

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

+ **RSA No.146/2016**

% **21st July, 2016**

SH. BASUDEV PRASAD Appellant
Through: Mr. Francis Paul, Adv. with appellant in person.

versus

SH. NAND GOPAL BACHHAS Respondent
Through: Mr. Pawan Sharma, Adv. with respondent in person.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By the Order dated 2.6.2016, a limited notice was issued in this Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) by a learned Single Judge of this Court noting that the appellant/defendant only wanted six months' time to vacate the suit premises and he was not assailing the judgments on merits which direct eviction of the appellant/defendant who was a tenant and also pass a decree for the payment of mesne profits.

2. Today counsel for the appellant on instructions from the appellant, who is present in person, states that the appellant is not ready to pay mesne profits

as per the judgments on merits yet seeks extension of time of six months. This stand is vehemently opposed on behalf of the respondent/plaintiff.

3. Since notice was issued in this appeal limited to the prayer of seeking six months' time to vacate the suit premises and appellant/defendant was not assailing the judgments on merits, today when the appellant does not want to pay mesne profits as per the judgments passed on merits, accordingly, there is no scope for entertaining this appeal in which a limited and conditional notice was issued.

4. It is also noted that no substantial question of law arises under Section 100 CPC inasmuch as the suit premises is outside the protection of the Delhi Rent Control Act, 1958 and the month to month tenancy was terminated by serving a Legal Notice dated 17.10.2013.

5. The relevant observations of the first appellate court rightly hold the appellant to be a monthly tenant, and tenancy having been terminated, and hence appellant did not have any right to stay in the premises in paras 11 to 16 of the impugned judgment, and which paras read as under:-

“11. Whereas, plaintiff's claim for recovery of possession and damages is based on the premise that he is owner/landlord of suit property which was let out to defendant and last paid rent of property was Rs. 5,000/- despite the fact that same was revised to Rs. 8,000/- per month and since the tenancy was month to month tenancy, same was terminated by plaintiff by serving upon defendant a legal notice dated 17.10.2013, vide which defendant was called upon to handover the vacant physical possession of suit property with 30 days of receipt of said notice.

12. However, on perusal of WS, it is pointed out that in para 1 of reply on merits, defendant has admitted his induction in the suit property by plaintiff though he

alleged that since plaintiff was merely an allottee of the suit property, he had illegally sublet the same to defendant and was further illegally collecting rent from defendant. Here, it is pertinent to mention that a suit for ejectment is different from a title suit for possession against a trespasser. In a suit for possession against erstwhile tenant, a tenant is estopped from denying landlord's title in view of Section 116 of Indian Evidence Act.

13. In the instant case, locus of plaintiff has been challenged by defendant on account of absence of any landlord & tenant relationship between plaintiff and defendant and in view thereof, both the issue no.1 & 2 were interconnected. And since the cause of action for filing a suit for ejectment and damages is also dependent upon the existence of relationship of landlord and tenant between the parties, I am of the view that Trial Court did not commit any error in taking up said three issues together. Since the common evidence was adduced on all said issues, there was no bar in taking up said issues together.

14. The second limb of contention raised on behalf of plaintiff/appellant is that there was no valid termination of tenancy because the legal notice dated 01.10.2008 was never served upon defendant. In the instant case, tenancy was terminated vide legal notice dated 17.10.2013 Ex.PW1/F, receipt of which by defendant is not even denied, rather defendant had issued a reply dated 25.10.2013 to said legal notice, which was also placed on trial court's record by defendant, though the same was never exhibited. Even otherwise, law is well settled that a suit for possession cannot be dismissed on the ground of invalidity of notice of termination because the tenant is only entitled to a reasonable time of 15 days to vacate the property. Therefore, even if the notice of termination is held to be invalid, service of summons of suit for possession can be taken as a notice u/Sec 106 of TPA, 1882 but in that event the landlord would be entitled to mesne profit after expiry of 15 days from the date of receipt of summons and not from the date of notice of termination.

15. As already noted above, even in the WS there is an implied admission of existence of landlord tenant between defendant and plaintiff. Even during evidence, defendant, who has been examined as DW1, admitted that he had been paying rent to plaintiff who inducted him as a tenant. Testimony of DW1 to the effect that he never entered into any agreement with the plaintiff for extension of lease is again an implied admission of lessor lessee relationship. DW1 has further deposed that at that time, when he deposed before trial court, he was paying rent of Rs. 5,000/- p.m. to the plaintiff.

16. All this material brought on record, goes to establish a clear case of existence of a month to month tenancy between plaintiff and defendant. Counsel for defendant has argued that plaintiff despite, having stated in his evidence that a written rent agreement was executed between him and defendant, failed to place the same on record and therefore, an adverse inference is liable to be drawn against him. However, said argument is totally bereft of merits for the reason that in view of Section 58 of Indian Evidence Act an admitted fact need not to be proved on record. In the instant case, defendant himself has admitted that suit property was let out to him by plaintiff who had also been collecting rent from him @ Rs.5000/- per month. Furthermore, a lease may be created by an oral agreement and need not necessarily be vide written instrument. In said circumstances, no adverse inference could have

been drawn against plaintiff.”

6. I do not find any perversity and illegality in the aforesaid findings and conclusions of the impugned judgment of the first appellate court for this second appeal under Section 100 CPC to be entertained. I may also note that now it is settled law so far as Delhi is concerned that even if a legal notice is not sent terminating tenancy, filing of a suit and service of summons of the suit amounts to termination of tenancy vide *M/s. Jeevan Diesels & Electricals Ltd. Vs. M/s. Jasbir Singh Chaddha (HUF) & Anr.* RFA No.179/2011 decided on 25.3.2011. (An SLP against the said judgment being SLP (Civil) No.15740/2011 has been dismissed by the Supreme Court on 7.7.2011.

7. No substantial question of law arises. Dismissed.

JULY 21, 2016
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VALMIKI J. MEHTA, J