

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

**Date of decision: 25<sup>th</sup> July, 2013**

+ **RFA 308/2013 & CM No.10197/2013 (for stay)**

**M/S MODI INFOSOLE PVT. LTD. .... Appellant**

Through: Mr. L.B. Rai, Advocate.

Versus

**MRS SUKHDEV KAUR .... Respondent**

Through: Mr. Arjun Harkauli, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**JUSTICE RAJIV SAHAI ENDLAW, J.**

1. The appeal impugns the judgment and decree dated 27<sup>th</sup> February, 2013 in suit No.04/2012 of Additional District Judge (ADJ)-05, Saket Courts, New Delhi on admissions, of ejectment of the appellant from commercial shop No.103 on the first floor of building No.88, Skipper Corner, Nehru Place, New Delhi.

2. The appeal came up first before this Court on 10<sup>th</sup> July, 2013 when the counsel for the respondent being on caveat appeared and the Trial Court record was ordered to be requisitioned.

3. The Trial Court record has been received. The counsels have been heard.

4. The respondent instituted the suit from which this appeal arises, pleading:

(i) that she is the landlady and owner of the aforesaid commercial

shop which had been let out by the respondent/plaintiff to the appellant/defendant;

(ii) that the lease of the appellant/defendant was renewed for a period of three years by a Lease Deed dated 10<sup>th</sup> April, 2002 at a monthly rent of Rs.16,293/- besides electricity, water and other municipal and society charges;

(iii) that the term of the said lease expired on 29<sup>th</sup> February, 2005 and no new lease had been signed between the parties but the appellant kept paying the monthly rent as per the old Lease Deed and continued to comply with the conditions contained therein;

(iv) that the appellant/defendant was thus a month to month tenant in the premises and the respondent/plaintiff got issued a legal notice dated 30<sup>th</sup> September, 2010 to the appellant/defendant, terminating the tenancy of the appellant/defendant with respect to the said commercial shop after 15 clear days from the date of receipt of the notice and called upon the appellant/defendant to thereafter hand over vacant, peaceful and physical possession of the premises; in the said notice, it was also informed to the appellant/defendant that if it fails to vacate the premises inspite of termination of its tenancy, it would be liable for mesne profits/damages for use and occupation at Rs.80,000/- per month which was the prevalent letting value of the said commercial shop; that the appellant/defendant was further informed that any payment remitted by it after the termination of tenancy, would be adjusted towards part-payment of mesne profits/damages for use and occupation of the premises;

(v) that the appellant/defendant refused to vacate inspite of receipt

of the notice and hence the suit.

5. The appellant/defendant contested the suit by filing a written statement. However, it is not deemed expedient to record herein all the pleas taken in the written statement as the counsel for the appellant/defendant has challenged the impugned judgment and decree on two aspects only; firstly, that inspite of denial by the appellant/defendant in its written statement of receipt of legal notice dated 30<sup>th</sup> September, 2010 or any other notice from the respondent/plaintiff, a decree for ejectment on admissions has been passed; and, secondly, that in view of the alternative plea taken in the written statement of waiver of the notice of termination of tenancy, no opportunity has been given to the appellant/defendant to prove the same and no decree on admissions could thus have been passed. The contents of the written statement in support of the said pleas urged before this Court, would be considered at the appropriate place.

6. The respondent/plaintiff filed a replication to the written statement of the respondent/plaintiff and the Trial Court on the basis of the pleadings of the parties proceeded to frame issues. However, the respondent/plaintiff before leading any evidence applied under Order XII Rule 6 of the Civil Procedure Code (CPC), 1908 and after the appellant/defendant had filed a reply to the said application, the learned ADJ has vide impugned judgment and decree allowed the application of the respondent/plaintiff under Order XII Rule 6 of CPC and axiomatically passed a decree for ejectment on admissions.

7. The counsel for the appellant/defendant, on the first of the two submissions made, has urged that in view of the categorical denial of receipt

of the notice, no decree for ejectment without the respondent/plaintiff proving the same, could have been passed. Reliance is placed on ***Jasbir Sobti Vs. Surender Singh*** 135 (2006) 658 (DB) and ***Crown Commercial House Vs. ICICI Bank*** 162 (2009) DLT 427 in this regard and paragraphs of the said judgment relating to the principles applicable in applying Order XII Rule 6 of CPC have been read out in the Court.

8. A perusal of the impugned judgment and decree shows the learned ADJ on this aspect to have referred to ***M/s. Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha (HUF)*** 183 (2011) DLT 712 laying down that even service of the summons of the suit can be treated as a notice under Section 106 of the Transfer of Property Act, 1982 and even if it were to be assumed that the notice pleaded by the respondent/plaintiff of termination of tenancy having been served on the appellant/defendant had not been served, though presumption of its service is required to be drawn, the tenancy stood terminated by filing of the suit. It was thus held that the plea of the appellant/defendant, of the suit for ejectment having been filed without determination of tenancy, did not require any trial.

9. In this regard, I may notice that the suit was instituted on 27<sup>th</sup> May, 2011; the summons of the suit were issued to the appellant/defendant on 6<sup>th</sup> July, 2011 for 2<sup>nd</sup> September, 2011; though the appellant/defendant was served with the said summons but did not file the written statement within the prescribed time and the suit was accordingly vide order dated 3<sup>rd</sup> October, 2011 listed for evidence of the respondent/plaintiff; that the appellant/defendant thereafter sought review/recall of the order closing its right to file the written statement and which application was allowed vide

order dated 17<sup>th</sup> December, 2011 and after nearly one and a half years thereafter, the judgment and decree aforesaid on admissions has been passed. It would thus be seen that the appellant/defendant, during the pendency of the suit itself for nearly two years, had notice that the respondent/plaintiff was not wanting to continue with the appellant/defendant as tenant.

10. It has in the circumstances been enquired from the counsel for the appellant/defendant as to what is the error in the reasoning aforesaid of the learned ADJ required to be corrected in this appeal.

11. The only argument of the counsel for the appellant/defendant is that the judgment in *M/s. Jeevan Diesels & Electricals Ltd.* relied upon by the learned ADJ is a judgment after full trial and thus can apply only after full trial has been conducted and not prior thereto.

12. The aforesaid argument, to say the least, is preposterous. Once the law is admitted to be, that service of summons of the suit for ejectment itself acts as determination of tenancy, it matters not whether the said law was laid in a case without recording evidence or after recording evidence and the applicability of the said law is not dependant upon the formality of trial to be completed.

13. Notice in this regard may be taken of the lead judgment on the said aspect of the Apex Court in *Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF)* (2008) 2 SCC 728. Thereafter, a Division Bench of this Court has also taken the same view in *Shri Ram Pistons & Rings Ltd. Vs. C.B. Agarwal (HUF)* MANU/DE/2381/2008.

14. There is thus no merit in the first submission aforesaid of the counsel

for the appellant/defendant.

15. The second contention of the counsel for the appellant/defendant is of the decree for ejectment on admissions being erroneous for the reason of the appellant/defendant having not been given an opportunity to prove waiver of the notice of termination of tenancy by the respondent/plaintiff. The waiver alleged is of a date prior to the institution of the suit. Though, in the light of the aforesaid position in law, making a notice of termination of tenancy irrelevant and holding the service of the summons of a suit for ejectment itself as sufficient notice, the argument of waiver of notice of termination also fails, but it is appropriate to deal with the argument raised.

16. The counsel for the appellant/defendant in this regard has relied on paras 5 to 7 of the preliminary objections in the written statement of the appellant/defendant which are as under:

*“5. That admittedly the lease for the suit property was executed on 10.04.2002 for a period of 3 years @ a monthly rent of Rs.16,293/- inclusive of the TDS and exclusive of electricity, water charges. Therefore, the lease became due for renewal on 09.04.2005. In April, 2005 the Plaintiff renewed the lease on the same terms and conditions which were agreed upon earlier with an increase of 15% in the monthly rent. The enhanced monthly rent of Rs.18,737/- was paid to the Plaintiff by the Defendant for the period April, 2005 to February, 2008. Again, in March, 2008, the lease was renewed by the Plaintiff for a further period of 3 years with 15% enhancement in the monthly rent. The enhanced monthly rent of Rs.21,548/- was paid by the Defendant company to the Plaintiff for the period of March, 2008 to February, 2011. The rent was further increased by 15% to Rs.24,780/- per month w.e.f. March, 2011 and the lease renewed for further period of 3 years. It is clear by the conduct of the Plaintiff in renewing the lease at regular intervals with 15% enhancement in the monthly rent and*

*further accepting the enhanced rent, that the lease has not expired till date and is still subsisting. It is pertinent to mention that this renewal has taken place after the date of the alleged notice and the date of filing of the present suit. Thus, the alleged notice dated 30.09.2010 stood waived under Section 113 of the Transfer of Property Act, 1882, with the express consent of the Plaintiff and by her accepting the enhanced rent after the filing of the suit. Thus, the suit of the Plaintiff is liable to be dismissed.*

6. *That alternatively, the suit of the Plaintiff is also barred under Section 116 of the Transfer of Property Act, 1882, as the Plaintiff has accepted the enhanced rent from the Defendant after the date of the alleged notice and the filing of the present suit. This contention is without prejudice to the objections stated herein above.*

7. *That admittedly the Plaintiff kept on accepting the rent and even enhanced the rent after the alleged expiry of the lease period, which speaks volume of the fact that the Plaintiff never had the intention of evicting the Defendant and the tenancy stood renewed for a period of 3 years w.e.f. March, 2011. Thus, on this ground also the suit is liable to be dismissed."*

17. The counsel for the appellant/defendant has relied on **J.S. Panesar Vs. Santokh Singh** 169 (2010) DLT 56, para 4 whereof is as under:

*"4. Waiver of notice by conduct is a well known concept in law. The acceptance of rent after expiry of notice by itself may not necessarily constitute a waiver but if the conduct of the parties goes to show that the parties intended to waive the notice and create a new tenancy, the waiver can be inferred from such conduct. In the present case when the notice was served the rent was Rs. 25/- p.m. This rent continued from November, 1998 till October, 2001 when at the request of the landlord Smt. Bhupinder Kaur increased rent from Rs. 25/- to Rs. 45/-. That shows that the parties had given a go-bye to notice of termination of the tenancy and the landlord considered that let*

*Smt. Bhupinder Kaur continue as a tenant & created a new relationship of tenancy with her by agreeing to higher rent. If the landlord had continued accepting rent of the premises under protest and had only insisted upon statutory increase by serving a notice, reminding the tenant that she was living in the premises because of statutory protection, the case would have been different but here is a case where after service of notice the landlord requested the tenant to increase the rent from Rs. 25/- to Rs. 45/-. The tenant agreed to the same and thus a new tenancy got created in respect of the same premises at monthly rent of Rs. 45/-. I consider that this conduct sufficiently reflects waiver on the part of the landlord. Under Section 113 of Transfer of Property Act, a notice stands waived on an act on the part of person giving it, showing an intention to treat the lease as subsisting, provided there is express or implied consent of the person to whom it is given. In the present case, once the landlord intended to continue the tenancy with Smt. Bhupinder Kaur at increased rent and Smt. Bhupinder Kaur agreed to it, the notice stood waived. I, therefore consider that there are no merits in this petition. The petition is hereby dismissed.”*

Reference in this regard is also made to **Sarup Singh Gupta Vs. S. Jagdish Singh** (2006) 4 SCC 205 and **Bhuneshwar Prasad Vs. United Commercial Bank** (2000) 7 SCC 232.

18. Though, it is evident from para 4 set out hereinabove of **J.S. Panesar** itself that to constitute a plea of waiver, there has to be an averment of an agreement and a unilateral act of tender of rent does not constitute waiver but it has nevertheless enquired from the counsel for the appellant/defendant whether not there are judgments of the Courts holding that such unilateral tender and acceptance of rent does not constitute waiver. The counsel accepts the said legal position (and for which reference can be made to **Sarup Singh Gupta** supra cited by the counsel himself and recent dicta of

this Court in *Parashottam Sarup Aggarwal (HUF) Vs. Dena Bank* CS(OS) No.398/2010 decided on 25<sup>th</sup> February, 2013 MANU/DE/0559/2013) but upon being asked as to show the plea in the written statement of any fresh agreement having been arrived at between the parties, is unable to point out any. All that is argued is that upon being given an opportunity of trial, the appellant/defendant would show the conduct of the respondent/plaintiff of having waived the notice.

19. In this regard it may be noticed that the respondent/plaintiff in her replication to para 5 aforesaid of the preliminary objections in the written statement of the appellant/defendant had pleaded that she had in her notice of termination of tenancy itself informed the appellant/defendant “that any amount deposited by the defendant in her account thereafter shall be adjusted towards unauthorized use and occupation. Mere deposit of monies into the account of the plaintiff does not mean that the plaintiff had accepted the same towards such rent as is sought to be alleged.”

20. The counsel for the appellant/defendant inspite of the aforesaid specific plea in the replication is unable to state whether the payment of rent was by deposit in the bank account of the respondent/plaintiff, as expressly pleaded in the replication.

21. A minute perusal of the plea aforesaid of the appellant/defendant in the written statement shows the plea to be of, increase by 15% in rent being in accordance with the clause to the said effect in the Lease Deed executed between the parties for the period from the year 2002 to 2005 and not account of any fresh agreement between the parties. The plea is thus of a unilateral increase of rent by the appellant/defendant by 15% every three

years. Merely because the respondent/plaintiff/landlady, inspite of the lease having lapsed in the year 2005, did not take any action for ejectment of the appellant/defendant and continued to receive the rent as tendered does not amount to a fresh agreement between the parties. Though the appellant/defendant in para 5 supra has pleaded that the respondent/plaintiff “in April 2005.....renewed the lease on the same terms and conditions....” but for the subsequent period there is no such plea also and all that is pleaded is that “the rent was further increased by 15% to Rs.24,780/- per month with effect from March, 2011 and the lease renewed for a further period of three years”.

22. The settled position in law is that by mere increase in rent, the lease does not stand renewed and the tenant remains a tenant from month to month. I do not find the appellant/defendant to have pleaded any fresh agreement having been arrived at between the parties in March, 2011 for renewal of the lease.

23. I have recently in judgment dated 14<sup>th</sup> May, 2013 in CS(OS) No.566/2012 titled ***Tejinder Singh Barhmi Vs. The Punjab State Cooperative Milk Producers Federation Ltd.,*** relying *inter alia* on the same judgments as relied upon by the appellant, held that deposit of cheques in bank account of the landlord does not amount to waiver of notice of determination of tenancy. Reference can also be made to ***Shanti Prasad Devi Vs. Shankar Mahto*** (2005) 5 SCC 543 also laying down that mere acceptance of rent for subsequent months in which the lessee continued to occupy the premises cannot be said to be a conduct signifying ‘assent’ to the continuance of the lessee even after the expiry of the lease period and that

there can be no “implied renewal by holding over on mere acceptance of rent offered by the lessee.”

24. There is thus no merit in the second contention also of the counsel for the appellant/defendant.

25. Resultantly, the appeal is dismissed. The appellant/defendant inspite of settled position in law and without having raised any substantial argument, having taken sufficient time of this Court is also burdened with costs of this appeal of Rs.20,000/- payable to the respondent/plaintiff within four weeks. If the costs are not so paid, the same shall be recoverable in execution.

Decree sheet be drawn up.

Copy of this order be given dasti.

**RAJIV SAHAI ENDLAW, J.**

**JULY 25, 2013**

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