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DIPAK BANERJEE

v.

SMT. LILABATI CHAKRABORTY

JULY 30, 1987

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[SABYASACHI MUKHARJI AND G.L. OZA, JJ.]

Constitution of India, 1950: Article 136—Concurrent findings of fact—Normally no interference—Where essential ingredients necessary for finding of a fact—Not found by courts below—Court bound to C *interfere.*

West Bengal Premises Act, 1956: Section 13(1)(a)—Sub-letting without written consent of landlord—Essential ingredients to be established—Services in lieu of right of occupation—Whether amount to D *receipt of rent so as to create sub-tenancy.*

The landlord-respondent filed a suit against the appellant-tenant for contravention of Section 13(1)(a) of West Bengal Premises Act, 1956 for sub-letting without his written consent by parting with the possession of two rooms out of the four rooms of the premises in question to E **the sub-tenant who had established a tailoring business therein. The trial court held that there was evidence of a sewing machine being used, that the sub-tenant was occupying the suit premises for tailoring business, and that it was for the tenant to establish that the sub-tenant had not been inducted as a sub-tenant and that he had given shelter to a helpless man. In the absence of the evidence of the sub-tenant, the trial** F **court drew the inference that there was sub-tenancy.**

The first appellate court upheld the finding of the trial court, and the High Court, in appeal, did not interfere with the findings of the courts below.

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In the appeal before this Court, it was contended that the question of sub-tenancy in a situation like the present case is an inference to be drawn from a certain conduct, and that the question was whether the sub-tenant was in exclusive possession of the part of the premises or H **whether the tenant had retained no control or that part of the premises.**

Allowing the appeal, this Court, A

HELD: 1. In order to prove tenancy or sub-tenancy, two ingredients had to be established, firstly, the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly, that right must be in lieu of payment of some compensation or rent. [684G] B

2.1 In view of the provisions of Rent Act, services cannot be consideration for sub-lease. [686B]

2.2 Services in lieu of the right of occupation would not amount to receipt of rent under the Rent Act to create sub-tenancy. Work performed by sub-tenants and the wages paid by doing certain kind of C services may be in lieu of rent as in the case of Agricultural Tenancies. But in urban area in civilised time that cannot be so. The Rent Act, 1956 cannot be fitted into a position where the services can be rendered in exchange of the right of occupation. [687D, E]

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3. In the second appeal, no court should interfere with the concurrent findings of fact. [684F]

Normally, this court is too reluctant to interfere with the concurrent findings of fact. But if the essential ingredients necessary for finding of a fact have not in fact been found by the courts below then this E court is bound to examine the question where injustice or wrong is done. That jurisdiction has to be exercised sparingly but, that cannot mean that injustice must be perpetuated because it has been done two or three times in a case. The burden of showing that a concurrent decision of two or more courts or tribunals is manifestly unjust lies on the appellant but once that burden is discharged, it is not only the right but F the duty of the Supreme Court to remedy the injustice. [687F, 688A]

In the instant case, as there is no finding of exclusive possession nor of any payment of money in exchange of the user of the part of the premises the finding of subletting cannot in law be upheld. As the sewing machine in question was used as a part of the apparatus of the G appellant in the facts of this case it could not be said to have been used separately or independently and cannot constitute a change of user as defined in Section 13(1)(h) of the Rent Act. [688B-C]

[Justice of the case demands increase of rent. The appellant has been in occupation since 1972 at a monthly rent of Rs.250. By present H

A **standards, this is wholly inadequate. The appellant shall pay at least Rs.350 per month from 1st August, 87. If the standard rent is more, then the respondent will be at liberty to apply for increasing the rent.] [688D]**

Smt. Krishnawati **v.** *Shri Hans Raj,* **A.I.R. 1974 S.C. 280;** *Associated Hotels of India Ltd. Delhi* **v.** *S.B. Sardar Ranjit Singh,* **[1968] 2 SCR 548;** *Sachindra Nath Shah* **v.** *Santosh Kumar Bhattacharya,* **A.I.R. 1987 SC 409;** *Barnes & Another* **v.** *Barratt and another,* **[1970] 2 All E.R. 483 and** *M/s Variety Emporium* **v.** *V.R.M. Mohd. Ibrahim Naina,* **A.I.R. 1985, SC. 207, referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10043 of 1983.

From the Judgment and Order dated 7.5.1982 of the Calcutta High Court in Appellate Decree T.No. 673 of 1982.

A.K. Ganguli, B.S. Chauhan, S.C. Ghosh and T. Sridharan for the Appellant.

Gobind Mukhoty, Arvind Minocha and Mrs. Veena Minocha for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is an appeal by special leave from the judgment and order of the High Court of Calcutta dated the 7th May, 1982 dismissing the second appeal and passing a decree for eviction. The High Court refused to interfere with the concurrent findings of facts, *inter alia,* on sub-letting. The main question here in this appeal is whether in fact there was any sub-letting. The respondent is the owner of the premises No. P-71, C.I.T. Road, Scheme No. (iv) M, Calcutta and the appellant was a tenant at a monthly rent of Rs.200 plus service charge Rs.50 according to English Calendar Month. It is alleged that the appellant was in arrear of rent for long time. For the purpose of this appeal as the decree was not passed on the ground of default it is not necessary to go into detail regarding the correctness of that allegation. The ground on which the suit proceeded and which resulted in this appeal is whether the defendant had sublet or parted with the possession of two rooms out of four to Lalit Mohan Biswas and he has established tailoring business there. Therefore, sub-letting without the written consent of the landlord either the whole or part of the building in violation of section

13(1)(a) of West Bengal Premises Act, 1956 (hereinafter called the 'Rent Act') and user for non-residential purpose of tailoring the premises let out for residential purposes, in violation of section 13(1)(h) of the Rent Act are two offences alleged against the tenant. There was one Mritunjoy Mukherjee who opened a Music School there for more than four months prior thereto without the written consent of the landlord. Mr. Mritunjoy Mukherjee is no longer in the picture and his case was not pressed any further.

The main contention was whether the premises in question was sub-let to Lalit Mohan Biswas who had established some tailoring business or not. There was evidence before the learned trial court and it is material in view of the contentions urged on the question of sub-letting to set out the same, of the plaintiff, the respondent herein who gave evidence and stated as under:-

> "I am the owner of the suit property. The defendant is a tenant at a monthly rental of Rs.250 payable according to English Calendar Month. The defendant is a defaulter since July, 1977. The defendant sub-let one room to Lalit Mohan Biswas in December, 1976. The sub-tenant has established tailoring business there. Customers visit his tailoring shop. Another room was sub-let to Mritunjoy Mukherjee, who opened a Music School there."

It was further stated that notice had been given for terminating the tenancy. It was further stated in the evidence as under:-

> "My wife Lilabati Chakraborty is the owner of the suit property. I do not know how much rent is collected by the defendant from the sub-tenants. I am not aware of the profits made by the sub-tenant. The defendants pay sum of Rs.200 plus Rs. 50 as service charge. The defendant paid the arrear rents by instalments. I am at present receiving rents from the defendant. It is not a fact that Lalit Mohan Biswas is not a sub-tenant and trades on behalf of the defendant."

It appears that a suggestion was made that Lalit Mohan Biswas was not a sub-tenant, which was denied by the witness. There was however no suggestion that Lalit Mohan Biswas was in exclusive possession of any part of the premises in question. Sree Lalit Mohan Biswas did not give evidence in the witness box.

A There was also evidence that a sewing machine was used by Lalit Mohan Biswas, who owned the machine was not clear. From this evidence as above the learned trial judge came to the conclusion that there was evidence of a sewing machine being used. The learned judge also came to the conclusion that Lalit Mohan Biswas was occupying the suit premises for tailoring business and he further came to the conclusion B that it was for defendant to establish that Lalit Mohan Biswas had not been inducted as a sub-tenant the moment his physical presence in the house was proved. According to learned trial judge the character and the conduct of the tenant suggested that he had sub-let portion of the premises and it is for the tenant to prove that he had given shelter to a helpless man. It was further in evidence that Lalit Mohan Biswas was C doing some sewing work for the tenant and he was also doing some independent works for others and it did come out in the evidence that he used to take meals with the tenant. The evidence of the tenant was that Lalit Mohan Biswas was allowed to occupy part of the premises due to pity and charity and further he was sewing in the house without any rent. He did some work for the tenant and his family D members and for others. On this evidence the learned trial judge, in the absence of the evidence of Lalit Mohan Biswas, drew the inference that there was sub-tenancy in favour of Lalit Biswas. There was an appeal to the Additional District Judge, Alipore and he discussed the evidence and upheld the said finding. There was a further appeal before the High Court and the High Court also did not interfere with the E findings of the Courts below.

In the premises the question arises whether the High Court was right in law. It is true that in second appeal no court, and in the instant case the High Court should not interfere with the concurrent findings of facts. It was rightly pointed out and it is well-settled law by this F Court not to interfere with the concurrent findings of facts. This was reiterated by this Court in *Smt. Krishnawati* v. *Shri Hans Raj*, A.I.R. 1974 S.C. 280 where this Court observed that on the concurrent finding of the fact where no question of law arises, the High Court should not interfere. It was further high-lighted before us that the question of sub-tenancy in a situation like the present, is an inference drawn from G a certain conduct. But in order to prove tenancy or sub-tenancy two ingredients had to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must be in lieu of payment of some compensation or rent. In *Associated Hotels of India Ltd. Delhi* v. *S.B. Sardar Ranjit Singh*, [1968] 2 SCR 548 this Court reiterated that H on the question whether the occupier of a separate apartment in a

premises was a licensee or a tenant, the test was whether the landlord had retained control over the apartment. Normally an occupier of an apartment in a hotel was in the position of licensee as the hotel-keeper retains the general control of the hotel including the apartment. But it is not a necessary inference of law that the occupier of an apartment in a hotel is a tenant. A hotel-keeper may run a first class hotel without sub-letting any part of it. Where the hotel-keeper retained no control over the apartment, the occupier was in the position of a tenant.

The question in this case is whether the alleged sub-tenant was in exclusive possession of the part of the premises and whether the tenant had retained no control over that part of the premises. There is no evidence on the fact that the alleged sub-tenant was in exclusive occupation of any part of the premises over which the tenant had not retained any control at all. On this aspect neither was there any pleading nor any evidence at all. No court gave any finding on this aspect at all. In that view of the matter one essential ingredient necessary for a finding, the case of sub-tenancy has not been proved. If that is so, the trial court, the first appellate court and the High Court were in error in holding that the sub-tenancy was proved.

Our attention is drawn to this Court's decision in *Sachindra Nath Shah* v. *Santosh Kumar Bhattacharya*, A.I.R. 1987 SC 409 where paying guests were occupying a portion of the premises, this Court reiterated that finding of fact regarding those persons would not be interfered with. But where the finding has been arrived at without finding the basic facts, it cannot be sustained.

There is another aspect of the matter, i.e., the payment of rent for sub-tenancy or consideration for sub-tenancy. Undoubtedly the alleged sub-tenant rendered certain services to the tenant but can the same be considered as rent under the Rent Act? Section 14(1) of the said Act prohibits sub-tenancy and it was pointed out before us that receipt of service in lieu of the occupation of a part of the premises as a licensee did not amount to payment or receipt of rent. Sub-tenancy as such is not defined in the Act. The sub-tenancy under the Transfer of Property Act, 1882 is governed by section 105 of the said Act and it defines sub-leases as a lease of immovable property as a transfer of right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

A There is no clear evidence in the instant case as to what kind of sewing Lalit Mohan Biswas used to perform for the tenant, on the other hand, he did perform some work which could be considered to be in lieu of his right to occupy the portion of the premises, if so this may be sub-lease in terms of section 105 of the Transfer of Property Act. But is it in lieu of consideration as contemplated under the Rent Act. B The question is, whether in the context of the provisions of Rent Act, can services be consideration for sub-tenancy? In other words whether in view of the provisions of the Rent Act services can be a good or any consideration for sub-lease is the question. We are of the opinion that it cannot be. See in this connection section 4 of the Rent Act, and the different sub-sections of that section, section 5, especially section 5(b). C These enjoin that excess over fair rent to be irrecoverable, put restriction on claim, demand or receipt of premium or other consideration. Section 8 is also relevant in this connection, see also section 9. Sections 2(h) and 2(d) also indicate money consideration. Section 13(j) and section 13(i) cannot be anything but money. Section 17(1) and section 17(2) and 17B also militate against the concept that services in lieu of D money can be consideration. It is however not possible to accept that services in lieu of the right of occupation would amount to receipt of rent under the Rent Act to create sub-tenancy. This frustrates and defeats the purpose of the Rent Act. Take for instance a case where a person renders services to the landlord in lieu of rent but this will completely erode the provisions of Rent Act and defeat the claims for E services. Work performed by sub-tenants and the wages paid by doing certain kind of services may be in lieu of rent as in the case of Agricultural Tenancies. But in urban area in civilized time that cannot be so. The Rent Act, 1956 cannot be fitted into a position where the services can be rendered in exchange of the right of occupation. This question arose in England in the case of *Barnes & Another* v. *Barratt* F *and another.*, [1970] 2 All E.R. 483. There the defendants occupied part of the house which was let to C. The defendants had exclusive use of three rooms and a kitchen while C had similar use of two rooms. The bathroom was shared. In return for their use of the above-mentioned accommodation the defendants cleaned part of the house, cooked for him and paid electricity, gas and fuel bills for the whole of G the house. On more than one occasion C refused to accept any payment of rent. The arrangement continued from 1951 until C's death in February, 1969. The interests of C were then surrendered to the plaintiffs who were the landlords. The plaintiffs claimed possession of the whole house. The county court judge ruled that the defendants were tenants within the protection of the Rent Acts, and were not H licensees, since the services rendered by defendants, according to the

county court judge constituted rent. The court of appeal in England held that the defendants were granted personal privilege of occupation and not tenancy. It was further held that even if there was a tenancy, the Rent Acts did not apply to it, because there was no agreed monetary quantification of the rent nor any agreed method of quantification. Sachs LJ. observed at page 484 of the report as follows:-

> "That the rendering of services can constitute rent at common law is well settled but whether it can, when there has been no quantification of their value, constitute rent under the Rent Acts is a different question. It was answered 45 years ago in *Hornsby* v. *Maynard*, [1925], 1 KB 514, by a Divisional Court particularly experienced in dealing with the manifold problems then regularly being raised by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, the Act from which so much of the later rent legislation is derived."

The Lord Justice further observed at page 485 as follows:-

> "However, if one turns to look at the structure of the Rent Acts as a whole, it is equally clear that their provisions with regard to rent restriction can only, in practice, be operated if that interpretation is correct. The effective basis of the restrictions turns on there being quantified sums to which the provisions of the Acts can apply."

The structure of the Rent Act in the instant case, as indicated above would also indicate that. We hold therefore that second ingredient, rent agreed was not there. And as such on the case pleaded and proved there could not have been any sub-tenancy.

It is true that normally this Court is too reluctant to interfere with the concurrent findings of fact. But if the essential ingredients necessary for finding of a fact have not in fact been found by the Courts below then this Court is bound to examine the question where injustice or wrong is done. In *M/s Variety Emporium* v. *V.R.M. Mohd. Ibrahim Naina*, A.I.R. 1985, SC. 207. Chandrachud, C.J. observed that concurrent findings of lower courts have relevance on the question whether Supreme Court should exercise its jurisdiction under Article 136 of the Constitution to review a particular decision. That jurisdiction has to be exercised sparingly. But, that cannot mean that injustice must be perpetuated because it has been done two or three

A times in a case. The burden of showing that a concurrent decision of two or more courts or Tribunals is manifestly unjust lies on the appellant. But once that burden is discharged, it is not only the right but the duty of the Supreme Court to remedy the injustice. As there is no finding of exclusive possession nor of any payment of money in exchange of the user of part of the premises the finding of sub-letting cannot in law be upheld.

As the sewing machine in question was used as a part of the apparatus of the appellant in the facts of this case it could not be said to have been used separately or independently and cannot constitute a change of user as defined in section 13(1)(h) of the Rent Act.

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We are unable to sustain the findings of the High Court and the courts below on the basis of the pleadings and evidence. The appeal is, therefore, allowed. The judgment and order of the High Court and the Courts below are set aside and the claim for ejectment is dismissed. But the justice of the case demands increase of rent. The appellant has been in occupation of the premises in question since 1972 at a monthly rent of Rs.250 per month. In the present standard this is wholly inadequate for the premises in question, we direct that the appellant shall go on paying at least Rs.350 per month from 1.8.87. If the standard rent is more than Rs.350 then the respondent will be at liberty to make any application for increasing the rent before the appropriate authority. Arrears, if any, must be paid by 31.8.87. There will be, however, no order as to costs.

This Court records its appreciation to Sree Amul Ganguly, learned counsel for the appellant and Sree Gobind Mukhoty, learned counsel for the respondent for the valuable assistance rendered to this Court.

N.P.V. Appeal allowed.