

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**S.A. 313 of 2005
With
IA No. CAN 2 of 2023
Rampuriah Estates Pvt. Ltd.
-Versus-
M/S. Bijay Tractor Spares Pvt.Ltd.
with
S.A. 316 of 2005
with
IA No. CAN 2 of 2023
Rampuriah Estates Pvt. Ltd.
-Versus-
M/S. Bijay Tractor Spares Pvt. Ltd.**

For the Appellant : Mr. Sakya Sen, Sr. Adv.
Mr. Goutam Das
Mr. Sandeep Kumar Tiwari
Ms. Sarnu Dutta

For the Respondent : Mr. Suvashish Sengupta
Mr. Debmalya Ghoshal
Mr. Sourath Dutt
Mr. Arnab Dutt
Ms. Laboni Dey

Heard on : 25.01.2024

Judgment on : 16.04.2024

Ajoy Kumar Mukherjee, J.

1. The present second appeal has been preferred against the judgment and decree of the first Appellate Court dated 13th May, 2005 in Title Appeal

No. 19 of 2004 and 20 of 2004, whereby Court below has affirmed the judgment and decree of the Trial Court dated 22nd December, 2003 passed in Ejectment Suit No. 189 of 2002 and 190 of 2002.

2. The plaintiff/Appellant herein had inducted the defendant as the monthly tenant in respect of one godown being No.2C on the first floor at premises no.8/1, 8A, 8B, 8C, Lalbazar Street and one office space being No.2 on the same floor. On or about 1997 plaintiff had filed two separate suits for eviction of the defendant from godown and the office space, one being Ejectment Suit no 309 of 1997 and another being ejectment suit no 310 of 1997 *inter alia* on the grounds of subletting and for causing damages in the suit property. Said suits were subsequently renumbered as ejectment suit no 189 of 2002 and 190 of 2002. Both the suits were tried analogously by the Trial Court.

3. The plaint case in a nutshell is that the defendant was a monthly tenant under the plaintiff in respect of aforesaid office no 2, on the first floor of premises no 8/1, 8A , 8B and 8C Lalbazar street at a monthly rental of Rupees 1500/- payable according to English calendar month and also in respect of one godown being no 2C on the same first floor of the said premises at a monthly rental of Rs. 840/-.The plaintiff had filed the suit for eviction in respect of the said office and godown against the defendant on the ground that the defendant has sub-let the office and the godown or portions thereof to (1). M/S Filtron Agencies (P) Ltd. (2). Srinivas Foods and process (P) Ltd. (3). Mungipa Lifters (P) Ltd. (4). Godwin Credit (P) Ltd. and (5). Srinivas Santi Paramshri Jalkalyan Trust, without the consent of the plaintiff either verbally or in writing and that the defendant has made

additions, alterations and/or unauthorised construction wrongfully and illegally in the office and godown without the consent of the plaintiff. It has been further alleged by the plaintiff that the defendant has broken the brick wall existing in between the said go down and the adjoining office no. 2 and thereby caused damages to the suit properties .The plaintiff accordingly determined the tenancies of the defendant by a notice dated 30th April 1997 calling upon the defendant to quit and vacate the aforesaid office and godown and to hand over the peaceful vacant possession thereof to the plaintiff on the expiry of last day of the month of June 1997. In spite of receipt of notice of eviction, the defendant failed to quit and vacate the suit premises and as such, the plaintiff filed the aforesaid suits.

4. The defendant contested both the suits by filing written statements in both the suits separately, denying the material allegations made in the plaints. The defence contention is that he did not sub-let the tenanted office or godown or any part thereof to any company or trust as alleged by the plaintiff. Further contention of the defendant is that Defendant is carrying on the business in the suit office and godown and the aforesaid companies are defendant's sister concern and they are carrying on the business in the suit office and godown as licensee and that no rent or other consideration was ever paid by them. Defendant further denied that he had made any addition or alteration and or unauthorised construction in the suit properties nor he has caused any damage thereto. Defendant admitted that he had received notice of ejectment dated 30th April 1997 but he had challenged the legality, validity and sufficiency of the said notice. Defendant accordingly prayed for dismissal of the said suit .

5. Learned Trial judge upon hearing both sides and after due considerations to the evidence and materials on record was pleased to held that the plaintiff in both the suits failed to establish and prove its case against the defendant and accordingly both the suits were dismissed on contest.

6. Being aggrieved by and dissatisfied with the impugned judgment and decree dated. 22 December 2003, the plaintiff preferred appeal before the court below with a prayer for setting aside the two impugned judgment and decree and for obtaining the decree as sought for in the prayer portion of the plaint of both the suits. Learned First appellate court upon consideration of the evidence and materials on record and after giving due regard to the submissions made by both the parties, did not agree to the submissions made on behalf of the Appellant. Accordingly court below held that the Trial Court while disposing of the suits being Ejectment Suit No. 189 and 190 of 2002 was justified in dismissing both the suits. Accordingly ,the findings arrived at by the Trial Judge was not interfered by the Court below and thereby Court below by the impugned judgment had dismissed both the appeal.

7. Being aggrieved by the judgment and decreed dated 13th May 2005 plaintiff/appellant preferred present second appeal before this Court.

8. The Division Bench of this court while admitting the second appeal vide its order dated 22nd July 2005, was pleased to observe that this second appeal will be heard on the following substantial questions of law :-

(i) Whether the learned Courts below committed substantial error of law in dismissing the suit on the ground of subletting in spite of the specific finding that M/s. Filtron Agencies(P) Limited and four other

agencies are continuing their business from the tenanted accommodation of the defendant;

(ii) *Whether the learned courts below committed substantial error of law in dismissing the case on the ground of subletting by totally overlooking the fact that it was for the defendant to disclose what was the relationship of those five agencies with the defendant and the plaintiff cannot be asked to prove payment of rent by those five agencies in favour of the defendant;*

(iii) *Whether the learned Courts below committed substantial error of law in disbelieving the ground of eviction on the ground of violation of clauses (m) (o) and (p) of Section 108 of the Transfer of Property Act by totally misreading the Commissioner's report which clearly indicates that opening of the door was of recent origin and it was for the defendant to prove that it was either made with the consent of the parties or was made before induction of the defendant as tenant.*

Decision

9. In view of concurrent finding of the courts below that plaintiff had failed to prove the ground of subletting and the ground under clause (m) (o) (p) of sec 108 of Transfer of Property Act, this court while exercising power under section 100 of the Code of Civil Procedure, is to consider whether findings of the courts below are manifestly perverse and/or whether the ultimate conclusion arrived at by the courts below are contrary to the evidence on record .

10. Now so far as allegation of violating the provisions of clause (m), (o), (p) of sec 108 of Transfer of Property Act is concerned, the plaint case as set out in paragraph 4 (b) of the plaint is as follows:-

“The defendant has made additions, alterations and unauthorised constructions wrongfully and illegally in the said godown without the consent of the plaintiff, verbally or in writing. The defendant has broken the brick-wall existing in between the said godown and the adjoining office at No 2, which is also within the tenancy of the defendant thereby causing damage to the property”..

11. In evidence plaintiff as P.W-1 admitted:-

“I did not send any notice to the defendant for inspection of the suit premises. I have passed B.Com from St. Xaviers College from the Calcutta University. I have got no Engineering degree or diploma. The

suit building is more than 100 years old. I have no map in respect of the first floor of the suit building”.

12. However Engineer commissioner in his report noted:-

“The above new plaster on wall (on both side) above door frame, indicates that the same was made for providing Lintel over door frame alternatively from each side to support the load of brick work and roof over the Door frame and after insertion of Lintel from both side, the 1”-3” thick Brick work has been cut for installation of Door frame. Door frame with wooden horn system on top, were adopted to facilitate easy installation of Door frame.

The Door connecting office No. 2 and Godown No, 2C were not installed at the time of original construction of the building, it has been installed subsequently by providing Lintel and dismantling Brick-wall from the condition of new plaster and wooden Door, it can be said that it will not be very old, but no opinion is given regarding age of the Door, as there are no approved technical method to determine its age correctly”

13. But Engineer Commissioner while gave reply to the question as to whether tenant has caused any damage in the suit property, has replied in his same report

(i) In the flooring of the godown there are some damages of the top surface of flooring, which can take place in a godown and this is normal wear and tear of flooring.

(ii) Physically no damage of the suit property are visible.

(iii) As there are technically no approved method to determine the age of dismantling the brick-work for insertion of the door frame no comments are given about age of breaking.

(iv) Physically no damage are visible in naked eye. Normally cracks are visible in the wall when it exceeds directly load of over it or as a result of differential movements between the various parts of structure. In this case precautionary measures were adopted for which cracks in brick wall are not visible.

14. Said engineer commissioner faced the dock as P.W. 2 and stated in his cross examination:-

“The suit building is more than 100 years old. I did not find any crack in the wall of the suit premises where the door exists. I did not notice during my inspection as to whether the floor of the suit premises became sub-sided and any of the walls tilted. If the iron rods inside the walls get rusty the walls will automatically be bulging and peeling. I did not notice new painting or white wash in the suit premises during inspection. I was unable to ascertain the age of the installation of the doors as there is no approved method for doing the same. The damage on the floor was due to normal wear and tear. I did not notice any crack or any sort of damage in the suit building due to installation of the aforesaid door”.

15. Trial Court while dealt with the issue came to a clear finding:-

“From the evidence and the report of the Ld. Engineer Commissioner I find that there is a door measuring 4'-3 ½"x 7'-0" in the load-bearing wall in between the suit office and the suit godown. Ld. Engineer Commissioner could not state the age of the alleged installation of the door. I do not find any satisfactory evidence on record as to when the door was installed in between the suit office and suit godown. Learned Commissioner, as per his evidence on record, could not find any sort of damage in the suit office or suit godown or in the load-bearing wall. He has also stated in his evidence that damage what he noticed on the floor was due to normal wear and tear. I do not find any satisfactory evidence on record actually when the door in question was installed, whether it was installed before the induction of the tenancy or after the induction of tenancy. The evidence is not clear at all on this point. Moreover, I do not find any satisfactory evidence regarding any sort of damage caused by the defendant as alleged. So, the plaintiff has failed to prove its case against the defendant so far as the alleged installation of the door and damage to the suit premises including the office and the godown is concerned. Accordingly, issue no.6 is decided against the plaintiff”.

16. The court below i.e. the first appellate court while dismissing the appeal on the self-same point observed as follows:-

“It further reveals in the evidence of P.W.1 that suit building is more or less 100 years old and that he (plaintiff) has no map in respect of 1st floor of the suit building. It has also been reflected in the oral testimony of P.W.1 that excepting the ejectment notice (Ext. 3 and 6) he never sent any letter to the defendant for breaking open the wall. It is also explicit from the evidence of P.W. 1 that he never lodged any diary with the local P.S, by bringing allegation for breaking open of the walls of the suit premises. Further, it has been manifested in the oral testimony of P.W. 1 that he came to know about the breaking of walls from Darwan of the suit premises. Admittedly, Darwan concerned has not been examined in this case. As a matter of fact the evidence of P.W. 1 does not appear to be satisfactory and convincing for establishing the allegations”.

17. Mr. Sen learned Counsel appearing on behalf of the appellant strenuously argued that both the courts below confined themselves only on the point as to whether any damage was caused or not as stipulated in

section 108 (m) and (o) of the Transfer of Property Act. Unfortunately both the Courts below completely ignored the provision as laid down in section 108(p) of the Act which states that the tenant must not without landlord's consent erect on the property any permanent structure. He further argued that from Engineer Commissioner's report, it is clear that the plaster as shown in the sketch map are made up of cement plaster with coarse sand and there are colour difference with surrounding old plaster and it also does not match with the surrounding plaster which is raised other than the surrounding plaster and that the door was installed subsequently by putting Linten and dismantling brick wall, which is not very old, though he refused to give any opinion regarding the age of such installation.

18. Mr. Sen accordingly argued that it is clear from commissioner's report that it was not a mere patch work. No cross examination offered on this point. He further argued that though it is true that learned Commissioner could not say age of installation of door by dismantling brick wall but he admitted that it was a new one, which fact was totally ignored by the courts below and they had discussed only as to whether there is any crack in the wall or not. According to Mr. Sen here lies the perversity in the orders impugned.

19. It is true that Learned Commissioner in his report has stated that the door was not installed at the time of original construction and it has been installed subsequently, but at the same time he opined as there is no approved technical method to determine its age correctly, so he refused to comment about the age of installation. Accordingly both the courts below came to a finding that Learned Commissioner could not say age of

installation of the door and that P.W. 2, i.e. engineer commissioner in his cross examination admitted that he did not see any new painting or white wash in the suit premises during inspection and further admitted that he did not find any crack in the wall of the suit premises where the door exists.

20. Now one can very well argue that tenancy was taken from 1st January 1972 and Engineer Commissioner while inspected in 2002 reported that the door was installed subsequently which is not very old so, inevitable conclusion would be such door was installed after taking tenancy.

21. Factually, it appears that plaintiff as P.W. 1 stated in his evidence that he did not see breaking of the wall of the suit property but he came to know about the same from the Darwan of the suit premises but he refused to examine said Darwan in this suit. In view of above even if the burden of proof does not lie on a party, the court may draw an adverse inference if such party withholds important document or witness who can throw light on this fact in issue. In this context reliance can be placed on **1968 SCC Online SC 63 (Gopal Krishnaji Ketkar Vs. M.H. Latif & others)**.

22. Again if the same issue is judged on the point of law also, it can be said that the first appellate court is the last court of fact. High Court is not a fact finding court in second appeal and whether the door in the suit premises was installed prior to granting of tenancy is not a substantial question of law. It can hardly be said that finding of courts below that *“from engineers commissioners report it is not ascertainable that doors were installed after granting of tenancy”* is not based on any material on record. The question, whether on the basis of Commissioner’s report which says that *“the door was installed subsequently which is not very old”*, courts could have decided the

issue of erecting permanent structure in the suit property in a different way, is not a question of law, justifying interference in second appeal. In this context reliance has been placed in the judgment reported in **Thulasidhara & another Vs. Narayanappa & others** reported in **2019 (6) SCC 409**. Apex Court in a judgment reported in **Gurnam Singh and others Vs. Lehna Singh**, reported in **2019(7) SCC 641** held in paragraph 19 as follows:

*“19. Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 CPC, it is not permissible for the High Court to reappreciate the evidence on record and interfere with the findings recorded by the courts below and/or the first appellate court and if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. We have noticed and even as repeatedly observed by this Court and even in *Narayanan Rajendran v. Lekshmy Sarojini* [*Narayanan Rajendran v. Lekshmy Sarojini*, (2009) 5 SCC 264 : (2009) 2 SCC (Civ) 500] , despite the catena of decisions of this Court and even the mandate under Section 100 CPC, the High Courts under Section 100 CPC are disturbing the concurrent findings of facts and/or even the findings recorded by the first appellate court, either without formulating the substantial question of law or on framing erroneous substantial question of law.”*

23. Now as regards subletting plaint case as appearing in para 4 of the plaint is

“Defendant has sub-let ,assigned and /or transferred the said godown or portion thereof to the following concern long after the commencement of the West Bengal premises Tenancy Act,1956 without the consent of the plaintiff, written or verbal..

Name of the Concerns.

1. Filtron Agencies Private Ltd.,
2. Shrinivas Foods & Process (p) Ltd.
3. Mungipa Lifters(p) Ltd.,
4. Godwin Credit (p) Ltd.,
5. Srinivas Santi Parmeshri Jankalyan Trust.”

24. Defence specific case on this issue is that the said companies named in the plaint are sister concerns of the defendant and Shri Sharat Kumar Agarwal is the common director of the defendant and other companies named therein and is also one of the trustee of Srinivas Santi Parameswari Jana Kalyan Trust founded by Srinibas Agarwala father of Sarat Kr. Agarwal, who was also a director and the defendant is carrying on business in the suit room since the inception of the tenancy and the said agencies are in possession of the suit property as licensee. No rent or other consideration was ever paid by any of them for such permissive occupation and the nature of occupation of the said agencies are very much known to the plaintiff who never objected; particularly after clarification of the defendant in its letter dated 26th May, 1988 and 1st August, 1994.

25. It appears that on 26th May 1988 defendant in reply to plaintiff's letter stated about possession of suit premises by the said companies, being their sister concern and that they are possessing the same without paying any rent and in the said letter defendant also sought for written consent from the landlord. It further appears that in reply to plaintiff's query dated 1.1.1994 about the said five companies, defendant gave reply on 05.08.1994 clarifying that they have not sublet or transferred, assigned any part of the tenanted portion to anybody. Again on 8th August 1994 plaintiff wrote letter stating that the information given by the defendant seems to be incorrect, which however replied by the defendant vide letter dated 16.08.1994, that the information given earlier are correct.

26. Trial Court while dealt with the issue of the subletting observed:-

“Admittedly, the defendant allowed M/S Filtron Agencies (p) Ltd and four others to run the business in the suit properties. According to the defendant M/S Filtron Agencies (p) Ltd and others are the sister concerns of the defendant. But the defendant has denied that they are its sub-tenants. The moot question is whether the defendant has parted with its possession exclusively to those companies and Trust or not and whether the defendant company accepts rent from them. In this connection Ld. Advocate for the plaintiff submits that the defendant has not filed the Articles of Association or Memorandum of Association to show that the defendant is carrying on its business in the suit properties. It is true that the defendant co. has not produced those documents and I think that this does not necessarily mean that the defendant has got no possession in the suit office and the godown. So, the companies, namely M/s. Filtron Agencies (p) Ltd. and others are not enjoying the suit properties in the exclusion of the defendant Co. The plaintiff has failed to prove that the defendant Co. accepts rent from them. So, whatever may be the contention on the side of the plaintiff. I think that the plaintiff has not been able to prove beyond reasonable doubt that the defendant has sub-let the suit properties or portions thereof to the sub tenants in view of the facts, evidence and the decisions as reported to above. Therefore, issue No. 5 is decided against the plaintiff.”

27. The first appellate court while considered issue of subletting came to following finding:

“Therefore, upon perusal and consideration of the evidence and materials on record and also giving due regard to the submission of the Ld. Lawyers of both sides as well as the rulings relied upon by the Ld. Lawyers concerned, this court cannot but agrees to the submission made by the Ld. Lawyer appearing for the respondent. In this view of the matter, I am satisfied to conclude and hold that the Ld. Judge while disposing of the suits bearing nos. 189 and 190 of 2002 was justified in dismissing both the suits. Accordingly, the findings arrived at by the Ld. Trial Judge deserves no interference by this Court. Resultantly, the instant appeals cannot be said to have any leg to stand upon and thus, both the appeals fail.”

28. It is well settled in view of different judicial pronouncements that a sub-tenancy or a sub-letting comes into existence when the tenant inducts a third party stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof. The landlord seeking eviction of a tenant alleging creation of a sub tenancy has to prove such allegation by producing proper evidence to that effect. Once it is proved that the tenant has parted with exclusive possession of the demised premises for a monetary

consideration, the creation of sub tenancy stand established. However, mere occupation is not sufficient to infer either sub-tenancy or parting with possession. In order to prove sub-tenancy, the first ingredient that has to be established is that the alleged sub tenant is in exclusive possession of the part of the premises and the tenant retains no control over that part of the premises. The second ingredients to prove the sub-tenancy is that the right to occupy the premises must be in lieu of payment of some compensation or rent .

29. So far as payment of rent is concerned , it is true that if there is any under current transaction regarding payment of rent in between tenant and sub-tenant, it is very difficult to collect evidence and to prove the same by the plaintiff/landlord before the court of law. However in the present context situation is slightly different. Defendant in reply to plaintiff's letter dated 26.05.1988 and also in written statement and evidence, stated that aforesaid agencies are his sister concern and their accommodation are free of rent . Now as per rule of evidence a negative assertion that sister concern came in possession of suit property without rent, can hardly be possible to prove by the defendant. When plaintiff alleges that defendant created sub tenancy in favour of said concern, the onus lies upon plaintiff to prove that possession was given to said companies in lieu of monetary consideration, which plaintiff has failed to discharge in the present context.

30. As regards the issue as to whether defendant has completely parted with possession in respect of suit property it has practically become oath versus oath. Mr. Sen in this context strenuously argued that defendant in written statement admitted that four concerns are their licensee without

license fee and as such handing over possession by defendant to four concerns is admitted and that section 13 (i) (a) of the Act of 1956 clearly attracts, as the defendant has given possession to the said concern without taking permission from landlord. The defendant has failed to produce any document that he had taken permission for subletting or for giving licence. Moreover though the defendant sought for such permission vide letter dated 26.05.1988 but such prayer for permission was turned down. Accordingly it is a clear case of sub-letting.

31. In this context it appears that in eviction notice plaintiff has given defendant's address which is the suit premises. Defendant admitted that he received the notice to quit from said address which hardly suggest that defendant had completely parted with possession of suit property as claimed by plaintiff or that he has completely lost control over the suit premises. In plaint also plaintiff has stated in cause title of the plaint that defendant "M/S Bijay Tractor Spares Private Limited having its registered office at 8/1, 8A, 8B & 8C, LalBazar Street" which is the suit property. It is not the case of the plaintiff that during pendency of the suit, sub tenancy has been created. In such view of the matter Trial Court's observation that defendant is in possession of the suit property and has not lost control over the suit property, cannot be said to be perverse or that such observation is not based upon evidence. As far as finding of fact recorded by courts below and also documentary evidence available in record suggests that the plaintiff/appellant has neither been able to prove payment of premium by sub-tenant to the tenant nor it has been established that defendant has lost control over the suit premises and /or completely parted with possession.

Mere occupation by agencies is not sufficient to infer either sub tenancy or parting with possession.

32. It is settled law that it is not open to the High Court to interfere with the findings of fact, which was based on the proper appreciation of evidence on record. So far as facts regarding creation of sub-tenancy is concerned, the first Appellate Court is the final court and unless and until the finding of facts recorded by the courts below on the point of sub-tenancy are found to be contrary to the evidence on record, it would not be justified for this court to set aside the findings of facts recorded by courts below on this issue, in order to come to this court's own finding, only on the ground that alternative view can also be possible. Since findings of courts below on the point of sub-letting is based on proper appreciation of evidence and such appreciation does not suffer from material irregularity or perversity i.e. not based on material, I am not inclined to interfere with the ultimate finding of the courts below on this point.

33. In such view of the, matter I find nothing to interfere with the concurrent findings of the court below. **S.A. 313 of 2005** and **S.A. 316 of 2005** both stands dismissed. Connected Application also accordingly disposed of.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)