

(2011) 07 MAD CK 0474

In the Madras High Court

Case No : C.R.P. (N.P.D.) No's. 1544 and 1545 of 2009

Rajendra Kumar Jain and Others

APPELLANT

Vs

S. Jaikrishnan

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 22(2)

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(2), 21, 25

Transfer of Property Act, 1882 — Section 108

Citation : (2012) 3 MLJ 434

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : N.D. Bahety, for the Appellant; C. Jagdish, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—These two Revision Petitions are directed against the order dated 17.2.2009 in R.C.A. Nos. 942 and 735 of 2011 on the file of the Rent Control Appellate Authority whereby and whereunder, while setting aside the dismissal of the eviction petition on the ground of different user, the Appellate Authority passed an order of eviction on the ground of different user and confirmed the finding with respect to sub-lease. The Facts:

The building which is the subject matter of the rent control proceedings was taken on lease by the first petitioner (hereinafter referred to as "Tenant") with effect from 1.4.1993 for the purpose of conducting a General Provision Stores. The tenant was paying a monthly rent of 4,000/-. Subsequently, the respondent became the landlord.

2. While the matters stood thus, the respondent (hereinafter referred to as "the landlord"), by invoking Section 10(2)(ii)(a) and 10(2)(ii)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, (for short, "the Rent Control Act"),

initiated eviction proceedings in R.C.O.P. No. 1937 of 2003 on the ground of sub lease and different user.

3. The landlord contended that the Tenant has parted with the physical possession of premises and it was given to the second petitioner and as such, he has no interest whatsoever in the business carried on in the name of Arihant General Stores. The landlord further contended that the Tenant permitted the third petitioner to conduct pani puri business in the tenanted portion and thereby, parted with physical possession. It was also contended that the business in pani puri would amount to different user and as such, tenant is liable to be evicted on the ground of different user. Accordingly, the landlord prayed for an order of eviction on the ground of sub-letting and different user.

4. The tenant in his written response disputed the contention of the landlord with regard to sub lease and different user. According to the tenant, the second petitioner, who is none other than his brother, has been assisting him in running the business. It was his contention that he is attending to his business at Anna Nagar and Mint Street and he has not parted with possession of the rented premises in favour of petitioners 2 and 3. Eviction on the ground of different user was also contested, as according to the Tenant, pani puri is an ancillary business and the third petitioner was his employee. Accordingly, Tenant prayed for dismissal of the eviction petition.

The Judgment under revision:

5. The learned Rent Controller initially took up the issue as to whether Arihant General Stores is a proprietary or a joint family business. The landlord contended that the business was conducted only by the second petitioner. The Rent Controller concluded that the landlord has proved the initial burden. According to the Rent Controller, Tenant has not adduced any valid and cogent evidence to discharge his burden as to whether it was a partnership or a proprietary concern. In the cause title, the tenant was described as the Proprietor of Arihant Stores. The said description was not objected to by the Tenant. The learned Rent Controller opined that what was stated in Exhibit R-1 with regard to the nature of business was not conclusive proof. The non explanation with respect to the status of Arihant General Provision Stores made the learned Rent Controller to accept the case of sub lease.

6. The eviction petition on the ground of different user was not accepted by the Rent Controller and accordingly, the case of the landlord was negated. In short, the Rent Controller passed an order of eviction on the ground of "sub lease" and rejected the request on the basis of "different user".

7. The order of eviction dated 5.7.2004 was challenged before the Appellate Authority in R.C.A. Nos. 942 of 2004 and 735 of 2005.

8. The Appellate Authority observed that the tenant has not produced any document to prove as to whether Arihant General Stores is a partnership

business or a proprietary one. According to the Appellate Authority, in case the business was conducted as a proprietary one and the second petitioner was only assisting the tenant, he should have produced the ration card to show that the second respondent was a member of Hindu undivided family. The Appellate Authority further held that in case the Tenant and his brother were living as undivided family and the business is a partnership firm, naturally, the second petitioner must be a partner. However, the partnership deed was not produced before the Court. Therefore, the second petitioner has to be treated as a sub lessee. Accordingly, the Appellate Authority concurred with the views expressed by the Rent Controller.

9. With respect to the ground "different user", the Appellate Authority concluded that pani puri is a cooked food and the same was not connected with general provision. Therefore, the Appellate Authority opined that it was nothing but a different user within the meaning of Section 10(2)(ii)(b) of the Act. In short, the Appellate Authority ordered eviction on both the grounds.

Rival Submissions:

10. The learned counsel for the tenant contended that the second petitioner is the brother of the tenant and as such, he was only assisting him in the business. Presence of the second petitioner in the premises cannot be taken as an indication to conclude that he was a sub lessee. According to the learned counsel, even the landlord has very clearly admitted in Exhibit R-1 about the partnership and therefore, the Rent Controller and the Appellate Authority grievously erred in their conclusion about the non production of evidence to show the existence of partnership. The learned counsel further contended that making pani puri cannot be termed as a different user, unrelated to the General Provision Store and as such, the finding rendered by the Appellate Authority was nothing but perverse.

11. The learned counsel for the landlord justified the order passed by the Court below.

According to the learned counsel, the act of sub lease is a secret affair and as such, there would be no direct evidence. The Court has to consider the case in its entirety. The finding of fact arrived at on the basis of the facts and circumstances of the case does not warrant interference in a revision u/s 25 of the Act.

Analysis:

12. The building in question was taken on lease by the tenant. The Tenancy was not reduced into writing. Exhibit R-1 shows that it was given for the purpose of conducting a general provision store in the name and style of "Arihant General Stores". Exhibit R-1 indicates that the provisional store is a partnership firm. However, no weight could be attached to the said statement in view of the non-production of Partnership Deed by the Tenant. In any case, the Tenant has not pleaded in his counter statement or in his evidence that Arihant General Stores is

a partnership and the second petitioner is his partner.

Sub Lease:

13. The moot question is whether the landlord has proved the act of sub lease on the basis of legal evidence.

14. The landlord in his rent control original petition contended that the Tenant has parted with the physical possession of the tenanted portion to the sub tenant - second petitioner herein and that he is now carrying on business in the name of Arihant General Stores. It was his further contention that the Tenant has no interest whatsoever in the business and he is running another stores in the name and style of Motilal Bikaneri Mittai at Mint Street, Chennai. When the landlord was examined as P.W.1, it was his evidence that he has not produced any document to show the sub lease. During the time of his cross examination, the landlord stated that he visited the store about 114 months before and on another occasion also, he went there and that was about two or three months earlier and it was for the purpose of purchasing certain provisions. It was his further evidence that the Tenant is not coming to the shop and he has sub-let the premises. Other than this pleading and oral evidence, there is nothing on record to support the case of the landlord with regard to sub-lease.

15. The Tenant maintained that the second petitioner is his brother and he was only assisting him in his business. The Tenant further admitted that his elder brother assists him to conduct the business at Mint Street. Neither in the pleadings nor in his evidence, Tenant has taken up the case of partnership. The evidence proceeds on the basis that Arihant Provision Stores is a proprietary concern and the second petitioner, who is none other than the member of the family, has been assisting him in conducting the business.

16. The issue now is whether the Tenant was guilty of parting with exclusive possession of the premises in favour of the second petitioner.

17. When eviction is sought on the ground of sub lease, the initial burden is always on the landlord. The landlord should prove the exclusive possession of the premises by the Tenant. So long as the Tenant retains legal possession, it cannot be said that he was guilty of sub-lease. There should be exclusive possession. Exclusive possession must comprise possession as well as legal possession. Merely because physical possession is with a stranger, it cannot be said that a case of sub-lease is made out, unless it is proved that the sub-tenant is in legal possession also.

18. The word "Legal possession" was interpreted by the Supreme Court in Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others, as possession with the right to include and also the right to exclude others.

19. Though the initial onus is on the landlord to prove the exclusive possession by the stranger, it would shift to the Tenant in case the landlord is in a position to produce prima facie materials to prove the sub tenancy created by the Tenant. It

is rather a cumbersome process to prove the act of sub-lease. At times, there would be no evidence to prove the tenancy though in reality, the Tenant might have transferred the premises and the building is in the possession of a total stranger. Some times, there would be partnerships and the Tenant also would be a partner. So long as the partnership is genuine, it cannot be said that there is a sub-lease in favour of the other partners. In case the partnership was a camouflage or a smoke screen to suppress the sub lease, and there are other materials to show that the Tenant had parted with legal possession, it would constitute a ground for eviction. Therefore, the issue of sub-lease is essentially a question to be decided on the facts and circumstances of a given case.

Supreme Court on Sub-Lease:

20. In *Ms. Celina Coelho Pereira and Others Vs. Ulhas Mahabaleshwar Kholkar and Others*, the Supreme Court considered Section 22(2)(b)(i) of the Goa, Daman and Diu Rent Control Act. The said Act is akin to Tamil Nadu Buildings (Lease and Rent Control) Act. The Supreme Court after analyzing the earlier judgments with respect to sub-letting, summarized the legal position thus:

25. The legal position that emerges from the aforesaid decisions can be summarised thus:

(i) In order to prove mischief of sub-letting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by the tenant in favour of a third party with exclusive right of possession, and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to sub-letting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the Court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.

(iii) The existence of deed of partnership between the tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

(iv) If the tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.

(v) Initial burden of proving sub-letting is on the landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to the

tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on the landlord would stand discharged by adducing prima facie proof of the fact that a party other than the tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.

21. While considering the question of sub-lease under the Jagdish Prasad Vs. Smt. Angoori Devi, the Supreme Court observed that merely from the presence of the person other than the Tenant in the premises, sub-lease cannot be presumed.

22. The Supreme Court in Dipak Banerjee Vs. Lilabati Chakraborty, held that to constitute sub-tenancy, the alleged Tenant should be in exclusive possession. It was further held that right to possess the premises must be in lieu of payment of rent or some contribution.

23. However, in Joginder Singh Sodhi Vs. Amar Kaur, the Supreme Court observed that the proof of mandatory consideration by the sub Tenant to a Tenant is not sine quo non to establish sub letting.

24. The landlord has not produced documentary evidence to prove sub letting. His basic contention relates to the presence of second petitioner in the subject premises. Though the landlord has stated in his eviction petition that the building is in the physical possession of the second petitioner, in his evidence, the landlord has not disputed the relationship between the Tenant and the second petitioner. Even according to the landlord, he went to the premises only twice and on those two occasions, the second petitioner was found there. Merely because the second petitioner was found in the subject premises, it cannot be said that there was an act of sub lease.

25. The Rent Controller placed reliance on certain circumstances to arrive at a finding that there was an act of sub lease. Advocate notice sent to the Tenant was returned with postal endorsement "refused". However, it was served at his business premises at Mint street. Mere refusal to accept the notice at the tenanted premises alone cannot be taken as a material to prove the exclusive possession by the second Respondent or that the Tenant has parted with possession of the premises.

26. The Appellate Authority accepted the case of the Tenant that the second petitioner is his brother. The document in Exhibit R-3, was accepted as proof indicating the relationship between the Tenant and the second petitioner. However, the defence taken by the Tenant that the second petitioner was only assisting him was negatived on the ground that he has not produced the ration card to show that the second petitioner is a member of Hindu undivided family. When it is made out that the second petitioner is the brother of the Tenant and he was assisting the Tenant in conducting business and in the absence of any

further proof to show that the exclusive possession was with the second petitioner, the Rent Controller grievously erred in its finding that there was an act of sub-lease.

27. The Appellate Authority was also of the opinion that the failure to produce the ration card and the income tax returns confirmed the case of exclusive possession of the premises by the second petitioner. The Appellate Authority proceeded on the basis that if the explanation offered by the Tenant for the presence of a stranger is not satisfactory, the Court will be justified in holding that it was a case of unauthorized sub lease. In short, the Appellate Authority proceeded on the basis of inference and arrived at a conclusion that the tenancy was transferred in favour of the second petitioner. However, the Appellate Authority failed to consider the fact that the Tenant at all point of time maintained that the second petitioner is none other than his brother, and he was assisting him in his business and there was no act of sub lease as alleged by the landlord.

28. Therefore, in the absence of any evidence to show the exclusive possession of the building by the second petitioner, the authorities below erred in arriving at a conclusion regarding sub lease. Therefore, I am inclined to set aside the finding with regard to sub lease.

Different User:

29. The landlord claimed eviction on the ground of different user, as according to him, though the building was given for the purpose of conducting "provision stores", the Tenant has been doing business in pani puri through the third petitioner and as such, he is liable for eviction.

30. The Rent Controller found that there was change of use, as according to him, the business in pani puri cannot be considered as a business different from the business for which the building was let. Accordingly, the eviction sought on the said ground was negated.

31. The Rent Control Appellate Authority observed that pani puri is a cooked food and it is not connected with the general provision stores. It was only on the basis of the said reasoning that eviction on the ground of different user was granted.

32. Exhibit R-2 marked on the side of the Tenant clearly shows that the building was given on lease for conducting General Provision Stores. It was not one confined to provision store. It was a general provision store. It is true that pani puri is a cooked food. However, it cannot be said that it was not part of the business in general provision store.

33. The presence of eatery is not uncommon nowadays in departmental stores. Leading chain of departmental stores are now selling even eatables from their outlets. Even in the City of Chennai, many leading Provision Stores make and sell pani puri and other related food items at their rental business premises. Earlier, the business in pani puri was a road side business. The same has now been

taken over by retail giants. Therefore, the manufacture and sale of pani puri cannot be treated as altogether a different business, unconnected to the business in provisions.

Earlier authority on different user.

34. The Supreme Court in *Hari Rao Vs. N. Govindachari and Others*, , considered Section 10(2)(ii)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act. In the said case, the building was given on rent for trade in shoes and leather goods. It was later used for selling readymade garments. The Rent Controller ordered eviction on the ground of sub-lease. The Appellate Authority rejected the claim. The matter was taken up before the High Court and the order passed by the original authority was restored. When the matter was taken up in civil appeal, the Supreme Court observed that there should be conversion of residential building into non residential building and mere change of user alone would not constitute a ground for eviction. The Supreme Court said at p. 118 of MLJ:

6. On the plain terms of the statute, uninfluenced by the authorities, it appears to us that user of the building for a purpose other than that for which it was leased, has to be considered in the context of Section 21 of the Act which prohibits conversion of a residential building into a non-residential building except with the permission in writing of the Controller, any covenant in that behalf entered into by the tenant and the nature of the tenancy. In other words, when the lease is granted for the purpose of a trade, in the absence of any covenant in the contract between the parties prohibiting a user different from the particular one mentioned in the lease deed, the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. In a case where the premises let out for a commercial purpose are used by the tenant for a residential purpose, it would be a user for a purpose other than that for which it was leased attracting Section 10(2)(ii)(b) of the Act. Similarly, if a building had been let out for the purpose of a trade, but a tenant uses the premises for the purpose of manufacture or production of materials after installing machinery, that would be a user other than the one for which the building was let. User of a building let out for a trade as a godown may attract the provision. Ultimately, the question would depend upon the facts of a particular case, in the context of the terms of the letting and the covenants governing the transaction and the general spirit of Section 108(o) of the Transfer of Property Act, 1882. Merely because a shop let out for trade in shoes and other leather goods is used by the tenant also for the purpose of trading in readymade garments, it could not be held to be a user by the tenant of the premises for a purpose other than that for which it was leased. It has to be noted that even now, the tenant is carrying on the business of trading in shoes, which according to the landlord was the purpose for which the building was let. The trade in shoes has not been stopped by the tenant. All that has happened is, that he has also diversified into selling some readymade garments or T-shirts, the manufacture of

which even some of the manufacturers of shoes have taken up.

35. It was only on the basis of doing business in pani puri, the Appellate Authority has allowed the eviction petition terming it as an act of different user. While arriving at such a conclusion, the Appellate Authority miserably failed to consider the fact that the tenancy was for the purpose of doing business in General Items and provisions terming it as a general provision store and it was not confined to provisions alone. Therefore, I am constrained to set aside the eviction order on the ground of different user.

36. The learned counsel for the landlord by placing reliance on the judgment of the Supreme Court in Patel Valmik Himatlal and Others Vs. Patel Mohanlal Muljibhai (Dead) Through L.Rs., contended that it is not open to the High Court to scan the evidence and to record a finding on the basis of such re-appreciation.

37. This is not a case of re-appreciation of evidence. The landlord has not adduced any legal evidence to show that the Tenant has parted with the exclusive possession of building. The landlord has not produced any concrete evidence, at least, basic evidence to show that there was an act of sub-lease. Mere statement in the pleading and the oral evidence alone would not suffice. There should be some evidence to prove the exclusive possession. The Rent Control Appellate Authority admitted the case of the Tenant that the second petitioner is his brother. The evidence let in by the Tenant shows that the second petitioner was only assisting him. Merely because the Tenant has got another business at mint street, it cannot be said that he has transferred the tenancy in favour of the second petitioner. The finding was solely on the ground that he was found in the premises. Other than the interested testimony of the landlord, there was nothing before the Court below to arrive at a finding with regard to sub-lease. The finding arrived at by the Court below has to be termed as perverse.

38. The Supreme Court in Hero Vinoth (minor) Vs. Seshammal, while considering the scope of Section 100 C.P.C. and the effect of concurrent Judgment, indicated the circumstances justifying the interference by the higher Courts in such judgments. The Supreme Court said:

The general Rule is that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute Rule. Some of the well-recognised exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

39. Therefore, on a careful consideration of the entire factual matrix, I am of the view that the Rent Controller as well as the Appellate Authority grievously erred in their decision to evict the Tenant on the ground of sub-lease and different

user. In the upshot, I allow the civil revision petitions. No costs. Consequently, M.P.s are closed.