GUJARAT HIGH COURT

Mehta Jagjivan Vanechand

Vs.

Doshi Vanechand Harakhchand

Second Appeal No. 297 of 1963

(M.P. Thakkar, J.)

29.06.1970

JUDGMENT

M.P. Thakkar, J.

1. Will a tenant who takes in a partner in a business run by him in rented premises incur the liability of being evicted on the ground that he has sublet or assigned his interest in the tenancy in favour of the partnership? It is this question which requires to be resolved in the present second appeal under section 28 of the Saurashtra Rent Control Act, 1951 by the plaintiff landlord who has failed in both the lower Courts. The Saurashtra Rent Control Act 1951, will be referred to as "the Rent Act" in the course of this judgment.
2. The appellant - plaintiff instituted Civil Suit No. 68 of 1958 in the Court of the Civil Judge (S. D.), Morvi claiming a decree for eviction under section 13 (1) (e) of the Rent Act, which is in the following terms, against the respondents-defendants:

> "13. (1) Notwithstanding anything contained in this Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied.
> * * * * * * * * * * *
> (c) that the tenant has, since the coming into operation of this Act, sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein ; or

The trial Court came to the conclusion that merely because the tenant entered into a partnership and took in a partner, it cannot be said that he had transferred or assigned his interest in the tenancy in favor of the partnership firm. The lower appellate Court endorsed this view. Thereupon the landlord has approached this Court by way of the present second appeal.

3. The facts are not in dispute. The tenant was carrying on business in the demised premises (hereafter referred to as the "suit shop") on his own as a sole proprietor of the business. In

October 1957 the tenant took in defendant No. 2 and defendant No. 3 as his partners. From then onwards the tenant along with his aforesaid two partners carried on business in the suit shop for the benefit of the partnership. The partnership deed executed between the tenant and his two partners (defendants Nos. 2 and 3) in terms made it clear that the tenancy rights continued to vest unto the tenant (defendant) No. 1 and that the defendants Nos. 2 and 3 who were joining him as partners were not to acquire any interest in the tenancy rights belonging to him. On these facts the question has been debated whether or not a subletting or assignment of the suit shop in contravention of section 13 (1) (e) of the Rent Act has taken place in October 1957.

4. The learned counsel for the landlord poses two key questions and answers them. Who was doing business in the suit shop and who was in possession till 1957? (The tenant-defendant No. 1). Who is doing business in the suit shop and who is in possession since 1957? (The partnership formed by the tenant with the two defendants). It is argued that the answers to the aforesaid two questions impel one to the conclusion that there has been either subletting or assignment notwithstanding the stipulation in the partnership deed that the tenancy interest will continue to remain vested unto the defendant No. 1 - tenant. The argument, in my judgment, is misconceived and fallacious. It is a well recognized proposition that a partnership is not a 'legal person' or a corporation sole or corporation aggregate having a distinct legal personality of its own. That a partnership is a compendious mode of describing the partners collectively is equally well known. The submission that a partnership firm a distinct legal entity and that the firm is now in possession of the suit shop and is doing business thereat whereas the defendant No.1 was doing so hitherto cannot therefore be countenanced. The two crucial questions posed by the learned counsel for the landlord may now be examined in a different light. Previously the tenant himself was using the shop and doing business. Now the plaintiff along with his two partners (defendants Nos. 2 & 3) is using the shop and doing business thereat. Does this constitute either sub-letting or assignment? The answer is clear-cut and unfaltering 'no'. The reasons for forming this opinion may now be considered in some detail. First, it may be considered whether this constitute assignment. In an assignment the assignor transfers the totality of his right, title and interest to the assignee. The transaction results in the assignor being denuded of his entire interest and the assignee replacing him and acquiring the entire interest in his stead. The assignor who had an interest previously would not have any interest howsoever little left with him any more. The assignee acquires the interest though previously he had none. What previously, belonged to the assignor (and none else) now belongs to the assignee (and no other). A similar view has been expressed in *South of England Dairies Ltd. v. Baker*[1], "An assignment" says Joyce J. "of a lease must necessarily embrace all the estate of the assignor: Preston on Conveyancing 3rd ed. Vol. II p. 124". This test does not answer in favour of the landlord. Unless it can be posited that the original tenant's entire interest has been extinguished and that of someone else to the exclusion of the original tenant created, it is futile to contend that there has been an assignment. Even if the tenancy interest had been thrown into the partnership (unlike the present case) the answer would not have been favourable to the landlord. Even in such a case the tenant continues to have an interest along with his two partners in the tenancy rights. He is not divested of his interest

altogether. Again one cannot make assignment in one's own favour along with two others. If the argument is correct, the tenant has made an assignment in his own favour jointly with others. But then he cannot have with others. But then he cannot have a split personality fulfilling the role of both 'assignor' and 'joint assignee. Unless the individuality of the assignor and assignee is different and distinct, it cannot constitute assignment. And as a partnership has no distinct personality, it is not possible to accede to the argument that taking in of partners constitutes assignment. There is another dimension

[1](1906)-2 Ch. Div. 631 at p. 639)

of the matter. A tenancy interest cannot be split up into parts. It is an integrated indivisible interest which must be retained or transferred in its entirety. Can one split up a tenancy interest, retain a part of it, and transfer the remainder to someone else? To ask the question is to answer it. As the tenant can not split up the interest, retain a part of it and transfer the remainder to his partners, it is evident that he cannot assign the tenancy interest to a partnership of which he himself along with others is partner. It is therefore, not necessary to demonstrate any further that it cannot constitute assignment.

5. Whether or not it will constitute sub-letting may now be examined. Sub-letting postulates two distinct persons: the head-tenant and the sub-tenant. Their rights and obligations are different. One cannot be one's own sub-tenant. If the transaction of taking in partners constitutes sub-letting, the defendant-tenant will be head-tenant and he himself along with his two partners will be the sub-tenants. It is not necessary to uncover the fallacy in this track of reasoning any further. As it is not feasible to accede to the argument that the partners of a partnership firm constitute a legal entity having a distinct identity, individuality, or personality, it is not possible to hold that a transfer has taken place from the tenant to himself and to two others (his partners). The contention cannot therefore, upheld that a sub-tenancy has come into existence between the tenant on the one hand and the tenant and his partners on the other. On this ground alone, the appellant -plaintiff must fail. But the decision can be buttressed on another ground as well. The argument that there has been a transfer of possession in favor of the partnership firm, that is to say, that there has been transfer of possession from the tenant to himself and two others is also an argument which arises from some misconception. Merely because the tenant continues to carry on the business in the same shop as hitherto but takes in two partners, the legal possession of the shop does not change hands. Using the shop is not equivalent to handing over legal possession of the shop. Legal possession is a concept which must be distinguished from the concept of physical occupation or user. On who occupies or uses a premises is not necessarily in legal n. Of the premises. There is a distinction between physical occupation and legal possession. A watchman may be in physical occupation of premises. That, however, does not mean that he is in legal possession of the premises. If a tenant leaves the town keeping his watchman on the premises, it cannot be said that a transfer of possession has taken place. The watchman is in occupation as an employee or agent of the tenant. The legal possession continues to be that of the tenant though the actual occupation is that of the watchman. Similarly even if the partners of the firm attend the shop and do business along with the tenant, it cannot be said that they are in legal possession of

the shop. This is another reason why the argument of the learned counsel for the landlord cannot be upheld.

6. A similar question was raised before the Madras High Court in *Gundalpalli Rangamannar Chetty v. Desu Rangiah*[2], A reference was made to *Jackson v. Simons*[3], and the distinction drawn between physical possession and legal to possession in that decision was taken in to account in rejecting the contention of the landlord that there was a subletting or assignment. It has been observed by the Madras High Court in paragraph (5) of the said decision as under:

> "In *'Jackson v. Simons'*[4], the question was whether the tenant broke a similar covenant. The defendant who was the tenant, without the plaintiffs' consent or knowledge agreed for the sum of Ls 7 per week to allow the proprietor of a night club carried on in a basement beneath the shop to the front part of the shop between the hours of 10-30 p.m. and 2 a.m. for the sale of tickets of admission to the club Romer J. held that the arrangement conferred to estate or interest in the demised premises but was a mere privilege or licence to use portion thereof, the defendant retaining the legal possession of the whole and did not, therefore, constitute a breach of the covenants not to assign. underlet, or part with the demised premises or any part thereof."
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> The Madras High Court also relied on an observation made by Scrutton *L. J. in Chaplin v. Smith*[5], wherein it was observed:
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> "He did not assign ; nor did he underlet. He constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them."
>
> Reliance was also placed on the Treatise of Foa on landlord and Tenant, 6th Edn, at page 323, where the law on the subject has been summarized in the following words:
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> "The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not so long as he retains the legal possession himself, a breach of the covenant."
>
> After considering all these decisions, the High Court of Madras extracted the following principles and came to the conclusion that a mere taking in of partners did not amount to transferring of possession and did not constitute assignment or subletting. Says the Madras High Court :
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> "It is clear from the aforesaid decisions that there cannot be a sub-letting, unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Section 105 of the Transfer of Property Act defines a lease of immovable property as to transfer

[2] AIR 1954 Mad 182
[3](1923) 1 Ch. 373
[4](1923) 1 Ch. 373 (B)

> of right to enjoy such property. Therefore to create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another. In the present case the exclusive possession of the premises was not given to the second respondent. The first respondent continued to be the lessee, though in regard to the business carried on in the premises he had taken in other partners. The partners are not given any exclusive possession of the premises or a part thereof. The first respondent continues to be in possession. subject to the liability to pay rent to his landlord. The partnership deed also, as I have already stated, does not confer any such right in the premises on the other partners. I therefore hold in the circumstances of the case that first respondent did not sublet the premises to the second respondent, and therefore he is not liable to be evicted under the provisions of Act No. 25 of 1949."

The view taken by me is reinforced by the opinion expressed by the Madras High Court in the aforesaid decision. A similar view has also been taken by the Saurashtra High

[5](1926) 1 KB 198, at p. 211

Court in *Karsandas Ramji v. Karsanji Kalyanji*[6], In my opinion, it is therefore clear that there has been no assignment or sub-letting in favor of the partners of the firm by the tenant so as to attract the bar of section 13 (1) (e) of the Rent Act. The view taken by the lower Courts is correct and no exception can be taken thereto.

7. The appeal, accordingly fails and is dismissed with no order as to costs.

Appeal dismissed.

[6] AIR 1953 Saurashtra 113, at pp. 114 & 115