(2013) 10 DEL CK 0441

In the Delhi High Court

Case No : CS (OS) No. 574 of 2010

M/s. Atma Ram Properties (P) Ltd. APPELLANT

Vs

Delhi Transport Corporation RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Constitution of India, 1950 — Article 227
Delhi and Ajmer Rent Control Act, 1952 — Section 6
Delhi Municipal Corporation Act, 1957 — Section 121(1)
Delhi Rent Control Act, 1958 — Section 14(1)(a), 3(c), 4, 50, 7(2)
Transfer of Property Act, 1882 — Section 105, 106

Citation : (2014) 3 AD 64 : (2014) 206 DLT 237

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Amit Sethi and Mr. Mukesh Ranjan, for the Appellant; J.S. Bhasin, Gurpreet Singh and Ms. Rashmi Priya, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—On 5th March, 2013 issues were framed by this Court wherein Issue No. 4, which reads as under, was treated as a preliminary issue.

4. Whether the present suit is barred under the Delhi Rent Control Act? (OPD)

The objection of the Defendant is that the Plaintiff has filed the present suit seeking decree of possession, recovery of a sum of Rs. 1.20 crores, damages and cost of the suit in respect of property situated at Atma Ram Mansion, Scindia House, Connaught Place, New Delhi. The Defendant has been a tenant in the building since 14th May, 1948 pursuant to Rent Deed executed between the erstwhile owners of the building and the predecessor of the Defendant on 15th May, 1939. The rent agreed between the parties was Rs. 627.50 per month and thus the Defendant is protected under the provisions of the Delhi Rent Control Act. 1958 (in short "the DRC Act"). In view of the said protection the present suit is not maintainable as the same is actually a suit for eviction of the tenant which has to be filed in terms of the DRC Act. It is contended by learned counsel for the Defendant that Section 3(c) of the DRC Act does not apply to certain premises whether residential or otherwise whose monthly rent exceeds Rs. 3,500/-. The Plaintiff by including the house tax payable on the tenanted premises, as rent, which is now assessable on the basis of unit area system and not on the basis of actual rent cannot treat the same as rent, thus taking the tenancy of the Defendant out of the purview of the DRC Act. The notice dated 4th September, 2009 u/s 106 of the Transfer of Property Act (in short ''TP Act'') does not seek eviction of the Defendant as a tenant and only seeks payment of house tax pursuant to amendment in the byelaws. Section 8 of the DRC Act prescribes the form in which notice is required to be issued to the tenant expressing the intention of the landlord to increase the rent. The notice does not say about the enhancement of rent. Since no notice of enhancement of rent has been given to the Defendant thus the rent of the Defendant would be deemed to be the one agreed between the parties, that is, less than Rs. 3,500/- There is no provision in law which permits house tax levied to be automatically treated as rent. Thus the tenancy of the Defendant would be covered under the provisions of DRC Act. Hence the present suit is liable to be dismissed on this count itself.

2. Learned counsel for the Plaintiff on the other hand contends that the landlord is required to seek eviction for non-payment of rent u/s 14(1)(a) of the DRC Act only if the premises fetch rent below Rs. 3,500/-. Since payment of house tax is the liability of the tenant, the same would also be treated as rent thereby enhancing the rent above Rs. 3,500/- and taking the suit out from the purview of the DRC Act. The Plaintiff issued a notice to the Defendant u/s 106z of the Transfer of Property Act (in short ''the TP Act'') which was replied vide letter dated 10th August, 2009 by the Defendant stating that it was not the Defendant''s liability to pay the house tax. Since the New Delhi Municipal Council Act, 1994 (in short ''NDMC Act'') is a later act the provisions thereof would prevail over the DRC Act and in view thereof the house tax now levied would be "rent" in the eyes of law and thus the suit of the Plaintiff is not liable to be dismissed. Reliance is placed on Calcutta Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others, and Ganga Ram Vs. Mohd. Usman, . Relying upon United Indian Assurance Company Ltd. vs. Smt. Anup Kaur, RSA No. 251/2008 decided on 28th April, 2011 it is stated that this Court has even treated the maintenance charges to be paid to a third party as part of the rent thereby holding that the bar of Section 50 DRC Act would not be applicable. Relying on Section 105 of the TP Act it is contended that lease of an immovable property is a transfer of right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money or service or share or anything of value. The definition specifically states that the money, shares, services or other thing to be so rendered is called the ''rent''. Hence the present suit filed by the Plaintiff is maintainable and not barred in view of the provisions of DRC Act.

3. I have heard learned counsel for the parties.

4. In the present suit the Plaintiff has prayed not only for a decree of possession in respect of the suit premises but has also sought decree for recovery of a sum of Rs. 1,20,00,000/-, mesne profits and damages for which the remedy does not lie under the DRC Act. Hence the present suit is maintainable qua prayers (b) and (c) in the suit.

5. As regards prayer (a), that is, a decree of possession of the suit premises the moot questions which arise for decision before this Court are whether the issue as noted above can be decided as a preliminary issue and if the answer is in affirmative then whether the House Tax payable by the landlord for tenanted premises would be treated as rent or not and the effect thereof? The DRC Act neither defines the Tease nor the ''rent''. Section 105 of TP Act defines lease as under:-

105. Lease defined.- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

6. It is thus apparent that the money, share, service or any other thing of value for the purpose of a lease agreement is called the ''Rent''. In Calcutta Gujarati Education Society and another (supra) the Hon''ble Supreme Court was dealing with Section 231 of Calcutta Municipal Corporation Act, 1980 (in short the CMC Act). In the CMC Act there was a departure from the earlier repealed Act of 1951 wherein the property tax was limited by the fair rent fixed under the tenancy law. However, by the CMC Act 1980 the valuation for the property tax was on the basis of market rate of rent and higher rate of tax was levied by introducing a consolidated rate of tax combining the tax on owners and tax on occupiers. The surcharge leviable on the occupiers of properties for non-residential/commercial use was included in the consolidated rate. While dealing with the challenge of the applicability of the provisions contained in Section 231 of the CMC Act it was held:

44. We have to examine the provisions of Section 231 of the Act in the light of the scheme of the Act. Section 231 of the Act reads thus:

231. Mode of recovery-If any person primarily liable to pay any consolidated rate on any land or building and is entitled to recover any sum from an occupier of such land or building, he shall have, for recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to recover such sum.

45. We find that the machinery provisions for assessment and recovery of tax basically involve the owner or the lessor who is ''primarily liable'' for the tax on property although in the course of assessment and recovery of portion of tax from the tenants, sub-tenants or occupants, their involvement is also directed. It is with the purpose to make procedure of recovery of tax simpler that the owner

or the lessor is proceeded against as the "person primarily liable." The owner or lessor of the property is ''primarily'' required to satisfy the demand towards tax with right to recover it from the tenant, sub-tenant or the occupant. If the landlord or the owner is obliged to make payment of whole amount of tax inclusive of his own share and share of the tenant, sub-tenant or the occupant, the owner or lessor has to be conferred with power to recover the portion of tax payable by the tenant, sub-tenant or occupant who is actually enjoying the property and putting it to use for commercial or non-residential purpose. The legislature has taken note of the fact that a large number of properties in Metropolitan city of Calcutta are in occupation of tenants, subtenants or occupants on a comparatively small amount of rent or lease money. In such situation to impose entire burden of tax on the owner or lessor, would be inequitable, more so when the tenancy law does not allow increase in rent beyond a particularly limit and the right of eviction of the landlord is restricted to the grounds under the Tenancy Act. By the impugned provisions of the Act, therefore, the legislature has thought of apportioning the tax burden between owner or the lessor as one party and the tenant, sub-tenant or occupier as the other parties. The whole amount of tax is recoverable from the lessor and may also be recovered from the tenant or subtenant through attachment of the rent. In case where the lessor or landlord has paid the whole tax including the portion of tax payable by the tenant or sub-tenant, the landlord has to be equipped with power to get himself reimbursed by recovery of the portion of tax paid by him on behalf of the tenant. Section 231 of the Act, therefore, creates fiction that the ''tax'' apportioned on the tenant would be treated as ''rent'' and would be recoverable as such. The word ''rent'' has not been defined in the tenancy law and this court has taken note of this legal position in the case of Puspa Sen Gupta Vs. Susma Ghose, which arose out of the provisions of Tenancy Act applicable to West Bengal. Rent is a compendious expression which may include lease money with service charges for water, electricity and other taxes leviable on the tenanted premises.

46. The provisions of the Tenancy Act merely enable the landlord to make a demand of arrears of rent and in default of the payment of the same sue the tenant for recovery of rent or eviction on the ground of non-payment of rent despite demand. The tenant can get protection against eviction on the ground of arrears of rent only if he makes requisite deposit of the arrears in the manner laid down in the provisions of the Tenancy Act. A provision to fictionally treat ''tax'' as ''rent'' is necessitated because in the absence of such a fiction in Section 231 of the Act, the landlord would be compelled to pay the whole amount of tax which is recoverable from him under the Act and would be left to an expensive and cumbersome remedy of filing a civil suit for recovery of such tax paid on behalf of the tenant, subtenant or occupant. Such a fiction is required to be incorporated u/s 231 of the Act because a private party cannot recover tax. If a lessor is obliged to pay a portion of tax leviable on the tenant, the landlord can recover the same not as ''tax'' but only as part of ''rent.'' The fiction created by

the legislation in Section 231 to treat ''tax'' as ''rent'' has to be taken to its logical conclusion. The Act under consideration and the Tenancy Act both are State Legislations. No question arises of legislative incompetence. There does not appear any inter se conflict between the two Acts. Both have to be read and applied harmoniously to achieve the legislative intent in the two enactments. The contention based on Section 231 of the Act, therefore, also does not commend to us and is rejected.

7. Thus the Hon''ble Supreme Court fictionally treated the tax as ''rent'' as otherwise landlord would be compelled to pay a whole amount of tax and would be levy to an expensive and cumbersome remedy of filing a civil suit for recovery of such tax paid on behalf of the tenant, sub-tenant or occupant. It was thus held that if a lessor is obliged to pay a portion of tax leviable on the tenant, the landlord can recover the same not as ''tax'' but only as part of ''rent. Section 67 of the NDMC Act reproduced herein below is similar to Section 231 of the CMC Act and thus the decision of Hon''ble Supreme Court as noted above is applicable to the facts of the present case. Section 67, NDMC Act provides-

Apportionment of liability for property tax when the premises are let out or sub-let.

67.

(1) If any land or building assessed to property tax is let, and its rateable value exceeds the amount of rent payable in respect thereof to the person upon whom under the provision of section 66 of the said tax is leviable, that person shall be entitled to receive from his tenant the difference between the amount of the property tax levied upon him and the amount which would be leviable upon him if the said tax was calculated on the amount of rent payable to him.

(2) If the land or building is sub-let and its rateable value exceeds the amount of rent payable in respect thereof to the tenant by his sub-tenant, or the amount of rent payable in respect thereof to a sub-tenant by the person holding under the sub-tenant, the tenant shall be entitled to receive from his sub-tenant or the sub-tenant shall be entitled to receive from the person holding under him, as the case may be, the difference between any sum recovered under this section from such tenant or subtenant and the amount of property tax which would be liable in respect of the said land or building if the rateable value thereof were equal to the difference between the amount of rent which such tenant or sub-tenant receives and the amount of rent which he pays.

(3) Any person entitled to receive any sum under this section shall have, for the recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person form whom he is entitled to receive the same.

8. The Full Bench of this Court in Ganga Ram (supra) while dealing with the similar provision of DRC Act held:

12. The owners-landlords preferred an appeal to the Additional District Judge,

Delhi, but the same was dismissed. They then filed a petition in the High Court under Art. 227 of the Constitution of India praying that the enhancement of the rateable value may be quashed as being illegal and void. The petition was heard by a Division Bench of this Court, S.N. Andley C.J. and S.N. Shankar J. The Division Bench held firstly that under S. 124(3) of the Delhi Municipal Corporation Act, notice had to be given to the owner or to any lessee or Occupier of the building when the rateable value of the building was sought to be increased, but that no notice of the proposed increase was given by the Corporation to any of the tenants who had made the unauthorized constructions so the basis of which the annual rateable value was proposed to be increased and that in the absence of such notice no increase could be made. The division Bench then observed that in that view of the matter, a contention urged on behalf of the Corporation that even if the manual rateable value was increased without giving notice to the tenants. the owners landlords could not have any complaint as they could recover the additional tax from the tenants under S. 121(1) of the Delhi municipal corporation Act as well as the contention in reply by the owners landlords that by reason of S. 7(2) of the Delhi Rent corporation Act. the additional tax on the building could not recovered by them from the tenants, did not fall for determination. Yet the division Bench considered the conflict between S. 121(1) of the corporation Act and S. 7(2) of the Rent control Act and held that the Delhi Rent control Act is a latter and special statue dealing with the rights and liabilities between landlords and tenants and Therefore the Delhi Control Act would prevail over the corporation Act as held by the Supreme Court in Asa Ram Vs. The District Board, Muzaffarnagar, , where the Supreme Court approved the following observation in King v. Justices of Middlesex (1831) 2 B and Ad 819

Where, two acts of parliament which passed during the same session and were to come into operation the same day are repugnant to each other, that which last received the Royal assent must prevail and be considered pro tanto a repeal of the other.

In that view, the Division Bench expressed its opinion that the right given by S. 121(1) of the corporation Act landlords was set at naught by S 7.(2) of the Rent Control Act

13. With due respect we are unable to agree with the above opinion of the Division Bench. In the first place, the'' said opinion was an obiter dictum. In the second place, the reason given by the Division Bench for its view, namely that the Rent Control Act was a later and special statute was: not correct. The Delhi Municipal Corporation Act was enacted in 1957. At that time, the Delhi and Ajmer Rent Control Act, 1952 (38 of 1952) was in force. It contained a provision in Section 6 thereof in terms identical with the provision in S. 7(2) of the Delhi Rent Control Act, 1958. It is not, Therefore, correct to proceed on the basis that S. 7(2) of the Delhi Rent Control Act, 1958, was a later provision. Further, as pointed out by H.R. Khanna C.J. in Ganga Ram Vs. Mohd. Usman, the bar

created by the provision in the Rent Control Act pertains to "normal tax on a building" occupied by a tenant, while S. 121(1) of the Corporation Act deals with the particular contingency where the property tax levied for the tenanted premises is more than the amount which would have been levied had the assessment been made on the basis of the rent payable by the tenant to the landlord. Thus, the provision in the Delhi Municipal Corporation Act was the later and special provision, and it would not be correct to proceed on the basis that the provision in the Rent Control Act is a later and special provision, while in fact S. 121(1) of the Corporation Act is a later and special provision. The decision in Gangs. Ram v. Mohd. Usman (supra) does not appear to have been brought to the notice of the Division Bench which had, there fore, no occasion to consider the reasons give by H.R. Khanna C.J. in the case of Gangs, Ram (supra). For all the above reasons, we are of the opinion that the view expressed by the Division Bench. regarding the conflict between S. 121(1) of the Corporation Act and S. 7(2) of the Rent Control Act cannot be accepted as laying down the correct law.

14. For the foregoing reasons, our answer to the second question mentioned by B.C. Misra J. is in the affirmative and we accordingly hold that the land lord is entitled to recover under S. 121(1) of the Corporation Act the enhanced amount of house tax from the tenant not withstanding the contract of tenancy and the provisions of S. 7(2) and Section 4 of the Delhi Rent Control Act. No other point or question was urged before us in the Civil Petition.

9. Further to decide the issue whether the house tax levied can be treated as rent, intention of the parties while entering into the lease agreement has also to be looked into. Thus since this would be an issue to be decided also on the facts of the case besides law the same cannot be treated as preliminary issue. It is no longer res-integra that an issue for which the evidence is required to be led cannot be treated as a legal issue and therefore, cannot be treated as a preliminary issue vide Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, . It was held that Order XIV Rule 2 of CPC confers no jurisdiction on a Court to decide mixed questions of fact and law as preliminary issues. There is no provision in the TP Act much less in the DRC Act that the House Tax forms part of the rent. Further there is no admission in the rent agreement that the Defendant is liable to pay house tax by treating the same as part of rent. Therefore, whether house tax is or is not part of rent is a disputed question of fact which requires trial and cannot be decided as a preliminary issue.

10. Therefore, the Issue No. 4 is decided partially in favour of the Plaintiff and against the Defendant holding that the present suit as regards prayers (b) and (c) is not barred by the provisions of DRC Act. However, whether a decree of possession can be passed in favour of the Plaintiff or not due to applicability of the provisions of DRC Act would have to be decided by this Court after the parties have led their evidence.

11. The plaintiff will file its list of witnesses in four weeks and evidence by way of affidavit of its witnesses in twelve weeks. List the suit before the learned Joint

Registrar on 17th March, 2014 for fixing the dates of trial.

