IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

RSA No.49/2008

DATE OF DECISION: 25.02.2008

Shri M.R.Sahni ..... Appellant

Through: Mr.Keshav Dayal, Sr. Advocate with Mr.Rakesh Sachdeva, Adv.

VERSUS

Mrs.Doris Randhawa ..... Respondent

Through: Mr.Mayank Goel, Adv.

PRADEEP NANDRAJOG, J.(Oral)

1 The appellant has suffered 2 concurrent decrees of ejectment and mesne profits against him. Aggrieved by the judgment and decree dated 5.12.2007 affirming the judgment and decree of the learned Trial Judge dated 21.5.2007 instant second appeal has been filed.

2. Notwithstanding various questions framed in the memo of appeal at the hearing today, learned senior counsel for the appellant urges that 4 substantial questions of law arise for consideration in the instant appeal.

3. The first substantial question of law sought to be projected by learned counsel for the appellant is: whether the suit for ejectment was barred under Order IX Rule 9 CPC on account of an earlier suit for ejectment being dismissed in default and not being restored The second question sought to be projected is whether by the act of filing a petition for eviction before the learned Rent Controller and alleging that the rent of the suit property was Rs.3500/- per month did notice Ex.PW1/2 and Ex.PW1/3 dated 10.8.1990 and 22.1.1990 respectively stood waived Third question projected is whether suit by only one co-owner was maintainable Lastly it is urged that on the evidence on record damages awarded towards mesne profits @ Rs.25,000/- per month from 1.5.2002 till realization cannot be sustained.

4. Having gone through the impugned judgments and decrees and the relevant evidence on record, in my opinion no substantial question of law arise for consideration in the instant second appeal.

5. My reasons are recorded briefly since the second appeal is being dismissed in limine and I am concurring with the view taken by the learned courts below.

6. The suit property, a three bedroom single unit house in Hauz Khas on a plot of land ad-measuirng 512 sq. yds. was let out to the appellant by late Shri S.S.Randhawa on 16.8.1981. Due to the enforcement of the Delhi Rent Control Act 1957 the terms of the lease did not enure to the benefit of the landlord for the reason a tenant could be ejected only on one or more of the grounds specified in Section 14 of the Delhi Rent Control Act being established; none were.

7. Fortunately for the landlords, the Delhi Rent Control Act came to be amended in the year 1988. Tenancies, where monthly rent exceeded Rs.3500/-, were not covered by the Delhi Rent Control Act.

8. A suit for ejectment was filed before the learned Civil Judge. The said suit bearing No.177/1992 (referred to in the impugned judgment as bearing No.177/1990) was dismissed in default on 17.1.1998. Admittedly, no application was ever filed seeking restoration of the suit and hence the suit was never restored. Instant suit seeking ejectment was filed in the year 2002 after serving a notice dated 11.3.2002 Ex.PW1/11 determining the tenancy.

9. In respect of the first so called substantial question of law sought to be projected, the question which arises is : What would be consequence when a suit for ejectment is dismissed in default

10. The answer is to be found in Order IX Rule 9 of the Code of Civil Procedure. It reads as under :- 9. Decree against plaintiff by default bars fresh suit (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from brining a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to cost or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. (2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

11. At the outset it may be stated that the principle underlying Order 9 Rule 9 CPC is public policy; not to vex the defendant for a second time on the same cause of action. But, it is not the same as the rule of res judicata enshrined under Section 11 of the Code of Civil Procedure.

12. What are the consequences of a suit for ejectment suffering a dismissal in default Does the tenant become a tenant in perpetuity Does he become the owner of the tenanted premises Does the landlord loose the right to regain possession for all times to come

13. Ex facie, once a tenant always remains a tenant unless the status changes by contract or by operation of law.

14. Let us consider a situation where a suit for ejectment of a tenant is dismissed on merits. Since it is not a title suit for possession, but only one for ejectment, the dismissal could be either on the ground that the lease has not expired by efflux of time, or that the tenancy has not been determined by a valid notice to quit or after such notice has been served, by subsequent act of the landlord amounting to waiver of the notice to quit, the notice has been waived. In such situations the lease subsists subsequent to the date of the decision, with the result that the lessor has no right of ejectment save and except after the lessor re-chooses to eject the tenant as per law. In such a situation, the lessor-lessee relationship subsists and on a subsequent cause a fresh suit for

ejectment can be brought. A defendant against whom an ejectment suit has been dismissed for default cannot be placed at a higher pedestal viz-a-viz a defendant against whom a suit has been dismissed on merits.

15. The issue can be considered from another angle. Dismissal of a suit for ejectment does not and can by no stretch of imagination extinguish the ownership of the lessor and confer the same upon the lessee. Similarly, it cannot convert a lease of limited duration into one in perpetuity. At the very best it operates as a waiver under Section 113 of the T.P.Act or an assent of the lessee within the meaning of Section 116 of the Transfer of Property Act. The lessee remains a lessee. He continues to be liable for the rent that accrues. Consequent to the dismissal of the suit the lessee is not a tenant at sufferance but from month to month or year to year (depending upon the lease) terminable at any future date as provided under Section 106 of the Transfer of Property Act.

16. This is how a suit for ejectment differs from a title suit for possession. The cause of action for an ejectment suit is the determination of the tenancy with the expiry of a particular tenancy month or by efflux of time. The termination for any subsequent month would be a separate and a distinct cause of action. The elapsing of each tenancy month and service of a fresh quit notice gives a fresh cause of action.

17. Since the subject matter of the first suit was whether the tenancy was validly determined thereby preventing an automatic renewal at the end of the month, the dismissal of the suit cannot put it any better and ensure that the renewal for the month ensuing did take place. It operates, at best, as a waiver of the notice to quit, or assent to holding over, but no more.

18. Section 116 of the Transfer of Property Act reads as under :- 116.Effect of holding over If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

19. The words or otherwise assents to his continuing in possession in Section 116 of the T.P.Act are sufficiently wide so as to include the allowing of a suit to be dismissed for default or abandoning a suit for ejectment under Order 23 Rule 1 and therefore will have the effect as provided by Section itself that is to say the lease will be renewed from month to month or year to year according to the purpose for which the property is leased as specified in Section 106. Any other construction will not only be contrary to the statute but shall be against the very fundamentals of a landlord-tenant relationship.

20. Even otherwise, a tenant at sufferance is also a tenant. His rights may be enlarged or upgraded from a tenant at sufferance to a tenant from month to month or year to year but by no stretch of imagination can these be converted into an absolute ownership or a tenancy in perpetuity. The occupation would remain permissive. A fresh notice to quit is a must since the earlier notice stands waived.

21. Under the circumstances it cannot be held that merely because an earlier suit for ejectment was dismissed in default, no subsequent suit for ejectment could be filed.

22. As noted hereinabove, fresh cause of action was alleged by predicating a claim that notice for ejectment dated 11.3.2002 Ex.PW1/9 was issued and served. I note that at the trial service of said notice has been established.

23. An alternative submission in relation to aforesaid plea which was made may also be considered. It was urged that the factum of filing of earlier suit and its dismissal was not brought to the notice of the Court when instant suit was filed and hence the suit ought to have been rejected on account of a fraud attempted to be played upon the Court. It was also urged that the landlady had taken recourse to an action under Section 14 D of the Delhi Rent Control Act and had obtained an order for eviction which was set aside by this Court in CM(M) No.668/1998 vide decision dated 9.3.2000.

24. In my opinion the suit was based on notice to quit dated 11.3.2002 and hence all prior litigations and history thereof was irrelevant.

25. The second so-called substantial question of law sought to be urged was that admittedly the suit property was let out at a rent of less than Rs.3500/- and notice dated 10.10.1990 and 22.1.1992 Ex.PW1/2 and Ex.PW1/3 being notices of enhancement of the rent under Section 6(A) of the Delhi Rent Control Act were waived on account of the landlady suing for eviction by filing a petition before the learned Additional Rent Controller. The eviction proceedings were initiated after afore-noted notices were issued. It is alleged that in the eviction petition the landlady stated that the rent of the premises was Rs.3500/- per month and not Rs.3850/- which would have been the rent if afore- noted notices were given effect to.

26. To put it pithily, contention urged is that the landlady had waived the notice Ex.PW1/2 and PW1/3.

27. The learned Appellate Court has dealt with this issue in paragraph 14 of its decision.

28. By virtue of Section 6A of the Delhi Rent Control Act, rents are liable to be enhanced by 10% every 3 years. The learned Appellate Court has taken note of the fact that when the landlady sued for eviction before the learned Additional Rent Controller, appellant took a defence that on account of the 2 notices aforesaid, rent stood enhanced to Rs.3850/- per month and on said account the court of the Rent Controller did not have the jurisdiction to entertain the eviction petition. The learned Appellate Court has also noted that on 11.1.2002 in presence of counsel for the parties authorized representative of the appellant had made a statement on oath as under :- I have received a notice of demand/enhancement of rent dated 22.1.1992 where after rate of rent of the premises has been enhanced to Rs.3850/- with effect from 1.2.1992 much before filing of the present petition. Hence, this Court has no jurisdiction to entertain the present eviction petition. I have also taken a similar plea in my application for leave to defend in Para-2 of the said affidavit dated September, 1997.

29. The learned Appellate Court has further noted that in view of the said statement made by authorized representative of the appellant the landlady withdrew the eviction petition on account of the learned Rent Controller not having jurisdiction over the subject matter of the lis.

30. I concur with the view taken that the appellant would be estopped from even pleading waiver. It has to be noted that if the land lady went before the Rent Controller notwithstanding having issued the 2 notices, the tenant predicated a defence under the 2 notices. The landlady

acquiesced in the defence of the tenant. The appellant is now estopped from alleging to the contrary.

31. The third stated substantial question of law sought to be projected at the hearing was that admittedly the original landlord S.S.Randhawa having died he was survived by his wife and children and that the suit for ejectment filed by only one co-owner was not maintainable.

32. The learned Trial Judge and the learned Appellate Court have dealt with the said contention.

33. The decision of the learned Appellate Court on said issue is at paragraphs 17 onwards of the impugned decision.

34. The learned Appellate Court has noted that the notices dated 10.10.1990 and 22.1.1992 for enhancement of rent Ex.PW1/2 and Ex.PW1/3 were issued on behalf of all co-owners. The learned Appellate Court has also noted that the appellant admitted paying the rent to the sole plaintiff. Further, testimony of the son of the plaintiff, namely S. Manjit Singh Randhawa who appeared as PW-2 has also considered in light of Ex.PW1/16 being a letter of authorization dated 4.2.2002 as per which all children of the plaintiff empowered their mother to take necessary steps recording that they had no objection to their mother suing for ejectment. I note that Ex.PW1/7 is a deed of relinquishment dated 11.1.1989 executed by Smt.Iqbal Kaur, mother-in-law of the respondent relinquishing her share in the suit property.

35. I additionally note that the learned Trial Court and the learned Appellate Court has referred to a decision of the Hon'ble Supreme Court reported as AIR 1976 SC 2335 Sh.Ram Pasricha Vs. Jagan Nath and Ors. holding that a co-owner of a property is deemed to be owner of each part of the property and is entitled to maintain a suit for ejectment/possession without impleading the other legal heirs.

36. The last so-called substantial question of law sought to be urged is that the determination of mesne profits @ Rs.25,000/- per month is without any evidence.

37. The learned Appellate Court has dealt with this issue in paragraph 24 of the impugned decision.

38. The learned Appellate Court has referred to the testimony of Tejinder Singh Randhawa, PW-3, who deposed that a lease agreement dated 16.1.2003 pertaining to property No.P-5, Hauz Khas Enclave, New Delhi fetched a rent of Rs.95,000/- per month. The learned Appellate Court has also referred to Ex.PW1/27 a newspaper citation pertaining to a property in Hauz Khas offered to be let out at Rs.60,000/- per month.

39. Contention urged is that the testimony of PW-3 was an oral statement unsupported by proof of the lease agreement dated 16.1.2003. It is urged that the contents of a written document can be proved by proving the document itself and in no other manner.

40. The learned Appellate Court has recorded that the locality Hauz Khas is a prime and posh colony of South Delhi. The learned Judge has also referred to letter relied upon Ex.PW1/27 and the testimony of PW-3.

41. Mesne profits have been awarded with effect from 1.5.2002.

42. Steep increase in rentals in Delhi is a matter of fact of which a judicial notice can be taken of by the Courts.

43. The suit property is a single unit comprising of 3 bed rooms attached toilets, kitchen, drawing room with a store on the first floor. Entire property is on rent. The plot size is 512 square yards. Rental of said property as of 2002 at Rs.25,000/- per month determined by the learned courts below cannot be faulted. If at all, the same appears to be on the lower side.

44. I note that in relation to determination of mesne profits there is always some element of guesswork. What has to be ensured is that the finding has not to be the conjecture of the Court. As long as there is some evidence to sustain the same, the finding cannot be faulted.

45. In my opinion Ex.PW1/27 is good evidence to sustain the finding.

46. The appeal is dismissed in limine.

47. No costs.

Sd./-

February 25, 2008 PRADEEP NANDRAJOG, J.