IN THE HIGH COURT OF SINDH, KARACHI

C.P. No. S-464 of 2003

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Samiur Rehman and another

vs.

IInd ADJ South Karachi and another

Before: Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing	:	26.09.2016
Petitioners	:	Through Shaikh S.M. Javed Advocate
Respondents	:	Through Mr. Mian Mushtaq Ahmed, Advocate For Respondent No.2

JUDGMENT

Zulfiqar Ahmad Khan, J: Facts leading to the instant litigation go back to 1950 when father of the Petitioner No.1 (herein unless the context otherwise suggests, would refer to the Petitioner No.1) Haji Anisur Rehman trading as "Limton Watch Company" became tenant of Indian Life Insurance Co. Ltd. in respect of shop No.2 situated at ground floor of the Building No.5-A, Zaibunnisa Street, Saddar, Karachi at the rent of Rs.380.24 per month. On the demise of Late Haji Anisur Rehman on 20.04.1952, the petitioner being his legal heir took possession of the business being run at the instant shop and the tenancy continued between the Indian Life Insurance Co. Ltd. and the petitioner, who continued to trade under the name and style of Limton Watch Co. from the said premises (Exhibit O1 to O9 are random letters addressed to Limton Watch Co. by the Indian Life Insurance Co. Ltd. between 30.06.1957 up to 29.08.1964).

2. On nationalization of all life insurance business in Pakistan through the Life Insurance (Nationalization) Order X of 1972, State Life Insurance Corporation of Pakistan (the Respondent No.2), by operation of law, got into the shoes of the Indian Life Insurance Co. Ltd. thus became owner and landlord of the said premises also.

3. However it was only on 05.03.1986 when the petitioner informed the Respondent No.2 that his father had passed away on 20.04.1952 and after his death, with the consent of his other legal heirs, he stepped in the shoes of his father Haji Anisur Rehman to carry on the business and requested the Respondent No.2 that the name of his father may be struck off from the record and his name be written in his place instead.

4. There is no dispute that the petitioner paid rent upto Aug-1986. However, differences between the parties commenced when the Respondent No.2 addressed a letter dated 15.4.1990 to Mr. Samiur Rehman, Managing Director, Limton Watch Co. (Pvt.) Ltd. alleging therein that the petitioner had committed default in the payment of rent for the month of Feb-1987 notwithstanding that rent for the month of Jan-1987 and Mar-1987 was admittedly having been received. It was further alleged that though the parties mutually enhanced rent to 760/= however, for the months of Apr-1988 and May-1988 the petitioner had paid rent at the old rate of Rs.418/24. Founding their case on the above referred three alleged defaults, the Respondent No.2 returned 30 cheques received by it between the periods of 13.10.1987 to 1.4.1990. In the same letter, it was also stated that the Respondent No.2 requires that said premises in good faith for its own occupation and business use.

5. On 26.2.1991 Respondent No.2 filed Rent Case No.306 of 1991 under Section 15 of the Sindh Rented Premises Ordinance, 1979 in

the Court of VII Rent Controller South Karachi on the grounds of (1) default in the payment of rent for Feb-1987 and differences of the mutually enhanced rent from Rs418/-24 to Rs.760/- for the months of April & May 1988; (2) requirement of the premises in good faith for its own occupation and (3) conversion of the sole proprietary concern into a private limited company without written consent of the Respondent No.2.

6. After service of Notice of the Rent Case, the petitioners filed their joint Written Statement, wherein they took the preliminary objection that the ejectment application filed by the landlord's attorney is not maintainable. However, on merits, the opponents admitted the relationship of landlord and tenant, as well as the rate of rent, but denied the case of the Applicant on all grounds.
7. The trial court framed following four legal issues:
    a) Whether affidavit in evidence is filed in this rent case by a competent person?
    b) Whether opponent has committed default in payment of rent?
    c) Whether the opponent No.1 has sublet the case premises to opponent No.2?
    d) Whether the applicant requires the case premises for personal bonafide use?
8. The learned Rent Controller gave negative findings on all of the four issues and accordingly dismissed the ejectment application vide his order dated 04.05.1998.
9. The Respondent No.2 challenged the aforementioned dismissal of the ejectment application before this Hon'ble Court by filing FRA No.363/1998. During pendency of the said FRA, the counsel for the appellant/respondent No.2 herein, stated that he would not press the appeal on the ground of personal use as contained in the order

dated 6.4.2000 passed by this Court. However, after amendment of Section 21 of the SRPO the said FRA was transferred to the learned District Judge, Karachi (South) and was registered as (new) FRA No.1259/2001 before the learned IInd Additional District Judge, Karachi (South) who heard and allowed the FRA No.1259/2001 vide impugned judgment dated 12.05.2003.

10. In support of its case, the Respondent No.2 filed Affidavit-in-Evidence of its Deputy Manager Peer Khan Sajid, who reiterated the contents of the eviction application and produced his memorandum of attorney for giving evidence in Rent Case No.306/91 as Ex. A/2. He also produced photocopy of the Petitioner No.1's letter dated 03.03.1986 as Exh.A/3 whereby he, for the first time, intimated the Respondent No.2 that his father died on 20.04.1952 and after the death of his father he stepped into the shoes of his father to carry on the business of Limton Watch Co., and requested that the name of his father be struck off from the record and his name be written in his place, instead.

11. In para 12 of his Affidavit-in-Evidence, he stated that the said premises was let out to Haji Anisur Rehman for carrying his sole proprietary business under the name of Limton Watch Co. and after his death being his son, with the consent of other legal heirs of late Haji Anisur Rehman, the opponent No.1/Petitioner became the sole proprietor of Limton Watch Co. and being in possession of the premises, he became the tenant of the Applicant, and without intimating the Applicant about the death of Haji Anisur Rehman, he tendered rent in the name of his father Haji Anisur Rehman.

12. In para 13 of his Affidavit-in-Evidence he stated that the opponent No.1 became the tenant of the said premises in his own name and without the written consent of applicants who subsequently assigned and transferred his tenancy rights to a private limited

company namely M/s. Limton Watch Co. (Pvt.) Ltd., which is a distinct juristic person and a separate legal entity, which may sue and be sued in its own name.

13. On the other hand, the Petitioner's witness Noorur Rehman stated in para 11 of his Affidavit-in-Evidence that the opponent No.1 was the managing partner of his family partnership business and right from the beginning there were 3 partners namely the opponent No.1 Samiur Rehman, his son Noorur Rehman, and his wife Mrs. Sarfaraz Begum. He further stated that in the year 1978 the partners of Limited Watch Co. converted themselves into a private limited company in which the same partners accordingly became directors.

14. A review of the impugned judgment shows that the appellate Court reversed the finding of the learned Rent Controller on issue No.1 and held that the Respondent No.2 competently examined their witness Peer Khan Sajid in the Rent Case.

15. On point No.2, the grounds of reversing the finding of the trial court is seemingly based on the understanding of the appellate court that since the Petitioner converted the sole proprietary concern namely Limton Watch Co. into a private limited company under the name of Limton Watch Co. (Pvt.) Ltd. and since the petitioner did so without intimating the Respondent No.2 and without taking latter's written permission, the Petitioner (in his view) ended up handing over the possession of the premises to the newly formed private limited company, thus the pay orders of rent sent by the tenant in the capacity of Managing Director, Limton Watch Co. (Pvt.) Ltd. were rightly returned back by the Respondent No.2. He also expressed his view that after receiving the said pay orders back from the Respondent No.2, the act of the Petitioner No.1 of depositing the rent in the MRC No.702/90 as Managing

Director, Limton Watch Co. (Pvt.) Ltd. was not a valid deposit of rent, therefore, he held that the Petitioner No.1 committed willful default in the payment of rent.

16. On point No.3 the appellate court ruled that since the Petitioner No.1 has converted the sole proprietary concern of Limton Watch Co. into a private limited company under the name of Limton Watch Co. (Pvt.) Ltd. without any prior written permission from the Respondent No.2, thereby it had handed over the possession of the case premises to the Petitioner No.2, thus pursuant to section 15 sub-section (2)(iii)(a) of SRPO it is to be treated as subletting. Accordingly, the appellate court reversed the finding of the learned Rent Controller on this point too.

17. In the instant case, the petitioner's counsel submitted following arguments in respect of two core issues, namely default and subletting:

I. DEFAULT

i. In respect of the allegation of default in the payment of rent for Feb-1987 during the course of cross examination, the very applicant's witness stated that it is a fact that rent was tendered by the opponent from Oct-1986 to Feb-1987 which was appropriated towards the rent of Sep-1986 to Jan-1987. Per counsel, the said witness further stated, "It is fact that applicant received rent for Sept-1986 by way of Cheque No.818671 dated 1.9.1986 for Rs.380.94, therefore, the alleged default in the payment of rent for the month of Feb-1987 was not proved.

ii. That under section 59 of the Contract Act, rent paid for the months of Oct-1986 to Feb-1987, cannot be applied to the rent for Sep-1986 to Jan-1987 that too when the rent for Sep-1986 had already been paid vide cheque No.818671 dated 1.9.1986 stated above.

iii. In respect of the alleged short payment, attention of the Court was drawn to the Applicant's Witness who stated that "it is incorrect to suggest that applicant received short payment for Apr-1988 and May-1988 vide cheque No.CS-571221 dated 3.5.1988", therefore per counsel, the payment of rent by the tenant is therefore duly established under the law.

iv. That no reason for return of the cheque was disclosed nor any proof of their return was given by the Respondent No.2.

v. Thus no default in the payment of rent of Feb-1987 and the alleged differential amount of Rs.683/52 is made out at all by adducing any evidence.

II. SUBLETTING:

i. That the shop was acquired by Haji Anis-ur-Rehman on the then prevailing terms to run Limton Watch Co. as a family concern and that Haji Anis-ur-Rehman died in 1952 thereafter the family headed by his elder son Samiur Rehman the (petitioner No.1 herein), continued with the firm as Partnership with Samiur Rehman as Managing Partner and never parted with possession of the tenanted property.

ii. That in 1978, Limton Watch Company converted itself into Limton Watch Company (Pvt) Ltd. and this fact was very much known to the Respondent No.2 herein.

iii. That vide letter dated 8.9.1981 (Page 305) the Respondent No.2, was asked to write the address as "Haji Anis-ur-Rehman c/o Limton Watch Co. Ltd. P.O Box No.7230 Saddar Karachi" and the Respondent No.2 did address numerous letters to the petitioners as such from

27.5.1982 onward i.e. (Page 309, 311, 319, 321 and 323). The Respondent No.2, addressed its letter dated 15.4.1990 to the petitioner as "Mr. Samiur Rehman Managing Director, Limton Watch Co. (Pvt). Ltd. Shop No.2, State Life Building No.5-A, Zaibunnisa Street, Saddar, Karachi" and that no mention of alleged sub-letting was made therein.

iv. That the Respondent No.2 also received rent due from the petitioners upto 28.2.1987 at the rate of Rs.380/24 per month as per routine.

v. That vide letter dated 18.12.1987 (Page 323) the Respondent No.2, addressed it to Mr.Samiur Rehman Managing Director M/s. Limton Watch Co. (Pvt) Ltd., stating that "we hereby inform you that M/s. Limton Watch Co. (Pvt) Limited is not our tenant" and returned the rent received by it at the rate of Rs.418/24 per month vide pay orders only stating that "the following pay orders are returned herewith as you are not willing to settle the matter by mutual agreement".

vi. That subsequently, the Respondent No.2 waived and acquiesced in the allegation, and accepted the mutually enhanced rent from the petitioners from Apr-1988 to Apr-1990 at the rate of Rs.760/ per month. However, all of sudden vide letter dated 15.4.1990 (Page 195) the Respondent No.2, returned the cheques/pay orders with the allegation of default in the payment of monthly rent and even in that letter, no mention of subletting was given.

vii. That it was only on 26.2.1991 for the first time in the ejectment application, the ground of conversion of

Limton Watch Company to Limton Watch Co. (Pvt) Ltd. without consent of the Respondent No.2 was raised and that point was canvassed during the entire course of evidence.

viii. That the alleged handing over of possession of the premises, to the Limton Watch Co. (Pvt) Ltd. if any, had taken place in the year 1978 to the very knowledge of landlord, who had waived and acquiesced in the same and received rent from petitioner as is evident from letters of the Respondent No.2 reproduced on Page 309 and 195.

ix. That after accepting mutually enhanced rent from M/s. Limton Watch Co. (Pvt) Ltd. the landlord is not entitled to press Section 15(2)(iii)(a) of SRPO 1979 for the ejectment of petitioners herein.

18. On the other hand, the Respondent No.2's counsel submitted following arguments in respect of above referred core issues of default and subletting:

i. On the contention that the Pay Orders as not being accepted by the Respondent No.2, which the Petitioner No.1 had sent to Managing Director of the Petitioner No.2, he later deposited rent in the Court in MRC No.702/1990, it was submitted that (as is evident from the photocopy of the Bank Challan produced on page 283) the petitioner No.1 has not deposited the rent in the MRC in his personal name rather he has deposited the rent in the said MRC in the capacity of Managing Director Limton Watch Co. (Pvt.) Ltd., as such, the said deposit was not to be treated as valid. In this connection, reference was made to PLD 1996 Karachi 109, wherein at

page 120 it has been held that "*the last question, as to whether rent deposited by partnership concern would not amount to due tender by the Appellant according to law be also answered in the affirmative. It is admitted position that the Respondents rented out the said premises to the Appellant Muhammad Shafi Chhotani and it was not rented out to the partnership concern where two more persons were inducted in the partnership concern. It has been admitted by the Appellant that after the refusal of rent by the Respondent, the Appellant did not deposit rent in N.M. Chottani proprietorship concern. The rent tendered by one of the partners of partnership concern would be a rent from the business of partnership concern and not from the proprietorship concern of Muhammad Shafi Chhotani, therefore, the tender of the rent by the Appellant in the capacity of one of the partners of M/s. N.M. Chottani partnership concern would not be due tender according to law from the proprietorship concern. Accordingly rent deposited by the partnership concern in the Court would not amount due tender by the Appellant under the law therefore latter was defaulter in the payment of rent.*"

ii. With regards the learned counsel for the Petitioners contention that since the other shareholders/director of the Petitioner No.2 are the son and wife of the Petitioner No.1, who are his family members, as such, no change has taken place in the status of the tenant, reference was made to the case of Manek J. Mobed vs. Shah Behram (PLD 1974 SC 351), wherein the full bench of the Hon'ble

Supreme Court held that "*If a person obtains lease-hold rights in his own name and subsequently assigns them to a firm or to a private limited company consisting of family members it cannot be said that no change has taken place in the status of the tenant or that it is not a case of subletting or assignment of lease-hold rights.*"

iii. With regards the learned counsel for the Petitioners' contention that the cheques of rent, which the Respondent No.2 had accepted were signed by Mr. Samiur Rehman Managing Director Limton Watch Co. (Pvt.) Ltd therefore, the doctrine of estoppels shall be applicable, reference was made to the case of Manek J. Mobed (supra) wherein at page 368 the Hon'ble Supreme Court held that *"Neither defendant No.1 nor defendant No.2 served a notice on Mr. Boman Abadan Irani that the latter had entered into possession as sub-tenant or assignee of lease hold rights. Formerly, cheques for rent were issued by Mr. Jehangir J. Mobed under his signatures. Cheques for rent were now sent by him in his name with the description 'Managing Director, Paradise Theatre Limited'. This addition by itself did not constitute notice of subletting to the landlord. It was idle on these facts to contend that by mere receipt of cheques signed by Jehangir J. Mobed as Managing Director, Mr. Boman Abadan Irani had waived the fulfillment of the condition that the tenant will not sublet the Paradise Theatre without the permission and consent in writing of the landlord. Nor was there any change of position on the part of the defendant No.1 or defendant No.2 by the receipt of*

cheques by Mr. Boman Abadan Irani drawn by Mr. Jehangir J. Mobed as Managing Director of Defendant No.2, the doctrine of estoppels had therefore no application in the facts of the case."

iv. Reference was further made to the case of State Life Insurance vs. Zahoor Ahmad (2001 YLR 58 Karachi), wherein at page 65 it was held that "*In view of this established factual position now the only point for consideration before me is that whether in such circumstances, possession of Respondent No.1 over the case premises in the capacity of Managing Director of Respondent No.2, could be considered as subletting in favour of Respondent No.2 or not. This legal aspect of the matter has been discussed and examined in several reported cases some of which have already been referred above. The dictum laid down in the case of Manek J. Mobed (PLD 1974 SC 351) and Roshal Ali Bhimjee (supra), on all fours is applicable to the instant case. Thus, the Appellant has succeeded to prove that the Respondent No.1 sublet both the premises to the Respondent No.2."*

v. With regards Petitioner counsel's contention that in its letter dated 15.04.1990 (Page 195) the Respondent No.2 asked the petitioners to vacate the premises on the ground of default and personal bona fide use, but in the ejectment application they have taken the ground of sub-letting too, thus as such, the ejectment application is not maintainable, it was submitted that SRPO does not make it obligatory upon the landlord when serving the notice upon the tenant to place all the grounds in the ejectment

letter and that no fresh ground could be taken in the ejectment application.

19. As it could be seen from the foregoing if the legal question as to the formation of private limited company in a rented premises would amount to sub-letting by its predecessor partnership company is answered, the issue of default would be automatically answered. So, in case if it is concluded that the conversion was not sub-letting thus the rent paid in the capacity of Managing Director of the private limited company would amount to rent paid by the partnership company, resultantly - no default. Therefore in the later part of this judgment, only this issue would be considered.

20. To start a journey towards answering this question, I find it important to consider what does the term sublet mean. The scope of the word sublet has been the subject of judicial determination in connection with covenants prohibiting subletting and imposing the penalty of forfeiture, if the covenants are contravened. The earliest being Pebbles vs. Glosthwaite (13 T L R 198) decided on 6th., February 1897 details of which case are encapsulated in the case of Boman Abadan Irani & others vs. Jehanghir J Mobed & others reported as 1967 PLD 449 Karachi. This 1897 judgment was given in an appeal from a decision of Mr.Justice Romer who had decreed the suit of the tenant Peebles. The question whether the premises had been sublet or assigned arose in this case in a peculiar way. The facts as they appear in the very brief report are that after Peebles' death his executors sold the premises and business to a limited company called A. M. Peebles & Sons Ltd. The stock was delivered to the company, which put its name up on the demised premises, which was registered as the office of the company. The property was not assigned to the company though. On the construction of the agreement Mr. Justice Romer held that the sale so far as regarded

this portion of the property sold, was not completed and he further held that the executors had never parted with the possession of the demised premises. In appeal, Lindley, L. J, noted that when the executors had agreed to sell their business, including the demised premises to a limited company they were advised that they should be careful else they would forfeit the property. Their solicitors informed them that they should not part with possession. The learned Judge upon the facts found that though the executors had let the company into possession they did not part with possession themselves and *so long as it was true in fact that the lessees had not parted with possession, they had committed no breach of the covenant.*

21. The second case refereed in the said Boman Abadan Irani (supra) case is that of Chaplin vs. Smith, again from the Court of Appeal. This case was cited before the learned Single Judge but he distinguished it upon the ground that the lessee was also doing his own business upon the premises and that it had not been shown in the present case that the defendant No. 1 had been doing any business of his own in the premises in suit. In this case also there was a restriction in the lease against subletting and assignment and the lessee had formed a company in which he had a substantial share. He had proposed to under let the premises and had sought the landlord's permission which the latter had declined. No further steps were then taken to assign the premises to the company and the lessee kept the control of it with himself and also kept the key of the premises in his possession. The same thing happened when a second company was formed which took over the business of the former company. In this transaction the lessee had expressly stipulated that he should remain in possession as actual tenant of the demised premises. It was also found that the lessee did business

of his own as well as of the company on these premises. Bankes L. J. after examination of a number of cases including that of Peebles v. Grosthwaite observed as follows:-

> "The lessee of a double fronted shop with a door in the middle and a counter on either side, who has covenanted not to part with possession of the demised premises or any part thereof, may sanely agree to allow a licensee to carry on a business in one part while the lessee himself remains in possession of the whole premises and carries on his own business in the other part. In that case there is no parting with possession, and I see no distinction between that case and this."

22. The third case refereed in the Boman Abadan Irani (supra) case is that of Gian Singh & Co. v. Devraj Nahar and others ((1965) AllER 768) decided by the Privy Council upon an appeal from Malaysia. In this case the tenant had taken two partners into his business and under the partnership deed the partners were to be entitled to the capital and property for the time being of the partnership and the goodwill of the business in equal shares. The capital of the partnership was to consist of the net value of the stock-in-trade, book debts and other assets of the business. The deed contained no specific reference to the tenancy, nor any other indication as to what rights or duties any party should have with regard to it. The landlords claimed possession of the premises on the ground that, by assigning to the partnership, the tenant had broken his covenant not to assign or sublet the premises without the landlords' written consent which they had admittedly refused to give. Upon these facts it was held that though the premises were an asset to the business this fact had no bearing upon the question whether that asset was transferred to the partnership. The partnership deed could not to be

construed as constituting an assignment of the premises by the tenant and so there was no breach of covenant.

23. While "parting with possession" became the key test to be applied when cases of subletting were considered in the common-law jurisdiction where courts time and again held that if an individual takes a premises on rent and then converts his partnership concern into a private limited company in which he has the controlling interest, it would not amount to parting with possession as long as he continues to be in possession of the premises and the covenants prohibiting subletting are not breached. This, in fact follows natural dictum that businesses need to grow and that no cavil could be placed on a person in the manner he chooses to structure his business (proprietor, partner or a private limited company), that could be done for tax or any other commercial purposes, as long he does not part with the possession of the tenanted property, no subletting could be alleged. However, the court in the above referred Boman Abadan Itani (supra) case gave opposite findings and held that *the company is at law a different person altogether from the subscribers to the Memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them.*

24. The reason of reaching to such a divergent outcome though however is not surprising. For this, I would like to dig deep into the facts of the said Boman Abadan Irani (supra) case in the following:

    a) The premises, a well-known Cinema building in Karachi originally belonged to one Naraindas Mirchandani who granted a lease of it for a period of 10 years commencing from 01.09.1943 in favour of the defendant No.1. The said

Naraindas Mirchandani sold the said land and building to the plaintiff Boman Abadan Irani and one Jamshed Minocher by a registered sale deed which was confirmed by the Custodian of Evacuee Property on 13.01.1950. The other joint vendee Jamshed Minocher relinquished his rights into the said Paradise Cinema building and land on 15.02.1950 and he thereafter ceased to have any right or interest in the said property. The first defendant Jehangir became a tenant of the plaintiff Irani.

b) The defendant Jehangir continued to hold the premises on the terms of the said lease of which Clause 9 contained the covenant "*That the lessee shall not sublet the cinema building or any part thereof to any one without the written permission and consent of the lessor within the period of the lease which shall not be unreasonably withheld.*"

c) On 09.09.1952 a private limited company was formed, of which the subscribers were the defendant No. 1 Jehangir, his son Manek, J. Mobed, the latter's wife Mrs. Khoorshed Manek Mobed and Jehangir's daughter Mrs. Parin R. Bamboat. The name of this company was Paradise Theatre Ltd. which was made as the defendant No. 2 in that suit. The first object of this company was to acquire and take over as a going concern cinema business which was then carried on in the federal capital area of Karachi by Jehangir and his son Manek. There were four such cinemas which were being run. These were Paradise Theatre, Picture House Theatre, Capitol Theatre and Mauripur Theatre.

d) Clause 12 of the Articles provided that the company shall forthwith enter into arrangement with the proprietors of the aforesaid cinemas to acquire and take over the above going

concerns including existing contracts and agreements with all or any of their assets, liabilities, right, title, interest, etc. On the expiration of the lease which took place on 31.08.1953 the plaintiff Irani, after an unsuccessful approach to the Rent Controller under section 10 of the Karachi Rent Restriction Act, filed a suit on 15.12.1953. The right to claim possession was urged on various grounds in the plaint, but it is only the ground of sub-letting which was pressed in the appeal and was also mainly pressed before the learned single Judge on the Original Side. This ground was contained in para. 7 of the plaint which read "*that the plaintiff contends that the defendant No. 1 has on his own statements sublet the premises in suit to defendant No. 2 without the consent in writing of the plaintiffs as required by the terms of the lease . . . . .*"

25. As it could be seen from the above case, a distinct entity in the form of a private limited company was created with the objective of acquiring and taking over (as a going concern) businesses of four different cinema properties, however, the tenancy agreement with the landlord was only in respect of one cinema. Thus the newly formed company took control of three more properties and singularly started operating four cinema premises owned by different landlords through the newly created private limited company. It was therefore of no surprise that court came to the conclusion that the new (private limited) company was different from the individual tenant with whom the landlord who had a lease agreement. Which is not the case at hand. Here the proprietor grew to a partnership and then to a private limited company, but solely doing the business from the premises leased out to him by the landlord, he did not form a company to take over isolated

businesses run by different individuals spread over different parts of the city or country with the objective to bring them under the control of the newly created private limited company.

26. It is important to mention that the above referred finding was appealed in the Apex Court which judgment is reported as Manek J. Mobed vs. Shah Behram (PLD 1974 SC 351) (already discussed above) wherein a three member bench conceded with the views appealed from, and additionally on the grounds that "the relevant condition of tenancy was that no subletting will be permitted without the permission and consent of the landlord in writing" dismissed the appeals.

27. Similar findings are given in the case reported as 1986 CLC 953 (Roshan Ali vs. The Standard Insurance Co., Ltd) where the Court while contemplating on the issue of subletting of premises by tenant held that office of limited company has separate legal entity and without the permission of landlord, setting up of such office in premises would amount to subletting, entitling landlord to eviction of tenant in circumstances. Once again before accepting this outcome, attention be drawn to the facts wherein the tenant (to whom the property was given in a personal capacity) was using the office for personal consultation purposes, it was subsequent that he created a limited company and placed a sign board of the same at the said premise, which definitely would render him having sublet the said premises to the incorporated company. In the instant case, the predecessor of the petitioner No.1 were always running the shop under name of Limton Watch Co. at the rented premises. No departures from the commercial activity was made, no new signage was placed and they never parted with possession of the said shop.

28. At this juncture study of Foa on Landlord and Tenant, 6th Edition is of great assistance, where the law on the subject of subletting and

parting with is dealt with at some length. At page 323, the author summarizes the issue in the following words:

> "The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not so long as he retains the legal possession himself, a breach of the covenant."

29. The expression "parting with possession" also find analysis in the Indian Supreme Court Judgment reported as 1989 MLD 2071 where the said expression is meant as "*giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is too parting with possession…..*"

30. Attention also be drawn to the case of Raja Huhammad Saleem vs. Rukia Rauf reported as 2002 MLD 597 which provides that *to constitute the breach of subletting, there must be a substantial parting with substantial part of premises. Tenant must wholly oust himself and part with legal possession of any part of the premises. Where the same is absent, it does not amount to subletting.*

31. Santosh Ajit Sachdeva vs. Anoopi Shahani (AIR 2007 SC 3231) is also of relevance where court held that "*if a proprietorship is converted into private company, unless it is shown that the tenant is actually controlling and managing business of the company, it will amount to sub-letting irrespective of the fact that the tenant is majority shareholder…*"

32. Also of relevance is the case of Vishwa Nath vs Chaman Lal Khanna (AIR 1975 Delhi 117) where the facts are that one individual was the tenant who took the premises on rent in November 1962 in his own name. In 1964 he formed a company in which he had a controlling interest and of which he was the chief executive and the managing director. He continued to be in possession of the premises and his sons and wife were the other shareholders with him. Court refused to evict him on the subletting ground and held that since he never parted with possession of the tenanted property, no subletting took place.

33. Last but not least is the case of subletting of residential property through www.airbnb.com (which is an online network enabling people to list for rent short-term lodging in residential properties, with the cost of such accommodation set by the property holder). It has over 2,000,000 listings in 34,000 cities and 191 countries which are offered for subletting. www.theguardian.com article by Donna Ferguson dated 2 April 2016 is a good read which states that in the circumstances where a number of the properties are offered for subletting by the tenants residing therein already "*any court would be very reluctant to forfeit a lease on such grounds*."

34. Importantly, since the word sublet is not defined anywhere in the law, courts have usually correlated it with the meaning of the word sub-lease. Section 105 of the Transfer of Property Act, 1882 is of relevance which defines a lease of immovable property as to *transfer of right to enjoy such property*. Therefore to create a lease or sub-lease, a right to exclusive possession and enjoyment of the property should have to be conferred on another person. Thus if there is no parting with possession, neither sub-lease nor subletting can be achieved.

35. Pursuant to the unavailability of any legal definition of the term subletting, to broaden the horizon, it would be useful to examine how this term is used in various jurisdictions:

a) New Zealand

> Subletting means a situation where a tenant moves out of the house they're renting and on-rents the house to someone else.

b) San Francisco - USA

> A subtenant is defined as a person who has no relationship with the landlord, but instead pays rent to another tenant.

c) Australia

> Sub-letting is when a tenant transfers part (but not all) of their interest under a tenancy agreement to another person but the original tenancy agreement with the landlord continues.

36. As it could be seen from the foregoing survey, to have a valid claim that the tenant has sublet the property, an arrangement has to be present between the head-tenant and the sub-tenant and it has to be shown that the head-tenant is receiving financial gains from this act.

37. The legal position that emerges from the aforesaid discussion is that in order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (i) parting with possession of tenancy by tenant in favour of a third party with exclusive right of possession; and (ii) that such parting

with possession has been done in lieu of compensation or rent. Contrarily, if the tenant is actively associated with the partnership business and retains control over the tenancy premises with him (may be along with partners) the tenant could not be said to have parted with possession.

38. When the above referred test is applied on the facts of the instant case, the answers come out to be as under:

Test	Result
Has the petitioner parted with possession of tenancy in favour of a third party with exclusive right of possession of the same given to any third party?	No
Is that parting with possession has been done in lieu of compensation or rent?	No

39. For the aforesaid reasons in the instant case where the tenant actively has associated with the business and retained the control over the tenanted premises (may be along with other partners or shareholders) the tenant cannot be said to have parted with possession or have had sublet the premises, accordingly the findings given in the impugned judgment are neither based on true appreciation of fact nor had applied correct legal standards thereto.

40. Once settled that by incorporating the business as a private limited company the tenant has not sublet the premises, the other point as to default (as prescribed in paragraph 19) also settles favorably to the benefit of the tenant.

For the aforesaid reasons, the judgment impugned is hereby dismissed and the petition is allowed.

Karachi: 03.01. 2017 Judge

Announced by me: _____

Judge