

In the High Court of Punjab and Haryana at Chandigarh

CR No. 3530 of 2018(O&M)
Date of Decision:16.7.2018

M/s Krishna Autos

---Petitioner

vs.

Kailash Rani and others

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Gagandeep Singh Sirphikhi, Advocate
for the petitioner
Mr. Jainender Saini, Advocate
for the caveator-respondent No. 1

Rekha Mittal, J.

The present petition directs challenge against concurrent findings of fact recorded by the Courts allowing application for eviction on twin grounds of material alteration in the tenancy premises and sub-letting.

Smt. Kailash Rani filed the application for eviction on the ground of non-payment of arrears of rent, bona fide personal necessity of the premises for business of Ravinder Kumar, her son, the tenant (respondent No. 1 therein) being guilty of materially impairing value and utility of the shops in dispute and also without written consent of the landlady has transferred tenancy rights to respondents No. 2 and 3 therein who are carrying on business in the name and style of M/s Khehra Property Advisor.

The learned Rent Controller allowed eviction application on the ground of material impairment, bona fide necessity and sub-letting. In appeal preferred by M/s Krishan Autos through Kuldeep Singh Khehra, the Appellate Authority set aside the eviction on the ground of bona fide necessity but affirmed findings of the Rent Controller in regard to eviction on the ground of sub-letting and material impairment.

Still feeling dissatisfied, M/s Krishan Autos through Sh. Kuldeep Singh Khehra has filed the instant petition.

With regard to material impairment to value and utility of the shops, the plea of the respondents is that M/s Krishna Autos through Sh. Ajay Mahajan had demolished/removed intervening pucca wall with cement plaster upto the height of 9 feet from the floor and has converted the shops in dispute in one unit, in absence of the applicant about a year back before filing the eviction application in January 2007.

The plea with regard to sub-letting has been raised on the premise that in the beginning of November 2011, respondent No. 1 therein without written consent of landlady has transferred his rights in respect of two shops in dispute or sub let the two shops to respondents No.2 and 3 therein who are carrying on their business under the name and style of M/s Khehra Property Advisors. The shops are being opened and closed by respondents No. 2 and 3 who are in exclusive possession of the shops to the exclusion of respondent No. 1 therein.

Counsel for the petitioner has assailed findings with regard to material impairment on account of removal of intervening wall by contending that the respondent landlady has not examined any building

expert to substantiate her plea with regard to removal of wall or its removal has caused crack of 14 feet length which has endangered safety of roof of the shops in dispute.

With regard to findings on the issue of sub-letting, it is vehemently argued that the courts have wrongly relied upon judgment of this Court **Nagin Chand vs. Kaushalya Devi 1985(2) RCR (Rent)577** to uphold plea of the landlady that sub-tenancy has been created in favour of Sh. Kuldip Singh Khehra. It is argued that Kulbir Singh Khehra respondent No. 3 has nothing to do with the premises in question except that he is the real brother of Kuldip Singh Khehra respondent No.2 before the Rent Controller. It is further argued that as in the present case, tenancy was initially created in favour of M/s Krishna Autos, a partnership firm of Ajay Mahajan and Neeru Gupta, change in constitution of the firm would not amount to creation of sub-tenancy. It is argued that even if all the partners who constituted the firm at the time of creation of tenancy cease to be partners by introduction of new partners, it does not amount to sub-letting. For this purpose, reliance has been placed upon judgment of the Gujarat High Court **Saroj Garments vs. Babulal Ramchandra 2000(2) RCR 231.**

In addition, it is argued that clause in the partnership deed Ex. R4 that Sh. Ajay Mahajan would only be entitled to profits of the business to the extent of 5% but loss is to be borne only by Sh. Kuldip Singh Khehra, another partner to the extent of 95% cannot be construed that partnership between Ajay Mahajan and Kuldip Singh Khehra is not genuine or the same is camouflage to save eviction on the ground of sub-letting. In this context,

reference has been made to judgment of the Bombay High Court **Ashok Babanrao Viskhande and another vs. Murlidhar Ramratan Bhandari and another 2003(2) RCR 525.**

Counsel for the caveator-respondent No. 1 has supported judgments of the courts by contending that the Court in Appeal, in para 21 has taken note of Clause 5 of partnership deed Ex. R4, created during pendency of the proceedings coupled with that no bank transaction, account books of the firm or other documents have been produced by the petitioner to prove that after change in partnership firm, firm ever did any business. It is argued that in view of the facts and circumstances obtaining in the present case, courts have rightly relied upon judgment of this Court in **Nagin Chand's case(supra)** to uphold plea of the respondent qua sub letting while rejecting that of the petitioner that partnership was created between Ajay Mahajan and Kuldip Singh Khehra, therefore, there is no question of the premises being sub let by Sh. Ajay Mahajan in favour of Sh. Kuldip Singh Khehra. He has also submitted that findings of the courts with regard to the tenant being guilty of materially impairing value and utility of the shops in question by removing intervening wall and converting two shops into one unit are liable to be affirmed. It is further argued that Ajay Mahajan initially filed the written statement but later absented from the proceedings, therefore, there is no counter to the case of respondent with regard to removal of intervening wall a year prior to institution of eviction application in the year 2007 because Kuldip Singh Khehra came in picture in the year 2011.

I have heard counsel for the parties, perused the paper book

particularly the judgments passed by the courts and the documents supplied by counsel for the parties, correctness whereof has not been disputed by counsel.

As has been noticed hereinabove, plea of the respondent-landlady with regard to alternations in the property causing material impairment to value and utility of the shops, the only fact that invites consideration is “whether the petitioner is guilty of removing intervening pucca wall with cement plaster upto the height of 9 feet?”. There is no dispute between the parties that at present no intervening wall is in existence and the two shops are one unit for want of intervening wall.

The question that calls for determination is “whether the tenant has removed the intervening wall or there was no such intervening wall in existence at the time of creation of tenancy?”.

The courts have held that in the rent deed executed on 15.10.2004 by M/s Krishna Autos, Jalandhar Road through its partner Ajay Mahajan, there is specific reference that two shops adjacent to each other with boundaries, detailed in the rent note, were rented out by Smt. Kailash Rani in favour of M/s Krishna Autos @ Rs. 2500/- per month. Had it been true that there was no intervening wall in the two shops at the time of creation of tenancy, there would not have been reference to two shops adjoining each other. This apart, husband of Kailash Rani appeared in the witness box and reiterated her version that two shops were let out vide rent deed dated 15.10.2004 (Ex. P2) and before filing of the eviction petition, the tenant had removed the intervening wall and caused material impairment to value and utility of the shops in dispute. Ajay Mahajan or any other partner

of M/s Krishna Autos either at the time of creation of tenancy or in the year 2006-07, did not appear in the witness box to counter testimony of Sh. Janak Raj PW4 meaning thereby that testimony of Janak Raj husband of Kailash Rani, who had personal knowledge of the facts of the case in hand remains unrebutted and unchallenged by the respondent.

Sh. Kuldip Singh Khehra (respondent No. 2 therein) through whom the instant petition has been filed appeared in the witness box to contest plea of the landlady both in regard to material impairment as well as subletting. Sh. Kuldip Singh Khehra is not privy to tenancy of the premises in question prior to the year 2011 and he purportedly entered into partnership with Ajay Mahajan in the year 2011 for doing the business in the name and style of M/s Krishna Autos. Ajay Mahajan, for the reasons best known, absented from the proceedings after filing the written statement and the same were contested by Kuldip Singh Khehra. Kuldip Singh Khehra despite alleging that Sh. Ajay Mahajan continued to be one of the partners of M/s Krishna Autos did not bother to examine him either through process of the court or otherwise. In this view of the matter, the courts below have rightly recorded a finding of fact that two shops were let out to M/s Krishna Autos in the year 2004 but the tenant is guilty of removing the intervening wall and converting the two shops in one unit thereby causing material impairment to value and utility of the tenancy premises. That being so, findings of the courts ordering ejectment on the ground of causing material impairment to the demised premises are liable to be affirmed.

This brings the court to the plea of creation of sub-tenancy by M/s Krishna Autos through its original partners in favour of Kuldip Singh

Khehra. The courts had taken into consideration the recitals in the partnership deed dated 19.4.2011 (Ex. R-4) whereby Neeru Gupta ceases to be the partner of M/s Krishna Autos and Sh. Kuldeep Singh Khehra became its partner to the extent of 95% whereas the remaining 5% is stated to be the share of Sh. Ajay Mahajan. Para 5 of the partnership deed says that loss of the firm would be borne by Sh. Kuldeep Singh Khehra to the extent of 100% and Sh. Ajay Mahajan as nil. The Appellate Authority has further noticed that Kuldeep Singh Khehra did not produce any document if any business was carried on by the newly constituted firm of Kuldeep Singh Khehra and Ajay Mahajan. It has been held that no bank transaction, no account books of the firm, no other document has been produced by the petitioner-respondent to prove that after change of constitution of the partnership firm, it ever did any business. Further held that if there is only a camouflage by creating such type of partnership deed, it is clear ouster of the original tenant from the demised premises and further shows that the property was let out to Kuldeep Singh Khehra. The court has relied upon judgment of this Court in **Nagin Chand's case (supra)** and held that the judgment is fully applicable to the facts of the case at hand.

In **Nagin Chand's case (supra)**, the shop was let out to Sh. Nagin Chand in 1958 and he started cloth business in the shop in 1971. He (Nagin Chand) obtained oral permission of Mulkh Raj (landlord) for starting cloth business. Ashok Kumar and Darshan Lal (alleged sub tenants) were nephews of Nagin Chand. In July 1976, Nagin Chand, Ashok Kumar and Darshan Lal entered into a partnership wherein it was provided that Ashok Kumar's share would be 80% and that of Darshan Lal and Nagin

Chand 10% each. It was not disputed that Darshan Lal and Nagin Chand were having their own business in different shops. Nagin Chand was doing oil business in another shop in Sirki Bazar without the aid of any partner or servant. Darshan Lal was running his own cloth business in another shop in Vaan Bazar, Ferozepur. The bank account in connection with the cloth business being carried on in the shop in dispute was exclusively operated by Sh. Ashok Kumar. In view of these facts, this court affirmed eviction of the tenant by holding that it has rightly been held that Nagin Chand had no interest in the cloth business being carried in the shop in dispute and partnership in which he has been shown holding a minor share is only a camouflage to avoid ejection on the ground of subletting.

Counsel for the petitioner has relied upon judgment of Gujarat High Court **Saroj Garments's case (supra)** to contend that change in partners from time to time as a result none of the original partners having remained in the firm would not amount to subletting. In the said case, the Court had noticed that second defendant has been named as alleged sub tenant but a careful reading of the pleadings fails to disclose any averment that the said second defendant was placed in exclusive possession of the leased premises by the tenant firm. Apart from the total absence of pleadings in this regard, there is not an iota of evidence on record that the second defendant (alleged sub tenant) is in exclusive possession of the leased premises. There is not an iota of averment, insinuation or evidence that it is the second defendant who is exclusively attending to the business of the reconstituted firm in the leased premises. In view of the aforesaid, the Court held that it is obvious that there is neither an averment nor

evidence on two vital aspects that (1) there was transfer of exclusive possession by the firm which was the tenant and (2) such transfer by the tenant firm was in favour of the second defendant who is alleged to be the illegal sub-tenant.

In the case at hand, there is specific averment in the application for eviction that respondent No. 1 (Ajay Mahajan) without written consent of the landlady has transferred rights under the lease deed or sublet the two shops in dispute to respondents No. 2 and 3 therein who are carrying on their business in the said two shops in the name and style of M/s Khehra Property Advisors. The said shops are being opened and closed by respondents No. 2 and 3 who are in exclusive possession of the two shops in dispute to the exclusion of respondent No. 1. Janak Raj, attorney and husband of the landlady has reiterated the aforesaid averments by way of his duly sworn affidavit Ex. PW4/A, in para 7 thereof. Perusal of lengthy cross examination to which Janak Raj was subject to would reveal that his testimony with regard to this aspect does not find challenge, thus, amounts to admission by the contesting party (petitioner herein).

As has been noticed hereinbefore, Sh. Ajay Mahajan did not appear in the witness box to say on oath that he still continues to be partner in the business being carried on in the shops in question or the partnership deed (Ex. R-4) is genuine and correct. Had it been true that Ajay Mahajan continued to be partner with Sh. Kuldeep Singh Khehra, there was no reason for him to abstain from the proceedings and Kuldeep Singh Khehra having failed to examine him. In the given scenario, the petitioner cannot derive any advantage to his contention from the referred authority.

To be fair to the petitioner, reference has been made to judgment of the Bombay High Court **Ashok Babanrao Vishkhande and another's case (supra)** to say that factum of loss being borne by one of the partners is not sufficient to hold that the partnership is not genuine or it was a camouflage to save eviction on the ground of subletting. In the referred authority, the court has taken into consideration certain facts recorded in para 3 of the judgment on the basis whereof the court refused to accept plea of the petitioners-landlords that the respondent-tenant is guilty of unlawful subletting. In the said case, respondent No. 1 was the original tenant whereas respondent No. 2 was stated to be sub-tenant to respondent No. 1 was an experienced businessman of 65 years whereas respondent No. 2 was a beginner aged 23 years. Both the partners have brought capital in equal share and respondent No. 1 was to share profits in the ratio 65:35 and other attending circumstances were stated to be clearly indicative of the fact that partnership entered into between the respondents was genuine. It is noticed that Appellate court has adverted to the fact that partnership firm is registered with the Registrar of Firms and the returns are regularly filed before the Income Tax Authorities as well as Sales Tax Authorities. There is no evidence that defendant No.1 is not in possession of suit premises or that defendant No. 2 was in exclusive possession thereof. The Appellate court also adverted to the relevant clauses in the partnership deed including that there would be no assignment or parting with tenancy rights vested in respondent No. 1 in favour of respondent No. 2 and respondent No. 1 would continue to pay monthly rent to the landlords out of his personal contribution. It is in this backdrop the Appellate Authority held that the

partnership was genuine one and there is no unlawful subletting within the meaning of provisions of the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947.

Counsel for the petitioner has failed to advance any meaningful arguments as to how he can draw similarity between the facts of the case at hand and that of the referred authority, in order to derive any advantage to his contention that there is no subletting or the partnership deed Ex. R4 is not a camouflage. Conversely, in the instant case, there is not even an iota of evidence that the partnership created in the year 2011 ever carried on any business in the demised premises much less supported by documentary evidence. In this view of the matter, the cited judgments have no bearing on the facts of the case in hand. The petitioner has miserably failed to substantiate his plea that consistent findings of fact recorded by the courts suffer from illegality warranting intervention in exercise of limited revisional jurisdiction.

For the foregoing reasons, the petition fails and is accordingly dismissed with costs.

(Rekha Mittal)
Judge

16.7.2018
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No