

KALA AND ANR.

A

v.

MADHO PARSHAD VAIDYA

AUGUST 27, 1998

[DR. A.S. ANAND AND D.P. WADHWA, JJ.]

B

Rent and Eviction :

Himachal Pradesh Urban Rent Control Act, 1987 :

S. 14(2)(ii)—Non-residential premises—Landlord seeking eviction of tenant for subletting—Rent Controller holding that subletting was not established and tenant did not part with possession of premises—Appellate authority passing order of ejectment—Revision dismissed by High Court—Held, onus to prove subletting is on landlord and if he establishes parting of possession in favour of a third party, onus would shift to tenant to explain—Since landlord did not discharge the initial burden and the tenant explained how the other person had permissive possession of shop as its manager, plea of subletting was not established—Appellate authority committed an error and the High Court allowed to perpetuate the same—To perpetuate an error is no virtue but to rectify it is the call of judicial conscience—High Court failed to correct the obvious error committed by appellate authority—Orders of High Court and appellate authority set aside and order of Rent Controller restored.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 997 of 1997.

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From the Judgment and Order dated. 19.9.96 of the Himachal Pradesh High Court in C.R. No. 14 of 1989.

G.L. Sanghi, P.R. Behl and M.A. Chinnasamy for the appellants.

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S.K. Puri and Arun K. Sinha for the Respondent.

The following Order of the Court was delivered :

This is a tenant's appeal by special leave. Respondent-landlord filed

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A an eviction petition against the appellants under section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter 'the Act') seeking eviction of the tenant from a shop situate in Moti Bazar, Muhalla Suhra, Mandi Town, H.P. According to the allegations made in the eviction petition the demised premises had been let out to Shri Hira Lal Sehgal, husband of appellant No.1. Shri Hira Lal Sehgal, died on 23rd February, 1983 and appellant No. 1 became the statutory tenant of the premises on his death. It was alleged that appellant No.1 thereafter sublet the premises to appellant No.2, Ravinder Kapur and that in the demised premises business was being run by appellant No. 2 though for "the advantage of both the appellants". The appellants filed a joint reply to the eviction petition and denied sub-letting. It was maintained that appellant No.2 who is the son of the sister of late Shri Hira Lal Sehgal had been brought up by late Shri Hira Lal Sehgal and that appellant No.2 was helping late Shri Hira Lal Sehgal in running his business at the demised shop till his death in 1983 and that after his death, appellant No. 2 was helping appellant No.1 and managing her business 'for and on her behalf'. The trial court after framing issues and recording evidence of the parties vide judgment and order dated 20th March, 1986 dismissed the eviction petition and held that the landlord had failed to prove that appellant No.1 had at any stage parted with the possession of the disputed premises after the death of her husband or that she had sublet the same to appellant No.2. It was found, as a fact, that appellant No.2 was working in his capacity as a Manager for rendering assistance to run the business to appellant No.1. Aggrieved by the order of the trial court, the landlord-respondent filed an appeal before the appellate authority under the Act.

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On 18th January, 1989, the appeal was accepted and the order of the Rent Controller was set aside. Ejectment of the appellants was ordered. The order of the appellate authority was challenged by the appellants through a civil revision petition in the High Court of Himachal Pradesh. A learned Single Judge of the High Court on 19th September, 1996, dismissed the revision petition thereby confirming the order of the appellate authority. Hence this appeal by special leave.

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H We have heard learned counsel for the parties and perused the record.

For what follows, the appellate authority committed an error not only in the appreciation of evidence but also by mis-reading the evidence and assuming the existence of certain facts which were neither alleged nor proved. The High Court also fell into a similar error. A

Section 14(2)(ii) of the Act provides that a landlord may evict his tenant by applying to the Controller, where the tenant has, after the commencement of the Act, without the written consent of the landlord transferred his rights under the lease or sublet the entire building or rented land or any portion thereof. B

In the petition filed under Section 14 of the Act by the respondent-landlord it was *inter alia* stated in paragraph 16 that :- C

"The whole of the premises have been sub-letted to respondent No.2 without the written consent of the petitioner, who is now running the business, to the advantage of both the respondents, after 23.2.1983." D

In paragraph 17 it was stated:-

"As respondent No.1 who is a tenant in the premises, has sublet the entire building to respondent, No.2 after the death of her husband on 23.2.1983, therefore both are liable to be ejected from the premises. Notice was also issued to the respondent no.1 on 18.11.1983, but she kept mum after its receipt, which clearly indicate that claim of the petitioner is *bona fide* and based upon true allegation." E

The appellants in their written statement replied paragraph 16 thus :- F

"Para No.16 is denied. The father of the respondent No.2 died when he was 2 years of age. The respondent No.2 is son of sister of late Sh. Hira Lal Sehgal, who has been maintained and brought up by late Sh. Hira Lal Sehgal and had been assisting earlier Sh. Hira Lal Sehgal and after his (death) respondent No.1 who being a widow is not able to handle the business as such is helped and assisted by respondent No.2 in her exclusive business which she has inherited from her husband. It is absolutely wrong and denied H

A that the premises have been subletted as alleged, the legal possession remains with the respondent No.1. The respondent No.2 is managing the business for and on behalf of respondent No.1 who is the proprietor of business and is admittedly the tenant of premises."

B The contents of paragraph 17 were also denied in view of what was stated in response to paragraph 16.

C The landlord-respondent appeared as his own witness as PW.2. In the examination-in-chief he remained completely silent about his allegation of the appellant No.1 having sub-let the premises to appellant No.2 or having parted with the possession of the premises or any portion thereof in favour of appellant No.2. The only reference made in examination-in-chief in that regard is to the effect that :-

D "On 23rd February, 1983 Shri Hira Lal died. After that his wife had without my consent, made Ravinder Kapur to sit in the said shop".

In his cross-examination the landlord-respondent admitted:-

E "I do not know whether the possession of the shop is with Kala and Respondent No.2 is working as helper."

F He further admitted that he had not found out as to for whose benefit the business was. The landlord-respondent also examined Shri B.C. Gupta, the Shop Inspector as PW.4. The Shop Inspector produced the summoned record and on the basis thereof deposed that Ravinder Kapur (appellant No.2) was the Manager of the shop and that his name appeared in their records only as the Manager of the shop. Thus, neither the landlord nor PW.4 supported the case of sub-letting in the evidence. PW-4 had categorically deposed, appearing as a witness of the landlord that appellant No.2 was working as a manager at the shop and even the landlord did not say anything to the contrary during his deposition

G Smt. Kala Devi, appellant No.1, appeared as her own witness. In her examination-in-chief she stated:-

H "Ravinder is working in this shop from last 20-22 years. First he was helping his maternal uncle who is my husband. After his death

he is helping me. *I am tenant of the shop. The keys of the shop are kept by me, the same are handed over by me in the morning for opening the shop. The business of this shop is mine. My shop, house and orchard work is being looked after by Ravinder Kumar.*

(Emphasis supplied).

The above statement was not at all questioned in the cross-examination, It has remained un rebutted. During the cross-examination, appellant No.1 stated that monthly payments towards expenses were made to Ravinder by her by way of salary. She reiterated during the cross-examination, "I am not looking after the business. I am tenant of the shop."

Appellant No.2 appeared as RW. 2 before the trial court. In his examination-in-chief, he *inter alia* asserted that appellant No.1 is the tenant and that the business is also hers and that he was not paying any rent to her and was only assisting her in her business. During the cross-examination he replied:-

"In the disputed shop. I have no ownership nor having any type of tenancy rights nor having any rights of any type. It is corrected that when Hira Lal Sehgal was alive he was having the agency for the sale of Cigarette & Bidi. I was helping him and he was paying the expenses to me.... It is incorrect that after the death of Hira Lal his wife is giving the profit of the shop but only is paying expenses etc. It is incorrect that I am receiving share as per the profit of the shop. It is incorrect that I am her partner."

From the aforesaid resume of evidence it is clearly established that appellant No.2, who had been assisting his maternal uncle earlier was assisting appellant No.1 after the death of his maternal uncle in 1983. The positive evidence of appellant No.1 and appellant No.2 to the effect that appellant No.1 has continued to be the tenant of the shop ; that she had not parted with the possession of the shop at all and that respondent No.2 was only assisting her to manage her business, not only of the shop but also her house and orchard has remained un rebutted and unchallenged. That apart, the evidence of Smt. Kala Devi, appellant No.1 to the effect that the keys of the shop were kept by her and the same used to be handed over by her to appellant No.2 in the morning for opening the shop further

A clinches the issue and establishes that appellant No.2 was only working in the shop as a Manager and that the property had not been sub-let to him nor had he acquired exclusive possession of the shop.

B The evidence led by the respondent-landlord is not only vague, inconclusive but is also unsatisfactory. The respondent-landlord did not even allege in his evidence that appellant No.1 had sub-let the premises in favour of appellant No.2. The learned Rent Controller had thus rightly come to the conclusion that appellant No.1 had not parted with the possession of the demised premises after the death of her husband and that she had not sublet the same to appellant No.2. The findings recorded by C the learned Rent Controller were based on proper and correct appreciation of evidence and other material on the record.

D The findings recorded by the appellate authority to the effect that because of the change of the nature of business from selling of cigarettes and bidis during the life time of Shri Hira Lal Sehgal, to the selling of sanitary-wares in the demised premises, it demonstrated that appellant No.1 had parted with possession of the shop in favour of appellant No.2 is wholly conjectural and irrational. A grave error was, therefore, committed by the appellate authority in coming to the conclusion of sub-letting in total E disregard of the evidence on the record. The appellate authority as well as the High Court drew up a rather rash inference from the change of business, which was wholly uncalled for. The onus to prove sub-letting is on the landlord and if he establishes parting of with the possession in favour of a third party, the onus would shift to the tenant to explain. In the F instant case, however, the landlord did not discharge the initial onus and although it was not required, yet, the tenant explained how appellant No.2 had the permissive possession of the shop as its Manager. On the established facts and circumstances of the case, the plea of sub-letting was not established.

G The appellate authority committed an error and what the High Court did was to perpetuate the same without proper application of mind. It goes without saying that to perpetuate an error is no virtue but to rectify it is the call of judicial conscience. The High Court failed to correct the obvious H error committed by the appellate authority.

The orders of the High Court and the appellate authority, not being based on correct appreciation of evidence on the record, cannot be sustained. We, therefore, set aside the orders of the High Court and the appellate authority and restore that of the learned Rent Controller. The appeal is consequently allowed with costs. A

R.P.

Appeal allowed. B