

Krishan Lal and anr. Etc. Vs. Harbans Lal and anr. Etc.

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Court : Jammu and Kashmir

Decided On : May-15-1987

Reported in : AIR1987J& K82

Judge : A.S. Anand, C.J.,; M.A. Shah and; M.L. Bhat, JJ.

Acts : Jammu and Kashmir Houses and Shops Rent Control Act, 1966 - Sections 2(6) and 11(1)

Appeal No. : Civil 2nd Appeal No. 5 of 1981 and Civil Revn. No. 56 of 1980

Appellant : Krishan Lal and anr. Etc.

Respondent : Harbans Lal and anr. Etc.

Advocate for Def. : R.P. Bakshi and; K. Chopra, Adv.

Advocate for Pet/Ap. : Avtar Singh and; L.K. Sharma, Adv.

Judgement :

Anand, C.J.

1. The question that has been referred by a learned single Judge of this Court for its decision by a Full Bench reads :

'Is a sub-tenant necessary party to a suit for ejectment brought under Section 11(1) of the J. & K. Houses and Shops Rent Control Act, 1966, even if the sub-

tenancy has been created in his favour by the tenant of the leasehold without the consent of his landlord, or even if the same is not created in respect of a major portion of the leasehold and is also not for a period of more than seven consecutive months ?'

The reference is essentially in two parts : one, is a sub-tenant necessary party even when the sub-tenancy has been created without the consent of the landlord, and, two, is the sub-tenant a necessary party even when the sub-tenancy has not been created in respect of a major portion of the leasehold and is also not for a period of more than seven consecutive months

2. The distinction between the two parts is self evident. Whereas the first affords a right of eviction to the landlord under the J. & K. Houses and Shops Rent Control Act, 1966 (hereinafter referred to as the Act), the second does not. As the reference is based on the phraseology of Clause (c) and the proviso to Clause (h) of Section 11(1) of the Act, it would be necessary first to notice the provisions of Section 11(1)(c) of the Act :

Section 11 reads thus :

'Protection of a tenant against eviction. --(1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any house or shop shall be made by any Court in favour of the landlord against the tenant, including a tenant whose lease has expired :

Provided that nothing in this sub-section shall apply to any suit for decree for such recovery of possession-

(a) xx xx xx xx (b) xx xx xx xx (c) Against a tenant who has sublet the whole or a major portion of the house or shop for more than seven consecutive months : Provided that if a tenant, who has sublet major portion of the house or shop, agrees to possess as a tenant the portion of the house or shop not sublet on payment of rent fixed by the Court, the Court shall pass a decree for ejectment from only a portion of the house or shop sublet and fix proportionately fair rent for the portion kept in possession of such tenant, which portion shall thenceforth

constitute house or shop under Clause (3) or CL (5) of S 2 and the rent so fixed shall be deemed fair rent fixed under Section 8; XX XX XX XX'

3. The section opens with a non obstante clause implying thereby that no order or decree for the recovery of possession of any house or shop to which the Act applies shall be made by any Court in favour of the landlord against a tenant except on the grounds contained in the Act. Clause (c) is but one such ground for eviction of a tenant who has sublet the whole or major portion of the house or shop for more than seven consecutive months. This clause was, however, amended vide Act No. XVI of 1978 and the absolute right of eviction on the ground of subletting of the whole or a major portion of the building for a period beyond seven consecutive months was made subject to the following proviso :

'Provided further that no order or decree for the recovery of possession shall be made in favour of the landlord if the tenant has sublet the house or shop or portion thereof with the written consent of the owner.'

It was, thus, for the first time in 1978 that the element of 'written consent' of the owner to the creation of a sub-tenancy was introduced by the legislature. For Clause (c) to be attracted in a given case, after the addition of the second proviso, the two conditions, viz. (1) that the tenant has sublet the whole or major portion of the house or the shop, and, (2) that the period of sub-tenancy has exceeded seven consecutive months, are subject to a further condition that where 'the tenant has sublet the house or shop or any portion thereof with the written consent of the owner', such a sub-tenancy cannot be made a ground for eviction.

4. Landlord's right to seek ejectment under Clause (h), however, is not affected by the consent or lack of it as the first proviso to the clause, mandates the landlord to make all sub-tenants necessary parties so as to afford them an opportunity to defend the claim to a decree for their ejectment. Since, the ground of ejectment under Clause (h) is independent of the rights created by Clause (c), the distinction envisaged by it about the portion and the period for which sublease is created is immaterial vis-a-vis the proviso to Clause (h).

5. Although the reference contemplates sub-tenants being made necessary parties in all suits brought under Section 11(1) of the Act but the question of all sub-tenants being made parties is mainly countenanced by the proviso to Clause (h) as appears from its plain language, which makes it obligatory for the landlord to make all sub-tenants of the leasehold parties to the suit brought under this clause and allowed opportunity of contesting the claim to a decree for ejectment. This clause reads :

'(h) Where the house or shop is reasonably required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the house or shop is held : Provided that all sub-tenants in the house or shop are made parties to the suit and allowed opportunity of contesting claim to decree for ejectment.'

6. Thus, unlike in Clause (c), the right of ejectment on the ground of reasonable requirement is not made subject to the tenancy whereas such a consent is a complete defence to a suit brought on the ground of subletting. So while consent of the landlord in case of subletting will determine the outcome of a suit brought under Clause (c), it is not so under Clause (h) as the proviso apart from requiring a sub-tenant being made party to the suit, allows him to consent (contest ?) the claim to decree for ejectment. This raises the question as to whether a sub-tenant has a right to resist the suit even though the owner had no privity of contract with him in cases covered by Clause (h). To determine this, first of all one has to find out the defence which is available under the Act to a tenant. The Act is admittedly designed to afford protection of possession to a tenant which is the rule while his ejectment an exception. Clause (h), therefore, being an exception, is nothing but a statutory recognition of the right of an owner to seek eviction when his requirement for personal use and occupation and for building or rebuilding is found to be genuine. But the term 'reasonably required' as occurring in the clause is further qualified by the Explanation appended to it which reads :

'The Court in determining the reasonableness of requirement for purposes of building or rebuilding shall have regard to the comparative public benefit or disadvantage by extending or diminishing accommodation, and in determining

reasonableness of requirement for occupation shall have regard to the comparative advantage or disadvantage of the landlord or the person for whose benefit the house or shop is held and of the tenant.'

7. The explanation unmistakably qualifies and controls the term 'reasonably required' by making it dependent to the comparative advantage and disadvantage of the landlord and tenant in case of necessity for personal occupation and public benefit that will accrue in case of building or rebuilding. The object of making all such sub-tenants parties to the suit where relief of ejectment is claimed under Clause (h), is obviously to allow them an opportunity of contesting the claim for ejectment. Since, partial eviction is also permitted, as is evident from the explanation to the clause, it necessarily follows that in case there are subtenants, they must be before the Court because an order likely to be passed by the Court can affect one or more of such subtenants. Another question however, is : whether all the defences which are available to a tenant are also available to the subtenant as well, who admittedly is not a tenant within the meaning of Section 2(6) of the Act which defines only a tenant. Likewise can a subtenant question the bona fides of the landlord about his requirement for the purpose of building and rebuilding. The answer to these questions will depend upon the interpretation of the proviso to the clause which makes a sub-tenant a necessary party. The proviso as noticed elsewhere does not speak of a subtenant being made a party to the suit like a pro forma defendant having no interest in the lis but confers upon him the right to contest the claim of the landlord to a decree for ejectment on all those grounds which are available to a tenant. This means the legislature has granted the subtenant the rights available to a tenant to defend his possession in a suit brought under Clause (h), thereby equating the two. In other words, a landlord in order to prove his reasonable requirement has to compare his need not only with the need of the tenant but also with that of the sub-tenant or sub-tenants, as the case may be. Once this conclusion is reached, it next requires to be determined as to whether the term "all sub-tenants" as used in the proviso is qualified or it includes, in its fold, all persons put in occupation of the premises whether with or without the consent of the owner. Before this question is answered, it may be emphasised that as an abstract proposition of law, it is no longer *res integra* that a sub-tenant is not a necessary party to a suit for ejectment of the tenant as laid down by the apex

Court in *Rupchand Gupta v. Raghuvanshi (Private) Ltd.*, AIR 1964 SC 1889 which reads :

'Taking the last action first, viz.. Raghuvanshi's omission to implead the appellant, it is quite clear that the law does not require that the sublessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and doesnot implead the sublessee as a party to the suit, the object of the landlord is to eject the sublessee for the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sublessee. This may act harshly on the sublessee, but this is a position well understood by him when he took the sublease. The law allows this and so the omission cannot be said to be an improper act.'

8. However, these observations may not apply to cases where a special provision is made for the benefit of the sub-tenants as is the case under the Act which allows all subtenants to contest the claim of landlord to a decree for ejectment based on Clause (h). However, the term 'all sub-tenants' though loosely used does not mean all those who have been put in occupation of the leasehold without the express or implied consent of the landlord and about whom he knows nothing. The expression has to be given a rather restricted meaning so as to harmonise it with the other provisions of the Act including Section 2(6) and so harmonising it follows that the expression is used in respect of those subtenants who can be allowed an opportunity under the Act to contest the claim to a decree for ejectment. Under the proviso to Clause(h) all the defences which are available to a tenant are *mutatis mutandis* available to the subtenant as well. For getting a decree of ejectment under Clause (h) the landlord has to compare his requirement with that of the tenant which is further subject to comparative advantage and disadvantage accruing to either of them. It, therefore, follows by necessary implication that by allowing a sub-tenant to contest the claim of the landlord, the proviso has equated him with the tenant vis-a-vis the twin grounds of ejectment contemplated by the clause and, therefore, the inference is that in order to bind the landlord to prove his requirement not only vis-a-vis the tenant but also the subtenant, the sub-tenancy ought to have been created with his consent and not otherwise.

9. The term 'sub-tenant' as such has not been defined in the Act but a simple consent of the landlord to sublet the premises though sufficient to create a sub-tenancy would not make a sub-tenant a tenant under the definition as given under Sub-section (6) of Section 2 of the Act reading :

' 'tenant' means any person by whom or on whose account rent or any money liable to be paid for use of house or shop is or but for a special contract, would be payable for any such premises and includes legal representative of such person, and, person continuing in possession after termination of tenancy in his favour, but does not include any person placed in occupation of the house or shop by its tenant without the consent of the landlord.'

The consent of the owner as used in the sub-section for creating sub-tenancy is nothing but a recognition of the institution of subtenancy by the Act and proviso to Clause (h) will have to be read in conjunction with it to harmonise the two. Any other interpretation would defeat the purpose of the proviso and lead to an anomalous situation making the latter part of the definition of 'tenant' superfluous and will also render the proviso redundant. This, however, is not possible because one of the basic principles of interpretation of statutes is to interpret the various provisions as they stand to harmonise them to advance the object of the Act and in case there appears to be any conflict while enforcing them to give an interpretation which harmonises their enactment. Once this is kept in view, the consent of the landlord in creating sub-tenancy as used in Section 2(6) will go to determine the status of a sub-tenant whom the landlord is obliged to make a party under Clause(h). In other words, the proviso to Clause (h) refers to only those sub-tenants who are not put in occupation of the premises by the tenant with the consent of the owner in terms of Section 2(6). One may argue that a person put in possession of the premises by the tenant with the consent of the landlord has been defined as a tenant by the Act but such an argument is fallacious because if that were to be considered the object or the intention of the legislature, then proviso to Clause(h) would not have been enacted as the relationship of landlord and tenant having come into being, a sub-tenant would substitute for the tenant. But that is not the case and hence the conclusion that the proviso to Clause (h) was, intended only to protect the interest of a sub-tenant who had been put in

possession of the premises by the tenant with the consent of the landlord in contemplation of Section 2(6) and none else. It, therefore, follows that the term 'all sub-tenants in the house or shop' as occurring in the proviso is qualified and controlled by latter part of Section 2(6) referring only to those sub-tenants who have been let in possession of the premises by the tenant with his consent. This was also the law stated by the learned single Bench of this Court in *Sant Ram v. Abdul Haq*, 1971 J & K LR 174 : (AIR 1974 J & K 81). While rejecting the argument that all sub-tenants, whether let in possession of the leasehold with or without the consent of the owner, are necessary parties to a suit for ejectment brought under Clause (h), Bhat, J. (as his Lordship then was) observed :

'It is nobody's case that Kasturi Lal (subtenant) was put in occupation of the shop with the consent of the respondent 'landlord'. Therefore, according to the definition of the tenant he cannot be regarded as a tenant under the Act. Section 11(1)(h) proviso quoted above and relied upon by the learned counsel for the petitioner applies only to those people who can be called sub-tenant when a person is not to be considered as a tenant, the question of his becoming a subtenant cannot arise because tenant is the genus and sub-tenant is a specie.'

One may not agree with the statement that 'tenant is the genus and sub-tenant is the specie' or that 'when a person is not to be considered as a tenant, the question of his becoming a sub-tenant would not arise' but the conclusion arrived at, in my opinion is correct. This is also the position under the second proviso to Clause (c) of the Act and, therefore, no different view is possible, the argument to the contrary notwithstanding.

10. Again, referring to Section 108(j) of the Transfer of Property Act, which permits the creation of sub-leases, the learned Judge held :

'But cases under the Act have to be determined and decided in terms of the Act itself.'

and rejected the application of Section 108(j) of the Transfer of Property Act to the cases under the Act. This view has acquired the seal of finality from the apex Court in *K. K. Krishnan v. H. K. Vijay Raghwan*, AIR 1980 SC 1756, wherein their

Lordships observed :

'If a State Rent Act makes provisions for eviction on certain specified grounds, eviction cannot be resisted on the basis of rights conferred by the Transfer of Property Act. Section 108(5) of the Transfer of Property Act stands displaced by Section 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act and is no defence to an action for eviction based on Section 11(4)(i) of the Act.'

11. The judgment in Sant Ram's case (AIR 1971 J & K 81) (supra), therefore, may be held to have laid down the correct law, though for somewhat different reasons as discussed above.

12. Similar questions once again fell for consideration before another learned single Judge of this Court in Chela Singh v. Tejinder Singh, 1982 Kash LJ 272 : (AIR 1983 J & K 10) where the trial Court of Sub Judge (C.J.M.), Jammu, had refused to implead the sub-tenant as a party to the suit for ejectment because the lease-deed did not permit its creation. Mufti, Actg., C. J. (as his Lordship then was) after analysing the scope of Section 11 of the Act observed :

'.....In this background let me proceed to consider Clause (c) of Sub-section (1) of Section 11 of the Act. Clause (c) provides for eviction of a tenant where he has sublet the whole or major portion of the house or shop for more than seven consecutive months. It will be noticed that, in effect and substance, Clause (c) provides for ground of eviction based upon forfeiture of tenancy where the following conditions are satisfied, viz. :

- (i) that the tenant has sublet the whole or major portion of the house or shop, and
- (ii) that the period of sub-tenancy has exceeded seven consecutive months.

Thus, Clause (c) disentitles a tenant from creating a sub-tenancy, the essential features of which are that it takes in whole or major portion of the demised premises and moreover extends over a period exceeding seven consecutive months. The sub-tenancy so created is unauthorised by the Act and if the tenant creates such sub-tenancy, whether with or without the consent of the landlord, he runs the risk of being evicted by the landlord and in a suit for eviction based on the

ground, whether alone or in conjunction with any other ground the sub-tenant would not be necessary party.....'

13. With respects I may say that the view expressed is not wholly correct. But, be that as it may, this view stands modified by the introduction of the second proviso to Clause (c) to the extent that while written consent of the landlord would make such a sub-tenancy permitted by the Act, the absence of it will expose the tenant to eviction and a subtenant, in that event, would not be a necessary party. The second proviso to Clause (c) introduced in 1978 was not noticed by the learned Judge and that perhaps accounts for the view held by him which must now be held to be no longer good law to the extent indicated above.

14. Coming now to the second part of the reference Mufti, Actg., C. J. in Chela Singh's case (AIR 1983 J & K 10) (supra) opined :

'.....On the other hand, if the subtenancy is of a nature which does not impinge upon Clause (c), the sub-tenancy would be deemed to be permitted sub-tenancy and in a suit for eviction brought by the landlord against the tenant, on any ground whatsoever, the sub-tenant would be a necessary party, irrespective of the fact whether the landlord had consented or not to the creation of such sub-tenancy. Viewed thus, el. (h) takes care of a sub-tenancy permitted by the Act in the sense explained above and where landlord seeks to sue the tenant on any ground mentioned in this sub-clause during the subsistence of such permitted sub-tenancy the law requires the landlord to make the sub-tenant a party to the suit and enjoins upon the Court to allow him opportunity of contesting the claim of ejection.....'

This view, also, with respects, in my opinion, is too widely stated. Under the scheme of the Act, consent of the owner being sine qua non for creation of sub-tenancy, it follows that proviso to Clause (h) refers only to such subtenants. This position is also amply borne out from the definition of the expression 'tenant' as used in Sub-section (6) of Section 2 of the Act (supra) and the right given to the sub-tenant by the proviso. Any argument to the contrary would lead to illogical results such as that the law expects the owner to go searching for the sub-tenants so as to implead them as parties to a suit about whom he has no knowledge. Even

otherwise, if sub-tenants not inducted with the consent of the landlord are deemed to be necessary parties in a suit for ejectment against the tenant, then a clever tenant by dubious means may attempt to defeat the claim for ejectment or in any event delay the disposal of the suit for ejectment by projecting fictitious persons as sub-tenants thereby perpetuating his possession by protracted litigation, to the harassment of the owner and waste of time of the Court in procedural wrangles. Law cannot countenance such a situation. It is, therefore, obvious that Clause (h) has to be read in conjunction with Clause (c) and the definition of the expression 'tenant' as used in Section 2(6) of the Act so as to harmonise all the provisions. A perfect harmony would, therefore, be reached when Clause (h) is held only to take care of such subtenants who are inducted with the consent of the landlord and such a sub-tenant in a suit brought under Clause (h) independently or in conjunction with the other sub-clauses, will have the right to contest the claim of ejectment in a suit brought by the landlord against the tenant and would be a necessary party. It is, thus, only such a sub-tenancy which is permitted by the Act. Accordingly the sub-tenant of a small portion of the leasehold and for a period of less than seven consecutive months, would be a necessary party only if the sub-tenancy has been created with the consent of the landlord as contemplated by Section 2(6) of the Act. The opinion of Mufti, Actg., C. J., therefore, to the effect that if the sub-tenancy is permitted then the sub-tenant would be a necessary party even if he was not inducted into the leasehold with the consent of the landlord, in my opinion, cannot be held to be good law.

15. It was in the background that the learned referring Judge noticed the cleavage in the judicial opinion in the two cases noticed above and made a reference by formulating the question reproduced in the opening part of this judgment. So far as the two judgments are concerned, as already observed, the law laid down in Sant Ram's case (AIR 1971 J & K 81) (supra) is the correct law whereas the law laid down in Chela Singh's case (AIR 1983 J & K 10) cannot be said to be a good law to the extent discussed above.

16. In the light of the aforesaid discussion, therefore, my answer to the question would be that in a suit for ejectment brought under cl. (h) singly or conjointly with the other grounds contained in Section 11(1) of the Act, all sub-tenants inducted

with the consent of the landlord as contemplated by Section 2(6) would be necessary parties to a suit for eviction but the written consent of the landlord to the creation of the sub-tenancy would disentitle the landlord to seek eviction of the tenant only on the grounds under Clause (c) in view of the amendment made in 1978.

17. The reference is answered accordingly.

M.A. Shah, J.

18. I agree.

M. L. Bhat, J.

19. I agree.

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