

Smt. Rajbir Kaur and Another

Vs

M/s. S. Chokesiri and Co.

Civil Appeal No. 4077 of 1982

(M. N. Venkatachaliah JJ)

09.08.1988

JUDGMENT

VENKATACHALIAH, J. –

1. This appeal, by special leave, by the landlord arises out of and is directed against the judgment and order dated August 23, 1982 of the High court of Punjab and Haryana in Civil Revision Application No. 2588 of 1980, allowing the respondent tenant's appeal and - in reversal of the concurrent finding of the court below that there was an unauthorised subletting - dismissing appellant's application under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 (Act) for an order for grant of possession.
2. There were other grounds for eviction - one of them that there were unauthorised structural alterations; but having regard to the limited scope of the proceedings before the High Court, those other points do not survive.
3. The two appellants - mother and son - as owners of the commercial premises S.C.O. No. 15, Sector 17-E, Chandigarh, granted a lease, under deed dated November 25, 1970, in favour of M/s. S. Chokesiri & Co., respondent herein. The lease was for a term certain of 10 years from January 1, 1971 under the terms and on conditions particularised in the deed. Rent was initially Rs. 3000 per month subject to certain increases stipulated in the lease deed. Respondent carries on a business in clothing and textiles under the name and style "Saree Sansar" in the demised premises.
4. The principal ground - and the only ground that survives on which eviction was sought was that the respondent had, in about the year 1973, unauthorisedly and without the consent of the appellants, inducted two subtenants in two portions of the premises who, there after, carried on their respective businesses of their own in the respective portions so sublet. One was a tailor, a certain Banwari Lal, who carried on his business under the name and style "Royal Star Tailors" and the other, Agia Ram Lamba, Proprietor of M/s. Kwaliti Restaurant who established a business under the name and style "M/s. Kwaliti Ice Cream" in the portion sublet.
5. The specific defence to this charge of subletting and the explanation for the admitted presence of those two other business establishments in the premises had better be excerpted from the respondent's additional written statement :

The respondents have not sublet any part of the demised premises to anyone. The whole of the demised premises are in the exclusive possession of the respondents and are being used for the purpose of carrying on the business of the respondents,

namely, selling cloth and ready-made garments and for purpose subsidiary and ancillary to the said business

No part of the demised premises has been sublet by the respondent to M/s. Kwaliti Ice Cream or any tailors. Section 17 is the most fashionable shopping centre of the city. Most of the customers who frequent this shopping centre, are ultra-modern persons. It is a matter of common knowledge that in modern shopping centres, the owners of show-rooms, whatever the nature of their business, keep small booths to provide cold drinks, ice-cream and popcorn etc., to the customers, who come there with their children and spend considerable time making purchases in the show-rooms. The maintenance of such booths has become a necessary adjunct of all big shops in modern shopping centres.

Similarly, it is well known that in order to run the business of selling cloth efficiently, it is necessary to have a tailoring shop on the premises. Every customer, who makes purchase of cloth in any cloth shop of any consequence wants to consult a tailor in order to know exactly the length of the material that will be required by him for preparation of garments of his choice and most of the customers also like to have the garments stitched by the tailoring outfit on the premises of the cloth shop, more specially when the customers belong to sophisticated upper class.

The respondent also produced and relied upon the agreements dated September 13, 1973 entered into between respondent and the said Banwari Lal of "Royal Star Tailors" (Ex. Mark 'B') and dated September 17, 1973 between the respondent and the said Agia Ram Lamba of "M/s. Kwaliti Restaurant" (Ex. Mark 'A') the terms of which, according to the respondent, clearly excluded any possibility of subletting.

6. Appellants in support of their allegation of subletting relied, particularly, on the report and evidence of Shri S. K. Chhabra, Advocate-Court Commissioner (AW 1) who in his report substantially corroborated appellants' charge of subletting; of Ram Lal Malhotra (AW 2) and Inspection in the Enforcement Office who spoke to the notices stated to have been issued by the authorities in regard to the partitions effected in the premises to accommodate the tailor and the ice-cream vendor; of Ravinder Pal Singh (AW 4) a customer of the ice-cream parlour who spoke about the exclusiveness of its possession; of Normal Singh (AW 5) who gave a similar account respect in the tailoring establishment; of Davinder Sing (AW 7), the husband of the first appellant and father of the second, who spoke about the nature and extent of the alleged subletting and of the exclusiveness of the possession of the subtenants of the portions in their respective occupation and certain other matters; and of Kul Rajinder Lal (AW 8) who took photographs (Ex. AW 8/1 to 4) which are stated to disclose that the ice-cream parlour was open late in the night seven after the respondent's textile business had been closed.

7. Mehtab Singh Gill, the second appellant, tendered evidence as AW 9. Some documents were marked and relied upon in evidence on appellants' side.

8. Respondent examined, amongst others, Vijinder Kumar (RW 2) stated to be an attestor of Exs. Mark 'A' and Mark 'B'; M. L. Sharma (RW 3) a Senior Architect, in Chandigarh administration who produced the plans at (Ex.R. 4); Surinder Mohan (RW 5) the tailor's son; Swatantar Kumar (RW 6) a partner of "M/s. Kwaliti Restaurant"; Parveen Jain (RW 7) who was examined to contradict Aw 8 in regard to the time at which the photographs Ex. AW 8/1 to 4 were taken; Baldev Raj (RW 8) the Manager of "M/s. Kwaliti Restaurant"; Krishan Lal (RW 9) an employee of "M/s. Kwaliti Ice Cream" and Des Raj Jain (RW 10) a partner of the respondent firm.

9. The relevant portions of document (Mark 'A') dated September 17, 1973 say

(1) That first part (y) will provide Softy Ice Cream Machine along with one employee at their premises and the whole Softy Ice Cream will be supplied by the 1st part at his own risk and costs.

(8) That both the parties can terminate the system at any time without any notice. In that case the first part will take away the machine from the premises.

10. The relevant recitals in the document (Mark 'B') dated September 13, 1973 provide

(1) That the first part (y) will do tailoring work only in the portion, i.e., back courtyard and he will keep the employees with the prior consent of the second part and the premises will be locked in the evening by the second part. The possession will remain with the second part.

(2) That the arrangement has been done as it is beneficial to both the parties and it will boost the business of second part and the first part be licensee in the premises and licence can be evoked will only (sic) at any time without any notice and in that case the first part will remove his machine and other articles. The second part will not be liable to pay any damages.

11. The learned Rent controller, on an appreciation of the evidence on the point, was persuaded to the view that, while the allegations of subletting in favour of the tailor hand not been established, the case of subletting so far as the "M/s. Kwality Ice Cream" was concerns, had clearly been established. It is relevant to mention here that some time in the year 1976 after the institution of the proceedings the tailor gave up his business and vacated the portion in his occupation. In about the year 1980 the ice-cream vendor is also stated to have gone away. Learned Rent Controller held that the evidence on record indicated the exclusive possession of the Kwality Ice Cream and that in the circumstances of the cases it was also legitimate to draw an inference, and raise a presumption, that monetary consideration alone had prompted the respondent into the transactions. Accordingly, the learned Rent Controller by his order dated March 2, 1979 allowed the appellants' application and made an order granting possession.

12. The appeal preferred by the respondent before the District Judge was unsuccessful and the order of eviction came to be upheld. The Appellate Authority also found that even in the case of M/s. Royal Star Tailors, there was a subletting. The Appellate Authority held

So in the cases in hand, two exclusive portions have been parted with for M/s. Royal Star Tailors and for M/s. Kwality Ice Cream and the only conclusion in view of the evidence on record could be that the premises has been sublet and the documents Mark 'A' and Mark 'B', could not be termed as licence deeds by any stretch of imagination. Hence, so far as the finding on the ground of subletting is concerned, I do not find any reason to differ with learned Rent Controller and on this point I affirm the finding of the Rent Controller on this part of the issue.

13. The High Court, by its order dated August 23, 1982, in Civil Revision Application No. 2588 of 1980 however, in exercise of its revision jurisdiction and upon a reappraisal of the evidence set aside the concurrent findings of the courts below in regard to the element of exclusive possession and set aside the orders of eviction passed by the courts below. Consequently appellants' application for possession was dismissed.

14. In reaching this conclusion, the High Court placed reliance on the two documents Mark 'A' and Mark 'B' entered into between the respondent on the one hand and M/s. Kwaliti Restaurant and Banwarilal, the tailor, respectively, on the other. The High Court observed :

A look at these documents goes to show that it was specifically mentioned therein that the possession of the demised premises will remain with the petitioner tenant and only the work connected with the supply of Softy Ice Cream and tailoring was allowed to be carried on. Except for the charges for the electricity consumed no rent is payable by the third parties to the petitioner. The agreements further envisage that the licences could be revoked at any time without any notice. The conditions prescribed in these documents do prima facie indicate that it was a case of licences, and not of subletting.

Referring to what it thought were certain procedural objections in accepting the report and the evidence of the Court Commissioner (AW 1) which had been accepted by the courts below, the High Court was persuaded to this view :

It appears that the authorities below have given great importance to a report of the Local Commissioner who was appointed during the trial for inspection of the demised shop. It is not disputed that the order appointing the Local Commissioner was passed by the Rent Controller ex parte without notice to the petitioner.

In the first place, there is nothing on the record to abduct that the petitioner was at any stage afforded an opportunity to file objections to the report as is usually done in such matters.

15. In regard to the correctness of the report itself, the High Court had this observation to Make :

The Local Commissioner made a report Ex. A-1 to the effect that there are three separate portions on the ground floor where the demised premises were situated and each of these portions had a separate access. A material part of this report is that none of the above portions is approachable from inside the demised shop. If the report of the Local Commissioner would have been Correct, there may be something to say in Favour of the landlords on the points of the conferment of exclusive possession of the portions to the third parties. There are, however, circumstances to show that this report is not factually correct.

The High Court placed reliance on certain plans said to have been submitted for effecting certain alterations to the building which are stated to have contained the signature of the first appellant to come to the conclusion that, consistent with the structural dispensations indicated in the plans, the alleged subtenants could not have had exclusive possession. On this aspect, the High Court observed :

These pans were proved by M. L. Sharma, Senior Architect (RW 3) who testified that they bear the signatures of Rajbir Kaur respondent-landlady. In fact, their correctness was also admitted by Davinder Singh, Mukhtiar and husband of Rajbir Kaur, landlady. These plans, according to learned counsel for the petitioner, indicate that after entering into the main gate of the shop, one could go into the portion which was permitted to be used by the Kwaliti Restaurant for supply of Softy Ice Cream. Similar is the case with the portion occupied by the tailor, The learned counsel for

the respondents has not been able to rebut this fact. This being so, the question of parting with exclusive possession of any portion of the shop in favour of the two alleged subtenants, does not arise.

16. The contentions of Shri G. L. Sanghi, learned senior advocate in support of the appeal admit of being formulated thus :

(a) The High Court was in error in interfering, in exercise of its revisional jurisdiction, with the concurrent finding of fact recorded by both the courts below as to the exclusivity of the possession of M/s. Kquality Ice Cream of the portions in which it was carrying on of its business. This was a pure question of fact the concurrent finding on which was not amenable to interference in exercise of revisional powers under the 'Act';

(b) That reliance by the High Court on the evidence of RW 3 and plans Ex.R. 4 to show that the structural modifications indicated an accessibility between the main premises and the portions in the occupation of subtenants was wholly misplaced as, indeed, Ex.R. 4 was itself produced in a totally different context and for an altogether different purpose, viz., to meet the ground of eviction based on unauthorised construction and not for purposes of rebutting exclusive possession of the subtenants;

(c) That even if the revisional jurisdiction of the High Court admitted a reappraisal of evidence, a finding of a facts which was the result purely of appreciation of oral evidence by the trial court could not be interfered with even by an appellate court and a fortiori in revision;

(d) That the view of the High Court as to the alleged infirmity of the court commissioner's (AW 1) report on the ground that his appointment was not preceded by a notice to the respondent was erroneous.

17. Dr. Chitale, learned senior advocate for the respondent, sought to support the order of the High Court contending, in the main, that, where a finding of fact is shown to have been rendered infirm and vitiated by a misreading of evidence and a non-consideration of material evidence, and where the inference and conclusion drawn from the evidence is non-sequiter the revisional jurisdiction under the 'Act' which is wider than that under Section 115 CPC could be invoked to correct errors even in findings of facts and that, at all events, the finding of a question of sub-tenancy being a mixed question of fact and law, this Court, even on an independent consideration of the whole matter, should not interfere as one of the essential ingredients in the concept of a sub-lease, viz., the existence of monetary consideration, in the form 'rent', as distinct from consideration by way of services, was wholly lacking. Learned counsel, however, emphasised the correctness of the finding of the High Court on the lack of exclusive possession, on which alone, according to the learned counsel, the appeal should fail.

18. Such controversy as exists in the case turns solely on whether the relationship between the respondent on the one hand and "M/s. Kquality Restaurant" and the "Royal Star Tailors" on the other, is one of subletting. Dr. Chitale contends that the two transactions lack the normal and the usual indicia of tenancy and were no more than mere personal privileges or personal licence to occupy; and that no interest in the property was transferred.

19. This case, indeed, presents once again the recurring facets of a familiar controversy, whether the transaction between a tenant and the person - alleged by the landlord - to be his subtenant is in law really one of subtenancy which often resembles, and is most liable to be confounded with, a licence. One of the twin principal tests by which a lease is distinguishable from the relationship created under a licence is the element of the right to exclusive possession involving the transfer of an interest in the property; the other being the 'rent' stipulated for the grant.

20. In *Wood v. Leadbitter* (153 ER 351, 354 : (1845) 13 M & W 838) Baron Alderson emphasized the element of the transfer of interest :

A dispensation or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful.

21. In *Glenwood Lumber Co. v. Phillips* (1904 AC 405, 408) the distinction was pointed out thus:

If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

22. It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further, the grant be for consideration. While the definition of 'lease' in Section 105 of the Transfer of Property Act, 1882, envisages the transfer of a right to enjoy the property, on the other hand the definition of a 'licence' under Section 52 of the Indian Easements Act, 1882, consistently with the above, excludes from its pale any transaction which otherwise, amounts to an "easement" or involves a transfer of an interest in the property, which is usually involved in the case of a transfer of right to enjoy it. These two rights, viz. easements and lease in their very nature, are appurtenant to the property. On the other hand, the grant only for the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence. But the converse implications of this proposition need not necessarily and always be true. Wherever there is exclusive possession, the idea of a licence is not necessarily ruled out. English law contemplates what are called 'possessor Licences' which confer a right of exclusive possession, marking them off from the more usual type of licences which serve to authorise acts which would otherwise be trespasses (See : John Dewar : Licences and Land Law, *Modern Law Review* (Vol. 49 No. 6. Nov. 1986) and S. Moriarty *Licences and Land Law : Legal Principles and Public Policies* (1984) 100 L.Q.R. 376). Thus exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single, simple litmus test to distinguish one from the other. The "solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties" (See *Cobb v. Lane* (1952) 1 All ER 1199 (CA)).

23. In *Marchant v. Charters* ((1977) 3 All ER 918, 922 (CA) Lord Denning, M.R. referred to the tests for determining whether an occupier is a licensee or tenant thus :

Gathering the cases together, what does it come to ? What is the test to see whether the occupier of one room in a house is a tenant or a licensee ? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent

or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee ?

24. In *Associated Hotels of India v. R. N. Kapoor* ((1960) 1 SCR 368, 383 : AIR 1959 SC 1262) this Court referring to the classic distinction between a lease and a licence said :

There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable Property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the lease hold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor.

25. In *B. M. Lall v. Dunlop Rubber & Co. Ltd.* ((1968) 1 SCR 23, 27 : AIR 1968 SC 175) the distinction between the two concepts was brought out :

A lease ... is the transfer of a right to enjoy the premises; whereas a licence is privilege to do something on the premises which otherwise would be unlawful The transaction is lease, if it grants an interest in the land; it is a licence if it give a personal privilege with no interest in the land.

26. In *Qudrat Ullah v. Municipal Board, Bareilly* ((1974) 1 SCC 202, 208) it was stated : (SCC p. 208, para 7)

... if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted a licence

27. In *Board of Revenue v. A. M. Ansari* ((1976) 3 SCC 512, 516 : 1976 SCC (Tax) 350 : (1976) 3 SCR 661, 665) it was again observed (SCC p. 516, para 10)

... it is the creation of an interest in immovable property or right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease.

28. In *Dipak Banerjee v. Smt. Lilabati Chakraborty* ((1987) 4 SCC 161, 165-66) Sabyasachi Mukharji, J. observed : (SCC pp. 165-66, para 6)

But in order to prove tenancy or subtenancy two ingredients had to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must be in lieu of payment of some compensation or rent.

29. However, in regard to the second requirement of 'consideration' for the transfer of the right to enjoys the property, it was in that case held that though Section 105 of the Transfer of Property Act envisaged even 'services' rendered by the lessee as a consideration for the grant; however, under the

Rent Acts, the position would be different. The proposition was noticed thus : (SCC p. 167, para 10)

The question is, whether in the context of the provisions of Rent Act, Services can be consideration for subtenancy ? In other words whether in view of the provisions of the Rent Act Services can be a good or any consideration for sublease is the question.

30. Answering, it was held : (SCC p. 167, para 10)

We are of the opinion that it cannot be It is however not possible to accept that services in lieu of the right of occupation would amount to receipt of rent under the Rent Act To create subtenancy. This frustrates and defeats and defeats the purpose of the Rent Act.

31. Again, in Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala ((1988) 1 SCC 155) Sabyasachi Mukharji, J. observed : (SCC p. 164, para 10)

To put it precisely if an interest in immovable property entitling the transferee to enjoyment was created, it was a lease; if permission to use land without exclusive possession was alone granted, a licence was the legal result. We are of the opinion that this was a licence and not a lease as we discover the intent.

32. The question is, whether in the present case, the evidence on record justifies the inference that the tailor and the ice cream vendor were put in exclusive possession. Dr. Chitale contended that the question would require to be determined upon a proper construction of the deeds entered into between the parties, and that, that alone is decisive of the matter. Indeed, learned counsel placed strong reliance on the following observations by this Court in Mrs. M. N. Clubwala v. Fida Hussain Saheb ((1964) 6 SCR 642, 652 : AIR 1965 SC 610) :

Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement.

The proposition of Dr. Chitale as to the conclusiveness of what emanates from the construction of the documents, has, in this case, its own limitations. The import, significance and conclusiveness of such documents making, or evidencing, the grants, fall to be examined in two distinct contexts. The dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a 'licence' and the other that it is a 'lease'. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing. But in cases where, as here, the landlord alleges that the tenant has sublet the premises and where the tenant, in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed. At best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case. The tenant and the subtenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transactions behind as facade of a self-serving and conveniently drafted instrument. The transaction might be collusive and a mere mask the parties choose to wear to confuse and confound third parties. In such a case the realities and substance of the transaction and not merely the deed, become the basis for the determination of the legal nature of the relationship. The deed is a mere piece of evidence. In deciding whether a

grant amounts to a lease or only a licence, regard must be had more to the substance than the form of the transaction. It is determined by the law and not by the label the parties choose to put on it. To give exclusive possession, there need not be express words to that effect; it is sufficient if the nature of the acts done by the grantee show that he has and was intended to have then right of exclusive possession. The fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from creating a lease.

33. In B. M. Lall case ((1968) 1 SCR 23, 27 : AIR 1968 SC 175) this Court observed :

The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant, is not decisive. The test of exclusive possession is not decisive ... though it is a very important indication in favour of tenancy.

34. Contentions (a) and (b) could conveniently be dealt with together. Shri Sanghi's first contention is the non-availability, to the revisional court, of the power to reappreciate evidence and substitute a finding of fact of its own in place of the concurrent finding of the courts below.

35. The cognate question is whether the concurrent finding of exclusive possession of M/s. Kwaliti Ice Cream is supportable on the evidence and if so, whether the High Court could, in revision, have substituted a finding of its own on the point. It is true, having regard to the language of Section 15(5) of the Act conferring revisional powers which include an examination of the legality or propriety of the order under revision, the High Court can, in an appropriate case, reappreciate evidence and interfere with finding of fact. But the question is whether that was called for or justified in the present case.

36. Shri Sanghi pointed out that finding of the trial Judge on the question of exclusive possession of M/s. Kwaliti Ice Cream could not be found fault with on the alleged ground of any non-consideration of material evidence. He submitted that the finding was supportable on the evidence. Shri Sanghi particularly referred to some admissions of the respondent's own witnesses in the course of their evidence. Learned counsel drew attention to the deposition of Krishan Lal (RW 9) who, while admitting his identity in the photograph Ex. AW 8/4 said :

In Ex. AW 8/4, I am sitting. I was cleaning the machine. My one hand was near the mouth. Portion of softy is separate. It is correct to suggest that the proprietor of 'Saree Sansar' opens the shop separately.

37. Shri Sanghi also referred to the following statement of Des Raj Jain (RW 10) a partner of the respondent's firm, which, according to the learned counsel, amounts to an admission of the exclusiveness of his possession :

The ice-cream premises can be locked from outside independently.

38. Shri Sanghi, quite understandably, placed strong reliance on the report of the Commissioner (AW 1) whose report substantiated the appellants' case. So far as the admissions attributed to Des Raj Jain (RW 10) is concerned, Dr. Chitale would say that the statement of the witness that the premises could be locked from outside independently does not militate against or detract from the internal inter-connection between the main premises of "Saree Sansar" and "Kwaliti Ice Cream". But the report and evidence of the Local Commissioner excluded any possibility of any such internal interconnection.

39. On an appreciation of the evidence the learned Rent Controller came to hold :

Evidence of the petitioners clearly establishes that there is a separate cabin for selling ice-cream which is under the control of ice-cream sellers. The licence deed is only a cloak to cover the real relationship of respondent with M/s. Kquality Restaurant, Section 17-E, Chandigarh. It is not believable at all that the respondent parted with a portion of the premises to M/s. Kquality Restaurant, Section 17-E, Chandigarh, without any consideration and just for the sake of supplying ice-cream to the customers that too after charging the price. It is all against the natural conduct that the respondent may part with a portion of the premises just for this mere facility.

The photographer Kul Rajinder Lal (AW 8) is an independent and truthful witness who took the photographs at about 9 p.m. when the business of ice-cream was being conducted. The Statements of the witnesses Swatantar Kumar (RW 6), Parveen Jain (RW 7), Baldev Raj (RW 8) and Krishan Lal (RW 9) are the statements of the interested persons who had clearly told a lie with a view to depose in favour of the respondent that the photographs were taken early in the morning. If the photographs were taken earlier in the morning, it would have been possible that the shop of the respondent would be open

No other presumption excepting that of subletting can be raised in the circumstances of the case. The respondent Des Raj (RW 10) has admitted that there are bigger cloth merchants in Sector 17 than his shop but none of them has opened such a booth of ice-cream in their shops.

40. The view of the High Court, in substance, was that there was conflict between the version of the Commissioner and the state of affairs indicated in the plans (Ex.R. 4) which did not support the exclusive and separate nature of the ice-cream vendor's possession and that the latter should prevail. But a more careful examination of the context in which M. L. Sharma (RW 7) the Senior Architect who produced Ex.R. 4 was examined shows that Ex.R. 4 was relied upon in rebuttal of and in answer to an altogether different ground i.e., the ground of unauthorised structural alterations and the alleged damage caused to the building thereby and to show that the structural alterations had been authorised by the first appellant. It is quite plain that respondent itself did not seek to rely on this evidence on the point of exclusive possession or lack of it.

41. Not even a suggestion was put to AW 7 or AW 9 to the effect that the structural alterations as evidenced by Ex.R. 4 rendered the exclusive possession of M/s. Kquality Ice Cream Impossible. Nor, indeed even one out of the 26 grounds in memorandum of appeal before the appellate court or the 24 grounds raised in the revision application before the High Court, refer to this inference to be drawn from Ex.R. 4. More importantly, even Des Raj Jain (RW 10) partner of the respondent firm does not himself claim this import and significance for Ex.R. 4. No witness stated that the structural alterations were strictly in accordance with the plan, Ex.R. 4. Apparently, this was not also the aspect on which respondent placed reliance before the courts below. Reliance on the plans to take away the effect of the positive evidence on record was not, therefore, justified.

42. The scope of the revisional jurisdiction depends on the language of the statute conferring the revisional jurisdiction. Revisional jurisdiction is only a part of the appellate jurisdiction and cannot be equated with that of a full-fledged appeal. Though the revisional power - depending upon the language of the provision - might be wider than revisional power under Section 115 of the Code of Civil Procedure, year, a revisional court is not a second or first appeal.

43. When the findings of fact recorded by the courts below are supportable on the evidence on record, the revisional court must, indeed, be reluctant to embark upon an independent reassessment of the evidence and to supplant a conclusion of its own, so long as the evidence on record admitted of and supported the one reached by the courts below. With respect to the High Court, we are afraid, the exercise made by it in its revisional jurisdiction incurs the criticism that the concurrent finding of fact of the courts below could not be dealt and supplanted by a different finding arrived at on an independent reassessment of evidence as was done in this case. We think in the circumstances, we should agree with Shri Sanghi that the concurrent finding as to exclusive possession of M/s. Kwaliti Ice Cream was not amenable to reversal in revision. Contentions (a) and (b), in our opinion, are well taken and would require to be held in appellants' favour.

44. On contention (c) as to the limitation on the powers, even of the appellate court, to dislodge finding of facts recorded by the trial court on a reappraisal of oral evidence, we think, the submissions of Shri Sanghi are not also without substance. The proposition, that the appellate court should not too lightly interfere with the appreciation of oral evidence made by the trial court, particularly based on the credibility of the witnesses whose demand on the trial court has had the advantage of observing, is too well settled to require reiteration. A clear exposition of the rule as to what extent the appellate court should regard itself as bound by the conclusions reached by the trial court on questions of fact is to be found in the speech of Lord Thankerton in *Watt v. Thomas* (1947 AC 487-88) :

I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus : (I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (II) The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

45. But in cases where there is no question of credibility or reliability of any witness or the question is one of a proper inference to be drawn from provided facts, the appellate court is - and should be - generally in as good a position to evaluate the evidence as the trial Judge is. Lord Reid in *Benmax v. Austin Motor Co. Ltd.* ((1955) 2 WLR 418, 422 : (1955) 1 All ER 326, 329 : 1955 AC 370) observed :

But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

46. In the same case, Viscount Simonds indicated the need to keep the distinction between a finding

on a specific fact on the one hand and a finding which is an inference from proved facts on the other, clearly distinguished. The limitations on the power of the appellate court to reappraise the evidence is clearly confined the former. That is the distinction between what is 'perception' and what is 'evaluation'.

47. Viscount Simonds observed : (ALL ER pp. 327-28)

A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation.

48. Reference on the point could also usefully be made to A. L. Goodhart's article (71 LQR 402, 405) in which, the learned author points out :

A judge sitting without a jury must perform dual function. The first function consists in the establishment of the particular facts. This may be described as the perceptive function. It is what you actually perceive by the five senses. It is a datum of experience as distinct from conclusion.

It is obvious that, in almost all cases tried by a judge without a jury, an appellate court, which has not had an opportunity of seeing the witnesses, must accept his conclusions of facts because it cannot tell on what grounds he reached them and what impression the various witnesses made on him.

49. The following is the statement of the same principle in "The Supreme Court Practice" (White Book, 1988 edn Vol. 1) :

Great weight is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of these statements. But the parties to the cause are nevertheless entitled as well on questions of fact as on questions of law to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. (p. 854-55)

.. Not to have Seen witness puts appellate judges in a permanent position of disadvantage against the trial judge, and unless it can be shown that he has failed to use or has palpably misused it can be shown that he has failed to use or has palpably misused his advantage - for example has failed to observe inconsistencies or indisputable fact or material probabilities [ibid. and Yuill (1945) p. 15; Watt v. Thomas (1947 AC 487-88)] - the higher court ought not take the responsibility of reversing conclusions so arrived at merely as the result of their own comparisons and criticisms of the witnesses, and of their view of the probabilities of the case (p. 855)

.. But while the Court of Appeal is always reluctant to reject a finding by a judge of the specific or primary facts deposed to by the witnesses, especially when the finding is based on the credibility or bearing of a witness, it is willing to form an independent opinion upon the proper inference to be drawn from it (p. 855)

50. A consideration of this aspect would be incomplete without a reference to the observations of B. K. Mukherjea, J., in *Sarju Pershad Ramdeo Sahu v. Raja Jwaleshwari Pratap Narain Singh* (1950 SCR 781, 783-84 : AIR 1951 SC 120) which as a succinct statement of the rule, cannot indeed be bettered :

The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.

51. The area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which the well known limitation on the powers of the appellate court to reappraise the evidence falls. The appellate court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the trial court fell into an obvious error.

52. With respect to the High Court, we think, that, what the High Court did was what perhaps even an appellate court, with full-fledged appellate jurisdiction would, in the circumstances of the present case, have felt compelled to abstain from and reluctant to do. Contention (c) would also require to be upheld.

53. Re Contention (d) : The High Court was of the view that the proceeding of the commissioner was vitiated by the absence of a notice to the respondents preceding the order appointing the Commissioner. It is true that some High Court had taken the view that no order appointing a Local Commissioner under Order 26 CPC could be passed ex parte. (See *Latchan Naidu v. Ram Krishan Ranga Rao Bahadur Bobbili Samasthanam* (AIR 1934 Mad 548 : 151 IC 941 : 1934 MWN 155)). But subsequent pronouncements of several High Courts, including the Madras High Court, have inclined to the better view that there might be circumstances which may necessitate and justify even an ex parte order appointing a Commissioner. But the requirements of Rule 9 of Order 26 are construed to apply to a stage after the making of an order appointing the Commissioner. In the present case, it is no doubt true, that the order dated February 3, 1975 of the trial court appointing a Commissioner did not in terms direct the parties to appear before the Commissioner. There is this infirmity in the proceedings of the Commissioner.

54. But it is possible to construe the power to appoint a Commissioner to inspect the extant state and nature of structures as not confined to Rule 9 of Order 26 but referable to Rule 7 of Order 39 CPC where the court can dispense with prior notice, should it appear to the court that the very object of making of appointment of a Commissioner would be defeated and frustrated by the issue of prior

notice. On the scope of Rule 8 of Order 39 as it stood even prior notice. On the scope of Rule 8 of order 39 as it stood even prior to its amendment, High Court have held that an ex parte order appointing a Commissioner, is permissible. However it is not necessary to pronounce on this question as even the other evidence on record relied upon by the trial court and the appellate court support their finding as to the exclusive possession of the ice-cream seller.

55. Dipak Banerjee case ((1987) 4 SCC 161, 165-66) on which strong reliance was placed by Dr. Chitale does not, in our opinion, advance the case of the respondent any further. There, the question was whether the tenant had sublet two rooms in the premises to a tailor who is stated to have established therein a tailoring business. The tenant denying the subletting contended that the tailor was allowed to occupy a part of the premises "due to pity and charity" and that he was "sewing in the house without any rent". It would appear that the tenant also did some service for the landlord and the members of his family. The alleged subtenant not having entered the box, the plea of subletting had come to be accepted. In the appeal before this Court it was held that there was neither pleading nor evidence nor a specific finding on the question of exclusive possession of the alleged subtenant and that, therefore, one of the essential ingredients of a sublease was lacking. It was further held that providing of services could not also be construed as consideration for purposes of the Rent Acts and that therefore, the second ingredient was also absent. The decision turned on the particular facts of the case. That case could be of no assistance to the respondents. Likewise, the decision in Khalil Ahmed case ((1988) 1 SCC 155) where also, on the facts of the case, it was held that the case of a sublease had not been made good.

56. Dr. Chitale then urged that there was not even a pleading by the appellant on the point of money consideration for the parting of possession and that no amount of evidence adduced on a point not pleaded could at all be looked into. As a general proposition the submission is unexceptionable; but in the present case, the point, in our opinion, is not well taken. Appellants specifically pleaded "subletting". Respondent understood that pleading as to imply all the incidents of subletting including the element of 'rent' and specifically traversed that plea by denying the existence of consideration. Parties went to trial with full knowledge of the ambit of the case of each other. In the circumstances the pleadings would be required to be construed liberally.

57. In Ram Sarup Gupta v. Bishun Narain Inter College ((1987) 2 SCC 555 : AIR 1987 SC 1242) this Court said this of the need to construe pleading liberally : (SCC pp. 562-63, para 6)

Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should sane considers. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

58. After all, the "parties do not have the foresight of prophets and their lawyers the draftmanship of a Chalmers". There is no substance in this contention of Dr. Chitale either.

59. The High Court did not deal specifically with the question Whether, in the circumstances of the case, and inference that the parting of the exclusive possession was prompted by monetary

consideration could be drawn or not. The High Court did not examine the aspect of the matter, as according to it, one of the essential ingredients, viz., of exclusive possession had not been established. 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 subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got. It is not, often, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contention 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 bearing the legal burden, shifts according as the weight of the evidences 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.

60. In the result, for the foregoing reasons, this appeal is allowed, the order of the High Court under appeal is set aside and the order of eviction passed by the courts below restored. Having regard to all the circumstances of the case, we grant time to the respondent to vacate and yield up the vacant possession till December 31, 1988. In the circumstances of the case, the parties are left to bear their own costs both here and below.

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