

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

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Date of decision: 18th December, 2013

+ RFA No.466/2013, CMs No.15423/2013 (for stay), 15422/2013 (for condonation of 909 days delay in re-filing the appeal) & 19694/2013 (for restoration of the appeal)

M/S KUSUM ENTERPRISES & ORS.

..... Appellants

Through: Mr. K.C. Mittal & Mr. A. Chauhan,
Advts.

Versus

VIMAL KOCHHAR & ANR.

..... Respondents

Through: Mr. R.S. Mahla, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree (dated 15.12.2010 of the Court of Additional District Judge (ADJ)-07, Central, Tis Hazari Courts, Delhi in CS No.191/2007 (ID No.02401C0235462007) filed by the respondents / plaintiffs) holding the rent / *mesne* profits payable by the appellants / defendants to the respondents / plaintiffs till 30.06.2008 @ Rs.60,000/- per month and @ Rs.6,000/- per day with effect from 01.07.2008 to 12.02.2009 with interest at 16%, without specifying from

which date to which date. The appeal is accompanied with an application for condonation of 909 days delay in re-filing the same.

2. Notice of the appeal and of the application for condonation of delay was issued and conditional stay granted and in response where to a sum of Rs.15,00,000/- is reported to have been deposited in this Court. The appeal was on 02.12.2013 dismissed in default of appearance of the appellants / defendants. The appellants / defendants filed an application for restoration and notice whereof was issued for yesterday. The counsel for the respondents / plaintiffs appeared and stated that though as per dicta of this Court in ***Brij Mohan Vs. Sunita*** 166 (2010) DLT 537, no case for condonation of long delay in re-filing the appeal is made out but subject to the appeal itself being heard, he has no objection to the appeal being restored to its original position and the delay in re-filing being condoned.

3. Accordingly, for the reasons stated, the appeal is restored to its original position and the delay in re-filing the appeal is condoned.

4. The counsels have been heard and the Trial Court record requisitioned in this Court perused.

5. The respondents / plaintiffs on 06.03.2007 instituted the suit from which this appeal arises, for ejectment of the appellants / defendants from an area of 3800 sq. fts. on the ground floor of property No.C-254, Maya Puri, Phase-II, New Delhi let out by the respondents / plaintiffs to the appellants / defendants, pleading:

- (i) that the said premises were let out for a period of two years with effect from 01.07.2006 vide three lease deeds, two dated 28.08.2006 and duly registered with the office of the Sub-Registrar, Delhi and the third dated 01.09.2006, duly attested by Notary Public, on total lease charges of Rs.60,000/- per month i.e. Rs.20,000/- per month under each of the three leases;
- (ii) that the appellants / defendants had failed to pay the entire legally recoverable arrears of rent and had paid rent at the rate of Rs.40,000/- per month only instead of at the rate of Rs.60,000/- per month;
- (iii) that the lease deeds provided for termination of the lease in the event of violation of any of the terms thereof;

- (iv) that the respondents / plaintiffs vide notice dated 08.01.2007 determined the tenancy of the appellants / defendants with effect from 28.02.2007 and called upon the appellants / defendants to deliver possession of the premises;
 - (v) though the said notice was duly served on the appellants / defendants but no reply was given thereto;
 - (vi) that the possession of the appellants / defendants of the premises with effect from 01.03.2007 was thus unauthorized and the respondents / plaintiffs in accordance with the lease deeds were entitled to recover *mesne* profits / damages for use and occupation at the rate of Rs.6,000/- per day;
- accordingly, the suit for ejectment / recovery of possession and for recovery, i) of arrears of rent and *mesne* profits till 28.02.2007 of Rs.2,81,400/-; and, ii) of *mesne* profits / damages for use and occupation with effect from 01.03.2007 till the date of delivery of possession at the rate of Rs.6,000/- per day, together with interest at 18% per annum from the date of institution of the suit and till realization was filed.

6. The appellants / defendants contested the suit, by filing a written statement, on the grounds:

(A) admitting only the two registered lease deeds each of which provided for payment of rent at the rate of Rs.20,000/- per month; and,

(B) denying that the appellants / defendants were in violation of any term of the lease deed as the appellants / defendants had paid / tendered rent at the rate of Rs.40,000/- per month less tax deducted at source.

7. Needless to state that the respondents / plaintiffs filed a replication controverting the contents of the written statement and reiterating the case in the plaint.

8. A perusal of the Trial Court record shows that during the pendency of the suit, a direction for payment of Rs.40,000/- per month less tax liable to be deducted at source was made and the unregistered and insufficiently stamped lease deed was impounded and sent to the Collector for assessing

the proper stamp duty and penalty of two times of the amount of deficiency in stamp duty was imposed.

9. On the pleadings of the parties, the following issues were framed in the suit on 29.11.2007:

- “1. *Whether the rent of premises was Rs.60,000/- per month or whether the Plaintiff is entitled to a sum of Rs.2,81,400/- as balance of arrears of rent from 01.07.2006 to 28.02.2007? (OPP)*
2. *Whether the tenancy of the defendant was duly terminated by the plaintiff, if so, its effect? (OPP)*
3. *Whether the Plaintiff, is entitled to possession of the ground floor of premises bearing No.C-254, Mayapuri, Phase-II, New Delhi? (OPP)*
4. *Whether the Plaintiff, is entitled to use and occupation charges at the rate of Rs.6,000/- per day or any other amount w.e.f. 01.03.2007?*
5. *Whether the Plaintiff, has filed the present suit after concealing material facts? If so, its effect? (OPD)*
6. *Relief.”*

10. Thereafter, the respondents / plaintiffs filed an application under Order 12 Rule 6 of the CPC for an order of ejectment on admissions and which application was allowed on 03.09.2008 and a decree of ejectment passed against the appellants / defendants. It is informed that in compliance therewith, possession of the premises was delivered on 13.02.2009. Thereafter, only the adjudication of rent / *mesne* profits remained and on which the parties went to trial.

11. The learned ADJ, in the impugned judgment, has found / observed / held:

- (I) that the respondents / plaintiffs had not indulged in any concealment;
- (II) that of the two registered lease deeds, one was for an area of 1800 sq. ft. and the other for an area of 2000 sq. fts. and the third unregistered lease deed was for the entire area of 3800 sq. fts.;
- (III) that it was the plea of the appellants / defendants that the third unregistered lease deed was a sham one;

- (IV) that though the third unregistered lease deed pertained to the same area to which the two registered lease deeds pertained but the intention behind creation of the three lease deeds was to provide for payment of rent at the total rate of Rs.60,000/- per month i.e. Rs.20,000/- per month under each of the three lease deeds;
- (V) the third un-registered lease deed was admittedly signed by the appellants / defendants;
- (VI) all the three lease deeds were admitted at the stage of admission / denial of documents;
- (VII) the Transfer of Property Act, 1882 does not require a lease deed to be necessarily in writing or by a registered document;
- (VIII) once the appellants / defendants principally agreed to take on lease 3800 sq. fts. at rent of Rs.60,000/- per month, they cannot be permitted to violate the said agreement, more so when the appellants / defendants got possession of the premises only upon execution of all the three lease deeds;

having availed fruits of the three lease deeds, the appellants / defendants were estopped from agitating the legality and veracity of the unregistered lease deed;

(IX) thus, the agreed rent of the premises was held to be Rs.60,000/- per month;

(X) that the respondents / plaintiffs were however not entitled to the shortfall in the rent paid for the months of July, August, and September, 2006 because in the cross-examination of the appellant / defendant, he had stated that the shortfall in rent of Rs.60,000/- for the months of July, August and September, 2006 stood received by the respondents / plaintiffs vide cheque dated 11.10.2006; the respondents / plaintiffs are not entitled to seek recovery of the shortfall in rent for the said months for this reason;

(XI) the respondents / plaintiffs were held entitled to recovery of rent at the rate of Rs.60,000/- per month for the months of December, 2006 and January and February, 2007 i.e. to a sum of Rs.1,80,000/-;

(XII) that all the three lease deeds contained a stipulation as under:

“Clause 5 : That in case due to any reason if the lease is not extended for further period, the lessee will hand over the possession of the premises by vacating peacefully to the lessor on or before the midnight of 30.06.2008. In case of default the lessee shall be liable to pay a sum of Rs.2,000/- per day as damages to the lessor for use and occupation of the premises”

(XIII) however the aforesaid stipulation was applicable only after the expiry of lease period on 30.06.2008 and not prior thereto, even in the event of earlier termination of the lease;

(XIV) the aforesaid stipulation was in accordance with Section 74 of the Indian Contract Act, 1872;

(XV) though the respondents / plaintiffs had not led any evidence to show that the property could fetch more than Rs.60,000/- per month for the period after 30.06.2008 but since the appellants / defendants had in each of the three lease deeds agreed to pay damages at the rate of Rs.2,000/- per day i.e. Rs.6,000/- per day, the appellants / defendants were liable to pay the same.

accordingly, it was held that the respondents / plaintiffs are entitled to agreed rate of Rs.60,000/- per month with effect from 01.03.2007 to 30.06.2008 and to Rs.6,000/- per day with effect from 01.07.2008 till the date of vacation of the premises on 13.02.2009.

12. The counsel for the respondents / plaintiffs has fairly admitted there is no evidence of *mesne* profits.

13. The Division Bench of this Court in ***National Radio and Electronic Company Ltd. Vs. Motion Pictures Association*** 122 (2005) DLT 629 has held that in the absence of proof of rate of *mesne* profits, *mesne* profits at a rate higher than the rate of rent by taking judicial notice of increase in rent cannot be given.

14. The controversy in this appeal is thus two fold. Firstly, whether in the face of the two registered lease deeds providing for payment of rent at the total rate of Rs.40,000/- per month, the direction for payment of rent / *mesne* profits for the period from December, 2006 till 30.06.2008 at the rate of Rs.60,000/- per month on the basis of additional sum of Rs.20,000/- being payable under the third unregistered lease deed is justified or not. Secondly,

whether in the absence of any evidence and invoking Section 74 of the Indian Contract Act, 1872, damages from 01.07.2008 till the date of vacation of the premises at the rate of Rs.6,000/- per day could be granted.

15. I am unable to sustain the finding of the learned ADJ of the total rent agreed between the parties being Rs.60,000/- per month instead of Rs.40,000/- per month as stipulated in the two registered lease deeds for the following reasons:

- (a) the unregistered lease deed is admittedly for the same premises for which the two registered lease deeds have been executed;
- (b) neither of the three lease deeds bears the date of execution thereof; however the two registered lease deeds were registered on 28.08.2006 and the unregistered lease deed bears the stamp dated 01.09.2006 of the Notary Public; the date of execution of the registered lease deeds is thus taken as 28.08.2006 and of the unregistered lease deed as 01.09.2006;
- (c) Section 91 of the Indian Evidence Act, 1872 provides that where the terms of a contract have been reduced in the form of

a document and where the matter is required by law to be reduced in the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself; Section 92 of the Evidence Act provides that where the terms of the contract required by law to be reduced in the form of a document have been proved according to Section 91, no evidence of any oral agreement between the parties for the purpose of contradicting, varying, adding to, or subtracting from its terms shall be admitted; though there are exceptions to both the said provisions but the same have not been invoked by the respondents / plaintiffs or their counsel and the case is not found to be falling in any of the exceptions;

- (d) it is also the settled position in law (See ***Chandrakant Shankarrao Machale Vs. Parubai Bhairu Mohite*** (2008) 6 SCC 745 and ***S.Saktivel Vs. M.Venugopal Pillai*** (2000) 7 SCC 104) that the terms of a registered document can be varied / altered by a registered document only; in ***Raval & Co. Vs. K.G. Ramachandran*** (1974) 1 SCC 424 it was specifically held that

any variation of rent reserved by a registered lease deed must be made by another registered instrument;

- (e) the learned ADJ has failed to notice the said binding provisions of law and the finding returned by the learned ADJ is contrary thereto;
- (f) a lease of immovable property for any term exceeding one year, as the instant leases were, as per Section 107 of the Transfer of Property Act, 1882 could be made only by a registered instrument; the finding / observation of the learned ADJ of there being no bar to make a lease orally is also contrary to law;
- (g) the leases for the period of two years were thus required in law to be reduced to the form of a document and were so reduced and the only evidence of the terms could be that document only and not other;
- (h) the plea and evidence of the respondents / plaintiffs of the total rent agreed for area of 3800 sq. fts. being not Rs.40,000/- per month as mentioned in the said lease deeds but being

Rs.60,000/- amounted to contradicting or varying the registered lease deeds;

- (i) even though the unregistered lease deed is recorded in the impugned judgment to have been impounded and the deficient stamp duty penalty having been paid thereon, but the same will still not cure the defect of non registration;
- (j) Section 49 of the Registration Act, 1908 prohibits a document required to be registered from being received as evidence of any transaction affecting such property unless it has been registered. The unregistered lease deed, even if had been cured from the defect of deficiency of stamp duty thus could not have been received in evidence; the rent in a lease deed cannot be a collateral transaction; reference if any required in this regard can be made to ***K.B. Saha & Sons Pvt. Ltd. Vs. Development Consultant Ltd.*** (2008) 8 SCC 564;
- (k) I am surprised that the learned ADJ has glossed over the aforesaid mandatory provisions of law; and,

- (l) there could be no estoppel against law; the Supreme Court in ***Raghunath Rai Bareja Vs. Punjab National Bank*** (2007) 2 SCC 230 has held that equity cannot defeat the law;
- (m) even otherwise, the plea of the respondents / plaintiffs amounts to the respondents / plaintiffs having indulged in violation of laws, obviously for the purpose of saving of stamp duty and income tax and have no equity in their favour and are rather barred from any relief on the said ground on the principle of *pari delicto*.

16. I am also of the view that the reasoning of the learned ADJ of the respondents / plaintiffs being entitled to *mesne* profits / damages for use and occupation with effect from 01.07.2008 and till the date of delivery of possession at the rate of Rs.6,000/- per day, on the basis of a clause to the said effect in the lease deeds is erroneous. The said finding again overlooks the consistent stream of judgments from ***Fateh Chand Vs. Balkishan Dass*** AIR 1963 SC 1405 till the dicta of the Division Bench of this Court in ***Vishal Engineers & Builders Vs. Indian Oil Corporation*** MANU/DE/6829/2011 holding that Section 74 of the Contract Act merely

provides the maximum compensation which could be given for breach of contract and without any evidence of loss, merely because of a penalty clause, such penalty cannot be awarded.

17. Thus, both the questions entailed in the appeal are decided in favour of the appellants / defendants and against the respondents / plaintiffs.

18. The judgment and decree impugned in the suit is thus set aside and substituted by a judgment and decree in favour of the respondents / plaintiffs of recovery of arrears of rent / *mesne* profits from the appellants / plaintiffs with effect from the month of 01.12.2006 till the date of vacation of the premises i.e. 13.02.2009 at the rate of Rs.40,000/- per month. The appellants / defendants shall of course be entitled to adjust from the amounts so becoming due, the amounts already paid to the respondents / plaintiffs. The respondents / plaintiffs shall also be entitled to interest at the rate of 9% per annum on the amounts so found due, with effect from 13.02.2009 till the date of payment.

19. No costs. Decree sheet be prepared.

20. Since it is not evident from the record as to how much amount has been paid by the appellants / defendants to the respondents / plaintiffs, it is deemed proper to list the matter before the worthy Registrar General for determination on the said aspect. The parties to appear before the worthy Registrar General on 28th January, 2014. The appellants / defendants to at least one week before the said date, file with advance copy to the counsel for the respondents / plaintiff, a statement showing the payments if any made for the aforesaid period together the proof thereof. If the respondents / plaintiffs controvert the same, the worthy Registrar General shall adjudicate the said dispute and upon adjudication thereof, the amount if any found due to the respondents / plaintiffs as per decree of this Court shall be got paid to the respondents / plaintiffs out of the amount of Rs.15,00,000/- deposited by the appellants / defendants in this Court and the balance amount if any together with interest accrued thereon shall be refunded to the appellants / defendants.

RAJIV SAHAI ENDLAW, J

DECEMBER 18, 2013

‘gsr’..