Gopal Saran

Vs

S. Satyanarayana

Civil Appeal No. 2747 of 1988

(Sabyasachi Mukharji, J.)

(Rangath Misra, S. Ranganathan JJ)

20.02.1989

JUDGMENT

SABYASACHI MUKHARJI, J. –

This appeal by special leave is against he judgment and order of the Division Bench of the High Court of Rajasthan dated February 23, 1988. The appellant is the tenant in the suit premises. The premises in question is a shop situated outside Delhi Gate, Udaipur, in the State of Rajasthan. In the said shop the appellant carried on the business of opticals. This fact is undisputed. He asserted that he was also running the business of advertisement by way of display of various advertisements (hoardings) boards at various places in the city of Udaipur. The case of the appellant was that though the appellant had taken the premises on rent on the basis of oral tenancy on August 1, 1971, the rent note in fact was executed on May 30, 1972. The respondent had filed the suit for eviction of the tenant appellant on three grounds, namely, (i) that the tenant-appellant had parted with possession of the roof of the said shop-room by putting up an advertisement board; (ii) by putting up such advertisement board, fixing the same on the roof of the said shop-room with iron angels, the appellant had caused material alteration to the premises; and (iii) the appellant had defaulted in payment of rent. On or about April 20, 1979, the trial court decreed the suit on the ground of default in payment of rent, material alteration and sub-letting. The appellant preferred an appeal before the learned District Judge, Udaipur, who remanded the case back to the trial on all the three issues, on the ground that the appellant had not been allowed to cross-examine the respondent or to adduce evidence in defence. On remand, the trial court held that the appellant had caused material alteration by fixing the board on the roof; had parted with possession of the roof by such fixing of the board; and had committed default in payment of rent. Accordingly, a decree was passed against the appellant for causing material alteration and for parting with the possession of the roof but no decree was passed by the trial court on ground of default because the said default was held by the learned trial Judge to be the first default. The appellant thereafter filed first appeal against the said judgment and decree passed by the trial court on November 9, 1984. By the judgment and decree dated March 20, 1987 the learned District Judge allowed the said appeal holding, inter alia, that by displaying the advertisement board the appellant had not caused any material alteration of the premises and display of such advertisements hoardings did not amount to parting with possession of the roof of the premises. In respect of default, on an analysis of the dates of payment it was held that there was no default in payment of rent for six months. The learned trial Judge had held that the default was the first default, therefore, there could be no decree for eviction on this ground. So even if the learned District Judge would have affirmed the findings of the trial court on the issue of default, there could not have been a decree in the said suit on the ground of default. The plaintiff-

respondent preferred an appeal before the High Court. The said appeal was allowed only on the issue of parting with possession holding that the display of the board amounted to parting with possession of the premises. Accordingly, the decree for eviction under Section 13(1)(e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, hereinafter mentioned as the 'Act', was passed. Section 13 of the said Act deals with the grounds for eviction of tenants. By clause (a), sub-section (1) of the said section provides that notwithstanding anything contained in any law or contract, no court shall pass any decree, or make any order, in favour of a landlord, evicting the tenant so long as he is ready and willing to pay rent thereof to the full extent allowable under the said Act unless it is satisfied, inter alia, that the tenant had neither paid nor tendered the amount of rent due from him for six months. Sub-clause (b) of sub-section (1) of the said section makes the tenant liable to eviction if he has wilfully caused or permitted to be caused substantial damage to the premises. Clause (e) of section (1) of Section 13 under which the decree in question, in the instant case, was passed provides as follows :

> (e) that the tenant has assigned sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord; or

As mentioned hereinbefore, the decree in this case was passed by the High Court under Section 13(1)(e) of the Act on the ground that the appellant had parted with possession. The High Court in the judgment under appeal has noted that the plaintiff-appellant had not disputed that the advertisement board was installed in the roof of the shop. The High Court noted that the appellant has also disputed that he was getting the rent for this board and the document which was tendered, viz., Ex. 6 showed that the Paramount Services had written a letter to the landlord-respondent Gulam Abbas herein and the same had been accepted by the appellant. The said Ex. 6 read as follows :

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Shri Gulam Abbas Bhalam Wala, Udaipur

Dear Sir,

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We wish to write that we have been taken the site for putting up commercial board on the terrace of the shop of Saran Optician, Udaipur. This site is with us for the last half year.

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Yours faithfully,

Paramount Services,

Sd/- Partner

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The High Court was of the view, that perusal of the document indicated that Paramount Services

had installed that board on the terrace of the shop and the site was with them for the last six months. The High Court further held that it transpired that the terrace of that shop had been away to the Paramount Services for installing the advertisement board. The High Court proceeded on the basis that Ex. 6, mentioned hereinbefore, showed that the site was with the Paramount Services and it has been admitted by the tenant-appellant that he had charged the money for leasing out this site to the Paramount Services. According to the High Court two factors were relevant in this case : (1) whether the site was the Paramount Services for the last six months and (2) that the defendant had admitted that he had received the rent for this. The High Court referred to the deposition of DW 1 Gopal Saran which was as follows :

> USS BOARD PAR PRACHAR KE TEEN SAAL KE PANDRAH SAU RUPAYE MAIN LETA THA JISMEN PAINTING AUR BOARD AUR LIKHAVAT KA KHARCH MERA THA

According to the High Court, these two factors establish that the defendant had parted with part of the terrace to Paramount Services. This according to the High Court, was wrong as it had been clearly prohibited in the lease deed Ex. 1. Clause 3 reads as under :

> DUKAN KO LIPA POTA SAPPH ACHHI HALAT MEN RAKHUNGA AUR BAGAIR LIKHIT IJAZAT AAPKE KOI MAJID TAMIR NA KARUNGA AUR NA DUSRE KISSI AUR KO MUNTKIL KAR SAKUNGA. MAIN KHUD DUKAN PAR BAITHUNGA.

2. The High Court found that the tenant-appellant had mentioned that they would not part with the possession, notwithstanding that the tenant-appellant had parted with the possession which was apparent, according to the High Court, from Ex. 6 and the statement of DW 1 what he had charged rent for installing this board. These two factors went to show, according to the High Court, that the defendant had parted with the possession of the part of the terrace so as to enable the Paramount Services to install the board in the premises. The court accepted the submission on behalf of the respondent-landlord that there was parting with possession and the landlord was entitled to a decree for eviction under Section 13(1)(e) of the Act. It maybe mentioned that two other submissions were urged before the High Court on behalf of the landlord-respondent, namely, that the rent was tendered and that when it was refused by the landlord, the tenant had deposited the rent in the court under Section 19-A of the Act not been established. There was also the finding on the issue of material and that was also not established by the respondent-landlord. But the High Court, in view of this finding under Section 13(1)(e) of the Act, as set out hereinbefore, found it unnecessary to go into those reasons and passed a decree for eviction. Aggrieved thereby, as mentioned hereinbefore, the tenant has come up in a appeal to this Court.

3. We find a certain amount of confusion as to what was the actual state of affairs. The pleadings of the plaintiff-respondent, the landlord in connection with the allegations of parting with possession are set out in paragraphs 5, 6 and 8 of the plaint and these have been answered by the appellant in paragraphs 5, 6, 8 and 9 of the written statement. It may be appropriate at this stage to set out the same both in Hindi as well as in English. Paragraph 5 is as follows :

> Hindi Original

5. YEH KI PRATIVADI NE BINE VADI KO POOCHHE EVAM VADI KI ANUMATI PRAPAT KIYE BINA VIVADGRAST DUKAN KE UPAR CHHAT PAR ZITER TRAKTAR KA BOARD

LAGA DIYA HAI JO CHHAT PAR LOHE KE ANGLE MAIN FIX KIYA HUVA HAI.

In English

5. Without permission and consent of the plaintiff the defendant has put up the board of Jitter Tractors on the roof of the disputed shop in question which is fixed on iron angles on the roof.

Paragraph 6 reads as under :

In English

6. The defendant has, without the permission and consent of the plaintiff given to the advertising agency the Board which has been displayed on the roof of the disputed shop taken by the defendant from the plaintiff on rent, in respect of which the defendant had not right.

Hindi Original

6. YEH KI BOARD JO VIVADGRAST DUKAN JO KI PRATIVADI KE PASS VADI KI AUR SE KIRAYA PAR HAI, KI CHHAT PAR LAG RAHA HAI VAH VIGYAPAN (ADVERTISEMENT) KA BOARD HAI JISKO PRATIVADI NE VADI KI ANUMATI PRAPAT KIYE BINA ADVERTISING AGENCY KO LAGANE DE DIYA HAI JISKA KI PRATIVADI KO SWATEY KOYEE ADHIKAR NAHIN HAI.

Paragraph 8 reads as under :

In English

8. The defendant has no right to place the board of the Advertising Agency on the roof of the shop without permission of the plaintiff.

Hindi Original

8. YEH KI PRATIVADI KE KO BINA VADI SE POOCHHE DUKAN KI CHHAT PAR ADVERTISING AGENCY KO BOARD LANGANE DENE KA KOYEE ADHIKAR NAHIN HAI.

Paragraph 5 of the written statement reads as follows :

In English

5. With regard to paragraph 5 of the plaint the defendant states that the defendant had displayed a sign board on the roof of the disputed shop but it is false to state that any angle has been fixed or embedded on the wall of the shop or of the roof or on the floor of the roof. The sign board has been placed without damaging the walls or the floor of the roof in any manner whatsoever. The angles have not been embedded. In putting up this sign board, there was necessity of obtaining written permission of the plaintiff. It was within the full knowledge of the plaintiff and the plaintiff never objected to the same, which means the plaintiff had consented to the same.

Hindi Original

5. VAD PATRA KE PAIRA 5 KE LIYE NIVEDAN HAI KE PRATIVADI NE EK SIGN BOARD VADGRAST DUKAN KI CHHAT PAR LAGAYA HAI PAR YEH MITHYA HAI KI DUKAN KI ATHVA CHHAT KI DIWAR ATHVA FARSH MAIN ANGLE LAGAYE HO VAH SIGN BOARD DUKAN KI DIWARON ATHVA CHHAT KE FARSH KO KISI BHANTI HANI PAHUCHE HUVE LAGAYA GAYA HAI. GADA NAHIN GAYA HAI. IS SIGN BOARD LAGANE MAIN VADI KO LIKHIT ANUMATI LENA AVASHAK NAHIN THA, VIASE VADI KE PURAN GYAN MAIN YEH BOARD LAGAYA THA TATHA AISA KARNE MAIN VADI NE KABHI APATTI NAHIN UTHAYEE, ARTHAT VADI KI AWAKRITI NAHI HAI.

Paragraph 6 of the written statement reads as follows :

In English

The allegations in paragraph 6 of the plaint that the Board belonged to any other advertising agency is false. The defendant himself has place the said board in the normal course of his carrying on the business. The defendant is using the said disputed shop on his own right for the purposes of carrying on his normal business.

Hindi Original

6. VAD PATRA KA PAIRA 6 MAIN MITHYA HAI KE BOARD KISI ADVERTISING AGENCY KA LAGA HUVA HAI. PRATIVADI SWAM NE VAH BOARD LAGAYA HAI TATHA APNA SADHARAN VAVASAYE KARTE HUVE LADAYA HAI. TATHA VADGRAST DUKAN KA PANE SADHARAN VAVSAYE MAIN HI UPYOG KAR RAHA HAI AVAM SADHIKAR KAR RAHA HAI.

Paragraph 8 of the written statement is as follows :

In English

The contents of para 8 of the plaint are not admitted. The defendant has not allowed anybody to put up the Board, but he has himself put up the same.

Hindi Original

8. VAD PATRA KA PAIRA 8 SAVIKAR NAHIN HAI. PRATIVADI NE BOARD KISI KO LANGANE NAHIN DIYA APITU SWAM LAGAYA HAI.

Paragraph 9 of the written statement is as follows :

In English

9. The defendant denies all the allegations in paragraph 9 of the plaint. In particular the defendant states that the plaintiff has no right to bring the present suit of eviction which has been filed on false grounds. The defendant has neither committed default in payment of rent nor he has allowed anybody to put up board on the shop, nor he has parted with possession of the leasehold property or any part thereof to anybody. The defendant is in full control and possession (of the disputed shop). It may be mentioned that in the plaint the plaintiff has not alleged any act of subletting by the defendant.

Hindi Original

9. VAD PATRA KA PAIRA 9 SARVATHA ASWIKAR HAI. VADI KO KOYEE SWATAV NAHIN HAI KI VAH MITHYA ADHARO PAR DUKAN KHALI KARVAYE NA TO PRATIVADI NE KOYEE CHOOK KI HAI, KIRAYA DENE MAIN AUR NA HI USNE DUKAN PAR KISI KO BOARD LAGANE DIYA HAI AUR NA HI KOYEE MUKTI BHOG KIRAYE LI HUEE SAMPATI KA PARTIVADI KE KISI BHI BHAG KA KISI KO BHI HYA HAI. VAH PRATIVADI KE POORAN BHUGTI BHOG MAIN HAI.

4. At the initial hearing before the trial court, namely, before the remand the plaintiff got himself examined as witness and the evidence of plaintiff in examination-in-chief was recorded on April 6, 1979. After recording the said evidence, the trial court recorded that the counsel for the defendant was absent and thereupon closed the case, without, however, entering into the question as to why the endorsement was made. Against the decree of the trial court, the first appeal was filed before the learned District Judge and as state herein-before, at the final hearing of the appeal, the first appellate court held that the defendant was not given adequate opportunity to either cross-examine the plaintiff or to adduce his evidence and on that ground the order of remand was made. The plaintiff-landlord, however, did not say in examination-in-chief that the Board was fixed by anyone else than the defendant or the there was parting with possession of the roof of the shop room or any part thereof or by pitting the said angles in the wall, which was again not admitted as correct by the appellant, any material alteration was made. However, a photograph of the Board was produced by the plaintiff and the same was marked as Ex. 2. After the case was remanded, the trial court directed the plaintiff to appear before the court and to subject himself to cross-examination by the defendant and also to produced his evidence, if any. In spite of several opportunities the plaintiff did not appear before the court and submit himself to cross-examination. As the plaintiff neither submitted himself for further cross-examination nor produced any other evidence or witness in support of the plaint the defendant led defence evidence and got himself examined. The English translation of the said evidence of the defendant-appellant was filed on behalf of the appellant at the hearing of this appeal. From the said evidence it would appear, he had stated, inter alia, as follows :

> (a) I have affixed the Board on this shop for advertisement. The said Board is affixed in cement pillars (should be post) and for affixing the said boards neither the roof not the walls of the shop were dug.
>
> (b) The Board is affixed permanently and I advertise the business of parties and get its payment. I have not parted with possession of any portion of the roof of the shop to anyone.

In 1974, I advertised for Bhatia at the Board in which I have written that I have Zeator I have strength, a picture tractor was also made there I used to take Rs. 1500 for 3 years for advertisement out of which painting of Board, writing expenditure was mine.

Cross Examination

> (a) It is wrong to say that the Board is fixed on the roof of the shop. I do not do business of tractor, but I deal in advertising business. Besides this I maintain 14 other boards in the city. The above board is 10 ft. x 4 ft. At present Hanuman Vanaspati is advertised through the Board which was for the last 2 months prior to this board was affixed.

(b) 14 Boards of Paramount Services are fixed prior to the year 1988 which are being maintained by me. Ex. 6 is the letter of the said service. I charge M/s Paramount Services Rs. 500 per year.

5. On the basis of the aforesaid, it was contended that it was the definite case of the defendant in examination-in-chief, that the Board belonged to him and that the defendant was carrying on his own business and that there was no dispute as to the same by the plaintiff. It may be mentioned that the plaintiff had not subjected himself to cross-examination in spite of the order of the court after the remand, therefore, it would not be safe to rely on the examination-in-chief recorded which was not subjected to cross-examination before the remand was made. It that is so, it will appear that there is no evidence of the plaintiff in respect of allegations in the plaint. This position appears established from the facts on record. When the plaintiff appeared for evidence in rebuttal he could have been cross-examined on these points. It was submitted that in rebuttal the plaintiff had stated only with regard to the default in payment of rent but the plaintiff had not chosen to support his plaint case, before the defendant went to the witness box. There was no question of cross-examining the plaintiff travelling beyond the evidence of the plaintiff given in examination-in-chief and thereby given an opportunity to make out a case in cross-examination. It, therefore, appears from the pleadings and the evidence that the respondent did not make out any case of the appellant parting with possession by putting up the hoarding. In examination-in-chief also he did not make out such a case and on the contrary his case was that it was the defendant-appellant who had put up the hoarding. The plaintiff did not allege that the defendant-appellant was not carrying on also advertising business. It was submitted on behalf of the appellant that having refused to submit to cross-examination the plaintiff has made the evidence in examination-in-chief non est. It was the case of the defendant that he was carrying on the business of advertisement by putting up the hoardings of different parties. The Board was made by him, paintings and writings were also done by him and for putting the hoarding the charged from his customers. Therefore, it appears to us that there are no clear findings that anybody was given lease or anybody was given the right to put up the hoarding and there was parting of possession in favour of anyone else. It was, however, argued that even if the appellant had put the advertisement board hoarding he was earning a huge amount by the same and this was a factor which would indicate that there was parting of possession by him. It was, however, submitted on behalf of the appellant that when the shop had been let out to the defendant-appellant for carrying on business it was the right of the defendant-appellant to carry on the business. It was legally permissible to use the said shop room and also use the roof thereof and earn as much as could be done and as such it is not parting with possession.

6. In the premises, it appears to us that for the purpose disposal of this appeal it is necessary to consider : (i) whether the appellant was carrying on his own advertisement business ? (ii) Even if so, whether such an act can be termed as parting with possession of the roof or any part thereof by the appellant in favour of the advertiser because by putting up such hoarding he is getting a return otherwise ? (iii) The next question that arises is that if it is found that it was not a business of the appellant to carry on the advertising but the appellant had allowed an advertising agency to put up its advertising hoarding, then would such an act amount to parting with possession of the roof or any part thereof by the appellant ? (iv) In any event, can any case or cause of action for she filed in 1974 on the basis of Ex. 6, namely, the letter dated January 20, 1977 of M/s Paramount Services be maintained ?

7. On behalf of appellant it was contended by Shri Tapash Ray, counsel for the appellant, that he judgment and order of the High Court could not be sustained and in the facts and circumstances of the case, there could not be any eviction order passed against the appellant by virtue of Section

13(1)(e) of the Act. Undisputedly the appellant was a tenant. Therefore, in terms of Section 13(1) of the Act, notwithstanding anything contained in any law, no decree for eviction can be passed except on the grounds mentioned in the said section. To sustain any order of eviction, it must be founded only on one of the grounds mentioned in the said section. Therefore, it has to be found out whether the respondent had been able to make out any of the grounds mentioned in Section 13 of the Act.

8. It was contended on behalf of the appellant that the advertisement board had been put up the appellant as part of his business and he had charged certain expenses in respect of the same and that, it was urged, was the finding of the courts below and the High Court was in error in holding that there was any parting with the possession. It was submitted that simply the display of advertisement board on the disputed premises did not amount to parting with possession of the premises. The High Court was wrong, it was urged, in accepting the plea of the respondent of parting with possession only on the basis of the letter dated January 20, 1977 (Ex. 6). The learned District Judge in the first appeal had accepted that there was no parting of possession. The High Court, on the other hand, in the judgment in appeal relying on Ex. 6 came to the conclusion that the appellant was getting rent for this board and the appellant had accepted document Ex. 6 which Paramount Services had written to the appellant. The High Court was wrong, it was submitted on behalf of the appellant, that Ex. 6 clearly showed that Paramount Services had installed this Board on the terrace of the shop and the shop was with them for six months. The learned District Judge on an analysis of the evidence come to the conclusion that there was no parting with possession. The High Court on an analysis of the same evidence came to be the conclusion that there was, It is, therefore, necessary as the learned District Judge did, to consider what was the evidence before the trial court. The plaintiff had given a statement before the trail court that a board of Paramount Advertising Agency was fixed over the disputed shop which was installed without asking him and that was of the size of 10 x 8. At the time of filing the suit there was board of Zitter and now it is of Maharaj Vanaspati. After making holes in the wall, it has been been fixed with cement with the held of iron angles. On the other hand, the defendant, Gopal Saran, had fixed the board of advertisement over the disputed shop which was fixed with cement by boring holes. For fixing the board the walls had not been dug. The board had been fixed in a temporary place on which he used to make advertisement of the business of the parties on payment. It was definite case in defence of the tenant that roof of the disputed shop has not been given to anyone. In cross-examination, he admitted that in 1974 advertising of Shri Bhatia was done on the board and for the advertisement he took Rs. 1500 for three years. The expenses towards the painting and fixing the board and writing were met by him. The board of his shop was fixed below the front of his shop in the name of Sharan Optician, the photo of which is Ex. 2. The tenant had given the receipt of Rs. 1500 to Bhatia. It was the definite case of the tenant that he dealt with the business of advertisement and there were 14 more boards in the city run by him. It was stated that he took Rs. 500 per cent for 15 boards from Paramount Services. In the photograph, Ex. 2, one board of the defendant was fixed in the name of Sharan Optician on the disputed shop and above it there was advertisement board which was of a tractor and fixed in front of the roof. The tenant had clearly stated that while fixing the board he did not bore the roof and the same had been fixed with the help of cement. On the other hand, it was stated by the landlord that it was fixed in the wall with the help of angles but this fact has not been supported by any other evidence. The learned District came to the conclusion that the board was fixed to the front of the side of the roof of the disputed shop. The roof of the disputed shop had not been bored nor any holes and been made in the wall. In these circumstances, the learned District Judge came to the conclusion that there was no alteration of the premises damage. The learned District Judge considered the question and the arguments that the defendant-appellant was not doing the work of advertisement and he had the business of spectacles and he had let out the space on rent for fixing the board on the roof and that

he had got a board fixed there from which it was clear that he had parted with the possession of the space on the roof and he had further given it on rent. Emphasis was laid on behalf of the respondent-landlord on Ex. 6. Ex. 6, it may be mentioned, is subsequent to the accrual to the cause of action. The suit was filed in 1974. Ex. 6 is dated January 20, 1977. Considering the aforesaid contentions and the position in law, the learned District Judge came to the conclusion that by Ex. 6 no portion of the disputed shop was given to the exclusive possession of the advertising agency or the defendant had not divests itself of any part of the roof. Simply by displaying the advertisement board on any portion of the roof, it could not be said that the possession had been delivered to the company to which the board belonged, according to the learned District Judge, He further held that the tenant continued to be in possession thereof. In such circumstances, it cannot be proved on the basis of the record, the learned District Judge came to the conclusion, that the tenant had parted with the possession.

9. In this connection, it may be appropriate to refer to the deposition of Gopal Saran, the defendant-appellant before the trial court. He had stated that he had put up his board on the shop for advertisement purpose. The board had been put in cement pillars and by putting up the said board neither the roof nor the wall had been dug. The board it was stated was permanently fixed and the tenant asserted that : "I advertise the business the business of the parties from time to time on payment. I have not parted with the possession of the shop or of the roof or any part thereof. "The tenant further stated that in "1974 I advertised for Bhatia on this board in which I had written that I have Zeator I have strength, a picture tractor was also made there. I used to take Rs. 1500 for three years for advertisement out of which painting of board, writing expenditure was mine. The board of my shop as Sharan Opticals is fixed on the front of the shop." It appears on an analysis of the evidence that the correct position in law, as established before the learned District Judge, was that the tenant used to carry on apart from opticals business, the business of advertising and for that he used to charge in the manner indicated therein. He used to charge certain amount of money. The question is whether by so doing, the tenant-appellant has assigned, sub-let or otherwise parted with the possession of the whole or any part of the premises without the permission of the landlord. It is undisputed that whatever has happened has happened without the permission of the landlord.

10. On the facts found, it cannot be said or even argued that there was any assignment by the tenant. "Assignment", it has been stated in Black's Law Dictionary, Fifth edn., p. 109, "is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein". It has further been stated as "The transfer by a party of all its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or partnership." It has to be examined whether there was sub-letting or otherwise parting with possession in terms of Section 13(1)(e) of the Act.

11. In this connection, it may be appropriate to refer to the deposition of the tenant, wherein he had stated :

> USS BOARD PAR PRACHAR KE TEEN SALL KE PANDRAH SAU RUPAYE MAIN LETA THA JISMEN PAINTING AUR BOARD AUR LIKHAVAT KA KHARCH MERE THA.

12. The above, in our opinion, indicates that the board was used for publicity and paintings and other expenses were of the tenant. Therefore, it was tenant who was carrying on the business. The learned trial Judge had noted the evidence on this. The learned trail Judge in his judgment at page 96 of the paper book had observed that the defendant in his written statement had admitted about the

fixation of sign board on the shop. But the board had been displayed by not fixing anything on the wall or any angles on the roof. The plaintiff-landlord had not submitted any evidence but the defendant-tenant in his evidence had admitted that he had fixed the board in the walls of the cement which was fixed permanently, and he fixed the board time to time during the course of his business of advertisement. The defendant further admitted that in 1947, he had advertised the board of Bhatia in which he had written that he had a tractor and the picture of tractor was made on the board. These in the learned trial Judge's judgment as well all the deposition of the tenant-appellant, in our opinion, conclusively establish that it was the tenant who was carrying on the business of advertisement by advertising the advertisements of different traders. If that is the position, then in this situation, can it be said that there was either any assignment, sub-letting or otherwise parting with possession.

13. Shri Tapash Ray, counsel for the appellant submitted that there was not. Shri Rajinder Sachar, on behalf of the landlord submitted that there was. Reliance was placed by Shri Tapash Ray on the observations of Farwell, J. of England in Stening v. Abrahams (LR (1931) 1 Ch 470). There the Chancery Division of the High Court of England was concerned in that case whereby the lessee's covenant was not to "part with the possession of the demised premises or any part thereof" and it was held that it was held that it was broken only if the lessee entirely excluded himself from the legal possession of the part of the premises. In the facts of that case a seven years' exclusive licence to erect an advertisement board against the front wall of the lessee's house followed by its erection was held not to be a breach of the above covenant. Farwell, J. in his judgment at page 473 of the report considered the question as to whether the defendants had broken the covenant against parting with possession of any apart of the premises. The plaintiffs therein had stated that by giving the A. A. Company "the right to use the front of the wall for an advertisement hoarding", the defendants had "parted with the possession of that front and 3-inch stratum of air outside it." The learned Judge noted that it was difficult to define the meaning of parting with possession generally. It must always be a question of fact and the construction of the particular agreement in each case and it cannot be determined by looking at the document alone. The learned Judge after disclaiming any attempt to define the meaning of parting with possession generally and reiterating that it must always be a question of fact and construction of the particular argument in each case observed in an instructive passage at pages 473-74 of the report as follows :

> But in my view a lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of right to concurrent user there is no parting with possession. Retention of a key may be negative indicium, and the authorities on the whole show that nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession. The fact that agreement is in form a licence is immaterial, as a licence any give the licensee so exclusive a right to the legal possession as to amount to a parting with possession.

Now does the present licence exclude the defendants from any part of the premises ? It no doubt gives the licensees the exclusive right to use the wall for an advertisement hoarding. No one, including the defendants, can use the wall for that purpose. On the other hand the defendants remain to a large extent in possession of the wall.

14. It was contended in that case that the front of the wall was wholly in the control of the licensees. That is not wholly the true view, Justice Farwell observed. The right of the licensees to put up their

advertisement hoarding did not prevent the defendants from using the wall so long as they did not interfere with their licensees. Merely giving the licensees a right to use the wall for a particular was not parting with possession within the covenant, in that case it was held.

15. On the other hand, on behalf of the landlord Shri Rajinder Sachar, referred to the decision of the King's Bench Division of the High Court of England in Gee v. Hazleton ((1932) 1 KB 179). There a statutory tenant of a dwelling house and land granted a licence for seven years at annual rent to a bill-posting company to erect advertisement hoarding of the land. The company was granted free and uninterrupted access to "the advertising position" for bill-posting, etc., purpose. It was held in appeal from the Country Court decision that although the document did not constitute the grant of a sub-lease, but only of a licence, the said part of the tenant's premises had ceased to be within the protection of the Rent Restriction Act because it was used for the business purposes by the other statutory tenant of the whole and the landlord was entitled to possession of that part. It may be stated that the principle of the aforesaid decision of Gee v. Hazleton ((1932) 1KB 179) is not quite relevant for the present purpose. In that case, the subject matter was a dwelling house with huge land around it let out for residential purpose. There the tenant had let out a part of the land to an advertising agency for carrying on commercial activities and the tenant was charging amount which was by far more than the total amount which she was paying as rent for the entire premises to the landlord. This factor was taken with the main factor that the portion of the land given to the advertising agency in that case was a grant of licence by the tenant in favour of the advertising agency giving the advertising agency exclusive possession in that land to the exclusion of the tenant. Therefore, in that case, the court held that there was parting with legal possession in favour of the advertising agency not because of realisation of amount by the tenant more than the rent paid by her but really because on the fact it was found that exclusive possession was given to the said advertising agency of a portion of the residential unit use for commercial activity. In that case, possession given to agency and also the right to exclude others including the tenant herself. The proposition of law lad down in Stening v. Abrahams (LR (1931) 1 Ch D 470) was approved in Gee v. Hazleton ((1932) 1 KB 179). In this connection, a reference may be made to the observations of Lord Justice Scrutton at page 185 of the report, where the learned Lord Justice had observed as follows :

> I can conceive in some advertising cases, cases of advertising boards, that different views may be taken when the advertising station consists of a board put on a dwelling house. There the paramount use of the wall is as the wall of the dwelling house; and there is also a difficulty in defining what one gets possession of when the possession granted is that of an advertising station attached to a wall. Here there is no difficulty of that sort.

Lord Justice Slesser at page 192 of the report referring to the Stening v. Abrahams (LR (1931) 1 Ch D 470) noted the view that the exclusive right to legal possession could amount to parting of possession. It is interesting to note in the case before the court Mr. A. T. Denning, as Lord Denning then was, had appeared for the landlord and had contended that if the defendant had herself used this portion of the premises for bill posting she would have been within the protection of the Rent Restriction Acts but the defendant had let it for business purposes to someone else and as such she would not be protected as to that portion. That is not the position here. Furthermore, under the Rajasthan Act, such kind of user does not take away tenant's rights. Under the said Act, the tenant must be guilty either of an assignment or sub-letting or otherwise parting with possession either of the whole or any part of the business without the permission of the landlord.

16. In this, there was no assignment. Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party. In this connection, reference may be made to the decision of this Court in Shalimar Tar Products Ltd. v. H. C. Sharma ((1988) 1 SCC 70) where it was held that to constitute a sub-letting, there must be a parting to legal possession, i.e., possession with the right to included and also right to exclude others and whether in a particular case there was sub-letting was substantially a question of fact. In that case, a reference was made at page 77 of the report to the Treatise of Goa on Landlord and Tenant, 6th edn., at page 323, for the proposition that the mere act of letting other persons into possession by the tenant, and permitting them a use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of covenant. In paragraph 17 of the report, it was observed that parting of the legal possession means possession with the right to include and also right to exclude others. In the last mentioned case, the observations of the Madras High Court in Gundalapalli Rangamannar Chetty v. Desu Rangiah (AIR 1954 Mad 182 : (1952) 1 MLJ 652) were approved by this Court in which the legal position in Jackson v. Simons ((1923) 1 Ch 373 : 128 LT 572 : 39 TLR 147) were relied upon. The Madras High Court had also relied on a judgment of Scrutton L. J. in Chaplin v. Smith ((1926) 1 KB 198 : 95 LJ KB 449 : 134 LT 393) at page 211 of the report where it was said :

He did not assign, nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them.

This position was also accepted in Vishwa Nath v. Chaman Lal (AIR 1975 Del 117 : 1975 Ren CJ 514) wherein it was observed that parting with possession is understood as parting with legal possession by one in favour of the other by giving him an exclusive possession to the ouster of the grantor. If the grantor had retained legal possession with him it was not a case of parting with possession. In this connection, reference may be made to the observations of this Court in Madras Bangalore Transport Co .(West) v. India Singh ((1986) 3 SCC 62) wherein the observations of the Delhi High Court had been approved. The concept of parting with possession private contracts between the landlord and the tenant was also known in India and it means parting with legal possession to the exclusion of the grantor himself. In this connection, the observations of this Court in Dr. Vijay Kumar v. Raghbir Singh Anokh Singh ((1973) 2 SCC 597) may be referred to. There the Rend Controller had found that the appellants had partitioned the shop in question in two portions. The two portions were demarcated by a wooden partition wall. In one portion there was the clinic of the first appellant and in the other portion, the other appellant was carrying on the business of sale and purchase of motor cars. The wooden partition wall had divided the single shop into two parts so that there were now two doors, one in the portion in the occupation of the first appellant, and the other portion in occupation of the other appellant. One could not go directly from one portion to the other on account of the wooden partition wall. The first appellant locked his portion. On these findings, the Rent Controller had held that the second and third appellants were in exclusive possession of their portions. Hence he came to the conclusion that the firsts appellant had parted with the possession of his portion to them. The Rent Controller did not accept the plea of the appellants that the business which was being carried on in their portion was the joint business of the appellants. The first appellant was assessed to income tax. He had never shown the income from the motor business in his income-tax returns. The appellants did not produce the account books. The Rent Controller accordingly held that the plea of joint business had not been established. It was argued before this Court that the first appellant being the father of the other two appellants established them in business and permitted them to occupy a half portion of the shop for that purpose. As a father, it was submitted, it was natural for him to establish his sons in life. In short, the argument was that the second and third appellants were occupying the half portion with his

permission. This Court held that that was a plausible argument but they were unable to entertain this at a letter stage in the Supreme Court and further held that the new plea was not a pleading of law but was a plea in fact.

17. In B. M. Lall v. Dunlop Rubber & Co. Ltd. ((1968) 1 SCR 23 : AIR 1968 SC 175) a distinction between the lease and licence was emphasised. See the observations at page 27 of the report. There was in the facts and circumstances of the case no grant of interest in land in favour of the advertiser.

18. In Rajbir Kaur v. S. Chekesiri and Co. ((1989) 1 SCC 19 : AIR 1988 SC 1845) it was emphasised that it was the operative intention which is important.

19. In Dipak Banerjee v. Smt. Lilabati Chakraborty ((1987) 4 SCC 161) it was reiterated that in order to prove tenancy or sub-tenancy 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, the right must be in lieu of payment of some compensation or rent. In this case, the tenant or the sub-tenant did not have any exclusive possession or interest in the building or in any part of the building nor was that right in lieu of any payment or any compensation, on the basis of the facts as indicated hereinafter.

20. From the aforesaid, it appears to us that the question whether there is a tenancy or licence or parting with possession in a particular case must depend upon the quality of occupation given to the licensee or the transferee. Mere occupation is not sufficient, in our opinion, to infer either sub-tenancy or parting with possession. In Associated Hotel of India Ltd. Delhi v. S. B. Sardar Ranjit Singh ((1968) 2 SCR 548 : AIR 1968 SC 933) it was held on the question whether the occupier of a separate apartment in a premises is a licensee or a tenant, the test is whether the landlord retained control over the apartment. Similarly, it was held by this Court in Krishnawati v. Hans Raj ((1974) 1 SCC 289 : (1974) 2 SCR 524) that sub-letting like letting, is a particular type of demise of immovable property and is distinct from permissive user like that of a licensee. If two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, will be in the absence of any other evidence, a rash inference to draw that the owners has let out that part of the premises. Shri Sachar sought to argue that in considering the question of eviction it has to be borne in mind that the purpose of the Rent Restriction Act is to protect dwelling house and not to protect a person who is not the resident of dwelling house but is making money by sub-letting it.

21. In our opinion, however, having regard took the quality, nature and degree of the occupation of the transferee and the facts found, it cannot be said that either there was any assignment or sub-letting or parting with possession to such a degree by permitting the hoarding that the tenant had long interest. He was using this premises for his benefit. Unless the tenant has infracted the prohibition of the Act, he is not liable to be evicted. The case rests on the express provision of the Act and there is no scope to explore the latent purpose of the Act.

22. In the premises, the High Court's order of eviction cannot be upheld. As no question of non-payment has been found by the trial court and the learned District Judge and there is no finding of any material alteration, in our opinion, the order for eviction cannot be sustained. The appeal, therefore, must be allowed.

23. The appeal is allowed and the order for eviction is set aside. In the facts and the circumstances of the case, however, the parties will pay and bear their own costs.

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