

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No.6545 of 2012 (O&M)

Reserved on: 30.01.2017

Date of decision: 22.02.2017

Balwant Singh Narang & another ...Petitioners

Versus

Saroj Gupta ...Respondent

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr.Vikas Behl, Sr.Advocate
with Mr.Nitish Garg, Advocate, for the petitioners.

Mr.Puneet Jindal, Sr.Advocate,
with Mr.Varun Goyal, Advocate, for the respondent.

G.S. SANDHAWALIA, J.

The present revision petition is directed against the concurrent findings recorded by the Rent Controller, Ludhiana and the Appellate Authority on 12.10.2010 and 13.09.2012, respectively, whereby eviction has been ordered on the ground that the property had been sublet to Harinder Singh Narang, by his father, Balwant Singh Narang, petitioner No.1 herein, who was the tenant without the consent of the landlord. A finding was recorded that the tenant had stopped carrying any business and he had delivered possession of the demised premises to his son and therefore, had no knowledge of the business in the firm and was a total stranger. The partnership deed which had been set up in defence (Ex.R2) was a mere sham transaction in the absence of any income tax returns and accounts books and sales tax returns having been produced. On issue No.4, regarding the estoppel by the landlord, it was held that this issue had not been pressed and therefore, it was decided against the tenants.

When the matter was carried to the Appellate Authority, it went on

to hold that subletting being a secret arrangement between the tenant and the sub-tenant and especially when it was between a close relation, as in the present case-between father and son, the matter could only be proved by way of circumstantial evidence. The onus was, thus, shifted upon the tenants that it was not a case of sub-tenancy. However, from the evidence brought on record, the partnership deed dated 01.04.1997 (Ex.R2) was held to be seeming to be a sham transaction. Elaborating this finding, it was noticed that copies of income tax and sales tax returns had not been filed nor the copies of account books and the terms and conditions enshrined in the partnership deed had also not been complied with. No books of account of partnership firms had been produced to show that both of them were jointly operating their account and in the absence of registration of the partnership deed, as per the evidence which has come on record, the father had become a total stranger to the business and therefore, there was an exclusion, as such, of the possession. The father did not even know where his son was residing and therefore, there was a severance of the joint family status. The cross-examination of the father, namely, Balwant Singh Narang was referred to for coming the said conclusion. Merely because the son was making the payment and the landlord was accepting the same as rent as payment on behalf of the father, who was the tenant would not estop the landlord from seeking eviction. The argument that there was no finding given on issue No.4, would also be of no help and accordingly, keeping in view the fact that the veil on the partnership deed had been lifted, it was held that possession had been parted with and the son, namely, Harinder Singh was in exclusive possession of the premises in dispute, without any permission. The objection

that the landlady herself had not appeared and the son had appeared as power of attorney was also overruled, in view of the close relationship, as such, between the parties.

Mr. Vikas Behl, Ld. Senior Counsel for the petitioner, has vehemently submitted that the evidence recorded by the Courts below were not justified that the partnership deed was a sham transaction and submitted that the firm continued to do business. The petition had been instituted on 04.02.2002 and therefore, thereafter also, the partnership was doing business. Reliance has also been placed upon the fact that two applications for additional evidence had been moved before the Appellate Authority to produce the record of the authorities, to show that the firm, as such, was running and therefore, the order of the Appellate Authority, dismissing the application for additional evidence on the same date when it dismissed the appeal, was not justified. It was, accordingly, submitted that the son of the landlady had admitted that the counterfoils of the rent receipts had been signed by Harinder Singh Narang and therefore, there was a estoppel, as such, from the part of the landlady. She had chosen not to appear herself and therefore, an adverse inference was to be drawn against her. It is, accordingly, submitted that it was a misreading, as such. That the father was living separately only for the last 4 years and not at the time of the institution of the petition. No evidence had been recorded on all the issues and even the case of the landlady is that there was a licence and therefore, no eviction, as such, on the basis of subletting, was justified. It was, accordingly, submitted that due to the close relationship, as such, eviction should not have been ordered on the ground of subletting. Reliance was placed upon the judgment

in **Smt. Gian Devi Anand Vs. Jeevan Kumar 1985(2) SCC 683** to contend that tenancy was inheritable and therefore, findings recorded by the Courts below were not justified and **Parkash Chand Vs. Bhan Chand 1995 (2) PLR 147** wherein the plea taken by the tenant was allowed and it was submitted that once the father was a partner in the business, it would not amount to subletting.

It was, lastly, argued that there was no such parting of the possession and reliance was placed upon the judgment of the Apex Court in **Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd. 2005 (2) SCC 217** and **Man Kaur (Dead) by LRs Vs. Hartar Singh Sangha 2010 (12) SCR 515** to contend that in the absence of the landlady appearing, the evidence of the power of attorney should not have been taken into consideration.

Mr. Puneet Jindal, Ld. Senior Counsel for the respondents, on the other hand, relied upon the judgments of the Apex Court in **Mohammedkasam Haji Gulambhai Vs. Bakerali Fatehali (Dead) by LRs 1998 SCR 465** and **Joginder Singh Sodhi Vs. Amar Kaur 2005 (1) CCC 238 (SC)** to submit that if the father and son were staying separately and the possession had parted, as has been done in the present case, it would be a clear case of subletting and therefore, justified the orders passed by the Courts below. Reliance was placed upon the judgment of this Court in **Ramji Dass & others Vs. Smt. Kamla Ram & others (2007) 2 RCR (Rent) 189**. Thus, it was, accordingly, pleaded that there was complete parting of possession, in the present case, while placing reliance upon the statements of the cross-examination of the father. It was submitted that once the factual finding had come before the Appellate Authority, there was no need to take

the additional evidence into account as it would only be done where it would enable the Court to pronounce judgment or for substantial cause and the said circumstances had not been made out, as such, and could not be used to fill up the lacuna.

Reliance was placed upon the judgment of the Apex Court in **Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh 2014 (9) SCC 78** to submit that in revisional jurisdiction, the evidence had not to be taken into consideration once there was no procedural infirmity and illegality in the orders of the Courts below. The rent deed, as such, had been consolidated into a subsequent rent deed dated 15.10.1981 and therefore, eviction on the ground of subletting was permissible and there was no issue of any license. The son was the general power of attorney and therefore, well versed with all the facts. In view of the pleadings and evidence which have come on record, the Courts below had rightly decided the issues and therefore, the findings recorded were liable to be upheld.

A perusal of the record would go on to show that the petition was filed by respondent No.1-landlady to put her in possession of shop No.8 and the portion on the back of shop Nos. 7 & 8, measuring 23'x23', which formed part of the property which was numbered as B-XVI-557 (old) B-XVI-699 (New), as shown in red colour in the plan attached. The boundaries had also been mentioned. It was pleaded that the original owner of the property was one Nathu Ram, who had let out the shop No.8 to Balwant Singh Narang, respondent No.1-herein at a monthly rent of Rs.200/- w.e.f. 01.05.1970. A licence deed had been executed between them which had been signed by both the parties and it was for carrying on business of selling and

buying of electroplating material under the name and style of M/s B.S.Naurang & Sons as its sole proprietor. On 01.08.1981, the portion measuring 23'x23' on the back of shops No.7 and 8 forming part of the property which was situated at Gill Road, Miller Ganj, Ludhiana, was also let out at a monthly rent of Rs.450/-. The same was reduced in writing in the form of rent note dated 15.10.1981 (Ex.P4). As per the terms of the said rent note, consolidated rent of shop No.8 and the back portion of shops No.7 & 8 was to be paid by the lessee and the tenant was not to sublet the premises to anyone without the written consent of the lessor, as per condition No.6. Balwant Singh Narang had signed the same as the sole proprietor of M/s B.S.Naurang and Sons. Nathu Ram had also served legal notice dated 23.05.1986 for payment of arrears of house tax @ 15% and he had died on 02.08.1989 and left a Will dated 31.01.1989 in favour of the landlady. Petitioner No.1 had also attorned in favour of the landlady and started paying rent to her, after the death of Nathu Ram and it was, accordingly, pleaded that the relationship of landlord-tenant, as such, existed.

It was specifically pleaded that he had sublet the premises to petitioner No.2 herein, his own son, for valuable consideration, without the consent in writing of the landlady and carrying any business and delivering the possession of the premises to his son. He had left the shop and was not carrying on any business and had become complete stranger in the premises. He was further charging rent from his son @ Rs.1500/- per month and was quite separate in residence and business. The landlady had come to know of the said arrangement a few months back and had enquired from the son that in which capacity he was occupying the shop as he had never been

authorized at any point of time.

Petitioner No.1-tenant took the plea in defence that he had not sublet the property and he had been inducted as a partner in the business vide partnership deed dated 01.04.1997. It was further submitted that initially the business was being done as a sole proprietor. There was an admission that the tenancy had been created for the back portion also, which was followed by delivery of possession and the premises had been let out to him in his personal capacity by Nathu Ram with whom there was a relationship of landlord-tenant. Regarding the specific averments which were made of subletting and surrendering of possession, it was denied that he had done so and much less for any valuable consideration and without the consent in writing of the landlady. It was further denied that he had become a complete stranger in the premises. It was also denied that the father and son had separate residence and business and that any enquiry had been made from the son. It was alleged that the business was being done earlier as a sole proprietorship till 01.04.1997. At that point, he had introduced his other son Inderjit Singh and wife Kuldeep Kaur as partners to the said business, vide partnership deed dated 01.04.1996. However, Inderjit Singh had retired on 31.03.1996 and petitioner No.2 was then inducted as partner vide partnership deed dated 01.04.1997 (Ex.R2). It was submitted that both the petitioners along with Kuldeep Kaur were carrying on business in partnership with each other and were in complete control of the tenanted premises as tenants and it was pleaded that the partnership deeds were attached.

Petitioner No.2, the son, in his written statement reiterated and denied the allegations of subletting and took a similar factual plea.

In the rejoinder filed to the written statements, filed by the present petitioners, the landlady took the plea that no copy of the alleged partnership deed dated 01.04.1997 had been attached and neither any copy had been supplied to her. The said deed was a sham transaction and had no legal consequences and the same was created with a view to camouflage the factum of subletting and that petitioner No.1 had stopped carrying on any business and had parted possession. It was further alleged that earlier the receipts were issued in the name of Balwant Singh as the sole proprietor and the said receipts were in possession of the father and son as noticed.

Sanjay Kumar-AW1 filed his affidavit in which he stated that the landlady was his real mother and she had given him power of attorney and it was further averred that petitioner No.1 had paid rent to his mother in his presence and the receipts had been issued. The counter-slips of the rent receipts were also placed on record as Exs.P9 to P11. He was, accordingly, cross-examined regarding the age of her mother, who was stated to be 62 years old and that the power of attorney was executed in his favour on 17.10.1989. He denied the knowledge of the partnership deed dated 01.04.1996 and the retirement of the earlier son-Inderjit Singh including the fact that whether his brother, Harinder Singh had been inducted as a partner also and the shares, as such, *inter se* the family. A suggestion that was put to him that the premises had not been sublet, was denied and similarly, he denied that the son was doing business in partnership with his father and mother and that possession had not been parted with.

Similarly, AW2, Sudhir Kumar submitted his affidavit in support of the case of the landlady and was examined, wherein it came out that he

was related to the landlady. He was cross-examined to the extent that whether Balwant Singh was doing business under the name of M/s B.S.Narang & Sons, which was denied that he was doing any business under the name of M/s B.S.Narang & Sons. He also denied that he had any knowledge about the partnership firm. Suggestions were put to him that the father was doing the business in the shop in dispute along with other partners, namely, Kuldeep Kaur and Harinderpal Singh, which he denied.

Similarly, Aakash Kumar Gupta, AW3 submitted his affidavit. He deposed that he had last seen Balwant Singh in the shop 2 years ago and he was working as Manager in M/s Ajay Steels. He further deposed that Balwant Singh along with his family were residing at Model Town, Ludhiana whereas the son was residing in Dugri, Ludhiana. He denied the suggestion that the father and son were doing business together.

Harinderpal Singh, the son appeared as RW1 and in cross-examination, he admitted that his father had suffered fracture of the left side of the femur on 19.01.2010 and was completely bedridden. He was not in a position to move and could not come to the Court for recording his evidence. In cross-examination, he admitted that the firm maintains regular books of accounts since its inception in 1996 and was regularly assessed to income tax and files its income tax returns regularly along with sales tax returns. But he did not know whether the firm was registered with the Income Tax department. The name of the counsels, namely, Shri Rajiv Johar and the income tax counsel Shri M.S.Aneja were also mentioned. An admission was made that his father was not residing with him for the last 4 years and earlier he used to do so and he clarified that now he resides with his brother-Inderjit

Singh. It was also admitted that the partnership firm of M/s B.S.Narang & Sons had filed the returns upto the year 2008-09 along with the balance-sheets, however, he had not brought the copies of the same. The assessment orders of the lessors of the firms had also not been sent to him and he had received the income tax assessment orders upto 2005-06. It was further his admission that he had not brought any account books of the partnership firm. The suggestion that there was no partnership constituted and that he was in exclusive possession, was denied. He denied that any litigation had taken place between him and his father. It was categorically denied that he had filed Civil Suit No.78 dated 27.04.2000, which was decided on 11.11.2004 against his father and his brother along with mother and other family members which had been filed through Shri M.C.Sehgal, Advocate. He denied that the originals of the partnership deeds, Exs.R1 & R2 were in his possession and submitted that the originals were in possession of his father's counsel. The factum of obtaining the licence from Municipal Corporation was also admitted, which he had obtained for the last 10 years since 1997. There was an admission that there was only one shutter fixed to the premises in dispute and that he was opening the shop even prior to 1997 and he used to open the shop at 9 am and locked the premises at closing hours at 8.30 pm. At that stage, he volunteered that his father also comes at his shop. The account books of the partnership firm were stated to be kept in the premises in dispute by him.

Similarly, the statement of RW2, Inderjit Singh, the other son would go on to show that he admitted that an intimation had to be sent to the Sales Tax Department when the constitution of the business concerned is

changed, as in the present case, from the sole proprietorship concerned. However, he denied of knowledge of any intimation sent when he had been inducted in the partnership concerned. He denied the knowledge whether any intimation had been sent regarding his retirement and that he was not in possession of the account pertaining to the period he remained partner and how much capital he had invested. Similarly, whether he had done so by cash mode or cheque, he could not remember and he also did not remember whether any amount was paid to him when he retired from the firm. He also failed to give any particulars of any bill of any purchaser issued by him from the said firm and that his mother had become the partner. He could not tell as to what was the total profit of the firm during his tenure and as to what was his share at that point of time was. Resultantly, he denied the suggestion that the said partnership was false and fabricated.

A perusal of the statement of petitioner No.1, who appeared as RW3, would go on to show that in the cross-examination, there was an admission that he had suffered an injury due to fracture and stopped going to the demised premises and he did not attend to the shop now. The rent was being paid through his son, who also paid the taxes and he was not present in the premises. The last rent was alleged to be made by him through his son but he was not present when it was made and it was alleged to have been made by way of a cheque. It was clarified that the rent was paid, thereafter, in cash, on the refusal of the landlady. When questioned regarding the last deposits of the income tax of the firm, he stated that he did not know the amount of tax paid and when the same was paid. Similarly, he deposed that he was not in possession of any such record as to how much tax of the firm

was deposited and as to for what period and submitted that the records were lying at the shop. His reply to the payment of sales tax also was the same that he could not tell the quantum of income tax paid during the last year and how much profit it had earned. Reply was that the same was shown in the account books and he could not tell the date and month when he had filed the income tax returns. Similarly, he could not tell the date and month when he attended the shop last time and he himself volunteered that he had stopped going to the shop after the accident, which was on 23.09.1990, which has also come in the cross-examination of RW2. He admitted that his son placed all the orders for the goods purchased but he clarified that the same was done on his instructions but he could not tell the parties from whom the goods had been purchased last time and the name of any purchaser who had purchased the goods from his firm. The amount of credit and debit of the firm and that of the bank, he could not tell nor he could tell the last payment made or received by the firm without seeing the books of account. The name of the accountant was not known to him and it was stated that he was a part-time accountant. He clarified that he was entitled to the profits earned by the firm and that the account books could tell. Similarly, the last payment received or given by the firm could not be clarified. He could not tell that how much amounts were credited or debited in the books which stood in his name. It was admitted that he was confined to bed for the last 10 months. An explanation was sought to be given that his son opens and close the shop because this was after he had met with an accident. He denied the suggestion that he was charging any rent. He, however, did not know where his son and family were residing and the original partnership deeds or the dissolution deed were stated

to be lying at the shop.

Keeping in view the above concurrent findings which have been recorded by the authorities below and the pleadings and the evidence of the parties, it is, accordingly, imperative for this Court to decide the above-said issue of subletting, keeping in view the principles laid down by the Apex Court wherein it has been time and again held that there is no direct evidence, as such, whereby any proof can be brought on record that the possession, as such, has been exclusively handed over and the sub-tenant is in complete control. The fact that subletting is a guise and a secret arrangement, has been well recognized and more so, in the present case, since father and son had got together and put up a unified defence that the father continues to be in possession of the property and the son is there, solely on account of the fact that he is a partner in the firm, which was set up w.e.f. 01.04.1997. It has also been settled by the Apex Court that once exclusive possession can be shown, then it would be for the tenant to rebut the evidence.

In **Bharat Sales Ltd. Vs. Life Insurance Corporation of India 1998 (1) SCR 711**, the Apex Court held that the landlord is kept out of the scene and the possession is transferred clandestinely to a person by concealing the overt acts and therefore, the monetary consideration, as such, which is paid for surrendering possession, might be in cash or in kind and may have been paid or promised to be paid. The same would have been paid in lump sum, the law, as such, does not require any payment to be proved by affirmative evidence. The Court is permitted to draw its own inference. Relevant portion of the judgment read as under:

“4. Sub-tenancy or subletting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement of understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sublet had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sublet or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sublet.

5. [In Rajbir Kaur vs. S. Chokesiri & Co](#) (1989) 1 SCC 19, it was held that it was not necessary for the landlord in every case to prove payment of consideration. It was laid down that if exclusive possession was established, it would not be impermissible for the Court to draw an inference that the transaction was entered into with the monetary consideration in mind. The Court further observed that transactions of subletting in the guise of licences are in their very nature clandestine arrangements between the tenant and the sub-tenant and there cannot be furnished direct evidence in every case. It will be noticed that in this case it was established as a fact that the tenant had parted with a part of the demised premises in favour of an ice-cream vendor who was in exclusive possession of that part of the premises and, therefore, the Court drew an inference that the transaction must have been entered into for monetary consideration. This decision has since been followed in many cases, as, for example, *United Bank of India Vs. Cooks and Kelvey Properties (p) Ltd.* (1994) 5 SCC 9, upon which, as we shall presently see, reliance has been placed by the petitioner also.”

Thus, an effort is to be made to find out who is in possession of the premises. The principles have further been laid down in **Ms. Celina Coelho Pereira & others Vs. Ulhas Mahabaleshwar Kholkar & others 2009 (2) RCR (Rent) 456** that the burden shifts after *prima facie* proof is adduced and it is for the tenant to rebut the same.

The same read as under:

“28. The legal position that emerges from the aforesaid decisions can be summarised thus :

(i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party

with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.

(iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

(iv) If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.

(v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to

proof unless rebutted.

29. The main question that falls to be determined in the present case is: is High Court justified in non-suiting the landlord on the ground that he has not pleaded that business of the firm M/s. Mandovi Tours and Travels is not conducted by its partners, but by Balaji Lawande and Netravalkar and that tenant has parted with the premises by subletting the same to these two persons under the garb of deed of partnership by constituting a bogus firm? In our judgment, the answer have to be in negative. In the plaint, the landlord averred that the tenant has sub-let the premises to M/s. Mandovi Tours and Travels, a partnership concern, without his permission and that the sub-lessee has been exclusively running the business in the rented premises although he has not pleaded specifically that the premises have been sublet to Balaji Lawande and Netravalkar but such lack of pleading cannot be held to be fatal. It has to be kept in mind that a transaction such as sub-letting by tenant which is not permissible under lease may be outwardly a deceptive arrangement and landlord may not come to know of true facts. The pleadings in such matters ought not to be construed too technically. The true test, as has been repeatedly said, is to see whether the other side has been taken by surprise or prejudiced.

30. If the purpose of constituting partnership by the tenant is ostensible and a deed of partnership is drawn to conceal the real transaction of subletting in a given case, the court may be required to tear the veil of partnership to find out the real nature of transaction entered into by the tenant and in such circumstances the evidence let in by the landlord cannot be ignored on the ground that there is some variance between pleading and proof. In a case such as the present one, the rule of *secundum allegata et probata* is not strictly applicable as the tenant cannot be said to have been put to any prejudice.”

Keeping in view the above principles and the pleadings of the parties, it is apparent that it is an admitted position that proprietorship

concern run by the father had been leased out as partnership initially. It has also come on record that he suffered an accident in the year 1990. There is also tacit admission that he had stopped going to the shop after the accident. His defence itself is that the partnership deed, as such, had been set up initially between the father, his wife and one son-Inderjit Singh on 01.04.1996 and the same only lasted for a period of one year. With effect from 01.04.1997 (Ex. R2), the 2nd partnership deed came into existence, on the basis of which, petitioner No.2 seeks to validate his possession and therefore, his defence is that the son is in possession but as a partner and the father continues also after the change of the proprietorship firm into a partnership firm. This defence was categorically sought to be disputed by the landlady by taking the plea that it was a sham transaction and had no legal consequences and the same was created with a view to camouflage the factum of subletting. The parties were, thus, well aware as to their respective stance as to on the basis of which they were in possession.

The evidence on record would go on to demonstrate that the earlier partner, namely, Inderjit Singh who was examined as RW2, was absolutely clueless to the fact that even how much capital he had contributed, even though he was a partner in the said partnership to the extent of 1/3 share, as per the deed dated 27.03.1997 (Ex.R1) which had been placed on record. A perusal of the same would go on to show that it specifically provided that the accounts of the partnership firm had been made upto date and the parties had no dispute, as such, but said partner was even unaware of any capital he had invested and by which mode. He was not in a position to tell what was the total profit of the firm and his share at any point of time and

thus, was not in a position to throw any light that there was any such genuine partnership which had been created and that he was using the premises. Similarly, the partnership deed which was, thereafter, sought to be relied upon (Ex.R2), showed that petitioner No.2 became liable for the profit and losses upto 30%. As per clause 8, he was to be drawing a salary of Rs.2500/- per month and after 31.03.1998, @ Rs.3500/- per month. Proper books of account had to be kept and maintained at the principal place of the firm's business.

As noticed from the statement, despite the fact that such a defence has been taken nothing was produced on record to show that the firm was maintaining any regular books of account and was being regularly assessed to the income tax and rebut the claim of the landlady that it was merely a sham transaction. Rather, the petitioner No.2 denied that he is having the originals of the partnership deeds and that the originals were in possession of his father's counsel. Neither the account books of the firm were produced nor any income tax record that he was doing business and being paid salary. No independent person was examined from any of the Sales Tax or Income Tax Department, neither any of his counsels were examined from the Sales Tax and Income Tax side specifically since their names had been given in the cross-examination. Apart from the bald statement of the family members, nothing was brought on record, to show that the partnership, as such, subsisted and that the son was not having the exclusive possession of the tenanted premises. All these factors would only go on to show that the reasons which have been recorded by the Courts below, keeping in view the cross-examinations of the tenants/ sub-tenant and the family members are

justified in the above-mentioned background. The respondent-landlady had, thus, successfully managed to rebut the onus upon the petitioners which they failed to dispel by bringing on record any evidence worth the name.

An effort has, now, been made to argue that the two applications under Order 41 Rule 27 CPC had been filed and therefore, the Lower Appellate Court should have allowed the same, so that the relevant records showing that the partnership was not a sham transaction and that the petitioners were successfully carrying on their business, by holding out that accounts were being maintained and the firm had been issued licenses of chemical storage, enquiry certificates of the firm and the medical record of the petitioner.

The provisions of Order 41 Rule 27 CPC are very explicit regarding the evidence which has to be led at the appellate stage. It is only in given situations where such additional evidence is to be brought on record which are :- (i) where the Trial Court refuses to admit the evidence which ought to be admitted, (ii) documents which were not within the knowledge or could not, after exercise of due diligence, be produced by the party and (iii) if the Appellate Authority required any document to be produced to enable it to pronounce judgment or for any other substantial cause. The Lower Appellate Court has rightly, vide order dated 13.09.2012, on the basis of settled principles, while deciding the appeal, held that the additional evidence sought to be produced was well within the knowledge of the appellant and could have been produced before the Rent Controller. In the absence of any valid reasons for bringing the application within the parameters of the provisions under Order 41 Rule 27 CPC, the petitioners cannot claim, as a matter of

right, that they should be permitted to lead evidence and bring on record that the partnership was a functional partnership and not a sham one.

As noticed, the boundary lines had been clearly drawn when the landlady had pleaded that it was a sham transaction and the tenant was well aware of the stand which it had taken and therefore, to show that possession, as such, was valid under the partnership which was subsisting, actual and jointly functional, it had to bring on record material, as such, to show that it was not a sham transaction and only for the purpose of defeating the eviction petition.

The Apex Court in **State of Gujarat & Anr. Vs. Mahendra Kumar Parshottam Bhai Desai (Dead) By LRs. (2006) 9 SCC 772** the Apex Court held that the lacuna, as such, cannot be allowed to be filled up and the additional evidence was not required by the Court to enable it to pronounce judgment. The documents, as such, which were existing at the time when the evidence was being led, could not be allowed to be brought on record at a subsequent stage.

Similarly, in **Basayya I. Mathad v. Rudrayya S. Mathad (2008) 3 SCC 120** has held that the said provisions cannot be used for filling up the lacuna and parties to the lis are not entitled to produce additional evidence as of course or routine.

In similar circumstances, in **Ramji Dass (supra)** the order of ejectment of the sons was upheld and the plea that since their father had died during the pendency of the litigation, the tenancy was heritable and was direct, was rejected. It was held that proof of monetary consideration was also not a *sine quo non* to establish subletting. It was further held that the

date of institution is the relevant date and as noticed, in the present case, the father continues to side with his son to defend his exclusive possession, by taking the help of the partnership deed, which has rightly been found to be a sham transaction. In the absence of any material brought on record, to show that the firm, as such, was doing business and that the father continued to be a partner and thus, the exclusive possession was, as such, not with the son, no fault can be found with the reasoning of the Courts below. Therefore, reliance upon the observations made in Gian Devi Anand (supra) would not be applicable to the present case that tenancy is heritable, since succession has not opened up yet.

Similarly, the judgment relied upon Parkash Chand (supra) by the petitioners, is not applicable, wherein it was held by this Court that where a tenant enters into partnership with another person for carrying on the business in the demised premises, it does not amount to sub-letting and therefore, the eviction petition, filed by the landlord, had been dismissed by allowing the revision petition. A perusal of the said judgment would go on to show that Ashok Kumar and Parkash Chand, the father and son had been sharing profits in the business in equal shares and there was material to show that there was a partnership, since salary was being paid to the pharmacists which had been received. The copy of the partnership deed had also been received by the office of the Drug Inspector. A finding was, thus, recorded that business was being run in partnership and therefore, partners were entitled to share profit and loss in equal shares and therefore, the said judgment would not be applicable to the facts and circumstances of the present case.

Similarly, reliance upon the judgment of the Apex Court in **Janki Vashdeo Bhojwani (supra)** whereby contention was raised that the landlady had herself not appeared and therefore, the evidence of the power of attorney is not to be taken into consideration, is without any basis. The pleadings have been discussed in detail and once a stance had been taken that possession was under a partnership and the premises in question was in the possession of the son but nothing was brought on record to show that the partnership was functional, as such, which would, thus, make it fatal, in the facts and circumstances. In the said case, the appellants were unsuccessful before the Apex Court and the observations came on account of the fact that the appellants had to prove that they were co-owners of the property and had to lead evidence whether they had any independent source of income and that they had purchased the property from their independent source of income. In spite of their not putting in appearance before the Tribunal, it had been held that they had a share and were co-owners of the property. The said finding was set aside by noting that they had not put in appearance in the witness-box and discharged the burden that they had share in the property and since they had to prove their independent source of income, to prove that they had purchased the property, it was held that the attorney could not depose regarding these facts and thus, the said judgment would not be applicable to the facts and circumstances of the present case.

In **Man Kaur (supra)** the Apex Court held that the suit for specific performance itself is not maintainable in the absence of the plaintiff and on account of the fact that the attorney holder coming forth, could not depose of the readiness and willingness and the status of mind of the

purchaser and his capacity of being prepared and willing to perform his part of the contract. It being a personal knowledge of the person concerned and therefore, a third party could not give evidence about these aspects. An exception was also carved out as to who could give evidence in the matters regarding personal knowledge and it was held that where the attorney happens to be a close family member and it is possible to have such a attorney who is a son and managing the affairs of an old and infirm parents, was one of the exceptions provided. As noticed, the dispute, as such, *inter se* the parties was not that where there is a personal knowledge, as such, which was required, in view of the stand taken in the pleadings itself and therefore, the said judgment would not be applicable to the facts and circumstances of the present case.

The argument raised that there was an estoppel, as such, on the part of the respondents since they had been accepting rent from the son, is without any basis. Merely because there is an issue, as such, that whether the respondents were estopped by their own act and conduct, would not enable the petitioners to put-forth this argument and take the said plea. No specific pleadings in this regard, as such, had been made by the tenant that by the act and conduct of the landlady, she had consented to the subletting. Rather, the stance of the petitioners has been consistent that the son was only occupying on the basis of a partnership and therefore, in the absence of any such pleadings, the said argument cannot be raised as it is settled principle that the purpose of pleadings, specifically, is to ensure that the other party is not taken by surprise and therefore, the argument raised, as such, is not liable to be taken into account. The Learned Senior Counsel, Mr.Jindal, appearing for

the respondent, was well justified in pointing out that issue No.4 was rather not pressed before the Rent Controller. The estoppel upon the landlady because of her own act and conduct to claim the house tax and house cess which was not claimed in the earlier petition and it, thus, barred the landlady on the principle of estoppel. Specific defence was taken by the petitioner-tenant and therefore, the issue had been framed regarding this aspect and not on the aspect of estoppel against the conduct of the parties, which has now been sought to be construed, which is contrary to the stand already taken by the petitioner-tenants that there was no sub-tenancy, in view of the partnership deed.

Resultantly, keeping in view the above discussions, this Court is of the opinion that the findings which have been recorded by the Courts below are well justified, keeping in view the evidence which has come on record and which have been discussed above. Thus, the Courts below were well justified in passing the order of eviction on the ground of subletting and no fault, as such, can be found with the said orders. Accordingly, the present revision petition is, hereby, dismissed. However, keeping in view the fact that the tenancy is more than 45 years old, the petitioners shall not be evicted till 30.09.2017.

February 22nd, 2017
Sailesh

(G.S. SANDHAWALIA)
JUDGE

Whether speaking/reasoned: *Yes/No*

Whether Reportable: *Yes/No*