

Sachindra Nath Shah

Vs

Santosh Kumar Bhattacharya

Civil Appeal No. 176 of 1983

(CJI P. N. Bhagwati, V. B. Eradi JJ )

19.12.1986

JUDGMENT

BHAGWATI, C. J. :-

1. The facts giving rise to this appeal lie in a very narrow compass and they may be briefly set out as follows.
2. The appellant was at all material times a tenant of the respondent in respect of a flat on the southern portion of the first floor of a building bearing No. 128/20 situate at Hazra Road, Calcutta. On July 13, 1970 the respondent filed a suit for eviction against the appellant on two grounds. One ground was that the appellant had committed default in payment of rent and the other ground was that the appellant had sub-let a part of the premises without the consent of the respondent. So far as the first ground is concerned, it is not necessary to state the facts on which this ground was founded since both the trial court as well as the first appellate court held that there was no default in payment of rent on the part of the appellant and the High Court also in second appeal did not disturb this finding of fact. It was the second ground which prevailed with the High Court in second appeal and we will therefore state only the facts bearing upon that ground.
3. The case of the respondent was that the appellant had without the consent of the respondent sub-let a part of the premises first in favour of one Anjali Mullick and thereafter in favour of Sukriti Sen and then in favour of Vinod Kumar Aggarwal and had thereby rendered himself liable to eviction under Section 13 (1) (a) of the West Bengal Premises Tenancy Act. The appellant sought to repel this case of the respondent by submitting that there was no sub-letting of any part of the premises by the appellant in favour of any one and taking Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal as paying guests did not amount to creation of sub-tenancy in their favour. The trial court upheld the contention of the appellant and rejected the claim of the respondent for possession under Section 13 (1) (a) of the Act. The trial court took the view that Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were merely paying guests of the appellant and there was no sub-tenancy created in their favour by the appellant and this finding of the trial court was upheld by the first appellate court in the appeal preferred by the respondent against the decision of the trial court. The respondent being aggrieved by the dismissal of his appeal by the first appellate court, preferred a second appeal in the High Court. The High Court disturbed the finding of fact reached by the trial court and confirmed by the first appellate court and held that since Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were in possession of a part of the premises, they should be presumed to be sub-tenants and since it was not shown by the appellant that they were not sub-tenants the conclusion must follow that the appellant had sub-let a part of the premises successively in favour of these persons and the respondent was consequently entitled to a decree for eviction against the

appellant under Section 13 (a) of the Act. Though there was no plea taken in the plaint that the appellant was using the premises for a purpose different from that for which the premises were let out to him and no issue was raised on any such plea, the High Court allowed the respondent to take up this plea for the first time in second appeal and observed that even if Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were paying guests and not sub-tenants, the appellant had by giving a part of the premises to paying guests one after another, used the premises for a non-residential purpose though the purpose for which the premises had been let out was residential and had accordingly rendered himself liable for eviction under Section 13 (1) (h) of the Act. The High Court accordingly passed a decree for eviction against the appellant both under Section 13 (1) (a) and Section 13 (1) (h) of the Act. The appellant thereupon preferred the present appeal with special leave obtained from this Court.

4. It is difficult to sustain the view taken by the High Court that Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were sub-tenants and that the appellant had therefore unlawfully sub-let a part of the premises without the consent of the respondent. The appellant in his evidence produced the agreements entered into by him with Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal and these agreements clearly showed that these three persons taken merely as paying guests and there was no sub-letting in their favour. The agreements with these three persons were in identical terms and we may therefore refer to the terms of only one of the agreements, namely, that entered into by the appellant with Anjali Mullick. The agreements clearly provided that Anjali Mullick would reside with the appellant as his paying guest and the amount of Rs. 120 per month payable by Anjali Mullick to the appellant cover also charges for food supplied by the appellant. It was made clear in the agreement that the premises shall continue to remain in the occupation of the appellant and that Anjali Mullick will be merely a paying guest living with the appellant. There can be no doubt on a plain reading of the agreement that Anjali Mullick was a paying guest and no interest in any part of the premises was created in her favour so as to entitle her to claim to be a subtenant. So also Sukriti Sen and Vinod Kumar Aggarwal were paying guests and not sub-tenants. It is indeed difficult to see how the High Court could possibly reach the conclusion that these three persons were sub-tenants of the appellant. It may be that where a person is shown to be in exclusive possession of a part of the premises given to him by a tenant, the burden of showing that such person is not a sub-tenant may lie on the tenant. This is a proposition on which we would not like to express any definite opinion, but even if this proposition were correct, we are of the view that in the present case, the burden of showing that Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were paying guests and not sub-tenants has been discharged by the appellant. Moreover, once a finding of fact was reached by trial court and confirmed by the first appellate court that Anjali Mullick, Sukriti Sen and Vinod Kumar Aggarwal were not sub-tenants and that the appellant had not sub-let any part of the premises, such finding of fact could not be interfered with by the High Court in second appeal. It is not possible to say that this finding was perverse : on the contrary, we are of the view that it was wholly correct. The decree for eviction passed by the High Court under Section 13 (1) (a) must therefore be set aside.

5. So far as the decree for eviction under Section 13 (1) (h) of the Act is concerned, it is impossible to sustain it. In the first place, there was no plea taken in the plaint based on Section 13 (1) (h) nor was any issue framed on the basis of such a plea nor was it urged as a ground for eviction in the trial court or in the first appellate court. It was for the first time urged before the High Court in Second appeal. This was clearly impermissible. But even if such a plea were allowed to be raised for the first time in second appeal, we do not think it is well founded. The premises were admittedly let out to the appellant for residential purpose. The appellant continued to reside in the premises along with the members of his family and because he had one spare room in the premises, he took one or two

persons at time as paying guests on a charge which was inclusive of food. The appellant did not carry on any business in the premises and the premises continued to be used for residential purpose by the appellant and the members of his family and the paying guests. It is therefore impossible to hold that the appellant used the premises for a purpose different from that for which the premises were let out to him. The High Court was clearly in error in passing a decree for eviction against the appellant under Section 13 (1) (h) of the Act.

6. We accordingly allow the appeal, set aside the decree for eviction passed against the appellant and dismiss the suit of the respondent. The respondent will pay to appellant costs throughout.

</html