

(2012) 08 DEL CK 0159
In the Delhi High Court
Case No : CS (OS) No. 114 of 2010

Narender Gupta Huf

APPELLANT

Vs

Vigneshwara Developwell Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 13-08-2012

Acts Referred:

Citation : (2012) 08 DEL CK 0159

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Rajender Dahiya, for the Appellant; Vandana Sharma, for the Respondent

Judgement

V.K. Jain, J.—The plaintiff is the owner of the shop bearing number G-20, Aggarwal Cyber Plaza, Netaji Subhash Place, Pitampura, Delhi-110 034. The above referred shop was let out by the plaintiff to the defendant for a period of 33 months. A registered lease deed between the parties was executed in this regard. The rent of the aforesaid shop was agreed between the parties as under:

17/12/2007 to 16/11/2008

Rs. 2,50,000/-

17/11/2008 to 16/10/2009

Rs. 2,66,250/-

17/10/2009 to 16/09/2010

Rs. 2,83,557/-

For the month of March, April and June, 2009, the plaintiff had given relaxation of Rs. 2,16,250/- per month in the rent to the defendants. A notice dated 4.7.2009 was sent by the defendants, to the plaintiff, for handing over possession and refund of security deposit. This, according to the plaintiff, was contrary to the terms and conditions of the lease deed, which envisaged three

months" advance notice to be given by the defendants and the security was refundable only after handing over peaceful and vacant possession of the premises to it. The plaintiff has claimed Rs. 2,66,250/- towards unpaid rent for July, 2009, Rs. 27424/- as service tax on that amount, Rs. 7,98,750/- being rent for three months and service tax amounting to Rs. 82,272/- on that amount, Rs. 40,625/- towards enhancement of rent for two and a half months and Rs. 4,185/- towards service tax on that amount. Thus, a total of Rs. 12,19,506/- has been claimed. After adjustment of the security deposit of Rs. 10 lac, a sum of Rs. 2,19,505/-, according to plaintiff, remained due to it from the defendants towards arrears of rent and service tax. The plaintiff has also claimed mesne profits amounting to Rs. 6,99,250/- @ Rs. 3,46,125/- per month for the period from 17.10.2009 to 17.12.2009. A decree for possession of the suit premises was also sought in the suit along with permanent injunction restraining defendants from creating any third party rights in terms of the suit premises. During pendency of this suit, defendants vacated the suit premises and the disputes between the parties are now limited to the security deposit, arrears of rent and mesne profits/ damages for use and occupation.

2. Defendants filed written statement contesting the suit and counterclaim for recovery of Rs. 10, 80,000/- has also been filed by them. It has been alleged in the written statement that since defendant no.1 had expressed its inability to pay the rent @ Rs. 2,66,250/- and sought to terminate the tenancy, the plaintiff had agreed to reduce the rent to Rs. 50,000/- and three consecutive MoUs dated 14.4.2009, 13.5.2009 and 10.6.2009 were executed in this regard. It is further alleged that consequent to a telephonic conversation, which defendant no.2 had with plaintiff, a lease termination letter dated 11.7.2009 was issued by defendant no.1, to the plaintiff, who was asked to take possession and refund security deposit of Rs. 10 lac. It is further alleged that the plaintiff refused to receive vacant possession of the suit premises from the defendants. As regards rent for July, 2009, it is alleged that since the rent was payable in advance and rent upto 17.7.2009 had already been paid to the plaintiff on 7.6.2009, the defendants who had offered possession of the suit premises to the plaintiff, vide letter dated 11.7.2009, are not liable to pay the same. It is further alleged that the plaintiff had no justification in not accepting possession of the tenanted premises from the defendants on receipt of letter dated 11.7.2009 and, therefore, the defendants are not liable to pay any rent for the notice period. As regards service tax, the case of the defendants is that there was no agreement between the parties for payment of the said tax by them.

In the counterclaim, defendants have claimed deposit of Rs. 10 lac with interest on that amount @ 18% per annum, amounting to Rs. 1,80,000/-. On January 18, 2011, the Learned Counsel for the parties stated that the suit be heard and finally decided on the basis of admitted documents as no oral evidence was required to be led in this matter.

3. Lease deed Ex. P1 is an admitted document and to the extent it is relevant,

the lease deed provides as under:-

1. The Lessor hereby grants the lease to the Lessee to occupy and use Shop No.6-20 on the Ground Floor of the building known as Aggarwal Cyber Plaza, Netaji Subhash Palace, Pitam Pura, Delhi (referred to as the "the said premises" hereinafter mentioned). The Lessee shall use the said premises for a period of 33 months commencing from 17.12.2007 and ending on 16.09.2010 for commercial purpose until terminated by efflux of time or terminated earlier as stated in clause (29) hereof.

9. Whereas this Agreement shall remain valid and binding for a period of 33 months commencing from 1.1.2008 till 30.09.2010. The Lok-in period will be for a period of 11 months for the Lessee and the Lessee will be at liberty to terminate this Lease Deed after a period of 11 months by giving three months" notice in writing to the Lessor. In case, the Lessee may opt to terminate this Lease Deed prior to the expiry of lock-in period of 11 months, the Lessee shall pay rent to the Lessor for the remaining period falling short of 11 months.

26. The interest free security deposit shall be refunded by the Lessor to the Lessee on production of the evidence by the Lessee to the effect that no amount is outstanding and payable to any Government or Semi Government agency or to the concerned authorities on account of electricity, telephone or water charges.

27. That in case Lessor fails to refund the security deposit subject to due compliance of terms and conditions of this Lease by the Lessee, the Lessor shall be liable to pay to the Lessee interest at the rate of 18% per annum for the delayed period of refund.

29. The parties hereto have agreed that the Lessee/Lessor shall be entitled to revoke/determine/terminate the Agreement by giving three months notice in writing without assigning any reasons whatsoever. The Lessee however shall notify the Lessor and give them three month"s time to rectify the breach before terminating the agreement. It is further agreed that in case of earlier determination of this agreement, the Lessor shall refund to the Lessee the Lease fee for the unexpired period received by the lessor, after deducting therefrom lease fee for the notice period and the security deposit.

37. That the Lessee will deposit the service tax along with the settled rent to the Lessor and the Lessor shall deposit the same to the concerned department as per the service tax rules and will deposit the amount of service tax without any delay. The service tax is exclusive of the rental charges. In the event of lessee making any default in payment of service tax or not depositing the same, the lessee will be liable for all sorts of penal consequences in this regard. The Lessor will not be required to deposit the service tax under any circumstances whatsoever and the lessee will have to deposit the same within the stipulated time.

4. The MoUs executed between the parties are Ex. P2, P3 and P6. The relevant

clauses of Ex. P2 are as follows:

2. The last payment made by the lessee to the lessor as a monthly rental for the month of March, 2009 Rs. 2,66,250/- (excluding service tax).

3. Now the lessee has approached the lessor for a relaxation in the rent for the month of April, 2009. As due to recession in market, both the parties mutually agreed to relax the existing current rental of Rs. 2,66,250/-.

The Lessor and lessee has mutually agreed to give relaxation of Rs. 2,16,250/- to the lessee for the month of April, 2009 and with the promise to resume again the same rent as per the previous originally lease agreement in the next coming month of May, 2009. In other words the lessee will pay Rs. 50,000/- excluding service tax as a rental for the month of April, 2009 to the lessor.

The relevant clauses of Ex. P3 are as follows:

2. Now the lessee has approached the lessor for a relaxation in the rent for the month of May, 2009. As due to recession in market, both the parties mutually agreed to relax the existing current rental of Rs. 2,66,250/-.

3. The Lessor and lessee has mutually agreed to give relaxation of Rs. 2,16,250/- to the lessee for the month of May, 2009 and with the promise to resume again the same rent as per the previous originally lease agreement in the next coming month of May, 2009. In other words the lessee will pay Rs. 50,000/- excluding service tax as a rental for the month of April, 2009 to the lessor.

The relevant clauses of Ex. P6 are as follows:

2. Now the lessee has approached the lessor for a relaxation in the rent for the month of June, 2009. As due to recession in market, both the parties mutually agreed to relax the existing current rental of Rs. 2,66,250/-.

3. The Lessor and lessee has mutually agreed to give relaxation of Rs. 2,16,250/- to the lessee for the month of June, 2009 and with the promise to resume again the same rent as per the previous originally lease agreement in the next coming month of July, 2009. In other words the lessee will pay Rs. 50,000/- excluding service tax as a rental for the month of June, 2009 to the lessor.

5. Ex. P4 is the Legal Notice sent by the defendant no.1 to the plaintiff no.1 through plaintiff no.2 who is its Managing Director. Vide this notice, the plaintiff was called upon to take vacant and peaceful possession of the suit premises with immediate effect, on refunding of deposit of Rs. 10 lac. Vide Ex. P5, the plaintiff intimated the defendants that it could offer vacant possession of the suit premises to the plaintiff only after giving three months' advance notice as per the terms of the lease deed. The defendants were further informed that only thereafter they were entitled to take back the amount of Rs. 10 lac, after deduction of all legal dues by virtue of clause 9 of the lease agreement. In its reply, the plaintiff also claimed enhanced rent of two and a half months amounting to Rs. 40,625/- along with service tax amounting to Rs. 4185/-. No

rejoinder notice was, however, sent by the defendants, disputing the claim in the reply of the plaintiff.

6. It is evident from clause 26 of the lease deed, which is an admitted document, that the security deposit of Rs. 10 lacs was to be refunded to defendant No.1/tenant only on its submitting, to the plaintiff, evidence to show that no amount in respect of the tenancy premises was payable by it on account of electricity, telephone or water charges. The dues of electricity, water and telephone are not ascertainable and cannot be paid before the tenant actually hands over possession of the tenancy premises to the landlord. If the tenant wanted to vacate the premises say on 11.07.2009, it was required to pay electricity, water and telephone charges till that date before it could seek refund of the security deposit because he keeps on using the electricity and water till the date he continues to occupy the tenancy premises. The agencies providing electricity, water and telephone have to take reading of the meters and prepare bills before the same can be paid by the user. Therefore, the electricity, telephone and water charges till the date on which the tenant wants to vacate the premises can at best be ascertained on the day next to the day on which the tenant stops using electricity, water and telephone installed in the tenancy premises. Not only the defendants before this Court, in terms of the lease deed, were required to pay those charges, they were also to furnish proof of the payment to the landlord before claiming refund of the security deposit.

7. In the notice Ex. P-4, which is dated 11.07.2009 and is an admitted document, defendant No.1, through defendant No.2, inter alia, called upon the plaintiff to take back vacant possession of the premises, without immediate effect, "on refunding the security deposit of Rs. 10 lacs". It was further stated in the notice that if the plaintiff failed to refund the deposit of Rs. 10 lacs, resulting in delay in handing over of possession of the rented premises, he would be liable for payment of all expenses borne by the defendants in maintaining the premises, along with interest @ 2% per month on the security deposit. It is thus evident that the defendants had made the refund of the security deposit a condition precedent to their handing over possession of the tenancy premises to the plaintiff. They also made it clear to the plaintiff that his failure to refund the security deposit would entail delay in handing over the possession. Thus, there can be no doubt that the defendants were not ready to hand over possession before obtaining refund of the security deposit from the plaintiff.

The stand taken by the defendants in the notice dated 11.07.2009 was absolutely contrary to the terms and conditions contained in the lease deed, particularly clause 26 which provided for refund of the security deposit only on the defendants furnishing evidence, to the plaintiff, to show that no amount was due to any authority towards electricity, water and telephone dues. This was nowhere the stand of the defendants, in the notice dated July 11, 2009 that they had cleared the electricity, telephone and water charges upto July 11, 2009 and had with effect from that date altogether stopped use of electricity, water and

telephone installed in the tenancy premises. No proof of deposit of electricity, water and telephone charges till July, 2009 was enclosed to the notice Ex. P-4. In view of the stand taken by the defendants in the notice dated July 11, 2009, the plaintiff was not obliged to take possession of the tenancy premises from the defendants on receipt of the said notice.

8. In *Uberoisons (Machines) Ltd. Vs. Samtel Color Ltd.*, the parties entered into a lease agreement for a period of 3 years. The lessee had deposited an interest free security with the lessor, which was to be refunded at the time of vacation of the premises and handing over possession thereof along with fittings and fixtures in the same condition as received from the landlord. Lessor, however, was not entitled to deduct/adjust the amount of security towards dues of rent. On expiry of the term of the lease or its earlier determination, the lessee was required to hand over vacant possession of the demised premises to the lessor in good condition against refund of the security deposit. The defendant/lessee gave notice to the plaintiff, expressing intention to vacate the demised premises on completion of 3 months. When the authorized representative of the plaintiff/lessor went to take possession and for settlement of accounts, it transpired that the demised premises had not been brought back to the original condition in which the same was let out. The plaintiff/lessor wrote to the defendant/lessee emphasizing that he would be liable to pay rent till vacant possession of the tenanted premises was given to him. The defendant, in reply to the letter of the plaintiff, called him upon to pay the amount of security and take vacant possession. An estimated cost of repairs was also conveyed by the lessor to the lessee. The defendant, thereafter, informed the plaintiff that repairs had been carried out and, therefore, possession be taken after settling the accounts. Simultaneously, he also sent legal notice to the plaintiff/lessor intimating that possession be taken on or before the date stipulated in the notice and the advance and security deposit be refunded. The plaintiff informed the defendant that the security had been forfeited and lease cancelled as arrears of rent for more than 2 months had not been paid. The defendant/lessee was called upon to pay arrears after adjusting advance rent and handing over possession within 3 days. The defendant, however, did not comply with the notice. By the time, this suit filed by lessor for possession, arrears of rent, mesne profit and damages came up for final adjudication, the only question which remained to be decided was that with respect to entitlement of the plaintiff to arrears of rent, mesne profits and damages. The plaintiff wanted arrears of rent upto the date to which the possession was retained by the defendant. The contention of the defendant on the other hand was that he had always been ready and willing to hand over possession of the premises but in view of the attitude adopted by the plaintiff in not refunding the security amount, did not hand over possession and, therefore, was not obliged to pay rent. Rejecting the contention of the defendant, this Court, *inter alia*, held as under:-

12. Now the question arises whether the tenant could have retained the possession of the premises without paying the rent thereof on account of non-

refund of security amount by the plaintiff. The answer is emphatic `no". The tenant has an independent remedy to recover the security but in no way can retain the possession of the premises on the plea that until and unless security is refunded, possession will not be handed over. Such a possession by the tenant is a possession for which he has to pay the rent as the premises could not have been put in use by the landlord nor have been let out by the plaintiff. No tenant can take the defense that he is entitled to retain the possession of the premises unless security amount is refunded to him. When there is an independent remedy to recover this amount, the retention of possession cannot be justified. In order to avoid the liability of rent, the tenant has the obligation to handover the possession. It is immaterial whether premises was put into use by the defendant/tenant or not. What is material was whether possession is retained by him or not.

In *Tamil Nadu Handloom Weavers' Co-operative Society v. Harbans Lal Gupta*, 2009 (107) DRJ 418 (DB), the lease granted for six years was terminable by 3 months' notice. The plaintiff/tenant terminated the lease with effect from 31st March, 1997 and demanded the amount of security, he had deposited with the lessor. One of the issues which came up for consideration before the Division Bench of this Court in that case was as to whether the plaintiff had validly terminated the lease of the subject premises. Relying upon the decision of the Rajasthan High Court in *Raja Laxman Singh Vs. State of Rajasthan*, , this Court, inter alia, held as under:-

21. The law with respect to the termination of lease by the tenant is well settled. Where the tenant vacates the tenancy premises and notifies the landlord to take the delivery of possession, the lease comes to an end. The refusal of the landlord to accept the possession will amount to delivery of possession and the possession shall be deemed to have been delivered to the landlord though the landlord may not accept the same...

The Court was of the view that the plaintiff had validly terminated the lease with effect from 31st March, 1997 by issuing notice of termination, which was duly received by the defendant. As regard the liability of the tenant to pay rent, the Court noticed that the plaintiff was insisting on refund of security deposit but was not ready to deliver the possession without taking back the security deposit. The Court upheld the decision of the trial Court that in such circumstances, the tenant was liable to pay rent upto 30th April, 1997 when possession was delivered to the defendant through a Local Commissioner.

9. Since the defendants insisted on refund of the security deposit to them before handing over possession of the tenancy premises to the plaintiff, they are liable to pay rent/damages for use and occupation of the tenancy premises to the plaintiff till the time they continued to occupy the tenancy premises. It would be pertinent to note here that even while putting appearance on receipt of summon from the Court, the defendants did not offer possession of the tenancy premises to the plaintiff. When this matter was heard on January 18, 2011, the contention

of the defendants was that they had validly terminated the lease and the plaintiff was not entitled to possession till the security deposit was refunded. This submission made by the defendants before the Court clearly shows that their stand had always been that the security deposit was to be refunded to them before they handed over possession of the tenancy premises to the plaintiff. It is only on May 12, 2011 that the defendants agreed to handover possession of the tenancy premises to the plaintiff subject to his depositing security amount of Rs. 10 lacs with the Registrar General of this Court.

10. The Learned Counsel for the defendants in his written submissions has placed reliance upon President of F. 1250 Chowghat Firka P.C.C. Co-operation Society Ltd., A.C. Raman v. Muthavally Seydali's son Valiyakath Kaithakkal Kunhi Bara Haji [AIR 1953(Mad.) 996] and Raja Laxman Singh Vs. State of Rajasthan, . The reliance on these judgments, in my view, is wholly misplaced. In the case before the Madras High Court, the defendant society had given notice to the plaintiff that since the premises was no longer required by it, he should take possession of the same. The defendant society also offered to give the keys of the premises. The plaintiff in reply stated that the society was not entitled to surrender the building as it was put up for the purpose of storing the foodgrains and on the understanding with the Government that it would be occupied as long as the distribution of the grains continued in that Firka. In reply to the notice of the plaintiff, the defendant society sent another notice reiterating that it was going to surrender the building by the end of 31.01.1949 after paying rent till that date and there should be no liability against them for any subsequent rent. It was on these facts that the Madras High Court held that the plaintiff who had refused to take possession when the same was offered could not ask the defendant liable to pay any rent after the lease was terminated and he had refused to take possession. However, in the case before this Court, the defendants never offered unconditional possession of the tenanted premises to the plaintiff. They were insisting upon refund of the security deposit, before handing over possession to the plaintiff and considering the terms and conditions of the lease deed, the stand taken by the defendants was absolutely contrary to the terms which they had agreed with the plaintiff. The notice given by them to the plaintiff, therefore, was not proper. Moreover, as per clause 9 of the lease deed, after lock-in period of 11 months, the lessee could terminate the lease deed only by giving three months notice in writing to the lessor. The defendants, on the other hand, offered possession to the plaintiff with immediate effect and also did not offer rent of three months in lieu of the notice to the plaintiff. In the case before the Rajasthan High Court, the roof of the tenanted premises having fallen, it had become unusable. The landlord, however, refused to take delivery of possession. It was, therefore, held that since the tenant occupies the building premises and need a shelter, if the roof falls down and the purpose of tenancy is determined by falling of the roof of the building and it does not remain a building, then the tenant may intimate the landlord that he is vacating as it is not worth keeping it and it is not in existence in accordance with the terms and conditions

of the lease. The landlord thereafter cannot claim rent from the tenant. However, there was no such situation in the case before this Court and the defendants continued to retain the possession of the tenanted premises till they delivered the possession after plaintiff had deposited Rs. 10 lac in this Court, at their insistence.

11. A perusal of record would show that the keys of the tenanted premises were handed over to the Learned Counsel for the plaintiff on 01.06.2011. The defendant no.1, therefore, was liable to pay rent to the plaintiff at the rate stipulated in the lease deed, till 31.5.2011. As per the lease deed, the rent agreed between the parties was Rs. 2,66,250/- per month upto 16.10.2009 and Rs. 2,83,557/- per month with effect from 17.10.2009 to 16.9.2010. The tenancy expired by efflux of time on 16.9.2010. Though the plaintiff has claimed damages for use and occupation @ Rs. 3,46,125/- per month, no evidence has been led by him to prove that the market rent of similar premises in the locality in which the tenanted premises is situated was Rs. 3,46,125/- per month or higher, during the period from 17.09.2010 to 31.05.2011. Therefore, in my view, the plaintiff is entitled to recover the rent/ damages for use and occupation @ Rs. 2,66,250/- per month for the period from 17.7.2009 to 16.10.2009 and Rs. 2,83,557/- per month for the period from 17.10.2009 to 31.5.2011.

12. The case of the defendants in written statement is that the plaintiff had reduced the rent to Rs. 50,000/- per month with effect from April, 2009. The case of the plaintiff, however, is that the rent was reduced only for 3 specific months i.e. April, May and June, 2011. A perusal of MOUs Ex. P2, P3 and P6 clearly shows that the rent which was reduced to Rs. 50,000/- per month for April, 2009 vide Ex. P2, for the month of May, 2009 vide Ex. P3 and for the month of June, 2009 vide Ex. P6 was to revert back to the agreed rent with effect from July, 2009. Therefore, defendant no.1 was liable to pay rent at the rate stipulated in the lease deed and not at the reduced rent which was applicable only for April, May and June, 2009.

13. The defendants have denied their liability to pay the service tax. However, clause 37 of the lease deed clearly shows that the defendant no.1 was required to pay service tax along with agreed rent and the liability towards the service tax was in addition to the rent agreed between the parties. Therefore, defendant no.1 is also liable to pay service tax on the agreed rent to the plaintiff.

14. The rent for the period from 17.7.2009 to 16.10.2009 at the agreed rate of Rs. 2,66,250/- per month comes to Rs. 7,98,750/-. The amount of service tax on the aforesaid amount comes to Rs. 82,272/-. The amount of rent for the period from 17.10.2009 to 16.09.2010 @ Rs. 283557/- per month comes to Rs. 31,19,127/-. Defendant no.1 is also liable to pay service tax at the prescribed rate on the aforesaid amount. The amount of damages for use and occupation of the tenanted premises for the period 17.9.2010 to 31.5.2011 @ Rs. 2,83,557/- per months comes to Rs. 24,05,661/-. Thus, the total amount payable by the defendant no.1 to the plaintiff towards rent and damages for use and occupation

comes to Rs. 64,05,810/-. This is exclusive of service tax on the amount of rent for the period from 17.10.2009 to 16.09.2010. After giving adjustment for Rs. 10 lac which the defendant no.1 had deposited as security deposit with the plaintiff, the balance amount due to the plaintiff from defendant no.1 comes to Rs. 54,05,810/-, exclusive of service tax on the rent for the period from 17.10.2009 to 16.09.2010. For the reasons stated hereinabove, the counterclaim filed by the defendants is dismissed. A decree for recovery of Rs. 54,10,383/- with proportionate costs of the suit is hereby passed in favour of the plaintiff and against defendant no.1 alone. Defendant no.1 will not be liable to pay any interest to the plaintiff if the decretal amount is paid within four weeks from the date of passing of this order. If, however, the whole decretal amount is not paid within four weeks, defendant no.1 shall pay interest @ 6% per annum from the date of filing of this suit till realization, on such decretal amount which fallen due at the time of filing of this suit and from the date on which the rent/damages for use and occupation became payable till realization on the balance decretal amount. The plaintiff shall calculate the amount of service tax at prescribed rate, on the rent for the period from 17.10.2009 to 16.9.2010 to defendant no.1 within one week and that amount shall also be paid within four weeks from the date of this order, along with the amount of Rs. 54,05,810/-. The deficient court fees shall be deposited by the plaintiff within two weeks from today, failing which the plaint shall stand rejected. Decree sheet be drawn accordingly.