

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 30.11.2010
Judgment Pronounced on: 03.12.2010

+ **CS(OS) No. 241/2010**

AJAY AHUJA & ANR.

.....Plaintiff

- versus -

M/S SUBHIKSHA TRADING SERVICES LTD.

.....Defendant

Advocates who appeared in this case:

For the Plaintiff: Mr. Rajesh Yadav

For the Defendant: None.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J

1. This is a suit for recovery of possession, arrears of rent and mesne profit/damages for use and occupation. The plaintiffs are the owners of plot No. 71 comprised in Khasra No. 53 in Lal Dora of Village Nangli Puna, Delhi, which has a constructed area of 125 sq. feet and office area of 1000 sq. feet. The defendant was inducted as a tenant in respect of

the aforesaid property, vide an unregistered lease agreement dated 20th October, 2005 at the rent of Rs 89,000/- p.m. The month of tenancy commenced from the 15th day of the month and ended on the 14th day of the succeeding month. The rent was to increase by 15% after three years. A supplementary lease agreement was also executed between the parties on 1st October, 2007, whereby an additional rent of Rs 13,000/- was agreed w.e.f. 1.02.2008 till 14th November, 2008 which was the last day of the lease. This was to increase to Rs 14950/- p.m. after three years. The total rent, thereby became Rs 1,02,000/- per month. The defendant also agreed to pay a sum of Rs 3,56,000/- as interest free security deposit, which was to be refunded at the time of vacating the premises, subject to the all adjustments. The rent was payable on or before the 10th day of each month. The defendant, however, did not pay or tender the rent w.e.f. October, 2008. It has been alleged in the plaint that though the tenancy expired with afflux of time on 14th November, 2008, the plaintiff as a matter of abundant precaution terminated the tenancy of the defendant by giving 15 day notice dated 11th November, 2009 w.e.f the midnight of 14th December, 2009. The notice

sent by courier was received back with the remarks “shifted”, whereas the notice sent by registered post at the suit premises was received back with the remarks “on repeated visits, premises found locked”. The notice sent at the registered office of defendant company was also received back with the remarks “left without instructions”. The notice dated 11.11.2009, according to the plaintiff thus stood served upon the defendant. Since the defendant has neither vacated the suit premises, nor paid arrears of rent w.e.f. October, 2008, the plaintiffs have now claimed possession of the suit premises besides arrears of rent, amounting to Rs 16,42,200/- at the rate of Rs 117300/- per month. The plaintiffs have also claimed damages for use and occupation at the rate of 10,000/- per day from the date of the filing of the suit till the possession of the suit premises is handed over to them.

2. The defendant was proceeded ex parte vide order dated 26th October, 2010, as no one appeared for it, despite service by publication and affixation in terms of the order dated 13th July, 2010.

3. The plaintiffs have filed affidavit of plaintiff No. 1 Ajay Ahuja by way of ex parte evidence. In his affidavit Mr.

A. Ahuja has supported, on oath, the case set up in the plaint. He has identified his own signatures as well as the signatures of the plaintiff No. 2 on the lease deed Ex.PW-1/2. He has also identified the signature of Mr. Parag Chaturvedi, representative of defendant company at point 'C' on this document. He has also identified the signature of the plaintiffs as well as the signature of Mr G. Udayan David authorized Representative of the defendant on the supplementary lease agreement Ex. PW-1/3. The notice dated 11th November, 2009 sent by the plaintiffs to the defendant through their counsel Mr Rajesh Yadav is Ex. PW-1/14. Ex. PW-1/15 is the certificate of posting under which this notice was sent, whereas Ex.PW-1/16 and PW-1/17 are the postal receipts, whereby the notice was sent by registered post. Ex. PW-1/18 and PW-1/19 are the courier receipts, whereby this notice was sent. The returned envelopes are Exs. PW-1/20 to PW-1/23. According to PW-1, the defendant neither handed over the possession to them nor has it paid arrears of rent w.e.f October, 2008 at the rate of Rs 1,17,300/- pm. He has also stated that the prevailing market rate of rent for the suit premises would not be less than Rs 3 lakhs per month on account of a

sharp price in the rentals and property prices in last 2-3 years.

4. A perusal of the lease agreement Ex.PW-1/2 which is an unregistered document would show that the suit premises was let out by the plaintiffs to the defendant at the rate of Rs 89,000/- per month. The premises were let out initially for a period of three years. Thereafter, for next three years, the rent was to be increased by 15 % and thereby become Rs 102350 per month. The rent was payable in advance before the 10th day of each month. The total lease period was fixed at 9 years and the rent was to become Rs 117702.50 per month on expiry of 6 years from the date of commencement of tenancy. This document also provided that the lessor would be entitled to terminate the agreement after giving three months written notice only in the events specified in clause 9. One of the grounds on which the lease could be terminated by giving three months notice was default in payment of lease amount for more than two months. It also provided that if the lessee fails to deliver the vacant peaceful possession of the premises to the lessor, it shall pay damages to the tune of Rs 10,000 /- per day to the lessor till the date of handing over the vacant possession.

5. The supplementary lease agreement Ex. PW-1/3 provides for payment of additional rent of Rs 13,000/- per month w.e.f 1st February, 2008 till 14th November, 2008 and, thereafter, at the rate of Rs 1,4950/- per months for next three years, which was to further increase to Rs 17,192.50 after three years from the date of the first increase. Thus, the total rent payable by the defendant became Rs 1,02,000/- w.e.f. 1st February, 2008 to 14th November, 2008 and Rs 1,17,300/- w.e.f 15th November, 2008.

6. A perusal of the notice Ex.PW-1/14 would show that vide this notice, the tenancy of the defendant was terminated w.e.f. the midnight of 14th December, 2009. It was further stated in the notice that if the defendant felt that the tenancy did not commence on the date stated in the notice, the tenancy would stand terminated, on expiry of month of tenancy, as understood by the defendant, which would expire next after 15 days from the service of the notice.

7. Section 107 of Transfer of Property Act, to the extent it is relevant, provides that a lease of immoveable property from year to year, or for any term exceeding one

year or reserving a yearly rent, can be made only by a registered instrument, whereas all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession

8. Neither lease agreement Ex.PW-1/2 nor the supplementary deed of lease agreement Ex.PW-1/3 is a registered document, though they purport to create lease for more than one year and, therefore, were required to be compulsorily registered.

9. Section 17(1)(b) of Registration Act provides that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property shall be compulsorily registered. Section 49 of Registration Act, to the extent it is relevant, provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall affect any immovable property comprised therein, unless it has been registered. Thus, since the lease deeds executed between the plaintiffs

and the defendant being for more than one year were required to be compulsorily registered and has not been got registered, it does not confer any right on the defendant to continue to be a tenant for the term stipulated in these deeds. As a result, the tenancy of the defendant in respect of the suit premises became a month to month tenancy, which could be terminated by giving notice to the defendant under Section 106 of Transfer of Property Act, which to the extent it is relevant provides that in the absence of a contract or local law or usage to the contrary, a lease of immovable property, for any purpose other than agricultural or manufacturing purposes, shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by 15 days notice. The above-referred provision of Section 106 of Transfer of Property Act would apply only if there is no contract to the contrary between the parties. The question which comes up for consideration is as to whether the term of tenancy stipulated in the lease deed Ex.PW-1/2 and supplementary deed Ex.PW-1/3 can be looked into, despite the fact that these documents, though compulsorily registrable, were not got registered.

10. The proviso to Section 49 of Registration Act

provides that an unregistered document affecting immovable property and required by that Act or the Transfer of Property Act to be registered may be received as evidence of any collateral transaction not required to be effected by registered instrument. The next question which therefore comes up for consideration is as to whether the term of tenancy stipulated in the lease deed Ex.PW-1/2 and supplementary deed Ex.PW-1/3 can be said to be a collateral transaction not required to be compulsorily registered or what is generally termed as a collateral purpose.

11. The collateral transaction referred in the proviso to Section 49 of Registration Act must necessarily be independent of or divisional from the transaction, to effect which the law required registration and such collateral transaction must be a transaction which by itself is not required to be effected by a registered document, meaning thereby that it should not be a transaction creating any third right, title or interest in immovable property of the value of Rs 100/- and more. If a document is inadmissible in evidence for want of registration, it cannot be used for the purpose of proving an important clause contained in the

document. This proposition of law is well-settled and was approved by Supreme Court in **State of Punjab Vs. Raninder Singh and Anr.** 2008 (8) SCC 564.

12. The requirement of registration stipulated in Section 106 of Transfer of Property Act for registration is related to (i) the term of the lease and (ii) the yearly rent, if any, reserved in the lease. Therefore, the term of tenancy is one of the most important component of a lease. If the term is up to one year, the lease is not required to be compulsorily registered, unless it reserves of yearly rent, whereas, if the term of the lease exceeds one year, it has to be compulsorily registered irrespective of whether a yearly rent is reserved or not. The notice of termination of tenancy has a direct bearing on the right of the tenant to continue to be in possession of the tenancy premises. If the notice, wherever required is not issued or is not valid, the tenant continues to be entitled to retain the tenancy premises in his right as its lawful tenant. If it is valid and is properly issued, the tenant thereafter becomes a trespasser, unless he becomes a statutory tenant on account of the protection provided to him by a rent control legislation. Therefore, it can hardly be disputed that the period of a notice for

termination of tenancy, being an important and essential component of the lease deed, cannot be said to be a collateral transaction or a collateral purpose in a transaction for leasing out an immovable property.

13. This issue also came up for consideration before this Court in **Jagatjit Industries Ltd. Vs. Sh. Rajiv Gupta** 18 (1980) DLT 434, where this Court, disagreeing with the view taken by the Allahabad High Court in **Lala Fateh Chand v. Mst. Radha Rani and Ors.**, 1956 Allahabad Law Journal, 625 held that the term of the lease cannot be looked at to find out the period of notice to quit to determine the tenancy. It was held that the term regarding notice of eviction is a term which affects immovable property and, therefore, cannot be said to be a collateral transaction. During the course of judgment, it was observed that the main purpose of the term regarding notice of eviction is as to when the tenant can be required to deliver the possession of the tenancy premises. In that case, one of the terms of the lease deed provided that the lease was for a period of 11 months with two years option with the lessee and could be terminated or extended by giving two months' notice by either side after expiry of lease or option period if exercised.

The contention before the Court was that the lease could be terminated by giving two months' notice by either side in terms of the aforesaid clause and for this purpose the aforesaid term in the lease deed could be looked into. This contention was expressly rejected by this Court. I see no good reason to take a contrary view and, therefore, hold that the irrespective of the requirement of 3 months' notice stipulated in the unregistered lease deed, the tenancy of the defendant could be terminated by giving notice envisaged in Section 106 of Transfer of Property Act.

14. The next question which comes up for consideration in this case is as to whether the notice, whereby the tenancy of the defendant was sought to be terminated by the plaintiffs, can be said to have been duly issued to/served on them. Admittedly, the notice was not actually received by the defendant-company either at its corporate office or at the suit premises. The notice sent by courier was received back with the remarks "shifted", whereas the notice sent by registered post at the suit premises was received back with the remarks "on repeated visits premises found locked". As noted earlier, the notice sent at the registered office of defendant-company was also

sent with the remarks “left without instructions”.

15. The contention of the learned counsel for the plaintiff is that the plaintiffs did whatever they could possibly have done to serve the notice upon the defendants and if the defendants chose to lock the suit premises and either shift its registered office or altogether stop its functioning and close down its operations and its registered office, without any intimation to the plaintiffs, that would amount to deliberate avoidance to receive the notice and consequently constitute a valid service.

16. In **M/s. Madan and Co. Vs. Wazir Jaivir Chand** AIR 1989, SC 630, the notice sent by the landlord to the tenant by registered post was received back with the endorsement “left without address returned to sender”. The relevant statutory provision which in the case before Supreme Court was Section 12 of J&K Houses and Shops Rent Control Act, 1966 provided for receipt of a notice of demand of rent by the tenant. The question which came up for consideration before the Court was as to whether the notice sent by registered post could be said to have been served and the tenant could be said to have received it. It was observed by the Court all that a landlord can do to

comply with the requirement of sending notice is to post a pre-paid registered letter, containing the tenant's correct address, and once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under Section 27 of General Clauses Act. It was further observed that a tenant can so many manipulate the matters that the notice gets returned to the sender with vague endorsement such as "not found" "not in station", "addressee has left" and so on. It was contended before the Court that a landlord knowing that the tenant is away from the station for some reasons, could go through the motions of posting a letter to him which he knows will be served. Recognizing such a possibility, the Court was of the view that if a registered letter, addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct and that if he is compelled to be away for some time, all that he has to do is leave necessary instructions with the postal authorities either to detain the letters addressed to him for some times until he returns or to forward them to the address where has gone or to deliver

them to some other person authorized by him.

17. In **K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another**, (1999) 7 SCC 510, the notice sent under Section 138 of Negotiable Instruments Act, was returned with the endorsement “addressee absent” and “intimation served on addressee’s house”. Observing that giving of notice is distinguished from receiving of notice, it was observed by Supreme Court that a person gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it. It was further observed that if a strict interpretation is given that the drawer should have actually received the notice, for the period of 15 days to start running, no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It was held that when a notice is returned by the sender as unclaimed such date would be the commencing date for reckoning the period of 15 days contemplated in Clause (c) to the proviso of Section 138 of the Act. Of course such reckoning would be

without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.

In the case before this Court the defendant has not come forward to contest the suit and to claim that it had no knowledge of the notice sent by the plaintiffs and was not in any manner responsible for its non-service.

18. In **D. Vinod Shivappa Vs. Nanda Belliappa** (2006) 6 SCC 456, Supreme Court while dealing with a notice issued under Section 138 of Negotiable Instruments Act and sent by registered post inter alia observed as under:

“This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted.”

In **V. Raja Kumari Vs. P. Subbarama Naidu and Anr** 2004 8 SCC 774, dealing with a case where the notice

could not be served on account of the fact that the door of the house of the drawer was found locked, Supreme Court held that the principle incorporated in Section 27 of General Clauses Act will apply to a notice sent by post and it would be for the drawer to prove that it was not really served and he was not responsible for such non-service.

In **State of M.P. Vs. Hiralal and Ors** 1996 (7) SCC 523, the respondent managed to have the notice returned with postal remarks “not available in the house”, “house locked” and “shot closed”. It was held that the notices had been served on the respondents.

In **C.C. Alavi Haji Vs. Palapetty Muhammed and Anr.** 2007 6 SCC 555, a Three-Judges Bench of Supreme Court was called upon to re-consider an earlier decision of Two-Judges Bench in the case of **D. Vinod** (supra), Supreme Court reiterated that where the payee despatches the notice by registered post with correct address of the drawer of cheque, the principle incorporated in Section 27 of General Clauses Act would be attracted. During the course of the judgment, the Court, *inter alia*, observed as under:-

“Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by

registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.”

19. In the case before this Court also, it was for the defendant-company, if it decided to lock the suit premises which it had been taken on rent from the plaintiffs, to make necessary arrangements for service of the letters, etc that could be sent to it, either by instructing the postal authorities to re-direct those letters to another address or to make some other arrangement for receipt of letters, etc. on its behalf. Same would be the position with respect to the registered office of the defendant-company, if it had decided to change its registered office or to altogether close down its operations as well as its registered office, without shifting the same to another place, (though as long as a company exists, it must have a registered office), it ought to have either provided an alternative address to the postal

authorities for re-directing its letter to that address or should have made some alternative arrangement for receipt of letters, etc. sent to its registered office. Another option available to the defendant-company was to give public notice communicating its new address to the public at large and/or to all those with whom it had transacted any business, including its debtors and creditors as well as the landlords of the premises which it had taken on rent. If the defendant-company decided not to adopt any of these courses available to it, the plaintiffs cannot be blamed for non-receipt of the notice by the defendant-company. The plaintiffs did the best they could have done by sending notice by registered post not only at the suit premises, but also at the registered office of the defendant-company and in these circumstances, the statutory presumption under Section 27 of General Clauses Act with respect to service of notice sent by registered post cannot be denied to the plaintiffs.

20. I, therefore, have no hesitation in holding that by sending the notice dated 11th November, 2009 which was returned back with the remarks “shirtd” “on repeated visits premises found locked” and “left without instructions” the

plaintiffs have duly complied with the requirement of Section 106 of Transfer of Property Act.

21. Since the tenancy of the defendant stands validly terminated, the plaintiff is entitled to a decree for possession of the suit premises. The evidence produced by the plaintiff also proves that in view of the lease agreement Ex.PW-1/2 read with supplementary agreement Ex.PW-1/3, the rent payable by the defendant was Rs 1,02,000/- per month with effect from 1st February, 2008 and stood increased to Rs 1,17,300/- w.e.f 15 November, 2008. The evidence produced by the plaintiff also proves that the arrears of rent payable by the defendant to the plaintiff come to Rs 16,42,200/-. The plaintiffs are entitled to recover that amount from the defendant.

22. The plaintiff has also claimed mesne profit/damages at the rate of Rs 10,000/- per day from the date of filing of the suit. It has come in the affidavit of plaintiff No.1 Shri Ajay Ahuja that the prevalent market rate of rent of the suit premises would not be less than Rs 3 lac per month, since there has been a sharp increase in the rental and property prices in last 2-3 years. No property dealer has been produced by the plaintiffs to prove the

market rent of the suit premises, with effect from the date the tenancy of the defendant was terminated. No lease deed of any property in the locality or any oral evidence any has been produced by the plaintiffs to prove the current market rent of such properties. As noted earlier, the total rent payable by the defendant was Rs 1,17,300/- w.e.f. 15th November, 2008 and this rent was not to increase for three years from the date of increase. Had the defendant continued to pay rent regularly, the plaintiff would have received Rs 1,17,300/- p.m. and not Rs 3,00,000/-, from it. In these circumstances, I hold that the plaintiff is entitled to damages for use and occupation of the suit premises, at the rate of Rs 1,17,300/- per month w.e.f. the date of the filing of the suit till the possession of the suit premises is delivered to the plaintiffs.

ORDER

The suit is hereby decreed for recovery of possession of the suit premises and recovery of Rs. 16,42,200/- towards arrears of rent, with costs. The plaintiffs will also be entitled to recover mesne profits/damages for use and occupation of the suit premises, at the rate of Rs. 117300/- p.m. from the date of

filing of this suit till they recover possession of the suit premises from the defendant.

(V.K. JAIN)
JUDGE

DECEMBER 03, 2010
BG