

Md. Salim

Vs

Md. Ali Since Deceased Through His Lrs. Md. Assim and Others

Special Leave Petition No. 4120 of 1987

(Sabyasachi Mukharji, G. L. Oza JJ)

26.08.1987

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This is a petition for special leave appeal against an order and judgment of the High Court of Calcutta September 24, 1986. By the impugned judgment and order the High Court has held that the present petitioner was not a sub-tenant of as such he was bound by the decree passed against the tenant for section. The petitioner challenges that finding and contends that he was a sub-tenant with knowledge and consent of the landlord and as such it does not bind him because in the suit he was not a party. There should have been a separate suit according to him. He should have been made a party to the suit. The High Court has held against the contention. We are of the view that the High Court was right. Our attention was drawn by Mr. Kacker to the agreement of September 1, 1966, contending that this was an arrangement of subletting and in that document one of the attesting witness was landlord himself. Therefore, this is done with the knowledge and consent of the landlord and as such valid. The agreement states, inter alia as follows :

This memorandum of agreement made this the 1st September, 1966 between Abdur Rahaman son of late Nabi Buksh by religion Muslim, by profession business of 51/I, Watgunj Street, P. S. Watgunj, District 24-Parganas. Calcutta-23, hereinafter called the first party of the one part and Md. Salim son of Waris Ali, by religion Muslim by profession business residing at 2/3, Mominpore Road, Police Station Ekbalpore, District 24-Parganas, Calcutta-23 hereinafter called the second party of the other part whereas the first party having taken settlement of a shop room its landlord Md. Mea has been running a business with the stock-in-trade as described in the schedule below and whereas the first party feels it inconvenient to look after and manage the same personally at present and whereas the second party is willing to manage the said business on behalf of the first party on terms and conditions hereinafter appearing; now this memorandum witnesses :

That the first party will remain the proprietor of the aforesaid business and the business licence shall stand in the name of the first party and the costs thereof shall be paid by the second party :

That house rent of the shop room shall be paid by the first party in his name; That the second party run the business in the shop room with the stock-in-trade supplied by the first party as described in the schedule as also with out articles and stock-in-trade to be supplied by him and manage the affairs of the said business under his personal supervision for two (2) years with effect from September 1, 1966 to August 31, 1968

on behalf of the first party and will restore the business along with the said articles in good condition with the expiry of the term of this contract; That the second party will pay to the first party a sum of Rs. 90 (Rupees Ninety) only per month payable within the seventh day of each month for which it becomes payable. That the second party will be entitled to appropriate the entire issues and profits arising out of the business in its entirety subject to the aforesaid payment to be made to the first party and the costs of licensee fees. That the second party shall not encumber the business in any way and shall not be entitled to raise a loan against the business and the business shall not be liable for any such, debt, if any, incurred by the second party; That the second party shall also bear all incidental costs for carrying on the business properly. That if the second party fails or neglects to pay the dues reserved under this contract for two months or violates any of the conditions mentioned herein then this agreement shall be treated as cancelled and of no effect and the First Party will be entitled to re-enter the shop room and business and to take possession of the same along with the articles mentioned in the schedule.

2. One of the attesting witnesses to the said agreement was Md. Ali, the respondent herein, who was at the relevant time landlord and is now represented by his legal representatives to this application. On a construction of the different clauses of the aforesaid document we are of the opinion that this was an agreement for management of the business of the tenant. It was not and cannot be constructed as an agreement of sub-tenancy. There was no exclusive possession with the respondent. There was no parting of possession of the premises, there was only a right to "manage" the business, looking after the existing business with fixed monthly payments and this cannot be constructed as an agreement of sub-tenancy. Therefore, though the landlord had knowledge of the document and as such can be said to have consented to the bargain it cannot be said to be consent to an agreement of sub-tenancy.

3. Our attention was drawn to the decision of this Court in *M/s. Girdhari Lal & Sons v. Balbir Nath Mathur* ((1986) 3 SCC 385), where considering similar provision of Delhi Rent Control Act, 1958, it was held that where the landlord had in fact consented to the sub-tenancy and as such the sub-tenancy was valid and landlord was bound by it. But in the present case, there was no sub-tenancy created by the agreement mentioned herein. Hence the consent and knowledge of the landlord do not help. Our attention was also drawn to Section 2(4) on the expression 'tenant' in West Bengal Premises Tenancy Act, 1956. That definition does not affect the position of the petitioner in the instant case as there was no sub-tenancy in the present case.

4. In view of the above, we are of the opinion that the High Court was right in the view it took. The special leave petition is accordingly dismissed. There will be no order as to costs.

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