
(2010) 03 BOM CK 0203

In the Bombay High Court

Case No : Civil Revision Application No. 676 of 2009

Shri Harakchand Hirji Shah and Others

APPELLANT

Vs

Vasudev Vaghji Relan and Another

RESPONDENT

Date of Decision : 03-03-2010

Acts Referred:

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

Citation : (2010) 3 ALLMR 27 : (2010) 2 BomCR 868 : (2010) 112 BOMLR 1153

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : P.S. Dani, instructed by Deepal Lulia, for the Appellant; Asha Bhambwani, for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—Rule, returnable forthwith, by consent.

2. The present civil revision application challenges the order passed by the Small Causes Court in R.A.E. & R. Suit No. 5105 of 1977 as well as the order of the appeal Court in Appeal No. 50 of 2000.

3. The applicants claim to be the tenants of Respondents-plaintiffs. The applicant filed a suit namely R.A.D. Suit No. 2325 of 1977 for a declaration and injunction against the Respondents. Another suit being R.A.E. & R Suit No. 5105 of 1977 for eviction of the applicants from the suit premises was filed by the Respondents. The eviction suit was mainly filed on the ground that applicant No. 1 who was the tenant had sublet the premises to applicant Nos. 2 and 3 without the permission of the landlord. The other ground for ejection was that applicant No. 1 was in arrears of rent. The plaint was later amended and an additional ground for eviction was pleaded, that the applicant No. 1 had acquired a suitable, alternate accommodation. Common evidence was led in both the suits. The trial Court decreed both the eviction suit on 13.1.2000 and dismissed the Applicant's suit. The applicants, therefore, preferred two appeals. The appellate Court set aside

the judgment of the trial Court in the suit filed for a declaration and injunction and dismissed the suit. However, the judgment and order of the trial Court in the eviction suit was confirmed by the appellate Court. The eviction decree passed on the ground of non-user of the suit premises was set aside. However, the decree was confirmed on the ground of subletting and acquisition of suitable alternate accommodation by the applicants.

4. Aggrieved by the decision of the appellate Court in confirming the decree passed by the trial Court on the aforesaid two grounds the applicants have preferred the present civil revision application.

5. Mr. Dani, appearing for the applicants, contended that both the Courts below have erroneously held that applicant No. 1 had acquired a suitable alternate accommodation abroad. He submits that it could not be said that applicant No. 1 had acquired alternate accommodation when in fact there was no evidence on record that applicant No. 1 had left India and was permanently residing abroad. He points out that the judgment of the Division bench of this Court in J. Marathe (since deceased through his legal heirs Mrs. Uma Vijay Gune and Another) Vs. P.V. Kaloake, to submit that acquisition of residential premises by a tenant in a different town will not ipso facto amount to acquisition of alternative suitable residential premises within the meaning of Section 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act (for short, hereinafter referred to as 'Bombay Rent Act'). He then submits that both the Courts have erroneously held that the premises were sublet by applicant No. 1 to applicant Nos. 2 and 3. The learned advocate submits that when a landlord seeks a decree of eviction on the ground of subletting the landlord must establish not only that somebody other than the tenant was occupying the suit premises but also that the premises were occupied by the third person for some consideration. He submits that this Court in Surendra M. Wagh and Another Vs. Manohar Krishna Kale and Another, , C.C. Yi Vs. Janakidevi Anantlal Gupta and Others, , Laxminarayan Gupta Vs. Bhagwandas Sahu and Another, and in the case of Vasant Mahadev Pandit and Anr. v. Zaibunnisa Abdul Sattar Dhuru and Anr. 2001 103 Bom. L.R. 437 has taken a consistent view that the landlord must establish that the tenant had parted with the possession of the suit premises for valuable consideration. He submits that both the Courts below have ignored these judgments of this Court and therefore have committed an error by decreeing the suit on the ground of subletting.

6. Mr. Dani points out that the evidence on record does not satisfy the ingredients of subletting. He submits that defendant No. 1 was admittedly the tenant of the plaintiff while defendant Nos. 2 and 3 are the brothers of defendant No. 1. Although defendant No. 1 stayed in London, he often returned to India and lived in the suit premises alongwith his brothers, defendant Nos. 2 and 3. According to Mr. Dani, these facts indicate that the suit premises were not sublet. Besides this, he points out that there is not even an iota of evidence on record to indicate that defendant Nos. 2 and 3 were paying defendant No. 1 any

consideration for occupying the suit premises.

7. Ms. Bhambwani appearing for the respondent, on the other hand, submits that in *Joginder Singh Sodhi Vs. Amar Kaur*, , the Supreme Court has held that the ingredients of subletting are parting of possession of rented property by a tenant to a third party and receiving monetary consideration there from. The Supreme Court has further held that the proof of payment of monetary consideration is not a sine qua non to establish subletting. She points out that this judgment was based on earlier judgments of the Supreme Court in *Gurpreet Singh Vs. Chatur Bhuj Goel*, , *Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta*, and *Nihal Chand Rameshwar Dass and Another Vs. Vinod Rastogi and Others*, .

8. The judgements of this Court cited by Mr. Dani do indicate that mere occupation of the suit premises by a person other than the tenant would not necessarily indicate that the premises have been sublet or that the tenant had parted with possession of the suit premises. The judgements speak of the landlord having to plead and prove the manner in which the tenant had parted with possession and inducted the sub-tenant. The burden is cast on the landlord to prove that the premises were occupied by a third person for consideration. Besides this, it has been held that no amount of evidence can substitute pleadings and unless the landlord pleads his case that the two ingredients of subletting exist, the Court cannot pass a decree on the ground of subletting. The Court has also concluded in the case of *Vasant Mahadev Pandit (supra)* that the members of a family residing together with the tenant are expressly excluded from the definition of the term "licensee". It has also been held that there must be positive evidence on record established by the plaintiff to indicate that the tenant was charging a consideration from the subtenant for occupying the premises.

9. The Supreme Court in the case of *Joginder Singh Sodhi v. Amar Kaur (supra)*, while considering the issue of subletting reiterated its earlier decisions and observed that the landlord has to prove by leading evidence that (i) a third party was found to be in exclusive possession of the rented property and (ii) parting of possession thereof was for monetary consideration. The Supreme Court while considering the submissions on behalf of the tenant which were similar to the submissions advanced by Mr. Dani in the present case has observed thus:

16. The contention of the learned Counsel for the appellant, however, is that even if it is assumed that one of the ingredients of sub-letting was established, the second ingredient, namely, parting of possession with "monetary consideration" was not established. The counsel urged that there is no evidence on record that any amount was paid either in cash or in kind by respondent No. 2 to respondent No. 1. In absence of such evidence subtenancy cannot be said to be established and the landlady was not entitled to get an order of eviction against the tenant.

17. We are unable to appreciate the contention. As observed by this Court in

Bharat Sales Ltd. v. Life Insurance Corporation of India, sub-tenancy or subletting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession of that person, instead of the tenant which ultimately reveals to the landlord that tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the subtenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sublet or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sublet. 18. In Smt. Rajbir Kaur and Anr. v. S. Chokesiri & Co. this Court, speaking through Venkatachaliah, J (as His Lordship then was) stated: (SCC p. 43, para 59)

"If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of sub-letting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of sub-letting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party being the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstance of the case, we think,

that, appellants having been forced by the courts below to have established exclusive possession of the ice-cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the courts below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found."

19. Again in *Kala and Anr. v. Madho Parshad Vaidya*, this Court reiterated the same principle. It was observed that the burden of proof of sub-letting is on the landlord but once he establishes parting of possession by the tenant to third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge that onus, it is permissible for the court to raise an inference that such possession was for monetary consideration.

20. We are in agreement with the observations in the above cases. In our considered opinion, proof of monetary consideration by the sub-tenant to the tenant is not a sine qua non to establish sub-letting. (emphasis added)

10. The judgments of this Court relied on by Mr. Dani in *C.C. Yi Vs. Janakidevi Anantlal Gupta and Others*, *Laxminarayan Gupta Vs. Bhagwandas Sahu and Another*, and in the case of *Vasant Mahadev Pandit and Anr. v. Zaibunnisa Abdul Sattar Dhuru and Anr.* 2001 103 (2) Bom.L.R. 437 were delivered prior to the decision of the Supreme Court in the case of *Joginder Singh Sodhi v. Amar Kaur*. Although the decision of this Court in the case of *Surendra M. Wagh and Another Vs. Manohar Krishna Kale and Another*, is of the year 2006, it is apparent that the judgment in *Joginder Singh Sodhi v. Amar Kaur* (supra), was not pointed out to the learned Single Judge. Thus, after the judgment in the case of *Joginder Singh Sodhi v. Amar Kaur* (supra), in a case of eviction on the ground of sub-letting the landlord is required to prove that the tenant had parted with the possession of the suit premises to a third party. The burden would then shift on to the tenant to explain his possession. If the tenant fails to discharge that onus, the Court can presume that such possession was for monetary consideration. In the present case, the landlord has established the fact that defendant Nos. 2 and 3 were in possession of the suit premises exclusively. Defendant No. 1 who was the tenant had left the country and was residing in London. The evidence on record establishes the fact that defendant Nos. 2 and 3 are in possession of the suit premises exclusively and defendant No. 1 only visits them every few years. Therefore, in my view, the submissions of Mr. Dani cannot be accepted.

11. The other contention raised by Mr. Dani is that defendant Nos. 2 and 3 being submissions, he has relied on the judgment in the case of *Vasant Mahadev Pandit and Anr.* (supra). However, the Supreme Court in the case of *Joginder Singh Sodhi v. Amar Kaur*, has observed thus:

22. It was then contended by the learned Counsel for the appellant that respondent No. 2 was the son of respondent No. 1 and since he was not a stranger, no presumption could be raised that he was a sub-tenant. We are unable to uphold even that contention. In our judgment, for deciding the question whether the tenant had created sub-tenancy, the relationship between the tenant and sub-tenant is not material. There is no privity of contract between the landlady and respondent No. 2. He was, therefore, a "stranger" to the landlady. She let the property to respondent No. 1 who was the tenant. Respondent No. 1 was bound to occupy the property as per the rent note executed by him wherein even undertaking was given by him that he would not part with possession or allow any other person to occupy the property. In spite of the rent note and undertaking, if without the written consent of the landlady, respondent No. 1 had inducted respondent No. 2 as his tenant or had parted with possession in favour of respondent No. 2, who was staying separately and yet found to be in exclusive possession of the shop, sub-tenancy was established.

23. Reference in this connection may be made to a decision of this Court in *Bhairab Chandra Nandan v. Ranadhir Chandra Dutta*. In that case, a finding was recorded by the trial court that the tenant had sub-let the premises to his brother without the consent of the landlord and accordingly an order of eviction was passed. The High Court, however, took a different view observing that the so-called sub-tenant was brother of the tenant and hence it was a case of licensee and not of sub-tenant. When the matter came to this Court, setting aside the order passed by the High Court this Court observed that there was "absolutely no warrant" for the reasoning which weighed with the High Court. The tenant was not occupying the property and had already shifted his residence to other place. It was, therefore, a clear case of sub-letting. This Court, in the circumstances, allowed the appeal of the landlord and passed an order of eviction.

12. Therefore, in my view, both the Courts below have rightly decreed the suit on the ground of subletting on the basis of the evidence led before them.

13. The other ground on which the suit has been decreed is that defendant No. 1 accommodation in London. Mr. Dani submits that the acquisition of alternate premises in London would not amount to acquisition of suitable premises within the meaning of Section 13(1)(I). He supports this submission by the judgment of the Division Bench of this Court in the case of *J. Marathe and Ors. v. P.V. Kaloke* (supra). Assuming that the acquisition of the premises by defendant No. 1 in London would not amount to acquisition of suitable premises under the Bombay Rent Act and the decree on that ground cannot be passed against defendant No. 1, in any event, the decree for ejectment has been passed on the ground of subletting with which I have dealt with earlier. The acquisition of premises in London by the tenant in fact lends credence to the landlord's contention that the suit premises have been sub let.

14. In my opinion, no case for interference has been made out by the applicants with the concurrent findings of fact recorded by both the Courts below. The civil

revision application is dismissed. Rule discharged. No costs.

15. On the request of the learned Advocate for the applicant, the status quo granted earlier to continue for a period of eight weeks from today, on the usual undertaking being submitted by the applicants and all the adults in their family to this Court within a period of two weeks from today.