

(1997) 02 MAD CK 0109
In the Madras High Court

S.K. Raffudin and Others

APPELLANT

Vs

N. Yeswantha Rao and Others

RESPONDENT

Date of Decision : 28-02-1997

Acts Referred:

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 8(5)

Citation : (1997) 2 LW 66 : (1997) 1 MLJ 581

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—C.R.P. No. 308 of 1997 arises from R.C.O.P. No. 193 of 1990 and C.R.P. No. 309 of 1997 arises from R.C.O.P. No. 200 of 1990. Both these proceedings were clubbed together by the Rent Controller and a common order was pronounced. When appeals were preferred, the appellate authority also disposed of the appeals by a common judgment.

2. In both the revisions, tenant is the revision petitioner.

3. R.C.O.P. No. 193 of 1990 was filed by the tenant u/s 8(5) of the Tamil Nadu Buildings (Lease and Rent Control) Act, seeking permission from Rent Controller for depositing the rent of Rs. 8,180 due to the respondent for the period ending with 31.7.1990 and permit him to continue to deposit future rents.

4. Material averments in that petition may be stated ;is follows:

There are three respondents. All of them are landlords of the building. They are sons of one late Narahan Rao. Under a lease arrangement dated 22.1.1974, petitioner herein took the building on a monthly rent of Rs. 750. It is averred that an advance amount of Rs. 5,000 was paid. Thereafter the rent was enhanced to Rs. 1,800. The arrangement in respect of such enhancement was oral, and the tenancy was according to English calendar month. From the very beginning, the tenant is running "Alankar Ribbon Stall" in the schedule premises. Initially the first respondent was collecting the rent, and subsequently, he directed the rent to be paid to the three respondents in proportion of Rs. 600. It

is further averred that it was the habit of landlords to take loan from the tenant, and huge amount is due to him from the landlords. Upto 21.3.1990 the first respondent has received the rent; second respondent has received (he rent upto 31.3.1990; and third respondent has received the rent upto 31.1.1990. Thereafter, the allegation in the petition is that without any reason the landlords refused to receive the rent. Therefore, the tenant began to send the rent in equal shares to all the three respondents either by demand draft or by cheque.

5. It is further averred that for the tenancy month of February, 1990. a demand draft was sent to the respondents towards their share after deducting the loan amount which they had borrowed. Before issuing the demand drafts towards rent, the petitioner sent a lawyer's notice to all the respondents. It is seen that all the cheques and demand drafts sent by the petitioner were refused to be accepted. In paragraph 4 of the petition, petitioner has calculated the rent due to each and every respondent from 1st January, 1990 till 31.7.1990. An amount of Rs. 4,200 is due (sic) Rs. 2,400 is due the respondent No. 2 by way of four months rent from 1.4.1990 to 31.7.1990. A sum of Rs. 1,580 is due to the third respondent for the tenancy month of February, 1990 and March, 1990 and for the period commencing from 1.7.1990 to 31.7.1990. According to the tenant, the total amount payable to the landlords is Rs. 8,180. He has averred that he was very regular in paying the rent, and there was no justification for landlords to decline to receive the rent. A registered notice was sent on 21.3.1990 along with a demand draft, but the same was refused to be accepted. Even before that, a lawyer's notice was issued. That was also refused to be accepted. According to petitioner, under such circumstances, he had no other alternative except to approach the court, seeking permission to deposit the rent.

6. The same was seriously opposed by the landlords. According to them, the tenant has not complied with the conditions u/s 8 of the Rent Control Act. It is only when the landlords themselves have filed a petition for eviction, apprehending that he will be evicted on the ground that he is a wilful defaulter, he has sought permission of court to deposit the rent into court, u/s 8(5) of the Rent Control Act. According to them, rent from November, 1980 is in arrears. There is no proper deposit or tender.

7. All the three respondents in R.C.O.P. No. 193 of 1990 (landlords) filed R.C.O.P. No. 200 of 1990, for eviction of the tenant on three grounds: viz., (1) That he has defaulted in payment of rent from November, 1989 to July, 1990. A total amount of Rs. 16,200 is due. The default is wilful. (2) The tenant has sub-let the building to one Jalal who is carrying on business in the schedule building. The same is unauthorised and without written consent. (3) The first respondent is an advocate. He has his office in the first floor of the building. He is a heart-patient. He is also suffering from high blood-pressure. Doctors have advised him not to climb staircase. He has no other residential building of his own in the Town. So, for purpose of conducting advocate's office, he requires the schedule building.

8. To the eviction petition, a detailed counter was filed by the tenant alleging that

he has not sub-let the building and he alone is doing business. The person who has been impleaded as sub-tenant, i.e., second respondent in R.C.O.P. No. 200 of 1990, is none other than his son, who is also helping him in his business, and he (1st respondent) is having full control over the business. The alleged sub-lease is only a pretext for eviction. Regarding default in payment of rent, he alleged that he is not a wilful defaulter, and long before the present petition was filed, he has also sought permission of the Rent Controller for depositing rent in court. According to him, the rent alleged to be due as mentioned in the eviction petition is not correct, and those amounts have already been deposited in R.C.O.P. No. 193 of 1990. For the subsequent period, he is continuing to pay the rent in the same court.

9. Insofar as the claim of the landlords that they require the building bona fide for their own occupation is concerned, tenant alleged that the first landlord is having his residence in the second floor of a big building bearing Door No. 6/60, Thomas Park Housing Colony, Race Course, Coimbatore. When he has his very house in second floor, to say that he cannot climb first floor to run his advocate's office is lacking in good faith. According to the tenant, the allegation of the first petitioner that he is a heartpatient is not correct. It is further said that the present room occupied by him is more than sufficient for running an advocate's office. Apart from the building in question, he has other buildings also. All the three grounds under which eviction was claimed by the landlords were disputed by the tenant.

10. Both the revision petitions were clubbed together, and evidence was taken in R.C.O.P. No. 193 of 1990 (filed by tenant).

11. After taking evidence. Rent Controller dismissed the petition filed by the tenant holding that no ground was made out u/s 8(5) of the Act. At the same time, the Rent Controller further found that he has defaulted in paying rent for the month of November, 1989. For the month of December, 1989, landlord has issued receipt. Rent Controller found that the son of the tenant is also having his own business in the adjacent building, and when the presence of the son is noted in the schedule premises, an inference could be drawn that it is the son who is doing business and, therefore, sub-lease is also true. Thirdly, the claim for eviction on the ground of bona fide occupation is also found to be genuine. The trial court held that the first petitioner is a heart-patient. He is also having high blood-pressure and is not in a position to climb staircase. The first floor cannot be used as an advocate's office since a major portion of the same is used by another petitioner for the residence of himself and the members of his family. The ground that the first petitioner cannot climb staircase was also found to be justified. Eviction was ordered on all the three grounds.

12. Aggrieved by the order, tenant preferred R.C.A. Nos. 138 of 1994 and 154 of 1994 before the appellate authority, Coimbatore. The appellate authority also confirmed all the findings of the Rent Controller, and both the appeals were dismissed.

13. It is the concurrent findings of the authorities below that are challenged in these revisions.

14. I will first consider the question of sub-letting, and whether the landlords have made out a case for eviction.

15. In the eviction petition, namely, R.C.O.P. No. 200 of 1990, the allegation contained in paragraph 5 reads thus:

The 1st respondent took the building for non-residential purpose. He had been running business. Recently, 1st respondent has sub-let the premises to 2nd respondent, without written consent of petitioners. Hence the 1st respondent has rendered himself liable for eviction.

16. To prove the case of sub-lease, we have only the oral evidence of P.W. 1, which is countered by R.W. 1. In chief-examination, this is what the landlord has said:

17. In cross-examination dated 23.3.1994, it is settled thus:

This is the evidence of P.W. 1 to prove sub-lease. In chief-examination, he denies having sub-let the building to any person. In this chief-examination, he has said thus.

He was cross-examined in detail. This is what he has said:

He was further cross-examined on 22.2.1994. In the last portion of this deposition, he has further said thus:

This is the only evidence that has been let in regarding the sub-lease.

18. It is settled law that to prove sub-lease, initially the landlord will have to prove that the tenant has parted with legal possession and a stranger is in exclusive possession of the building. So long as the exclusive possession is not even spoken to by P.W. 1, there cannot be any question of sub-lease. Both the authorities below have not entered a finding that the second respondent, Jaleel, is in exclusive possession of any portion of the building. Both the authorities below have come to the conclusion that Jaleel might be in possession on the ground that he is having independent business. According to the Authorities below, from his presence in the premises, such an inference can be had.

19. I do not think, law goes to the extent of saying that a mere presence of a person in a shop will amount to sub-lease.

20. In the decision reported in Jagdish Prasad Vs. Smt. Angoori Devi, , their Lordships said thus:

It is only when a person other than the tenant sits in the shop in exercise of his own right that the presumption of sub-letting can arise. As long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, sub-letting flowing from the presence of a person other than the tenant

in the scope cannot be assumed. The Act does not require the Court to assume a sub-tenancy merely from the fact of presence of an outsider. The allegation that the premises has been sub-let to a person has to be proved as a fact by the landlord and merely on the basis of a photograph showing presence of that person or his son within the premises, sub-letting cannot be presumed.

[Italics supplied]

In that case, the only evidence was, the presence of a son in the shop premises.

21. What is sub-letting is also defined by the Supreme Court in the decision reported in *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, . In paragraph 17 of that judgment (at page 78), their Lordships said thus:

...Parting to the legal possession means possession with the right to include and also right to exclude others. That, in our opinion, is the matter of fact....

So, the alleged sub-tenant must be in a position to exclude others from interfering with his enjoyment of the building. The entire premises must be under his control and only under him the other persons can be included within the premises. Evidence in this regard is absolutely lacking in this case.

22. In *Dev Kumar (Died) through LRs. Vs. Smt. Swaran Lata and others*, , the only evidence that was let in was, a Commissioner's Report. When the Commissioner initially went to the property, he found certain other persons also doing business. When he went for a second time, the Commissioner was shown a rubberstamp having the words as sold selling agent of another person. The other person for whom the agent was doing business was alleged to be the sub-tenant. Apart from the Commissioner's Report, a cash bill under the so-called name of the sub-tenant was also produced. Considering these two evidence, their Lordships of the Supreme Court said thus:

...At the most, the conclusion can be that while the tenant was continuing his own business as well as a business of Commission Agent of M/s. Ram Saran Bhola Nath, respondents 2 to 4 have also been permitted to continue their business in the name of Ram Saran Rattan Chand. But that does not establish either the exclusive possession of Respondents 2 to 4 or that the tenant has parted with his possession. The exclusive possession of the premises being the first criterion for establishing sub-letting and the same not being established, the conclusion of the High Court about sub-letting is vitiated. In our considered opinion the landlady, Respondent No. 1, has utterly failed to establish the plea of sub-letting....

[Italics supplied]

In paragraph 9 of the judgment, their Lordships said thus:

...The conclusion on the question of subletting is a conclusion on a question of law derived from the finding on the materials on record as to the transfer of exclusive possession and as to the said transfer of possession being for

consideration.

[Italics supplied]

Their Lordships reiterated the legal position laid down in the decisions reported in Jagdish Prasad Vs. Smt. Angoori Devi, and held that unless exclusive possession or parting with possession is proved, there cannot be any question of sub-letting. Their Lordships further went on to say that if that is proved, it may not be impermissible for the court to draw an inference What the transaction was entered*into for monetary consideration.

23. Similar is the case reported in Rajbir Kaur and Another Vs. S. Chokesiri and Co., , wherein also, their Lordships reiterated that "if exclusive possession is established, and the version of the tenant as to the particulars and the incidents of the transaction is found unacceptable in the particular facts and circumstances of the case, as in the present 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 subletting 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. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting and establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion, viz., the landlord. 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 bearing the legal burden, shifts according as the Weight of the evidence adduced by the party during the trial.

[Italics]

24. So, the basic ingredient to prove the case of sublease is "parting with possession". The alleged sublessee must have the right to include and exclude others. If evidence on that aspect is lacking, as held in the decisions cited supra, a finding on subletting can only be considered as illegal. Since the conclusion on sub-letting is a question of law, even though the finding of the authorities below is concurrent, this Court is competent to reverse that finding.

25. Even in the chief-examination, P.W. 1 (landlord) has said that the tenant is still continuing his business in ready-made garments. When the tenant was examined, a suggestion was put to him alleging that both the sons of the tenant are managing the business, but the suggestion was denied. In the petition, the sub-lease is alleged to be with one Jalal and subsequently with one Abubucker. But the essential ingredient, i.e., parting with legal possession was not spoken to by P.W. 1. P.W. 2, even though he is another petitioner, does not say anything about sublease.

26. Learned Counsel for the respondents relied on the decision reported in *Shanmugam, M. v. C. Kannabiran and Anr.* (1996) 2 L.W. 322. On the basis of the said decision, an argument was taken that if a stranger is present and is shown to have some interest in the building, or in the business, it is for the tenant to establish the reason for his presence. I do not think the argument could be accepted. In the case cited, the stranger was doing a watch repairing business of his own, unconnected with the business of the tenant. He was found to be in exclusive possession of a portion of the room by putting up a cabin around him. It was, after finding that the stranger is in exclusive possession, it was held that it was for the tenant to explain the circumstances under which the stranger came into occupation. The decision may not have any application to this case.

27. The finding on sub-lease by the authorities below cannot be supported and, therefore, it has to be set aside.

28. The second ground for eviction, is, default in payment of rent. Even though the authorities below have held that the rent was in arrear for the month November, 1989, they have dismissed the petition of the tenant u/s 8(5) of the Rent Control Act. If the tenant is not entitled to invoke Section 8(5) of the Act as found by the authorities below, in spite of the fact that he is depositing rent therein, are not the finding of the authorities below inconsistent in holding that the default was only for the month of November, 1989.

29. Learned Senior counsel for the revision petitioner submitted that it is not a case of wilful default. The only reason mentioned by the authorities below is that the tenant has not produced any receipt evidencing payment. This, according to learned Counsel, will not amount to wilful default with liability to penal consequence of eviction. Learned Counsel submitted that even rent for the month of December, 1987 has been received. So, naturally, a presumption can be drawn that unless the rent for November, 1989 is paid, rent for December, 1989 would not have been received. So, there would have been a discharge of payment of rent till December, 1989.

30. I cannot agree with learned Senior counsel for the petitioner. It is admitted by the tenant himself that whenever rent was paid, receipt was issued by the landlord. When they refused to issue receipt, he began to send the amount by cheque or draft. No explanation is offered by the tenant during his examination why he could not produce the receipt for November 1989. Both the authorities below came to the conclusion that if there is no explanation for non-production of the receipt, it amounts to default in payment of rent.

31. Before this Court, the tenant has filed C.M.P. No. 1696 of 1997 seeking permission to adduce additional evidence. It is his case that the receipt for November, 1989 was produced in court in a suit against the very same landlord and he could recollect the same only a few days before the filing of the application. The genuineness of the same is seriously disputed by the landlord.

Being revisional court, unless satisfactory grounds are made out, I cannot agree with the request of the learned Counsel for the petitioner (tenant) that the same should be admitted in evidence, in revision. Again, the powers of revisional court are very much material. It has only to consider the legality, propriety and regularity of the findings of the authorities below. The authorities below have decided the case on materials, and I do not find any ground to receive the receipt mentioned above, as additional evidence, in Revision. The C.M.P. is, therefore, dismissed.

32. I have to consider as to what is the effect of dismissal of an application u/s 8(5) of the Act. u/s 8 of the Rent Control Act, it is the duty of the landlord to issue receipt. In case the respondents (landlords) refused to do so, certain duties are cast on the tenant. If the landlord refuses to accept the rent or evades issue of receipt, tenant can issue a notice, asking him to inform the Bank in which the amount has to be deposited. If, in spite of such a notice, the landlord did not answer, then only the tenant gets a cause of action to move a petition u/s 8(5) of the Act. Even before moving the court, one more attempt has to be made by the tenant, i.e., he has to make an attempt by sending the amount through money order after deducting the money order commission. These are the statutory requirements that are to be complied with by the tenant before invoking Section 8(5) of the Act. If the statutory requirements are complied with, and the tenant deposits the rent in Court, by virtue of the legal fiction u/s 8 of the Act, the deposit is treated as payment directly to the landlord. If the legal requirements are not complied with, the legal fiction is also not available. In that case, he will be treated as a defaulter. In this connection, the decision reported in Kuldeep Singh Vs. Ganpat Lal and another, may usefully be referred to. It is a case under Rajasthan Premises Control Act, wherein there is a similar provision. Section 19 of that Act enables the tenant to deposit the rent in court on satisfying certain conditions as provided in a similar Section, namely, Section 8 of our Act. In that case also, without satisfying the requirements, tenant continued to deposit the rent in court. In spite of the deposit, their Lordships said that deposit will not amount to payment to the landlord and, therefore, he is a defaulter and consequently the legal fiction is not available to him. Paragraphs 6 to 8 of the judgment are relevant for our purpose, and they read thus:

Shri Sachar does not dispute that the conditions prescribed in Clause (c) of SUB-section (3) of Section 19-A for the purpose of making the deposit in court are not fulfilled in the present case. The submission on Shri Sachar, however, is that since the appellant had deposited in court the rent for the months of May, 1982 to October, 1982 on 29.10.1982, before the said rent for six months fell due, he cannot be held to be a defaulter in payment of rent for six months and a decree for eviction u/s 13(1)(a) could not be passed. Shri Sachar has, in this connection, placed reliance on the decisions of this Court in Duli Chand Vs. Maman Chand (Dead) by Lrs., and Sheo Narain Vs. Sher Singh, .

We have carefully perused the said judgments. Both these judgments relate to

the proviso to Section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 which affords protection against eviction of the tenant if on the first hearing on the application for ejectment after due service he pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the controller. In both these cases, the tenant, had deposited the amount of rent in the court in which the ejectment proceedings were pending prior to the first hearing of the application and on the first hearing the landlord was made aware of the deposit. This Court has held that even though there was no provision in the Act for deposit of the rent in court the said deposit could be treated as compliance with the requirements of the proviso to Section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 and the tenant was entitled to avail of the benefit of the said proviso.

In the present case, the appellant is seeking to avail of the benefit of the legal fiction u/s 19-A(4) of the Act. It is settled law that a legal fiction is to be limited to the purpose for which it is created and should not be extended beyond that legitimate field (See: *Bengal Immunity Co. Limited v. State of Bihar* (1955) 2 S.C.R. 646). The appellant can avail of the benefit of Section 19-A(4) if the deposit of Rs. 3600 made by him in the Court of Munsif (South), Udaipur, on 29.10.1982, by way of rent for the months of May, 1982 to October, 1982, can be treated as a payment u/s 19-A(3)(c) so as to enable the appellant to say that he was not in default in payment of rent. u/s 19-A(3)(c) the tenant can deposit the rent in the court only if the conditions laid down in the said provision are satisfied. It is the admitted case of the appellant that these conditions are not satisfied in the present case. The deposit which was made by the respondent in court on 29.10.1982 cannot, therefore, be regarded as a deposit made in accordance with Clause (c) of Sub-section (3) of Section 19-A and the appellant cannot avail of the protection of Sub-section (4) of Section 19-A and he must be held to have committed default in payment of rent for the months of May, 1982 to October, 1982. This means that the decree for eviction has been rightly passed against the appellant on account of default in payment of rent for the period of six months.

33. Even in his petition R.C.O.P. No. 193 of 1990, tenant has not averred that he has issued notice to the landlords to name the bank, nor has he a case that he sent the amount by money order. When the draft sent by the tenant was refused, and when he received the notice, informing about the default, tenant rushed to court, seeking permission to deposit the rent in court. If the Statutory requirements are not complied with, even though there was deposit in court the same cannot be considered as tender to the landlords, so as to have full discharge. When he has not satisfied the statutory requirements and rushed to Court, mala fide is also, clear i.e., he wanted to forestall the cause of the landlords on false allegations. When the case put forward by the tenant is not true and the deposits are also not real payments, he must be deemed to be a wilful defaulter. I therefore, confirm the findings of the authorities below for added reason. I hold that the tenant is liable to be evicted on that ground.

34. On the question whether, the landlords require the building bona fide for their own occupation, authorities below have concurrently held that the first petitioner has come to court in good faith. He has proved the case that he is still climbing the staircase. He has also spoken before court that he has shifted his residence in view of his illness. Doctors have advised him not to climb staircase, and his illness is likely to aggravate.

35. Learned senior counsel for the petitioner submitted that a legal practitioner who is able to come to court and practise in all the courts, naturally, will be in a position to climb the staircase also. It is true, when he comes to court, he might have to climb the staircase. But from that fact alone, his case cannot be thrown out. It is further in evidence P.W. 1 has no other building of his own to have his advocate's office. From evidence, it is clear that even the first floor of the building belongs to joint family of P.W. 1 along with his cousins. It is not a case of co-ownership property. Originally, the first floor, which was occupied by him as an advocate's office, is now used by P.W. 2 as his residence. A major portion of the same has now been converted as bed-room of P.W. 2, who is also a practising lawyer. No other disqualification is also brought to the notice of court to hold that the claim is not bona fide. It is a concurrent finding of fact based on materials. The trial court believed the evidence of P.W. 1 and has seen the witness when he said that he is a heart-patient. Medical evidence has also been filed.

36. Under the above circumstances, I do not think that the landlords can be thrown out on the ground that the building is not required for their own occupation. That finding of the authorities below is also confirmed.

37. In the result, this Court holds that the revision petitioner is liable to be evicted on the ground that the landlords require the building for their own occupation and also on the ground that the tenant is a wilful defaulter in payment of rent. The ground of sub-letting is found against the landlords. Taking into consideration the facts and circumstances of the case, I direct the parties to suffer their own costs. The civil revision petitions are dismissed, subject to the above modification.