

(2008) 10 DEL CK 0103
In the Delhi High Court
Case No : CS (OS) 1232 of 2001

A.R. Chadha and Co. and Others

APPELLANT

Vs

Punjab and Sind Bank

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 23 Rule 3

Citation : (2008) 10 DEL CK 0103

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : L.K. Garg, for the Appellant; Rajinder Wali, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The suit was instituted by the plaintiffs as landlords for ejectment of the defendant bank from mezzanine floor admeasuring 4265 sq. ft. of C-14 to C-16, Atma Ram House, Connaught Place, New Delhi, after the expiry of the term of the lease deed dated 9.12.1996 for a term of six years from 1.4.1995 to 31.3.2001 and for recovery of mesne profit/damages for use and occupation w.e.f. 1.4.2001 @ Rs. 80/- per square feet per month. The suit was instituted on 30.5.2001. The defendant filed a written statement contesting the claim of the plaintiffs. However, the parties filed IA No. 7571/2004 Under Order 23 Rule 3 of the CPC, wherein the defendant gave an undertaking to vacate the premises on or before 31.8.2005. Though, there was no admission in the said application by the defendant of the entitlement of the plaintiff to a decree for ejectment/possession, but the prayer in the said application was for decree in the suit in terms of the application and for acceptance of undertaking on behalf of the defendant and for ordering an inquiry Under Order 20 Rule 12 of the CPC for determination of the mesne profit from 1.4.2001.

2. The aforesaid application of the parties for compromise came up before the court on 10.11.2004, when the application was allowed and the undertaking tendered in support of the application was accepted and the suit qua the question of vacation and possession disposed of in terms of settlement recorded

in the application.

3. On the next date i.e. 24.2.2005, this Court again noted that on 10.11.2004 undertaking of the defendant to deliver possession had been recorded and the suit qua relief of vacation and possession the premises was disposed of and what remained to be adjudicated was the question of compensation for unauthorized use and occupation of the premises and the following issue was framed:

Whether the plaintiff is entitled to claim compensation for unauthorized use and occupation/mesne profit for the demised premises? If so, at what rate and for what period. OPP

and the matter was posted for evidence.

4. The plaintiffs examined only one witness i.e. the plaintiff No. 3 Shri C.M. Chaddha. The defendant examined two witnesses. The defendant, thereafter sought to examine a third witness also which request was allowed with right to the plaintiffs to lead evidence in rebuttal. The defendant thereafter examined the third witness and the plaintiff No. 3 Mr. C.M. Chadha examined himself in rebuttal.

5. Though the prayer in the application for compromise was for ordering an inquiry Under Order 20 Rule 12 of CPC and in which inquiry only rate and period of mesne profit is germane, but from the narrative aforesaid, it will be noticed that neither did this Court pass a decree for possession nor return any finding on the entitlement of the plaintiff to the relief of possession. This Court, on the compromise application having been filed by the parties, appears to have acted only on the undertaking of the defendant to vacate the premises by 31.8.2005. Perhaps for this reason only the issue framed also took within its ambit, the entitlement also of the plaintiff to the mesne profits, if any.

6. There being no adjudication by this Court of the defendant being in unauthorized possession of the premises, notwithstanding the possession of the premises having been delivered by the defendant to the plaintiffs on 31.8.2005 as undertaken by the defendant, this Court, before determining the quantum of mesne profits will have to determine the question of the entitlement of the plaintiff to the same. Only if the defendant is found to be in unauthorized possession of the premises, would the question of determination of quantum of mesne profits arise.

7. It appears that the parties, after recording of the undertaking with respect to the possession, were under misconception that only the rate of mesne profits was in issue. For this reason, no evidence was led as to the entitlement to mesne profits. Upon the said question being put to the counsel for the plaintiffs during the hearing on 28.7.2008, the matter was adjourned on request. However, the counsel for the plaintiff on the adjourned date argued on the basis of the material on record.

8. As aforesaid, this suit was filed for the relief of possession on the basis of the term of the tenancy under a registered lease deed having expired by efflux of

time. However, the original lease deed was neither filed nor any steps taken by the plaintiff for having the same filed. A certified copy of the registered lease deed though on record, has not been proved or referred to in the evidence of the parties. Thus, the same cannot be referred to or read in evidence. No admission/denial of the said document also took place. However, I find that the plaintiffs have in the plaint in paras 5 & 6 stated that the lease deed was for a period of six years w.e.f. 1.4.1995 and the defendant had vide Clause 2D thereof agreed to deliver the premises at the end or on the earlier determination of the tenancy. The written statement in corresponding paras 5 & 6 does not deny the contents of paras 5 & 6 of the plaint. Thus, it stands admitted by the defendant that the lease between the parties was from 1.4.1995 for a period of six years. Even though, there is no averment in the plaint that the lease deed was registered and in the absence of registration of lease, even if providing for a terms of six years, would be a month to month tenancy, to be determined by a notice to quit and not expiring by efflux of time, and even though none of the witnesses have admitted the factum of registration, but in the face of the certified copy of lease deed dated 9.12.1996 being on record, even though not proved, I am inclined to admit the case of the plaintiff of expiry of the term of lease by efflux of time.

9. However, that would still not mean that the plaintiffs are entitled to mesne profits. The defendant has in its written statement taken another defence to the entitlement of the plaintiffs to any relief from the court. In this regard, it may be stated that the suit was instituted by seven plaintiffs of which the plaintiff No. 1 Mr. A.R. Chadha & Company in the plaint is described as a partnership firm, plaintiff No. 2 is Sh. C.M. Chadha as trustee of M/s. Atma Ram Trust, plaintiff No. 3 is the same Sh. C.M. Chadha in his personal individual capacity and the plaintiffs No. 4 to 7 are the widow and daughters of Late Shri Atma Ram Chadha. During the pendency of the suit, IA No. 10853/2007 was filed by the plaintiffs to bring on record the factum of demise of the plaintiff No. 4 (widow of Late Shri Atma Ram Chadha) and further stating the right to sue survived to the remaining plaintiffs. This Court vide order dated 20.11.2007 made an entry in the memo of parties deleting the plaintiff No. 4 from the array of the plaintiffs.

10. It is stated in para 2 of the plaint that Shri C.M. Chadha is also the trustee of M/s. Atma Ram Trust, in whose name property No. C-14 to C-16, with respect to portion of which the suit was filed, vested. It was further stated that besides Shri C.M. Chadha, Late Shri Atma Ram Chadha was also the trustee of the said M/s. Atma Ram Trust. It was further stated that Shri C.M. Chadha is authorized to institute the suit on behalf of M/s. Atma Ram Trust and is entitled and competent to sign and verify the plaint. It was further pleaded that plaintiffs No. 3 to 7 are the legal heirs of Late Shri Atma Ram Chadha. In para 3 of the plaint, it was pleaded that the plaintiffs No. 2 to 7 are the landlords and owners of the property No. C-14 to C-16, Connaught Place, New Delhi. In para 5 of the plaint, it is stated that the lease deed dated 9.12.1996, was executed by Shri Chander Mohan Chadha for himself and in his capacity as trustee for and on behalf of M/s. Atma Ram Trust.

11. The defendant in its written statement took a plea that the suit had not been instituted by a competent person on behalf of M/s. Atma Ram Trust stated to be the owner of the property and denied that Shri Chander Mohan Chadha was authorized to sign and verify the plaint. It was further pleaded that in a suit on behalf of the trust, all the trustees are liable to be made party to the suit and failing which the suit is liable to be dismissed.

12. No replication was filed by the plaintiffs. The plaintiffs have also failed to lead any evidence whatsoever on the aforesaid aspect of the matter. As aforesaid, even the lease deed has not been proved. However, in the pleadings, it is admitted that the lease deed was between Shri Chander Mohan Chadha acting for himself and as trustee of M/s. Atma Ram Trust on the one hand and the defendant on the other. Thus, as per the lease deed only Shri Chander Mohan Chadha in his personal individual capacity and the said M/s. Atma Ram Trust are the landlords. The plaintiff No. 1 which is stated to be a registered partnership firm and the plaintiffs No. 4 to 7 who are the legal heirs of Shri Atma Ram Chadha have no locus whatsoever in the present suit which as aforesaid is a suit between the landlord and tenant only and has been valued as such. Even though, it is pleaded that besides Shri Chander Mohan Chadha, Shri Atma Ram Chadha was the other trustee of M/s. Atma Ram Trust, but even if that be so, on his demise, his legal representatives would not become the landlord. In any case, there is no explanation in this respect either in the plaint or in the evidence.

13. The objection of the defendant in the written statement of the suit having not been instituted by M/s. Atma Ram Trust, who according to the plaint also is the landlord, goes to the root of the matter. It is now no longer *res integra* that a trust is not a legal entity and is not entitled to sue in its own name. Trust is compendium name of all the trustees and can act only through all the trustees and not otherwise. It has nowhere been pleaded or proved that Shri Chander Mohan Chadha is the only trustee of M/s. Atma Ram Trust, which is the landlord. The suit, thus instituted by Shri Chander Mohan Chadha only as a trustee of M/s. Atma Ram Trust has not been properly instituted and the plaintiffs would not be entitled to any relief on this ground alone. The Division Bench of this Court in *Duli Chand Vs. Mahabir Pershad Trilok Chand Charitable Trust*, has held that all the trustees should join in institution of the suit.

14. Though, no specific issue has been framed on the aforesaid plea in the written statement, but once an omnibus issue has been framed by this Court on the entitlement of the plaintiffs to mesne profits, the issue has to be decided with reference to the pleadings of the parties and in which, as aforesaid, defendant has set up a plea of the plaintiffs being not entitled to any reliefs for the reason of the suit having not been properly instituted. The plaintiffs have not taken any care to deal with the said plea or to satisfy the court of the due institution.

15. I must confess that the thought did occur to me that substantial justice should be done between the parties. However, it is a suit and not a writ petition. The plaintiffs have shown disregard to prove their case in accordance with law.

As aforesaid, even the lease deed on the basis of which the suit has been filed, has not been proved. Even after the said facts were brought to the notice at the time of commencement of hearing, no effort was made to even apply for making up the deficiency. I am thus constrained and feel bound by law to hold that the plaintiffs have failed to prove their case.

16. The conclusion thus is, though the defendant was in unauthorized use and occupation of the premises w.e.f. 1.4.2001 till 31.8.2005 but the suit has not been properly instituted.

17. As far as the period and rate of mesne profits is concerned, though mesne profits have been claimed w.e.f. 1.4.2001, but the suit was instituted on 30.5.2001. The plaintiffs ought to have in accordance with law paid court fees on the mesne profits accrued till the institution of the suit. However, no such court fees was paid and only an inquiry into the mesne profits w.e.f. 1.4.2001 was sought. The plaintiffs would thus have been entitled to mesne profits w.e.f. 1.6.2001 to 31.8.2005 only, had the suit been properly instituted.

18. With respect to the rate of the mesne profits, the witness of the plaintiffs has deposed that he is also the Managing Director of Atma Ram Builders Pvt. Ltd., and a photocopy of the lease deed executed by the said Atma Ram Builders Pvt. Ltd., was annexed to the affidavit. When the said witness stepped into the witness box, he stated that had brought a certified copy of the lease deed of which photocopy had been filed along with affidavit. Ex. PW1/1 has been put on the said certified copy.

19. Again the said document also has not been proved in accordance with law. Neither the original of the document is brought before the court nor has the witness identified the signatures on the certified copies. Without the execution of the documents having been proved, no reliance whatsoever can be placed thereon. However, so as to return finding of all aspects, even if the said document is to be read in evidence, the same is with respect to the showroom in the inner circle of Connaught Place comprising of ground floor, a mezzanine having a total area of 4200 square feet. The same was let out w.e.f. 20.8.2003 @ Rs. 5,50,000/- per month i.e. Rs. 130.95 paise per square feet per month. The tenant therein had also deposited advance rent of Rs. 33,00,000/- and interest free security deposit of Rs. 42,00,000/-. On the basis of the said document, it is urged that the claim of mesne profits @ Rs. 80/- per square feet per month is reasonable and justified.

20. Per Contra, the premises subject matter of the present suit are the mezzanine floor only and which has one entrance through the staircase opening in the inner circle and the main entrance through a staircase opening on the Radial Road leading to Minto Road. There is a drastic difference in the letting values of showrooms in the inner circle and a mezzanine floor, which is essentially meant for office purposes only. Thus, in my opinion, Ex. PW1/1 does not give any evidence of the benefit which the defendant bank availed by

unauthorized use of the premises from 1.6.2001 to 31.8.2005.

21. The witness of the plaintiff has referred to another document which has been filed in original before the court and on which Ex. PW1/2 has been put. However, the position as to mode of proof of the said document is the same as the earlier. Photocopy of the document was annexed to the affidavit and at the time of tendering of the affidavit into evidence, original was filed before the court. However, execution thereof has not been proved. I may state that the counsel for the defendant had raised objection to the admission of the document into evidence on the ground of mode of proof. The recording of the evidence being before the Joint Registrar, the objection has to be decided now and I find the objection to be valid and the said document to have been not proved in accordance with law. However, even if the said document is to be read, the same is again with respect to ground floor and mezzanine floor and rights in terrace again of a premises in the inner circle. However, the said document shows that though the rent of the said premises was reduced from Rs. 7,50,000/- per month fixed on 1.8.1999 to Rs. 5,35,714/- w.e.f. 1.11.2001. The said document of the plaintiffs shows that in or about the middle year of 2004, there was a fall in the rent in the Connaught Place area.

22. The third document relied upon by the plaintiffs is relating to a Bata Showroom. Ex. PW1/3 and Ex. PW1/4 were put on the same, but again I find the document not to have been proved in accordance with law. Be that as it may, the same shows the rent of a mezzanine within the showroom to be Rs. 100/- per square feet. However, a mezzanine within a showroom and which can be accessed from the showroom and forms part of showroom has an entirely different letting value than a mezzanine meant for office purposes only.

23. Thus, I find that the documents of the plaintiffs even if to be read in evidence do not throw any light on rate of mesne profits of the said premises.

24. The witness of the defendant has purported to prove the lease of another premises on the first floor in the Connaught Place area in the tenancy of the defendant. The lease has also not been proved in accordance with law and only a photocopy has been filed before the court. Further, the said document cannot give any estimate of the prevalent rate, the same being in the nature of an illegal subletting. DW2 has deposed of having taken lease of ground mezzanine and second floor in Scindia House, from M/s. Atma Ram Properties Ltd., w.e.f. 1.11.2003 @ Rs. 25/- per square feet for the ground floor @ Rs. 15/- per square feet on the mezzanine floor. Again, though the document has not been proved in accordance with law, but the same cannot be a bench mark of the prevalent rent owing to it being in the nature of sub tenancy.

25. There has been a tendency to take judicial notice of the general increase of the rent. However, Division Bench of this Court in National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association, after examining the various judgments in which the judicial notice had been purportedly taken found that the said

judgments were always on admissions and held that the court cannot take judicial notice of what rent the premises were capable for fetching and in the absence of any evidence being led by the plaintiffs on whom the onus rests.

26. I find that the plaintiffs in the present case have not led any evidence of any para materia premises from which it can be gathered as to what was the rent between the 1.6.2001 to 31.8.2005.

27. In view of my findings above, I hold that the suit has not been properly instituted and the plaintiffs have also failed to prove the rate of mesne profits. The suit is as such dismissed. However, in the facts of the case, the parties are left to bear their own costs. Decree sheet be drawn up.