

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

+ **RSA No.290/2015**

% **25th July, 2016**

SH. SUBHASH CHANDERAppellant
Through: Mr. Rajiv Bajaj, Advocate.
versus

SH. FATHAY SINGH Respondent
Through: Mr. Amreek Singh, Advocate.

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 under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff/landlord against the Judgment of the First Appellate Court dated 23.7.2015 whereby the first appellate court set aside the judgment of the trial court decreeing the suit for possession with respect to shop bearing no.1/9255, Plot no.12, West Rohatash Nagar Chowk, Babarpur Road, Shahdara, Delhi-32 under Order XII Rule 6 CPC. The first appellate court by the impugned judgment has held that the trial court has committed an error in not considering the fact that the respondent/defendant has not admitted the jurisdiction of the civil court and in fact claimed application of the Delhi Rent Control Act, 1958 i.e effectively holding and stating, though not

clearly saying so, that there was no scope of application of Order XII Rule 6 CPC. Besides the first appellate court not mentioning the fact with respect to Order XII Rule 6 CPC being not applicable, the first appellate court has, very surprisingly, passed no order for remanding the suit to the trial court for decision inasmuch as if the first appellate court by the judgment was of the opinion that the defendant has not admitted the non-applicability of the Delhi Rent Control Act to the area where the suit property is situated, then, the first appellate court ought to have remanded the suit for trial on the disputed question of fact, however, the first appellate court failed to do so. In fact the judgment of the first appellate court flies in the face of the doctrine of *res judicata* contained in Section 11 CPC, and which aspect will be discussed hereinafter.

2. The relevant paras of the impugned Judgment of the First Appellate Court dated 23.7.2015 are paras 18 to 21 and these paras read as under:-

“18. Defendant has disputed the jurisdiction of court claiming that the suit property is situated in Revenue Estate of Village Sikdarpur, whereas documents placed by plaintiff in respect of property comprises suit property suggest that suit property is situated in Revenue Estate of Village Uldhanpur, Illaqa Shahdara, Delhi. It is clear from the law laid down by the Hon’ble High Court in Sheel Kumar Goel (supra) that area comprises of Village Uldhanpur was included in the schedule of Delhi Rent Control Act for applicability of Delhi Rent Control Act, 1958.

19. In view of aforesaid discussion, I am of the considered opinion that Ld. Trial court has committed an error by not considering the fact that defendant has not admitted the jurisdiction of court as he disputed the same. Under these circumstances, I am of the view that impugned order suffers illegality and infirmity and therefore, same is liable to be set aside. Accordingly, impugned order dated 01/01/2015 is hereby set aside. Appeal is disposed of as allowed.

20. Considering the facts, no order as to costs. Decree sheet be prepared.

21. Appeal file be consigned to record room. TCR be sent back to the court concerned with copy of this judgment.”

3. The following substantial question of law is framed for decision of the present second appeal:-

“Whether the first appellate court could have ignored the bindingness of the earlier stage judgment of a co-ordinate court/ADJ dated 28.10.2013 in the same very suit which was in appeal holding that the Delhi Rent Control Act does not apply to the suit premises?”

4. It is trite that the principle of *res judicata* has the effect that the merits of the earlier judgment have not to be seen which have become final and the earlier judgment, even if it is presumed to have wrongly been decided, the issue is binding on the parties once the same achieves finality. It is no longer *res integra* that a decision between the parties of an issue at an earlier stage in the suit operates as *res judicata* for the later stages of the suit vide ***Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another 1999 (5) SCC 590.*** Between the same parties and in this very suit the issue with respect to applicability of the Delhi Rent Control Act to the premises in question came up before the earlier ADJ in RCA No. 35/2013 titled as ***Sh. Subhash Chander Vs. Sh. Fathay Singh.*** This appeal RCA No. 35/2013 was filed by the present appellant/plaintiff against the Judgment and Decree passed by the Trial Court on 11.7.2013 by which the

trial court had rejected the plaint under Order VII Rule 11 CPC on the ground that the suit property fell within the urban limits and hence was covered by the provisions of the Delhi Rent Control Act. The First Appellate Court in its earlier Judgment dated 28.10.2013 set aside the earlier Judgment of Trial Court dated 11.7.2013 and held that the Delhi Rent Control Act does not apply to the suit premises, and remanded the matter to the trial court for decision in accordance with law. The relevant paras of the earlier Judgment dated 28.10.2013 of the first appellate court are paras 12 to 15 and which paras read as under:-

“12. In **Ajab Singh’s case (supra)**, our own **Hon’ble High Court** has affirmed the finding of the Ld. trial court that the revenue estate of village Sikdarpur has not been notified for the applicability of the provisions of the DRC Act and the remedy available to the plaintiff was to file a suit for possession. In the present case, admittedly vide order dated 03.11.2011, Ld. trial court of ARC, North East, KKD Courts dismissed the eviction petition of the appellant/landlord in respect of the shop in question on application and objection of the respondent/tenant to the effect that the provisions of the DRC Act are not applicable to the suit shop situated in village Sikdarpur. After dismissal of the petition, the appellant/landlord had terminated the tenancy of the respondent/tenant and filed a suit for possession of the shop in question where the respondent/tenant has taken an objection that contrary to his previous stand that the suit shop being situated in village Sikdarpur is covered under the provisions of the DRC Act and admittedly, the rent of the shop in question has been below Rs.3500/- per month and the suit of the appellant/landlord was barred under Section 50 of the DRC Act. Without referring and discussing the previous stand and conduct of the respondent/tenant, the Ld. trial court has referred the notification dated 08.12.1954 which reads as under:-

“Notification
Delhi, the 8th December 1954

No.F.4(10)/50-L.S.G.-in exercising of the powers conferred by sub section (3) of Section 5 of the Punjab Municipal Act, 1911, as in force in the state of Delhi, the Chief Commissioner, Delhi pleased to include within the limits of Municipal Committee, Delhi-Shahdara, the area defined in the schedule below

situated coterminously with the Northern Limits of the existing boundaries of the said Municipality as defined in Chief Commissioner's Notification No.F.4(57)/43(i)-L.S.G.Dated 6th July 1943, No F.4(22)/48-L.S.G. Dated 20th April, 1951, No F.4(19)/50-L.S.G. Dated 9th June 1952 and No.F.4(25)/51-L.S.G. Dated 1st April, 1954.

SCHEDULE

South- A line drawn Eastwards from the intersecting point of Western boundary of village Auldanpur and the existing Northern limit, 220 yards from the G.T.Road parallel to G.T.Road upto the Western Boundary of village Chandrawali alias Shahdara thence Northwards along the Western boundary of Shahdara upto the junction (Sehhadda) of village boundary of village Auldanpur Sikdarpur, and Shahdara and thence the Eastwards upto the Eastern boundary of Chandrawali alias Shahdara.

East- A line drawn Northwards from the intersecting point of Chandrawali alias Shahdara and the existing Northern limits of Shahdara Municipal upto the Seh Hadda of village Sobholi and Chandrawali alias Shahdara.

North- A line drawn Westwards from Seh Hadda of village Sabholi and Chandrawali upto Seh Hadda of village Chandrawli Sabholi and Gokaplr thence Northwards upto Seh Hadda of village Gokalpur and Babarpur.

West- A line drawn Southwards from Seh Hadda of village Babarpur upto Seh Hadda of village Jafrabad and Auldanpur thence Southwards upto the intersecting point on Western limits of limits of Auldanpur and the existing Northern limits of Shahdara Municipality 220 yards from the G.T.Road.”

13. A perusal of above said notification dated 08.12.1954 reveal that the then Chief Commissioner of Delhi has included the areas within the limits of Municipal Committee Delhi, Shahdara as per the schedule and in the schedule, the boundaries and directions of the municipal areas are mentioned within which the municipal areas would be covered. The name of village Sikdarpur is found in the said notification while mentioning Southern boundary of municipal area. It does not mean that Sikdarpur village itself is in municipal area. Rather it only refers area which is situated on the Southern side of municipal area. It appears that the Id. trial court has merely taken the relevant extract from the judgment dated 15.02.2014 of Sr. Civil Judge in civil suit no.9/2012 titled as “Sh. Arun Kumar & another vs. Sh. Subhash Chander”. By no stretch of imagination, the municiple area can be identified just by reading the said notification without the help of some site plan of the relevant area. No site plan of relevant area is on the record. Consequently, this cannot be said that the village Sikdarpur where the suit shop is situated is covered by the said notification.

14. Moreover, the appellant/landlord cannot be permitted to blow hot and cold at the same time and take frivolous stand just to somehow defeat the claim of the respondent/tenant and in this regard, the judgment of **M/s Raj**

Kishan & Company vs. National Thermal Power Corporation 2012 (194) DLT 314 (Delhi) can be referred to. The maxim of Scots law *qui approbat non reprobat* (one who approbates cannot reprobate) applies to the facts of the present case. The respondent/tenant took the plea before the court of Ld. ARC in the said ejectment petition under Section 14 (1) (e) of the DRC Act that the shop in question being situated in village Sikdarpur is not covered/notified under the provisions of the DRC Act and on his specific objections and application, the ejectment petition was dismissed only on this ground by said order dated 03.11.2011 and when the appellant/landlord filed a civil suit for possession of the shop in question after terminating the tenancy of the respondent/tenant under Section 106 of Transfer of Property Act, he cannot be allowed to take advantage by saying that the village Sikdarpur is covered under the provisions of the DRC Act and civil court has no jurisdiction. References can be given to the judgment of **Hon'ble Supreme Court in Karam Kapahi and others. vs. M/s Lal Chand Public Charitable & another 2010 (4) SCC 753, Shyam Telelink Ltd. vs. Union of India 2010 (10) SCC 165 and Vikas Motors Ltd. vs. Dr. P.K. Jain 1999 (6) 548.**

15. In view of my above said discussions, it comes out that once the respondent/tenant has taken an objection before the court of Rent Controller that the suit shop is not situated in the area covered by the DRC Act and now, on filing of civil suit by the appellant/landlord in respect of the same shop, the respondent/tenant cannot be allowed to say that the suit shop is already urbanized and covered under the provisions of the DRC Act. Moreover, it has already been decided by our own Hon'ble High Court in Ajab Singh's case (supra) that the village Sikdarpur is not notified to be municipal area and the provisions of the DRC Act are not applicable. The appellant/landlord cannot be rendered without remedy as a party having a grievance must have a remedy and the respondent/tenant cannot be allowed to blow hot and cold *uno flatu*. Resultantly, the appeal is accepted and the impugned judgment and decree of Ld. trial court dated 11.07.2013 are hereby set aside and parties are directed to appear before the Ld. trial court on 08.11.2013 and the trial court shall proceed to decide the matter in accordance with law. Trial Court record be sent back with as attested copy of this judgment. Appeal file be consigned to record room." (underlining added)

5. It is clear from a reading of this earlier Judgment of the First Appellate Court dated 28.10.2013 that the respondent/defendant/tenant is harassing the appellant/landlord by blowing hot and cold because before the Rent Controller the respondent/tenant claimed that the Delhi Rent Control Act did not

apply resulting in such proceedings coming to an end and thus respondent/landlord filing the suit in civil court. Respondent/tenant was, *inter alia*, rightly held to be estopped from urging that the suit premises fell under the Delhi Rent Control Act.

6. The trial court after the remand Order dated 28.10.2013 has held that the suit property does not fall within the Delhi Rent Control Act and hence passed its judgment under Order XII Rule 6 CPC decreeing the suit of the appellant/plaintiff for possession on the ground that there was a relationship of landlord and tenant between the parties, legal notice terminating the tenancy was served and in any case the same was not necessary in view of the settled law, so far as Delhi is concerned, that filing of a suit in fact amounts to notice terminating tenancy vide ***Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha (HUF) & Anr. 2011 (183) DLT 712.*** The relevant paras of the Judgment of the Trial Court dated 2.1.2015 decreeing the suit for possession of the appellant/plaintiff are paras 7 and 8 and these paras read as under:-

“7. The cumulative effect of the discussion so far is that the Defendant was the tenant of the Plaintiff, rent was Rs.210/- per month excluding water and electricity charges and the tenancy of the Defendant was legally terminated. It is established preposition of law that no notice is required for termination of the tenancy when the suit has filed by the plaintiff/owner/landlord for recovery of the possession. In the case titled as **Sky Land International Pvt. Ltd. vs. Kavita P. Lalwani in 2012 (4) CLJ 83 Del.**, the Hon'ble High Court has held that :-

(A) Code of Civil Procedure, 1908-O XII Rule 6- Judgment on admission-admission of appellant about relationship of landlord and tenant between parties, tenancy on registered lease and expiry of term and, non-renewal thereof, as well as payment of rent in respect of suit property-suit decreed in appeal, appellant has misused processes of law by raising false defence-appeal dismissed with costs of Rs. 2,00,000/-

(B) Transfer of Property Act, 1882-Section 106 (3)-Notice terminating tenancy -By amendment of 2002, by sub-section (3), raising of technical defences as to validity of 15 days notice to terminate monthly tenancy have been done away-suit for possession would not be dismissed on ground of invalidity of notice terminating tenancy.

(C) Transfer of Property Act, 1882-Section 106- Notice-Suit for possession cannot be dismissed on ground of invalidity of notice- Tenant is only entitled to reasonable time to vacate premises.

(D) Transfer of property Act, 1882-Section 106- Notice-Termination of tenancy-After service of notice, tenant can only be permitted to continue in possession of tenanted premises on payment of market rent.

(E) Transfer of Property Act, 1882-Section 107- Lease-Tenant at sufferance- is one who wrongfully continues in possession after expiry of term of lease-tenancy at sufferance does not create relationship of landlord and tenant.

(F) Transfer of Property Act, 1882-Section 108 (g), 111 (a)- Termination of lease-Mere acceptance of rent by landlord from tenant in possession after determination of lease either by efflux of time or by notice to quit, would not create tenancy so as to confer on erstwhile tenant status of tenant.

Further, in Para no. 16 it has been held Summons of the suit can be treated as notice under Section 106 of Transfer of property Act, 1882 which reliving the judgment **Nopany Investments (P) Ltd. vs. Santokh singh (HUF), 2008 (2) SCC 728**, the Hon'ble Supreme Court held that filing of suit is itself a notice to quit on the tenant and therefore, no notice to quit under Section 106 of the Transfer of Property Act is necessary to enable the landlord to get the decree of possession. The observations of the Supreme Court are reproduced hereunder:-

“In any view of the matter, it is well settled that filing of an eviction suit under the general law itself is a notice to quit on the tenant. Therefore, we have no hesitation to hold that no notice to quit was necessary under Section 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant.”

16.2 In **Jeevan Diesels & Electricals Ltd. vs. M/s. Jasbir Singh Chadha (HUF), 182 (2011) DLT 402**, this Court held that even assuming that the

notice of termination was not served, the tenancy shall stand terminated on filing of the suit. The relevant portion of the judgment reads as under:-

“7. The second argument that the legal notice dated 15/07/2006 was not received by the Appellant, and consequently the tenancy cannot be said to have been validly terminated, is also an argument without substance and there are many reasons for rejecting this argument. These reasons are as follows:-

(ii) The Supreme Court in the case of *Nopany Investments (P) Ltd. vs. Santokh singh (HUF)*, 2008 (2) SCC 728 has held that the tenancy would stand terminated under general law on filing of a suit for eviction. Accordingly, in view of the decision in the case of Nopany (supra) I hold that even assuming the notice termination tenancy was not served upon the Appellant (though it has been served and as held by me above) the tenancy would stand terminated on filing of the subject suit against the appellant / defendant.

8. Therefore the Plaintiff is entitled to receive the possession of the suit property from the Defendant. Hence on the basis of the admission the reliefs at this stage which can be granted to the Plaintiff is “Possession of the suit property i.e. Premises bearing no. shop No.1/9255, Plot No.12, West Rohatash Nagar Chowk, Babarpur Road, Shahdara, Delhi-32 more specifically shown in red in the site plan forthwith granted to the plaintiff.”

7. Now the first appellate court by the impugned judgment has effectively set aside the earlier Judgment of the co-ordinate court/ADJ dated 28.10.2013 and held that the suit property does not fall in village Sikdarpur and that the respondent/defendant/tenant disputes the same by pleading that it falls in village Uldhanpur, and therefore, there is no admission for the suit to be decreed under Order XII Rule 6 CPC. In my opinion, the first appellate court by its impugned judgment has committed the most elementary and basic error in failing to appreciate that as a co-ordinate court it had no power to take away the finality of the earlier Judgment of the ADJ dated 28.10.2013 in RCA No.35/2013 which

held that the suit premises, of which the appellant/plaintiff was a landlord and respondent/defendant was a tenant, fell within village Sikdarpur to which the Delhi Rent Control Act does not apply. The entire basis of application of the principle of *res judicata* is irrespective of the merits decided in the earlier judgment, and taking even an extreme case that the judgment may have wrongly decided the issue, the said earlier judgment still would be final and binding. Admittedly, the respondent/defendant did not challenge the earlier Judgment of the ADJ dated 28.10.2013 which became final and which held that the suit premises fell in village Sikdarpur to which the Delhi Rent Control Act does not apply ie the suit premises did not fall in village Uldhanpur as now contended by the respondent/defendant/tenant.

8. In view of the above said discussions, substantial question of law is answered in favour of the appellant/landlord and against the respondent/tenant holding that the trial court had rightly decreed the suit inasmuch as admittedly there was a relationship of landlord and tenant between the parties and once the premises were outside the scope of application of the Delhi Rent Control Act, the respondent's/defendant's tenancy having been terminated, he was bound to handover the possession to the appellant/landlord, and thus the trial court had rightly decreed the subject suit for possession.

9. In view of the above, the appeal is allowed with costs and the Judgment of the Trial Court dated 1.2.2015 is restored. Appellant will file certificate of costs within a period of two weeks from today and which costs shall be paid by the respondent/defendant/tenant to the appellant/landlord within a period of two weeks thereafter. The second appeal is allowed with the aforesaid observations.

JULY 25, 2016
ib

VALMIKI J. MEHTA, J

