Prabha Sehgal vs Subhash Sahoonja on 17 September, 2018

Author: Anil Kshetarpal

Bench: Anil Kshetarpal

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(1) Civil Revision No.6275 of 2014 (O&M)
Date of Order:17th September, 2018

Smt. Prabha Sehgal ..Petitioner

Versus

Shri Subhash Sahoonja ..Respondent

(2) Civil Revision No.6278 of 2014 (O&M)

Smt. Urmil Kaushal and another ..Petitioners

Versus

Shri Subhash Sahoonja ..Respondent

(3) Civil Revision No.7492 of 2015 (O&M)

Subhash Sahoonja ..Petitioner

Versus

Prabha Sehgal ..Respondent

(4) Civil Revision No.7493 of 2015 (O&M)

Subhash Sahoonja ..Petitioner

Versus

Urmil Kaushal and another ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vijay Sharma, Advocate,
for the petitioner (in CR No.6275 and 6278-2014)
for the respondent (in CR No.7492 and 7413-2015).

Mr. Tushar Sharma, Advocate,
for the respondent (in CR No.6275 and 6278-2014)
for the petitioner (in CR No.7492 and 7493-2015)

ANIL KSHETARPAL, J.

By this judgment, Civil Revision Nos.6275, 6278 of 2014, 7492 and 7493 of 2015 shall stand disposed of. Counsel for the parties are also agreed that all these four revision can conveniently be disposed of by a common judgment.

Civil Revision No.6275 of 2014 and 6278 of 2014 have been filed by the landlords, whereas Civil Revision Nos. 7492 and 7493 of 2015 have been filed by tenant.

Dispute in both the revision petitions is with respect to two adjoining premises, one originally owned by Smt. Pritam Devi (daughter-in- law) and second owned by Smt. Bhagwanti (mother-in-law). Shop numbers are 13 and 14, Leela Bhawan Market, Patiala. Both the shops were constructed separately and leased out in favour of tenant Subhash Sahoonja at Rs.6000/- per month each for each shop with a provision for increase of rent by 15% after every three years. In both the petitions, eviction has been sought of the tenant on the grounds of non payment of rent, material structural alteration, resulting into material impairment in the value and utility of the building and bonafide requirement for the son of one of the co-owner-landlady-Smt. Prabha Sehgal.

Tenant contested the petition by pleading that he is a co-sharer in the property having purchased a share in the property. He further pleaded that relationship of landlord and tenant has come to an end. It was further pleaded that landlady-petitioner had also entered into an oral agreement to sell and suit for specific performance of the agreement to sell is pending.

2 of 18 Tenant also contested the petition on the ground that bonafide requirement of the son of the landlady, Anupam Sehgal is not genuine as he has sold his share.

Learned Rent Controller after appreciation of the evidence ordered eviction of the tenant after recording a finding that there is no merger of tenancy in the ownership as respondent-tenant has not purchased entire property and in absence of purchase of the entire share, there can be no

merger. Hence, the learned Rent Controller ordered eviction on the ground of non payment of rent, structural alteration as well as on bonafide personal necessity of the son of the landlady. It may be noted that suit for specific performance of the agreement to sell filed by the tenant was dismissed for non-prosecution.

Tenant filed appeal in both the cases. During the pendency of the appeal, tenant filed two applications, one Under Order 6 Rule 17 CPC for amendment of the written statement and another under Order 41 Rule 27 for permission to lead additional evidence. Both the applications were allowed vide order dated 09.12.2010 and the learned Appellate Authority after framing an additional issue sought report of the Rent Controller. Additional issue as framed was with respect to the plea taken by the tenant that whether entire premises used under the name and style of Handyman's Beer Bar and Restaurant, which was depicted as Shop Nos.13 and 14 as one and indivisible unit, if so, its effect. Rent Controller after permitting the parties to lead evidence, submitted a report and held that both the premises are separate premises.

During the pendency of the appeal, one of the co-owner who was a purchaser of an undivided share also filed an application for 3 of 18 impleadment and objected to the continuance of eviction proceedings. Said application was dismissed against which a civil revision was filed in the High Court but no stay was granted.

On 02.12.2012, i.e. during the proceedings before the appellate authority, all the co-owners including landlords in both the petitions, tenant, his wife and Rattan Jaiswal and Kushal Jaiswal entered into a memorandum of family settlement. It was agreed that Smt. Prabha Sehgal and Urmil Kaushal shall receive sale consideration to the extent of 70% of their share in both the shops and remaining 30% of their share will be paid to Subhash Sahoonja being tenant in possession towards premium for his occupation. It was further agreed that Subhash Sahoonja shall sell both the shops to any prospective buyer at the market rate. However, it was also agreed that memorandum of understanding shall remain valid for six months and thereafter the parties shall be free to negotiate the terms again. Clauses 5, 6 and 11 of the memorandum of understanding are extracted as under:-

> "5. That all the six parties have mutually entered into this memorandum of understanding to sell the aforesaid two shops to any prospective buyer at the market rate. Shri Subhash Sahoonja, Smt. Kuldeep Sahoonja, Shri Rattan Jaiswal and Smt. Kushal Jaiswal shall be entitled to receive the sale consideration as per their respective shares in both the shops.
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> 6. That Smt. Prabha Sehgal and Smt. Urmil Kaushal shall receive the sale consideration to the extent of 70% of their share in both the shops. The remaining 30% of their share will be paid to Shri Subhash Sahoonja being

4 of 18 tenant in possession subject to the condition that the entire arrears of rent due to Smt. Prabha Sehgal and Smt. Urmil Kaushal shall be paid at the time of execution of the agreement of sale with the prospective buyer. It is also made clear that the admitted arrears of rent by Shri Subhash Sahoonja up to October 2012 have already been paid to Smt. Prabha Sehgal and Smt. Urmil

Kaushal.

11. That in view of this Memorandum of Understanding entered into between the parties, Smt. Prabha Sehgal and Smt. Urmil Kaushal shall not press for the decision of appeals filed by Shri Subhash Sahoonja before the Appellate Authority, Patiala, till the property in question (shop no.13 and 14) is sold to prospective buyer. This Memorandum of Understanding shall remain valid for six months and thereafter the parties shall be free to negotiate the terms again."

Tenant did not sell the property and landlord thereafter proceeded with the appeal, resulting in judgment passed by learned appellate authority in both the cases. It may be noted that the learned appellate authority upheld the order of eviction on the grounds of material structural alteration in the building, resulting into material impairment as also tenant has failed to pay the rent. However, appellate authority reversed the judgment on the following grounds:-

> (1) that bonafide necessity with respect to son of Prabha Sehagl, landlady in both the cases is not proved as firstly 5 of 18 son has not stepped into the witness box;

(2) necessary ingredient with regard to son have not been pleaded;

(3) as per memorandum of understanding parties had decided to sell of the property, therefore, the bonafide requirement, if any, has ceased to exists;

(4) the Anupam Sehgal, the son has sold his share in favour of her mother Prabha Sehgal and therefore, bonafide necessity is not established.

Learned appellate authority, however, did not pass a decree for possession on the ground that one of the co-owner namely Mr. Ratttan Jaiswal had objected to the eviction.

This court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by both the courts below.

After hearing of learned counsel for the parties, this court is of the view that following questions need to be answered:-

> (1) Whether a co-owner who does not object to the filing of the petition and allows Rent Controller to pass an order of eviction, can during the pendency of the appeal be permitted to frustrate the decree for eviction by objecting to the eviction petition.
>
> (2) Whether objection raised by a co-owner to the maintainability of rent petition for eviction pales into insignificance once the parties enter into a memorandum of understanding and it is decided between the parties 6 of 18 that effort would be made by the tenant to sell the property failing which memorandum of understanding would come to an end and thereafter the aforesaid co-

owner has never objected to the continuance of the ejectment petition?

(3) Whether a tenant who does not object to the maintainability of the petition on the ground that failure of the landlord to plead necessary ingredients of the family member whose bonafide requirement ejectment is being sought, for can be permitted to object to the maintainability of the petition at a subsequent stage and whether non appearance of such person in evidence is necessary before eviction can be ordered?

Now let us deal with the first and second issue together:-

> Every co-owner is owner to the extent of every inch of common property. It is well settled that one co-owner can seek eviction of the tenant if the remaining co-owners do not have any objection. The consent for filing the petition can be expressed or implied. Once a petition has been filed by one co-owner and allwoed, order of eviction cannot be permitted to be defeated by other co-owner. Learned Appellate Authority has relied upon judgments passed by the Supreme Court in Mohinder Prasad Jain vs. Manohar Lal Jain (2006) 2 SCC 724 and T. Lakshmipathi v. P.Nithyananda Reddy, (2003) 5 SCC 150 to hold that any objection taken by a co-owner at any point of time objecting to the eviction petition would result in dismissal thereof. On careful examination of the aforesaid two judgments, it can be said that in none of the judgments, 7 of 18 Hon'ble Supreme Court has laid down as a preposition of law that a co-

owner is entitled to object to the eviction proceedings even at appellate stage once decree for eviction has been passed. Paragraphs which have been extracted by the first appellate court from the judgments of the Hon'ble Supreme Court do not deal with the aforesaid issue.

In the case of India Umbrella Manufacturing Co. and others vs. Bhagabandei Agarwalla (Dead) by LRs. Savitri Agarwalla (Smt) and others, (2004) 3 SCC, 178, Hon'ble Supreme Court has observed that once a petition has been filed by co-owners jointly then at subsequent stage a co- owner cannot midway withdraw his consent and object to the maintainability of the petition. It has been laid down that there cannot be any midway withdrawal of consent by the co-owner as the rights crystalized on the day of filing of the petition.

Learned counsel for the respondent has referred to the order passed by the Hon'ble Supreme Court in the case of Mangal Builders and Enterprises Limited and another v. Williamson Magor and Company Ltd. And another, SLP(C) No(s).9616-9617 of 2015, decided on 06.04.2017, to submit that a co-owner is entitled to object to the petition at any stage. This court has carefully read the order passed by the Hon'ble Supreme Court in Mangal Buildiders (supra). The Hon'ble Supreme Court has also referred to the previous judgment passed by India Umbrella Manufacturing Co. (supra) and thereafter examining a Full Bench judgment of Patna High Court in Sharfuddin and others vs. Bibi Khatija and Another, AIR 1988 Patna, 58, have held that if at the initial stage a co-owner objects to the filing of the eviction petition, the aforesaid petition is liable to be dismissed. In that case, Hon'ble Supreme Court was dealing with a situation when one 8 of 18 of the co-owner at the very

inception, filed an application under Order 7 rule 11 CPC for dismissal of the eviction proceedings.

As noticed earlier in the present case, facts situation is entirely different. It is somewhere near to the judgment passed by the Hon'ble Supreme Court in India Umbreall (supra). In that case, Hon'ble Supreme Court was dealing with a situation when a co-owner after having filed the petition for eviction jointly, subsequently midway wanted to withdraw the consent, which was not held permissible.

In the present case, the objection filed by a co-owners would not be maintainable for two reasons. Firstly, no objection was taken by the co-owner at the time of filing of the petition or during the pendency of the proceedings before the Rent Controller. Objection was filed only when appeal was pending and there was a order of eviction in favour of the landlord. Secondly, after the objection having been taken, all the co-owners including the tenant, who had also become co-owner, entered into a memorandum of understanding on 02.12.2013 and permitted the tenant to sell the property so as to resolve the dispute as tenant was occupying the premises for long time. It was provided in the memorandum of understanding that aforesaid opportunity is being given to the tenant only for a period of six months. This fact is clear from reading of clause 11 of the memorandum of understanding which has been extracted above. In view thereof, the express consent of the all co-owners to continue with the proceedings for eviction, is clearly discernible. Thereafter, no co-owner has objected to the eviction proceedings after the memorandum of understanding was signed.

Still further, it would not be proper and in the interest of justice 9 of 18 that a co-owner is allowed to frustrate order of eviction passed against a tenant merely because the tenant enjoying the long possession has been able to secure the transfer of rights of some of the co-owners who on account of compelling reasons, have succumbed to pressure and sold their share. In the present case, it is apparent that on account of long drawn litigation, various co-owners have sold the property in favour of tenant, his wife, friend of tenant Rattan Jaiswal and his wife. It is well settled that once a person purchases an undivided share in the joint property, he is entitled to the possession only by way of partition. A subsequent transferee who has become co-owner cannot be allowed to frustrate a valid decree of eviction passed in favour of the co-owner and against the tenant which is for the benefit of all the co-owners.

This issue can also be examined from another angle. As per Section 111 of the Transfer of Property Act, merger of tenancy or determination of lease is only possible if whole of the property vests at the same time in one person in the same right. Section 111 (d) deals with the aforesaid situation. In the present case, landlady-petitioner continues to be co-owner and tenant continues to be a tenant. A tenant cannot be permitted to create a situation by purchase of some share in the property defeating the rights of the other co-owners.

In view of the discussion made above, the issues No. 1 and 2 as framed are answered in favour of the landlord.

With respect to 3 issue, it may be noticed that landlady filed a petition pleading requirement for her son Anupam Sehgal. It was pleaded by the landlady that she requires the premises for settling her son who is wanting to start business of readymade garments or any other suitable 10 of 18 business keeping in view the circumstances and market conditions prevailing at the time of getting actual possession thereof. Petitioner pleaded necessary ingredients as required under the Act with regard to herself.

In the reply filed by the tenant , no objection was taken by him that necessary ingredient of section 13 of the East Punjab Urban Rent Restrict Act have not been pleaded with respect to the son i.e. Anupam Sehgal.

Landlady appeared in the evidence and reiterated the requirement of the premises for her son. It has come in evidence that the son is at present doing his business of fish aquarium from his residence. Even when the tenant appeared in evidence he admitted that Anupam Sehgal deals in the business of fish aquarium. Hence, Rent Controller ordered eviction on the ground of personal necessity. However, learned Appellate Authority reversed the ground of personal necessity With regard to first reason, it may be noted that such objection was never taken by the tenant before the Rent Controller. Had such objection been taken by the landlady would have filed amended petition to cure the formal defect. Once that objection has not been taken, the tenant cannot be permitted to raise objection at the appellate stage. The aforesaid aspect has been considered in detail by this court in the case of Gurbaj Singh vs. Parshotam Singh and others 2011 (3) PLR 653 and Amrik Singh and another vs. R.R.Gulati & Other 2011(3) PLR 572, wherein four questions were framed and answered by the court and it was held that non- compliance of mandatory provision of the Act once not objected in the reply, cannot defeat the right of the landlord. The questions which have 11 of 18 been framed by the court while deciding aforesaid cases are extracted as under:-

> "1. Whether a landlord can seek eviction of a tenant from a non-residential premises on the ground of bona fide necessity of his son and whether son's requirement is also covered by the word used "his own occupation"?
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> 2. Whether son of the landlord, for whose benefit the non-residential premises is sought to be got vacated, if not the landlord or the owner himself, is also required to plead the ingredients of Section 13(3)(a)(i) of the Act in the eviction petition?
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> 3. Whether the landlord who though pleaded bona fide need of the non-residential premises for his son who has not pleaded that he does not possess another non-residential premises in the urban area concerned or had not vacated such a building without sufficient cause after coming into force of the Act, but would it be sufficient if he had appeared and deposed on oath that he does not possess another non-residential building in the urban area concerned nor had vacated such a building without sufficient cause in the same urban area after coming into force of the Act?
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> 4. Whether the tenant can raise the question of non- compliance of mandatory provisions of Section 13(3)9A)

(i) of the Act even if he did not question it in his reply nor ask for any issue in this regard for the purpose of

12 of 18 trial?"

This judgment has been followed by another coordinate Bench while deciding Civil Revision No.7382 of 2016. Respectfully following with the aforesaid view, this court is also of the view that tenant cannot be permitted to raise an objection for the first time in appeal or even subsequent stage when the trial is in progress.

Similarly other reasons assigned by the learned Appellate Authority are also erroneous. It is not necessary that in every case, family members for whom eviction is being sought, must appear in evidence. In the present case, landlady has appeared in evidence and deposed about the bonafide requirement of her son. Landlady had answered all the questions which were asked by learned counsel for the tenant in cross-examination. In such circumstances, learned first appellate authority erred in drawing adverse inference on account of non appearance of the son of the landlady. As regards, memorandum of understanding that was only have a limited period and that cannot be taken as abandonment of bonafide requirement of the landlady. Memorandum of understanding was arrived at so as to resolve entire dispute but in Clause 11, it was specifically provided that it would come to an end after expiry of 6 months and the appeal pending before the learned Appellate Authority was never got dismissed on an execution of the memorandum of understanding.

Still further, transfer of an undivided share in the property by son Anupam Sehgal in favour of his mother, who is landlady, cannot be taken to be adverse circumstance against the son. Anupam Sehgal is admittedly in the business of dealing with fish aquariums and learned Rent Controller after examining the evidence have found that the requirement of

13 of 18 the landlady for her son is bonafide. Learned Appellate Authority clearly committed an error in reversing that findings.

Now let us deal with the arguments of the counsel for the tenant who has filed two revision petitions bearing nos. 7492 and 7493 of 2015.

Learned counsel has submitted that the learned Appellate Authority could not have affirmed the finding on material alteration as in the previous petition, filed by Prabha Sehgal and Urmil Sehgal on same ground was filed and dismissed for non-prosecution. Prabha Sehagl had made an application in the year 1998 seeking amendment of her petition wherein she specifically stated that shops no.13 and 14 were indivisible unit and were let out as it is by Shri Satpal Sehgal, karta of the Joint Hindu Family. He further submitted that the previous petition was dismissed for non-prosecution. Hence, second petition on the same ground is not maintainable.

This court has considered the submission, however, find no substance therein.

Landlady, when she appeared in evidence in the present case, she has explained that her affidavit was got signed by using blank papers by her brother who used to forge her signatures on the applications and affidavits. Still further, dismissal of non-prosecution of the previous petition would not render the present petition not maintainable. There was no adjudication on merits. It is well settled that only broad principles of the Code of Civil Procedure are for regulating the procedure in the rent petition are applicable but strict rules of Code of Civil Procedure does not apply. In the present case, both the courts have found that tenant has made substantial structural changes which amounts to additions and alterations having 14 of 18 impaired the value and utility of the building in question. In the petition ,the landlord had given details of the material alterations and additions made by the tenant, which are extracted as under:-

> "(i) he has fixed a false ceiling in the front verandah.
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> (ii) There were iron shutters in the front of the hall opening in the verandah. However, the respondent has built pucca pillars adjoining the shutters on their front side.
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> (iii) The respondent has broken the eastern wall of the hall and has fixed three air conditioners and affixed 2/3 ventilators in it.
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> (iv) He has built a staircase in this hall and has built a middle hall at a height of about 8' from the floor of the hall.
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> (v) He has built a pucca store at the back of the aforesaid middle hall. A false ceiling in the Verandah mentioned above has been extended inside the hall by the respondent and he has closed this space thus stopping light and air from the front of the hall.
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> (vi) In a back wall on the southern side of the hall, the respondent has opened a pucca door by breaking the wall.
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> (vii) There was a complete pucca wall from the front of the hall upto its back which separated this hall from the adjoining hall of Smt. Bhagwati Devi. In this wall, the respondent has opened a common door. The respondent

15 of 18 had removed nearly 8' long common wall and has joined back portion of this wall with the back portion of the hall of Smt. Bhagwati Devi. He has also constructed a new pucca wall in the hall upto roof level about 8' from the back wall.

(viii) The respondent has broken southern and eastern walls of the hall in the back portion and has fixed ventilators at a height of about 8'. The respondent has constructed a toilet etc. on the ground floor of the hall." In the written statement filed on 15.11.2006, while replying to para 6 of the

petition, the tenant simply denied the assertion. Learned Rent Controller as well as Appellate Authority on appreciation of evidence have found that material alteration are significant in nature and all these alterations, additions have resulted into impairment of the value and utility of the building. This court does not find that the judgments passed by the courts below on this aspect of the matter suffer from any error.

As regards, dismissal of the previous petition for non- prosecution, it is held that the order of dismissal of petition for non- prosecution would not operate as a bar to the maintainability of the second petition. Previous petition has not been dismissed on merits. Learned counsel for the tenant further submitted that pursuant to the memorandum of understanding the arrears of rent have been paid. He submitted that therefore, once payment has been made, the ground for non-payment has ceased to exist. Although, argument in first brush appears to be attractive, however, on close scrutiny it is found to be without substance. As per the 16 of 18 scheme of the Act, tenant is required to tender the rent on the first date of hearing. That provision has been interpreted to hold that first date of hearing means the date on which court applies its mind. Still further, Hon'ble Supreme Court in the judgment passed in the case of Rakesh Wadhawan vs. M/s Jagdamba Industrial, 2002(2) Rent Law Reporter, 36 has held that the rent controller would assess the provisional rent and thereafter the tenant shall be liable to pay the same. However, in the present case, tenant denied the relationship and took a plea that tenancy has come to an end. On entering into an agreement to sell, tenancy does not come to an end unless tenant surrenders tenancy rights at the time of entering into an agreement to sell. In the present case, suit for specific performance of the agreement to sell filed by the tenant has already been dismissed.

Still further mere payment of rent subsequently during the pendency of the appeal would not cure the defect of non-payment of rent before the rent controller. The rent has been accepted as per the memorandum of understanding because landladies were feeling frustrated with the delay and had hence agreed to sell the property and authorized tenant to sell the property. It is further clear from the reading of para 11 of the memorandum of understanding extracted above, that the aforesaid memorandum of understanding was to remain valid only for a period of 6 months.

In view thereof, the ground of non-payment of rent would not stand cured merely because in appellate authority pursuant to a memorandum of understanding some amount was paid. The aforesaid amount would be towards use and occupation of charges/mesne profits as tenants has continued to remain in possession.

In view of the aforesaid discussion, Civil Revision No.6275 17 of 18 and 6278 of 2014 filed by the landlords are allowed, whereas remaining two revisions filed by the tenant i.e. Civil Revision Nos.7492 and 7493 of 2015 shall stand dismissed.

17th September, 2018 (ANIL KSHETARPAL)
nt JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No