# Panjak Bhargava And Another vs Mohinder Nath And Another on 11 December, 1990

## Equivalent citations: AIR1991SC1233, JT1990(4)SC628, 1990(2)SCALE1251, (1991)1SCC556, [1990]SUPP3SCR508A, AIR 1991 SUPREME COURT 1233, 1991 (1) SCC 556, (1990) 4 JT 628 (SC), 1990 (4) JT 628, (1991) IJR 66 (SC), (1991) 20 DRJ 99, (1991) 2 RENCJ 112, (1991) 1 RENCR 96, (1991) 1 RENTLR 87, (1991) 1 CURLJ(CCR) 200, (1991) 43 DLT 384

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## Bench: M.N. Venkatachaliah, N.D. Ojha, J.S. Verma

ORDER

M.N. Venkatachaliah, J.

1. The appellant-landlords seek special leave to appeal to this Court from the Judgment dated 29.11.1989 of the High Court of Delhi in SAO No. 384 of 1987 allowing Respondent-tenants' appeal and setting-aside the Appellate Order dated 17.10.1987 of the Rent Control Tribunal, Delhi which had confirmed the order of the Rent Controller dated 16.2.1987, granting possession of premises No. 19/20, New Rohtak Road, to the appellants upon the expiration of a limited-tenancy Under Section 21 of the Delhi Rent Control Act, 1958, [Act].

2. The effect of the High Court's judgment was invalidation of the permission for the limited-tenancy and refusal of appellants' prayer for possession. The High Court held that the initial grant of permission by the Rent Controller Under Section 21 for a limited-tenancy for five years from 6.4.1978 was itself marred by a fraudulent suppression of material facts; that the permission, in effect, was merely a ex-post facto sanction of a subsisting tenancy which had earlier come into existence on 5.3.1978 and that, therefore, the appellants were not entitled to the benefit of Section 21. The High Court relied upon a pronouncement of this Court in Subhash Kumar Lata v. R.C. Chhiba to support its view that the nullity of the order Under Section 21 obtained by fraud could be urged in defence against execution.

3. We have heard Sri Rajinder Sachhar, learned Senior Counsel for the appellants and Sri Avadh Bihari Rohtagi, learned Senior Counsel for the respondent-tenants. Special Leave is granted.

The necessary and material facts, briefly stated, are these: Appellants and the respondents by their

joint application to the Rent Controller sought for and obtained permission for a limited-tenancy for five years Under Section 21. Respondents not having surrendered possession upon the expiry of the said period of five years, the appellants commenced proceedings for re-delivery. Respondents resisted the proceedings raising several contentions. They urged that the appellants were not the owners of the premises at all; that the permission Under Section 21 was vitiated by fraud resulting from a suppression by the appellants of the material fact that at the relevant time the premises was not available for letting at all; that respondents had been inducted into possession as tenant from 5.3.1978 itself and therefore, one of the basic jurisdictional requirements for the grant of permission Under Section 21 was absent and that, at all events, a fresh contractual tenancy had been created with effect from 6.4.1983 immediately upon the expiry of the five years term of the limited-tenancy.

4. The Rent Controller by his order dated 16.2.1987 rejected all these contentions and made an order granting possession. The respondents' appeal before the Rent Control Tribunal was unsuccessful. In the second appeal Under Section 39 of the Act by the respondents, the High Court held that even prior to the limited-tenancy, the respondents had been inducted into possession as tenants; that the subsequent permission for the limited-tenancy was a mere pretence and the result of a fraud on the statute and, therefore, a nullity. Relying on Subhash Kumar Lata's case, the High Court held that such a nullity could be pleaded in and against execution as well. The High Court, accordingly, allowed the second appeal and, in reversal of the orders of the authorities below, dismissed appellants' claim for possession. The correctness of this view is assailed in this appeal.

It must, however, be stated that Sri Rohtagi while supporting the judgment of the High Court did not - and rightly in our opinion - lay store by the other defences urged by the respondents as to the alleged fresh-tenancy or as to the disputed ownership of the property. Sri Rohtagi, however, sought to maintain that there having been an earlier subsisting tenancy as found by the High Court, the purported creation of a limited-tenancy thereafter was a nullity such as could collaterally be urged against execution.

5. The contentions of Sri Rajinder Sachhar in support of the appeal could be formulated thus:

> (i) that both the Rent Controller and the Appellate Tribunal having concurrently held that respondents' occupation of the premises from 5.3.1978 to 5.4.1978, even if true, did not constitute a tenancy in that the other requisite indicium of tenancy, namely, the stipulation of a consideration was absent and that the latter finding being a pure question of fact, the High Court, in exercise of its jurisdiction Under Section 39 which permitted an appeal only on a substantial question of law, could not reappreciate evidence and upset the finality of that finding of fact;
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> (ii) that, at all events, even if the limited-tenancy Under Section 21 was obtained despite the subsistence of a tenancy created earlier, the Respondents were bound to assail the validity of the limited-tenancy during its subsistence and not as a collateral plea in the course of execution, as held in J.R. Vohra v. Indian Export House Pvt. Ltd. ; Inder Mohan Lal v. Ramesh Khanna ; Joginder Kumar Butan v. R.P.Oberoi, ; Shiv Chander Kapoor v. Amar Bose and Yamuna Maloo v. Anand Swarup .

6. On the first contention, Sri Sachhar said that the High Court approached the matter as if in general appellate jurisdiction which clearly was not the scope and amplitude of an appeal Under Section 39 of the Act. It was urged that the finding of the Tribunal that even though respondents were shown to be in occupation, however, no inference of a lease was permissible as one of the essential twin requirements, namely, the stipulation of rent had not been established was essentially one of fact and that the High Court was in error in assuming jurisdiction to reverse that finding of fact. Sir Sachhar said that even if the question whether, upon its proper construction, the receipt Exhibit DW-1/3 was susceptible of an inference that the transaction envisaged by it was one of lease could be said to be a question of law, by no standards it could be held to be a substantial question of law within the meaning and for purposes of Section 39 of the Act.

7.The first limb of the argument that no question of law at all arose can not be accepted. The receipt dated 5.3.1978 on which Respondents relied contained a recital that a cheque for Rs. 18,000 mentioned in it was given as rent for the premises for the period of 12 months w.e.f. 5th March, 1978. The Rent Controller and the Tribunal, quite errorneously, proceeded to hold that the mere fact that the cheque had been shown to have been returned had the effect of taking away the consideration for the lease. These authorities mistook the non-payment of rent in point of fact as equivalent to absence of consideration in point of law. This was clearly erroneous. A stipulation for payment of rent was by itself sufficient to bring about a contract of tenancy where, of course, the other element of exclusivity of possession was shown. The High Court held that a consideration promised is as valid as one paid, and that, therefore, the circumstance that the cheque was returned would not detract from the legal consequence of the stipulation to pay rent implicit in Exhibit DW 1/3. The High Court construed the receipt and found that a lease was intended. The construction of a document which is the foundation of the rights of parties raises a question of law. An inference from facts admitted or found is a question of law if such an inference is to be drawn on the application of proper principles of law to the facts. Such determination is a mixed question of fact and law. We cannot accept Sri Sachhar's submission that the High Court treaded on the forbidden ground of facts.But Sri Sachar's other submission is that in any case this was not a 'substantial' question of law'. We might as well examine this.

8. What is a substantial question of law would certainly depend upon facts and circumstances of every case and if a question of law had been settled by the highest court of the country that question however important and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as substantial question of law. In Raghunath Prasad v. Deputy Commissioner of Partabgarh [1927] 54 LA. 126 the Judicial Committee observed that a question of law to be considered a "substantial question of law" need not be one of general importance and it could be a substantial question "as between the parties". This Court had occasion to consider the views expressed on the point by the High Courts of Bombay, Nagpur and Madras in Kaikhushroo Pirojsha Ghaira v. C.P. Syndicate Ltd. [1948] I. Bom. L.R. 744; Dinkarrao v. Rattansey, I.L.R. (1949) Nag. 224 and Rimmalapudi Subba Rao v. Noony Veeraju I.L.R. 1952 Mad. 264 respectively placing differing emphasis on what was a "substantial" question of law between the parties. It was held by this Court that while the view taken by the Bombay High Court was too narrow, the one taken by the Nagpur High Court was too broadly stated. Approving the view taken by the Madras High Court it was observed:

> ...The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court, or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.
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> (emphasis supplied) (See: Sir Chunilal V. Mehta and Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd. [1962] Supp. 3 SCR 549 at 557 and 558.

9. Thus tested, could the question involved in the second appeal before the High Court be said to be a substantial question of law? The proposition emanated from the following discussion of the High Court:

> A lease, as defined by Section 105 of the Transfer of Property Act, is a transfer of a right to enjoy property in consideration of a price paid or promised. If it can be shown in a given case that the transfer of the right to enjoy the property was made a consideration for a price promised and not actually paid, even then it will amount to a lease. It is manifest from the receipt of OW-1/3 that the cheque for Rs. 18,000 mentioned in it represented the 'rent' for the premises for the period of 12 months with effect from 5th of March, 1978. The question whether the rent was actually 'paid' is a no consequence for the determination of the question whether a tenancy was created with effect from the date mentioned in the receipt. Likewise, the fact that the cheque for Rs. 18,000 was never encashed and was returned is immaterial for this purpose ...
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> It is trite proposition that mere reciprocal promises are sufficient in law to sustain the formation of a contract. Pointing out the distinction between contracts of "executed" consideration and of "executory" consideration this Court, referring to and excerpting from Chitty on Contracts, said:
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> It is necessary to appreciate clearly the distinction between the two classes of contracts where the consideration is either executed or executory. "An executed consideration consists of an act for a promise. It is the act which forms the consideration...
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> In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration."
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> In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the other.

> If the contract has been fully and completely performed on both sides, no question of any further rights and liabilities under the contract is likely to arise. If, however, the contract is one in which the consideration is executed on one side, there will be a right no one side and an outstanding liability on the other. If the consideration is executory on both sides, there will be outstanding rights and liabilities on both sides.
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> (emphasis supplied) [See: Union of India v. Chaman Lal & Co. ] The proposition hat reciprocal promises are sufficient to bring about the formation of a contract is well settled, and indeed elementary. But, the High Court does not appear to have been invited to examine the question whether this proposition in its application to the case assumed a substantial character as between the parties. The appeal did involve a question of law. That question directly and substantially affected the rights of the parties. It is possible to assume that the High Court considered the question as a substantial one between the parties. We do not think that it would be appropriate to fault the judgment on this ground, though the point might well have been an eminently arguable one if it had been raised before the High Court. In any event in the view we take of the second contention this point loses its materiality.

10. But Shri Sachhar's submission on the second contention is not without force. It is urged by him that even if there was an earlier tenancy and permission Under Section 21 was sought and obtained suppressing that fact or where permission is procured by fraud the remedy of the tenants is to bring-up a challenge to the limited tenancy as soon as the tenants discover these facts - and Sri Sachhar says that in this case they knew it even at the time permission was sought - and not to wait till the landlord makes his application for recovery of possession. Sri Sachhar submitted that the essential conditions for the exercise of jurisdiction Under Section 21 as indicated in S.B. Naronah v. Prem Kumari Khanna are first, that the landlord did not require the demised premises "for a particular period" only and secondly, that the letting must be made for residential purposes. Sri Sachhar submitted while Subhash Kumar Lata's case to the extent it holds that Section 21 was not intended to grant "post-facto" sanction of a subsisting tenancy and a permission obtained by suppressing material-facts which enables the landlord to straight-away recover possession would be invalid accords with the earlier Rulings, however, to the extent it expands the remedies and enables a defence based on such infirmity even after the period of the limited tenancy has expired and in resistence to the execution would clearly be irreconcilable with the view taken in J.R. Vohra v. Indian Export House Pvt. Ltd. ; Joginder Kumar Butan v. R.P. Oberoi ; Shiv Chander Kapoor v. Amar Base and Yamuna Maloo v. Anand Swarup some of which are pronouncements of larger benches than the one that decided Subhash Kumar Lata's case. Shri Sachar submitted that the learned Judge who spoke for the bench in Subhash Kumar Lata's case had himself in Joginder Kumar Butan v. R.P. Oberoi reiterated the rule in Vohra's case and said:

> ...It was observed by this Court in J.R. Vohra v. India Export House, that the remedy available to a tenant in a case where there was only a ritualistic observance of the procedure while granting permission for the creation of a limited tenancy or where such permission was procured by fraud practised by the landlord or was a result of collusion between the strong and the weak, would be for the tenant approaching the

> Rent Controller during the currency of the limited tenancy itself for adjudication of his pleas as soon as he discovers facts and circumstances that tend to vitiate ab initio the initial grant of permission and not to wait till the landlord makes his application for recovery of the premises, after the expiry of the period fixed Under Section 21.
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> [See p. 29] (emphasis supplied) Sri Sachhar submitted that where permission for a limited-tenancy Under Section 21 was obtained either by suppressing the fact that the landlord did not at all require the premises for his own use or that the letting was not for residential purposes or any other material circumstance which if the Rent Controller had knowledge of would have persuaded him to decline to exercise jurisdiction, the infirmities were all of the same nature and in all such cases, it cannot be predicated that there was a lack of inherent jurisdiction so as to entitle the tenant to treat and ignore the permission as non-est.

11. Shri Rohtagi, however, urged that Section 21 to the extent it runs counter and forms an exception to the general scheme of the statute, its operation was required to be restricted severely to the express conditions and limitations contained in that section and that wherever permission for a limited-tenancy was sought and obtained suppressing any jurisdictional fact such as that the prospective limited tenant was already in occupation as a regular tenant, the transaction amounted to a fraud on the statute, rendering the permission void ab-initio. Shri Rohtagi submitted that Subhash Kumar Lata's case recognised this species of nullity and illustrated the availability of a collateral attack as a remedy. The case, says counsel, stood on a different footing; where there was fraud on the statute the consequent nullity could be set-up wherever and whenever the order was sought to be given effect to.

12. We have considered these rival contentions. What Sri Rohtagi in substance says is that the jurisdiction of the Rent Controller to grant permission is conditional and that if the conditions upon which alone permission can be granted are not fulfilled, permission cannot be granted in invitum and that consequently the landlord cannot recover possession. Learned counsel says that parties cannot give the Rent Controller a jurisdiction which the legislature indicates he shall not have. Sri Rohtagi relied upon S.B. Naronah v. Prem Kumari Khanna .

13. It is true that in Nahronah's case a challenge to the validity of the limited-tenancy was permitted even after the period of limited lease. But later cases have substantially denuded this position. In Vohra's case, this Court laid down that a tenant who assails the permission Under Section 21 on the ground that it was procured by fraud - a ground not dissimilar to the one urged in the present case - must approach the Rent Controller during the currency of the limited-tenancy for an adjudication of his pleas as soon as he discovers facts and circumstances which, according to him, vitiate the permission. It was held that whether it was a "mindless order" or one procured by fraud practised by the landlord or was the result of a collusion between landlord and tenant there was no justification for the tenant to wait till the landlord made his application for recovery of possession but there was every reason why the tenant should have made an immediate approach to the Rent Controller to have his pleas adjudicated as soon as facts and circumstances giving rise to such pleas came to his knowledge.

The reason why this requirement was built-in working the rights and obligations Under Section 21 was the need to re-concile and harmonise certain competing claims that arise in administering the scheme of Section 21. This Court, referring to those competing claims observed:

> What then is the remedy available to the tenant in a case where there was in fact a mere ritualistic observance of the procedure while granting permission for the creation of a limited tenancy or where such permission was procured by fraud practised by the landlord or was a result of collusion between the strong and the weak? Must the tenant in such cases be unceremoniously evicted without his plea being inquired into? The answer is obviously in the negative. At the same time must he be permitted to protract the delivery of possession of the leased premises to the landlord on a false plea of fraud or collusion or that there was a mechanical grant of permission and thus defeat the very object of the special procedure provided for the benefit of the landlord in Section 21? The answer must again be in the negative...
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> [see. p. 911] The manner in which the Court harmonised and reconciled these competing and conflicting claims and interests was by insisting upon the tenant to approach the Rent Controller for adjudication of his pleas as soon as he discovered that the initial grant of permission stood vitiated. This was evolved as a part of policy of law for the reconciliation of divergent and competing claims. It was held:
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> ...In our view these two competing claims must be harmonised...by insisting upon his approaching the Rent Controller during the currency of the limited tenancy for adjudication of his pleas no sooner he discovers facts and circumstances that tend to vitiate ab initio the initial grant of permission. Either it is a mechanical grant of permission or it is procured by fraud practised by the landlord or it is the result of collusion between two unequals but in each case there is no reason for the tenant to wait till the landlord makes his application for recovery of possession after the expiry of the fixed period Under Section 21 but there is every reason why the tenant should make an immediate approach to the Rent Controller to have his pleas adjudicated by him as soon as facts and circumstances giving rise to such pleas come to his knowledge or are discovered by him with due diligence...
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> [see p. 911 &912] This has been reiterated in the cases of Shiv Chander Kapoor and Yamuna Maloo.

14. It is difficult to reconcile the observations in Subhash Kumar Lata's case with the pronouncements in other earlier and later cases. In view of the pronouncements of this Court as to the limitations on the permissible challenge to the exercise of jurisdiction Under Section 21, any appeal to the remedy based on concept of nullity and collateral attack is inappropriate. Suffice it to say that in a collateral challenge the exercise is not the invalidation of a decision, but only to ascertain whether the decision "exists" in law at all and to rely upon incidents and effect of its "non-existence". The authority of decided cases is to the effect that the permission granted must be presumed to be valid till set aside. Doctrine of collateral challenge will not apply to a decision which

is valid ex-hypothesi and which has some presumptive existence, validity and effect in law. Such a decision can be invalidated by the right person in right proceedings brought at the right time. It is only a nullity stemming from lack of inherent jurisdiction or a proceeding that wears the brand of invalidity of its forehead that might afford a defence even against enforcement. Shri Sachhar is right in his contention that such a collateral challenge may not be available where there is no lack of inherent jurisdiction but what is disputed is only the existence or non-existence of facts which though collateral to the merits do require investigation into and adjudication upon their existence or non-existence on the basis of evidence. If the parties before the Rent Controller have admitted that the fact or the event which gives the Controller jurisdiction is in existence and there was no reason for the Controller to doubt the bona fides of that admission as to a fact or event, the Controller is under no obligation to make further enquiries on his own as to that factual state. The test of jurisdiction over the subject matter is whether the court or Tribunal can decide the case at all and not whether the court has authority to issue a particular kind of order in the course of deciding the case.

A learned author says:

> A court is said to have jurisdiction of the subject matter of a particular controversy if the court has authority to hear and decide causes of a class to which the particular controversy belongs. In defining jurisdiction of the subject matter in these terms, the courts have emphasised that the jurisdiction of a court depends upon its right to decide the case and not upon the merits of its decision.
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> (See: Hugh B. Cox, "The Void Order and the Duty to Obey", 16 U. Chi, L. Rev. 86(1948).

15. The expressions 'void', 'voidable', 'nullity', as observed by the Lord Chancellor in London & Clyde side Estates Ltd. v. Aberdeen D.C. [1980] 1 WLR 182, may be misleading in so far as they are "supposed to present a court with the necessity of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments, compartments which in some cases (e.g. 'void' and 'voidable') are borrowed from the language of contract or status, and are not easily fitted to the requirements of administrative law." Some observations of the Lord Chancellor are again worth re-calling:

> ... In this appeal we are in the field of the rapidly developing jurisprudence of administrative law, and we are considering the effect of non-compliance by a statutory authority with the statutory requirements affecting the discharge of one of its functions...
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> When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is

> not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own.... But in a very great number of cases it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights...
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> (emphasis supplied) The contention of Shri Rohtagi as to this particular remedy being available to a tenant in such circumstances is, in the ultimate analysis, not as sound as it might at first sight appear. The expression 'fraud on the statute' is merely a figurative description of a colourable transaction to evade the provisions of a statute and does not, for purposes of choice of the remedy, distinguish itself from the consequences of fraud as vitiating the permission Under Section 21 referred to in Vohra's case.

16. Indeed, in Dhanvanti v. D.D. Gupta it was held that permission Under Section 21 for letting out the premises to the same tenant for limited periods more than once successively would not by itself and without more vitiate the subsequent grants. In one sense, the successive grants of permission would share the characteristics of post-facto grant.

17. In the circumstances and for the foregoing reasons, this appeal is allowed, the judgment of the High Court dated 29.11.1989 in SAO No. 384 of 1987 set aside and the order of the Rent Control Tribunal dated 17.10.1987 affirming the order of the Rent Controller dated 16.2.1987 restored Parties are left to bear and pay their own costs in this appeal.