

(1985) 12 DEL CK 0006

In the Delhi High Court

Case No : Second Appeal No. 420 of 1979

Shameshwar Prasad Bhargava and Others

APPELLANT

Vs

Kulwant Rai Jam and Others

RESPONDENT

Date of Decision : 18-12-1985

Acts Referred:

Citation : (1986) 29 DLT 331 : (1986) 10 DRJ 245

Hon'ble Judges : Gian Chand Jain, J

Bench : Single Bench

Advocate : R.L. Tandon and R.K. Makhija, for the Appellant;

Judgement

G.C. Jain, J.

(1) This order shall also dispose the connected appeal No. 404/79 (S.C. Bhargam v. Kulwant Rai Jain and others) as both the appeals arise out of a common order.

(2) The dispute is in respect of a portion of property No. 4754-4755, Darya Ganj, Ansari Road, Delhi. These premises were admittedly let out to Dr. Shameshwar Prasad Bhargava (hereinafter to be referred "tenant in March/April, 1959).

(3) On 9/5/1969 Kulwant Rai Jain brought a petition for recovery of possession of the said premises on the allegations that the tenant, without obtaining his consent in writing, had sub let, assigned or otherwise parted with the possession of the various portions of the premises in dispute in favor of M/s. Bhargava & Associates, Dr. H.D. Goyal and Kishore Corporation. The eviction was also claimed on the grounds under clauses (c), (j) and (g) of the proviso to Sub Section (1) of Section 14 of the Delhi Rent Control Act, 1958 (for Short the Act"). These grounds were, however, not pressed before the Tribunal and do not survive.

(4) The tenant averred that he was a tenant Under M/s. Kulwant Rai Saroj Kumar Jain. The premises were admittedly let out by Kulwant Rai and Saroj Kumar. However in partition this property came to the share of Kulwant Rai and now he

was the sole landlord. This fact has not been disputed.

(5) The tenant denied any sub letting in favor of Kishore Corporation. It was explained that Sh. I B. Bhargava, the owner of that Corporation was his father-in-law and was using his table for office correspondence and the tenant's business. This plea was accepted and there is no , challenge to the correctness of this finding:

(6) The tenant admitted that he had sub let a portion of the premises in suit to M/s. Bhargava and Associates in May 1960 and another portion to Dr. H.D.Goyal in December, 1961. M/s Bhargava and Associates also in the written statement admitted that a portion of the premises in dispute had been let out to them by the tenant. Dr. Goyal, however, pleaded that he was simply sharing accommodation with the tenant and there was no sub letting, assignment or parting with possession of any portion of the premises in his favor. The learned Tribunal, however, found that a portion of the premises had also been sub let to Dr. Goyal, Correctness of this finding has also not been disputed.

(7) The claim of the landlord for eviction, however, was resisted on the only pleas that the landlord had given a letter authorising the tenant to sub let the portions of the property as and when required. The tenant also gave past history. He stated that in March, 1958 the premises in dispute had been let out to Dr. Surender Man Singh, Surgeon, and Dr. H.K.. Chutani, Physician. After their appointment in All India Institute of Medical Science, New Delhi in November, 1958 the premises were let out to Dr. Atam Parkash, surgeon and the tenant (Dr. Shameshwar Prasad Bhargava, physician) though the receipts of rent continued to be in the name of Dr. Surender Man Singh. On the appointment of Dr. Atam Prakashin AII India Institute of Medical Sciences in 1959 his portion was occupied by Dr. J.P. Singh, surgeon. In April, 1959 the entire premises were let out to the tenant and he executed a rent note, although Dr. J.P. Singh continued to occupy a portion of the said premises. It was averred that these facts showed that from the very beginning the premises, though let out to one person, were meant to be sub let ; the landlord however, was taking benefit of the fact of loss of the rent deed as well as the letter of authority which fact was clear from the circumstances that he kept quiet all these years.

(8) The Addl Controller on examining the evidence held that Jai Ram Dass, father of the landlord, who had the requisite authority in this behalf from his son, the landlord, had permitted the tenant in writing to sub let the premises in dispute. He consequently dismissed the eviction petition vide his order dated 26/7/1976.

(9) The landlord filed an appeal before the Rent Control Tribunal. The Tribunal reversed the finding of the learned Addl. Controller and came to the conclusion that the tenant had failed to prove any permission in writing to sub let the premises and consequently vide his order dated 30/10/1979 allowed the appeal set aside the order of the Addl Controller, and instead passed an order for recovery of possession of the premises in dispute in favor of the landlord against

the tenant and sub tenants.

(10) Feeling aggrieved the tenant Dr. Shameshwar Prasad Bhargava, Dr. H.D. Goyal and Kishore Corporation have filed the present appeal (SAO 420/79). The other appeal (SAO 404/79) has been filed by S.C. Bhargava, proprietor of Bhargava and Associates.

(11) Second appeal to the High Court was competent u/s 39(1) of the Act. Sub-section (2) of Section 39 of the Act, however, provides that "No appeal shall lie under sub-section (1) unless the appeal involves some substantial question of law." In view of these provisions the High Court could not reassess the evidence afresh and enter into the merits of The case and was bound by the decision of the Tribunal on questions of fact. (Sec M/s. Delhi Vanaspati Syndicate v. M/s. Bhagwan Das Faqir Chand, 2nd (1971) volume-I, 84).

(12) In the present case the landlord had admitted that his father had the authority to permit the tenant to sub let the premises in dispute. He, however, maintained that no such permission in writing had been given by him or his father. Therefore the main question for determination was whether Jai Ram Dass, father of the landlord, had given the letter authorising the tenant to sub let the premises. This question was essentially a question of fact. The finding on this question recorded by the Tribunal was, Therefore, binding on this Court.

(13) Learned counsel appearing for the appellants, conscious of this legal position, submitted that the learned Addl. Controller had duly appraised the evidence of both the parties and found the evidence produced by the tenant credible and returned a finding in favor of the appellants, the said finding did not suffer from and infirmity and the Tribunal, Therefore, was not justified in reversing the finding of facts. It was pointed out that the Tribunal has, without justification, interpreted the pleadings very strictly, he ignored the fact that for 10 years the landlord took no action, he also did not take into consideration the previous history of letting and sub lettings and his finding was unreasonable and could not be sustained. Reliance was placed on Shakila Banu Vs. Gulam Mustafa, , and Trailakyanath Maity and Another Vs. Provabati Santra and Others, .

(14) Learned counsel for the landlord, on the other band, contended that the Addl. Controller was unnecessarily influenced because of the evidence of eminent doctors. Dr. Surender Man Singh. Dr. Chutani and Dr. Atam Parkash had said nothing on this fact. The evidence was at variance with the pleadings. It was neither satisfactory nor sufficient to prove this fact. The Tribunal was fully justified in reversing this finding.

(15) In Shakila Banu's cafe (supra) the Bombay High Court has held that the opinion of the trial judge about credibility of the witnesses should not ordinarily be disturbed in appeal. The appellate court should not reappraise oral evidence and arrive at findings contrary to those of trial judge. It was further held that the lower appellate court ignores the law relating to review of oral evidence by court of appeal it commits substantial error so as to render its finding, liable to be set

aside in second appeal. In Trailakyanath Maity's case (Supra) the Calcutta High Court had also held that the first appellate court, though a final court of fact, will not normally set aside the finding of facts made by the trial court on consideration of evidence unless there are compelling circumstances to do so.

(16) The question for determination, Therefore, is whether the learned Rent Control Tribunal was justified in setting aside the finding of facts recorded by learned Addl. Controller and whether his finding was unreasonable?

(17) The authority letter, which was the primary evidence has not been produced and is stated to have been lost. The tenant has produced secondary evidence. He as his own witness, and Amar Nath Gautam have deposed that the said letter was typed on the letter head of the tenant and was signed by Jai Ram Dass in their presence. Dr. J.P Singh, Dr. V.N Sharma, Dr. NL. Parmanik and S.C. Bhargava, proprietor of Bhargava Associates, have deposed that they had seen that authority letter. Learned Tribunal duly appraised the evidence and refused to rely on them for reasons recorded. I have carefully examined the reasons which, in my view, are valid .

(18) In para 18(a)(i)(d) of the written statement the tenant has averred "That in the month of April 1959 the landlord got a rent deed executed from the respondent only for whole of the premises, in dispute although Dr. J P. Singh continue to occupy the portion of the premises previously occupied by Dr. Atam Prakash and gave a letter authorising the respondent to sub let the portion of the premises to third parties as and when required." In para 3 (a) of the written statement he had pleaded that he was a tenant under M/s. Kulwant Rai Saroj Kumar Jain. Read with the averments made in para 3 (a) of the written statement the word landlord" used in para 18 (a) (i) (d) meant M/s. Kulwant Rai Saroj Kumar Jain. In other words, the case set up by him was that the letter authorising him to sub let the premises had been given by M/s. Kulwant Rai Saroj Kumar Jain or at the most either of them. It was no-where pleaded that the said letter had been given by Jai Ram Dass.

(19) Learned counsel for the appellant contended that Jai Ram Dass had admittedly been managing-the property. He had been letting the premises from time to time and Realizing rent and in these circumstances the word landlord" could not be strictly construed and what was meant was that the permission had been given by Jai Ram Dass who was the landlord for all purposes. I do not agree. If that was the plea then why a suggestion to kulwant Rai Jain, the landlord, in cross-examination, that he had given the permission. In Cross-examination Kulwant Rai Jain slated, "I never gave any letter of authority to respondent No. 1 to the effect that he could sub let any part of the portion in dispute to any one for the purpose of clinic or residence, as and when he likes, nor my attorney gave any such letter of authority to him. My attorney, I mean my father. This statement must have been made on questions put so him on behalf of the tenant. This statement shows that tell that date the tenant was not sure as to who had given the permission. A sort of fishing inquiry in his behalf

was being made. It is also clear from the fact that the tenant made an application dated 28/7/1970 summoning Kulwant Rai Jain and Saroj Kumar Jain for cross-examination. These witnesses were required to bring with them, inter alia, copy of letter of authority in favor of the tenant authorising him to sub let the portion of the premises in dispute. No reason has been given as to why the copy was summoned from them and not from Jai Ram Dass. It is pertinent to note that there is not an iota of evidence suggesting that any copy of the authority letter was prepared.

(20) S.C. Bhargava, proprietor of M/s Bhargava Associated who is admittedly a close relation of the tenant and claims to have seen the authority letter, had averred in his written statement, "the premises were let out to the replying response by respondent No. I after having obtained the written consent from the petitioner. The petitioner was admittedly Kulwant Rai Jain had not Jai Ram Dass. All these circumstances made the version of the tenant unacceptable.

(21) The tenant admittedly executed a rent note: in April, 1959. It provides that the tenant shall not sub-let, the premises or any part there. In presence of this rent note statement of the tenant that at the inception of the tenancy Jai Ram Dass had orally allowed the tenant to sub let the position vacated by Dr. Atam Prakash, could not be believed. The authority letter is stated to have been given after about 15 days of the execution of the rent note which specifically prohibited sub-letting. Generally speaking it is not believable that in spite of this prohibition contained in the rent note the landlord as his father just after 15 days would give written content for sub letting. No reason has been given for the change of this term. As a matter of fact the case of the tenant was that permission to sub let had been given at the time of the creation of the tenancy itself orally and after some time in writing. As stated above plea relating to oral permission cannot be accepted in the presence of the term prohibiting sub letting contained in the rent note admittedly executed by the tenant. Had this permission been given then there was no occasion for the tenant to sign on the rent note.

(22) The tenant has examined Dr. Surender Man Singh, Dr. H.K. Chutani and Dr. Atam Prakash who had deposed about previous lettings and subletting. That evidence, whatever its worth, was not relevant. The landlord may allow one tenant to sub let the premises and he may not allow the other to do so. So far as the present tenant in concerned the rent note contained a term which prohibited sub letting. In presence of this term in the rent note previous history of letting and sub letting as of no value.

(23) It is correct that the landlord took no action on the ground of unauthorised sub lettings for several years. The consent in writing, however, cannot be inferred from this circumstance.

(24) For all these reasons learned Tribunal, in my view, was justified in reversing the finding of the learned Addl, Controller and holding that the tenant had failed to prove that sub lettings were with the consent in writing of the landlord. The

finding was correct and calls for no interference in second appeal.

(25) It was then argued that the landlord by accepting the rent for several years in spite of " these sub lettings would be deemed to have abandoned his right to claim eviction on the ground of sub letting. The tenant had not raised any plea of abandonment, waiver or estoppel in his written statement. Assuming that he could raise this plea the same had no substance. Clause (b) of Sub-section (1) of Section 14 of the Act confers right on the landlord to claim eviction if the tenant has, on or after 9th day of June, 1952, sub let assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord. Clause (b) uses the phrase "consent in writing." By using this phrase the legislature excluded any other kind of consent, i.e. oral consent or consent by acquiescence or conduct. Therefore, there cannot be any. estoppel, waiver or abandonment against the express and clear provision contained in clause (b). In view of this specific provision a course of action which has accrued to the landlord cannot be destroyed by knowledge or acquiescence. The question of abandonment of a statutory right conferred on the landlord by clause (b) does not arise See *Shambhu Dutt v. Balwant Lal*. 1968 Plr 790 and *Smt. Balquis Jehan Begum v. Sibhatulla and another*, 1971 Rcr 95

(26) For all these reasons there is no merit in these appeals and the same are dismissed. The appellants are, however, allowed three months time to vacate the premises. Parties are left to bear their own costs.