

REPORTED

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% DATE OF RESERVE: February 02, 2010

DATE OF DECISION: February 05, 2010

+ RFA No.58/2010 and CM No.2025/2010

DEEPAK BHARDWAJ AND ANR Appellants
Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Pankaj Vivek, Mr. Sindhu Sinha and
Mr. Nikhil Bhalla, Advocates.

versus

SMT. USHA RAI Respondent
Through: Mr. Daljit Singh, Sr. Advocate with
Mr. M.S.Vinaik, Advocate.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and decree of the learned Additional District Judge dated 04.01.2010 whereby and whereunder a decree of ejectment regarding the property bearing Flat No.28A, New Central Market (also known as Shankar Market), Connaught Circus, New Delhi was passed

against the appellants with the direction to hand over the possession of the said property to the respondent.

2. With the consent of the parties, the appeal was taken up for final hearing after admission on 02.02.2010.

3. The sole contention of the appellants in the instant case was that the Civil Court did not have jurisdiction to pass a decree for possession in view of the provisions of Section 50 of the Delhi Rent Control Act read with Section 3(c) of the said Act.

4. The essential facts are not in dispute. Thus, the fact of ownership of the respondent and her letting out the property to the appellants No.1 and 2 at the rate of Rs.300/- per month for a period of 9 years and 11 months by a lease deed dated 19.12.1985 has not been denied by the appellants. It is also admitted by the appellants that in view of the lease deed executed between the parties on 19.12.1985, the appellants No.1 and 2 were permitted to sub-let the premises. It is also an admitted fact that the appellants No.1 and 2 had in fact sub-let the suit premises. Here the main dispute arises between the parties. The respondent has alleged in the suit filed by it that the property was sub-let by the appellants No.1 and 2 to the appellant No.3 at the rate of Rs.50,000/- per month. The appellants No.1 and 2 in the written statement filed by them have denied this fact, but have nowhere in their written statement disclosed at what

rate the property had been sub-let by them. Then again, according to the respondent, the lease had expired by efflux of time on 19.11.1995, being for a period of 9 years and 11 months effective from 19th December, 1985, and the month to month tenancy stood terminated by the registered legal notice issued by the respondent to the appellants No.1 and 2 on 20th September, 2005, by which notice the appellants were asked to vacate the suit premises and to hand over the vacant and peaceful possession of the same to the respondent by 31st October, 2005. The appellants, however, denied that the tenancy was a month to month tenancy and that it stood terminated by the respondent's notice dated 20th September, 2005. An issue was accordingly framed by the learned trial court on the question as to whether the suit fell under the jurisdiction of this Court or was under the purview of the Rent Controller. The said issue, being issue No.3, reads as under:-

“ISSUE NO.3:

***Whether the present suit is barred under
Section 50 of Delhi Rent Control Act? OPD”***

5. It is in respect of this issue that the parties have addressed arguments in the appeal. The learned senior counsel for the appellants, Mr. Sandeep Sethi contended that in view of the provisions of Section 101 of the Indian Evidence Act, the onus of proving this issue has been wrongly placed upon the appellants and it was for the respondent to prove that the appellants No.1 and 2

had sub-let the suit premises to the appellant No.3 at the rate of Rs.50,000/- per month. The appellants were not required to prove by leading any evidence that they had sub-let the suit premises at the rate of Rs.50,000/- per month. It was further contended by Mr. Sethi that though the respondent had examined herself as PW-1, she had failed to discharge the burden placed upon her of proving that the premises had been sub-let for a rent of Rs.50,000/- per month, and the suit of the respondent must, therefore, be held to be barred under the provisions of Section 50 of the Delhi Rent Control Act.

6. Mr. Daljit Singh, the learned senior counsel for the respondent, on the other hand, contended that the burden to prove the issue was rightly placed by the learned trial court on the appellants, but the appellants had failed to lead any evidence in support of this issue and as a matter of fact had not even challenged the testimony of the respondent (PW-1) except for a mere suggestion put to PW-1 that the property had not been sub-let at the rate of Rs.50,000/- per month to the defendant No.3, no further explanation whatsoever was called from PW-1. It was contended that the mere putting of a suggestion to a witness cannot impeach the testimony of the witness, which otherwise is uncontroverted. The learned senior counsel for the respondent also contended that even assuming the initial burden of proving the issue was upon the respondent, the respondent had discharged the said burden, but the

appellants No.1 and 2 had failed to prove the rate of the rent at which they themselves had sub-let the property, which was within their special knowledge and the onus of proving which was upon them. My attention was also drawn by the learned senior counsel for the respondent to the provisions of Section 106 of the Indian Evidence Act, which reads as follows:-

“Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

7. Having heard the learned senior counsel for the parties at length and gone through the precedents cited by them at the Bar, I am of the considered opinion that the respondent has discharged the initial burden placed upon the respondent of proving that the property had been sub-let at the rent of Rs.50,000/- per month. It was so asserted by the respondent in the suit filed by the respondent. The assertion of sub-letting was not denied by the appellants No.1 and 2 and, on the other hand, the appellants No.1 and 2 asserted that they had an absolute and unfettered right to sub-let the premises and that they in fact had done so, but not at the rate of Rs.50,000/- per month as asserted by the respondent. Cleverly, the appellants No.1 and 2 while denying the fact that the property had been sub-let at the rent of Rs.50,000/- per month, failed to disclose in their written statement the rate of rent per month being charged by them from their sub-tenant. At the same time, while asserting in the written

statement that the respondent had wrongly mentioned the rate of rent of the premises to be Rs.50,000/- per month in order to bring out the present suit from the purview of Delhi Rent Control Act, the appellants did not even care to state as to whether the rent was more than Rs.3,500/- per month or less than Rs.3,500/- per month. The vague and evasive denial by the appellants No.1 and 2 of the assertion made by the respondent that the premises had been sublet for the sum of Rs.50,000/- per month as rent led the learned District Judge to make the following apposite observations:-

“The entire conduct of the defendant No.1 & 2 reveals that first in the written statement they have smartly escaped from disclosing the fact that at what rate of rent they have sublet the property. Secondly, the defendants have not led any evidence and even avoided appearing themselves in witness box so that the exact amount they are getting from defendant no.3 in form of the rent does not come on record. The conduct of the defendant No.1 and 2 reveals that they have withheld the important information/evidence in this regard for which an adverse inference can be drawn against them.”

8. This Court is inclined to agree with the aforesaid observations made by the learned trial court as it is more than evident that the appellants No.1 and 2, who appeared to be availing of a stupendous amount of rent by sub-letting the premises of the respondent, have no desire to come forward to disclose the truth. Had there been even a grain of truth in the assertion of the appellants No.1 and 2 that the premises were not let by them to their sub-tenant for the

sum of Rs.50,000/- per month and had the rent been less than Rs.3,500/- per month, certainly, to my mind, the appellants as defendants would not have hesitated to state on oath in the written statement as to what was the rent which was being received by them nor they would have hesitated to step into the witness box to state on oath that the rent being received by them was less than the sum of Rs.3,500/- per month. Their self imposed silence on the issue of the rent being received by them from their sub-tenants must necessarily lead to the inference that they have much to hide by shrouding the entire issue of rent with their aforesaid silence. To put it differently, their silence speaks volumes. The total dearth of evidence from the side of the appellants as also their evasive denial of the averments made by the respondent in their written statement readily leads this Court to infer that a handsome amount of rent was being pocketed by the appellants, the particulars of which they have no desire to disclose even assuming the rent was less than the sum of Rs.50,000/- per month.

9. This being the position, there is enough law laid down by this Court to enable me to uphold the further contention of the respondent that where the premises are sub-let and fetch a rent of Rs.3,500/- per month or more, the tenant cannot be allowed to avail of the protection provided by the Delhi Rent Control Act. In the case of ***P.S Jain Company Ltd. vs. Atma Ram Properties***

(P) Ltd. & Ors. reported in **65 (1997) DLT 308 (DB)**, an identical question was posed as follows:-

“The point for consideration in the appeal is: Whether a tenant who is paying a rent of Rs.900/- p.m. (less than Rs.3,500/- as specified in Section 3(c) of the Delhi Rent Control Act, 1958) can be evicted by a simple notice under Section 106, Transfer of Property Act, through the Civil Court if he has lawfully sublet the premises to two tenants, one for Rs.40,000/- p.m. and another for Rs.4,500/- p.m. (in each case for more than Rs.3,500/- p.m.)?”

10. After relying upon four Supreme Court judgments dealing with interpretation of a statute in a purposeful manner rather than by adopting a mechanical approach, the Division Bench answered the aforesaid question as under:-

“12. In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs.3,500/- p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs.3,500/- p.m. In case a tenant paying less than Rs.3,500/- p.m. to his landlord has sublet the very same premises may be lawfully for a rent above Rs.3,500/- p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs.3,500/- p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub-tenant) more than Rs.3,500/- p.m. though he is paying less than Rs.3,500/- p.m. to his landlord. The above contrast is well-illustrated by the facts of the case before us. The appellant-tenant is paying only Rs.900/- p.m. to the plaintiff, while he has sublet the premises in two units, one for Rs.40,000/-

p.m. and another for Rs.4,500/- p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant.”

11. In ***Atma Ram Properties (P) Ltd. vs. Pal Properties (India) Pvt. Ltd. & Ors.*** reported in ***91 (2001) Delhi Law Times 438***, a learned Single Judge of this Court relying upon the law enunciated in the case of ***P.S. Jain Company Ltd. (supra)*** and affirming the decree for possession of the property in question, in paragraph 17 of his judgment reiterated the law as under:-

“17. Thus it is clear that the relevant rent is the one which is paid by sub-tenant to the tenant. In the instant case it is more than Rs.3,500/- PM and, therefore, no protection under the Delhi Rent Control Act would be available to the defendants and the present suit is not hit by Section 50 of the Rent Control Act.”

12. In view of the aforesaid law laid down by this Court and the fact that no decision to the contrary was cited before me, the inevitable conclusion is that the case falls outside the purview of the Delhi Rent Control Act, 1958 and within the jurisdiction of the Civil Court. In view of this fact and in view of the further fact that the respondent has discharged the onus placed upon her of proving that the notice terminating the tenancy (Exhibit PW-1/3) was duly received by the appellants as revealed from the A.D. cards (Exhibit PW-1/5 to Exhibit PW-1/7), it transpires that the tenancy was duly terminated with effect from 31.10.2005 and hence after the said date, the appellants are in

unauthorised possession of the suit premises as held by the learned trial court.

13. On being faced with this situation, a last ditch effort was made by the learned senior counsel for the appellants by contending that the tenancy was not a month to month tenancy and hence not liable to be terminated by a notice of termination in view of the fact that Clause 14 of the lease deed itself showed that the lease was liable to be “extended and renewed at the option and request of lessee after its expiry by the lessor or his legal heirs and successors, whosoever may be at that time”. The learned senior counsel for the respondent objected to the raising of the aforesaid contention by stating that this plea had been specifically given up before the learned trial court by the counsel for the appellants, as was evidenced by the fact that it was not dealt with by the trial court.

14. Even otherwise, the learned senior counsel for the respondent contended, that the lease being for a period of 9 years 11 months effective from 19th December, 1985 (Clause 14 of the lease deed) and being extendable and renewable “at the option and request of the lessees” and the lessees having failed to exercise the said option, it was no longer open to the appellants/lessees to now contend that the lease had been extended and/or renewed. Reference was made by the learned senior counsel for the respondent in this regard to a Division Bench judgment of the Allahabad High

Court rendered in ***Sewak Ram and Ors. vs. Municipal Board, Meerut, AIR***

1937 Allahabad 328 to contend that when the terms of an agreement are reduced to writing then the rights of the parties are governed by the terms agreed upon and in order to decide the rights of the parties, the Court has to look only to the terms agreed upon and not to any other extraneous circumstance.

15. The learned senior counsel for the appellants, on the other hand, relied upon the judgment of the Supreme Court in ***State of U.P. and Ors. vs. Lalji Tandon (Dead), (2004) 1 SCC 1***, to contend that the lease in the instant case being extendable, it was not necessary to have a fresh deed of lease executed.

Reference was made to paragraph 13 of the said judgment, which is as follows:

“13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on The Transfer of Property Act, Ninth Edition, 1999, p.1011). Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. (Baker v. Merckel (1960) 1 All ER 668, also Mulla, ibid, p.1204). Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an extension of lease in accordance with the covenant in that regard contained

in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed; as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.”

16. The aforesaid decision rendered by the Hon'ble Supreme Court, in my view, has no bearing on the instant case for the reason that even assuming the lease to be extendable and not renewable (which is strongly refuted by the respondent), it could only be extended “at the option and request of the said lessees after its expiry by the lessor or his legal heirs and successors whatsoever may be at that time”. In the instant case, there is no assertion in the written statement that such an option for the extension of the lease was ever exercised nor any document is relied upon in this regard. It was for the tenants to have stepped into the witness box to assert that an option was exercised after the expiry of the initial lease to have the same extended and the lessor agreed or refused to agree to extend the same. In the instant case, with the determination of the lease deed after the period of 9 years 11 months by efflux

of the time limited thereby and the failure of the lessee to exercise an option to have the same extended and/or renewed, the lease became a month to month lease liable to be terminated by a notice under Section 111 (h) of the TP Act.

17. No doubt on the expiry of the initial lease period, the appellants could have opted for an extension or a renewal of a lease deed. Having failed to exercise the said option at the appropriate time or even to have raised a murmur about the non-extension/non-renewal thereof, it is no longer open to the appellants to contend that they have a lease in perpetuity. The reasons for arriving at the aforesaid conclusion are three-fold:

- (a) Clause 14 of the lease deed specifically refers to the exercise of **option and request** by the lessee, which of course is to be compulsorily acceded to by the lessor. No such option was admittedly exercised by the lessee.
- (b) On the expiry of the lease, the lessee could have sued the lessor for the specific performance of the contract as regards the renewal of the lease. Admittedly, this was not done.
- (c) There was no provision in the aforesaid clause of the lease deed, i.e., Clause 14, for an **automatic** extension or renewal.

18. The conclusion is, therefore, inevitable that the appellants/lessees contended themselves by treating the lease as a month to month lease by

holding over. It is possibly for this reason that the appellants have not stepped into the witness box before the learned trial court to assert that they had exercised their option for the extension/renewal of the lease deed.

19. Before parting with the case, it may also be mentioned that at the conclusion of the arguments it was pointed out to this Court that the sub-tenant in the instant case was not “Schoolnet India Limited” who was impleaded as the appellant No.3 by the respondent but was M/s. IL&FS Academy. I am not inclined to dwell on this contention for the reason that this is a bald assertion made by the appellants which is altogether unsubstantiated by any evidence and even if found to be correct has no bearing on the issues involved in the instant case. Even otherwise, the trial court had framed an issue with regard to misjoinder of parties upon which the appellants chose to lead no evidence and it is, therefore, not open to them to turn around at this juncture and state that there has been a misjoinder of parties.

20. For all the aforesaid reasons, there is no merit in the appeal. RFA No.58/2010 and CM No.2025/2010 are accordingly dismissed.

REVA KHETRAPAL, J.

February 05, 2010
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