

(2012) 08 RAJ CK 0139
In the Rajasthan High Court
Case No : Civil Second Appeal No. 284 of 2007

Malchand and Another

APPELLANT

Vs

The Deedwana Industrial Corporation, Deedwana

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Citation : (2012) 08 RAJ CK 0139

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : S.C. Maloo, for the Appellant; Sunil Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—The present second appeal of the defendants - tenants is directed against the judgment and decree dtd.5.5.2007 passed by the learned Additional Dist. Judge, Deedwana in Civil Appeal No. 34/2002 - The Deedwana Industrial Corporation V/s Mal Chand and anr. whereby the learned Additional Dist. Judge, Deedwana allowed the appeal and set aside the judgment and decree dtd.4.9.2002 passed by the learned Civil Judge (S.D.), Deedwana in Civil Original Suit No. 78/2001 - The Deedwana Industrial Corporation V/s Mal Chand and anr. whereby the eviction suit filed by the plaintiff - landlord for eviction and recovery of arrears of rent was rejected by the learned trial Court. The case of the plaintiff - respondent - landlord is that it had given shop in question situated at Sadar Bazar, Deedwana on rent to the appellants - tenants Mal Chand and Mahaveer Prasad on 1.1.1995 at Rs. 50/- per month. It was alleged that the defendants have not paid any rent for last six months and therefore, they are defaulter. It was also alleged that in the month of February, 2000, the defendants had put a iron shutter gate and furniture in the shop which amounted to material alteration in the suit property. It was alleged in the plaint that the defendants have further sublet the said suit shop to Chandra Prakash Sarda and he has started his business by the name of M/s Tirupati Garments w.e.f. 8.3.2000 and in this regard the plaintiffs produced Ex.3 Invitation card for the inauguration of the

said shop and Pamphlet (Ex.4) which does not bear the names of Mal Chand and Mahaveer Prasad, the original tenants, but only of sub-lettee Chandra Prakash Sharda.

2. The learned trial Court vide judgment and decree dtd.4.9.2002 rejected the suit of the plaintiff - landlord holding that the plaintiffs have failed to prove subletting by the original tenants in favour of Chandra Prakash Sharda and giving the benefit of first default, the suit filed by the plaintiffs was dismissed.

3. Against the judgment and decree dtd.4.9.2002, the plaintiffs preferred the first appeal and the learned first appellate Court vide judgment and decree dtd.5.5.2007 allowed the appeal on the ground of subletting and directed eviction of the defendants within two months.

4. The learned counsel for the defendants - appellants -tenants Mr. S.C. Maloo submitted that from the evidence available on record, it is not established that the defendants have sublet the suit shop to Chandra Prakash Sharda. Chandra Prakash was merely an employee of the defendants - tenants. Mr. S.C. Maloo further averred that Ex.4 Pamphlet as well as Invitation card bore the name of original tenant Mahaveer Prasad Lohiya, though cover-up envelop does not bear his name. He, therefore, submitted that unless parting with exclusive possession in favour of sub-lettee Chandra Prakash Sharma was proved, the learned Appellate Court could not reverse the findings of learned trial Court in this regard. Therefore, the findings of learned lower appellate Court regarding subletting are perverse.

5. On the other hand, the learned counsel for the respondent - landlord Mr. Suresh Shrimali supported the impugned judgment and decree of the learned trial Court and submitted that the findings of facts about subletting do not give rise to the substantial questions of law and the appeal deserves to be dismissed. Drawing attention of the Court towards proof of subletting produced by the plaintiff - landlord Ex.3 Invitation Card of sublettee's firm M/s Tirupati Garments, he submitted that Ex.4 curiously is printed in the name of sublettee Chandra Prakash Sharda, but somebody has affixed ink seal of the name of original tenant Mahaveer Prasad Lohiya also later on purportedly showing his control over the firm of the sublettee Sh. Chandra Prakash Sharda. He submitted that there is no case of any partnership between the original tenants Mahaveer Prasad Lohiya and Mal Chand and sublettee Chandra Prakash Sharda set up by the defendants and from the statements of witnesses also recorded by the learned trial Court, it was clear that the suit shop in question was handed over exclusively to the sublettee Chandra Prakash Sharda and claim of the defendants that he was merely an employee of the original tenants was a sham defence. Mr. Suresh Shrimali submitted that the evidence cannot be reappreciated in the second appeal and the issue No. 3 has rightly been decided in favour of the plaintiff - landlord by the first appellate Court, whereas the learned trial Court had clearly fallen into error. No consent or written agreement by the landlord in favour of sublettee was ever produced by the defendants. He, therefore, submitted that

the second appeal of the defendants - tenants involves no substantial question of law and therefore, the same deserves to be dismissed by this Court.

6. The learned counsel for the appellants - tenants Mr. S.C. Maloo relied upon the decision of Hon''ble Supreme Court in the case of Gopal Saran Vs. Satyanarayana, wherein the tenant additionally carried on the business of putting up advertisement boards of customers on terrace of demised shop and some amount was charged from from such customers and nobody was given right to put up boards. The Hon''ble Supreme Court held that there was no assignment or subletting or parting with the possession and mere occupation is not sufficient to infer either sub-tenancy or parting with possession.

The facts of the said case are distinguishable from the facts of the present case, where exclusive possession has been handed over to sub-lettee Chandra Prakash Sharda who has opened his own business in different name of M/s Tirupati Garments and no evidence worth the name has been produced on record to show the inter relationship of original tenants and sub-lettee except the self serving affidavit of couple of persons, which have rightly not been believed by the appellate Court below while returning the findings of facts in favour of the plaintiff - landlord.

7. Mr. S.C. Maloo, learned counsel for the defendant -tenant also relied upon the decision of this Court in the case of Jamna Lal V/s Abdul Rehman reported in (2007) WLC (UC) 62, wherein a person was allowed to work as tailor in outside portion of the shop while the original tenant retained the exclusive possession of the shop in question, this Court held that there was no sub-tenancy.

The facts of the said case are also clearly distinguishable from the facts of the present case and hence this judgment is of little avail to the defendants - tenant in the present case.

8. In the case of M/s. Delhi Stationers and Printers Vs. Rajendra Kumar, the Hon''ble Supreme Court held that subletting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. Parting of legal possession means possession with the right to include and also a right to exclude others and mere occupation is not sufficient to infer either sub-tenancy or parting with possession.

In the said case also, the alleged sub-tenant was brother-in-law of the tenant and was also employed by him and the Court found that mere user of kitchen and latrine in occupation of the property by the said brother-in-law would not mean that the tenant had transferred exclusive right to such subtenant.

The facts of the said case is distinguishable from the facts of the present case as it was a case of residential house, whereas in the present case, a shop earlier in occupation of original tenants Mal Chand and Mahaveer Prasad has been handed over to the sub-tenant Chandra Prakash Sharda who started his own business and no documentary evidence has been brought on record by the defendants -

tenants to show any common legal relationship between the original tenants and sub-lettee. Therefore, the judgments relied upon by the learned counsel for the appellants - defendants are not of any help to him.

9. On the other hand, Mr. Sunil Mehta, learned counsel for the respondent - plaintiff - landlord has relied upon the following judgments in support of his submissions:

i) Bhagwan Singh and anr. V/s Smt. Vimla Devi - SBCSA No. 22/2009 decided on 16.7.2012.

ii) Chain Singh V/s Mahendra - SBCSA No. 114/1997 decided on 4.8.2011.

iii) M/s Chikku Motors V/s Kaplu Ram reported in (2009) 1 DNJ 407

10. In the case of Chain Singh V/s Mahendra (supra), this Court has observed as under:

12. Having heard learned counsels for the parties, this Court is of the considered opinion that there is no force in the present appeal of the defendant-appellant and the learned trial court has rightly come to the conclusion that it was a case of subletting by the original tenant, Chain Singh in favour of sublettee, Prem Singh. No evidence of partnership was brought before the learned courts below, which could be only in the form of a written instrument duly registered under the Partnership Act. Even if assuming for arguments sake that oral partnership was there, no Books of Accounts for sharing of profit equally by them and mutuality of acting on behalf of other, was proved before the learned courts below. Mere close relations of two, cannot be held to be a case of implied partnership. The sublettee, Prem Singh was admittedly running a "Pan" shop near the suit premises. The parting of possession to the exclusion of the original tenant thus was proved by the plaintiff-respondent in the present case and, therefore, the eviction decree deserves to be up-held. The substantial questions of law are thus answered in favour of plaintiff-respondent and against the defendant-appellant-tenant.

11. In the case of M/s Chikku Motors (supra), this Court has held as under :

7. Having gone through the impugned judgment of first appellate Court, this Court is of the opinion that the eviction decree passed by the first appellate Court reversing the trial court's judgment does not require any interference. The findings of first appellate Court of subletting in favour of present defendant holding that the partnership was merely a camouflage and false defence appears to be correct. The original tenant Ramesh Patel had admittedly shifted to London way back in the year 1985-86 itself and never returned. At least he never appeared before the trial Court to depose. No evidence was produced before the trial Court to establish such partnership, so much so that said partnership was not even registered with the Registrar of Firms. This was not disputed even by the learned Counsel for the appellant defendant. The fact that present appeal has been filed by one Chittarmal as power of attorney holder of original tenant

Ramesh Patel also shows that Ramesh Patel has no interest in the said partnership business and said partnership deed was drawn up merely to provide a cover and to make believe that original tenant had not parted with the possession of suit premises in favour of present appellant.

12. Having heard the learned counsel for the parties and having perused the record of the case, this Court does not find any substantial question of law to be arising in the preset second appeal of the defendants - tenants. The findings of facts about subletting recorded by the learned first appellate Court about subletting are based on relevant evidence and do not give rise to any substantial question of law. Ex.3 invitation card and Ex.4 pamphlet do not bear the name of the defendants - original tenant. Not only this, the said documents bear the telephone number of Chandra Prakash Sharda only. Therefore, it has rightly been held by the learned first appellate court that the original tenants have sublet the suit shop to Chandra Prakash Sharda.

13. Accordingly, the present second appeal of defendants is found to be devoid of merit and the same is accordingly dismissed. No order as to costs. The appellants-defendants-tenants shall hand over the peaceful and vacant possession of the suit property viz. shop in question to the respondent-plaintiff within a period of six months from today i.e. on or before 28th February, 2013 and shall pay mesne profit @ Rs. 3,000/- per month commencing from September, 2012 and will further continue to pay the mesne profit each month by 15th day of the next succeeding month or in advance to the respondent also and in case there is any default in payment of mesne profit, the period of six months for eviction shall stand reduced and the decree of eviction would become executable forthwith. The defendants shall also clear all the arrears of rent and mesne profit and pay the same to the plaintiff within three months from today, otherwise the same will bear interest @ 9% per annum. The tenants shall also not sub-let, assign or part with the possession of the suit premises or any part thereof in favour of any one else and would not create any third party interest in the same during the aforesaid period and if it is so done, the same would be treated as void. The appellants-defendants shall furnish a written undertaking incorporating the aforesaid conditions in the trial court within one month and one copy thereof along with affidavit, in this Court. It is made clear that if the peaceful and vacant possession of the suit shop is not handed over to the respondent-landlord within a period of six months from today or mesne profits are not paid as directed above, besides the expeditious execution of the decree in normal course, the respondent-plaintiff shall also be entitled to invoke the contempt jurisdiction of this Court. A copy of this judgment be sent to both the learned courts below and both the parties forthwith.