

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

+ **FAO No. 189/2017**

% **25th April, 2017**

AMALGAMATED BEAN COFFEE TRADING COMPANY NOW
COFFEE DAY GLOBAL Appellant

Through: Mr. Bipin Kalappa, Advocate.

versus

SURJIT SINGH JOLLY Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.15577/2017 (condonation of delay)

1. For the reasons stated in the application, delay in filing the appeal is condoned.

C.M. stands disposed of.

FAO No.189/2017

2. This first appeal under Order XLIII Rule 1(r) of Code of Civil Procedure, 1908 (CPC) impugns the order of the trial court dated 9.2.2017 by which the trial court has allowed the application filed by the respondent/plaintiff under Order XXXIX Rule 10 CPC and directed that the appellant/defendant should pay arrears of rent w.e.f May,

2014 to February, 2015 and thereafter *mesne* profits for remaining 15 months at the similar rent and till possession is handed over to the respondent/plaintiff.

3. The facts of the case are that respondent/plaintiff let out the suit property bearing no. A-9, Block D-1-A, Janakpuri, New Delhi to the appellant/defendant for setting up its retailing business relating to various products and services. The minimum guarantee amount payable to the respondent/plaintiff under the lease deed was Rs.1.10 lacs per month. Tenancy as per the lease agreement dated 23.10.2013 commenced from 1.2.2014. The respondent/plaintiff terminated the tenancy of the appellant/defendant in terms of the notice dated 24.1.2015 and thereafter the subject suit for possession and *mesne* profits was filed. In this suit the said application under Order XXXIX Rule 10 CPC was filed by the respondent/plaintiff which has been allowed by the impugned order. For allowing of the application trial court has referred to the judgment of the learned Single Judge of this Court in the case of ***Sangeeta Batra Vs. M/s VND Foods & Ors.*** Crl.A.No.679/2015 decided on 1.7.2015 that a tenant if he alleges that the tenanted premises cannot be used, then the tenant cannot keep on one hand retaining the premises by refusing to surrender possession of the same and yet claim that rent is not payable. The learned Single

Judge of this Court in the case of ***Sangeeta Batra (supra)*** has referred to Section 108(e) of the Transfer of Property Act, 1882. These aspects are referred to by trial court in paras 5 and 6 and which paras read as under:-

“5. It is well settled law in case title ***Sangeeta Batra Vs M/s VND Foods & Ors, CR No.679/2015, decided on 01.07.2015*** that Sec 108 of Transfer of Property Act deal with the aspect of rights and liabilities of lessor and lessee. The rights and liabilities of the lessee are enumerated from clause (d) onwards upto clause (q). Clause (e) of Sec 108 reads:

“(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.”

6. Thus, if the leased premises is rendered substantially and permanently unfit for the purpose for which it was let, the lessee has the option to avoid the lease. Unless the lessee so avoids the lease, he cannot avoid his obligation contained in Clause (l) of Sec 108, which states that *“the lessee is bound to pay or render, at the proper time and place, the premium or rent to the lessor or his agent in this behalf.”*

4. Trial court in the end in para 8 of its impugned order has referred to the fact that it was in the knowledge of the appellant/defendant that premises were sealed by the local authority for misuse since 5.3.2014 but in spite of the same the appellant/defendant did not choose to surrender the lease which could have been done in view of Section 108 of the Transfer of Property Act. Accordingly the trial court by applying the ratio of the judgment in the case of ***Sangeeta Batra (supra)*** held that it was not possible for the appellant/defendant to deny its liability to pay arrears of rent or *mesne* profits in case it

chooses to continue to hold the lease premises. The possession of the leased premises was only handed over to the respondent/plaintiff from 1.6.2016.

5. I do not find any illegality or perversity in the impugned order inasmuch as it is only for the period for which the agreed amount was not paid that the impugned order has been passed directing payment of rent.

6. Learned counsel for the appellant/defendant argued that premises in question were let out for a commercial purpose as per the lease deed and therefore since the premises were sealed by the local authorities on the ground that premises could not be used for commercial purpose, hence, the respondent/plaintiff cannot take advantage of its own wrong. The argument of the appellant/defendant is misconceived inasmuch as there cannot be any estoppel against the law when the nature of user of the premises in Delhi is governed by the statutory provisions and the statutory master plan under the Delhi Development Act, 1957. Once the master plan, which is a statutory document, provides for the premises as not being a commercial one, then, the appellant/defendant is deemed to know the user of the premises, and therefore, the appellant/defendant cannot contend that it

has been duped or breach has been committed by the respondent/plaintiff of the premises of the terms of the lease deed.

7. In somewhat similar circumstances under Section 14(1)(k) of the Delhi Rent Control Act, 1958 it was held by the Supreme Court in the case of *Faqir Chand Vs. Shri Ram Rattan Bhanot (1973) 1 SCC 572* that there cannot be estoppel against a landlord from seeking eviction of a premises which were let out for commercial purposes although under the master plan the premises could only be used for the residential purposes. Supreme Court held that even if by consent landlord and tenant agree to user of a residential premises for commercial use, the same will not mean that the landlord is subsequently estopped from claiming eviction of the tenant from the tenanted premises on the ground of misuse as per the master plan of Delhi. In any case, the appellant/defendant cannot insist on continuing with the lease yet not pay the admitted rental of the suit premises. The impugned order therefore cannot be faulted with.

8. In view of the above, there is no merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

APRIL 25, 2017
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VALMIKI J. MEHTA, J