

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

RFA No.263/2006 and RFA No.488/2006

Reserved on : 4th November, 2008

Date of decision: December 05, 2008

RFA No.263/2006

TAMIL NADU HANDLOOM WEAVERS
COOPERATIVE SOCIETY ...

Appellant
Through: Mr. Pawan Mathur, Adv.

Versus

HARBANS LAL GUPTA

Respondent
Through: Mr. Anupam Srivastava, Adv.

RFA No.488/2006

HARBANS LAL GUPTA

Appellant
Through: Mr. Pawan Mathur, Adv.

Versus

TAMIL NADU HANDLOOM WEAVERS
COOPERATIVE SOCIETY ...

Respondent
Through: Mr. Anupam Srivastava, Adv.

CORAM :-

THE HON'BLE MR.JUSTICE PRADEEP NANDRAJOG

THE HON'BLE MR. JUSTICE J.R. MIDHA

J.R. MIDHA, J.

1. M/s. Tamil Nadu Handloom Weavers Cooperative Society was a tenant under Mr. Harbans Lal Gupta in respect of basement, ground and mezzanine floor in property No.F-6, Kalkaji, New Delhi. M/s. Tamil Nadu Handloom Weavers Cooperative Society filed a suit for mandatory injunction and recovery of Rs.4,76,149.93 against Mr. Harbans Lal Gupta who filed a counter claim for Rs.5,74,000/-.

2. Claim in the suit by the society was that it had deposited Rs.12,62,000/- with Harbans Lal Gupta as security when agreement of lease was entered into in the year 1995

and that 50% of the security deposit was appropriated towards rent by adjusting Rs.10,000/- per month. That maintenance charges which were payable by it to Harbans Lal Gupta were also adjusted till March 1997. Stating that in all Rs.7,90,996/- were adjusted and thus Rs.4,71,004/- were refundable. It was pleaded that the society had removed all its goods and belongings from the tenanted premises save and except a few racks which were not permitted to be removed by Harbans Lal Gupta on 26.3.1997. It was asserted that the society had consumed electricity in sum of Rs.20,705.89 and water charges payable by it was Rs.1,100/-. Effecting further deductions it was stated that adjusting said sums from the security deposit Rs.4,49,198.11 became due and payable. Claiming pre suit interest on said amount @24% per annum amounting to Rs.26,951.52, sum of Rs.4,76,149.63 was claimed.

3. In the written statement-cum-counter claim Harbans Lal Gupta sought a decree of Rs.5,74,000/- by alleging that possession of the tenanted premises was not returned to him and that he was entitled to rent in sum of Rs.16,68,891/-. He alleged that an estimated sum of Rs.3,40,000/- would be required to restore the tenanted property due to damage caused thereto; further seeking adjustment of Rs.20,705.89 towards outstanding electricity bill he stated that appropriating the security deposit by him he was entitled to a decree in sum of Rs.5,74,000/-.

4. Vide judgment and decree dated 17th January, 2006, the learned Trial Court has decreed the suit in sum of Rs.1,33,701/- and has dismissed the counter claim. Both the parties have challenged the impugned judgment and decree.

5. For the sake of convenience, M/s. Tamil Nadu Handloom Weavers Cooperative Society, the appellant in RFA No.263/2006, is hereinafter referred to as the plaintiff and Mr. Harbans Lal Gupta, the appellant in RFA No.488/2006, is referred to as the defendant.

6. The defendant let out the suit property to the plaintiff vide registered Lease Deed dated 14th August, 1995 - Ex.PW-1/2 at a monthly rent of Rs.70,000/-. The period of lease was fixed for six years w.e.f. 1st June, 1995. The lease was terminable by three months notice in writing by the plaintiff (clause 11). The lease agreement empowered the plaintiff to carry out the temporary additions and alterations and install fixtures and fittings without the consent of the defendant. However, the modifications/alterations of permanent nature required written consent of the defendant (clause 6). At the expiry of the lease the plaintiff was obliged to surrender the vacant possession of the suit premises in good repairs together with final payment of receipt for electricity and water charges to the defendant and the damages to the fittings and the property have to be made good (clause 18).

7. The parties executed a Security Deposit Agreement dated 14th August, 1995 - Ex.PW-1/4 in pursuance to which, the plaintiff paid the security deposit of Rs.12,62,000/- to the defendant on 14th August, 1995, out of which Rs.10,000/- per month was adjustable towards the rent and the remaining amount was refundable at the time of surrender of the vacant possession after adjusting the dues of rent, maintenance, bills of

electricity, water, sewerage and cost of repairs. The agreement provided that the delay in refund of the security deposit would carry interest at the rate of 24% per annum.

8. The parties also executed Maintenance Agreement dated 14th August, 1995 - Ex.PW-1/3 which provided for payment of maintenance charges of Rs.35,166/- per month for maintenance and upkeep of the services viz. continuous water supply, electricity, firefighting equipments etc.

9. Vide notice dated 21st December, 1996 Ex.PW1/6 the plaintiff terminated the lease w.e.f. 31st March, 1997. The plaintiff demanded the balance security deposit from the defendant by the said notice.

10. Vide reply dated 30th January, 1997 - Ex.PW-1/7, the defendant acknowledged receipt of the notice - Ex.PW.1/6 and conveyed his no objection to the termination. However, the defendant advised the plaintiff to settle the account in terms of the provisions of the security agreement at the time of handing over the possession.

11. According to the plaintiff, all the goods were removed from the suit premises except few racks and electrical fittings. The plaintiff alleged to have visited to the suit premises to remove the few racks and electrical fittings on 26th March, 1997 but the defendant did not allow the staff of the plaintiff to remove the same and threatened them with serious consequences. The plaintiff further alleged to have contacted the defendant number of times to settle the account but the defendant refused to settle the account with the malafide intention. The plaintiff further alleged that the defendant did not provide electrical and water bills to the plaintiff to avoid settlement of account and refund of security deposit. The plaintiff alleged to have approached the defendant on 31st March, 1997 for handing over the possession and settlement of account and receipt of balance security deposit but the defendant refused. The plaintiff issued a telegram dated 31st March, 1997 - Ex.PW-1/9 to the defendant.

12. On 1st April, 1997, the plaintiff received a registered letter dated 26th March, 1997 - Ex.PW-1/10 from the defendant in which the defendant raised various issues including the payment of electricity and water charges and non- restoration of the suit premises. 13. On 2nd April, 1997, the plaintiff instituted suit for mandatory injunction for direction to the defendant to take back the possession of the suit property and for recovery of Rs.4,76,149.63.

14. Vide order dated 30th April, 1997, the learned Trial Court appointed a Local Commissioner to visit the suit property and to take the photographs of the suit property. The learned Trial Court further directed that the fixtures and fittings installed by the plaintiff to be removed and taken out by the plaintiff after the preparation of list by the Local Commissioner. It was further recorded that the plaintiff was ready to hand over and the defendant was ready to take the possession of the suit premises.

15. In pursuance to the aforesaid order, the learned Local Commissioner visited the suit property on 30th April, 1997 and prepared the list of the fittings and fixtures of the

plaintiff installed in the suit premises and also took the photographs. The keys of the suit premises were thereafter handed over to the defendant. The fixtures and fittings of the plaintiff in the suit premises as per the Local Commissioner were as under:- List of fittings and fixtures installed in premises under the tenancy of Tamil Nadu Handloom Weavers, plaintiff prepared at site:- GROUND FLOOR : 1. 3 (Three) Racks . 2. 1 (One) Wall cabinet. 3. 1 (One) counter. 4. 1 (One) counter with mirror and side racks. 5. 32 (Thirty two) lights. 6. 14 (Fourteen) Mini Hylogene lights. 7. 21 (Twenty one) spot lights. 8. 1 (One) tube light in Hall. 9. 1 (One) tube light in stairs case. 10. 1 (One) tube light in Bath room. 11. 1 (One) show mirror 8 x 3 approx. BASEMENT : 1. 10 (Ten) steel pipes. 2. 01 (One) rack steel pipe, set. 3. 136 (One hundred and thirty six) lights including, spot and Mini Hylogene. 4. 3 (Three) racks (steel pipe). 5. 2 (Two) counters. 6. 1 (one) rack partition (2 pieces). MAZANINE FLOOR 1. 6 (Six) window glasses in Mazanine. 2. 9 (Nine) lights in Mazanine floor.

16. The plaintiffs claim for mandatory injunction became infructuous with the handing over of the possession to the defendant on 30th April, 1997 and the claim remained with respect to the recovery of the outstanding security amount.

17. The defendant contested the suit on various grounds, inter alia, that the plaintiff failed to deliver the possession on 31st March, 1997 thereby rendering the notice - Ex.PW-1/6 infructuous. The defendant alleged to have waited at the suit premises along with an engineer and others on 31st March, 1997 to receive back the possession and the plaintiff did not show up. The respondent denied having caused any obstruction in the removal of the fixtures and fittings by the plaintiff. The defendant alleged that on 26th March, 1997, the employees of the plaintiff were dismantling certain fixtures embedded in the beams of the building and the defendant advised the plaintiff to get the work done under the supervision of an engineer/architect so that the safety of the building was not endangered. The defendant admitted the receipt of possession on 30th April, 1997 but alleged that the suit premises were neither restored to its original condition nor the fixtures and fittings were removed by the plaintiff. The defendant hired a Civil engineer and a retired Chief Engineer to estimate the cost of restoration and supplied the estimate to the plaintiff on 8th May, 1997. However, the plaintiff refused to carry out the restoration on the plea that it had carried out the modernization of the property with the consent of the defendant. The defendant referred to plaintiffs internal letter dated 12th May, 1997-Ex.DW1/64 in which the defendant had agreed to pay the reasonable cost of repair. The defendant awarded the restoration work to M/s. Krishna Construction for Rs.3,40,000/- out of which advance payment of Rs.1,00,000/- was made vide cheque No.320856 dated 1st June, 1997. The plaintiff did not remove the fixtures and fittings from the suit premises which were finally removed by the defendant. The defendant adjusted balance security amount of Rs.4,01,392/- against various heads including cost of restoration of the suit premises, the outstanding rent upto 30th June, 1997, the outstanding electricity and water dues and made a counter claim of Rs.5,74,000/- against the appellant. The defendants counter claim included rent and maintenance charges upto 30th June, 2007 and interest thereon, rent and maintenance charges for additional accommodation of 253 sq.ft. and interest thereon, restoration and repair charges of Rs.3,40,000/-

18. At the trial, the plaintiff produced only one witness, namely, Mr. M.A. Lahori, its Regional Manager as PW-1, who reiterated the case set up in the plaint. Mr. Lahori also appeared in rebuttal evidence. In the cross examination, PW-1 admitted that he was not present when the suit premises were taken on rent by the plaintiff. PW-1 was also not present when the possession of the suit premises was handed over back to the defendant. The PW-1 admitted the photographs - Ex.PW/1/1 to PW-1/75 to be of 31st March, 1997.

19. The defendant examined ten witnesses in his defence. The defendant himself appeared as DW-1 and reiterated the defence set up in the written statement. We shall refer to the statement of the relevant witnesses. DW-4 had prepared the estimate of restoration of the premises to be Rs.4,00,000/-. He also stated to have shortlisted the contractor, M/s. Krishna Construction and negotiated the amount at Rs.3,43,700/-. DW-6, Laxmi Narayan Garg, son-in-law of defendant reiterated the case of the defendant and stated that plaintiff did not turn up to hand over the possession on 31st March, 1997 whereas the defendant was waiting for them along with other persons to take the same. He stated that the estimated cost of restoration as given by Mr. K. C. Sharma was Rs. 3,50,000 and the work was got done from M/s. Krishna Construction co. for Rs. 3,40,000. DW-7, K. C. Verma, Retired Chief Engineer proved the estimate of Rs. 3,40,451, Ex. DW1/59. DW-10 is the partner of the Contractor, M/s.Krishna Construction who completed the restoration work. DW-10 proved the final bill Ex.DW-1/67. DW-10 also proved receipt - Ex.DW-1/69 for Rs.25,000/- vide cheque No.630697.

20. The first question which arises for consideration, in this case is, whether the plaintiff has validly terminated the lease of the subject premises.

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. This issue arose for consideration in the decision reported as Raja Laksman Singh Vs. State AIR 1988 Rajasthan 44. In said case, the tenant terminated the tenancy and offered the vacant possession to the landlord who, however, refused to take possession and put conditions to it. It was held by the Court that the possession shall be deemed to have been delivered as soon as the property was vacated. The Court held as under: -

23. Tenant wants to deliver the possession and landlord does not accept the possession. In such circumstances, it will have to be presumed that the possession has been delivered as soon as the property has been vacated. Vacation of the property together with a notice to the landlord to take the delivery of the possession is submission for the purpose of restoration of the possession and, any impediment put up by the landlord in the matter of redelivery of the possession and not accepting the possession on the ground that some terms and conditions will have to be fulfilled will amount to the delivery of possession and it shall be deemed for all purposes that as soon as the property

has been vacated the possession has been delivered though the landlord may not accept the possession.

24. There is nothing in the section to compel to defendant who has terminated the tenancy and who has offered to deliver vacant possession and whose offer has been refused by the landlord on the ground that the possession shall be taken back only on the payment of Rs.5,000/- by way of damages. If the tenant fails to comply with the demand for damages, however, legitimate it might be the Plaintiff will have a right to sue for damages for the negligence, default or other acts or the defendant. The remedy which the plaintiff has chosen in this case that he shall take possession only when the conditions are fulfilled i.e. when the damages are paid absolutely without any basis.

22. In the decision reported as P.C.C. Co-op. Society v. Baba Haji AIR 1953 Madras 996, the tenant gave the notice dated 6th December, 1948 to the landlord that the godown was no longer required and therefore, the landlord should take the possession of the same on 15th December, 1948. The tenant also offered to give the keys of the premises to the landlord. This notice was promptly replied by the landlord on 14th December, 1948 whereby the landlord refused to accept the premises on the ground that there was an understanding that the lease will not be surrendered. The tenant sent another notice dated 27th December, 1948 reiterating that the premises shall be surrendered by the end of 31st January, 1949 and the tenant will not be liable to pay the rent subsequent thereof. This was again objected to by the landlord who filed a suit for recovery of the rent against the tenant. It was held by the Court as under:- 5. When the lease has been terminated by a valid notice as provided for under Section 111, Transfer of Property Act and when possession has been offered and the Plaintiff had refused to take possession, it cannot be held that the lease would still continue in favour of the Plaintiff. No authority has been cited by the learned counsel for the Respondent to substantiate this extraordinary position he has taken up. The authorities which have been cited by him seem to be completely without any bearing on the point at issue. In the present case it is not a case of any failure on the part of the Defendant to deliver up vacant possession of the premises. On the other hand, it is quite patent that after terminating the tenancy the Defendant went to the extent of offering the key of the premises and it was refused. And the refusal is only ground that the building should be in complete repair and then only the landlord would take possession. Such a position taken up by the landlord is wholly untenable. If the premises have been damaged and damaged to a considerable extent as it transpires from the evidence and the judgment of the learned District Munsif, the Plaintiff has got his remedies by proceeding against the Defendant society for damages and he will be entitled to get every pie of damage which he will prove against the society. But that would entitle the plaintiff to refuse to take possession of the premises and then act as if the defendant is continuing as a tenant under him or that the tenant is in occupation and use of the premises and therefore liable to pay damages for such use and occupation. The issues have been confused and the remedy has been misconceived. There is nothing in this section to compel the defendant, who has terminated the tenancy and who has offered to deliver vacant possession and whose offer has been refused more than once, to remain in the premises until the premises, which a recalcitrant tenant might have purposely or otherwise damaged, is put in a state of proper repair. If he fails to comply with any

demand, however legitimate it might be, from the plaintiff, the remedy of the plaintiff would be to sue for damages for the neglect or default or other deliberate acts of the defendants. The remedy that the plaintiff has chosen in this case seems to be absolutely without any basis. Even so in AIR 1937 Lah 121 (E) it has been held that the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession and the costs of the legal proceedings to oust the under tenant from wrongful possession if the tenant fails to deliver vacant possession after termination of notice. But in the present case the facts are on a much stronger footing. Here the tenant has not merely terminated the tenancy but also offered to deliver vacant possession by giving the key. I do not think it is necessary for me in the view I have taken to multiply the authorities or to refer to those that have been further cited by the learned counsel for the petitioner. I am of the opinion that the decision of the learned District Munsif is wholly wrong and untenable and he ought to have held that the plaintiff was not entitled to recover any rent or any damages for the period for which he laid this suit. On the other hand, the Plaintiff should have been directed to seek the proper remedy by taking possession of the property and then to sue the defendant for the recovery of damages that have been caused to the property of the plaintiff. Instead of doing so, the plaintiff has misconceived his remedy and the learned District Munsif has fallen into the error of accepting that was the proper remedy for the plaintiff.

23. In the present case, the plaintiff issued a valid notice of termination Ex.PW1/6 to the defendant who received, acknowledged and accepted the same vide reply Ex.PW1/7. We, therefore, hold that the plaintiff has validly terminated the lease of the subject premises with effect from 31st March, 1997. We do not find any merit in the contention of the defendant that the notice Ex.PW1/6 had become infructuous or had been waived.

24. The next question is up to what date, the plaintiff is liable to pay the rent to the defendant. The plaintiffs contention is that it is liable to pay the rent up to 30th March, 1997 whereas the defendant is claiming the rent up to 30th June, 1997. The learned Trial Court has held that the plaintiff is liable to pay the rent upto 30th April, 1997 because the possession of the suit premises was delivered to the defendant through the Local Commissioner on 30th April, 1997. We agree with the finding of the learned Trial Court. Though the plaintiff had terminated the tenancy w.e.f. 31st March, 1997 but the possession was delivered on 30th April, 1997. We do not agree with the contention of the plaintiff that it offered the possession to the defendant on 31st March, 1997 and the defendant refused to take it back. On careful consideration of the evidence of both the parties, it is clear that the plaintiff was insisting on refund of security deposit but was not ready to deliver the possession without taking back the security deposit. From the report of the Local Commissioner, it is clear that the plaintiff had not even removed all the fixtures and fittings from the suit premises. The plaintiff also did not offer the inspection of the suit premises to the defendant. The account was also admittedly not settled at that time. Therefore, the learned Trial Court has rightly held the liability of the plaintiff to pay the rent upto 30th April, 1997.

25. The defendant has set up a counter claim of Rs.3,40,000/- towards the cost of restoration of the suit premises. DW-1 proved the estimate of expenditure of Rs.3,40,451/- as Ex.DW-1/59, out of which the cost of marble stone flooring including cost of rubbing and polishing is Rs.2,99,096/-. The cost of remaining items namely dismantling of stones, slabs/flooring, dismantling of old plaster, demolishing brick work, tile work, removal of ceiling, distempering, PF paneling, cement plastering of ceiling, brick work, removal of malba and other repairs is Rs.41,355/- (Rs.3,40,451 Rs.2,99,096). Vide letter dated 8th May, 1997 Ex.DW-1/60, the defendant sent the copy of Ex.DW-1/59 to the plaintiff requesting him to get the work done, failing which the defendant was to get the work done on its own. The plaintiff replied vide letter dated 12th May, 1997 Ex.DW-1/63 in which it stated that the plaintiff had carried out moderanisation with the consent of the defendant. However, it was stated that the cost of repair was highly exaggerated. In an internal letter dated 12th May, 1997 DW-1/64, the plaintiff recorded that they were prepared for reasonable repair charges and the defendant was requested to deduct reasonable charges from the security deposit account. The plaintiff removed all the fittings, fixtures, racks and iron stands on 2nd May, 1997 except three racks and some iron stands which were subsequently dismantled and removed by the defendant which is recorded in defendants letter Ex.DW-1/65A. Vide letter 25th September, 1997 Ex.DW-1/67, M/s. Krishna Construction intimated the defendant of completion of the restoration and repair work and further that they have received Rs.3,18,700/- and final bill was being sent. The final bill attached thereto for Rs.3,48,703 shows that the cost of laying the marble stone flooring was Rs.3,12,173/- and the cost of the remaining repairs was Rs.36,530/- (Rs.3,48,703/- Rs.3,12,173/-).

26. The learned Trial Court rejected the entire claim of the cost of restoration. We have examined the evidence on record. We agree with the learned Trial Court that the defendant has not proved that the modifications/alterations were of permanent nature. The defendant has also not produced the evidence or the photographs of the condition of the premises after the renovation. We are of the view that notwithstanding the discrepancies referred to by the learned Trial Court, entire cost of Rs.3,48,703/- mentioned in the final bill Ex.DW-1/67 is not recoverable from the plaintiff as Clause 18 of the lease deed refers to the surrender of the vacant possession in good repairs. Section 108 (m) of the Transfer of Property Act, 1882 is subject to the contract to the contrary and therefore, the parties shall be governed by Clause 18 of the lease deed. The claim of Rs.3,12,173/- towards laying of marbles stone flooring is not for repair but renovation and reconstruction which does not fall within the purview of Clause 18 of the lease deed. We, therefore, reject the claim of Rs.3,12,173/- of the defendant towards the cost of marble stone flooring. The defendant is entitled to the remaining cost of Rs.36,530/- towards the repairs which the plaintiff is liable to bear by virtue of clause 18 of the lease deed.

27. The learned Trial Court has awarded the rent as well as maintenance charges for two months to the plaintiff on the ground that it would have taken two months to restore the premises to its original shape. The maintenance charges were Rs.35,166/- per month. The grant of maintenance charges for two months by the learned Trial Court is not justified because there was no maintenance during the period of repairs. In fact, there

could not have been any maintenance during the period of repairs. The claim of maintenance charges for two months awarded by the learned Trial Court to the defendant is therefore rejected. However, we agree with the learned Trial Court and uphold grant of rent for two months to the defendant as the repair work allowed by us would have certainly taken two months time.

28. The defendant has claimed Rs.1,60,860/- towards the rent/maintenance charges for additional accommodation of 253 sq.ft. provided to the plaintiff. The defendant has also claimed interest @ 24% per month on the said amount. The defendant has also claimed expenses for electricity load, charges for putting hoarding, expenditure on anti-termite treatment and interest on Income Tax. All the aforesaid claims have been rejected by the learned Trial Court as being hit by Section 91 of the Indian Evidence Act. We agree with the learned Trial Court and uphold the reasons given by the learned Trial Court.

29. The plaintiff is claiming interest at the rate of 24% per annum on the balance security deposit. The learned Trial Court has rejected the claim of interest on the ground that the plaintiff did not restore the suit premises to its original condition. We agree with the learned trial court. The plaintiffs conduct, detailed in para 29 below, does not entitle it to any interest.

30. In view of the above, we uphold the finding of the learned Trial Court that the plaintiff is liable to pay the rent of the suit premises to the defendant upto 30th April, 1997. We also uphold the finding that the plaintiff is liable to pay the rent of two months to the defendant for carrying out the repairs. However, we set aside the maintenance charges for two months awarded by the learned Trial Court to the defendant for carrying out the repairs. We further allow a sum of Rs.36,530/- to the defendant towards the cost of repairs. A net effect is out of Rs.1,33,701/- awarded to the plaintiff, Rs.70,332/- towards the maintenance charges for two months have to be added and Rs.36,530/- towards the cost of repairs have to be subtracted. A refundable security deposit amount comes to Rs.1,67,503/-.

31. In view of the above, we hereby allow RFA No.263/2006 and partially modify the judgment and decree passed by the learned Trial Court to the extent stated above. We pass a decree in sum of Rs.1,67,503/- in favour of the plaintiff and against the defendant. We award interest to the plaintiff on said sum @9% per annum from the date of the suit till realization. We dismiss RFA No.488/2006.

32. Noting that both parties have acted fairly unreasonably with each other and both parties took fairly incorrect and unjustified stand we hold that neither party shall be entitled to costs against each other either in the suit or in the appeals.

Sd./-
J.R. MIDHA,J
Sd./-

PRADEEP
NANDRAJOG,J

December 05, 2008