

(1992) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Civil Revision Application No. 938 of 1980

Rameshchandra K. Patwa and Others

APPELLANT

Vs

Vithaldas Chimanlal and Others

RESPONDENT

Date of Decision : 10-09-1992

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)(e), 13(1)(ee)

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : AIR 1993 Guj 114 : (1993) 1 GLR 193

Hon'ble Judges : C.K. Thakkar, J

Bench : Single Bench

Advocate : S.N. Soparkar, for S.B. Vakil, for the Appellant; V.P. Shah, for the Respondent

Final Decision : Allowed

Judgement

C.K. Thakkar, J.—This Revision Application is filed by the petitioners-original defendants 1 to 5 against the decree of eviction passed by the trial Court and confirmed by the appellate Court.

2. To appreciate the controversy in question, few relevant facts may now be stated. The opponents-plaintiffs filed H.R.P. Suit No. 137 of 1973 in the Small Causes Court at Ahmedabad against the petitioners and one S.D. Shah and Co. (defendant 6) to recover possession of the suit premises bearing Municipal Census No. 1956 situated opposite English Cinema, Khadia, Ahmedabad, inter alia on the ground that defendant 2 and 3 who were the lawful tenants of the suit property had illegally and unlawfully sub-let a portion thereof to defendants 4 to 6. It was also alleged that defendants 2 and 3 were in arrears of rent from October 1, 1971, and they had committed breach of terms of tenancy. On those allegations, the tenancy of the defendant was terminated by a registered notice and they were called upon to vacate the premises. Since they did not comply with the notice, a suit came to be filed for possession of the suit property.

3. Defendants 2, 3 and 4 appeared and filed joint written statement at Exh. 14, contending that notice to vacate the premises was not legal and valid. They denied that they were in arrears of rent. Defendants 2 and 3 denied that they had unlawfully sub-let or transferred the suit premises or any part thereof to anyone as alleged by the plaintiffs, They also denied having committed breach of terms of tenancy and prayed for dismissal of the suit. Defendant No. 6, though served, did not appear.

4. On the basis of the pleadings of the parties the trial court framed necessary issues at Exhibit 34 and after hearing the parties, it held the suit notice to be legal and valid. The court further held that defendants 2 and 3 had unlawfully sub-let the suit premises to defendants 4 to 6. The plaintiffs were, therefore, entitled to a decree for possession against the defendants. The trial Court, however, dismissed the suit for possession on the ground of breach of terms of tenancy, as well as On the ground of arrears of rent. In accordance with the findings recorded by the trial court, a decree of eviction was passed against the defendants on February 21, 1977.

5. Being aggrieved by the decree of eviction, defendants 1 to 5 preferred Civil Appeal No. 197 of 1977 before the Appellate Bench of the Small Causes Court at Ahmedabad. The appellate Court, though confirmed the decree of eviction passed against them on the ground of sub-letting by defendants 2 and 3 in favour of defendant 6, it set aside the finding recorded by the trial court about subletting of the suit premises to defendants 4 and 5. According to the appellate court, defendants 2 and 3 were partners and in that capacity, they had executed a rent note (Exhibit 39). In 1969, defendants 4 and 5 were taken as partners and hence, according to the appellate court, it could not be said that defendants 2 and 3 had sub-let part of the premises to defendants 4 and 5. Therefore, to that extent, the finding recorded by the trial Court was set aside. But at the same time, the appellate court held that defendant 6 was a "stranger" as and when possession was parted in favour of defendant 6 by defendants 2 and 3, it was a case of sub-letting. Accordingly, the decree was confirmed by the appellate court. It is this decree which is challenged in the present Civil Revision Application.

6. Mr. S. N. Soparkar for Mr. S. B. Vakil, learned counsel for the petitioners contended that the decree of eviction passed by the courts below against the petitioners on the ground of sub-letting by defendants 2 and 3 in favour of defendant 6 was illegal and contrary to law. He submitted that necessary ingredients of exclusive possession and payment of rent as required to be established in case of sub-tenancy were not proved and, therefore, the decree requires to be set aside by this Court. He further submitted that no clear, specific and categorical finding of defendant 6 being in possession has been recorded either by the trial court or by the appellate court and therefore, no decree could have been passed u/s 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Act").

7. Mr. V. P. Shah for Mr. B. R. Shah, learned counsel for the plaintiffs, on the

other hand, supported the decree for possession passed by the trial court and confirmed by the appellate court in favour of the plaintiffs. She, however, supported the decree for possession passed by the trial court on the ground that it was right in holding that defendants 2 and 3 had sub-let the premises to defendants 4 and 5 and the appellate court was not right in reversing the finding of the trial court that there was no sub-letting by defendants 2 and 3 to defendants 4 and 5. Mr. Shah further submitted that even if this court holds that sub-letting by defendants 2 and 3 in favour of defendants 4 and 5 or defendant 6 was not proved, it was clearly proved that defendants 2 and 3 have given a part of the premises on licence for monetary consideration to defendants 4 to 6 and/or to defendants 4 and 5 or to defendant 6 without previous permission of the landlord and the case was clearly covered by Section 13(1)(ee) of the Act and on that ground also, the decree for possession requires to be confirmed. Relying on the provisions of Order 41, Rule 33 of the Code of Civil Procedure, 1908 ("Code" for short), she submitted that to the extent the appellate court interfered with the finding of the trial court regarding sub-letting by defendants 2 and 3 in favour of defendants 4 and 5 requires to be upset by this court and the decree for possession requires to be upheld even on that ground. Respondent 8 (defendant 6) though served, has not remained present in this Court also.

8. A number of decisions have been cited by the learned counsel for the respective parties. I am not referring to all the decisions cited before me by the learned counsel. It is, however, necessary to deal with some of the decisions in the light of the facts and circumstances of the present case.

9. Mr. Soparkar submitted that looking to the case put forward by the plaintiffs in the plaint as modified from time to time, it is clear that the plaintiffs themselves were not certain and consistent regarding sub-letting by defendants 2 and 3. Drawing my attention to the plaint, he submitted that at the initial stage, the plaintiffs were not certain as to which portion of the suit premises had been sub-let by defendants 2 and 3 in favour of defendants 4 and 5 or in favour of defendant 6. Relying on para 5, he submitted that originally, it was the case of the plaintiffs that defendants 2 and 3, contrary to the terms and conditions of the rent note, sub-let, transferred or assigned "some portion" of the suit premises without prior permission of the landlord to one Standard Textiles defendant 4. The portion was not described or earmarked. It is only after the amendment in the plaint (Exhibit 11) that names of defendants 5 and 6 were added. Similarly, in the notice Exhibit 36 dated March 8, 1972, the allegation was made by the plaintiffs about sub-letting by defendants 2 and 3 in favour of defendant 4. There was no murmuring regarding subletting, transfer or assignment in favour of defendant 6. Relying on oral evidence of Gopaldas, Mr. Soparkar stated that even that witness does not say as to which portion of the property was occupied by the defendants 4 and 5 and by defendant 6. The said witness stated that the suit premises consists of a big room. Defendants 2 and 3 were occupying a portion, where a table could be put, while in the remaining portion, defendants 4 to 6 were carrying on business. Strong reliance was placed by the courts below on a

report submitted by the commissioner Exhibit 41. The said report was prepared pursuant to an order passed by the court. Mr. Soparkar submitted that the report would help the defendants rather than the plaintiffs. Looking to the report, it appears that the suit property is situated on the first floor and it consists of one room. There is a wooden partition, There is also one bath room-cum-lavatory. At the time when the commissioner visited the place, certain materials were found from the gallery as well as from the room. Books of accounts, bill book, files of Standard Textiles (defendant 4) were present. Books of account of Shripal and Co. (defendant 5) were also there. A telephone (No. 24436) was lying. Certain certificates were hanging on the wall; (1) Central Sales Tax Registration Certificate dated November 23, 1971 (It is not clear as to Which defendant that certificate belonged) (2) Registration Certificate issued by the Municipal Corporation in favour of D. Shah and Co, (defendant 6). The address which is mentioned in the said certificate is Municipal Cepsus No. 1956 (suit property) and it was for the year 1972-73. (3) Certificate issued by, the Sales Tax Officer dated December 10, 1971 in favour of D. Shah and Co. (defendant 6). (4) Sales Tax Certificate of Rameshbhai K. Patwa (defendant 2), (5) Registration Certificate of M/s. Standard Textiles (defendant 4). Other sundry articles were also found. Relying on two facts namely; (i) hanging certificate in the name of defendant 6 in the suit premises, and; (ii) certificate issued by the Municipal Corporation under the Bombay Shops and Establishments Act, 1948 in favour of defendant 6, wherein the address of the suit premises was mentioned, both the courts held that it was proved that defendant 6 was in possession of the property and since he was a "total stranger", the only inference which could be drawn in the facts and circumstances was that he was a sub-tenant in the suit premises. Since the defendants 2 and 3 have sub-let the suit premises to defendant 6, they were liable to be evicted and accordingly, the decree of eviction was confirmed by the appellate court. Therefore, the material question before me is whether the inference drawn by the courts below about possession of defendant 6 in the suit premises on the basis of the certificates can be said to be legal and valid and whether the defendants were liable to be evicted on that ground.

10. Though Ms. Shah vehemently contended that the lower appellate court has committed an error of law in not confirming the finding of sub-letting by defendants 2 and 3 to defendants 4 and 5 also and by reversing the decree for possession on that ground, must admit that could not persuade myself in taking a different view than the one taken by the appellate court. After considering the relevant circumstances and germane grounds in my opinion the appellate court rightly concluded that there was no sub-letting by defendants 2 and 3 in favour of defendants 4 and 5. For that purpose, inter alia, following factors have been considered by the appellate court. Original tenancy in favour of defendants 2 and 3 was as partners and the tenancy was in favour of partnership firm, defendants 2 and 3 on the one hand and defendants 4 and 5 on the other hand were near relatives: there was no evidence that defendants 2 and 3 were charging any rent or any other monetary consideration from defendants 4 and 5 partners of

defendant 5 firm were also members of family of defendants 2 and 3; there was common accountant for writing books of accounts of the firm of defendant 1 and of defendants 4 and 5; all the defendants were members of Hindu Undivided Family and they were using the suit premises jointly; one of the partners of defendant 1 firm was, partner either in firm of defendant 4 or of defendant 5. It could not, therefore, be said that there was sub-letting in favour of defendants 4 and 5 by defendants 2 and 3. It clearly appears to me that the appellate court has not committed any error of law which requires interference in the exercise of revisional jurisdiction of this Court and the said finding, therefore, requires to be upheld.

11. The question then remains about subletting, assignment or transfer of suit premises by defendants 2 and 3 or giving it on licence to defendant 6. So far as the provisions of Section 13(1)(ee) is concerned, Mr. Soparkar submitted that it was never the case of the plaintiffs either before the trial court or before the appellate court. There was no pleading on the point. No issue was framed to that effect. No evidence was led by the parties and the attention of the parties was never focussed to the said controversy. It was not even considered by any of the courts and, therefore, at this revisional stage, it is not open to the plaintiffs to take such a contention and the court should not allow the plaintiffs to argue that point. I find considerable force in the argument of Mr. Soparkar. However, as from the discussion hereinafter, it is clear that the plaintiffs cannot succeed even on that ground.

12. For getting possession of property on the ground of sub-letting by a tenant in favour of a third party, as held by the Hon''ble Supreme Court in the leading decision of Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, , two ingredients have to be established: firstly, the third party must have exclusive right of possession or interest in the premises or part of the premises in question and, secondly, that right must be in lieu of payment of some compensation or rent. The said principle has been reiterated by the Hon''ble Supreme Court in a number of subsequent decisions. Therefore, before a landlord is entitled to a decree for possession on the ground of sub-letting, he will have to satisfy the court that the tenant has parted with possession of the entire suit property or part thereof in favour of a third party who is in exclusive possession thereof and there is monetary consideration. Mr. Soparkar submitted that in the instant case, there is no pleading, no evidence and no finding on any of the two elements. Relying upon a number of decisions including the decisions in the case of Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, , Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others, , M/s. Delhi Stationers and Printers Vs. Rajendra Kumar, , he submitted that following English decisions, the Hon''ble Supreme Court has held that to constitute sub-letting, parting of possession is a sine quo non or condition precedent. Parting of possession means possession with the "right to include" as also a "right to exclude" others. Mere occupation is not sufficient to infer either subtenancy or parting with possession. Mr. Soparkar submitted that it is true that the decree is

passed by the courts below on the ground that defendants 2 and 3 have sublet the part of the premises to defendant 6. But he wondered how and on what basis, the said finding has been recorded by the Courts below. He submitted that neither, in the pleading nor in the evidence it was alleged on what particular day, defendant 6 was found in possession of the suit property or any part thereof. The day on which the commissioner visited the place, defendant 6 was not found. From the report of the commissioner Exhibit 41 also, the said fact is established. It is on the basis of two certificates found from the suit premises that a decree of evidence came to be passed on the ground of sub-letting of part of the premises by defendants 2 and 3 in favour of defendant 6. According to Mr. Soparkar, when the defendant 6 was not found in possession either of the entire property or any part thereof, the first condition was not satisfied. In absence of possession, there was no question of "right to exclude others" by defendant 6. He submitted that if a third party is in exclusive possession of the tenanted property, in a given set of circumstances, a court may draw inference about payment of rent or compensation or monetary consideration in lieu of rent by the third party (subtenant, to the tenant. It may not be possible) for the landlord to establish such an agreement or payment inasmuch as originally it would not be within the knowledge of the landlord but within the special knowledge of the tenant as well as sub-tenant. He, however, submitted that as far as possession is concerned, the said fact must be established and it must be established by the landlord, failing which no inference of sub-tenancy can be drawn against the tenant. He submitted that parting of possession and nature of possession are two different things. The former must be proved by the landlord since it is a factum to be established. If the possession is not proved, the matter must rest there and it is not open thereafter to draw any inference or make any conjecture regarding nature of possession of third party. It is only after the factum of possession is proved that the enquiry regarding nature of possession would arise and absence of satisfactory explanation or relevant circumstances, it may be open to a court to infer that the tenant has parted with possession by creating sub-tenancy in favour of third person. In the instant case, according to Mr. Soparkar the initial factum of possession by defendant 6 is not proved and, therefore, the courts below were not right in passing the decree against defendants 2; and 3 on the ground that they have sub-let or parted with possession of the suit premises infavour of defendant 6.

13. I am of the opinion that, the submission of Mr. Soparkar is well-founded. Ms. Shah could not show that at any time, defendant 6 was found to be in physical possession of the suit property or any part thereof. Again, there is no evidence that a particular part was either given to or retained by defendant 6. When possession of defendant 6 was not established, further query regarding right to include and right to exclude others did not arise. In my judgment the courts below have committed an error of law in jumping to the conclusion that defendants 2 and 3 have sub-let the premises to defendant 6 only on the basis that two certificates were found from the suit property. True, it is, that in the

certificate of defendant 6 issued under the Bombay Shops and Establishments Act, 1948, the address of the suit premises had been mentioned. It is also correct that a certificate issued by the Sales Tax Department in favour of defendant 6 was hanging on the wall of the suit premises. But in my opinion, the factual possession of a particular person in a property is entirely different from presence of certificates in a property. Even if the defence of the defendants 2 and 3 that defendant 6 had forgotten the certificates in the suit shop is not believed, it was not open to the courts below from that fact alone to hold that defendant 6 was in possession of the suit shop. As observed by me, the said finding must be based on evidence and the factum of possession must be proved. Since it is not established, the said finding can be said to be without any evidence on record and such a finding cannot be said to be a "finding" in the eye of law and no decree of eviction against the defendants 2 and 3 can be passed.

14. My attention was also invited by Mr. Soparkar to a decision of this Court in Civil Revji. Appl. No. 235 of 1960 decided by P. N. Bhagwati, J, (as he then was) on January 1, 9, 1962. In that case also, a decree came to be passed against the tenant on the ground that he had sub-let a part of the premises to one Yusuf Suleman for running a paan galla and he was in possession of that part of the premises. Reversing the decree of eviction, this court-observed that the fact that there as a paan galla in a part of the premises was admitted by the tenant. His case, however, was that it was a part of the restaurant run by the defendant and the person who was looking after paan galla was not doing that business as an owner but as an employee of the defendant. The case of the defendant was not believed by the courts below. This court did not interfere with the said finding. But it held that merely from the fact that Yusuf Suleman was in possession of a part of the premises (of paan galla), it could not be said that the defendant had unlawfully sub-let the premises and was liable to be evicted. This court, therefore, set aside the decree of eviction. Observing that what was required to be proved was not only the evidence showing possession by third party, but that he was in exclusive possession and enjoyment of that portion of the premises and was having ultimate control over it. In this connection, reliance was placed by this court in the case of C. Rangamannarv. Desu Ranchiah, reported in AIR 1954 Madras 182. That decision has been approved by the Hon'ble Supreme Court in Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, as also in Gopal Saran Vs. Satyanarayana, . A similar view was also taken by J. B. Mehta, J. in Civil Revision Application No. 303 of 1970 decided on November 29, 1973. I am bound by the decisions of the Hon'ble Supreme Court as also the decisions of this court. In my opinion, in the facts and circumstances of the case, it cannot be said that defendants 2 and 3 have sub-let the suit property or any part thereof to defendants 4 and 5 or to defendant 6 and the decree of eviction passed against the defendants 2 and 3 on the ground of sub-letting requires to be interfered with by this Court.

15. Ms. V. P. Shah, however, submitted that it is not necessary that the landlord must prove that the tenant had parted with possession of the rented property for

monetary consideration. She submitted that since it would be ordinarily be within the special knowledge of tenant and sub-tenant, it is open to the court to draw inference about payment of consideration. She also submitted that it was the case of the plaintiffs that defendants 2 and 3 had sub-let or parted with possession of premises or a part thereof either in favour of defendants 4 and 5 or in favour of defendant 6, and it was obligatory on the part of defendants 2 and 3 to satisfy the conscience of the court regarding nature of possession of defendants 4 and 5 and/or of defendant 6. She submitted that there was total denial on the part of the defendants 2 and 3 and, therefore, the case of the plaintiffs was rightly believed by the courts below. Regarding defendant 6, she submitted that though served, defendant 6 never appeared in any court. If it was the case of the defendants 2 and 3 that possession of defendants 4 and 5 or for that purpose, of defendant 6 was merely permissive as a licensee or in any other capacity, it was for the defendants 2 and 3 to put forward that case and the courts could have decided that issue. Since no such plea was put forward by the defendants 2 and 3, the finding of sub-letting recorded by the courts below does not require any interference by this court. Reliance was also placed in this connection by Ms. Shah on the decision of the Hon"ble Supreme Court in the case of *Rajbir Kaur and Another Vs. S. Chokesiri and Co.,* . In that case, two persons were found in, the suit premises and they were running "Royal Star Tailors" and "M/s. Quality Restaurant". The Hon"ble Supreme Court in the light of the facts found held that it was a case of subletting and decree was passed in favour of the landlord. In my opinion, however, the ratio laid down in *Rajbir Kaur's* case (supra) does not apply in the instant case. Ms. Shah is ignoring the most material and vital fact as mentioned by the Hon"ble Supreme Court in para 5 of the report, wherein it was observed that the possession of those persons was "admitted". As observed by me, if the possession is admitted, established or proved by evidence or otherwise, it may be open to the court to infer the nature of possession in absence of any explanation from the tenant or the party in possession. In the instant case, however, the factum of possession itself is disputed and not a single document is produced from which it can be said that defendant 6 was in possession of the suit property. The said inference was drawn by the Courts below on the basis of certificates issued by the Sales Tax Department and by the competent authority under the Bombay Shops and Establishments Act. I am clearly of the view that no inference of physical possession of defendant No. 6 could be drawn, on the basis of the above certificates and the decision in *Rajbir Kaur and Another Vs. S. Chokesiri and Co.,* cannot help the plaintiffs.

16. Ms. Shah also submitted that defendant 6 was a "stranger" and in absence of any explanation either from defendants 2 and 3 or from defendant 6, inference of sub-letting was rightly drawn by the courts below. She submitted that in cases in which inference of subletting was not drawn by the Hon"ble Supreme Court were the cases in which the persons were near relatives or closely associated in business. It is true that in the instant case, defendant 6 was a "stranger". It was,

therefore, permissible to the Courts below to draw an inference of sub-letting provided the factum of possession of defendant 6 was established. But in my judgment that fact ought to have been established by cogent evidence and no inference regarding factum of possession could be drawn.

17. Ms. Shah also submitted that the decisions of P. N. Bhagawati, J. (as he then was) and J. B. Mehta, J. stood impliedly overruled in view of the subsequent decisions of the Hon"ble Supreme Court in Rajbir Kaur and Another Vs. S. Chokesiri and Co., as also Roopchand v. Gppi Chand's case (AIR 1989 SC 1416) (supra). In my judgment, however, the settled legal position appears to be that the factum of possession requires to be established. It is only thereafter, the further question of enquiry or inference arises. In the instant case, since possession of defendant 6 is not established, the decree on the ground of sub-letting passed by the trial court and confirmed by the appellate court against defendants 2 and 3 requires to be quashed and set aside.

18. The plaintiffs are also not entitled to a decree for possession u/s 13(1)(ee) of the Act inasmuch as under that provision also, possession of third party is sine qua non. If that condition precedent is not fulfilled, the suit of the plaintiff must fail. In my opinion, therefore, the decree of eviction passed by the courts below requires to be interfered with.

19. In the result, this Civil Revision Application is allowed. The decree of eviction passed against the petitioners by the trial court and confirmed by the appellate court is quashed and set aside. In the facts and circumstances, however, there will be no order as to costs.