A PULIN BEHARI LAL

v.

MAHADEB DUTTE AND ORS.

FEBRUARY 3, 1993

B [KULDIP SINGH AND N.M. KASLIWAL, JJ.]

West Bengal Premises Tenancy Act, 1956—Sections 13 and 16—Eviction on the ground of sub-letting—Previous consent in writing of the landlord for creation of sub-tendancy—Necessary.

C *House Rent—Eviction on the ground of default in payment of rent and sub-letting—Question of waiver—Whether acceptance of rent after having knowledge of sub-letting amounts to waiving.*

The appellant was the tenant with respect to shop room on a monthly rent of Rs. 50. On 27th September, 1973, the respondent purD chased the premises in question from the Commissioner of Partition and Receiver in a suit for partition between the owners of the said premises. The appellant tenant was notified about the sale and was asked to pay rent to the respondents.

E **The respondents filed a suit for ejectment on 12th December, 1975 in the City Civil Court on the ground of default in payment of rent and sub-letting. The Trial Court decreed the suit on the ground of sub-letting. The appellant filed an appeal before the High Court against the judgement of the Trial Court.**

F **The Judges of the Division Bench of the High Court took divergent views. While one Judge held that the plaintiff having accepted the rent even after having the knowledge of subletting plaintiff had waived or dispensed with their right of forfeiture and as such directed the dismissal of the plaintiff's suit, the other Judge took a contrary view that under the West** G **Bengal Premises Tenancy Act, 1956, a tenant was under an obligation to pay rent to the landlord and there was no question of waiving the right of forfeiture by accepting the rent by the landlord.**

In view the difference of opinion between the two judges, the matter was referred to a third Learned Judge, who agreed with the latter view. H **Thus the appeal preferred by the tenant was dismissed, against which the**

present appeal by special leave was filed. A

Dismissing the appeal, this Court,

HELD : 1.01. A perusal of the provisions of Section 13 and 16 of the Act clearly shows that when there was no previous consent in writing of the landlord for creation of sub-tenancy it shall be a ground for eviction in terms of Section 13(1)(a) of the Act. Even in case of creation of sub-tenancy with the consent of the landlord in writing it was necessary to follow the future procedure prescribed under section 16(1) of the Act. Mere knowledge or acknowledgement of rent cannot defeat the landlord's right to get a decree for ejectment on the ground of sub-letting. If the view as contended on behalf of the applicant is accepted the provisions of both the sections 13 and 16 would become nugatory. [476E-F] B C

1.02. There is a clear mandate in Section 13(1)(a) that the protection against eviction to the tenant shall not be available in case the tenant transfers, assigns or sub-lets in whole or in part the premises held by him without the previous consent in writing of the landlord. [476F] D

1.03. Waiver is a question of fact which depends on the facts and circumstances of each case. In case of waiver of any provisions of the Statute it is necessary to prove that there was conscious relinquishment of the statutes. [478D] E

1.04. In the instant case there is no question of waiver. It was necessary for the tenant appellant to prove that the landlord had accepted the rent being fully conscious that by their act they were relinquishing the right of eviction available to them on the ground of sub-letting under Section 13(1)(a) of the Act. [478E] F

1.05. Any acceptance of rent from the appellant in January, 1975 cannot amount to any waiver in respect of rent from the appellant in January, 1975 cannot amount to any waiver in respect of the right of eviction on the ground of sub-letting. [479D] G

M/s Shalimar Tar Products Ltd. v. *H.C. Sharma & Ors.*, [1988] 1 SCC 70, relied on. H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2629 of 1980.

From the Judgment and Order dated 17.3.80/25.7.80 of the Calcutta High Court in Original Decree No. 10 of 1980.

B Dr. Shankar Ghosh, Somnath Mukherjee and P.K. Mukherjee for the Appellant.

Rathin Das for the Respondents.

C The Judgment of the Court was delivered by

KASLIWAL, J. This is a tenant's appeal by grant of Special Leave in a suit for eviction decreed against him by all the Courts.

The appellant took one road side shop room in the ground floor of D premises No. 75, Surendra Nath Banerjee Road, Calcutta on rent @ Rs.50 per month. On 27th September, 1973 the respondents herein purchased the premises in question from the Commissioner of Partition and Receiver in High Court Suit No. 1183 of 1961 (*Anto Kumar Dhar* v. *Satya Narayan Dhar & Ors.*), a suit for partition etc., between the owners of the said premises. The said Commissioner of Partition and Receiver notified the appellant E about the said sale and asked him to attorn his tenancy and to pay rent to the respondents. The appellant as such started paying rent to the respondent purchasers till January, 1975. On 21st May, 1975 the respondent landlords sent a notice to quit on the ground of default in the payment of rent and subletting. The appellant sent a reply in writing on 6th June, 1975 F denying the alleged default in payment of rent as well as subletting. The respondents filed a suit for ejectment on 12th December, 1975 in the City Civil Court at Calcutta (IIIrd Bench). The suit was based on the ground of default in the payment of rent and subletting. The trial court decided the question of default in the payment of rent in favour of the appellant G but decided the question of subletting against him and as such decreed the suit by Judgment dated 12th June, 1979. The appellant aggrieved against the aforesaid Judgment filed an appeal before the High Court.

A Division Bench of the High Court consisting of N.C. Mukherji and Surendra Mohan Guha, JJ. heard the appeal. Guha, J. held that the H plaintiffs had knowledge of assignment or subletting in favour of Sujoy

Kumar Dass Gupta much earlier than the last payment of rent in January, 1975. In this view of the matter Guha, J. held that the rent having been accepted after the knowledge of subletting long before the determination tenancy, the natural inference from this conduct would be that the plaintiffs had waived or dispensed with their right of forfeiture. Guha, J. as such accepted the appeal and directed the dismissal of the plaintiff's suit. N.C. Mukherji, J. disagreed with the aforesaid view of Guha, J. and according to him the tenant's liability to eviction arose under the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the Act') once the fact of subletting was proved. According to Mukherji, J. a tenant under the Act was under an obligation to pay rent to the landlord and there was no question of waiving the right of forfeiture by accepting the rent by the landlord. In view of the difference of opinion between the two Learned Judges the matter was referred to third Learned Judge. Mr. P.K. Banerjee J., The third Learned Judge by his order dated 23rd June, 1980 agreed with the view of N.C. Mukherji, J. The majority view being in favour of the respondent landlords, the appeal was ultimately dismissed by the High Court by order dated 25th July, 1980. Aggrieved against the Judgment of the High Court, the tenant has come in appeal to this Court. We have heard Learned counsel for the parties and have gone through the record. The trial court as well as all the Learned Judges including Guha, J. in the High Court have recorded a finding of fact that there was no previous consent in writing by the landlord for the sub-tenancy created by the tenant appellant. This finding of fact is binding on the appellant and cannot be assailed before this Court. The only question on which Guha, J. held in favour of the tenant appellant was that the rent having been accepted after the knowledge of sub-letting, the natural inference from this conduct would be that the landlords had waived the right of claiming eviction against the tenant. In our view in the facts and circumstances of the present case the aforesaid view taken by Guha, J. is not correct. A perusal of the provisions of Sections 13 and 16 of the Act make the position clear. The relevant portions of the aforesaid provisions are reproduced as under:-

Section 13 - Protection of tenant against eviction

(1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or more of the following groups, namely:-

A (a) Where the tenant or any person residing in the premises let to the without the previous consent in writing of the landlord transfers, assigns or sublets in whole or in part the premises held by him;

Section 16 - Creation and termination of sub-tenancies to be notified-

B

(1) Where after the commencement of this Act, any premises are sublet either in whole or in part by the tenant with the previous consent in writing of the landlord, the tenant and every sub-tenant to whom the premises are sublet shall give notice to the landlord in the prescribed manner of the C creation of sub-tenancy within one month from the date of such subletting and shall in the prescribed manner notify the termination of such sub-tenancy within one month of such termination.

(2) Where before the commencement of this Act, the tenant with or without the consent of the landlord, has sublet any premises either in whole D or in part, the tenant and every sub-tenant to whom the premises have been sublet shall give notice to the landlord of such subletting in the prescribed manner (within six months) of the commencement of this Act and shall in the prescribed manner notify the termination of such-tenancy within one month of such termination.

E A perusal of the above provision clearly show that when there was no previous consent in writing of the landlord for creation of sub-tenancy it shall be a ground for eviction in terms of Section 13(1)(a) of the Act. Even in case of creation of such sub-tenancy with the consent of the landlord in writing it was necessary to follow the further procedure F prescribed under Section 16(1) of the Act. Mere knowledge and/or acceptance of rent cannot defeat the landlord's right to get a decree for ejectment on the ground of sub-letting. If the view as contended on behalf of the appellant is accepted the provisions of both the above sections 13 and 16 would become nugatory. There is a clear mandate in Section 13(1)(a) that the protection against eviction to the tenant shall not be available in G case the tenant transfers, assigns or sublets in whole or in part the premises held by him without the previous consent in writing of the landlord. It was contended by the learned counsel for the appellant that the provision as regards consent may be treated as mandatory but so far as the writing part of the consent is concerned the same may be treated as directory. It was H also contended that in the present case the sub-tenancy was created in 1970

even before the purchase of the suit premises by the present plaintiff/landlords on 27th September, 1973 and in this view of the matter the present plaintiff/landlords cannot file a suit for eviction on the ground of sub-letting under Section 13(1)(a). Reliance in support of the above contention has been placed on *A.S. Sulochna* v. *C. Dharmalingam*, [1987] 1 SCC 180.

We find no force in the above contention. The above case relied on by the Learned counsel for the appellant is altogether distinguishable. In that case the relevant provision for consideration was Section 10 (2)(ii)(a) of the Tamilnadu Buildings (Lease and Rent Control) Act, 1960. The undisputed facts in that case as observed in the Judgement were that the father of the appellant landlord had granted a lease in favour of the father of the respondent tenant prior to 1952 . The father of the appellant as also the father of the respondent both had died and respondent was accepted as a tenant upon the death of his father in 1968. The suit for eviction on the ground of unlawful sub-letting was filed in 1970 by the appellant who had inherited the property from her father. Admittedly, neither the appellant nor the respondent had any personal knowledge about the terms and conditions of the lease nor they had any personal knowledge regarding the circumstances in which the father of the respondent tenant had created a sub-tenancy way back in 1952, 18 years before the institution of the suit. Neither the appellant nor respondent had any personal knowledge as to whether or not the sub-tenancy was created with the written consent of the landlord 18 years back in 1952. On these facts it was held that there was nothing on record to show that the sub-letting which was made 18 years before the institution of the suit was in violation of the relevant provisions of law. There was no evidence direct or circumstantial on the basis of which it could be said that the lease did not confer on the father of the respondent the right to create a sub-tenancy, or, that it was done without written consent of the then landlord that is to say, the father of the appellant. Thus in the above case the plaintiff landlord had inherited the property from her father and had brought a suit for eviction on the ground of sub-letting which was created 18 years prior to the suit. This Court held that the flouting of the law, the sin under the Rent Act must be the sin of the tenant sought to be evicted, and not that of his father or predecessor in interest. Respondent inherited the tenancy, not the sin, if any, of his father. The law in its wisdom seeks to punish the guilty who commits the sin and not his son who is innocent of the rent law offence. The above case is further

A distinguishable because the sub-tenancy was created in 1952 long before the Act which came into force in 1960.

So far as the facts of the case in hand before us are quite simple. Admittedly a sub-tenancy has been created in 1970 without consent in writing of the previous landlord and the only question for consideration is B whether any waiver can be applied against the present landlords merely on account of accepting rent till January, 1975. The third Learned Judge of the High Court has relied on the provisions of sections 23 and 24 of the Act in order to hold that the question of waiver is only restricted under the aforesaid two sections which deal with the question of accepting rent C deposited under Section 21 in the Court or acceptance of rent in respect of the period of default in payment of rent where there is no proceeding pending in the Court for the recovery of possession of the premises. In our view there is no need of restricting the question of waiver under the provisions of sections 23 and 24 only which deal with special kind of D situation. We are considering the question of waiver independently of the provisions of the Act and it would be clear that there is no question of waiver in the present case. Waiver is a question of fact which depends on the facts and circumstances of each case. In the case of waiver of any provisions of the Statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the Statute. In the E case like the present one before us, it was necessary for the tenant appellant to prove that the landlords had accepted the rent being fully conscious that by this act they were relinquishing the right of eviction available to them on the ground of sub-letting under Section 13(1) (a) of the Act. The Rent Act is for the protection of the rights of the tenants but at the same F time it does not permit the sub-letting by a tenant without the consent in writing of the landlord and this provision has been kept in public interest for the benefit of the landlords and the same can only be negatived by an act of conscious relinquishment of such right by the landlord. We find support in the above view in a decision of this Court in *M/S Shalimar Tar Products Ltd.* v. *H.C. Sharma and Other,* **[1988] 1 SCC 70.** In the above G case it was held that:

> "Section 14 (1) proviso (b) and 16(2) and (3) of the Delhi Rent Control Act enjoin the tenant to obtain consent of the landlord in writing to the specific Sub-letting. This H requirement serves a public purpose i.e. to avoid dispute

as to whether there was consent or not. The mere permission or acquiescence is not enough. There is no implied permission. Any other interpretation of the provisions will defeat the object of the statute and is, therefore, impermissible". A

Apart from the circumstances mentioned above it has been further found established that the respondent landlord had given a notice to the appellant to quit determining the tenancy on 21st May, 1975. In reply to the aforesaid notice the tenant appellant had not disclosed that by a deed of assignment dated 21st June ,1974 in favour of Sujoy Kumar Das Gupta sub-letting had been made. Thus this fact was not disclosed even in the reply to the notice as late as 6.6.1975. This fact regarding sub-letting to Sujoy Kumar Das Gupta came to the notice of the landlord respondent for the first time on 15th September, 1975 when Sujoy Kumar Das Gupta, the Sub lessee himself sent a notice through his Solicitor intimating to the respondent landlords that partnership between Shri Gupta and appellant had been dissolved. In the said notice it had been stated that the appellant Pulin Behari Pal due to old age and physical infirmities had become unable to discharge his duties in the partnership business and as such had transferred, assigned all his interest, goodwill of the business and his right, title and interest to the said Sujoy Das Gupta absolutely and forever. Thus any acceptance of rent from the appellant Pulin Behari Pal in January, 1975 cannot amount to any waiver in respect of the right of eviction on the ground of sub-letting. Be that as it may, admittedly there is no compliance of Section 16 also in the present case and this is an additional factor on the basis of which the tenant appellant cannot escape the liability of eviction. B C D E F

In the result we find no force in the present appeal and it is accordingly dismissed with costs. In facts and circumstances of the case we grant time to vacate the suit premises on or before 30th April, 1993 on furnishing an usual undertaking before this Court within four weeks.

B.V.B.D. Appeal dismissed.