section 60 of the Code of Civil Procedure reads as under :—

“60 (section 266) (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank notes, Cheques, bills of exchange, hundies, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf.

Provided that the following particulars shall not be liable to such attachment or sale, namely;

.....

(kc) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply.”

8. Thus section 60 of the Civil Procedure Code itself indicates that the interest of a lessee is saleable property in respect of which the lessee has a disposing power. If it were not so, it would not have been necessary in the proviso, which excludes certain properties from sale and attachment in execution of a decree, to include the interest of a lessee holding a particular type of leasehold interest viz. in respect of a residential building to which the provisions of law for the time being in force relating to the control of rents and accommodation apply. If a lessee's right did not constitute property within the meaning of that expression in section 60 of the Civil Procedure Code, there would have been no necessity to enact clause (kc) to the proviso thereof.

9. It is thus clear that the tenancy rights of the judgment-debtor constitutes a saleable property within the meaning of that expression in section 60 of the

2003(1) Mh.L.J.] VEETRAG INVESTMENTS vs. PREMIER BRASS 461

Code of Civil Procedure and in respect thereof the judgment-debtor has a disposing power, which he may exercise for his own benefit.

10. I am in agreement with Mr. Palan's submission that the proviso to section 60 of the Code of Civil Procedure is not exhaustive. In other words, if there is a statutory bar prohibiting attachment and sale of property of a particular nature under an enactment, then merely because it is not included in the proviso to section 60, it cannot be said that the bar would not operate.

11. Founding himself in this proposition, Mr. Palan submitted that section 26 of the Maharashtra Rent Control Act, 1999 (hereinafter referred to "1999 Act") contains an absolute bar against the tenant to sublet or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. Section 26 of the 1999 Act reads thus :—

"26. In absence of contract tenant not to sublet or transfer or to give on licence —

Notwithstanding anything contained in any law for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sublet or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein".

12. In view of the provisions of sections 7(15) and 25 of the 1999 Act a sub-tenant falls within the meaning of the term "tenant". Thus the judgment-debtor, who is a sub-tenant of the applicant is clearly a tenant within the meaning of that expression in section 26 of 1999 Act. Consequently the restrictions on the tenant imposed by section 26 of 1999 Act will also apply to the judgment-debtor.

13. Sections 7 (15) and 25 of the 1999 Act, are as follows :—

"7. (15) "tenant means any person by whom or on whose account rent is payable for any premises and includes :—

(a) such person, —

(i) who is a tenant, or

(ii) who is a deemed tenant, or

(iii) who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or

(iv) who has derived title under a tenant, or

(v) to whom interest in premises has been assigned or transferred as permitted.

by virtue of, or under the provisions of, any of the repealed Acts;

(b) a person who is deemed to be a tenant under section 25;

**25. Certain sub-tenants to become tenants on determination of tenancy.**

— When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet and such sub-tenancy is subsisting on the date of commencement of this Act or where sub-tenancy is permitted by a contract between the landlord and the tenant, such sub-tenant shall, subject to the provisions of this Act, be deemed to become the tenant of

462 VEETRAG INVESTMENTS vs. PREMIER BRASS [2003(1) Mh.L.J.

his landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued.”

14. The question then really is whether section 26 of the 1999 Act contains an absolute bar against the judgment-debtor assigning or transferring its interest as a sub-tenant in the said premises. It is true that section 26 is a non-obstante provision. It bars the tenant from sub-letting or giving on license, premises let to him or to assign or transfer in any other manner his interest therein. However, this bar is subject to any contract to the contrary. A plain reading of section 26, indicates that the bar is not absolute but subject to any contract to the contrary. Whether in the facts of the present case, the judgment-debtor being a sub-tenant a contract to the contrary by it requires the landlord or the applicant i.e. the head tenant to be a party to the contract is a matter which does not fall for consideration presently. A sub-tenant can, with the consent of the landlord and/or the head tenant enter into a contract to sublet or give on licence the whole or any part of the said premises let out to him or to assign or transfer in any other manner his interest therein.

15. This view is supported by the judgment of a Division Bench of this Court in the case of *Union Bank of India vs. M/s Mittersain Rupchand and Ors.* reported in 1995(2) Mh.L.J. 481 = (1996) 3 C.C.C. 52.

The question that fell for consideration of the Division Bench was whether the tenancy rights and goodwill of a running concern can be attached in execution under Order 21, Rule 54 of the Civil Procedure Code. The decree-holder sought and obtained attachment of the goodwill and the tenancy rights in the property in respect of which the respondent was a tenant. The judgment-debtor was a tenant in respect of the premises which were attached. It was contended on behalf of the judgment-debtor that the goodwill and tenancy rights are not saleable property and over which the judgment-debtor had no disposing power. Consequently it was contended, the execution levied was invalid. Rejecting the contention, the Division Bench held in paragraph 7 that there was no bar whatsoever under sub-section (1) of section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to “1947 Act”), to attach and sell the leasehold interest of a lessee in a premises leased out for a non-residential purpose.

Section 15(1) of 1947 Act, reads as under :—

“15. (1) Notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises.

Provided that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification.”

2003(1) Mh.L.J.] VEETRAG INVESTMENTS vs. PREMIER BRASS 463

For the purposes of the present submission, the provisions of section 15(1) of 1947 Act are similar to the provisions of section 26 of 1999 Act. The Division Bench construed section 15(1) thus :—

“6. Sub-section (1) of section 15 of the Bombay Rent Act, which is set out hereinabove, *inter alia* provides that it shall not be lawful for any tenant to sublet the whole or any part of premises or to assign or transfer in any other manner his interest therein. The plain reading of sub-section makes it clear that the prohibition is not absolute because it is always open to the parties to contract to the contrary as provided by the section. It is always open for the lessor and the lessee to contract that the lessee can sublet the premises or assign or transfer in any other manner his interest therein. In other words the prohibition contained in sub-section (1) is not absolute. The section nowhere provides that the transfer shall be void. The proviso of the sub-section confers power on the State Government to issue notification permitting the transfer of interest and such notification has been issued permitting transfer of interest of the lessee in the business premises, provided what is transferred is the running business with tenancy rights. It is, therefore, clear that even the legislature never contemplated that the lessee of non-residential premises cannot transfer or assign the interest in the leasehold rights. The learned Judge, was, therefore, not right in observing that the transfer of leasehold interest in non-residential premises is totally prohibited and therefore not liable for attachment.”

16. The ratio of the judgment of the Division Bench squarely applies to the provisions of section 26. As I have observed earlier section 26 also does not contain an absolute bar. The observations of the Division Bench in respect of section 15(1) extracted above, would therefore, clearly apply to the provisions of section 26.

17. There is yet another reason for construing section 26 in this manner. Mr. Naik, invited my attention to section 56 of the 1999 Act. There was no similar provision in the 1947 Act. Section 56 of 1999 Act reads thus :—

“Section 56. Right of Tenant and Landlord to receive lawful charges. — Notwithstanding anything contained in this Act, it shall be lawful for.—

(i) the tenant or any person acting or purporting to act on behalf of the tenant to claim or receive any sum or any consideration, as a condition of the relinquishment, transfer or assignment of his tenancy of any premises;

(ii) the landlord or any person acting or purporting to act on behalf of the landlord to receive any fine, premium or other like sum or deposit or any consideration in respect of the grant, or renewal of a lease of any premises, or for giving his consent to the transfer of a lease to any other person.”

Once again it must be noted that the expression tenant in section 56 of 1999 Act would include a deemed tenant which the judgment-debtor is. Section 56 of the 1999 Act now permits a tenant to claim or receive any sum or any consideration as a condition for the relinquishment, transfer or assignment of his tenancy of any premises let to him. It also permits the landlord to receive any

464 VEETRAG INVESTMENTS vs. PREMIER BRASS [2003(1) Mh.L.J.]

fine, premium or other like deposit or any consideration in respect of grant, or renewal of a lease of any premises, or for giving his consent to the transfer of a lease to any other person.

Section 56 thus now gives a valuable right and creates a further interest in respect of premises let to a tenant. In view of section 56 of the 1999 Act a fortiorari tenancy rights of a tenant constitute saleable property and give tenants a disposing power in respect thereof and the same are therefore, liable to be attached and sold in execution of a decree.

18. In answer to Mr. Naik's submission in respect of section 56 of the 1999 Act, Mr. Palan invited my attention to J. D. Dalal's Commentary on The Maharashtra Rent Control Act, 1999 at page 747 and adopted the same as his argument. The relevant part reads as follows :—

“Then the question arises how far are the provisions of section 56 of the Act which now allow the landlord and tenant to take consideration for relinquishment, transfer or assignment of tenancy of any premises consistent with this provision. Because while a consideration is legal for transfer or assignment of any premises the transfer of premises let for business or trade or storage is prohibited. This situation appears to be somewhat inconsistent. Therefore section 56 stands restricted to transfer of premises let for residence or education. That would mean that lease or tenancy of residential or educational premises to which the proviso may apply can be a matter of commercial bargain particularly because of section 56 put the tenancy or lease of commercial premises cannot be so. The provision should have been vice versa. At the same time section 56 has a non obstante clause viz. notwithstanding anything contained in the Act. Does it mean that section 56 overrides the provisions to section 26. If that is so there was no point in excluding the premises let for business or trade or storage,”

I fail to understand why according to the learned author the transfer of premises let for business or trade or storage is prohibited. Firstly, as I have observed earlier, there is no absolute bar on transfer or assignment of the tenancy rights in respect of commercial premises. The bar is subject to a contract to the contrary. Founding himself on this erroneous premise the author goes on erroneously to conclude that section 56 is restricted in its application to premises let for education and residence. In the circumstances, there is no inconsistency between the provisions of sections 26 and 56 of the 1999 Act. Sections 26 and 56 in fact complement each other. With respect I am not inclined to accept Mr. Palan's submission based on the above commentary and reject the same as being contrary to the provisions of the 1999 Act.

19. Having said this, it is necessary at this stage to clarify the position regarding the rights of landlords and head tenants. I have held that tenancy rights can be attached and sold in execution of a decree. The rights of the tenants if exercised under section 56 the 1999 Act would also be liable to be attached and sold in execution of a decree. However, this cannot affect the rights of the landlords/head tenants in any manner, for the right of a tenant under section 56 of 1999 Act can only be exercised with the consent of the landlord. In execution of a decree against the tenant/sub-tenant, the Court cannot force an unwilling



2003(1) Mh.L.J.] VEETRAG INVESTMENTS vs. PREMIER BRASS 465

landlord/head tenant to enter into such a agreement. But if such an agreement is entered into by the landlord or head tenant with a tenant or sub-tenant as the case may be, the consideration received by the latter is liable to be attached and sold.

20. Further, if the landlord and/or the head tenant is willing to enter into an agreement as contemplated in sections 26 and 56, it would be possible for the executing Court to force the tenant or sub-tenant to enter into an agreement contemplated therein. Needless to say, the executing Court at that stage would not confirm the agreement, sale, assignment or transfer unless it is satisfied that the same was reasonable, fair and genuine. In this regard such a sale would be no different from a sale of any other property.

21. Mr. Palan, relied upon a judgment of this Court in the case of *Veetrag Investments and Finance Co. vs. M/s Premier Brass and Metal Works Pvt. Ltd. and M/s Seksaria Sons Pvt. Ltd. Mumbai*, reported in 2002 (3) Mh.L.J. page 455. It is necessary to set out the facts in that case before dealing with the ratio therein. Incidentally, it is interesting to note that the application for raising attachment and setting aside in that case also was taken out in the present suit. The applicant was the owner and landlord of the premises. The defendant was a monthly tenant in respect thereof. According to the applicant, the defendant had committed a breach of tenancy and he intended therefore to file a suit for eviction against him and for recovery of possession.

The plaintiff had obtained the decree mentioned earlier by me. The plaintiff had taken out a Notice of Motion for attachment before judgment under Order 38, Rule 5 of the Code of Civil Procedure. The learned Counsel appearing for the defendant made a statement that the defendant would maintain status - quo in relation to the premises in his occupation. When the suit was finally disposed of, the defendant's counsel was not prepared to continue the statement. The learned Judge, who passed the decree, appointed a Court Receiver in respect of the premises therein but directed the Court Receiver to take only formal possession, which the Court Receiver did. Ultimately the Court Receiver was directed to hold a bid between the plaintiff and the defendant to find out whose bid was higher for utilising the premises as an agent of the Court Receiver. If the plaintiff's bid was higher, the Court Receiver was directed to appoint him as his agent. The plaintiff filed an execution application and obtained a Judge's order whereby the Court Receiver was directed to sell the suit premises to the plaintiff or his nominee for a sum of Rs. 40,00,000/-. The Court Receiver was directed to hand over possession of the premises to the plaintiff. The plaintiff was thereafter put in possession of the premises.

Thereafter the applicant took out a Chamber Summons under Order 21, Rule 90 of the Code of Civil Procedure praying that the order sanctioning sale of the premises in favour of the plaintiff be set-aside and for raising the attachment. The applicant further made an application that he be permitted to re-enter the premises. It was contended on behalf of the plaintiff that he had by operation of law become a tenant of the applicant and therefore, this Court did not have jurisdiction to entertain the Chamber Summons.

22. It is important to note that the learned Judge dealt with two separate applications in the Chamber Summons – one was for quashing the sale that was sanctioned by the Court and other was to raise the attachment. The plaintiff's

R.F. 30

466 VEETRAG INVESTMENTS vs. PREMIER BRASS [2003(1) Mh.L.J.]

contention that the property had been validly sold in execution of a decree, was negated by the learned Judge. It is however, important to note that the learned Judge did not quash the attachment, which had been levied by the Court. This is clear from paragraphs 8, 9 and 10 read with paragraph 18 of the judgment .

The learned Judge in paragraphs 8 and 9 dealt with the submission made on behalf of the plaintiff to the effect that the goodwill and tenancy rights in such premises were saleable property and therefore would be liable to attachment and sale in view of section 15(1) of 1947 Act read with the notification issued thereunder permitting transfer and assignment of leasehold interest in the business in cases when the stock-in-trade of a running business is transferred or assigned. The plaintiff sought to support the sale relying upon the judgment in *Union Bank of India vs. M/s Mittersain Rupchand and Ors.* (supra). It is in respect of this argument that the learned Judge observed as follows in paragraphs 9 and 10 :—

“9. Shri Samdani, however, pointed out that the Rent Act, 1947 has been repealed by the Maharashtra Rent Control Act, 1999 (hereinafter referred to as “the Rent Act, 1999” for short). Section 58 of the said Act provides for repeal of the Rent Act, 1947, it may be noted that the Rent Act, 1999 came into force with effect from 31-3-2000. The impugned order ordering sale of the demised premises in demised of the plaintiff was made on 30-3-2001 i.e. exactly one year after the coming into force of the Rent Act, 1999. It is therefore, obvious that the question as to whether tenancy and goodwill in respect of the premises which are non-residential can be transferred, is governed not by a Rent Act, 1947, but, the Rent Act, 1999. Shri Samdani referred to the provisions of section 26 of the Rent Act, 1999 which provides that in the absence of contract tenant not to sublet or transfer or give on licence. The section reads;

Section 26. Notwithstanding anything contained in any law, for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sublet or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein;

Provided that, the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such lease or class of lease any premises or class of premises other than those let for business, trade or storage to such extent as may be specified in the notification.

10. The proviso enables the State Government to permit in any area the transfer of interest in the premises held on lease other than those let for business. It is not brought to my notice that the State Government has issued any notification under the proviso of section 26 of the Rent Act, 1999. Even in that case, the notification cannot be in respect of the premises let for business. It is therefore, clear that in the absence of any contract, the tenant has no right to sublet or transfer the premises held by him whether they are for residential or non-residential purposes. The argument of Shri Samdani is to the effect that the sale of the demised premises as per the order dated 30-3-2001 is contrary to the provisions of

2003(1) Mh.L.J.] VEETRAG INVESTMENTS vs. PREMIER BRASS 467

section 26 of the Rent Act, 1999. According to him, Court cannot permit anything to be done which violates the provisions of any Act. In other words, what the defendant could not have done otherwise legally done, cannot be got done through Court. In view of that the submission of Shri Samdani in this behalf is sound and sustainable. Therefore, the same will have to be upheld.”

23. However, in paragraph 18 the learned Judge ordered as under :—

“18. In the result, the Chamber Summons is made absolute in terms of prayer clause (b) subject to the deletion of the bracketed portion which reads “and quash attachment if any levied thereon on 23rd November, 2000 or any other date be raised”. It is clarified that the attachment of the demised premises will continue and that the plaintiff/decreed holder will be at liberty to follow the prescribed procedure for sale of the demised premises”.

Thus the learned Judge set-aside the sale but did not raise the attachment. The judgment is therefore of no assistance to Mr. Palan. In the present case, the Court has not ordered the premises to be sold. It has only attached the goodwill and tenancy rights of the judgment-debtor.

24. Mr. Naik, however submitted that even the sale of goodwill and tenancy rights of the Judgment-debtor/defendant is permissible. Relying upon section 58(c) of the 1999 Act he contended that the notification issued under section 15(1) of 1947 Act is saved. The judgment in *Veetrag Investment's case*, the relevant part of which is reproduced above is binding on me and it answers the issue against Mr. Naik's submission.

25. Mr. Palan relied upon paragraph 5 of the affidavit in support of this Chamber Summons to contend that the facts stated therein were not seriously disputed. These facts refer to the merits of the case between the judgment-debtor and the applicant and are relevant only to the appeal pending before the Small Causes Court and not for the purpose of the present Chamber Summons.

26. Mr. Naik submitted that there was considerable delay on the applicants part and that therefore the Chamber Summons ought to be dismissed in view of proviso (b) of Order 21, Rule 58(1) of the Civil Procedure Code under which no claim or objection shall be entertained if it is designedly or unnecessarily delayed. Considering the view that I have taken, it is not necessary to go into this question.

27. In the circumstances, the Chamber Summons is dismissed. The applicant shall pay the plaintiff the costs of this Chamber Summons fixed at Rs. 5,000/-

Parties to act on an ordinary copy of this order, duly authenticated by the Chamber Registrar/C.S. of this Court.

*Chamber summons dismissed.*

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1995(2) Mh.L.J.]

481

**BOMBAY RENT ACT, SECTION 15(1) AND CIVIL PROCEDURE CODE, SECTION 60(1) PROVISO (kc) : INTEREST OF LESSEE IN PREMISES LEASED FOR NON-RESIDENTIAL PURPOSES CAN BE ATTACHED AND SOLD IN EXECUTION**

*(M. L. Pendse, Actg. C. J. and S. M. Jhunjhunwala, J.)*

**[Appeal from 1994 Mh.L.J. 835]**

UNION BANK OF INDIA

*Appellants.*

vs.

M/s MITTERSAIN RUPCHAND and others

*Respondents.*

**(a) Civil Procedure Code, S. 60(1) Proviso (kc) and Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 15(1) — No bar under section 15(1) to attach and sell leasehold interest of lessee in premises leased out for non-residential purpose.**

In an execution application filed by the decree holder seeking execution of a money decree, the executing Court levied attachment of goodwill and tenancy rights of non-residential premises which were in possession of the judgment debtor on lease. The judgment debtor took out a Chamber Summons for raising the attachment on the ground that section 15(1) of the Bombay Rent Act prevented creation of any sub-tenancy or assignment or transfer in any manner of the interest of a tenant. The trial Judge by his judgment reported in *1994 Mh.L.J. 835* raised the attachment on the view that as transfer of tenancy rights was prohibited by law, the same could not be attached. In Appeal by the decree holder,

*Held*, that there is no bar whatsoever under sub-section (1) of section 15 to attach and sell the leasehold interest of a lessee in premises leased out for non-residential purpose. It was not in dispute that the premises secured on lease by the judgment debtor were leased out for non-residential purpose and used for commercial purpose. The exclusion as provided under section 60 of the Civil Procedure Code was not attracted. The right or interest to occupy is a species of property and this right is attachable and saleable in execution of decree against the judgment debtor. The prohibition contained in section 15(1) of the Bombay Rent Act is not absolute because it is always open to the parties to contract to the contrary as provided by the section. The grievance on account of breach of sub-section (1) of section 15 of the Act could only be at the behest of the lessor. The lessee whose interest in the leasehold rights is attached cannot complain about the same. The trial Judge was not accurate in treating the goodwill and tenancy interest in the business premises as separate and distinct and therefore it was not necessary to examine the finding that goodwill independently of the tenancy rights cannot be attached

Appeal No. 143 of 1994 decided on 20-3-1995 against order dated 8-2-1994 in Chamber Summons No. 563 of 1991 in Summary Suit No. 1975 of 1988. (O.O.C.J., Bombay)

R. F. 61

482 UNION BANK vs. MITTERSAIN RUPCHAND [1995(2) Mh.L.J.]

under section 60 of the Civil Procedure Code, goodwill not being a saleable interest. Chamber Summons for raising attachment dismissed. [Proposition that goodwill alone is not saleable in all cases not accepted and as determination of the question was not required in the present case, same was not examined.] 1994 Mh.L.J. 835, REVERSED, AIR 1975 SC 1470, Rel., 71 BLR 809, AIR 1985 Bom. 1 and AIR 1983 Delhi 430, Dist. (Paras 5 to 7)

**(b) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 15(1) —** *There is no bar under section 15(1) to attach and sell leasehold interest of a lessee in premises leased out for non-residential purpose.* (Paras 4 and 7)

For appellants : *P. V. Shah with Ms. Mamta Doshi*

For respondents : *M. L. Bansal with Ms. Sunita Poddar*

**JUDGMENT**

**M. L. PENDSE, ACTG. C.J. :—** An interesting question as to whether the tenancy rights and the goodwill of the running concern can be attached in execution under Order 20, Rule 54 of the Code of Civil Procedure falls for determination in this appeal preferred by decree holder to challenge the order dated February 8, 1994 (since reported in 1994 Mh.L.J. 835) passed by executing Court on Chamber Summons No. 563 of 1991. To appreciate the question only few facts are required to be set out.

The Appellants/Decree Holder instituted Suit No. 1975 of 1988 on June 7, 1988 for recovery of Rs. 5,83,828.50 inclusive of interest. The suit was instituted as a summary suit and the Defendants/ Respondents were granted conditional leave to defend on deposit of certain amount. The defendants failed to deposit the amount and consequently decree came to be passed on March 30, 1989. As the amount was not paid, except the sum of Rs. 54,391.29, the Appellants preferred execution application No. 229 of 1989 on September 14, 1989. The Appellants sought to attach goodwill and tenancy rights in the property situated at 336-A, 3rd floor, Kalbadevi Road, Bombay. The premises admeasuring about 2,000 sq.ft. was secured by the Respondents on lease. The Executing Court by order dated September 27, 1989 levied attachment in accordance with the provisions of Order 21, Rule 54 of the Code of Civil Procedure.

2. On June 28, 1991 the Respondents took out Chamber Summons No. 536 of 1991 for raising attachment. The gravamen of the claim of the Respondents was that the goodwill and tenancy rights are not saleable property and over which the Respondents have no disposing power and consequently the execution levied by the Appellants was invalid. It was also claimed that section 15(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 prevents creation of any sub-tenancy or assignment or transfer in any manner of the interest of a tenant. It was claimed that this provision of the Rent Act prohibits the Respondents from sub-letting and assigning the tenancy rights and consequently the attachment levied by this Court was

1995(2) Mh.L.J.] UNION BANK vs. MITTERSAIN RUPCHAND 483

invalid. The Respondents pleaded by affidavit dated January 29, 1990 sworn by Respondent No. 2 that the Respondents had closed the business for more than 3 years before the date of the affidavit. It was further claimed that the Respondents have inducted number of sub-tenants and licensees in the premises and the Respondents are in occupation of a small portion admeasuring about 150 sq.ft. The Chamber Summons for raising the attachment was resisted by the Appellants pointing out that the goodwill and the tenancy rights are saleable property and the Respondents have disposing power over the same. It was pointed out that section 15 of the Rent Act does not prescribe for a total prohibition of creation of sub-tenancy or assignment of interest but on the other hand prescribes that such sub-tenancy or assignment is permissible by contract between the lessor and lessee and in respect of business premises, the running business along with the stock-in-trade and tenancy rights can be assigned. The Appellants pointed out that the Respondents have created illegal sub-tenancies and licencees only with a view to defeat the claim of the Appellants.

3. The trial Judge by impugned judgment came to the conclusion that the Respondents did not have the disposing power over the tenancy rights and therefore the property was not liable for attachment as prescribed by section 60 of the Code of Civil Procedure. The learned trial Judge further held that as the transfers of tenancy rights are prohibited by law the same cannot be attached. The learned trial Judge felt that as Respondents are claiming that the business was closed and the stock-in-trade was not available it was not open to transfer or assign the tenancy rights as incidental to the sale of business. The learned Judge further held that the goodwill being the very sap and life of the business the same cannot be attached and sold in execution. On these findings the learned Judge made the Chamber Summons absolute and attachment was raised. The Appellants feeling aggrieved have preferred the present Appeal.

Mr. Shah, learned Counsel appearing on behalf of the Appellants, submitted that the learned Judge was in error in concluding that the Respondents did not have saleable interest and which could be disposed of by sale of goodwill and tenancy rights of premises in their occupation. Mr. Shah further submitted that the learned Judge was not right in the construction placed on provision of section 15 of the Rent Act. Reliance on two decisions of this Court in *Zarina Umer Chamdewala vs. Sati Lalchand Verumal Lalwani* reported in 71 BLR 809 and *M/s D. Vasantraai and Co. vs. The Official Assignee, High Court of Judicature at Bombay and Others*, reported in AIR 1985 Bom. 1, and that of Delhi High Court in *Belrex India Ltd. vs. Singhal Electric Co. and Others*, reported in AIR 1983 Delhi 430 was not accurate. Mr. Bansal, learned Counsel appearing on behalf of the Respondents, on the other hand submits that the decision of the learned trial Judge does not suffer from any infirmity and is not required to be disturbed in this Appeal. Mr. Bansal did not dispute that the decretal amount is due and that the Respondents have parted with substantial portion of the leased premises.

## 484 UNION BANK vs. MITTERSAIN RUPCHAND [1995(2) Mh.L.J.]

4. The learned Judge referred to the Execution Application and the attachment sought in respect of the goodwill and tenancy rights of the Defendants in the business premises. The learned Judge felt that the attachment was sought in respect of the goodwill and tenancy rights and these two terms are separate and distinct. Mr. Shah is right in his contention that it is not permissible to split up the two terms 'goodwill' and 'tenancy rights' and what is sought to be attached was both the goodwill and tenancy rights in respect of the business premises. Section 60 of the Code of Civil Procedure, inter alia, provides that the land, house or other buildings and all other saleable property, movable or immovable, which is not specifically excluded is liable to attachment in execution of a decree. The section further prescribes that the saleable property must belong to the judgment debtor and over which or the profits of which the judgment debtor has a disposing power. Section then sets out the properties which are not liable to attachment and sale and one of the category of such property is found in clause (kc). The clause prescribes that the interest of the lessee of a residential building to which the provision of law for the time being in force relating to control of rents and accommodation apply. It is therefore clear that the interest of a lessee in a residential premises and to which the provisions of Bombay Rent Act apply, is not liable to attachment and sale in execution. Mr. Shah submits, and in our judgment with considerable merit, that the exclusion of properties liable for attachment and sale refers specifically to residential premises and do not take into its sweep the premises used for non-residential purposes. It is not in dispute that the premises secured on lease by the Respondents were leased out for non-residential purpose and used for commercial purpose. The exclusion, therefore, clearly is not attracted. Mr. Bansal submitted that even if the exclusion is not attracted still it is incumbent upon the decree holder to establish that the Respondents have saleable interest in the tenancy rights and a disposing power over said interest. It was urged that provisions of section 15 of the Bombay Rent Act sets out that lessee of property cannot claim saleable interest and a disposing power in such leasehold interest. To examine the contention it is necessary to set out the relevant provision of section 15(1) of Rent Act :

“15.(1) Notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises:

Provided that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on

1995(2) Mh.L.J.] UNION BANK vs. MITTERSAIN RUPCHAND 485

licence any premises or class of premises and to such extent as may be specified in the notification.”

In accordance with the powers conferred by the proviso to sub-section (1) of section 15, the State Government has issued notification permitting transfer and assignment of leasehold interest in business premises, in cases where the stock-in-trade of the running business is transferred or assigned. Relying on this provision it was urged on behalf of the Respondents that the leasehold interest and premises leased for non-residential purposes cannot be termed as saleable property in which the lessee has disposing power. It is not possible to accede to the submission.

5. The Supreme Court examined the ambit of section 60 of Code of Civil Procedure in its judgment in the case of *Ramesh Himmatlal Shah vs Harsukh Jadhavji Joshi*, reported in *AIR 1975 SC 1470*. In the case before the Supreme Court, the decree holder obtained a money decree and took out a warrant of attachment of flat No. 9 of Paresh Co-operative Housing Society Ltd. at Santacruz, Bombay. The attachment was not raised by the City Civil Court but in appeal the learned single Judge of this Court raised the attachment on the ground that the sale of flat being illegal. Letters Patent Appeal preferred by the decree holder ended in dismissal and the question which fell for determination before the Supreme Court was attachability and saleability of the flat. It was contended before the Supreme Court that the provisions of Maharashtra Co-operative Societies Act, 1960 and the Rules framed thereunder and the Bye-laws of the Society prohibits transfer of a flat by the member and consequently the flat was not liable to attachment and sale. The Supreme Court noticed provisions of section 29 of Co-operative Act which inter alia provides that a member shall not transfer any share held or interest in the capital of property of the society unless the transfer is made to a member of the society or to a person whose application for membership has been accepted. Section 31 of the Act then provides that the share or interest of the member in the capital of the society or in the loan-stock issued by housing society or the funds raised by the society from its member by way of savings shall not be liable for attachment or sale under any decree or order of the Court. Section 47 then provides that the society shall have first charge upon the interest of the member in the immovable property for any outstanding dues or dues payable by the society. Sub-section (2) of section 47 provides that no property or interest in the property which is subject to a charge shall be transferred in any manner without the previous permission of the society. Sub-section (3) of section 47 then provides that any transfer made in contravention of sub-section (2) shall be void. On consideration of these provisions, the Supreme Court observed that the right or interest to occupy is a species of property and this right is attachable and saleable in execution of the decree against the judgment debtor. It was held that there is nothing in the language of section 31 to indicate that the right to occupation, which is the right to be sold in auction, is not attachable in execution of the decree. It was further observed that there is nothing in section 31 to even



**486 UNION BANK vs. MITTERSAIN RUPCHAND [1995(2) Mh.L.J.]**

remotely include the prohibition against attachment or sale of the right to occupation of the flat. The Supreme Court noticed that as there was no impediment in assignment of the flat, it is obvious that the judgment debtor had saleable interest and a disposing power while holding possession of flat as a member of the cooperative society. The Supreme Court then observed :

“We, therefore, unhesitatingly come to the conclusion that this species of property namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law.”

The Supreme Court further observed that in the absence of clear and unambiguous legal provisions to the contrary, it will not be in the public interest nor in the interest of the commerce to impose a ban on saleability of flats by a tortuous process of reasoning. The prohibition intended by the legislature must be in express terms and the Supreme Court failed to find one. The Supreme Court therefore held that the right to occupation of a flat is property both attachable and saleable. The judgment of the Supreme Court, to which attention of the learned single Judge was not invited, is a clear answer to the contention of the Respondents that the goodwill and tenancy rights in the office premises are not liable to attachment and sale.

6. Sub-section (1) of section 15 of the Bombay Rent Act, which is set out hereinabove, inter alia provides that it shall not be lawful for any tenant to sub-let the whole or any part of the premises or to assign or transfer in any other manner his interest therein. The plain reading of sub-section makes it clear that the prohibition is not absolute because it is always open to the parties to contract to the contrary as provided by the section. It is always open for the lessor and the lessee to contract that the lessee can sub-let the premises or assign or transfer in any other manner his interest therein. In other words the prohibition contained in sub-section (1) is not absolute. The section nowhere provides that the transfer shall be void. The proviso of the sub-section confers power on the State Government to issue notification permitting the transfer of interest and such notification has been issued permitting transfer of interest of the lessee in the business premises, provided what is transferred is the running business with tenancy rights. It is, therefore, clear that even the legislature never contemplated that the lessee of non-residential premises cannot transfer or assign the interest in the leasehold rights. The learned Judge was, therefore, not right in observing that the transfer of leasehold interest in non-residential premises is totally prohibited and therefore not liable for attachment. It was also overlooked that the grievance on account of breach of sub-section (1) of section 15 of the Bombay Rent Act can only be at the behest of the lessor and the lessee whose interest in the leasehold rights is attached cannot complain about the same. Indeed, in the present case, the Respondents have admitted on affidavit that

.1995(2) Mh.L.J.] UNION BANK vs. MITTERSAIN RUPCHAND 487

out of about 2,000 sq.ft. of the leased area, 1850 sq.ft. have already been parted with either under the cover of sub-leases or licenses. The conduct of the Respondents speak for itself and requires no further comment. The lessee has not created the alleged sub-leases and licenses for no consideration. In the absence of total prohibition of transfer of leasehold interest in respect of non-residential premises it is not correct to suggest that the lessee of such premises do not hold saleable property or do not hold disposing power in respect of such interest.

7. Mr. Bansal relied heavily on the decision of the Division Bench of this Court in *Zarina Chamdewala's* case (supra). In the case before the Division Bench the property in dispute was a residential flat and agreement of lease did not confer power on the lessee to transfer the leasehold interest. The Division Bench of this Court found that under section 15 of the Bombay Rent Act transfer of interest in residential premises was unlawful. In that case the lessee was adjudicated as insolvent and the issue arose as to whether the Official Assignee can recover possession in accordance with the provisions of sections 17 and 52 of the Presidency Towns Insolvency Act which inter alia provide that the property of insolvent vests in the Official Assignee. The Division Bench held that the tenancy of monthly tenant of a residential premises who has been adjudicated insolvent is not attachable under section 15 of the Bombay Rent Act and therefore it cannot be regarded as property of the insolvent and which must vest in the Official Assignee. The decision of the Division Bench clearly deals with the residential premises and the interests in such premises are not attachable under section 60(kc) of Code of Civil Procedure. The proviso to sub-section (1) of section 15 of the Bombay Rent Act confers power on the State Government to issue notification and such notification has been issued only in respect of non-residential premises and obviously with a view not to put fetters on the commerce which is practised on a large scale in this metropolis. The restrictions or limitations imposed upon the lessee while conferring the protection under the provisions of the Rent Act were not required to be strictly applied in respect of the premises leased out for business and the wisdom of the legislature is reflected by conferring power on executive to issue notification. In our judgment, the decision of the Division Bench has no application to premises let out for non-residential purposes. Mr. Bansal then submitted that the decision of the Division Bench in respect of residential flat was followed with approval by another Division Bench in the judgment in the case of *M/s D. Vasantrai and Co.* (supra) where the premises leased out were for the purpose of carrying on business. The submission is not accurate because the decision proceeds on the basis that the agreement between the parties while effecting transfer was only for the purpose of creation of sub-tenancy of the premises and nothing more. As mentioned hereinabove it is not permissible to merely transfer or assign interest in the leasehold property but it must be accompanied by transfer of running business and stock-in-trade. The decision therefore proceeds on the peculiar facts and that case nowhere holds that the leasehold

488 UNION BANK vs. MITTERSAIN RUPCHAND [1995(2) Mh.L.J.]

interests of a lessee of non-residential premises are not liable to attachment and sale. Reliance on the decision of the single Judge of Delhi High Court in the case of *Belrex India Ltd.* (supra) is also not accurate. Section 14 of Delhi Rent Control Act, inter alia provided that no order or decree for recovery of possession of any premises shall be made by any Court in favour of landlord against the tenant unless the tenant has on and after June 9, 1952 sub-let, assigned or otherwise parted with possession of the premises without obtaining the consent of the landlord in writing. As the tenant in the case before the Delhi High Court had transferred the interest without obtaining consent of the landlord in writing, it was held that the tenant had no disposing power over the premises under tenancy and consequently no saleable interest. The decision has no application to the facts of the case or the provisions of section 15 of the Bombay Rent Act. In our judgment, there is no bar whatsoever under sub-section (1) of section 15 to attach and sale (sic) the leasehold interest of a lessee in a premises leased out for non-residential purpose.

8. Mr. Bansal then submitted that the transfer or assignment of tenancy rights in the premises leased out for non-residential purposes is permitted provided what is transferred is the running business with stock-in-trade. Relying on the assertion made in the affidavit of Respondent No. 2 and to which reference is made hereinabove, it was claimed that the business carried on by Respondents was closed three years before the date of attachment and the Respondents did not possess any stock-in-trade. It is not possible to accept the uncorroborated claim made by the Respondents and only with the object of seeking raising of attachment. Affidavit of Respondent No. 2 clearly sets out that at least an area of 150 sq.ft. out of the leased premises of 2,000 sq.ft. is still in possession of the Respondents and the Respondents are obviously making huge profits out of the remaining area of 1,850 sq.ft. in an extremely busy and prestigious business locality situated at Kalbadevi. We are not prepared to blindly accept the claim of the Respondents that the business is closed or stock-in-trade is not available. It also could not be overlooked that even if the assertion is correct, still the leasehold interest of Respondents could be attached and sold, in case the lessor has no objection. The lessor has not come forward to seek raising of attachment and we are not prepared to raise the attachment on mere assertion of the Respondents that the business is not carried on or the stock-in-trade is not available. In our judgment the learned trial Judge was not accurate in treating the goodwill and tenancy interest in the business premises as separate and distinct and therefore it is not necessary to examine the finding of the learned trial Judge that the goodwill independently of the tenancy rights cannot be attached under section 60 of the Code of Civil Procedure, 1908, the goodwill not being a saleable interest. We wish to make it clear that we are not accepting the proposition that the goodwill alone is not saleable in all cases but the determination of the question is not required in the present case and therefore we refrain from examining the same. In our judgment, the

1995(2) Mh.L.J.]

PANDURANG vs. JANARDHAN

489

impugned order passed by the learned Judge raising attachment is not correct and is required to be set aside.

9. Accordingly Appeal is allowed and judgment dated February 8, 1994 on Chamber Summons No. 563 of 1991 is set aside and the Chamber Summons stands dismissed. Respondents shall pay the costs of the Appellants throughout.

*Appeal allowed.*

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HINDU LAW : PARTITION : STAMP ACT, SECTION 36

(*R. G. Vaidyanatha, J.*)

PANDURANG N. VANARASE since deceased by heirs *Appellants.*

vs.

JANARDHAN NARAYAN VANARASE and others *Respondents*

**(a) Stamp Act, S. 36** — *Hindu Law — Joint family property — Partition — Documents to prove severance of joint status between parties — No objection taken in lower Court regarding their admissibility as not being stamped — Admissibility of documents cannot be questioned at any subsequent stage of proceedings.* AIR 1961 SC 1655, Rel. (Para 10)

**(b) Hindu Law** — *Joint family property — Partition — Agreement signed by all brothers reading “We have distributed among ourselves movable articles..... We have no concern with each other’s movable properties” — Both sides giving evidence in their own interest — Plea by party therefore to the effect that documents in question were never acted upon and that there was no severance of joint status not sustainable.* (Para 12)

**(c) Hindu Law** — *Partition of joint family property — Severance in joint status of family proved — Contention by member that properties subsequently acquired by other members should be treated as joint family properties, not sustainable — Member can only ask other members to account for income derived from properties in their possession which were given to them.* AIR 1979 SC 1279, AIR 1960 Bom. 159, Rel. (Para 18)

**(d) Partnership Act, S. 40** — *Dissolution of partnership — Firm can be dissolved with consent of all partners — Section does not prescribe mode in which consent should be taken — Consent can be express or implied.* (Para 17)

For appellants : *G. B. Karandikar*

For respondents Nos. 1, 2-G, 3 and 9-A : *M. A. Rane*

For respondents Nos. 3-3, 5 and 7 : *A. V. Datar*

**JUDGMENT :—** This is a defendant’s appeal against the judgment and decree dated 2nd November, 1977 in Special Civil Suit No. 52 of 1972 on the file of Civil Judge, Senior Division at Satara. I have heard the learned Counsel appearing for both the parties.

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F. A. No. 95 of 1978 decided on 3-10-1994. (Bombay)

R. F. 62

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 305

set out the options. Obviously, judicial discretion has to be exercised in consonance with the settled legal principles governing grant of leave to defend in summary suits.

29. The office is directed to place the above summons for judgment before the appropriate Court to be decided in accordance with this judgment.

*Order accordingly.*

MAHARASHTRA RENT CONTROL ACT, 1999, SECTION 26 AND  
CIVIL PROCEDURE CODE, SECTION 60(1) PROVISO (kc)

[Full Bench]

(*R. M. Lodha, S. J. Vazifdar and Anoop V. Mohta, JJ.*)

TANGERINE ELECTRONICS SYSTEMS PVT. LTD.,  
MUMBAI

*Decreeholders.*

vs.

INDIAN CHEMICALS, MUMBAI and others

*Judgment Debtors.*

And

SHAHID SHAUKAT SARKAR OF MUMBAI and others

*Applicants.*

**(a) Maharashtra Rent Control Act, 1999 (18 of 2000), S. 26 and Civil Procedure Code, S. 60(1) Proviso (kc) — Interest of a tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of a decree against the tenant.**

Clause (kc) appended to the proviso of sub-section (1) of section 60 of the Civil Procedure Code prohibits the attachment and sale of interest of the lessee of a residential building to which the Rent Control Act applies but the said prohibition is not applicable to the interest of a tenant of a non-residential premises to which the Maharashtra Rent Control Act applies. A tenant's right to remain in occupation of a non-residential premises governed by the Maharashtra Rent Control Act, 1999 is a property. Such property is saleable and the tenant has disposing power over the interest of tenancy for his benefit. The interest of a tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of a decree against the tenant. 2002(3) Mh.L.J. 455, OVERRULED, (1975)2 SCC 105, Rel, 1995(2) Mh.L.J. 481, 1969 BLR 801, (1893) Vol. XX Calcutta 273, (1914) CWN 1182 and 2003(1) Mh.L.J. 458 = 2003(1) All MR 493, Ref. (Paras 33 and 39)

**(b) Interpretation of Statutes — Non-obstante clause can be read as clarifying the whole position and may be understood to have been incorporated by way of abundant caution and not for limiting the ambit and scope of the operative part of the enactment.** (Para 34)

For the decree holder : *D. D. Madon* instructed by *M/s Ranjit and Co.*

In support of Chamber Summons : *Mahendra Ghelani* instructed by  
*M/s Law Charter*

Chamber Summons No. 593 of 2003 in Execution Application No. 636 of 2001 in Summary Suit No. 2255 of 1998 decided on 4-3-2004. (O.O.C.J., Bombay)

R.F. 20

306 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

**List of cases referred :**

1. *Veetrag Investments and Finance Co. vs. M/s Premier Brass and Metal Works Pvt. Ltd., Mumbai, 2002(3) Mh.L.J. 455 (Veetrag Investments I)* (Paras 1, 20, 37)
2. *Ramesh Himmatlal Shah vs. Harsukh Jadhavji Joshi, (1975)2 SCC 105* (Paras 9, 16, 17, 24)
3. *Union of India vs. M/s Mittersain Rupchand and ors., 1995(2) Mh.L.J. 481* (Paras 17, 19, 20, 23)
4. *Zarina Umer Chamdewala vs. Sati Lalchand Verumal Lalwani, BLR Vol. LXXI 1969 page 801* (Paras 17, 21, 22, 23, 24)
5. *M/s Veetrag Investments and Finance Company vs. M/s Premier Brass and Metal Works Private Ltd., 2003(1) Mh.L.J. 458 = 2003(1) All MR 493 (Veetrag Investments II)* (Para 20, 28)
6. *Golak Nath Roy Chowdhary vs. Mathura Nath Roy Chowdhary, decided on 1-9- 1891 [(1893) Vol. XX Calcutta 273]* (Paras 26, 27, 28)
7. *Tamaya vs. Timapa Ganpaya, ILR (7) Bombay 262* (Para 26)
8. *Keshab Chandra Pramanik vs. Ajhar Ali Biswas, (1914) CWN 1182* (Paras 27, 28)
9. *Saraswat Co-operative Bank Ltd. vs. Chandrakant Magan Lal Shah, 2002(1) Mh.L.J. 581* (Para 39)

**JUDGMENT**

**R. M. LODHA, J. :-** The learned Single Judge of this court doubted the correctness of the view of another learned Single Judge in the case of *Veetrag Investments and Finance Co. vs. M/s Premier Brass and Metal Works Pvt. Ltd., Mumbai, 2002(3) Mh.L.J. 455 (Veetrag Investments I)* and passed the following order :—

“The principal question raised in this Chamber Summons is that the disputed property (non-residential) is tenanted property and if it is so, the same cannot be subject matter of attachment and sale in the course of execution of the decree. Reliance is placed on the decision of the Single Judge of this Court reported in *2002(3) Mh.L.J. 455 in Veetrag Investments and Finance Co. vs. M/s Premier Brass and Metal Works Pvt. Ltd., Mumbai*. In this decision, the Court has mainly adverted to the provisions of section 26 of the Maharashtra Rent Control Act, 1999, to conclude that the tenant has no right to sublet or transfer the premises held by him, whether they are for residential or non-residential purposes (see para 19); and on that basis, found that the leasehold rights cannot be put to sale.

In my opinion, prima facie, by virtue of section 56 of the Act, which is a non-obstante provision, the limitation or restriction imposed in section 26 of the Act is lifted and would enable the decreeholder to enforce the decree qua such premises, for it recognises that the tenant or any person acting or purporting to act on behalf of the tenant can claim or receive any sum or any consideration as a condition of the relinquishment, transfer or assignment of his tenancy of any premises. The judgment of this Court pressed into service has obviously not

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 307

considered the efficacy of section 56 of the Act, which has a non-obstante clause.

In the circumstances, the appropriate course is to refer the matter to a larger Bench for an authoritative pronouncement of the question that arises for consideration in this case.

Accordingly, the papers be placed before the learned Chief Justice for assigning it to a larger Bench.”

2. This is how the present Full Bench has been constituted by Hon’ble the Chief Justice.

3. In the order of reference, the learned Single Judge has not narrated the necessary facts. The learned counsel for the parties were not ad-idem on facts before us. Bereft of facts, in the circumstances, the neat question of law for our consideration is; whether the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies, is attachable and saleable in execution of the decree against the tenant?

4. The answer to the aforesaid question would depend on the consideration of the aspects; is the tenant’s right to remain in occupation of the non-residential premises a property; is such property saleable and has the tenant disposing power over the interest of the tenancy for his benefit.

5. The word “property” has nowhere been defined under the Transfer of Property Act. The Civil Procedure Code also does not define the term “property”. The term ‘property’ possesses a variety of different applications having different degrees and includes, in its widest sense, all a person’s legal rights, of whatever description. In its ordinary and general meaning, the property is not only the thing which is subject matter of ownership but also includes dominium or the right of ownership or partial ownership and it indicates and describes every possible interest which a party can have, and will include any benefit that a person is entitled to take out of the property of another.

6. A lease, in the generic sense, is the form of encumbrance which consists in a right to the possession and use of the property owned by some other person.

7. Section 105 of the Transfer of Property Act, 1882 (For short ‘TP Act’) provides thus :

**105. Lease defined.**— A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

8. From this definition of word “lease”. It is clear that lease creates an interest in the property and unless there is a transfer of such interest, there can be no lease. The creation of an interest in the immovable property is a test to determine whether the transaction is lease. Thus, it is a transfer of right to enjoy the property leased and by way of lease, the lessee gets the right to remain in occupation of the premises on payment of rent.

9. In *Ramesh Himmatlal Shah vs. Harsukh Jadhavji Joshi*, (1975)2 SCC 105, the Supreme Court was seized with the question of law : Is a flat in a tenant

308 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

co-partnership housing society under the Maharashtra Co-operative Societies Act, 1960 liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit the same has been allotted by the society. The Supreme Court considered the said question in the light of the provisions of section 60 of the Civil Procedure Code (CPC), the provisions of the Maharashtra Co-operative Societies Act, 1960 and also the bye-laws of the society and held in para 19 of the report thus —

“19. This right or interest to occupy is a species of property. We have to consider whether this right to the particular property is attachable and saleable in execution of the decree against the judgment-debtor. It is contended by Mr. Chatterjee, amicus curiae, that section 31 of the Act completely bars attachment and sale of the said property in execution of the decree. We have already pointed out the difference in language between section 29 and section 31 and also made reference to section 47(1)(b) in that connection. There is nothing in the language of section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in section 31 to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. Once section 31 is out of the way, we are left with section 29 wherein we do not find even a provision of prior consent for transfer of share or interest in such property. The only restrictions under section 29(2) are that the member may not transfer his interest in the property prior to one year and the transfer is made to an existing member of the Society or to a person whose application for membership has been accepted by the Society. It is true that Bye-law 71D says that a member to whom a tenement is allotted shall not assign or underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee, but there is nothing to show that contravention of this bye-law makes the assignment void under the Act unlike in the case of a transfer being void under section 47(3). There is no impediment to ratification of the assignment by the Committee particularly in view of the legal position arising out of the conjoint effect of section 29, Rule 24 and Bye-law 9. Section 29 read with Rule 24 shows that there is no prohibition as such against transfer of a share to a member or even to a non-member if he consents to be a member and makes an application for membership by purchasing five shares as provided under Bye-law 9. Reading the aforesaid provisions there is no reason to think that there is any question of refusal of membership of the Society to a non-member if he is qualified otherwise and makes an appropriate application in which case the transfer of shares will be operative and thus the assignment of the right to occupation will hold good. Further it is significant that under section 146(a) of the Act, contravention of sub-section (2) of section 47 is punishable under section 47 of the Act. Contravention of any bye-law is, however, no offence. We, therefore, unhesitatingly come to the conclusion that this species of property, namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a



2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 309

stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law.”

10. In what we have discussed above, it cannot be seriously disputed that tenant’s right to remain in occupation of the non-residential tenanted premises is a property. If it were not so, the interest of a lessee of the residential building to which the Rent Control Act was applicable would not have been excluded by introducing clause (kc) in proviso to sub-section (1) of section 60 Civil Procedure Code.

11. Section 6 of the TP Act provides that property of any kind may be transferred, except as otherwise provided therein or by any other law for the time being in force. Clause (d) of section 6 reads thus —

“6. What may be transferred.— Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.”

12. By virtue of section 108(j) of the T. P. Act the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. Section 108(j) further provides that the lessee shall not by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. The question, therefore, to be considered is, how far section 26 of the Maharashtra Rent Control Act, 1999 (For short, Act of 1999) restricts the tenants right of the transfer of whole or any part of interest in the property.

13. Before we advert to section 26, it may be proper to refer to section 7(15) and section 25 of the Act of 1999 to ascertain who the tenant is.

“Section 7

.....

(15) “tenant” means any person by whom or on whose account rent is payable for any premises and includes, —

- (a) such person.—
  - (i) who is a tenant, or
  - (ii) who is a deemed tenant, or
  - (iii) who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or
  - (iv) who has derived title under a tenant, or
  - (v) to whom interest in premises has been assigned or transferred as permitted,

by virtue of, or under the provisions of, any of the repealed Acts;

- (b) a person who is deemed to be a tenant under section 25;
- (c) a person to whom interest in premises has been assigned or transferred as permitted under section 26;

310 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

- (d) in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of this Act, any member of the tenant's family, who,—
- (i) where they are let for residence, is residing, or
- (ii) where they are let for education, business, trade or storage, is using the premises for any such purpose.

with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the court.

*Explanation.*— The provisions of this clause for transmission of tenancy shall not be restricted to the death of the original tenant, but shall apply even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant.

**“Section 25. Certain sub-tenants to become tenants on determination of tenancy.** — When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let and such sub-tenancy is subsisting on the date of commencement of this Act or where sub-tenancy is permitted by a contract between the landlord and the tenant, such sub-tenant shall, subject to the provisions of this Act, be deemed to become the tenant of his landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued.”

14. In the background of section 7(15) and section 25 of the Act of 1999, we turn to section 26 which reads thus —

**“26. In absence of contract tenant not to sub-let or transfer or to give on licence.** — Notwithstanding anything contained in any law for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sub-let or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein :

Provided that, the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases any premises or class of premises other than those let for business, trade or storage to such extent as may be specified in the notification.”

15. The said section 26 does not absolutely prohibit or totally forbid the tenant – the tenant as meant by section 7(15) – to sublet or give on licence or assign or transfer in any other manner whole or any part of the premises let to him since it is subject to the contract to the contrary with the landlord. In other words, the landlord is always at liberty to permit the tenant to sublet or give on licence or assign or transfer in any other manner whole or any part of the premises let to him. The contract contrary to the prohibition provided in section 26 can be at any time – at the time the premises are let out to the tenant or any time thereafter, even after the tenant has sublet or given on licence or assigned or transferred his interest in the premises let out to him. The landlord can always ratify the action of the tenant in subletting or giving on licence or assigning or

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 311

transferring in any other manner his interest in the premises let to him. Thus, section 26 of the Act of 1999 cannot be held to contain the absolute bar against the tenant of the non-residential premises nor the transfer in contravention of section 26 is absolutely void that is void against the whole world but may be void against the landlord furnishing him the ground to get a decree for ejection.

16. Reverting back to the case of *Ramesh Himmatlal Shah*, though section 31 of the Maharashtra Co-operative Societies Act, 1960 provides that the share or interest of the member in the capital of society shall not be liable to attachment or sale under any decree or order of a court or in respect of any debt or liability incurred by the member and section 47 of the said Act makes provision to the effect that no property or interest in property covered under sub-section (1) thereof shall be transferred in any manner without previous permission of the society and any transfer made in contravention of sub-section (2) shall be void, the Supreme Court held that right to occupy the flat in a tenant co-partnership housing society by its member was a species of the property and was liable to attachment and sell in execution of a decree against the member in whose favour or for whose benefit it has been allotted by the society. The Supreme Court also held that the right to occupy such a flat assumed significant importance and acquired under the law a stamp of transferability in furtherance of the interest of commerce to impose a ban on saleability. It was held that though the flat was owned by the society, the member allottee had a right or interest to occupy the same and that there was nothing in section 31 to indicate that the right to occupation which was a right to be sold in auction was not attachable in execution proceedings. Mr. Mahendra Ghelani, the learned counsel appearing for the applicants in support of the chamber summons sought to distinguish this judgment by contending that the observations made by the Supreme Court, "this right or interest to occupy is a species of property" and, "that this species of property namely the right to occupy a flat of this type" are made in the light of the interest of the member allottee in co-partnership housing society in share of interest in the capital and interest in the property of the society. We are unable to accept the distinction so suggested by Mr. Mahendra Ghelani. The facts in the case of *Ramesh Himmatlal Shah* are thus : Ramesh Himmatlal Shah claimed money decree against Harsukh Jadhavji Joshi and took a warrant of attachment of flat No. 9 of Paresh Co-operative Housing Society Ltd. at Santacruz, Mumbai. That flat described as ownership flat in common parlance was attached on August, 8, 1970 and the warrant of attachment was served on the judgment-debtor while he was in jail in Rajkot. In due course, a sale proclamation was also issued in respect of the flat while the judgment-debtor was yet in jail. At this stage of the proceedings, the brother of the judgment debtor (Hasmukh Jadhavji Joshi) took out a chamber summons challenging the execution on the ground that the flat did not belong to the judgment-debtor but belonged to him and to the judgment-debtor's wife and that the attachment should be raised. His chamber summons was made absolute but in appeal, the order was set aside and the matter was remanded. The said chamber summons was, however, finally dismissed on September 30, 1971. Hasmukh Jadhavji Joshi did not take any further action against the rejection of his claim against the property. After coming out of the jail, the judgment-debtor filed the suit in the year 1972 to set aside the decree. He

312 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

could not secure an order of injunction to prevent the execution of the decree. The flat was offered for sale and was purchased in auction by one Bhupendra N. Shah for a sum of Rs. 24,000/-. The sale, however, was not yet confirmed and the judgment-debtor took out another chamber summons setting up a new plea for setting aside the warrant of attachment and proclamation of sale on the ground that the flat in a co-operative housing society was not liable to attachment and sale. He stated that he had no saleable interest in the said property under section 60 of Civil Procedure Code and, therefore, was not liable to attachment. The chamber summons was dismissed by the City Civil Court but the learned Single Judge of this court allowed the appeal and set aside the attachment and sale of the flat. The Division Bench of this court maintained the order of the learned Single Judge and the matter was carried to the Supreme Court and as noticed by us above, the Supreme Court held that right of interest to occupy the flat by the judgment-debtor Hasmukh Joshi was a species of the property and that it was both attachable and saleable. In the light of the principles laid down by the Supreme Court in *Ramesh Himmatlal Shah*, when we view the provisions of section 26 of the Act of 1999, we find the support for what we have held above that section 26 does not contain an absolute bar against the tenant in subletting or giving on licence or transfer or assign the premises let out to him as the said provision is subject to the contract to the contrary.

17. The Division Bench of this court in *Union of India vs. M/s Mittersain Rupchand and ors.*, 1995(2) Mh.L.J. 481 was concerned with the question as to whether the tenancy rights and the goodwill of the running concern can be attached in execution under Order 20, Rule 54 of Civil Procedure Code. That was the case where in the execution application filed by the decree holder seeking execution of the money decree, the executing court levied attachment of goodwill and tenancy rights of non-residential premises that were in possession of the judgment-debtor on lease. The judgment-debtor took out chamber summons for raising the attachment on the ground that section 15 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (For short "Bombay Rent Act") prevented creation of any sub-tenancy or assignment or transfer in any manner of the interest of a tenant. The trial Judge of this court by his judgment, raised the attachment holding that as the transfer of tenancy rights was prohibited by law, the same could not be attached. Reversing the view of the learned trial Judge of this court, the Division Bench held that there was no bar whatsoever under sub-section (1) of section 15 to attach and sell the leasehold interest of a lessee in the premises leased out for non-residential purpose. The Division Bench referred to the judgment of the Supreme Court in the case of *Ramesh Himmatlal Shah* and also the Division Bench of this court in *Zarina Umer Chamdewala vs. Sati Lalchand Verumal Lalwani*, BLR Vol. LXXI 1969 page 801 and held thus :—

"6. Sub-section (1) of section 15 of the Bombay Rent Act, which is set out hereinabove, inter alia provides that it shall not be lawful for any tenant to sub-let the whole or any part of the premises or to assign or transfer in any other manner his interest therein. The plain reading of sub-section makes it clear that the prohibition is not absolute because it is always open to the parties to contract to the contrary as provided by the section. It is always open for the lessor and the lessee to contract that the

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 313

lessee can sub-let the premises or assign or transfer in any other manner his interest therein. In other words the prohibition contained in sub-section (1) is not absolute. The section nowhere provides that the transfer shall be void. The proviso of the sub-section confers power on the State Government to issue notification permitting the transfer of interest and such notification has been issued permitting transfer of interest of the lessee in the business premises, provided what is transferred is the running business with tenancy rights. It is, therefore, clear that even the legislature never contemplated that the lessee of non-residential premises cannot transfer or assign the interest in the leasehold rights. The learned Judge was, therefore, not right in observing that the transfer of leasehold interest in non-residential premises is totally prohibited and therefore not liable for attachment. It was also overlooked that the grievance on account of breach of sub-section (1) of section 15 of the Bombay Rent, Act can only be at the behest of the lessor and the lessee whose interest in the leasehold rights is attached cannot complain about the same. Indeed, in the present case, the respondents have admitted on affidavit that out of about 2,000 sq.ft of the leased area, 1850 sq. ft have already been parted with either under the cover of sub-leases or licenses. The conduct of the respondents speak for itself and requires no further comment. The lessee has not created the alleged sub-leases and licenses for no consideration. In the absence of total prohibition of transfer of leasehold interest in respect of non-residential premises it is not correct to suggest that the lessee of such premises do not hold saleable property or do not hold disposing power in respect of such interest.”

18. Section 15(1) of the Bombay Rent Act since repealed by the Act of 1999 was as follows :

“15(1) Notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises :

Provided that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification.”

19. On the comparison of section 15(1) of the Bombay Rent Act and section 26 of the Act of 1999, it would be seen that both sections are almost identical save little difference in the proviso appended to both sections which empower the State Government to permit the transfer of interest in premises by publication of notification in the official Gazette. Proviso appended to section 15(1) of the Bombay Rent Act provided that the State Government may by notification in the Official Gazette permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any

314 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

premises or class of premises and to such extent as may be specified in the notification while the proviso appended to section 26 such notification can be issued by the State Government only for the premises other than those let for the business trade or storage. In our considered view, this difference in proviso by taking out non-residential premises out of the purview of State Government's power to permit the transfer of interest by issuance of notification in official gazette does not make the ratio of the Division Bench in *Mittersain Rupchand* inapplicable under section 26 of the Act of 1999. Even if we assume that under the proviso to section 26 of the Act of 1999, the State Government cannot permit the transfer of interest in the premises let out for business, trade or storage, the prohibition contained in section 26 being subject to the contract to the contrary does not alter the legal position that the restriction under section 26 is neither absolute nor total. We find ourselves unable to agree with the submission of Mr. Mahendra Ghelani that section 26 of the Act of 1999 provides total prohibition for transfer to the tenant and the only exception being the contract to the contrary and, therefore, the tenancy right is not saleable.

20. Incidentally, we may notice that one of us (S. J. Vazifdar, J.) in *M/s Veetrag Investments and Finance Company vs. M/s Premier Brass and Metal Works Private Ltd.*, 2003(1) Mh.L.J. 458 = 2003(1) All MR 493 (*Veetrag Investments II*) considered the question whether section 26 of the Act of 1999 contain an exact bar against the judgment-debtor assigning or transferring its interest in the tenanted premises. S. J. Vazifdar, J. considered the Division Bench judgment in the case of *Mittersain Rupchand* and the judgment of the learned Single Judge in *Veetrag Investments I* and after taking into consideration the relevant provisions of the Act of 1999 and section 60 of the Civil Procedure Code held that section 26 does not contain absolute bar against the judgment-debtor assigning or transferring its interest as a sub-tenant in the said premises.

21. Mr. Mahendra Ghelani, the learned counsel relied upon the Division Bench judgment of this court in *Zarina Umer Chamdewala* (supra). The Division Bench in *Zarina Umer Chamdewala* held that the tenancy of the monthly tenant who has been adjudicated an insolvent and which is not alienable under section 15(1) of the Bombay Rent Act cannot be regarded as property of insolvent which much vest in the official assignee under section 17 of the Presidency Towns Insolvency Act, 1909. The Division Bench observed thus —

“The Act of 1947 made a departure from those provisions. Section 5(11) of the Bombay Rent Control Act, 1947, defines the word “tenant” in such a way as not only to include a tenant for the time being under an agreement with the landlord, but, also sub-tenants and other persons as have derived title under a tenant before the commencement the Act of 1947 and thereafter before the commencement of the amendment of 1959 even if they remained in possession of the premises after the termination of the lease with or without the assent of the landlord. Even the successors of a tenant who have derived title prior to the amendment of 1959 and any member of the tenant's family residing with him at the time of his death as may be decided in default of the agreement by the Court are included in the definition. By section 15, as it originally stood, it made it unlawful for any tenant to sub-let the whole or any part of the

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 315

premises let to him or to assign or transfer in any other manner his interest therein, with a proviso that the State may by notification in the Official Gazette permit in any area the transfer of interest in premises held under such leases and to such extent as may be specified in the notification. This section was amended in 1959 and was made subject to any contract to the contrary. The clear effect of this section is that until the Act was amended no tenant was entitled in any manner to transfer or sub-let his interest in the tenancy, and after the amendment unless permitted by the contract. Under the proviso the State Government had issued notifications from time to time which permitted the transfer of tenancy interest along with business as a going concern, and the sad experience of the litigating public is that it is extremely misused. However, with the policy of the legislation we are not concerned."

22. In *Zarina Umer Chamdewala*, the Division Bench went on to hold thus —

"In the present case, the flat is a residential flat and the agreement gives no power to the defendant to transfer her interest in the property. On the contrary, it specifically prohibits her from transferring the same to anyone under clause 11 thereof. It is obvious, therefore, that under section 15 of the Bombay Rent Act the transfer is unlawful. In the circumstances, assuming that it is property the question is, is it such property that it can be divisible amongst the creditors either as it is or by cash realisation of the same, and the answer must be in the negative.

As we have stated earlier, sections 17 and 52 of the Presidency towns Insolvency Act read together can only mean that the property which vests in the official assignee must be such property that it is capable of being disposed of so that the amount realised can be divided amongst the creditors. We find support for this conclusion in the decision of this Court in *Chandrakant Devji vs. Narottamdas Amarchand* where Sir John Beaumont C. J. dealing with the question in a slightly different context says (p. 646):

"..... A suit relating to the property of the insolvent, in my opinion, means a suit which, if successful, will increase the assets distributable amongst the creditors, or the defence of which may prevent the assets being diminished."

It was on this ground that the learned Chief Justice held under section 68(1)(d) of the said Act that (p. 646) :

"..... a right to institute an appeal, which merely relates to a money claim against an insolvent, is not, in my view, a legal proceeding relating to the property of the insolvent and does not fall within the powers given by section 68 to the Official Assignee."

Mr. Ramchandani has invited our attention to a passage in Sir D. F. Mulla's *Law of Insolvency in India*, second edition, 1958, and argued that whatever may be the position in regard to the alienability of the property or otherwise, even such a tenancy is property and must vest in the Official Assignee. In particular, he relies upon para 501 at page 471, which reads as follows :

316 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

“ ‘Property’ includes any property over which, or over the profits of which, any person has a disposing power which he may exercise for his own benefit. In view of that definition, all property in the hands of the insolvent, though inalienable, would vest in the Officer Receiver, unless exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.”

Even though the statement has been worded very widely, the footnote contains cases, which clearly indicate that the proposition as widely stated cannot be supported. In *Bhola Nath vs. Chunni Lal*; in *Sohan Singh vs. Official Receiver occupancy rights under the Punjab Tenancy Act*; in *Vithoba Chinnaji vs. Mahadeo Kesheorao* occupancy land in Nagpur and in *Masumayya vs. Official Receiver, Kurnool Masjir service lands*, were held not to vest in the receiver in insolvency. In the first case under the Agra Tenancy Act the ex-proprietary tenancy could not be transferred in execution or alienated except in accordance with law. In the second case, the lands involved were governed by the Punjab Tenancy Act which could not be attached or sold in execution of a decree or transferred by private contract without the consent of the landlord. In the fourth case, which is more apposite, the lands were service Inam lands. Such lands it was held in *Anjaneyalu vs. Sri Venugopala Rice Mill Ltd.* to be inalienable by reason of section 6(d) of the Transfer of Property Act as it “was opposed to the nature of the interest affected thereby”. In our view, the ratio of these cases must apply to the case where a tenant is a monthly tenant governed by the Rent Act unless his tenancy is made alienable under the proviso to section 15(1) of the Bombay Rent Act,”

23. *Zarina Umer Chamdewala* was considered by the Division Bench in *Mittersain Rupchand* and was distinguished thus —

“7. Mr. Bansal relied heavily on the decision of the Division Bench of this Court in *Zarina Chamdewala's* case (supra). In the case before the Division Bench the property in dispute was a residential flat and agreement of lease did not confer power on the lessee to transfer the leasehold interest. The Division Bench of this Court found that under section 15 of the Bombay Rent Act transfer of interest in residential premises was unlawful. In that case the lessee was adjudicated as insolvent and the issue arose as to whether the Official Assignee can recover possession in accordance with the provisions of sections 17 and 52 of the Presidency Towns Insolvency Act which inter alia provide that the property of insolvent vests in the Official Assignee. The Division Bench held that the tenancy of monthly tenant of a residential premises, who has been adjudicated insolvent is not attachable under section 15 of the Bombay Rent Act and therefore it cannot be regarded as property of the insolvent and which must vest in the Official Assignee. The decision of the Division Bench clearly deals with the residential premises and the interests in such premises are not attachable under section 60(kc) of Code of Civil Procedure. The proviso to sub-section (1) of section 15 of



2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 317

the Bombay Rent Act confers power on the State Government to issue notification and such notification has been issued only in respect of non-residential premises and obviously with a view not to put fetters on the commerce which is practised on a large scale in this metropolis. The restrictions or limitations imposed upon the lessee while conferring the protection under the provisions of the Rent Act were not required to be strictly applied in respect of the premises leased out for business and the wisdom of the legislature is reflected by conferring power on executive to issue notification. In our judgment, the decision of the Division Bench has no application to premises let out for non-residential purposes. Mr. Bansal then submitted that the decision of the Division Bench in respect of residential flat was followed with approval by another Division Bench in the judgment in the case of *M/s D. Vasantrai and Co.* (supra) where the premises leased out were for the purpose of carrying on business. The submission is not accurate because the decision proceeds on the basis that the agreement between the parties while effecting transfer was only for the purpose of creation of sub-tenancy of the premises and nothing more. As mentioned hereinabove it is not permissible to merely transfer or assign interest in the leasehold property but it must be accompanied by transfer of running business and stock-in-trade. The decision therefore proceeds on the peculiar facts and that case nowhere holds that the leasehold interests of a lessee of non-residential premises are not liable to attachment and sale. Reliance on the decision of the single Judge of Delhi High Court in the case of *Belrux India Ltd.* (supra) is also not accurate. Section 14 of Delhi Rent Control Act, inter alia provided that no order or decree for recovery of possession of any premises shall be made by any Court in favour of landlord against the tenant unless the tenant has on and after June 9, 1952 sub-let, assigned or otherwise parted with possession of the premises without obtaining the consent of the landlord in writing. As the tenant in the case before the Delhi High Court had transferred the interest without obtaining consent of the landlord in writing, it was held that the tenant had no disposing power over the premises under tenancy and consequently no saleable power over the premises under tenancy and consequently no saleable interest. The decision has no application to the facts of the case or the provisions of section 15 of the Bombay Rent Act. In our judgment, there is no bar whatsoever under sub-section (1) of section 15 to attach and sale (sic) the leasehold interest of a lessee in a premises leased out for non-residential purpose.”

24. Be it noted that in *Zarina Umer Chamdewala*, the Division Bench also held that the word “property” was of wide import and may include every right which a person has over property and in this sense, a monthly tenancy that a person may hold may amount to property. In the context of the provisions of Presidency Towns Insolvency Act. Section 15(1) of Bombay Rent Act and the facts obtaining therein, the Division Bench observed that tenancy interest of the insolvent was not property and even if it was held to be property, it could not be divided amongst the creditors either as it is or by cash realisation of the same.

318 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

The observations of the Division Bench in *Zarina Umer Chamdewala* cannot be extended to the case like this where the question is whether the interest of the tenancy of non-residential premises to which the Act of 1999 applies is attachable and saleable in execution of the decree against the tenant, and particularly after the judgment of the Supreme Court in *Ramesh Himmatlal Shah*.

25. Section 26 forbids the voluntary transfer of interest in the premises by the tenant but does not prevent the transfer by the court. Where the transfer is by an operation of law and not by act of the parties, section 26 shall have no application. The argument that what the defendant could not have done otherwise legally could not be done through court is misplaced and devoid of merit. For one, it is consistently held for more than a century that restriction on assignment to transfer by the tenant under the lease or otherwise does not apply to an assignment by operation of law taking the effect in invitum as a sale under an execution. The other, neither section 26 nor any other provision in the Act of 1999 restricts a sale in execution of the decree.

26. In the case of *Golak Nath Roy Chowdhary vs. Mathura Nath Roy Chowdhary*, decided on September 1, 1891 and reported in (1893) Vol. XX Calcutta, 273, the Division Bench of Calcutta High Court held, "we take it to be clear law in India, as in England, that a general restriction of assignment does not apply to an assignment by operation of law taking effect in invitum, as a sale under an execution. The Bombay cases cited are authorities for this proposition as regards India". *Golak Nath Roy Chowdhary* was a case where certain land was leased — the lease expressly prohibiting the lessee and his heir from making any assignment of the property either by sale or gift, though there was no provision for forfeiture or for re-entry by reason of assignment in violation of its terms. The leased property was sold in execution of the decree against the lessee. In the suit to recover possession, the plaintiff contended that by virtue of the provisions in the lease nothing passed to the purchaser under the sale nor was there any saleable interest within the provisions of section 266 (now section 60) of the Civil Procedure Code in the lessee. The defence of the auction purchaser, inter alia, was that the lease did not prevent a sale in execution. The Division Bench of Calcutta High Court referred to the judgment of this Court in *Tamaya vs. Timapa Ganpaya*, ILR., 7 Bombay 262 and held that a restriction on assignment does not apply to an assignment by operation of law. In *Tamaya*, this court held that a clause against voluntary alienation afforded no ground for impeaching the title of an auction purchaser, to whom the alienation was by act of law and not by the lessee.

27. *Golak Nath Roy Chowdhary* was followed by the Division Bench of Calcutta in *Keshab Chandra Pramanik vs. Ajhar Ali Biswas*, (1914) CWN 1182. In that case the appellant *Keshab Chandra* held the permanent lease of some lands on which he had his huts; there was a condition, however, in the lease that if he made any transfer of the lands, the landlord would re-enter. The decree holder *Ajhar Ali* having attached the land and the huts, the lessee *Keshab Chandra* objected that the land was not saleable under section 60 Civil Procedure Code since under section 60 Civil Procedure Code such lands only can be sold as are saleable and belong to the judgment debtor and judgment debtor could not sale the lands, the court cannot sale the same. Repelling the objection of the

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 319

judgment debtor, the Division Bench of Calcutta High Court held, "This argument is based on a misapprehension of the word saleable used in the section. The word evidently means saleable by auction at a compulsory sale under the orders of the court and not transferable act of parties. The lease in this case forbade by the tenant, but did not prevent a sale by the court. This view is in accord with the opinion expressed in the case of *Golak Nath vs. Mathuranath* and we have no reason to differ from the same".

28. The legal position reiterated in *Golak Nath Roy Chowdhary* and *Keshab Chandra Pramanik* with regard to a general restriction imposed in the lease deed on assignment of tenancy interest by the lessee that such general restriction on assignment does not apply to an assignment by operation of law taking effect in invitum, as a sale under an execution, is applicable equally to a general restriction in law on assignment of tenancy interest by the tenant and we hold so.

We clarify however that by what we have said about Court sales, we do not intend affecting the rights of the landlord under the 1999 Act. In *Veatrag Investments II, 2003(1) Mh.L.J. 458 = 2003(1) All MR 493*, it was held that though the rights of the tenant are liable to be attached and sold in execution of a decree, the same cannot affect the rights of the landlords/head tenants in any manner for the right of a tenant under section 56 of 1999 Act can only be exercised with the consent of the landlord and that in execution of a decree against the tenant/sub-tenant, the Court cannot force in unwilling landlord/head tenant to enter into such a agreement. We however keep this question open to be decided by the executing Court at the appropriate stage.

29. Even otherwise, if the tenant acts in contravention of the prohibition contained in section 26 by voluntary transferring or assigning the interest of tenancy, the tenant exposes himself to eviction as unlawfully subletting or transfer or assignment by the tenant is a ground for eviction.

30. Section 60 of the Civil Procedure Code is as follows :—

**"60. Property liable to attachment and sale in execution of decree,—** (1)  
The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

.....  
.....

320 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

- (kc) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply :

.....  
.....”

31. It would be seen from section 60 that all saleable property which belongs to the judgment-debtor may be attached and sold in execution of the decree against him subject to proviso to sub-section (1). Similarly, the saleable property over which the judgment-debtor has a disposing power which he may exercise of his own benefits may also be attached and sold. A property may not belong to the judgment-debtor and yet he may have a disposing power over it exercisable for his own benefit. In such cases, the property is liable to attachment and sale subject to proviso to sub-section (1). From what we have discussed above, it is clear that the tenancy right of the non-residential premises is a property and is saleable within the meaning of section 60 Civil Procedure Code.

32. Section 56 of the Act of 1999 legitimatizes the acceptance of consideration for relinquishment, transfer or assignment of tenancy of any premises. It also legalises for the landlord to receive any premium or other like sum or deposit inter alia for giving his consent for transfer of the lease to any other person. Section 56 of the Act of 1999 reads thus —

“56. *Right to Tenant and Landlord to receive lawful charges.*— Notwithstanding anything contained in this Act, it shall be lawful for, —

- (i) the tenant or any person acting or purporting to act on behalf of the tenant to claim or receive any sum or any consideration, as a condition of the relinquishment, transfer or assignment of his tenancy of any premises;
- (ii) the landlord or any person acting or purporting to act on behalf of the landlord to receive any fine, premium or other like sum or deposit or any consideration in respect of the grant, or renewal of a lease of any premises, or for giving his consent to the transfer of a lease to any other person.

33. The aforesaid provision leaves no manner of doubt that it enables the tenant to claim or receive any sum or any consideration, as a condition of the relinquishment, transfer or assignment of his tenancy of any premises. It indicates that the tenant has a disposing power in respect of the interest in the tenancy in the non-residential premises for his own benefit either by surrendering it to the landlord for any sum or consideration or transfer or assign the tenancy for consideration. Clause (kc) appended to the proviso of sub-section (1) of section 60 prohibits the attachment and sale of interest of the lessee of a residential building to which the Rent Control Act applies but the said prohibition is not applicable to the interest of a tenant of a non-residential premises to which the Maharashtra Rent Control Act applies and therefore, it can safely be held that the interest of the tenant in the non-residential premises to which the Act of 1999 applies is attachable and saleable in execution of the decree against the tenant.

34. Section 26 as well as section 56 of the Act of 1999 start with the non-obstante clause. While section 26 starts with the expression, “Notwithstanding

2004(2) Mh.L.J.] T. E. S. PVT. LTD. vs. INDIAN CHEMICALS 321

anything contained in any law for the time being in force .....”, section 56 starts with the expression, “Notwithstanding anything contained in this Act.....” Non-obstante clause may give the enacting part of the section in case of an conflict an overriding effect over the provision or Act mentioned in the non-obstante clause. It may also be read as clarifying the whole position and may be understood to have been incorporated by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. The expression notwithstanding anything contained in any law may not be construed to take away the effect of any provision of the Act in which that section appears. Though the learned Single Judge in the order of reference observed that by virtue of section 56 of the Act that starts with non-obstante clause, the limitation or restriction imposed in section 26 is lifted, in our judgment, this may not be correct approach to the construction of sections 26 and 56 of the Act of 1999 as the first thing to be ascertained would be whether both can be read harmoniously. There should be clear inconsistency between the two before giving an overriding effect to the non-obstante clause. Be that as it may, in the light of the issue posed before us it is not necessary to go into the question whether section 56 overrides section 26 because one thing is clear that section 56 indicates in no manner of doubt that the interest of the tenant in the non-residential premises to which the Act of 1999 applies is saleable and the tenant has the disposing power of the said property for his benefit.

35. There may be a case where the tenant does not transfer or assign his tenancy rights but only surrenders his tenancy to the landlord. Section 26 does not come in the picture in that case. For the surrender of his tenancy, the tenant may receive money as there is no prohibition and section 56 of the Act of 1999 legalises that. Yet another case where the tenant transfers or assigns his tenancy rights in non-residential premises to the third party on consideration for transfer or assignment. The landlord ratifies the act of transfer or assignment and also accepts money for grant of such permission to transfer. There may also be a case where the landlord purchases in public auction the interest of the tenant in execution with a view to get back his property without undertaking exercise of eviction. The cases may be many. Can it be said that interest of the tenant in the non-residential premises is not saleable or that the tenant has no disposing power in respect of such interest for his benefit. The answer obviously has to be in the negative.

36. The submission of Mr. Mahendra Ghelani that the saleable right has to be in praesenti and merely because the lessor may give his consent later on or he may ratify the act of transfer or assignment done by the tenant cannot be a reason to hold that the interest in tenancy can be transferred in the teeth of section 26, is without merit and devoid of substance for the reasons we have already indicated above.

37. In *Veetrag Investments I*, the learned Single Judge in paras 8, 9 and 10 noted thus —

“8. The next submission made by Shri Samdani is that the demised premises are not liable to be attached. There is no dispute on the fact that the applicant is the owner and landlord of the entire building of which the demised premises are a part and that the defendant is only tenant in

R.F. 21

322 T. E. S. PVT. LTD. vs. INDIAN CHEMICALS [2004(2) Mh.L.J.]

the demised premises. The question which arises is whether tenanted premises are liable to be attached and sold in execution of a decree passed against the tenant himself. In this respect Shri Mehta drew my attention to section 60 of the Civil Procedure Code which contains a list of the properties which are liable to attachment and sale in execution of a decree. The list contains lands, houses or other buildings etc. The proviso to section 60 specifies the properties which shall not be liable for attachment and sale. Shri Mehta referred to Clause k(c) of section 60 which in substance states that the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply, is not liable to attachment or sale. Admittedly, the demised premises are commercial premises. Therefore, the submission of Shri Mehta is that the same is liable to be attached and sold in execution of a decree. In this respect Shri Mehta relied upon the decision of a Division Bench of this Court in *Union Bank of India vs. Mittersain Rupchand*, 1995(2) Mh.L.J. 481 = AIR 1995 Bom. 371, wherein it was held that the exclusion of properties mentioned in section 60 of the Civil Procedure Code specifically refers to residential premises and not to premises used for non-residential purposes. It was further held that goodwill and tenancy rights in such premises would be saleable property and, therefore, they would be liable to attachment and sale. It was also held that section 15(1) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 (For short, "the Rent Act, 1947") would be no bar. Section 15(1) in substance prohibits the tenant from subletting for transferring or giving on licence the premises in this occupation. This is however, subject to any contract to the contrary. In other words, if there is a contract between the landlord and tenant whereby the form of permits, letter then such a transfer of the premises would be valid.

9. Shri Samdani, however, pointed out that the Rent Act, 1947 has been repealed by the Maharashtra Rent Control Act, 1999 (hereinafter referred to as "the Rent Act, 1999", for short). Section 58 of the said Act provides for repeal of the Rent Act, 1947. It may be noted that the Rent Act, 1999 came into force with effect from 31-3-2000. The impugned order ordering sale of the demised premises in demised of the plaintiff was made on 30-3-2001 i.e. exactly one year after the coming into force of the Rent Act, 1999. It is therefore, obvious that the question as to whether tenancy and goodwill in respect of the premises which are non-residential can be transferred, is governed not by a Rent Act, 1947 but, the Rent Act, 1999. Shri Samdani referred to the provisions of section 26 of the Rent Act, 1999 which provides that in the absence of contract tenant not to sub-let or transfer or give on licence.

.....

10. The proviso enables the State Government to permit in any area the transfer of interest in the premises held on lease other than those let for business. It is not brought to my notice that the State Government has issued any notification under the proviso of section 26 of the Rent Act,

2004(2) Mh.L.J.] J. RAJMOHAN PILLAI vs. STATE OF MAH. 323

1999. Even in that case, the notification cannot be in respect of the premises let for business. It is therefore, clear that in the absence of any contract, the tenant has no right to sublet or transfer the premises held by him whether they are for residential or non-residential purposes. The argument of Shri Samdani is to the effect that the sale of the demised premises as per the order dated 30-3-2001 is contrary to the provisions of section 26 of the Rent Act, 1999. According to him, Court cannot permit anything to be done which violates the provisions of any Act. In other words, what the defendant could not have done otherwise legally done, cannot be got done through court. In view of that the submission of Shri Samdani in this behalf is sound and sustainable. Therefore, the same will have to be upheld.”

38. To the extent the observations of the learned Single Judge in para 10 of the aforesaid judgment are inconsistent with what we have already discussed above and that we need not repeat, the view of the learned Single Judge in *Veetrag Investments (I)* cannot be said to be a good law.

39. The judgment of the Division Bench of this Court in the case of *Saraswat Co-operative Bank Ltd. vs. Chandrakant Magan Lal Shah, 2002(1) Mh.L.J. 581*, should not detain us for a long. In that case the question was whether tenancy rights of a company in liquidation were capable of being transferred, assigned or attached. Surely a different question with which we are concerned. But in *Saraswat Bank* also the Division Bench held that the prohibition against transfer or assignment or transfer of tenant’s right under section 15 of the Bombay Rent Act was not absolute but was subject to certain well known exceptions.

40. We, therefore, conclude that the tenant’s right to remain in occupation of the non-residential premises governed by the Maharashtra Rent Control Act, 1999 is a property; such property is saleable and the tenant has disposing power over the interest of tenancy for his benefit and in view thereof, we hold that the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of the decree against the tenant.

41. Let the papers of chamber summons No. 593 of 2003 in Execution Application No. 636 of 2001 in Summary Suit No. 2255 of 1998 be placed before the learned Chamber Judge for proceeding accordingly.

*Order accordingly.*

CRIMINAL PROCEDURE CODE, SECTION 251

(J. G. Chitre, J.)

J. RAJMOHAN PILLAI

*Petitioner.*

vs.

STATE OF MAHARASHTRA and another

*Respondents.*

**Criminal Procedure Code (2 of 1974), S. 251** — *Trial of summons cases — Magistrate must perform judicial act as indicated by section 251.*

Cri. W. P. No. 83 of 1998 decided on 12-3-2003. (Bombay)

“Para I of Schedule VI both as it originally stood and as amended, as seen already, empowered the licensee “to adjust his rates, so that his clear profit in any year shall not, as far as possible, exceed the amount of reasonable return”. We shall reserve for later consideration the meaning of the expression “so adjust his rates”. But one thing is clear and that is that the adjustment is unilateral and that the licensee has a statutory right to adjust his rates provided he conforms to the requirements of that paragraph *viz.*, the rate charged does not yield a profit exceeding the amount of reasonable return. The conclusion is therefore irresistible that the maxima prescribed by the State Government which bound the licensee under the Electricity Act of 1910, no longer limited the amount which a licensee could charge after the Supply Act, 1948, came into force since the “clear profit” and “reasonable return” which determined the rate to be charged was to be computed on the basis of very different criteria and factors than what obtained under the Electricity Act.”

12. For the reasons mentioned above, these appeals fail and they are dismissed with costs. One hearing fee.

1969 (1) Supreme Court Cases 792

(From Rajasthan)

[BEFORE S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

GOPPULAL .. Appellant ;

*Versus*

THAKURJI SHRIJI SHRIJI DWARAKADHEESHJI .. Respondents.  
AND ANOTHER

Civil Appeal No. 53 (N) of 1969, decided on 12th March, 1969

**Rajasthan Premises (Control of Rent and Eviction) Act, 1950—Section 13(1)(e)  
—Whether applicable to sub-lettings before the Act came into force—Whether an  
increase in rent amounts to grant of a new lease.**

Respondents let four shops to respondents in 1944 and other two shops in 1945. In 1953 the respondent agreed to pay consolidated enhanced rent for the six shops per month. Appellant sub-let four shops with respondents’ permission and the other two without his permission. Under Jaipur Rent Control Order, 1947, sub-letting was a ground for eviction. Respondent filed suit for eviction under Section 13(1)(e) of the 1950 Act. Trial Court held that all the six shops were sub-let but with permission of the landlord and the notice to quit was waived by accepting rent subsequently. The High Court held that four shops were sub-let with landlord’s permission and two without his permission but there being one integrated tenancy for all the six shops, the landlord was entitled to seek eviction from all the six shops under Section 13(1)(e) and that there was no waiver of notice to quit.

*Held :*

- (i) There was no integrated lease by the mere fact that the rent was increased in 1953 and rent consolidated, as a mere increase or reduction of rent does not necessarily import the surrender of the existing lease and the grant of a new tenancy.

*Hill and Redman’s Law of Landlord and Tenant*, 14th Ed., Article 385, page 493.

(Paras 4, 5)



(1)S.C.C.] **GOPPULAL v. T. S. S. DWARKADHEESHJI** (*Bachawat, J.*) 793

(ii) The permission of the landlord for the sub-letting is not established from the mere fact that the landlord realised rent after the sub-letting in the absence of proof that the landlord had then clear knowledge of the sub-lease.

(Para 6)

(iii) As sub-letting of two shops after October 15, 1947, was not established, the Jaipur Rent Control Order, 1947 had no application. On the date of sub-letting no Rent Control Legislation was in force.

The words 'has sub-let' in Section 13(1)(e) of the 1950 Act being in present perfect tense, take within their sweep any sub-letting which was made in the past and has continued up to the present time and it does not matter that the sub-letting was either before or after the Act came into force. This construction is supported by the provisions of Sections 26 and 27(1) of the Act. (Paras 9 and 10)

It is wrong to say that Section 13(1)(e) takes away vested rights and should not be given a retrospective effect because apart from the Rent Control Act, the landlord is entitled to eject the tenant on the expiry of the period mentioned in the notice to quit. Section 13(1) protects tenant from eviction except in certain specified cases and if one of the grounds of ejection is made out, the tenant does not qualify for protection from eviction and it matters not that he had the right to sub-let the premises under Section 108(j) of the Transfer of Property Act.

Appeal allowed in part.

*C. B. Agarwala*, Senior Advocate (*Rameshwar Nath* and *Mohinder Narain*, Advocates of M/s. Rajindra Narain and Co. with him) for Appellant ;

*B. R. Iyengar*, Senior Advocate (*S. K. Mehta* and *K. L. Mehta* Advocates of M/s. K. L. Mehta and Co. with him) for Respondents.

The Judgment of the Court was delivered by

**BACHAWAT, J.**—This appeal arises out of a suit for ejection by a landlord against a tenant. The defendant is the tenant of six shops belonging to Thakurji Shri Shri Dwarkadheeshji installed in the temple at Chaura Raasta, Jaipur. Devendra Prasad is the adhikari or manager of the temple. He gave a notice to the defendant to quit the shop on August 1, 1957. On February 28, 1958, the deity and Devendra Prasad filed a suit against the defendant claiming recovery of possession of the six shops and Rs. 1,006/- on account of arrears of rent. The suit was governed by the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (Act No. XVII of 1950). The plaintiffs asked for ejection of the defendant on the ground that he had sub-let the six shops. The other grounds of ejection were not established, and it is not necessary to mention them. The courts below concurrently found that Devendra Prasad as the adhikari of the temple was entitled to give the notice to quit and to maintain the suit.

2. The trial court held that (1) all the six shops were sub-let by the defendant ; (2) the sub-letting was with the permission of the landlord and (3) the notice to quit was waived by acceptance of rent subsequently accrued due. Accordingly, the trial court dismissed the suit so far as it claimed ejection and passed a decree for Rs. 1006/- on account of arrears of rent. The plaintiffs filed an appeal against the decree. The District Judge, Jaipur City, dismissed the appeal. The plaintiffs filed a second appeal against the decree. The High Court held that (1) there was one integrated tenancy of all the six shops ; (2) four shops were sub-let with the permission of the landlord ; (3) two shops were sub-let without the permission of the landlord towards the end of 1947 ; (4) the tenant having sub-let a part of the premises without the permission of the landlord the ground of

eviction under clause (e) of Section 13(1) was made out and the landlord was entitled to a decree for possession of all the six shops, and (5) there was no waiver of the notice to quit. Accordingly, the High Court allowed the appeal and passed a decree for eviction of the defendant from the six shops. The present appeal has been filed by the defendant after obtaining special leave.

3. Counsel for the appellant conceded that there was no waiver of the notice to quit by acceptance of rent or otherwise. The points arising for determination in this appeal are : (1) was there one integrated tenancy of all the six shops ? (2) were the two shops sub-let without the permission of the landlord towards the end of 1947 ? and (3) is the sub-letting a ground of ejection under clause (e) of Section 13(1) of the Rent Act ?

4. As to the first question, we find that four shops were let to the defendant in 1944 and the other two shops on the northern side of the staircase of the temple were let to him in 1945. The rent of the four shops was Rs. 150/- per month. The rent of the other two shops was Rs. 65/- per month. In Paragraph 5 of the plaint it was pleaded that in 1953 the defendant agreed to pay a consolidated rent of Rs. 251/8/- per month for all the six shops and to vacate them by July 31, 1957. In Paragraph 5 of the written statement the defendant denied this contract and alleged that in 1953 there was only an enhancement of rent. The first two courts found that in 1953 there was no new contract of tenancy, that there was only an increase of rent and that the other terms and conditions of the tenancy remained unaltered. This finding was not vitiated by any error of law.

5. A mere increase or reduction of rent does not necessarily import the surrender of the existing lease and the grant of a new tenancy. As stated in *Hill and Redman's Law of Landlord and Tenant*, 14th ed., Article 385, p. 493 :

“But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end.”

In the present case the first two courts on a review of the entire evidence came to the conclusion that the increase of rent did not import a new demise. This finding of fact was binding on the High Court in second appeal. The High Court was in error in holding that there was one integrated tenancy of the six shops.

6. As to the second question the defendant denied that he sub-let the two shops. The courts below concurrently found that this denial was false and that he sub-let the two shops to his brother-in-law Ram Gopal. There was no pleading nor any issue that the sub-letting of the two shops was made with the permission of the landlord. It was not the case of the defendant at any stage of the trial that he had obtained the permission of the landlord for sub-letting the two shops. In the absence of any pleading and any issue on this point the first two courts were in error in holding that the two shops were sub-let with the permission of the landlord. The permission of the landlord for the sub-letting is not established from the mere fact that the landlord realised rent after the sub-letting in the absence of proof that the landlord had then clear knowledge of the sub-lease.

7. The date of the sub-letting of the two shops is not mentioned in the

(1)S.C.C.] **GOPPULAL v. T. S. S. DWARKADHEESHJI** (*Bachawat, 7.*) 795

plaint. In the absence of any pleading and any issue on this question the High Court was in error in recording the finding that the two shops were sub-let towards the end of 1947 after the Jaipur Rent Control Order, 1947 came into force. We can only say that the sub-letting was some time after 1945.

**8.** As to the third question, Section 13(1) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 provides :

“Notwithstanding anything contained in any law or contract, no Court shall pass any decree, or make any order, in favour of a landlord, whether in execution of a decree or otherwise, evicting the tenant so long as he is ready and willing to pay rent therefor to the full extent allowable by this Act, unless it is satisfied.”

The sub-section then sets out several grounds of ejection under twelve main heads. Clause (e) mentions the following ground :

“That the tenant has assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord.”

The appellant's contention is that sub-letting before the Act came into force is not within the purview of clause (e). The High Court held that the two shops were sub-let after October 15, 1947, when the Jaipur Rent Control Order, 1947, came into force, that the sub-letting was a ground of ejection under Paragraph 8(1)(b)(ii) of that Order and that the tenant's liability for eviction on this ground continued after the promulgation of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. With regard to this line of reasoning it is sufficient to say that the plaintiffs have not established that the sub-letting was after October 15, 1947. The case must be decided on the footing that on the date of the sub-letting, no Rent Control legislation was in force.

**9.** The question whether a sub-letting before the coming into force of the Act is within the purview of clause (e) of Section 13(1) depends upon the construction of that clause. The relevant words are “has sub-let”. The present perfect tense contemplates a completed event connected in some way with the present time. The words take within their sweep any sub-letting which was made in the past and has continued up to the present time. It does not matter that the sub-letting was either before or after the Act came into force. All such sub-lettings are within the purview of clause (e).

**10.** Sections 26 and 27(1) of the Act throw considerable light on the construction of Section 13(1). They are as follows :

“26. No decree for the eviction of a tenant from any premises in areas to which this Act extends for the time being, passed before the date of commencement of this Act shall in so far as it relates to the eviction of such tenant be executed against him, as long as this Act, remains in force therein, except on any of the grounds mentioned in Section 13 and under the circumstances specified in this Act.

27. (1) In all suits for eviction of tenants from any premises in areas to which this Act has been extended under Section 2, pending on the date specified in the notification under that section, no decree for eviction shall be passed except on one or more of the grounds mentioned in Section 13 and under the circumstances specified in this Act.”

Section 26 bars the execution of a decree for eviction passed before the commencement of the Act except on any of the grounds mentioned in Section 13 and under the circumstances specified in the Act. Likewise, Section 27(1) bars the passing of a decree for eviction in a pending suit except on one or more of the grounds under Section 13 and under the circumstances specified in the Act. Sections 26 and 27(1) clearly contemplate that the grounds of eviction mentioned in Section 13 may have arisen before the Act came into force.

11. The argument that Section 13(1)(e) takes away vested rights and should not be given a retrospective effect is based on fallacious assumptions. Apart from the Rent Act the landlord is entitled to eject the tenant on the expiry of the period mentioned in the notice to quit. Section 13(1) protects the tenant from eviction except in certain specified cases. If one of the grounds of ejection is made out the tenant does not qualify for protection from eviction. We find no reason for presuming that Section 13(1)(e) is not intended to apply to sub-lettings before the Act came into force. If the tenant "has sub-let" the premises without the permission of the landlord either before or after the coming into force of the Act, he is not protected from eviction under Section 13(1)(e), and it matters not that he had the right to sub-let the premises under Section 108(j) of the Transfer of Property Act.

12. The plaintiffs have thus established the ground of eviction under Section 13(1)(e) with regard to the two shops on the northern side of the staircase of the temple. With regard to the four other shops the courts below concurrently found that they were sub-let with the permission of the landlord. In our opinion, the plaintiffs are entitled to a decree for ejection of the defendant from the two shops and the claim for eviction from the other four shops should be dismissed.

13. In the result, the appeal is allowed in part. The decree passed by the High Court for eviction of the defendant from the four shops is set aside and the suit in so far as it claims eviction from the four shops is dismissed. The decree passed by the High Court for eviction of the defendant from the other two shops on the northern side of the staircase of the temple mentioned in Paragraph 4 of the plaint is affirmed. Parties will pay and bear their own costs throughout, in this Court and in all the courts below. The defendant will have one month's time to vacate the two shops.

**1969 (1) Supreme Court Cases 796**

*(From Madhya Pradesh)*

[BEFORE M. HIDAYATULLAH, C. J. AND V. RAMASWAMI AND G. K. MITTER, JJ.]

BEOHAR RAJENDRA SINHA AND OTHERS .. Appellants ;

*Versus*

STATE OF M. P. AND OTHERS AND VICE VERSA .. Respondents.

Civil Appeal Nos. 386 and 387 of 1966, decided on 11th March, 1969

**Civil Procedure Code, 1908—Section 80—Notice—Requirements of—Notice by Karta of Joint Family but suit filed by divided members of family—Validity of.**

*Held*, that the notice under Section 80, C. P. C., given by Bcohar Raghubir Singh (Karta of the joint family), was sufficient in law to sustain a suit brought by all the divided