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HIGH COURT OF DELHI : NEW DELHI

Date of Order : August 13, 2008

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RFA No.315/2008 & 316/2008

% National Insurance Company Limited ... Petitioner
Through: Mr.Yogesh Malhotra, advocate

versus

Shri K.L. Juneja & Ors. ... Respondents
Through: Mr. Bharat Bhushan Bhatia and
Ms. Sanjana Vikal, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.(ORAL)

Caveat Petition No.53/2008 in RFA No.315/2008

Since Caveators appear through counsel on advance copy being served, the caveat stands disposed of.

RFA's 315 & 316/2008

1. ADMIT.
2. Learned Counsel for the respondents who has lodged a caveat on behalf of respondents accepts notice of admission of the appeals.

3. Since the appellant has filed true copy of the records of Suit No.143/2005 and Suit No.298/2005, it is agreed between learned counsel for the parties that the trial court record need not be summoned and printing of paper book be dispensed with and matter heard today itself.

4. Heard learned counsel for the parties.

5. RFA No.315/2008 lays a challenge to the decree passed by the learned trial Judge in Suit No.143/2005. The suit was filed by the appellant. Prayer made in the suit was to pass a decree against the respondents in sum of Rs.3,04,224/- with further prayer that interest be also granted to the appellant @ 12% per annum from date of suit till date of realization.

6. By way of RFA No.316/2008 the appellant challenges the decree passed in Suit No.298/2005 which was filed against the appellant by the respondents.

7. Both suits i.e. Suit No.143/2005 and 298/2005 have been disposed of by a common judgment and decree dated 30th April, 2008 by the learned trial Judge.

8. As noted above, appellant herein who was the plaintiff of Suit No.143/2005 has suffered a dismissal of the suit. Respondents who were the plaintiffs of Suit No.298/2005 have obtained a decree in sum of Rs.6,78,632/- against the appellant

together with interest @6% per annum from the date of suit till realization.

9. Briefly noted, the relevant facts are that a jural relationship was created between the appellant and the respondents when a lease deed dated 18th January, 1999 (Ex.PW1/2) was executed creating a tenancy in favour of the appellant under the respondents in respect of the subject property with effect from 23rd February, 1998.

10. The tenancy was for a period of nine years. Obviously, the tenancy would have expired on 22nd February 2007.

11. By January 2005 the agreed monthly rent payable was Rs.1,40,408/-.

12. The appellant desired to terminate the tenancy and accordingly wrote a letter informing the respondents that it intends to vacate the tenanted premises. Respondents were informed that by way of security deposit they were holding a sum of Rs.5,85,040/-. It was informed that possession would be surrendered by the end of February, 2005. Appellant informed the respondents that they may appropriate part of the security deposit towards future rent.

13. Respondents reconciled to the premature determination of the tenancy evidenced vide Ex.PW1/5. The same is a memo recorded at the tenanted premises on 28th February 2005 when first respondent, Shri K.L. Juneja, who is husband of second respondent and is the father of the third respondent went to the site intending to receive possession. But he did not do so. The reason was certain breakages noticed in the tenanted premises.

14. After recording in Ex.PW1/5 the breakages in the tenanted premises, an agreed note was appended at the bottom of the memo recording as under:-

“Possession shall be handed over/taken over on completion/rectification and balance security shall be refunded after adjusting due rent for the month.”

15. In token of execution the memo, Ex.PW1/5, has been signed by Shri K.L. Juneja, respondent No.1, recording him to be the owner and Lalit Pandey, the representative of the appellant.

16. Vide Ex.PW1/6, being a letter dated 03.03.2005, written by the appellant to the respondents, with reference to the breakages listed in Ex.PW1/5, appellant informed the respondents that all breakages at site have been rectified. In relation to the tax deducted at source certificate which was to be issued it was informed that the same would be ready and handed over to the

respondents on 7.3.2005. Said date was notified to the respondents requiring their presence at site so that they could receive possession of the tenanted premises, with further request that after adjusting the rent payable for the month of January and February 2005 as also for the seven days of the month of the March 2005 balance security deposit may be refunded to the appellant.

17. In spite of receipt of Ex.PW1/6, none reached the site from side of the respondents requiring the appellant to hand deliver a letter on 8.3.2005, Ex.PW1/7. The letter was delivered to the respondents informing that the respondents did not visit the site to receive the possession on 7.3.2005. Respondents were advised to reach the premises on 11.3.2005 at 14.00 hours so that possession could be handed over.

18. The respondents did not reach the tenanted premises on 11.3.2005.

19. On 18.4.2005, since the said position continued till then, appellant caused to be served on the respondents a legal notice, Ex.PW1/8. Referring to the lease deed dated 18.1.1999, Ex.Pw1/2, and the subsequent events relatable to the memo dated 28.2.2005 (Ex.PW1/5) and subsequent correspondence, appellant informed the respondents that the appellant would not

be liable for any dues post 28.2.2005. A demand in sum of Rs.3,04,224/- was made informing the respondents that they were holding security in sum of Rs.5,85,040/- and were entitled to adjust the rent payable for the months of January and February 2005 @ Rs.1,40,408/- per month, totaling Rs.2,80,816/-. (It be noted that Rs.3,04,224/- is the remainder after subtracting Rs.2,80,816/- from Rs.5,85,040/-).

20. The legal notice, Ex.PW1/8, was responded to by the respondents vide their lawyer's reply dated 29.4.2005, Ex.PW1/9.

21. The respondents took the plea that the tenancy was for an agreed period of nine years and hence could not be terminated prior to 22.2.2007.

22. On the situation aforesaid, the appellant had no option but to file a suit for recovery of the balance security deposit held by the respondents after adjusting the rent for 2 months liable to be adjusted from the security deposit.

23. The suit was filed somewhere in the month of July, 2005. After narrating the afore noted facts, decree in the sum of Rs.3,04,224/- was prayed for. Interest @ 12% per annum from the date of suit till date of realization was also prayed for.

24. Needless to state the amount claimed in the suit was Rs.5,85,040/- – Rs.2,80,224/- = Rs.3,04,224/-.

25. Appellant's suit was met with a counter suit filed by the respondents.

26. The respondents claimed a decree in the sum of Rs.12,63,672/- together with interest @ 12% per annum from the date of the suit till date of realization.

27. Needless to state the claim in the suit was the rent payable with effect from 1.1.2005 till 30.9.2005 @Rs.1,40,408/- per month.

28. It be noted that the respondents' suit was filed on 12.9.2005.

29. After recording evidence, by a common judgment and decree dated 30.4.2008, learned trial Judge dismissed the suit of the appellant and decreed the suit filed by the respondents but restricted the decree to Rs.6,78,632/-, for the reason the learned trial Judge gave adjustment of Rs.5,85,040/- (the security amount already held by the respondents) from out of the sum of Rs.12,63,672/- being the rent held payable by the appellant to respondents for the months of January 2005 till the end of September 2005 i.e. nine months.

30. The decision of the learned trial Judge is based on a single reasoning.

31. With reference to the lease agreement, Ex.PW1/2, learned trial Judge has held that the lease was for a fixed period of 9 years and that commencing from 23.2.1998 it was expiring on 22.2.2007. Finding that there was no covenant in the lease empowering the tenant to determine the lease except on account of the property being destroyed, noting that the property was not destroyed, learned trial Judge held that the appellant was liable to pay rent to the landlord till the lease period expired on 22.2.2007.

32. Learned counsel for the appellant urges that the learned trial Judge fell in error in completely ignoring Ex.PW1/5, the memorandum dated 28.2.2005. Counsel urges that the learned trial Judge failed to appreciate that the law of contract does not prohibit or prevent parties from novating the contract by agreed consent. Learned counsel urges that the memorandum dated 28.2.2005 evidences agreement between the parties that the tenancy would stand determined when the appellant rectifies the defect noted in the memorandum Ex.PW1/5.

33. With reference to the letters, Ex.PW1/6, (dated 3.3.2005) and Ex.PW1/7 (8.3.2005), learned Counsel urges that

the same reflect that the conditions of the memo Ex.PW1/5 were fully complied with in as much as the rectification work was completed and possession offered.

34. Confronted with the aforesaid submissions, except to urge that the case was never projected as aforesaid before the learned trial Judge, learned counsel for the respondents has no submission to make.

35. We note from the pleadings of the appellant in the suit filed by the appellant that the appellant has made a reference in para 6 of the plaint to the memorandum drawn between the parties on 28.2.2005. The appellant has also referred to the subsequent letters issued by the appellant and served upon the respondents pointing out that the defects required to be rectified as per the memorandum dated 28.2.2005 were rectified and in spite thereof the respondents did not take possession of the tenanted premises. Thus, the argument urged as herein today, namely that the appellant did not project its case as it is sought to be urged before us is not correct.

36. We need hardly write much more. We have noted herein above the relevant contents of the memorandum dated 28.2.2005, Ex.PW1/5.

37. The memorandum clearly records the consent of the landlord to receive possession of the tenanted premises when the defects noted in the memorandum stand rectified. We note that the defects were rectified by 3rd March 2005 and due intimation thereof was given to the respondents. We also note that it is not the case of the respondents that defects were not rectified. It was also not the case of the respondents that appellant had not vacated the premises and vacant physical possession thereof was not offered.

38. The novation of the original lease is writ large on the face of the memorandum recorded on 28.2.2005. The intention of the parties is clearly reflected. The intention is the agreement between the parties: for the landlord to take over possession and for the tenant to hand over possession when defects stood rectified. It would not be out of place to record that the memorandum further records *that on rectification of the defects possession shall be handed over/taken over and balance security amount shall be refunded after adjusting the rent due.*

39. Parties could not have reflected their intention with more clarity.

40. It is unfortunate that the learned trial Judge has ignored the material documents and relevant evidence which has

been noted by us hereinabove. Learned trial Judge has totally eschewed the principle of novation of a contract. Learned trial Judge has not kept in mind that nothing prevents the parties to a contract to, by consent, novate the contract.

41. For the reasons noted hereinabove, the two appeals stand disposed of as under :-

(a). RFA No.315/2008 is allowed. Impugned judgment and decree dated 30.4.2008 dismissing Suit No.143/2005 is set aside. The suit filed by the appellant is decreed in sum of Rs.2,54,402/-. The said sum has been calculated after giving credit of rent to the respondents for the months of January, 2005, February, 2005 and upto 11th of March, 2005 for the reason by said date the appellant had informed the respondents that the defects being rectified, respondent should take over possession of the tenanted premises. We grant interest to the appellant on the said sum @ 6% per annum from the date of the suit till date of realization.

(b). RFA No.316/2005 is allowed. Impugned judgment and decree dated 30.4.2008 decreeing Suit No.298/2005 in sum of Rs.6,78,632/- with pendente lite and future interest is set aside. Suit No.298/2005 is dismissed.

42. We propose not to pass any order pertaining to costs except directing that proportionate court fee paid by the appellant in Suit No.143/2005 would be paid by the respondent to the appellant as also the proportionate court fee paid in RFA No.315/2008. Full court fee paid by the appellant in RFA No.316/2008 shall also be paid by the respondents to the appellant.

PRADEEP NANDRAJOG, J.

SUNIL GAUR, J.

August 12, 2008
DKG