

(1980) 03 PAT CK 0009
In the Patna High Court
Case No : A.F.A.D. No. 88 of 1976

Laxmi Narayan Gauri Shankar

APPELLANT

Vs

Gopal Krishna Kanoria and Another

RESPONDENT

Date of Decision : 18-03-1980

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11
Transfer of Property Act, 1882 — Section 108

Citation : AIR 1981 Patna 137 : (1981) PLJR 54

Hon'ble Judges : M.P. Varma, J; Hari Lal Agrawal, J

Bench : Division Bench

Advocate : Kailash Roy and Chunilal, for the Appellant; Shreenath Singh, Amla Kant Chaudhary and G.C. Bharuka, (for No. 1) and M. Salabuddin Khan, (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—This second appeal is by a tenant against whom respondent No. 1 instituted a suit for eviction from a house situated in Fatna City. The suit for ejectment was instituted on the grounds of (1) personal necessity, (2) subletting to respondent No. 2, and (3) material damage caused to the building by the sub-tenant, respondent No. 2.

2. Both the courts below negated the plaintiff's case of personal necessity as well as subletting on the ground that the sub-lease was created with his consent but the third ground has been accepted and the suit has been decreed by both the courts on the ground of material deterioration in the building caused by wrongful act of the respondent No. 2, the sub-tenant.

3. The present appeal has been filed only by defendant No. 1, the head-lessee, and the sub-lessee has filed an application under Order 41. Rules 4 and 33 read with Section 151 of the CPC that in case of success of the appellant, the decree for his eviction from the premises in question should also be set aside. When the appeal was placed for hearing before a learned single Judge of this Court, it was

contended by the learned counsel for the appellant that the appellant cannot be held liable in law for the alleged act of the sub-tenant and, therefore, the decree for eviction was without jurisdiction. In view of the fact that there was no direct decision relating to a sub-lessee of a building he referred the matter to a Division Bench and accordingly the case has been placed before us for hearing.

4. I may now state, very briefly, the facts which are relevant for the points raised in this second appeal. Admittedly respondent No. 1 is the owner of the suit house which is a double-storeyed building bearing Municipal Holding No. 116, situate in Mohalla Bagh Lodan (Mirchaiganj) in the town of Patna City. The entire building was let out to the appellant-firm which is a wholesale dealer in cloth and monthly rental at the relevant time was Rs. 100/-. According to the case of respondent No. 1 the appellant inducted and sub-let to respondent No. 2, the first floor of the building without his knowledge. Admittedly respondent No. 2 was carrying a business of manufacture of ink at another place in "Yadav Market" situate quite close to the premises in suit and after his induction in the suit premises, he kept his gaddi in the first floor. But later on, on account of certain differences with his other landlord, he shifted his manufacturing unit as well to the suit premises. It is alleged that for manufacturing ink respondent No. 2 had to store huge quantities of firewood, acid, spirit and other inflammable articles in the premises and the process of manufacture emitted thick smoke from the bhatti besides gas and carbon, causing material damage to the building besides blackening the walls and being a source of nuisance to the neighbours. Respondent No. 1 on coming to know of these facts asked the appellant to get the premises in occupation of respondent No. 2 vacated, but having failed he instituted the suit, as, according to him, the appellant and respondent No. 2 both are in collusion with each other.

In its written statement the appellant controverted the allegations of respondent No. 1 and contended that respondent No. 2 was inducted in pursuance of a compromise arrived at between the parties in an earlier suit and therefore, the subletting being authorised in law, it cannot be held responsible for any act of the sub-tenant. Nonetheless, it denied the allegations of respondent No. 1 that any material damage had been caused by the sub-tenant. Defendant No. 2 did not file any separate written statement.

5. It may be mentioned that earlier respondent No. 1 had instituted a money suit in the year 1952 for recovery of arrears of rent against the appellant which ended into a compromise. It is by this compromise decree (Ext. C) "that the rent of the premises was fixed at Rs. 100/- per month and the first floor portion of the building terminable with the tenancy of the tenant". It is in pursuance of this compromise decree that the appellant sublet the first floor of the premises in question to respondent No. 2 sometime in December 1955 on a monthly rental of Rs. 50/-.

It may also be mentioned that the appellant instituted Title Suit No. 27 of 1967 against respondent No. 2 for his eviction, inter alia, on the ground that the

respondent No. 2 had "maliciously misused it and condition of the building has materially deteriorated owing to act of waste and negligence and they have committed breach of tenancy thus reserving his right to institute another suit for recovery of damages on account of injury caused to the building. The plaint of the said suit was filed by the plaintiff and was marked Ext. 3. That suit was filed about seven months before the institution of present suit by respondent No. 1. In between this period, namely, the filing of the suits by the appellant and the respondent No. 1, it is alleged that a fire broke out in the premises in occupation of respondent No. 2.

6. The trial Court recorded the following findings;

(i) The plaintiff has failed to establish that defendant No. 1 had no right to sublet the portion of the suit house, specially for manufacturing purpose.

(ii) The plaintiff has failed to establish that defendant No. 1 committed any breach of the terms of the tenancy.

(iii) The material deterioration in the condition of the suit building by the act of defendant No. 2 has been admitted by defendant No. 1 in Ext. 3.

On these findings the trial court decreed the suit.

The lower appellate court in an appeal by the appellant, recorded these findings:

(a) The premises are being used by defendant No. 2 for manufacturing ink and in that process the condition of the building has been materially deteriorated,

(b) The appellant failed to establish that respondent No. 1 had consented for letting out the premises to respondent No. 2 for manufacturing purposes.

(c) The appellant is guilty of the breach of the implied condition of the tenancy and liable for the acts resulting in the material deterioration of the condition of the building by permitting respondent No. 2 to manufacture ink.

7. Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 protected a tenant from eviction from any building in his occupation, except on one or more of the grounds mentioned therein, e. g.,

"(a) for breach of the conditions of the tenancy.

(b) where the condition of the building has materially deteriorated owing to acts of waste by, or negligence or default of, the tenant, or of any person residing with the tenant or for whose behaviour the tenant is responsible;

(c) to (e) xx xx xx xx

We have seen that both the courts below have found as a fact that respondent no. 2 has committed material deterioration in the condition of the building owing to waste and act of negligence, for which the appellant was liable in law. The lower appellate court, however, in disagreement with the trial court, has

recorded a further finding that the appellant was also guilty for breach of the implied condition of tenancy by allowing respondent No. 2 to use the premises for manufacturing ink which was injurious to the building.

8. Mr. Kailash Roy, appearing for the appellant, however contended that (1) the facts found by the courts below for recording the finding that there has been a material deterioration, did not constitute a material deterioration in law, and (2) even assuming that the facts alleged and found did constitute any material deterioration, then the appellant being not a party to those acts of damage and waste, particularly when it had already taken steps for eviction of defendant no, 2, cannot be held liable in any way.

9. I think the first argument can be very conveniently disposed of without much discussion. The argument was based on the evidence of the plaintiff's attorney, who examined himself as P. W. 5, wherein he stated that on account of the smoke and emission of other gases the walls of the building had been blackened. Learned Counsel, therefore, argued that blackening of the walls can hardly be called to be material deterioration in the eye of law as contemplated under Clause (b) of Section 11 of the Act, as that could be removed and cleared up and the walls could become tidy by re-colouring the same and the landlord if at all could claim some damages.

Mr. Shreenath Singh, learned counsel appearing for the landlord-respondent, refuted this argument and contended that P. W. 5 had also stated of the fact of material deterioration to the building and no question in cross-examination was put to him as to what did the witness mean by that statement. He further submitted that it was not open to the appellant to dispute the fact of material deterioration in the building in view of its own statement and allegations made in the plaint (Ext. 3) filed against the second respondent.

I have already quoted the relevant statements made in this regard in the plaint of the suit instituted by the appellant and would accept the argument of Mr. Shreenath Singh that in view of those averments it is not now open to Mr. Kailash Roy to raise any controversy or join issues on this question. I, therefore, would accept the finding recorded by the courts below that material deterioration has been committed to the premises in question.

10. I now proceed to examine the second contention of Mr. Kailash Roy as to whether on account of the waste and damage caused by respondent No. 2 to the premises in question, and accepting his case for the sake of argument that the appellant was not a party thereto, it can be held responsible for all those acts.

This question at once takes us to the consideration of some of the relevant provisions contained in Section 108 of the T. P. Act where the rights and liabilities of a lessor and lessee have been enumerated. The relevant clauses which are material for our present purpose are as follows:

"(1) the lessee may transfer absolutely or by way of mortgage or sub-lease the

whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:"

"(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force."

"(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased."

11. We have already seen that the premises was let out to the appellant for the purpose of carrying on cloth business and it cannot be disputed that the process of manufacturing ink is quite different and onerous. The adverse effects on the building in course of the manufacturing process which also necessitated setting up of a Bhatti, have already been noticed by the courts of fact. An ancillary question, therefore, arises namely where a lessor authorises a lessee to sublet a premises, then whether that consent would entitle the lessor to sublet the premises for an entirely different kind of user. Even assuming that the appellant was not bound to sublet the premises only for the purpose of a cloth business under the restrictions imposed by Clause (o) of Section 108, it was certainly bound to sublet the premises for the use of the property which was not destructive or injurious thereto and to exercise the same amount of prudence at the time of subletting as it was bound in relation to the user of its own property.

Mr. Kaliash Roy, however, laid emphasis on the statement made by respondent No. 1 in the plaint that respondent No. 2 was at that time carrying the manufacturing operations in the premises of the nearby "Yadav Market" and was only having his gaddi in the first floor at the time of induction and it was only subsequently that when some trouble arose between respondent No. 2 and the landlord of the "Yadav Market" that he was obliged to shift the manufacturing unit from the market and install the same in the premises in suit.

I do not think the appellant can claim any protection on this account, because it was in duty bound as to its statutory obligations, to take proper remedial measures and protective steps against respondent No. 2, the moment it found that the nature of user by respondent No. 2 had become injurious and was going to cause material deterioration to the building, but it allowed the manufacturing process to go on for several years. It seems to have taken the action against respondent No. 2 only in January 1967, after being served with a registered notice from respondent No. 1 in August, 1966, asking it to vacate the premises. The provisions of the Bihar Buildings Act have taken away the right of the tenant to give a sub-lease without the landlord's consent. The effect of the compromise decree whereby the landlord gave his consent to the appellant to sublet the

premises merely amounted to a declaration that he would not eject his tenant on the ground of sub-letting and the appellant could sub-lease the lease-hold property like a lessee under the general law as laid down in Clause (j) of Section 108 of the Transfer of Property Act. But notwithstanding such a transfer or sub-lease, the sub-lessor would always remain subject to "any of the liabilities attaching to the lease".

Mr. Kailash Roy, however, did not dispute the above proposition in principle but he attempted to make a distinction between the acts of bad faith and misfeasance of a sub-lessee to which the appellant was not a party and other acts done by him in ordinary course of business. In other words, he argued that the appellant cannot be held liable for the extraordinary behaviour of respondent No. 2 the liability for the (sic) he did not dispute. In my judgment there is no foundation in law for the ingenious distinction sought to be brought in by Mr. Roy. If the liability is attached to him in law for the acts of misconduct and bad faith then the liability must apply a fortiori, as a matter of public policy, just like for all the acts of the members of his own family, servants and employees for the extraordinary behaviour of the sub-lessee. To a question put by the Court as to whether the appellant could escape liability for the extraordinary behaviour of its own servants, employees etc. with respect to the premises under its own occupation, counsel under constraint had to concede that the appellant was squarely liable. The provisions of Section 11(b) of the Buildings Control Act is very clear in this regard. It is, therefore, difficult, to conceive as to how, in view of the clear and express stipulations under Clause (i) of Section 108, the appellant could escape the consequences and the liabilities of its sub-lessee, namely, respondent No. 2, particularly when there was an implied covenant that no act of waste negligence or default by the tenant himself or of any person residing with him or for whose behaviour he is responsible, would be committed which will cause material deterioration to the building. For the discussions to be made hereinafter and some authorities which I shall notice, it is not possible for me to make out a distinction between the behaviour of a sub-tenant and that of the tenant himself or of persons residing with him. The law under Clause (b) of Section 11 of the Buildings Control Act as well as that contained in Section 108(i) of the T. P. Act makes the tenant personally liable and responsible for the behaviour of a sub-tenant and he cannot be permitted to contend that his liability on account of the acts of misconduct of the sub-lessee would cease. In the Halsbury's Laws of England (3rd edition) "liabilities of tenant and assignee" to the landlord have been very succinctly stated at page 651 of the 23rd volume as follows:

"1367. Tenant's liability to landlord on covenants.

The assignment of the lease does not prejudice the personal contract between the tenant and the landlord, and accordingly the tenant remains liable on the covenant for payment of rent and the other covenants on his part contained in the lease unless the lease otherwise provides; but as regards covenants which

run with the land, the assignee also becomes liable to the landlord by reason of privity of estate. . ."

The present is not a case of an out and out assignment of the leasehold interest in favour of the sub-lessee, respondent No. 2, so as to throw the burden of the liability upon him. Had it been a case of assignment, then only the landlord had a concurrent remedy against the assignee for the rent and on the covenants running with the land. The remedy as against the tenant is founded on privity of contract: and as against the assignee on privity of estate. In such cases the landlord may sue either the tenant or the assignee or both at the same time; but he can have only one satisfaction.

On the facts it is clear that no privity of contract existed between respondent No. 1 and respondent No. 2 and in such circumstance the interest of respondent No. 2 in the leasehold being co-extensive with that of the appellant, no estate in favour of respondent No. 2 came into existence. This Court on "two occasions, namely, in the cases of (1) Protap Chandra Singh Vs. Nibaran Kumar Mitra and Another, and (2) Md. Zamiruddin and Others Vs. Mrs. Fatima Ahmad and Others, relying upon the decision of the Supreme Court in the case of Rup Chand Gupta Vs. Raghuvanshi Private Limited and Another, has held that in a suit for ejectment of the lessee, the sub-lessee was not a necessary party and the decree passed against the lessee was binding on the sub-lessee. In the case of a sub-lease the sub-lessee becomes a tenant of the lessee and does not stand in the lessee's place. Therefore, there is neither privity of estate nor privity of contract between the head-lessor and the sub-lessee and a sub-lessee is not liable for rent nor on the covenants in the head-lease to the head-lessor (see *South of England Dairies Ltd. v. Baker* 1906 2 Ch 631. This court also in the case of *Dr. S. M. Usman v. Muhammad Sulaiman* 1953 BLJR 586 held that the provisions of the Buildings Control Act apply as between a tenant and a sub-tenant of a building, inasmuch as the term "landlord" did not suggest that the landlord must be the proprietor or the owner of the building. The appellant has already, in exercise of the above power, instituted a title suit against respondent No. 2 vide Annexure 3 as already said earlier. The whole, emphasis of Clause (i) of Section 108 of the Transfer of Property Act is that the lessee by transferring the whole or part of his interest does not absolve himself from his contractual liabilities to the lessor. Even a notice of the transfer does not affect his liabilities. Unless, therefore, a privity of estate is founded between the head-lessor and the sublessee, the liability of the lessor continues.

The independent status of the sublessee was again recognised by the Supreme Court in the case of *Karam Singh Sobti and Another Vs. Shri Pratap Chand and Another*, where it was held that, the sub-tenant alone can appeal in his own right against the decree, even though the tenant decides not to file an appeal and, therefore, he has got independent right to have the decree set aside, although thereby the tenant would also be freed from that decree. Perhaps labouring under this impression respondent No. 2 has filed an application for a relief under

Rules 4 and 33 of Order 41 of the Code, as already referred to earlier.

12. From the above discussions, it is clear that the privity of contract in the case of a sub-tenancy under the Buildings Control Act between the tenant and his sub-tenant remains exclusively between them and the tenant cannot be heard to contend that he will not be liable or responsible for the behaviour of his sub-tenant to the landlord and that in case of breach of any of the conditions of the tenancy or for causing any material deterioration in the condition of the building or for any act of waste by negligence or default, it was the tenant who alone was entitled to take an action for the eviction of the sub-tenant and the landlord could not on his own take action for the eviction of the sub-tenant himself on the aforesaid grounds.

13. Mr. Kailash Roy also advanced an ancillary argument and that was that every waste or deterioration to the building was not enough to entitle the landlord to terminate the tenancy and eject the tenant as the landlord is required not only to prove an act of waste on the part of a tenant but also to prove that the said Act is likely to impair materially the value or utility of the house. There is a body of authorities on this line no doubt, and Mr. Roy also cited the cases of Smt. Savitri Devi v. U. S. Bajpai AIR 1956 Nag 60 Sadhu Venkayya and Another Vs. Colla Meenakshamma, and P. Damodaram v. K. Loganatha Chettiar AIR 1956 Mad 54 and contended that in any view of the matter the plaintiff was not entitled to a decree for eviction and, if at all, he can claim some damages.

This argument has no application to the facts and the circumstances of the present case for the simple reason that both the courts have concurrently held that there has been material deterioration to the building in question. It has already been seen that the appellant itself in the suit instituted against respondent No. 2 has de served its right to sue for damages on account of the injury caused to the building. Material deterioration is a question of fact and the learned counsel for the appellant cannot be heard to say, in a second appeal as to whether a par ticular deterioration was material or not, as it was not a question of law. It was observed by a Bench of the Cal cutta High Court in Kanti Chandra Banerjee v. Prenati Sarkar 67 C WN 617 that a material deterioration remains in fact material deterioration and cannot by law become legally im material and to say in second appeal that the finding is not right is really to behind a finding of fact. The right to claim damages, therefore, for the waste and material deterioration stands apart to sue the tenant for eviction on that ground, as that is a ground enumerated in Section 11 (1) of the Buildings Control Act for eviction of a tenant.

14. I, therefore, do not find any merit in this appeal and would dismiss the same with costs.

M.P. Varma, J.

I agree.