Supreme Court of India
Shalimar Tar Products Ltd vs H.C. Sharma & Ors on 12 November, 1987
Equivalent citations: 1988 AIR 145, 1988 SCR (1)1023
Author: S Mukharji
Bench: Mukharji, Sabyasachi (J)

PETITIONER:
SHALIMAR TAR PRODUCTS LTD.

Vs.

RESPONDENT:
H.C. SHARMA & ORS.

DATE OF JUDGMENT12/11/1987

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
OZA, G.L. (J)

CITATION:
1988 AIR 145 1988 SCR (1)1023
1988 SCC (1) 70 JT 1987 (4) 440
1987 SCALE (2)1114
CITATOR INFO :
RF 1989 SC1141 (16)
R 1989 SC1806 (9)
R 1989 SC1819 (10)
RF 1991 SC1055 (5)
RF 1991 SC2053 (16)

ACT:
Delhi Rent Control Act , 1958: Sections 14(1) proviso (b), 16(2) and (3)-Tenant-Eviction on ground of sub letting-consent to sub letting should be in writing-Mere permission or acquiecence would not do-Waiver of this statutory right-Not permissible.

HEADNOTE:
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The respondent-landlord sought eviction of the appellant-tenant on the ground of having sub-let without written consent the portion in his occupation in favour of M/s. R.C. Abrol & Co. The appellant resisted the petition for eviction, contending that it was not maintainable in the absence of a notice to quit while determining the tenancy, that there was no sub-letting or parting of possession by the appellant in favour of M/s. R.C. Abrol & Co., in view of

Clause 14 of the Lease agreement, which provided: "That the lessee undertakes not to sub-let the premises to any other party without the written permission of the lessor and that the lessee's contractors M/s.R.C. Abrol and Co. will share the premises with the permission of the lessor". The Rent Control Tribunal ordered eviction of the appellant on the ground of sub-letting.

The High Court dismissed the Second Appeal of the appellant and confirmed the decision of the Rent Control Tribunal ordering eviction.

In the appeal to this Court by special leave it was contended for the appellant, that there was no sub-letting or parting of possession by the appellant-tenant in favour of M/s. R.C. Abrol & Co. (P) Ltd., and that if there was sub-letting that had been made with the written consent of the landlord.

Dismissing the Appeal,

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HELD: 1. Sections 14(1) proviso (b), 16(2) and (3) of the Delhi Rent Control Act , 1958 require the tenant to obtain consent of the landlord in writing for sub-letting of the premises. The purpose of such written consent was that it would cut out litigation on this ground. Mere permission or acquiescence would not do. The consent must be to the specific sub-letting and must be in writing. There is no implied permission. [1026A, 1028D]

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South Asia Industries Private Ltd. v. S. Sarup Singh & others, A.I.R. 1966 S.C. 346,referred to.

Raja Ram Goyal v. Ashok Kumar and others ,[1975] All India Rent Control Journal 534; Kartar Singh v. Shri Vijay Kumar and Another, [1878] All India Rent Control Journal 264 and M/s. Delhi Vanaspati Syndicate, Delhi v. Bhagwan Dass Faquir Chand, A.I.R. 1972 Delhi 17,approved.

2. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity. Waiver is a question of fact which has to be decided by facts and evidence. [1029C]

Chaplin v. Smith, [1926) 1 King's Bench Division 198, referred to.

In the instant case, there was no question of waiver. There was no conscious relinquishment of the advantage of any statute. No Court has gone into this fact. It does not seem to have been urged before the High Court also. As this requirement of the statute is in the public interest there cannot be any question of waiver of a right, dealing with the rights of the tenants or the landlord. [1029D]

3. To constitute sub-letting there must be parting of the legal possession. Parting of the legal possession means possession with the rights to include and also the right to exclude others. This is a question offact. [1032B]

Mehta Jagjivan Vanechand v. Doshi Vanechand, A.I.R.

1972 Gujarat 6, referred to.

In the instant case, exclusive possession was given to the sublessee, R.C. Abrol & Co. and the tenant has transferred the right to possess in that portion. It is clear that the sub-letting was done wihout the consent in writing of the landlord. There was, therefore an inevitable breach of the covenant. The High Court was therefore right in upholding the order of the Rent Control Tribunal and directing eviction of the appellant. [1032G-1033A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1425 of 1973.

From the Judgment and Order dated 21.9.1973 of the Delhi High Court in S.A.O. No. 294 of 1972.

Dr. Shankar Ghosh and Rathin Das for the Appellant. A.B. Rohtagi, Soli J. Sorabjee, Mrs. R. Swami, A.K. Verma and Ms. S. Sethna for the Respondents.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI J. This is an appeal by special leave directed against the judgment and order of the High Court of Delhi dated the 21st September, 1973 in Second Appeal No. 294/72. The High Court dismissed the Second Appeal of the appellant and confirmed the decision of the Rent Control Tribunal and ordered eviction. Before the High Court three contentions were urged namely:-

1. The petition for eviction was not maintainable in the absence of a notice to quit while determining the tenancy,

2. There was no sub-letting or parting of possession by the appellant-tenant in favour of R.C. Abrol & Company Pvt. Ltd., and

3. If there was such sub-letting, it had been made with the written consent of the landlord so was not actionable.

The Rent Control Tribunal confirmed the findings against the appellant in all the three contentions and the High Court also affirmed the findings of the Rent Control Tribunal. We must note that no contention was raised before us as far as point No. 1, namely notice was not served. The only contention before us was that there was no sub-letting or parting of the possession by the appellant-tenant in favour of R.C. Abrol & Company Pvt. Ltd. and secondly it was urged that if there was sub-letting that had been made with the written consent of the landlord. The Clause 14 of the lease deed in the instant case which provides, inter alia, the terms and conditions is as follows:-

"Clause 14-That the lessee undertakes not to sub- let the premises to any other party without the written permission of the lessor, and that the lessee's contractors M/s

R.C. Abrol & Co. will share the premises with the permission of the lessor."

This is in consonance also with provisions of Section 14(1)(b) of the Delhi Rent Control Act, 1958 (hereinafter called the Act) and Sub-Sections (2) and (3) of Section 16 of the said Act. The first question, therefore, is whether there was any sub-letting and secondly if so was the same with the consent in writing of the landlord. All these questions are essentially questions of facts and were held against the appellant by the Rent Control Tribunal which was the final Court of facts, applying the correct propositions of law. This conclusion has been affirmed by the High Court. Before us it was pointed out by Sree Shankar Ghosh, learned counsel for the appellant, that it was not necessary that the consent to sub-letting should be in writing and what he contended was that it was necessary to have the consent and the manner of proving consent was provided in writing. In other words, he contended that the provision which required that the consent should be in writing meant it was mandatory so far as it enjoined consent but it was directory so far as it said that such consent should be in writing. Apart from the statute in this case, we find it difficult to accept this argument in view of the specific clause in the statute hereinbefore. In South Asia Industries Private Ltd. v. S. Sarup Singh and others, A.I.R. 1966 S.C. 346. Justice A.K. Sarkar as the learned Chief Justice then was, observed that the object of interpreting a statute was to ascertain the intention of the legislature in enacting it. An interpretation defeating the object of a statute is, therefore, not permissible.

In paragraph 11 of the judgment at page 350 the learned Judge observed as follows:-

> "I notice that the lease gave no express right to the lessee to assign with or without the consent of the lessor. The lessee no doubt had that right under the Transfer of Property Act. It may be that under the clause the lessee's assignee would be included in the expression "lessee" as used in the lease; that is the entire effect of the clause. But this would be so whether the lessor had consented to the assignment or not. therefore this clause does not lead to the conclusion that the lessor had consented to the assignment. It is of no assistance in the present case. I am also inclined to the view that the consent contemplated by Section 14(1) proviso (b) is a direct consent to a contemplated assignment to a particular assignee. See Regional Properties Ltd. v. Frankenschwerth, [1951] 1 All ER 178. Clearly the clause in the case relied upon could not be a consent of this kind."

It is true that Justice R.S. Bachawat had expressed the view that the consent could be general or special but in the case before the Court there was no conduct which showed that there was consent by the general words of the clause in the deed. We are of the opinion on reading of the different provisions that the consent enjoined by bargain between the parties in this case must be in writing and must be to the specific sub-letting.

That was the view of the Delhi High Court in Raja Ram Goyal v. Ashok Kumar and others, [1975] All India Rent Control Journal 534. In Kartar Singh v. Shri Vijay Kumar and Another, [1978] All India Rent Conrol Journal 264 the High Court of Punjab & Haryana has also expressed similar view. In the case of M/s Delhi Vanaspati Syndicate, Delhi v. M/s Bhagwan Dass Faqir Chand, (A.I.R. 1972 Delhi 17) Khanna, C.J. as he then was of the Delhi High Court observed at page 19 of the report:

"Section 16 of the Act of 1958 holds the key to the interpretation of provisions of Clause (b) of sub-section (1) of Section 14 of this Act as well as of Clause (b) of subsection (1) of S. 13 of the Act of 1952. It deals with restrictions on sub- letting. Sub-section (1) of section 16 makes sub- letting lawful though it was without the consent of the landlord provided that the sub-letting has taken place before 9th day of June, 1952 and the sub-tenant is in occupation of the premises at the time when the Act of 1958 came into force. Sub- section (2) of section 16 reiterates the provisions of Clause (b) of sub-section (1) of Section 13 of the Act of 1952 and lays down that the sub-letting after 9th day of June, 1952 without obtaining the consent in writing of the landlord shall not be deemed to the lawful. It does not say that the requisite consent should be obtained before sub-letting the premises and the consent obtained after sub-letting will not enure for the benefit of the tenant.

However, sub-section (3) of Section 16 prohibits subletting of the premises after commencement of Act of 1958 without the 'previous' consent in writing of the landlord. The use of word 'Previous' in this sub-section shows that where it was the intention of the legislature that the consent in writing should be obtained before sub-letting, it said so specifically. The absence of the word 'Previous' in subsection (2) shows that it was not the intention of the legisla-

ture that the consent in writing could be obtained before sub-letting. Before the Act of 1952 a tenant could successfully show acquiescence of the landlord in sub-letting to escape forfeiture of tenancy. Since the absence of consent in writing by a landlord for sub-letting gave rise to unnecessary litigation between a landlord and a tenant, the Act of 1952 required the consent of the landlord in writing after its commencement. The purpose seemed to be that the consent of the landlord evidence by a writing would cut out litigation on this ground. After all a landlord could always agree to sub-letting either before or after sub-letting of the premises. For that reason no condition was laid down that such consent should be obtained before sub-letting the premises."

We are in agreement with this approach to the interpretation and it is in consonance with the view expressed by this Court earlier as mentioned hereinbefore. In the aforesaid view of the matter we are of the opinion that it was necessary for the tenant to obtain the consent in writing to sub-letting the premises. The mere permission or acquiescence will not do. The consent must be to the specific sub-letting and must be in writing. Indeed there was no implied permission also here. Our attention was drawn to the fact that the landlord had written letter to the tenant and the landlord objected to the sub-letting, the moment he realised the situation.

In that view of the matter we are clearly of the opinion that in this case there was no consent in writing on the part of landlord to such sub-letting.

Dr. Shankar Ghosh tried to state that in view of the fact that the key of the premises was stated to be in the custody of the tenant, there was no sub-letting. It was the mere user, it was urged. It is

difficult to accept this contention. The case of sub-letting was accepted as has been found by all the Courts in this case.

Our attention was drawn to the certain observations on the question of directory/mandatory nature of the requirement that consent should be in writing.

Reliance was placed on the observations of Craies on Statute Law 7th Edition 261 wherein in the election case requirement that ballot paper had to be kept in a particular manner was considered to be directory and similarly it was submitted in this case the requirement of the consent to be in writing should be construed to be directory. It was urged that the conduct of the parties indicated that there was no breach of the covenant. We are unable to agree. Here the situation is clearly different. Here the requirement of consent to be in writing was to serve a public purpose, i.e., to avoid dispute as to whether there was consent or not.

Reliance was also placed on the observations of Maxwell in the Interpretation of Statutes 12th Edition at page 328 on the question of waiver:

Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity. We are, however, in this case unable to agree. Firstly, in this case there was no case of waiver. Waiver is a question of fact which has to be tested by facts and evidence. There was no conscious relinquishment of the advantage of any statute. No Court has gone into this fact. It does not seem to have been urged before the High Court also. Apart from this, in this requirement of the statute which is in the public interest there cannot be any question of waiver of a right, dealing with the rights of the tenants or the landlord. In Chaplin v. Smith, [1926] 1 King's Bench Division 198, it was held that physical possession was not sufficient, there must be legal possession.

The question was whether there was any consent in writing in this case. We have noticed Clause 14 of the lease deed states that the lessee will not sublet the premises or any part to any party without the written permission of the lessor except that the lessee's Contractors M/s R.C. Abrol & Co. Pvt. Ltd. will share the premises with the permission of the lessor. So the permission of the lessor was there but the purpose was of the sharing with M/s R.C. Abrol & Co. Pvt. Ltd. was not of leasing the premises to any other entity. For the purpose of this, it is suffice for us to state that Clause 14 as enjoined did give permission of leasing the premises to M/s. R.C. & Co. Pvt. Ltd. which was a different entity.

Dealing with this contention the High Court observed in its judgment that the company had been incorporated some time in 1957 after the commencement of the tenancy. Company was a distinct legal entity. It appears in this case that the company was composed of the different persons. The High Court noted that there was never any consent in writing of the landlord to sub-letting the premises to the incorporated company. The permission must have been in writing and specific in the words of Justice Sarkar in South Asia Industries Private Ltd. v. Sarup Singh and others, (Supra).

In the case of Mehta Jagjivan Vanechand v. Doshi Vanechand, (A.I.R. 1972 Gujarat 6), Justice Thakkar as he then was of the Gujarat High Court observed at page 8 of the report:

> "A similar question was raised before the Madras High Court in Gundalpalli Rangamannar Chetty v. Desu Rangiah, AIR 1954 Madras 182. A reference was made to Jackson v. Simons, [1923] 1 Ch. 373, and the distinction drawn between physical possession and legal possession in that decision was taken into account in rejecting the contention of the landlord that there was a subletting or assignment. It has been observed by the Madras High Court in paragraph (5) of the said decision as under:-
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> "In `Jackson v. Simons' [1923] 1 Ch. 373(B) the question was whether the tenant broke a similar covenant. The defendant who was the tenant, without the plaintiffs' consent or knowledge agreed for the sum of Ls 7 per week to allow the proprietor of a night club carried on in a basement beneath the shop to the front part of the shop between the hours of 10.30 P.M. and 2 a.m. for the sale of tickets of admission to the club Romer J. held that the arrangement conferred to estate or interest in the demised premises but was a mere privilege or licence to use portion thereof, the defendant retaining the legal possession of the whole and did not therefore constitute a breach of the covenants not to assign, underlet or part with the demised premises or any part thereof." The Madras High Court also relied on an observation made by Scrutton L.J. in Chaplin v. Smith, [1926] 1 KB 198, at p. 211, wherein it was observed:
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> "He did not assign; nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them."
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> Reliance was also placed on the Treatise of Foa on Landlord and Tenant, 6th Edn. at page 323, where the law on the subject has been summarized in the following words:
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> "The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not so long as he retains the legal possesion himself, a breach of the covenant." After considering all these decisions, the High Court of Madras extracted the following principles and came to the conclusion that a mere taking in of partners did not amount to transferring of possession and did not constitute assignment or subletting. Says the Madras High Court:
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> "It is clear from the aforesaid decisions that there cannot be a sub-letting 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. Section 105 of the Transfer of Property Act defines a lease of immovable property as to transfer of right to enjoy such property. Therefore to create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be

> conferred on another. In the present case the exclusive possession of the premises was not given to the second respondent. the first respondent continued to be the lessee, though in regard to the business carried on in the premises he had taken in other partners. The partners are not given any exclusive possession of the premises or a part thereof. The first respondent continues to be in possession subject to the liability to pay rent to his landlord. The partnership deed also, as I have already stated, does not confer any such right in the premises on the other partners. I, therefore, hold in the circumstances of the case the first respondent did not sublet the premises to the second respondent, and therefore he is not liable to be evicted under the provisions of Act No. 25 of 1949." The view taken by me is reinforced by the opinion expressed by the Madras High Court in the aforesaid decision. A similar view has also been taken by Saurashtra High Court in Karsandas Ramji v. Karsanji Kalyanji, AIR 1953 Sau. 113 at pp. 114 & 115. In my opinion, it is therefore clear that there has been no assignment or subletting in favour of the partners of the firm by the tenant so as to attract the Bar of s. 13(1)(e) of the Rent Act. The view taken by the lower Courts is correct and no exception can be taken thereto.

There is no dispute in the legal proposition that there must be parting of the legal possession. Parting of the legal possession means possession with the right to include and also right to exclude others. That is, in our opinion, is the matter of fact. In this case, it has been found that there was a right of possession in favour of the sub-lessee R.C. Abrol & Co. Pvt. Ltd. and right to exclude indeed as it appears from the narration of the fact that the company has gone into liquidation and the official liquidator has taken possession of the premises on behalf of the liquidator and that must be on the basis that it was the asset belonging to the company. In that aforesaid view of the matter we are unable to accept this proposition that there was no sub- letting.

Dr. Shankar Ghosh drew our attention to the observations of the High Court of Delhi in the following three cases:

Vishwa Nath and Anr. v. Chaman Lal Khanna & Others, [1975] All India Rent Control Journal 514.

Shri Gurdial Singh v. Shri Brij Kishore & Others, [1970] Delhi Law Times 592.

M/s Reliable Finance Corporation (P) Ltd. v. M/s Clearing House and Agencies Private Ltd & Ors. [1984] 2 Rent Control Reporter 449.

Madras Bangalore Transport Co. (West) v. Inder Singh and Others, [1986] 3 S.C.C. 62.

He contended that in the light of the aforesaid authorities in this case, there was no parting of legal possession in favour of the sublessee. We are unable to accept this position. In the instant case, exclusive possession was given to the sub-lessee and the tenant had transferred the right to possess in that portion. It is clear that subletting was done without the consent in writing of the landlord. If that is so, there was inevitably breach of the covenant.

In that view of the matter the High Court was right in upholding the order of the Rent Control Tribunal and directing eviction of the appellant. The appeal, therefore, must fail and is accordingly dismissed.

In view of the fact that the appellant has been in possession of the premises for quite some time and to make its arrangements for shifting we direct the decree for eviction shall not be executed before 30.6.1988 provided the appellant files the usual undertaking in this Court within four weeks from today. Mesne profits will be payable from 1st of December 1987 @ Rs.7,000 per month until the possession is delivered.

1. That the appellant will hand over vacant and peaceful possession of the premises to the respondents on or before 30.6.1988 from today.

2. That the appellant will pay to the respondent arrears of rent, if any, within one month from today.

3. That the appellant will pay to respondent further compensation for use and occupation of the premises month by month before 10th of every month.

4. That the appellant will not induct any other person in the premises.

The Court further directs that in default of compliance with any one or more of these conditions or if the undertaking is not filed as required within the stipulated time, the decree shall become executable forthwith.

N.V.K. Appeal dismissed.