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Judgment
1, 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 29 of 1963

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N :-

GIAN SINGH & CO. — Appellants (Plaintiffs)

-and-

1. DEVARAJ NAHAR
alias DEVARAJ NAHAH
2. LABH SINGH
3. HARBANS SINGH — Respondents (Defendants)

CASE FOR THE APPELLANTS

1. This is an Appeal by the leave of the Court of Appeal of the Federation of Malaya sitting at Kuala Lumpur from that part of the Judgment of the said Court of Appeal and the Order pursuant thereto given and made on the 28th February, 1963, which allowed an appeal from the Judgment of Mr. Justice Dato Hashim in the High Court at Kuala Lumpur given on the 14th August, 1962, and set aside the Order of the same date pursuant thereto in so far as it was adjudged and ordered that the Respondents (Defendants) should quit and deliver vacant possession of the premises known as No.11, Mountbatten Road, Kuala Lumpur (hereinafter called "the premises"). pp.33-4 pp.27-32 pp.19-23

2. The said Judgments and Orders were given and made in an action commenced in the High Court at Kuala Lumpur by the Appellants against the Respondents claiming possession of the premises, arrears of rent and mesne profits against the first Respondent and possession of the premises and damages for unlawful occupation against the second and third Respondents.

3. By their Statement of Claim dated the 23rd April, 1959, in the said action the Appellants (so far as is pp.1-4

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material to this appeal) alleged :-

Paragraph 1: that they were the chief tenants of (inter alia) the premises and that the first Respondent was at all material times their sub-tenant of the premises where he carried on the business of sports goods dealer under the name and style of Nahar & Co. of which he was the sole proprietor.

Paragraph 2: that the second and third Respondents were traders residing in Kuala Lumpur and Singapore respectively.

Paragraph 3: that it was a term of the said sub-tenancy that the premises should not be sub-let or assigned without the written consent of the landlords, i.e. the Appellants.

Paragraph 4: that on or about the 26th March, 1958, the Appellants having come to know that the first Respondent was taking stock of his business with a view to handing the same over to a purchaser, wrote a letter to him

p.53

stating that they would not agree to any other person becoming a tenant of the premises and also giving him notice terminating his sub-tenancy with effect from the 30th April, 1958.

Paragraph 5: that the Appellants at the same time having come to know that the third Respondent was the prospective purchaser of the said

p.54

business of Nahar & Co., wrote him a letter enclosing a copy of the said letter written to the first Respondent and informed him that they could not agree to a new tenant taking over the premises.

Paragraph 6: that as a result of a search made thereafter at the Registry of Businesses the

pp.61-2

Appellants discovered that the first

pp.46-52

Respondent had on the 24th March, 1958, entered into a partnership deed with the second and third Respondents in respect of the said business of Nahar & Co. and that by the terms of the said deed had purported to convey all the assets of his business to a new partnership consisting of himself and the second and third Respondents and

that the first Respondent had thereby committed a breach of the said condition under which he held the said sub-tenancy.

Paragraph 7: that on or about the 27th March, 1958, the first Respondent caused to be tendered by the manager of the new partnership the rent for the months of February and March 1958, on condition that the Appellants issued receipts in favour of Nahar & Co., and that the Appellants declined to accept the rent by or on behalf of the partnership.

Paragraph 9: that the Appellants therefore claimed that they were entitled to immediate possession of the premises against the first Respondent as tenant in possession and against the second and third Respondents as trespassers.

4. By their Defence and Counterclaim dated the 21st May, 1959 the Respondents admitted paragraphs 1, 2, 4 and 5 of the Statement of Claim and further admitted that the second and third Respondents had entered into a partnership deed with the first Respondent on the 24th March, 1958. They denied that it was a term of the first Respondent's said sub-tenancy that the premises should not be sub-let or assigned without the consent of the landlords or that the said partnership deed operated as a sub-letting or assignment by the first Respondent of any part of his interest in the premises or that he had committed a breach of the terms of his sub-tenancy by executing such deed. They further denied that the first Respondent had sub-let or assigned to the second and third Respondents and, alternatively, denied that the first Respondent was under any covenant to the Appellants not to sub-let or assign and therefore alleged that if any subletting or assignment had taken place it was lawful and not in breach of covenant. As to paragraph 7 of the Statement of Claim the first Respondent alleged that the tender of rent by him on the 27th March, 1958, was a good tender in law and the Appellants had no lawful ground for refusing the same. pp.4-5

The Counterclaim in the said pleading was by the first Respondent alone who alleged therein that since he became the sub-tenant of the premises on the 1st January, 1956, he had made payments of rent to the Appellants in excess of the standard rent of the pp.5-6

premises and he counterclaimed for the amount of the said overpayments. The matters alleged in the said
pp.6-7 Counterclaim and in the Reply and Defence to Counterclaim are not material to this appeal.

5. At the trial of the action before Mr. Justice Dato Hashim on the 19th July, 1962, the Appellants' evidence consisted of the documents and correspondence which had been agreed between the parties and in addition to the admissions made in the Defence, they relied in particular on the following :

pp.61-2 (a) A certified copy of extracts from the Register of Businesses which showed that Amind Chand Nahar, who was the father of the first Respondent, had commenced to carry on the business of Nahar & Co. in 1934 as sole proprietor and that he gave up the said business on the 31st December, 1955; that as from the 1st January, 1956, the first Respondent was the sole proprietor of the business of Nahar & Co until the 24th March, 1958, when the second and third Respondents became partners with him in the said business. The principal place of business was at all times shown as being at the premises.

pp.40-2 (b) 3 letters dated the 24th and 27th July and the 10th August, 1953, passing between the Appellants' solicitors and Nahar & Co., the first of which stated that the sub-tenancy of the premises was subject to a condition against assigning or subletting and the last that the condition was made orally at the time of the letting and that the terms of the Appellants' receipts left no doubt about the terms of the letting.

pp.53-5 (c) 3 letters, the first two of which are each dated the 26th March, 1958, and are the letters referred to in paragraphs 4 and 5 of the Statement of Claim and the last is dated the 3rd April, 1958

pp.46-52 (d) The Partnership Deed between the Respondents dated the 24th March, 1958, whereby the Respondents agreed to become partners in the business of Nahar & Co. then carried on by the first Respondent for the period and on the terms

therein expressed of which the material ones are as follows :-

"1. The partnership shall be deemed to have commenced on the 24th day of March 1958 and shall continue for the term of two years from that date.

2. Any partner may at the end of two years or any subsequent year of the partnership retire from the partnership on giving not less than four calendar months previous notice in writing to the other partners or partner or leaving the same at the place of business of the partnership and at the expiration of such year the partnership shall determine accordingly as to the partner leaving or giving such notice and thereupon the provisions of clauses 17 and 18 of these presents shall (with the substitution of the continuing partner or partners for the surviving partner or partners and of the retiring partner for the representative of the deceased partner and other consequential modifications) apply as if the retiring partner had died at the expiration of such year.

3. The death or retirement of any partner shall not dissolve the partnership as to the other partners.

4. The partnership business shall be that of dealers in sports goods and other connected businesses, general merchants commission agents under the style or firm name of "Nahar & Co" and shall be carried on at No. 11 Mountbatten Road, Kuala Lumpur or at such other place or places as the partners may from time to time agree upon.

5. Subject to the provisions of these presents the partners shall be entitled to the capital and property for the time being of the partnership and to the goodwill of the business in equal shares.

6. The capital of the partnership shall consist of the net value of the stock-in-trade book debts and other assets of the business of "Nahar & Co" heretofore carried on by Devraj at No. 11 Mountbatten Road, Kuala Lumpur less the outstanding liabilities of that business and for purposes of computation the said assets shall be taken to be of the net value of $30,000/- which shall be credited to the three partners equally as their share of capital. "

pp.35,36-9, 43

(e) Receipts for rent given by the Appellants to Nahar & Co. on which were printed terms prohibiting subletting or assigning without the landlord's written consent.

pp.57,59 and 60.

(f) Three letters dated the 7th April, the 14th April and the 19th April, 1958, passing between the Appellants or their solicitors and the Respondents' solicitors dealing with the alleged tender of rent for the months of February and March 1958 and the demand on behalf of the Respondents that the receipt therefor should be in the name of Nahar & Co.

pp.35-6, 38-9 and 43

6. At the said trial of the action the Respondents tendered in evidence six receipts for rent from the Appellants to Nahar & Co. bearing dates between the 21st October 1946 and the 28th February, 1958, of which four had no terms upon them restricting subletting or assigning.

pp.12-3

The oral evidence adduced on behalf of the Respondents included that of the first Respondent himself who stated that he was the managing partner of Nahar & Co. Singapore and a partner of the firm in Kuala Lumpur, that he had been working in Singapore since 1949, that he had received the letter of the 24th July, 1953, from the

pp.40-2

Appellants' Solicitors and replied asking for details on the 27th July, 1953, and received the letter of the 10th August, 1953, to which he did not send a reply. Cross-examined he said that the letter of the 10th August, 1953, was opened by his father and handed to him, that he had read the part of the letter reading "but our clients' receipts leave no doubt about the terms" but paid no attention to it and that after 1956 the rent was paid by his manager and he did not see the receipts. He

p.12,l.42

said further in cross-examination: "In 1958 before the agreement was executed I know the K.L. premises were a valuable asset for my business. When I took the partners I did not retain a portion for myself and all the partners enjoyed the use of the entire premises." At the end of his cross-examination he stated that he had sold two-thirds of his interest in the Kuala Lumpur firm to the second and third Respondents each of whom paid him $10,000.

pp.19-22

7. In his judgment given on the 14th August, 1962 the learned trial Judge after setting out the facts which

were not in dispute continued as follows :-

"The first question for the Court to decide is whether there has been an assignment by 1st defendant by taking in 2nd and 3rd defendants as partners in the business of Nahar & Co., Kuala Lumpur of which 1st defendant was the sole proprietor before he entered into an agreement with 2nd and 3rd defendants on 24.3.58. Mr. Ramani for the plaintiff cited numerous cases in support of his contention that there was an assignment. He also referred to the printed words on the receipt which read as follows :- pp.20-1

"(1) No tenancy will be recognised by the Landlord unless taken direct from him.

(2) This house is not to be sublet or assigned without the written consent of the Landlord".

Mr. Ramani contended that the tenant could not assign the tenancy when the receipts had these printed words and he supported his contention by referring to Eusof Ali & Anor. v. Nyonya Lee Gaik Hooi 1953, 19 M.L.J. 98. In his judgment Briggs, J. quoted the words of Evans, J. as follows :-

"The wording on the receipt is clearly a term imposed by the landlord, and I think that the evidence and findings show that the parties themselves understood the tenancy to be subject to a condition that it continued only while direct from the landlord, and that consequently an assignment would determine it".

It is also a fact as pointed out by Mr. Marjoribanks Counsel for the defendants, that earlier receipts did not have these printed words. I think the printed words came into existence as a result of the Control of Rent Ordinance 1948 which came into force on 31.1.48. Mr. Marjoribanks for the defendants contended that there was no assignment and even if there was it was a part assignment as 1st defendant was a partner of Nahar & Co, Kuala Lumpur and still a sub-tenant of plaintiffs. It was his contention that by the agreement of 24.3.58, 1st defendant only took in two partners, 2nd and 3rd defendants and did not assign his sub-tenancy to the other 2 partners. However, I hold that clause 2 of the said agreement did result in 1st defendant assigning the sub-tenancy to the other 2 partners. Under clause 2 any partner could retire from the partnership at the end of two years from the date of the execution of the agreement. 1st defendant has admitted in his evidence he has received $20,000 from the other partners. 1st

defendant is a resident of Singapore. Under the agreement 1st defendant can retire from the partnership at the end of 2 years from 24.3.58 and if he does retire the result will in fact be that the premises will be under the new sub-tenants, 2nd and 3rd defendants.

I therefore find that an assignment has in fact taken place on the execution of the agreement dated 24.3.58 and I give judgment in favour of the plaintiffs."

The learned trial Judge therefore ordered that the Respondents should vacate the premises on the 31st October, 1962.

8. On the 10th September, 1962, the Respondents appealed to the Court of Appeal at Kuala Lumpur. The said appeal was heard on the 8th January, 1963, and on
pp.27-30 the 28th February, 1963, the judgment of the Court of Appeal was delivered by Mr. Justice Hill. The said judgment did not deal with the finding of the learned trial Judge that the first Respondent's sub-tenancy was subject to the condition that the premises should not be sublet or assigned without the written consent of the landlords.

After referring to the learned trial Judge's reasoning based on Clause 2 of the partnership agreement for coming to his conclusion that the first Respondent had assigned the sub-tenancy to the other two Respondents, Mr. Justice Hill said :-

pp.28-9 "Was there in fact or in law an assignment? With great respect to the learned trial Judge in my view the agreement does not expressly or impliedly assign the tenancy or any part thereof by the first Appellant to either or both of the other Appellants. It is an agreement to carry on the business of Nahar & Co., at 11 Mountbatten Road or at such other place or places as the partners may from time to time agree upon. The capital of the partnership was to consist of the net value of the stock-in-trade, book debts and other assets of Nahar & Co. The monthly tenancy of the premises was not an asset of Nahar & Co. The first Appellant alone was the sub-tenant and what might happen at the end of two years is mere conjecture.

At page 365 of the 12th Edition of Lindley on Partnership under the heading "Property used for partnership purposes not necessarily partnership property" it is stated:-

> 'Again, it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all'. "

Mr. Justice Hill then referred to three cases, Corporation of Bristol v. Westcott (1870) 12 Ch.D. 461, Peebles v. Crosthwaite 13 T.L.R. 97 and Chaplin v. Smith, 1926 1 K.B. 198, which he considered were in point, and concluded that he was of opinion that there was no assignment of the sub-tenancy by the first Respondent and that the Respondents should not have been ordered to vacate the premises and in so far as that part of the judgment appealed against was concerned, the appeal was allowed and the order for possession set aside.

9. Although the decision of the learned trial Judge that the first Respondent had assigned the sub-tenancy to the second and third Respondents and the reasoning by which he reached that conclusion may be open to criticism, it is submitted that the Court of Appeal were wrong in holding that the sub-tenancy was not an asset of Nahar & Co. while the first Respondent was sole proprietor of that business. The evidence showed that the first Respondent never occupied the premises himself and the business was always carried on by a manager who paid the rent and was given receipts in the name of Nahar & Co. and that the letters passing between the landlords and the tenant were addressed to or written in the firm name. Moreover, the first Respondent himself admitted in cross-examination that before he entered the partnership in 1958 he knew that the premises were a valuable asset to his business. It is further submitted that although the partnership deed did not expressly refer to the sub-tenancy of the premises, the sub-tenancy passed from and was assigned by the first Respondent to himself and the second and third Respondents as one of "the other assets of the business of Nahar & Co. heretofore carried on" by the Respondent by virtue of the provisions of clause 6 of

the partnership deed. It is also submitted that the 3 cases cited by Mr. Justice Hill in his judgment are not relevant to the present case because in those cases the question considered by the Court was not whether there was an assignment but whether there had been a parting with possession of premises. For these reasons it is submitted that the Court of Appeal should have held that the first Respondent had committed a breach of the condition against assignment without the landlord's written consent and ought not to have set aside the order for possession made by the learned trial Judge.

10. It is further submitted that the trial Judge's decision that the tenancy of the first Respondent was subject to a condition that the premises shall not be sublet or assigned without the landlord's written consent was a finding of fact supported by the evidence and the said finding ought not to be disturbed.

11. The Appellants respectfully submit that the Judgment and Order of the Court of Appeal should be set aside in so far as the same set aside the Order for possession made by the learned trial Judge and that this appeal should be allowed with costs for the following amongst other

R E A S O N S

1. Because the sub-tenancy of the first Respondent was subject to a condition that the premises should not be sublet or assigned without the written consent of the landlord.

2. Because the sub-tenancy of the first Respondent was an asset of the business carried on by him under the name of Nahar & Co. and as such was assigned by him to himself and the second and third Respondents under the terms of the partnership deed dated the 24th March, 1958.

3. Because the said assignment constituted a breach of the said condition of the sub-tenancy and the Order for possession made by the learned trial Judge ought not to have been set aside by the Court of Appeal and should be restored.

DINGLE FOOT Q.C.

G. AVGHERINOS

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CASE FOR THE APPELLANTS

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