

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

+ RSA No. 91/2004

% 3rd March, 2014
NARESH CHADHA & ORS Appellants
Through: Mr. Amitabh Narayan, Adv.

VERSUS

DHARAMVEER SINGH & ORS. Respondents
Through: Mr. J.C.Mahindro, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This regular second appeal is filed by the plaintiff against the judgment of the first appellate court dated 30.1.2004 which has allowed the appeal filed by the defendants against the judgment of the trial court dated 18.2.2003. The trial court by its judgment dated 18.2.2003 had decreed the suit for possession filed by late Smt. Ram Dulari and who is now represented by the appellant herein.

2. The ground on which the first appellate court allowed the appeal of the defendants was that the original tenant Sh. Diwan Singh at the time of his death was a contractual tenant since his contractual tenancy was not

terminated during his life time by sending him a notice under Section 106 of the Transfer of Property Act, 1882, the contractual tenancy rights stood inherited by all the legal heirs of deceased Sh. Diwan Singh as per the Hindu Succession Act, 1956 and therefore since the legal heirs were tenants under the Delhi Rent Control Act, 1958, the suit for possession will not lie in the civil court in view of Section 50 of the Delhi Rent Control Act.

3. The relevant observations of the first appellate court in this regard are contained in the following words of the first appellate court :

I have considered the rival contentions and have carefully gone through the record of this case. PW6 Naresh Kr. Chadha is the main witness of the plaintiffs who has appeared before the Ld. Trial Court. In his examination in chief recorded on 15.12.97 he had stated that during the life time of Sh. Diwan Singh, his tenancy was terminated. He sought to place on record a photocopy of the notice vide which the tenancy was alleged to have been terminated (Mark-C). The exhibition of this notice was objected to by the other party. Apart from this, there is no evidence on record on behalf of the plaintiffs that a notice of termination of tenancy was duly served upon Diwan Singh. Mark-C, the alleged notice is reported to have been sent by Sh. Prem Sagar Gupta, adv. in the month of February 1973 under instructions from Smt. Ram Dulari. The plaintiffs have neither examined Ram Dulari nor have examined Sh. Prem Sagar Gupta, the Adv. who had sent this notice. The plaintiffs have also not placed on record any postal receipt of AD card vide which the said notice had been served upon Diwan Singh. Therefore, there is no evidence on record to prove that a notice of termination of tenancy was actually sent and served upon Diwan Singh, the actual tenant. As already stated there is no other evidence on record to prove that tenancy of Diwan Singh was terminated during his life time. The defendants on their part had denied that a notice of termination of tenancy had

been served upon Diwan Singh during his life time. I, therefore, hold that Ld. Lower court had fallen in error in holding that the tenancy of Diwan Singh had been terminated during his life time. Since it has not been proved on record that the tenancy of Diwan Singh had been terminated during his life time, it must be held that he had died as a contractual tenant rather than a statutory tenant. There is no dispute with regard to the facts that Diwan Singh had died issueless and his wife had pre-deceased him. There is overwhelming evidence on record that Khacheru Mal, the brother of Diwan Singh had come to stay with him in the suit property during his life time along with his family. On the death of Diwan Singh, as a contractual tenant, the tenancy was inherited by his brother Khacheru Mal (See *Ganesh Trivedi vs. Sundar Devi & others* (2002) 2 SCC 329). On the death of Khacheru Mal, the tenancy was inherited by his family members including the present appellant. It has, therefore, to be held that there was a relationship of landlord and tenant between the parties. The rent of the suit premises was admittedly less than Rs.3500/- P.M. The tenancy was, therefore, protected under the provisions of Delhi Rent Control Act. The Civil Court had no jurisdiction to entertain and try the present suit U/s. 50 of Delhi Rent Control Act. I, therefore, reverse the findings of the Id. Trial Court on issue No.2 and also hold that the plaintiff is not entitled to a decree of possession, as prayed for. The judgment dated 18.2.2003 passed by the Ld. Civil Judge, is hereby set aside. Lower court record be sent back. File be consigned to record room.” (underlining added)

4. It is trite that under the Delhi Rent Control Act, a tenant as is defined under Section 2(1) of the Delhi Rent Control Act, 1958, is a person who inherits the rights of a statutory tenant qua residential premises. So far as commercial premises are concerned it is now settled law in Delhi by virtue of judgment of *Gian Devi Anand vs. Jeevan Kumar and Ors.*, 1995 (2) SCC 683 that rights of a commercial tenant are inherited by all the legal

heirs under the Hindu Succession Act and not by the limited legal heirs as specified under Section 2(1) of the Delhi Rent Control Act with respect to residential premises. The effect of Section 2(1) is that where the contractual tenancy as regards residential premises of a tenant is terminated in his life time, the tenancy rights are not inherited by all the legal heirs specified under the Hindu Succession Act but only by such family members who are specified in Section 2(1). Also such persons specified under Section 2(1) must be those who were residing with the deceased tenant at the time of his death and who must be financially dependent upon him. In case the persons are financially independent, such persons have right only for staying upto one year in the premises after the death of the original tenant whose contractual tenancy was terminated in his life time. In case, contractual tenancy of tenant of residential premises is not terminated during the life time of a tenant, in such circumstances, the rights are not inherited by limited persons specified in Section 2(1) and tenancy rights would be inherited by all the legal heirs under the Hindu Succession Act i.e for limited inheritance under Section 2(1) it is necessary in the life time of tenant contractual tenancy must be terminated by serving of a notice under Section 106 of the Transfer of Property Act, 1882. In effect the rights of inheritance

of a commercial tenancy and a residential tenancy where the contractual tenancy rights are not terminated in the life time of the tenant, are the same.

5. In the present case as the aforesaid observations of the first appellate court will show, the appellants failed to lead any evidence whatsoever of service of the legal notice terminating the contractual tenancy of late Diwan Singh in his life time. No proof was filed of service of the alleged notice of February 1973, terminating the tenancy. Also, the Advocate who issued notice was not examined, though I doubt that even the examination of Advocate (or Ram Dulari for that matter) would have made any difference to the factum of actual service of the notice terminating tenancy, once service of notice is denied by the defendants and not proved to be served.

6. In view of the above I do not think that there is any illegality whatsoever in the judgment of the first appellate court inasmuch as once the contractual tenancy of residential premises is not terminated during the life time of the tenant, all persons who are legal heirs under the Hindu Succession Act will inherit the tenancy rights of the residential premises.

7. At this stage I must note that before 1979 as regards proceedings for eviction of tenants under State Rent Control Acts (i.e not in suits filed in civil courts) there were conflicting judgments of the Supreme Court as to whether a tenant's contractual tenancy ought to be terminated before

eviction petition is filed under the respective Rent Control Acts of the different States. Whereas one set of judgments required that the contractual tenancy must be terminated before filing of an eviction petition on the grounds of eviction as specified in the Rent Control Acts, other set of judgments had held that no notice terminating contractual tenancy was required. The matter was then referred to a Seven Judges Constitution Bench of the Supreme Court in the case *V. Dhanapal Chettiar Vs. Yesodai Anmal (1979) 4 SCC 214*. In *V.Dhanapal's* case (*supra*), the Constitution Bench of Seven Judges held that for filing of a petition for eviction of a tenant under the State Rent Control Acts, no notice terminating the tenancy is required to be served upon the tenant terminating his contractual tenancy as a pre-condition for filing of eviction proceedings under the State Rent Control Acts. This judgment which is relied upon on behalf of the appellant to contend that no notice is required for filing of a suit for possession against a tenant and the contractual tenancy terminates on filing of the suit is misconceived because in the present case the suit is filed in the civil courts and proceedings are not for eviction of a tenant under the Delhi Rent Control Act. As suit for possession is filed in a civil court where the defendant is not a tenant under the Delhi Rent Control Act falling within Section 2(1). In the present case, the tenant had already expired when the suit for possession was

filed and during his life time his contractual tenancy was never terminated. The pre condition for the coming into existence of limited succession of tenancy rights of residential premises under Section 2(l) is that the contractual tenancy of residential premises is terminated in the life time of the tenant. Tenants under the Delhi Rent Control Act in spite of termination of their contractual tenancy continue to have statutory protection against eviction and such tenants were called as statutory tenants (as differentiated from contractual tenants)i.e tenants having statutory protection of the different States Rent Control Statutes. Accordingly, in such circumstances, the Seven Judges Constitution Bench held in the *V. Dhanpal's case (supra)* that for filing of an eviction petition on any of the grounds on the basis of which eviction can be ordered of the tenant under the State Rent Control Acts no notice is required before filing of an eviction petition on the grounds as specified under the Rent Control Acts inasmuch as the tenancy comes to an end only on passing of the final eviction decree/ order and not because of terminating of the contractual tenancy. Therefore, the judgment of *V. Dhanpal's case (supra)* has no application to the determination of the issue as to limited inheritance of the tenancy rights under Section 2(l) and the limited rights under which Section comes into effect only on the contractual tenancy of residential premises of a tenant being terminated in his life time,

and only thereafter the limited tenancy rights are inherited in favour of the limited persons has found in Section 2(1). Accordingly, I reject the contention that no notice was required for filing of the suit in the civil court in view of *V. Dhanpal Chettiar's case (supra)*

8. The next argument which is argued on behalf of the appellant is that onus of issue no. 2 was upon the defendants and, therefore, it was for the defendants/respondents to prove that the notice was not served. This argument is also misconceived for the reason that merely because an onus is wrongly put will not mean that the onus was on the defendants to show that notice was not served. As per the pleadings, service of notice terminating contractual tenancy allegedly of February 1973 was denied by the defendants. Accordingly, onus was squarely upon the plaintiff/appellant and in any case issue of onus pales into insignificance once evidence is led on behalf of both the parties and as per the evidence led on behalf of both the parties it is shown that the notice terminating tenancy of February 1973 was never served upon late Diwan Singh. In this regard I would also reject a related argument urged on behalf of the appellant that since the evidence of the main witness who is the defendant in the case, namely, Dharamveer Singh cannot be read as his evidence was closed, notice is thus proved to have been served, is an argument again without merit because the issue is

squarely and only with respect to the service of notice of termination of tenancy and it will make no difference that the evidence of DW-2 stood closed.

9. The final argument which is urged on behalf of the appellant is that the tenancy came into existence before the passing of the Delhi Rent Control Act, and therefore, there was no requirement of serving a notice under Section 106 of the Transfer of Property Act for limiting the tenancy rights as per Section 2(l) of the Act. What is essentially argued is that since tenancy was first created in 1935 and the Transfer of Property Act came into effect in Delhi after 1962, there was hence no requirement of terminating the tenancy of 1935 by means of a notice under the Transfer of Property Act which came into force in 1962. Once again this argument is misconceived because the rights which the appellants/plaintiffs claimed are as per Section 2(l) of the Delhi Rent Control Act. Once rights are claimed as per a particular section of a particular statute, ingredients of that provisions have to be specified. The ingredient of that provision being Section 2(l) is that the contractual tenancy had to be terminated in the life time of the tenant Diwan Singh. Diwan Singh died in 1977. Transfer of Property Act, 1882 was applicable to Delhi in 1977. Contractual tenancy therefore had to be terminated as a precondition of coming into application of Section 2(l) of the Act for the

plaintiffs to succeed in their case that the tenancy rights of Diwan Singh were not inherited by anyone inasmuch as Diwan Singh had died issueless and his wife had pre-deceased him. Therefore, this argument urged on behalf of the appellants is also misconceived and is accordingly rejected.

10. Counsel for the appellants argued that the first appeal filed before the first appellate court was barred by limitation and the appellate court should have taken notice of this fact under Section 3 of the Limitation Act to dismiss the first appeal as barred by time. However, when a query was put to the counsel for the appellants in this Court as to whether this argument was urged before the first appellate court, counsel for the appellants conceded that no such argument was raised before the first appellate court. Accordingly, once no such argument is raised obviously the issue of limitation even if it arose stood waived inasmuch as there would be an acceptance by deeming condonation of delay in filing of the appeal. A right which exists in favour of the parties can surely be waived and it is not unknown that delay in filing of an appeal is condoned on account of concession made by the person who is entitled to object to the delay in filing of the appeal. This argument is also therefore rejected.

11. In view of the above no substantial question of law arises under Section 100 CPC. The appeal is, therefore, dismissed, leaving the parties to bear their own costs.

MARCH 03, 2014
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VALMIKI J. MEHTA, J.