

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

+ **C.M.(M) No.798/2014 & C.M.Nos.14170-14171/2014**

% **29th August, 2014**

SH. SURINDER KALRAPetitioner

Through: Mr.J.C.Mahindro, Advocate.

VERSUS

SARDAR SATBIR SINGH Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution of India is filed against the concurrent judgments of the courts below; of the Additional Rent Controller dated 13.4.2011 and the Rent Control Tribunal dated 19.4.2014; by which the eviction petition on the ground of subletting under Section 14(1)(b) of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'the Act') filed by the petitioner/landlord has been dismissed.

2. Before touching upon the merits of the case, I must observe that there was a provision of second appeal viz Section 39 in the Delhi Rent Control Act, but, that provision of second appeal stands repealed by the Act 57 of

1988. Once there is no provision of second appeal, a petition under Article 227 of the Constitution of India cannot be filed as if it is a second appeal under a non-existing provision of Section 39 of the Delhi Rent Control Act. The second appeals which were filed under Section 39 of the Delhi Rent Control Act, in any case had to be only on a limited ground of existence of substantial questions of law and once that provision for limited filing of second appeal is removed, then a petition under Article 227 of the Constitution of India will have to be read in a much more stricter manner, more so in the facts of the present case where concurrent judgments have been passed against the petitioner/landlord.

3. The facts of the case are that the respondent is a tenant in one shop in the ground floor of the premises bearing no.H-7-A, Model Town, Delhi-09. The respondent is a doctor and his wife Manpreet Kaur is also a doctor. The case of the petitioner/landlord with respect to subletting is two fold. Firstly, subletting was claimed because the tenanted premises were used by the wife Manpreet Kaur. The second ground for subletting was that the wife had entered into a partnership business with one Mr.Gurbir Singh, and they were carrying on business in the tenanted premises under the name and style of

M/s Herb-e-Hayaat Overseas in partnership, and therefore there is subletting.

4. Both the courts below have held that it is not the case of the petitioner/landlord that there are disputes between the husband and wife, and therefore it cannot be held that the tenanted premises are not in the control and possession of the husband/respondent/tenant. This is obviously because a wife who lives with her husband is surely entitled to carry on business in the tenanted premises of the husband and user by the wife of the tenanted premises cannot mean and is not so proved in this case, that, the physical control and possession of the tenanted premises is divested from the respondent/tenant and came to be vested exclusively in the wife of the respondent/tenant.

5. I may note that the present is not a case where the allegation is that a son of the tenant who is living in a separate family is exclusively doing business in the tenanted premises of his father, and may be in facts of such cases it can amount to subletting, however, once a husband and his wife i.e the respondent and his wife Manpreet Kaur are living together as a family, the user of the premises by the wife whether individually at one stage or thereafter with partnership with Mr.Gurbir Singh cannot mean that the

tenanted premises are not in control and possession of the petitioner/tenant and that there is subletting.

6. I would not like to reproduce extensively the paras of the impugned judgments, but some of the relevant observations in some of the paras of the impugned judgment of the Rent Control Tribunal dated 19.4.2014 which rightly decides the case against the petitioner/landlord are para nos.17, 18, 22, 34, 35, 37 and 38, and which read as under:-

“17. **What it to be proved :-** As already discussed for proving the sub tenancy, the landlord has to establish that the tenant has parted with the possession of the whole or part of the tenanted premises. To prove sub tenancy two essential conditions are to be satisfied:-

- (1) That sub tenant was in exclusive possession of the property or part of the property;
- (2) That between the sub tenant and the chief tenant there was relationship of lessee and lessor.

18. Exclusive possession means the possession to the exclusion of others or not admitting the existence of something incompatible with the possession of the sub tenant. The possession does not mean the physical possession only but legal possession also. Parting with the possession means giving possession to persons other than those to whom possession has been assigned by the lessee and the parting with possession must have been by the tenant. The mere user by other person is not parting with possession so long as the tenant retaining the legal possession himself or in other words; there must be vesting of the

possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession. But so long as the tenant keeps to control with him then it cannot be said that the sub tenant is in exclusive possession and, hence, it does not fall within the mischief of clause (b) to Section 17(1). 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 right to return to the premises and be in possession thereof. The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with the possession.

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22. The presumption is only the inferences, which a logical and reasonable mind normally draws. In case of sub letting the presumption is drawn if the landlord prima facie shows the presence of a third person in the premises that he is a sub tenant, however the presumption is rebuttable. The Hon'ble Supreme Court opined that if a party gets exclusive possession of the property, prima facie he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease. In a suit by the landlord for eviction of the tenant on the ground of sub letting the landlord discharges the onus by leading evidence showing that occupants are in exclusive possession of apartments for valuable consideration. It is for the tenant to rebut that prima facie evidence. This principle was

followed in case of Lakhi Ram Dass vs. M/s Vidyut Cable and Rubber Industry Bombay. Hon'ble Delhi High Court took the opinion that if the landlord establishes that a third person is in possession of the part of the premises then in view of the presumption arising from that it was for the tenant to establish the notwithstanding the grant of exclusive possession the legal possession continued with the tenant. Once it is admitted that there is third person in the premises then it is for the tenant to explain their presence. Hon'ble Mr. Justice Sultan Singh of Hon'ble High Court of Delhi also took the similar view and held that if person other than the tenant is found in exclusive possession of the tenancy premises, the presumption is that the third person is a sub tenant or an assignee and the onus is on the tenant to prove that he had not parted legal possession, but has retained such possession. Hon'ble Justice Ms. Sunanda Bhandare took the similar view in case Narain Singh & Ors. vs. Vijendra Singh Chadha & Anr. If the tenanted premises is not in possession of the tenant but in occupation of a stranger in the circumstances the inference of sub letting could be drawn.

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34 However, in view of the pleadings on the record, evidence led, documents proved on the record and arguments addressed by both the Counsel, I do not find any flaw in the impugned Judgment passed by the Ld. Trial Court in view of the reasons given therein. The appellant/petitioner has nowhere pleaded or stated that there is vesting of possession by the respondent in Dr. Manpreet Kaur by divesting himself not only of physical possession but also of the right to possession. The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession. The

appellant/petitioner has deposed during the cross examination that the respondent has sublet the premises to Dr. Manpreet Kaur and has also produced the record of Income Tax Department and Punjab National Bank. The witnesses from the Punjab National Bank and Income Tax department have produced the account opening form by firm M/s Herb-E-Hyatt wherein the address of the partnership firm is mentioned as H-7-A, Model Town, Delhi. In the partnership deed the address of the partnership firm is mentioned as the tenanted premises. However, the respondent stated that the said firm was not carrying on the business for the tenanted premises. The respondent examined eight witnesses who deposed that the respondent was in exclusive possession of the tenanted premises and no other firm or person was carrying out any business from the tenanted premises. RW 5 Sh. Gurbir Singh has placed on record the copy of the bank statement of partnership firm M/s Herb-E-Hyatt starting from 01.06.03 to 02.04.08. The perusal of these documents shows that the address of the firm in all the bank statements from the year 2003 to 2008 is mentioned as F-5/3, Model Town, Delhi. Even in the income tax return filed for the year 2004,2005,2006 the address of partnership firm is mentioned F-5/3, Model Town, Delhi apart from tenanted premises.

35. The evidence on the record clearly indicate and prove that the control of the premises in question was with the respondent and that Dr. Manpreet Kaur who is the wife of the respondent was/is not in exclusive possession of the side premises. Even otherwise, there is nothing on the record which may prove that there is any act of the respondent which may fall within the mischief of clause 14(1)(b) of the Act. The appellant/petitioner has failed to prove divestment and/or abandonment of the right to possession in order to invoke the clause of parting with the possession. Rather the evidence on the record proved that the

respondent has not parted with the legal possession of the suit premises.

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37 The appellant/petitioner has stated that the respondent has sublet the premises to Dr. Manpreet Kaur. The appellant/petitioner during his cross examination has admitted that Dr. Manpreet Kaur is the wife of the respondent. The respondent in his evidence has also deposed that Dr. Manpreet Kaur is his wife. RW 8 Dr. Manpreet Kaur also deposed that she is the wife of the respondent. Ld. Trial court has correctly held that the appellant/petitioner has not given any details that Dr. Manpreet Kaur is in exclusive possession of the tenanted premises in exclusion of respondent. On the other hands, all the witnesses examined by the respondent have stated that tenanted premises being the wife of the respondent. The petitioner has failed to prove the exclusive possession of Dr. Manpreet Kaur in exclusion of the respondent. Ld. Trial Court has correctly placed the reliance upon the judgment reported as “**1974 RLR 171 (S.C.)**” wherein it is held that “where wife is tenant and husband is doing business in the shop is not subletting”. Therefore even on this ground the appellant/Petitioner is not able to prove the necessary ingredients of assigning, subletting/parting with possession.

38. In the present case, in view of the pleadings, evidence and proved documents, there is nothing on the record that there was transfer of legal possession of the demised premises in favour of a third person/persons/firm/party etc., more specifically in favour of Dr. Manpreet Kaur who is the wife of the respondent and the Dr. Manpreet kaur was/is in exclusive possession of the suit premises and there was/is a relationship of lessor and lessee between the alleged sub tenant and chief tenant. There is also no material on the record to prove by way of any evidence that legal possession was not with the respondent and/or there is vesting of the

possession by the respondent in favour of his wife or any other person/persons/firm etc. by divesting himself not only of the physical possession but also of the right of possession. There is nothing on the record that the respondent was/is not having the control of the tenanted premises with him or has/had parted with the same. Rather, it can be said that Dr. Manpreet kaur/Sh. Gurbir Singh/M/s Herb-E-Hyatt was/is not having the possession of the suit premises and the exclusive legal possession of the suit premises was/is with the respondent. There is nothing on the record that the alleged sub tenant was/is in exclusive possession of the suit premises. Hence, I do not find any flaw in the impugned Judgment passed by the Ld. Trial Court holding that the petitioner is not able to prove against the respondent the necessary ingredients for sub letting/assigning/parting with the possession of the suit premises.”

7. A reading of the aforesaid paras of the impugned judgment shows that the Rent Control Tribunal has rightly held that there was no subletting.
8. In view of the above, there is no merit in this petition, and the same is therefore dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

AUGUST 29, 2014
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