

Joginder Singh Sodhi vs Amar Kaur on 8 October, 2004

Equivalent citations: AIRONLINE 2004 SC 928

Bench: Arijit Pasayat, C.K. Thakker

CASE NO. :

Appeal (civil) 5199 of 2003

PETITIONER:

JOGINDER SINGH SODHI

RESPONDENT:

AMAR KAUR

DATE OF JUDGMENT: 08/10/2004

BENCH:

ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:

JUDGMENT 2004 Supp(5) SCR 303 The Judgment of the Court was delivered by THAKKER, J. The present appeal is filed by the appellant against an order of eviction passed the Rent Controller. Ludhiana in R.A. No. 24 of 1985, confirmed by the Appellate Authority in MCA (r) No.42/RBT-37 of 1987-1990, as also confirmed by the High Court of Punjab and Haryana in Civil Revision No.2115 of 1990.

The appellant Joginder Singh Sodhi was original respondent No.2. Smt. Amar Kaur, respondent herein, filed R.A. No.24 of 1985 against Sodhi Mukand Singh (since deceased) and Joginder Singh (Respondent No.2-appellant herein) for recovery of possession of suit premises being shop No.7 out of property No. B.XX.609, Premjit Market, Ferozepur Road, Ludhiana. The property was let out to deceased Mukand Singh on a monthly rent of Rs.50 by lease-deed executed by late Mukand Singh on December 9, 1966. Whereas the case of the petitioner-landlady was that the property was let out to deceased Mukand Singh, the say of Mukand Singh was that he took the property on lease for his son Joginder Singh-respondent No.2.

The landlady filed an Eviction Petition under Section 13 of the East Punjab Urban Rent Control Act, (hereinafter referred to as "the Act") seeking eviction of both the respondents on two grounds; namely, (i) non-payment of rent, and (ii) sub-letting. The respondents filed a common reply denying the allegations. According to them, they were not in arrears of rent, nor the premises were sub-let by respondent No.1 to respondent No.2. They asserted that the premises were taken by the father for being used by the son since the very beginning.

Before the Rent Controller, Ludhiana, the ground of non-payment of rent was not pressed by the landlady. The issue for determination, therefore, which remained before the Rent Controller was as

to whether the respondent No.1 had sub-let the premises to respondent No.2. Considering the rent note executed by respondent No.1, the Rent Controller recorded a finding that the property was let out to respondent No.1 and without the written consent of the landlady, it was sub-let by respondent No.1 to respondent No.2. He also recorded a finding that respondent No. 1 and respondent No.2 were staying separately and respondent No.2 was found to be in exclusive possession of the shop and was doing business as photographer. He further observed that from the rent note, it was clear that the property was to be used by respondent No.1 only. Had the intention of the father was to get the property for his son, he would have expressly mentioned the name of his son as tenant but since the premises were let out to the father and he parted with possession thereof and respondent No.2 was found to be in exclusive possession, the case of the sub-letting by respondent No. 1 in favour of respondent No.2 was established. The landlady was, therefore, entitled to get possession of the property. Accordingly, an order of eviction was passed against the respondents.

Being aggrieved by the order passed by the Rent Controller, the respondents filed an appeal before the Appellate Authority. The Appellate Authority again considered the submissions of the appellants and in the light of the evidence, agreed with the findings recorded by the Rent Controller, confirmed the order of eviction and dismissed the appeal. It was observed that the execution of rent note was duly proved wherein it was stated that respondent No. 1 who was a retired Inspector of Excise Department had taken the property on lease for running "his own business" with an undertaking that he would neither part with possession nor permit anyone else to occupy the shop. It was also observed that father and son were staying separately and it was not disputed before the Appellate Authority that the shop was found to be in "exclusive possession" of respondent No.2 who was running his business of photography. It, therefore, could not be said that the order passed by the Rent Controller was illegal or otherwise improper. Accordingly, the order of eviction was confirmed by the Appellate Authority.

Against the order passed by the Appellate Authority, Revision Petition was filed by the respondents in the High Court of Punjab and Haryana. During the pendency of the Revision Petition, original respondent No. 1 died. Original respondent No.2 proceeded with the matter without joining the heirs and legal representatives of deceased respondent No. 1 inter alia stating that being the son of the deceased, he was representing the estate of the deceased. Moreover, as one of the legal representatives of the deceased, he was already on record. He, therefore, prayed that the name of deceased Mukand Singh be deleted from the array of parties. The prayer was granted.

The High Court while dismissing the revision petition, observed that the Forum below had taken a correct view in ordering eviction of the tenant from the premises on the ground of sub-letting. It further observed that since Mukand Singh died and his name was ordered to be deleted from the array of parties without reservation of any right of any of the legal heirs, the order of eviction passed against him remained unchallenged and legal heirs were bound by such order. Revision petition was hence, dismissed.

On May 6, 2003, notice was issued by this Court and stay against eviction was granted. On July 21, 2003, leave was granted. We have heard the learned counsel for the parties. Learned counsel for the appellant strenuously contended that an error of law and of jurisdiction has been committed by the

Forum below as also by the High Court in holding that the appellant herein-respondent No.2 before the authorities- was sub-tenant. It was submitted that the appellant was son of deceased Mukand Singh, who had executed a rent note. Deceased Mukand Singh had taken the premises on lease for the appellant and there was no sub-letting. It was also submitted that the authorities erred in holding that it was established by the landlady that the appellant was a sub-tenant. It was also argued that the High Court has erred in observing that as heirs of deceased Mukand Singh were not brought on record, the order passed against him had become final. The appellant was already on record and thus the estate was represented. It was, therefore, submitted that the orders passed by the authorities below and confirmed by the High Court deserve to be quashed and set aside by allowing the appeal.

The learned counsel for the respondent - landlady, on the other hand, supported the order passed by the authorities under the Act. He submitted that on the basis of the rent note executed by the tenant and undertaking given by him, it was held that the shop was let out to deceased Mukand Singh for conducting his business. Mukand Singh had also given an undertaking that he would not part with the possession of the property. The Rent Controller recorded a specific finding that respondent No.2-appellant herein was found to be in exclusive possession of the shop and hence sub-letting was clearly established. If, on that ground, an order of eviction was passed, it could not be said that the order was illegal or contrary to law. It was also submitted by the learned counsel that during the pendency of revision petition, Mukand Singh-original tenant died and his heirs and legal representatives were not brought on record. The effect was that an order of eviction passed against him became final and the High Court was wholly justified in dismissing revision petition on that ground also. It was, therefore submitted that the appeal deserves to be dismissed.

Two questions were raised by the learned counsel for the appellant, firstly, whether an order of eviction passed by the Rent Controller, confirmed by the Appellate Authority and also by the High Court is in accordance with law. Secondly, the effect of death of Mukand Singh-original tenant against whom proceedings were initiated and failure to bring his heirs and legal representatives on record in Revision Petition before the High Court.

Regarding sub-letting, in our opinion, the law is well settled. It is observed in the leading case of *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh*, [1968] 2 SCR 548: AIR (1968) SC 933 that in a suit by the landlord for eviction of tenant on the ground of sub-letting, the landlord has to prove by leading evidence that (i) a third party was found to be in exclusive possession of the rented property and (ii) parting of possession thereof was for monetary consideration.

The above principle was reiterated by this Court from time to time. In *Shama Prashant Raje v. Ganpatrao and Ors.*, [2000] 7 SCC 522, the Court stated that on sub-letting, there is no dispute with the proposition that the two ingredients, namely, parting with possession and monetary consideration therefor have to be established.

In the instant case, a finding of fact has been recorded by the Rent Controller, confirmed by the Appellate Authority as also by the High Court that the property was let out to deceased Mukand Singh and he was the tenant. A rent note executed by the tenant also proves that fact. It was stated

in the rent note that the property was rented to him for his business. The tenant had also given an undertaking that he would neither part with possession of the property nor would permit anyone else to occupy it. A further finding was also recorded that respondent No.2- appellant herein, was found in exclusive possession of the property. The authorities have also held that father and son were staying separately. In the light of these facts, therefore, it can be concluded that it was proved that the tenant had parted with possession in favour of his son who was found to be in exclusive possession though he was staying separately.

The contention of the learned counsel for the appellant, however, is that even if it is assumed that one of the ingredients of sub-letting was established, the second ingredient, namely, parting of possession with 'monetary consideration' was not established. The counsel urged that there is no evidence on record that any amount was paid either in cash or in kind by respondent No.2 to respondent No. 1. In absence of such evidence sub-tenancy cannot be said to be established and the landlady was not entitled to get an order of eviction against the tenant.

We are unable to appreciate the contention. As observed by this Court in *Bharat Sales Ltd. v. Life Insurance Corporation of India*. [1998] 3 SCC 1, sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession of that person, instead of the tenant, which ultimately reveals to the landlord that tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the subtenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

In *Smt. Rajbir Kaur and Anr. v. M/s S. Chokesiri and Co.*, [1989] 1 SCC 19, this Court, speaking through Venkatachaliah, J (as His Lordship then was) stated:

"If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw

an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of sub-letting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of sub-letting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party being the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstance of the case, we think, that, appellants having been forced by the courts below to have established exclusive possession of the ice-cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the courts below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found."

Again in *Kala and Anr. v. Madho Parshad Vaidya*, [1998] 6 SCC 573, this Court reiterated the same principle. It was observed that the burden of proof of sub-letting is on the landlord but once he establishes parting of possession by the tenant to third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge that onus, it is permissible for the court to raise an inference that such possession was for monetary consideration.

We are in agreement with the observations in the above cases. In our considered opinion, proof of monetary consideration by the sub-tenant to the tenant is not a *sine qua non* to establish sub-letting.

In the case on hand, a finding is recorded by the authorities under the Act that respondent No.2-appellant herein was found to be in exclusive possession of the property. He was staying separately and not with his father. He was doing his independent business of photography. The explanation by the tenant-respondent No.1 as to how the respondent No.2- appellant herein came to occupy the shop was that the lease was obtained by respondent No.1, (father) for respondent No.2 (son), which was not believed by the authorities. In view thereof, by drawing an inference that the respondent No.1 had sub-let the suit property to respondent No.2, no illegality had been committed by the authorities.

It was then contended by the learned counsel for the appellant that respondent No.2 was the son of respondent No.1 and since he was not a stranger, no presumption could be raised that he was a sub-tenant. We are unable to uphold even that contention. In our judgment, for deciding the question whether the tenant had created sub-tenancy, the relationship between the tenant and sub-tenant is not material. There is no privity of contract between the landlady and respondent

No.2. He was, therefore, a 'stranger' to the landlady. She let the property to respondent No.1 who was the tenant. Respondent No.1 was bound to occupy the property as per the rent note executed by him wherein even undertaking was given by him that he would not part with possession or allow any other person to occupy the property. In spite of the rent note and undertaking, if without the written consent of the landlady, respondent No.1 had inducted respondent No.2 as his tenant or had parted with possession in favour of respondent No.2, who was staying separately and yet found to be in exclusive possession of the shop, sub-tenancy was established.

Reference in this connection may be made to a decision of this Court in Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, [1988] 1 SCC 383. In that case, a finding was recorded by the trial court that the tenant had sub-let the premises to his brother without the consent of the landlord and accordingly an order of eviction was passed. The High Court, however, took a different view observing that the so-called sub-tenant was brother of the tenant and hence it was a case of licensee and not of sub-tenant. When the matter came to this Court, setting aside the order passed by the High Court, this Court observed that there was "absolutely no warrant" for the reasoning which weighed with the High Court. The tenant was not occupying the property and had already shifted his residence to other place. It was, therefore, a clear case of sub-letting. This Court, in the circumstances, allowed the appeal of the landlord and passed an order of eviction.

It was also submitted that there was waiver on the part of the landlady inasmuch as though she was aware that Mukand Singh was not in possession and his son was doing business, not only that she allowed to occupy the premises by the son but even continued to receive rent from Mukand Singh as well as the appellant herein (Joginder Singh). She has, thus waived her right to get possession on the ground of sub-letting.

We are not impressed by the argument. Firstly, waiver is a question of fact which must be expressly pleaded and clearly proved. No such plea had been raised either by the tenant or by the "sub-tenant" before the Rent Controller, before the Appellate Authority or even in the High Court. Such question cannot be allowed to be raised for the first time in this Court. That apart, the language of Section 3(2)(ii)(a) of the Act is clear and unambiguous. It mandates that no tenant can sub-let the tenanted property or part thereof without the written consent of the landlord. In the present proceedings, it is not even the case of the tenant (deceased Mukand Singh) that he had obtained 'written consent' of the landlady to sub-let the shop to his son Joginder Singh. On the contrary, his assertion that the property was taken by him for his son was not believed. Hence, order of eviction cannot be held illegal as the doctrine of waiver cannot be applied. A bald plea of waiver cannot defeat statutory provision made in larger public interest [Vide M/s Shalimar Tar Products Ltd. v. H.C. Sharma and Ors., [1998] 1 SCC 70; Pulin Behari Lal v. Mahadeb Dutta and Ors., [1993] 1 SCC 629].

In our opinion, therefore, the order of eviction passed by the Rent Controller and confirmed by the Appellate Authority as well as by the High Court on the ground that the tenant had illegally sub-let the property needs no interference.

In our view of the first question decided against the appellant herein, we express no opinion on the second question raised by the learned counsel for the appellant.

For the reasons aforesaid, the appeal deserves to be dismissed and is accordingly dismissed. Interim relief granted earlier stands vacated. In the facts and circumstances of the case, however, there shall be no order as to costs.

In view of the order passed in Civil Appeal No.5199 of 2003, no order is necessary in interim application No.2 in Civil Appeal No,5199 of 2003 and it stands disposed of.