SUREME COURT OF INDIA

Duli Chand (Dead) By L.Rs.

Vs.

Jagmender Dass

(V. Ramaswami and L.M. Sharma JJ.)

08.12.1989

JUDGMENT

V. RAMASWAMI, J.

The tenant is the appellant. The re- spondent-landlord filed a petition under section 14(1)(b) of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'the Act') for an order of eviction of the appellant-tenant for a shop bearing No. 361 (Old No.25-A) Azadpur, G.T. Road, Delhi, on the ground that the tenant-Duli Chand has sub:let or parted with the possession of the said shop after 9th day of June, 1952 to M/s Hira Lal Sri Bhagwan illegally and without the written consent of the landlord. The main contention of the tenant was that there was no sub-letting or parting with the possession of the shop, that Hira Lal was a relative of the tenant who died some time prior to 1958, that Sri Bhagwan is the son of the tenant, and that the name of the business was given as M/s Hira Lal Sri Bhagwan in memory of the deceased relative Hira Lal. He further pleaded that the possession of the shop is with the tenant. Some other defences like the Respondent- petitioner was not a landlord, that he had no locus standi to file the petition for eviction, and that the notice of termination of tenancy was not valid, were taken in the written statement and they were overruled and do not survive for consideration in this appeal. On the main contention, the tenant has taken up the defence that Sri Bhagwan is the son of the respondent and the name of the business M/s Hira Lal Sri Bhagwan is given only in memory of the deceased relative Hira Lal. A reply statement was filed by the land- lord to the effect that though Sri Bhagwan was the natural son of the tenant-Duli Chand, he had been given in adoption to Hira Lal, that on such adoption Sri Bhagwan had gone out of the family of the respondent and that it was a clear case of sub-letting or parting with the possession of the shop. On the facts and circumstances of the case, the question of subletting did not arise but the case was considered on the dispute whether the tenant had parted with possession of the shop. The tenant never pleaded that he had obtained any written consent from the landlord for parting with posses- sion. The only question, therefore, for consideration in this case is as to whether the tenant had parted with pos- session of the whole or part of the tenanted premises. The learned Rent Controller held that the landlord had not proved parting with possession of the tenanted shop by the tenant. On appeal by the landlord the Rent Control Tribunal held that the tenant had parted with the legal possession of the tenanted premises and in that view ordered the eviction of the tenant under section 14(1)(b) of the Act. The second appeal filed by the tenant to the High Court was dismissed confirming the finding of the Rent Control Tribunal that the tenant had parted with possession of the tenanted shop. Section 14(1)(b) of the Act provides that the Rent Controller may on an application made to him in the pre- scribed manner make an order for

recovery of possession of the premises on the ground—

"(b) that the tenant has, on or after the 9th day of June, 1952, sub-let, assigned or other- wise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord."

The parametric content and the meaning of the words "parted with possession of the whole or any part of the premises" had come up for consideration in a quite number of cases including some of the decisions of this Court. It is enough if we refer to the latest judgment of this Court on this point. In Jagan Nath (deceased) through L.Rs. v. Chander Bhan and Others, [1988] 3 SCC 57, Mukharji, J. speaking for the Court held that:

"parting with possession meant giving posses- sion to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the fight to possession. So long as the tenant retains the fight to possession there is no parting with possession in terms of clause (b) of section 14(1) of the Act." The facts in this case as found by the Rent Control Tribunal which was accepted by the High Court are that the concern M/s Hira Lal Sri Bhagwan is the sole proprietary concern of Sri Bhagwan, that Sri Bhagwan has been carrying on that business in the premises in dispute, that Duli Chand-tenant had no interest in the business, that Sri Bhagwan is in exclusive possession of the property, that tenant Duli Chand works at another Shop, M/s Aggarwal Hard- ware and Mills Stores with his younger son, that there was no plea of concurrent user of the premises by the tenant nor there is any plea that Sri Bhagwan is a licensee, that occasionally the tenant-Duli Chand was seen sitting in the shop and that the tenant had not retained any control over the same. These facts clearly support the finding of Appel- late Tribunal and High Court that the tenant had parted with legal possession of the shop to the said Sri Bhagwan. The learned counsel for the appellant, however, contend- ed that Sri Bhagwan was not the adopted son of Hira Lal and that by permitting the son to carry on business it could not be stated that he had parted with the legal possession of the premises. In this connection, he drew our attention to the decision of this Court in Lakshman Singh Kothari v. Smt. Rup Kanwar, [1962] 1 SCR 477 wherein this Court had held that in order that an adoption may be valid under Hindu Law there must be a formal ceremony of giving and taking by the natural parent and the adopted parent after exercising their volition to give and take the boy in adoption and that such an evidence of a valid adoption is not available in this case. The Appellate Tribunal and the High Court have dealt with the evidence available in this case in detail and came to the conclusion that Sri Bhagwan was adopted by Hira Lal. It is not neces- sary for us to rely on the evidence available or the find- ings as proof of a valid adoption under Hindu Law but the evidence and the findings are enough to show that though Duli Chand and Sri Bhagwan are father and natural son, it is not possible to invoke any presumption that they constituted a Joint Hindu Family. It may also be mentioned that in the written statement the tenant had not pleaded specifically that he and Sri Bhagwan, constituted a Hindu Joint Family, that they are in joint possession, that either the business is joint family business or Sri Bhagwan was permitted to use the premises for carrying on any business as licensee re- maining in joint possession. The evidence on adoption is thus to be treated only relevant for the purpose of consid- ering the question whether the tenant has not retained any control over the premises and that he has parted with the possession, and we do not think that the Courts below erred in relying on the same for this purpose.

At this stage we may dispose of another point raised by the learned counsel in connection with the admissibility of certain evidence in this case. In support of the case of the landlord that Sri Bhagwan was adopted by Hira Lal he exam- ined three witnesses, AW 2, AW 3, and AW 4. The first wit- ness was an Inspector of House Tax According to this witness in the House Tax assessment register Sri Bhagwan was shown as the son of Hira Lal and residing at 26 Sarai Peepal Thalla, which was the residence of Hira Lal and not that of tenant-Duli Chand. The next witness was an Upper Division Clerk of the Excise Department. His evidence was to the effect that in the licence issued under the Central Excise Act the father's name of Sri Bhagwan was shown as Hira Lal. The other witness was Upper Division Clerk in the Sales Tax Department and his evidence was that Sri Bhagwan was an assessee of the Department and as per the records in his office the father's name of Sri Bhagwan was Hira Lal. The learned counsel contended that these evidences were inadmis- sible under Section 91 of the Evidence Act. Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such con- tract, grant or other disposition of property except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of Evidence Act. This Court has considered the scope of section 91 in Bai Hira Devi and Others v. The Official Assignee of Bombay, [1958] 1 SCR 1384 it was held therein:

"The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on which is sometimes de- scribed as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents. In a sense, the rule enunciated by section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act." The evidence in this case is not with reference to the terms of contract or grant or any other disposition of property which has been reduced to the form of a document or a case in which the matter is required by law to be reduced in the form of a document but the evidence is to the effect that Sri Bhagwan has given his father's name as Hira Lal while claiming ownership to the House No. 26, Sarai Peepal Thalla to the Municipality and similarly the evidence of the other witnesses were that while applying for a licence he had given his name as son of Hira Lal. The evidence may be worth nothing without production of the extracts from the property register or the other books maintained by the departments. However, that does not make the evidence itself inadmissible.

The learned counsel for the appellant then contended that Sri Bhagwan had been carrying on business right from 1958 to the knowledge of the landlord and that therefore, the landlord shall be deemed to have waived his right to get order of eviction on the ground of parting with the posses- sion under section 14(1)(b) of the Act. In this connection, the learned counsel for the appellant relied on the evidence of the landlord and some of his witnesses. The landlord in his evidence as AW 1 has stated that Sri Bhag- wan has been to his knowledge sitting at the shop since the year 1968 that he has seen the board of M/s Hira Lal Sri Bhagwan since 1972, and that he was residing in the same building behind the shop in dispute. AW 5 who is the Uncle of the landlord who came to depose on behalf of the landlord in his evidence had stated that the firm M/s Hira Lal Sri Bhagwan is doing the business in premises since 1960-61. The tenant in his evidence has stated that the firm M/s Hira Lal Sri Bhagwan is functioning in the disputed premises for the last 18 years. The Rent Controller found that Shri Bhagwan was doing business in the said premises since 1962, i.e., after

the death of Hira Lal. On the basis of this evidence the learned counsel contended that the landlord was aware that Shri Bhagwan was carrying on business for at least 16 years prior to the filing of the petition for eviction and in the circumstance he shall be deemed to have waived his claim for eviction under section 14(1)(b). The learned counsel for the landlord, however, contended that the land- lord had not received the rent after he came to know of the parting with the possession by the tenant that he was col- lecting rent till about 1972 only from the tenant-Duli Chand, that the tenant defaulted in payment of the rent subsequent to 1972, and the petition for eviction was filed thereafter in 1976 and in such circumstances there could be no question of waiving of his right with knowledge of part- ing with possession by tenant could arise in this case. He also contended legally no such waiver could be pleaded on the language used in section 14(1)(b) of the Act. In Associated Hotels of India Ltd. Delhi v. S.B. Sardar Ranjit Singh, [1968] 2 SCR 548 this Court held that, a waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his right and of facts enabling him to take effectual action for the enforce- ment of such right.

In the present case, though there is some evidence to show that the sign board M/s Hira Lal Sri Bhagwan was seen in the premises since 1972 and the landlord had seen Sri Bhagwan sitting in the shop since the year 1968, there is no positive evidence to show when the landlord had came to know of Sri Bhagwan getting the exclusive possession and doing business in the premises. In fact, since the question of waiver has not been raised in this form in the courts below there is no definite finding as to when the landlord came to know of such parting with possession and Sri Bhagwan doing business in the premises as the sole proprietor of M/s Hira Lal Sri Bhagwan and whether he had received rent after such knowledge. We can- not, therefore, permit this point to be raised for the first time in this Court nor can we go into this question of fact. That apart section 14(1)(b) requires a "consent in writing" of the landlord in order to avoid an eviction on the ground of sub-letting, assigning or otherwise parting with the possession of the whole or any part of the premises. This Court considering the need for obtaining a consent in writ- ing under the provision, in M/s. Shalimar Tar Products Ltd. v.H.C. Sharma and Others, [1988] 1 SCC 70 quoted with ap- proval the following passage from the judgment of the High Court in Delhi Vanaspati Syndicate v. M/s. Bhagwan Dass, Faquir Chand:

"Section 16 of the Act of 1958 holds the key to the interpretation of provisions of clause (b) of sub-section (1) of section 14 of this Act as well as of clause (b) of sub-section (1) of section 13 of the Act of 1952. It deals with restrictions on sub-letting. Sub-section (1) of section 16 makes sub-letting lawful though it was without the consent of the landlord provided that the sub-letting has taken place before June 9, 1952 and the sub- tenant is in occupation of the premises at the time when the Act of 1958 came into force. Sub-section (2) of section 16 reiterates the provisions of clause (b) of sub-section (1) of section 13 of the Act of 1952 and lays down that the sub-letting after June 9, 1952 with- out obtaining the consent in writing of the landlord shall not be deemed to be lawful. It does not say that the requisite consent should be obtained before sub-letting the premises and the consent obtained after sub-letting will not enure for the benefit of the tenant. However, sub-section (3) of Section 16 prohib- its subletting of the premises after commence- ment of Act of 1958 without the 'previous' consent in writing of the landlord. The use of the word 'previous' in this sub-section shows that where it was the intention of the legis- lature that the consent in writing should be obtained before sub-letting it said so specif- ically. The absence of the word 'previous' in sub-section (2) shows that it was not the intention of the legislature that the consent in writing could be obtained before sub-letting. Before the Act of 1952 a tenant could successfully show acquiescence of the landlord in subletting of escape forfeiture of tenancy. Since the absence of consent in writing by a

landlord for sub- letting gave rise to Unnecessary litigation between a landlord and a tenant, the Act of 1952 required the consent of the landlord in writing after its commencement. The purpose seemed to be that the consent of the landlord evidenced by a writing would cut out litiga- tion on this ground. After all a landlord could always agree to sub-letting either before or after sub-letting of the premises. For that reason no condition was laid down that such consent should be obtained before sub-letting the premises."

In the aforesaid view it was held that it was necessary for the tenant to obtain the consent in writing to sub- letting the premises. The mere permission or acquiescence will not do. The consent shall also be to the specific sub- letting or parting with possession. This Court further observed that the requirement of consent to be in writing was to serve a public purpose, i.e., to avoid dispute as to whether there was consent or not and that, therefore, mere permission or acquiescence will not do. While noting that everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protec- tion of the individual in his individual capacity, in the context of the statutory provision of the Delhi Rent Control Act, this Court further held that the requirement as to the consent being in writing was in the public interest and that, therefore, there cannot be any question of waiver of a right, dealing with the rights of the tenants or landlord. The words used in the section are "without obtaining the consent in writing of the landlord." If the words were "without consent of the landlord" it might mean without consent, express or implied and in that sense question of waiver may arise. The question of implied consent will not arise, if the consent is to be in writing. The learned counsel for the appellant referred to a number of decisions of the English Courts in support of his contention. We do not think it necessary to refer to them in view of the direct decision of this Court on this point. In the circumstances, there are no grounds to interfere with the decisions of the courts below. This appeal is accordingly dismissed with costs.

Y. Lal Appeal dismissed.

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