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SMT. SHANTI BAI AND OTHERS

v.

DINKAR BALKRISHNA VAIDYA AND ORS.

MARCH 2, 1994

B

[S. MOHAN AND M.K. MUKHERJEE, JJ.]

*Tenancy laws:*

C

*Bombay Rents, Hotel and Lodging House Rates Control Act, 1947—Sections 14 and 15—Held, protection for available to assignees of sub-lessees—Protection available only to lawful sub-lessees—Sub-lessee cannot create further sub-lease—Transfer of Property Act, 1882—Section 108(j).*

D

The suit property, an extent of 11,000 sq.ft. of land which was owned by one T was mortgaged by him to D in 1947 and subsequently leased out by T in favour of S in 1948. Under the lease deed the purpose was mentioned as for residence and shops and the lessee was authorised to sub-lease. There was also no prohibition against assignment. In 1949 the lessee sub-leased the property by a registered deed to defendants 2 and 3, who constructed fourteen shops on a portion of the land sub-let to them and let them out to several persons, who in turn assigned their interest to different persons. An extent of 4000 sq. ft. was sub-let by defendants 2 & 3 to S B, and seven shops were also sold by them to SB. On 6.12.1952 defendants 2 & 3 assigned their rights, title and interest in respect of the land in favour of Defendants 6, 7 & 8.

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In 1952 the mortgagee D filed a suit for enforcement of the mortgage which was decreed. The mortgagee himself purchased the suit land in the auction. The sale was confirmed and symbolical possession was delivered to him.

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In the meantime the Nazir of the Court was appointed as guardian under the Court of Wards Act since the mortgagee was declared a lunatic. The Nazir filed a suit for recovery of a possession and arrears of rent (Civil Suit No. 1142 of 1965) since his demand for rent from the original lessee was not complied with. A ground of sub letting was also added. The suit was decreed but the decree of the trial court was revised in appeal. The

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writ petition filed by the mortgagee-purchaser D under Article 227 of the

Constitution of India was allowed by the Bombay High Court. The assignees from the original sub lessee appealed to this Court by special leave, claiming the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as sub lessees. A

Dismissing the appeal, this Court

B

HELD: 1. The appellants who are assignees from the sub- lessees cannot claim protection as sub-lessees. The original lessee and sub-lessees are not before the court. It is well settled that in such circumstances that a sub-tenant cannot create further sub-tenancy. [301-F]

*Jai Singh Morarji & Ors. v. M/s. Sovani Pvt. Ltd. & Ors.*, [1973] 2 SCR 603, applied. C

2. There is no scope for application of section 15 of the Bombay Rent Control Act. Though the parties are afforded liberty to contact out of the section, it is only a lawful sub tenant who could claim protection. If in law they are not sub-tenants of the original lessor, this sections totally in-applicable. [301-G] D

3. Section 14 is also inapplicable. For the application of section 14, there must be a lawful sub-tenancy. This is not so here. The occupants were not lawfully inducted as sub-tenants either prior to 1959 or 1973 (the relevant years for the applicability of sections 14 and 15). [301-H, 302-A] E

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2006 of 1981.

From the Judgment and Order dated 15.7.80 of the Bombay High Court in S.C. Application No.242 of 1973. F

U.R. Lalit, V.N. Ganpule and B. Sangal for the Appellants.

S.K. Dholakia, U.Bhagat and V.B. Joshi for the Respondent No. 10-15. G

V.A. Bobde, V.D. Khanna, A.M. Khanwilkar, P.H. Parekh and J.S. Wad for the Respondents.

The Judgment of the Court was delivered by

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**A** **MOHAN, J.** The short facts leading to this civil appeal are as under:

The suit property was originally owned by Trimbak Hari Awate. He executed a simple mortgage on 28.4.1947 to an extent of 11,000 square feet which represent the entire property for a sum of Rs.20,000 in favour of Dinkar S. Vaidya. On or about 7.7.1948, Awate executed a lease-deed in favour of Shankar Godaji Gore. The purpose mentioned in the lease-deed was residence and shops. Under the lease-deed, the lessee was authorised to sub-lesase. The period of lease was 25 years. The annual rent was Rs.1,500 payable monthly at the rate of Rs.125. There was no prohibition from the assignment in the said lease.

**B**

**C** On 17.2.1949, Shankar Godaji Gore, the lessee executed a registered sub-lease in respect of entire land in favour of two persons Sulochanabai Thakur and Krishnabai Sarde, original defendants No.2 & 3. The sub-lease was for a period of 99 years and 9 months. The monthly rent was fixed at Rs. 50. Defendants 2 & 3, the sub-lessees constructed fourteen shops on a portion of the land sub let to them. These shops were let out for rent to several persons. They in their turn assigned their interest to different persons. On 7.11.1949, an area of 4,00 sq. ft. was sub-let by defendants nos. 2 & 3 in favour of Sardar Biwalkar on a rent of Rs. 135 p.m. for a period of 67 years. On the same day of the lease, defendants 2 & 3 sold seven out of fourteen shops to Biwalkar. On 6.12.1952, defendants 2 & 3 assigned all their rights, title and interest in respect of the suit land in favour of Bayajabai Ganpat Gore, Sundarabai Babasaheb Gore and Yashodabai Balasaheb Gore, defendants 6, 7 and 8 respectively.

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**F** In 1952, Dinkar Balkrishna Vaidya, the mortgagee filed a suit being Special Civil Suit No. 89 of 1952 for enforcement of mortgage. In that suit, mortgagor Awate and defendant No.1 to 4 were made party-defendants. That suit was decreed. In execution of the final decree in the auction the mortgagee Dinkar Balkrishna Vaidya himself came to purchase the suit land measuring about 1,000 sq. ft. The sale was confirmed on 19.12.57.

**G** Symbolical possession was granted on 2.3.1960. It appears that during the pendency of the suit, mortgagee was declared a lunatic. Therefore, Nazir of the Court was appointed as guardian and the property was taken possession of by the Nazir under the provisions of Court of Wards Act.

**H** The Nazir filed Regular Civil Suit No. 1142 of 1965 in the Small Causes Court, Poona for recovery of possession and arrears of rent since

his demand for rent from Shankar Godaji Gore was not complied with. Shankar Godaji Gore assigned his right, title and interest in the shop premises to defendant Nos. 19 and 20. Likewise, on 27.8.63 defendant No. 5 assigned his right, title and interest in the shop in favour of defendant No. 21. Therefore, another ground of sub-letting was also added. That suit was decreed on 27.11.68. Aggrieved by the said judgment, Civil Appeal Nos. 279, 354 and 265 of 1969 were preferred against the same. Civil Appeal Nos. 279 and 354 of 1969 came to be allowed while Civil Appeal No. 265 of 1969 was dismissed for non-prosecution. Thereupon, the first respondent moved the High Court under Article 227 of the Constitution of India. That was numbered as Special Civil Application No. 242 of 1973. By the impugned order dated 15.7.1980, that came to be allowed. Hence, the present civil appeal.

The learned counsel for the appellants Shri U. R. Lalit after taking us through the relevant provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Act') submits that the lease-deed in favour of Shankar Godai Gore specially enabled him to sub-let. Under the lease-deed dated 7.7.1948, Awate the original owner permitted the lessee Shankar Godaji Gore to construct therein and give the said building or any portion thereof to any person on lease rent and he could take the income derived therefrom. Therefore, there was clear enablement to sub-lease.

Under the Transfer of Property Act, there is no bar for a lessee to sub-lease. In such a case that right or interest could be assigned in favour of third party. That was what was done by the lease-deed dated 17.2.1949. The sub-lessees constructed the building and let out a few and assigned their rights in favour of other defendants. If the sub-lessees continued in possession prior to 21.5.1959, they would be entitled to the statutory protection because prior to 1959, if there was sub-letting, the landlord could not proceed to evict. Section 15 of the Act barring sub-lessees came into force only by amendment Act 49 of 1959, that too, subject to the contract to the contrary. Here is a case of a contrary contract. Under these circumstances the ruling reported in *Sardar Total Singh v. M/s Gold Field Leather Works, Bombay*, [1985] 2 SCR 563 would squarely apply. No eviction was possible under Section 13(1)(e) of the Act because it must be an unlawful sub-letting. Therefore, there is total protection both under 1959 Act and 1973 Act.

**A** There is no warrant to hold that first defendant has unlawfully sub-let. In any event, if defendant Nos. 2 and 3 are sub-tenants in accordance with Section 14 of the Act, unless special sub-tenancy is determined, no eviction is possible.

**B** Mr. S.K. Dholakia, learned counsel for the respondent Nos. 24, 26 and 27 supporting this argument submits that there is privity of contract between the original lessor and the occupant. The predecessor of the original lessor had authorised the defendant No. 1 to build the superstructure. Defendant No. 1 had absolute right to transfer his interest and having transferred his right of construction to defendant Nos. 2 and 3, the construction was made by defendant Nos. 2 and 3 lawfully and binding on the original lessee as he had not made any contract to the contrary. The occupants were inducted lawfully as tenants of the superstructure before 1959 or 1973 and therefore are eligible to the protection available under Sections 14 and 15 of the Act. Even on equity, they are entitled to a decision in their favour. It has been noted by the High Court that some of the occupants are tailors, laundrymen etc. and their livelihood is dependant on these premises. The eviction will entail severe hardship.

**E** Mr. V.A. Bobde, learned counsel for the respondents submits, no doubt under the original lease date 7.7.1948, a permission had been given to Gore to construct but he never constructed. He created a sub-lease in favour of defendant Nos. 2 and 3. It was the sub-lessees who had put up this building. In relation to the demised property there was no privity of contract between the original lessor and the contesting defendants. Defendants 2 and 3 constructed 14 shops and assigned their right in favour of defendant Nos. 6, 7 and 8. How can these occupants claim the right as sub-tenancy? *Jai Singh Morarji and Ors. v. M/s Sovani Pvt. Ltd. and Ors.*, [1973] 2 SCR 603 clearly lays down that no further sub-lease is possible. That would squarely apply to the facts of the present case. The reliance placed on *Tota Singh's* case (supra) is not correct. In any event, Section 14 does not take within it assignments and transfers.

**G** The short question that arises for our consideration in this case is, whether the occupants, the present appellants who are the assignees from defendant Nos. 2 and 3 can claim the protection of the Act as sub-lessees.

**H** The original lease-deed date 7.7.1948, between Awate and Gore states in clause 2 sub-clause (1) and (3) as follows:

"2(1)I have taken the said land on rent for the period of 25 years from the date 7.7.1948 and have taken the same in my possession this day.

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2(3) The land is vacant and I shall construct buildings therein as per my wishes and I shall give the said building on any portion thereof to any person on lease rent and I shall take the income derived therefrom."

Admittedly Gore did not put up any construction. However, reliance is placed on Clause 2 sub-clause (3) extracted above to urge that he had a right of sub-lease because he could build and let it out in favour of any one he liked. In our considered opinion the permission to construct means nothing more than an emphasis of the manner of enjoyment of the property. Even then as stated above, Gore never constructed. He leased-out the property in favour of defendant Nos. 2 and 3 by lease-deed dated 17.2.1949. Under clause 2 sub-clause (d), it is stated as follows:

"The said land is vacant. We shall construct structures thereon as per our wishes and we shall give the said building or any portion thereof on sub-lease to any person and we shall take the income derived therefrom. We shall obtain the permission required for the said construction. In case your signature or consent is required in that matter, you are to give the same."

These sub-lessees (defendant Nos. 2 and 3) assigned their rights in favour of defendant Nos. 6, 7 and 8 and others who are the appellants. How can they claim protection as sub-lessees? The important point to note here is that the original lessee Gore, defendant Nos. 2 and 3 sub-lessees are no longer before us. They have not filed the appeal. In these circumstances, the principle applicable to this case is as stated in *Jai Singh Morarji & Ors.* case (supra) that a sub-tenant cannot create further sub-tenancy. Therefore, we are totally unable to see any scope for application of Section 15 of the Act. The parties are afforded liberty to contract out of the Section. Even then it is only a sub-tenant who could claim protection. If in law, they are not sub-tenants of the original lessor, this Section is totally inapplicable.

A Again for the application of Section 14, there must be a lawful sub-tenancy. That is not so here. The occupants were not lawfully inducted into possession as sub-tenants either prior to 1959 or 1973. Therefore, we are unable to accept the contention urged by Mr. U.R. Lalit and Mr.S.K. Dholakia, learned counsels. Hence, that Section is also inapplicable

B Weighing the equitable considerations, the Civil Appeal was adjourned or effecting a compromise. But the parties have not done so. Therefore, we are unable to grant any relief on that score. The Civil Appeal will stand dismissed. However, there shall be no order as to costs.

R.R.

Appeal dismissed.