

(1968) 01 MP CK 0009

In the Madhya Pradesh High Court

Case No : Second Appeal No. 292 of 1965

Smt. Thakurain Dulaiya

APPELLANT

Vs

Shivnath Punjabi and Others

RESPONDENT

Date of Decision : 08-01-1968

Acts Referred:

Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946 —
Section 2, 4, 6
Evidence Act, 1872 — Section 115
Government of India Act, 1935 — Section 107(2)

Citation : AIR 1969 MP 130 : (1971) ILR (MP) 691 : (1969) JLJ 157 : (1968) 13 MPLJ 251 : (1968) MPLJ 251

Hon'ble Judges : S.P. Bhargava, J; R.J. Bhawe, J

Bench : Division Bench

Advocate : A.P. Sen, General and A.R. Choubey, Govt., R.S. Dabir, B.C. Verma, R.P. Sinha and M.R. Pathak, for the Appellant; M. Adhikari, K.K. Adhikari, P.R. Noolekar and S.C. Jain, for the Respondent

Final Decision : Allowed

Judgement

Bhawe, J.

Smt. Thakurain Dulaiya, the plaintiff-appellant, is the owner of House No. 828, Lordganj, Jabalpur, and the respondent No. 1 (defendant No. 1) is the tenant thereof at the monthly rent of Rs. 120/-. The plaintiff filed the suit, out of which this second appeal arises, for ejectment on various grounds including the ground that the defendant No. 1 had sub-let part of the premises to the defendants 2 and 3 and that the subletting being unlawful she was entitled to eject the defendants u/s 12(1)(b) of the Madhya Pradesh Accommodation Control Act, 1961. The defendant No. 3 vacated the premises during the pendency of the suit. The defence of the defendants 1 and 2 was that the part of the premises was sublet to the defendant No. 2 at a tripartite contract between the plaintiff, the defendant No. 1 and the defendant No. 2, arrived at between the parties at Mauranipur in April 1955. It was not disputed that the contract was oral; but the

submission was that it being a tripartite contract, it was not unlawful.

The trial Court negated other grounds urged by the plaintiff but held that under Clause 12-A of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as the "Rent Control Order"), which was in force in 1955, a tenant was prohibited from sub-letting any portion of the accommodation except in pursuance of a condition in the lease-deed executed in favour of the tenant or with the written consent of the landlord; and as no written consent of the landlady was obtained in this particular case, the sub-letting was unlawful and that the plaintiff was entitled to a decree for ejectment.

The lower appellate Court, however, felt bound by the decision of Shiv Dayal, J. in *Ramkishan v. Jamuna Prasad*, SA No. 357 of 1962 D/- 27-11-1962 (MP), wherein it was held that Clause 12-A of the Rent Control Order was ultra vires and unconstitutional. In this view of the matter, it was held that the subtenancy in favour of the defendant No. 2 was not unlawful and that the plaintiff was not entitled to a decree for ejectment. The plaintiff has now come up in second appeal.

The decision of Shiv Dayal, J. is based on the decision of Mudholkar, J. (as he then was) in *Tilokchand Nathmal Agarwal Vs. Ganpatdas Bhagwandas Bairagi*, . The Full Bench decision of the Nagpur High Court in *Balkishan v. Total-das* AIR 1955 Nag 246 was unfortunately not brought to the notice of Shiv Dayal, J. The Full Bench decision takes a contrary view of the matter. Hence, it appears that this appeal was placed before this Division Bench for disposal.

Before we proceed further, it may be noted that the Rent Control Order was promulgated by the State Government in exercise of powers conferred u/s 2 of the C. P. and Berar Regulation of Letting of Accommodation Act, 1946 (hereinafter referred to as the 1946 Act"). The Act was enacted after obtaining assent of the Governor-General as contemplated u/s 107(2) of the Government of India Act, 1935 and, as such any provisions of the 1946 Act or any orders passed by the State Government in exercise of powers u/s 2 of the Act must be held to be immune from any attack that they are in conflict with any provisions of the Central Act. In 1958 Nag LJ 392: *Tilokchand Nathmal Agarwal Vs. Ganpatdas Bhagwandas Bairagi*, , Mudholkar, J. however, held that Clause 12-A of the Rent Control Order was repugnant to the provisions of Section 108(j) of the Transfer of Property Act. His Lordship was of the view that the subject "Transfer of Property" falls in the Concurrent List, i.e., List III of Seventh Schedule of the Government of India Act, 1935; the State Legislature, therefore, could not make any law repugnant to the provisions of the Transfer of Property Act, unless the procedure prescribed u/s 107(2) of the Government of India Act, 1935, was followed.

His Lordship observed that though assent of the Governor-General was obtained while enacting the 1946-Act, the assent could not be availed of for upholding the validity of Clause 12-A of the Rent Control Order because, even though Section 2

of the 1946 Act did confer a power on the State Government to provide by general or special order for regulating the letting or subletting of any accommodation, it did not mean that the power conferred was intended to be exercised by the State Government in derogation of the provisions of any Central Act. His Lordship held that it must be presumed that when the Legislature enacted Section 2 of the 1948 Act, it contemplated making by the Government of such an order as would be in conformity with the provisions of the Transfer of Property Act. It was further observed that the 1946 Act itself did not contain any provision which was repugnant to the Transfer of Property Act, and hence it could not be said that the Act authorized the State Government to promulgate any order so as to abrogate the provisions of the Transfer of Property Act. This very reasoning was followed by Shiv Dayal, J. in S.A. No. 357 of 1962 D/- 27-11-1962 (MP) (supra). In both these cases, the provision of Section 6 of the 1946 Act were not taken note of. Section 6 reads:

"Any order made or deemed to be made u/s 2 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

This provision clearly indicates that though the 1946-Act itself did not contain any provision repugnant to the Transfer of Property Act or any other Central Act, it was clearly contemplated that the orders issued u/s 2 of the Act might contain such provisions. It is, therefore, futile to say that Section 2 of the Act did not authorise promulgation of any order so as to abrogate any provisions of the Central Act.

In the case of AIR 1955 Nag 246 (supra) the provisions of the 1946 Act came for consideration. On the vires of Section 2 of the Act, it was held by the Full Bench:

"Section 2 cannot be impugned on the ground that it is very meagre in principle and has left the entire matter of legislating with respect to the topics specified in Clauses (a) to (d) to the executive. No question of legislative competence to delegate can arise in England. There are instances of delegation even on matters of principle by the British Parliament by entrusting the executive with the power of giving meaning and content to legislation enacted in the barest outline by making orders, regulations and orders in council and the doctrine that, in legislating upon subjects committed to the care of the Indian Legislature, it could legislate in the same manner as the Parliament at Westminster could do, has now been firmly established."

and as to the validity of Clauses 4 to 8, it was held:

"Clauses 4 to 8 of the Rent Control Order, in so far as they are inconsistent with Section 108, T.P. Act, are sustained by reason of Section 6 of the C.P. and Berar Act 11 of 1946 and as the Act has received the assent of the Governor-General, no question of repugnancy with the existing law arises u/s 107(1). Government of India Act, 1935, because of Sub-section (2) of that section."

On parity of reasoning it must be held that Clause 12-A of the Rent Control Order is also validly promulgated and is not ultra vires or unconstitutional as held by Shiv Dayal, J. in S.A. No. 357 of 1962 D/- 27-11-1962 (MP) (supra). We have already observed that the Full Bench decision was not brought to the notice of Shiv Dayal, J. We are bound by the Full Bench decision and hence our conclusion is that S.A. 357 of 1962 D/- 27-11-1962 (M.P) (supra) does not lay down correct law. We, therefore, hold that the lower appellate Court was in error in holding that Clause 12-A of the Rent Control Order was ultra vires and unconstitutional.

Shri Sen, learned Advocate-General, urged that Clause 12-A of the Rent Control Order was not open to challenge for another reason also. Shri Sen urged that the 1946-Act and the Rent Control Order promulgated thereunder were enacted within the powers conferred under Item 21 of the Second List (Provincial List) of the Seventh Schedule of the Government of India Act, 1935. Item 21 deals with land that is to say, rights in or over land, land-tenures, including relation of landlord and tenant. He urged that, in pith and substance, the above provisions are directed to control the relations between the landlord and the tenant. Incidentally, they may trench upon other fields, including transfer of property. But such incidental trenching upon could not change the colour or substance of the legislation. In support, he relied on the decisions of the Privy Council in *Prafulla Kumar v. Bank of Commerce, Khulna* AIR 1947 PC GO and *Megh Rai v. Allah Rakhia* AIR 1947 PC 72 . In view of the Full Bench decision, we are not called upon to consider this aspect of the matter; but we may, in passing, observe that Clause 12-A of the Rent Control Order can also be held to be intra vires and constitutional on the abovesaid ground also, Shri Adhikari, learned counsel for the respondents, also very fairly conceded that he could not support the decision of Mudholkar, J. in 1958 Nag LJ 392= *Tilokchand Nathmal Agarwal Vs. Ganpatdas Bhagwandas Bairagi*, , as also the decision of Shiv Dayal, J. in S.A. No. 357 of 1962 D/-27-11-1962 (MP) (supra).

This brings us to the consideration of the question as to the effect of the subtenancy created by the defendant No. 1 in favour of the defendant No. 2 with the consent of the landlady, though without her consent in writing. Shri Dabir, learned counsel for the appellant, urged that inasmuch as creation of such a sub-tenancy was prohibited under Clause 12-A of the Rent Control Order, no lawful sub-tenancy was created in favour of the defendant No. 2, and as such the landlady was entitled to a decree for ejectment under Clause (b) of Sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961. Shri Adhikari, on the other hand, urged on behalf of the respondents that the Rent Control Order was repealed by the M. P. Accommodation Control Act, 1955, and any prohibition as to subletting was withdrawn as a result of the 1955-Act. He specifically referred to Section 4 (e) which reads thus:

"4. Restrictions on eviction -- No suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds:--

***** (e) that the tenant has, without an express permission in the contract, sub-let the whole or any portion of the accommodation; or that he has assigned his tenancy right to another or has removed his possession therefrom.

Provided that if the accommodation had been so sublet before the commencement of this Act with the direct or indirect permission of the landlord, the tenant shall not be liable to eviction."

He urged that proviso under Clause (e) made it abundantly clear that if the premises had been sub-let with the direct or indirect permission of the landlord, no ground for eviction was available to the landlord. On the finding of the lower appellate Court, the sub-tenant was inducted with the permission of the landlady, though it was not in writing. Shri Adhikari urged that though under the Rent Control Order such a sub-tenancy was invalid, the effect of Section 4(e) of the 1955-Act was to remove that bar and to validate the sub-tenancy, which was invalid under the repealed Order. He further urged that inasmuch as under the 1955-Act such a sub-tenancy was validated, it could not be urged that the subtenancy could be termed as "unlawful" under the present Act. He emphasised that the present Act does not define "unlawful subletting". Under the Transfer of Property Act, such a right is recognized. The prohibition contained in the Rent Control Order disappeared when that Order was repealed by the 1955-Act. That Act went further and gave protection to the tenants if they had inducted subtenants with the direct or indirect permission of the landlord, thus validating the sub-tenancies which were invalid Under the old law. He, therefore, urged that even on the assumption that initially the sub-tenancy was unlawful, its character changed when the 1955-Act was enacted and it no longer remained an unlawful sub-tenancy when the present Act was enacted.

We find it difficult to accept the contention of Shri Adhikari. It is plain that no new contract was entered into between the defendant No. 1 and the defendant No. 2. The same contract continued even after the 1955-Act was brought into force. The proviso under Clause (a) of Section 4 protects only those subtenancies, which were validly created and which were with the permission of the landlord, direct or indirect. It does not, in any way, touch a sub-tenancy, which was in the inception unlawful and unenforceable in law. In any case, the proviso had not the effect of making an unlawful sub-tenancy a lawful subtenancy, though under the 1955-Act no ground would have been furnished to the landlord to terminate the tenancy on the ground of unlawful subletting. We are therefore, of the view that the submission of Shri Adhikari is without any force.

Shri Adhikari, then, urged that the prohibition under Clause 12-A of the Rent Control Order was as against a tenant creating a sub-tenancy on his own; there was nothing in the said Clause to prohibit a landlord from becoming a party to the subletting, as was done in this case under the tripartite contract. We find it difficult to accept this contention. Even under the so-called tripartite contract the defendant No. 2 did not become a tenant of the landlady. The transfer was

effected in his favour by the defendant No. 1, though approval to such a transfer was secured from the landlady. It is thus clear that the tenant created the sub-tenancy interest and the subtenant remained responsible to the tenant. No direct relationship between the landlady and the defendant No. 2 came into existence. The alleged tripartite contract, therefore, means nothing more than that the landlady gave her oral consent to the tenant to sublet the premises to the defendant No. 2. This was prohibited by Clause 12-A of the Rent Control Order, unless the permission was in writing. It must, therefore, be held that the sub-letting was unlawful.

It was also suggested that the prohibition contained in Clause 12-A of the Rent Control Order was for the benefit of the landlord and that he could have waived that benefit, and the landlady in giving explicit permission to sub-let had waived that benefit. In *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, their Lordships of the Supreme Court, while considering the provisions of Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. held that the provision in Section 15 prohibiting sub-letting of premises was in furtherance of public policy. Any contract of sub-letting was, therefore, hit by Section 23 of the Contract Act, and in such a case the plea of waiver as against the Landlord was not available to the tenant or the sub-tenant. Their Lordships held:

"Waiver is the abandonment of a right which normally everybody is at liberty to waive a waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied ... But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable."

We must, therefore, hold that the plaintiff is not estopped from urging that the subtenancy was unlawful, though she had given her consent orally for such sub-letting.

In this view of the matter, our conclusion is that the lower appellate Court was in error in setting aside the decree of the trial Court. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. The appellant shall get costs of this court as well as of the lower appellate Court from the defendants 1 and 2, A decree be drawn up accordingly.

The defendant No. 3 was also made a party on the allegation that he was also a sub-lessee of the defendant No. 1. He had, however, vacated the premises when the case was pending before the trial Court. He was made a pro forma party in the lower appellate Court as well as here. He was ex parte. We, therefore, make no order regarding costs as against him. The plaintiffs costs are to be borne only by the defendants 1 and 2. Their liability shall be joint and several.