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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.568/2011

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19th December, 2011

SHRIRAM PISTONS & RINGS LTD

..... Appellant

Through : Mr. T.K.Ganju, Sr. Adv. with
Mr. Jayant K. Mehta, Mr. Aditya Ganju &
Mr. Sukant Vikram, Advs.

versus

BASANT KHATRI

..... Respondent

Through :

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 8.11.2011 decreeing the suit for possession and mesne profits filed by the respondent/landlord.

2. The facts of the case are that the appellant/defendant/lessee vide a lease deed dated 3.8.2005 took on lease the premises being E-35, Third

Floor, Himalaya House, 23, Kasturba Gandhi Marg, New Delhi-110001 admeasuring 994 sqr. ft. from the then owner/landlord-Mrs. Usha Lall. This lease deed was for a period of 3 years from 1.7.2005 to 30.6.2008. This lease deed is not a registered document, and therefore, the tenancy would obviously be only a monthly tenancy. The so-called period of lease expired on 30.6.2008. The original owner/landlord, Mrs. Usha Lall in the meanwhile on 11.6.2008 had entered into an agreement to sell of this property with the present respondent/plaintiff. This agreement to sell dated 11.6.2008 was subsequently registered on 11.2.2009, after payment of the requisite stamp duty and registration charges. Since the appellant/defendant failed to vacate the property in spite of termination of the tenancy by legal notice dt.14.7.2008, the subject suit for possession and mesne profits came to be filed.

3. The appellant/defendant/lessee contested the suit on various grounds. One ground was that the respondent/plaintiff had no locus standi to file the suit, inasmuch as, he was not the owner/landlord of the premises and there was no atornment by the appellant/defendant towards the respondent/plaintiff. It was contended that an agreement to sell does not

between the original owner/landlord and the respondent/plaintiff was only an agreement to sell, no rights flow to the respondent/plaintiff. It was also argued before the Trial Court that the property was not identifiable and therefore the suit was not maintainable. It was also argued that mesne profits as claimed were not payable.

4. The Trial Court has held that there was a relationship of landlord and tenant between the parties inasmuch as there was a registered sale agreement dated 11.2.2009 entered into between the original owner/landlord and the respondent/plaintiff. The Trial Court distinguished a recent judgment of the Supreme Court in the case of *Suraj Lamp Industries Pvt. Ltd. vs. State of Haryana & Anr. (C) SLP 13917/2009* decided on 11.10.2011 by holding that the same is only prospective in operation. The Trial Court has also held that the legal notice dated 14.7.2008 terminating the tenancy was duly served upon the appellant/defendant, and in any case, service of summons of the suits amounted to termination of tenancy. The Trial Court while disbelieving the evidence led on behalf of the respondent/plaintiff with respect to mesne profits, has, however, still held that the mesne profits should be calculated at ₹155/- as claimed by the respondent/plaintiff.

5. The first argument of the learned senior counsel for the appellant before this Court is that the suit was not maintainable as the respondent/plaintiff was not the owner/landlord of the premises. In my opinion, this argument is without any merit inasmuch as the original owner/landlord, Smt. Usha Lall has executed and registered the agreement to sell dated 11.2.2009 with respect to the suit property in favour of the respondent/plaintiff. By this agreement to sell, which is a duly registered document, after paying the requisite amount of stamp duty, the original owner/landlord agreed to transfer the leased property to the respondent/plaintiff and also transferred constructive possession of the same to the respondent/plaintiff. In pursuance to the agreement to sell, registered on 11.2.2009, the original owner/landlord - Mrs. Usha Lall also wrote a letter dated 11.6.2008, Ex. PW1/5, to the appellant/defendant informing of the agreement to sell and stating that the lessee/tenant, i.e. the appellant/defendant has now to deal with the respondent/plaintiff for the suit property, including with respect to handing over possession or with respect to the security deposit.

As per Section 53A of the Transfer of Property Act, 1882, once there is an agreement to sell in writing signed between the parties and

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possession is delivered, then the prospective purchaser under the agreement to sell gets benefit of the doctrine of part performance whereby the original owner/landlord is prevented from claiming any right of ownership in the property as against the prospective purchaser. Before passing of the Act 48 of 2001 by the Legislature which amended various provisions of the Transfer of Property Act, 1882, Registration Act, 1908, Court Fees Act, 1870 as applicable to Delhi, there was a misuse of this provision of Section 53A of Transfer of Property Act, 1882 whereby in order to overreach the authorities with respect to stamp duty, registration and payment of 'unearned increase' to the superior lessor of the land, parties were entering into an agreement to sell and taking benefit of doctrine of part performance as per Section 53A. The Legislature consequently brought in Act 48 of 2001 whereby an agreement to sell falling under Section 53A could not be looked into unless the same be registered and the stamp duty paid thereon as per 90% value of the sale deed. For payment of stamp duty circle rates have been fixed in Delhi and on which rates stamp duty is paid. Therefore once an agreement to sell is duly registered with the necessary stamp duty having been paid, the prospective purchaser such as the respondent/plaintiff gets

Property Act, 1882. The decision of the Supreme Court in the case of *Suraj Lamp (supra)* was to prohibit those sets of transactions which fell foul of the erstwhile Section 53A before the same was amended by Act 48 of 2001. However, once, the requirement of existing Section 53A of Transfer of Property Act, 1882 is satisfied, i.e. the agreement to sell is duly registered and stamped, then, such agreement can definitely to be looked into and will not fall foul either of the existing/amended Section 53A of the Transfer of Property Act, 1882 or the judgment in the case of *Suraj Lamp (supra)*. I am therefore of the opinion that the respondent/plaintiff had definitely become the landlord of the premises entitling him to possession of the suit property on the basis of the agreement to sell registered on 11.2.2009. No doubt remains as to the respondent/plaintiff being the landlord once we look at atornment letter, Ex.PW1/5 dated 11.6.2008 addressed by Mrs. Usha Lall to the present appellant/defendant. Before this Court, in my opinion, the appellant/defendant ought to have filed a photocopy of this letter inasmuch as, this letter contains the endorsement of receipt thereof by the appellant/defendant which would have been clear from the photocopy by the appellant/defendant, however, only a typed copy of this letter dated 11.6.2008 has been filed before this Court. In any case, after perusal of the

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record with the learned senior counsel for the appellant, it becomes clear that there is no cross-examination of the witnesses of the respondent/plaintiff that the appellant/defendant/tenant did not receive this letter Ex.PW1/5 dated 11.6.2008 and nor is there any affirmative evidence led on behalf of the appellant/defendant that it has not received this letter dated 11.6.2008, Ex.PW1/5 from the original owner/landlord, Mrs. Usha Lall. An issue of atornment is not a matter of choice once rights in a property are transferred, and the original landlord directs the tenant to deal with the new owner/landlord. In the present case, in the face of the registered agreement to sell dated 11.2.2009 executed by the erstwhile owner/landlord in favour of the respondent/plaintiff and the atornment letter dated 11.6.2008, Ex. PW1/5, the appellant/defendant has no option but to take the respondent/plaintiff as a landlord of the premises. Merely contending that the appellant/defendant refuses to accept the respondent/plaintiff as the landlord of the premises, cannot take its case any further and the appellant/defendant is a tenant under the respondent/plaintiff. I also feel that the appellant/defendant has no business to dispute the fact that the respondent/plaintiff is the landlord inasmuch as the original owner/landlord herself is not disputing the fact that the respondent/plaintiff is the landlord.

6. The second issue which was urged on behalf of the appellant/defendant is that the property in question was not identifiable and therefore no decree could have been passed with respect to such a property. Reliance is placed in support of this argument upon *Nahar Singh vs. Harnak Singh & Ors. 1996 (6) SCC 699*.

In my opinion, even this argument raised on behalf of the appellant/defendant is also totally without substance. I would go to the extent of saying that this argument is an argument of desperation. Surely a tenant, who stays in a premises for many years; pays rent with respect to the same; enters into a lease deed with respect to the same and acts on the relationship of landlord and tenant qua the leased premises, cannot turn around and say that no decree for possession can be passed with respect to the tenanted premises because it is not identifiable. I may note that the respondent/plaintiff had led the evidence being the site plan, Ex.PW3/1, whereby the leased premises have been specifically identified at a point mark A. Learned senior counsel for the appellant argued that there are no dimensions given with respect to this portion which is shown as mark A, however, when I look at the site plan which is filed before this Court, I find that dimensions with respect to length and breadth of the leased premises are

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given, and they are definitely, in any case, identifiable for the decree to be executed. It does not lie in the mouth of the appellant/defendant/tenant to raise frivolous defences for refusing to comply with the decree for possession by stating that the property in question is not identifiable, although, the appellant/defendant has taken benefit of the lease and stayed in the leased premises, and which, as already stated above, has been identified in the site plan Ex.PW3/1. I therefore reject this argument urged on behalf of the appellant/defendant that the decree for possession could not be passed as the premises could not be identified.

7. The present appeal, challenging the decree for possession, is therefore dismissed so far as the challenge is laid to the decree for possession inasmuch as the decree in the present case is a severable decree in two parts, one for possession of the tenanted premises, and the other with respect to mesne profits of the tenanted premises. I have kept in mind the definition of the decree as provided under Section 2(2) CPC, and as per which, a decree includes a final determination of one cause of action or one relief as claimed by a party to a suit, i.e. a decree includes determination of one of the matters in controversy in the suit.

8. So far as the aspect of mesne profits are concerned, the
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arguments as have been addressed on behalf of the appellant/defendant are under three heads, i.e. one with respect to the period for which the same is payable, two qua the rate at which the same is payable, and thirdly the claim for adjustment of the security deposit. The learned senior counsel for the appellant/respondent argued that mesne profits have wrongly been held to be payable at ₹155/- per sq. ft. It was also argued that the mesne profits were not payable from July, 2008, but should be taken as payable only from the date of filing of the suit. On this aspect of mesne profits, it was also argued that the Trial Court has erred in not granting adjustment of the security deposit amount of ₹15,11,100/-.

9. On the aspect as to the date from when the mesne profits are payable, I do not find that there can be too much dispute inasmuch as the respondent/plaintiff/landlord has proved the legal notice, Ex.PW1/10 dated 14.7.2008, along with the various postal receipts with respect to the same. The appellant/defendant, in continuation of its trait in not filing crucial documents against it, has not sought to assist this Court either by filing this legal notice in this Court or the postal receipts which have been exhibited with respect to this legal notice, although, in the bulky file various other documents, pleadings, depositions have been filed. A reference to the RFA No.568/2011

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evidence which has been led in the case, and the cross-examination of the witnesses shows that though there is a denial of receipt of the notice on behalf of the appellant/defendant, however, once the necessary postal receipts have been proved and exhibited in the Trial Court, and more so it is not disputed by the appellant/defendant, that the address to which the notice is sent was not the address of the appellant/defendant, I would hold that the lease was determined by serving of the legal notice dated 14.7.2008. However, I agree with the arguments of learned senior counsel for the appellant that the mesne profits cannot definitely be granted for July, 2008, because a lease has to be terminated by a 15 days' notice in terms of Section 106 of the Transfer of Property Act, 1882 and therefore, I would hold that the mesne profits in this case would be payable not w.e.f. July, 2008 but w.e.f. 15.8.2008 giving a reasonable period for service of the notice dated 14.7.2008 and an expiry of 15 days thereafter. I may at this stage note that Section 106 of the Transfer of Property Act, 1882 was amended by Act 3 of 2003 by the Legislature whereby objections as to the notice not having validly terminated the tenancy by the date of termination ending with the tenanted month have been done away by the Legislature to declare that as long as a period of 15 days' expires prior to the filing of the suit, there

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cannot be objections to notice terminating tenancy as not being a valid notice of termination of tenancy.

10. There are however crucial aspects with respect to the issue of mesne profits, and with respect to which there prima facie is a case for issuance of notice in this appeal. I agree with the learned senior counsel for the appellant that once the Trial Court discarded the evidence which was led on behalf of the respondent/plaintiff being the lease deeds, Ex.PW1/18 to PW1/20, then, there was no other evidence to hold that the mense profits should be ₹155/- per month. Of course, I am only expressing a prima facie view, inasmuch as, I feel that possibly the lease deeds, Ex.PW1/18 to PW1/20 can be looked as evidence inasmuch as there is no cross-examination with respect to these lease deeds that these documents are bogus documents or that they are fabricated documents. Further, no objection as to exhibition of the documents has been taken at the stage at which the documents were exhibited, i.e. before including of cross-examination. In the present case, since there is no challenge to the exhibition to these documents before the cross-examination began, or possibly even later, therefore in view of the judgment of the Supreme Court reported as *R.V.E.*

Anr., 2003 (8) SCC 752 any objection to the exhibition and proof of documents is therefore deemed to have been waived by the appellant/defendant.

11. The argument of the learned senior counsel for the appellant that the appellant is also entitled to adjustment of security deposit is also an argument which has to be accepted in a limited manner. A security deposit is given to ensure that at the time of vacation of the premises, there are no dues of the appellant/defendant/tenant towards respondent/plaintiff/landlord therefore, if on the date of handing over of the possession by the appellant/defendant to the respondent/plaintiff/landlord, there are no dues either towards rent, or mesne profits as per today's order, or towards electricity or water charges or other maintenance charges, or other charges in terms of the lease deed, then the respondent/plaintiff will be bound to give adjustment with respect to the amount of security deposit towards the total claim of the respondent/plaintiff under the subject money decree, and as amended by today's orders.

12. I have held in the case of *M/s. M.C.Agarwal HUF vs. M/s. Sahara India & Ors.2011 (183) DLT 105* that even if a landlord has failed to lead evidence with respect to prevalent rents, yet in such circumstances,

this Court can take judicial notice of increase in rent of metropolitan cities, more so in commercial areas. In *M/s. M.C.Agarwal HUF(supra)*, the premises were also situated in Connaught Place and in fact on the same road, i.e. Kasturba Gandhi Road like in the present case. In *M/s. M.C. Agarwal HUF (supra)* case I have held that a 15% increase of rent every year should be payable by a tenant to a landlord. In the present case, lease commenced, though unregistered, for 3 years w.e.f. 1.7.2005. The so-called period of lease expired on 30.6.2008, therefore from 15.8.2008, the date of termination of tenancy, the mesne profits would become 15 % more than the agreed rate of rent ₹44/- sqr. per feet. For each year thereafter as per the judgment of the *M/s. M.C.Agarwal HUF (supra)* there will be a 15% increase over the last paid rent. Accordingly, while directing that the impugned judgment and decree so far as mesne profits are concerned, will remain stayed at ₹155/- per sqr. feet, however subject to further orders, the judgment and decree will operate for mesne profits commencing from 1.9.2008 with a 15% yearly increase cumulatively, i.e. 15% increase which will be payable from second year, third year, fourth year etc after the termination of tenancy will be 15% increase of the mesne profits on the total

etc respectively.

At this stage, learned senior counsel for the appellant states that at the admitted rate of ₹44/- per sqr. ft., the dues/charges have already been deposited in the trial court which the respondent/plaintiff can withdraw and the appellant agrees that the arrears of the difference of mesne profits which are payable from 1.9.2008 till date in terms of today's order, and future mesne profits in terms of today's judgment month-to-month would be paid to the respondent/plaintiff till the possession is handed over to the respondent/plaintiff. On payment to the respondent/plaintiff of such amount operation of the impugned judgment and decree qua mesne profits is stayed till further orders unless varied by the Court. This is however, without prejudice to the rights of the appellant/defendant inasmuch as, the appellant/defendant is aggrieved with respect to granting of a decree for possession with respect to the tenanted premises.

13. Accordingly, limited to the aspect of mesne profits, and in terms of the prima facie observations made above qua the mesne profits, let notice issue to the respondent on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 5th March, 2012.

Trial Court record be requisitioned. The amount in terms of today's
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judgment be paid by the appellant/defendant to the respondent/plaintiff within a period of 4 weeks from today.

14. The costs of ₹ 25,000/- in terms of order dated 8.11.2011 be now deposited within one week from today.

VALMIKI J. MEHTA, J.

DECEMBER 19, 2011

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