PETITIONER:
Roop Kumar

RESPONDENT:
Mohan Thedani

DATE OF JUDGMENT: 02/04/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:

J U D G M E N T

(Arising out of S.L.P. (C) No. 5835/2001)

ARIJIT PASAYAT,J.

Leave granted.

This case is a classic example of a just cause getting defeated by setting up dubious pleas and depriving a party of what is legally due to him. It is one of those innumerable cases where course of justice has been attempted to be deflected by factual and legal red herrings.

Appellant is the defendant in a suit filed by respondent-plaintiff No.1 for recovery of consolidated and expected commission/rendition of accounts and possession of Premises No.15A/16-I, Ajmal Khan Road, Karol Bagh, New Delhi.

As per suit averments respondent-plaintiff No.1 was a tenant in respect of the aforesaid premises on a monthly rent w.e.f. 15.8.1962. The shop was registered under the Shops and Commercial Establishments Act, (in short the 'Establishment Act') in the name of M/s Esquire, of which respondent-plaintiff No.1 was the proprietor. Later on, the name of the concern was changed to M/s Purshotams. For all intents and purposes there was no change of proprietorship. Plaintiff No.2, Tahil Ram is the father of respondent-plaintiff No.1 and his power of attorney holder. Tahil Ram entered into an agency-cum-deed of licence with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licence agreement was incorporated in an agreement dated 15.5.1975. Earlier, the appellant-defendant was having his business as tailors and drapers at A-7, Prahlad Market, Deshbandhu Gupta Road, New Delhi. He had approached respondent-plaintiff No.1 for use of his premises in question under his tenancy as a show room on licence-cum-agency basis. As per the agreement, plaintiffs were to receive their commission @ 12% on tailoring business and @ 3% commission on the sale of materials of all kinds as conducted by the appellant-defendant. Possession of the shop continued with the plaintiffs along with the tenancy rights. The agreement was initially for a period of five years, with option of extension by mutual consent. The agreement expired on 14.5.1980 and was never renewed thereafter. In terms of clause 5 of the agreement, the appellant-defendant was to keep separate accounts of the tailoring and cloth materials;

and therefore, he was an accounting party. The agreement was duly acted upon and at no point of time possession was delivered to the defendant and as noted above, remained with the plaintiffs. Later on, for his own convenience, defendant brought his tailors for tailoring business. Defendant has trespassed by destroying all traces of evidence of possession and has started displaying the signboards and other advertisement materials, as if M/s Roop Tailors and Drapers are conducting business in the suit premises. Accounts were rendered up to 30.6.1976. Payments were made by cheques and by other modes. Accounts were also rendered up to 31.3.1978 by the defendant under his own hand and signatures. After that date, defendant neither rendered accounts nor made any payment in spite of repeated reminders and requests. Legal notice was served through registered post for payment of commission, and a demand was made for true and faithful rendition of accounts. After 14.5.1980, defendant was asked to vacate the premises, but he forcibly continued to occupy the premises. This led to initiation of proceedings under Section 145 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'). Defendant to frustrate the legal demands of the plaintiffs filed a suit for injunction. Though, the period of the agency-cum-licence deed expired on 15.5.1975, the defendant continued to remain in possession. On the ground of limitation, the plaintiffs claimed what is due from 1.10.1977 to 31.3.1978 which came to be Rs.7,000/- and from 1.4.1978 to 14.5.1980 the commission was estimated to be about Rs.70,000/-. Claim of damages at Rs.6,000/- from 14.5.1980 to 14.10.1980 was made for a period of five months. Plaintiffs also claimed a decree for possession of the shop along with a decree for damages and for payment of the commission and rendition of accounts.

Primary stand of the defendant in reply was that he was in lawful occupation and possession as tenant under the plaintiffs. Some documents on false representation had been obtained from him giving the wrong impression that they were to be produced for fixing of standard rent in a case of eviction, and these documents were never intended to be acted upon otherwise. The purported agreement was not acted upon, and was a sham document and there was no agreement relating to commission and, therefore, the question of rendition of any accounts did not arise. It was further stated that due to litigation between plaintiff No.1 and his landlords, the defendant was made a victim though with a spirit of good faith and to help the plaintiffs, he had signed some documents which were not intended to be acted upon, but have been maliciously relied upon to his disadvantage. There was no relationship of principal and agent as claimed. A suit for injunction had been filed and the same is pending adjudication. Additional plea was taken that as per averments in the plaint, defendant is alleged to have committed act of criminal trespass on 2.5.1980 after surrendering possession to the plaintiffs, so the suit on the basis of agreement dated 15.5.1975 or on the basis of termination of agency-cum-licence deed is not maintainable.

Initially 11 issues were framed on 17.2.1981. Subsequently, an additional issue was framed on 6.4.1993. Nine witnesses were examined to further the plaintiffs' case, while defendant examined seven witnesses. Several documents were exhibited and proved. Some other documents were marked, but were not proved.

The Trial court decreed the suit in favour of the plaintiffs and against the appellant-defendant. The judgment and decree came to be assailed in Regular First Appeal before the Delhi High Court.

Before the High Court the parties agreed that the basic question which required consideration was whether relationship between the respondent and the appellant was that of licensor and licensee or it was that of lessor or lessee. The Trial Judge had held that the transaction between the respondent and appellant evidenced by an agreement dated 15.5.1975 amounts to licence and not sub-letting. There was a finding recorded by the Trial Court to the effect that the appellant was a party to earlier ejectment proceedings which was not factually correct. Since the Trial Court nurtured this wrong notion which runs through the entire judgment, it was held that the reasoning given by the Trial Court in support of its findings on various issues and particularly issues Nos. 1, 6, 7 and 10 cannot be sustained. The High Court with consent of parties exercised powers conferred by Order 41 Rules 30, 32 and 33 of the Code of Civil Procedure, 1908 (in short the 'Code'). Arguments were heard on the merit of the issues framed in the suit. On consideration of the rival stands, the High Court came to hold that the conclusions arrived at by the Trial Court were correct, though the reasonings in support of the conclusions were different. That being the position, reasonings were recorded in support of the conclusions by the High Court. On consideration of the rival stands, it held that the agreement dated 15.5.1975 was entered into between them with mutual consent and the appellant-defendant signed the same voluntarily and out of his free will; it was not a sham document; was in fact acted upon; the appellant-defendant was an accounting party in terms of the agreement referred to above; in terms of that agreement accounts had been rendered up to March 1978 and payment of commission was made up to June 1976; the appellant-defendant did not criminally trespass in the disputed shop; he was in unlawful possession of the shop as the licence came to end on expiry of the period as contained in the agreement dated 15.5.1975; the appellant-defendant was only a licensee and not the lessee and, therefore, the Civil Court i.e. the Trial Judge had jurisdiction to entertain the suit. The commission charges for the period from 14.10.1977 to 31.3.1978 fixed at Rs.7,000/- was affirmed. For the period from 1.4.1978 and 14.5.1980 the appellant-defendant had not rendered accounts and, therefore, taking into account the average monthly commission for which the accounts were rendered, a decree for Rs.25,500/- was passed in favour of the plaintiffs and against the defendant in respect of the commission charges for the period from 1.4.1978 to 14.5.1980 and subject to payment of court fees by the plaintiffs. As the appellant-defendant was in unauthorised occupation of the premises in question at the rate of Rs.1200/- p.m., the Trial Court was not justified in fixing at the rate of Rs.500/-. The commission for the period for which accounts were rendered was more than Rs.1200/- in the normal course and, therefore, the appellant would have paid Rs.1200/- p.m. even if he was continuing in possession in terms of the agreement. The rentals in the area have increased by leaps and bounds after 1980 and the claim of Rs.1200/-p.m. was very reasonable. Therefore, respondent-plaintiff No.1 would be entitled to damages for use and occupation of the premises by the appellant-defendant at the rate of Rs.1200/-p.m. A decree of Rs.6,000/- was accordingly passed for the period from

15.5.1980 to 14.10.1980 subject to payment of court fees by the respondent-plaintiff No.1. Decree for possession was passed. The respondent-plaintiff No.1 was entitled to damages for use and occupation of the premises at the rate of Rs.1200/-p.m. from the date of suit till delivery of possession subject to payment of proper court fee. Costs were awarded. The appeal was dismissed with costs.

In appeal, learned counsel for the appellant has taken various pleas. Essentially they are as follows: The High Court was not justified in hearing the appeal as if it was the Trial Court having come to the conclusion that the premises on which the Trial Court proceeded were erroneous. That amounts to denial of a forum of appeal which was statutorily provided and in essence amounted to deprivation of such a right. Reliance was placed on a decision of this Court in A.R. Antulay v. R.S. Nayak and Ors. (AIR 1988 SC 1531). The High Court has not considered the true import of Sections 91 and 92 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') in its proper perspective. It is not as if a party is not entitled to lead oral evidence to show that the agreement was not intended to be acted upon and the terms were really not reflective of intention of the parties. In fact, the agreement was not acted upon. The High Court proceeded on an erroneous basis as if some of the issues were not pressed before the Trial Court and the High Court. The clauses of the agreement on which the Trial Court and the High Court placed reliance do not prove the essence of the transactions and/or intention and should not have been given undue importance. Some of the basic issues like Issue No.12 were not adjudicated by the Trial Court and the High Court. Though reference was placed on the objections filed to the application under Section 145 of the Cr.P.C., stand of the appellant was not taken note of. In fact, an application had been filed for taking note of the objections which unfortunately the High Court treated to have become infructuous as it was listed on the day the judgment was delivered. While considering a plea that the agreement was not intended to be acted upon, veil has to be lifted by considering the evidence and the surrounding circumstances in their proper perspective. Though the Trial Court had granted Rs.500/- p.m. as damages, the High court suo motu without even any challenge thereto by the respondent raised the same to Rs.1200/-p.m. The specific stand of the appellant was that the agreement was executed as a devise to protect the plaintiffs in the suit for ejectment or/and that relating to fixation of standard rent in the dispute between the plaintiffs and their landlords. The High Court erroneously came to hold that payments were made as commissions for various periods. As the Trial Court proceeded on the basis as if the appellant was a party in proceedings earlier, the foundation of its conclusions was shaken. The High Court should have remitted the matter back to it for fresh adjudication after having found that the conclusions were contrary to records and materials; instead it adjudicated the matter acting as a Trial Court which is not permissible. The High Court erroneously proceeded to do so as if the appellant had conceded to such a course being adopted while in reality there was no concession.

Per contra, learned counsel for the respondent submitted that after having agreed before the High Court that it may take up the whole matter for adjudication on merits, on consideration of the evidence on record, it is not open to the appellant to take a stand that there was no

such concession when in fact the High Court has specifically recorded about such concession in detail. The stand that the appellant was a sub-tenant, being a tenant under the plaintiffs is clearly untenable in view of the documentary evidence to which the High Court has referred in detail. The scope and ambit of Sections 91 and 92 of the Evidence Act have been rightly considered by the High Court. The stand that the agreement was intended to be a protection of the plaintiffs in proceedings between plaintiffs and their landlords is falsified because of the fact that the suit for eviction was filed after about 7 months of execution of the agreement. There is no dispute that the agreement was executed. Therefore, the appellant was bound by it. In any event, there is no question of sub-tenancy in view of the clear bar provided under Section 16 of the Delhi Rent Control Act, 1958 (in short the 'Rent Control Act') which prohibits sub-tenancy without a consent of the original landlord. It has not been shown that the original landlord had consented to the sub-tenancy. The High Court has rightly therefore discarded the plea. Not only issue No.12 but also several other issues were given up before the Trial Court and the High Court and it is not open to the appellant to make a grievance that these issues were not considered. So far as enhancement of the damages is concerned, the High Court had exercised powers under Order 41 Rule 33 with the consent of the parties and when the claim was for damages, it was open for the High Court to accept the claim as made by the respondent-plaintiff No. 1 in the Trial Court by fixing damages at Rs.1200/-p.m.

It would be logical to first deal with the plea relating to absence of forum of appeal. It is to be noted that the parties agreed before the High Court that instead of remanding the matter to trial Court, it should consider materials on record and render a verdict. After having done so, it is not open to the appellant to turn round or take a plea that no concession was given. This is clearly a case of sitting on the fence, and is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak and Anr. (1982 (2) SCC 463). In a recent decision Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors. (2002 AIR SCW 4939) the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary.

Before we deal with the factual aspects, it would be proper to deal with the plea relating to scope and ambit of Sections 91 and 92 of the Evidence Act.

Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it

is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence p.397 and p.398; Phipson Evidence 7th Edn. P.546; Wigmore's Evidence p.2406.) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

(a) the enaction or creation of the act.
(b) its integration or embodiment in a single memorial when desired;
(c) its solemnization or fulfillment of the prescribed forms, if any; and
(d) the interpretation or application of the act to the external objects affected by it.

The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.

The enaction or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

The practical consequence of integration is that its scattered parts, in their former and incohate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose

of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (See Mc Kelvey's Evidence p.294). As observed in Greenleaf's Evidence page 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence p. 648)

In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberation omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document which limitation improved by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

The two sections are, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only to bilateral documents. (See: Bai Hira Devi and Ors. vs. Official Assignee of Bombay AIR 1958 SC 448). Both these provisions are based on "best evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.

The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

This Court in Smt. Gangabai v. Smt. Chhabubai (AIR 1982 SC 20) and Ishwar Dass Jain (dead) thr.Lrs. v. Sohan Lal (dead) by Lrs.(AIR 2000 SC 426) with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

But the question is whether on the facts of the present case, the reasons given by the defendant-appellant in his evidence for claiming the agreement as sham document can be accepted.

As noticed by the High Court, the respondent-plaintiff No.1 had proved on record that the appellant-defendant had acted upon the agreement by himself, submitting the statements giving the account of tailoring and sale of materials as well as payment of commission on the basis of statements as per the terms of an agreement.

The High Court also referred to certain exhibited documents to hold that the appellant was paying commission at the rate of 12% on the tailoring business, and 3% on the sale of materials of all kinds. Reference has been made to Exhibits PWs 6/4, 6/5, 6/6 to 6/9. It was noted that cheque dated 12th August, 1975 for Rs.963.43 has been paid which corresponds to the commission for the month of July 1975 payable on the sale of cloth as well as tailoring. The cheque is exhibited as PW 2/3.

On a reference to Exhibit PW 6/4 and Ex.PW6/5, it appears that in respect of the sale of cloth and on

commission of tailoring, the amounts payable for the month of July 1975 are Rs.454.95 and Rs.513.48 respectively. Adding up, the total comes to Rs.968.43 for which cheque dated 12.8.1975 has been issued. Similarly, for the month of August 1975, the amounts are Rs.401.85 and Rs.513.72, and cheque dated 19.9.1975 is for an amount of Rs.915.57, which tallies with the commission of Rs.401.85 and Rs.513.72 respectively. Some instances were also noticed by the High Court. It was highlighted that in many instances amounts in round figures have been paid. It does not help in furthering his case. No explanation has been offered as to why cheques for amounts tallying with commissions, upto even paise were issued.

It is to be noticed that though no label attached to the agreement, it does not specify any monthly amount to be paid by the appellant to respondent. Therefore, the question of any fixed monthly rent does not arise. The High Court has also taken note of several other instances to conclude that the agreement was one of licence and not of lease. That being the position, the conclusions of the High Court are in order and do not warrant interference.

Admittedly, there was no consent of the original landlord to create sub-tenancy in terms of Section 16(2) of the Rent Control Act as noted above. Since there is no consent of the landlord, something which is forbidden by law could not be pleaded. That being the position, the High Court was justified in rejecting the plea of sub-tenancy.

In almost similar situation, this Court in Waman Shriniwas Kini v. Ratilal Bhagwandas and Co. (AIR 1959 SC 689) while considering corresponding provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 held that subletting without previous consent is unlawful and if such plea of subletting is accepted, it would be enforcing an illegal agreement.

In Delta International Ltd. v. Shyam Sundar Ganeriwalla and Anr. (AIR 1999 SC 2607) several principles were culled out by this Court in relation to disputes on the issue whether the agreement was for one of lease or licence in a particular case. Six conclusions were recorded in paragraph 15. Conclusion No.5 reads as follows:

"Prima facie, in absence of a sufficient title or interest to carve out or to create a similar tendency by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour, because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter."

In the background of Section 16(2) of the Rent Control Act, the principles set out above clearly negate the appellant’s case.

One plea which is urged with some amount of emphasis was increase of the damages from Rs.500/-p.m. to Rs.1200/-p.m. As noted supra, with the consent of the parties, the High Court had exercised powers under Order 41, Rules 30, 32 and 33. It took note of the ground realities which were not disputed before us. High Court recorded a positive finding that in the normal course the appellant would have paid at least Rs.1200/-p.m., though the amount payable was more than, even for the period for which accounts were rendered or were to be rendered. It was fairly accepted by learned counsel for the appellant before us that the rentals in the area have increased by leaps and bounds after 1980. That being so, the specious plea that there was no scope for enhancement of the quantum of damages fixed by the Trial Court is indefensible. Judged from any angle, the appeal is

devoid of merit and deserves dismissal with costs which we direct. In a case of this nature, waiver of costs would be acting with leniency on a person who deserves none. Costs fixed at Rs.25,000/-.

JUDIS