

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ FAO(OS) 476/2012

M. GULAB SINGH AND SONS (P) LTD Appellant

Through: Ms.Jyoti Singh, Sr.Adv. with Mr.Nitesh
Mehra, Mr.Abhishek Gupta, Ms.Angel
Bhardwaj and Ms.Saahila Lamba,
Advocates.

versus

B.L.B. LIMITED Respondent

Through: Mr.Ankit Jain and Mr.Anand M.Mishra,
Advocates.

AND

+ FAO(OS) 477/2012

M. GULAB SINGH AND SONS(P) LIMITED Appellant

Through: Ms.Jyoti Singh, Sr.Adv. with Mr.Nitesh
Mehra, Mr.Abhishek Gupta, Ms.Angel
Bhardwaj and Ms.Saahila Lamba,
Advocates.

versus

B.L.B. LIMITED Respondent

Through: Mr.Ankit Jain and Mr.Anand M.Mishra,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
01.10.2012

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Caveat Nos.1019/2012 and 1020/2012 in FAO(OS) No.476/2012

Since learned counsel for the respondent/caveator has entered appearance, the caveat stands discharged.

CM No.17218/2012 in FAO (OS) No.476/2012

CM No.17220/2012 in FAO (OS) No.477/2012

Allowed subject to just exceptions.

CM No.17217/2012 in FAO (OS) No.476/2012

CM No.17219/2012 in FAO (OS) No.477/2012

Notice, which is accepted by learned counsel for the respondent. The delay of 22 days and 24 days respectively in filing the appeals is condoned subject to payment of Rs.5,000/- as costs in each of the appeals.

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The appellant is the landlord of the premises qua which two separate leases were executed in respect of the front and rear portion of 4th Floor, Block 'B' of property bearing no.6, Bahadur Shah Zafar Marg, New Delhi-110 002 by two registered lease deeds dated 09.11.2005 and 27.12.2005. The leases were initially for a period of five years with a provision for increase of rental by 15 per cent after the expiry of initial five years. The important aspect is that there was a specific clause stipulating that rent shall be inclusive of "all taxes, duties, charges, maintenance in connection with property only". The rent was however exclusive of charges for consumption of electricity and water which were directly payable by the lessee to the authorities. On the imposition of the service tax, it is the own case of the parties that the respondent-tenant of its own paid the rental amount as well as the service tax from month of April-2008 till May, 2009.

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The disputes arose inter se the parties on account of allegations of misuse and other connected matters whereafter no service tax was paid. In view of the disputes, the appellant as landlord sought to terminate the lease deed under Section 106 of the Transfer of Property Act and initiated legal proceedings by two separate suits for possession and mesne profits.

The suits were referred to the Delhi High Court Mediation and Conciliation Centre and a settlement agreement was arrived at on 18.07.2011. The relevant terms and conditions of the settlement agreement are as under:

“6. The following settlement has been arrived at between the Parties hereto:

i) It has been mutually agreed between the parties that the defendant shall vacate the front portion of the tenanted premises in their occupation on or before 31.07.2011 and shall hand over the vacant and peaceful possession to the plaintiff. The plaintiff shall refund the security amount to the defendant taken at the time of inception of tenancy after deducting all the arrears of rent till 31.07.2011.

ii) That there are certain fixtures which are fixed in the said portion. An option is given to the plaintiff, if they want to retain any of those fixtures they shall pay the value of the same to the defendant as mutually agreed between the parties. The said intimation will be conveyed by the plaintiff to the defendant latest by 20.07.2011, thereafter the defendant shall be free to remove such fixtures on or before the period of handing over the vacant possession to the plaintiff.

iii) That defendant shall hand over the vacant and peaceful possession of the rear portion of the tenanted premises under their occupation on or before

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31.12.2013 (which is the subject matter of the other suit). The defendant shall pay to the plaintiff all the agreed rate of rent till the time he hands over the vacant and peaceful possession of the tenanted premises in the rear portion of the suit premises.

iv) The plaintiff after entering into the present settlement shall withdraw both the suits filed in this Hon'ble Court within two weeks from handing over the possession by the defendant to the plaintiff of the front portion of the tenanted premises.

7. By signing this Agreement the parties hereto state that they shall have no further claims or demands against each other with respect to the above mentioned suits bearing nos. CS (OS) No.1491/2010 and CS (OS) No.1544/2010 and all the disputes and differences have been amicably settled by the Parties hereto through the process of Mediation."

Thus in a nutshell while one portion (front) was to be vacated, the rear portion was to continue in tenancy of the respondent. The security amount lying with the appellant was to be refunded back to the respondent after deducting all arrears of rent till 31.07.2011 qua the front portion which was to be vacated. Para 7 of the settlement agreement specifically stated that there are no "further claims or demands against each other with respect to the aforesaid suits." Further that "all the disputes and differences have been amicably settled by the parties hereto through the course of mediation." The settlement agreement was thereafter placed before the court and on 27.09.2011 both the suits were disposed of in terms of the settlement

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agreement. It may be noticed that the said order specifically provided as under:

“ 5. The plaintiffs are liable to refund the security amount paid by the defendant to it after making adjustment of rent, electricity and water in terms of the tenancy agreement.

6. In view of the above, it is directed as follows:-

(i) The settlement agreement Exh.P-II is taken on record.

(ii) The parties shall remain bound by the terms of the settlement agreement Exh.P-II.

(iii) The undertakings given by the parties are accepted and they shall remain bound by the same.

(iv) In view of the settlement between the parties, no issue survives for adjudication.

(v) These two suits are disposed of in terms of the settlement contained in para 6 of the agreement dated 18th July, 2011. (Exh.P-II).”

The effect of the aforesaid was that a specific provision was made while refunding the security amount to make adjustment of rent, electricity and water in terms of the tenancy agreement. It may be stated that the settlement agreement itself referred to only the rent and thus possibly on this being raised by the appellant, in terms of the lease agreements, electricity and water were separately provided for so that arrears if any could be adjusted out of the security amount.

Unfortunately despite all the controversies having been put to rest, the refund of security did not take place. The appellant claimed that there were

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arrears of water and electricity charges over which there was some controversy. However, the material controversy raised was that the appellant sought to recover even the service tax arrears from the security refund. In view of this controversy, there was exchange of letters inter se the parties which ultimately culminated in the appellant filing an application under Section 151 of Code of Civil Procedure, 1908 for clarification/modification of the decree dated 27.09.2011. There were in fact two directions sought in this application: i) modify/clarify the order and judgment dated 27.09.2011 to the extent that the direction may be issued to the respondent to clear its outstanding dues payable towards service tax ii) to clear all water and other dues. Thus the appellant itself was conscious of the fact that the judgment and decree dated 27.09.2011 did not provide for the liability of service tax on the respondent as it was seeking a modification of the decree. It is this application which has been rejected by the impugned order dated 20.07.2012.

The learned single Judge has recorded the controversy and reproduced the settlement terms. Thereafter learned single Judge has also recorded the material facts that there were no averments in the plaint qua liability of the respondent to pay the service tax even though this issue was live at the time when the suit was instituted. Learned single Judge has also opined that even if the claim of the appellant was based on the fact that there was some understanding in terms whereof the respondent was liable to pay service tax which had actually resulted in the respondent paying the tax for a period of few months, there were no such agreed terms and conditions in the settlement

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recorded by the mediator affixing the liability on the respondent and thus the appellant should be deemed to have abandoned its claims if any towards service tax.

The sum and substance of the submission of the learned senior counsel for the appellant before us is that at the time when the lease agreements were entered into, service tax was not envisaged. She cannot dispute the position that in terms of the lease agreement all liabilities of any nature towards tax are on the appellant, but contends that that should be relatable to only the taxes as prevalent on the date of the lease deed. It is thus her submission that the subsequent levy of service tax should be to the account of the respondent more so as it is a tax on service which is provided to the respondent, and it is in the nature of an indirect tax to be recovered from the service recipient. In this behalf, learned counsel has relied upon the judgment of the Division Bench of this court in RFA(OS) No.64/2012, M/s Vasari India Pvt. Ltd v. Ghanshyam Dass Soni & Anr. decided on 20.07.2012. In the facts of the said case also, there was a registered lease deed where the commercial property had been let out. There was default in payment of rent. The suit for possession and damages was filed. In the written statement there was an admission qua non payment of rent though the defendant volunteered to pay the amount of the rent. It is in that context that the learned single Judge opined that the preliminary objection raised by the tenant that he was not liable to pay service tax was a defence prohibited by law inasmuch, as, service tax on commercial rented properties is an indirect tax and the jurisprudence on indirect tax tells us that the primary liability of the landlord to pay the tax

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to the Income Tax Authorities can be passed on to the tenant for the reason that, as per the law, it is the commercial use by the tenant which enhances the utility to the tenant with respect to the property which attracts service tax on commercial properties.

Thus it was held that this preliminary objection with respect to service tax was prohibited by law. This does not mean that there can be no express or implied contract to the contrary between the service provider and the service recipient.

We are, however, unable to appreciate the submission of the learned senior counsel for the appellant. We are at present concerned with the situation where the issue is merely of passing on the liability by the landlord to the tenant qua service tax on such tax having been imposed. There was litigation initiated inter se the parties. The respondent had stopped paying the service tax. This issue was live at the time when the suit was filed. There was no mention in the suit qua the liability to pay service tax. Not only that, when the dispute was referred to mediation, there was no agreement recorded qua the liability of the respondent to pay service tax. The last nail in the coffin is the manner in which the decree was passed i.e. while accepting the settlement, at the request of the appellant, there are observations qua payment of water and electricity charges by the respondent in terms of the lease agreement where, once again, the issue of liability of respondent to pay service tax was not raised by the appellant. We have already noticed that para 7 of the settlement agreement clearly states that there are no disputes and differences surviving inter se the parties. It is clearly an afterthought on the

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part of the appellant to have raised this issue post the decree having been passed and now seeking to fasten this liability on the respondent which the decree did not envisage. The conduct of the appellant contra indicates the existence of even an implied term of the contract to fasten the liability of service tax on the respondents. The original contractual terms may have been silent in this regard but the subsequent developments clearly show that there was an implied novation of the agreements – not to saddle the liability of service tax on the respondent and to the effect that the appellant should absorb the said liability itself.

We thus find no merit in these appeals which are dismissed with costs of Rs.10,000/- each in both the appeals.


SANJAY KISHAN KAUL, J


VIPIN SANGHI, J

OCTOBER 01, 2012/dm