DELHI HIGH COURT

Jagan Nath

Vs.

Abdul Aziz (Delhi)

S.A.O. No. 149 of 1971
(V. S. Deshpande, J.)

28.4.1972

JUDGEMENT

V. S. Deshpande, J.

1. After the prayer of the landlords Abdul Aziz and Mohammad Usman (respondents herein) for the eviction of the tenants Gyan Chand and Neb Raj from the premises in dispute was disallowed and standard rent was fixed at Rs. 100/- per month at the instance of the tenants by the trial Court, Civil Appeal No. 321 of 1954 was filed by the landlords. On 31-12-1954 the counsel for the tenants stated as follows.-

> The tenants would be paying rent at Rs. 166/- per month. The disputed premises were in the occupation of Daulat Ram Dogal Mal and Jagan Nath as sub-tenants and Neb Raj as tenant. The tenants undertook not to bring into the premises any new sub-tenants either in place of the present ones or otherwise.

Counsel for the landlords stated that he accepted the above statement of the counsel for the tenants.

2. In view of the above statements, the appellate Court passed a decree in favour of the landlords for Rs. 1650/- (at the enhanced rate of rent) in place of a decree for Rs. 1000/- which had been passed by the trial Court (at the reduced rate of rent of Rs. 100/- per month). The tenants Were also ordered to pay to the landlords future rent at the higher rate. The Court also recorded that the names of the existing occupants were given by the counsel for the tenants who undertook not to put in any one else in the premises either as tenants or sub-tenants and that if they were to do so, they would be liable to ejectment.

3. The landlords, however, again applied for the eviction of the tenants without imp leading the sub-tenants who had been accepted as such by the landlords by the compromise of 31-12-1954. An order of eviction was obtained by the landlords against the tenants only on 31-12-1963. The landlords then obtained the permission of the Competent Authority under Section 19 of the Slum Area (Improvement and Clearance) Act, 1956 to execute the order of eviction again without imp leading the sub-tenants. At this stage, Jagan Nath (appellant herein) applied under Sections 16 and 18 of the Delhi Rent Control Act, 1958 (hereinafter called the Act) stating that he, who was formerly a lawful sub-tenant under Section 16 of the Act, had become a tenant of the premises under Section 18 of the Act and that he was not liable to be evicted from the premises in view of the compromise decree of 1954 and because he was not a party to the proceedings taken by the landlords against the tenants.

4. Jagan Nath's application was dismissed by the Controller and the dismissal was upheld by the Rent Control Tribunal on two grounds, namely:-

> (1) Assuming that he was a lawful subtenant of the premises because of the compromise of 31-12-1954, he did not become the tenant of the premises under Section 18 (1) of the Act because he had not given a notice to the landlords within six months of the commencement of the Act as required by Section 17 (2), and
> (2) That he failed to prove that he was in exclusive possession of the whole of the premises.

5. The question for decision in this second appeal by Jagan Nath centers round the effect on the rights of the parties of the compromise decree of 31-12-1954. The effect may be considered from three different aspects.

6. Firstly, under Section 16 (2) of the Act Jagan Nath could not be regarded as a lawful sub-tenant unless the premises were sub-let either in whole or in part to him by the then tenants after obtaining the consent "in writing" of the landlords.

7. The meaning of the words "in Writing" would appear to be the same as the meaning of the word "written" in Section 2 (a) of the Arbitration Act which defines an arbitration agreement to mean "a written agreement" etc. In construing the latter, the Supreme Court has held that "written" does not mean "signed" by the parties. It does not also mean that a formal document was executed by the parties (*Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji)* [1] and *Union of India v. A. L. Rallia Ram,* [2] It is sufficient if the agreement between the parties is actually available in writing so

that it can be read. In the present case, the statements of the counsel of the tenants and the landlords were recorded by the appellate Court and formed the basis of the consent decree. The statements, therefore, amounted to "writing". When the tenants asserted that Jagan Nath and another were their sub-tenants and that they lived in the house along with Neb Raj, the tenant, it was open to the landlords to deny to give their consent in writing to the sub tenancy. But the landlord accepted the statement of the counsel of the tenants implying their consent to the sub-tenancy.

Consent may be express or implied. Either would be sufficient provided that it is in writing. It was not necessary for the landlords to say in so many words that they consented to the sub-tenancy. Their acceptance of the statement of the counsel of the tenants was sufficient as such consent. For, the tenants agreed to pay rent at Rs. 166/- per month instead of Rs. 100/-which had been fixed by the trial Court as standard rent. The tenants would not have agreed to pay the enhanced rent if the landlords had not agreed to the occupation of the premises by the sub-tenants. Each statement, therefore, was consideration for the other and thus formed a valid agreement between the parties. I am of the view, therefore, that Jagan Nath became a lawful subtenant of the premises on 31-12-1954 under Section 16 (2) of the Act because of the "consent in writing" of the landlords.

8. Secondly, the conduct of the landlords operated as an estoppel. Because the landlords agreed to recognize Jagan Nath and another as lawful sub-tenants, the tenants who had induced them as sub-tenants agreed to pay rent to the landlords at the enhanced rate. The tenants thus changed their position to their disadvantage acting on the representation made by the landlords that they accepted Jagan Nath and another as lawful sub-tenants. The landlords also accepted the benefit under the agreement when the Additional District Judge Shri Y. L. Taneja passed a decree for Rs. 1650/- at the enhanced rate of rent in favour of the landlords in place of the original decree of Rs. 1000/- at the lower rate of rent. Under Section 115 of the Evidence Act and also according to the wider principle of estoppels by conduct therefore, the landlords were stopped from asserting later that Jagan Nath was not a lawful sub-tenant occupying the premises with the consent of the landlords in writing. Another fact of the same principle of estoppels by conduct is that the landlords approbated the agreement on 31-12-1954 and derived benefit there under. They cannot therefore, be allowed to reprobate the same agreement now and to take the stand that Jagan Nath was not a lawful sub-tenant.

9. Under Section 17 (2) of the Act, however, a lawful sub-tenant was required to give

notice to the landlord of the creation of the sub-tenancy within six months of the commencement of the Act. The Act came into force on 9-2-1959. No notice of sub tenancy was given by Jagan Nath to the landlords thereafter. The Controller and the Rent Control Tribunal regarded this as a fatal lacuna in the title of Jagan Nath to become a lawful sub-tenant. They, however, did not consider at all the effect of the compromise of 31-12-1954 before reaching this conclusion. It appears to me that the object of the giving of notice under Section 17 (2) is to make the landlord aware of the claim made by the sub-tenant. This gave the landlord an opportunity to contest the claim. If he did so, the Controller had to decide the dispute between the landlord and the subtenant under Section 17 (3). The duty imposed on the sub-tenant by Section 17 (2) and the right conferred on the landlord by Section 17 (3) were thus both enacted purely for the benefit of the landlord. An analogy will help. Notice of the termination of tenancy by the landlord has to be given under Section 106 of the Transfer of Property Act purely for the benefit of the tenant.

In *Batoo Mal v. Rameshwar Nath,* [3] a Division Bench of this Court held that it was open to the tenant to waive such notice. He could do so either by initially agreeing that his tenancy would be terminable without notice or later by conduct by failing to object to eviction proceedings by the landlord though not preceded by such notice. Just as the notice under Section 106 of the Transfer of Property Act had to be given by the landlord for the benefit of the tenant, the notice under Section 17 (2) of the Act has to be given by the sub-tenant to the landlord merely for the benefit of the landlord. The landlord can waive the notice either by agreeing at the creation of the sub-tenancy that no such notice need be given or by subsequently failing to object to the sub-tenancy on the ground of lack of notice. The question is whether the landlords waived the necessity of notice by the agreement of 31-12-1954. By that agreement, the landlords not only consented in writing to Jagan Nath becoming a lawful sub-tenant but also invited a decree of the Court recording the said agreement. Sub-sections (2) and (3) of Section 17 can be analyzed into the following requirements, namely :-

(1) Notice of the creation of the sub tenancy by the sub-tenant to the landlord;
(2) Denial of the sub-tenancy by the landlord; and
(3) Decision of the dispute by the Controller.

Notice to the landlords of the creation of the sub-tenancy was given by the agreement of 31-12-1954 itself. Notice means communication or knowledge. The landlords knew of the creation of the sub-tenancy because they themselves consented to its creation in writing in the presence of the Court. This is to be distinguished from the requirements

of Section 16 (2). For, under Section 16 (2) the tenant or the sub-tenant may merely allege that the premises were sub-let with the consent in writing of the landlord. It is only when notice under Section 17 (2) is given to the landlord that this allegation is made known to the landlord. Therefore, the agreement of 31-12-1954 was not merely an allegation within the meaning of Section 16 (2) but also a communication of the same to the landlord and acceptance of the same by him. It is true that the notice under Section 17 (2) is to be given after the commencement of the Act. But if the landlord agrees to dispense with such notice even before the commencement of the Act, then the notice can be waived by the landlord even before the occasion to give it arises.

In the present case, the landlords must be held to have so waived the giving of the notice by the sub-tenant Jagan Nath even before the occasion for giving the notice arose. When the landlords were themselves parties to the agreement of 31-12-1954 and also to the consent decree, it would be a pointless formality for the sub-tenant to give them a notice under Section 17 (2). For, even if the landlords wanted to deny the sub-tenancy, they were stopped from doing so. For, the only object of the notice was to enable the landlords to deny the sub-tenancy. But such denial was not available to the landlords because of the agreement of 31-12-1954. Thirdly, the only right of the landlord was to get the dispute adjudicated on by the Controller. The consent decree of 31-12-1954 was already binding on the landlords and the tenants. The sub-tenant Jagan Nath claimed through the tenants. He was, therefore, entitled to the benefit of the compromise decree on the principle underlying Section 11 of the Code of Civil Procedure . The Controller was, therefore, barred by *res judicata* from again adjudicating on the status of Jagan Nath. Therefore, all the three elements of sub-sections (2) and (3) stated above were fulfilled by the agreement of 31-12-1954. Therefore, on the special facts of this case, no further compliance with sub-sections (2) and (3) of Section 17 of the Act was possible. Sub-sections (2) and (3) of Section 17 must therefore, be deemed to have been complied with. For, the requirements of sub-sections (2) and (3) of Section 17 are themselves subject to the effect of the compromise of 31-12-1954 and the *res judicata* arising out of the consent decree based on it.

10. It is arguable for the landlords, however, that the sub-tenant was bound to comply with the provisions of Section 17 (2) of the Act and that he cannot plead either the compromise or the compromise decree as an excuse for non-compliance with it. For, there can be no estoppel against a statute. The stark phrase that there can be no estoppel against a statute is, however, only a partial statement of the law and is,

therefore, liable to cause much misunderstanding. In two Division Bench decisions of this Court, namely, *Battoo Mal v. Rameshwar Nath,* [4] and *Ram Rattan Bhanot v. Faqir Chand,* [5] it was observed that there are two kinds of legislative provisions, namely :-

(1) those based on public policy, and
(2) those enacted only for the benefit of a person or a class of persons.

It is often said that there can be no estoppel against a statute based on grounds of general public policy. As pointed out by Lord Radcliffe in *Kok Hoong v. Leong Kweng Mines, Ltd.,* [6] :-

> "A principle as widely stated as this might prove to be rather an elusive guide ..... a more direct test to apply.....is to ask whether the law that confronts the estoppels can be seen to represent a social policy to which the Court must give effect in interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise ..... General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection..... or for the protection of others..... In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms."

11. Briefly, those provisions of law which are meant to protect a person or a class of persons even against his or their own voluntary acts cannot be defeated by a plea of estoppel (*Jagdish Chander Bhalla v. Lakshaman Swarup,* [7] reviewing the Supreme Court decisions on the point). But those provisions of law which exist only for the benefit of a person or a class of persons can be waived by the beneficiaries. Such beneficiaries can be estopped thereafter from invoking the statutory benefit in their favour.

12. Sections 17 (2) and 17 (3) of the Act expressly contemplate consent in writing by the landlord to the creation of subtenancy. Unlike the Bombay Hotel and Lodging House Rates Control Act, 1947, considered by the Supreme Court in *Waman Shriniwas Kini v. Ratilal Bhagwandas and Co*[8] there is no absolute prohibition of subletting in the Delhi Rent Control Act, 1958. Sections 17 (2) and 17 (3) do not, therefore, protect the landlords against themselves. No public policy is contravened therefore, if the landlords consent in writing to the sub-tenancy. The compromise and the decree based on it are, therefore, valid. The estoppel of the landlords by their

conduct and also by *res judicata* can, therefore, operate against the landlords.

13. So long as a consent decree has not been set aside, it is as binding on the parties as is a decree in invitum. As observed by the Supreme Court in *Sunderabai v. Devaji Shankar Deshpande9*[9] of the Civil Procedure Code does not apply in terms to consent decrees. For, it cannot be said that such a decree decides a matter in issue between the parties. But a consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed in invitum, (see also *Shankar Sitaram Sontakke v. Balkrishana Sitaram Sontakke,* [10] and *Raja Sri Sailendra Narayan Bhanja Deo v. The State of Orissa,*) [11].

14. While dismissing the application of Jagan Nath under Sections 16 and 18 of the Act, the learned Controller and the Rent Control Tribunal failed to consider the three effects of the consent decree of 31-12-1954, namely :-

(1) that it amounted to a consent in writing of the landlords to the creation of sub-tenancy under Section 16 (2),
(2) That it stopped the landlords from raising the plea of lack of notice under Section 17 (2), and
(3) That it operated as *res judicata* between the parties.

Under Section 25 of the Act, persons claiming under the tenant are liable to be evicted from the premises along with the tenant. But Section 25 is "subject to the provisions of Section 18". Jagan Nath became a tenant of the premises when the tenancy of the original tenants was determined by the order for eviction passed against them. He could not, therefore, be evicted in execution of an order of eviction passed against the original tenants as he was not a party to the eviction proceedings against the tenants.

Alternatively, Jagan Nath had an independent title to the premises in the sense that the statutory tenancy obtained by him under Section 18 was not dependent on the title of the original tenants but was independent of it. According to the proviso to Section 25, therefore, Jagan Nath was not liable to be evicted from the premises in execution of the eviction order against the original tenants. The dismissal of the application of Jagan Nath by the Controller, therefore, affected the substantial right of tenancy of Jagan Nath. It was, therefore, an order "under the Act" within the meaning of Section 38 (1) of the Act from which an appeal lay to the Rent Control Tribunal. Similarly, the order of the Rent Control Tribunal dismissing Jagan Nath's application involved "substantial questions of law" within the meaning of Section 39 (2) of the Act giving rise to a second appeal to the High Court for the same reason, namely the failure to

consider the various effects of the consent decree of 31-12-1954 on the rights of the parties.

15. The second premises on which the Controller and the Rent Control Tribunal proceeded was that Jagan Nath did not prove that he was in exclusive possession of the whole of the premises. The reasoning of the learned Controller and the Tribunal was that on the date of the compromise decree i.e. 31-12-1954 not only Jagan Nath but others were also in occupation of the premises. They, therefore, concluded that Jagan Nath must have been in occupation of only a specified portion of the premises while other specified portions must be in occupation of other persons. This reasoning is not countenanced by law.

16. On 31-12-1954, Neb Raj as tenant and Jagan Nath and another as subtenants were in occupation of the premises. Though the title or interest of a tenant is superior to that of a sub-tenant, the tenant and the sub-tenant are in the same position with regard to possession. It is true that as distinguished from the licence, a tenant is entitled to exclusive possession. This only means that a licencee cannot exclude as a matter of right the licensor from the premises. It also means that a tenant can exclude the landlord and a sub-tenant can exclude the tenant from the premises as a matter of right. But there is nothing in law to prevent the landlord and the tenant or the tenant and the sub-tenant from agreeing that both of them would be in possession of the whole of the premises. The definition of a lease in Section 105 has got only two essential elements, namely:-

(1) That it is a transfer of a right to enjoy immovable property, and

(2) That the transfer is in consideration of the price paid or promised.

According to the second paragraph of Section 107 of the Transfer of Property Act, a monthly lease can be made by an oral agreement accompanied by delivery of possession. It is not, however, necessary that such delivery of possession to the sub-tenant must mean that no other person would remain in occupation of the premises. On the contrary, a lease can be granted to more than one person as joint tenants or co-tenants. The tenants may even agree that the landlord also should continue in joint possession or common possession with the tenants (particularly when they are relations like Jagan Nath who is a brother of Neb Raj) provided that the right to joint occupation or common occupation of the tenants is such that the tenants cannot be excluded from such joint or common possession of the landlord. In the present case, the compromise of 31-12-1954 itself shows that there were two sub-tenants, namely, Jagan Nath and another. There is nothing to show that any particular part of the

premises was in the occupation of Jagan Nath and another part in the occupation of the other sub-tenant.

Similarly, the original lease granted to Gyau Chand and Neb Raj also does not shew that they were in occupation of separate portions in the premises. In the absence of any evidence to the contrary, the presumption arising under Section 45 of the Transfer of Property Act is that the interests of two tenants and later of the two sub-tenants were equal. This does not mean that each of them was in separate possession of specified half portions of the premises. On the contrary, each of them was entitled to the possession of the whole of the premises jointly with the other. For instance, if one of the vendees of a pre-emptible sale is a co-sharer, then his share would be free from pre-emption only if it is separately specified in the sale-deed. But if the sale-deed does not contain any specification of the shares acquired by each of the vendees, then the vendee who is a co-sharer loses his preferential right and the whole property is liable to pre-emption including the interest of the vendee who is a co-sharer (*Ram Udit v. Sheo Harakh* [12]

17. In 32, Halsbury's Laws of England 332, in paragraph 517, the nature of the interest and possession of each of the joint tenants is described as follows :-

> "Nature of joint tenant's interests. - Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature and duration. In the case of freeholds, the season, and, in the case of leaseholds, the possession is vested in all; none holds any part to the exclusion of the others. At common law the interest of each must vest at the same time. These are the four unities of title, interest, possession and time; but in joint tenancy arising by limitations under the Statute of Uses, or under devises by will, the fourth unity was not essential, and the interests of the various joint tenants might vest at different times."

18. At common law and prior to the change effected by statutes in England, the position regarding tenancy in common in respect of the unity of possession was the same as it was in respect of a joint tenancy. This is stated in the same volume of Halsbury's Laws of England at page 341 as follows:-

> "Tenancy in common resembled joint tenancy in matters depending on unity of possession. The occupation was undivided, and neither owner could claim a separate part save by obtaining partition. One tenant in common who received more than his share of the rents and profits was liable to account to the others,

and a tenant in common would be restrained by injunction from destructive waste."

19. It is only when a partition by metes and bounds is effected that the unity of possession among the joint tenants and the tenants in common is destroyed and it is only thereafter that each such tenant is in separate possession of his specified portion of the property. Till such a partition each of them is in possession of the whole of the property without excluding the others inasmuch as each of them has the same right to the possession of the whole property. In this state of law, it was not right for the Controller and the Rent Control Tribunal to insist that Jagan Nath must show that he was in exclusive possession of the whole of the premises. Since he was the only person resisting the execution of the order for eviction, he may be in fact in such exclusive possession. But in law he was entitled to the possession of the whole of the premises as one of the two sub-tenants inasmuch as in the compromise of 31-12-1954 there is no indication that the persons in occupation were in separate possession of specified portions of the premises. In the absence of any such indication to the contrary, the presumption was that they were all in joint possession of the whole of the premises. The Controller and the Rent Control Tribunal were not justified, therefore, in proceeding on the presumption that merely because Jagan Nath and some other person were in occupation of the premises, Jagan Nath could not have been in the occupation of the whole of the premises but must have been in the occupation of only a specified portion thereof. The presumption, on the other hand, is that he was in joint occupation of the whole of the premises. The second premise thus also fails.

20. The appeal is, therefore, allowed. The orders of the Controller and the Rent Control Tribunal are set aside. The landlords respondents shall not be entitled to execute the order of eviction obtained by them against the former tenants in respect of the premises against the appellant Jagan Nath who became the tenant of the premises when the landlords obtained an order of eviction against the tenants thereby terminating the tenancy of the original tenants. The tenancy of Jagan Nath in respect of the premises is to be on the same terms and conditions as that of Gyan Chand and Neb Raj in view of Section 18 (1) of the Act. While Jagan Nath expressly based his claim on the compromise decree in paragraph 3 of his application under Sections 16 and 18 of the Act, the landlords falsely denied paragraph 3 of the application as absolutely wrong. The landlords were also not justified in not joining Jagan Nath as a party to the application for eviction against the tenants after having known that Jagan Nath had become a lawful sub-tenant by virtue of the compromise decree of 31-12-1954. The landlords shall pay the costs incurred by Jagan Nath throughout, in the

Court of the Controller, that of the Rent Control Tribunal and in this Court.

Appeal allowed.

Cases Referred.

1. 1955-2 SCR 857 : (AIR 1955 SC 812

2. 1964-3 SCR 164 : (AIR 1963 SC 1685).)

3. AIR 1971 Delhi 98,

4. ILR (1970) 1 Delhi 748 : (AIR 1971 Delhi 98)

5. S.A.O. 83-D of 1965 D/- 22-11-1971 (Delhi),

6. 1964 AC 993 at p. 1016

7. ILR (1971) 1 Delhi 504

8. ., (1959) Supp 2 SCR 217 : (AIR 1959 SC 689),

9. , AIR 1954 Supreme Court 82, Section 11

10. 1955-1 SCR 99 : (AIR 1954 SC 352)

11. 1956 SCR 72 : (AIR 1956 SC 346).

12. , AIR 1928 Oudh 384).