$~49(Appellate)

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

\+ CM(M) 592/2022 & CM No. 28211/2022, CM No. 28212/2022

BABA RAHIM ALI SHAH & ANR. ..... Petitioners
Through: Mr. V.K. Mishra, Adv.

versus

SH. ATUL KUMAR GARG ..... Respondent
Through: Mr.Rahul Madan, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T(O R A L)

% 03.06.2022

1. This petition, under Article 227 of the Constitution of India, assails order dated 26th May, 2022 passed by the learned Additional District Judge ("the learned ADJ") in CS 129/2022 whereby an application under Section 9 of the Code of Civil Procedure, 1908 (CPC) read with Sections 50 and 44 of the Delhi Rent Control Act, 1958 ("the DRC Act"), filed by the petitioners, as the defendants in the said suit, was dismissed by the learned ADJ. The contention of the petitioners was that, by operation of Section 9 of the CPC and Section 50 read with Section 44 of the DRC Act, the suit was maintainable only before the Rent Controller.

2. Needless to say, the merit of this submission would have to be examined on the basis of the case set out in the plaint of the respondents *vis-a-vis* the aforesaid statutory provisions.

The plaint

3. The respondents claimed to be tenants of a shop situated at 1, Qutub Road, Sadar Bazar, Delhi (the suit property), of which Baba Barat Ali Shah was the landlord. Consequent to the demise of Baba Barat Ali Shah, Petitioner 1 claimed to have become the owner of the suit property. The ownership of Petitioner 1 was, however, disputed by the respondent in the suit.

4. These aspects, need not, however, detain this Court as they are not strictly relevant to adjudication of the controversy at hand. Suffice it to state that the plaint alleged that the petitioners were vandalising the suit property and were interfering with its peaceful occupation by the respondents. It was also alleged that the petitioners had caused considerable damage to the suit property, by way of proof whereof photographs were also filed in the plaint, and, that the petitioners were liable to repair the damage caused by them.

5. Predicated on these allegations, the suit prayed thus:

> "PRAYER
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> It is respectfully prayed this Hon'ble Court may:-
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> A. A Decree of permanent injunction be passed in favour of plaintiff and against the Defendants thereby restraining them, their relatives, employees, agents, labour or any person claiming through them, from interfering in the peaceful possession and enjoyment of the tenanted shop and from causing any damage to the tenanted shop or from putting water in the shop from the roof in the tenanted premises;

B. A decree of Mandatory. injunction in favour of the Plaintiff and against the Defendants thereby directing the Defendants to carry out necessary repair in the roof of the tenanted shop including the basement so that there would be no water came down at the tenanted shop

OR

in alternative the directions may be given to the Defendants to allow the Plaintiff to get repair the roof of the tenanted shop including the basement and the Defendants be directed to give the expenses which will
be incurred in repairing.

Further the SHO of PS Sadar Bazar be directed to provide protection and assistance of male and female staff of police while carrying on the repair work in the tenanted shop.

C. A decree of damages for a. sum of Rs. 3,00,000/- in favour of the Plaintiff and against the Defendants.

D. Costs of the suit be also awarded in favour of the Plaintiff and against the Defendants.

E. Such other .and further orders, which this Hon'ble Court may deem fit and proper in the' circumstances of the case, be also passed."

6. The aforesaid suit is presently pending adjudication before the learned ADJ.

7. In the aforesaid suit, the petitioners, as the defendants in the suit filed an application under Section 9 of the CPC read with Sections 50 and 44 of the DRC Act, alleging that the suit was not maintainable before the learned Civil Judge, but would lie, instead, before the Rent Controller. As such, it was prayed that the suit be dismissed as not maintainable.

8. The aforesaid application, filed by the petitioners, stands dismissed by the impugned order dated 26th May, 2022, passed by the learned ADJ.

9. Aggrieved thereby, the petitioners have invoked the jurisdiction vested in this Court by way of Article 227 of the Constitution of India.

10. As such, the only issue that arises for consideration in the present case is as to whether CS 129/2022, filed by the respondent against the petitioners was, or was not, maintainable before the learned Civil Judge.

11. This question is easily answered on a bare reading of Sections 50 and 44 of the DRC Act, and Section 9 of the CPC. Section 9 is the provision, in the CPC, which counterbalances Section 50 of the DRC Act.

12. Section 9 of the CPC reads thus:

> "**9. Courts to try all civil suits unless barred --**
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> The Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
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> *Explanation I.* – A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

> *Explanation II*. – For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

Clearly, therefore, Section 9 empowers Courts to try all suits of a civil nature excepting suits in respect of which taking of cognizance is expressly or impliedly barred.

13. The case of the petitioners was that, as the taking of cognizance, by the Civil Court, of CS 129/2022 was expressly barred by Section 50 of the DRC Act, applying Section 9 of the CPC, the suit would not lie before the learned Civil Judge.

14. Section 50(1) of the DRC Act reads thus:

> "**50. Jurisdiction of civil courts barred in respect of certain matters. –**
>
> (1) Save as otherwise expressly provided in this Act, no civil court shall entertain any suit or proceeding in so far as it relates to the fixation of standard rent in relation to any premises to which this Act applies or to eviction of any tenant therefrom or to any other matter which the Controller is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Controller under this Act shall be granted by any civil court or other authority."

15. Sub-Section (1) of Section 50 prohibits Civil Courts from entertaining suits or proceedings insofar as they relate to (i) fixation of standard rent, or (ii) eviction of a tenant or (iii) any other matter which the Rent Controller is empowered by or under the DRC Act to decide.

16. Learned Counsel for the petitioners acknowledges the fact that he does not seek to pigeonhole his objection under either contingency (i) or (ii), as the suit of the respondents did not seek either fixation of standard rent or eviction of the petitioners. He, however, invokes contingency (iii) in Section 50(1). He submits that, as the suit related to a matter which the Controller was empowered to decide under the DRC Act, it would not lie before the learned Civil Judge.

17. To support his stand that the matter to which the suit filed by the respondents related was one which the Controller was empowered to decide under the DRC Act, Mr. Mishra relies on Section 44 of the DRC Act.

18. Section 44 reads as under:

> "**44. Landlords duty to keep the premises in good repair**. –
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> (1) Every landlord shall be bound to keep the premises in good and tenantable repairs.
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> (2) If the landlord neglects or fails to make, within a reasonable time after notice in writing, any repairs which he is bound to make under sub-section (1) the tenant may make the same himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord:
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> Provided that the amount sod deducted or recoverable in any year shall not exceed one-twelfth of the rent payable by the tenant for that year.
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> (3) Where any repairs without which the premises are not habitable or usable except with undue

> inconvenience are to be made and the landlord neglects or fails to make them after notice in writing, the tenant may apply to the Controller for permission to make such repairs himself and may submit to the Controller an estimate of the cost of such repairs, and, thereupon, the Controller may, after giving the landlord an opportunity of being heard and after considering such estimate of the cost and making such inquires as he may consider necessary, by an order in writing, permit the tenant to make such repairs at such cost as may be specified in the order and it shall thereafter be lawful for the tenant to make such repairs himself and to deduct the cost thereof, which shall in no case exceed the amount so specified, from the rent or otherwise recover it from the landlord:
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> Provided that the amount so deducted or recoverable in any year shall not exceed one-half of the rent payable by the tenant for that year:
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> Provided further that if any repairs not covered by the said amount are necessary in the opinion of the Controller, and the tenant agrees to bear the excess cost himself., the Controller may permit the tenant to make such repairs."

19. One may de-construct Section 44 of the DRC Act thus: Sub-Section (1) of Section 44 binds every landlord to keep the premises in good and tenantable repairs (*sic* condition?). If the premises are not kept in good and tenantable condition by the landlord, the tenant is entitled, under sub-section (2) to issue a notice, in writing, to the landlord, to repair the premises. In the event that the landlord fails to do so within a reasonable time after receipt of such notice, sub-section (2) empowers the tenant to make the repairs himself and deduct the expenses of the repairs from the rent payable to the landlord or recover such expenses from the landlord. Neither sub-section (1) nor sub-section (2) refers to any exercise of power by the Controller.

20. Exercise of power by the Controller is, however, envisaged by sub-section (3) of Section 44. Where tenanted premises are not habitable, except by carrying out repairs therein, and, after receipt of notice to that effect from the tenant, the landlord fails to carry out the said repairs, Section 44(3) allows the tenant to apply to the Rent Controller for permission to make such repairs himself. The specific ingredients which are required to be satisfied before a tenant invokes the jurisdiction of the Rent Controller under Section 44(3) are, chronologically, that are that *(i) the premises should not be habitable or usable except by carrying out repairs, (ii) notice in writing has to be issued by the tenant to the landlord to carry out such repairs, and (iii) the landlord should neglect or fail to make the repairs despite receiving such notice.* It is only when these three eventualities, chronologically and cumulatively are satisfied that the tenant may approach the Controller. Even then, the power of the Controller is to permit the tenant to carry out the repairs and submit, to the Controller, an estimate of the cost of repairs which, after hearing the landlord, the Controller may call upon the landlord to disgorge.

21. There is, therefore, no provision in Section 44 of the DRC Act, or elsewhere in the DRC Act, whereby the Rent Controller can call upon the landlord to carry out repairs of the tenanted premises. He may permit the tenant to carry out repairs under Section 44(3) if, after receipt of notice from the tenant in that regard, the landlord fails to repair the premises.

22. Viewed in this background, on a bare perusal of the prayers in the suit filed by the respondents, it is clear that these prayers could not be granted by the Rent Controller. The first prayer is for a decree of permanent injunction in favour of the respondent and against the plaintiffs, restraining the plaintiffs from interfering in the peaceful possession and enjoyment of the suit premises by the respondent. The second prayer is for a decree of mandatory injunction to the landlord to carry out necessary repairs in the suit premises. As already noticed hereinabove, the DRC Act does not empower the Rent Controller to direct the landlord to repair the tenanted premises. Even, the alternative prayer B in the suit is for a direction to the landlord to allow the tenant to repair the suit premises. The Rent Controller is not empowered under the DRC Act to give any such direction to the landlord. The remaining prayers in the suit are clearly outside the jurisdiction of the Rent Controller.

23. As such, it is clear that the DRC Act does not empower the Rent Controller to grant any of the prayers in the suit. Applying, therefore, Section 50 of the DRC Act, it cannot be said that the suit was one which could be decided by the Rent Controller, so as to oust the jurisdiction of the Civil Court to adjudicate and decide the *lis*.

24. A Coordinate Bench of this Court, of Hon'ble Mr. Justice Madan B. Lokur (as he then was) has also held, apropos Section 44, in ***Yogender Pal Bhatia v. Rajesh @ Sonu***[1] thus:

[1] 2005 (116) DLT 202

"**13.** Quite clearly, the provisions of Section 44 of the Act are applicable only when the landlord neglects to carry out repairs. However, in the present case, the contention of the Petitioner is that the Respondents are deliberately causing damage to the property with an ulterior motive. This, it is submitted, is not the same as neglecting to repair the tenanted premises and would, therefore, fall outside the purview of Sections 44 and 50 of the Act.

14. The word neglect has been explained in ***Laxmikant Revchand Bhojwani and Another* v. *Pratapsing Mohansingh Pardeshi***[2], as "to fail to give due care, attention, or time to. To fail through thoughtlessness or carelessness. To ignore or disregard." Neglect along with its grammatical variation negligence has been explained in ***Consumer Unity & Trust Society* v. *Chairman & Managing Director, Bank of Baroda***[3], 150 in the following words:—

> "Negligence is absence of reasonable or prudent care which a reasonable person is expected to observe in a given set of circumstances."

15. Similarly, in ***State of Maharashtra v. Kanchanmala Vijaysing Shirke***[4]**,** , it has been stated that negligence is the omission to do something which a reasonable man is expected to do or a prudent man is expected to do.

16. Negligence as a tort has been considered in ***Poonam Verma v. Ashwin Patel***[5], to involve the following constituents:—

(a) A legal duty to exercise due care.
(b) Breach of duty.
(c) Consequential damages.

17. In ***M.S. Grewal* v. *Deep Chand Sood***[6]**,** negligence in common parlance has been said to mean and imply failure to exercise due care expected of a reasonable prudent person.

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[2] **(1995) 6 SCC 576**
[3] **(1995) 2 SCC**
[4] **(1995) 5 SCC 659**
[5] **(1996) 4 SCC 332**
[6] **(2001) 8 SCC 151**

> "It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of others. In most instances, it is caused by needlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act."
>
> In other words, negligence is want of attention and doing of something which a prudent and reasonable man would not do.
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> **18.** Consequently, there are two scenarios; on the one hand there is neglect or negligence on the part of the landlord to look after the tenanted premises, and on the other, there is a deliberate act of causing damage to the tenanted premises or being so totally neglectful in looking after the tenanted premises as to virtually become a deliberate act of damaging them.
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> **19.** The allegation of the Petitioner falls in the second category because it is his case that in spite of knowing fully well that the tenanted premises require repair, not only are the Respondents totally neglecting to do anything about it, but are deliberately damaging the property so as to ensure that the Petitioner has no option but to vacate the tenanted premises, which actually suits the interest of the Respondents. To lend weight to this submission, learned counsel for the Petitioner has pointed out that the Respondents have carried out unauthorized construction on the upper floors of the tenanted premises thereby compounding the problem. It is to show that the Respondents are carrying out unauthorized construction that learned counsel for the Petitioner has referred to the order passed by the Division Bench in LPA No. 326/2001."

25. This Court has, therefore, taken a view, in the afore-extracted paragraphs from ***Yogender Pal Bhatia***[1] that Section 44 would not apply where there is a specific allegation that the landlord has deliberately caused damage to the suit premises. The assessment of such a plea, according to this Court, could only be done by a Civil

Court and not by the Rent Controller. Even on that ground, therefore, the plea of the petitioner that the suit filed by the respondent was not maintainable before the learned Civil Judge had no merit and could not, therefore, sustain.

26. In view of the aforesaid, I do not find that the impugned order passed by the learned ADJ suffers from any jurisdictional error or is, even otherwise, legally vulnerable, so as to justify interference under Article 227 of the Constitution of India.

27. The petition is accordingly dismissed with no orders as to costs. Miscellaneous Applications also stand disposed of.

C. HARI SHANKAR, J

JUNE 3, 2022/kr