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

Date of decision: 9th January, 2020

+ **CM(M) 345/2018**

RAJ KUMA RAJORA & ORS

..... Petitioners

Through: Mr. Sunil Dutt Dixit, Advocate.
(M:9312832910)

versus

AJAY DHINGRA & ANR

..... Respondents

Through: Mr. Rajiv Nehru, Ms. Shweta Kapoor
and Mr. Tejinder Sahini, Advocates.
(M:9810081428)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J(Oral)

1. The present petition impugns order dated 1st February, 2018 by which the application under Order XV-A CPC was decided by the Trial Court which has directed payment of only the admitted rent of Rs. 98/- per month to the Plaintiff. The operative portion of the order of the Id. Trial Court reads as under:

“As per the clear explanation of Order 15A explained by Hon'ble High Court of Delhi, it is clear that erstwhile tenant/defendant can be directed to deposit such rate of damage/mesne profit as erstwhile tenant may on the basis of material on record be found to have agreed to pay to the landlord even if the tenant before the court may not have admitted the same. It is only in case of unauthorized occupation that court can order deposition of such damage/mesne profit which may appear to the court as reasonable. With respect to unauthorized occupation, the court can determine the

reasonable amount of mesne profit/damage. However, in case of erstwhile tenant as per the judgment of Hon'ble High Court of Delhi as discussed above, only rent payable as per record (whether admitted or not) payable by the tenant can be ordered to be deposited by the tenant in the court during the pendency of the suit. As nature of tenancy has been disputed in the present case, it can not be said at this stage whether tenancy has been terminated and defendant has become unauthorized occupant or not. Accordingly, at this stage, it will not be advisable to term the defendant as unauthorized occupant and directing him to pay the reasonable mesne profit/damage to the plaintiff. The perusal of record only shows that defendant had been paying the rent to the plaintiff Rs.98/- per month till 2005. Apart from it, there is no mention of payment of rent at any other rate by the defendant to the plaintiff. Accordingly, application is allowed only to the extent that defendant is hereby directed to deposit the rent which he was earlier paying i.e. Rs.98/- per month to the plaintiff in the court from October, 2005 till the date of deciding this application and also afterwards at the rate of Rs.98/- per month on or before 10th of every month.”

2. The brief background of the present petition is that a suit for recovery of possession and arrears of rent/damages/mesne profits was filed by the Petitioners/Plaintiffs (hereinafter ‘owners’) against the Defendants/Respondents (hereinafter ‘tenants’). The tenanted premises comprises of Municipal No.7010, Plot No.8 and Municipal No.7011, Plot No. 10, Block No.14-B, at Dev Nagar, Karol Bagh, New Delhi-110005 measuring 174.6 sq. yards (hereinafter ‘tenanted premises’) of which the Plaintiffs are admittedly the owners. The case of the owners is that the tenanted premises was originally given out on rent to one Mr. Jagdish

Chander several years ago. On 2nd August, 2005 a notice was issued on behalf of the owners for terminating the tenancy. Despite the said notice having been served, the tenants did not vacate the property. In the meantime, Mr. Jagdish Chander passed away in October, 2005 and is survived by his two sons who are in occupation of the property. The present suit was filed in 2016 against the said two sons of Mr. Jagdish Chander who were impleaded as Defendants in the suit. The admitted rent which was being paid by Mr. Jagdish Chander was Rs. 98/- per month. The tenants entered appearance and took the stand that the notice of termination is a fabricated document. Further, one of the objections of the tenants is that they are not unauthorised occupants and the suit is not maintainable as the Delhi Rent Control Act, 1958 would apply, in view of the rent being, only Rs. 98/- per month. The suit is pending adjudication and evidence is currently being recorded in the suit.

3. In the meantime, an application under Order XV-A CPC was filed by the owners seeking deposit of the market rent on the basis of the prevalent rates being paid in the area. It is the case of the owners that the tenants are unauthorised occupants in view of the provisions of Explanation II of Section 2(1) of the Delhi Rent Control Act, 1958 and further that no rent was paid between 2005 till 2016 by the Legal Heirs of the deceased and this itself proves that the tenants were well aware that they were unauthorised occupants. The claim of the owners was for Rs.2 lakhs per month as damages per month from 22nd January, 2016 i.e., the date of filing of the suit.

4. The Trial Court, by the impugned order, has held that only the admitted rent would be liable to be deposited by the tenants and has

accordingly disposed of the application. The said order dated 1st February, 2018 is under challenge in this petition.

5. Ld. counsel appearing for the owners submits that the tenants are clearly unauthorised occupants inasmuch as under Explanation II of Section 2(1) of the Delhi Rent Control Act, if the legal representatives of the deceased tenant were not dependants of the deceased tenant, the legal heirs are only afforded one years' time, post which, they are deemed to be unauthorised occupants. It is further submitted that the original notice for termination of the tenancy was filed before the Id. Trial Court including the original registered post receipt. The counsel who had issued the notice had also appeared as a witness before the Id. Trial Court and has confirmed his signatures on the notice. The trial is still underway.

6. Ld. counsel further submits that the purpose of the Order XV-A CPC is to ensure that any damages/mesne profits which is to be paid, after a *prima facie* view is taken, at this stage, is secured in some manner in favour of the landlord. It is further urged that the property itself is in a prime commercial area on the main road in Karol Bagh. It is admeasuring 175 sq. yards approximately and is lying locked for several years. It is not in a good condition, though, it is the case of the tenants that they are either using the same for selling food items, in the pleadings before the Trial Court, the stand taken was that they are running a soap business from the tenanted premises. Ld. counsel submits that the neighbouring premises has been let out at Rs. 200/- per sq. feet per month as is clear from the lease agreement dated 5th March, 2009 which is placed on record. Ld. counsel for the Petitioners places reliance upon the Division Bench judgment in ***Raghubir Rai v. Prem Lata and Ors., 2011(2014) DLT 516***

7. On the other hand, ld. counsel for the tenants submits that the notice served in 2005 is a completely bogus notice. Reference is made to the notice to show that the enrolment number of the counsel is mentioned on the notice, however, the requirement for mentioning the enrolment number only came into effect only since 18th December, 2006. Thus, it is impossible that a lawyer would have mentioned the Bar Council enrolment number prior to the said notification by the Bar Council of Delhi. Thus, the notice was never issued and was in any case never served upon by the tenants. It is further argued, in view of the previous orders passed by this Court, that the judgment in *M/s. Atma Ram Properties (P) Ltd vs M/s Federal Motors Pvt. Ltd., (2005) 1 SCC 705* would not be applicable as the same related to a situation where an eviction decree was passed and thereafter the market rent was directed to be deposited, as a condition for stay.

8. It is further argued that the judgment in *Raghubir Rai (supra)* also would not be applicable inasmuch as the question as to whether the legal representatives who are now in possession of the property are unauthorised occupants or not, is yet to be decided by the ld. Trial Court and unless and until the said decision is made, Order XV-A CPC would not be applicable. Finally, it is submitted that the lease agreement relating to the neighbouring property is not a comparable one as the said property is being used by Axis Bank for their currency chest which requires extremely heavy-duty construction and a specialised kind of building to be constructed. In the present case, the property in question has a building which is in dilapidated condition and thus the lease agreement of the neighbouring property, cannot be taken to be a standard.

9. After hearing ld. counsels for the parties and perusing the record, the

objection which has been taken by the tenants i.e., in respect of the enrolment no. being mentioned and the notification by the Bar Council would itself not render the notice to be bogus notice. The lawyer who had served the notice, having appeared before the Id. Trial Court and in any case, the original registered AD receipt having been placed on record, there would be a presumption, at least at the *prima facie* stage, to hold that the notice has been served upon the tenants in terms of the provisions of the General Clauses Act, 1897. Moreover, it was the practice of several lawyers to mention their enrolment number on the letter heads even prior to the issuance of a general notification by the Bar Council of India.

10. Further, the conduct of the tenants by itself completely reveals that they never considered themselves to be authorised tenants, as it is not disputed that from October, 2005 till the filing of petition in 2016, no rent was tendered or paid by them to the owners. The tenants have placed on record a reply affidavit which clearly admits that the father was the tenant in the property and he was running a soap business in the name and style of M/s. Ishwar Dass & Co. The property is undoubtedly in a prime commercial area and it has been a long time since the tenants are in occupation of the same. Even if the notice was not served, in view of the judgment in ***Nopany Investments (P) Ltd. v. Santokh Singh (HUF)*, 2008 (2) SCC 728** which was considered again in ***Jeevan Diesels & Electricals Ltd v. M/s. Jasbir Singh Chadha (HUF) & Anr, [RFA 179/2011, decided on 25th March 2011]***, the filing of the suit itself would in effect constitute a notice terminating the tenancy. The Supreme Court held in ***Nopany (supra)*** as under:

“22. ... In any view of the matter, it is well settled that

filing of an eviction suit under the general law itself is a notice to quit on the tenant. Therefore, we have no hesitation to hold that no notice to quit was necessary under Section 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant. This view has also been expressed in the decision of this Court in V. Dhanapal Chettiar v. Yesodai Ammal [(1979) 4 SCC 214: AIR 1979 SC 1745]”

11. Under these circumstances, it would not be right for the Trial Court to hold that no amount would be payable except the admitted rent. It was this very issue which was determined by this Court in **Raghubir Rai (supra)** both by the Id. Single Judge and by the Id. Division Bench. The Id. Division Bench judgment clearly holds that the Court under these circumstances while considering an application under Order XV-A CPC ought to direct the deposit of the damages/occupation charges upon termination of the tenancy based on the prevalent market rent.

“24. We are of the view that the Court, in exercise of powers under Order XV-A of the CPC is empowered to direct deposit at such rate as the erstwhile tenant / defendant may on the basis of material on record be found to have agreed to pay to the landlord for the said period even if the tenant before the Court may not have admitted the same or disputed / controverted the same. Similarly, in a suit between the owner of immovable property and an unauthorized occupant, Order XV-A empowers the Court to direct the defendant who though may not be liable to be ejected / dispossessed immediately without trial but who, on preponderance of probabilities may not be found to have a right to continue in possession of the property, to deposit during the pendency of the suit such amount as may appear to be reasonable, to safeguard the right of the owner of the property and to ensure that such

owner is compensated at least for the time taken in adjudication of a false defence taken up by the defendant in unauthorized occupation. This, in our view is necessary to avoid the process of the Court being abused by unscrupulous litigants and to curb the growing tendency of using the process of litigation as a tool of oppression.

25. We should however not be interpreted as laying down that Order XV-A empowers the Court to, without evidence assess mesne profits or to merely by taking judicial notice and without any material on record, arbitrarily direct the defendant to deposit a much higher amount than what he had been paying or had agreed to pay. Reference in this regard can be made to the judgment of the Division Bench of this Court in **National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association** 122 (2005) DLT 629 laying down that mesne profit have to be proved by reliable and cogent evidence in accordance with law. Of course, if the erstwhile tenant / defendant is found to have agreed to periodically increase the rent / user charges, even if such contract may have come to an end, in exercise of powers under Order XV-A of the CPC direction for deposit with such increases can be made unless strong grounds exist for such increases being not due.

...

28. We are prima facie unable to believe that a valuable commercial property, as the subject property is, would have been let out at a rent below Rs.3,500/- per month, allowing the letting to fall within the ambit of the Rent Act, whereunder the eviction of a tenant is not only difficult but virtually impossible. Both the parties obviously have been indulging in transactions in cash, perhaps to avoid taxes. We in the circumstances are of the opinion that there is no reason to interfere with the order of the learned Single Judge."

12. Thus, the test to determine unauthorised occupant, is one to be adjudged on the '*preponderance of probabilities*'. Recently in ***Rajesh Anand v. Rahul Wadhwani and Anr.***, [CM(M) 1375/2018, decided on 5th December, 2019] this Court had held as under:

“14. In the judgment of Raghubir Rai (supra), the Id. Division Bench of this Court has clearly held that if, on the basis of the pre-ponderance of probabilities the tenant may not be found to have a right to continue in possession of the property, some amount ought to be directed to be paid for the said period. ...”

13. The sons of the deceased tenant are conducting their own business and were not dependants of the father and they did not even tender rent after the demise of the father. While the neighbouring property could be a standard which could be adopted, considering the fact that the property is not similarly constructed in the manner as has been argued by the tenants, the same could only be a measure which the Court could keep in mind while fixing the damages to be paid for occupation of the tenanted premises. The Id. Trial Court has clearly erred in holding that only the admitted rent can be paid. The purpose of Order XV-A CPC would be completely defeated if only the admitted rent is directed to be paid. The provisions of Order XV-A CPC are specifically enacted for the purpose of giving benefit to landlords and the judgment of the Division Bench in ***Raghubar Rai (supra)*** is clearly binding in the present case.

14. Under these circumstances, keeping in mind the distinction between the neighbouring premises and the current premises and the fact that the tenants have been in occupation of the suit property for several years, it is

deemed appropriate to direct deposit of Rs.1 lakh per month from 2016 i.e. the date of the filing of the suit till date. The arrears from 2016 till date shall be deposited within a period of three months, however, the monthly occupation charges with effect from January, 2020 shall be deposited on or before the tenth of every subsequent month before the Id. Trial Court.

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

PRATHIBA M. SINGH
JUDGE

JANUARY 09, 2020

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