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+ **IN THE HIGH COURT OF DELHI AT NEW DELHI**
RFA No.275/2011

% **22nd July, 2011**
DELHI TOURISM & TRANSPORTATION DEVELOPMENT CORPORATION LTD.
..... Appellant
Through: Mr. R.K.Dhawan with Mr. Pulkit Sachdeva &
Mr. Rahul Gaur, Advs.

VERSUS

M/S. SETH PROPERTIES & ORS. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment dated 10.3.2011 which has decreed the suit of the respondent no.1 for possession and mesne profits against the appellant.

2. Before proceeding further, I may state that in Delhi, if the tenant pays rent in excess of Rs.3,500/- per month then the premises are outside the protection of the Delhi Rent Control Act, 1958. This position was extended to apply to the fact situation wherein the tenant had a right to sublet the premises and the sub-tenant was paying rent in excess of Rs.3,500/- per month to the tenant. Meaning thereby even if the tenant is paying rent less than Rs.3,500/- per month to the landlord, but, if the sub-

tenant is paying to the tenant rent of more than Rs.3,500/- per month, premises have no protection of the Delhi Rent Control Act, 1958. The issue is now settled by a Division Bench judgment of this Court reported as ***P.S. Jain Company Ltd. Vs. Atma Ram Properties (P) Ltd. 1997 (65) DLT 308.*** The Division Bench judgment upheld the judgment of a learned single Judge R.C. Lahoti, J (as he when was) in the case of ***Atma Ram Properties Pvt. Ltd vs. P.S. Jain Company Ltd 1995 (57) DLT 131*** holding that premises are outside the protection of the Rent Act if the sub-tenant pays a rent above Rs.3,500/- to the tenant.

3. The facts of the case are that the appellant claims to have taken the premises on license from one M/s. Milani & Co. vide a license deed dated 25.3.1983 exhibited as Ex.DW-1/1. A reference to this license deed shows that the only right of M/s. Milani & Co. mentioned in this license agreement for giving entitlement to the appellant to come into the premises was that M/s. Milani & Co. was stated to be “in exclusive legal occupation” of the suit premises. Subsequently on 7.6.91, M/s. Milani & Co. surrendered the rights in the suit premises in favour of the defendants no. 1 and 2 in the suit and who are arrayed as respondents no. 2 and 3 in the present appeal. The appellant accepted the substitution of Milani & Co. by the defendants no. 1 and 2 and started paying charges to the defendants no. 1 and 2. This becomes clear from the following paragraphs of the written statement of the appellant filed in the Trial Court and also the affidavit by way of evidence filed by it. Para 3 of the

preliminary objections of the written statement of the appellant in the Trial Court reads as under:-

“3. That as per the rent deed dated 7.6.1991 executed between the Plaintiff and Defendant no.1 and 2, M/s. Milnai Company had relinquished all their right in the premises in question and M/s. Milani Company had handed over the physical possession of the premises to Defendants No. 1 and 2 thereby the Defendant No.1 and 2 stepped in to the shoes of M/s. Milani Company and the use and occupation charges which were paid by Defendant no.3 to M/s. Milani Company were started to be paid to the Defendants no. 1 and 2.”

This aspect was further confirmed by para 8 on merits of the written statement and which reads as under:-

“8. That the contents of para 8 of the suit are wrong, false and hence denied. it is however not denied that rental value of the suit premises is Rs.1331/- per month. it is however denied that at least Rs.40,000/- per month paid by Defendant No.3 to Defendants No.1 and 2 as subletting charges. As a matter of fact the answering Defendant is only paying gross profit @ 11.95% from the sale amount to the Defendants No.1 and 2 as per the License Agreement dated 25.03.1983. it is denied that the collective rental value of the entire value is more than Rs.3,500/- per month. As a matter of fact the rental value of the suit premises is Rs.1331/- which is being charged by the Plaintiff from Defendant No.1 and 2 and this rent is exclusive of electricity and water charges. Thus, the rent is much less than Rs.3,500/- per month therefore, the suit is barred under Section 50 of the Delhi Rent Control Act.”

In support of the aforesaid averments, the appellant filed its affidavits by way of evidence and para 4 of the said affidavit by way of evidence reads as under:-

“4. That as per the rent deed between the plaintiff and Defendant No.1 and 2 M/s Milani Company had relinquished all their right in the premises and had handed over the possession to Defendant No.1 and Defendant No.2 as such the Defendant No.1 and 2 stepped in the shoes in the Milani Company and the occupation charges

were then paid to Defendant No.1 and 2 by Defendant No.3.”

4. The Trial Court has after considering entire evidence in the case decreed the suit on the ground that the defendants no. 1 and 2 in the suit, respondents no. 2 and 3 herein, were the tenants in the property and the defendant no. 3 in the suit (appellant herein) was the sub-tenant paying charges of 11.95% of the gross profit to its landlords viz. the defendants no.1 and 2/respondents no. 2 and 3. The Trial Court has arrived at a finding of fact that at no point of time the monthly charges which were paid were less than Rs.40,000/- per month. The relevant finding of the Trial Court is contained in Paras 13 to 16 of the impugned judgment and which read as under:-

“13. perusal of the case file shows that the suit property was initially let out by the plaintiff to M/s Milani Co. and vide Rent Deed dated 7.6.1991, executed between the plaintiff and defendant No.1 & 2, M/s. Milani Co. had handed over the physical possession of the suit premises to defendant No.1 & 2 and M/s Milani Company had relinquished its rights in the suit premises in favour of the defendant No.1 & 2 and thereafter, defendant No.1 & 2 had stepped into the shoes of M/s Milani Company. **These facts have not been denied by the plaintiff.** It is further observed that the defendant No.3 has admitted that defendant No.3 was paying rent compensation to defendant No.1 & 2 @ 11.95% of the gross profit from the sale of the liquor by defendant No.3, from the suit premises. DW-1 R.K. Batra, Manager (Liquor Zone), of defendant No.3 has reiterated and reaffirmed these facts in his affidavit Ex. DW-1/A. This witness has admitted in his cross-examination that the defendant No.3 had paid the user charges of the premises to defendant No.1 & 2 on account of use of the suit premises and the suit premises is exclusively in control of defendant No.3. He has further stated that different portion of the suit premises was in possession of defendant No.1 & 2. This witness has further admitted that the rent compensation @ 11.95% was subsequently increased to 12.5%. this

witness has further admitted that this amount was being paid by defendant No.3 to defendant No.1 & 2 as commission for the use and occupation of the portion of the suit premises in its possession and this amount had never been below the amount of Rs.3,500/- per month.

14. Perusal of the record further shows that similar objection was taken by defendant No.3 in its application under Order 7 Rule 11 CPC and the said application was disposed off by the Ld. predecessor of this court vide order dated 18.5.2007 and the judgments cited by the Ld. counsel for the plaintiff were also considered by the Ld. Predecessor of this court and the following observations were recorded, while disposing off the preliminary issue regarding the maintainability of the present suit and the application of defendant No.3 under Order 7 Rule 11 CPC, as under :-

"Insofar as the maintainability of the present suit is concerned, the attention of this court has drawn to the judgments titled as Atma Ram Properties (P) Ltd. vs. Pal Properties (India) Pvt. Ltd. Ors, 91 (2001) Delhi Law Times 438, Brahmanand Kejriwal Vs. Kushal Kishore Aggarwal, 90 (2001) Delhi Law Times 49 (DB) and Atma Ram Properties (P) Ltd. Vs. M/s P.S.Jain Company Ltd. & Ors, 57 (1995) Delhi Law Times 131. in these judgments, the Hon'ble High Court has held that in the event the rent payable by the sub tenant to the tenant is more than Rs.3500/-, the premises would be outside the scope of Delhi Rent control Act, even if the rent payable by tenant to the principal landlord is less than Rs.3500/- per month. Hence, it is held that the present suit as framed is maintainable. Thus, the application under Order 7 Rule 11 CPC is also liable to be dismissed. The same is hereby dismissed."

15. This order was challenged by the defendant No.3 before the Hon'ble High Court in CRP No.127/2007 but the said revision petition was also dismissed by the Hon'ble High Court vide order dated 17.7.2009. The said order has not been challenged by defendant No.3, till date and therefore, the same has attained finality.

16. In view of the previous observations of this court vide order dated 18.5.2007 and the order of the Hon'ble Court dated 17.7.2009, passed in CRP No.127/2007 and the fact that the rent compensation paid by the defendant No.3 to defendant No.1 & 2 had never remained below the amount of rs.3500/-. I am of the considered opinion that

the present suit is not barred under the provision of Section 50 of the Delhi Rent Control Act. Accordingly, this issue is decided in favour of the plaintiff and against the defendant no.3." (underlining added)

5. No fault can be found with the aforesaid findings of the Trial Court as it has been established on the record that defendants no. 1 and 2 were the tenants in the premises and to whom the defendant no.3/appellant was paying charges at 11.95% of the gross profit, and which charges were more than Rs.3,500/- per month being at least Rs.40,000/- per month. In fact, the Trial Court in para 25 of the impugned judgment has also noted that the premises are assessed to property tax and the property tax has been assessed taking the ratable value at Rs.40,000/- per month. This aspect was proved in the evidence of PW1 who placed on record the assessment order no.607/99 dated 21.12.1999 confirming the possession of the defendant no.3 and the ratable value at Rs.40,000/- per month.

6. Learned counsel for the appellant argued the following issues before me:-

- i) There was no privity of contract between the appellant and the defendants no. 1 & 2 and therefore the suit was liable to be dismissed.
- ii) There was an arbitration clause in the agreement between M/s. Milani and Company and the appellant, and consequently there was also an arbitration clause in the agreement between the appellant and the defendants no. 1 & 2 and which disputes were

pending before the Civil Court and therefore the present suit cannot be filed to cause frustration to the rights of the appellant.

iii) The Trial Court has erred in granting mesne profits at Rs.44,000/- per month for the ground floor of the suit premises.

7. I am afraid, I am not persuaded by any of the arguments as raised by the learned counsel for the appellant. Firstly, the contention that there is no privity of contract of the appellant/defendant no.3 with the defendants no. 1 and 2 is belied by the averments made by the appellant/defendant no.3 itself in the written statement and in fact also confirmed by its affidavit by way of evidence, and the relevant paras as I have reproduced above, which show that the appellant has paid the necessary charges with respect to the premises to the defendants no. 1 and 2. The Trial Court has also accepted such position by giving the appropriate finding in paragraph 13 of the impugned judgment, and in fact has noted that the appellant admits these facts. Accordingly, there is no strength in the argument that there is no privity of contract between the appellant/defendant no.3 and the defendants no. 1 and 2/respondents no. 2 and 3. So far as the issue that there are disputes pending between the appellant and the respondents no. 2 and 3, such disputes do not take away the right of the landlord to file a suit for possession against its tenant, and who were the defendants no. 1 and 2, and sub-tenant, appellant/defendant no.3 on the ground that the premises were outside the protection of the Delhi Rent Control Act, 1958. In such a suit all that has to be pleaded and proved is that the factum of tenancy in favour of

defendants no. 1 and 2 and the fact that defendant no.3/appellant was paying rent in excess of Rs.3,500/- per month to the defendants no. 1 and 2. All this has already been established and as discussed above. The second argument therefore raised by counsel for the appellant also has no merits. So far as the issue of the rate of mesne profits is concerned, the Trial Court has granted mesne profits at Rs.44,000/- per month for 2003 onwards as the legal notice terminating the tenancy was dated 22.5.2003. Surely, the grant of mesne profits at Rs.44,000/- is at a very conservative figure, because if the appellant is paying Rs.40,000/- per month to the defendants no. 1 and 2/respondents no. 2 and 3 from around 1991 then taking the figure of Rs.44,000/- twelve years later in 2003 cannot be at any stretch of imagination be said to be illegal or perverse. Courts have regularly taken judicial notice of increase in rents. Legislature has also accepted this aspect and in Delhi Section 6A of the Delhi Rent Control Act, 1958 allows increase of rent by 10% every three years.

8. In view of the above, I do not find any merit in the appeal. The aforesaid admitted facts do not require any examination of the Trial Court record. The necessary pleadings, affidavit by way of evidence and the license deed between M/s Milani and Company and the appellant are already filed in this Court along with the other documents and the deposition. There is, therefore, no merit in the appeal. Dismissed.

JULY 22, 2011
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VALMIKI J. MEHTA, J.