

A ARM GROUP ENTERPRISES LTD.
v.
WALDORF RESTAURANT AND ORS.

APRIL 1, 2003

B [DORAISWAMY RAJU AND D.M. DHARMADHIKARI, JJ.]

Rent Control and Eviction:

C *West Bengal Premises Rent Control (Temporary Provisions) Act, 1950—Sections 12 and 13—Tenant surrendering tenancy, thereafter, inducting sub tenant-sole proprietor of a concern—Original landlord obtaining compromise decree of eviction—Firm with new partners excluding erstwhile sole proprietor claiming status of direct tenant—Seeking protection against eviction in execution by decree—Held: Only 'tenant inferior to tenant of first degree' can claim protection as 'direct tenant' under landlord—Sub tenant of 'tenant inferior to tenant of first degree' does not have any such status or protection—There is neither evidence nor case set up by either of the parties that erstwhile proprietor had sub-let the premises to the firm—Thus, firm with new partners excluding erstwhile sole proprietor cannot claim status of direct tenant—Term of the compromise decree reserved right to the landlord to take necessary legal steps to evict sub tenants, thus decree executable.*

F Appellant acquired title to the suit premises from the original owner. Respondent No.3 was a contractual tenant of the original landlord. He gave a formal notice to the landlord expressing its intention to surrender the tenancy and vacate the leased premises by 31.8.1953. Respondent No.3 vacated the suit premises but the vacant possession was not handed over to the landlord. Landlord filed a suit for eviction. Suit was decreed in terms of compromise decree under which the tenant vacated the suit premises and reserved liberty to the landlord to take necessary legal steps for evicting sub-tenants who had been inducted by the tenant. Landlord then
G filed suit for eviction against sub-tenant. Respondent No.1-firm pleaded that before surrender of tenancy tenant had inducted E being the sole proprietor of the restaurant on 1.7.1953, later on E formed a partnership with two others, which was registered on 1.3.1954 much later after surrender of tenancy by the tenant on 31.8.1953. Single Judge of High
H Court held that the remedy of the landlord was to execute the compromise

decree and that it was barred by section 47 CPC. Landlord then filed an application for execution of decree which was allowed. Meanwhile respondent No.1-firm as sub-tenant filed a counter suit seeking declaration of its status as direct tenant under West Bengal Premises Rent Control (Temporary Provisions) Act 1950 and protection thereunder. The Court held that the remedies of the parties lay in execution proceedings. Landlord again filed an application for execution of the decree. High Court allowed the same holding that the registered partnership firm could not have been inducted as sub tenant on 1.7.1953 when as matter of fact on that date the restaurant was only a proprietary concern of E thus the firm cannot claim status of protected tenant directly under the landlord as per the provisions of Section 13(2) of the Act. The firm filed an appeal. Division Bench allowed the appeal holding that by operation of law E either as the proprietorship concern or as a partner of partnership firm became a tenant directly under original landlord and that the landlord would be entitled to bring a suit for eviction against the firm on the ground that as sub-tenant, it was inducted unlawfully by the proprietor of the restaurant who had become tenant directly under the Act but recourse to execution proceedings was impermissible in law. Hence the present appeals.

Appellant contended that the firm having come into existence on its registration on 1.3.1954, after surrender of tenancy by the tenant on 31.8.1953 and also admitting the fact of entry of E in the tenanted premises on 1.7.1953 for carrying on the business of restaurant as the sole proprietor, the firm, of which the sole proprietor subsequently became partner and which came into existence on 1.3.1954 on registration, could not, on surrender of tenancy by the tenant on 31.8.1953, claim status of direct tenant under the Act; that the Division Bench failed to make a distinction between the claim of status of direct tenant by the sole proprietor and the firm of which the sole proprietor subsequently became a partner; and that the sole proprietor to whom the tenant had sub-let the suit premises on 1.7.1953 had left India and ceased to be a partner of the firm, the present firm comprising totally new partners and in occupation of the disputed premises through the erstwhile proprietor E have absolutely no right, title or interest to resist execution of the decree obtained against the tenant.

Respondents contended that the averments in the pleadings of the appellant in the courts below amount to admission that restaurant in either of the capacities as 'proprietary concern' or 'partnership firm', came into

- A possession of the suit premises as a sub-lessee on 1.7.1953 prior to the
surrender of tenancy by the tenant on 31.8.1953; that the compromise
decree under which the tenant has already surrendered the tenancy and
vacated the premises, is not executable against the firm as sub-tenant as
the latter has become direct tenant under Act; and that the remedy of the
landlord is to institute a fresh suit on the ground if available to them under
the provisions of West Bengal Premises Tenancy Act, 1997.

Allowing the appeals, the Court

- HELD: 1.1. The claim for status of direct tenant and protection
under the West Bengal Premises Rent Control (Temporary provisions) Act
1950 could if at all have been claimed only by E as the sole proprietor of
the business concern to whom the premises were sublet prior to the
surrender of tenancy, by substantiating the necessary conditions precedent
including the point of time when he became one such, in the background
of the notice of surrender of tenancy by the tenant. After E had walked
out of the tenanted premises ceasing to have any concern, connection or
interest in the firm and left India, the present partners of the firm, who
are in occupation of the business premises have no right in *presenti* to resist
their dispossession under the decree obtained against the tenant. Along
with the tenant who has already surrendered the tenancy and vacated the
leased premises and the sub-tenant having already lost possession of the
leased premises, the present firm with its new partners who claim to be
in occupation through the sub-tenant have no right to resist the execution
of the decree. [241-A-C]

- 1.2. The Division Bench of High Court erred in holding that sub-
tenancy is created both for the proprietary concern and the partnership
firm merely because the trade name in which the business was continued
remains the same i.e. Waldorf Restaurant. Waldorf Restaurant is merely
a trade name. It is not a legal entity independent of proprietor of the
business carried on in that name and the partnership firm which came
into existence later on. The legal entities or the legal persons are the
'proprietor' and the 'partnership firm'. Sub-tenancy was created in favour
of E as the sole proprietor. In the absence of disclosure of the partnership
agreement, to which the proprietor was a party, it is not ascertainable
whether tenanted premises were brought as assets into the business of the
firm by the erstwhile sole proprietor. It also erred in assuming that there
could have been a sub-letting by the sole proprietor to the partnership

firm and even in that case the firm will have status of a sub-tenant and protection under the 1950 Act. Under the 1950 Act only the "tenant inferior to the tenant of first degree" can claim protection as 'direct tenant' under the landlord. A sub-tenant of a "tenant inferior to the tenant of first degree" does not have any such status or protection under the 1950 Act. There is neither evidence nor a case set up by either of the parties that the erstwhile proprietor had sub-let the premises to the present firm. The provisions of 1950 Act do not permit, without consent of the landlord, creation of sub-tenancy by a sub-tenant or in other words "tenant inferior to the tenant of first degree". Furthermore, the erstwhile proprietor of the business himself became partner of the firm. Such an act on his part was sub-letting or not, would depend upon the terms of the partnership deeds, which were withheld from disclosure to the Court despite a lawful demand therefor. Mere carrying on by the tenant a partnership business as partner in the leased premises, no doubt, does not *per se* amount to sub-letting unless it is shown that he withdrew his control of the leased premises and parted with the possession of the property and thereby surrendered his individual tenancy rights in favour of the partnership firm. [240-D-H; 241-D-E]

1.3. Mere averment in the pleadings of the appellants that 'use of the leased premises by the restaurant was a wrongful entry' and that too by way of reference to the claims made by the firm in the various proceedings cannot be an admission of the fact that the firm came into possession of the premises prior to the surrender of the lease by the tenant. There can be no admission on a question of law to be held as binding on the appellant. All the more so when the said fact is one which has to be necessarily and properly established by the firm, as a condition precedent to claim the cover of statutory protection under the Tenancy Act. [242-E-G]

1.4. The tenant surrendered the lease with effect from 31.8.1953 by a notice but failed to vacate it on the due date. Landlord was therefore, required to file a suit against the tenant on the basis of the notice for surrender of tenancy. During pendency of the suit the tenant entered into a compromise and in terms thereof vacated the leased premises. As against the sub-tenants, which the tenant had inducted during subsistence of tenancy, one of the terms of the compromise decree reserved liberty to the landlord to take necessary legal steps for their eviction. The landlord thereafter instituted independent suit for eviction of the sub-tenant and

- A the court held that the remedy of the landlord is to execute the compromise decree. The firm as sub-tenant filed a counter suit seeking declaration of its status as direct tenant under Act of 1950 and protection thereunder and the Court held that the remedies of the parties lay in execution proceedings. As the landlord failed in obtaining eviction decree in the suit filed by it, it moved an application for execution of the compromise decree.
- B One of the terms of the compromise decree which reserved right to the landlord to take necessary legal steps to evict the sub-tenants, makes the decree executable to that extent. [243-A-E]

- C *Calcutta Credit Corporation Ltd. v. Happy Homes Private limited*, [1968] 2 SCR 20; *Indra Kumar Karnani v. Atul Chandra Patitundi*, [1965] 3 SCR 329; *Arjun Kanoji Tankar v. Santaram Kanoji Tankar*, [1969] 3 SCC 555 and *Helper Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri*, AIR (1987) SC 1782, referred to.

- D 2. With regard to the plea of *res judicata*, since both the landlord and the firm had filed cross suits against each other and both the courts came to a common conclusion that the parties should litigate their right in execution proceedings and nothing was decided on merits of rights and claims of the parties, thus, such a plea is no longer available to the parties against each other in the execution proceedings. [236-B]

- E 3. As both the parties had instituted suits against each other, the appellants cannot be held to be lacking in *bona fides* in resorting to the remedy of suit. The long period spent in the suit deserves to be condoned. Under Section 14 of the Limitation Act, the period spent in prosecuting civil proceedings *bona fide* and with due diligence is liable to be excluded in computing the period of limitation for the suit or the application.
- F [236-C-D]

Roshan Lal Kuthalia and Ors. v R.B. Mohan Singh Oberoi, [1975] 4 SCC 628, referred to.

- G CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2609-2610 of 2003.

From the Judgment and Order dated 4.8.2000 of the Kolkata High Court in G.A. No. 1659 of 2000 in A.P.D. No. 346 of 2000.

- H A.K. Mitra, Dr. A.M. Singhvi, Jaideep Gupta, Anil Agarwalla, S. Singhvi

and K. V. Vijayakumar for the Appellant.

A

Shanti Bhushan, Bimal Chatterjee, David Mantosh, Mrs. Sumita Mukherjee, Raja Mantosh, Ms. Vandana Jalan, P.R. Ramasesh, Satish Vig. (NP) for the Respondents.

The Judgment of the Court was delivered by

B

DHARMADHIKARI J. Leave to appeal is granted.

Long period of more than 45 years period spent in this litigation amply demonstrates how clever parties by adopting all conceivable tactics succeed in delaying justice and thus bring disrepute to the justice delivery system.

C

The appellants (who will hereinafter be referred to as 'the landlord') have acquired from the original owner title to building No. 2 of which ground floor, area 2537 Sq. Ft in Park Street, Calcutta are the leased premises in dispute between the parties before us. The previous owner of the premises obtained a compromise decree of eviction on 27.4.1955 against Allenberry & Company limited (respondent No.3) which was the tenant in the leased premises. Presently in the said premises, a well-known restaurant in the trade name of "*Waldorf Restaurant*" is being run by registered partnership firm of that name (Respondent No. 1) herein and hereinafter shortly referred to as the 'firm').

D

Under the terms of the compromise decree, the tenant - Allenberry & Co. (respondent No.3 herein), has vacated the suit premises. The firm in assertion of its claim to the status of sub-tenant has been successful for the past 45 years in resisting the execution of the decree against it.

E

The main question involved in these appeals is whether the respondent firm can claim status of sub-tenant and seek protection against eviction in execution of the compromise decree against the tenant, under the provision of the West Bengal Premises Rent Control (temporary provisions) Act 1950 (hereinafter shortly referred to as the Act of 1950).

F

Shorn of unnecessary details of long drawn litigation between the parties, only the facts relevant for decision of the legal question are required to be stated.

G

The suit premises presently in use for running Waldorf Restaurant originally belong to Chitpur Golabari Company Limited (respondent No.2

H

A herein). Between the period 1.1.1939 to 31.12.1951 Allenberry & Company (respondent No.3 herein) was the contractual tenant of the original landlord. On 12.8.1953 Allenberry & Co. (hereinafter shortly referred to as the tenant gave a formal notice to the landlord expressing its intention to surrender the tenancy and vacate the leased premises by 31.8.1953. The service of notice to the landlord for surrender of the leased premises resulted in law in
B determination of the lease under Section 106 read with Section 111 of the Transfer of Property Act. This legal position has been finally settled by the Judgment of this Court in the case of *Calcutta Credit Corporation Ltd. v. Happy Homes Private Limited*, [1968] 2 SCR 20. That was a case in respect of other portion of the same building which was also in occupation of original
C tenant and was part of the leased premises which were surrendered by the tenant.

Despite the service of formal notice of surrender of tenancy by the tenant, vacant possession of the suit premises was not handed over to the landlord. The landlord, therefore, instituted suit No.1645 of 1954 on 28.5.1954
D for eviction of the tenant. The said suit was decreed on 27.4.1955 in terms of a compromise under which the tenant vacated the suit premises and reserved liberty to the landlord to take necessary legal steps for evicting sub-tenants who had been inducted by the tenant. The three sub-tenants named in the compromise decree were *Chowranghee Sales Bureau Pvt. Ltd., Happy Homes Pvt. Ltd. and Waldorf Restaurant* (respondent No.1 herein).
E

After obtaining the compromise decree of eviction against the tenant, the landlord instituted three separate suits for eviction against the above-named three sub-tenants. Separate decrees for eviction were obtained against the two sub-tenants viz. *Chowanghee Sales Pvt. Ltd. and Happy Home Pvt. Ltd.* The litigation in the case of *Happy Homes Pvt. Ltd.* came up to this
F Court and the decree obtained by the landlord against it, was maintained by the decision in the case of *Happy Homes Pvt. Ltd.* (supra). This Court in the case of *Happy Homes Pvt. Ltd.* held that after service of notice of surrender of tenancy by the tenant, its continuance in the leased premises was only as a statutory tenant and not as a contractual tenant. This court held such statutory
G tenant had no right to sub-let the premises. The sub-tenant could not, therefore, claim status of direct tenant under the landlord on the basis of the provisions of Section 12 and 13 of the Act of 1950. At this stage, it is necessary to take note of the relevant provisions of Section 13 of the Act of 1950.

H “13. Sub-lease not be binding in certain cases—(1) Notwithstanding anything contained in this Act, or in any other law of the time being

in force, if a tenant inferior to the tenant of the first degree sub-lets in whole or in part the premises let to him except with the consent of the landlord and of the tenant of a superior degree above him, such sub-lease shall not be binding on such non-consenting landlord, or on such non-consenting tenant.

Explanation - In this sub-section.

- (a) "a tenant of the first degree" means a tenant who does not hold under any other tenant ;
- (b) "a tenant inferior to the tenant of the first degree" means a tenant holding immediately or mediately under a tenant of the first degree ;
- (c) "landlord" means the landlord of a tenant of the first degree.

(2) Where any premises or any part thereof have been or has been sub-let by "a tenant of the first degree" or by "a tenant inferior to a tenant of the first degree", as defined in explanation to sub-section (1) and the sub-lease is binding on the landlord of such last mentioned tenant, if the tenancy of such tenant in either case is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (b) of the proviso to sub-section (1) of section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part, as the case may be, holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined :-

Provided that it shall be competent for the landlord, or any person deemed under this section to be a tenant holding directly under the landlord, to make an application to the Controller for fixing rent of the premises or part thereof in respect of which such person is so deemed to be a tenant and until the rent is fixed by the Controller on such application such person shall be liable to pay to the landlord the same rent as was payable by him in respect of the premises or part thereof, as the case may be to the tenant before the tenancy of the tenant therein had been determined. The Controller in fixing the rent shall not determine such rent at the rate which is beyond the limit fixed by paragraph (4) of Schedule A. The rent so fixed shall be

A deemed to be the standard rent fixed under section 9”.

As stated above, *Happy Homes Pvt. Ltd.* was also one of the sub-tenants found to have been inducted after surrender of tenancy by original tenant Allenberry & Co. The sub-tenant sought protection against eviction in execution of the compromise decree against the tenant on the ground that it
B had become direct tenant under the landlord in accordance with Section 13 of the Act of 1950. The above plea of sub-tenant Happy Homes Pvt. Ltd., was negated by this Court by holding thus:-

“We are unable to agree with the contention raised by counsel for the
C respondent. In our view, since a statutory tenant has merely a personal right to protect his possession, and has no estate or interest in the premises occupied by him, he cannot convey an estate or interest which he does not possess. A statutory tenant by parting with possession forfeits the protection of the Act, and unless the statute expressly provides or clearly implies otherwise, the person inducted by him
D cannot claim the protection of the Act. In our judgment, clause (c) of Section 12(1) applies only to a case in which the tenant has an interest in the estate which he could sub-let. Similarly, section 13 contemplates a case in which a contractual tenant has sub-let the premises. If it be held that the expression ‘tenant’ in section 13(2) and in clause (c) of section 12(1) includes a statutory tenant, an estate or an interest in the demised premises would be conferred by him upon a transferee which
E the tenant himself does not possess, and that a tenant who has acted contrary to the provisions of clauses (m), (o) & (p) of section 108 of the Transfer of Property Act, or has used the property for immoral illegal purposes, or has committed acts of negligence and default which may materially deteriorate the condition of the premises, or
F has otherwise been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining or neighbouring premises including the landlord, or has failed to pay rent exceeding two months and has thereby incurred liability to forfeit the protection of the statute granted to him by section 12(1) and whose right has been forfeited by due
G notices, may still sub-let the premises and the sub-lessee would then be entitled to claim the right under section 13(2) on the determination of the tenancy of the tenant.

Considered in the light of the scheme and object of the Act, the expression “tenant” in clause (c) of section 12(1) or in section 13(2)
H must, in our judgment, mean a contractual tenant alone and not a

statutory tenant. The definition in section 2(11) of the expression "tenant" includes a statutory tenant. But the definition does not apply if there is anything repugnant in the subject or context. A statutory tenant has no interest or estate in the premises occupied by him, and we are unable to hold that the Legislature without making an express provision to that effect intended to invest him with power to induct into the premises in his occupation a person who would be entitled to claim the right and interest of a contractual tenant. If the view which has appealed to the High Court of Calcutta be accepted, a statutory tenant whose right of occupation is determined by a notice to quit, because of conduct which entails forfeiture of the protection of the Act, may induct a sub-tenant so as to defeat the claim of the landlord, and presumably a tenant sued in ejectment may also exercise that privilege, for the right if granted would enure till a decree in ejectment is passed. The Legislature has not made any such express provision, and no provision to that effect which makes the right of the landlord conferred by the Act to obtain a decree in ejectment against his tenant illusory may be implied.

Coming back to the facts of this case, after obtaining a decree of compromise against the tenant, the landlord instituted a suit on 9.6.1956 against the firm for its eviction. The firm contested the suit by taking a plea that before surrender by the tenant of its tenancy with effect from 31.8.1953 under statutory notice, the tenant had inducted on 1.7.1953 Eng Chick Wong being the sole proprietor of Waldorf Restaurant. Later on, the above-named sole proprietor formed a partnership with two others viz. Wong Lee Si Moi & Wulishih. The partnership firm comprising of three partners above named was registered on 1.3.1954 i.e. much after the surrender of tenancy by the tenant with effect from 31.8.1953. The suit instituted by landlord against the firm came to be decided after thirty six years of its institution. Learned Single Judge of Calcutta High Court, sitting on Original Side, by judgment dated 25.8.1992 in Suit No.1546 of 1956, filed for eviction, held that the dispute in the suit can be decided in proceedings of execution of the compromise decree. The suit was held as barred by provisions of Section 47 of the Code of Civil Procedure. On the basis of judgment in the said suit of the Calcutta High Court, the landlord moved an application on 19.6.1993 for execution of the compromise decree against the firm.

In order to frustrate attempt of the landlord to execute the decree, the firm filed a counter suit on 3.8.1993 against the landlord seeking injunction

A to restrain it from executing the compromise decree against the firm.

By allowing the landlord's application under Order 7 Rule XI of the Code of Civil Procedure, the court held that the suit was barred by Section 47 of the Code of Civil Produce and it was dismissed on 21.12.1995.

B The appeal preferred by the firm to the High Court was also dismissed. The High Court also came to the conclusion that if the firm is claiming status of direct tenant under the landlord by taking recourse to the provisions of Section 13 of the Act of 1950, its remedy lay in raising appropriate objection in course of execution of the decree in the executing court. A suit for the purpose was held as not maintainable.

C Against the judgment of the High Court, the firm filed a Special Leave Petition to this Court which was withdrawn on 12.10.1988.

D The judgments in two counter suits filed against each other by the original landlord and the firm thus settle the legal position between the contesting parties that their remedies lay before the executing court.

E The firm in order to frustrate the executing of compromise decree against it made a second attempt by filing an application on 15.3.1999 in the trial court for setting aside the compromise decree of eviction in Civil Case No.1645 of 1954. That application was dismissed by the Court on 4.8.1999.

F On the side of the landlord the application for execution filed by it was allowed by the learned Single Judge of Calcutta High Court on 20.4.2000. Learned Single judge of the High Court came to the conclusion that the firm came into existence on its registration under Partnership Act only on 1.3.1954 i.e. after the surrender of tenancy by the original tenant on 31.8.1953. In the opinion of the High Court, the registered partnership firm could not have been inducted as a sub-tenant, as alleged on 1.7.1953, when as a matter of fact on that date the Restaurant was only a proprietary concern of Eng Chick Wong. The learned Single Judge therefore came to the conclusion that the firm cannot claim status of a protected tenant directly under the landlord on the provisions of Section 13(2) of the Act of 1950. For better appreciation of the ratio of the Judgment of the learned Single Judge, its relevant part deserves to be reproduced:

H "In those circumstances I would find, that there was no proof whatsoever, before this Court, that Waldorf the present partnership firm had been inducted as a sub-tenant on 1.7.1953. It would also

appear to me, and not contended on behalf of Waldorf either, that the list of subtenants which had been furnished by Allenberry & Co. to the plaintiff, if disclosed, would show that it had been inducted before the tenancy of Allenberry & Co. had been terminated. The severe allegation that Waldorf, which was before this court, had been registered as a partnership firm on September 16, 1954, which would be subsequent to the termination of the tenancy, remained uncontroverted. In its order dated September 25, 1997, the appellate court in my view, had clearly adjudicated the question of direct tenancy against Waldorf and the principles of *res judicata* would, I am afraid prevent this question to be further urged in a Court of Law for further consideration. Waldorf, I would unhesitatingly hold, was a sub-tenant under Allenberry & Co. and made upon the termination of the tenancy and making of the compromise decree dated April 27, 1955 in accordance with the "Terms of Settlement", the decree was indeed executable by the plaintiff against Waldorf. The plaintiff had been prosecuting more than one litigation in this Court and since there was no *mala fide*, on record, in the plaintiff so doing, I would conclude that the plaintiff had been prosecuting the legal proceedings diligently, and in good faith. The plaintiff was, therefore, entitled to rely on the provisions contained in Section 13(2) of the Limitation Act, and this execution application I am inclined to hold was not barred by the laws of limitation.

For those reasons there shall be an order in terms of prayers (a), (b), (c), (d), (e) and (f) of the Tabular Statement. Mr. Animesh Ghosal, an advocate of this court is appointed receiver to comply with the above directions. The receiver shall file a report of compliance with copies to the parties within a period of four weeks from the date of receipt of the xerox of the signed copy of this order. The report shall be kept in the records of this matter. The receiver shall be paid a remuneration of 500 Gm by the decree holder at the time of the service of the xerox of the signed copy of this judgment.

Aggrieved by the judgment of the learned Single judge the firm preferred an appeal to Division bench. The Division bench by the impugned judgment delivered on 4.8.2000 allowed the appeal of the firm and set aside the judgment of the learned Single Judge. After examining the entire facts and events in the long course of litigation, the Division bench came to the conclusion that 'by operation of law' Eng Chick Wong either as the *proprietorship concern*

A or as a *partner of partnership firm* became a tenant directly under Chitpur Golabari Co. (original landlord). It further held that the landlord would be entitled to bring a suit for eviction against the firm on the ground that as sub-tenant, it was inducted unlawfully by the proprietor of Waldorf Restaurant who had become tenant directly under the Act of 1950 but recourse to execution proceedings was impermissible in law.

B For better appreciation for the reasoning and conclusion of the Division Bench, the relevant part of the Judgement needs to be reproduced :-

C “Assuming for the sake of argument that by reason of reconstitution of such firms, the original tenant went out of the said partnership firm and, thus, the possession of the present firm comprising of Charles Mantosh, HIS Wen Wong and Mata Prasad Pandey became illegal, but the same would be of no consequence inasmuch as, such action on the part of the original sub-tenant namely, the proprietorship concern of Waldorf Restaurant and/or partnership firm would at best result in creation of sub-tenancy. But there cannot be any doubt whatsoever that by operation of law Eng Chick Wong *either as proprietorship concern or as a partner of partnership firm became a tenant directly under Chitpur Golabari. As against a tenant, the landlord inter alia is entitled to file a suit for eviction on the ground that a sub-tenancy has been created. But for the purpose, an application under section 47 of the CPC would not be maintainable so as to enable the decree holder not only to evict the defendant but also a tenant who had, by a legal fiction, become direct tenant under him.* A legal fiction as is well known must be given its full effect.

F *[Emphasis applied]*

G In these appeals learned counsel appearing for the appellant questions the correctness of judgment of the Division Bench and supports judgment of learned Single Judge. The main contention advanced is that the firm having come into existence on its registration on 1.3.1954 i.e. after surrender of tenancy by the tenant on 31.8.1953, it could not claim status of a tenant directly under the landlord by recourse to Section 13(2) of the Act of 1950. It is submitted that admitting the fact of entry of Eng Chick Wong in the tenanted premises on 1.7.1953 for carrying on the business of Restaurant as the sole proprietor, the firm, of which the sole proprietor subsequently became a partner and which came into existence on 1.3.1954 on registration could not, on surrender of tenancy of the tenant, claim status of direct tenant under

the Act of 1950. The argument advanced is that the Division Bench failed to make a distinction between the claim of status of direct tenant by the *sole proprietor* and the *firm* of which the sole proprietor subsequently became a partner. Alternatively, it is submitted that the sole proprietor to whom the tenant had sub-let the suit premises on 1.7.1953 having left India and ceased to be a partner of the firm, the present firm comprising totally new partners and in occupation of the disputed premises have absolutely no right, title or interest to resist execution of the decree obtained against the tenant. It is submitted that with the tenant who has voluntarily surrendered the tenancy and vacated the leased premises and the sub-tenant, meaning the erstwhile proprietor, having lost possession of the premises, the present partners of the firm (respondent no.1 herein) in occupation through the erstwhile proprietor Eng Chick Wong, are also liable to be evicted in execution of the compromise decree obtained against the tenant.

In reply to the argument advanced on behalf of the appellant, learned counsel appearing for the firm laid much emphasis on the pleadings of the appellant submitted in the courts below. By taking us through the pleadings it is pointed out that throughout in the long course of litigation in the counter civil suits and the execution proceedings, at many places, averments have been made stating that the 'Waldorf Restaurant' was inducted as a tenant on 1.7.1953. On behalf of respondents, learned counsel argues that the above averments in the pleadings of the appellant in the courts below amount to admission that Waldorf Restaurant in either of the capacities as 'proprietor concern' or 'partnership firm', came into possession of the suit premises as a sub-lessee on 1.7.1953 prior to the surrender of tenancy by the tenant on 31.8.1953.

The conclusion of the Division bench is thus supported on the ground that the firm presently in occupation has become a direct tenant under the landlord after surrender of tenancy by the original tenant and has a protection against eviction under the Act of 1950.

It is also contended that the compromise decree under which the tenant has already surrendered the tenancy and vacated the premises, is not executable against the firm as sub-tenant as the latter has become direct tenant under Act of 1950. It is submitted that the remedy of the landlord is to institute a fresh suit on grounds, if available to them, under the provisions of West Bengal Premises Tenancy Act, 1997.

We have considered the arguments advanced by learned counsel

A appearing for the contesting parties. Before dealing with the main contention raised, we may dispose of two preliminary grounds on plea of *res judicata* and limitation to which reference has been made in the judgment of the High Court.

B So far as the plea of *res judicata* is concerned, we find that since both the landlord and the firm, had filed cross suits against each other and in both the courts came to a common conclusion that the parties should litigate their rights in execution proceedings and nothing was decided on merits of rights and claims of the parties, such a plea is no longer available to the parties against each other in the execution proceedings.

C As regards the bar of limitation, it was not rightly pressed on behalf of the firm. As both the parties had instituted suits against each other, the appellants cannot be held to be lacking in *bona fides* in restoring to the remedy of suit. The long period spent in the suit deserves to be condoned. Under Section 14 of the Limitation Act, the period spent in prosecuting civil proceedings *bona fide* and with due diligence is liable to be excluded in computing the period of limitation for the suit or the application. On the question of limitation see the following observations of this Court in the case of *Roshan Lal Kuthalia and Ors. v. R.B. Mohan Singh Oberoi*, [1975] 4 SCC 628.

E “27. Certainly, Section 14 is wide enough to cover periods covered by execution proceedings (See 1959 SCR 811 at 818¹). After all Section 47 itself contemplates transmigration of souls as it were of execution petitions and suits. The substantial identity of the subject-matter of the lis is a pragmatic test. Moreover, the defects that will attract the provision are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits, comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right See [1971] 2 SCR 397 at 401². In the Associated Hotels case (i.e. the very lis in its earlier round on the execution side) this Court pointed out [1961] 1 SCR 259 at 272³ that the question was one of initial jurisdiction of the court to entertain the proceedings. Thus in this very matter, the obstacle was jurisdictional and the exclusionary operation of Section 14 of the Limitation Act was attracted”.

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We now take up for consideration the hotly contested issue between the parties on the alleged claim of the firm to the status of direct tenant under the landlord on the basis of provisions of Section 13 of the Act of 1950. The provisions of Sections 12 & 13 were construed in the light of the scheme of Act of 1950 by this Court in the case of *Indra Kumar Karnani v. Atul Chandra Patitundi*, [1965] 3 SCR 329. This Court in that case held that consent of landlord is not required for creating sub-tenancy by the "tenant of the first degree". Consent of landlord, however, is held to be necessary where the sub-tenant defined in the Act as "tenant inferior to the tenant of the first degree" creates a sub-tenancy. In the case of creation of sub-tenancy by the "tenant of the first degree," the sub-tenant, even on termination of tenancy of the "tenant of the first degree," becomes 'direct tenant' under the landlord and is thus protected, meaning thereby that he can be evicted only on proof of any of the grounds under the provisions of Section 12 of Act of 1950.

For better appreciation of the ratio of decision in the case of *Indra Kumar Karnani*, (supra) we would reproduce the relevant part of it :-

"It is manifest that section 13(1) makes a distinction between the two classes of sub-tenancies, namely, (1) sub-tenancy created by a tenant of the first degree, and (2) sub-tenancy created by "a tenant inferior to the tenant of the first degree" by which is meant a tenant holding immediately or mediately under a tenant of the first degree. So far as the second class of sub-tenancy is concerned, the sub-section enacts that the sub-letting will not be binding upon the landlord or on the tenant of the superior degree unless each of them has consented to the transaction of sub-lease. There is no express provision in section 13(1) that a sub-lease of the 1st class requires previous consent of the landlord or that in the absence of such consent the sub-lease shall not be binding upon the non-consenting landlord. Section 13(2) refers to both the classes of sub-leases and states that if the sub-lessee shall be deemed to be a tenant in respect of the premises demised to him if the tenancy of such tenant is lawfully determined under the provisions of the Act otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to sub-section (1) of section 12. In the case of second class of sub-lease, i.e., sub-leases created by a tenant inferior to the tenant of the 1st degree also the sub-lessee will acquire the status of a tenant as mentioned in the statute but in this class of sub-leases the rights of the tenant are conferred on the sub-lessee only if the sub-

- A lease is binding upon the landlord. In enacting section 13(1) and (2) of the 1950 Act the legislature has deliberately made a distinction between the two classes of sub-tenancies and provided that in the case of sub-lease of the first class, namely, sub-leases created by a tenant of the first degree, the sub-lessee will acquire the status of the tenant in respect of the premises demised, though the sub-lease is not binding upon the landlord according to the agreement of lease. The legislature has further provided that in the case of sub-lease of the second class the sub-lessee will acquire the status of a tenant of the premises only if the sub-lease is binding upon the "landlord" as defined in section 13(1). It follows that in the case of sub-letting by a tenant of the first degree no consent of the landlord to sub-letting by tenant of the first degree is required as a condition precedent for acquisition by the sub-lessee of the tenant's right but in the case of sub-letting by a tenant inferior to the tenant of the first degree the consent of the landlord and also of the tenant of the superior degree above him to the subletting is necessary if the sub-lessee is to acquire the rights of the tenant contemplated by section 13(2).

In the present case, the firm with totally new partners excluding the erstwhile sole proprietor is claiming status of a direct tenant under the Act of 1950 and resisting execution of the compromise decree against it.

- E Waldorf Restaurant is merely a trade name. It is not a legal person and has no existent independent of the proprietor who initially carried on business in that trade name in the suit premises as sub-tenant and later on by joining as partner of the firm registered in the same trade-name. The present firm (comprising totally new partners) has not disputed the fact that on 1.7.1953 the tenant (Allenberry & Co.) had sub-let the suit premises to Eng Chick Wong as sole proprietor of the Waldorf Restaurant.

On this undisputed fact, the erstwhile sole proprietor of the Waldorf Restaurant namely Eng Chick Wong could alone claim status of a direct tenant under the landlord on termination of tenancy of the original tenant.

- G The crucial question, however, is whether the present partnership firm, in which the erstwhile proprietor Eng Chick Wong was a partner and has now ceased to be so, can claim direct tenancy in its favour under the landlord on surrender of tenancy by Allenberry & Co. As we have noted above, the tenancy was surrendered on 31.8.1953 and as has been held by this Court in the case of another sub-tenant *Happy Homes Pvt. Ltd.* (supra), after surrender

of tenancy by the tenant, sub-tenant inducted by a statutory tenant cannot claim status of a direct tenant under the Act of 1950. In the present case, on 1.7.1953 the firm had not become a sub-tenant. The firm (respondent No.1 herein) therefore, cannot claim status of a direct tenant under the landlord and seek protection of the Act of 1950. A

Learned counsel appearing for the appellant have placed before us a chart to show how the partnership of the firm went on continuously changing with retirement of partner one after the other and entry of new partners. It is not necessary to go into details of the various changes in the constitution of the firm. The fact, however, is not disputed that when the firm was first registered on 1.3.1954, the partnership firm comprised Eng Chick Wong as the erstwhile sole proprietor of the business with two other partners joining him viz. Hsi Wen Wong and Wu Li Shih. Sometime in the year 1958, the two above named partners retired and Eng Chick Wong continued as partner with a new partner Philip Wing Hui Wu. In the year 1963, again the two above-named partners were joined by three new partners. In December 1991 Eng Chick Wong ceased to be a partner and the partnership consisted of only three other partners. In the present partnership firm, there are now three new partners Hsi Wen Wong, Mata Parasad Pandey and Charles Mantosh. B C D

The appellant in the courts below sought discovery of all partnership agreements correspondence exchanged between Waldorf and Allenberry relating to formation of the sub-tenancy and relevant facts regarding constitution and re-constitution as also registration of the firm in the name of Waldorf Restaurant. These documents, if produced would even disclosed as to the actual point of time when the proprietor also has been inducted actually as sub-tenant. The firm, formally by its reply, refused to supply copies of partnership agreement and other relevant information sought as above. It took a plea that it was their internal affair and plaintiff can have no concern with it. The tenanted premises were sub-let to the sole proprietor of a business concern, who later on with other two individuals constituted a partnership firm. Whether in such a situation, the tenanted premises held by him in as erstwhile sole proprietor, would become a partnership property or not would depend upon the terms of the partnership agreement. The burden to prove as to when the sub-tenancy was created and that the suit premises which were sub-let to the proprietor, on his forming a partnership firm, became property of the firm, was squarely on the firm which is resisting the execution proceedings and seeking to claim a benefit in the form of a statutory protection. The firm has deliberately withheld from disclosure the details as to the initial E F G H

A creation of sub-tenancy and various agreements of partnership entered into between the partners from time to time which would have shown the nature of partnership and as to the rights, if any, acquired by it in this regard. There is no evidence to prove that the tenanted premises of which the sole proprietor Eng Chick Wong was the sub-tenant, became the asset or property of the firm from the year 1954 when the partnership was registered.

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C Under Section 14 of the Partnership Act 1932, in the absence of an agreement to the contrary, property exclusively belonging to a person, on his entering into partnership with others, does not become a property of the partnership merely because it is used for the business of the partnership. Such property will become property of the partnership only if there is an agreement - express or implied - that the property was, under the agreement of the partnership, to be treated as the property of the partnership. See decision of this Court in the case of *Arjun Kanoji Tankar v. Santaram Kanoji Tankar*, [1969] 3 SCC 555 at paragraphs 13 & 14.

D The reasoning adopted by the Division Bench is erroneous that sub-tenancy is created both for the proprietary concern and the partnership firm merely because the trade name in which the business was continued remains the same i.e. Waldorf Restaurant. The reasoning adopted by Division Bench which has been supported by learned counsel appearing for the firm, is obviously misconceived in law and proceeded upon misdirection on facts. As

E we have stated above. Waldorf Restaurant is merely a trade name. It is not a legal entity independent of proprietor of the business carried on in that name and the partnership firm which came into existence later on. Sub-tenancy was created in favour of Eng Chick Wong as the sole proprietor. In the absence of disclosure of the partnership agreement, to which the proprietor

F was a party, it is not ascertainable whether tenanted premises were brought as assets into the business of the firm by the erstwhile sole proprietor. The Division Bench is also wrong in assuming that there could have been a sub-letting by the sole proprietor to the partnership firm and even in that case the firm will have status of a sub-tenant and protection under the Act of 1950.

G We have already noted above that under the Act of 1950 only the "tenant inferior to the tenant of the first degree" can claim protection as 'direct tenant' under the landlord. A sub-tenant of a "tenant inferior to the tenant of first degree" does not have any such status or protection under the Act of 1950. There is neither evidence nor a case set up by either of the parties that the erstwhile proprietor had sub-let the premises to the present firm. The

H provisions of Act of 1950 do not permit, without consent of the landlord,

creation of sub-tenancy by a sub-tenant or in other words "tenant inferior to the tenant of the first degree". A

In the aforesaid situation, claim for status of direct tenant and protection under Act of 1950 could if at all have been claimed only by Eng Chick Wong as the sole proprietor of the business concern by substantiating the necessary conditions precedent including the point of time when he became one such, in the background of the notice of surrender of tenancy by the tenant. After Eng Chick Wong had walked out of the tenanted premises ceasing to have any concern, connection or interest in the firm and left India, the present partners of the firm, who are in occupation of the business premises have no right in *presenti* to resist their dispossession under the decree obtained against the tenant. Along with the tenant who has already surrendered the tenancy and vacated the leased premises and the sub-tenant having already lost possession of the leased premises, the present firm with its new partners who claim to be in occupation through the sub-tenant have no right to resist the execution of the decree. B C

The Division Bench of the High Court has wrongly assumed creation of sub-tenancy by the proprietor in favour of the partnership firm. The erstwhile proprietor of the business himself became one of the partners of the firm. Such an act on his part was sub-letting or not would depend upon the terms of the partnership deeds, which were withheld from disclosure to the court despite a lawful demand therefore. Mere carrying on by the tenant a partnership business as partner in the leased premises, no doubt, does not *per se* amount to sub-letting unless it is shown that he withdrew his control of the leased premises and parted with the possession of the property and thereby surrendered his individual tenancy rights in favour of the partnership firm. See *Helper Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri*, AIR (1987) SC 1782 particularly the following observations in paragraphs 5 & 19 at pages 1784 and 1790 :- D E F

"5. It is well settled that if there was such a partnership firm of which the appellant was a partner as a tenant the same would not amount to subletting leading to the forfeiture of the tenancy. For this proposition see the decision of the Gujarat High Court in the case of *Mehta Jagjivan Vanechand v. Doshi Vanechand Harakhchand*, AIR (1972) Guj.6. Thakkar, J. of the Gujarat High Court as the learned Judge then was, held that the mere fact that tenant entered into a partnership and allowed the premises being used for the benefit of partnership does not constitute assignment or subletting in favour of G H

A the partnership firm entitling a landlord to recover possession. This view is now concluded by the decision of this Court in *Madras Bangalore Transport Co.(West) v. Inder Singh*, [1986] 3 SCC 62 : AIR (1986) SC 1564.

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B “19..... We may mention that in *Gunadalapalii Rangamannar Chetty v. Desu Rangiah*, AIR (1954) Mad 182, Subba Rao, J. as the learned Chief Justice then was, held that there cannot be a subletting, unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease.

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Two additional grounds urged on behalf of the firm now remain for decision. It is emphatically argued that in the pleadings of the appellant before the High Court in earlier litigation, there is admission that Waldorf Restaurant entered the leased premises as sub-tenant. It is argued that this admission is binding on the appellant. We have been taken through relevant parts of the pleadings. It is true that at several places in the pleadings there is mention of alleged unlawful entry of Waldorf Restaurant in the leased premises. As we have found above, Waldorf Restaurant was being run in the leased premises firstly, as sole proprietary concern in the year 1953 and subsequently after surrender of tenancy by the tenant as a partnership concern from 1954.

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We have also held that Waldorf Restaurant is merely a trade name. It is not a legal entity. The legal entities or the legal persons are the ‘proprietor’ and the ‘partnership firm’. Mere averment in the pleadings of the appellants that ‘use of the leased premises by Waldorf Restaurant was a wrongful entry’ and that too by way of reference to the claims made by the firm in the various proceedings cannot be an admission of the fact that the firm came into possession of the premises prior to the surrender of the lease by the tenant. There can be no admission on a question of law to be held as binding on the appellant. All the more so when the said fact is one which has to be necessarily and properly established by the firm, as a condition precedent to claim the cover of statutory protection under the Tenancy Act.

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Last ground urged is that the compromise decree on its own terms is not executable because the tenant, on the date of the compromise decree, had already vacated the premises. On a closer scrutiny of the terms of the compromise decree, we do not find any merit in the submission that it is not

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executable against the sub-tenant. We have traced the history of the litigation. A
 The tenant surrendered the lease with effect from 31.8.1953 by a notice but
 called to vacate it on the due date. Landlord was therefore required to file a
 suit against the tenant on the basis of the notice for surrender of tenancy.
 During pendency of the suit the tenant entered into a compromise and in B
 terms thereof vacated the leased premises. As against the sub-tenants, which
 the tenant had inducted during subsistence of tenancy, one of the terms of
 the compromise decree reserved liberty to the landlord to take necessary
 legal steps for their eviction. The landlord thereafter instituted independent
 suit for eviction of the sub-tenant. In that suit, the Court held that the remedy
 of the landlord is to execute the compromise decree. The firm as sub-tenant, C
 had filed a counter suit seeking declaration of its status as direct tenant under
 Act of 1950 and protection thereunder. In the counter suit of the sub-tenant,
 the Court took the same view that the remedies of the parties lay in execution
 proceedings. The Judgment rendered in the counter suit of the sub-tenant i.e.
 the firm was challenged in this court in special leave petition but it was
 withdrawn. The Judgment rendered in the counter suit as also the other D
 rendered in the suit filed by the landlord against the sub-tenant, have attained
 finality. It is only after the landlord failed in obtaining eviction decree in the
 suit filed by it that it moved an application for execution of the compromise
 decree. One of the terms of the compromise decree which reserved right to
 the landlord to take necessary legal steps to evict the sub-tenants, makes the
 decree executable to that extent. It cannot therefore be urged by the firm that E
 the compromise decree on its terms is not executable.

Thus we find that the tenant - Allenberry & Co. has surrendered the
 tenancy and vacated the leased premises. Eng Chick Wong the sole proprietor
 of the proprietary concern Waldorf Restaurant, to whom the premises were
 sublet prior to the surrender of tenancy has also vacated the premises and left F
 India. The possession of the leased premises has been left with the firm
 through its partners who must vacate the premises on extinguishment of the
 rights of the tenant and the sub-tenant.

Consequently, we allow these appeals. The impugned judgment dated
 4.8.2000 of the Division Bench of the High Court of Calcutta is set aside and G
 that of the learned Single Judge dated 20.4.2000 is restored. Since respondent
 No. 1 has dragged on the litigation for such a long period, the appellant
 would also be entitled to full costs incurred in courts below and in this Court.
 The counsel fee shall be allowed as per rules.

N.J.

Appeals allowed. H