

A MS. CELINA COELHO PEREIRA & ORS.

v.

ULHAS MAHABALESHWAR KHOLKAR & ORS.
(Civil Appeal No. 7258 OF 2009)

B OCTOBER 30, 2009

[TARUN CHATTERJEE AND R. M. LODHA, JJ.]

Goa, Daman and Diu Building (Lease, Rent and Eviction) Control Act, 1968 – s.22(2)(b)(i) – Eviction petition

C – *On the ground of sub-letting – Tenant taking plea of partnership with the sub-tenant – Order for eviction by Rent controller and Tribunal – High Court in petition under Article 227 of the Constitution, setting aside finding of courts below – On appeal, held: High Court was not justified in non-suiting*

D *the landlord in exercise of jurisdiction under Article 227 – Failure as regards pleadings not fatal – Pleadings in such matters ought not be construed too technically – If the partnership formed was for cancelling the sub-letting, Court is required to tear the veil of partnership – Constitution of India, 1950 – Article 227 – Pleadings.*

Rent Control and Eviction – Eviction on the ground of sub-letting – Discussed.

F *Doctrine – Rule of 'secundum allegata et probata' – Applicability of.*

Maxim – 'Secundum allegata et probata'—Applicability of.

G *Appellants-landlord filed petition for eviction against the tenant on the ground of sub-letting. Tenant denied the plea of sub-letting, stating that he had started the business in the name of a partnership firm of which he and his family members were the partners and the*

premises was exclusively in his possession. Rent Controller held that sub-letting was established and directed the tenants to vacate the premises. Appeal against the order of Rent Controller was dismissed upholding the order of Rent Controller. In writ petition under Article 227 of the Constitution of India, High Court set aside the orders of the courts below. Hence the present appeal. A B

Allowing the appeal, the Court

HELD: 1.1. In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, i.e. parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession; and that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent. [Para 28] [582-A-B] C D

1.2. Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant. [Para 28] [582-C] E F

1.3. The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person. [Para 28] [582-D-E] G

1.4. If tenant is actively associated with the H

A **partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.** [Para 28] [582-E-F]

B **1.5. Initial burden of proving sub-letting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.** [Para 28] [582-G]

C **1.6. Initial burden lying on landlord would stand discharged by adducing *prima facie* proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.** [Para 28] [582-H; 583-A]

E **2.1. High Court judgment is erroneous. It erred in holding that the tenant wanted to examine one of the partners, but he was not permitted by the Rent Controller. This is factually incorrect inasmuch as there is nothing on record to suggest that the tenant wanted to examine one of the partners. What appears from record is that an application came to be filed by the firm to whom the**

F **premises in question was sub-let through its partner for its impleadment and intervention but the said application was rejected. The said order never came to be challenged by the firm. The High Court also failed to advert to the question whether the firm was a genuine partnership firm**

G **or was a camouflage to cover up the mischief of subletting. Though, the Administrative Tribunal as well as the Additional Rent Controller have recorded a specific finding that the partnership was not genuine partnership and it was created with an intention to circumvent the**

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provisions of Goa, Daman and Diu, Buildings (Lease, Rend and Eviction Control) Act, 1968, but the High Court did not go into this aspect on the ground that there was no specific pleading to this effect in the application for eviction. [Para 16] [570-F-H; 571-A-C]

Associated Hotels of India Ltd., Delhi v. S.B. Sardar Ranjit Singh AIR 1968 SC 933; Smt. Krishnawati v. Hans Raj (1974) 1 SCC 280; Helper Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri & Ors, (1987) 3 SCC 538; Jagan Nath (Deceased) through LRs. vs. Chander Bhan And Ors. (1988) 3 SCC 57; Gopal Saran vs. Satyanarayana (1989) 3 SCC 56; G.K. Bhatnagar (Dead) By LRs. vs. Abdul Alim (2002) 9 SCC 516; Parvinder Singh vs. Renu Gautam and Ors. (2004) 4 SCC 794; Mahendra Saree Emporium (II) vs. G.V. Srinivasa Murthy (2005) 1 SCC 481; Vaishakhi Ram and Ors. v. Sanjeev Kumar Bhatiani (2008) 14 SCC 356; Nirmal Kanta (Dead) Through LRs. v. Ashok Kumar and Anr. (2008) 7 SCC 722, relied on.

2.2. The High Court is not justified in non-suiting the landlord on the ground that he has not pleaded that business of the firm is not conducted by its partners; and that tenant has parted with the premises by sub-letting the same under the garb of deed of partnership by constituting a bogus firm. Lack of pleading as to whom the premises in question has been sublet, cannot be held to be fatal. A transaction such as sub-letting by tenant which is not permissible under lease may be outwardly a deceptive arrangement and landlord may not come to know of true facts. The pleadings in such matters ought not to be construed too technically. The true test, is to see whether the other side has been taken by surprise or prejudiced. [Para 29] [583-B-E]

2.3 If the purpose of constituting partnership by the tenant is ostensible and a deed of partnership is drawn

- A to conceal the real transaction of subletting in a given case, the court may be required to tear the veil of partnership to find out the real nature of transaction entered into by the tenant and in such circumstances the evidence let in by the landlord cannot be ignored on the
- B ground that there is some variance between pleading and proof. In a case such as the present one, the rule of *secundum allegata et probata* is not strictly applicable as the tenant cannot be said to have been put to any prejudice. [Para 30] [583-F-H]
- C 2.4. The High Court has been too technical in construing the pleadings of the case overlooking the fact that plea of sub-letting has been set up by landlord in the plaint and there has been full and critical examination of the evidence by the Additional Rent Controller as well as
- D the Administrative Tribunal. The Additional Rent Controller and the Administrative Tribunal cannot be said to have misdirected themselves either on law or on facts. Both Authorities found as a fact that the firm was not a genuine partnership and it was formed to cover up the
- E sub-letting of the suit premises. They also found as a fact that the partnership having not been found to be genuine partnership, it was difficult to hold that the tenant continued to have a control over the suit premises. These findings are based on the consideration of
- F evidence on record. It cannot be said that the aforesaid view is not a possible view. [Para 31] [584-A-D]

Bathutmal Raichand Oswal v. Laxmibai R. Tarta and Anr. (1975) 1 SCC 858; State through Special Cell, New Delhi v. Navjot Sandhu alias Afshan Gurū And Ors. (2003) 6 SCC 641; Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (1986) 4 SCC 447; State of Maharashtra v. Milind and Ors. (2001) 1 SCC 4; Ranjeet Singh v. Ravi Prakash (2004) 3 SCC 682; Shamshad Ahmad and Ors. v. Tilak Raj Bajaj (Deceased) through LRs. and Ors. (2008) 9 SCC 1, relied on

3. In view of the facts and circumstances of the case A and the findings recorded by the Additional Rent Controller as well as the Administrative Tribunal, High Court was not justified in interfering with the concurrent orders of eviction based on the ground of sub-letting in exercise of its power under Article 227 of the Constitution of India. [Para 35] [586-D-E]

4. It is also not correct to say that the powers of the Rent Controller under the Act, 1968 are exercisable like that of courts of Mamlatdars under the Goa, Daman and Diu The Mamlatdar's Court Act, 1966 and that onus never shifted to the tenant. [Para 36] [586-F]

Case Law Reference :

AIR 1968 SC 933	Relied on	Para 18	D
(1974) 1 SCC 280	Relied on	Para 19	
(1987) 3 SCC 538	Relied on	Para 20	
(1988) 3 SCC 57	Relied on	Para 21	
(1989) 3 SCC 56	Relied on	Para 22	E
(2002) 9 SCC 516	Relied on	Para 23	
(2004) 4 SCC 794	Relied on	Para 24	
(2005) 1 SCC 481	Relied on	Para 25	F
(2008) 14 SCC 356	Relied on	Para 26	
(2008) 7 SCC 722	Relied on	Para 27	
(1975) 1 SCC 858	Relied on	Para 32	G
(2003) 6 SCC 641	Relied on	Para 33	
(1986) 4 SCC 447	Relied on	Para 34	
(2001) 1 SCC 4	Relied on	Para 34	H

A (2004) 3 SCC 682 Relied on Para 34
(2008) 9 SCC 1 Relied on Para 34

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7258 of 2009.

B From the Judgment & Order dated 29.11.2006 of the High Court Bombay at Goa in Writ Petition No. 156 of 1999.
Ranjit Kumar, Binu Tamta, Prashant Shukla, for the Appellants.

C Surendra Desai, Prashant Kumar, Triveni Poteker, J.K. Mahapatra, Amarjit Singh Bedi, for the Respondents.

D The Judgment of the Court was delivered by
R.M. LODHA, J. 1. Leave granted.

E 2. Abilio Coelho Pereira – since deceased and now represented by the present appellants, (for the sake of convenience hereinafter referred to as 'landlord'), made an application on April 6, 1979 before the Rent Controller, Goa North Division, Panaji for eviction of Mahabaleshwar Ramchandra Colcar – since deceased and now represented by the respondents – (hereinafter referred to as 'tenant') on the grounds of subletting and change of user, as provided in Goa, Daman & Diu Buildings (Lease, Rent & Eviction) Control Act, 1968, (for short, 'Act, 1968'). The landlord in the application for eviction averred that a building situated at Stres Joao de Castro, Panaji is owned by him; that one of the rooms on the ground floor of the said building was let out to the tenant @ Rs.80/- per month on January 10, 1959 for grocery business; that initially the lease was for a period of two years but later on it was renewed from time to time and the last renewal was made upto October 10, 1969; that on coming into force of Act, 1968 the tenant became statutory tenant; that the tenant without permission or consent of the landlord has transferred/sublet

tenancy interest in the premises to Mandovi Tours and Travels; that the transferee/sub-lessee is exclusively running the business in the said rented premises and that no grocery shop is being run by the tenant in the said premises.

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3. The tenant traversed the application for eviction and denied that he has transferred/sublet the premises to Mandovi Tours and Travels or that the tenancy interest in the said premises has been let out to the said partnership concern. The tenant's defence in the written statement was that having advanced in age, he was not doing good business in grocery and he thought of starting the business of tours and travels within the territory of Goa and, for this reason, he formed a partnership in the name and style of M/s. Mandovi Tours and Travels and took his son and daughter-in-law as his partners along with one Smt. Kunda Wagh. The tenant further averred that booking and reservation of passengers and tourists is being done from the said premises by the firm and that the possession of the premises continues to be with him exclusively. An additional written statement was filed by the tenant on September 25, 1979 but since nothing material turns on that, it is not necessary to refer to the said additional written statement.

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4. During the pendency of the proceedings, an application came to be filed by M/s. Mandovi Tours and Travels through its partner Umesh Kolkar for its impleadment and intervention but the said application came to be rejected on September 15, 1984.

5. It may be noticed here that the original tenant died on May 18, 1986 and his legal heirs (present respondents) were impleaded as respondents.

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6. The Additional Rent Controller, Panaji Sub-Division, Panaji-Goa recorded the evidence of the parties and, after hearing them vide his order dated January 16, 1995 held that ground of sub-letting was established and directed the present

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A respondents to vacate the subject premises and put the landlord in possession within 30 days from the date of receipt of the order.

B 7. The present respondents challenged the order of eviction passed by the Additional Rent Controller in an eviction appeal before the Administrative Tribunal, Goa. The original landlord seems to have died during the pendency of appeal and the present appellants who are his legal representatives were brought on record.

C 8. The Administrative Tribunal, Goa, after hearing the parties, dismissed appeal on December 24, 1998. Thus, the eviction order passed by the Additional Rent Controller was upheld by the Administrative Tribunal, Goa.

D 9. The present respondents, not satisfied with the concurrent orders, preferred writ petition under Article 227 of the Constitution before the High Court of Bombay at Goa.

E 10. Vide judgment and order dated November 29, 2006, High Court allowed the writ petition and set aside the concurrent orders of eviction passed by the Additional Rent Controller and the Administrative Tribunal. It is from this order that the present appeal by special leave has been preferred by the present appellants.

F 11. We heard Mr. Ranjit Kumar, learned senior counsel for the appellants and Mr. S.G. Dessai, learned senior counsel for the respondents at quite some length.

G 12. The Additional Rent Controller, after sifting the evidence let in by the parties and the covenants of the partnership deed, recorded his findings thus :

H "It may be noted that from the covenants of the partnership deed it was clear that the books of accounts had to be maintained, statement for the purpose of income tax had to be prepared etc. and instead of bringing this evidence

into record the respondent went on saying that he could not produce the books of accounts as his father had told him that the same were not maintained from the beginning. This statement was made on the next date of hearing when on the previous date he had promised to produce the same. Further the power of attorney of the respondent mentioned that he was not able to say how much his wife received from the share of the sales of the two tempos belonging to the partnership firm even the files regarding the income tax returns, the power of attorney of the respondent stated that he was not aware whether any returns have been filed or not. It is clear from this that none of the partners were brought into the witness box. It is difficult to accept that this partnership actually existed but it was a cover front for any under-hand dealing with the said Balaji Lawande and Netravalkar. It is to be noted that neither Balaji nor Netravalkar came to depose as witnesses. As regards to the point that the partnership was purely a family concern it was difficult to accept when at the time of hearing different parties of the same family engaged different advocates and advances arguments on their behalf. Under no circumstances, it was explained as to why Kunda Wagh was taken as a partner when she could have easily been taken as an employee as she was required for the purpose of liaison and planning of tours."

13. The Additional Rent Controller, thus, held that the case of the tenant that the partnership firm existed cannot be accepted and that it was a cover for an underhand dealing with Balaji Lawande and Netravalkar. The Additional Rent Controller went on to hold :

".....Even if the authorities mentioned by the respondent in their written arguments were to support the case of the respondent, it is difficult to accept this proposition because in the facts itself and the omission of the respondent to come out with the truth the said authorities

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- A do not hold him at all. Now considering all these aspects it is held that the respondent has not performed his obligation specially with reference to the authority mentioned above in RCJ 1993 Vol. I page 292 to 295 in the case of *Trilok Singh vs. Bavanti Prasad* where it was mentioned in the judgment "Sub-letting being clandestine affairs direct evidence cannot ordinarily be available" have been complied by the respondent to justify the genuineness and the existence in practice of the said partnership deed. It may be noted also that the ground taken at later stage that two partners of the firm had become the legal heirs of the respondent, the question of the application of the section 2(p) i.e. the definition of the member of the firm of the tenant becomes applicable after his death cannot be accepted because proceedings were initiated well before the death of the original respondent and it relates to the events at the time of filing of this application. It may be noted also that the evidence of the respondent was recorded through his power of attorney and son Ulhas during the life time and, therefore, the respondent cannot take shelter of this provision now.
- E Under these circumstances, as the respondent has failed to perform his obligation to prove that there had not been an under hand sub-letting because in all such cases, the sub-letting was always clandestine and, therefore, direct evidence cannot be brought by the applicant and hence the duty cast on the respondent."

- G 14. The Administrative Tribunal also held that the partnership – Mandovi Tours and Travels – was not a genuine partnership and it was formed to cover up subletting of suit premises. For recording this finding, the Administrative Tribunal gave the following reasons:

"Admittedly, the appellants did not examine any of the partners of the partnership firm before the Rent

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Controller. However, the appellants examined one Shri Ulhas Kholkar as a power of attorney for the original tenant. In fact, he happens to be the son of the original tenant. According to this witness, the appellants started the business in the suit premises under the name and style M/s. Mandovi Tour & Travels in February 1977 for conducting sight seeing tours. This witness was cross-examined by the respondents. From the trend of the cross examination of this witness, it is clear that the partnership was not at all acted upon and it only remained as a paper document. He has admitted that the Mandovi Tours and Travels has not maintained any books of accounts from the inception. It was suggested to this witness that there are no account books as partnership business does not exist at all which suggestion was denied by this witness. It was also suggested to this witness that the suit premises are in exclusive possession of Sitakant Netravalkar and Balaji Lawande which suggestion was also denied by this witness. His wife happens to be one of the partners but he does not know what income his wife receives from the partnership business. In his cross-examination, he has also stated that he cannot say as to who shall retain the premises in case the partnership was dissolved. As per clause 7 of the Partnership Deed, it was necessary for the partnership firm to open bank account in the name of firm to be operated by second and third party jointly. As per clause 8 of the partnership deed the accounting year of the partnership was from 1st April ending on 31st March every year and the first sets of books were required to be closed on 31.3.1978. As per clause 9 of the partnership deed, it was necessary to keep proper books of accounts and which were required to be completed on 31st March every year. However, it is pertinent to note that the appellants have not brought any evidence on record to show that they have opened a bank account in the name of the firm. The appellants have also not brought any

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A evidence on record to show that books of accounts were maintained by the partnership firm. In my view, therefore, the evidence on record clearly establishes that the said partnership was not at all a genuine partnership and it was created only to circumvent the provisions of the Rent Control Act."

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C 15. The Administrative Tribunal also held that the tenant did not hold any control over the suit premises and though his case was that to do travel business, a firm Mandovi Tours and Travels was constituted but failed to prove that Mandovi Tours and Travels was a genuine partnership. This is what the Administrative Tribunal said :

D "In the present case before me the original tenant had only 10% share. The partner Smt. Kunda J. Vagh who is stranger has 30% shares. As discussed above, the said partnership is found not to be genuine partnership and it was formed to cover up the sub-letting of the suit premises. This being the position, it is difficult to hold that the appellants still have a control over the suit premises. I am, E therefore, satisfied that the appellants have parted with the possession of the suit premises to the said Mandovi Tours and Travels. The appellants have failed to prove that the said partnership was a genuine partnership."

F 16. Insofar as High Court is concerned, two errors are apparent from its judgment. In the first place, High Court erred in holding that the tenant wanted to examine one of the partners, Umesh Mahabaleshwar Kholkar but he was not permitted by the Rent Controller. This is factually incorrect inasmuch as there G is nothing on record that even remotely suggests that the tenant wanted to examine one of the partners Umesh Mahabaleshwar Kholkar. What appears from record is that an application came to be filed by M/s. Mandovi Tours and Travels through its partner Umesh Kholkar for its impleadment and intervention but the said application was rejected on September 15, 1994. The fact of H the matter is that the said order never came to be challenged

by M/s. Mandovi Tours and Travels. Secondly, the High Court failed to advert to the question whether the firm M/s. Mandovi Tours and Travels was a genuine partnership firm or was a camouflage to cover up the mischief of subletting. Though, the Administrative Tribunal as well as the Additional Rent Controller have recorded a specific finding that the partnership M/s. Mandovi Tours and Travels was not genuine partnership and it was created with an intention to circumvent the provisions of Act, 1968, but the High Court did not go into this aspect on the ground that there was no specific pleading to this effect in the application for eviction.

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17. Section 22(2)(b)(i) of the Act, 1968 which is relevant for the present appeal reads thus :

"22. Grounds for eviction. – (1)..... (2) If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied –

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(a).....

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(b) that the tenant has without the written consent of the landlord –

(i) transferred his right under the lease or sub-let the entire building or any portion thereof, or"

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18. In the case of *Associated Hotels of India Ltd., Delhi v. S.B. Sardar Ranjit Singh*¹, this Court held that when eviction is sought on the ground of subletting, the onus to prove subletting is on the landlord. It was further held that if the landlord *prima facie* shows that the third party is in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence.

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19. The aforesaid legal position was also noticed by this Court in the case of *Smt. Krishnawati v. Hans Raj*².

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1. AIR 1968 SC 933

2. (1974) 1 SCC 280

A 20. In *Helper Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri & Others*³, this Court held that in a case where a tenant becomes a partner of a partnership firm and allows the firm to carry on business in the demised premises while he himself retains legal possession thereof, the act of the tenant does not amount to subletting. It was held that whether there is genuine partnership or not must be judged in the facts of each case in the light of the principles applicable to partnership.

C 21. While dealing with the mischief contemplated under Section 14(1)(b) of the Delhi Rent Control Act, 1958 providing for eviction on the ground of subletting, this Court in the case of *Jagan Nath (Deceased) through LRs. vs. Chander Bhan And Ors.*⁴ held:

D "The question for consideration is whether the mischief contemplated under Section 14(1)(b) of the Act has been committed as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting

3. (1987) 3 SCC 538

H 4. (1988) 3 SCC 57

with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession"

22. The question whether the tenant has assigned, sublet or otherwise parted with the possession of the whole or any part of the premises without the permission of the landlord within the meaning of Section 13(1)(e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, fell for consideration in *Gopal Saran vs. Satyanarayana*⁵. This Court held :

"Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party. In this connection, reference may be made to the decision of this Court in *Shalimar Tar Products Ltd. v. H.C. Sharma* [(1988) 1 SCC 70] where it was held that to constitute a sub-letting, there must be a parting of legal possession, i.e., possession with the right to include and also right to exclude others and whether in a particular case there was sub-letting was substantially a question of fact. In that case, a reference was made at page 77 of the report to the Treatise of Foa on *Landlord and Tenant*, 6th edn., at page 323, for the proposition that the mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of covenant. In paragraph 17 of the report, it was observed that parting of the legal possession means possession with the right to include and also right to exclude others. In

5. (1989) 3 SCC 56

A the last mentioned case, the observations of the Madras High Court in *Gundalapalli Rangamannar Chetty v. Desu Rangiah* (AIR 1954 Mad 182) were approved by this Court in which the legal position in *Jackson v. Simons* [(1923) 1 Ch 373] were relied upon. The Madras High Court had also relied on a judgment of Scruton L.J. in *Chaplin v. Smith* [(1926) 1 KB 198] at page 211 of the report where it was said :

C He did not assign, nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them.

D This position was also accepted in *Vishwa Nath v. Chaman Lal* (AIR 1975 Del. 117) wherein it was observed that parting with possession is understood as parting with legal possession by one in favour of the other by giving him an exclusive possession to the ouster of the grantor.

E If the grantor had retained legal possession with him it was not a case of parting with possession."

F The court also reiterated that to prove sub-tenancy, two ingredients have to be established, firstly, the tenant must have exclusive right of possession or interests in the premises or part of the premises in question and secondly, the right must be in lieu of payment of some compensation or rent.

23. In the case of *G.K. Bhatnagar (Dead) By LRs. v. Abdul Alim*⁶, this Court held as follows :

G "A conjoint reading of these provisions shows that on and after 9-6-1952, sub-letting, assigning or otherwise parting with the possession of the whole or any part of the tenancy

premises, without obtaining the consent in writing of the landlord, is not permitted and if done, the same provides a ground for eviction of the tenant by the landlord. However, inducting a partner in his business or profession by the tenant is permitted so long as such partnership is genuine. If the purpose of such partnership may ostensibly be to carry on the business or profession in partnership, but the real purpose be sub-letting of the premises to such other person who is inducted ostensibly as a partner, then the same shall be deemed to be an act of sub-letting attracting the applicability of clause (b) of sub-section (1) of Section 14 of the Act." A B C

24. A three-Judge Bench of this Court in *Parvinder Singh v. Renu Gautam and Others*⁷ commented upon the device adopted by tenants many a time in creating partnership as a camouflage to circumvent the provisions of the Rent Control Act. The following observations are worth noticing : D

"The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is sub-letting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack-renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership E F G H

- A he cannot necessarily be held to have sub-let the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the
- B tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant.
- D A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against sub-letting or parting with possession.
- E This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sub-lets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord
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from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by the tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction.....”

25. In yet another decision, a three-Judge Bench of this Court in *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy*⁸ considered earlier decisions, few of which have been referred above, while dealing with a matter relating to subletting of the premises within the meaning of Section 21(1)(f) of Karnataka Rent Control Act, 1961 and observed as follows :

“The term “sub-let” is not defined in the Act — new or old. However, the definition of “lease” can be adopted *mutatis mutandis* for defining “sub-lease”. What is “lease” between the owner of the property and his tenant becomes a sub-lease when entered into between the tenant and tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in Section 105 of the Transfer of Property Act, 1882 is a transfer of a right to enjoy such property made for a certain time for consideration of a price paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is *sine qua non* of a lease. A sub-lease would imply parting with by the tenant of the right to enjoy such property in favour of his sub-tenant. Different types of phraseology are employed

- A by different State Legislatures making provision for eviction on the ground of sub-letting. Under Section 21(1)(f) of the old Act, the phraseology employed is quite wide. It embraces within its scope sub-letting of the whole or part of the premises as also assignment or transfer in any other manner of the lessee's interest in the tenancy premises.
- B The exact nature of transaction entered into or arrangement or understanding arrived at between the tenant and alleged sub-tenant may not be in the knowledge of the landlord and such a transaction being unlawful would obviously be entered into in secrecy depriving the owner-landlord of the means of ascertaining the facts about the same. However still, the rent control legislation being protective for the tenant and eviction being not permissible except on the availability of ground therefor having been made out to the satisfaction of the court or the Controller, the burden of proving the availability of the ground is cast on the landlord i.e. the one who seeks eviction. In *Krishnawati v. Hans Raj* [(1974) 1 SCC 289] reiterating the view taken in *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh* [(1968) 2 SCR 548] this Court so noted the settled law: (SCC p. 293, para 6)

- F "[T]he onus to prove sub-letting is on the landlord. If the landlord *prima facie* shows that the occupant who was in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence."

- G Thus, in the case of sub-letting, the onus lying on the landlord would stand discharged by adducing *prima facie* proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of Section 105 of the Transfer of Property Act, was holding right to enjoy such property. A presumption of sub-letting may then be raised and would amount to proof unless rebutted. In the context of the premises having
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been sub-let or possession parted with by the tenant by adopting the device of entering into partnership, it would suffice for us to notice three decisions of this Court. *Murlidhar v. Chuni Lal* (1970 Ren CJ 922) is a case where a shop was let out to a firm of the name of Chuni Lal Gherulal. The firm consisted of three partners, namely, Chuni Lal, Gherulal and Meghraj. This partnership closed and a new firm by the name of Meghraj Bansidhar commenced its business with partners Meghraj and Bansidhar. The tenant firm was sought to be evicted on the ground that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm amounted to sub-letting. This Court discarded the contention as "entirely without substance" and held that a partnership firm is not a legal entity; the firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. The two firms, old and new, had a common partner, namely, Meghraj, who continued to be in possession and it was fallacious to contend that earlier he was in possession in the capacity of partner of the old firm and later as a partner of the new firm. The landlord, in order to succeed, has to prove it as a fact that there was a sub-letting by his tenant to another firm. As the premises continued to be in possession of one of the original tenants, Meghraj, then by a mere change in the constitution of the firm of which Meghraj continued to be a partner, an inference as to sub-letting could not be drawn in the absence of further evidence having been adduced to establish sub-letting. In *Helper Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri* [(1987) 3 SCC 538] the tenant had entered into a partnership and the firm was carrying on business in the tenancy premises. This Court held that if there was a partnership firm of which the appellant was a partner as a tenant, the same would not amount to sub-letting leading to forfeiture of the tenancy; for there cannot be a sub-letting unless the lessee parted with the legal

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A possession. The mere fact that another person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession of the premises. So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting. In *Parvinder Singh v. Renu Gautam* [(2004) 4 SCC 794] a three-Judge Bench of this Court devised the test in these terms: (SCC p. 799, para 8)

B “If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the tenant may not be said to have parted with possession.

C However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant”.

F 26. In *Vaishakhi Ram and Others v. Sanjeev Kumar Bhatiani*⁹, one of us (Tarun Chatterjee, J.), in a case of subletting under Section 14(1)(b) of Delhi Rent Control Act, held:

G “A plain reading of this provision would show that if a tenant has sub-let or 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, he would be liable to be evicted from the said premises. That is to say, the following ingredients must be satisfied before

an order of eviction can be passed on the ground of sub- A
letting:

(1) the tenant has sub-let or assigned or parted with B
the possession of the whole or any part of the
premises;

(2) such sub-letting or assigning or parting with the B
possession has been done without obtaining the
consent in writing of the landlord."

....."It is well settled that the burden of proving sub- C
letting is on the landlord but if the landlord proves that the
sub-tenant is in exclusive possession of the suit premises,
then the onus is shifted to the tenant to prove that it was
not a case of sub-letting."

27. In *Nirmal Kanta (Dead) Through LRs. v. Ashok Kumar and Another*¹⁰, this Court held thus : D

"What constitutes sub-letting has repeatedly fallen for the E
consideration of this Court in various cases and it is now
well-established that a sub-tenancy or a sub-letting comes F
into existence when the tenant inducts a third party stranger
to the landlord into the tenanted accommodation and parts G
with possession thereof wholly or in part in favour of such
third party and puts him in exclusive possession thereof.
The lessor and/or a landlord seeking eviction of a lessee
or tenant alleging creation of a sub-tenancy has to prove
such allegation by producing proper evidence to that effect.
Once it is proved that the lessee and/or tenant has parted
with exclusive possession of the demised premises for a
monetary consideration, the creation of a sub-tenancy and/
or the allegation of sub-letting stands established."

28. The legal position that emerges from the aforesaid decisions can be summarised thus : H

- A (i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

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- B (ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting.
- C However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.
- D (iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

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- F (iv) If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.

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- G (v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

- H (vi) In other words, initial burden lying on landlord would stand discharged by adducing *prima facie* proof of the fact that

a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted. A

29. The main question that falls to be determined in the present case is: is High Court justified in non-suiting the landlord on the ground that he has not pleaded that business of the firm M/s. Mandovi Tours and Travels is not conducted by its partners, but by Balaji Lawande and Netravalkar and that tenant has parted with the premises by subletting the same to these two persons under the garb of deed of partnership by constituting a bogus firm? In our judgment, the answer have to be in negative. In the plaint, the landlord averred that the tenant has sub-let the premises to M/s. Mandovi Tours and Travels, a partnership concern, without his permission and that the sub-lessee has been exclusively running the business in the rented premises although he has not pleaded specifically that the premises have been sublet to Balaji Lawande and Netravalkar but such lack of pleading cannot be held to be fatal. It has to be kept in mind that a transaction such as sub-letting by tenant which is not permissible under lease may be outwardly a deceptive arrangement and landlord may not come to know of true facts. The pleadings in such matters ought not to be construed too technically. The true test, as has been repeatedly said, is to see whether the other side has been taken by surprise or prejudiced. B C D E

30. If the purpose of constituting partnership by the tenant is ostensible and a deed of partnership is drawn to conceal the real transaction of subletting in a given case, the court may be required to tear the veil of partnership to find out the real nature of transaction entered into by the tenant and in such circumstances the evidence let in by the landlord cannot be ignored on the ground that there is some variance between pleading and proof. In a case such as the present one, the rule of *secundum allegata et probata* is not strictly applicable as the tenant cannot be said to have been put to any prejudice. F G H

A 31. The High Court, as the discussion in impugned judgment shows, has been too technical in construing the pleadings of the case overlooking the fact that plea of sub-letting has been set up by landlord in the plaint and there has been full and critical examination of the evidence by the

B Additional Rent Controller as well as the Administrative Tribunal. The Additional Rent Controller and the Administrative Tribunal cannot be said to have misdirected themselves either on law or on facts. Both Authorities found as a fact that Mandovi Tours and Travels was not a genuine partnership and it was formed to cover up the subletting of the suit premises.

C They also found as a fact that the partnership having not been found to be genuine partnership, it was difficult to hold that the tenant continued to have a control over the suit premises. These findings recorded by the Administrative Tribunal as well as the Additional Rent Controller are based on the consideration of evidence on record. In any case, it cannot be said that the aforesaid view of the Rent Control Authorities is not a possible view.

32. In *Bathutmal Raichand Oswal v. Laxmibai R. Tarta And Another*¹¹, this Court held :

F "The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts."

33. In *State through Special Cell, New Delhi v. Navjot Sandhu alias Afshan Guru And Others*¹² this Court explained the power of the High Court under Article 227 thus :

G "Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over

11. (1975) 1 SCC 858

12. (2003) 6 SCC 641

all courts and tribunals throughout the territories in relation A to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article B 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such C discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the D exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could E not be exercised "as the cloak of an appeal in disguise".

34. The aforesaid two decisions and few other decisions, namely, *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*¹³, *State of Maharashtra v. Milind & Ors.*¹⁴, *Ranjeet Singh v. Ravi Prakash*¹⁵, came to be considered by this Court in the case of *Shamshad Ahmad & Ors. v. Tilak Raj Bajaj (Deceased) through LRs. And Others*¹⁶ and this Court held :

"Though powers of a High Court under Articles 226 and G 227 are very wide and extensive over all courts and

13. (1986) 4 SCC 447

14. (2001) 1 SCC 4

15. (2004) 3 SCC 682

16. (2008) 9 SCC 1

- A tribunals throughout the territories in relation to which it exercises jurisdiction, such powers must be exercised within the limits of law. The power is supervisory in nature. The High Court does not act as a court of appeal or a court of error. It can neither review nor reappreciate, nor reweigh the evidence upon which determination of a subordinate court or inferior tribunal purports to be based or to correct errors of fact or even of law and to substitute its own decision for that of the inferior court or tribunal. The powers are required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts and inferior tribunals within the limits of law."
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35. In light of the aforesaid legal position concerning jurisdiction of the High Court under Article 227, which the High Court failed to keep in mind, it must be held that in the facts

- D and circumstances of the case and the findings recorded by the Additional Rent Controller as well as the Administrative Tribunal, High Court was not justified in interfering with the concurrent orders of eviction based on the ground of sub-letting in exercise of its power under Article 227 of the Constitution of
- E India.

36. The submission of the learned senior counsel for the respondents that the powers of the Rent Controller under the Act, 1968 are exercisable like that of courts of Mamlatdars

- F under the Goa, Daman and Diu the Mamlatdar's Court Act, 1966 and that onus never shifted to the tenant is devoid of any substance and is noted to be rejected.

37. For the foregoing reasons, the appeal must be allowed and is allowed. The judgment dated November 29, 2006

- G passed by the High Court is set aside. The parties will bear their own costs.

K.K.T.

Appeal allowed.