

(1996) 02 MAD CK 0133
In the Madras High Court

Chandanmal Mootha

APPELLANT

Vs

Hajee Mohideen and Others

RESPONDENT

Date of Decision : 09-02-1996

Acts Referred:

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(2)(ii)

Citation : (1996) 1 LW 510 : (1996) 1 MLJ 643

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—C.R.P. Nos. 2064 and 2207 of 1988 arise from R.C.O.P. No. 5510 of 1982. C.R.P. No. 2080 of 1988 arises from

R.C.O.P. No. 5512 of 1982. C.R.P. No. 3225 of 1988 arises from R.C.O.P. No. 5511 of 1982.

2. In all the three eviction petitions filed by the landlords, there was a common ground for eviction, namely, bona fide requirement of the building

for immediate demolition and reconstruction. In R.C.O.P. No. 5510 of 1982, there was an additional ground, namely, that the first respondent

therein had unauthorisedly sub-let the building to the 2nd respondent therein.

3. All these three eviction petitions were jointly tried, and eviction was ordered in all the petitions. The ground of sub-letting was also found in

favour of the landlords in R.C.O.P. No. 5510 of 1982.

4. Appeals were filed by the tenants as well as the subtenant before Appellate Authority (VIII Judge, Court of Small Causes, Madras) and they

were dismissed. Hence, the revisions. C.R.P. No. 2064 of 1988 is by the tenant, and C.R.P. No. 2207 of 1988 is by the subtenant in R.C.O.P.

No. 5510 of 1982.

5. The subject-matter in all these proceedings is the building bearing new No. 126, Nainiappa Naicken Street, Madras.

6. It is averred in all the eviction petitions that the building is more than 60 years old. The ground and first floors are covered by Madras Terrace

Roofing and the portion in the second floor is covered by A.C. sheet roofing. The building has been neglected without proper maintenance for

several years, and the condition of the building is very poor. It is further said that the southern side roof of the first floor and the staircase leading to

the second floor are supported by casuarina posts. There is every chance of the building collapsing any moment. The building is in a very

dangerous condition. It is further averred that the Corporation of Madras has also issued notice to the petitioners, directing them to immediately

demolish the building. The landlords have decided to demolish the entire building for the purpose of constructing a new building thereon, and,

therefore, they bona fide require the petition mentioned building for the immediate purpose of demolition and reconstruction. The petitioners

(landlords) have also undertaken to demolish the building within a period of one month. Before institution of the proceedings, registered notice was

issued to all the tenants, except the tenant in R.C.O.P. No. 5511 of 1982, the other tenants did not comply with the demand, nor did they send

any reply.

7. As stated in R.C.O.P. No. 5510 of 1982, there is an additional ground for eviction, i.e., unauthorised sub-letting. In the counter-statement filed

by all the tenants, they dispute the right of the landlords to get eviction. According to them, the building does not require immediate demolition and

reconstruction. They would say that the physical condition of the building is strong. One of the tenants has stated that by about the year 1970, the

entire building was renovated, and even though the building is stated to be 60 years old, in fact, in view of the renovation, it could be construed

only as 15 years old. They further said that the Municipal Corporation might have issued the notice only in collusion with the petitioners (landlords).

8. Regarding the allegation made by the landlords that certain portions of the roof are supported by casuarina posts, the tenant in R.C.O.P. No.

5510 of 1982 has stated that those posts are placed only to safeguard the building from any possible damage by the neighbouring property owner,

who is putting up a multi-storeyed building. The sub-tenant in the said R.C.O.P. would say that the casuarina posts are only a stage-managed show perpetrated by the landlords in collusion with the tenant.

9. The tenant in R.C.O.P. No. 5511 of 1982 has stated that no portion of the building is support by any casuarina post, but, after the purchase of the building, the landlords decided to carry out some repairs in the second floor, and for that purpose, some casuarina posts were kept in the premises, and that there is no possibility of the building collapsing in the near future. Regarding the notice issued by the Corporation of Madras, it is said that it might have been prepared by using the printed forms that are easily available in the Corporation of Madras.

10. In R.C.O.P. No. 5510 of 1982, the landlords have said that the second respondent therein is an unauthorised sub-tenant. This is answered by the tenant in paragraph 8 of the counter-statement by stating that he has got permission to sub-let the premises, and, therefore, the sub-letting in this case cannot be said to be unauthorised. Second respondent has admitted that he is a sub-tenant, but he would deny the allegation that he is an unauthorised subtenant. He has further said that it was with written consent of the landlords that he has become a subtenant, and, therefore, the landlords are not entitled to get an order of eviction on the ground of unauthorised sub-letting.

11. Before the Rent Controller, evidence was adduced, On the side of the landlords, P.W. 1 and P.W. 2 were examined. P.W. 1 is the first petitioner and P.W. 2 is an Engineer. Exs. A-1 to A-24 were marked on their side. On the side of the respondents/tenants, four witnesses were examined, of whom, R. Ws. 1 and 2 claim to be independent witnesses who claim to have inspected the building and given report, and R.Ws.3 and 4 are tenants. As documentary evidence, they produced Exs. B-1 to B-12.

12. The Rent Controller, after taking into consideration the entire evidence, came to the conclusion that the building requires immediate demolition and reconstruction. Landlords have got the financial facility to reconstruct the building, and the age of the building is also such that it requires immediate demolition. He further held that if a new construction is put up, that will be beneficial to both the landlords and the tenants. The Rent Controller believed the evidence of P.W. 2. He also took into consideration the

notice issued by the Corporation of Madras, to support the case of the landlords that the building requires immediate demolition and reconstruction.

13. So far as the ground of sub-letting is concerned, Rent Controller is of the view that even though both the tenant and sub-tenant had taken a stand that it was with the written consent of the landlords, they had not discharged the burden of proof by producing the concerned document.

Therefore, the second respondent in R.C.O.P. No. 5510 of 1982 was presumed to be an unauthorised sub-tenant. The appellate authority also

concurred with all the findings of the Rent Controller.

14. The only points to be considered in all these revisions are whether the second respondent in R.C.O.P. No. 5510 of 1982 is an unauthorised

subtenant, and whether the landlords are entitled to get an order of eviction on that ground, and whether all the tenants are liable to be evicted, on

the ground that the entire building is liable to be demolished and reconstructed.

15. I will first deal with the aspect of unauthorised sub-letting, in R.C.O.P. No. 5510 of 1982, from which C.R.P. Nos. 2064 and 2207 of 1988

arise.

16. I have already said that the sub-tenancy is admitted, but the case put forward by the tenant and also the sub-tenant is that it was with the

consent of the landlords.

17. u/s 10(2)(ii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, eviction can be had on the ground of unauthorised lease, if the lessee

has transferred his right under the lease or any portion thereof, if the lease does not confer on him any right to do so. It further says that if the

tenancy is after 23rd October, 1945, sub-lease given must be with the written consent of the landlord.

18. By a reading of the said section, it is clear that if it is not with the written consent of the landlord, any sub-lease is presumed to be unauthorised.

The tenant as well as the sub-tenant have taken a stand that it is with written consent. But when oral evidence was taken, they were not in a

position to produce any authority or document, permitting sub-lease.

19. Learned Counsel for the petitioners (tenants) contended that even if the tenant or the sub-tenant could not produce any written authority, since

the second respondent in R.C.O.P. No. 5510 of 1982 (sub-tenant) was in occupation of the building openly, long before the petitioners herein

became the owners of the building, and since sub-tenancy was also made known to the previous owner, and since there was no objection from

him, the objection must be deemed to have been waived, or the landlords had acquiesced the sub-tenancy.

20. According to me, the said contention cannot hold good. When statute provides that there should be a written consent, there cannot be the question of any waiver or acquiescence.

21. Learned Counsel for the petitioners brought to my notice the decision reported in A.S. Sulochana Vs. C. Dharmalingam, , a case which arose

under the Tamil Nadu Buildings (Lease and Rent Control) Act. The question that came for consideration was, whether the tenant who was in

possession of the building, was guilty of creating subtenancy. It was found in that case that it was not the tenant who created sub-tenancy, but his

predecessor, and the unauthorised act done by the predecessor, cannot be a ground for eviction of the existing tenant. It was under those

circumstances, their Lordships said that sub-letting in that case was in violation of the relevant provisions of law.

22. The question whether statutory violation could be acquiesced or waived, came for consideration by the Supreme Court in other case.

23. In Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others, , their Lordships said thus:

Though everyone has 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 but here there was no case of waiver. Moreover, in view of the statutory requirement which is in public interest, there cannot be

any question of waiver of a right, dealing with the rights of the tenants or the landlord.

[Italics supplied]

That case arose under the Delhi Rent Control Act, and sub-letting without consent of landlord was taken as a ground for eviction. Paragraphs 6, 7

and 13 of the said judgment can usefully be extracted.

That was the view of the Delhi High Court in Raja Ram Goyal v. Ashok Kumar (1975) 1 R.C.J. 534. In Kartar Singh v. Shiv Vijay Kumar (1978)

1 R.C.J. 264, the High Court of Punjab and Haryana has also expressed similar view. In the case of Delhi Vanaspati Syndicate, Delhi Vs.

Bhagwan Dass Fadir Chand, , Khanna, C.J. as he then was of the Delhi High Court observed at page 19 (para 11) 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 Sub-section (1) of Section 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 June 9, 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 subletting after June 9, 1952 without obtaining the consent

in writing of the landlord shall not be deemed to be lawful. It does not say that the requisite consent should be obtained before subletting the

premises and the consent obtained after sub-letting will not ensure for the benefit of the tenant. However, Sub-section (3) of Section 16 prohibits

sub-letting 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 contained before sub-

letting it said so specifically. The absence of the word "previous" in Sub-section (2) shows that it was not the intention of the legislature that the

consent in writing could be obtained before subletting. 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 evidenced by a writing would cut out litigation on this ground. After all a landlord could always agree to

subletting 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 of 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. (Paras 6 and 7).

[Italics supplied]

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 *Chaplain v. Smith*, it was held that

physical possession was not sufficient, there must be legal possession. (Para 13).

[Italics supplied]

The said decision was followed in *Dull Chand (Dead) by L.Rs. v. Jagmender Dass* (1990) 1 S.C.C. 169 and, at page 176 of the reports, their

Lordships said that 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 and that therefore mere permission or acquiescence will not do: In paragraph 11, their Lordships" emphasised the point thus:

...If the words were "'without consent the landlord'" it might mean without consent, express or implied and in that sense question of waiver may

arise. The question of implied consent will not arise, if the consent is to be in writing.

24. In *Pulin Behari Lal Vs. Mahadeb Dutta and Others*, , similar question came for consideration, and the decision reported in *A.S. Sulochana Vs.*

C. Dharmalingam, cited by learned Counsel for the petitioners herein, was also

distinguished. The case arose under West Bengal Premises

Tenancy Act, where also, a similar provision for eviction is provided. Paragraphs 4 and 5 of the judgment dealt with the matter and their Lordships

also considered whether a statutory benefit could be waived and what are the ingredients to prove such waiver. In paragraph 6 of the judgment,

their Lordships considered the question of statutory waiver also. Paragraphs 4 and 5 and the relevant portion of paragraph 6 read thus:

A perusal of the above provisions clearly show that when there was no previous consent in writing of the landlord for creation of sub-tenancy it

shall be a ground for eviction in terms of Section 13(1)(a) of the Act. Even in case of creation of such sub-tenancy with the consent of the landlord

in writing it was necessary to follow the further procedure prescribed u/s 16(1) of the Act. Mere knowledge and/or acceptance of rent cannot

defeat the landlords right to get a decree for ejection on the ground of sub-letting. If the view as contended on behalf of the appellant is accepted

the provisions of both the above Sections 13 and 16 would become nugatory. There is a clear mandate in Section 13(1)(a) that the protection

against eviction to the tenant shall not be available in case the tenant transfers, assigns or sublets in whole or in part the premises held by him

without the previous consent in writing of the landlord. It was contended by the learned Counsel for the appellant that the provision as regards

consent may be treated as mandatory but so far as the writing part of the consent is concerned the same may be treated as directory. It was also

contended that in the present case the sub-tenancy, was created in 1970 even before the purchase of the suit premises by the present

plaintiff/landlords on September 27,1973 and in this view of the matter the present plaintiff/landlords cannot file a suit for eviction on the ground of

subletting u/s 13(1)(a). Reliance in support of the above contention has been placed on A.S. Sulochana Vs. C. Dharmalingam, .

We find no force in the above contention. The above case relied on by the learned Counsel for the appellant is altogether distinguishable. In that

case the relevant provision for consideration was Section 10(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The

undisputed facts in that case as observed in the judgment were that the father of the appellant/landlord had granted a lease in favour of the father of

the respondent tenant prior to 1952. The father of the appellant as also the father of respondent both had died and respondent was accepted as a tenant upon the death of his father in 1968. The suit for eviction on the ground of unlawful sub-letting was filed in 1970 by the appellant who had inherited the property from her father. Admittedly, neither the appellant nor the respondent had any personal knowledge about the terms and conditions of the lease nor they had any personal knowledge regarding the circumstances in which the father of the respondent-tenant had created a sub-tenancy way back in 1952, 18 years before the institution of the suit. Neither the appellant nor respondent had any personal knowledge as to whether or not the sub-tenancy was created with the written consent of the landlord 18 years back in 1952. On these facts it was held that there was nothing on record to show that the sub-letting which was made 18 years before the institution of the suit was in violation of the relevant provisions of law. There was no evidence direct or circumstantial on the basis of which it could be said that the lease did not confer on the father of the respondent the right to create a sub-tenancy, or, that it was done without written consent of the then landlord, that is to say, the father of the appellant. Thus in the above case, the plaintiff-landlord had inherited the property from her father and had brought a suit for eviction on the ground of sub-letting which was created 18 years prior to the suit. This Court held that the flouting of the law, the sin under the Rent Act must be the sin of the tenant sought to be evicted, and not that of his father or predecessor-in-interest. Respondent inherited the tenancy, not the sin, if any, of his father. The law in its wisdom seeks to punish the guilty who commits the sin and not his son who is innocent of the rent law offence. The above case is further distinguishable because the sub-tenancy was created in 1952 long before the Act which came into force in 1960.

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...So we are considering the question of waiver independently of the provisions of the Act and it would be clear that there is no question of waiver in the present case. Waiver is a question of fact which depends on the facts and circumstances of each case. In the case of waiver of any provisions of the statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the statute. In the

case like the present one before us, it was necessary for the tenant appellant to prove that the landlords had accepted the rent being fully conscious

that by this act they were relinquishing the right of eviction available to them on the ground of sub-letting u/s 13(1)(a) of the Act. The Rent Act is

for the protection of the rights of the tenants but at the same time it does not permit the sub-letting by a tenant without the consent in writing of the

landlord and this provision has been kept in public interest for the benefit of the landlords and the same can only be negated by an act of

conscious relinquishment of such right by the landlord. We find support in the above view in a decision of this Court in Shalimar Tar Products Ltd.

Vs. H.C. Sharma and Others, . In the above case it was held: S C.C.71, Notes:

Section 14(1), Proviso (b) and 16(2) and (3) of the Delhi Rent Control Act enjoin the tenant to obtain consent on the landlord in writing to the

specific sub-letting. This requirement serves a public purpose i.e., to avoid dispute as to whether there was consent or not. The mere permission or

acquiescence is not enough. There is no implied permission. Any other interpretation of the provisions will defeat the object of the statute and is,

therefore, impermissible....

On the basis of the abovesaid decisions, it cannot be contended by learned Counsel for the petitioners (tenants) that there was waiver on the part

of the landlords.

25. In this case, there cannot be any question of waiver also for the reason that the tenant has got a definite case that the sub-tenancy was with the

written consent of the landlords. When they have failed to prove the same, the question of waiver will not arise. The finding of the authorities below

that the second respondent in R.C.O.P. No. 5510 of 1982, i.e., revision petitioner in C.R.P. No. 2207 of 1988 was unauthorisedly inducted into

the premises is, therefore, to be upheld.

26. Learned Counsel for the tenant also submitted that the sub-tenancy is only in respect of a very small portion of the tenanted premises, and a

major portion of the building is still in his physical possession and, therefore, sub-letting cannot be a ground for ordering eviction.

27. The said contention also cannot have any legal force in view of the statutory provisions. The statute prohibits sub-tenancy of any portion of the

tenanted premises.

28. The finding of the Rent Controller as well as the Appellate Authority in this regard is, therefore, correct and confirmed.

29. The other question in all the revision petitions is, whether the tenants are liable to be evicted on the ground that the building requires demolition and reconstruction.

30. P.W.2 is an Expert Engineer, who has inspected the building and has submitted a report. Even before that report, the Corporation of Madras has issued a notice to the landlords, asking them to demolish the building in question, in view of its dangerous condition. That notice has been marked as Ex. A-5. When a Statutory Authority issues a notice, law presumes that before issuing that notice, the Authority was satisfied about the condition of the building.

31. Along with that notice, we have to take into consideration the averments in the reply to the same. In the eviction petition it is said that the building is very old, and portions of the building are now supported by casuarina posts so that it may not collapse, causing danger to human life and property. The fact that the casuarina posts have been used or that they are lying in the premises is admitted even by the tenants. Of course, they have got their own explanation for the same. Tenants also filed Engineers' Reports, and R.Ws. 1 and 4 (Engineers) were examined on the side of the tenants. According to those witnesses, the building is not in dangerous condition, and the structure is not bad.

32. Even though the Statute says that the tenant is liable to be evicted on the ground that the building requires immediate demolition and reconstruction, it does not insist that the building must to that extent be dilapidated. Of course, the physical condition of the building is also to be considered and that must be given primary importance, in finding out whether the building is in such a bad condition that it requires immediate demolition. But the question that has to be considered is whether the renovation or repair to that building will be advantageous or whether in its place reconstruction is to be had. If some renovation or repair is effected, the life of the building may be extended. But the law does not insist that the landlord should continue to renovate the building or postpone the collapse of the building for years together. In the decision reported in P.Orr.

& Sons. (P.) Limited v. Associated Publishers (Madras) Limited (1990) 2 L.W. 547,

also, their Lordships do not say that the building must collapse or the condition of the building must be in such a dangerous state that the landlords should get the tenants evicted immediately. Their Lordships only said that before ordering eviction, the physical condition of the building must also be taken into consideration, and that the same must be given the primary importance before other conditions are proved.

33. On the available evidence also, this Court cannot come to a different conclusion from the one arrived at by the Authorities below. The authorities below, believing the evidence of P.Ws. 1 and 2, came to the conclusion that the building requires immediate demolition and reconstruction. Portions of the building are supported by casuarina posts. The Statutory Authority, namely, the Corporation of Madras, has also issued notice. At the same time, the Engineer's Report produced by R.Ws. 1 and 4 were not believed. Though R.Ws. 1 and 4 claim to have inspected the building in question, their reports do not say anything about the presence of casuarina posts, the presence of which is admitted even by the tenants. So, it is clear that these reports must have been procured by the tenants, so that they can continue as tenants of the building for some more period. The question whether the building requires demolition and reconstruction is a pure question of fact, and the authorities below have entirely discussed the evidence in that case and have come to a definite conclusion.

34. Learned Counsel for the petitioners (tenants) brought to my notice my own decision reported in C. Rajagopal Vs. Mrs. Mallika Begum, . In that case, I said that when there are two conflicting reports, it is better to appoint an Advocate Commissioner who will file a report with the assistance of an engineer. The facts of that case are entirely different. In this particular case, there is independent evidence regarding the physical condition of the building apart from the Engineer's Report prepared by P.W. 2. It is not a case of accepting one report and rejecting the other. Therefore, the decision reported in C. Rajagopal Vs. Mrs. Mallika Begum, has no application to the facts of this case.

35. In this case, the financial capacity of the landlords to demolish and reconstruct the building in question is not in doubt. He has obtained plan and licence, and has also proved the importance of the locality where the building is

situated. When we take all these circumstances into consideration, it cannot but be held that the building requires immediate demolition and reconstruction. In this connection, it may not be out of place to point out one more circumstance, namely, that even the tenant in R.C.O.P. No. 5510 of 1982 (petitioner in C.R.P. No. 2064 of 1988), after the filing of the revision, has agreed with the land lords to surrender vacant possession of the building in his occupation. That also proves the bona fides of the landlords when they put forward a claim that the building in question requires demolition and reconstruction, though I am not resting my conclusion on that agreement.

36. In the result, all the civil revision petitions are dismissed, however, without any order as to costs.

37. After pronouncement of the order, learned Counsel for the petitioners requested for time to vacate the premises. Learned Counsel for the landlord was also heard. Learned Counsel for the petitioners agree that their clients will file affidavits of undertaking to vacate the premises unconditionally. Accordingly, the tenants are directed to file an affidavit of undertaking within three weeks from today to the effect that they will surrender vacant possession to the landlord within four months from today. In case the affidavits are not filed within the stipulated time, landlord is at liberty to get possession of the building irrespective of the time granted.