M/S.Sait Nagjee Purushotham & Co.Ltd vs Vimalabai Prabhulal & Ors on 4 October, 2005

Equivalent citations: AIR 2006 SUPREME COURT 770, 2005 (8) SCC 252, 2006 AIR SCW 45, (2005) 2 WLC(SC)CVL 611, (2005) 8 SCALE 235, (2005) 3 CIVILCOURTC 763, 2006 HRR 1 503, (2006) 1 ICC 77, (2005) 2 RENCR 436, (2005) 2 RENTLR 641, 2005 SCFBRC 567, (2005) 4 KER LT 452, (2005) 2 RENCJ 59, (2005) 6 SUPREME 722, 2006 (2) ALLMR (NOC) 5

Author: A.K. Mathur

Bench: Arun Kumar, A.K. Mathur

CASE NO.:
Appeal (civil) 1113 of 2003

PETITIONER:
M/s.Sait Nagjee Purushotham & Co.Ltd.

RESPONDENT:
Vimalabai Prabhulal & Ors.

DATE OF JUDGMENT: 04/10/2005

BENCH:
ARUN KUMAR & A.K. MATHUR

JUDGMENT:

J U D G M E N T A.K. MATHUR, J.

This appeal is directed against the order passed by the Division Bench of the High Court of Kerala whereby the Division Bench by its order dated 9.11.2001 has affirmed the finding of the appellate court directing eviction of the tenant under Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as the "Act ") and denying eviction to the landlord under Sections 11 (4) (i) and 11(4)(ii) of the Act and dismissed both the revision petitions.

Brief facts which are necessary for disposal of this appeal are that the building in question was owned by a joint Hindu family of which Nagjee Amarsee was the senior most member. He had a younger brother, Purushotham Amarsee. Nagjee Amarsee had a son, Jayananthan Amarsee. Purushotham Amarsee had three sons, one of whom died at the age of 20. He had two surviving sons namely, Naranjee and Makeklal. There was a partnership firm consisting of the members of the joint family. The building in question was let out to the firm. The firm was the tenant and later on it was converted into a private limited company. In a partition, the major portion of the building was

allotted to the group represented by the landlords. Gradually, the interest of the landlords in the company was taken over by the members of the family representing the tenant's group. The property scheduled to the rent control petition was a major portion of the building which was admittedly set apart to the share of the branch of the family represented by the landlords. The landlords filed a suit for eviction on the ground that the respondent Nos.5,6 & 9 (herein) had completed their education and were sitting idle and they wanted to start business of their own in the scheduled building and they needed the scheduled building for their own occupation at Calicut. Therefore, they claimed eviction of the tenant under Section 11(3) of the Act. They also pleaded the ground of sub-letting to a tailor who was impleaded as a party in the rent control proceedings. It was pleaded that sub-letting was unauthorized and without the consent of the landlords. Hence, the landlords were entitled for eviction under Section 11 (4) (i) of the Act. They also alleged material alteration in building and sought a decree under Section 11 (4) (ii) of the Act. The tenant resisted the eviction petition and pleaded that he was perpetual lessee and could not be evicted by the landlords. He also denied the bona fide need of plaintiffs and denied alteration in the premises in question. It was also pleaded that the tenancy has commenced prior to 1940. As such, the tenant could not be evicted on the ground of bona fide need by virtue of Section 11(17) of the Act. The tenant contested that the landlords were not entitled to an order of eviction. The parties led evidence before the Rent Controller. The Rent Control Court held that the landlords were not entitled to an order of eviction either under Section 11(3) of the Act or under Section 11(4)(i) of the Act. The landlords preferred an appeal before the appellate authority. The appellate authority on re-appraisal of the relevant evidence came to the conclusion that the landlords had made out a claim for eviction under Section 11(3) of the Act on the ground of bona fide need for their own occupation but they could not substantiate their claim for eviction under Sections 11(4) (i) & 11(4)

(ii) of the Act. Thus, the appellate authority partly allowed the appeal filed by the landlords and granted a decree of eviction on the ground of bona fide need under Section 11(3) of the Act while the plea of sub-letting and material change in premises under Sections 11(4) (i) & 11(4) (ii) of the Act was declined. Both the landlords and the tenant filed revision petitions i.e. the landlords' revision petition was for decree of eviction on the ground of sub-letting and alteration in premises under Sections 11(4) (i) & 11(4) (ii) of the Act and the tenant filed the revision petition against the eviction on the ground of bona fide need of the landlords under Section 11(3) of the Act. Hence, both the revision petitions were clubbed together and were disposed of by the Division Bench of the High Court by its order dated 9.11.2001. Hence, the present appeal against the aforesaid order passed by the High Court.

Learned counsel for the appellant challenged the finding of the appellate authority as well as the High Court with regard to the bona fide need of the landlords and secondly he also sought protection under Section 11(17) of the Act that the appellant- tenant had been in possession of premises since 1940, therefore, appellant is entitled to protection under Section 11(17) of the Act.

First of all we shall take up the question of bona fide need of the landlords. So far as the partition of the property and the present premises coming to the share of the landlords are concerned, there is no dispute that the portion of the building has come to the share of the landlords and they are the owners as a result of the partition of the family properties. But the question is whether the landlords

who are the owners of the portion of the building have substantiated the allegation with regard to the bona fide need or not. We have gone through the findings of the trial court as well as that of the appellate authority and the High Court and after closely scrutinizing the same, we do not think that the finding recorded by appellate court and the High Court can be interfered by this Court on the ground of being perverse or without any basis. The landlords have led evidence to show that one of their sons who had requisite qualification for starting a computer institute wants to establish the same at Calicut and others for extension of their business.. The trial court as well as the first appellate court and the High Court examined the statements of P.Ws.2 & 3 and after considering their evidence, the appellate court reversed the finding of the trial court and held that the need of the respondent- landlords to start business at Calicut, is bona fide & genuine. It was held that it cannot be said that a person who is already having business at one place cannot expand his business at any other place in the country. It is true that the landlords have their business spreading over Chennai and Hyderabad and if they wanted to expand their business at Calicut it cannot be said to be unnatural thereby denying the eviction of the tenant from the premises in question. It is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. It is not the tenant who can dictate the terms to the landlords and advise him what he should do and what he should not. It is always the privilege of the landlord to choose the nature of the business and the place of business. However, the trial court held in favour of tenant-appellant. But the appellate court as well as the High Court after scrutinizing the evidence on record, reversed the finding of the trial court and held that the need of establishing the business at Calicut by the landlords cannot be said to be lacking in bona fide.

Learned counsel for the appellant submitted that in fact this plea of either starting business or expanding it at Calicut is nothing but sham and it was also pointed out that some of the sons have multifarious activities and are already established in some other business and one of the sons i.e. respondent No.9 had already gone to United States of America and he has settled there. Therefore, the need is not bona fide. We fail to appreciate that when two sons are there and if they want to expand their business at Calicut then it cannot be said that the need is a sham one. It is not possible for the landlords and their sons to wait till the disposal of the case. They have to do something in life and they cannot wait till the appellant is evicted from the premises in question. It is common experience that landlord tenant disputes in our country take long time and one cannot wait indefinitely for resolution of such litigation. If they want to expand their business, then it cannot be said that the need is not bona fide. It is alleged that one of the sons of the landlords has settled in the U.S.A.. That does not detract from the fact that the other sons of landlords want to expand their business at Calicut. Indian economy is going global and it is not unlikely that prodigal sons can return back to mother land. He can always come back and start his business at Calicut. On this ground we cannot deny the eviction to the landlords.

In support of the plea of bona fide requirements by the landlords, learned senior counsel for the respondents sought to support the same by placing reliance on the decisions of this Court, in case of Ramkubai (Smt.) deceased by LRs & Ors. v. Hajarimal Dhokalchand Chandak & Ors. reported in (1999) 6 SCC 540, it was observed that B was unemployed on the date of filing of the suit but in the meanwhile started some business and in that context, their Lordships held that it cannot be

expected to idle away the time by remaining unemployed till the case was finally decided. It was held that if the eldest son was carrying on business along with his mother that does not mean that his need has not been established for starting his own business.

In the case of Pratap Rai Tanwani & Anr. vs. Uttam Chand & Anr. reported in (2004) 8 SCC 490, it was held that the bona fide requirement of the landlord has to be seen on the date of the petition and the subsequent events intervening due to protracted litigation will not be relevant. It was held that the crucial date is the date of petition. Their Lordships further observed that the normal rule is that the rights and obligations of the parties are to be determined on the date of the petition and that subsequent events can be taken into consideration for moulding the reliefs provided such events had a material impact on those rights and obligations. It was further observed by their Lordships that it is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. Therefore, the courts have to take a very pragmatic approach of the matter. It is the common experience in our country that specially landlord- tenant litigation prolongs for a long period. It is true that neither the person who has started the litigation can sit idle nor the development of the events can be stopped by him. Therefore, the crucial event should be taken as on the date when the suit for eviction was filed unless the subsequent event materially changed the ground of relief.

In the case of Gaya Prasad vs. Pradeep Srivastava reported in (2001) 2 SCC 604, their Lordships observed that the landlord should not be penalized for the slowness of the legal system and the crucial date for deciding the bona fide of the requirement of the landlord is the date of his application for eviction. Their Lordships also observed that the process of litigation cannot be made the basis denying the landlord relief while litigation at least reaches the final stages. However, their Lordships further added that subsequent events may in some situations be considered to have overshadowed the genuineness of the landlord's need but only if they are of such nature and dimension as to completely eclipse such need and make it lose significance altogether.

Thus, we are of opinion that the view taken by the first appellate court as well as by the High Court appears to be justified and there is no reason to take a contrary view of the matter.

So far as the finding of the first appellate court and that of the High Court with regard to the eviction of the tenant on the ground of sub-letting & material change in premises under Section 11(4)(I) & (ii) is concerned, that has been held against the landlords and there is no cross-appeal before us. Therefore, we need not go into merits of the findings of the courts below. However, another argument which has been very seriously contended by learned counsel for the appellant was that the premises in question were in the possession of the tenant prior to 1940. Therefore, the appellant is entitled to protection under section 11(17) of the Act. Relevant provisions of the Act read as under :

> "Section 11 (17) Notwithstanding anything contained in this section a tenant who has been in continuous occupation of a building from 1st April 1940 as a tenant, shall not be liable to be evicted for bona fide occupation of the landlord or of the occupation by any members of his family dependent on him, provided that a landlord of a residential building shall be entitled to evict such a tenant of that building if the

> landlord has been living in a place outside the city, town or village in which the building is situated for a period of not less than five years before he makes an application to the Rent Control Court for being put in possession of the building, and requires the building bona fide for his own permanent residence or for the permanent residence of any member of his family or the landlord is in dire need of a place for residence and has none of his own. Explanation In computing the period of continuous occupation from 1st April, 1940, the period if any, during which the landlord was residing outside the city, town or village in which the building is situate shall be excluded."

In order to appreciate this submission of learned counsel for the appellant, we have to go back to the history about the business. Learned counsel took us to the background history and invited our attention to the evidence led in the present case and he also invited our attention to a decision of this Court in an Income-tax matter of the appellant firm and wanted us to take judicial notice of the facts pleaded therein. Just to recapitulate a few facts about the origin of this firm, the firm Sait Nagjee Purshotham and Co. was started in the year 1902 and carried on business in banking and piece-goods and yarn. It was reconstituted by an agreement of partnership dated December 6, 1918. There were six partners, of whom five were members of a family and the sixth was an outsider. The agreement provided that the partnership could not be dissolved by a change in the constitution thereof. About 1932, the firm started the manufacture and sale of soap. It had also started the manufacture and sale of umbrellas. One of the partners died and another retired, and on January 2, 1934, the remaining four partners executed an instrument varying some of the terms of the agreement of 1918 but providing however that subject to the variations the earlier agreement was to remain effective. Thereafter, on May 30, 1939, two agreements of partnership were executed of which the first recited that the manufacture and sale of soaps and umbrellas was carried on by the three partners along with a fourth partner with effect from October- November, 1937; and the second deed recited that the three partners continue to carry on the business in banking, piece-goods and yarn. This deed further recited that the agreement dated 1918 was revoked and that the affairs of the firm would be regulated by the new agreement. Later, by an instrument dated October 30, 1943, after the retirement of certain partners and admissions of new partners, the parties thereto agreed to carry on as one single partnership the business carried on by the two partnerships constituted under the deeds dated May 30, 1939. Ultimately, under an agreement dated February 7, 1948 the business was taken over by a company with effect from November 13, 1947. But the question before us is when the new company came to be constituted in 1948 it had old partners or not and what is the nature of this company. We were also taken through necessary evidence of the tenant to substantiate that all the old members of the firm continued when the new firm was constituted in 1948. But after going through the evidence it does not transpire that in fact all the old members of the earlier partnership firm continued to be the directors of the newly constituted company i.e. M/s. Sait Nagjee Purushotham & Co. Ltd. a private limited company which was incorporated under the Indian Companies Act, 1930. The appellant failed to substantiate that the old firm which was subsequently converted into a private limited company had all the directors who were the partners of the old partnership firm. We could not persuade ourselves from the evidence which were led in this suit that the said firm which was the partnership firm and subsequently converted into a private limited company had the same directors. The appellant did

not lead any categorical evidence to show that the same firm which was there in 1918 was later on converted into a private limited company with the same Directors. Therefore, the evidence in the present case is totally lacking. We insisted learned counsel for the appellant to satisfy us that the old firm which was there prior to 1948, converted into a private limited company with the same directors but learned counsel for the appellant failed to satisfy us. In fact, this question seems to have not been seriously raised either before the trial court, or the appellate court or before the High Court. It was observed by the trial court with regard to the protection under Section 11(17) of the Act that in order to prove that the firm is continuing in the tenanted building from 1940, it is admitted by the tenant that prior to the formation of the tenant- company the business was conducted by the partnership firm. It is apparent from Ext.B-6 that the tenant company came into existence in 1948 and memorandum and article of association clearly shows that the company was incorporated on 6.2.1948. Therefore, it was held that it is a separate legal entity from the date of incorporation. It was held by the trial court that the tenant company could not claim any tenancy right of partnership because the newly constituted separate legal entity had come into existence on 6.2.1948. Therefore, it was observed by the trial court that the very important ingredient of Section 11(17) is lacking in this case. Similarly, the appellate court in paragraph 25 of its order also held that the tenant company has not produced any document to show that it was in possession of the building as such before 1940. In fact, the private limited company came into existence in 1948. Therefore, the first appellate court also affirmed the finding of the trial court. Likewise, the High Court affirmed the findings of the courts below and observed that both the Rent Control Court and the Appellate Authority rightly held that tenancy commenced only in the year 1948 and hence the tenant cannot claim the protection of Section 11(17) of the Act. In view of this concurrent finding by all the Courts below there was hardly any scope to pierce the corporate veil. However, learned counsel very strenuously urged that the facts given in the earlier decision of this Court with regard to this firm in an Income-tax matter may be taken into consideration de hors the actual evidence led in the civil suit. We cannot consider the facts pleaded in another case with regard to the firm but in order to substantiate that the same firm was occupying the premises on 1.4.1940, the tenant has to lead specific evidence so as to claim protection under Section 11(17) of the Act in this suit. We have ourselves gone through the evidence adduced in this case to find out whether any evidence has been led by the tenant to show that the same partnership firm continued when it was converted into the private limited company registered under the Companies Act with the same Board of Directors. But we regret to say that there is none in this case. This is a civil suit and party has to plead and prove in this case. We cannot look into the facts appearing in other case pertaining to this case.

Learned counsel has invited our attention to a decision of this Court in the case of Madras Bangalore Transport Co.(West) vs. Inder Singh & Ors. reported in (1986) 3 SCC 62. In this case, on examination of the facts this Court found that the company was an alter ego or corporate reflection of the tenant-firm and the two were one for all practical purposes having substantial identity and therefore, in that context their Lordships held that there was no subletting, assignment or parting with possession of the premises by the firm to the company so as to attract Section 14(1)(b) of the Delhi Rent Control Act, 1958. Therefore, this case was decided on the peculiar facts and it was found that the tenant-company was having no new but the same partners. Therefore, their Lordships held that the new company cannot mean to be a sub-lessee. Therefore, in view of the peculiar facts, it was held that the new identity of the company was the same as was the old one. Therefore, this case is

distinguishable on its facts.

In the case of Vishwa Nath & Anr. vs. Chaman Lal Khanna & Anr. reported in AIR 1975 Delhi 117, learned Single Judge of the Delhi High Court examined the concept of formation of a new concern with the same members. It was observed that if an individual takes the premises on rent and then converts his sole proprietorship concern into a private limited company in which he has the controlling interest, he cannot be evicted from the premises. After examining the facts, learned Single Judge took the view that the earlier company and the successor one are identical in all respect. In this connection, learned Single Judge examined large number of English cases also. In Chaplin v. Smith [(1926) 1 KB 198] the Court of Appeal held that no interest in the demised premises passed to the companies or either of them and that there had been no breach of the lessee's covenant not to part with the possession of the premises or any part thereof. In this case, the whole question turned on the question of fact and it was observed in paragraph 41 as follows :

> " 41. To sum up: on the facts, proved Vishwa Nath was the tenant. He took the premises on rent in November 1962 in his own name. In 1964 he formed a company in which he had a controlling interest and of which he is the chief executive and the managing director. He is in possession of the premises. His sons and wife are the other share-holders with him. In my opinion there is no subletting or parting with possession."

As against this learned counsel for respondent has invited our attention to a recent decision of this Court in the case of Singer India Ltd. vs. Chander Mohan Chadha & Ors. reported in (2004) 7 SCC 1 wherein the decision in Madras Bangalore Transport Co.(West) (supra) was also considered. This Court after considering the aforesaid decision observed as follows:

> " This case has been decided purely on facts peculiar to it and no principle of law has been laid down."

Their Lordships also observed that in order to find out the real identity of the new firm or private limited company, one has to lift the corporate veil and examine whether the same partners continue or not.

In this connection, learned counsel for respondent invited our attention to another decision of this Court in the case of Electrical Cable Development Association vs. Arun Commercial Premises Cooperative Housing Society Ltd. & Anr. reported in (1998) 5 SCC

396. In this case, the claim of the appellant was that an association which was an unregistered body known as Indian Cable Makers' Association was inducted in the year 1969 as a tenant in the premises Room No.503, 5th Floor, Arun Chambers, Tardeo, Bombay by respondent No.2 under an agreement termed as " leave and licence" dated 23.9.1969 at a rental of Rs.1500/- per month out of which Rs.1000/- was towards the premises and rent of Rs.500/- per month was payable towards furniture and fixtures. The name of the appellant was changed from Indian Cable Makers' Association into M/s. Electrical Cable Development Association. It was registered in the year 1972.

In that context, the question arose whether M/s. Electrical Cable Development Association is the successor of the Indian Cable Makers' Association and their Lordships after examining the memorandum of association and articles of the appellant- Company and after reviewing the matter found that it was not the same. It was observed that articles and the memorandum of association only provided that a member of Electrical Cable Development Association as of right be admitted subject to certain conditions. It does not say that all those members in the unregistered association become members of the association much less any resolution was produced before the Court of the Electrical Cable Development Association to show that they were converting themselves into an incorporated body. Therefore, in that context, their Lordships held that the Electrical Cable Development Association is not the real successor of M/s. Indian Cable Makers' Association and they are not the same. Therefore, on this question of fact their Lordships found that it was distinctly separate legal entity and not the successor of the unregistered firm and the decree of eviction was affirmed.

In the case of G.Sridharamurti vs. Hindustan petroleum Corporation Ltd. & Anr. reported in (1995) 6 SCC 605, the provisions of the Karnataka Rent Control Act, 1961 came into consideration and in this case a distinction was made between voluntary formation of company and in-voluntary formation of the company. In-voluntary formation of company means if by virtue of a statute law, a company is taken over then in that case the successor company will not become a sub-tenant and in case, it is a voluntary formation of company then in that case necessary evidence will have to be led to show that for all purposes it is same. In this case, ESSO a private oil company was merged by virtue of Section 7 of the Esso (Acquisition of Undertakings in India) Act, 1974. On coming into force of this Act, the pre-existing tenancy rights held by Esso Company with the appellant initially stood transferred and vested in the Central Government and thereafter it became a Government company known as Hindustan Petroleum Corporation Limited. In that context, their Lordships held that the premises were occupied by Esso which has been acquired by the Central Government under the enactment of the Parliament and therefore it will not become a sub-tenant.

In the case of Janki Devi (Smt.) & Anr. vs. G.C.Jain reported in (1994) 5 SCC 337(II), the premises were let out for being used as a school under the name and style of Tagore School by a society registered under the Registration of Societies Act. The respondent landlord sought to evict lessee on the ground of subletting in favour of the society. The appellant was the secretary of the society. But the school was run by different management. Their Lordships observed that the test to determine a sublease is whether original lessee has the right to include and exclude others. Once she is merely a secretary, this test is not answered. Therefore, their Lordships found that the premises were subleased.

In the case of Cox & Kings Ltd. & Anr. vs. Chander Malhotra (Smt.) reportd in (1997) 2 SCC 687, the premises in question was demised to Cox & Kings (Agents) Limited, a company incorporated under the United Kingdom Companies Act. On account of certain problems the company wound up and had assigned under agreement the leasehold interest in the demised premises to the Indian company which carried on the business in the tenanted premises without obtaining written consent of the landlord. This was challenged by the respondent on the ground that this amounted to subletting under the Delhi Rent Control Act. Their Lordships after examining the matter answered

the question that since the foreign company was leased out to an Indian company that amounts to voluntary transfer and the Indian company became a sub-tenant without the consent of the landlord. Their Lordships answered the question against the tenant and held that this amounts to sub-leasing within the meaning of Section 14(1)(b) of the Delhi Rent Control Act.

On review of all these cases it clearly transpires that the appellant- tenant has failed to substantiate that the private limited company which was formed in the year 1948 carried the same partners on the Board of Directors as were there prior to 1948.

In view of the ratio laid down by this Court in the aforesaid decisions, various tests were laid down obtaining in the facts of each case. But the common ratio which runs in all these cases is that if there is voluntary transfer by the company to a newly incorporated company then in that case one has to plead and prove that all the members of the old firm continued in the new firm and it is essentially the same. The only exception which has been made is that the transfer of the old company to a new one is under the statute or law. Therefore, in the present case after verifying the records of the case, we have found that all the three courts have consistently observed that the benefit of Section 11(17) of the Act cannot be extended to the appellant in this case and we are of opinion that the view taken by the courts below is correct and there is no ground to interfere in this appeal.

Hence, as a result of our above discussions we are of opinion that there is no merit in this appeal and the same is dismissed. However, since the appellant had been in possession for long time and it is private limited company we grant nine months time to it to deliver the possession to the respondent- landlords. The appellant will furnish an undertaking before the Rent Controller to the above effect within four weeks from today and in case the appellant does not file any such undertaking, then it will be open to the respondents to execute this order as a decree and get vacant possession of the premises in question with the help of Police. There would be no order as to costs.