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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 11th February, 2020

+ **CM (M) 166/2020**
M/S EMBASSY RESTAURANT & ANR. Petitioners
Through: Mr. Anip Sachthey, Sr. Advocate
with Mr. Mohit Paul, Ms. Anjali
Chauhan and Ms. Ria Sachthey,
Advocates (M: 9873118968).

versus

M/S ATMA RAM BUILDERS (P) LTD. Respondent
Through: Mr. Amit Sethi and Ms. Riddhi Jad,
Advocates (M: 8447276840).

CORAM:
JUSTICE PRATHIBA M. SINGH
Prathiba M. Singh, J. (Oral)

CAV 128/2020

1. Caveat is discharged as the Caveator has entered appearance.

CM APPL. 5274/2020 (exem. from filing dim annexures)

CM APPL. 5275/2020 (exem. from filing complete TCR)

CM APPL. 5277/2020 (exem. from filing certified copies of annexures)

2. Exemptions are allowed, subject to all just exceptions. Applications are disposed of.

CM APPL. 5276/2020 (125 days' delay in re-filing)

3. This is an application for condonation of delay in re-filing the petition. For the reasons stated in the application, the delay is condoned.

4. Application is disposed of.

CM(M) 166/2020 and CM APPL. 5273/2020

5. The present petition has been filed challenging the impugned order dated 5th August, 2019, by which the Petitioners'/Defendants' (*hereinafter*, "*Defendants*") application under Order VII Rule 11 CPC has been rejected

by the Trial Court. Mr. Amit Sethi, Id. counsel for the Respondent, appears on advance notice. Id. counsel for the parties have been heard.

6. The present petition arises out of a suit for possession and recovery of *mesne* profits, filed by the Respondent/Plaintiff - M/s Atma Ram Builders (P) Ltd (*hereinafter*, “*Plaintiff*”) against the Defendants – M/s Embassy Restaurant and Mr. Sunil Malhotra, in respect of property bearing Plot No. 3, Block D, Connaught Place, New Delhi (*hereinafter*, “*suit property*”) from where the Defendants are running an eating joint. The suit was filed in 2014. On 11th March, 2016, the following issues were framed in the suit: -

“1. Whether suit is hit by Section 50 of Delhi Rent Control Act, 1958? OP Parties.

2. Whether Plaintiff had admitted in the past that the Property Tax is not part of the rent being paid by the defendant to the plaintiff? OPD.

3. Whether the plaintiff is well within its rights to include the Property Tax as the rent of the suit property by invoking Section 67 of NDMC Act, 1994 apart from New Delhi Municipal Council Determination by Annual Rent Bylaws 2009? OPP.

4. Whether this petition hit by res judicata? OPP.

5. Whether plaintiff is entitled to recovery of possession of suit property i.e. Property No. 11-D, D Block, Connaught Place, New Delhi where defendant is running a Embassy Restaurant which is admeasring 232.25 Sq.m shown in red in the site Plan? OPP.

6. Whether plaintiff is entitled to decree of mesne profit @ Rs. 1,000/- per Sq.f per month from the date of filing of the suit till the date of actual vacation and is also entitled to receive Rs.5,83,333/- as mesne profit for the week i.e. 1.10.2014 to 07.10.2014? OPP.

7. Relief.”

7. One of the contested issues in the suit is whether the house tax component would be considered a part of the rent or not. The suit was based

on the premise that the house tax payable would have to be computed within the rent and hence, the tenancy is not covered by the Delhi Rent Control Act, 1958. As can be seen from the issues above, specific issues have been framed as to whether the Court has jurisdiction and whether the property tax is part of the rent or not. The Defendants, however, chose to file an application under Order VII Rule 11 CPC. The application under Order VII Rule 11 CPC is again premised on the plea that the property tax payable in respect of the suit property is not part of the rent. The said application was heard from time to time and was considered in the orders dated 12th February, 2018, 26th July, 2018 and by the impugned order.

8. In the impugned order, the Trial Court has considered the judgment of the Supreme Court in ***NDMC v. Association of Concerned Citizens of New Delhi & Ors.*** [Civil Appeal No(s) 903-930/2019, decided on 22nd January, 2019] and has held that in view of the fact that for parties, like the Defendants who were already assesseees under the byelaws of 2009 and would continue to pay house tax under the then extant regime, since the tax amount is not refundable, the application under Order VII Rule 11 CPC is not maintainable. The relevant observations of the Trial Court are as under: -

“Reasons for Decision –

*It is relevant to quote here para no.89 of the case titled as **NDMC Vs. Association of Concerned Citizens of New Delhi and Ors.** which is as follows-*

89. One last but very significant aspect is still required to be dealt with. The declaration of Impugned Bye-laws as ultra vires has created a difficult situation. These Bye-law were framed in the year 2009. They were struck down by the High Court vide impugned judgment dated 10th August, 2017. They held the field from 2009- 2017. While

issuing notice in these Special Leave Petitions on 22nd September, 2017, in respect of the direction of the High Court to pass re-assessment order, this Court observed that it would be open to the NDMC not to pass such reassessment orders. That interim order has prevailed during the pendency of these appeals. Further, as already noted above, 95% of the assesses are agreeable to pay the tax as per Byelaws 2009. In these circumstances, to upset the appercart completely may not be appropriate. In such a peculiar situation in exercise of powers under Article 142 of the Constitution, we direct that those assesses who have paid the tax as per Byelaws, 2009 their assessment shall not be reopened. Another reason for taking this course of action is that these assesses are satisfied with the assessments under Bye-laws, 2009. However, it will not apply to the respondents herein, namely those assesses who were the writ petitioners in the High Court. In their cases, the direction given by the High Court in the impugned judgment shall prevail."

In view of Judgment of Hon'ble Supreme Court, those assesses who have already made payment of rent, tax is not to be refunded to them.

It is submitted by Ld. Counsel for plaintiff that he has already made payment of the rent and attention of the Court is drawn towards the various documents filed on record i.e. NDMC receipts thereby showing payment of tax since 2009 onwards. These documents are also exhibited in evidence. Further it is also the argument of counsel for plaintiff that though unit area has been set aside now NDMC has been assessing tax on the reasonable comparable market rent which the property can fetch. In view of above, though the unit area method is set aside but the tax which is paid by plaintiff to NDMC is not to refunded to him, hence argument of defendant cannot be accepted. Further, only unit area method is set aside, but tax is now to be calculated on actual

comparable market rent. Hence, the fact that tax has increased considerably cannot be denied.

Further the present suit is filed by plaintiff on the ground that tax is part of rent which is also an additional ground which is to be decided after evidence. In the circumstances, application under Order 7 Rule 11 CPC is dismissed.”

9. Mr. Anip Sachthey, ld. Sr. counsel appearing for the Defendants, submits that the unit area method, which was the basis of the Plaintiff's case in the plaint has already been struck down in ***Association of Concerned Citizens of New Delhi & Ors. v. NDMC & Ors. [W.P.(C) 3348/2010 and connected matters, decided on 10th August, 2017]***. The said judgment has also been upheld by the Supreme Court. Ld. Sr. counsel submits that the directions given by the Supreme Court in respect of existing assesses are only to ensure that demands etc. are not reopened against the parties who were paying under the extant regime and such directions would not change the legal position that the unit area method has been struck down. He further relies upon the judgment of the Supreme Court in ***Atma Ram Properties Private Limited v. Oriental Insurance Company Limited, (2018) 2 SCC 27*** to submit that house tax cannot be considered as being part of the rent for the purposes of seeking eviction.

10. On the other hand, Mr. Amit Sethi, ld. counsel appearing for the Plaintiff, submits that the question as to whether the suit is hit by the Delhi Rent Control Act, 1958 or not and whether the tax would be deemed to be a part of the rent or not are issues which are to be adjudicated in the suit. Specific reliance is placed on Issue Nos. 1, 2 and 3. Ld. counsel further relies upon the orders dated 12th February, 2018 and 26th July, 2018, to submit that the Trial Court has already taken a view in this regard and those

orders are not under challenge. Thus, the present petition is not liable to be entertained. He further submits that a revision petition under Section 115 CPC ought to have been filed, as opposed to the present petition under Article 227.

11. This Court has considered the application, the judgments cited, submissions made and the pleadings of the parties. A perusal of the issues shows that there is a specific issue in respect of whether the property tax is deemed to be part of the rent or not. The other orders cited by the Plaintiff also show that the case of the parties is that there is an oral agreement that the house tax would be part of the rent. Order dated 12th February, 2019 is relevant and is set out below:-

“At this stage, it is submitted by ld. counsel for defendant that the present Court does not have jurisdiction in view of the judgment of Hon’ble Supreme Court title ‘Atma Ram Properties Vs Oriental Insurance Company’.

On the other hand, it is argued by Ld counsel for plaintiff that the said judgment is regarding NDMC Act Section 67. It is further argued by Ld counsel for plaintiff that in the present case in his replication there are specific averments regarding oral agreement between the parties that house Tax was to form part of the rent.

I have heard both the counsels and gone through the record.

In the present case, there is specific issue which is being framed which is issue no. 2 as follows:

2. Whether plaintiff had admitted in the past that the property Tax is not part of the rent being paid by the defendant to the plaintiff?

Moreover, there are specific averment regarding oral agreement between the parties in the replication that house tax was to form of the rent and trial is already going on. Moreover the said judgment of Hon’ble Supreme Court has dealt with the issue of rent where

there is no agreement between the parties, and or written. In may considered opinion, the said judgment is not applicable in those cases where plaintiff is able to prove agreement between the parties. At this stage, going on by the pleadings of the plaintiff, it cannot be said that the present suit is maintainable. Now to come up for arguments on u/O 7 rule 11 CPC application on 16.04.2018.”

12. Considering the issues which have been framed in the matter as also the parties’ stand that there is an agreement between them that the house tax would be part of the rent, the evidence to be led, would be relevant and the matter cannot be decided at this stage in an application under Order VII Rule 11 CPC. The suit cannot be rejected at this stage, as the parties are also relying upon oral agreement/s in respect of how the house tax/property tax is to be treated. The decision on this issue would also have a bearing on the question as to whether the suit is barred by the provisions of the Delhi Rent Control Act, 1958. The suit is almost at the final stage wherein the Plaintiff’s evidence has already been adduced. The Defendants’ evidence was however delayed. The Local Commissioner has now placed the matter on 30th March, 2020.

13. In the above background, the following directions are issued: -

- (1) The impugned order dated 5th August, 2019 and any other orders passed in the application under Order VII Rule 11 CPC would not come in the way of the Trial Court adjudicating the issues which have already been framed in the matter. The same shall be decided independently, without being affected by the observations made in the aforementioned orders;
- (2) Issues 1, 2 and 3 would be adjudicated on the basis of oral and

documentary evidence as also the binding precedents on these issues, without being affected by the observations in the impugned order;

(3) Considering the fact that the matter is listed on 30th March, 2020 and there was a delay by the Defendants in leading the evidence, the Defendants are given one last opportunity to lead evidence before the Local Commissioner who already stands appointed by the Trial Court.

(4) On instructions, it is submitted that the Defendants wish to lead the evidence of two witnesses. The affidavits of the said witnesses shall now be filed within a period of two weeks, subject to payment of costs of Rs. 1,50,000/- to the Plaintiff. The costs shall be tendered to the Plaintiff on or before the next date before the Local Commissioner. Upon the affidavit of evidence being filed, the matter shall be fixed before the Local Commissioner on 3rd March, 2020 at 2.30pm. The Local Commissioner shall not grant any adjournments to the Defendants.

14. The evidence shall be concluded on or before the next date before the Trial Court. The Trial Court shall, after conclusion of evidence, proceed expeditiously with the matter for final arguments.

15. With these observations, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 11, 2020
MR/T