

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

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Date of decision: 3rd December, 2015

+ RFA No.137/2006 & CM No.5981/2013 (by way of cross appeal / cross objections)

BHARAT HEAVY ELECTRICAL LTD.

..... Appellant

Through: Mr. A.K. Roy, Adv.

Versus

BADRI DASS ABBI & ORS.

..... Respondents

Through: Mr. Sandeep Sharma, Adv. for R-1 to 5.

Mr. Sanjeev Mahajan, Adv. for R-6.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the judgment and decree dated 24th November, 2005 of the Court of Shri O.P. Gupta, Additional District Judge (ADJ), Delhi decreeing the suit No.247/2001 (Old No.4831/1991) of the respondents No.1 to 5/plaintiffs for recovery of *mesne* profits for use and occupation of property no.3, Panchsheel Shopping Complex, Panchsheel Colony, New Delhi jointly and severally against the appellant and the respondent no.6 National Building Construction Corporation Limited (NBCC) in the sum of Rs.19,43,040/-.

2. Notice of the appeal was issued. The respondent no.6 NBCC upon service of the notice filed CM No.5981/2006 by way of cross objections/cross appeal, notice whereof was also issued.

3. The counsel for the respondent no.6 NBCC on 28th April, 2006, in the absence of the counsel for the appellant or the counsel for the respondents no.1 to 5/plaintiffs, stated that the respondent no.6 NBCC had already paid half of the *mesne* profits to the decree holder and on the basis of that statement, execution in regard to further recovery of the amount was stayed.

4. Vide order dated 12th May, 2006 the cross objections preferred by the respondent no.6 NBCC were ordered to be heard along with the appeal. The appeal was admitted for hearing on 31st October, 2006 and pending further orders, the execution of the impugned judgment and decree was stayed. Upon application being filed by the respondents/plaintiffs no.1 to 5 for early hearing, the appeal was taken out of the category of '*Regulars*' and listed for today for hearing. The counsel for the appellant, the counsel for the respondents no.1 to 5/plaintiffs and the counsel for the respondent no.6 NBCC have been heard.

5. On enquiry, it is informed, that the possession of the premises was delivered to the respondents No.1 to 5/plaintiffs on 26th April, 2001 and the *mesne* profits decreed vide the impugned judgment and decree are for the period from 1st November, 1989 to 26th April, 2001.

6. In view of the limited nature of challenge made before this Court, it is not deemed necessary to set out the pleadings, evidence and findings of the Trial Court thereon.

7. Suffice it is to state that it is the uncontroverted position that the appellant was a tenant in the subject premises and had sublet the said premises to the respondent no.6 NBCC. Though the appellant, in its written statement in the suit, raised a dispute with respect to the relationship of

landlord with the respondents no.1 to 5/plaintiffs and an issue was framed thereon but the finding on the said issue is in favour of the respondents no.1 to 5/plaintiffs and is not under challenge now. Thus, as of today it is not in dispute that the appellant was a tenant under the respondents no.1 to 5/plaintiffs.

8. The only contention of the counsel for the appellant is that for the period for which *mesne* profits have been decreed, the appellant is not liable for *mesne profits* since the appellant had prior thereto with the consent of the respondents no.1 to 5/plaintiffs sublet the said premises to the respondent no.6 NBCC and for the subject period it was the respondent no.6 NBCC alone which was in occupation of the premises and was paying rent/charges to the respondents no.1 to 5/plaintiffs and thus the decree for *mesne* profits in so far as against the appellant is wrong and the decree ought to have been against the respondent no.6 NBCC only.

9. It is contended that the learned ADJ erred in passing the decree jointly and severally against the appellant and the respondent no.6 NBCC. Reliance in this regard is placed on ***Lucy Kochuvareed Vs. P. Mariappa Gounder*** (1979) 3 SCC 150 and it is argued that Supreme Court therein has held that the *mesne* profits can only be claimed from a person in unauthorized / wrongful possession of the premises.

10. The respondent no.6 NBCC in its cross objections has controverted the joint and several liability imposed on the respondent no.6 NBCC for *mesne* profits. It is contended that the liability for *mesne* profits was of the appellant only in as much as the respondents no.1 to 5/plaintiffs had called upon the appellant only to vacate the premises and the appellant also never

called upon the respondent no.6 NBCC to vacate the premises and hence the possession of the respondent no.6 NBCC of the premises could not have been said to be unlawful or unauthorized, to invite liability for *mesne* profits.

11. Though the counsel for the appellant has sought to rely upon the lease deed under which the appellant had taken the premises on rent to contend that the appellant under the said lease deed was permitted to sublet the premises and had sublet the premises to the respondent no.6 NBCC under the said authority but upon it being enquired whether the lease deed is registered, has fairly stated that it is not. I am afraid without the lease deed being registered and being properly stamped and which it is not, the same cannot be looked into in evidence. Though the counsel for the appellant has also contended that the Trial Court in the impugned judgment has heavily relied on the lease deed but in my opinion the said question also pales into insignificance from what follows hereafter.

12. The case of the appellant is of having sublet the premises to the respondent no.6 NBCC. The liability of a tenant towards the landlord does not end by subletting the premises. The plea of the appellant that owing to the appellant having sublet the premises in its tenancy with the consent of the landlord, the liability of the appellant as a tenant towards the landlord came to an end is in total ignorance of Section 108(B)(j) of The Transfer of Property Act, 1882. Section 108 of the Act provides for the rights and liabilities of lessor and lessee of an immovable property in the absence of a contract or local usage to the contrary. In Part B, Clause (j) provides that “lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such

interest or part may again transfer it” but further provides “the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease”. It thus follows that from the mere act of having sublet the premises, a lessee / tenant does not cease to be subject to the liabilities attached to the lease.

13. The argument of the counsel for the appellant, of the liability of the appellant as a tenant having come to an end merely by subletting of the premises to the respondent No.6 NBCC is thus legally misconceived. I have however examined the Trial Court record to see whether the appellant has pleaded any other facts or led any other evidence to show extinguishment of its liability as a tenant.

14. It was the case of the respondents No.1 to 5/plaintiffs in the plaint that though the appellant had sublet the premises to the respondent No.6 NBCC and the appellant had also written to the respondents No.1 to 5/plaintiffs in this regard but the respondents No.1 to 5/plaintiffs never accepted the respondent No.6 NBCC as their tenant and that there was no privity of contract between the respondents No.1 to 5/plaintiffs and the respondent No.6 NBCC. It was further the case in the plaint that the rent of the premises was being paid by the appellant only, though the appellant claimed to have transferred the lease rights to the respondent No.6 NBCC. The appellant in the written statement, besides pleading having sublet the premises under the permission in this regard contained in the unregistered lease deed, admitted that though the respondents No.1 to 5/plaintiffs ought to have accepted rent from the respondent No.6 NBCC but had refused to do so. No other plea was taken from which it could have been said that the

appellant had ceased to be liable as a tenant. It was also not the case that under the lease deed (even if were to be registered and to be read in evidence), the liability of the appellant as a tenant was to cease upon the appellant subletting the premises. Though in the absence of a plea, the question of looking into any evidence in this regard does not arise but I have still looked into the evidence recorded and do not find therein also anything from which it can be said that the liability of the appellant as the tenant came to an end.

15. Thus there is nothing to the contrary to make the legal position as provided in Section 108 (B)(j) of the Transfer of Property Act inapplicable. The respondents no.1 to 5/plaintiffs had a privity of contract with the appellant alone even if they permitted the appellant to sublet the premises. The appellant as a tenant was liable to the respondents no.1 to 5 landlords for *mesne profits* for unauthorized use and occupation of tenancy premises after determination of tenancy.

16. As far as the cross objections filed by the respondent no.6 NBCC are concerned, I am at the outset of the opinion that the cross objections would not lie by a defendant in an appeal preferred by a co-defendant. The respondent no.6 NBCC, if so desirous of impugning the decree against itself ought to have preferred its own independent appeal and could not have challenged the appeal by way of cross objections which could have been filed only in the appeal if any, preferred by the plaintiff. On enquiry, I am told that no Court Fees also has been paid on the cross objections.

17. Even otherwise, I do not find any merit in the contention of the counsel for the respondent no.6 NBCC.

18. The respondent no.6 NBCC if not earlier, at least on the service of the notice of the suit from which this appeal arises became aware that the respondents no.1 to 5/plaintiffs were claiming the appellant as well as the respondent no.6 NBCC to be in unauthorised possession of the premises. It is not the case of the counsel for the respondent no.6 NBCC that the respondent no.6 NBCC at any time offered to vacate the premises thereafter. In this regard it may be noticed that the suit as originally filed was for recovery of approximately Rs.4 lacs only towards *mesne* profits due till then and the balance amount decreed is towards future *mesne* profits of a date after the passing of the decree and execution of which decree has been made subject to payment of Court Fees thereon by the respondents no.1 to 5/plaintiffs. The respondent no.6 NBCC having thus continued in possession of the premises and for which period the possession has been held to be unauthorized, would be equally liable for the *mesne* profits. Moreover, the respondent No.6 NBCC as a lawful sub-tenant as it claimed itself to be, was also liable to the superior landlord i.e. the respondents No.1 to 5/plaintiffs for *mesne profits* for the reason of being in actual possession of the property with respect to which *mesne profits* were claimed.

19. I may quickly refer to some case law in this regard:

- (i) ***Ardeshar Cowasji Patel Vs. K.D. & Bros.*** AIR 1925 Bom 330, ***Manmatha Nath Chowdhury Vs. Nalinaksha Rai*** AIR 1925 Cal 423 and ***Chimanlal Dalchand Vs. Maharajadhiraj H.H. Shri Sumersinghji Bahadur of Kishangarh*** AIR 1961 Raj 17 hold that Section 108 expressly enacts that the lessee by

transferring the whole of his interest does not absolve himself from his contractual liabilities to the lessor.

- (ii) **(Raja) Satya Niranjana Chakravarty Vs. Surajubala Debi** MANU/PR/0004/1929 and **Devidasa Bhatta Vs. B.Ratnakana Rao** AIR 1966 Mysore 147 lay down that a lessee, even by giving a notice of transfer of the lease to the lessor, does not affect his liability.
- (iii) **Hunsraj Vs. Bejoy Lal Seal** AIR 1930 Privy Council 59 and **Nanjappa Vs. Ranga Swami** AIR 1940 Mad 410 lay down that a sublease for whole of the unexpired term does not operate otherwise than by way of a sublease.
- (iv) **Bombay Municipal Corporation Vs. Vasantlal Fulchand** AIR 1938 Bom 360 and **Saradindu Vs. Sm. Kamini Ray** AIR 1942 Cal 514 holding that the original lessee is liable on his covenants i.e. by privity of contract and the assignee is liable for privity of estate and there is no inconsistency between the liability of the two.
- (v) **Ram Kinkar Vs. Satya Charan** AIR 1939 Privy Council 14 holding that when there is an absolute assignment of the whole interest of the lessee, such an assignment creates privity of estate between the lessor and the assignee and the assignee becomes liable to the lessor on covenants running with the land.
- (vi) **Raja Sri Jyoti Prasad Singh Vs. Samuel Henry Sedden** AIR 1940 Patna 516 laying down that a lessee is entitled to sue the

assignee for the rent and that the assignee is liable jointly and severally with the lessee.

- (vii) ***Treasurer of Charitable Endowments Vs. Tyabji*** MANU/MH/0003/1948 holding that a lessee cannot by his unilateral act of assigning his interest in the leasehold premises put an end to the obligations which he has undertaken either by the contract of lease or under Section 108 and that as far as privity of contract is concerned, the only person liable is the lessee himself and the obligation to hand over possession of the property on the determination of the tenancy is not upon the assignee but upon the lessee. It was held that accordingly the proper person to whom notice to vacate should be given is the lessee.
- (viii) ***Pandit Kishan Lal Vs. Ganpat Ram Khosla*** AIR 1961 SC 1554 holding that relinquishment of a tenancy is different from an assignment of the tenancy; in the case of the latter, the tenant remains liable to the landlord for fulfillment of his obligation as a tenant, while the assignee becomes liable for the privity of the estate; on the contrary relinquishment extinguishes the lease.
- (ix) ***Lal Chand Vs. Gopi Kishan*** 14 (1978) DLT 89 holding that the lessee does not cease to be liable for the rent and for the performance of other obligations of the lease by subletting the premises.
- (x) ***Laxmi Narain Gauri Shankar Vs. Gopal Krishna Kanoria alias Gopi Krishna*** (1987) 1 SCC 51 holding that a tenant

remains liable for the wrongful act of the sub-tenant and is accordingly liable for eviction for the damage caused to the tenancy premises by the sub-tenant.

20. No error is thus found in the Trial Court decreeing the suit for recovery of *mesne* profit jointly and severally against the appellant and the respondent no.6 NBCC.

21. No other argument has been raised.

22. There is thus no merit neither in the appeal nor in the cross objections; both are dismissed with costs. Counsel's fee assessed at Rs.15,000/- in each.

23. Decree sheet be prepared.

24. There is some controversy whether half of the decretal amount as claimed by the respondent no.6 NBCC has been paid or not. I am however not required to entertain the said controversy which can be dealt with in the execution proceedings.

RAJIV SAHAI ENDLAW, J.

DECEMBER 03, 2015

'pp/gsr'

(Corrected and released on 24th December, 2015).