*Privy Council Appeal No. 29 of 1963*

**Gian Singh & Co.** – – – – – – – – – *Appellants*

*v.*

**Devraj Nahar alias Devaraj Nahah and others** – – – *Respondents*

FROM

## THE SUPREME COURT OF THE FEDERATION OF MALAYA

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY 1965.

*Present at the Hearing:*
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD UPJOHN.
[*Delivered by* LORD PEARCE]

The appellants (referred to as " the landlords ") are the chief tenants of certain shop premises in Kuala Lumpur. In 1934 they sub-let those premises on an oral monthly tenancy to the first respondent's father who there carried on the business of a dealer in sports goods under the style of Nahar & Co. At the end of 1955 the father retired owing to ill-health. The business was then taken over by the first respondent (referred to as " the tenant ") and thereafter by novation he occupied the premises on the same terms as his father had done.

In March 1958 the tenant took two partners into his business. The landlords then brought this action 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. They joined as co-defendants the second and third respondents, who are the tenant's two partners.

The tenancy is protected by the Control of Rent Ordinance No. 2 of 1956, but no question arises on the terms of that Ordinance. It is common ground that a good notice was given by the landlords terminating the common law tenancy; that the tenant then became a statutory tenant; and that under the Ordinance no order for possession could be made against him unless he was in breach of covenant. If however he was in breach, the landlords are entitled to an order.

At the trial the tenant contended that there was no covenant not to assign or sublet and that, if there was, he had not committed any breach of it. The trial judge after hearing the oral evidence and considering the deed of partnership concluded that there was a covenant against assigning or subletting and that the tenant had broken it by entering into the partnership deed. He relied on clause 2 of the partnership deed as constituting an assignment. Accordingly he made an order for possession against the tenant and the two other respondents.

They then appealed successfully to the Court of Appeal on the ground that there had been no breach of the covenant either under clause 2 or under any clause of the partnership deed. There was also among the grounds of appeal some complaint of the Judge's finding that there was a covenant against assignment or subletting, but that does not appear to have figured largely or at all in the argument. The Court of Appeal did not deal with it, but they took the view that there had been no assignment or subletting, and discharged the order for possession. The landlords now appeal.

Mr. Gratiaen for the landlords has not felt able to rely on clause 2 of the Partnership Agreement which was the foundation of the learned trial Judge's decision, but he contends that the plain implication of clauses 5 and 6 supported by the behaviour of the respondents and some admissions of the tenant in cross-examination is that there has been an assignment by the tenant to the partnership.

The partnership deed witnesses that the three respondents " hereby mutually agree to become partners in the business of Nahar & Co. now carried on by " the tenant " alone at No. 11 Mountbatten Road, Kuala Lumpur for the period and on the terms hereinafter expressed."

The relevant terms are as follows:—

> " 5. Subject to the provisions of these presents the partners shall be entitled to the capital and property for the time being of the partnership and to the goodwill of the business in equal shares.
>
> 6. The capital of the partnership shall consist of the net value of the stock-in-trade book debts and other assets of the business of " Nahar & Co." heretofore carried on by Devraj at No. 11 Mountbatten Road, Kuala Lumpur less the outstanding liabilities of that business and for purposes of computation the said assets shall be taken to be of the net value of $30,000/- which shall be credited to the three partners equally as their share of capital."

The deed contains no specific reference to the tenancy, nor any other indication as to what rights or duties any party shall have with regard to it.

For the landlords it is argued that the tenancy was one of the " other assets of the business of Nahar & Co." under clause 6, that the partners were under clause 5 " entitled to the capital and property for the time being of the partnership . . . in equal shares" and that the joint effect of the two clauses was to divest the tenant of his tenancy and to vest it in the partners, thus constituting an assignment. In addition the tenant said in cross-examination " I know the premises were a valuable asset to (sic) my business. When I took the partners I did not retain a portion of the premises for myself and all the partners enjoyed the use of the entire premises." Moreover the advocate who conducted the case devoted much argument to the point that an assignment of two-thirds of the tenant's interest was not a breach of a covenant to assign—apparently on the assumption that there had been some such assignment. Furthermore the solicitor for all three respondents tried hard to resist rent receipts offered by the landlords in the name of the tenant personally " as proprietor of Nahar & Co." and to force him to give receipts in the name of " Nahar & Co.", that being the form in which they had been issued while the tenant was the sole proprietor.

In their Lordships' view, however, these supplemental considerations add nothing to the deed. The tenant could not but admit that these excellent premises were an asset to the business, but that does not bear on the question whether the tenancy was an asset of the business which was transferred to the partnership. And the fact that the partners enjoyed the use of the entire premises was an obvious consequence of the deed but it does not decide the point in issue. The respondents' advocate never made any admission that there was an assignment and the judge's notes of the submissions are brief. The efforts of the respondents to secure receipts in the name of Nahar & Co. after the partnership had been formed might well support an inference against there having been any assignment. The tenant certainly, and the other respondents probably, knew that the landlords had for some time past been maintaining a clear refusal of permission to any assignment. And it could well be that they considered it too dangerous to commit themselves to anything that could constitute an assignment and might jeopardise the tenancy, and preferred rather to wait and see whether it was possible for the partnership by some manoeuvre to insinuate itself or infiltrate into the tenancy. The requests for receipts made out to Nahar & Co. could be such a manoeuvre, and, if granted, might have succeeded in that object. Be that as it may, their Lordships are of opinion that it is to the deed that the landlords must look if they are to establish an assignment.

Hill J. A. in the Court of Appeal aptly quoted from Lindley on Partnership 12th Ed. p. 365 under the heading " Property used for partnership purposes not necessarily partnership property " the following words " Again it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm or without any lease at all." He also relied on *Peebles v. Crosthwaite* (13 T.L.R. 198) and *Chaplin v. Smith* ([1926] 1 K.B. 198) as establishing that a lessee who retains possession does not commit a breach of the covenant against parting with possession by allowing other people to use the premises.

When one person is proprietor of a business the question which assets are included as assets of the business may not always be clear. There is no certainty that the tenant regarded his personal tenancy, albeit used by him as premises for carrying on the business, as an asset of the business, which passed with the business. And if, under the deed, the tenancy was being assigned to the partnership, one would certainly expect to find clearer provision with regard to it. The tenancy might have been dealt with by the tenant giving to his partners a licence to trade with him there or by his constituting himself a trustee for the partnership, or merely by giving the partners no express rights at all. From a practical point of view the incoming partners were, even if no arrangement at all was made about the premises, adequately protected by clause 4 which provided that the business should be carried on at the premises " or at such other place or places as the partners may from time to time agree upon ". In the face of that it is difficult to see how the incoming partners could be ousted from the premises by the tenant. And they may well have been content to leave the tenancy vested in the tenant rather than play with fire by seeking an assignment.

But whatever be the motives that lay behind the deed, their Lordships cannot construe it as constituting an assignment. They are therefore in agreement with the Court of Appeal that there was no assignment and that the tenant should not have been ordered to vacate the premises.

Their Lordships will therefore report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellants should pay the costs of the appeal.

(91334) Wt. 8069/113 75 2/65 Hw.

# In the Privy Council

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GIAN SINGH & Co.

*v.*

DEVRAJ NAHAR alias DEVARAJ NAHAH
AND OTHERS

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DELIVERED BY

LORD PEARCE

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1965