

Hari Narain and anr. Vs. Bela Devi

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Court : Delhi

Decided On : Jul-16-1993

Reported in : 1993IIIAD(Delhi)88; 51(1993)DLT375

Judge : P.K. Bahri, J.

Acts : [Delhi Rent Control Act, 1958](#) - Sections 14(1)

Appeal No. : Second Appeal No. 29 of 1990

Appellant : Hari Narain and anr.

Respondent : Bela Devi

Advocate for Pet/Ap. : I.S. Mathur,; Tasleem Ahmedi,; Uma Dutta and;

Judgement :

P.K. Babri, J.

(1) The challenge in this appeal is to the judgment of the Rent Control Tribunal dated 30/03/1990, by which he had allowed the appeal of the landlady and had set aside the order of the Additional Rent Controller dated 1/02/1988, by which the eviction petition brought on the ground of eviction covered by Clause (b) of proviso to Sub-section (1) of Section 14 of the Delhi Rent Control Act was dismissed and the Rent Control Tribunal has allowed the eviction petition and passed the eviction order on the said ground leaving the parties to bear their own

costs.

(2) The case set up by the landlady, in brief, is that the shop located in premises No. C/30-A, Model Town, Delhi, was let out to Hari Narain but he has, about ten years earlier, sublet, assigned and parted with possession of the said shop in favor of his real brother Jagdish Narain without obtaining any written consent of the landlady. The two brothers filed a joint written statement and pleaded that there has been no subletting or assigning or parting with possession of the demised premises by the tenant in favor of his brother and as a matter of fact, both brothers have a partnership firm under the name and style of M/s. Lakshmi Store which is functioning in the shop and the partnership deed was executed on 4/10/1965 and both of them are carrying on business in the said shop as partners and they have share in profit and loss equally. They also pleaded that the partnership firm is also assessed to income-tax.

(3) In support of the ground of eviction the landlady appeared in the witness box and deposed that the tenant Hari Narain had parted with possession of the shop in favor of his brother Jagdish Narain about 10-12 years ago and it is only Jagdish Narain and his two sons, namely, Titu and Mukesh, who are running the business in the shop. She produced a chit Ex. A2 given by Hari Narain wherein he had mentioned his address as Hari Narain Raj Kumar, 3679, Narang Colony, Tri Nagar and she stated that Hari Narain is residing and having his shop at that address. She denied that both the brothers are carrying on the business in the shop in question. It is admitted fact that the landlady is residing on the first floor of the same property but she had not given any Explanation as to why she has waited for ten years for filing the eviction petition. The landlady herself had produced in cross-examination of Jagdish Narain, the alleged sub-tenant, the counterfoils of the rent receipts bearing signatures of Jagdish Narain the photocopies of the same proved on the record are Ex. R2 which are of the period 1969 to 1976. PW2 another tenant of the landlady in the same building deposed in examination-in-chief that it was Jagdish Narain only who is in possession of the shop in question. This witness, however, in cross-examination could not say whether both the brothers are running the shop together or not. However, he admitted that Hari Narain also sometimes comes and sits at the shop and even Hari Narain's son

also sometimes comes to the shop.

(4) However, the position of law is very clear that once a partnership is set up then onus is on the tenant to prove the existence of a genuine partnership and if such onus is not discharged then a presumption can be drawn in view of Section 14(4) of the Delhi Rent Control Act that in fact, subtenancy has been created by the tenant.

(5) The appellants had proved on record partnership deed Ex. R5 and assessment orders Exs. R6 to R8 of the Income-Tax Department of the assessment years 1975-76, 1976-77 & 1982-83 which clearly show that the Income-tax authorities have treated the business being run in the shop in question as partnership business of the two brothers having equal shares. They have also proved on record Account Opening Form, copy Exs R3 & R4; and specimen signatures Exs. R1 & R2 given in the bank showing that bank account was opened in 1984 in the name of partnership and both the partners could individually operate the bank account. The two appellants appeared as RW2 & RW3 and made statements on oath that partnership business of the two appellants is being run in the demised premises.

(6) The learned Additional Rent Controller relying on these documents and statements of the said two witnesses and also statement of PW2 gave a finding that appellants have been able to prove existence of a genuine partnership business of the two appellants in the shop in question and thus, the ground of subletting or parting with possession is not made out. He particularly emphasized that if there had been any such subletting or parting with possession of the shop as claimed by the landlady she would not have waited for eight years to file the eviction petition and she would not have got the signatures of the alleged sub-tenant on the counterfoils of rent receipts for such a long period.

(7) The learned Tribunal, on the other hand, after referring to the contents of the partnership deed has given a finding that this partnership deed does not meet with the requirements of the definition of 'partnership' given in the Partnership Act and thus, he reversed the finding of the Additional Rent Controller and held that appellants have failed to prove the existence of any genuine partnership business

in the shop in question and thus, presumption mentioned in Section 14(4) of the Delhi Rent Control Act came into play and ground of subletting stood proved.

(8) The learned Rent Control Tribunal has relied on *Mangat Ram v. Om Parkash*, (1962) 64 Plr 30. It is, indeed, not in dispute that Section 4 of the Partnership Act lays down the essential elements which must exist before a particular business could be called partnership business. Those elements are:

(i) it must be the result of an agreement between several persons; (ii) the agreement must be to share the profits of the business; and (iii) the business must be carried on by all or any of them acting for all and there must be an intention to become partners.

(9) In the cited case the partnership deed did not indicate as to who was to carry on the business, whether all partners were to carry on business or one of the partners was to carry on business acting for the other partners and thus, as one of the essential elements to show the existence of partnership was lacking, it was held that the said partnership deed did not bring about any partnership as understood under the Partnership Act. Similar was the position in *Kastur Chand v. Gujjar Mal & Others*, 1977 (2) RLR 470.

(10) There is no dispute about the legal proposition enunciated in these two judgments. Unfortunately in the present case the learned Tribunal only referred to the terms 1 to 11 of partnership deed Ex. R5 in coming to the conclusion that this partnership deed does not indicate as to who is to carry on business out of the two brothers and whether one brother was to carry on business on behalf of the other brother. So, as the element of agency is lacking, thus, this particular document does not bring about a partnership in consonance with Section 4 of the Partnership Act. The learned Rent Control Tribunal unfortunately failed to notice the recitals mentioned in the document which clearly indicated that both the partners are carrying on business in the said shop jointly. It was recited that Hari Narain was carrying on the general merchants business in the shop since 1962 but due to paucity of funds the business was not successful and therefore, he had joined his brother Jagdish Narain as partner in the said business and both the parties have been running the said partnership business of general merchants

since 1/10/1965. This partnership deed was executed on 4/10/1965. So, it is quite clear that the said essential element of partnership mentioned in Section 4 of the Partnership Act was indicated in the recitals of the document that both partners are to carry on the actual business in the saidshop. So, these two judgments relied upon by the Rent Control Tribunal were distinguishable on facts. This omission of the Rent Control Tribunal to read the recitals of the document which have ample bearing in understanding the intention of the parties gives rise to a question of law and second appeal is competent on question of law before this Court.

(11) There is no doubt a typographical mistake in Ex.R5 as to the date when Hari Narain started the business in the shop. Because it is not disputed in the pleadings that tenancy commenced in 1963, so mentioning of the year 1962 on the face of it is typographical mistake. No question was put to the appellants in cross examination to get the Explanationn as to how the year 1962 came to be mentioned. The learned Counsel for the respondent has drawn my attention to the endorsement of the Stamp Vendor appearing at the back of the first page of the document which shows that stamp paper was purchased on 6/10/1963. This has been highlighted by the learned Counsel for the respondent in support of his contention that it was not a genuine document and it has been brought in existence only for the purpose of this case. Again, no question was put to either of the appellants in cross-examination with regard to purchase of this stamp paper in1963 and reasons for purchasing the said stamp paper in the year 1963. It is to be remembered that there was admittedly no dispute or quarrel amongst the parties till the filing of this eviction petition. The landlady was very well aware of Jagdish Narain functioning in the shop for the last so manyyears. So, there could be no occasion for the appellants to have started taking steps for showing the existence of partnership in the shop in question in order to camouflage the alleged subletting in favor of Jagdish Narain.

(12) The Income-tax assessment orders would also indicate that there must have been genuine partnership otherwise there could be no reasons forthe appellants to have filed their returns in the Income-tax department as far back as in the year 1975-76 onwards. It is, no doubt, clear from the sub Ex.A2 that tenant has another shop in Tri Nagar but still in cross-examination on questions were put to find out

from him as to who is running the shop at Tri Nagar. It has come out in cross-examination of Public Witness 2 that tenant has a son and so possibility of tenant's son helping the tenant in his shop at Tri Nagar cannot be completely over-ruled. Be that as it may, the mere fact that tenant has another shop at Tri Nagar would not lead to any inference that the business being carried on in the shop in question is not partnership business of the appellants and is the exclusive business of Jagdish Narain. Ex. Rio is the copy of the certificate issued under the Shop and Establishment Act. This was issued on 19/01/1968. This also shows that occupier employer is Hari Narain. Incase the appellant-tenant had sublet the shop to brother Jagdish Narain, there could be no occasion for tenant as being shown occupier employer under the Shop and Establishment Act.

(13) The learned Counsel for the respondent has pointed out that there exists a telephone in the name of Jagdish Narain in the shop in question where as Hari Narain in cross-examination has stated that he did not remember the telephone number and from this Counsel for the respondent would like me to draw an inference that Hari Narain is not at all coming to toe shop. Some persons may have weak memories for the numbers. So,only on this score that tenant did not remember the telephone number existing in the shop is no ground to further draw an inference that business being run in the shop is not partnership business of the appellants. The question is whether there exists a genuine partnership. It is not necessary that tenant as a partner should also continue to remain in the shop and run the business of partnership. The partnership business could be carried on by the other partner Jagdish Narain on behalf of the tenant Hari Narain. The terms of the partnership deed show clearly that both the partners are equally liable for losses of the partnership business being run in the shop. Incase a fictitious partnership deed was to be brought into existence the tenant would not have taken up the liability to share the losses which may occur inthe business being run in the shop in question. One of the clauses of the partnership also makes it clear that the tenancy rights in the shop in question would continue to belong to the tenant but the rent was to be paid by the partnership firm and on dissolution of partnership possession of the tenancy premises was to be handed over to the tenant and Jagdish Narain was to have no right or claim to the said tenancy premises. The right to possess the tenancy premises has not been given up by the tenant.

(14) In *Jagan Nath (deceased) through Lrs. v. Chander Bhan & Ors.*, : AIR 1988 SC1362 , it has been clearly held that 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 and the 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. It was emphasized that so long as the tenant retains the right to possession there is no parting with possession in terms of Clause (b) of Section 14(1) of the Delhi Rent Control Act. In the cited case the tenant had retired from the business and his sons only were looking after the business. Still it was held that the tenant had the right to displace the possession of the sons. So, it cannot be said that tenant has legally divested himself of legal possession of the demised premises.

(15) In *re: Ambalal Sarabhai*, Air 1924 Bom 182, it was held that the fact that the control of the business is kept with one partner does not in any sense negative the existence of partnership according to law. In support of this proposition that unless legal possession is parted with by the tenant there cannot be any subletting. Counsel for the appellants has cited *Gundalapalli Rangamanner Chetty v. Dew Rangiah & Others* : AIR1954 Mad182 and *Helper Cirdharbhai v. Saiyed Mohmad Mirasaheh Kadri & Others*, : [1987]3SCR289 . There is no dispute about the legal proposition of law enunciated in these judgments,

(16) The learned Counsel for the respondent has argued that no account books have been produced by the appellants to prove as to what were the initial investment of the appellants in the partnership business. Both the appellants when they appeared in the witness box deposed that they have brought the available account books but no question was put in cross-examination to the appellants in respect of the genuineness of those account books. Jagdish Narain had clearly stated that he can give the amount of investment made by each of the partners from the account books brought by him but still no question was put in that connection by the respondent. So, it cannot be said that appellants have suppressed the production of account books in the present case.

(17) In *Banarsi Dass v. Smt. Shakuntala*, 1988(1) DL 431, it was held that an adverse inference can only be drawn against a person who does not produce or offer to produce the account books. In the present case the appellants had brought the account books which were available in Court at the time they gave their statements. So, no adverse inference can be drawn against the appellants in not filing the account books in Court when they have produced the account books and in case the respondent thought that those account books were fictitious and did not depict true facts, she could have sought inspection of the account books and cross-examine the appellants pin-pointing any deficiencies which might have existed in the account books. No such steps were taken by the respondent. So, it cannot be said that any adverse inference can be drawn against the appellants in the present case for not filing the account books on the record of the case.

(18) In view of the above discussion, I hold that judgment of the Rent Control Tribunal is vitiated with illegality and he was not legally right in reversing the judgment of the Additional Rent Controller which was well reasoned and based on evidence available on the record. I hold that ground of eviction covered by Clause (b) of proviso to Sub-section (1) of Section 14 of the Delhi Rent Control Act is not made out.

(19) I allow the appeal and set aside the judgment of the Rent Control Tribunal and restore the judgment of the Additional Rent Controller dismissing the eviction petition. Parties are, however, left to bear their own costs throughout.