IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

S.A 46 of 2011

Smt. Sarbati Debi & Ors.

-Vs-

Pratima Sharma & Ors

For the Appellants: Mr. Buddhadeb Ghoshal,
Mr. Lakshmi Kanta Pal,
Mr. Bandhu Brata Bhula.

For the Respondents: Mr. Anirban Ray,
Mr. Debdut Mukherjee,
Ms. Urmila Chakraborty,
Mrs. Debasmita Mitra.

Heard on: February 20, 2020.
Judgment on: December 24, 2020.

BIBEK CHAUDHURI, J. : –

1. The defendants in a suit for eviction and recovery of possession being Title Suit No.324 of 1992 are the appellants before this Court challenging concurrent finding of fact by both the learned Trial Court as well as the learned First Appellate Courts wherein the following substantial questions of law are involved:-

i) Whether the learned judges in the courts' below substantially erred in law in decreeing the suit for eviction on the ground of violation of Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, 1882?

ii) Whether the learned judges in the courts' below substantially erred in law in holding that the defendants are guilty of sub-letting without adverting the legal principle regarding payment and acceptance of rent coupled with delivery of possession.

2. It is pertinent to mention at the outset that the plaintiffs/defendants became the owners of premises No.9 Karl Marx Sarani within P.S Watgung by auction purchase. The appellants were the premises tenants in respect of one shop room wherein they have been running business of selling footwear. The plaintiffs filed the above mentioned suit on the grounds of default of payment of rent, reasonable requirement for extension of their business, subletting and causing substantial damage of the suit premises in violation of Clause (m), (o) and (p) of Section 108 of the Transfer of Property Act. The learned Trial Court, by its judgment and decree dated 30th June 2007 decreed the suit holding, inter alia, that the plaintiffs were able to prove their case on the grounds of default, subletting and causing material damage and

substantial addition and alteration of the suit shop room and, therefore, liable to be evicted from the suit premises.

3. The defendants being aggrieved by and dissatisfied with the judgment and decree passed by the learned Trial Court filed an appeal before the learned District Judge, South 24 Parganas at Alipore. The said appeal was transferred to the Court of the learned Second Additional District Judge at Alipore and registered as Title Appeal No.258 of 2007. By a judgment and decree dated 30th September, 2010 the said appeal filed by the defendants/appellants was dismissed on contest. The learned Judge in First Appellate Court however gave protection to the defendants against eviction under Section 17(4) of the West Bengal Premises Tenancy Act, 1956. The appeal was dismissed affirming the finding of the learned Trial Court in respect of subletting and causing substantial damage of the suit premises by the defendants/appellants.

4. It is necessary to mention here that the plaintiffs did not file any appeal against the finding of the First Appellate Court on the grounds of reasonable requirement and default.

5. Therefore, in the instant appeal this Court confines its discussion exclusively on the substantial questions of law framed by the Division Bench of this Court at the time of admission of appeal.

6. For adjudication of substantial questions of law involved in the instant appeal it is necessary to state in a nutshell the case of the respective parties on the grounds of subletting and causing addition and alteration and damage to the suit premises.

7. It is the case of the plaintiffs/respondents that the defendants have parted with possession of a portion of the suit premises in favour of one Laxmidhar Bhunia and sublet the same for opening a pan shop (betel shop) without their consent.

8. It is also pleaded by the plaintiffs that the defendants caused addition and alteration and substantial damage to the suit premises without the knowledge and consent of the plaintiffs in contravention of Clauses (m), (o) and (p) of the Transfer of Property Act. The defendants fixed one iron safe on the main wall cutting the beam of the suit shop room and erected a false roof under the ceiling of the tenanted premises without the permission and consent of the plaintiffs.

9. In their written statement, the defendants denied the allegation of subletting made by the plaintiffs in the plaint. It is the specific case of the defendants that one Uma Sankar Agarwala @ Gupta, since deceased was the original tenant in respect of the suit shop room under the erstwhile landlord. For augmentation of income the said Uma Sankar Agarwala started a pan shop (betel shop) in the road side wall space of his tenancy with the knowledge and consent of the previous landlord. One Laxmidhar Bhunia was appointed by the said Uma Sankar Agarwala as an employee to look after the said business and the said Laxmidhar Bhunia was not a sub-tenant but a mere licensee under the defendants. It is also pleaded by the defendants that the said Uma Sankar Agarwala filed a suit being Title Suit No.437 of 1983 against Laxmidhar Bhunia treating him as licency and for his eviction.

10. In respect of the plaintiff's case of causing substantial damage to the suit premises in violation of Clauses (m), (o) and (p) of the Transfer of Property Act, the allegation of fixing one iron chest or iron safe cutting the main wall of the suit shop room and erection of a false roof (macha) inside the tenanted premises were denied by the defendants.

11. Mr. Buddhadeb Ghoshal, learned Advocate for the appellants submits that the plaintiffs became the owners of the suit premises by auction purchase. The predecessor-in-interest of the appellant was inducted as a tenant in respect of suit shop room at a monthly rental of Rs.100/- by the erstwhile landlord. No tenancy agreement was executed by and between the original landlord and tenant in respect of the suit premises delineating the terms and conditions of the tenancy granted to the predecessor-in-interest of the defendants. From the evidence of PW1 it is ascertained that after they became owners of the premises in suit they found one iron safe fixed on the wall of the tenanted shop room and one wooden false roof fixed below the concrete roof of the tenanted shop room. It is pointed out by Mr. Ghoshal that the respondents failed to establish during trial of the suit that the defendants/appellants caused substantial damage of the suit shop room by fixing an iron safe on the wall of the suit shop room and constructing a false roof inside it. Even assuming that the appellants fixed one iron safe cutting a portion of a wall of the tenanted room and constructed a wooden false roof, there is no iota of evidence on record that by such construction the suit premises was substantially damaged. There was no violation of Clauses (m), (o) and (p) of Section 108

of the Transfer of Property Act as well as Clauses (b) and (d) of Section 13(1) of the West Bengal Premises Tenancy Act, 1956. It is contended by Mr. Ghoshal that such construction was carried out by the predecessor-in interest of the present appellants with the permission and consent of the erstwhile tenant. It is also pointed out by him that the respondents failed to refute such positive case of the defendants/appellants in course of evidence. According to Mr. Ghoshal findings of both the Trial Court as well as First Appellate Court on the issue of causing substantial damage to the suit premises by the appellants are based on perversity of fact finding and erroneous application of law. In support of his contention Mr. Ghoshal relies on a Full Bench decision of this Court in the case of **Ratanlal Bansilal & Ors. vs. Kishorilal Goenka & Ors.** reported in **AIR 1993 Cal 144**.

12. Learned Advocate for the respondents, on the other hand, submits that the question as to the perversity of finding of fact by the Trial Court as well as the First Appellate Court or failure to appreciate the evidence on record properly is not a substantial question of law formulated by the Division Bench of this Court at the time of admission of appeal. Therefore, the learned Advocate for the appellants cannot raise such issue at the time final hearing of the appeal. According to the learned Counsel for the respondents Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act operate altogether in different circumstances. Under Clause (m) of Section 108 of the Transfer of Property Act, the liability of the lessee is :

i) To keep the property in good condition, non-compliance of which entitles the landlord a decree for ejectment,

ii) To restore the property after termination of the lease, in the same condition in which it was let out.

Clause (o) of Section 108 stipulates that the lessee is to use the land as a man of ordinary prudence would use his own land. This clause debars the lessee from pulling down or damaging building belonging to the lessor.

The lessee may not use the property for a purpose other than that for which it was leased, for it is waste to change the nature of the premises. If this were done by structural alteration it would involve demolition and reconstruction which is expressly forbidden by Clause (p) of Section 108 of the Transfer of Property Act.

13. From the pleadings of the parties it is ascertained that the plaintiffs/respondents tried to make out a case within the scope of Clause (o) of Section 108 of the Transfer of Property Act alleging, inter alia, that the appellants damaged the suit premises by fixing one iron safe and constructing a wooden floor below the concrete roof of the suit shop room. According to the learned Counsel for the respondents such construction specially fixation of iron safe cutting portion of wall and beam of the room is an instance of causing substantial damage and both the courts on appreciation of evidence rightly decided the issue in favour of the

respondents. This Court sitting in second appeal having limited scope to decide substantial question of law, is not in a position to alter the findings of fact of both the courts below.

14. Having heard the learned Advocates for the appellants and the respondents and on careful perusal the evidence on record, I like to point out at the outset that existence of iron safe fixed on a wall of suit shop room under occupation of the defendants/tenants as well as wooden roof under the concrete roof are not denied. The defendants/appellants claimed that the said iron safe was fixed and wooden roof was constructed with the permission of the erstwhile landlord. However, the appellants failed to produce any document to show that permission to fix one iron safe on the wall and construction of wooden roof was granted by the original landlord to their predecessor-in-interest at any point of time.

15. Now the question that arises for consideration is as to whether fixing of iron safe and construction of wooden roof inside the suit premises are acts of substantial damage or waste.

16. Hon'ble Supreme Court in **Rafat Ali vs. Sugni Bai** reported in **1999 1 SCC 133** was pleased to hold that all acts of waste or damage does not amount to a ground for eviction and it is only those acts of waste which would very probably impair the value of the building or its utility which would make the tenant liable for eviction. It is not enough that some impairment has been caused to the building. But the value of the building or the utility thereof should have decreased in a reasonably substantial degree and then only can it be said that the acts of waste and damage are

likely to impair the value or utility of the building. In **Waryam Singh vs. Baldev Singh** reported in **2003 (1) SCC 59,** the tenant covered the adjoining verandah of the suit shop room by constructing walls on two sides and rolling shatter in front of it and removed the original door. The question arose whether enclosing the verandah amounts to impairing materially the value or utility of shop. The landlord failed to prove that as a result of the change, the shop was damaged substantially. In fact by putting the shatter in front of the shop, flow of light and air was increased and the shop being in a business locality, the area of shop gets increased by verandah being getting enclosed. The Hon'ble Supreme Court was pleased to hold in the above facts that the act of the tenant did not materially impair the value or utility of the tenanted shop room and refused to grant eviction against the tenant.

17. In the instant case the appellants, admittedly run the business of selling footwear in the said shop room. In order to keep the sale proceed in the shop, they fixed one iron safe. Measurement of the is 1½ inch X 1½ inch. The said iron safe was fixed cutting a portion of wall. Similarly there is no iota of evidence to the effect that the wooden roof constructed inside the suit shop room caused substantial damage to the suit shop room. There is also no evidence that such construction of wooden roof or fixation of iron safe diminished the value and utility of the suit shop room. In the absence of such evidence, it is not possible for this Court to agree with the findings of the learned courts below on the issue of causing

substantial damage to the suit shop room by fixing one iron safe and constructing a false roof.

18. Substantial question of law No.1 is thus decided in favour of the appellants.

19. Now let me adjudicate the substantial question of law No.2.

20. I have already quoted the substantial question of law at the very beginning of my judgment. Ground No.2 of the substantial question of law is having two distinct parts, viz, (i) whether the defendants are guilty of subletting without having any evidence regarding payment and acceptance of rent and (ii) delivery of possession in favour of sub-tenant by the tenant.

21. It is not in dispute that one Laxmidhar Bhunia has been running a business of betel shop in an almirah shop fixed the outer wall of the suit premises.

22. The case of the defendants/appellants on this score is that the original owners Uma Sankar Agarwala @ Gupta started the said business of betel shop on the exterior wall of the shop room to augment income and appointed Laxmidhar as his employee to look after the said business. Laxmidhar is not a sub-tenant under the defendants.

23. Thus the defendants have claimed the business of betel shop as of their own and Laxmidhar is running the business on behalf of the defendants. Appellant No.2 Gajanand Gupta deposed during trial of the case as DW1. In his cross-examination he candidly admitted that Laxmidhar has been running a betel shop on the exterior wall of the suit

shop room. It is also stated by him on oath that Laxmidhar does not submit accounts of business to DW1. Laxmidhar also does not make any payment to DW1. Laxmidhar is the absolute owner of the said betel shop business. DW2 Rajendra Prasad Gupta also admitted in his cross-examination that Laxminath @ Laxmidhar Bhunia exclusively runs the betel shop situated on the exterior wall of the tenanted premises.

24. From the evidence of witness on behalf of the defendants it is clear that Laxmidhar is in exclusive possession of an almirah shop situated on the exterior wall of the suit shop room and he exclusively runs betel shop business in the said shop room. It is also found from the evidence on record that the original tenant Uma Sankar Agarwala filed a suit against the said Laxmidhar praying for his eviction claiming that he was a licensee under the original tenant. Laxmidhar, on the other hand filed a suit for permanent injunction claiming himself to be a tenant under Uma Sankar Agarwala. Both the suits and subsequent appeals were however dismissed.

25. It is strenuously argued by Mr. Ghoshal that Laxmidhar was neither a licensee nor a sub-tenant. Status of Laxmidhar was not established even by the court of law in previous suits and appeals. Therefore, it cannot be said that Laxmidhar was a sub-tenant under the original tenant or under the present appellants.

26. There is no dispute on the question that exterior wall of a tenanted premises is part of tenancy, albeit the term premises has been defined in the West Bengal Premises Tenancy Act, 1956 in the following words:-

> 2. (f) "premises" means any building or part of a building or any hut or part of a hut let separately and includes-
>
> (i) the gardens, grounds and out-houses, if any, appertaining thereto,
>
> (ii) any furniture supplied or any fittings or fixtures affixed for the use of the tenant in such building or part of a building or hut or part of a hut, but does not include a room in a hotel or a lodging house;

27. It is true that the exterior wall of a tenanted premises has not been specifically stated as part of tenancy but it is well settled that a demise of a part a building divided horizontally or vertically includes the external walls enclosing the part so demised. An extraordinary fixture to an external wall of which part encloses the demised premises is included in the demise, if it is or is fixed to such part of the external wall as encloses the demise premises. In the absence of any agreement to the contrary, the tenant has right of exclusive occupation not only all the inside area of the room, but of the outside walls as well.

28. Therefore, the outside wall of the tenanted premises is within the tenancy of the appellants. In their written statement specific case of the defendants is that the original tenant, namely, Uma Sankar Agarwala @ Gupta, since deceased opened the betel shop on the exterior wall of the tenanted premises and appointed Laxmidhar to run the said business. The defence case has been demolished when both DW1 and DW2 admitted in their cross-examination that the said business is being run exclusively by Laxmidhar Bhunia. Therefore, Laxmidhar Bhunia is in exclusive possession of a part of exterior wall of the suit premises where

he has been running a business since long. Filing of suit by Uma Sankar Agarwala and counter suit by Laxmidhar are ample proof in support of exclusive possession of the said betel shop by Laxmidhar. It is true that respondents failed to produce any evidence as to payment of rent or premium of any kind by Laxmidhar in favour of the defendants. but it is consistently held by the Hon'ble Supreme Court that when sub-tenancy is created between the tenant and sub-tenant, it is a clandestine arrangement in favour of a third person and in such a situation it would be difficult for the landlord to prove, by direct evidence that the person to whom the tenant has parted with the exclusive possession had paid monetary consideration to the tenant. When it is established that the tenant has parted with possession of the tenanted premises or part of it in favour of a third person and the suit third person is in exclusive possession of the same, the court, in such cases is permitted to draw its own inference to infer that the premises or part of it were sublet. In support of the above observation the decision of the Hon'ble Supreme Court in **M/S Bharat Sales Ltd vs. L.I.C of India** reported in **1998 (3) SCC 1** may be relied on.

29. In view of above discussion, substantial question of law No.2 is decided against the appellants and in favour of the plaintiff.

30. In view of the above discussion this Court holds that there is no reason to interfere with the judgment and decree passed by the Trial Court in Title Suit No.324 of 1992 and affirmed by the First Appellate Court in Title Appeal No.258 of 2007 on the ground of subletting. This

Court however does not agree with the findings on the issue of violation of clauses (m), (o) and (p) of Section 108 of Transfer of Property Act by the appellants.

31. For the reasons state above, I do not find any merit in the instant appeal and the same is liable to be dismissed.

32. Accordingly, the appeal is be and the same is dismissed on contest, however without cost.

33. The department is directed to draw up fresh decree for eviction in favour of the respondents on the ground of subletting.

34. The appellants are directed to quit, vacate and deliver peaceful possession of the suit premises within 60 days from the date of this order failing which the respondents are at liberty to put the decree in execution before the executing court.

(Bibek Chaudhuri, J.)