(1959) 08 AHC CK 0007

Allahabad High Court

Case No: Second Appeal No. 1109 of 1957

Ram Prakash		APPELLANT
	Vs	
Shambhu Dayal Agarwal and Another		RESPONDENT

Date of Decision: Aug. 31, 1959

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 101
- Transfer of Property Act, 1882 - Section 105

Citation: AIR 1960 All 395

Hon'ble Judges: S.S. Dhavan, J

Bench: Single Bench

Advocate: Baleshwari PrasadB.S. Darbari and S.N. Varma, for the Appellant; J.N. Agarwala, for the Respondent

Final Decision: Partly Allowed

Judgement

S.S. Dhavan, J.

This is a defendant''s second appeal against a decree for ejectment. It is necessary to state very briefly the facts which have led to this appeal. Sri Sharnbhu Dayal, the plaintiff respondent is the owner of bunglow No. 306 in the Civil Lines, Jhansi. It was let out to Sri Sudhundar Kumar Varma defendant-appellant No. 1. It is common ground that, after the partition of India, his brother-in-law Ram Prakash came from Pakistan to live with him at Jhansi. He is defendant No. 2 in the suit for ejectment and a pro forma respondent in the appeal. He has also filed an appeal against the decree for ejectment on his own behalf.

Both these appeals are being heard together and this judgment will govern both. The whole controversy centres round the terms and conditions under which Ram Prakash, the refugee from Pakistan, was admitted into the house by his brother-in-law. Sri S.K. Varma the appellant. It is common ground that Ram Prakash

came to live with his brother-in-law about 1948-49, that the latter shifted into another house with his wife but his children continued to live in the same house.

It is also conceded by both counsel that the landlord made an application in 1949 before the Rent Control and Eviction Officer asking for the ejectment of Ram Prakash on the ground that, after the tenant had left the house with his wife. Ram Prakash was occupying it as an unauthorised person. It is also not in dispute that the Rent Control and Eviction Officer rejected the application on the ground that as long as the tenant or any member of His family continued to live in the house and paid rent, the house would not be deemed to have been vacated.

That officer also observed that Ram Prakash was the brother-in-law of the tenant and had been sharing the house intimately with him, and that therefore he would be treated as a member of the family and the question of the owner driving him out of the house did not arise. It is also a fact that in 1950 the landlord made another application for the ejectment of the tenant on the ground that he wanted the accommodation for his own use.

This too was rejected by the Rent Control and Eviction Officer on the ground that he was living in One of his own houses and that some of the members of the tenant were still occupying the house and, therefore, permission for ejectment could not be granted. Subsequently, in 1954 the landlord made another application for the eviction of the tenant which again was rejected on the ground that it was open to the landlord to file a suit for ejectment if his case was that the tenant had sub-let the house without his permission. Thus, it is clear that by the end of 1954 the efforts of the landlord to reoccupy the house, either on the ground of his own need or on the allegation of sub-letting against the tenant, were unsuccessful.

2. On 20th May, 1954 the landlord filed the present suit for ejectment on two grounds -- (1) that the tenant had defaulted in payment of rent and (2) that he had sub-let the house to his brother-in-law Ram Prakash without the landlord''s permission. The trial court held that there had been no default in payment of rent but that there had been an unauthorised sub-letting of the house by the [tenant. Accordingly, he decreed the suit for ejectment. On appeal, the learned Civil Judge, Jhansi upheld both findings -- that is to say, he too held that there had been no default in payment of rent and that the tenant had sub-let the house without the permission of the landlord. Accordingly, he dismissed the appeal and confirmed the decree for ejectment. Against this decision the tenant S.K. Varma has come to this Court in Second Appeal.

3. Mr. Baleshwari Prasad learned counsel for the appellant, urged that the findings of both the courts that there had been an illegal sub-letting was wrong in law. He contended that the question whether the relationship between two parties amounts to a tenant is a mixed question of law and fact and that this court can re-examine the evidence in Second Appeal. He referred to one or two authorities of this Court in

support of his argument. On the other hand, learned counsel for the respondent has argued that the case is concluded by findings of fact and this Court should not re-open the question of sub-tenancy in Second Appeal. In my view, Mr. Baleshwari Prasad''s contention is right.

Whether a certain set of facts existed or not is a matter for the lower appellate court to decide and its verdict would be binding on the High Court in Second Appeal; but whether the facts found by that lower Court constitute a relationship of sub-tenancy or of landlord and tenant between the parties is a question of law, and if the lower courts have come to an erroneous conclusion on this point, the High Court can interfere in Second Appeal. I shall, therefore, consider whether, on the facts found by the lower appellate court, its finding that the house in dispute had been sub-let by the tenant is correct in law.

4. Tenancy, letting or sub-letting, is the creation of a contract express or implied. Like every other contract, an agreement of tenancy must contain all the essential elements of a valid contract. One of them is that the object or subject-matter of the contract must be certain or capable of being made certain. A contract of tenancy must relate to specified premises. To create a tenancy or subtenancy, the tenant or sub-tenant must be given exclusive possession of specific accommodation.

But if A says to B "You can live with, my family in my house on payment of rent B becomes As paying guest but there is no tenancy. A paying guest is not necessarily a tenant. If a person is allowed to live in a house by the owner as a paying guest, but is not given possession over the whole or any part of the house, the relationship is not that of landlord and tenant. These principles have been correctly appreciated by the lower appellate court which observed :

".....In order to prove that sub-letting was made, ''it must be established that tenant transferred a right to ''the tenant (sub-tenant) to enjoy the property, subject matter of the sub-lease, for a certain time, express or implied, in consideration of a price, paid or promised. ...''".

He also cited with approval the principle laid down in a judgment of the Madras High Court that to create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another and that the tenant must part with his possession of the property.

5. The question in the present appeal is whether these principles were correctly applied by the lower appellate court when it held that the tenant had sub-let the house to his brother-in-law.

6. It is common ground that the brother-in-law from Pakistan came to live with his brother-in-law in India soon after the partition of India in 1947. It was conceded by learned counsel for the respondent that there is no evidence whatsoever that any part of the house was placed in the exclusive possession and enjoyment of the

brother-in-law. There is evidence, which was believed by the learn-ed Judge, that the brother-in-law was paying rent while he was living in the house. But this fact would not make him a tenant of the brother-in-law, and the learned Judge too has admitted in his judgment that mere payment of rent is not sufficient to create a tenancy. In the absence of any evidence that there was a transfer of possession of the whole or a part of the house to the brother-in-law, no question of sub-letting could arise.

7. Learned counsel for the respondent, however, stated that the house must be deemed to have been transferred to the brother-in-law from Pakistan as a sub-tenant on the date when the Indian brother-in-law and hip, wife left it and started residing elsewhere, On a question from the court as to which portion of the house was sub-let, learned counsel replied that the entire house was sub-let by the tenant when he left it and the brother-in-law was free to occupy it. He stated that the tenancy was created in or about 1949 when the tenant-in-chief and his wife left the house.

8. This contention, however, is negative by the admitted fact that though the Indian brother-in-law and his wife left the house, their children continued to live in it. Learned counsel for the respondent contended that the children must be deemed to have been living in, the old house with the permission of the brother-in-law from Pakistan, who was their maternal uncle and the sub-tenant of their father. In considering the position of the children in the house, the learned Judge appears to have made a wrong approach. He observed :

"Defendant No. 2 (the brother-in-law front Pakistan and the alleged sub-tenant) has not examined any son of defendant No. 1 (the chief tenant) to state that the possession or control over the building vests in them. Had the control or legal possession been with the sons of defendants, it was not at all difficult to examine them."

The learned Judge was wrong in thinking that the children could acquire possession of the house merely because their parents had started living in another place. The control and possession of the house remained with the father as tenant. The learned Judge was in error in thinking that there could be any tenancy in favour of the children for a minor has no capacity to contract. Therefore, there was no onus on the defendants to prove that the children had acquired the possession of the house from their father: a party docs not have to prove what is not its case.

9. The real question is whether the brother- in-law from Pakistan acquired possession of the house or whether the defendant No. 1, whom I shall call the Indian brother-in-law continued in possession as tenant though he permitted the Pakis- tani brother-in-law to live in the house and to look after his children. The learned Judge has observed :

"Even if a part of the accommodation is in the control or legal possession of defendant No. 2, it is quite clear from the facts and circumstances of the case that a sub-lease is established and there is no doubt in my mind that defendant No. 2 (the Pakistani brother-in-law) who has been living in the house for such a long time does not have with him legal possession or control". (The double negative is grammatically not correct. He probably meant that the brother-in-law from Pakistan did have legal possession and control of the accommodation in dispute.)

The learned Judge correctly enunciated the principle that a transfer of a part of the possession of the house would have the legal effect of creating a "tenancy in respect of that part, but he was wrong in making a presumption that the mere fact of the brother-in-law living in the house for such a long time had the effect of vesting the possession of the house in him.

He should have applied his mind to the principle enunciated by himself that exclusive possession of the property should be conferred on the tenant to create a tenancy, and should have considered whether the brother-in-law acquired exclusive possession of the house even after the tenant had left it. I do not find that the lower appellate court has applied its mind to this question at all or examined the evidence from this point of view.

10. The question before me is whether I should examine this evidence myself or remand the case to the lower appellate court for a decision on the question whether the brother-in-law from Pakistan acquired exclusive possession after the tenant had admittedly gone elsewhere to live with his wife but his children continued to live there. I think it would be in the interests of justice not to prolong this case but to decide it myself, for there is sufficient evidence on the record to decide this issue.

There are a number of applications made by the brother-in-law to the Rent Control and Eviction Officer, Jhansi after the tenant had gone to live elsewhere. In these he stated the facts and circumstances under which he came to live with his brother-in-law and prayed that the house be allotted to him in case it was vacated by the tenant. The use of the word '""Vacated" shows that the original tenant had not vacated the house. It is true that, on this application, the Rent Control Inspector made a report that the possession of the brother-in-law might be regularised by the Rent Control and Eviction Officer and the house be allotted to him.

However, the Inspector does not appear to have considered the fact that the family of the tenant continued to live in the old house. It appears to me that, as long as the original tenant was keeping a part of his family in the old house and had not renounced the tenancy, the possession of the invitee over any part of the house could not be exclusive and his position was that of a licensee or, at the most, a paying guest. If the parties were strangers, I would be inclined to hold that the tenant who had left the house intended to create a sub-tenancy for profit.

But where the parties are close relations and one of them comes from Pakistan to seek shelter with the other, there is no presumption that a sub-tenancy is created merely because the host and his wife allow the refugee guests to live with them and then, for the sake of enlarging the available accommodation, shift to another house but leave a part of their family in the old house. There must be cogent evidence that a relationship of sub-tenancy was created, and it must be proved that the refugee guest was given exclusive possession of the premises.

Probably it was the intention of both brothers-in-law that ultimately the house would be vacated by the original tenant in favour of the refugee brother-in-law, but the Court has to consider not the ultimate intentions, but the legal effect of what they did. I am not prepared to hold that the plaintiff has proved that a sub-tenancy was created. The plaintiff has not proved that the defendant has done anything which is forbidden by the existing law or is beyond the legitimate use of the premises as a tenant. The light to invite guests -- even paying guests -- is included in the legitimate enjoyment of the rights of tenancy, as long as no sub-tenancy is created. In this view of the matter, his suit must fail. The appeal is allowed in part and the suit for ejectment is dismissed.

11. A decree for arrears of rent for one month was also passed and an appeal was filed against this part of the decree. Mr. Baleshwari Prasad says that he does not propose to press this part of the appeal. The appeal against the decree for rent, is, therefore, dismissed.

12. In the result, the appeal is allowed in part and the suit for the ejectment of the tenant dismissed. In the circumstances of the case the parties shall bear their own costs throughout.

13. I do not think this is a fit case for special appeal and leave to appeal is refused.