

CASE NO.:
Appeal (civil) 6712 of 2001

PETITIONER:
BISWANATH PODDAR

Vs.

RESPONDENT:
ARCHANA PODDAR & ANR.

DATE OF JUDGMENT: 25/09/2001

BENCH:
N. Santosh Hegde & S.N. Variava

JUDGMENT:

SANTOSH HEGDE, J.

Leave granted.

The appellant herein who is the owner of one room in ground floor of premises No.42-A, Shakespeare Sarani, P.S. Park Street, Calcutta, had let out the said premises to Smt. Archana Poddar, respondent No.1 herein, for carrying on the business under the name and style of M/s. A.K. Enterprises. It is stated that the said tenant had inducted M/s. Paspur Travels Pvt. Ltd., the second respondent herein, as a sub-tenant in contravention of the provisions of the West Bengal Premises Tenancy Act, 1956 (for short the Act). On this basis, the appellant instituted Ejectment Suit No.144/93 against the first respondent which came to be decreed on 22.4.1997 by the Vth Bench of the City Civil Court, Calcutta. The allegation in the said suit was that the sub-letting of the premises to third party like the second respondent without the knowledge and consent of the appellant being contrary to the provisions of the Act, the appellant is entitled to eviction of the first respondent from the suit premises. At this stage, it is necessary to note that the second respondent herein was not made a party to the said suit for ejectment.

Pursuant to the decree obtained by him, the appellant filed Ejectment Execution Case No.65/97 before the City Civil Court, Calcutta in which the second respondent filed an application numbered as Misc. Case No.2433/98 purporting to be under Order XXI, Rules 99, 100 and 101 read with Section 151 of the Code of Civil Procedure, praying for setting aside the decree passed in the abovesaid ejectment suit, and also for injunction restraining the appellant from interfering with its possession of the suit property. In that application it was contended that the tenancy in its favour was with the consent of the appellant and the eviction decree was obtained by fraud and collusion behind the back of the second respondent. The trial court after perusing the evidence adduced and considering the arguments of the parties held that the appellant had not

consented to creation of a sub-tenancy as also the second respondent herein had not intimated the landlord of it being inducted as a sub-tenant within the time stipulated in the Act or thereafter, therefore, the second respondent did not have the right to be impleaded as a party in the original eviction suit. On this basis, though it did not go into the question of collusion and fraud in detail, it still came to the conclusion that all questions relating to fraud and collusion could have been considered had the second respondent complied with the provisions of Section 16 of the Act, and the second respondent having not complied with the same, it cannot claim any lawful right which it claimed in the Miscellaneous Case. It also incidentally held that it cannot be said that there was a collusion between the appellant and the first respondent herein.

Being aggrieved by the said order of the executing court, the second respondent herein preferred an appeal before a Division Bench of the High Court at Calcutta in FMA No.1369 of 2000. The High Court without going into the statutory requirement of acquiring a tenancy right by a sub-tenant, came to the conclusion that since the second respondent had raised the question of fraud and collusion specifically in its objections and the appellant had denied the same, the executing court was duty bound to have decided this question in accordance with law and it could not have rejected the application of the second respondent on the ground that the said question had become academic since the second respondent had not complied with the statutory requirement of the provisions of the Act. On this basis, it allowed the appeal and remanded the matter to the executing court to decide the question whether there was any collusion and fraud in the matter of decreeing the suit for eviction filed by the appellant against respondent No.1. It is against this judgment and order of the High Court that the appellant is now before us in this appeal.

Mr. Bhaskar P. Gupta, learned senior counsel appearing for the appellant contended before us that in a matter pertaining to sub-tenancy if the party claiming sub-tenancy fails to establish that it had complied with the statutory requirement of the Act then such person did not have the legal right of being heard in the eviction petition filed against the original tenant. Hence, it was not necessary to implead such sub-tenant in the ejectment suit filed by the landlord against the original tenant. He contended that the requirement of the provisions of the Act in regard to creating of sub-tenancy being mandatory and if the party claiming sub-tenancy has failed to fulfil the said requirement, there being no statutory need to implead or hear such party before passing the order of eviction, the question of obtaining the decree by fraud and collusion will not arise. Hence, it was not necessary for the executing court to have gone into this question, even so he pleaded the court on the basis of the material on record, has held that respondent No.2 has not established the said allegation of fraud and collusion.

A perusal of the Act shows that Section 14 of the Act puts an embargo on the creation of a sub-tenancy without the previous consent in writing of the landlord. The relevant portion of the said Section reads thus :

S. 14. Restriction of subletting. (1) After the commencement of the Act, no tenant shall, without the previous consent in writing of the landlord, --
(a) sublet the whole or any part of the premises held by him as a tenant; or

Section 16 of the Act mandates that a party seeking sub-tenancy should first have the previous consent in writing of the landlord and such sub-tenant will have to give a notice to the landlord in the prescribed manner of the creation of sub-tenancy within one month from the date of such sub-letting. The said Section reads thus :

S. 16. Creation and termination of sub-tenancies to be notified. (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 creation of the 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. (emphasis supplied)

Sub-sections (2) and (3) of Section 16 are not necessary for disposal of this appeal, hence, not reproduced.

Section 13 of the Act which protects the tenants against eviction also provides the limited grounds available for the eviction of a tenant. Sub-section (2) of the said Section provides that a sub-tenant who has complied with the requirement of Section 16 of the Act is required to be made party to any suit or proceeding for recovery of the possession of the premises by the landlord. Conversely, this Section indicates that the sub-tenants who have not complied with the requirement of section 16 of the Act need not be made party to the suit or proceedings for the recovery of possession by the landlord. Section 13(1) reads thus :

S. 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 grounds, namely :-

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

(2) The sub-tenants, if any, referred to in section 16 who have given notice of their sub-tenancies to the landlord under the provisions of that section shall be made parties to any suit or proceeding for the recovery of possession of the premises by the landlord :

Based on the above provisions of the Act, Mr. Gupta submits that the requirement of obtaining previous consent of the landlord before acquiring the sub-tenancy right and intimating the landlord by notice by the tenant as well as by the sub-tenant in the prescribed manner within one month from the date of such subletting is a mandatory requirement of law and unless the said requirement is complied with, Section 14 of the Act comes into play which prohibits the creation of a sub-tenancy. In such a situation, it is contended that Section 13(2) makes it unnecessary for the landlord to implead a sub-tenant while seeking eviction on the ground of subletting. In such a fact-situation it is contended that it is unnecessary to go into the question of fraud and collusion because once the subletting contrary to the Act is proved, the question of obtaining decree for eviction by fraud or collusion does not arise, therefore, an issue of fraud and collusion becomes redundant.

Per contra, Mr. Dhruv Mehta, learned counsel appearing for the respondents, contends that in every case where there is an allegation of fraud and collusion, the court deciding the issue involving this question should first decide the issue pertaining to fraud and collusion because if it is held that the decree obtained is tainted by fraud and/or collusion, such decree could be void ab initio because of the principle fraud unveils everything. He also assailed the finding of the executing court that there was no consent of the landlord for subletting, because the agreement entered into between the first and the second respondent in regard to subletting clearly showed that the first respondent had such authority or consent of the landlord to sublet. Therefore, even if there was no notice to the landlord as required under Section 16 of the Act from the tenant as well as the sub-tenant, that requirement being only directory in nature, the executing court was not justified in rejecting the petition filed by the second respondent. He also contends that the sub-tenancy in question has been created nearly 10 years ago, therefore, the very fact that the landlord did not move any petition for eviction for such a long time would show that the landlord had waived his right to evict the said tenant and the West Bengal Act being different from Rent Acts of other States, which permit entering into a contract even contrary to a statute, it should be held that there was an implied contract between the landlord and the sub-tenant in regard to creation of a sub-tenancy.

Having heard the arguments of the learned counsel and perused the records, we notice that under the provisions of the Act the requirement of previous consent of the landlord as also intimation in writing in the manner prescribed under the Act by the tenant as well as the sub-tenant within the time stipulated thereunder being a mandatory requirement, the creation of sub-tenancy without fulfilling these requirements becomes opposed to Section 14 of the Act. If it is a sub-tenancy created contrary to the provisions of the Act then as could be seen from Section 13(2) of the Act, it becomes unnecessary for the landlord to implead the sub-tenant when he seeks to evict the original tenant on the ground of unlawful tenancy. In the instant case, the parties before the executing court have adduced evidence and based on that evidence the trial court has come to the conclusion on facts that neither of the twin requirements, namely, the previous consent of the landlord and notice in writing by the tenants is fulfilled. Therefore, it came to the conclusion that there was no obligation on the part of the landlord to have impleaded the second respondent as a party to

the original eviction petition because the said respondent did not have a legal right to be heard in view of Section 13(2) of the Act. However, Mr. Mehta questions the correctness of the findings of the executing court in regard to the previous consent of the landlord by relying upon the agreement between the first and the second respondent creating a sub-tenancy in question. He pointed out that in the said agreement dated 17.3.1983 it was clearly stated that the original tenant had the right to sublet the premises in question. In support of this, he pointed out the following clause in the said agreement : And whereas the first party by virtue of the consent of the superior landlord Shri Vishwanath Poddar in respect of the said premises is otherwise empowered to sublet and/or part with possession and/or to let out the said premises or any portion thereof to any person or persons. On the basis of this clause in the agreement, Mr. Mehta contends that the landlord had given previous consent to the original tenant to sublet or part with possession of the premises to any person(s), therefore, a separate previous consent of the original landlord (the appellant) is not essential. We are unable to accept this argument of Mr. Mehta. The appellant is not a party to the above agreement. Any statement made in the said agreement will not be binding on the appellant and there being no other evidence to show that in fact there was such written previous consent given by the appellant to create a sub-tenancy. Respondent No.2 cannot rely upon a bilateral agreement between the tenant and the sub-tenant to deprive the owner of a statutory right of eviction by a contract inter se between themselves. The trial court has specifically come to the conclusion based on the evidence on record that on behalf of the second respondent no other material has been produced to establish the fact that the previous consent of the landlord was obtained even though time was granted for the said purpose. Mr. Mehta, however, contended that the executing court has grossly erred in relying upon the evidence of first respondent to come to the conclusion that there was no previous written consent of the landlord for creating a sub-tenancy, because the evidence of the first respondent being contrary to the written agreement between the parties, no such evidence could have been admissible in evidence probably relying on Sections 91 and 92 of the Evidence Act. But in our view, it is not necessary to go into this question because when the second respondent has failed to establish on her own that there was any previous written consent of the landlord even assuming that the evidence of the first respondent is to be eschewed, the position will not improve in any manner in favour of second respondent because the second respondent could not have independently relied upon the terms of the agreement between it and the first respondent to establish the previous written consent of the appellant. This being a mandatory requirement of law, in our opinion, the second respondent has failed to establish this mandatory requirement of the Act i.e. Section 14 of the Act.

It is also to be noted that as per the judgment of the executing court, the second requirement of the statute, namely, issuance of a written notice of creation of sub-tenancy by the sub-tenant under Section 16 is also not complied with in the instant case. This factum of non-issuance of notice as required under Section 16 is not disputed by learned counsel for respondent No.2. But the contention in regard to this was that the requirement of issuance of notice by the sub-tenant to the landlord within the time stipulated and the manner stipulated in Section 16 was not a mandatory requirement and the same is only directory and in view of the facts and circumstances of this case, a failure of issuance of such notice to the landlord would not vitiate the tenancy created in favour of second respondent.

In support of this contention, learned counsel for second respondent has placed reliance on the judgments of this Court in T.V. Usman v. Food Inspector, Tellicherry Municipality, Tellicherry (1994 1 SCC 754) and Mangalore Chemicals & Fertilisers Limited vs. Deputy Commissioner of Commercial Taxes & Ors. (1992 Supp. 1 SCC 21). Having considered these judgments, we are of the opinion that the law laid down in the said cases will not be of much assistance to second respondent in the present case. In the context of the Acts concerned therein, this Court held that the provisions considered by it in those cases are directory and not mandatory. In the instant case, the language of Section 14 clearly bars creation of any sub-tenancy without the previous consent in writing of the landlord. This requirement of notice is further qualified by the prescribed method of issuance of notice which is found in Rule 4 of the West Bengal Premises Tenancy Rules. The Section also prescribes the time limit within which such notice has to be given. If we peruse Rule 4 referred to hereinabove, the notice has to be sent by registered post. It also statutorily prescribes the contents of the notice and the place to which it should be addressed. All these conditions coupled with the use of the word shall both in the Section and the Rules indicate that the Legislature intended this requirement of notice under Section 16 of the Act to be mandatory. Therefore, the argument of Mr. Mehta that the requirement of Section 16 is only directory, cannot also be accepted.

As stated above, Mr. Mehta further argued that the West Bengal Act permits a contract contrary to the statute and by the act of waiver on the part of the landlord, it should be stated that there was an implied contract of permitting the creation of tenancy as also waiving the notice required under Section 16 because for nearly 10 years the landlord did not take any step to evict neither the original tenant nor the second respondent. Though it is a fact that under the West Bengal Act, a contract contrary to the provisions of the Act is permissible, on facts and circumstances of this case, we are unable to accept that there was any implied contract between the landlord and the tenant; more so in the backdrop of the fact that there is no evidence whatsoever to show that the landlord had either consented to the creation of tenancy or had acted in any manner in furtherance of creation of tenancies like acceptance of rent or such similar acts which would establish an implied contract. We must now notice two judgments of this Court which have been cited before us, one of which was also cited before the High Court but the same came to be distinguished by the High Court. The first of the judgments is Shantilal Rampuria & Ors. v. M/s. Vega Trading Corpn. & Ors. (1989 3 SCC 552). In that case, this Court held : Therefore, previous consent in writing of the landlord with respect to each sub-letting separately is essential and a general authority to the tenant in this regard will not be sufficient in law. Since in the present case consent of the appellant-landlord had not been contained (sic) obtained specifically for each of the sub-tenancies the respondent-tenant must be held to have violated Section 14. The appellants have, thus, established the ground mentioned in Section 13(1)(a) and are entitled to succeed. This judgment delivered in the context of the West Bengal Act clearly holds that a notice under Section 16 of the Act is a must.

Similarly, this Court in Silverline Forum Pvt. Ltd. v. Rajiv Trust & Anr. (1998 3 SCC 723), accepted the law laid down in Shantilal's case (supra) and held that sub-section (1) of Section 16 requires 3 requisites, namely, (i) the sub-tenancy should have been created after the commencement of the West

Bengal Act; (ii) the landlord of the premises should have given written permission to the tenant to create sub-tenancy; and (iii) tenant and the sub-tenant should have notified the landlord of the creation of sub-tenancy within one month of such creation. It also held that sub-section (3) of Section 13 mandates that the decree for ejectment shall be binding on every sub-tenant unless he falls within the ambit of either sub-section (2) or (4) of Section 13 meaning thereby whether such sub-tenant is a party to the original eviction proceeding or not, the same will be binding on the sub-tenant. In the instant case also, in view of the fact that respondent No.2 has not complied with the statutory requirement under the Act, the eviction decree against the first respondent would be binding on the second respondent in view of the provision of sub-section (3) of Section 13.

If this be the position in law, we are unable to appreciate what purpose would be served by further enquiring into the allegation of fraud and collusion in this case. On facts of this case, it is established that the second respondent has not complied with its statutory obligation to perfect its right as a sub-tenant. It is also clear from the provisions of the Act that the landlord need not have impleaded the second respondent in his suit for eviction. In such circumstances, in our opinion, the allegations of fraud and collusion in obtaining the eviction decree become purely academic.

Therefore, in our opinion, the trial court was justified in coming to the conclusion that the objections raised by the second respondent in the Miscellaneous Case filed before it are devoid of any merit, hence, non-consideration of the question of fraud and collusion does not in any manner detract the legality of the decree of eviction obtained by respondent No.1 which is also binding on respondent No.2 in view of Section 13(3) of the Act.

In the said view of the matter we are of the considered opinion that the High Court erred in interfering with the findings of the executing court and remanding the matter to the trial court for consideration of the allegations of fraud and collusion. Therefore, the judgment and order of the High Court impugned in this appeal has to be set aside.

We notice that the second respondent has been running a travel agency in the suit schedule premises for a considerable length of time, and will be put to hardship if the eviction is to be ordered with immediate effect. On taking into consideration this hardship, we direct that the second respondent will not be evicted from the suit premises till 31.3.2002 provided it files a usual undertaking in this Court within a period of 4 weeks from today, further agreeing to pay damages for use and occupation of the building @ Rs.7,000/- per mensem which is the amount it contends that it was paying to the first respondent as rent for the premises in question.

For the reasons stated above, this appeal succeeds and the same is hereby allowed. The judgment and order dated 10.4.2000 in FMA No.1369/2000 made by the High Court of Calcutta is set aside and the judgment of the executing court is upheld.

The appeal is allowed accordingly. No costs.

...J.
(N. Santosh Hegde)

September 25, 2001.

.J.
(S.N. Variava)

JUDIS