

Mohammad Kasam Haji Gulambhai vs Bakerali Fatehal1 (D) By Lrs on 8 September, 1998

Equivalent citations: AIR 1998 SUPREME COURT 3214, 1998 (7) SCC 608, 1998 AIR SCW 3130, 1998 (7) ADSC 144, 1999 (1) ALL CJ 139, 1998 (5) SCALE 182, 1998 BOMRC 592, 1998 () HRR 623, (1999) 1 ALLMR 690 (SC), 1999 (1) ALL MR 690, 1999 SCFBRC 47, 1998 ADSC 7 144, 1999 (1) SRJ 60, 1998 (2) UJ (SC) 704, (1998) 6 JT 259 (SC), (1999) 2 MAD LW 58, (1999) 1 GUJ LR 101, (1998) 2 GUJ LH 655, (1999) 1 MAHLR 459, (1998) 2 RENCJ 305, (1998) 2 RENCJ 375, (1998) 2 RENTLR 340, (1998) 7 SUPREME 248, (1998) 5 SCALE 182, (1998) 3 CURCC 242, (1999) 1 BOM CR 565

Author: D.P. Wadhwa

Bench: D.P. Wadhwa

CASE NO.:

Appeal (civil) 7957 of 1996

PETITIONER:

MOHAMMAD KASAM HAJI GULAMBHAI

RESPONDENT:

BAKERALI FATEHAL1 (D) BY LRS.

DATE OF JUDGMENT: 08/09/1998

BENCH:

DR. A.S. ANAND AND D.P, WADHWA

JUDGMENT:

JUDGMENT 1998 Supp (1) SCR 465 The judgment of the Court was delivered by D.P. WADHWA, J. The appellant-landlord is aggrieved by the judgment of the Gujarat High Court. By this judgment in revision, High Court reversed the judgments of two Courts below ordering eviction of the respondent-tenant on a petition filed by the appellant under clause (e) of sub-section (1) of Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, the 'Act') as applicable to the State of Gujarat. Under this clause, a landlord is entitled to recover possession of the premises on the ground that "the tenant has since the coming into operation of this Act unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein".

The premises in question is a shop. It was let out to the tenant Bakerali Fatehali ('Bakerali for short) by predecessor of the appellant w.e.f. December 1, 1946. A rent note was duly executed. The

premises were sold to the appellant in 1947, Bakerali executed second rent note in favour of the appellant. There is no dispute that both the rent notes contained a clause that the premises had been taken on lease by Bakerali for his own use and occupation and that "he shall not sublet the premises in favour of anybody".

At this stage, we may also refer to Section 15 of the Act which puts an embargo on the 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". This is, however, subject to any contract to the contrary. Thus, irrespective of there being no clause in the rent note entitling the tenant to sublet the premises the law forbids him from doing so. He cannot even assign or transfer in any other manner his interest in the tenanted premises. In the present case, a clause in the rent note specifically forbids Bakerali from subletting the premises.

The appellant filed proceedings for eviction of the respondent in 1978 in the court of Small Causes at Vadodara. On October 31, 1984, the eviction suit was decreed. Against that judgment respondent filed an appeal before the Joint District Judge who by judgment dated November 6, 1993 affirmed the judgment of the judge Small Causes and dismissed the appeal. Thereafter, respondent took the matter to the High Court in revision. In the meantime, Bakerali died and his legal representatives were brought on record. High Court, by the impugned judgment dated July 28, 1995, allowed the revision and, as noted, set aside the orders of both, the Judge Small Causes and the Joint District Judge.

The appellant had alleged that Bakerali had unauthorisedly and unlawfully sublet, assigned or transferred his interest in the suit premises to his two sons without obtaining his consent. Appellant said that Bakerali earlier entered into a partnership with his four sons for carrying on the business of sale of medicines in the suit premises and a partnership deed dated November 15, 1955 was executed between them. This partnership deed specified the shares of the five partners in the profit and loss of the firm. While Bakerali was having 4 anna share, his four sons were having 3 anna share each. Earlier, Bakerali was having his business as a scale proprietor in the name of M/s; Fatehali & Sons, After the partnership was formed, it was given the name M/s. B.A. Fatehali & Sons. The Partnership was at will and under clause (7) thereof, it was provided that "only the partner No. 1 (Bakerali) will be the exclusive proprietor and owner of the goodwill of the business, place of the business and all other rights of the business". This partnership continued till November 14, 1974 when a new partnership deed between two sons of Bakerali was executed and in terms thereof Bakerali and his two other sons retired from the business of the partnership. They were the partners in the partnership deed dated November 15, 1955 as well. The recitals of the partnership deed dated November 14, 1974 are as under :

"Whereas, the above two partners join the following partners in the partnership, which partnership is doing business of medical and provisions stores in the name and style of M/s. B.A. Fatehali & Sons, opposite to Raopura Tower, Vadodara, on the strength of the partnership deed made on Kartak Sud 1 of Samvat Year 2021, the 15th date of November, 1955. But the following three partners have settled their accounts and have voluntarily retired from the partnership business with effect from the date

of execution of this deed, i.e., Kartak Sud 1, of Samvat Year 2031, Thursday, the 14th day of November, 1974. The said partners are :

Sheth Bakarali Fatehali Jafarali Bakarali and Fatehali Bakarali.

The aforesaid three partners have decided to retire from the partnership considering these two partners responsible and liable for all the debts, outstanding dues, furniture, fixtures etc. as per closure of the books of accounts as on Aso Vadi 30 of Samvat Year 2030. Now, we both the partners are responsible to inform all the banks, traders, firm registration, Shops and Establishment Department, Income-tax Department, Sales Tax Department and all other offices and departments wherever necessary for all other licences and permits etc. of this partnership firm. The retiring three partners shall give their signatures etc. wherever necessary on all the documents, applications and other papers relating to this change in partnership.

Since there is a change in the constitution of the aforesaid old partnership, this new partnership deed has been executed on the following terms and conditions."

The business of the new partnership was carried on in the suit premises. Various clauses of this partnership deed clearly showed that after Bakerali retired from the earlier partnership M/s. B.A. Fatehali & Sons, he was to have no concern, right, title or interest in the new partnership which was now carrying on business in the suit premises, though in the same name. It has come on record that one of the two partners of the new partnership was paying rent to the appellant of the shop premises but the appellant was issuing rent receipts invariably in the name of Bakerali. During the continuance of this partnership, one of the two partners died and his son was taken into partnership and a new partnership deed dated March 6, 1969 was executed which partnership deed did not contain any of the recitals of partnership deed dated November 14, 1974. In these circumstances, question arises if the case of the appellant falls within the provisions of clause

(e) of sub-section (1) of Section 13 of the Act entitling him to decree of eviction against the respondents.

The facts are not much in dispute. Respondents case is that Bakerali did not efface himself Completely from the shop premises altogether. He had to retire from the business because of his ill-health and further that he used to come to the shop premises off and on. As far as ill-health of Bakerali is concerned, it does not lend any credence to the case of the respondents as Bakerali continued to be a partner in other business with his other sons in some other premises. His coming to the shop premises off and on is also of no significance as a father may like to visit his sons to see how they are faring in the business. Both partnership deeds dated November 14, 1974 and March 6, 1979 unmistakably show that henceforth Bakerali would have no concern either with the shop premises or with the business being carried on by the new partnership in the shop premises. Respondents contended that the suit premises where business was being carried on under the new partnership Was, in fact, taken on rent for and on behalf of the family of Bakerali. As Bakerali was the elderly member of the family, the suit premises was taken on lease in his name. It was also

pleaded that second and third partnerships were in continuation of the first partnership wherein in clause (7) it was specifically stated that the suit premises shall belong to Bakerali. But then this clause (7) in the first partnership deed dated November 15, 1955 negatives any such contention that suit premises were taken on lease by Bakerali for the benefit of the family. In order to dislodge the case of the appellant, respondents said that rent receipts, as noted above, had always been issued by the appellant in the name of Bakerali though the rent was being paid by one of his sons. Thus, according to respondents, there had been some arrangement regard-ing the affairs of the family assets and Bakerali did not attend to the business because of advanced age and ill-health. They :said this would not amount to any subletting or transfer or assignment of tenancy rights of Bakerali to his sons. It is difficult to appreciate this line of defence by the respondents. It rather shows that Bakerali stopped paying any rent to the appellant landlord after partnership dated November 14, 1974 Was ex-ecuted and rent was being paid by one of his sons who was partner in the new partnership. A necessary inference would be that rent was paid from the business of the new partnership and it is not material that the rent receipts were being issued in the name of Bakerali. These had to be issued in the name of Bakerali otherwise landlord could be said to have accepted the son who was paying the rent or the new partnership as tenant of the suit premises. Documents brought on record do not show that what the respondents contended was a mere arrangement of distribution of family assets. Rather new partnership deeds show that business now carried on by the two partners was independent of any right whatsoever of any other person including Bakerali both as regards the suit premises as Well as the business. It is also difficult to accept the argument that partnership deed dated November 14, 1974 is in continuation of the partnership deed dated November 15, 1955. There is no clause in the partnership deed dated November 14, 1974 that Bakerali will have any right "in .suit, premises or in the business being carried on there under the new partnership. Third partnership deed dated March 6, 1979 destroys the case of the respondents altogether that Bakerali had even any say in the business of the new partnership or in the place of business being the suit premises. One of the partners in the new partnership appeared as the sole witness for the respondents. No document of any nature whatsoever was produced by the respondent in support of any of their contentions. These documents would mean records of the Income-tax Authorities, Sales Tax Authorities, Shop and Establishment Authorities and other authorities under the Drugs Act since the business in the shop premises was that of selling medicines. Witness admitted in his testimony that Bakerali had handed over the suit shop to him and his brother Alibhai in the year 1974 and that Bakerali was hot visiting the shop after handing over the same to partners of the new partnership, though he used to visit the shop premises occasionally. The witness said Bakerali used to come the shop premises "to see as to how we were doing the business".

In reversing the two judgments of the Courts below, High Court strongly relied upon a decision of this Court in Jagan Nath (deceased) through Lrs. v. Chander Bhan & Ors., [1988] 3 SCC 57. In this case, father was the tenant. He retired from the business and his sons were looking after the same. The question was had the father divested himself of the legal right to be in possession of the premises? This Court said that even though the father had retired from the business, in the facts of the case, it could not be said that he had divested himself of the legal right to be in possession. The court found that the father was carrying on the business with his sons and the family was a Joint Hindu Family and it was difficult to presume that the father had parted with possession legally to

attract the mischief of Section 14(1)(b) of the Delhi Rent Control Act. This provision provides that the landlord could take possession of the premises from the tenant if the tenant had sublet, assigned or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. Considerations which led this Court to allow the appeal Of the tenant Jagan Nath (since deceased) were; (1) Jagan Nath was being helped in his business of Bindra Tent House by his two sons even prior to the incorporation of partnership of the two sons in the name of Bindra Tent House; (2) the business of Bindra Tent House was being carried on in part of the tenanted premises which was residential-cum- commercial; (3) Jagan Nath and his two sons constituted a Hindu Undivided Family. Since Jagan Nath was carrying on the business with his sons and the family was a joint Hindu family it is difficult to presume that father had parted with possession of any part of the premises. There is no evidence that there has been any subletting or assignment; (4) even though Jagan Nath had retired from the business his sons had been looking after the same. From the facts which stood proved it cannot be said that Jagan Nath had divested himself of the legal right of possession; and (5) though much could be said on the conduct of Jagan Nath who had been sitting on the fence and avoiding the issue and had not been fair and frank in conduct of his case but that is no ground to disentitle him to the benefits of law if the facts had been proved that he had not parted with possession. After analyzing these facts this Court said ; "It is well settled that parting with possession meant giving possession to persons other than those to whose possession had been given by the lease and the parting with possession must have been by the tenant; user by other is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be Vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession." The Court also relied on its earlier decision in *Smt. Krish-nawati v. Hans Raj*, [1974] 1 SCC 289. In that case, two persons lived in a house as husband and wife. One of them had rented the premises and allowed the other to carry on business in a part of it. Again, the question was if it amounted to subletting. This Court held that if two persons live together in a house as husband and wife and one of them who was the tenant of the house allows the other to carry on business in a part of it, it will, in the absence of any other evidence, a rash inference to draw that the tenant has let out that part of the premises. The Court said that it was a settled law that onus to prove subletting was on the landlord. If the landlord prima facie shows that the occupant who was in the exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence. The Court said that the landlord in that case produced no evidence to show subletting in spite of the denial by the tenant in the written statement of any subletting.

Reference was also made to another decision of this Court in *P.A. Thomas & Anr. v. M. Mohammed Tajuddin & Anr.*, [1989] 3 SCC 240 where this Court remanded the matter to the High Court with a direction to give finding as to the fact if appellant-tenant retained effective control over the affairs of the partnership of which he was a partner. It was also a case of eviction of the tenant. We do not think this judgment is of any relevance to the controversy involved in the present appeal. In *Dipak*

Banerjee v. Lilaboti Chakraborty, [1987] 4 SCC 161, which was a case under the West Bengal Premises Tenancy Act, 1956, one of the issues before this Court was if the allegation of the landlord that the premises let out to tenant, part to which had been sublet by him, so as to entitle the landlord to evict the tenant under Section 13(1)(a) of that Act. This Court said that in order to prove sub-tenancy, two ingredients are necessary to be established; (1) the sub-tenant is in exclusive possession of part of the premises and the tenant retains no control over that part of the business, and (2) right to occupy the premises by the sub-tenant must be in view of payment of some compensation or rent. In that case, the Court held that both the ingredients were missing and held that there was no subletting.

We have been referred to two judgments of learned single judges of the Gujarat High Court interpreting clause (e) of Section 13(1) of the Act. In Harshachandra Narsibhai Patel and Others v. Ibrahim Haji Khubanhai, (1984) GLH 965 it was one of the terms of the tenancy that tenant would not sublet, assign or transfer his suit premises to anybody else. After some time the tenant wound up his business and sublet the premises. On the allegation of subletting suit was filed for recovery of possession of the suit premises. It was not in dispute that the tenant was no longer in possession and the suit premises was in possession of a third person. Both the trial court and the appellate court decreed the suit of the landlord. The matter came in revision before the High Court. It was urged that even assuming that possession of the suit premises was transferred by the tenant it cannot be said that the premises was sublet by him as the landlord had failed to prove that the transfer was for some consideration. It was pointed out that neither in the pleading nor in the evidence it was stated by the landlord that suit premises was transferred by the tenant to a third person for some consideration and therefore no case of subletting had been made out. The Court rejected the plea of the petitioners and said :

"Moreover, it must be remembered that Section 13(1)(e) of the Rent Act is much wider and it is not confined merely to the acts of unlawful sub-letting. It also provides that if a tenant has assigned or transferred in any other manner his interest in the premises taken on lease by him, then also the landlord will become entitled to a decree for possession of the said premises. The words "transfer in any other manner" are much wider and would include within their meaning and ambit a transfer made in favour of a relative or a known person, once it is proved that he has left the premises and the transferee is put in exclusive possession. To give these words a restricted meaning and equated such a transfer with sub-letting is to make that part of the sub-section redundant. The facts of this case clearly show that defendant No. 1 had transferred his interest in the suit premises to defendant No. 2. If it is found that the premises were transferred for valuable consideration then it will certainly amount to sub-letting. Even if it is not possible to come to that conclusion, then also it amounts to a transfer in any other manner."

To support what the learned single judge said we may refer to a decision of this Court in Kedar Lal Seal and Another v. Hari Lal Seal, AIR (1952) SC

47. In this case plaintiff though he did not use the word "subrogation" he had asked in substance for the relief to which a subrogee would be entitled under the Transfer of Property Act. This Court cautioned that a case cannot be thrown out on mere technicalities and observed as under

"I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the claim may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in Costs."

In the present case before us there is no such ambiguity in the pleadings and the landlord filed a suit for eviction on the ground that Bakerali had unauthorisedly and unlawfully sublet the premises or assigned or transferred in any manner his interest therein.

In *Dudabhai Karsandas Patel and Others, v. Sulochanaben Gopaldas Kothari*, (1994) 1 GLR 541 a business was being run in the tenanted premises in partnership wherein the tenant was one of the partners. Upon dissolution of the firm the tenant walked out not only from the business of the firm but also of the premises and left business and premises to the remaining partners. Landlord sought eviction of the tenant and claimed possession of the suit premises under clause (e) of Section 13(1) of the Act. It was found that the tenant neither had any interest in the business that was being carried on in the suit premises by the remaining partners nor he had any interest in the tenancy rights and the exclusive possession since the date of dissolution of the firm was with the remaining partners. The court returned the finding that tenant had parted with not only physical possession of the suit premises but also the legal possession thereof in favour of third persons.

Clause (e) of Section 13(1) of the Act is couched in widest terms. There is absolute prohibition on the tenant from subletting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In partnership where tenant is a partner, he retains legal possession of the premises as partnership is a compendium of names of all the partners. In partnership the tenant does not divest himself of his right in the premises. On the question of subletting etc. law is now very explicit. There is prohibition in absolute terms on the tenant from subletting, assignment or disposition of his interest in the tenanted premises.

To restate in the present case facts do not show that Bakerali could exercise his power throughout the suit premises at his pleasure to the exclusion of his two sons who were running their business in partnership there and it cannot be said that he continued to exercise control over the suit premises. Bakerali had no concern with the partnership business now being carried on under the partnership deeds dated November 14, 1974 and March 6, 1979 in the suit premises. In the absence of records of the partnership business which the respondents failed to produce, it has to be presumed that rent was paid by one of the sons of Bakerali in the new partnership from the partnership account. It is now the sons of Bakerali who are in complete control of the suit premises and were exercising exclusive possession for the same to the exclusion of Bakerali. That Bakerali would occasionally visit

the shop premises does not advance the case of the respondents that he could exercise his rights over the shop premises. He had handed over the shop premises to his sons who were exercising their independent right over the same and conducting their business thereat. Bakerali completely divested himself of the suit premises as well as the business. Clause (7) of the first partnership deed dated November 15, 1955 negated any contention that Bakerali had taken the suit premises on lease for the benefit of the family. Bakerali never paid rent of the shop premises which, as noted above, was paid from the partnership of his two sons. Bakerali was not exercising any physical control over shop premises. Record does not show that he had either the power or the intention at any given time to exercise his right of possession over the shop premises. It cannot even be said that he was exercising control over the shop premises through his sons who were carrying on their independent business in the shop premises and paying rent therefor. Bakerali was neither in physical nor in actual or constructive possession of the shop premises. Physical control over the shop premises was now exercised by his two sons to the exclusion of Bakerali. It is not that Bakerali could just walk in and assert his right of possession to the shop premises. His sons:

were not in occupation of the shop premises and running their business as agents of Bakerali. We do not think that High Court in the present case approached the question raised in the revision before it properly. It relied on the judgment of his Court in Jagan Nath's case [1988] 3 SCC 57, which was under the provision of Delhi Rent Control Act and was confined to the facts of that case which were not applicable in the present case.

We, therefore, set aside the impugned judgment of the High Court and restore that of the Judge, Small Causes Court and Joint District Judge, Baroda. We grant six months' time to the respondents to vacate and hand over the possession of the suit premises to the appellant subject to his filing the usual undertaking in this Court in four weeks. The appeal is allowed with costs,