P. John Chandy And Company (P) Ltd vs John P. Thomas on 29 April, 2002

Equivalent citations: AIR 2002 SUPREME COURT 2057, 2002 (5) SCC 90, 2002 AIR SCW 2113, 2002 (4) SCALE 247, 2002 (2) LRI 514, 2002 SCFBRC 370, 2002 (6) SRJ 48, 2002 (3) SLT 542, (2002) 4 JT 444 (SC), 2002 (1) ALL CJ 708, (2002) ILR(KER) 2 SC 555, 2002 (4) JT 444, 2002 ALL CJ 2 1336, 2002 ALL CJ 1 708, (2002) 1 RENCR 569, (2002) 2 KER LT 220, (2002) 2 RENCJ 70, (2002) 1 RENTLR 688, (2002) 3 SCJ 557, (2002) 4 SUPREME 393, (2002) 4 SCALE 247, (2002) WLC(SC)CVL 460, (2002) 47 ALL LR 694, (2002) 3 CURCC 44

Author: Brijesh Kumar

Bench: Brijesh Kumar

CASE NO.:
Appeal (civil) 3158 of 2002

PETITIONER:
P. JOHN CHANDY AND COMPANY (P) LTD.

Vs.

RESPONDENT:
JOHN P. THOMAS

DATE OF JUDGMENT: 29/04/2002

BENCH:
D.P. Mohhapatra & Brijesh Kumar

JUDGMENT:

BRIJESH KUMAR, J.

Leave granted.

The appellant in this appeal has impugned the judgment and order dated 26.6.2001 passed by the Kerala high Court, allowing the civil revision preferred by the respondent-landlord, setting aside the appellate order and holding that the Rent Controller was justified in passing an order of eviction of

the tenant-appellant under Section 11 (4) (i) of the Kerala Buildings (Lease And Rent Control) Act 1965.

The facts which do not admit of dispute are that the accommodation in question originally belonged to the grand father of the present respondent, who died in the year 1953. It came down to the father of the respondent who also died some time 1976. The property ultimately came to the respondent. In the year 1949 Shri P. George, grand father of the respondent rented out the premises to the appellant-company which was sub-let to different sub- tenants from time to time. The respondent gave notice to the appellant on 17.11.1981 to terminate the sub-lease arrangements but the tenant failed to comply with the notice. Ultimately John P. Thomas-respondent filed RCP No.16 of 1982 in the Court of Rent Controller. Kottayam. The eviction was sought on the ground that the appellant-tenant had transferred his rights creating sub-leases in favour of several persons without the consent of the landlord. One of the sub-tenants had even been running a printing press in the premises whereas according to the case of the landlord the premises were let out to the appellant for its use as an office and godown. The petition was contested but the fact of sub-letting was not denied. On the other hand, it was pleaded that one sub- lease was created initially in 1949 itself when the premises were taken by the appellant on rent which fact was within the knowledge of the grand father and the father of the respondent as well as that of the present respondent. Admittedly, a few more sub-leases were created in 1970s. Nobody ever objected to the same. It could thus well be presumed that the landlord had consented to the sub-letting which was within their knowledge. There does not seem to be any document of lease. The appellant also produced one CPW2 in evidence who had been one of the Directors of the appellant Co. from 1946 to 1960. According to him negotiations of rental arrangement took place in his presence and the arrangement of letting included sub- letting as well.

The Rent Controller on consideration of the evidence adduced by the parties as well as other material on the record came to the conclusion that there has not been any positive conferment of right upon the appellant to sub-let or transfer the rights under the lease. While appreciating the evidence the trial court observed that in so far the evidence of CPW2 is concerned, in cross-examination he has stated that there was no document of lease and had no knowledge whether any decision was taken by the Board of Directors of the Company in regard to the tenancy or the terms thereof. He also stated that terms of rental arrangement were not discussed and there was no evidence on record which may have been kept in the records of the company regarding the same nor he remembered what happened in 1949. The trial court considering other parts of his statement as well found that his evidence was unworthy of credence and that of an interested person and observed "therefore I dis-believe CPW2 and render his evidence as unreliable". The petition thus filed by the respondent landlord was allowed holding that there was no consent of the landlord for sub-tenancies created by the appellant.

The tenant filed an appeal before the Rent Control Appellate Authority, Kottayam. The appeal was allowed by order dated February 21, 1992. The appellate court recorded a finding to the effect "in the absence of any evidence either oral or documentary the terms of tenancy have to be gathered from the long course of conduct of the parties ever since commencement of the tenancy in 1949". The appellate court considering the facts and circumstances that the sub-lease was coming down since

long within the knowledge of the landlord and they having never raised any objection, by their conduct it could be inferred that the landlord had consented to the sub-letting. The appellate court then also referred to the statement of CPW2 who was formerly one of the Directors of the appellant company and was related to the parties and according to whom the rent arrangement was made in his presence which enabled the tenant-appellant to sub-let the premises. The appellate court ultimately held that having regard to the long course of conduct of parties it was satisfied that contract of tenancy allowed sub-letting by the tenant. It further observed "even assuming that there was specific stipulation in the contract of tenancy prohibiting sub-letting, the landlord by acceptance of rent must be deemed to have waived his right to claim eviction on the ground of sub-letting"

Aggrieved by the order passed by the appellate authority the respondent preferred a revision under Section 20 of the Kerala Buildings (Lease And Rent Control) Act 1965. The revision was allowed as indicated earlier holding that the sub-leases were created in contravention of Section 11 (4)(i) of the Act. The revisional court found that the tenant failed to establish that in terms of lease they were entitled to sub-let the accommodation. Mere inaction or failure on the part of the landlord to initiate any action in the matter would not amount to conferment of right on the tenant under the lease to sub-let nor waiver of the right of the landlord to get the premises vacated could be inferred.

Dealing first with the point of lease arrangement in 1949 with consent to sub-let, it may be noticed that it is principally based on the oral evidence of CPW2. Undisputedly there is no written lease deed nor conditions of lease have been reduced in writing. According to CPW2 he had been the Director of the appellant-company during the period starting from 1946 to 1960. He was making the statement obviously more than 30 years of the lease arrangement with the appellant in 1949. We find that the trial court has considered and appraised the whole statement of CPW2 including his cross-examination on the basis of which the trial court recorded its finding that his statement was unworthy of credence and it could not be clearly made out from his statement that consent for sub-letting was accorded to the tenant. The statement of CPW2 has been annexed along with the counter-affidavit filed by the respondent. The learned appellate authority tried to place reliance on the statement of CPW2 merely referring to a part of his statement in examination-in- chief. For proper appraisal of evidence, a Court must consider the whole statement. Cross-examination constitutes an important part of the statement of a witness and whatever is stated in the examination-in-chief, stands tested by the cross-examination. The trial court in its judgment has referred to specific parts of the statement of SPW2 in cross-examination. Such a finding recorded after appraisal of the whole statement would not be negated by the appellate court without recording cogent reasons for doing so. The finding of the appellate court about the statement of CPW2, basing it on picking some part of the statement, ignoring the rest of it, cannot be treated to be a valid finding. It may rather amount to misreading of the statement or basing a finding ignoring the major and more important part of the statement. Such a finding is vitiated in law and therefore not sustainable at all. In our view the

High Court has rightly ignored it and acted according to the finding recorded by the trial court. The learned counsel for the respondent has referred to a case reported in (1999) 5 SCC. 645Ubaiba versus. Damodaran where it has been held that even though revisional power under Section 20 of the Kerala Buildings (Lease and Rent Control) Act 1965 may be wider than that under Section 115 CPC but it does not entitle the court to re-appreciate the evidence and substitute its own conclusion in place of the appellate authority. The proposition of law as laid down in the above-noted decision cannot be in dispute but in the present case we find that the trial court had recorded its finding after appraisal of whole statement including the cross-examination of the witness whereas the appellate court took a different view ignoring the major part of the statement of the witness, particularly made in the cross- examination which was specifically referred to by the trial court in its order. Such a finding as recorded by the appellate court certainly leans to be a perverse finding. The decision in the case of Ubaiba (supra) would be of no help to the appellant on the facts of the present case.

Yet another fact which attracts the attention of the Court is that CPW2 had made the statement about sub- letting some time in the year 1949. It will have no bearing on the merits of the present case. The Kerala Buildings (Lease and Rent Control) Act 1965 came into force in the year 1965. Sub-tenancies have also been created, after coming into force of the Act, in the years 1971, 1972 and 1974. There is no statement of CPW2 in respect of these sub-tenancies. He could not say anything about the terms of sub-lease arrangement. In this background perhaps more stress has been on the point of implied consent based on inference drawn from the conduct of the parties. According to the appellate court the implied consent of the landlord for sub-letting would be inferable on account of the fact that there has been inaction on the part of the landlord for a very long time and they raised no objection whatsoever in the last 32 years against the sub-tenancy created by the tenant- appellant. Yet another circumstance relied upon against the landlord is that he had been accepting the rent all the time even though having knowledge of the sub-tenancy. Therefore, implied consent on the part of the landlord is legally inferable and the landlord would be taken to have waived his right to take any action in the matter for evicting the tenant.

The finding of the appellate court which has not been accepted by the High Court takes us to consider the point of implied consent due to inaction on the part of the landlord to take any steps for eviction of the tenant. Before considering the relevant provision so as to have proper appreciation of the point, it is observed that drawing inference from the facts established, is not purely a question of fact. It is always considered to be a point of law in so far it relates to inferences to be drawn from the finding of fact. Finding of the fact in the present case is that after the lease was given to the appellant in the year 1949 sub-tenancies had been created apart from in the year 1949 itself, in the years 1965, 1971, 1972 and 1974. So as to have a clear factual position it may be indicated that liability of the tenant to hand-over possession on account of sub-letting, to the landlord, came into existence by virtue of Section11 (4)

> (i) of the Kerala Buildings (Lease and Rent Control) Act 1965. Therefore, for the purposes of the above said provision sub-tenancies created before the enforcement of the Act may not have any relevance. The tenancy is created after 1965 in the years 1971, 1972 and 1974 would clearly be subject-matter of incurring the liability of the tenant to hand over the possession to the landlord.

In this context the observations made by the appellate court that no objection was taken by the landlord for the last 32 years is not correct. The respondent had served a notice on the appellant-tenant in 1981 which is a period of 10 years from 1971 and 7 years from 1974. It is in so far factual position and finding of inaction for 32 years on the part of the landlord is concerned. We may now turn to the question of implied consent in the background of the relevant provision. Section 11 (4) (i) of the Kerala Buildings (Lease and Rent Control) Act 1965 reads as under:

> 11 (4 (i). A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building,
>
> (i) if the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-lets the entire building or any portion thereof if the lease does not confer on him any right to do so;

Provided.."

A perusal of the relevant provision as quoted above clearly indicates that the landlord can claim possession of the building from the tenant in case of sub-letting by the tenant without the consent of the landlord, in case the lease does not confer on the tenant a right to sub-let. The provision provides for "conferment" of right on the tenant to sub-let the accommodation. That is to say, so as to be entitled to sub-let, the tenant must be granted that right to do so, by the landlord. The expression `confer' is pointer to something done overtly and explicitly. The meaning of the word `confer' as indicated in the Law Lexicon by P. Ramanatha Aiyar 2nd Ed.Reprint 2000 at Page 381 means "to give". "Conferring is an act of authority--------men in power confer". It is therefore clear that the conferring indicates some positive action in giving something, may be some right or privilege to another person. It is in this background that the word `consent' as occurring in clause (I) of sub-s.(4) of Section 11 of the Kerala Buildings (Lease and Rent Control) Act 1965 is to be seen. According to the said provision if the lease does not "confer" a right on the tenant to sub-let, he cannot do so without the consent of the landlord. If he does so after coming into force of the Act, he would be liable to be evicted and the possession be given to the landlord. On reading of the whole provision proposition of implied consent, in such cases, would not be readily acceptable. The consent of the landlord should be in a positive way, clear cut and without ambiguity since otherwise right to sub-let is only to be conferred on the tenant by the landlord in the lease itself. It can reasonably be expected that a right which is otherwise to be conferred by having such a condition in the lease itself, consent, in absence thereof, preferably be in writing and in case it is not so, it is to be clear cut without any ambiguity or shadow of doubt. The conduct of the landlord which has been mainly taken into account on the point of implied consent is his inaction for a long time despite the knowledge of the fact of sub- letting by the tenant to other persons. The period of 32 years as

indicated by the appellate authority is incorrect as discussed earlier. Nonetheless it can be said that there has been inaction on the part of the landlord for some years if not 32 years. But inaction in every case does not necessarily lead to an inference of implied consent or acquiescence. In this connection we may refer to Words and Phrases Legally Defined Vol.1 Third Ed. Page 27 where we may first see what has been said about Acquiescence. It is as follows:

> "Mere inactivity on the part of a defendant is not to be construed as acquiescence in delay by the plaintiff. "sleeping dogs, in the form of sleeping plaintiffs, need not be aroused by defendants from their slumbers" (per Roskill LJ in Compagnie Francaise de Television v. Thorn Consumer Electronics Ltd. [[1978] RCP 735 at 739]); Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation [1979] 3 All ER 194 at 198, per Donaldson J."

It may also answer the observation of the appellate court that the landlord by inaction is to be taken to have waived his right to take any action against the tenant.

A distinction has also been drawn between `Acquiescence' and `Consent'. It is in relation to a dispute between a landlord and a tenant and we again refer to Words and Phrases Legally Defined Vol.1 Third Ed. Page 314 "[The Landlord and Tenant Act 1954, S.23(4) is concerned with a situation where an immediate landlord or his predecessor in title has `consented' to a breach of covenant, or the immediate landlord has acquiesced in it.] `I agree..that in the context of Section 23(4) of the Act, whatever consent or acquiescence may mean in different contexts, in that context 'consent' is put in plain antithesis to 'acquiescence', and that, therefore, if something falls within the description 'acquiescence', it is not consent. The difference which is pointed out between the two in this context is that 'consent' involves some affirmative acceptance, not merely a standing by and absence of objection. The affirmative acceptance may be in wiring, which is the clearest obviously; it may be oral; it may conceivably even be by conduct, such as nodding the head in a specific way in response to an express request for consent. But it must be something more than merely standing by and not objecting. `Bell v Alfred Franks & Bartlett Co. Ltd. [1980] 1 All ER 356 at 362. C.A. per Megaw LJ."

The above observations though no doubt made in reference to particular provision, yet they throw some light on the question of implied consent that there has to be something more than mere inaction or lack of initiative on the part of the landlord. In context with the above, we find our view reinforced on the meaning and import of the word `consent' as used in Cl.(i), sub.s.(4) of Section 11 of the Act when read in the background of the word `confer' in the latter part it will only mean that consent has to be with some positive action on the part of the landlord so that the tenant can be said to have had the authority to sub-lease his lease rights. Mere silence may not be enough.

Learned counsel for the respondent has placed reliance upon a decision of this court reported in AIR 1988 S.C. 852 Hiralal Kapur versus Prabhu Choudhury. The tenant in this case seems to have sub-let a part of his tenancy to a Trust which started its activities from the premises of which landlord may also have been aware. The tenant had also started paying the rent by two cheques one in his name and another cheque of the Trust. The rent so tendered was duly accepted by the landlord. In some correspondence which took place between the tenant and the landlord, the Trust was not

accepted as a sub-tenant. It was held by this Court that merely by the fact that the cheque of the Trust was being accepted as a part of the amount of rent and the fact that landlord may have the knowledge of the fact that the Trust was using part of the premises would not lead to any implied inference or consent of sub-lease in favour of the sub-tenant. For this conclusion no doubt the letters of the landlord had also been referred to by which sub-tenancy was not accepted by the landlord yet the fact remains that Court did not come to the conclusion that that before writing of those letters it was to be taken a case of sub-tenancy by conduct. The fact is that knowledge of possession or a part of the accommodation with the Trust and the acceptance of the part of the rent by cheque from the Trust were not considered conclusive of an inference of consent for sub-tenancy. Yet another case relied upon by the learned counsel for the respondent is reported in AIR 1996 S.C. 2361 equivalent to 1996 (11) SCC 728- Ram Saran versus Pyare Lal and another. In this case also the tenant surrendered his tenancy rights in favour of a registered Society without consent of the landlord. The landlord had also started accepting the rent tendered by the tenant in the name of the registered society. It was held that no inference of authorised sub-tenancy could be drawn nor inference of implied consent and it was held that the landlord was not estopped from seeking eviction on the ground of unauthorised sub-letting. The conduct of the landlord in accepting the rent from the society was held to be of no consequence. We have already observed earlier that the inference drawn from findings of fact is a legal question. It would not amount to interfering or substituting the finding of fact by the revisional court. Hence the decision in the case of Ubaiba (supra) relied upon by the learned counsel for the appellant would not be of any assistance to it.

In view of the discussion held above, we find no reason to interfere with the order passed by the High Court setting aside the orders of the appellate authority and upholding the orders of the trial court, refusing to draw any inference of implied consent on the basis of inaction or conduct of the landlord. The consent as envisaged under Section 11 (4) (i) of the Kerala Buildings (Lease and Rent Control) Act 1965 would mean consent with some positive act which may lead to inference of conferring right on the tenant to sub-let the premises and mere inaction would not be sufficient to amount to implied consent on the part of the landlord.

In the result, the appeal is dismissed. However, there would be no order as to costs.

----------J. (D.P. Mohapatra)

----------J. (Brijesh Kumar) April 29, 2002