

DELHI HIGH COURT

Abdul Hamid

Vs.

Nur Mohammad,

S.A.O. No. 284 of 1973.

(S. Rangarajan, J.)

21.4.1976

ORDER

S. Rangarajan, J.

1. The first appellant is the tenant and the second appellant is his younger brother. The respondent had filed an eviction petition on 6-10-1970 under Section 14 of the Delhi Rent Control Act, 1953 (hereinafter referred to as the Act) on the grounds of :

- (a) Sub-letting or parting with possession by first appellant to second appellant [Section 14(1)(b)];
- (b) Non-living by the tenant or any other member of his family in the premises let out [Section 14 (1)(d)];
- (c) Personal need [(Section 14 (1)(e)]; and
- (d) The tenant having acquired other accommodation [(Section 14 (1)(h)].

Eviction having been ordered on the grounds enumerated under Section 14 (1)(b), (d) and (e) and an appeal against the same also having been dismissed this second appeal has been preferred.

2. Since interference is possible under Section 39 of the Act only if there is any substantial question of law arising in the appellant's favor the arguments proceeded only on the basis of the findings of the Courts below. It may be sufficient, therefore, to notice the relevant finding of the Tribunal on only the questions argued in this appeal.

3. After observing that the landlord had simply pleaded in para 18(3) in the eviction petition that he was the owner of the premises in dispute and needed the premises *bonafide* for his residence and for his family members who are dependent upon him, the learned Tribunal noted that the appellants have not been taken by surprise by

reason of the landlord not having specifically stated that he had no other reasonably suitable accommodation. In other words, the learned Tribunal understood the said pleading as complying with the requirements of Section 14 (1)(e) of the Act and, as I understand the learned Tribunal, that it was not necessary to "re-state" as a ground in the eviction petition the expressions employed in the statute

4. The learned Tribunal also held that the brother of appellant No. 1 (appellant No. 2) was in exclusive possession of the premises in dispute and that this amounted to parting with possession under Section 14 (1)(b).

5. Only two questions, both of some nicety have alone been argued:

(1) Whether it is sufficient for the landlord to merely state in the petition that he required the premises let out for own *bonafide* occupation without also averring that he has no other reasonably sufficient or suitable accommodation as stated in Section 14 (1)(e) ?

(2) Whether from the mere occupation may be exclusive of a close relation of the tenant like a brother it can be inferred, without more, that there had been a parting with possession in favour of the brother as to warrant eviction of the brother tenant as stated in Section 14 (1)(b) ?

It is common ground that even if one of these two questions is found in favour of the landlord this appeal will fail, in other words, the appellants will in order to succeed make good both these contentions.

1st contention.

Section 14 (1)(e) of the Act reads as follows :

"(e) that the premises let for residential purposes are required *bonafide* by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable residential accommodation" etc.

6. There has been somewhat conflicting dicta on whether the mere mention of the *bonafide* requirement of the landlord of the premises for the occupation, as residence, of himself and members of his family dependent on him is sufficient or whether he should also aver, in addition, that there was no other suitable residential accommodation. It will be convenient to begin the discussion of this question by referring to a decision of R S. Narula, C.J. of the Punjab & Haryana High Court in

Rajinder Singh Naude v. Kewal Krishan,¹ The discuss on there was whether a landlord, who had neither pleaded nor proved that he was not occupying another residential building in the urban area concerned and that he had not vacated that building without sufficient cause after the commencement of the Act in the said urban area was entitled to evict the tenant. Holding against the landlord on this point Narula, C.J. permitted an amendment which would bring the landlord's case within the provisions of Section 13 (3)(a)(i) of the East Punjab Urban Rent Restriction Act 1949, the relevant terms of which are similar to the present Act.

7. It had been held in *Krishan Lal v. Smt. Pritam Kumari*,² a decision relied upon by the Tribunal, that it was not necessary for the landlord to "re-state" in the application the statutory conditions. After noticing the above decision reference was also made by Narula, C.J. to a decision of the Supreme Court in *Attar Singh v. Inder Kumar*,³ that in order to succeed under a similar provision the landlord has not only to prove that he needs the premises for his own use but he also has to prove that he is not in possession of any other such premises in the urban area in question and also to prove that he had not vacated any such premises without sufficient cause after the commencement of this Act. The following observations of Wanchoo, J. (as he then was), speaking for the Supreme Court, on page 87 are apposite to the present situation:

"Turning now to sub-clause (c) we find that the landlord has not only to prove before he can get the tenant evicted on the ground that he requires rented land for his own use that he is not in possession of any other rented land for the purpose of his business in that urban area but also to prove that he had not vacated any rented land without sufficient cause after the commencement of the Act. Thus he had not only to prove that he is not in possession of any other rented land for his business but also to prove that he had not vacated any other rented land which he used principally for business without sufficient cause".

8. A similar view appears to have been taken in two other decisions of the Punjab and Haryana High Court (1) by D. K. Mahajan, J. in *Darshan Singh v. Jagdish Kumar*,⁴ by Muni Lal Verma, J. in *Brij Lal v. Smt. Janak Rani*,⁵ (Short Note of Cases reported in It was pointed out in the latter that the landlord was bound to urge all the conditions necessary to get an eviction and to prove the same; where he had failed to mention that he had no other sufficient accommodation the eviction application would not be maintainable. It seems to me, with respect, that is a reasonable construction and that the instant provision has to be similarly construed. It is manifestly not sufficient for the landlord to merely state that he requires the premises for his own occupation;

yet another necessary fact which he has to prove is that he had no other reasonably suitable residential accommodation. Having regard to the avowed object of the enactment, namely, to safeguard the tenant against arbitrary and unjust eviction the statutory safeguards against eviction are conditions precedent which have to be strictly complied with before Courts can exercise jurisdiction to order eviction. I have no difficulty, therefore, in holding that in the absence of even an averment in the present case, that the landlord had no other reasonably suitable residential accommodation, he cannot evict the tenant on a ground not even pleaded. Merely saying that he required the premises *bonafide* for his own residential accommodation was hardly enough when he did not allege that he has no other sufficient accommodation for his residence, in a case where the demised property in question is not the only property either owned or said to be owned by him, he does not furnish the Court with the necessary precondition for ordering eviction.

9. The relevant and well-established rule of pleading is that no evidence can be let in on a matter not pleaded but is required to be pleaded and that no amount of evidence even if let in, without such a pleading, can be looked into [vide *Saddik Mohamed Shah v. Mt. Saran*, AIR 1930 PC 57(1)].

10. The Rent Control Tribunal conceded in paragraph 22 of his Order that no specific plea had been taken by the landlord that he had no other reasonably suitable residential accommodation. I am afraid that the Tribunal has not properly perceived the scope of the objection that the landlord had not stated that he had no other reasonably suitable accommodation, by persuading itself, perhaps a little too easily, that there had been no surprise sprung on the tenant by the landlord.

11. In this case it is admitted by the landlord that he was the owner of premises No.1056 which he had let out to Sunder Lal for running a factory. But a further question arose whether prior to such letting it had been used for residential premises. Yet another question raised was whether the landlord or his wife was the owner of house No. 1049, stated to be gifted to the wife. At least regarding the former an enquiry, as a fact, became necessary and it seems difficult for me to assert that these cause no surprise, getting sporadic admissions from witnesses without a pleading may not be sufficient.

12. The discussion regarding surprise was probably sought to be advanced by referring to *Krishan Lal Seth v. Pritam Kumari* ⁶ this was said to be incorrect by Narula C.J. in *Rajinder Singh Nanda v. Kewal Krishan*,⁷ . The Rent Control Tribunal

had also made a reference to a decision of this Court by I.D. Dua, C.J. in *Ved Parkash Gupta v. Hans Raj Taneja*,⁸ who was stated to have taken a view similar to one taken in *Krishan Lal Seth*. On a perusal of the decision it is seen that this question was not gone into. Certain observations of the Supreme Court in *Nagu Bai Ammai v. B. Shama Rao*, were also extracted by the Tribunal but they do not hear specifically on this question. All that happened in that case was that in spite of the absence of a specific plea of *lis pendens* with reference to sale and also any issue for evidence on this question had been let in and the absence of specific pleading was seen to be a mere irregularity resulting in no prejudice. The decision of the Privy Council in *Siddik Mohomed Shah*, [(AIR 1930 PC 57(1))] was quoted with approval, but it was held to have no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto. Here the situation is different completely.

13. The three conditions necessary for obtaining eviction under Section 14(i)(e) are :

- (1) That the landlord is the owner of the premises in question;
- (2) That his requirement of the same for occupation of the residence in *bonafide*; and
- (3) That he had no other reasonably suitable residential accommodation.

14. These are three separate facts which have to be pleaded, concerning each one of them the tenant must be able to make his averment (pleading) either admitting or denying each of them. It is in the light of such pleadings, making assertions and counter-assertions concerning each and every fact in issue, that attention could be properly focused at the trial.

15. Paragraph 18 of the application states:

"(1) The respondent No. 1 has acquired possession of another house No. 888, Haveli Azam Khan, Chitli Kabar, Delhi and is living therein with his family members.

(ii) Neither the respondent No. 1 nor any member of the family of the respondent No. 1 is living in the premises for the last about 1 year and a half.

(iii) The petitioner who is owner of the premises needs the premises bona fine for his residence and the residence of his family members who are dependent upon him.

(iv) The respondent No. 1 has illegally sublet, assigned, or has parted with possession of the premises to respondent No. 2 without the consent of the

petitioner".

16. There was no reference to any other item of property either belonging to or said to belong to the landlord.

17. The tenant is not expected to make a research himself and unaided by any such allegation by the landlord concerning the number of other premises that he owns or can be said to own and which he is unable to reduce to possession for the purposes of his residence as claimed. The tenant should have a fair opportunity of making an enquiry regarding them and to make counter-assertions, if any. In reply to the above blanket allegations the tenant could not be expected to make any better pleading than what was seen in the above-noticed paragraph 18.

18. In the replication the following alone was pleaded by the landlord :

"Para 18 with all its clauses is incorrect and is denied. Clause wise reply is submitted hereunder:

(a)(i) Clause a(i) is incorrect. The respondent No. 1 has acquired vacant possession of house No. 888, Haveli Azam Khan, Chikli Kabar, Delhi and is living therein.

(ii) Clause a (ii) is incorrect. Respondent No. 2 is not the member of the family of respondent No. 1 and is living separately with his family members. Neither respondent No. 1 nor his family is living in the premises in dispute for the last about two years.

(iii) Clause a (iii) is incorrect. The petitioner needs the premises in dispute for his and his family members who are dependent upon him, residence. It is denied that the petitioner has been letting out any residential premises.

(iv) Clause (ii) is incorrect. Respondent No. 1 has sublet, assigned or has parted with possession of the premises to respondent No. 2, without the consent of the petitioner."

19. Even though the tenant had stated in paragraph 18(a)(iii) of the written statement that the landlord had recently let out portions to Abdul Khalid, Mohd. Ismail and Abdul Wahid in house No. 1049 and in house No. 1056 where the landlord was residing, he had recently let out the entire ground floor to one Sunder Lal who is running a factory there was no specific denial in the replication. All that was stated in para 18(a)(iii) of the replication was that it was "denied that the petitioner had been letting out any residential premises." There is no specific averment that house No 1056 was not residential. This kind of non-traverse has to really put against the landlord. The kind of traverse that is necessary was indicated by Mudholkar, J. in

"Bearing in mind that Order 6II, Rule 5, Civil P.C. provides that every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted, to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial. No specific issue on the question of adoption was, therefore, raised. In the circumstances the High Court was right in saying that there was no occasion for the parties to lead any evidence on the point. However, Sreelal who was examined as a witness on behalf of the plaintiffs has spoken about the fact of adoption and his statement can at least be regarded as *prima facie* evidence of adoption. It is true that he admits the existence of a deed of adoption and of its non-production in the Court. This admission, however, would not tender oral evidence inadmissible because it is not by virtue of a deed of adoption that a change of status of a person can be effected. A deed of adoption merely records the fact that an adoption had taken place and nothing more. Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible. We, therefore, agree with the High Court that the plaintiffs' suit for partition of their half share in the property was not incompetent because Shankarlal was not made a party thereto."

The same must be extended to non-traverse in the replication of averments made in the written statement.

20. There is no application even for amendment of the application for eviction. The position taken during the arguments was that even without "restating" the ground mentioned in Section 14 (1)(e) it has possible to claim eviction on the bare allegation of *bonafide* requirement for the landlords residence and without even saying that there was no other reasonably suitable residential accommodation available to the landlord. It seems to me that on a question of this importance it would be neither safe nor desirable to rest any decision on the mere ground of want of surprise to the tenant. The statute has laid on the landlord the duty to allege and to prove what is laid down in Section 14(1)(e); without even making such necessary allegations there will be no jurisdiction for a Rent Controller to order eviction. The conditions stated in Section 14 are preconditions which must be strictly established before jurisdiction can be

exercised under the Act to order eviction of any tenant. If the landlord fails to make such specific allegations concerning such a pre-condition he does so at his peril. 2nd contention:

21. The finding on this question by the Tribunal was"..... It has been proved that the tenant, his wife and children were residing in house No. 888, Haveli Azam Khan and not in the premises in dispute". After holding that Abdul Aziz was not a member of the family of appellant No. 1 and that the tenant was residing in house No. 888 Haveli Azam Khan and his brother Abdul Aziz was residing in the premises in dispute, the Tribunal observed as follows:

"In the present case I have held that appellant No. 2 was in exclusive possession of the premises in dispute. Exclusive possession no doubt is not a decisive test of the distinction between the lease and license. However, it is an important circumstance for determination whether the legal possession had been transferred. In my view, if it is proved that a person other than the tenant was in exclusive possession of the demised premises then at least the onus shifted to the other party to explain the possession of the stranger and it is for him to prove that he was merely a licensee.

In the present case the only explanation is that Abdul Aziz was a brother. This alone, in my view, is not sufficient to hold that he was merely a licensee."

22. As the subsequent discussion will show this finding would not be legally sufficient to order eviction.

23. Adverting to the explanation for Abdul Aziz and his brother the Tribunal was of the view that it was not sufficient to hold that he was merely a licensee. The question which is material to consider is whether on the basis or the brother... being in possession without more it can be held that the other tenant (brother) had "parted with possession" of the whole or any part of the premises as laid down by Section 14 (1)(b) of the Act. Section 14 (1)(b) may be read :

"That the tenant has on or after the 9th day of June 1952, sub-let, as assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord."

"Part with possession" has to be understood in the legal sense; this expression has been interpreted by this Court in some decisions out before noticing them it may be useful to refer to the concept of family which was explained by a Division Bench of this Court consisting of H.R. Khanna, C.J. (as he then was)

and Parkash Narain, J. in *Gobind Dass v. Kuldip Singh*,).¹¹ The term "family" is not capable of concise definition because what constitutes a family in a given set of circumstances or in a particular society depends upon the habits and ideas of persons constituting that society and the religious and socio-religious customs of the community to which such persons may belong. A remote relation may, in a given set of circumstances, be treated as a member of the family, whereas in another set of circumstances the same relation may not be legitimately called a member of the family. In that case the expression "family" was held to include brothers, their wives and children; the discussion was in the context of the Delhi Rent Control Act of 1988.

24. Palekar, J., speaking for the Supreme Court, in *Smt. Krishanwati v. Hans Raj*,)¹² observed that when two persons lived together in the house as husband and wife and one of them who owns a house allows the other to carry on the business in a part of it, it would be in the absence of any other evidence be a rash inference to draw that the owner would let out a part of the premises.

25. A Division Bench of this Court consisting of S. N. Andley and V. R. Tatachari, JJ. (as both of them then were) construed in *Hazari Lal v. Giani Ram*,)¹³ the expression "parting with possession" as meaning giving possession to persons other than those to whom possession has been given by the lease; the mere user by other persons is not "parting with possession" as long as the tenant retains the legal possession himself, 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. It was further observed that the mere fact that the tenant himself was not in physical possession of the tenancy premises for any period of time would not amount to parting with possession so long as, during his absence, the tenant has a right to return to the premises and he in possession thereof. Divestment or abandonment of the right to possession is necessary in order to invoke the clause "parting with possession".

26. Applying the said test to the findings in the present case it is nothing more than the brother also being in possession; no parting with possession in the manner contemplated by Section 14 (1)(b) has been made out even on the findings on this question by the Courts below. The pleadings on this aspect, namely, the application for eviction (in paragraph 18 (a)), written statement thereto and the replication thereto have already been read. It is not disputed that respondent No. 2 is the real brother of the first respondent. The case of the tenants is that the first respondent was maintaining the second respondent and his family who were dependent on the former.

The only assertion, by the landlord in reply to this averment in the replication, was that the first respondent had sublet, assigned or had parted with possession of the premises and that the second respondent was in exclusive possession of the premises.

27. What was relied upon by the Court below was the separate ration cards which were held to militate against their being members of a joint family (though Muslims) and the absence of a presumption among Muslims of their being members of joint family. The actual evidence adduced by the respondents (tenants) was that the mother collected the rations and that there was a joint mess. The family was a large one; the demises property alone was not sufficient the members had to occupy not only house No. 888 but also house No. 1039/40, which were almost opposite to each other. The father had died in 1964 and the first appellant was made tenant on 1-1-1965.

28. One looks into the orders of both the Controller and the Tribunal in vain to find out anything therein to show either that there was actual subletting by one brother to the other or that the brother-tenants had legally precluded himself from claiming back possession of the demised premises. Apart from discussion the pertaining to the birth of second respondent's child in the demised property and his being shown as a voter there is nothing to show that the first respondent had sublet the demised property to the second respondent. The entire finding on this aspect is made to rest inferentially on the brother (2nd respondent) exclusively, living in the demised premises.

29. The reference to the second respondent's residing there is hardly of any significance; his residing there is not in issue. The further question for consideration is whether the mere presence of a brother along with the tenant or at least without anything to indicate that the first respondent had put himself from the pale of claiming possession from the second respondent would amount to subletting or parting with possession within the meaning of Section, 14(1)(b). It seems to me that none of the facts adverted to by both the Courts below are sufficient to show that the first respondent had "parted with possession" in favour of the second respondent. What the Tribunal said on this question had already been noticed earlier.

30. Rajinder Sachar, J. held in *Gurdial Singh v. Brij Kishore*,¹⁴ that it is not the law that no sooner does any person other than a lessee occupy a premises it must be held that the tenant had parted with possession of the demised premises. What has to be seen in such cases is whether the tenant has totally effaced himself and whether the possession of the third person is exclusively in his own right and to the ouster of the lessee. In that case it was seen that there was not even a hint in the evidence on record

and that the evidence on the contrary showed that the user was with the permission and consent of the tenant.

31. N. S. Deshpande, J. also pointed out in *H.C. Sharma v. Life Insurance Corporation of India,*) ¹⁵ that it was not mere use or occupation of the premises in the ordinary sense that was forbidden by proviso (b) to sub-section (1) of Section 14. What is forbidden is the parting with the legal possession.

32. On the other hand, the landlord has been given the right of action on the ground that neither the tenant nor any member of his family has been residing in the demised property for 6 months immediately before the date of filing of the application. The Tribunal observed that it has been proved that neither the tenant nor any member of his family had been residing in the premises for more than six months prior to the filing of the eviction petition; this was only on the view that he held Abdul Aziz was not a member of the family. The decided cases show the concept of the family itself is such that it could include to Mahammadan brothers as well. To say that a Muslim Brother is not a member of the family and to further say that since the brother (now tenant) was found to be living in the demised premises it was a case of his brother tenant not living in that demised premises attracting Section 14 (1)(d) is, it seems' to me, to argue in a circuitry. That is the reason why I have noticed the only two points that arise for decision in this case are those under Section 14(1)(e) and (b) but not (d).

33. In the result no ground has been made out for eviction either under Section 14 (1)(e) or (b). Each of these raises a substantial question of law-warranting interference with the decree of eviction passed by the Controller, confirmed by the Tribunal. In the circumstances the decrees of Courts below are reversed and the application for eviction is dismissed with costs throughout.

Appeal allowed.

Cases Referred.

1. (1975 RCR 325): (1975 Rent CJ 320)
2. (1961-63 PLR 865),
3. (1967-69 Pun LR 83)
4. 1975 RCR 99 : 1975 Rent CJ (SN) 19 p.14
5. 1975 Rent CJ. (SN) 48 pp 41-42).

- 6.(1961-63 Pun LR 865;
7. 1975 RCR 325
8. (1969 RCR 406)
9. (AIR 1956 SC 593)
- 10.(AIR 1967 SC 109).
- 11.(1970 RCR 511
12. 1974 RCR 163 (AIR 1974 SC 280
13. 1972 RCR 74 : (1972 Rent CJ 41
14. (1970 Delhi LT 592)
15. (1969 RCR 436)(Delhi)