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

Date of Decision: 6th December, 2019

+ **CM (M) 1738/2019**

RATTAN MEHTA & ORS. Petitioners
Through: Mr. G.P. Thareja & Ms. Shalini
Gandharva, Advocates (M-
9811123833)

versus

GAYATRI SHAH & ANR. Respondents
Through: Mr. Rajesh Yadav, Ms. Ruchira Arora
& Mr. Dhananjay Mehlawat,
Advocates. (M-9811006760)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 1st August, 2019, by which the Plaintiffs'/Respondents' (*hereinafter*, "*Plaintiffs*") application under Order XI Rule 1 CPC has been allowed by the Id. ADJ.
2. The petition arises out of a suit for possession, *mesne* profits and damages in respect of a shop located in property bearing No.25-A, C-Block, Vasant Vihar Market (local shopping Centre-I), New Delhi (*hereinafter*, "*suit property*"), filed by Smt. Preeti Shah and Smt. Santosh Shah against various Defendants who are part of the same family and one M/s Mahima Caps (P) Ltd.
3. The case of the Plaintiffs is that initially the suit property was rented to the Petitioners/Defendants (*hereinafter*, "*Defendants*"), as per the lease deed dated 15th May, 1984 at Rs.1,500/- per month. However, an alleged sub-tenancy was entered into by the Defendants with M/s Mahima Caps (P)

Ltd., vide agreement dated 15th July, 2004, under which the rent amount of Rs.1 lakh was to be paid as a minimum guaranteed profit/sale proceed. On the strength of this agreement, as well as the judgment of a Id. Division Bench of this Court in ***P.S. Jain Company Ltd. v. Aatma Ram Properties (P) Ltd, 1997 1 AD (DELHI) 454***, a civil suit was preferred before the Id. Civil Court.

4. A copy of the alleged rent agreement, as available with the Plaintiffs, was annexed with the plaint. In the written statement, the existence of the agreement itself was not challenged, however, the nature of the agreement was pleaded. The Defendants continued to take the position that the rent amount has always been Rs.1,500/- per month.

5. The following issues were framed in the suit on 30th January, 2018:

“1. Whether the suit of the plaintiff’s is barred under Section 50 of the Delhi Rent Control Act, 1958? OPD 1 and 2.

2. Whether the suit is bad for misjoinder of parties as Defendant no.4 is not a necessary party to the suit? OPD 1 and 2.

3. Whether the suit of the Plaintiff is barred by the limitation, principle of estoppel, acquiescence and doctrine of election? OPD 1 and 2.

4. Whether the plaintiffs are precluded from filing the suit, having withdrawn the eviction petition no.E-445/09 which was pending in the court of Sh. Pawan Kumar Rajawat, Ld. ARC, Saket Courts, New Delhi, suit for declaration and injunction vide Suit no.07/12 and M.No.45/11 both titled as Rajeesh Shah v. MCD both dismissed vide its order dated 03.09.2015 by the court of Ms. Surya Malik Grover, Ld. SCJ-cum-RC south Saket Courts, New Delhi? OPD 1 and 2.

5. Whether the amount received as monthly minimum guaranteed profit of Rs.1,00,000/- by defendant no.1

and Smt. Anju Mehta (since deceased now represented by defendant no.1 and 3) from defendant no.4 under the agreement dated 15.07.2004, was in the nature of the rent or not? OPP.

6. Whether the plaintiff's are entitled to a decree of possession of the suit premises in terms of prayer clause (a)? OPP.

7. Whether the plaintiffs are entitled to a decree for recovery of Rs.4,75,000/- towards damages for illegal and unauthorised use and occupation of the suit premises from 15.10.2015 till the date of filing of the suit, as per prayer clause (b)? OPP.

8. Whether the plaintiff's are entitled to a decree of mesne profit and damages at the rate of Rs.7,00,000/- per month or illegal and unauthorised use and occupation of the suit premises from the date of the suit till handing over of vacant and peaceful possession of the suit premises in terms of prayer clause (c)? OPP

9. Whether the plaintiffs are entitled to award of interest, if so, at what rate? OPP.

10. Relief?"

6. After the framing of issues, the Plaintiffs moved an application under Order XI Rule 1 CPC seeking discovery of the original rent agreement as the original of the agreement dated 15th July, 2004 is in the exclusive possession of the Defendants. In reply to the said application, the Defendants did not deny having possession of the rent agreement, however, they took the stand that the original of the said document would speak for itself. Under these circumstances, the application was heard by the Id. Trial Court. The same was disposed of vide the impugned order dated 1st August, 2019, in the following terms:

"5. I have heard rival contentions of parties and perused the record in the light of relevant statutory provisions of Order XI of CPC.

6. Looking into the contents of written statement and in particular the preliminary objections taken by the Defendants, version of Defendants is that the Plaintiff No.2 and her husband had inducted, by an unregistered lease deed dated 15.05.1984, the Defendant No.1 and Late Smt. Anju Mehta, mother of Defendant No.1 as tenant at the suit premises for a monthly rent of Rs.1500/- per month for running a Restaurant. Written statement further mentions that the Defendants are paying rent regularly to the landlord since beginning of the tenancy. It further mentions that the Plaintiffs refused to accept the rent sent to them by a money order in the month of November 2015 and the same has been deposited in the Court.

7. The written statement further mentions that Defendants are running a restaurant M/s Mini Mahal since the year 1984. It states that the alleged subletting cannot be looked into by the Court after the dismissal of the case of Plaintiffs vide order dated 12.10.2015 passed by Ld. ARC. It further states that with changes in taste of society, the Partners had agreed to reconstitute the Firm with the goodwill of M/s Mini Mahal and partners therein in the name of M/s Rain. It states that the firm M/s Rain collaborated with a multinational M/s Mahima Caps P. Ltd. to meet the requirements of food as per change of taste.

8. The corresponding reply in para no.29 of Written Statement to the averments in plaint shows an evasive reply. It does not answer the averment in para no.29 of the plaint in categorical terms. The factum of existence of agreement dated 15.07.2004 and subletting referred to by the Defendants "as alleged subletting in the written statement" is within the exclusive knowledge of Defendants who are in possession thereof. The tenancy by the Defendants under the Plaintiffs is not denied. What is denied is the alleged factum of subletting on the strength of the agreement dated 15.07.2004 which is only within knowledge of Defendants no. 1 and 2.

9. I observe that from pleadings, what is discernible is that Defendants have nowhere disclosed the factum as to whom they are paying rent of Rs.1500/- for running a restaurant. It is not disclosed that after the alleged refusal by the Plaintiffs to receive rent, where and for what period, such rent is being deposited by them. Clearly, the averments in the written statement to this effect are unsupported and vague.

10. In judgment passed by hon'ble Delhi High Court in **A.K Aggarwal Vs. Shanti Devi, 1996 RLR 60:1997 (1) RCR 22** it was observed that:

"Order XI of the CPC, contains salutary provision which are intended to curtail evidence thereby expediting trial of suit and as such their provisions are very useful. They have to be liberally used and parties have to be encouraged to use them in the course of trial. The provision of Order XI, Civil Procedure Code do not deserve a technical or truncated approach. Ultimately the use of these provisions saves time of the Court and costs of litigation to the parties".

"Jessel M.R. in Attorney-General vs. Gashill (1882) 20 Ch. 0. 519, said: "Now, one of the great objects of interrogatories when properly administered has always been to save evidence, that is to diminish the burden of proof which was otherwise on the Plaintiff. Their object is not merely to discover facts which will inform the Plaintiff as to evidence to be obtained, but also to save the expense of proving a part on the case."

"Cotton L.T., J, said: Interrogatories are "not limited to giving the Plaintiff a knowledge on that which he does not already know but include the getting an admission of anything which he has to prove on any issue which is raised between him and the Defendant."

"In judgment Suresh Chand Vs. K.M Vinay Devi (decided on 14.09.1973) it was observed as:

"A party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. The object is to obtain an admission from the opponent which will make the burden of proof easier than it otherwise would have been. The purpose is to get from the Defendant an admission of that which no doubt he denied by his defense but not on oath. About the fact of the parentage of the appellant Suresh Chand a fact which is within the knowledge and an admission of it by him must obviously save enormous amount of expense at the trial"

11. Considering the position in law as to the object of interrogatories, I find that the application of the plaintiff deserves to be allowed. In order to obtain an admission from the Defendants of the factum of the Agreement in question, which is material and relevant to the issue raised in the pleadings, the interrogatories are required to be answered.

12. The application of the Plaintiffs stands allowed. The defendants no.1 and 2 are hereby directed to be delivered the interrogatories annexed alongwith application within prescribed form and the same be returned within 4 weeks to be placed on record.

13. The application stands allowed."

7. The first challenge to the above order is that a premature discovery could not have been directed under Order XI CPC, in view of Order XI Rule 20 CPC, which requires that whenever there is a jurisdictional issue which has to be decided first, the question of discovery/inspection has to be reserved till the said issue is decided. Ld. counsel also relies upon the judgment of the Supreme Court in ***Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) Through His LRs., (1990) 1 SCC Page 193*** to argue that the question of jurisdiction is also to be decided by the correct forum, i.e., in this

case the RCT and not by the Civil Court and thus, the Civil Court in itself lacks the jurisdiction to pass the impugned order directing discovery. Ld. counsel further submits that the Defendants were admittedly paying rent of Rs.1,500/- per month to the Plaintiffs and since the time they did not accept the same, the amount is being deposited with the RCT. Accordingly, it is submitted that the direction to deliver the interrogatories and to answer the same is untenable in law.

8. On the other hand, ld. counsel for the Plaintiffs submits that firstly, there is a subsequent order dated 26th November, 2019 which has been passed by the ld. Trial Court which has not been disclosed in the present petition. In fact, the Court has proceeded further to hold that the Defendants are in violation of the order dated 1st August, 2019 and it is thereafter that the Defendants have chosen to challenge the order dated 1st August, 2019. Thus, the Defendants ought to have first disclosed the order dated 26th November 2019 passed by the ld. Trial Court.

9. Ld. counsel further submits that in the plaint, a clear and categorical stand was taken by the Plaintiffs that the Plaintiffs are not in possession of the original agreement dated 15th July, 2004 and the Defendants are in power and possession of the same. This fact was not controverted in the written statement and hence, the Defendants ought to be taken to be in possession of the agreement dated 15th July, 2004. Reliance is also placed on a copy of the agreement dated 15th July, 2004 which is signed by both Smt. Anju Mehta and Sh. Rattan Mehta.

10. Finally, it is submitted that in reply to the application under Order XI Rule 1 CPC, the Defendants took the stand that the original of the document would speak for itself. All this goes to show that the document is within the

control and possession of the Defendants and the Plaintiffs only have a copy of the same. Thus, the direction to produce the same is in accordance with law.

11. It is further submitted by Mr. Rajesh Yadav, Id. counsel for the Plaintiffs, that the judgment of the Id. Division Bench of this Court in ***P.S. Jain Company Ltd. (supra)*** is clear to the effect that when there is a question of sub-letting by the tenant, the tenant cannot seek protection under the provisions of the Delhi Rent Control Act, 1958.

12. In rejoinder, it is submitted by Mr. G.P. Thareja, Id. counsel for the Defendants, that an affidavit has been subsequently filed by the Defendants before the Id. Trial Court stating that the original of the said agreement is not in their power and possession.

13. Having heard the Id. counsels for the parties and having perused the record, what is important to observe is that there was a subsequent development vide order dated 26th November, 2019 which was not brought to the notice of the court when the hearing began. It is to be noted that whenever such petitions are filed, Id. counsels, as well as the litigants, are liable to disclose any subsequent developments which have taken place after the filing of the petition, either by filing the order on record or at the hearing.

14. Paragraph 29 of the plaint in the present suit reads as under:

“29. That the Plaintiffs are not in possession of the original agreement dated 15.07.2004. The said original agreement would be in power and possession of the Defendant Nos.1 to 3. The said Defendants shall file the original agreement dated 15.07.2004 on the record of this Suit. The Plaintiffs only have a photocopy of the said agreement available with them,

which is being filed along with the Plaintiff.”

15. In response to paragraph 29, the written statement reads as under:

“29. That the contents of paragraph 29 of the plaint as stated are against the fundamental rules of pleading and is a matter of evidence. The paragraph under reply is liable to be struck off and calls for no reply.”

Thus, there is no denial of the averments made in paragraph 29 of the Plaintiff.

16. A perusal of the issues shows that the first issue that has been framed to be adjudicated by the Id. Trial Court is whether the suit is barred under Section 50 of the Delhi Rent Control Act, 1958. The said issue is to be adjudicated in view of the judgment of the Id. Division Bench in ***P.S. Jain Company Ltd. (supra)*** after ascertaining the factum of sub-letting at Rs.1 lakh per month. The question as to whether the suit is barred under the Delhi Rent Control Act, 1958 cannot be decided without looking at the agreement dated 15th July, 2004. If there has, in fact, been sub-letting for Rs.1 lakh per month, the said agreement would have a direct bearing on the decision on the said issue. Thus, the application under Order XI Rule 1 CPC was rightly filed before the Id. Trial Court seeking discovery of the said agreement.

17. The interrogatory which was served upon the Defendants reads as under:

“Interrogatories on behalf of the aforesaid Plaintiffs for the examination of the above-named Defendant Nos.1 and 2

1. Was not the agreement dated 15.07.2004, a true photocopy of which has been placed on record by the Plaintiffs, entered/executed between M/s Rain, through its partners Smt. Anju Mehta w/o late Shri Surinder Mehta and Shri Rattan Mehta s/o late Shri Surinder Mehta (Defendant No.1 herein), and M/s Mahima Caps

Private Limited (Defendant No.4 herein), through its Managing Director Shri Dhiraj Arora, with respect to property No.25-A, situated in C Block, Vasant Vihar Market (local shopping Centre-I), New Delhi-110057, whereby M/s Mahima Caps Private Limited was to pay minimum guaranteed profit of Rs.1,00,000/- per month to M/s RAIN of which Smt. Anju Mehta and Shri Ratan Mehta were partners.

The aforesaid interrogatory is required to be answered by each of the Defendant Nos.1 and 2. ”

18. In the application under Order XI Rule 1 CPC, paragraph 2 clearly avers that the agreement is in the possession of the Defendants and in response thereto, the Defendants plead as under:

“2. In reply to paragraph 2, it is submitted that the contents of paragraph 2 relate to the contents of the plaint. The contents of the plaint will be referred to at the appropriate stage of oral submissions. The plaintiffs themselves state that the plaintiff have relied upon the said documents. The plaintiffs are to prove the said documents in accordance with law and not by way of alleged interrogatory which is in the form of fishing enquiry. The original of the said will speak for itself. It is denied that the said document for all intent and purposes is an agreement of sub-lease as alleged in the paragraph under reply. The plaintiffs cannot seek any information about any profit given to Smt. Anju Mehta since deceased. It is absolutely false to say that the said profit was in the nature of rent. It is absolutely false to say that Delhi Rent Control Act became inapplicable to the suit premises as alleged in the paragraph under reply.”

19. A perusal of the above application and the reply filed thereto shows that the Defendants are clearly evading the question as to the existence of the agreement. Even during the process of admission/denial, the notation put

by the Defendants is as under:

“That the copy of agreement dated 15.07.2004 filed by the Plaintiff at serial no.3 is not admitted.”

20. Such a denial of the agreement dated 15th July, 2004 can be no denial in law. Clearly, if the agreement was entered into by the Defendants, they ought to have come clean to the Court. The further affidavit allegedly filed, prior to the passing of the order and subsequent to the filing of the reply, is not placed on record by the Defendants. In any event, the Defendants cannot be allowed to renege from their earlier pleadings, in respect of the rent agreement. Under these circumstances, it cannot be held that the said agreement is not relevant for the adjudication of the main issue i.e., the maintainability of the suit. If it is held, after perusing the agreement, that there is a sub-tenancy, in terms of the agreement dated 15th July, 2004, the same would take the suit outside the purview of the Delhi Rent Control Act, 1958, as per the judgment of this Court in **P.S. Jain Company Ltd. (supra)**. The observations of the Id. Division Bench in the said judgment are as under:

“12. In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs. 3,500 p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs. 3,500 p.m. In case a tenant paying less than Rs. 3,500 p.m. to his landlord has sub let the very same premises—may be lawfully—for a rent above Rs. 3,500 p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs. 3,500 p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub--tenant) more than Rs. 3,500 p.m. though he is paying less than Rs. 3,500 p.m. to his

landlord. The above contrast is well illustrated by the facts of the case before us. The appellant tenant is paying only Rs. 900 p.m. to the plaintiff, while he has sublet the premises in two units, one for Rs. 40,000 p.m. and another for Rs. 4,500 p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant.

13. Indeed there will be a serious anomaly if such a tenant is to be allowed the benefit of the rent control legislation. If he should get protection, the strange situation will be that when he cannot be evicted except on limited grounds specified in the Act and that too only before the Rent Controller, he could, in his turn, evict his tenants i.e. the sub-tenants, by giving a simple notice under Section 106 of Transfer of Property Act, and then move the Civil Court. Further, he could after such eviction of his tenants (i.e. sub-tenants) induct fresh sub-tenants at still higher rents. In our view, an interpretation which places him in such an advantageous position is to be avoided.”

21. Disclosure of the said agreement is therefore crucial for the adjudication of the suit. The Defendants are clearly not coming clean to the Court. The denial of the said document is completely evasive and such a denial is no denial in the eyes of law. The interrogatories have been correctly directed to be served upon the Defendants and due to non-compliance, an adverse inference can be drawn by the Id. Trial Court.

22. Further vide order dated 26th November 2019, the Id. Trial Court has directed as under:

“Ld. Counsel for Plaintiff states that the D-1 and D-2 have not complied with the directions passed vide order dt. 01.08.19 despite having delivered the interrogatories to them and which are not answered.

Ld. counsel for D-1 & 2 states that pursuant to the

Para No.12 of the order dt. 01.08.19, the interrogatories were to be delivered to D-1 & 2 afresh and not the ones i.e. proposed interrogatories annexed along with the application of the plaintiffs. Be that as it may. The Defendants have failed to explain the compliance of the directions since 01.08.19 and this seems to be an attempt to delay the proceedings on their part.

In view of the provisions under Order 11 Rule 21 CPC, Defendants are hereby directed to explain in writing the non-compliance of the order within a month before any adverse order against them is considered.

Ld. Counsel for Plaintiffs seeks to move an application for striking out the defence of D-1 and D-2 for failure to comply with the order.

Relist for filing the explanation by D-1 & D-2 and consideration over application of Plaintiffs on 11.12.19 at 12.P.M.”

23. Accordingly, the petition is dismissed with Rs.20,000/- as costs. All pending applications are also disposed of. Rs.10,000/- each shall be paid, in equal sum, by the Petitioners/Defendants to the two Plaintiffs/Respondents, on or before the next date before the Id. Trial Court. The proceedings before the Id. Trial Court shall go on in accordance with law. *Dasti.*

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 06, 2019/Rahul