

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

+ **RFA No. 367/2008**

% **12th December, 2011**

M/S KALATEX

..... Appellant

Through : Mr.H.S. Phoolka, Senior Advocate
with Ms. Sunita Tiwari, Advocate.

versus

COL. B.L. TANDON

..... Respondent

Through : Mr. Naveen Kr. Chaudhary and Mr.
Shiv B. Chetry, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial court dated 5.7.2008 which has decreed the suit of the respondent / plaintiff / landlord for possession and mesne profits / admitted rent.

2. The facts of the case are that the respondent / plaintiff filed a suit for recovery of possession and arrears of rent with respect to the premises C-712, Phase-I, Okhla Industrial Area, New Delhi. The subject property was let out on a monthly rent of ₹30,000/- to the appellant / defendant. It was

pleaded in the plaint that ₹ 7.20 lakhs became due as arrears of rent for the period ending 31.10.2000, and therefore, the tenancy which was a month to month tenancy was terminated by a legal notice dated 23.9.2000 seeking delivery of possession on 31.10.2000. Since the appellant / defendant failed to vacate the premises, the subject suit for possession and mesne profits came to be filed.

3. The appellant / defendant appeared in the suit and contested the suit by raising various grounds. The first ground was that the relationship between the parties was not of a landlord and a tenant inasmuch as the agreement dated 17.10.1988 entered into between the parties was a consultancy agreement. It was pleaded that the suit was not properly instituted against the defendant inasmuch as what the defendant to the suit is i.e. what is “M/s Kalatex” – defendant, is not stated in the plaint. It was further pleaded that the appellant / defendant was not in arrears of rent. Finally, it was pleaded that the possession of the suit premises was not with the appellant / defendant, and the possession always continued to be with the respondent / plaintiff.

4. After completion of pleadings, the trial court framed the following issues:

“1. Whether the suit is not maintainable due to mis-joinder

and non-joinder of proper parties? OPD

2. Whether the plaint is liable to be rejected for making false verification and filing of false affidavit alongwith the stay application? OPD
3. Whether there has been no relationship of landlord / tenant between the plaintiff and the defendant in respect of the suit property? OPD
4. Whether the plaintiff is entitled to decree for an amount of ₹8.10 lakh alongwith interest? OPP
5. Whether the plaintiff is entitled to a decree for damages for use and occupation of suit premises @ ₹3,000/- per day? OPP
6. Whether the plaintiff is entitled to any interest, if yes, at what rate and for what period? OPP
7. Relief.”

5. Before this Court learned senior counsel for the appellant argued the following points in support of the appeal:

- (i) The respondent / plaintiff admits to have signed the agreement dated 17.10.1988, and which agreement is a consultancy agreement, and therefore, there was no relationship of landlord and tenant between the parties.
- (ii) There are no arrears of rent inasmuch as the TDS certificates filed by the respondent / plaintiff, and proved and exhibited in the trial court, show that the arrears of rent were cleared upto 31.10.2000 i.e. the date

of termination of tenancy.

- (iii) The appellant / defendant is not properly sued because it is not stated in the plaint as to what the defendant i.e. “M/s Kalatex” is.
- (iv) The appellant / defendant was never in possession of the property and therefore, there could not have been decree for possession of the respondent/plaintiff.

6. So far as the aspect as to whether there was a relationship of landlord and tenant between the parties, the same was the subject matter of issue no.3 before the trial court. Some of the relevant findings of the trial court in this regard are contained in paras 16 to 21 of the impugned judgment and which read as under:

“16. I have perused the affidavit of the plaintiff Ex.P-1. He has proved the said reply by his learned counsel to the notice of the defendant to produce the original agreement which has been proved by the defendant Ex. DW1/2. Since the plaintiff has failed to reply the said notice of producing the original of the agreement and the defendant has proved the subsequent renewal agreement Ex. PW1/D1 to Ex. PW1/D3 which are not admitted by the plaintiff in cross examination except admitting the signatures, the original agreement Ex. DW1/2 dated 17.10.1988 as finds mentioned in the renewal agreement can be led as secondary evidence. On perusal of the Ex. DW1/2 in para no.8, it is found as under:-

“8. It is agreed that so long as the party of the Second part is desirous of carrying out the said office and business operation in the said plot, the

said plot will be made available to the Party of the Second Part for the said purposes without any let or hindrance on the part of the Party of the First Part.”

17. These contents of Ex. DW1/2 shows that the suit premises remained in possession of the defendant till the closure of the business by them as per their own admission. The other evidence on record as well as the averments in the written statement at page 5, the defendant has admitted to be in possession of the suit premises.

18. In the plaint as well as in the notice of termination of tenancy Ex. PW1/1, the plaintiff has alleged that the tenancy was from month to month and it is no where stated that the suit premises was let out to the defendant by written agreement. There is no bar in creating tenancy orally. The learned counsel for plaintiff has stated that Form 16A with regard to deduction of income tax at source Ex.PW1/11 (collectively) is a sufficient proof of relationship of landlord and tenant between the plaintiff and the defendant because the amount in those Form is shown as rent. The contention of the learned senior counsel for defendant regarding the Ex.PW1/11 (collectively) was that the same were not admissible in evidence because the same were photocopies and were not proved as secondary evidence. So, this contention was rebutted by the learned counsel for plaintiff stating that the document Ex. PW1/11 (collectively) are original and their execution is duly admitted by the defendant. The contention of the leaned counsel for plaintiff was found to be true as the document Ex. PW1/11 (collectively) are the original certificate and for that reasons the defendant cannot dispute the admissibility of the document Ex.PW1/11 (collectively).

19. The learned counsel for plaintiff further argued that the Ex.PW1/10 is the another document on record

which shows that the defendant has categorically admitted themselves to be the tenant in occupation of the suit property. The learned counsel for plaintiff further argued that the objections of the learned counsel for defendant that the original documents not filed as per law is not tenable because the documents were filed on 10.8.2004 when the issues were framed and there was no objection on behalf of the defendant to the filing of the documents on the said date or on subsequent dates and the filing of the original documents before the framing of issues is sufficient compliance of the provisions wherein the documents can be filed before framing of issues.

20. The document Ex. PW1/10 is the certificate issued by Sh. Arun Mehra, Managing Partner of defendant wherein it is categorically stated as under:-

“That is to certify that we are the sole occupant at C-172, Okhla Industrial Area, Phase-I, New Delhi – 110020 and we also confirm that we are paying a rent of ₹18,500/- per month (Rupees Eighteen Thousand and Five Hundred only) to Col. B.L. Tandon R/o C-544, Defence Colony, New Delhi.”

21. In the cross examination, Sh. Arun Mehra deposed that “It is correct that Ex PW1/10 bears my signatures at point A and the address mentioned in the said notice is of the defendant. Vol. stated the document does not bear any date. Again said Ex PW1/10 is the photocopy and I doubt the legality of the paper / document.”

(Underlining added)

7. A reading of the aforesaid paras shows that the trial court has referred to the various documentary evidences which were available on the record to arrive at the conclusion that there was a relationship of landlord and tenant between the parties. The trial court has referred to the agreement dated

17.10.1988, Ex. DW1/2, whose para 8 specifically mentions of the appellant / defendant having the suit premises for carrying out business without any let or hindrance by the party of the first part / plaintiff / respondent. The trial court has also referred to the various TDS forms which were issued by the appellant / defendant from time to time for many months, and which show that TDS was deducted by the appellant / defendant towards the rent being paid for the premises. These documents have been exhibited as Ex.PW1/11 (colly.). There is also in addition to the TDS certificates, a certificate issued by the partner of the appellant / defendant, Ex.PW1/10, that, that the appellant / defendant was paying rent of ₹18,500/- per month. Sh. Arun Mehra, partner of the appellant / defendant, when put this document in cross-examination, clearly admitted his signatures on this document. Thereafter, having realized his mistake he tried to get over the same by saying that the legality of the document is questioned because the same is a photocopy, however such subsequent stand cannot withdraw the admission already made. In view of the aforesaid, the trial court in my opinion rightly has come to a conclusion that there was a relationship of landlord and tenant between the parties. A document, being the agreement dated 17.10.1988, Ex.DW1/2, cannot take away from the fact that in reality, the relationship between the parties was of a landlord and a tenant. It is always open to a

person to show, after admitting his signatures on the documents, that in fact the purport and the relationship which is entered into between the parties through the document is really the relationship of landlord and tenant, though described in other terms in the agreement. I, therefore, reject the argument urged on behalf of the appellant / defendant that there is no relationship of landlord and tenant between the parties. I really fail to understand at all how such an argument can in fact be raised in face of the TDS certificates issued from time to time as also the certificate Ex. PW1/10 issued by the appellant / defendant itself.

8. The second argument which is raised on behalf of the appellant / defendant is that there were no arrears of rent till the tenancy was terminated on 31.10.2000. It was pleaded that the fact that the TDS certificates have been filed by the respondent / plaintiff, and which TDS certificates show payment of rent till 31.3.1999 and thus it has to be held that there were no arrears of rent at least till 31.3.1999. Prima facie, the argument as raised on behalf of the appellant appeared to have substance, however, it was agreed by the learned senior counsel for the appellant that never was any payment made by the appellant to the plaintiff in cash, and all payments were made in cheque. Surely, if that be so, it was very simple and easy for the appellant / defendant to have filed a copy of his bank account or summoned record from

his bank showing that in fact payments were upto the period ending 31.10.2000 but this was not done. The counsel for the respondent is correct in his submission that the appellant / defendant only gave the TDS certificates, and which obviously must have been given to avoid penal liability under the tax provisions, and really, the rent was never paid. Accordingly, I hold that since the appellant / defendant failed to file the record of his bank account showing payment of the cheques upto 31.10.2000, the appellant / plaintiff has rightly been held liable to pay arrears of rent till 31.10.2000 for a total period of 24 months inasmuch as a total amount of ₹ 7.20 lakhs was claimed till the termination of tenancy, and which amount of ₹ 7.20 lakhs is the rent at the rate of ₹30,000/- payable for a period of 24 months. This argument of the appellant / defendant is also rejected that there can be no decree towards arrears of rent.

9. The third argument urged on behalf of the appellant / defendant is that it was not properly described in the plaint and therefore the suit was liable to fail. I may at the outset, while referring to this argument, refer to Order 30 CPC which provides that a partnership firm can be sued in its name without individually suing the partners. This provision of Order 30 Rule 1 CPC is a complete answer to the argument as being urged on behalf of the appellant / defendant that it was not properly sued. In any case no doubt remains as to

the fact that “M/s. Kalatex” was a partnership firm inasmuch as the certificate Ex.PW1/10 filed and proved by the respondent / plaintiff on record clearly shows that the appellant / defendant was a partnership firm. In my opinion, this argument raised on behalf of the appellant is in fact quite clearly malafide and hyper-technical inasmuch as, if really it was not known who was the defendant, then how the appellant / defendant appeared and contested the suit as the defendant - M/s. Kalatex. Obviously, there was no doubt about the constitution of the defendant / appellant i.e. “M/s. Kalatex” that the same was a partnership firm. I, therefore, reject this third argument which is raised on behalf of the appellant / defendant as no prejudice is caused to the appellant / defendant by not stating in the plaint that M/s. Kalatex is a partnership concern, as the defendant cannot argue that it is not aware of its own constitution.

10. The final argument which was raised on behalf of the appellant / defendant was that the appellant / defendant was not in possession. It is argued that an interim order dated 30.10.2001 was passed by the Court as per which the respondent / plaintiff was directed not to dispose of the goods of the appellant / defendant and which shows that the respondent / plaintiff was in possession. Surely, this interim order cannot be said to have created any rights in favour of the appellant / defendant inasmuch, interim orders do

not decide rights in a suit which are finally to be decided only at the stage of final arguments. Interim orders are passed only on the basis of the averments made in the interim applications and they enure for the benefit only till the duration of the suit. However, the suit is decided at the final arguments as per evidence led by both the parties. As per evidence led by both the parties, it is clear that the possession was taken by the respondent / plaintiff after the local commissioner was appointed and who gave possession at all to the respondent / plaintiff on 26.5.2003 by breaking open the locks as per the report dated 13.8.2003. I put it to the learned senior counsel for the appellant that if the appellant / defendant was not in possession then how the local commissioner was appointed to give possession to the respondent / plaintiff by breaking open the locks and if any letter or any notice was ever written by the appellant / defendant to the respondent / plaintiff, inasmuch as, taking of illegal possession was indeed a serious matter. The learned senior counsel for the appellant, however, admits that no letter or notice was ever issued to the respondent / plaintiff that the respondent / plaintiff had illegally broken locks on the premises, and which were said to have contained goods of appellant / defendant for which an interim order dated 30.10.2001 was passed. I therefore reject the argument that the possession of the premises were not with the appellant /

defendant.

11. It is quite obvious that the entire object of the appellant / defendant is to harass the landlord. The harassment began first by not giving rent. This non-payment of rent was not over a few months, but was for a period as long as of 2 years. One surely thinks that it is only a landlord who would understand this position when he does not receive the rent for the period as long as 24 months. Not only the appellant / defendant falsely and vehemently contested the suit, the suit was contested on totally frivolous and vexatious grounds as to wrong description of a defendant or there not being a relationship of landlord and tenant between the parties and so on. It is high time that such vexatious litigation should not be allowed to profit the appellant / defendant. The Supreme Court recently in the case of ***Ramrameshwari Devi & Ors. v. Nirmala Devi & Ors., (2011) 8 SCC 249*** has held that it is a high time that actual and realistic costs be imposed. The Supreme Court has emphasized that a litigant who malafidely contests and delays a case, should not be allowed to profit from the delay in the conclusion of the litigation. In the case before the Supreme Court, Supreme Court had imposed costs of ₹2 lakhs towards frivolous litigation. In the facts and circumstances of the present case considering that the respondent / plaintiff has been put to unnecessary costs of this appeal, I deem it fit that

the present appeal is dismissed with costs of ₹50,000/-. I am also empowered to impose actual costs as per **Volume V of the Punjab and Haryana High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15**. Costs be paid within a period of two weeks from today. Appeal is dismissed and disposed of accordingly.

VALMIKI J. MEHTA, J.

DECEMBER 12, 2011

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