

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

+ **RFA No.393/2018**

% **9th May, 2018**

SHOBHA THAPAR Appellant

Through: Mr. Jagjit Singh, Advocate.

versus

ORACLE SOFTWARE INDIA LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.19143/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.19144/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 15 days

in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.393/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the

appellant/plaintiff/landlady impugning the judgment of the Trial Court dated 5.12.2017 by which trial court has partly decreed the suit filed by the appellant/plaintiff/landlady. The appellant/plaintiff/landlady filed the suit for recovery of Rs.37,96,870/- towards arrears of rent and *mesne* profits but trial court has decreed the suit only for arrears of rent for the months from 1.7.2001 to 30.4.2002 totaling to Rs.6,25,950/-. *Mesne* profits/rent for the period after 30.4.2002 has not been granted to the appellant/plaintiff/landlady on account of her refusing to receive possession of the tenanted premises from the respondent/defendant/tenant on 30.4.2002.

4. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs.37,96,870/-. How this figure of Rs.37,96,870/- is arrived at is stated in para 3.7 of the plaint and this para reads as under:-

“3.7 Defendant company committed breach in performance of obligations cast upon it under terms of lease deed. Defendant company did not pay rent of leased premises regularly as such is in arrears of rent. Since possession of the premises is not delivered unto Plaintiff on expiry of lease, Defendant is liable to pay *mesne* profits/usufructuary charges-cum-liquidated charges detailed as under:

i)	Rent w.e.f. 1.7.2001 to 31.7.2002 i.e. for 13 months @ Rs.48,150/- per month	Rs.06,25,950.00
ii)	Interest accrued upto July, 2002 @ 12% p.a.	Rs.00,43,817.00

	Interest accrued from 1 st August 2002 to Feb.2005 (31 months) @ 12% p.a.	Rs.01,94,045.
iii)	Mesne profits/usufructuary charges- Cum-liquidated charges as per clause 7(a) of lease deed @ 1.5 times of rent i.e. Rs.72,225 per month w.e.f. 1.8.2002 to 28.2.2005 (31 months) Interest accrued on mesne profits From August 2002 to February, 2005 @ 12% p.a. (31 months).	Rs.22,38,975.00 Rs.06,94,083.00
	Total	Rs.37,96,870.00

(Rupees Thirty Seven lacs Ninety Six thousand Eight hundred and Seventy only)”

5. According to the appellant/plaintiff, the appellant/plaintiff was entitled to *mesne* profits even after termination of lease w.e.f 30.4.2002 inasmuch as the case of the appellant/plaintiff was that terms of the lease deed dated 22.11.1999 entered into between the parties were not complied with by the respondent/defendant/tenant, and therefore the appellant/plaintiff was not bound to receive back possession of the tenanted premises on 30.4.2002, and consequently the respondent/defendant being in unauthorized occupation was liable to pay *mesne* profits/damages even after 30.4.2002. The case of the respondent/defendant was that by its letter dated 16.1.2002 lease was terminated w.e.f 28.2.2002 and since the appellant/plaintiff failed to receive possession therefore the appellant/plaintiff is not liable to rent from 28.2.2002 and that the

appellant/plaintiff is not entitled to *mesne* profits from 28.2.2002. I may note that since the lease was terminable by a three months notice, hence the trial court has extended the date of 28.2.2002 to 30.4.2002.

6.(i) Trial court has dealt with the issue with respect to entitlement of the appellant/plaintiff for rent and *mesne* profits under two aspects/heads. The first aspect/head is of validity of the notice of termination of tenancy dated 16.1.2002 inasmuch as the notice of termination of tenancy dated 16.1.2002 was only of about one and half months ending on 28.2.2002, whereas in terms of Clause 33(d) the lease could be terminated by lessee by giving a three months notice. In this regard, trial court has relied upon the provision of Section 106 of the Transfer of Property Act, 1882 as amended with the underlying intent of the amendment so as to validate defective notices on account of notices being defective for being less than the period required by law for termination of tenancy, and accordingly trial court has held that though the lease will not stand terminated on 28.2.2002 in terms of the letter of the respondent/defendant dated 16.1.2002 w.e.f 28.2.2002, but the lease will stand terminated at the end of three months period ending on 30.4.2002.

(ii) I completely agree with the reasoning and conclusion of the trial court in this regard and which extensively discusses and refers to the legislative intent of amending Section 106 of the Transfer of Property Act so as to remove defects of notices only on account of the same not containing the period as required by law/contract for termination of tenancy. The relevant discussion of the trial court in this regard is contained in paras 14 to 19 of the impugned judgment and these paras read as under:-

“14. The other main objection of the learned counsel for plaintiff is that the letter dated 16.01.2002 issued by the defendant was not a valid notice as it did not provide the minimum period of 3 months which was the mandatory requirement of the lease deed. On this point, the Section 106 of the Transfer of Property Act is relevant and the same is reproduced as under:

Sec. 106. Duration of certain leases in absence of written contract or local usage -

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that subsection, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or

delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

15. From reading of sub-clause (3) of Section 106 of the said Act, it is clear that a notice shall not be deemed to be invalid merely because the period mentioned therein falls short of the period as specified under sub Section (1), where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. From the object of sub clause (3) of Section 106, an analogy can be drawn in this case also to the effect that on account of falling short of the period of 3 months, the said notice dated 16.01.2002 cannot be said to be invalid though the period of three months should be counted after the date of its receipt.

16. While reading the said sub-clause, it is noticed that the said sub clause (3) was inserted by the Transfer of Property Amendment Act, 2003 w.e.f. 31.12.2002 and, therefore, a question arises as to whether the said sub clause (3) is applicable to the notice dated 16.01.2002 or not since the effective date of said Amendment Act is of subsequent period i.e. 31.12.2002.

17. As per Section 3 of the Transfer of Property Amendment Act, 2002, the amended Section 106 is applicable to all the notices which have been issued before the commencement of said Amendment Act (i.e. 31.12.2002) but where no suit or proceeding has been filed before such commencement. The said Section 3 is reproduced as under:

Sec. 3 Transitory provisions.- The provisions of Section 106 of the principal Act, as amended by section 2, shall apply to -

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act; and

(b) all notices which have been issued before the commencement of this Act but where no suit or proceeding has been filed before such commencement.

18. Thus, it is clear that the sub-clause(3) of Section 106 of the Transfer of Property Act is applicable to the letters issued by the defendant i.e. dated 16.01.2002 and 18.04.2002. In result, I hold that in view of the aforesaid provisions of the Transfer of Property Act, the letter dated 16.01.2002 is a valid notice terminating the tenancy. However, the date of determination/termination of the tenancy must be counted after 3 months of the receipt of the said letter.

19. There is no specific date surfaced on the judicial file as regards “receiving” of the said letter by the plaintiff but the said letter has been acknowledged in the reply of the plaintiff dated 01.02.2002 and, therefore, the date of “receiving” of the said letter can be taken in the ordinary course as 3-4 days of the date of its posting i.e. 20.01.2002. But to avoid any confusion/hypotheses, the date is treated as “01.02.2002”. If the period of 3 months is counted from the said date, it would end on

30.04.2002. Accordingly, in view of the aforesaid facts, I hold that the lease stands terminated on 30.04.2002.” (underlining added)

7.(i) The second aspect to be decided is as to whether the appellant/plaintiff could have validly refused to receive the possession of the tenanted premises on 30.4.2002, and especially in view of the letter of the respondent/defendant dated 18.4.2002.

(ii) In this regard, the contention of the appellant/plaintiff is by referring to her letter dated 1.2.2002 and a subsequent letter dated 20.4.2002, and it is accordingly argued that the appellant/plaintiff was not bound to receive possession of the tenanted premises on 30.4.2002.

8. In order to appreciate the controversy, the letters dated 16.1.2002, 1.2.2002, 18.4.2002 and 20.4.2002, with letters dated 16.1.2002 and 18.4.2002 being written by the respondent/defendant to the appellant/plaintiff and the letters dated 1.2.2002 and 20.4.2002 having been written by the appellant/plaintiff to the respondent/defendant, are reproduced below:-

“Letter dated 16.1.2002

Regd.AD
MRS. SHOBHA THAPAR
E-11/7,
Vasant Vihar,

January 16,2001/2002

Ground Floor
New Delhi

RE: TERMINATION NOTICE

Dear Madam,

Please refer to the Lease deed October, 1999 in respect of Flat No.4 having 535 Sq. Ft. Super area on 5th Floor (hereinafter referred to as the "Premises"). We have paid you an amount of Rs.7,22,250/- as Security Deposit and having been paying you monthly rent calculated @ Rs.90 per sq. ft. area till date.

We have now decided to terminate the aforesaid lease and handover the possession of the Premises on or before February, 28, 2002 subject to refund of Security Deposit and any other outstanding dues. Please note that the Lease Deed is unregistered and consequently the lease is a month to month lease and hence terminable under Section 106 of the Transfer of Property Act.

FOR ORACLE INDIA PVT. LIMITED

Sd/-

(AUTHORISED SIGNATORY)

Letter dated 1.2.2002

M/s Oracle Software India Ltd.

1/2/2002

Flat No.4,5th Floor,
Gopal Das Bhawan,
28, Barakhamba Road,
New Delhi-110001

Sub: **Non-payment of rent of Flat No.4 since July,2001**

Sir,

This has reference to your letter of 16.1.2002 wherein you have expressed your intention to terminate the lease of Flat No.4, on Vth Floor having area of 535 sq. ft.

Said letter under reply does not narrate the true and correct facts.

Lease for the flat was registered. Terms of lease prevail and govern the tenancy. As per lease deed tenancy can be determined only:-

- i) Upon clearance of all arrears of rent. You are in arrears since July, 2001 to Feb. 2002. The arrears of rent works out to Rs.3,85,200 (Rupees Three lakhs eighty five thousand two hundred only). Besides you are further liable to pay interest @ 24% per annum till date of payment, upon the aforementioned amount.
- ii) The security deposit cannot be appropriated towards arrears of rent. The security deposit is repayable at the time of delivery of vacant possession subject to the conditions that the premises are absolutely maintained in original conditions and are intact, all arrears towards electricity, water maintenance charges stands fully paid.
- iii) Notice for determination of lease has been given by giving three months notice.

In the absence of above requirements there can be no termination of lease and therefore, terms of lease govern.

Per your letter the averments are absolutely contrary to the terms of lease. Therefore, the letter cannot constitute any termination of lease as alleged. The termination is subject to the conditions narrated above. Pay arrears of rent, grant inspection of premises, issue notice as per lease deed and only then you have right to terminate the lease. It is for you to decide how do you want to proceed, the manner in which you want to go and the mode in which you want to settle the account.

Thanking you,

Yours faithfully,
Sd/-

Letter dated 18.4.2002

Dated 18th April, 2002

Shobha Thapar
E-11/7, Vasant Vihar
Ground Floor
New Delhi-110057
Dear Sir/Madam

1. This is to inform you that we are handing over the possession of the various flats located on the 5th floor 'A' wing Gopal Das Bhawan on April 25th 2002 (hereinafter the "Premises")
2. The possession of various flats in the Premises is being handed over by giving a duplicate set of keys for the main entrance of the Premises since this is one contiguous space and has one entry and exist access.
3. this handing over of the possession of the Premises is further and in terms of Oracle India's letter dated 7/3/2002 & 16/1/2002 and in accordance with the Site Plan of the Premises.
4. If you have no objection to the handing over of the possession in the manner stated hereinabove then kindly make yourself available on the aforesaid date. This handing over of the possession of course is subject to settlement of all outstanding dues including but not limited to refund of the outstanding security deposit lying with you.
5. In case you have any objection to the handing over of the flats in the manner stated hereinabove. Please inform us within 3 days of the receipt of this letter so that all issues can be mutually discussed and amicably settled by both parties.

Yours sincerely
For Oracle India Private Limited
sd/-
(Authorised Signatory)

Letter dated 20.4.2002

20.4.2002

M/s Oracle Software India Ltd.,
Flat No. 4, 5h Floor,
Gopal Das Bhawan,
28, Barakhamba Road,
New Delhi-110 001.

Sub. : Your letter dated 18.4.2002.

Sir,

Kindly refer to the subject letter wherein you have proposed to hand over the vacant possession of the various flats located at 5th Floor, A Wing, Gopal Das Bhawan on 25.4.2002, under your tenancy.

Firstly, the contents of your letter as stated are incorrect. You are narrating incorrect factual positions in your letters which is contrary to your own records. You never sent us any letter dated 7.3.2002. Letter dated 16.1.2002 stands duly replied vide our letter dated 1.2.2002. Thereafter, there is no exchange of correspondence.

Secondly, you are asking for settlement of outstanding dues. No dues are to be settled at that point of time. You have to first make payment to us immediately towards arrears of rent, interest accrued, rent in lieu of notice period as detailed hereinbelow:

Sr. No.	Particulars/Head	Amount (In Rs.)
1.	Arrears of rent of the tenanted premises from July, 2001 to April, 2002	4,81,500.00
2.	Interest accrued on arrears of rent from July, 2001 to April, 2002 @ 24% for each month.	0,52,965.00
3.	Amount of rent payable in lieu of notice period for 3 months as per Lease Deed.	1,44,450.00
Total		6,78,915.00

On receipt of above payment, out further right is to :-

i) Carry out inspection of the tenanted premises and have to ascertain that there is no damage caused to the premises, there is no structural alternations, no removal of fixtures, fittings and facilities provided therein.

ii) Certification of entire payments towards consumption of energy/power/water/contribution/maintenance charges.

Thirdly, it is only on compliance, confirmation, certification and on delivery of vacant peaceful possession of the tenanted premises to us, that you are entitled to claim refund of security deposit.

From:
Mrs. Sobha Thapar,
E-11/7, Ground Floor,
Vasant Vihar
New Delhi – 110 057.

Till such time, the above compliance is made you cannot assert your right to claim refund of security deposit from us.

Security deposit is not subject to appropriation under any other head whatsoever.

Resultantly, you have to immediately discharge following obligations :-

- a) Making payment of Rs. 6,78,915.00 as detailed hereinabove immediately.
- b) Producing receipts/bills of deposit of electricity/power charges, maintenance charges to the respective authorities.
- c) Grant inspection of the tenanted premises for our certification that neither the same are damaged nor any fixture & fittings are missing from the tenanted premises.
- d) And/or otherwise for our verification that no claims arise against the amount of security deposits, so as to enable use to take possession of the premises on 25.4.2002 as stated by you in your letter under reply.

In case if you shall fail to make compliance to the requirements contained in paragraphs (a) to (d) above, then you cannot make a request contained in your letter and in such eventuality you shall continue to remain liable for payment of rent and charges in terms of the covenants laid under the Lease Deed.

Kindly treat it as most urgent and let us know your intentions for our future course of action.

Thanking you,

Yours faithfully,
Mrs. Shobha Thapar”

9. The admitted position is that from the respondent/defendant the appellant/plaintiff had security deposit with her of Rs.7,22,250/-. From this amount lying of Rs.7,22,250/- with the appellant/plaintiff even if we reduce the amount of Rs.3,85,200/- being the arrears of rent to February, 2002, and thereafter again for two more months till 30.4.2002 with monthly rent being admittedly Rs.48,150/-, yet still there would be available to the credit of the respondent/defendant an amount of Rs.2,40,750/- of the

respondent/defendant/tenant lying with the appellant/plaintiff/landlady and therefore the appellant/plaintiff could not have refused to receive possession allegedly on account of dues remaining on alleged non-compliance of terms of lease deed. Explanations which are sought to be given by the appellant/plaintiff/landlady for not receiving possession on 30.4.2002 are not acceptable once sufficient amount was always available with the appellant/plaintiff/landlady to take care of all the dues of the respondent/defendant towards the appellant/plaintiff including towards arrears of rent till 30.4.2002. Trial court in my opinion therefore has committed no illegality in holding that the appellant/plaintiff has illegally refused to receive possession and therefore was not entitled to any rent or *mesne* profits w.e.f 1.5.2002. Trial court in this regard has also relied upon the judgment of the learned Single Judge of this Court dated 14.5.2015 in RFA No.784/2010, and the relevant paras of the trial court in the impugned judgment in this regard are paras 9 to 13 and these paras read as under:-

“Procedure for determination of lease

9. On the point of determination of a lease, specific provision has been provided in Section 111 of the Transfer of Property Act and the same is reproduced as under:

Sec.111 A lease of immovable property determines-

- (a) by efflux of the time limited thereby:
- (b) where such time is limited conditionally on the happening of some event-by the happening of such event:
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-by the happening of such event:
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:
- (f) by implied surrender:
- (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may reenter on the happening of such event]; and in [any of these cases] the lessor or his transferee [gives notice in writing to the lessee of] his intention to determine the lease:
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

10. From the said Section, it is clear that a lease can be determined by any of the mode as prescribed in the above said Section. In the instant case, there was a specific tenure of the lease which was ending on 31.07.2002 but from the exchange of various letters between the parties, this court is required to examine whether the lease was validly termination/determined prior to that or not. The answer to this question will affect the other rights and liabilities of the parties.

11. At the outset, the counsel for the defendant argued that the letter dated 16.01.2002 sent by the defendant to the plaintiff constitutes a notice to terminate the lease but the learned counsel for the plaintiff contented that the said letter was not a valid notice as specific time of 3 months was not given as per the terms of the lease deed and that this defect was also communicated through letter of the plaintiff dated 01.02.2002. The learned counsel for the plaintiff further stressed that in addition to the defect of prescribed time period of 3 months, the lessee was also required to fulfill his other obligations i.e. payment of arrears of rent, inspection of the property, settlement of the security amount, etc. which he did not perform.

12. On the contrary, the learned counsel for the defendant, by relying on various precedents/case laws, argued that once a tenant has given a notice for termination of tenancy or shown his intention to quit the

leased premises, it is the obligation of the lessor to receive the possession of the leased premises and for other issues like arrears of rent, damages etc., the lessor can resort to the remedies available to him under law. He further urged that on such grounds, the lessor has no right to postpone restoration of possession of the leased property and if he does so, then the tenant is not liable to pay the rent after the period of termination of lease. The relevant observations of the cited cases are extracted as under:

H.S. Bedi vs. National Highway Authority of India decided by Hon'ble Justice Mr. J.R. Midha, High Court of Delhi dated 14.05.2015 in RFA no. 784/2010 wherein it was held:

“The law with respect to the obligations of the landlord and tenant upon determination of tenancy are well settled. Upon determination of a tenancy and offer of possession by the tenant, the landlord cannot refuse to take over the possession. If the landlord refuses to take the possession, the possession shall be deemed to have been delivered to the landlord and the tenant would not be liable to pay the rent. The following judgments may be referred to in this regard.”

In A.C. Raman vs. Muthavally Seydali's Son Valiyakath Kaithakkal Kunhi Bara Haji, AIR 1953 Madras 996, the tenant gave the notice to the landlord that the tenanted premises were no longer required and therefore, the landlord should take back the possession. The tenant also offered to give the keys of the premises to the landlord. The landlord however refused to accept the premises on the ground that there was an understanding that the lease would not be surrendered. The tenant sent another notice reiterating that the premises would be surrendered on the notified date and the tenant would not be liable to pay the rent subsequent thereto. This was again objected to by the landlord who filed a suit for recovery of the rent against the tenant. The learned Munsif decreed the suit holding that the landlord was not bound to take the possession till the restoration of the premises by the tenant and, therefore, the tenancy continued and the tenant would be liable to pay the rent. The tenant challenged the said judgment before the Madras High Court. The High Court allowed the appeal and held that the landlord, who refused to take the possession upon termination, cannot hold the tenant liable to pay any rent after termination.

The plaintiff, it must be stated, has misconceived his remedy and by no stretch of imagination could it be said that the plaintiff, who has refused to take possession when possession was offered, could hold the defendant liable for any rents after the lease was terminated and after the plaintiff refused to take possession. The grounds alleged for refusing to take possession by the plaintiff were that the building was damaged and that until and unless the building is repaired, the plaintiff is not obliged or bound to take possession. Such a position

seems to be wholly untenable. When the lease has been terminated by a valid notice as provided for under S. 111 of the Transfer of Property Act and when possession has been offered and the plaintiff had refused to take possession, it cannot be held that the lease would still continue in favour of the plaintiff.

Vacation of the property together with a notice to the landlord to take the delivery of the possession is submission for the purpose of restoration of the possession and, any impediment put up by the landlord in the matter of redelivery of the possession and not accepting the possession on the ground that some terms and conditions will have to be fulfilled will amount to the delivery of the possession and it shall be deemed for all purposes that as soon as the property has been vacated the possession has been delivered though the landlord may not accept the possession.

The security is paid to the landlord for the purposes of guarantee that no damage is done by the tenant nor any fixtures and fittings are removed and every landlord is entitled to use the security for repairing the damages done by the tenant. Though the security cannot be adjusted towards arrears of rent but in case the tenant hands over possession of the premises without any damage, the landlord has no right to retain the security."

13. In the light of aforesaid case laws, I am of the considered opinion that the insistence of the lessor upon the lessee for settlement of other issues i.e. arrears of rent, security amount, inspection of property or damages etc. without taking the possession of the leased property were not in accordance with law and in fact, the lessor was obliged to first receive the possession of the premises as soon as the possession was offered to him/her. Accordingly, the aforesaid grounds for not receiving of possession as mentioned in the letters dated 01.02.2002 and 20.04.2002 cannot be considered at this stage while deciding the issue of determination of lease." (underlining added)

10. In the present case though the trial court has held that appellant/plaintiff could not refuse to receive possession on termination of tenancy on the ground of dues remaining payable towards arrears of rents, alleged electricity charges arrears, interest etc, yet this Court has given additional reasoning above that in the

facts of this case even after adjustment of claim of appellant/plaintiff towards rent till 30.4.2002 still a substantial amount of Rs. 2,40,750/- of the respondent/defendant/tenant was with the appellant/plaintiff/landlady for any further dues which she was claiming towards interest on arrears of rent till 30.4.2002 as detailed in para 3.7 of the plaint which is reproduced above. Appellant/plaintiff hence was completely unjustified in refusing to receive possession of the tenanted premises on 30.4.2002.

11. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

MAY 09, 2018
Ne

VALMIKI J. MEHTA, J