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

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DECIDED ON: 12.04.2017

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FAO (OS) 107/2017, CM APPL.13603-13605/2017

**M/S OVERNITE EXPRESS LTD. THR ITS AUTHORISED
REPRESENTATIVE**

..... Appellants

Through: Mr. T.K. Ganju, Sr. Advocate with Mr.
Ashish Upadhyaya and Mr. Rohit Gandhi,
Advocates.

Versus

KANWAR SINGH PRADHAN (DECEASED) THR LRS. Respondents

Through: None.

CORAM:

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA**

S.RAVINDRA BHAT, J.(OPEN COURT)

1. The appellant is aggrieved by the order of the learned Single Judge rejecting its petition under Section 34 of the Arbitration and Conciliation Act, 2015 (hereafter "the Act"). The main or rather the only ground urged to say that the award was patently and manifestly illegal was that the learned Arbitral Tribunal ignored the mandate of Section 114 of the Transfer of Property Act, 1882.

2. The parties had entered into a registered lease deed on 31.12.2004, for a period of 21 years; this was in respect of basement and ground floor at premises no.221, Gali No.6, Mahipal Pur Extension, New Delhi. The admitted lease rent was ₹30,000/- per month for each portion of the

premises. That apart, parties appear to have entered into some arrangement for the letting out of the first floor - but that was not the subject matter of the registered lease deed. Claiming that the appellant/lessee had breached the terms of the lease, the lessor/respondent terminated it by a notice, dated 12.05.2011. The notice stated that the lessor did not wish to continue with the arrangement. The lessee/appellant replied on 23.05.2011 resisting the notice and at the same time enclosing three cheques towards the three previous month's lease rent as well as for the subsequent month. The lessee submits that the subsequent month's rent was accepted. Lessor sought eviction by preferring the dispute to the Arbitrator.

3. Before the Arbitral Tribunal, the lessee's contention firstly was that the notice did not spell out the reasons for termination much less invoking the concerned provision, i.e., Clause-18; secondly that in fact there was no default since cheques towards the rent for the months in controversy had been tendered subsequently and were en-cashed. The Arbitrator, however, rejected the lessee's contentions and allowed the claim. This became the subject matter of the Section 34 petition, which was rejected by the learned Single Judge.

4. Mr. Ganju, learned senior counsel argues that the Single Judge fell into error by overlooking the patent illegality, to wit, the effect of Section 108 (c) and Section 114 of the Transfer of Property Act, 1882 which obliged the lessor to accept the rent, even if, *arguendo* there were a controversy with respect to defaults. It was emphasized that since the lessor admittedly accepted the rent subsequently even for the months in controversy, the

question of default ought not to have gone into and the claim should have been rejected.

5. Learned Single Judge in the impugned order reasoned as follows: -

“15. The view that learned Arbitrator has taken on Clause 5 of the lease deed dated 31st December, 2014 is certainly a plausible one. A reading of the clause does appear to indicate that the parties envisaged a situation where the agreement could be terminated earlier than 21 years for any reason whatsoever. Upon the happening of that event, in terms of Clause 5, the entire security deposit of Rs. 1.8 lakhs, after adjusting any outstanding amount towards rent payable till the date of termination, shall be refunded to the lessee. While Clause 23 does state that the lease has been granted for a period of 21 years, it has to be read along with other clauses in the lease deed.

16. As regards the non-payment of rent for three consecutive months, the case of the Petitioner was that the Respondent deliberately did not deposit the cheques that had been collected for the months of February, March and April 2011. The learned Arbitrator has returned a factual finding that the Petitioner was unable to establish that in fact it had tendered such cheques as claimed by it to the Respondent. In other words, the Petitioner was unable to counter the Respondent's case that till such time the rent was actually deposited in the Court, the Petitioner did not make any attempt to pay it to the Respondent.

17. Even as regards the service of notice for termination of the lease, the case of the Petitioner that it did not receive the notice for termination of lease dated 1st March, 2005 was unable to be established by it before the learned Arbitrator. It was in any event an unregistered lease. The Respondent was able to

establish on facts that vis-a-vis both these agreements, statutory notices under Section 106 of the Transfer of Property Act, 1882 were in fact served upon the Petitioner and the Respondent was therefore within his rights to terminate the two lease agreements.

18. The case of the Petitioner that it had spent Rs. 2.5 lakhs on repairing the premises was unable to be established by it before the learned Arbitrator.

19. As rightly pointed out by learned counsel for the Respondent, these proceedings are not in the nature of an appeal and this Court is not expected to re-appreciate the evidence. Unless the Court finds something in the impugned Award that shocks the judicial conscience, the Court is not expected to undertake a merit review and interfere with the Award simply because another view is possible to be taken on the evidence before the learned Arbitrator.

20. The impugned Award has several findings of fact which have not been shown by the Petitioner to be perverse. None of the grounds under Section 34 of the Act stand attracted.”

6. Section 108 of the Transfer of Property Act, 1882 to the extent it is relevant, reads as follows: -

“108. Rights and liabilities of lessor and lessee. - In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased: -

(A) Rights and Liabilities of the Lessor

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound on the lessee's request to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested."

7. Section 114 of the Transfer of Property Act, 1882 reads as follows: -

"114. Relief against forfeiture for non-payment of rent. - Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

8. The appellant's contention here is that even if it were assumed that for three months there was a default, subsequent tendering of the rent, its acceptance and acceptance of the later periods' rents precluded a sustainable legal claim. In short, the appellant argues that the Arbitrator to the extent it

overlooked Section 114 of the Transfer of Property Act, 1882, committed a patent illegality.

9. This Court is un-persuaded with the submissions. Firstly as to what constitutes a patent illegality has been clearly spelt out in several judgments of the Supreme Court - most of which were considered in the decision reported as *Associated Builders v. Delhi Development Association* [(2015) 3 SCC 49]. It is not every illegality that would attract the scrutiny and interference on the part of the Civil Court but one that is so unreasonable and contrary to notions of justice as embodied in some salient features of positive law, that it would require judicial intervention. As far as the appellant's submissions with respect to Section 114 read with Section 108 of the Transfer of Property Act, 1882 is concerned, the Court is of the opinion that they too are unmerited. As to whether in fact the amounts were tendered when they had to be tendered, there is no clarity on the part of the appellant. In fact, the cross examination of their relevant witnesses leaves this part completely unproved. In other words, the lessee was unable to prove that it tendered the rent, at the relevant time each month. What was proved was that the rent for the said three months in question was tendered later and for subsequent months. Now, as far as this is concerned, the Court notices that for some period, the amount was deposited in the Court for later months and the amounts so deposited in the Court were accepted without prejudice.

10. The Court is unable to agree with the contention of the learned senior counsel with regard to Section 114 of the Act for the reason that it is not compulsive unlike in State rent control legislations, which oblige the landlords to accept - in the case of first defaults - tendering of rent. It is

entirely discretionary. This was highlighted in *Rakesh Wadhawan & Ors v M/S. Jagdamba Industrial Corporation* AIR 2002 SC 2004, where it was noted: -

“Where a lease of immoveable property has determined by forfeiture for non-payment of rent and the lessor files a suit for ejectment of the lessee, the Court exercises a discretionary jurisdiction of passing an order relieving the lessee against the consequences of forfeiture if at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrears with interest and costs or furnishes such security as the Court thinks sufficient. Having appointed a time for payment, the Court still retains jurisdiction to extend the time (Chandless-Chandless Vs. Nicholson 1942 (2) All ER 315). Even the time appointed by a consent decree can be extended (Smt. Amiya De Vs. Dhirendra Nath Mandal AIR 1971 Calcutta 263). The discretion conferred by Section 114 of TP Act is of wide amplitude guided by the principles of justice, equity and good conscience and the Court would examine the conduct of the parties, the comparative hardship and lean in favour of one whose hands are clean..”

Again, in *Namdeo Lokman Lodhi v Narmadabai & Others* AIR 1953 AIR 228 it was held that:

“In our opinion, in exercising the discretion, each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant, This was the view taken by the Madras High Court in Appa Shetty v Mohammad Beari (1916) I.L.R, 39 Mad. 834), and the matter was discussed at some length. We agree with the ratio of that decision. It is a maxim of equity that a person (1) (1927) I.L.R. 54 Cal. 485. who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitles him to relief in equity, then the court's hands are not tied to exercise it in his favour.

With great respect we think that the observations cited above contain sound principles of law. We are, therefore, unable to accede to the contention of Mr. Daphtary that though section 114 of the Transfer of Property Act confers a discretion on the court, that discretion except in cases where third party interests intervene must always be exercised in favour of the tenant irrespective of the conduct of the tenant.”

11. Quite evidently, therefore, whether a tenant ought to be permitted to tender rent and continue in the premises is not a matter of unilateral choice; rather, it is dependent upon exercise of discretion by courts and tribunals, on a fact dependent exercise, where the rights of the rival parties are examined and balanced. The exercise of discretion in such cases, by a forum agreed to by both the parties, in favour of one and excluding the other, cannot be termed as a patent illegality.

12. In view of the foregoing reasons, there is no merit in the appeal. It is therefore dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

APRIL 12, 2017
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