

% 28.11.2006

Present: Mr. Chaman Lal Sachdeva, Adv. for the Appellant.  
Mr. R.S. Endlaw, Advocate for the Respondent.

+ Caveat No. 137/2006

\* Since learned counsel for the respondent is present, caveat stands discharged.

+ CM No. 16099/2006

\* Allowed subject to just exceptions.

+ SAO No.4/2006 & CM No.16098/2006

\* An eviction petition was filed against the predecessor in interest of the appellant, S. Nihat Singh ( hereinafter referred to as, 'the tenant' ) under Section 14 (1) (b), (j) & (h) of the Delhi Rent Control Act, 1958 (hereinafter referred to as, 'the said Act' ). The Additional Rent Controller in terms of the judgment dated 17.10.2001 dismissed the eviction petition on all the grounds.

A separate petition was filed by the respondent against the tenant under Section 14(1)(a) of the said Act for non-payment of rent. The tenant was found in default of rent but that being the first default, benefit was made available to the petitioner under Section 14(2) of the said Act.

The respondent filed an appeal against the judgment dated 17.10.2001 and the Additional Rent Control Tribunal ( hereinafter referred to as, 'the Tribunal' ) in terms of the impugned order has

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allowed the appeal of the respondent limited to the ground of Section 14(1)(b) of the said Act on account of subletting and it is that order which is now sought to be impugned in the second appeal.

It is trite to say that in a second appeal in terms of the provisions of Section 39 of the said Act (which has since been deleted but the second appeal survives in respect of eviction proceedings filed prior to amendment of the Act in 1988) only a question of law has to be examined. This appeal thus has to be considered within the parameters of the jurisdiction vested in this court in a second appeal. Since the appeal only relates to the question of subletting, the facts in relation thereto are only being discussed.

Late Sardar Nihal Singh was a tenant in respect of flat bearing no. 5/6, Windsor Manson, Janpath Lane, New Delhi consisting of four rooms, kitchen and WC. It was the plea of the respondent that the tenant had inducted a sub tenant in a portion of the property being one Mohd. Yusuf Khan carrying on business under the name and style of M/s Kashmir Holiday Travels. The stand of the tenant was that the said person had unauthorizedly trespassed in the portion of the property on 06.11.1985 and had soon thereafter filed a suit for injunction restraining the tenant

from dispossessing him from the portion of the property in his possession except by due process of law on the allegation that the portion had been sublet to M/s Kashmir Holiday Travels. The tenant did not take any steps for lodging any police complaint or obtaining possession of that portion ostensibly on the ground that since the suit for injunction had been filed by the unauthorized occupant, the tenant could not take any action. The suit for injunction did not achieve any finality but ultimately on 20.11.1990, the tenant filed a suit for possession against Mohd. Yusuf Khan. The alleged trespasser did not lead any evidence and the suit was decreed in terms of the judgment and decree dated 06.01.2000. Mohd. Yusuf Khan preferred a first appeal in this court which was never prosecuted as the amount of damages was never paid and the appeal was dismissed for non prosecution. The dismissal took place on 02.11.2000. A perusal of the prior order on 15.09.2000 in the said appeal shows that while considering the stay application it was submitted on behalf of the tenant that the possession had been taken over and thus the only question that remained was the money part of the decree.

The Additional Rent Controller, in the conspectus of the aforesaid facts, has considered the question of the presence of

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an outsider in the tenanted premises and as to whether there was sufficient material to come to the conclusion that the parameters of Section 14(1)(b) of the said Act had been met.

The said provision reads as under:

**"14. Protection of tenant against eviction**

1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant:

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:-

a).....

b) that the tenant has, on or after the 9th day of June, 1952, sublet assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord;"

There is no dispute about the legal proposition that once an outsider is present, the onus shifts on the tenant to show in what capacity that outsider is occupying a portion of the tenanted premises. The presence of the outsider is not in dispute. The plea of the appellant is that the outsider was a trespasser.

It may be noticed that Sardar Nihal Singh who was a tenant since 1950 died during the pendency of the appeal before the Additional Rent Control Tribunal. On his demise on 21.06.2004,

his wife was impleaded as a party, who also passed away on 12.08.2005. Thereafter the present appellant was impleaded as he claimed to be the adopted son of the deceased tenant.

Learned counsel for the respondent in this behalf has sought to urge that in case of a residential tenancy, the inheritability could only be on a person dependent on the deceased tenant for purposes of residence. The wife inherited the tenancy, but after she passed away the son, who is more than 24 years old, cannot be said to be dependent for purposes of residence and thus even otherwise the appellant is not entitled to continue in the tenanted premises. This aforesaid plea was also raised before the Tribunal which did not find it appropriate to consider the same in view of the conclusion arrived at on the question of subletting. It is not necessary to consider this aspect in the present appeal even though it cannot be disputed that only a person dependent on the tenant for the purposes of residence can inherit the tenancy under Section 2(I)(iii) of the said Act.

The Tribunal has *inter alia* considered three aspects which are material insofar as the question of subletting is concerned. The alleged trespass has occurred on 06.11.1985 and yet no FIR or police complaint was filed. The testimony of late Sardar Nihal Singh in this behalf while being cross examined is as under:

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“I lodged a report in the police when in 1985 he was taken forcible possession. I do not remember the exact date when I filed a suit for possession against him. It is wrong to suggest that I am sublet portion to him illegally. It is wrong to suggest that Mohd. Yusuf Khan is using my telephone. I did not lodge any FIR for trespassing.”  
(emphasis supplied)

A reading of the aforesaid shows that though the tenant as a witness in support of his case did state earlier that he had lodged a police complaint, he admitted later that he had not lodged any FIR for trespassing. This is a material fact since in a case of trespass the party is expected to take prompt action. The only explanation given in this behalf is the suit filed by the alleged trespasser. The suit was only for injunction seeking a restraint order from being dispossessed except by due process of law. This did not prevent the tenant from filing an appropriate suit seeking possession. In fact, this is exactly what Sardar Nihal Singh did after five years. It is not the case that the suit for injunction was decided first and thereafter the suit for possession was filed. Thus, the tenant kept silent for a period of five years.

It is also material to note that the alleged trespasser did not lead any evidence in support of his case and the plea of the tenant went un rebutted. It is in those circumstances that the suit for possession was decreed along with damages. The possession was handed over and the appeal filed by the alleged trespasser

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was dismissed for non prosecution.

In my considered view, the Tribunal cannot be faulted for coming to the conclusion that the conduct of the tenant did not show any prompt action as would be expected in case of a trespasser. The alleged trespasser and the tenant were in the same trade. It is in these circumstances that the Tribunal has come to the conclusion that the object of the *inter se* litigation between the tenant and Mohd. Yusuf Khan was only to provide a cover or possibly some disputes may have arisen between them after Mohd Yusuf Khan came in possession of a part of the premises.

In the end, it cannot be lost sight of that it is not the jurisdiction of this court to once again start re-appreciating the evidence and the material on record and the legislature in its wisdom has restricted the present appeal only to a question of law.

In my considered view, really there is no question of law which arises for consideration in the present appeal.

Dismissed.

November 28, 2006  
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SANJAY KISHAN KAUL, J.