

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Judgment Reserved on: 06.02.2008**
Judgment Delivered on: 07.01.2009

% **C.M. (M) No.2164/2006**

Maharaj Krishan Khanna Petitioner
Through: Mr. R.P. Bansal, Sr. Adv. with
Mr. Rakesh Mahajan, Mr. Prabhat
Ranjan & Mr. Sheetesh Khanna,
Advocates

versus

Surinder Kumar & Anr. Respondents
Through: Mr. S.C. Singhal, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J.

1. The present petition under Article 227 of the Constitution of India is directed against the order dated 27.10.2006 passed by the learned Additional District & Sessions Judge, Delhi Rent Control Tribunal whereby he has allowed the appeal preferred by the respondents against the eviction order passed by the learned Additional Rent Controller in Eviction Petition No. E 55/02 dated 01.10.2005.

2. The Petitioner had filed an eviction petition under Section 14 (1) (b) of the Delhi Rent Control Act(hereinafter referred as Act),

against the respondents by subletting of the Suit premises in favour of respondent no. 2 Ms. Alka, the wife of respondent no. 1 before the Rent Controller, Delhi, in respect of two shops including the mezzanine floor in one shop on the ground floor situated at S-27, Rajouri Garden, New Delhi 110027

3. Admittedly, the shops had been originally let out to Smt. Nirmala Mago, for commercial purpose on a monthly rental of Rs. 1000/- for both shops. The tenant Smt. Nirmala Mago, passed away on 19.11.2000 and thereafter the tenancy right devolved upon her legal heirs. Her son Surender Kumar (Respondent No. 1), is one of her legal heirs and pursuant to the mutual understanding between all the legal heirs, the landlord was informed that respondent no. 1 would be the successor tenant in the said premises was alleged that the Suit premises had been sublet to Smt. Alka Mago, i.e respondent no. 2, on the basis that she had started carrying on her own independent business from the said premises under the name and style of M/s Konark Enterprises. She had also opened a bank account with Canara Bank, Rajouri garden branch in the name of M/s Konark Enterprises, wherein she was shown as the sole proprietor of the said concern. It was alleged that the Petitioner had received a cheque dated 1.01.2002 bearing no. 376732 for a sum of Rs. 16940/-, purported to be rent for the period 1.11.2000 to 31.01.2002 from the above said account.

4. The eviction petition was resisted by the Respondents on the ground that the respondent no.2, who was the daughter-in-law of the

late Smt. Nirmala Mago, was taken as a partner by her during her life time on 1.11.2000 by executing a partnership deed and after the demise of Smt. Nirmala Mago on 19.11.2000, the respondent no.2 has been discharging the obligation of the firm. It was also pleaded that the business was stopped w.e.f. 01.04.2001 and even the Sales Tax Number had been surrendered to the authorities. Since 01.04.2001, the Suit premises was lying locked. It was also argued that, in any event, no question of subletting arises when respondent no. 2, who is alleged to have carried on the business in the name of her proprietary concern M/s. Konark Enterprises, is none other than the wife of respondent no.1 and was the daughter-in-law of the deceased original tenant Smt. Nirmala Mago.

5. The Rent Controller allowed the eviction petition in favour of Petitioner, by disbelieving the partnership set up by the respondents between Late Smt. Nirmala Mago and respondent no. 2, Ms. Alka and by holding that Ms. Alka was carrying on her proprietary business from the Suit premises wherein respondent no. 1 had no role to play. He also rejected the argument that respondent no. 2 being the wife of respondent no. 1, no subletting can be alleged in view of their relationship.

6. The respondents assailed the judgment of the Ld. ARC before the Ld. ADJ/RCT, inter alia, on the ground that after the death of late Smt. Nirmala Mago, who was admittedly the tenant in the demised premises, the first respondent being her legal heir succeeded to the

tenancy rights. The business of M/s Konark Enterprises was being carried on from the suit premises by the mother who inducted the second respondent as her partner because of her not keeping good health. After her death, the second respondent was never in actual possession of the suit property. She opened a Bank account as the proprietor of M/s Konark Enterprises to wind up the pending affairs of the firm, in which she was inducted as a partner during the life time of Smt. Nirmala Mago. In any event, even if Smt. Alka Mago was allowed to continue to run her business in the name and style of M/s Konark enterprises in the Suit premises, it would not amount to creating a sub-lease. She being the wife of the first respondent, daughter-in-law of the deceased tenant and a member of the family, she cannot be considered to be in the position of Sublettee.

7. The Learned ADJ/RCT has, vide his impugned order has set aside the eviction order passed by the Ld. Rent Controller by placing reliance on various judgments cited by the respondents on the issue that, for a case of subletting to be made out, the sub-lettee has to be placed in exclusive possession of the tenanted premises, and the wife/family member of a tenant, who is running a business, cannot be said to be a sub-lettee.

8. Learned counsel for the Petitioner argues that the impugned order has been passed without appreciating the correct factual position and documents filed on record. It is argued that the partnership deed was a camouflage and had been created with a view to cover up the

subletting in favour of respondent no. 2. It is argued that the Petitioner had placed documents on record and produced witnesses to show that respondent no.2 was in possession of the suit premises as a sub-tenant. It is stated that Ld. RCT wrongly opined that the petitioner/landlord has failed to prove subletting / parting of possession of the premises, as a sub tenant to respondent no. 2. The Petitioner submits that the fact that there was no partnership, as alleged, is proven beyond any doubt by the fact that respondent no. 2 had opened an account with Canara Bank, Rajouri Garden, New Delhi in her capacity of sole Proprietor of M/s Konark Enterprises. The Petitioner impugns the observation of the RCT that *"after the death, bank account was opened in the name of M/s Konark Enterprises showing Smt. Alka as **partner**"* as patently wrong and contrary to the record. He also, similarly assails the observation of the Ld. RCT to the effect that the Petitioner "has admitted that Nirmala Devi died in November 2000 and her shop is *in possession of her son Shri Surender Kumar **who is running the business under the name and style of M/s Konark Enterprises along with his wife who is a partner in the firm***" as being patently erroneous and contrary to the record.

9. Before proceeding further, an important aspect which cannot be lost sight of is that the legislature in its wisdom has amended the said Act whereby the appeal to the Tribunal under section 38 of the said Act has been confined to only a question of law and second appeal to this Court has been abolished. In view thereof, the scrutiny

by this Court under Article 227 of the Constitution of India is not to review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be based. The Supreme Court in **Mohd. Yunus V Mohd. Mustaquim** AIR 1984 SC 38 has observed that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227 of the Constitution as the supervisory jurisdiction conferred on the High Courts is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and the said jurisdiction is not to correct an error apparent on the face of the record, much less an error of law. In **Hari Ram v. Rukmani Devi & Ors**; 64 (1996) DLT 662 it has been observed that unless it is shown that the findings of facts were perverse or based on no evidence at all, the same would not to be interfered in second appeal. On the plea of the tenant that the onus was on the landlord to prove subletting it was observed that the relationship of sublessee and lessee is a matter of knowledge which is confined to the parties alone and thus all that the landlord can do in such circumstances is to prove the circumstances which would reasonably lead to an inference of subletting or parting or assigning the premises or any part thereof. In **Rohini Prasad v. Kasturchand**, (2000) 3 SCC 668 the Supreme Court while dealing with the scope of the jurisdiction of the High Court in Second Appeal, to interfere with the order passed in First Appeal, the Supreme Court has held that where the misreading of evidence by appellate Court would lead to miscarriage of justice or its finding is based on no evidence and thus

perverse, the High Court can upset the finding of the first appellate. It was held that the High Court interferes in second appeal not because the appreciation of evidence by the first appellate Court was not correct, but on account of the fact that the first appellate Court misread the evidence.

10. In the light of aforesaid discussion I will proceed to analyze whether the findings of the RCT are perverse and warrant the interference of this Court. A perusal of the account opening form placed on record clearly shows that the respondent no. 2 had opened the bank account in Canara Bank, Rajouri Garden, New Delhi as the sole proprietor of the firm M/s Konark Enterprises and it also shows Surender Kumar as her introducer in the Bank. Similarly, a perusal of compromise note dated 19.12.2001 cannot be interpreted to mean any admission by the Petitioner of the fact that respondent no. 2 was a partner of M/s Konark Enterprise. In fact, that is not even the defence set up by the respondents. It seems the aforesaid observations made by RCT are erroneous and contrary to the facts and material placed on record.

11. The next issue that arises is whether these erroneous findings of the Ld. RCT has any bearing or effect on the decision of the Ld. RCT on the merits of this case. Undisputedly, upon the demise of the original tenant, the tenancy rights devolved upon respondent no. 1 and he was entitled to use and occupy the suit premise. The Ld. RCT has not considered it necessary to go into the aspect, whether the

finding of the Ld. ARC that the partnership deed between the original tenant Smt. Nirmala Devi and respondent no. 2 was a camouflage or not. He merely proceeds on the premise that respondent no. 2 being a family member of the original tenant, as well as of respondent no. 1 could use and carry on her sole proprietary business without being labeled as a subtenant. Since the aforesaid observations of the Ld. RCT which are factually incorrect do not in any way impinge on the reasoning adopted by him, in my view, the said errors are not material and merely on account of the said errors, the impugned order cannot be set aside.

12. In ***M/s Mahendra Saree Emporium v. G.V. Sirinivasa Murthy*** JT 2004 (7) SC 20 the Supreme Court has held that the term sub let is not defined in the Act –new or old but the definition of lease can be adopted mutates mutandis for defining sub lease. In view of section 105 of Transfer of Property Act, 1882, a sub lease would imply parting with by the tenant of a right to enjoy such property in favour of his sub tenant. Similarly in ***Helper Girdharibhai v. Saiyed Mirasaheb Kadri & Ors.*** (1987) 3 SCC 538, it was held that there cannot be a subletting unless the lessee parted with the legal possession. The mere fact that some other person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub lease. In ***Hazari Lal And Ram Babu v. Shri Gian Ram*** 1972 RCR 74 also it was held that where legal possession is retained by a tenant, there is no parting with possession and mere

user by another person is not such parting with possession. The expression "otherwise parted with the possession" was commented upon in Para 9 of the judgment which reads as under:

"9. Clause (b) to the proviso to Sub-section (1) of Section 14 of the Rent Act uses three expressions, namely, "sub-let", "assigned and otherwise parted with the possession" of the whole or any part of the premises without obtaining the consent in writing of the landlord. These three expressions deal with three different concepts and apply to different circumstances. In subletting there should exist the relationship of landlord and tenant as between the tenant and his sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sublet. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression "parted with the possession" undoubtedly postulates as has been held in the cases mentioned above the parting with legal possession. As we understand it, the lease has given parting with possession means giving possession to persons other than those whom possession and "the parting with possession" must have been by the tenant. The mere user by the other persons 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 claim possession from his guest who does not pay him any rent or other consideration, it would not be possible to say that the tenant has parted with possession even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the tenant has a right to disturb the possession of his guest at any time, he cannot be said to have parted with the possession of the tenancy premises. The mere fact that the tenant himself is not in physical possession of the tenancy premises for any period of time would not

amount to parting with the possession so long as, during his absence, the tenant has a right to return to the premises and be in possession thereof. A more privilege or licence to use the whole or a part of the demised premises which privilege or licence can be terminated at the sweet Will and pleasure of the tenant at any time would not amount to "parting with possession." The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession."

13. In **Jagan Nath v. Chander Bhan** (1988) 3 SCC 57, Supreme Court while dealing with expression "parting with possession" in the context of a tenant living with other family members, who has allowed the tenanted premise to be used by other family members, has held as under:

"6. The question for consideration is whether the mischief contemplated under Section 14(1)(b) of the Act has been committed, as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. 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. This Court in *Smt Krishnawati v. Hans Raj* AIR 1974 SC 280 had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises, allowed the other to carry on business in a part of it. The question was whether it amounted to subletting and attracted the provisions of sub-section (4) of Section 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence, a rash inference to draw that the owner has let out that part of the premises. In this case if the father 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 legally to attract the mischief of Section 14(1)(b) of the Act."

14. Thus, the enquiry in such cases has to be as to who is in legal possession of the premises. In the case in hand, there is no dispute to the fact that the respondent no. 1 has acquired the tenanted premise through inheritance and thus is in legal possession of the said premises. Even if his wife i.e respondent no.2 is taken to be a separate legal entity, mere allowing her to continue her business in the said premises, without anything more, cannot at any stretch of imagination be said to parting away with the legal possession of the premises. In my considered view, the Ld. RCT has rightly held that the possession of the second respondent was in her capacity of a member of the family of Late Smt. Nirmala Mago and the first respondent, who has succeeded to the tenancy rights of his mother and, as such, there was no parting away with the legal possession of the tenanted premises,

since no other material evidence has been brought on record to infer a subletting. Consequently, I find no infirmity in the decision arrived at by the Ld. RCT and no ground for interference is made out.

Dismissed.

(VIPIN SANGHI)
JUDGE

January 07, 2009
as/rsk