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

+ **FAO 92/2013 & CM 3080/2013 (Stay) and FAO 94/2013**

% 2nd April, 2014

MAHENDER KUMAR GARG Appellant
Through: Mr. K.S. Singh, Ms. Tripta, Advocates

VERSUS

HARISH NAGPAL Respondent
Through: Mr. Mahendra Singh, Advocate for
Respondent with respondent Harish Nagpal, in
person.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. These first appeals are filed under Order 43 Rule 1(u) read with Section 104 CPC, 1908 impugning the order of the first appellate court dated 9.1.2013. The first appellate court has dismissed the application filed by the appellant/defendant/tenant under Order 41 Rule 19 CPC and Section 5 of the Limitation Act, 1963 for restoration of the first appeals which were dismissed in default vide order dated 26.3.2011.

2. I may note that ordinarily courts are lenient, and even this Court would have been lenient in hearing granting of the first appeal on merits before the first appellate court, but, the facts of the present cases persuade me not to allow these appeals inasmuch as appeals are by a recalcitrant tenant who has no protection of the Delhi Rent Control Act, 1958 but obdurately continues to illegally stay in the suit premises belonging to the respondent/landlord being property no. B-529, Sudershan Park, New Delhi situated on 45 square yards plot.

3. Two suits were decided by the trial court vide its judgment dated 8.8.2006. The first suit was a suit No. 263/2000 for injunction filed by the appellant/plaintiff claiming relief of injunction that he should not be dispossessed without due process of law as he is a tenant at a rent of Rs. 800/- per month in the suit property. Second suit was a Suit No. 844/2002 filed by the respondent/plaintiff for possession/recovery of rent and mesne profits against the appellant/tenant.

4. The trial court held that the rate of rent of the suit premises was not Rs. 800/- as contended by the appellant/tenant, but was Rs. 5000/- as was the case of the respondent/landlord and hence the appellant had no protection of the Delhi Rent Control Act once the rent was more than Rs.3500/- pm. In

this regard, trial court has referred to the rent note which was proved as Ex. PW-1/1/ DW-1/1, and also that the appellant/defendant in cross-examination admitted his signatures on this rent note. The relevant observations of the trial court are contained in paras 8 to 8.6 of its judgment dated 8.8.2006 and which paras read as under:

“8. Onus to prove this issue was upon the plaintiff. To discharge this onus, plaintiff examined himself as PW1 and proved on record the following documents:

- (i) The original rent note as Ex.PW1/1.
- (ii) Site plan as Ex.PW1/2,
- (iii) Account maintained by plaintiff with respect to the rent paid by the defendant as Ex.PW1/3&4.
- (iv) Legal notice has also been exhibited as Ex.PW1/4, postal proof with respect to service of legal notice as Ex.PW1/5 &6.

8.1 Plaintiff has been cross-examined extensively by the defendant with respect to averments made in the plaint as well as deposition made. However, nothing adverse came out from the said cross-examination. The plaintiff has also examined one Sh. D.R.Saluja from the office of Collector of Stamp as DW1, who proved on record the relevant register maintained by the concerned stamp vendor with respect to the sale of stamp paper on which the rent deed in question was executed as Ex.DW1/1. The plaintiff has also examined one Sh. Lalit Jain and Sh. Surender Kumar Anand. Sh. Lalit Jain was attesting witness to the Ex.PW1/1, who identified his signatures on the said rent deed at point ‘x’ as well as also identified the signatures of defendant at point ‘A’. The said Sh. Lalit Jain also

proved on record the Rent Agreement executed by Mr. Sanjay Tyagi and his brother in order to prove that the prevalent rent as on the defendant letting out of the property in question was not to the tune of Rs.800/- per month but was varying in between Rs.3 thousand to Rs.5 thousand and hence, has tried to prove the line of defence taken by defendant with respect to rate of rent being Rs.800/- as false but rather on the other hand and contentions so put forward by the plaintiff with respect to rate of rent as agreed between the parties to Rs.5,000/- as correct.

8.2 Now as far as the present issue is concerned, the following facts are to be considered by the court:

- (i) Whether the relationship of landlord and tenant is admitted by the defendant.
- (ii) Whether the lease deed dated 21.09.1999 was executed in between the parties.
- (iii) If the fact no.(ii) is decided in affirmative, what is the effect of the same.
- (iv) If the fact nos. (i) to (iii) are decided in affirmative, whether the tenancy was terminated as per provisions of Transfer of Property Act.

8.3. Now coming to the fact no.(i), it is pertinent to mention that prior to the filing of this suit, the present defendant has filed a suit for permanent injunction bearing No.263/2000 against the present plaintiff, wherein by virtue of para no.1, he has stated as under:

“that the plaintiff (present defendant) took the whole premises xxxxxxxxxxxx on rent from the defendant (present plaintiff)”.

8.4 In fact by virtue of the para no.1 of reply on merits in the W/S filed in the present case also, the defendant has admitted the plaintiff to be his landlord. Accordingly, the relationship of

landlord and tenant in between the parties stand proved by way of defendant's admission.

8.5 As far as the fact no.(ii) is concerned, the lease deed has been proved on record as Ex. PW1/1. The defendant in the present case has been examined as PW1 in suit No.263/00 and during the cross-examination made on 30.10.2004, in reply to a question admitted that the Mark A3 which is later on exhibited as Ex.DW1/1 i.e the Lease Deed in question bears his signatures at point A. This clear cut on the part of the defendant with respect to putting his signatures at point A on Mark A3-DW1/1-Lease Deed dated 21.09.1999 puts the controversy to rest with respect to execution of Lease Deed in between the parties.

8.6 As soon as the execution of the lease deed in question stands admitted by the defendant, there cannot be any escape for the defendant from admitting the rent as of Rs.5,000/- per month instead of Rs.800/- per month as claimed by the defendant.”
(underlining added)

5. I may note that there was no requirement ordinarily to refer to the merits of the matter as discussed by the trial court for decreeing of the suit of the respondent/plaintiff for possession, arrears of rent and mesne profits in this appeal which is only on a limited aspect with respect to seeking restoration of the first appeals which were dismissed in default by the first appellate court on 26.3.2011, but, I have purposely given the aforesaid facts only to show that really strategies are being adopted by the appellant/plaintiff to somehow or the other continue the illegal stay in the

suit premises and which will take place if it is directed by this Court that the first appeals dismissed in default by the first appellate court be heard on merits by allowing these appeals.

6. I may also state that after conclusion of the arguments, a query was put by the Court to the appellant through his counsel, that if appellant wanted time to vacate the suit premises, to which the appellant firstly agreed to vacate the suit premises within three months, however, the consent for vacation could not come through because appellant refused to pay even the arrears at the rate of rent of Rs. 5,000/- per month which has been found by the trial court to be the rent between the parties and not Rs. 800/- per month as was the case of the appellant. I may also for completion of narration say that judgment which was passed by the trial court was after trial and both the parties had led evidence.

7. So far as the present appeals on merits are concerned as to whether the first appellate court was justified in dismissing the applications under Order 41 Rule 19 I find no error in the impugned judgment inasmuch as after arguments on applications under Order 39 (10) CPC of the respondent for an order to deposit the rent of Rs. 800/- per month was reserved. Arguments on the applications under Order 39(10) CPC were heard on 10.9.2010 and the

case fixed for orders on 1.10.2010, Ultimately, the order to make payment of use and occupation at Rs. 800/- per month under Order 39 Rule 10 CPC was passed on 3.1.2011 and the case was adjourned to 11.3.2011 for arguments in the appeal. Appellant/tenant, however, did not comply with the order of payment of Rs. 800/- per month though the appellant was personally present on 11.3.2011. On 11.3.2011 the appeals were adjourned for argument to 26.3.2011, but on 26.3.2011 neither the appellant nor his counsel appeared till 2.00 P.M., and therefore, the appeals were dismissed in default.

8. The first appellate court has found that the case set up by the appellant is not believable that he thought that the cases were listed for orders on 26.3.2011, and with which conclusion I agree, inasmuch as, orders were already passed on 11.3.2011 and it is not possible that the counsel for the appellant or the appellant did not know that orders were already passed on 11.3.2011 on the application of the respondent/landlord under Order 39 Rule 10 CPC directing payment of use and occupation charges at Rs. 800/- per month.

9. I also agree with the first appellate court that the case set up that 26.3.2011 was fixed for orders, and therefore, the appellant did not appear

till 4.00 P.M., when orders were pronounced, is not believable because it is not the only case of the appellant/tenant that as per the cause list for 26.3.2011 the matter was shown in the category of pronouncement of orders.

10. No doubt in this case the appeals were dismissed in default after two dates of non-appearance by the appellant, however, in the peculiar facts of this case I am not inclined to accept reasons for non-appearance on 11.3.2011 and 26.3.2011 in view of the detailed facts narrated by me above and which show that appellant/tenant somehow or the other wants to illegally occupy the suit premises with respect to which the suit was filed way back in the year 2000 i.e more than 14 years back.

11. In view of the above, I do not find any merit in the appeals, and in my opinion the appeals are filed with ulterior purposes to delay the execution of the decree for possession against the appellant/tenant, and therefore, appeals are dismissed with costs of Rs. 25,000/- which shall be payable within four weeks from today. I am empowered to impose costs by exercising my powers under *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15* which entitles this Court to impose actual costs. The Supreme Court in the judgment in the case of the *Ram Rameshwari Devi & Ors. Vs. Nirmala Devi & Ors. (2011) 8 SCC 249*

has held that it is high time in certain litigations that actual costs must be imposed.

APRIL 02, 2014
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VALMIKI J. MEHTA, J