

(1971) 03 DEL CK 0006

In the Delhi High Court

Case No : Second Appeal No. 246D of 1964

Hazari Lal and Others

APPELLANT

Vs

Giasi Ram and Others

RESPONDENT

Date of Decision : 30-03-1971

Acts Referred:

Citation : (1972) 8 DLT 85 : (1971) 1 ILR Delhi 347

Hon'ble Judges : T.V.R. Tatachari, J; Narain Andley, J

Bench : Division Bench

Advocate : G.N. Aggarwal and A.C. Sehgal, for the Appellant;

Judgement

S.N. Andley, J.

(1) This second appeal under the Delhi Rent Control Act, 1958, hereinafter referred to as "the. Rent Act", has come before us upon a reference by one of us (Tatachari J.) to determine the exact scope of the expression "otherwise parted with the possession" used in clause (b) to the proviso to sub-section (1) of section 14 of the Rent Act. The question has arisen in the circumstances set out hereinafter .

(2) The appellants are the landlords of House No. 946, Ward No. 8. Gali Nai Basti, Kucha Pati Ram, Delhi, wherein respondent No. 1 was a tenant of three rooms and two Kothries on the ground floor at a rental of Rs. 16.97 per month. The appellants filed a petition for the eviction of respondent No. 1 from the aforesaid tenancy premises on the ground that respondent No. 1 had not paid the arrears of rent from December 1, 1959, till the end of March, 1961; that respondent No. 1 "is suitably accommodated in Vinay Nagar, New Delhi, where he is residing permanently from more than a year" and that respondent No. 1 had sublet the tenancy premises to respondents Nos. 2 to 4 (Chanda Lal; Pandit Ranjit and Suba Rao respectively) without the consent of the appellants for about a year. The arrears of rent were deposited in the Court under the provisions of the Rent Act and the question of eviction on the ground of non-payment of

arrears of rent did not survive before the Rent Controller or the Rent Control Tribunal and docs not survive here. The petition for eviction was contested only by respondent No. 1. On the question of sub-tenancy, the case of respondent No. 1 was that he himself was occupying the premises and that no other person was in possession thereof as a sub-tenant. Respondent No. 1 also denied that he had any other place where he could live as of right. In the additional pleas, respondent No. 1 stated that respondent No. 2 (Chanda Lal) was the real brother-in-law of his son and respondent No. 3 (Pandit Ranjit) was his cook. It was further stated that respondent No. 2 had been living with respondent No. 1 for the last five years as his relative. It was denied that respondent No. 4 (Suba Rao) ever resided with respondent No. 1.

(3) Before the appearance of the respondents in the Court of the Rent Controller, the appellants filed an application under Order 26 of the CPC to ascertain who was in possession of the property in suit. Notice of this application was ordered to issue for a date fixed in the main petition. At the same time the Rent Controller appointed Mr. P. C. Mital, Advocate, as Local Commissioner "go to the spot and after inspection report as to who is in occupation of the premises in dispute. His fee is fixed Rs. 30 -". In pursuance of this order the Local Commissioner submitted his report (Exhibit AW.I/I) to the Rent Controller. He reported that he found respondents Nos. 2 to 4 in occupation of the tenancy premises. He further stated that on interrogation respondents Nos. 2 and 4 told him that none of the household goods in the tenancy premises belonged to the tenant respondent No. 1 who had left the premises and was living in the quarters in East Vinay Nagar, New Delhi, with his son. Shri Kishan Gupta for the last 2½ or 3 years. He further reported that respondent No. 4 was doing the agency work of a firm of the brother of respondent No. 2; that respondent No. 2 was an employee of the State Bank of India and respondent No. 3 was their servant. He further reported that respondent No. 4 was sitting in one of the rooms with some samples of cloth of carpets and respondent No. 2 was worshipping in the courtyard and respondent No. 3 was cooking food. He further reported that respondents No. 2 to 4 were found by him to be in exclusive possession of the tenancy premises and he recorded the statements of respondents Nos. 2 and 4 which were signed, by them. It will, therefore, be seen that the Commissioner not only made a report about his visual inspection of the tenancy premises to ascertain as to who were in occupation of the tenancy premises as he was ordered to do but went further and recorded the statements of respondents Nos. 2 and 4. These statements were filed with the report and were marked as Exhibit AW. 1/2 on having been proved by Mr. Mital who appeared as a witness for the appellants.

(4) The parties led oral evidence. The appellants produced witnesses of the locality to prove that respondents Nos. 2 to 4 were in occupation of the tenancy premises and that respondent No. 1 was not residing there. Respondent No. 2 appeared as a witness on behalf of respondent No. 1. He stated that he had been living with respondent No. 1 since 1956 as a relation because he was the brother-

in-law of the son of respondent No. 1. He denied that he was a sub-tenant. In his cross-examination he admitted the visit of the Local Commissioner in his presence and he also admitted his signatures on the statement Exhibit AW. 1/2 which was recorded by the Commissioner. He further admitted that respondent No. 4 (Suba Rao) was also present at the time and he also made a statement to the Commissioner. He stated that respondent was not present at the time when the Commissioner had come to the tenancy premises and that the .son of respondent No. 1 had been living in his quarter in Vinay Nagar for 2^ years. Tn his statement to the Commissioner, respondent No. 2 had it recorded that respondent No. 1 was the father of his brother-in-law who was living in his quarter in Vinav Nagar where respondent No. 1 had also been living for 2.5 years. He further stated that respondent No. 1 had left the tenancy premises where he, respondent No. 2, had been living as a guest of respondent No. I for the last 21- or 3 years and that all the goods in the tenancy premises belonged to him or to respondent No. 4. He further stated that respondent No. 1 left the tenancy premises with bag and baggage and that he was in exclusive possession of the Dalan and to Baithak and that respondent No. 4 had been living with him for the last 2.5 months.

(5) By his order dated November 19, 1963, Mr. Sudarshan Agarwal, Additional Rent Controller, Delhi, who was trying the matter found that no case of unlawful subletting in favor of respondents No. 2 to 4 had been proved on the record. In his opinion, the right of exclusive possession and enjoyment of the property should be conferred on the sub-tenant to create a sub-letting and he found that respondent No. 1 had retained the legal possession of the tenancy premises. He was, however, of the view that a case of unlawful parting with possession was made out against the respondents on the basis of the report of the Commissioner, Exhibit AW. I/I as they had been found in occupation of the tenancy premises. The Rent Controller also relied on the report of the Local Commissioner that none of the household effects lying in the premises belonged to respondent No. 1 who had been living in Vinay Nagar with his son. The Rent Controller concluded, somewhat in contradiction to his earlier finding, that the report of the Local Commissioner had established that respondents Nos. 2 to 4 were in exclusive occupation of the tenancy premises and since such occupation was without the consent of the appellants, the respondents had incurred the liability to eviction on this ground. The Rent Controller then dealt with the plea that respondent No. 1 had acquired vacant possession of a residence within the meaning of clause (h) to the proviso to sub-section (I) of section 14 of the Rent Act and held that even though respondent No. 1 had shifted to the quarter of his son. it could not be said that respondent No. 1 had acquired vacant possession of the residence in his own right. The Rent Controller noted the fact that the son of respondent No. 1 had left service and had shifted to the tenancy premises. In view of his finding as to parting with possession, the Rent Controller made an order for eviction of the respondents from the tenancy premises.

(6) Respondent No. 1 then filed an appeal before the Rent Control Tribunal,

Delhi, which was disposed of by order dated June 1, 1964. The Tribunal discussed the oral evidence which had been adduced by the parties. He then rejected the report of the Commissioner on the ground that it was not his business to record the statement of any person. The Tribunal further found that inasmuch as the appointment of the Commissioner had been made ex-parte without complying with the provisions of rule 18 of Order 26 of the Code of Civil Procedure, his report could not be looked into as evidence under rule 10(2) of the aforesaid Order. For this conclusion the Tribunal relied upon *Sasanka Sekhar Pal and Others Vs. Dinanath Gorain and Others*, . The Tribunal then found as proved from the facts on the file that respondent No. 2 was related to respondent No I being the brother-in-law of his son and was living in commensality with him and respondent No. 3 was their cook. He further found that there was absolutely no evidence on the file to show that respondents Nos. 2 to 4 were in exclusive possession in their own right of any portion of the tenancy premises. The Tribunal was of the view that "if a person resides with a tenant as a relative in commensality with him then there is no parting with the possession of the whole or part of it in his favor". He, Therefore, disagreed with the finding of the Rent Controller as to parting with possession of the tenancy premises and, allowing the appeal filed by respondent No. 1, dismissed the application for eviction.

(7) The first question that arises for consideration is whether the Tribunal was right in rejecting the whole of the Commissioner's report. The question of the value to be placed on the report of a Local Commissioner in these circumstances came up for consideration before a Division Bench of this Court (*Andley and Safeer JJ.*) in the case reported in 1970 Delhi L T 268 in re : *jamil Ahmed Taban and others v. Mst. Khair-Ut-Nisa anil others*"). In that case also a Local Commissioner had been appointed ex-parte to go to the spot and report as to who were in occupation of the premises in question. The Madras case referred to earlier and other cases were noticed and it was held that the reports of the Commissioner could not be evidence in the case under Order 26, rule 10(2) of the Code by reason of the non-compliance of the provisions of Order 26, rule 18(1). But it was observed:-

"THE reports are documents which have been produced as primary evidence and the proof by the commissioner of their execution proves their contents u/s 61 of the Evidence Act. The Commissioner appointed had to inspect the property and collect the information as required by the order of the Controller which we have held is a valid, order under clause (c) of Rule 7 of Order 39. He inspected the property and collected the information and recorded it in his reports. Then he was examined not under Order 26, rule 10(2) of the Code but as an ordinary witness and proved the two reports as having been made by him. No question was put to him in cross-examination challenging the truthfulness of the contents of the reports."

It was, Therefore, held that the reports have value and are admissible in evidence even u/s 157 of the Evidence Act. It was then observed:-

"THE only question which remains to be seen is as to which or the statements in the reports Exhibits at and A2 can be relied upon. The Commissioner was appointed only to inspect the premises and ascertain the persons who were in possession of the premises. To that extent only, the reports stand proved. The other statements relating to subletting and the time of subletting made in the reports, being beyond the scope of the order, cannot be relied upon as having been duly proved merely on the basis of the reports. The Tribunal has erred in relying merely on the reports for his conclusion that there was unauthorised subletting after the coming into force of the Act. He has not relied upon any other evidence."

Now, in the present appeal before us a similar order was passed by the Rent Controller appointing a Commissioner to go and ascertain the Persons who were in possession of the tenancy premises. The Commissioner made a report to the Court. For the reasons stated in the aforesaid Division Bench decision, the report of the Commissioner cannot be treated as evidence under sub-rule (2) of rule 10 of Order 26 of the Code as he had not given the notice required by rule 18 of Order 26 of the Code. But, the Commissioner has appeared as a witness in this case and has proved not only his own report but also the statements made by respondents Nos. 2 and 4 before him. It is true that the statement of the Commissioner with regard to subletting and exclusive possession in his reports cannot be the sole basis for the finding that there was such subletting or exclusive possession. His statement is, however, evidence u/s 157 of the Evidence Act and, Therefore, the statement in his report that there was subletting and exclusive possession has to be weighed like any other evidence Along with the other evidence on the record. The difficulty in this case is that the Tribunal while giving his finding of fact has altogether remitted from consideration the entire report of the Commissioner as already stated and has come to the conclusion that there was no parting with possession on the other evidence on the record. In so far as the statement by the Commissioner in his report that there was exclusive possession with respondents Nos. 2 to 4 is concerned, it is based upon the statements of respondents Nos. 2 and 4 recorded by him. therefore. we will have to see how far the conclusion as to exclusive possession of the Commissioner is supported by the statements of respondents Nos. 2 and 4. Respondent No. 4 has not appeared as a witness in Court but his statement before the Commissioner has been proved by the Commissioner himself and by respondent No. 2. Respondent No. 4 has stated that he had been living with respondent No. 2 for 2 to 2.5 months without paying any rent. In this statement he does not claim any exclusive possession of any particular portion of the tenancy premises. Respondent No. 2 has stated that the son of respondent No. 1 was living in East Vinay Nagar, New Delhi, in a quarter and that respondent No. 1 was also living there for 2-^ or 3 years; that respondent No. 1 had left since that time but that he was living in the premises as a guest of respondent No. 1 for the last 2.5 or 3 years. He has further stated that respondent No. 1 had left the tenancy premises with bag and baggage. He has admitted that exclusive

possession of the Dalan and Baithak was with him and that respondent No. 4 had been living with him for the last 2.5 months. A significant part of the statement is that he said that he had been using the Dar Dalan and Kothries occasionally. This statement has to be read as a whole and, in our view, the fact that respondent No. 2 has stated that he was staying as a guest of respondent No. 1, lends a meaning to his statement of exclusive possession of the Dalan and the Baithak. It has to be understood in the sense that nobody else except him and respondent No. 4 were using this portion of the tenancy premises. Respondent No. 2 had, as stated earlier, also appeared as a witness in Court. In his statement in Court also he has admitted that he had been staying with respondent No. 1 since 1956 as a guest and that respondent No. 3 was the cook. He denied the subletting and explained that respondent No. 4 used to visit him as he was the Manager of his brother's factory. Respondent No. 2 has, Therefore, stated both before the Commissioner and in Court that he was a mere guest of respondent No. 1 and he did not claim any right in himself to be in possession of the premises where he was living only as a guest. We do not find any contradiction in the two statements of respondent No. 2 and cannot, Therefore, upset the finding of fact of the Tribunal even though it was arrived at without taking into consideration the statement of respondent No. 2 made to the Commissioner.

(8) The question, Therefore, arises whether in the circumstances found, it can be urged that there was, in law, a parting with possession in favor of any of the respondents Nos. 2 to 4 and this raises the question as to the scope of the expression "otherwise parted with the possession "

(9) The first case is a decision of Kapur J. reported in 1956 D L T 28 in re: G.I). Chaudhary v. Shri Anand Sarup where it has been held that "so long as the lessee retains the legal possession of the whole of the premises he does not commit a breach of law against parting with the possession by allowing other people to use the same. A tenant cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of a right to concurrent user there is no parting with possession. Retention of a key may be a negative in dictum but nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession." What is the concept of "legal possession" has not been elaborately dealt with in this judgment. The next case is a decision of Ismail J. reported in Pragowati Devi Vs. Bhawani Shankek Basrurker, where it was held that the grant of exclusive use of one room could not amount to parting with the possession of that room. The learned Judge agreed with the view of Kapur J. in G. D. Chaudhary's case (supra). Here again the circumstances in which legal possession could be said to have been parted with have not been specified. The next case is a decision of Deshpande J. in re : Bhagwan Dass and others v. ^ Rajdev Singh and manlier .This case also proceeds on the basis that if legal possession is retained by the tenant, there is no parting with possession.

(10) Clause (b) to the proviso to sub-section (1) of section 14 of the Rent Act uses three expressions, namely, "sub-let", "assigned" and "otherwise parted with the possession" of the whole or any part of the premises without obtaining the consent in writing of the landlord. These three expressions deal with three different concepts and apply to different circumstances. In sub-letting there should exist the relation ship of landlord and tenant as between the tenant and ins sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sub-let. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression "parted with the possession" undoubtedly postulates as has been held in the cases mentioned above the parting with legal possession. As we understand it, parting with possession means giving possession to persons other than those to whom possession has been given by the lease and "the parting with possession" must have been parted with by the tenant. The mere user by other persons is not parting with possession so lone as the tenant retains the legal possession himself or in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to claim possession from his guest who does not pay him any rent or other consideration, it would not be possible to sav that the tenant has parted with possession even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the. tenant has a right to disturb the possession of his guest at any time. he cannot be said to have parted with the possession of the tenancy premises. The mere fact that the tenant himself is not in physical possession of the tenancy premises for any period of time would not amount to parting with the possession so long as, during his absence, the tenant has a right to return to the premises and be in possession thereof. A mere privilege .or license to use the whole or a. part of the demised premises which privilege or license can be terminated at the sweet will and pleasure of the tenant at any time would not amount to "parting with possession". The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession.

(11) Viewed in this light, we are unable to come to the conclusion in the circumstances of this case that there was any parting with the possession by respondent No. 1 in favor of any of the other respondents. These other respondents were in the premises at the sweet will and pleasure of respondent No. 1 and could not claim a right to possession of the premises as against respondent No. 1. We, Therefore, agree with the Tribunal that the appellants have failed to establish their case of parting with possession.

(12) It is then contended by the appellants that they are entitled to a decree of eviction under clause (d) to the said proviso which gives a right to the landlord to claim eviction of the tenant from the premise; which were let for use as a residence and wherein neither the tenant nor any member of his family has been

residing for a period of six months immediately before the date of the filing of the application for the recovery of possession. Although an averment has been made in the petition for eviction that respondent No. 1 has not been residing in the tenancy premises for about a year, all the requirements of the aforesaid clause (d) have not been pleaded. Further the case was not tried on this issue before the Rent Controller nor was any argument addressed before the Rent Control Tribunal in this behalf.

(13) Then it was contended that the appellants are entitled to eviction under clause (h) to the said proviso because respondent No. 1 had acquired vacant possession of a residence for himself. This question was raised before the Rent Controller and the appellants' argument was repelled correctly on the ground that the acquisition of a residence by the son of respondent No. 1 in East Vinay Nagar could not amount to the acquisition by respondent No. 1 of vacant possession of a residence for himself.

(14) For these reasons, we find no merit in this appeal which is dismissed. But in the circumstances of the case we make no order as to costs.