

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

% **Date of decision: 27th August, 2018.**

+ **RSA 164/2017**

RAJENDER JAINA **Appellant**
Through: Mr. Rajesh Aggarwal, Adv.

Versus

DELHI DEVELOPMENT AUTHORITY **Respondent**
Through: Mr. Kunal Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 11th January, 2017 in RCA No.45145/2015 of the Court of Additional District Judge (West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 6th May, 2015 in CS No.564/2014 (Unique ID No.02401C01331922007) of the Court of Civil Judge (West)] of dismissal of a suit filed by the appellant/plaintiff against the respondent/defendant Delhi Development Authority (DDA).

2. The appeal came up first before this Court on 4th July, 2017, when, without indicating the substantial question of law, if any arising, which is a *sine qua non* for entertaining a Regular Second Appeal, notice thereof was ordered to be issued and the Trial Court record requisitioned.

3. The Trial Court record has been received and the counsel for the respondent/defendant DDA appears. The counsel for the appellant/plaintiff has been heard and the records perused.

4. The appellant/plaintiff instituted the suit, from which this appeal arises, for (i) declaration that the liability to pay ground rent with respect to the various spaces in building at plot No.22, A-Block, Local Shopping Centre, Preet Vihar, Delhi is on the licensees/occupants and not on the appellant/plaintiff; and, (ii) injunction directing the respondent/defendant DDA to recover the ground rent charges from the licensees/occupants of various spaces in the building constructed on the aforesaid plot.

5. However, though reliefs in the manner aforesaid were sought, only the respondent/defendant DDA was impleaded as defendant in the suit and the licensees/occupants on which/whom liability for the ground rent was sought to be foisted by a decree of declaration and/or for recovery wherefrom direction to the respondent/defendant DDA was sought, were not impleaded as defendants to the suit.

6. Without impleading the persons on whom liability was sought to be foisted, the suit was not maintainable and the plaint ought to have been rejected on the very first date when it came up for admission. A mechanical issuance of summons of the suit has resulted in the suit consuming the time of the Courts since the year 2007, for the last eleven years.

7. Be that as it may, the respondent/defendant DDA filed a written statement contesting the suit, pleading (a) that the lease of land was granted in favour of the appellant/plaintiff; (b) that as per the terms of the lease, the

appellant/plaintiff, without permission of the respondent/defendant DDA, was not entitled to sell/transfer the land or any part of the construction thereon to anyone else; (c) that the liability for ground rent was of the appellant/plaintiff; (d) that it was further a term of the lease that even transfer of any part of the construction on the said plot of land by the appellant/plaintiff, even if with the permission of the respondent/defendant DDA, will not absolve the appellant/plaintiff from liabilities under the lease deed including for ground rent; and, (e) that the appellant/plaintiff had violated other terms of the lease as well.

8. On the pleadings of the parties, the following issues were framed in the suit on 7th September, 2009:

- “1. Whether the plaintiff is entitled to relief of declaration as prayed for? OPP*
- 2. Whether the plaintiff is entitled to relief of injunction as prayed for? OPP*
- 3. Relief.”*

9. The Suit Court, on the basis of the evidence led by the parties, dismissed the suit, recording/reasoning (i) that the persons on whom the liability for ground rent was sought to be transferred had not been made parties to the suit and in their absence, no declaration and injunction as sought could be granted; (ii) that the appellant/plaintiff had failed to prove that he had parted with possession of whole of the plot or entire construction thereon; (iii) that the documents proved by the appellant/plaintiff himself showed that under the licence agreements executed by the appellant/plaintiff in favour of others, the appellant/plaintiff

was to recover the ground rent from the said licensees; (iv) that respondent/defendant DDA was not a party to the aforesaid license agreements and had not granted any permission for execution thereof; and, (v) that it was not in dispute that as per terms of the lease of the land underneath the property, the liability for ground rent was of the appellant/plaintiff.

10. The First Appellate Court has dismissed the appeal of the appellant/plaintiff affirming the reasons given by the Suit Court.

11. The counsel for the appellant/plaintiff has today argued, (a) that the appellant/plaintiff has transferred the entire built up area on the aforesaid plot of land and is now not in possession and control of a single square inch of the built up area or the land; (b) that under the Delhi Apartment Ownership Act, 1986 (Apartment Act), the liability for all outgoings for the property has shifted to the licensees/occupants; (c) that the respondent/defendant DDA cannot thus recover the ground rent from the appellant/plaintiff.

12. The counsel for the respondent/defendant states that no such plea of Apartment Act was taken by the appellant/plaintiff in either of the two Courts below and has not been dealt with in either of the two judgments. It is further stated that it was the plea of the appellant/plaintiff before the Suit Court, that the appellant/plaintiff was in possession of the terrace.

13. The counsel for the appellant/plaintiff states that though no such plea qua the Apartment Act was taken in the plaint before the Suit Court or in the appeal before the First Appellate Court but was taken in the written

submission filed before the First Appellate Court but has not been dealt with.

14. I have enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff now stands divested of the terrace also.

15. The counsel for the appellant/plaintiff states that the appellant/plaintiff continued to be in possession of the terrace.

16. It is quite obvious that what was earlier stated was false.

17. I have further enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff is levying and collecting maintenance charges on/from the occupants of the building.

18. The counsel for the appellant/plaintiff replies in the negative.

19. I have further enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff is asserting any right to maintenance or charges thereto.

20. The counsel for the appellant/plaintiff states that there is litigation between the appellant/plaintiff and the licensees/occupants in this regard and which is pending. It is further stated that the appellant/plaintiff is claiming maintenance charges from the occupants but the occupants are disputing the entitlement of the appellant/plaintiff.

21. The same also demonstrates the difficulty with which the truth is coming out.

22. The appellant/plaintiff cannot, on the one hand, claim a right to maintain the building and to levy and recover maintenance charges from the

occupants of the building and on the other hand wash hands with respect to liabilities qua the land and the building constructed thereon.

23. In the same vein, it has further been enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff has drawn and executed the Deeds Of Apartment required by Section 13 of the Apartment Act to be executed by the appellant/plaintiff as promoter, builder or developer of the building.

24. The reply is again in the negative.

25. It is quite obvious that the provisions of the Apartment Act are being invoked to avoid liability without the appellant/plaintiff performing his own obligations under the said law. The appellant/plaintiff cannot be selective in this regard and if intends the Apartment Act to apply, ought not to claim any right of maintenance and ought to execute the Deeds Of Apartment.

26. A Deed Of Apartment, under Section 13(v), (vi) & (viii) is required to specify the area of the apartment, common area and facilities to which apartment has access, percentage of undivided interest appertaining to the apartment in the common areas and facilities and value of the property and each apartment. Only on all such particulars being specified, can the proportionate liability of each apartment owner for ground rent be defined. Reference in this regard can be made to Section 19 of the Act. Similarly, under Section 8 of the Apartment Act, the appellant/plaintiff, as lessee of the land, is required to execute sublease deeds in respect of land in favour of apartment owners. Only then, can it be said that the liability for ground rent is of sublessee. Else, under Section 23 the appellant/plaintiff has to

recover the ground rent from apartment owners and cannot avoid his liability as lessee, therefor.

27. I have thus enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff is willing to make a statement that the appellant/plaintiff will not assert any right of maintenance or will not levy and collect maintenance charges and is willing to give possession of the terrace to the occupants.

28. The reply is in the negative. Now, it is stated that the counsel for the appellant/plaintiff has to seek instructions in this regard.

29. Once, the matter is listed before the Court, all the said facts would have been envisioned and considered and after hearing, adjournments in this fashion cannot be granted to derail the hearing.

30. I have yet further enquired from the counsel that if the appellant/plaintiff is left with no concern with the land and/or building constructed thereon, why is the appellant/plaintiff pursuing the challenge/demand and whether not the only consequence of the appellant/plaintiff not paying the ground rent would be, the respondent/defendant DDA, effecting re-entry and cancelling the lease of the land.

31. The counsel for the appellant/plaintiff states that the respondent/defendant DDA would “recover the monies in execution”.

32. However, on enquiry, “in execution” of what, no answer is forthcoming.

33. It is not as if there is a decree for recovery of ground rent in favour of the respondent/defendant DDA and against the appellant/plaintiff.

34. The appellant/plaintiff cannot in such manner adopt a dog in the manger approach by asserting rights but contesting liability.

35. Moreover, a perusal of the lease of the land underneath the property shows that the effect of non-payment of ground rent is forfeiture/re-entry of the lease and once the appellant/plaintiff is left with no concern with the land and the building, it will be for the occupants to contest the forfeiture/re-entry, if any affected by the respondent/defendant DDA.

36. It is thus quite obvious that no error can be found in the impugned judgment nor does this Regular Second Appeal raise any substantial question of law. Rather, as aforesaid, the suit itself from which this appeal arises, was misconceived and deserved dismissal at threshold.

Dismissed.

No costs.

AUGUST 27, 2018

bs

RAJIV SAHAI ENDLAW, J.