

No. 29 of 1963

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF THE FEDERATION OF  
MALAYA IN THE COURT OF APPEAL AT KUALA LUMPUR

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B E T W E E N :

GIAN SINGH & CO. (Plaintiffs)  
Appellants

- and -

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

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CASE FOR THE RESPONDENTS

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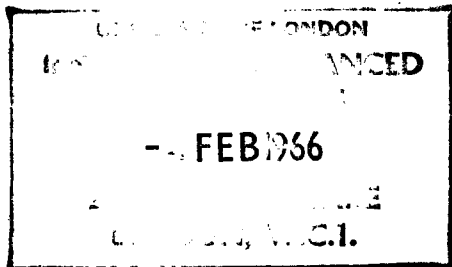
1. This is an appeal against so much of the Judgment dated 28th February 1963 of the Court of Appeal of the Supreme Court of the Federation of Malaya at Kuala Lumpur (pursuant to final leave granted by the said Court on the 28th August 1963) as allowed with costs the Respondents' Appeal from a Judgment dated 14th August 1962 of the High Court of Kuala Lumpur in the Federation of Malaya. p.31, 1.26  
20 p.33, 1.1  
p.23, 1.1

2. The matters in issue arise out of an action by the Appellants (who were the Plaintiffs) claiming

(i) as against the First Defendant.

(a) possession of premises at No. 11  
Mountbatten Road in the town of Kuala Lumpur (hereinafter referred to as "the said premises") occasioned by an alleged breach of an alleged term of the sub-tenancy not to assign or sub-let the said premises without the written permission of the Plaintiffs as Landlords;  
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- (b) arrears of rent at the rate of \$200.80 per mensem from the 1st February 1958 to the 30th April 1958;
  - (c) mesne profits from the 1st May 1958 until possession;
- and

(ii) as against the Second and Third Defendants

- (a) possession of the said premises; and
- (b) damages for their unlawful occupation.

3. The Respondents (who were the Defendants) denied any such assignment or sub-letting as alleged or at all and denied further that there was any term in the sub-tenancy from the Plaintiffs against assigning or sub-letting. The First Respondent further counterclaimed for alleged overpayments of rent in the sum of \$875.00 on the ground that the provisions of S. 6(2) of the Control of Rent Ordinance 1948 had not been complied with; but this issue is not now being further pursued, and such portions of the Record of Proceedings as deal with this aspect of the case should be ignored as irrelevant except insofar as they establish that the said premises were subject to the Control of Rent Ordinances of the Federation of Malaya. 10 20

4. The relevant provisions of the current Control of Rent Ordinance No. 2 of 1956, which was still in force at all material times, are:-

(A) The definition in section 2:

"'premises' means any dwelling-house, flat, factory, warehouse, office, counting-house, shop, school and any other building in which persons are employed or work and any part of any premises let or sub-let separately....." 30

(B) Section 12(1): "No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely -

- (a) where rent lawfully due has been in arrear for fourteen days or upwards:

Provided that rent shall not be deemed to be in arrear if the tenant proves that it was tendered before such date;

- 10 (b) where any obligation of the tenancy other than the payment of rent (whether under the contract of tenancy or under the provisions of this Ordinance), so far as the obligation is consistent with the provisions of this Ordinance, has been broken or not performed by the tenant and the Court considers it reasonable that such order or judgment be made or given;....."

- 20 (c) Section 13: "In any proceedings for the recovery of possession of any premises except on the grounds set out in paragraph (a) of sub-section (1) of section 12 of this Ordinance no costs shall be awarded to either party to the proceedings:

Provided that if the Court is of the opinion that either the landlord or the tenant has acted in an improper or unreasonable manner the Court may order that the landlord or the tenant, as the case may be, shall pay the whole or part of such costs as it may think fit".

30 5. In his Judgment on the 14th August 1962 Hashim J. p.19, l.5 found a number of facts which were not disputed, as therein more specifically set out, including that

(i) the First Respondent's sub-tenancy was and is a monthly tenancy;

(ii) when the First Respondent's father retired in December 1955 the First Respondent carried on business in the said premises under the same style or title of Nahar & Co. through a manager;

40 (iii) on the 24th March 1958 the First Respondent entered into an agreement in writing with the Second and Third Respondents whereby the Second and Third Respondents became partners in Nahar & Co; and

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(iv) on 26th March 1958 the Appellants wrote to the First Respondent that they would not accept any new tenant and gave him notice to quit and deliver vacant possession of the premises on or before the 30th April 1958.

- p.12, 1.8 &  
p.13, 1.28 )
- p.2, 1.12
- p.38, 1.6
- p.39, 1.18  
& p.43, 1.1
- p.20, 1.28
- p.21, 1.20
6. The sub-tenancy was created, apparently orally, in 1934 and no written records of the terms of the agreement were produced to the Court; in particular no evidence of any sort was adduced in support of the Appellants' allegation that in the original sub-tenancy agreement there was a term prohibiting assigning or sub-letting without the written consent of the landlord. 10
7. The Appellants produced as exhibits at the trial various receipts or copy receipts for rent, one of which dated 6th December 1948 bore a superscription: "Tenancy rights are not transferable without the authority of the Landlord". Two others dated 7th October 1949 and 28th February 1958 were also produced by the Appellants with superscriptions reading: 20
- "(1) No tenancy will be recognised by the Landlord unless taken direct from him.
- (2) This house is not to be sub-let or assigned without the written consent of the Landlord".
- None of the five other receipts produced bore reference to any such term.
8. The learned Judge in his judgment appears to have held that the superscriptions on the receipts became a term of the tenancy and relied in support of this on a dictum of Briggs J. (quoting Evans J.) in Eusof Ali and Anor v. Nyonya Lee Gaik Hooi 1953, 19 M.L.J. 98. 30
9. The learned Judge then found that clause 2 of the Partnership agreement between the three Respondents dated 24th March 1958 constituted an assignment by the First Respondent to the Second and Third Respondents.
- Clause 2 provided as follows:- 40

"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....."

10 The learned Judge gave the following reasons for his finding:-

"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. First Defendant has admitted in his evidence he has received \$20,000 from the other partners. First Defendant is a resident of Singapore. Under the agreement First Defendant can retire from the partnership at the end of 2 years from 24th March 1958 and if he does retire the result will be in fact that the premises will be under the new sub-tenants, Second and Third Defendants".

p.21, 1.9

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Thereupon the learned Judge then gave judgment for the Plaintiffs on this issue and ordered that the Defendants should quit and deliver vacant possession of the said premises.

10. The Defendants appealed. The grounds of appeal were in substance as follows:

p.24

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(a) That the learned Judge was wrong in law in holding that the execution of the agreement dated 24th March 1958 constituted an assignment in law: at the most he only dealt with an assumption as to what might happen in the future;

(b) That in any event the deed of partnership did not transfer the premises to the partnership but only gave the partners a licence while the partnership endured to enter the said premises;

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(c) That even if there had been an assignment this was only to all three partners (including the existing sub-tenant - the First Respondent) and not merely to the Second and Third

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Respondents, and such a transfer would be no breach of any prohibition against sub-letting or assigning;

(d) But that in any event on the evidence the learned Judge should not have held that there was any effective prohibition on sub-letting or assigning.

p.27 11. The appeal came on for hearing before Thomson C.J., Hill and Barakbah JJ.A. and on the 28th February 1963 the judgment of the Court was delivered by Hill J.A. In his judgment the learned Judge of Appeal found that neither expressly nor impliedly had there been any assignment of the lease or any part thereof by the First Defendant to either or both of the other Defendants. The learned Judge of Appeal referred to the cases of Peebles v. Crosthwaite 13 T.L.R. 97 and Chaplin v. Smith [1926] 1 K.B. 198 and Corporation of Bristol v. Westcott (1879) 12 Ch. Div. 461 and quoted the dictum of Romer J. in Jackson v. Simons [1923] 1 Ch. 373 at p. 380 that: 10

p.30, 1.8 "a lessee who retains possession does not commit a breach of the covenant against parting with possession by allowing other people to use the premises".

12. In the event as the learned Judge of Appeal was of opinion that there had been no assignment by the First Defendant and that the Defendants should not have been ordered to vacate the property, it was unnecessary for the Court to consider whether any term prohibiting sub-letting or assigning had ever existed and this point was not expressly decided. The appeal against the order for possession was allowed and the present Appellants were ordered to pay the costs of the Appeal. 30

pp.33 & 34 13. On the 28th day of August 1963 the Court of Appeal of the Federation of Malaya granted the Appellants Final Leave to appeal to His Majesty the Yang di-Pertuan Agong from that part of the Judgment and Order of the Court of Appeal dated the 28th February 1963 refusing to the Appellants possession of the said premises. 40

14. So far as concerns the existence of any term prohibiting sub-letting or assignment, it appears to be common ground that there was no such term in the original sub-tenancy; and it is submitted that it could not be introduced subsequently into the contract by the unilateral action of the landlords in writing prohibitory words on a receipt. Further if such words are to be incorporated, the tenant is entitled to know which of the two sets of prohibition is applicable, since that on the 1948 receipt does not, for example, prohibit sub-letting. If the Landlord is relying on the later versions it is strange that they should only be found on two receipts (and receipts presumably were issued each month) which were issued with an interval of over 8 years between them. In the circumstances the question of acquiescence would hardly seem to arise, especially when the evidence was to the effect that the rent was paid and the receipts received by the manager of the sub-tenant (the First Respondent) and the First Respondent himself never saw any of the receipts prior to the hearing.

p.12, l.37

The Respondents contend that in the circumstances of this case there never was any prohibition against sub-letting or assigning in the terms of the sub-tenancy, and consequently there was no jurisdiction in the High Court at Kuala Lumpur to make an order for possession of the said premises.

15. In any event even if (contrary to the Respondents' contentions) there were any such prohibition, it is submitted that the First Respondent had not been guilty of any breach of it. The Respondents respectfully adopt the reasoning in the cases cited in the Judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya.

16. The only evidence relied upon by the learned trial Judge as establishing an assignment appear to be:-

(i) The possibility that under Clause 2 of the partnership agreement the First Respondent could retire from the partnership some two years later;

p.21, l.9

(ii) The fact that the Second and Third Respondents had paid a sum of money to the

p.21, l.11

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First Respondent, presumably to become partners;

p.21, l.14

(iii) The fact that the First Respondent lived in Singapore.

The Respondents submit that it is now established law that the fact that the First Respondent has entered into a partnership agreement with the Second and Third Respondents does not constitute any sub-letting or assignment by him of the said premises, and that this is even more so when (as here) the sub-tenancy of the said premises is not one of the assets of the partnership. 10

pp. 46-52

17. The Respondents therefore humbly submit that this Appeal should be dismissed with costs for the following amongst other

R E A S O N S

- (1) That the First Respondent's sub-tenancy contained no prohibition against sub-letting or assigning;
- (2) That, even if it did, on the evidence and in law there has not been any sub-letting or assigning by the First Respondent; 20
- (3) That in the premises there was no jurisdiction to make an order for possession of the said premises.

FRANK WHITWORTH.



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2. LABH SINGH
3. HARBANS SINGH (Defendants)  
Respondents

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CASE FOR THE RESPONDENTS

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