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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.491/2018

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6th July, 2018

TORQUE BIKES (P) LTD

..... Appellant

Through: Ms. Geeta Luthra, Sr. Adv. with
Mr. Harmeet Singh Oberoi, Mr. Varun Ahuja &
Mr. Ashish Garg, Advs.

versus

HARSHA GUPTA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908(CPC) is filed by the defendant/tenant impugning the judgment of the Trial Court dated 30.1.2018 by which the Trial Court has decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff/landlord against the appellant/defendant/tenant, so far as the relief of possession is concerned, under Order XII Rule 6 CPC.

2. Right at the outset, I must note that the present appellant/defendant/tenant is a tenant who is indeed a truant tenant. This I

say so because the defence of the appellant/defendant struck off on account of non-payment of rent. The contention for non-payment and suspension of rent by the appellant/defendant/tenant was that there was damage to the tenanted premises as a result of falling down of the roof and consequently the appellant/defendant/tenant has claimed suspension of rent. While this Court was sitting in the FAO Roster, this very same aspect came up before this Court and this Court by a detailed judgment dated 24.5.2017 rejected the self-same contention of the appellant/defendant/tenant, which is being urged today to claim entitlement to suspension of 50% of the rent. This judgment dated 24.5.2017 in the case of *Torque Bikes Private Ltd. vs. Harsha Gupta*, 2017 (5) AD (Delhi) 192 reads as under:-

“FAO No. 21/2017

1. This first appeal under Order XLIII Rule 1 (r) of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant/tenant impugning the order of the trial court dated 27.10.2016 by which the trial court in exercise of powers under Order XXXIX Rule 10 read with Order XVA CPC (as applicable to Delhi) has directed the appellant/defendant/tenant to pay the admitted rate of rent for the period for which rent has admittedly not been paid. The rent has not been paid with effect from 1.3.2016 and the admitted rate of rent is Rs.1,84,500/-. CPC was amended with respect to suits filed in Delhi by the landlords for possession against tenants and in which suit for payment of interim rent an application can be filed under Order XVA CPC. This provision of Order XVA CPC reads as under:-

ORDER XVA

STRIKING OFF DEFENCE IN A SUIT BY A LESSOR

(A) “In any suit by a owner/lessor for eviction of an unauthorized occupant/lessee or for the recovery of rent and future mesne profits from him, the defendant shall deposit such amount as the court may direct on account of arrears upto the date of the order (within such time as the court may fix) and thereafter continue to deposit in each succeeding month the rent claimed in the suit as the court may direct. The defendant shall continue to deposit such amount till the decision of the suit unless otherwise directed.

In the event of any default in making the deposit as aforesaid, the Court may subject to the provisions of sub-rule (2) strike off the defence.

(2) Before passing an order for striking off the defence, the court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause, if shown in order to decide as to whether the defendant should be relieved from an order striking off the defence.

(3) The amount deposited under this rule shall be paid to the plaintiff owner/lessor or his Advocate and the receipt of such amount shall not have the effect of prejudicing the claim of the plaintiff and it would not also be treated as a waiver of notice of termination."

2. The aforesaid provision of Order XVA CPC was specifically inserted by the legislature inspite of there existing the provision of Order XXXIX Rule 10 CPC in order to ensure that a tenant did not stay in the tenanted premises during the pendency of the suit filed by the landlord for possession without payment of rent.

3. In the present case it is undisputed that appellant/defendant became a tenant of the respondent/landlord/plaintiff in terms of the lease deed dated 26.5.2015. The total area let out was an area of 4500 sq. feet. The area which has been let out is situated in part of the property bearing Municipal No. 30, Najafgarh Road, Shivaji Marg, New Delhi. Appellant/defendant under this lease deed admittedly entered upon the suit premises as a tenant and started using the same. The appellant/defendant, however, failed to pay the rent with effect from 1st March, 2016. The subject suit for possession, arrears of rent and damages was hence filed by the respondent/plaintiff by terminating the tenancy by notice dated 15.4.2016 on account of non-payment of admitted rent by the appellant/defendant. It is in this subject suit that the subject application for payment of pendente lite rent was filed and which has been allowed by the impugned order dated 27.10.2016 and which order reads as under:-

"27.10.2016

Present:

Sh.

Sachin Mishra and Sh. Bharat Deepak, counsel for the plaintiff.

Sh. H.S.Arora, counsel for the defendant/counter-claim.

Previous cost of Rs.10,000/- paid by the defendants.

The documents in compliance of the previous order are supplied to the counsel for the plaintiff against receipt.

Arguments on the application under order 39 Rule 10 CPC heard.

Record perused.

The plaintiff has filed the present suit for possession, arrears of rent, damages/mesne profits and injunction against the defendant. It is submitted that the plaintiff is owner and landlord of the suit property which was let out to the defendant vide lease deed dated 26.05.2015.

It is stated that the defendant has fails to pay the rent w.e.f 16.01.2016. It is stated that the legal notice was served upon the defendant but despite service of the legal notice, the defendant has failed to make the payment. Hence, this suit.

The defendant after service of the summons filed the written statement. In the written statement existence of the relationship of landlord and tenant between the parties is admitted. The execution of the lease deed dated 26.05.2015 is also admitted. It is stated that the total rent of the suit property is Rs. 1,84,500/- per month. It is stated that the defendant

was constraint to suspend the payment of entire rent w.e.f 01.03.2016.

The plaintiff by way of the application under order 39 Rule 10 CPC is praying for issuance of the directions to the defendants to pay the admitted rent. The defendant has admitted the existence of the relationship of landlord and tenant between the parties. The rate of rent of the suit premises @ Rs.1,84,500/- per month is also admitted by the defendant. The execution of the registered lease deed dated 26.05.2015 is also admitted by the defendant.

The defendant has raised the defence that the plaintiff with ulterior motive to hide his own illegal acts has filed the present suit as the entire tenanted premises have been rendered useless. It is submitted that the defendant is not able to use the suit premises due to the inaction/malafide action of the plaintiff, therefore, the defendant is entitled for suspension/withheld of the payment of the rent.

The counsel for the defendant has relied upon five judgments in support of his contentions. The judgment mentioned at Sr. no. 1 and 2 are related to the provisions of Delhi Rent Control Act, therefore, the same are not applicable to the present case.

The ratio laid down in the judgment mentioned at Sr. no.3,4 and 5 are not applicable to the facts of the present case.

The perusal of the lease deed dated 26.05.2015 clearly reveals that there is no covenant for suspension of rent. The parties has not agreed for suspension of rent in case of any such even as alleged by defendant.

Keeping in view of the admission of registered lease deed and admission of the rate of rent and relationship of landlord and tenant between the parties, the defendant is directed to deposit in the court/or to pay the admitted rent of Rs.1,84,500/- per month w.e.f. 01st March 2016 upto date within 30 days from today. The defendant is directed to continue to deposit or pay the admitted rent on or before 10th day of every month.

This order is passed without prejudice to the contentions raised by the parties to the suit.

Put up for filing of written statement to the counter claim and replication to the plaint for 17.12.2016."

4. It is, therefore, seen that the factum of relationship of landlord and tenant is admitted, rate of rent is admitted and the period of non-payment of rent is admitted. In view of the provision of order XVA CPC, the present was hence a fit case where the court below has rightly exercised its power directing the appellant/defendant to pay the admitted rate of rent for the period for which the rent was admittedly not paid.

5. Counsel for the appellant/defendant argued that the appellant/defendant was entitled to suspension of rent and that the appellant/defendant has in fact filed a counter-claim. It is argued that the suit premises were unusable on account of construction being made in another part of the property and also that the roof of the part of the tenanted premises in Hall no. 1 had fallen down making the tenanted premises unusable and hence the appellant/defendant was entitled to invoke the doctrine of suspension of rent and hence there was disentitlement of the respondent/plaintiff for payment of rent. Reliance is placed upon the photographs which are filed in this Court to support the arguments urged on behalf of the appellant/defendant.

6. I have gone through the photographs. The so called 'falling down of the roof' is really a bizarre argument to say the least. Roof definitely has not fallen down. The photographs only show that there is a

space of about one sq. feet in one iron sheet in the roof. Surely therefore such minor damage in one small portion on a roof which is purely made of iron sheet cannot amount to 'falling down of the roof'. It is noted by this Court that as per Clause of Repair and Maintenance at pages 9 and 10 of the lease deed, the repair and maintenance of the tenanted premises during the currency of the lease has to be carried out by the appellant/defendant. Therefore, though counsel for the appellant/defendant sought to take benefit of the first three lines at page 10 of the lease deed, appellant/defendant cannot use these three lines in the lease deed to claim that the repairing of the roof even during the tenancy period at all times would be of the respondent/plaintiff, inasmuch as, these three lines is only with reference to the initial repairing of the roof at the time lease was taken. Therefore, the defence of the rent not being paid with respect to the area of 4500 sq. feet by showing of one photograph wherein there is damage to one very very small portion/part of the roof containing an iron sheet it cannot thereby be alleged that the roof has fallen down. This argument is a totally a frivolous reason for non-payment of rent and is therefore rejected.

7. The second defence urged on behalf of the appellant/defendant invoking the doctrine of suspension of rent is by placing reliance upon certain photographs which show that at certain point of time in the year 2016, there were certain debris and jhuggis which were existing in portion of the premises 30, Nazafgarh Road, Shivaji Marg, New Delhi and part of which premises is under the tenancy of the appellant/defendant. In other words, the entire premises 30, Najafgarh Road, Shivaji Marg, New Delhi is a very large plot of land and out of this plot of land only a part of the constructed area is let out to the appellant/defendant. The total land area of the respondent/landlord is 1.66 acres with one acre being 4840 sq. yds. Besides the appellant/defendant there are about two other tenants of the respondent/landlord in the plot in question and who continue to use their tenanted premises on payment of rent. One part of the property 30, Nazafgarh Road, Shivaji Marg, New Delhi belongs to one co-owner and it is that other co-owner who for a period of few months in the year 2015-16 carried out some construction work as a result of which there were some temporary disturbances. Disturbance and that too a temporary disturbance is not a prevention for the appellant/defendant from using the tenanted premises when various other tenants were also existing in the premises, using their tenanted premises, and paying the rent to the respondent/landlord.

8. I may finally observe that the photographs filed in this case on behalf of the appellant/defendant are only convenient photographs for a very small portion of entire property 30, Nazafgarh Road, Shivaji Marg, New Delhi and that too with respect to a limited period in the year 2015-16 and thus such photographs showing a limited and convenient position cannot be interpreted as a complete blockage to the appellant/defendant from using the tenanted premises for the entire lease period. Once a minor disturbance or minor

blockage has not prevented other tenants from using their portion and paying rent to the respondent/landlord, then this defence of the appellant/defendant of it being prevented from using the tenanted premises is clearly therefore farfetched and in fact a dishonest stand and is thus rejected.

9. Learned counsel for the respondent/plaintiff argued that the appellant/defendant is habitual of taking premises on rent and thereafter it stops paying the rent to the landlords and that various litigations are thus pending of various other landlords against the appellant/defendant, however, so far as these proceedings are concerned, this aspect being not relevant is not being touched upon.

10. In view of the above discussion, it is found that the present appeal is an abuse of the process of law. The present appeal is filed by a tenant who from March 2016 is not paying the huge admitted rent of Rs. 1,84,500/- per month. Appellant/defendant wants to continue in the tenanted premises without paying of rent and which is unacceptable especially after amendment of CPC by adding Order XVA CPC so far as Delhi is concerned.

11. This appeal is therefore dismissed with actual costs. Actual costs will be the cost not only of the present appeal, but also the costs incurred by the respondent/plaintiff for pursuing the proceedings under Order XXXIX Rule 10 CPC read with Order XVA CPC in the trial court. Respondent/plaintiff will file an affidavit and certificate of costs including the fees of its lawyers with respect to these proceedings and the subject proceedings in the trial court within a period of four weeks from today. Costs will be paid by the appellant/defendant to the respondent/landlord/plaintiff within a period of four weeks thereafter.

CRP No. 56/2017

12. This civil revision petition under Section 115 CPC impugns the order dated 16.1.2017 by which the defence of the appellant/defendant was struck off on account of non-payment of rent directed to be paid under Order XVA CPC by the earlier order of the trial court dated 27.10.2016.

13. Since there is admitted non-compliance of the order dated 27.10.2016 and I have already dismissed the FAO No. 21/2017 upholding the order dated 27.10.2016, accordingly, there is no merit in this revision petition and the same is therefore dismissed with actual costs. The respondent/landlord will file the certificate of costs with an affidavit with respect to these proceedings as also the subject proceedings in the court below with respect to striking off defence within a period of four weeks and costs will be paid by the appellant/defendant to the respondent/landlord/plaintiff within four weeks thereafter.”

(emphasis is mine)

3. The fact of the matter, therefore, is that the appellant/defendant/tenant most contumaciously, and if I can say so dishonestly, failed to pay the rent from March,2016 and which is just after a few months of the lease commencing on 19.5.2015. The respondent/plaintiff/landlord was forced to send a legal notice dated 15.4.2016, and surely no landlord expects that within a few months of creation of a commercial tenancy with rent of Rs.1,84,500/-, the tenant will illegally and unfairly stop paying the rent. The appellant/defendant/tenant continues to use the tenanted premises without payment of rent and therefore tenancy has been rightly terminated. Even if suspension of part of rent is pleaded (50% rent is argued before this Court to be only payable) yet the balance rent has admittedly not been paid from March,2016. No tenant can plead suspension of entire rent and yet keep on using the entire tenanted premises.

4. It is seen that there is no dispute that there is a relationship of landlord and tenant between the parties, and that the rate of rent was more than Rs.3,500/- per month i.e. Rs.1,84,500/- per month and the legal notice terminating tenancy dated 15.4.2016 stands served. In any case, it has been held by this Court in the case of *M/s. Jeevan Diesels and Electricals Limited Vs. Jasbir Singh Chadha (HUF) and Anr. (2011) 183 DLT 712*

that a service of summons in a suit can also be treated as a notice terminating the tenancy.

5. Learned Senior Counsel for the appellant/defendant has sought to argue that the appellant/defendant was entitled to suspension of rent and for which a counter claim has been filed however the fact that the counter claim has been filed and on which adjudication will take place cannot mean that the Court has to presume that counter claim today be ordered to have succeeded, and that consequently the appellant/defendant/tenant has obtained a money decree, and thus the appellant/defendant/tenant is entitled to suspension of rent. Therefore, as of today since the appellant/defendant is in gross default in paying rent from March, 2016, till date the offer is only to pay 50 % of the rent from March,2016, I do not find that present is either a case where this Court should, in any manner, exercise any discretion in favour of truant tenants such as the appellant/defendant. Once the self-same defence is legally rejected in terms of detailed judgement dated 24.5.2017 in FAO No.21/2017 this court also fails to understand that if the tenanted premises are really unusable then why is the appellant/defendant/tenant simply not surrendering the tenanted premises back to the landlady.

6. Learned Senior Counsel for the appellant/defendant then argued that

the defence of the appellant/defendant was struck-off and therefore Trial Court could not have looked into the written statement filed by the appellant/defendant for admissions, however, in my opinion, Trial Court has rightly rejected this argument by stating that striking of any defence does not mean that what is stated by the appellant/defendant in his written statement cannot be looked into. The relevant observations in this regard are contained in para 12 of the impugned judgment and this para 12 reads as under:-

“12. Firstly the striking of the defence does not mean that the written statement which has already come on record could not be looked into completely by the court. It only means that the defence taken by the defendant in the written statement shall not be considered by the court. Hence, merely because the defence has been struck off the admission made in the written statement will not stand withdrawn. Further even if the plea of defendant is taken to be correct then the situation is that there is no written statement filed by defendant. As per provisions of Order VIII Rule 3 & 4 of CPC, if any allegations made in the plaint has not been specifically denied, then the same is deemed to be admitted. Hence, if it is taken that there is no written statement on record then the allegations made in the plaint are not specifically denied by defendant thus amounting to the admission of the said allegations. Further defendant himself has stated that the provisions of Order VIII Rule 10 of CPC shall be applied. As per order VIII Rule 10 of CPC if no written statement has been filed by defendant then the court shall pass judgment against him. The word used in Order VIII Rule 10 of CPC is ‘shall’ which means that in the absence written statement by the defendant, the plaintiff shall be entitled for judgment.” (underlining added)

7. In view of the aforesaid discussion, I do not find any illegality whatsoever in the impugned judgment. There is no dispute that the lease which existed in favour of the appellant/defendant has been terminated on

account of non-payment of rent. The lease is outside the protection of the Delhi Rent Control Act, 1958 as the rent is more than Rs.3,500/- per month. Trial court was therefore justified in decreeing the suit by applying Order XII Rule 6 CPC.

8. Learned senior counsel for the appellant/defendant finally contended that there was a lock in period and the lease was for a period of five years and therefore such a lease expiring on 18.5.2020 could not have been terminated by the Legal Notice dated 15.4.2016, however this argument is rejected because it overlooks the fact that by the same lease deed there is a termination clause and which rightly entitled the landlord to terminate the lease in case of non-payment of rent. In this case non-payment of the rent from March, 2016 is an indubitable position which emerges from the record, and that lack of justification for non-payment of rent stands affirmed by this Court in its judgment dated 24.5.2017 as already reproduced above and the additional reasoning already given above.

9. The appeal being therefore a gross abuse of process of law, and since Trial Court has not imposed any cost, this appeal is dismissed with costs of Rs.5 lacs and which costs shall be paid by the appellant/defendant/tenant to the respondent/plaintiff/landlord within a period of six weeks from today.

JULY 06, 2018/ ak

VALMIKI J. MEHTA, J