

PETITIONER:
ISHA VALIMOHAMAD & ANR.

Vs.

RESPONDENT:
HAJI GULAM MOHAMAD & HAJI DADA TRUST

DATE OF JUDGMENT 14/08/1974

BENCH:
MATHEW, KUTTYIL KURIEN
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MATHEW, KUTTYIL KURIEN
RAY, A.N. (CJ)

CITATION:
1974 AIR 2061 1975 SCR (1) 720
1974 SCC (2) 484
CITATOR INFO :
O 1979 SC1745 (16)
R 1987 SC1217 (13)
RF 1991 SC2156 (10)

ACT:
Saurashtra Rent Control Act 1951- Whether termination of tenancy under Transfer of Property Act necessary before filing a suit for eviction on the grounds of subletting--Repeal and saving clause-Meaning of right, privilege acquired, accrued or- incurred.

HEADNOTE:
The respondents let out the premises to the appellants in the year 1951 in a place governed by the Saurashtra Rent Control Act, 1951 which prohibited a tenant from subletting the premises. The appellant sublet the premises in violation of the Saurashtra Act at a time when Saurashtra Act was in force. In 1963, the Saurashtra Act was repealed and the Bombay Rent Act was made applicable to the area in question. Under the Bombay Act there is no prohibition against subletting by the tenant unless the contract of tenancy prohibited it. The respondent terminated the tenancy of the appellant after the Saurashtra Act was repealed and, thereafter, a suit was filed for recovery of possession on the ground of subletting. The High Court held that the suit to recover possession was competent under Saurashtra Act after its repeal as the respondent had an accrued right within the meaning of section 51 of the Bombay Rent Act. The High Court assumed that the notice under the Transfer of Property act was necessary to terminate the tenancy.

HELD : (1) The High Court was not right in its assumption that the notice under the Transfer of Property Act was necessary to terminate the tenancy on the ground that the appellants had sublet the premises. Under the Transfer of Property Act a mere subletting by a tenant unless the contract of tenancy so provides is no ground for terminating the tenancy. The respondent could not have issued a notice under the Transfer of Property Act to determine the tenancy as the contract of tenancy did not prohibit subletting by the tenant. The Saurashtra Act unconditionally prohibited a tenant from subletting and it was under that Act that the

landlord was entitled to recover possession of the premises on the basis that the tenant had sublet the premises. A right accrued to the landlord to recover possession under the Saurashtra Act when the tenant sublet the premises and the right survived the repeal of that Act under section 51 of the Bombay Rent Act. Therefore, the suit for recovery of possession of the premises was maintainable after the repeal of the Saurashtra Act. [726-727D]

(2) The right of a landlord to recover possession is not an accrued right if before the issue of a notice if under any law it was necessary for the landlord to issue tile notice to determine the tenancy. Privilege and inability are correlatives. Where there is a privilege there must be inability. Privilege is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a ,certain act. [724B,-725H; 726A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : CIVIL Appeal No. 1915 of 1970 (Appeal by Special Leave from the Judgment & Order dated the 2nd/3rd March, 1970 of the Gujarat High Court in Revision Appln. No. 371 of 1966.)

V.N. Ganpule and Urmila Sirur for the appellants.

D. V. Patel, KL. Hathi, A.R. Chaphekar and P.C. Kapur, for respondent No. 1.

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The Judgment of the Court was delivered by MATHEW, J. In this appeal, by special leave, the question for consideration is whether the High Court was right in dismissing a revision petition filed by the appellants and thereby upholding the judgment of the learned District Judge, Jamnagar, decreeing the suit filed by respondent No. 1 for possession of the suit premises.

The suit premises consisted of a building known as Abdul Rat man Manzil and it belonged to one Haji Mohamad, Haji Dada Wakf (Trust). The building was leased to Osman Jamal and Company under a rent note dated January 15, 1947. In or about the year 1951, the firm of Osman Jamal and Company was wound up and the appellants took the premises on rent on a monthly rent of Rs. 320/-. The respondent, the landlord, purported to terminate this tenancy by a notice dated February 12, 1964 on the ground that the appellants (tenants) had defaulted in the payment of rent and had sub-let the premises. At the trial of the suit, the plea that the appellants committed default in payment of rent was given up and, therefore, the sole issue before the Court was whether the appellants had sub-let the premises. The contention of the appellants was that under the contract of lease, they had the right to sub-let the promises and, there-fore, the respondent was not entitled to recover possession of the premises.

The trial court held that the contract of tenancy contained no prohibition against the tenant sub-letting the premises and so, the respondent was not entitled to recover possession of the premises for the reason that the appellants had sub-let the premises and dismissed the suit. The respondent. filed an appeal against this decree before the District Judge. He held that s. 15 of the Saurashtra Rent Control Act, 1951 (hereinafter referred to as "the Saurashtra Act") which prohibited a tenant from Sub-letting the premises superseded the contract of tenancy between the parties as that section was not subject to any contract to the contrary and, therefore, the landlord obtained the right

to recover possession of the premises by virtue of s. 13(1)(e) of the Saurashtra Act. He further held that the repeal of the Saurashtra Act by the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter referred to as "The Bombay Act") on December 31, 1963, did not affect the rights, privileges, obligations or liability acquired, accrued or incurred under the former Act and, therefore, the liability of the appellants to ejectment under s. 13(1)(e) of the Saurashtra Act on the ground of sub-letting could be enforced by a suit, notwithstanding the repeal of that Act. The District Judge, therefore, allowed the appeal and decreed the suit.

Against this judgment, the appellants filed a revision before the High Court of Gujarat. When the application for revision came up for hearing before a learned single judge of the High Court, he referred it to a Division Bench. The question before the Division Bench was :

"Whether the landlord is entitled to maintain a suit for recovery of possession from the tenant. On the ground

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of sub-letting under section 13(1)(e) of the Bombay Rent Act (No. 57 of 1947), as applied to Gujarat State on 31 December 1963), where the sub-letting was made during the pendency of the Saurashtra Rent Control Act and neither the notice to terminate the contract was given nor the suit was filed before the date on which the Saurashtra Rent Control Act was repealed ?"

The Division Bench, by its judgment, held that the suit to recover possession of the premises was competent under s. 13(1)(e) of the 'Saurashtra Act notwithstanding the repeal of that Act as the respondent had an accrued right within the meaning of s. 51, proviso (2) of the Bombay Act and confirmed the decree for ejectment. It is from this judgment that the present appeal has been filed.

As already stated, the Saurashtra Act was repealed on December 31, 1963; the Bombay Act was made applicable to the area in question on January 1, 1964. The appellants sub-let the premises while the 'Saurashtra Act was in force in the area. That Act by s. 15 prohibited sub-letting notwithstanding anything contained in any law. Section 13(1)(e) of the Saurashtra Act provided :

"13. When landlord may recover possession-
(1)Notwithstanding anything contained in this Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

* * * * *

(e) that the tenant has, since the coming into operation of this Act, sub-let the whole. or part of the premises or assigned or transferred in any other manner his interest therein."

Therefore, there can be no doubt that the respondent could have filed a suit to recover possession under S. 13(1) of the Saurashtra Act on the ground that the appellants had sub-let the premises while that Act was in force. But the appellants submitted that since no notice, terminating the tenancy was given before the repeal of the Saurashtra Act, the respondent-landlord had no accrued right to recover possession which could survive the repeal and therefore he was not entitled to file the suit after the repeal of that Act, as under the corresponding provisions of the Bombay

Act, the suit was not maintainable.

Section 13(1)(e) of the Bombay Act provides :

"13. When landlord may recover Possession.-

(I) Notwithstanding anything contained in this Act but subject to the provisions of s. 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

* * * * *

(e) that the tenant has, since the coming into operation of this Act unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein."

It may be noted that under the Bombay Act, there is no prohibition against sub-letting by tenant unless the contract of tenancy prohibited it. That idea is conveyed by the words "unlawfully subject" in

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the sub-section. That apart, the section can obviously have no application as the subletting was before the coming into operation of that Act.

The notice to terminate the tenancy was issued by the landlord on February 12, 1964 i.e., after the Saurashtra Act was repealed and the suit was filed for recovery of possession of the premises after the Bombay Act came into force. As already stated, the Division Bench took the view that the landlord had an accrued right within the meaning of proviso (2) to s. 51 of the Bombay Act, and therefore, a suit could be instituted for recovery of possession under s. 13(1)(e) of the Saurashtra Act. Section 51 of the Bombay Act, so far as it is material, provides :

"51. Repeal of Sau. Act XXII of 1951 and of Bombay LVII of 1947 as extended to Kutch Area and saying.-

The Saurashtra Rent Control Act, 1951 (San. Act XXII of 1951) and the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947) as extended to the Kutch area of the State of Gujarat by the Government of India, Ministry of States, Notification No. 215-J. dated the 10th September 1951 are hereby repealed

Provided that

* * * * *

(ii) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed;

(2) any such investigation, legal proceeding or remedy may be continued, instituted or enforced and any such penalty, forfeiture and punishment, may be imposed, as if the aforesaid law had not been repealed."

As already stated, the submission on behalf of the appellants was that before the issue of notice terminating the tenancy, the landlord had no accrued right to institute a suit for recovery of possession as the issue of a notice determining the tenancy on the ground of subletting was a sine qua non for filing a suit under s. 13(1)(e) of the Saurashtra Act. In other words, the argument was that the subletting by the tenant when the Saurashtra Act was in force only gave the landlord a right to terminate the tenancy and that until the tenancy was terminated by a notice under the Transfer of Property Act, it cannot be said that any right accrued to the landlord to recover possession of the

premises which would survive the repeal of the Saurashtra Act.

if a notice under the provisions of the Transfer of Property Act was necessary to determine the tenancy on the ground of sub-letting, we do not think that the High Court was right in its view that a right accrued to the landlord to recover possession of the premises under s. 13(i)(e) of the Saurashtra Act merely because the tenant sub-let the premises and that was prohibited by s. 15 of that Act. In other words, if the assumption of the High Court that a notice terminating

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the tenancy on the ground of sub-letting was necessary for filing a suit under s. 13(1)(e) of the Saurashtra Act was correct, then we do not think that the respondent-landlord had an accrued right which would survive the repeal of that Act unless the notice was issued determining the tenancy during the currency of that Act. We do not think that the right of a landlord to recover possession on the ground that the tenant has sub-let the premises is an accrued right before the issue of a notice, if under any law it was necessary for the landlord to issue the notice to determine the tenancy on the ground of sub-letting.

In *Hamilton Coll v. While* (1) Atkin L.J. said that the provision of s. 38(f)(c) of the English Interpretation Act, corresponding to s. 51, proviso (2), of the Bombay Act, was not intended to preserve abstract rights conferred by the repealed Act and that it applies only to the specific rights given to an individual upon the happening of one or more events specified in the statute. The Court held in that case that a tenant's general right to compensation for disturbance would not survive the repeal of the Agricultural Holdings Act, 1908. But, where a landlord, before the repeal, had given his tenant notice to quit, the tenant had 'acquired a right' which would 'accrue' when he quitted his holding-the right to receive compensation. In *Abbott v. Minister of Lands* (2) where the appellant claimed that as a purchaser of Crown land in New South Wales in 1871 he became entitled under the Crown Lands Alienation Act 1861 to make further purchases of Crown land adjoining his original holding. The Act of 1861 was repealed by the Crown Lands Act, 1884 which, however, provided that notwithstanding the repeal 'all rights accrued' by virtue of the repealed enactment should remain unaffected. The Judicial Committee held that the mere right existing at the date of the repealing statute to take advantage of the provisions of the Act repealed was not a 'right accrued' within the meaning of the saying clause. In *Director of Public Works v. Ho Po Sang* (3), the Privy Council has had to consider the question. It was held that the fact that the Director of Public Works had given a Crown lessee notice of his intention to grant a rebuilding certificate, which would enable the lessee to recover vacant possession from the persons in occupation of the premises, did not confer any right to the certificate on the lessee, since various conditions had remained to be fulfilled before the certificate could be granted, so that the lessee had no more than a hope that it would be granted. Lord Morris of Borth-y-Gest said :

"It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification

is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act, The latter is not."

(2) [1895] A.C. 425.

(1) [1922] 2 K.B. 422.

(3) [1961] A.C. 9011

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In *Free Lanka Insurance Co. Ltd. v. Ranasinghe* (1) Lord Evershed said that the distinction between what was, and what was not, a right must often be one of great finance and the Court held that a claim given by the Ceylon Motor Car Ordinance of 1936 to an injured person against the other party involved in an accident was "something more than a mere hope or expectation...he had in truth a right...although that right might fairly be called inchoate or contingent".

We do not, however, think that the right of the landlord to terminate the tenancy by giving a notice on the ground that the tenant has sub-let the premises was an accrued right within the meaning of s. 51 of the Bombay Act which would survive the repeal of the Saurashtra Act.

Mr. Patel for respondent contended that even if the landlord had no accrued right, he at least had a 'privilege' as visualised in s. 51, proviso (1)(ii) of the Bombay Act and that the privilege should survive the repeal.

"A privilegium, in short, is a special act affecting special persons with an anomalous advantage, or with an anomalous burthen. It is derived from *privatum*, which, as opposed to *publicum*, signified anything which regards persons considered individually; *publicum* being anything which regards persons considered collectively, and forming a society"

(See Austin's *Jurisprudence*, Vol. II, 5th ed. (1911) P. 519) The meaning of that word in jurisprudence has undergone considerable change after Austin wrote. According to Hohfeld :

"....a privilege is the opposite of a duty, and the correlative of a 'no-right'". For instance, where "X has a right or claim that Y should stay off the land (of X), he himself has the I privilege' of entering on the land; or, in equivalent words, X does not have a duty to stay off."

Fundamental Legal Conceptions, (1923) pp. 38-39)

Arthur L. Corbin writes

"We know that those results would not occur. In such case we say that B had no right that A should stay out and that A had the privilege of entering."

(See "Legal Analysis and Terminology", 29 Yale Law Journal 163)

According to Kocourek

"Privilege and inability are correlatives. Where there is a privilege there must be inability. The term-, are correlatives. The dominus of a Privilege may prevent the servus of the Inability from exacting an act from the dominus"

(See "Jural Relations", 2nd ed., P. 24)

(1) [1964] A.C. 541.

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Paton says :

"The Restatement of the law of Property defines a privilege as a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a certain act".

(See Jurisdiction, 3rd ed.(1964), p.256)

We think that the respondent-landlord had the legal freedom as against the appellants to terminate the tenancy or not. The appellants had no right or claim that the respondent should not terminate the tenancy and the respondent had, therefore, the privilege of terminating it on the ground that appellants had sub-let the premises. This privilege would survive the repeal. But the problem would still remain whether the respondent had an accrued right or privilege to recover possession of the premises under S. 13(1) of the Saurashtra Act on the ground of the sub-letting before the repeal of that Act. The fact that the privilege to terminate the tenancy on the ground of sub-letting survived the repeal does not mean that the landlord had an accrued right privilege to recover possession under s. 13(1) of that Act as that right or privilege could arise only if the tenancy had been validly terminated before the repeal of the Saurashtra Act.

Be that as it may, we do not, however, think that the High Court was right in its assumption that a notice under the Transfer of Property Act was necessary to terminate the tenancy on the ground that the appellant s had sub-let the premises; or, for that matter, the landlord could legally have terminated the tenancy by giving a notice, unless the contract of tenancy prohibited the tenant from subletting the premises.

Under the Transfer of Property Act, mere sub-letting, by a tenant, unless the contract of tenancy so provides, is no ground for terminating the tenancy. Under that Act a landlord cannot terminate a tenancy on the ground that the tenant had sub-let the premises unless the contract of tenancy prohibits him from doing so. The respondentlandlord therefore could not have issued a notice under any of the provisions of the Transfer of Property Act to determine the tenancy, as the contract of tenancy did not prohibit sub-letting by the tenant. To put it, differently under the Transfer of Property Act, it is only if the contract of tenancy prohibits sub-letting by tenant that a landlord can forfeit the tenancy on the ground that the tenant has sub-let the promises and recover possession of the same after issuing a notice. Section III of the Transfer of Property Act provides that a lease- may be determined by forfeiture if the tenant commits breach of any of the conditions of the contract of tenancy which entails a forfeiture of the tenancy. If sub-letting is not prohibited under the contract of tenancy, sub-letting would not be a breach of any condition in the contract of tenancy which would enable the landlord to forfeit the tenancy on that score by issuing a notice. If that be so, there was no question of the respondent landlord terminating the tenancy under the Transfer of Property Act on the ground that the tenant had sub-let the premises. It is only under s. 13(1)(e) of the Saurashtra

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Act that a landlord was entitled to recover possession of the property on the basis that the tenant had sub-let the premises; and, that is because, s. 15 of that Act unconditionally prohibited a tenant from sub-letting. The

Saurashtra Act nowhere insists that the landlord should issue a notice and terminate the tenancy before instituting a suit for recovery of possession under s. 13(1)(e) on the ground that the tenant had sub-let the premises. The position, therefore, was that the landlord was entitled to recover possession of the premises under s. 13(1) of the Saurashtra Act on the ground that the tenant sub-let the premises. It would follow that a right accrued to the landlord to recover possession under s. 13(1) of the Saurashtra Act when the tenant sub-let the premises during the currency of that Act and the right survived the repeal of that Act under proviso (2) to s. 51 of the Bombay Act and, therefore, the suit for recovery of possession of the premises under s. 13(1) read with clause (e) of the Saurashtra Act after the repeal of that Act on the basis of the sub-letting during the currency of the Saurashtra Act was maintainable. In this view, we think that the judgment of the High Court must be up held and we do so.

The appeal is dismissed, but we make no order as to costs.

Appeal dismissed.

P.H.P.

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