Sri Sunil Kumar Verma Vs Sri Devendra Prakash Bansal and Another

Court: Allahabad High Court

Date of Decision: Feb. 16, 2010

Acts Referred: Constitution of India, 1950 â€" Article 226
Evidence Act, 1872 â€" Section 120
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 â€" Section 12, 13, 14, 15, 20

Citation: (2010) 3 AWC 2992

Hon'ble Judges: Shishir Kumar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Shishir Kumar, J.
This writ petition has been filed for quashing the order passed by respondent dated 6.9.2008 (Annexure 15 to writ

petition) and order dated 2.3.2009 (Annexure 17 to writ petition).

2. The facts arising out of present writ petition are that dispute relates to a shop situated in Mohalla Kajijadgan, Qasba and Tehsil Chandpur,

District Bijnor. The defendant-petitioner is a tenant on monthly rent of Rs. 425/-. The shop in dispute is under tenancy for more than 30 years.

Initially rent was Rs. 145/- but subsequently it has been enhanced to Rs. 425/-. There is no dispute to this effect that plaintiff-respondent No. 1 is

the landlord. On 3.1.2007, a notice was issued by respondent No. 1 with an averment that defendant-petitioner has committed default in payment

of rent from 12.2.2004 to 11.4.2006 amounting to Rs. 14,450/- and further has sublet the aforesaid shop to his brother Sri Rakesh Kumar

Verma, respondent No. 2, hence he is liable for eviction from shop in dispute. In order to create a ground for eviction, plaintiff-respondent had

been refusing to receive rent from petitioner. In that circumstances, petitioner after making an application deposited rent u/s 30(1) of the U.P.

Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The said application was registered as Misc. Case No. 73 of 2006 and on

being issued notices, respondent-landlord appeared and stated that he has never refused to accept rent and said to have been sent him through

money order and he was still ready and willing to accept rent and to issue rent receipt. On the aforesaid statement the application was rejected by

order dated 15.9.2006. Before giving notice in question, plaintiff-respondent No. 1 has served another notice dated 23.9.2006 through which

tenancy of petitioner has been determined on account of non-payment of rent. After receiving of notice, a reply refuting the allegations made was

done and it was specifically stated that there is no default on the part of petitioner as money-orders were refused by landlord sent by petitioner

time and again. A reference to proceedings u/s 30 was also made. It was also stated that there was no sub-letting. Sri Rakesh Kumar Verma was

engaged in the business of supply of jewellery items and in this connection used to visit the shop of defendant-petitioner. Petitioner again tried to

pay rent due up-to-date through money orders but it was refused. A suit was filed which was numbered as SCC Suit No. 6 of 2007 on the

averment that defendant-petitioner has defaulted in payment of rent from 12.2.2004 to 11.12.2006 and has also sub-letted the shop in dispute to

defendant-respondent No. 2. A written statement was filed and an application was made on 6.4.2007 depositing rent to the tune of Rs. 22,185/-

for the purposes of claiming benefit u/s 20(4) of the Act No. XIII of 1972. The said amount was deposited on the aforesaid date. In the written

statement filed by petitioner, a specific averment was made that he has never committed any default and he was sending rent through money-orders

but after refusal, petitioner tried to deposit it u/s 30(1) of the Act but on the statement made by respondent-landlord that he is ready to accept rent,

the application was dismissed. But anyhow, claiming benefit of Section 20 Sub Section 4, the amount has already been deposited. Respondent

No. 2 was also engaged in the business of manufacturing and selling of jewellery items and in this connection he often visits the shop of petitioner,

therefore, there cannot be any presumption that it has been sub-let to respondent No. 2. Petitioner is an exclusive owner of shop in dispute and

doing business. Certain photographs has been filed by respondents showing therein that respondent No. 2 is sitting in the shop and two cash

memos of M/s Rakesh Jewellers have been filed. Petitioner denied the factum of this fact that photographs which have been filed does not belong

to disputed shop. Nor has the petitioner ever put any Board in the name of Meerut Jewellers thereof. Petitioner has also brought on record an

application duly supported by his affidavit bringing therewith on record photographs which was also result of trick photography and which showed

Sri Man Mohan, son of plaintiff- landlord to be sitting in the shop in dispute. In such situation, petitioner wanted to prove that such photographs

cannot be an exclusive prove for the said purpose.

3. It has been submitted that in support of the plaint case plaintiff Sri Devendra Prakash Bansal did not examine himself and instead in his place his

son Sri Manmohan Bansal was examined who alleged himself to be a power of attorney and only his statement was recorded as P.W.-1.

Therefore, in view of Section 120 of the Evidence Act, the statement of son who deposed as P.W.-1 cannot be taken into consideration.

Petitioner also in support thereof has produced himself as D.W.-1 and his brother as D.W.-2 and one Sri Anil Kumar as D.W.-3 and Sri Chandra

as D.W.-4 who deposed and supported the case of petitioner. Sri Rakesh Kumar Verma, respondent No. 2 has clearly deposed before the Court

as D.W.2 as he never did any business from the shop in dispute and supported the case of petitioner that petitioner is doing business from the shop

in question but in spite of aforesaid fact though it was fully established from the record, the Judge Small Causes Court vide its judgement and order

dated 6.9.2008 (Annexure 15 to writ petition) has decreed the suit. Petitioner feeling aggrieved by the judgement and decree filed a revision but

revisional court without considering these questions raised by petitioner has dismissed the revision vide its judgement and order dated 2.3.2009.

Hence, the present writ petition.

4. It has been submitted by Sri K.K. Arora, learned Counsel appearing for petitioner that while recording a finding on the question of sub-tenancy,

courts below has failed to appreciate that photographs brought on record by landlord cannot be taken into consideration for the said purpose.

Further presence of Sri Rakesh Kumar Verma in the shop in dispute does not lead to this conclusion that he was in exclusive possession of the

shop in dispute. It was also proved from the record that Rakesh Kumar Verma having his own shop and doing his exclusive business. Further,

court below has erred in holding that shop in dispute is treated to be vacant within the meaning of Section 12 of Act No. 13 of 1972 due to sub-

letting to respondent No. 2. There is no default on the part of petitioner, therefore, petitioner is entitled to get benefit u/s 20 Sub Clause 4 of the

Act. One of the point raised by petitioner is that plaintiff himself has not come before the witness box and his son being power of attorney has

made statement, he was not a competent person to make a statement on behalf of landlord because he cannot have any personal knowledge and

averment made in the plaint does not show or establish that shop in question has been sub-let to respondent No. 2. There must be two ingredients

for the purpose of subletting the premises in question, one is that it has been permanently given to another person and second is that there is some

prove regarding transaction between the parties. No finding to this effect has been recorded. Only it has been stated that respondent No. 2 has

been found sitting in the shop. This cannot lead to the fact that shop in question has been sub-letted. Further submission has been made that there is

no pleading in the plaint as regards subletting. Respondent''s case is not in consonance to the provision of Section 12 of the Act No. 13 of 1972.

The three ingredients mentioned u/s 12 has to be fulfilled while declaring vacancy in certain cases (a) that tenant is substantially removed his effects

(b) he has allowed it to be occupied by any person who is not a member of his family and (c) in the case of residential building, he as well as

members of his family have taken up residence, not being temporary residence, elsewhere. Sub-Section 2 states that in a case of non-residential

building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner as a new partner, as the

case may be, the tenant shall be deemed to have ceased to occupy the building. Further submission has been made that in view of Section 25,

there is a prohibition of sub-letting, it can only with the permission of the landlady and District Magistrate.

5. In such situation, learned Counsel for petitioner submits that in view of settled position of law and in view of facts of this case, there cannot be

any opinion to this effect that there is any subletting and admittedly on the first date of hearing total rent has been deposited, therefore, it cannot be

held that ingredients of Section 12 as mentioned above has been fulfilled and petitioner in any means have sub-let the shop in question. The finding

contrary to this effect is against the evidence on record. Learned Counsel for petitioner on various issues has relied upon various judgements of this

Court as well as the Apex Court which is being reproduced below:

1. Joginder Singh Sodhi Vs. Amar Kaur,

22. It was then contended by the learned Counsel for the appellant that Respondent No. 2 was the son of Respondent 1 and since he was not a

stranger, no presumption could be raised that he was a sub-tenant. We are unable to uphold even that contention. In our judgment, for deciding the

question whether the tenant had created sub-tenancy, the relationship between the tenant and sub-tenant is not material. There is no privity of

contract between the landlady and Respondent 2. He was, therefore, a ""stranger"" to the landlady. She let the property to Respondent 1 who was

the tenant. Respondent 1 was bound to occupy the property as per the rent note executed by him wherein even undertaking was given by him that

he would not part with possession or allow any other person to occupy the property. In spite of the rent note and undertaking, if without the

written consent of the landlady, Respondent 1 had inducted Respondent 2 as his tenant or had parted with possession in favour of Respondent 2,

who was staying separately and yet found to be in exclusive possession of the shop, sub-tenancy was established.

2. 1990 (1) ARC 93 Badri Nath Garg v. Sheo Prasad Tandon

22. Further it is borne out from the record that the ""Standard Book Depot"" and ""Adarsh Pustak Bhandar"" are being run from the accommodation

in question. It has come in evidence that the ""Standard Book Depot"" was incepted some time in the year 1965 in the accommodation in question,

though the rent receipts were issued by the opposite-party in the name of the applicant Badri Nath Garg. It is on this premise that the opposite-

party has alleged that Badri Nath Garg has sub-let the accommodation to Kailash Nath Garg. The allegation of the opposite-party that Kailash

Nath Garg is the sub-tenant of the applicant (Badri Nath Garg) is incredulously abhorrent and is unworthy of acceptance. It smacks of the lack of

understanding of relationship amongst the Hindus. Joint family was the bane of Hinduism. Assimilation and not separation was the key-note of

Indian culture. Brothers have lived in harmony, thus, culogising the precepts of Hinduism. One amongst such members being the head was the

''karta'' of the family. He was the patriarch, who looked after the interest and comfort of each and every member of the family. He was

Machiavellian sovereign, whose word and dictate was resounding and acceptable to each and every one in the family. With the passage of time

modern environment plagued the Hindu society and individual interest tarnished the very sanctity of joint Hindu family system. Badri Nath Garg

was the karta of the family as is emerging from the record and if the rent receipts are issued only in his name it would not tentamount that the other

brothers had no interest in the business carried by the family. Members of family start various business which are looked after by one of them.

Opposite-party was well aware about the fact that Kailash Nath Garg is the real brother of Badri Nath Garg, applicant. The opposite -party still

camouflaged this fact by initial concealment but later on admitting it. There is nothing on record to suggest that at the time or even today family is

not well knit or is not united. It does not happen looking tot he present day background that for the advancement of the business as has been

stated, one of the brothers is directed to look after one business. There is not an iota of evidence even to suggest that Badri Nath Garg has in any

case parted with the possession and that too with a permanent intention. A presumption cannot be raised in such circumstances that Badri Nath

Garg has nothing to do with the business or has lost all interest therein. It was incumbent on the opposite-party to have established and proved to

the hilt that the alleged occupant is the sub-tenant enjoying possession exclusively and secondly that sub-tenancy has been created for valuable

consideration. Sub-tenancy can neither be presumed not inferred. It has to be proved to the satisfaction of the Court that the two cardinal

ingredients as enumerated above has been satisfied. Instantly the opposite-party has failed to prove to the hilt that the alleged sub-tenant Kailsh

Nath Garg is exclusively enjoying the possession of the accommodation in question. Kailash Nath Garg might have been directed to transact the

business for the benefit of the family. Even assuming that Kailash Nath Garg is sitting on the shop in question it cannot be safely assumed nor

presumed that he is enjoying exclusive possession in lieu of a valuable consideration. It would be a sad day to infer that one of the real brothers

would be the sub-tenant of the other brother in the absence of any evidence or weighty material. It is an imaginative and fanciful allegation, which

cannot throne truth that brother cannot be sub-tenant. Agreements are not arrived at between the brothers often but the mutual understanding

pervades showing affinity and kinship. The oral dictate of the karta of the family is more than an agreement in writing. The opposite-party has failed

to discharge the burden which lay heavily on him to show that he profits of the Firm do not go to the family. It could have been shown by

documentary evidence that Kailash Nath Garg is the sole occupant of the accommodation in question enjoying its possession exclusively for his

benefit but such a proof is utterly wanting. An inference in such circumstances cannot be raised much to the detriment of the applicant. In the case

of Ajit Singh v. Naresh Chand Gupta and Ors. 1981 ARC 332 , it has been held as stated above that onus of proving sub-letting is on the landlord

who has to establish that the occupant is the alleged sub-tenant and is in exclusive possession of the tenanted accommodation and that too for a

valuable consideration. I respectfully agree to this view. The first essential ingredient for holding that the person, who is an occupant as a sub-tenant

is in exclusive possession of the accommodation in question. This could have been proved by the opposite-party but in vain. The second ingredient

that the person has occupied the accommodation in question for some valuable consideration may be established by the circumstances from the

relationship of lessor and lessee between the tenant and the alleged sub-tenant found to be in exclusive possession may be inferred. It is, thus, clear

that the first ingredient that the person is in exclusive possession as a sub-tenant has to be established beyond doubt. The opposite-party has

miserably failed to establish such a cardintal fact. Further in the absence of such a categorical finding of exclusive possession, the trial court''s order

finding Kailash Nath Garg to be sub-tenant is manifestly erroneous and is not in accordance with law. Even if, as discussed above, Kailash Nath

Garg is in exclusive possession then the element of having exclusive possession over the accommodation in question for a valuable consideration is

utterly lacking. The Court below vaguely proceeded that it is not possible to extract the reality as regards of valuable consideration. It was liable to

be investigated. In the case of Smt. Krishnawati Vs. Shri Hans Raj, , it was held that onus to prove sub-letting is on the landlord. It is only after the

landlord prima facie satisfies that the occupant, who was in exclusive possession of the accommodation in question let out for valuable

consideration. It is only after such satisfaction that the tenant would be required to rebut the allegation. The onus in any case in absence of the twin

consideration unless satisfied cannot be shifted to the tenant. The learned Counsel for the opposite-party tried to support the finding recorded by

the trial Court I am unable to agree as to how such finding can be deemed to be sacrosanct. I am clearly of the opinion that the Court below did

not approach the issue on correct legal principle. The Court below has lost sight of factual common sense and has drawn inference in the teeth of

the view taken in the case of Smt. Krishnavati.

3. 2000 (2) ARC 103 Suraj Mukhi and Anr. v. IInd ADJ, Shahjahanpur and Ors.

6. The question was whether, the tenant had sub-let the accommodation, the Apex Court emphasised that it is not mere possession but there must

be other relevant circumstances particularly exclusive possession of such person. In Resham Singh Vs. Raghbir Singh and Another, , where the

brother of the tenant was carrying on the business and it was found that he was only looking after the business particularly when his brother was

involved in a criminal proceeding and absconding, it was held that sub-letting was not proved. In Ram Prakash v. Shambhu Dayal AIR 1960 All

395, where the parties were close relations and one of them came from Pakistan to take shelter with the other, there was no presumption that a

sub-tenancy was crated merely because the host and his wife allowed the refugee guest to live with them and then, for the sake of enlarging

available accommodation shifted to another house but left a part of their family in the old house.

7. The Court has to examine the nature of possession of such person who is alleged not be a member of the family of the tenant. If his possession is

in the nature of a licence without putting him in exclusive possession, it cannot be taken that it was sub-letting by the tenant to him. Respondent No.

1 has to examine the matter afresh in accordance with law.

4 . Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, .

6. The question for consideration is whether the mischief contemplated u/s 14(1)(b) of the Act has been committed as the tenant had sublet,

assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord.

There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or

assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. 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, 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. 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 Act. Even though the father had retired from the business and the sons had been looking after the business in the facts of this case, it cannot

be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants,

i.e., his sons, it cannot be said that the tenant had parted with possession. This Court in Smt. Krishnawati Vs. Shri Hans Raj, had occasion to

discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises allowed

the other to carry on business in a part of it. The question was whether it amounted to sub-letting and attracted the provisions of Sub-section (4) of

Section 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who

owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence a rash inference to draw that the

owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu

family, it is difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Act.

5. 1992 (2) ARC456 Gur Dayal Khanna and Ors. v. Smt. Malti Devi and Ors.

11. In the cases involving sub-letting it is difficult for the landlord to produce direct evidence in this regard showing the existence of the relationship

of tenant-in-chief and the alleged sub-tenant because the matter is specially within their knowledge, therefore, in order to prove sub-letting the

landlord has to rely on attending circumstances. It is in this view of the matter that the Legislature has provided for a presumption of fact about

coming into existence of sub-tenancy taking recourse to a legal fiction. Once a sub-letting takes place the impediment in the way of the landlord to

recover possession stands removed inducing him to go to Court and ask for recovery of possession. The tenant''s liability to eviction arise once the

fact of unlawful sub-letting is proved.

12. It cannot, however, be overlooked that while the initial onus of proving sub-letting or a transfer of the lease holding is upon the landlord yet

once the Court is satisfied that there has been a transfer of possession, the onus may shift and within whose special knowledge the facts emplaining

the manner in which such possession has been transferred lie, may have to bear the burden thereafter. It is, therefore, clear that when once the

parting of possession is proved, the burden shifts on to the tenant to show that the possession is proved, the burden shifts on to the tenant to show

that the alleged sub-tenant is in occupation not as a sub-tenant but only as a licensee or as a person in permissive occupation. The initial onus to

prove the ground of eviction, thus, rests on the landlord. But the facts which are in the special knowledge of the tenant must be proved by tenant

and the tenant cannot take advantage of the onus of proof to withhold the best evidence in his possession or power to satisfy the Court with regard

to the correctness of the case set up by him.

16. The word "occupy" as used in Section 12(1)(b) and Section 12(2) of the Act referred to above is quite significant. This word is a word of

uncertain meaning and sometimes denotes legal possession in the technical sense. However, at other times, occupation denotes nothing more than

the physical presence in a place for a substantial period of time. Its precise meaning in any particular statute must depend on the purpose for which

and the context in which it is used. As observed by the Apex Court, the modern positive approach is to have a purposeful construction that is to

effectuate the object and purpose of the Act.

17. Under the scheme of the U.P. Act No. 13 of 1972 the word "occupy" as used in Sections 12(1) and 12(2) of the said Act appears to have

been made connoting different meanings. This word so far as Section 12(2)(b) is concerned denotes physical possession while this word as used in

Section 12(2) of the Act denotes legal possession in the technical sense. In order to attract Section 12(1)(b) it has to be established that the tenant

has allowed the demised premises or any part thereof to be physically occupied by any person who is not a member of his family and once the fact

of the demised premises or any part thereof being physically occupied by a person contemplated u/s 12(1)(b) is established as indicated above the

presumption of fact about the sub-tenancy having come into existence becomes available to the landlord by virtue of the legal fiction envisaged

under explanation to Section 25 of the Act.

6. Resham Singh Vs. Raghbir Singh and Another,

9. As stated above, it is settled position of law that burden of making a case of subletting is on the landlord/landlady. In the present case there is no

evidence regarding parting of possession of the suit premises by respondent No. 1-Raghbir Singh in favour of his brother respondent No. 2-Kuldip

Singh and that said Kuldip Singh was in an exclusive possession of the suit premises. There is also no evidence of relationship of lessee and lessor

between the two brothers. For the reasons stated above we do not find any merit in the present appeal and accordingly dismissed.

7. Dipak Banerjee Vs. Lilabati Chakraborty,

7. The question in this case is whether the alleged subtenant was in exclusive possession of the part of the premises and whether the tenant had

retained no control over that part of the premises. There is no evidence on the fact that the alleged subtenant was in exclusive occupation of any

part of the premises over which the tenant had not retained any control at all. On this aspect neither was there any pleading nor any evidence at all.

No court gave any finding on this aspect at all. In that view of the matter one essential ingredient necessary for a finding, the case of subtenancy has

not been proved. If that is so, the trial court, the first appellate court and the High Court were in error in holding that the subtenancy was proved.

8. Smt. Chander Kali Bai and Others Vs. Shri Jagdish Singh Thakur and Another,

9. Shri J.C. Thind Vs. Union of India (UOI) and Others, .

27. In Navinchandra N. Majithia Vs. State of Maharashtra and Others, the Hon''ble Supreme Court while considering the provisions of Clause (2)

of Article 226 of the Constitution, observed as under:

In legal parlance the expression ''cause of action'' is generally understood to mean a situation or state of facts that entitles a party to maintain an

action in a Court or a Tribunal; a group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to

obtain a remedy in Court from another person... Cause of action is stated to be the entire set of facts that gives rise to an enforceable claim; the

phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment.... the meaning attributed to the phrase ''cause

of action'' in common legal parlance is existence of those facts which given a party a right to judicial interference on his behalf.

10. 2005(1) AWC 138 (SC) Janki Vashdeo Bhojwanti and Anr. v. Indusind Bank Ltd. and Ors.

13. Order III, Rules 1 and 2, C.P.C., empowers the holder of power of attorney to ""act"" on behalf of the principal. In our view the word ""acts

employed in Order III, Rules 1 and 2, C.P.C., confines only in respect of ""acts"" done by the power-of-attorney holder in exercise of power

granted by the instrument. The term ""acts"" would not include deposing in place and instead of the principal. In other words, if the power-of-

attorney holder has rendered some ""acts"" in pursuance to power-of-attorney holder has rendered some ""acts"" in pursuance to power-of-attorney,

he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him.

Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of

which the principal is entitled to be cross-examined.

11. 1999 (2) ARC Vishwanath Singh v. Special Judge (E.C. Act), Varanasi and Ors.

11. Section 12(1)(b) provides that the building shall be deemed to have been ceased to be occupied if the landlord or the tenant has allowed to be

occupied by any person who is not a member of his family. The word used is ""occupation"". This occupation must be on transfer of possession by

the tenant. If the possession is not transferred to another person it cannot be treated as occupation of such third person. If a servant, guest or

relative lives together with the tenant, they cannot be said to have occupied the accommodation in their own right on transfer of possession by the

tenant.

14. In Jagdish Prasad v. Smt. Angori Devi 1984 (1) ARC 679, interpreting the provisions of Sections 12(1)(b), 12(2) and 20(2)(e) the Court held

that merely from the presence of a person other than the tenant in the shop, subletting cannot be presumed. There may be several situations in

which a person other than the tenant may be found sitting in the shop; for instance, he may be a customer waiting to be attended to; a distributor

who may have come to deliver his goods at the shops for sale; a creditor coming for collection of the dues; a friend visiting for some social purpose

or the like. As long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, subletting flowing from

the presence of a person other than the tenant in the shop cannot be assumed.

On the other hand, Sri K.M. Garg, learned Counsel for respondents submits that in view of allegation made in para 5 of the plaint, a specific

averment has been made that petitioner has sub-let the shop in question, and therefore, a deemed vacancy as provided u/s 12(1)(2) of the Act has

been created. Petitioner has deliberately filed forged photograph which is apparent from the application dated 19.8.2008. Further finding recorded

by courts below are finding of fact and needs no interference by this Court. It is well settled in law that the point which has not been raised before

the court below cannot be raised before this Court first time. There was no suggestion before the court below that it is not the photograph of

respondent No. 2. The Judge, Small Causes Court as well as revisional court has recorded a cogent finding on the basis of evidence on record that

shop in question has been sub-leted to respondent No. 2 and petitioner is living and doing business in Kankhal and it is away from district Meerut

and having shop in Kankhal in front of Ram Krishna Mission Hospital. In such situation, it cannot be inferred by any means that shop in question

has not been sub-let by petitioner to respondent No. 2 and therefore the order passed by court below is perfectly legal and based on evidence on

record.

Learned counsel for respondents has placed reliance upon paras 11 to 20 of the case in Gur Dayal Khanna and Ors. v. Smt. Malti Devi and Ors.

reported in 1992 (2) ARC 456 . He has further placed reliance upon paras 13 to 22 in the case of Joginder Singh Sodhi Vs. Amar Kaur, , reliance

has also been placed upon paras 98 to 101 reported in 2003 (2) ARC 347 Kashi Nath v. Sushila Rastogi. Learned Counsel for respondents has

also placed reliance upon the following judgments which are quoted below:

M/s. Bharat Sales Ltd. Vs. Life Insurance Corporation of India, .

4. Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and

puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between

the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is

enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to

the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into

possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately

reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a

situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the

sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid

monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind

or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out

or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made

secretly, the law does not require such payment to be proved by affirmative evidence and the Court is permitted to draw its own inference upon

the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

5. In Rajbir Kaur and Another Vs. S. Chokesiri and Co., , it was held that it was not necessary for the landlord in every case to prove payment of

consideration. It was laid down that if exclusive possession was established, it would not be impermissible for the Court to draw an inference that

the transaction was entered into with the monetary consideration in mind. The Court further observed that transactions of sub-letting in the guise of

licences are in their very nature clandestine arrangements between the tenant and the sub-tenant and there cannot be furnished direct evidence in

every case. It will be noticed that in this case it was established as a fact that the tenant had parted with a part of the demised premises in favour of

an ice-cream vendor who was in exclusive possession of that part of the premises and, therefore, the Court drew an inference that the transaction

must have been entered into for monetary consideration. This decision has since been followed in many cases, as, for example United Bank of

India Vs. Cooks and Kelvey Proerties (P) Ltd., , upon which, as we shall presently see, reliance has been placed by the petitioner also.

Rajbir Kaur and Another Vs. S. Chokesiri and Co., .

57. In Ram Sarup Gupta v. Bishun Narain Inter College this Court said this of the need to construe pleadings liberally : (SCC pp. 562-63, para 6)

Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a

case it is the duty of the court to ascertain the substance of the pleadings should be considered. Whenever the question about lack of pleading is

raised the enquiry should not be so much about the form of pleadings; instead the court must find out whether in substance the parties knew the

case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they

proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings

in appeal.

59. The High Court did not deal specifically with the question whether, in the circumstances of the case, an inference that the parting of the

exclusive possession was promoted by monetary consideration could be drawn or not. The High Court did not examine this aspect of the matter,

as according to it, one of the essential ingredients, viz., of exclusive possession had not been established. If exclusive possession is established, and

the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances

of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration of

mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licenses are in their very nature, clandestine

arrangements between the tenant and the subtenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The

burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the

party"s case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the

appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant through out a trial, the evidential burden which

rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the

circumstance of the case, we think, that, appellants having been forced by the courts below to have established exclusive possession of the ice-

cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the courts

below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of

human conduct, that the transaction must have been entered into for monetary considerations, There is no explanation forthcoming from the

respondent appropriate to the situation as found.

Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta,

2. The appellant sought the eviction of the respondent on four grounds but the two grounds which found favour with the Trial Court and Appellate

Court are that the respondent had sublet the premises to his brother without the consent of the appellant and, secondly, the appellant bona fide

required the leased portion of the house for the use and occupation of the members of his family. These concurrent findings, though pertaining to

facts have been interfered with and reversed by the High Court and, if we may say so even at the outset by a process of reasoning which is at once

in-opposite and unconvincing.

5. Now coming to the question of subletting once again we find that the Courts below had adequate material to conclude that the respondent had

sublet the premises, albeit to his own brother and quit the place and the subletting was without the consent of the appellant. Admittedly, the

respondent was living elsewhere and it is his brother Manadhir who was in occupation of the rooms taken on lease by the respondent. The High

Court has taken the view that because Manadhir is the brother of the respondent, he will only be a licencee and not a subtenant. There is

absolutely no warrant for this reasoning. It is not as if the respondent is still occupying the rooms and he has permitted his brother also to reside

with him in the rooms. On the contrary, the respondent has permanently shifted his residence to another place and left the rooms completely to his

brother for his occupation without obtaining the consent of the appellant. There is therefore no question of the respondent''s brother being only a

licencee and not a subtenant. Hence it follows that the High Court was not justified in setting aside the concurrent findings of the Courts below on

the ground of subletting also.

Union of India (UOI) Vs. Chaturbhai M. Patel and Co.,

7. The High Court has carefully considered the various circumstances relied upon by the appellant and has held that they are not at all conclusive to

prove the case of fraud. It is well settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must

be established beyond reasonable doubt: per Lord Atkin in AIR 1941 93 (Privy Council) . However suspicious may be the circumstances,

however strange the coincidences, and however grave the doubts, suspicion alone can never take the place of proof. In our normal life we are

sometimes faced with unexplainable phenomenon and strange coincidences, for, as it is said, truth is stranger than fiction. In these circumstances,

therefore, going through the judgment of the High Court we are satisfied that the appellant has not been able to make out a case of fraud as found

by the High Court. As such the High Court was fully justified in negativing the plea of fraud and in decreeing the suit of the plaintiff.

Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others,

11. In our opinion the question of drawing an adverse inference against Apte and Bavdekar on account of their absence from the court would arise

only when there was no other evidence on the record on the point in issue. The first appellate court had relied upon the admission of the decree-

holder himself and normally there could be no better proof than the admission of a party. The High Court however, has observed in its judgment

that the decree-holder has made no admission in his evidence which would justify refusal to draw adverse inference for the failure of Apte and

Bavdekar to step into the witness box.

13. In the agreement dated December 29, 1958 between the decree-holder and the judgment-debtor. Ext. 58, there is a clear reference to the

amounts due to Apte from the judgment-debtor and the decree-holder had full knowledge of the dues of Apte. Apart from the dues of Apte there

were other dues also to be paid by the judgment-debtor. If according to the judgment-debtor himself the amount of Rs. 46,000/-, which was due

to Apte, had not been cleared off even by the sale of the property to Bavdekar the decree-holder could not proceed against the property in the

hands of Bavdekar. The attachment of the property at the instance of the decreeholder was only subject to the lien of Apte and unless the entire

amount due to Apte was cleared off the decree-holder could not proceed against the property in the hands of the purchaser, Bavdekar. Therefore,

the conclusion drawn by the two courts below that the amount of Rs. 46,000/- and odd was due to Apte from the judgment debtor and the same

had not been cleared off even by the sale of the property under attachment, was based on the materials on the record viz., the admission of the

decree-holder, the admission of the judgment debtor and from various letters and receipts Exts. 47/1 to Ext. 47/13. All these documents have

been lost sight of by the High Court which has indeed exceeded its jurisdiction in reversing the finding on the assumption that the courts below had

approached the case with a wrong view of law in not drawing an adverse inference against Apte and Bavdekar on their failure to appear in court

when the question of loan due to Apte from the judgment-debtor and the sale of the properties for Rs. 46,000/- has been amply proved by the

evidence on the record. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there

is no evidence on the record.

2003 (2) ARC 347 Kashi Nath v. Sushila Rastogi (Relevant paras are 98 to 101)

1982 ARC 647 Shambhoo Prasad v. IInd Addl. District and Sessions Judge, Varanasi and Ors.

8. Sri Faujdar Rai learned Counsel for the petitioner, however, submitted that the photograph relied on by the appellate court in support of its

conclusion that the petitioner is not using the shop was not admissible in evidence. It was urged that the photograph had not been proved according

to law. I cannot accept the contention. The photograph was filed by the landlord only as a corroborative piece of evidence. There was substantive

evidence of the landlord to the effect that the petitioner was selling eggs on a thela and that he was primarily engaged in the business of selling eggs

and its preparation in the market as a hawker. Moreover, no objection was raised by the petitioner before the appellate court as regards the

admissibility of the photograph. The only objection take was that the photograph was contrived and that it did not represent the true state of affairs.

This aspect was considered by the appellate court and for good and proper reasons rejected as unsatisfactory.

(2003) 12 SCC 728 Kailash Chander v. Om Prakash and Anr.

4. The facts found are: Respondent 2 is the son of Respondent 1. In the premises in question there has been a partition by wooden frame/plank.

Respondent 2 has been using the rear portion to carry on his activities as UTI agent and Respondent 1 was carrying on cloth business in the front

portion of the premises. Respondent 2 has nothing to do with the cloth business in any capacity whatsoever. The respondents did not explain the

nature of the possession of Respondent 2 in the premises in their written statement but denied his possession. During the trial, the possession of

Respondent 2 was sought to be justified stating that Respondent 1 did not part with the possession of any portion of the premises so as to place

Respondent 2 in exclusive possession and that Respondent 2 was in permissive possession of the premises in question having close relation with

Respondent 1. The Rent Controller, as already notice above, on appreciation of the evidence held that Respondent 1 had sub-let the portion of the

premises to Respondent 2. The Appellate Authority affirmed the same. These findings recorded are based on the evidence. It is no possible to say

that these findings recorded by the Rent Controller and affirmed by the Appellate Authority, are either perverse or not based on evidence. The

High Court was exercising its revisional jurisdiction u/s 15(6) of the Act. As to the scope of exercise of that power it is explained in the judgment of

this Court in Lachhman Dass v. Santokh Singh. In paragraph 7 of the said judgment it is stated thus:(SCC p.205)

7. The first question that arises for our consideration is whether the learned Single Judge of the High Court was justified in reassessing the value of

the evidence and substitute his own conclusions in respect of the concurrent findings of fact recorded by the two courts below, in exercise of his

revisional powers vested in the High Curt u/s 15(6) of the Act. In the present case as discussed earlier the Rent Controller passed the order of

eviction against the respondent on the ground mentioned u/s 13 of the Act against which the respondent preferred an appeal under Sub-section (2)

of Section 15 of the Act and the Appellate Authority affirmed the order of eviction passed by the Rent Controller. Here it may be noted that the

Act does not provide a second appeal against the order passed in appeal by the Appellate Authority under Sub-section (2) of Section 15. The

Act, however, under Sub-section (6) of Section 15 makes a provision for revision to the High Court against any order passed or proceedings

taken under the Act. Thus, the legislature has provided for a single appeal against the order passed by the Rent Controlling Authority and no

further appeal has been provided under the Act. The legislature has, however, made a provision for discretionary remedy of revision which is

indicative of the fact that the legislature has created two jurisdictions different from each other in scope and content in the form of an appeal and

revision. That being so the two jurisdictions- one under an appeal and the other under revision cannot be said to be one and the same but distinct

and different in the ambit and scope. Precisely stated, an appeal is a continuation of a suit or proceedings wherein the entire proceedings are again

left open for consideration by the Appellate Authority which has the power to review the entire evidence subject, of course, to the prescribed

statutory limitations. But in the case of revision whatever powers the revisional authority may have, it has no power to reassess and re-appreciate

the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision. In this view of the matter we

are supported by a decision of this Court in State of Kerala v. K.M. Charia Abdulla and Co.

5. This Court proceeded to say further that unless the High Court comes to the conclusion that the concurrent findings recorded by the two courts

below are wholly perverse and erroneous, which manifestly appear to be unjust, there should be no interference. In the case on hand also the two

courts below have appreciated evidence placed on record and on a proper appreciation concluded that the case of sub-letting, as pleaded by the

appellant, is proved. In our view, the High Court was not justified in interfering with such concurrent finding. It is not shown on behalf of the

respondents herein that the findings recorded by the two courts below were either perverse or not based on evidence. We must also keep in mind

that activities as UTI agent in the part of the premises exclusively by him, it was for the respondent to establish that his possession on that premises

was not as a sub-tenant. Merely because Respondent 1 is the father of Respondent 2 there cannot be any justification to say that it was not a case

of sub-letting.

2003 (1) AWC 126 (SC) Mohd. Shahnawaz Akhtar and Anr. v. Ist A.D.J., Varanasi and Ors.

3. At this stage, the limits of jurisdiction of the High Court in issuing a writ of certiorari under Article 226 of the Constitution needs to be kept in

mind. It has been held by a Constitution Bench of this Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, , as follows:

The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by

this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction

committed by inferior courts or Tribunals; these are cases where orders are passed by inferior courts or Tribunals without jurisdiction, or in excess

of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or

Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the

order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the

jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate court. This

limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be

reopened or questioned in writ proceedings. An error of law which is apparent corrected by a writ, but not an error of fact, however, grave it may

appear to b. In regard to the finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said

finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which

has influenced the impugned finding. Similarly if a finding of fact is based on no evidence that would be regarded as an error of law which can be

corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding off fact recorded by

the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the

Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy of insufficiency of evidence led on a point and the

interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated

before a writ court. It is within these limits that the jurisdiction conferred on High Courts under Article 226 to issue a writ of certiorari can be

legitimately exercised.

4. The trial court, as well as the revisional court, had on appreciation of evidence come to the conclusion that the 4th respondent had sublet the

premises. Incoming to the conclusion, they had relied on a report of a Commissioner appointed by the trial court to visit the premises. The

Commissioner had found that somebody else was carrying on business of selling ready-made garments inside and around the premises.

Admittedly, the 4th respondent was not carrying on this business. The 4th respondent had also not produced any license to carry on any business

nor produced any documents like bills, vouchers, sale receipts, etc. to show that he had been carrying on any business in the suit premises. It is on

appreciation of this evidence that the suit had been decreed and the revision dismissed. The high Court, however, reversed the findings of the trial

court and the revisional court on the reasoning that even if the entire evidence is accepted, this would still not amount to a case of subletting. The

High Curt held that at the most, it would be a case of casual license allowing persons to temporarily store their goods inside or to do some business

outside the shop by using the patra and also on a chowki. On this reasoning, the High Court allowed the writ petition.

After considering the argument on behalf of parties and after perusal of record and various decisions cited on behalf of parties, it borne out from

record that initially this premises in dispute was let out to petitioner on a monthly rent. The question for consideration by this Court is only as

whether in the facts and circumstances and finding recorded this shop in dispute has been sub-let to respondent No. 2 or not. For the said purpose

Section 25 of the Act is relevant. Section 25 is being quoted below:

25. Prohibition of Sub-letting:

(1) No tenant shall sub-let the whole of the building under this tenancy.

(2) The tenant may with the permission in writing of the landlord and of the District Magistrate, sub-let a part of the building.

Explanation- For the purposes of this section:

(i) where the tenant ceases, within the meaning of Clause (b) of Sub-section (1) or Sub-section (2) of Section 12, to occupy the building or any

part thereof he shall be deemed to have sub-let that building or part;

(ii) lodging a person in a hotel or a lodging house shall not amount to subletting.

6. Sub-Section 1 of Section 12 states that a landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part

thereof if (a) he has substantially removed his effects therefrom, or (b) he has allowed it to be occupied by any person who is not a member or his

family, or (c) in the case of a residential building, he as well as the members of his family have taken up residence, not being temporary residence,

elsewhere.

7. Sub Section 2 of Section 12 states that in the case of non-residential building, where a tenant carrying on business admits a person who is not a

member of his family or a partner then in that case, tenant shall be deemed to have ceased to occupy the said building. But from the record, no

finding has been recorded by the courts below that petitioner has substantially removed his effects from the shop in question and ingredients of

Section 12 in true spirit has been complied with. As regards the photograph submitted by respondent, in my opinion, that cannot be taken as a sole

evidence for the purposes of establishing that shop in question has been let out to respondent No. 2. Further, admittedly, landlord himself has not

appeared before the Court and has made statement who was the relevant person for the purposes of establishing the fact that shop in question is in

exclusive possession in lieu of valuable consideration. It was incumbent on the part of opposite party to establish and prove to the hilt that the

alleged occupant is the sub-tenant enjoying possession exclusively and secondly that sub-tenancy has been created for valuable consideration.

Sub-tenancy can neither be presumed nor inferred. It has to be proved to the satisfaction of the Court that two cardinal ingredients as enumerated

has been satisfied. In the present case, in my opinion, the opposite party-landlord has to prove to the hilt, the alleged sub -tenancy to respondent

No 2. As regards the sub-letting, the ingredients and prove of parting of possession of rented property by the tenant into a third party and receiving

monitoring consideration is necessary. Burden of prove of sub letting is on the landlord, but in case, if it is established, burden will be immediately

shifted to tenant. Admittedly, respondent No. 1 is not a stranger, therefore, no presumption can be raised that he was a sub-tenant. The submission

of learned Counsel for petitioner that power of attorney in view of Order III Rules 1 and 2 of CPC cannot act as a principal and in respect of

matter which only principal can have knowledge. Admittedly, the son of respondent-landlord has appeared before the Court and has stated on

oath. At no point of time, the landlord who was the best person to depose before the court has not come forward to depose before the Court. The

Apex Court in Janki Vashdeo Bhojwani and Anr. v. Industrial Bank Ltd. and Ors. reported in 2005(1)AWC 138 (SC) has considered this issue

and has held in para 13 that in view of Order III, Rules 1 and 2 of Civil Procedure Code, confines only in respect of ""acts"" done by power-of-

attorney holder in exercise of power granted by the instrument. The term ''acts'' would not include deposing in place and instead of the principal.

This argument on behalf of learned Counsel for petitioner has got some force to this effect that respondent-landlord has not come forward before

the Court and only his son Manmohan Bansal has depose on his behalf on the basis of power of attorney executed. In my opinion he was not the

best person to depose to that effect or having any knowledge whether petitioner has sub-let the shop in question or not. In the present case, the

court below has assumed that petitioner has sub-let the shop in question to respondent No. 2 without recording a finding that whether the tenant

has transferred the possession to them or not. The respondent landlord is not able to show from the record that respondent No. 2 has been

admitted as partner in the business who is not a member of his family as held in case of Harish Tandon v. Additional District Magistrate reported in

1995 (1) ARC, 220 . A presumption has been taken that respondent No. 2 has been inducted as a sub tenant in the shop in question. The court

below has not recorded a cogent finding to this effect on the basis of relevant record. Unless and until a finding is recorded that respondent No. 2

was in exclusive possession, in my opinion, it cannot be held that building in question has been subleted. In Resham Singh Vs. Raghbir Singh and

Another, . the Apex Court has taken into consideration this fact that where brother of tenant was carrying on business and it was only found that he

was looking after the business particularly when his brother was out or involved in a proceeding then the Apex Court has held that it cannot be said

to be sub letting. The Court has to examine the nature of possession of such person who is alleged not to be a member of family of the tenant. If his

possession is in the nature of a licence without putting him in exclusive possession it cannot be taken into consideration that it was subletting by the

tenant to another person. Though, the judgement cited on behalf of petitioner to this effect that burden was upon the landlord to prove that it was a

case of sub letting. As soon as landlord discharges the burden, immediately the burden shifted upon the tenant to prove that premises in occupation

of some one else or a person sitting in the shop in question is a member of the family of the tenant and not a partner and if he is not able to prove

the same, then he is liable for ejectment. There is no dispute to this effect that if it is established that tenant carrying on business in a building admits

a person who is not a member of a family as a partner or a new partner, immediately the vacancy will be there. But from the perusal of the

judgement passed by courts below, in my opinion, the burden has not been discharged properly by the landlord, therefore, in my opinion, the order

passed by the respondents is not sustainable in law.

8. Therefore, the writ petition is allowed. The orders passed by respondents dated 6.9.2008 (Annexure 15 to writ petition) and order dated

2.3.2009 (Annexure 17 to writ petition) are hereby quashed.

9. No order as to costs.