

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.01.2011

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RFA (OS) 84/2007

PUNCHIP ASSOCIATES P. LTD & ORS

..... Appellants

versus

S. RAJDEV SINGH DECD. & ORS

..... Respondents

Advocates who appeared in this case:

For the Appellant	: Mr Sandeep Sethi, Sr Adv. with Mr Saif Mahmood and Mr A.K. Mehta, Advs for Appellant Nos.1, 2 & 4. Mr Ashok Bhasin, Sr Adv. with Mr Anshul Arora and Ms Aanchal, Advs. for Appellant No.3.
For the Respondents	: Mr Sanjeev Sachdeva, Adv. with Mr Vibhu Verma and Mr Preet Pal Singh, Advs. for Respondent Nos.1-4. Mr Vishnu Mehra, Adv. with Mr. R.L. Kadamb, Adv. for Respondent No.5.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

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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 |

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the judgment and order dated 19.09.2007 passed a learned Single Judge of this Court in CS(OS) No.2842/1995. The plaintiffs (the respondent Nos. 1 to 4 herein) in the said suit had sought recovery of possession from the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) in respect of the first floor of the premises bearing No.G-72, Connaught Circus, New Delhi, (hereinafter referred to as 'the suit property') which belonged to the respondent Nos.1 to

4 who had by a lease deed dated 18.09.1986, which was duly registered on 20.09.1986, leased the suit property to the appellant No.1 on a monthly rent of Rs.189.05. At the outset, it may be mentioned that the entire case revolves around the interpretation of the said lease deed.

2. On the pleadings of the parties, the following four issues were framed by the learned Single Judge by an order dated 27.02.2007:-

- “1. What is the effect of the Lease Deed dated 18.9.1986 not being renewed or its specific performance not being sought by the defendants? OP Parties
2. Whether any notice of termination of tenancy was required to be served on the sub-tenants? If so, its effect? OPD-2 to 4
3. Whether the plaintiff is entitled to possession of the suit property? OPP
4. Relief.”

3. By virtue of the impugned judgment, the learned Single Judge decided all the issues in favour of the plaintiffs (respondent Nos.1 to 4 herein) and against the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) and as a consequence thereof passed a decree for possession in favour of the plaintiffs (respondent Nos.1 to 4 herein) and against the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) in respect of the suit property. A decree for costs was also passed in favour of the said respondent Nos.1 to 4.

4. The appellants have only taken two pleas before us in the course of arguments. The first plea is that Clause 4 of the lease deed dated

18.09.1986 has not been duly considered by the learned Single Judge. It was submitted that Clause 4 constituted a complete waiver of the right to seek possession on the part of the landlords i.e., respondent Nos. 1 to 4. It was also contended that the lease was a perpetual lease and the landlords had no right to terminate the same.

5. The second and only other point urged before us on the part of the appellants is that the learned Single Judge did not consider the question of issuance of a notice under Section 106 of the Transfer of Property Act, 1882. This contention was based on the premise that even if Clause 4 is interpreted against the appellants and in favour of respondent Nos.1 to 4 and it is held that the tenancy had become a month to month tenancy, the same had to be terminated in law by issuance of a notice under Section 106 of the Transfer of Property Act, 1882, before the respondent Nos.1 to 4 would be entitled to recover possession of the suit property from the appellant Nos.1 to 4 and respondent No.5. According to the learned counsel for the appellants, no such notice has in fact been served upon them and apart from the lease deed dated 18.09.1986 no other document was admitted by the said appellants before the learned Single Judge. Consequently, it was submitted that the learned Single Judge had committed an error by ignoring the provisions of Clause 4 of the lease deed and also in not requiring the respondent Nos.1 to 4 to establish that the tenancy had been terminated by a notice under Section 106 of the Transfer of Property Act, 1882.

6. In response to these arguments, the learned counsel for the respondent Nos.1 to 4 submitted that Clause 4 of the lease deed would operate only during the existence of the lease period. This, he said, would be apparent from a plain reading of Clause 4 itself. It was submitted that the lease was admittedly for an initial period of five years and was subject to renewals in terms of Clause 2 of the lease deed. He submitted that it is a matter of fact that the lease was not renewed in terms of Clause 2 of the lease deed after the initial period of five years had elapsed on 17.09.1991. The lease could only be renewed by virtue of another registered lease deed and that has not happened as a matter of fact. He submitted that it is because of this that the issue No.1 referred to above was framed in the manner it was.

7. The learned counsel for the respondent Nos.1 to 4, with regard to the submission concerning the issuance of a notice under Section 106 of the Transfer of Property Act, 1882, submitted that this ground is not available to the appellants inasmuch as no issue was framed on this nor was such issue sought to have been framed on the part of the appellants even though they had sufficient opportunity for the same. He referred to the chronology of events to substantiate this argument. The said events shall be referred to herein below.

8. Taking up the question of issuance of notice under Section 106 of the Transfer of Property Act, 1882, we are in agreement with the learned counsel for the respondent Nos.1 to 4 that this question cannot, now, be agitated at the appellate stage when no issue was framed before the learned Single Judge. The learned counsel for the respondent Nos.1 to 4 is also

correct in his submission that the appellants had ample opportunity and they never sought to include the question of issuance of notice under Section 106 of the Transfer of Property Act, 1882 as a specific issue because it was always assumed that such a notice had been issued. This would be apparent from the chronology of events which we shall refer to presently.

9. On 18.09.1986, the said lease deed was executed for a period of five years. The lease was in favour of appellant No.1, who sublet the suit property to appellant Nos.2 to 4. On 09.07.1987 appellant Nos.1 to 4, together, sublet the suit property to respondent No.5, which is a bank, at a rental far in excess of Rs3,500/- per month. In the year 1991, the respondent Nos. 1 to 4 filed a petition under Section 14(1)(b) of the Rent Control Act, 1958 for alleged unauthorized subletting. The plea taken by the appellant Nos.1 to 4 in that petition was that the subletting was authorized. During the pendency of the said petition under Section 14(1)(b) of the Delhi Rent Control Act, 1958, a decision was rendered by a learned Single Judge of this Court in the case of **Atma Ram Properties (P) Ltd v. P.S. Jain Company Ltd: 1995 (57) DLT 131** wherein it was held that even those properties, where the main tenant pays less than Rs3,500/- per month rent but where it has been sublet for a rental of more than Rs3,500/- per month, would be outside the purview of the Delhi Rent Control Act. After this decision was rendered, the respondent Nos. 1 to 4 issued a notice on 09.04.1995 under Section 106 of the Transfer of Property Act, 1882, to the appellant No.1. It would be pertinent to point out that the decision of the learned Single Judge in **Atma Ram Properties (supra)** was confirmed by a Division Bench of this

Court in *P.S. Jain Company Ltd. v. Atma Ram Properties (P) Ltd & Ors.*

1997 (65) DLT 308 and ultimately the Special Leave Petition, being SLP (C) 8762/1997, was also dismissed on 29.04.1997 by the Supreme Court.

10. Going back to the petition filed by the respondent Nos.1 to 4 which was pending before the Additional Rent Controller, it appears that the same was dismissed on 04.10.1995 by the said Additional Rent Controller on the ground that the Delhi Rent Control Act would not apply to the tenancy in question and therefore, he had no jurisdiction to entertain the same. It is specifically recorded in the order dated 04.10.1995 passed by the Additional Rent Controller in paragraph 3 that the notice dated 09.04.1995 marked as Ex. P-X was served by and on behalf of the petitioners (respondent Nos.1 to 4 herein) on the respondent No.1 (appellant No.1 herein) wherein it was asserted that the suit property was covered by the exception under Section 3(6) of the Delhi Rent Control Act and that the appellant No.1 was liable to be evicted under the provisions of the Transfer of Property Act, 1882. Paragraph 5 of the said order goes further and it is observed that through the said notice, the petitioners (the respondent Nos.1 to 4 herein) had terminated the tenancy of respondent No.1 (the appellant No.1 herein) from the end of 31.05.1995.

11. It is, therefore, clear that the position had been accepted by the parties that a notice dated 09.04.1995 under Section 106 of the Transfer of Property Act, 1882, had been served by the respondent Nos.1 to 4 on the appellant No.1 terminating the tenancy from the end of 31.05.1995. It is because of this that no specific issue was even sought to be raised by the

appellants at the time the issues were framed by the learned Single Judge. We are clearly of the view that this was so because the question of issuance and service of notice dated 09.04.1995 under Section 106 of the Transfer of Property Act was a non issue in view of the admitted position as recorded above.

12. We may also point out that four issues, which have been referred to in the earlier part of this judgment, had been framed by virtue of the learned Single Judge's order dated 27.02.2007. The appellant Nos.1 to 4 were not happy with the issues as framed and they filed a review application being RA No.4721/2007 seeking review of the said order dated 27.02.2007. In that application also, although they set out certain proposed issues, there was no issue sought in respect of the notice under Section 106 of the Transfer of Property Act. It is another matter that the review application was dismissed by virtue of the order dated 25.04.2007 and even the appeal therefrom being FAO(OS) 281/2007 was dismissed by a Division Bench of this Court on 30.07.2007. It may also be pertinent to note that the Division Bench while dismissing the said appeal had remarked that the plea for further issues and for leading oral evidence was an afterthought which could not be permitted. The Special Leave Petition, being SLP (C) 1379/2007, filed by the appellants was also dismissed as withdrawn on 20.08.2007.

13. The above discussion makes it clear that the question of notice under Section 106 of the Transfer of Property Act, 1882, was not raised as an issue by the appellants before the learned Single Judge. Even when they sought further issues to be framed they did not seek any issue on this aspect

of the matter. It is obvious that they did not do so because the entire question was a non issue in view of the accepted and admitted position as noted in the order of the Additional Rent Controller dated 04.10.1995.

14. We now come to the interpretation of Clause 4 of the lease deed dated 18.09.1986. Before we go on, it would be relevant to examine both Clause 2 as well as Clause 4 of the lease deed. The same read as under:-

“2. That the Tenant or his successors in interest shall be entitled to renew the lease in respect of the tenancy premises for similar terms of Five Years each subject to such increase in the rent as permitted by the Rent Control Acts or increase of 25% (Twenty Five percent) at each renewal in case the Rent Control Act does not apply to the said premises.”

“4. That the demised premises are presently covered under Delhi Rent Control Act, 1958 and the Landlords undertake that if Delhi Rent Control Act, 1958 is amended and by virtue thereof the landlords acquire any additional rights, the Landlords will not exercise or enforce any such rights and in particular shall not exercise or enforce any right to evict the Tenant from the demised premises on any ground except for the breach of the terms of the perpetual lease dated 20th July 1937 or breach of the terms of this deed during the duration of the lease or any extension thereof.”

15. A plain reading of Clause 2 of the lease deed makes it absolutely clear that the lessee or his successors in interest were entitled to renew the lease in respect of the suit property for similar terms of five years each subject to such increase in the rent as was permitted by the Rent Control Acts or increase of 25% at each renewal in case the Rent Control Act did not apply to the suit property. Two things are abundantly clear from this Clause. The

first is that the lease as such was only for a period of five years. This is also confirmed by a reference to Clause (1) to the *habendum* wherein the expression used is:-

“to hold the same for a term of five years.....”

The second point is that the lease could be renewed at the option of the lessee or his successors in interest for similar terms of five years each subject to the increase in rent stipulated therein. This clearly meant that the lease was for five years and could be renewed by the lessee. However, such renewals, to take effect in law, would have to be by way of registered lease deeds. It is an admitted position in this case that there was no renewal of the lease deed inasmuch as no registered lease or for that matter even any unregistered lease was executed in the present matter after the expiry of the five-year period.

16. A reading of Clause 4 does indicate that the landlords had waived any additional rights if acquired by way of amendment to the Delhi Rent Control Act, 1958 and the landlords had covenanted that such additional rights, if any, would not be enforced by them to evict the lessee from the suit property on any ground except for the breach of a term of the perpetual lease dated 20.07.1937 (between the President of India and the landlords) or breach of the terms of the deed dated 18.09.1986 during the duration of the lease or any extension thereof. The learned counsel for the appellants referred to the decision in the case of *State of U.P. v. Lalji Tandon: 2004 (1) SCC 1* and, in particular, to paragraph 13 thereof. The said paragraph reads as under:-

“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 or 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.**
(emphasis supplied)”

17. This was referred to in the context of there being a difference between an extension of lease and a renewal of a lease. He submitted that Clause 4 of the lease deed in the present case did not refer to a renewal of the lease deed but only to an extension thereof and consequently any period beyond the initial period of five years would be regarded as an extension of the lease although there may not have been a renewal of the lease in the strict

sense. We are unable to see as to how the aforesaid decision of the Supreme Court is of any help to the appellants. The interpretation of the lease would depend on the facts and circumstances of each case. The said decision itself makes it clear that where a lease contains a covenant for renewal, the option must be exercised consistently with the terms of such covenant. And, if exercised, a fresh deed of lease shall have to be executed between the parties, failing which, another lease for a fixed term shall not come into existence. In the present case, we find that it is only Clause 2 which contains the covenant for renewal. Clause 4, by itself, does not at all permit any renewal or extension of the lease. Clause 4 of the lease deed, to our minds, only indicates that the landlords had waived their rights to enforce any additional rights which may arise through amendments of the Delhi Rent Control Act, 1958, during the currency of the lease or during any extension thereof. The reference to ‘extension thereof’ can only mean renewal under Clause 2 of the lease deed as there is no other clause or covenant providing for extension of period of the lease. Since, admittedly, the lease has not been renewed in terms of Clause 2 by executing a fresh lease, the question of waiver under Clause 4 does not arise as the lease itself no longer subsists.

18. The learned counsel for the appellants referred to the decision of the Supreme Court in the case of **Krishna Bahadur v. Purna Theatre and Ors.** 2004 (8) SCC 229 and, in particular, to paragraphs 9 and 10 thereof.

The same read as under:-

“9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a

cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.”

19. The said decision reiterates the well-known principle that waiver is contractual and estoppel is only a rule of evidence. There is no difficulty with this principle. The only question is that the waiver that is referred to in Clause 4 of the lease deed would only apply during the currency of the lease. It is not as if the landlords had waived their rights till eternity even if the lease is not renewed.

20. Paragraph 16 of the impugned judgment has aptly set out the key issue. The said paragraph 16 reads as under:-

“16. The important issue, however, is that it being a lease in respect of an immovable property for more than a year, a registered document is necessary. The terms of the lease would continue to apply for a period of five years of the lease. In case defendant No.1 wanted to exercise the right of renewal, then a fresh lease had to be executed and registered every time such renewal had to take place. If the plaintiffs failed to co-operate, defendant No.1 could have enforced his rights through a suit for specific performance for execution of such a lease deed. Defendant No.1 failed to do either. The lease expired by efflux of time. Any suit for specific performance of the renewal under the lease deed was to be filed within

three years from the cause of action, which would be the date when the lease came to an end by the efflux of time. The failure to exercise the said right resulted in defendant No.1 being only a tenant by holding over.”

21. We are entirely in agreement with the views expressed by the learned Single Judge and they are clearly in consonance with the discussion above. Since no other point was urged before us and on both counts we have held against the appellants, this appeal is dismissed with costs.

22. The amounts deposited by the respondent No.5 pursuant to directions given by virtue of the order dated 21.04.2009 in CM No.4745/2008 by the respondent No.5 shall continue to remain deposited with the Registrar of this Court till the parties have their rights to the same, if any, determined by an appropriate forum.

23. All the other pending applications also stand disposed of.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

JANUARY 11, 2011

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