IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : EVICTION

R.C.S.A. No 390/1980

Reserved on: 14.07.2006

Date of decision: 18.07.2006

SH.KISHAN CHAND ...PETITIONER

Through: MR.J.P.GUPTA, ADVOCATE

VERSUS

SRI CHAND ...RESPONDENT

Through: MR.PUNEET BHATNAGAR, ADVOCATE

SANJAY KISHAN KAUL, J.

(1)Late Sh. Srichand was the owner/landlord of shop bearing no.1372 Vaidwara, Delhi which was given on tenancy to late Sh.Kishan Chand on 27.06.1959 vide rent note of the same date on a monthly rent of Rs 45.25 inclusive of house tax but exclusive of other charges. In the year 1975, an eviction petition was filed by the landlord against the tenant under Section14(1)(a) and 14(1)(b) and 14(1)(j) of the Delhi Rent Control Act, 1958 (hereafter referred to as the 'said Act') alleging that the arrears of rent had not been paid. The eviction petition also set out that the landlord was compelled to file a suit no. 260/70 for arrears of recovery of rent for a period of three years prior to the filing of the suit which was decreed. It was alleged that even after the decree, the rent had not been paid. Permission had to be sought from the competent authority under Slum Area (Improvement and Clearance) Act. A further allegation made in the eviction petition was that the shop had been sublet to one Mr. Sukhan, a barber, in the month of April, 1972. Such subletting was alleged to be without the consent either in writing or otherwise of the landlord. After the proceedings were initiated before the competent authority (Slum), Sh. Sukhan is stated to have vacated the demised premises at the instance of the respondent. The third set of allegations were made in respect of the substantial damage to the shop and unauthorized addition and alteration.

(2)The tenant raised a dispute in respect of the rate of rent, denying that he had sublet the shop or caused substantial damage to the premises.

(3)The Additional Rent Controller found that it was undisputed that the suit for recovery of arrears of rent had been decreed by the Civil Court and the notice for

arrears of rent were proved to have been duly served on the tenant. The rate of rent was found to be Rs 45.25 per month. It was found that the matter was one of first default in terms of Section 14(1)(a) of the said Act and thus the tenant was entitled to the benefit of Section 14(2) of the said Act. The tenant was thus called upon to deposit arrears of rent under Section 15(1) of the said Act.

(4)The question of parting with possession of the part of the premises to Sh.Sukhan was not found to be proved. The position was same in respect of the grounds under Section 14(1) (j) of the said Act for causing substantial damage to the premises.

(5)The landlord Sh. Srichand preferred an appeal before the Rent Control Tribunal and the appeal was allowed by the tribunal by the order dated 06.09.1980 on a finding that grounds for eviction had been made out under Section 14(1) (b) of the said Act on account of subletting. The findings arrived at by the Additional Rent Controller under Section 14(1)(a) and 14(1)(j) were not assailed during the course of the arguments before the appellate tribunal.

(6)The appellate tribunal discussed the testimony of the witnesses and in view of the testimony a finding was arrived at that there was actual subletting of a part of the shop. The appellate tribunal took note of the fact that in view of the admitted presence of Sh.Sukhan, it was for the tenant to explain the position of the third person, Sh. Sukhan was not an employee of the tenant and that the tenant had deposed incorrectly.

(7)The tenant aggrieved by the said order has filed the present proceedings which are in the nature of a second appeal. This provision of second appeal since stands deleted from the Statute, but as it stood originally, the same reads as under:
Section 39 Second Appeal

1) Subject to the provisions of sub section (2) an appeal shall lie to the High Court from an order made by the Tribunal within sixty days from the date of such order:

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

2) No appeal shall lie under sub section (1) unless the appeal involves some substantial question of law.

(8)It may also be noticed that the original tenant has since passed away and the legal heirs have been impleaded. The position is the same with the landlord. In fact the suit property was also sold by the landlord ultimately in pursuance to the sale deed dated 14.06.2000 and two subsequent purchasers have been impleaded in place of the original landlord.

(9)The appeal has been pending unfortunately for almost 26 years. The appeal was also dismissed in between for non prosecution, but was restored.

(10)At the inception of the hearing itself, it was put to the learned counsel for the

appellant that the arguments must confine to parameters of Section 39 and thus only a substantial question of law can be examined in the second appeal. In view thereof learned counsel fairly stated that the only legal proposition he seeks to raise is that there was never any parting with legal possession by the tenant and so long as the tenant is entitled to get back the physical possession, it cannot be said that a sub tenancy was created.

(11)Learned counsel for the appellant has relied upon the judgment of the Division Bench of this court in Hazari Lal and another v. Sh.Giani Ram & Ors (Delhi); All India Rent Control Journal 41. It was held that the expression 'parting with possession' means giving possession to persons other than whom possession had been given by the lease and the parting with possession must be by the tenant. The mere user by the other person is not parting with possession so long as the tenant retains the legal possession himself. Thus it is only when vesting of possession by the tenant in another person is by divesting himself not only of physical but also of the right to possession could subletting be made out. 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 stay the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the tenant has right to disturb the possession of his guest at any time, he cannot be said to have parted with possession of the tenancy premises.

(12)A reading of the factual matrix of the said case shows that an eviction petition had been filed by the landlord against the tenant on grounds of landlord having acquired an alternative premises and the tenanted premises being sublet. The eviction petition was contested by the tenant and on the question of sub tenancy it was stated that the tenant was himself occupying the premises and no other person was in possession as a sub tenant. The second respondent was stated to be the real brother in law of the son of the tenant who had been living with the tenant for five years as a relative. It is in the contest of these facts that the distinction was laid down between the legal parting with possession and somebody continuing to stay in the suit property with the tenant. In my considered view the same would have no application to the facts of the present case.

(13)Learned counsel for the respondent has relied upon the judgment of the learned Single Judge of this court in Kailash Kumar & Ors v. Dr. R.P.Kapur; 54 (1994) Delhi Law Times 342 where almost the complete law and judgments in respect of the question of creation of sub tenancy has been discussed in depth. It was held that the question of subletting or parting with possession would depend on the peculiar facts of each case and the basic principal enunciated even by the Supreme Court is that once it is proved that a particular portion of the demised premises has been given in exclusive possession to a stranger, then the onus shifts on the tenant to show in what capacity the stranger is in exclusive possession of that portion and on the failure of the tenant to explain the presence of such a person in exclusive possession of the portion of the demised premises, presumption would arise that the portion was sublet or parted with possession in favour of the stranger by the tenant. The case was one of a second appeal and the court held that it would not be justified to reverse findings of fact based on admissible evidence in such a second appeal. The learned Single Judge

relied upon an earlier judgment in Vinod Kumar v. Ajit Singh Ahluwalia;1969 RCJ 218 where it was held that in an appeal under Section 39 of the said Act, the High Court was incompetent to re-assess the evidence afresh. Same observations were found to be made by the Supreme Court in Bhagwan Dass & Another v. S.Rajdev Singh & Another; AIR 1970 SC 986.

(14)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 were 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 sublessess and lesseee 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 reasonable lead to an inference of subletting or parting with possession or assigning the premises or any part thereof.

(15)The aforesaid judgment succinctly set out the scope of jurisdiction of this court under Section 39 of the said Act. It is not the job of this court to draw out conclusions than that which was arrived at by the appellate court. A third person has been found in the suit property and it was for the tenant to explain the presence. The third party was not found to be an employee of the tenant. The mere fact that subsequently the tenant has been able to persuade the sub tenant to leave the tenanted premises would not imply that no sub tenancy was created. In my considered view, learned counsel for the appellant is seeking to draw conclusions from the judgment in Hazari Lal and Another case (supra) which never formed the basis of the said judgment. As observed above, the question there was of the occupation of the premises by a relation of the tenant along with the tenant. The principal of law laid down is not that if the tenant is subsequently able to evict the sub tenant no sub tenancy would have been created.

(16)In my considered view there is no legal issue raised in the present appeal nor do the facts call for any interference.

(17)The appeal is without any merit and is dismissed with costs of Rs 5,000.

Sd/-

SANJAY KISHAN KAUL, J.