

Mohammedkasam Haji Gulambhai

Vs

Bakerali Fatehali (dead) by Lrs.

Civil Appeal No. 7957 of 1996

(Dr. A. S. Anand, D. P. Wadhwa JJ)

08.09.1998

JUDGMENT

D. P. WADHWA, J.

1. The appellant-landlord is aggrieved by the judgment of the Gujarat High Court. By this judgment in revision, the High Court reversed the judgments of two courts below ordering eviction of the respondent-tenant on a petition filed by the appellant under clause (e) of sub-section (1) of Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short "the Act") as applicable to the State of Gujarat. Under this clause, a landlord is entitled to recover possession of the premises on the ground that "the tenant has since the coming into operation of this Act unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein".

2. The premises in question is a shop. It was let out to the tenant Bakerali Fatehali ("Bakerali" for short) by the predecessor of the appellant w.e.f. 1-12-1946. A rent note was duly executed. The premises were sold to the appellant in 1947. Bakerali executed a second rent note in favour of the appellant. There is no dispute that both the rent notes contained a clause that the premises had been taken on lease by Bakerali for his own use and occupation and that "he shall not sub-let the premises in favour of anybody".

3. At this stage, we may also refer to Section 15 of the Act which puts an embargo on the tenant "to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein". This is, however, subject to any contract to the contrary. Thus, irrespective of there being no clause in the rent note entitling the tenant to sub-let the premises, the law forbids him from doing so. He cannot even assign or transfer in any other manner his interest in the tenanted premises. In the present case, a clause in the rent note specifically forbids Bakerali from sub-letting the premises.

4. The appellant filed proceedings for eviction of the respondent in 1978 in the Court of Small Causes of Vadodara. On 31-10-1984, the eviction suit was decreed. Against that judgment, the respondent filed an appeal before the Joint District Judge who by judgment dated 6-11-1993 affirmed the judgment of the Judge, Small Causes and dismissed the appeal. Thereafter, the respondent took the matter to the High Court in revision. In the meantime, Bakerali died and his legal representatives were brought on record. The High Court, by the impugned judgment dated 28-7-1995, allowed the revision and, as noted above, set aside the orders of both the Judge, Small Causes and the Joint District Judge.

5. The appellant had alleged that Bakerali had unauthorisedly and unlawfully sub-let, assigned or transferred his interest in the suit premises to his two sons without obtaining his consent. The appellant said that Bakerali earlier entered into a partnership with his four sons for carrying on the business of sale of medicines in the suit premises and a partnership deed dated 15-11-1955 was executed between them. This partnership deed specified the shares of the five partners in the profit and loss of the firm. While Bakerali was having 4-anna share, his four sons were having 3-anna share each. Earlier, Bakerali was having his business as the sole proprietor in the name of M/s Fatehali & Sons. After the partnership was formed, it was given the name M/s B. A. Fatehali & Sons. The partnership was at will and under clause (7) thereof, it was provided that "only Partner 1 (Bakerali) will be the exclusive proprietor and owner of the goodwill of the business, place of the business and all other rights of the business". This partnership continued till 14-11-1974 when a new partnership deed between two sons of Bakerali was executed and in terms thereof, Bakerali and his two other sons retired from the business of the partnership. They were the partners in the partnership deed dated 15-11-1955 as well. The recitals of the partnership deed dated 14-11-1974 are as under :

"Whereas the above two partners join the following partners in the partnership, which partnership is doing the business of medical and provisions stores in the name and style of M/s B. A. Fatehali & Sons, opposite to Raopura Tower, Vadodara, on the strength of the partnership deed made on Kartak Sud 1 of Samvat Year 2021, the 15th day of November, 1955. But the following three partners have settled their accounts and have voluntarily retired from the partnership business with effect from the date of execution of this deed, i.e., Kartak Sud 1 of Samvat Year 2031, Thursday, the 14th day of November, 1974. The said partners are :

#1. Sheth Bakerali Fatehali, 2. Jafarali Bakerali, and 3. Fatehali Bakerali.##

The aforesaid three partners have decided to retire from the partnership considering these two partners responsible and liable for all the debts, outstanding dues, furniture, fixtures etc. as per closure of the books of accounts on Aso Vadi 30 of Samvat Year 2030. Now, we both the partners are responsible to inform all the banks, traders, firm registration, Shops and Establishments Department, Income Tax Department, Sales Tax Department and all other offices and departments wherever necessary for all other licences and permits etc. of this partnership firm.

The retiring three partners shall give their signatures etc. wherever necessary on all the documents, applications and other papers relating to this change in partnership.

Since there is a change in the constitution of the aforesaid old partnership, this new partnership deed has been executed on the following terms and conditions."

6. The business of the new partnership was carried on in the suit premises. Various clauses of this partnership deed clearly showed that after Bakerali retired from the earlier partnership M/s B. A. Fatehali & Sons, he was to have no concern, right, title or interest in the new partnership which was now carrying on business in the suit premises, though in the same name. It has come on record that one of the two partners of the new partnership was paying rent to the appellant of the shop premises but the appellant was issuing rent receipts invariably in the name of Bakerali. During the continuance of this partnership, one of the two partners died and his son was taken into partnership and a new partnership deed dated 6-3-1969 was executed which partnership deed did not contain

any of the recitals of the partnership deed dated 14-11-1974. In these circumstances, question arises if the case of the appellant falls within the provisions of clause (e) of sub-section (1) of Section 13 of the Act entitling him to a decree of eviction against the respondents.

7. The facts are not much in dispute. The respondents' case is that Bakerali did not efface himself completely from the shop premises altogether. He had to retire from the business because of his ill-health and further that he used to come to the shop premises off and on. As far as ill-health of Bakerali is concerned, it does not lend any credence to the case of the respondents as Bakerali continued to be a partner in other business with his other sons in some other premises. His coming to the shop premises off and on is also of no significance as a father may like to visit his sons to see how they are faring in business. Both partnership deeds dated 14-11-1974 and 6-3-1979 unmistakably show that henceforth Bakerali would have no concern either with the shop premises or with the business being carried on by the new partnership in the shop premises. The respondents contended that the suit premises where business was being carried on under the new partnership was, in fact, taken on rent for and on behalf of the family of Bakerali. As Bakerali was the elderly member of the family, the suit premises was taken on lease in his name. It was also pleaded that the second and third partnerships were in continuation of the first partnership wherein in clause (7) it was specifically stated that the suit premises shall belong to Bakerali. But then this clause (7) in the first partnership deed dated 15-11-1955 negatives any such contention that the suit premises were taken on lease by Bakerali for the benefit of the family. In order to dislodge the case of the appellant, the respondents said that the rent receipts, as noted above, had always been issued by the appellant in the name of Bakerali though the rent was being paid by one of his sons. Thus, according to the respondents, there had been some arrangement regarding the affairs of the family assets and Bakerali did not attend to the business because of advanced age and ill-health. They said this would not amount to any sub-letting or transfer or assignment of tenancy rights of Bakerali to his sons. It is difficult to appreciate this line of defence by the respondents. It rather shows that Bakerali stopped paying any rent to the appellant-landlord after partnership dated 14-11-1974 was executed and rent was being paid by one of his sons who was a partner in the new partnership. A necessary inference would be that rent was paid from the business of the new partnership and it is not material that the rent receipts were being issued in the name of Bakerali. These had to be issued in the name of Bakerali otherwise the landlord could be said to have accepted the son who was paying the rent or the new partnership as the tenant of the suit premises. Documents brought on record do not show that what the respondents contended was a mere arrangement of distribution of family assets. Rather, new partnership deeds show that business now carried on by the two partners was independent of any right whatsoever of any other person including Bakerali both as regards the suit premises as well as the business. It is also difficult to accept the argument that the partnership deed dated 14-11-1974 is in continuation of the partnership deed dated 15-11-1955. There is no clause in the partnership deed dated 14-11-1974 that Bakerali will have any right in the suit premises or in the business being carried on there under the new partnership. The third partnership deed dated 6-3-1979 destroys the case of the respondents altogether that Bakerali had even any say in the business of the new partnership or in the place of business being the suit premises. One of the partners in the new partnership appeared as the sole witness for the respondents. No document of any nature whatsoever was produced by the respondents in support of any of their contentions. These documents would mean the records of the Income Tax authorities, Sales Tax authorities, Shops and Establishments authorities and other authorities under the Drugs Act since the business in the shop premises was that of selling medicines. The witness admitted in his testimony that Bakerali had handed over the suit shop to him and his brother Alibhai in the year 1974 and that Bakerali was not visiting the shop after handing over the same to the partners of the new partnership, though he

used to visit the shop premises occasionally. The witness said Bakerali used to come to the shop premises "to see as to how we were doing the business".

8. In reversing the two judgments of the courts below, the High Court strongly relied upon a decision of this Court in *Jagan Nath v. Chander Bhan* ((1988) 3 SCC 57). In this case, the father was the tenant. He retired from the business and his sons were looking after the same. The question was, had the father divested himself of the legal right to be in possession of the premises? This Court said that even though the father had retired from the business, in the facts of the case, it could not be said that he had divested himself of the legal right to be in possession. The Court found that the father was carrying on the business with his sons and the family was a joint Hindu family and it was difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Delhi Rent Control Act, 1958. This provision provides that the landlord could take possession of the premises from the tenant if the tenant had sub-let, assigned or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. Considerations which led this Court to allow the appeal of the tenant Jagan Nath (since deceased) were :

(1) Jagan Nath was being helped in his business of Bindra Tent House by his two sons even prior to the incorporation of the partnership of the two sons in the name of Bindra Tent House;

(2) the business of Bindra Tent House was being carried on in part of the tenanted premises which was residential-cum-commercial;

(3) Jagan Nath and his two sons constituted a Hindu undivided family. Since Jagan Nath was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession of any part of the premises. There was no evidence that there had been any sub-letting or assignment;

(4) even though Jagan Nath had retired from the business, his sons had been looking after the same. From the facts which stood proved, it cannot be said that Jagan Nath had divested himself of the legal right of possession; and

(5) though much could be said on the conduct of Jagan Nath who had been sitting on the fence and avoiding the issue and had not been fair and frank in the conduct of his case, but that is no ground to disentitle him to the benefits of law if the facts had been proved that he had not parted with possession.

After analysing these facts, this Court said : (SCC p. 61, para 6)

"It is well settled that parting with possession meant giving possession 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 right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father

had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession."

The Court also relied on its earlier decision in *Krishnawati v. Hans Raj* ((1974) 1 SCC 289). In that case, two persons lived in a house as husband and wife. One of them had rented the premises and allowed the other to carry on business in a part of it. Again, the question was if it amounted to sub-letting. This Court held that if two persons live together in a house as husband and wife and one of them who was the tenant of the house allows the other to carry on business in a part of it, it will, in the absence of any other evidence, be a rash inference to draw that the tenant has let out that part of the premises. The Court said that it was a settled law that onus to prove sub-letting was on the landlord. If the landlord prima facie shows that the occupant who was in the exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence. The Court said that the landlord in that case produced no evidence to show sub-letting in spite of the denial by the tenant in the written statement of any sub-letting.

9. Reference was also made to another decision of this Court in *P. A. Thomas v. M. Mohd. Tajuddin* ((1989) 3 SCC 240) where this Court remanded the matter to the High Court with a direction to give a finding as to the fact if the appellant-tenant retained effective control over the affairs of the partnership of which he was a partner. It was also a case of eviction of the tenant. We do not think this judgment is of any relevance to the controversy involved in the present appeal. In *Dipak Banerjee v. Lilabati Chakraborty* ((1987) 4 SCC 161) which was a case under the West Bengal Premises Tenancy Act, 1956, one of the issues before this Court was if the allegation of the landlord that the premises let out to the tenant, part of which had been sub-let by him, so as to entitle the landlord to evict the tenant under Section 13(1)(a) of that Act. This Court said that in order to prove sub-tenancy, two ingredients are necessary to be established :

- (1) the sub-tenant is in exclusive possession of part of the premises and the tenant retains no control over that part of the business; and
- (2) right to occupy the premises by the sub-tenant must be in view of payment of some compensation or rent.

In that case, the Court held that both the ingredients were missing and held that there was no sub-letting.

10. We have been referred to two judgments of learned Single Judges of the Gujarat High Court interpreting clause (e) of Section 13(1) of the Act. In *Harshachandra Narsibhai Patel v. Ibrahim Haji Khubanbhai* (1984 Guj LH 965) it was one of the terms of the tenancy that the tenant would not sub-let, assign or transfer his suit premises to anybody else. After some time, the tenant would up his business and sub-let the premises. On the allegation of sub-letting, suit was filed for recovery of possession of the suit premises. It was not in dispute that the tenant was no longer in possession and the suit premises was in possession of a third person. Both the trial court and the appellate court decreed the suit of the landlord. The matter came in revision before the High Court. It was urged that even assuming that possession of the suit premises was transferred by the tenant, it cannot be said that the premises was sub-let by him as the landlord had failed to prove that the transfer was for some consideration. It was pointed out that neither in the pleadings nor in the evidence was it stated by the landlord that the suit premises was transferred by the tenant to a third person for some

consideration and therefore no case of sub-letting had been made out. The Court rejected the plea of the petitioners and said :

"Moreover, it must be remembered that Section 13(1)(e) of the Rent Act is much wider and it is not confined merely to the acts of unlawful sub-letting. It also provides that if a tenant has assigned or transferred in any other manner his interest in the premises taken on lease by him, then also the landlord will become entitled to a decree for possession of the said premises. The words 'transfer in any other manner' are much wider and would include within their meaning and ambit a transfer made in favour of a relative or a known person, once it is proved that he has left the premises and the transferee is put in exclusive possession. To give these words a restricted meaning and equate such a transfer with sub-letting is to make that part of the sub-section redundant. The facts of this case clearly show that Defendant 1 had transferred his interest in the suit premises to Defendant 2. If it is found that the premises were transferred for valuable consideration then it will certainly amount to sub-letting. Even if it is not possible to come to that conclusion, then also it amounts to a transfer in any other manner."

To support what the learned Single Judge said, we may refer to a decision of this Court in *Kedar Lal Seal v. Hari Lal Seal* (AIR 1952 SC 47 : 1952 SCR 179). In this case, the plaintiff though he did not use the word "subrogation", had asked in substance for the relief to which a subrogee would be entitled under the Transfer of Property Act, 1882. This Court cautioned that a case cannot be thrown out on mere technicalities and observed as under :

"I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

11. In the present case before us, there is no such ambiguity in the pleadings and the landlord filed a suit for eviction on the ground that Bakerali had unauthorisedly and unlawfully sub-let premises or assigned or transferred in any manner his interest therein.

12. In *Dudabhai Karsandas Patel v. Sulochanaben Gopaldas Kothari* ((1994) 1 Guj LR 541) a business was being run in the tenanted premises in partnership wherein the tenant was one of the partners. Upon dissolution of the firm, the tenant walked out not only from the business of the firm but also of the premises and left the business and the premises to the remaining partners. The landlord sought eviction of the tenant and claimed possession of the suit premises under clause (e) of Section 13(1) of the Act. It was found that the tenant neither had any interest in the business that was being carried on in the suit premises by the remaining partners nor had he any interest in the tenancy rights and the exclusive possession since the date of dissolution of the firm was with the remaining partners. The Court returned the finding that the tenant had parted with not only physical possession of the suit premises but also the legal possession thereof in favour of third persons.

13. Clause (e) of Section 13(1) of the Act is couched in the widest terms. There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any

contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on the tenant from sub-letting, assignment or disposition of his interest in the tenanted premises.

14. To restate in the present case, facts do not show that Bakerali could exercise his power throughout the suit premises at his pleasure to the exclusion of his two sons who were running their business in partnership there and it cannot be said that he continued to exercise control over the suit premises. Bakerali had no concern with the partnership business now being carried on under the partnership deeds dated 14-11-1974 and 6-3-1979 in the suit premises. In the absence of records of the partnership business which the respondents failed to produce, it has to be presumed that rent was paid by one of the sons of Bakerali in the new partnership from the partnership account. It is now the sons of Bakerali who are in complete control of the suit premises and are exercising exclusive possession over the same to the exclusion of Bakerali. That Bakerali would occasionally visit the shop premises does not advance the case of the respondents that he could exercise his rights over the shop premises. He had handed over the shop premises to his sons who were exercising their independent right over the same and conducting their business thereat. Bakerali completely divested himself of the suit premises as well as the business. Clause (7) of the first partnership deed dated 15-11-1955 negated any contention that Bakerali had taken the suit premises on lease for the benefit of the family. Bakerali never paid rent of the shop premises which, as noted above, was paid from the partnership of his two sons. Bakerali was not exercising any physical control over the shop premises. The record does not show that he had either the power or the intention at any given time to exercise his right of possession over the shop premises. It cannot even be said that he was exercising control over the shop premises through his sons who were carrying on their independent business in the shop premises and paying rent therefor. Bakerali was neither in physical nor in actual or constructive possession of the shop premises. Physical control over the shop premises was now exercised by his two sons to the exclusion of Bakerali. It is not that Bakerali could just walk in and assert his right of possession to the shop premises. His sons were not in occupation of the shop premises and running their business as agents of Bakerali. We do not think that the High Court in the present case approached the question raised in the revision before it properly. It relied on the judgment of this Court in Jagan Nath case ((1988) 3 SCC 57) which was under the provisions of the Delhi Rent Control Act and was confined to the facts of that case which were not applicable in the present case.

15. We, therefore, set aside the impugned judgment of the High Court and restore that of the Judge, Small Cause Court and the Joint District Judge, Baroda. We grant six months' time to the respondents to vacate and hand over the possession of the suit premises to the appellant subject to his filing the usual undertaking in this Court in four weeks. The appeal is allowed with costs.