
(2010) 12 DEL CK 0101

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 123 of 2010 and CM No. 22376 of 2010

Hill Elliott and Co. Ltd.

APPELLANT

Vs

Shri Bhupinder Singh

RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 7 Rule 11
General Clauses Act, 1897 — Section 27
Transfer of Property Act, 1882 — Section 106

Citation : (2011) 121 DRJ 438

Hon'ble Judges : Vikramajit Sen, J;G.P. Mittal, J

Bench : Division Bench

Advocate : G.L. Rawal and Kuljeet Singh, for the Appellant; Sanjiv Bahl and Rajan Narain, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—Appellant takes exception to the order dated 26th October, 2010 passed by the learned Single Judge in Civil Suit (OS) No. 2400/2008 whereby IA No. 9073/2010 under Order 12 Rule 6 of the Code of Civil Procedure, 1908 (CPC) was allowed and suit for possession filed by the Respondent was decreed.

2. We have heard Shri G.L. Rawal senior counsel for the Appellant threadbare.

3. Before we go into merits of the Appeal, we may sum-up essential facts necessary for disposal of the Appeal.

4. The Respondent (hereinafter referred to as the plaintiff) is owner of Property No. S-323, Panchsheel Park, New Delhi. He had let out the ground floor, first floor, garage with servant quarter and lawn attached to the said construction to the Appellant (hereinafter referred to as "Hill Elliott") through a registered Lease Deed dated 16.10.1982. The tenure of the lease was for a period of four years expiring on 12.10.1986. According to the plaintiff no registered Lease Deed was executed thereafter and thus Hill Elliott became statutory tenant on month to

month basis on paying agreed rent @ Rs. 7,000/- per month. The tenancy of Hill Elliott was terminated vide a notice dated 9.08.2008 w.e.f. 12.09.2008. The said notice was sent by registered post AD, speed post AD, courier service and UPC to the Defendant and the same was duly served upon Defendant by speed post AD as well as by registered post AD and by UPC. The notice is also deemed to have been served by courier as Hill Elliott had refused to accept the same as per the endorsement made on the undelivered envelop. According to the case of the plaintiff, the AD cards for the notice sent by registered AD post and speed AD post at the address of the suit premises were not received back. The plaintiff, therefore, wrote a letter dated 9.09.2008 followed by a letter dated 16.10.2008 to the Postal Authorities to give the service report about the notices. The Postal Authorities through its letter dated 09.10.2008 informed the plaintiff that the notices sent through postal receipt No. 4527 and 4528 dated 09.08.2008 had been duly delivered to the addressee on 12.08.2008.

5. Apart from claiming a decree for possession, the plaintiff also sought a relief of mesne profits which he assessed at Rs. 4,00,000/- per month w.e.f. the date the tenancy had come to an end i.e. 13.09.2008.

6. Hill Elliott contested the Suit by way of filing a written statement and denied the relationship of landlord and tenant between the parties. It took up the plea that Ashok Kumar Jhajharia had been inducted as a tenant w.e.f. 26.12.1989. It referred to the Suit filed by the plaintiff before the Civil Court being No. 358/1993 (hereinafter referred to as the plaintiff's previous Suit) where he sought eviction of another person i.e. Ashok Kumar Jhajharia. Hill Elliott took the plea that the said Suit was withdrawn unconditionally without obtaining any leave and thus the instant Suit was not maintainable. It also disputed the service of the notice for termination of tenancy. Hill Elliott also made a mention of another Suit being No. 12/1993 instituted by Ashok Kumar Jhajharia, the erstwhile Director of Hill Elliott against the plaintiff wherein Ashok Kumar Jhajharia had sought a decree of declaration that he was not a tenant in respect of suit premises and that a subsequent registered Lease Deed dated 26.12.1989 had never been acted upon between the plaintiff and Ashok Kumar Jhajharia and that Hill Elliott continued to be the tenant as it had never surrendered the possession of the suit premises. It may be mentioned that in the plaintiff's earlier suit Ashok Kumar Jhajharia had also been impleaded in addition to Hill Elliott and same plea had been taken by Ashok Kumar Jhajharia as Defendant No. 1 in the said Civil Suit that he had never been inducted as a tenant in the premises. It may be mentioned that the earlier Suit was filed way back in the year 1993 and the plaintiff had woken up only in the year 2008 to admit the stand taken by Hill Elliott as well as Ashok Kumar Jhajharia that Hill Elliott continued to be a tenant in the premises and consequently the Suit was withdrawn by the plaintiff.

7. A fresh Suit after service of notice as aforesaid was filed and an application under Order 12 Rule 6 CPC was moved. The learned Single Judge relying upon the admission in the previous proceedings between the parties and proof of

service of the notice terminating the tenancy passed the impugned order.

8. Shri G.L. Rawal, learned senior counsel for the Appellant has made three submissions:

(i) Of course in the previous Suit Hill Elliott had taken up the stand that Hill Elliott had never surrendered the tenancy and had continued to be a tenant since the year 1982, yet Hill Elliott can explain the circumstances under which the said admission was made and therefore a decree on admission could not have been passed by the learned Single Judge.

(ii) Hill Elliott had denied the receipt of notice dated 9.08.2008. The service of notice u/s 106 of the Transfer of Property Act is a condition precedent for terminating the tenancy. The denial of service became a triable issue as the presumption of service of notice u/s 27 of the General Clauses Act is a rebuttable presumption. Thus, the service of notice being a triable issue could have been decided only during the trial.

(iii) In the Application under Order 7 Rule 11 CPC, Hill Elliott had raised an important issue regarding validity of the supporting Affidavit filed by the plaintiff in support of the Plaint. The learned Single Judge had decreed the Suit under Order 12 Rule 6 CPC without disposing of the Application under Order 7 Rule 11 CPC which was illegal.

9. We shall be dealing with the contentions one by one.

10. The learned Single Judge has extracted various paragraphs of the previous Suit between the parties with regard to the admission made by Hill Elliott. We would like to refer to Paras 2 & 4 of the Preliminary Objections of the Written Statement of Hill Elliott (Defendant No. 2 in the previous Suit) hereunder for ready reference:

2. That the plaintiff has not come to this Hon"ble Court with clean hands. In fact, the plaintiff tried to grab upon the tenanted premises by illegal means in so much so that the plaintiff tried to adopt the side way by alluring to its Delhi representative Shri Ashok Kumar Jhalaria and thereby entering into a lease deed alleged to have been executed on 26-12-89 in between the plaintiff and the Defendant No. 1. It is submitted that the tenanted premises have been under the tenancy of the Defendant No. 2 since10.1982. Time and again, the tenancy period is extended and lastly it was extended in the month of December, 1986. The property bearing No. S 323, Panchsheel Park, New Delhi is under the tenancy of Defendant No. 2 as such with effect from 16-10-1982. On account of new understanding /settlement of the plaintiff and Defendant No. 2, the tenanted period was further extended upto 31st December, 1989. The rent payable was Rs. 7,000/- (Rupees seven thousand only) per month. At no point of time, prior to 31st December, 1989 neither the tenancy of Defendant No. 2 was terminated nor Defendant No. 2 surrendered the possession of the tenanted premises to the plaintiff. Further, it appears that as the property value in the area is increasing

day by day, the greed crept up in between the plaintiff and Defendant No. 1 and thus in order to get the possession of the property by illegal means, the plaintiff entered into the alleged lease agreement on 26-12-1989 with Defendant No. 1 with the hope that Defendant No. 1 who has been residing alongwith family members of Shri G.L. Jhajaria Ex-Director of the Defendant No. 2 in the tenanted premises might deliver the possession of the tenanted premises to the plaintiff. However, since the possession was with Defendant No. 2 and at no point of time the Defendant No. 2 delivered the possession and the management of the Defendant No. 2 was keeping continuous watch upon the property which is being used for residential-cum-commercial purpose, they....

3. xxxxxxxx

4. That the suit is barred due to applicability of principles of Estoppel. It is submitted that w.e.f. 1-1-1990 it was Defendant No. 2 who has been continuously sending the rent to the plaintiff through cheque / Demand drafts under its covering letters. The cheques/demand drafts were accepted by the plaintiff without any reservation. Up-to-date rent was sent through speed post and registered post and is paid to the plaintiff by Defendant No. 2 after an adjustment of amount of Rs. 45,000/- which was incurred by the Defendant No. 2 in repairing/white-washing/painting/plastering and polishing of the tenanted premises with the consent of the plaintiff in the year 1989-90. It may be pointed out that since 1982 no steps had been taken by the plaintiff to get the tenanted premises white-washed/painted for the last 8 years. It was white-washed and painted in the year 1990 when its condition become uninhabitable. All the bills and vouchers etc. in respect of expenses incurred by the Defendant No. 2 on behalf of plaintiff with his consent, for this purpose, are in possession of the Defendant No. 2. Thus the plaintiffs continuous acceptance of the rent by way of Bank Draft/ cheques from Defendant No. 2 have stopped him for claiming anybody else except Defendant No. 2 to be his tenant.

11. Thus, there is no gainsaying that the admission made by Hill Elliott was clear, specific and unequivocal that the tenancy of Defendant No. 2 did not come to an end by execution of the Lease Agreement dated 26.12.1989 between the plaintiff and Ashok Kumar Jhajharia. Rather, a specific plea had been taken by Hill Elliott that the said Lease Agreement had been got executed by the plaintiff with Shri Ashok Kumar Jhajharia in the hope that Ashok Kumar Jhajharia (Defendant No. 1 in the previous Suit) who had been residing in the premises along with family members of Shri G.L. Jhajharia, ex-Director of Hill Elliott might deliver possession of the suit premises to the plaintiff. Does it lie in the mouth of Hill Elliott now to say that Hill Elliott is not a tenant in the premises or that it can withdraw or explain the admission? The simple answer to the question is plain "No". The written statement in the previous suit had been filed by a duly authorized person. In fact, Shri Ashok Kumar Jhajharia is not a stranger to Hill Elliott or to Shri K.G. Jhajharia. Shri K.G. Jhajharia was the Director of the Company for 30 years and is brother of Shri Ashok Kumar Jhajharia. Ashok

Kumar Jhajharia admittedly is the representative of Hill Elliott in Delhi.

12. Shri G.L. Rawal learned senior counsel placed reliance on Geo-Group Communications Inc. Vs. IOL Broadband Ltd., in support of his contention that admission can be explained. There is no dispute about the proposition of law as laid down in Geo Group that admission can be explained but it must be remembered that a party cannot be permitted to resile from an admission where the same is clear and unequivocal. In the instant case we have already extracted Paras 2 & 4 of the written statement in the previous proceedings which would show that denying the continuation of tenancy after 26.12.1989 by Hill Elliott would amount to resiling from a clear cut admission made by it, which is not permissible in law. Reference may be made to Gautam Sarup Vs. Leela Jetly and Others, , where in Para 16 of the report it was observed by the Apex Court that it was one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. The Apex Court referred to Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., and Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, , and in Para 28 observed as under:

28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a Defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

13. A reference may also be made to Viswalakshmi Sasidharan (Mrs) and Others Vs. Branch Manager, Syndicate Bank, Belgaum, , where the Defendant had initially taken up the plea that due to slump in the market they could not sell the goods, realize the price of the finished product and pay back the loan to the Bank. It was observed that the admission came in their way to plead at the later stage that they had suffered loss on account of deficiency in service.

14. In this view of the matter, we have no hesitation to come to the conclusion that the admission regarding continuation of the tenancy after 26.12.1989 coupled with the averments to the effect that the Lease Deed dated 26.12.1989 was created by the plaintiff to somehow manage to get the possession of the suit premises from Ashok Kumar Jhajharia makes it crystal clear that as per its admission Hill Elliott continued to be the tenant in the premises and the said admission cannot be withdrawn by it.

15. Coming to the presumption of service of notice dated 09.08.2008, the notice was sent to Hill Elliott by registered AD post, speed AD post, UPC and by courier

service. It was specifically pleaded that the Hill Elliott had refused to accept the notice sent by the courier service whereas a confirmation was given by the Postal Authorities regarding delivery of the notice (article through postal receipt No. 4527 and 4528 dated 9.8.2008) on 12.08.2008. It has been submitted by Shri G.L. Rawal, learned senior counsel for the Appellant that presumption u/s 27 of the General Clauses Act is a rebuttable presumption and since Hill Elliott has denied service of notice dated 9.8.2008 it became a triable issue and the learned Single Judge committed a grave error in presuming service of the notice upon Hill Elliott. In support of his contention, the learned senior counsel has referred to Tele Tube Electronics Ltd. Vs. Delhi Sales Tax Appellate Tribunal and Others, ; D. Vinod Shivappa Vs. Nanda Belliappa, ; M/s. Green View Radio Service Vs. Laxmibai Ramji and another, . There is no dispute about the proposition of law that the presumption of service of notice u/s 27 of the General Clauses Act is a rebuttable presumption. However, the facts of each case have to be seen to reach the conclusion whether any rebuttal is forthcoming from the party who is deemed to have been served. We have already referred to hereinbefore as to how the notice terminating the tenancy was sent to Hill Elliott. A perusal of the relevant paragraphs of the written statement filed by Hill Elliott would show that it had simply denied the receipt/service of notice. The circumstances under which the notice dated 9.08.2008 was not received by Hill Elliott were not stated either in para 7 of the Preliminary Objections of the written statement or in reply to Para 5 of the Plaint. Hill Elliott has not stated that the premises during the period the notice is purported to have been served were lying locked; that no responsible person of Hill Elliott was present in the premises during this time or there was any other reason by which the normal course of business of service of notice was prevented. Thus, the denial of service of notice shall be treated as a vague denial and thus deemed to have been admitted.

16. In C.C. Alavi Haji Vs. Palapetty Muhammed and Another, , return of notice sent by registered post with the remarks by the Postal Authorities "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station" due service is to be presumed. In the instant case, the notice sent by the courier service has been refused whereas a confirmation has been received regarding service of the notice sent by registered AD and by speed post. In addition the notice was also sent by UPC.

17. In the absence of specific denial, we find no merit in the contention raised on behalf of Hill Elliott that the presumption being rebuttable opportunity should have been given to the Appellant to prove that the notice has not been served.

18. The purpose of the enactment of provision of Order 12 Rule 6 CPC is to give the plaintiff a right to speedy judgment. The thrust of amendment is that in an appropriate case a party on the admission of the other party can press for judgment as a matter of legal right. If in a case like the present one, a dishonest litigant is permitted to delay the judgment on the ground that he would show during the trial that he had not received the notice, the very purpose of the

amendment in the provision would be frustrated.

19. We have perused the averments made in the Application under Order 7 Rule 11 CPC and the Affidavit filed along with the Plaint before the learned Single Judge. The plea of the Appellant is that the Affidavit filed by the plaintiff is no Affidavit in the eyes of law as the plaintiff has not stated in the Affidavit as to which paragraph of the Plaint is true to his knowledge and which paragraph of the Plaint has been averred on the basis of the information / advice received.

20. A perusal of the supporting Affidavit would show that the averments have been made on the basis of the record.

21. In our view, there is no defect in the Affidavit. The instant case for possession and mesne profits is based on the documents right from inception of the tenancy which was created through a Lease Deed dated 16.10.1982 followed by the earlier litigation between the parties and then service of notice terminating the tenancy. There is no merit in the plea raised on behalf of the Hill Elliott that the Plaint was liable to be rejected as the supporting Affidavit was defective.

22. In view of the foregoing discussion, we do not find any error or infirmity in the impugned order. The Appeal is absolutely meritless, frivolous and has been filed to dishonestly retain possession of the premises whose rent in the year 1982 was just Rs. 7,000/- per month and current market rent is stated to be Rs. 4,00,000/- per month. The Appeal rather depicts that some of the litigants have scant respect for the Court and the course of Justice and they can take any stand to suit their interest unmindful of the fact that they can be prosecuted for making false averments in the Court of Law.

23. The Appeal is dismissed with costs of Rs. 1,00,000/- to be deposited with Delhi Legal Services Authority, Patiala House Courts, New Delhi within a period of eight weeks, failing which the Authority shall be entitled to take proceedings for recovery of the costs from Hill Elliott.

24. Pending applications also stand disposed of.