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**(2011) 05 DEL CK 0357**

**In the Delhi High Court**

**Case No :** Regular Second Appeal No. 317 of 2007 and CM No. 17429 of 2007

National Organic Chemical Industries Ltd.

APPELLANT

Vs

Arvind Aggarwal and Another

RESPONDENT

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**Date of Decision :** 05-05-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 2(12)

**Citation :** (2011) 05 DEL CK 0357

**Hon'ble Judges :** Indermeet Kaur, J

**Bench :** Single Bench

**Advocate :** Rajinder Dhawan and T. Akhtar, for the Appellant; None, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Indermeet Kaur, J.—These appeals have impugned the judgment and decree dated 21.9.2007 which has reversed the finding of the trial judge dated 11.7.2005. Two suits had been filed bearing suit No. 395/2002 & 396/2002 qua suit property bearing No. 601, 6th floor, Ashoka Estate, 24 Barakhamba Road, New Delhi and 614, 6th Floor, Ashoka Estate, 24 Barakhamba Road, New Delhi. They had been consolidated and vide judgment and decree dated 11.7.2005 the suits filed by the Plaintiffs Arvind Aggarwal and Smt. Chandan Aggarwal seeking recovery and possession of the suit property had been dismissed. The impugned judgment had reversed this finding. The suits of the Plaintiffs stood decreed.

2. Plaintiff No. 1 is the owner/landlord of the aforementioned suit property. It had been leased out to Defendant No. 1 vide agreement dated 02.01.1984 w.e.f. 01.01.1984; rent was Rs. 5103/- per month & Rs. 7,479/- respectively for the 2 suit properties which was increased from time to time. Legal notice dated 06.5.1995 was sent to the Defendant terminating his tenancy w.e.f. 31.5.1995; Defendant paid no heed to the same. Last paid rent was Rs. 7348.80 & Rs. 10,770/- per month. Defendant had not paid rent w.e.f. 01.3.1995 to 31.5.1995; sum of Rs. 22,046.40 & Rs. 32,310/- respectively was due the Plaintiffs. In spite

of legal notice Defendant had failed to vacate the suit property. Present suit was accordingly filed for possession as also damages for unauthorized use and occupation with a prayer that an enquiry under Order 20 Rule 12 of the CPC (hereinafter referred to as "the Code") be carried out to determine the rate of damages to be awarded in favour of the Plaintiff.

3. Written statement was filed. It was stated that on 27.6.1995 the entire building namely Ashoka Estate in which the suit property is located was sealed by the Delhi Fire Authority after a major fire broke out in the building. On 01.7.1995 the Defendant had asked the Plaintiff to take possession of the suit property and set off the amount of Rs. 4,20,000/- which had been deposited by the Defendant with the Plaintiff as security amount. Plaintiff paid no heed. Reminders dated 18.9.1995 and 4.12.1995 as also a legal notice dated 30.4.1996 sent by the Defendant calling upon the Plaintiff to take possession of the suit property were also not replied. Suit of the Plaintiff is liable to be dismissed.

4. On the pleadings of the parties, the following eight issues were framed:

1. Whether the suit is not maintainable in law? OPD
2. Whether the suit is bad for misjoinder of the parties? OPD
3. Whether the suit does not disclose the cause of action? OPD
4. Whether this Court has no pecuniary jurisdiction to try this suit? OPD
5. Whether the Plaintiff has suppressed the material facts, if so its effect? OPD
6. Whether the tenancy of Defendant has been validly terminated vide notice dated 6.5.1995. If so, its effect?
7. Whether the Plaintiff is entitled for the relief of damages and occupation as claimed? OPP
8. Relief.

5. Oral and documentary evidence was led. Trial judge while dealing with issue No. 6 had noted that the possession of the suit property has since been delivered by the Defendant to the Plaintiff and the security amount has also since been returned. Only question was the determination of mesne profits which was due and payable if any by the Defendant. This was dealt with while disposing of issue No. 7. Court had examined the oral and documentary evidence as also communications exchanged between the parties. Admittedly suit property had been delivered to the Plaintiff on 06.1.1997. Court was of the view that the Plaintiff was not entitled to any damages.

6. In appeal this finding was modified. The appellate court was of the view that the tenancy had been terminated w.e.f. 31.5.1995 on which date the Defendant had become an unauthorized occupant; fire had taken place on 27.6.1995 whereupon the building was sealed. On 07.5.1996 the building was desealed;

suit had been filed on 22.9.1995. Court was of the view that the intent of the Defendant to return the premises was not clear. Damages had been awarded @ 80/- per square feet per month w.e.f. 01.6.1995 to 06.1.1997 i.e. the date of the delivery of the possession of the suit property.

7. This is a second appeal. It has been admitted and on 07.11.2008 the following substantial question of law was formulated:

Whether the Appellant is liable to pay the mesne profits for the period, when the building, of which the suit premises formed a part, remained sealed due to fire in the building, after the termination of the tenancy?

8. On behalf of the Appellant, it has been urged that the judgment of the court below is illegal as the property in dispute had been sealed on 07.06.1995; it was desealed only on 07.05.1996; PW-1 in his cross-examination has also admitted that in this period market rent could have been obtained for the demised premises. This is evident from the fact that the property remained sealed in this intervening period. It is pointed out that mesne profit granted @ Rs. 80/- per square feet is clearly a perversity; the property was of no use to the Defendant; they had in fact shifted their office to another organization; Defendant had been repeatedly writing to the Plaintiff to take back possession but the Plaintiff had not taken the possession for which the Defendant cannot be burdened with any liability.

9. None has appeared for the Respondents.

10. Admittedly the suit property has been vacated under the orders of the court on 06.01.1997. It is also not in dispute that legal notice dated 06.05.1995 served upon the Defendant terminating his tenancy w.e.f. 31.5.1995. Admittedly the Defendant had become unauthorized occupant of the suit property w.e.f. 01.06.1995. The date of handing over the possession of the suit property is also an admitted fact i.e. 06.01.1999. Damages had rightly been calculated for his intervening period i.e. w.e.f. 01.06.1995 to 06.01.1997. The contention of learned Counsel for the Appellant is that even presuming that the Plaintiff was in constructive possession of the suit property (although not in actual physical possession) even then he could not be made liable for the period when the property was sealed as admittedly during this intervening period, property could not have fetched any market rent.

11. "Mesne profit" had been defined u/s 2(12) of the Code of Civil Procedure. This finding reads as under:

"mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

12. This definition encompasses those profits which the person in wrongful possession of such property actually received or might with ordinary diligence

have received there from together with interest on such profits. This is the test on which the grant of mesne profits, if any, has to be determined. Ex. PW-1/125 was the lease deed which has been filed by the Plaintiff showing that the same suit property had been let out w.e.f. 01.01.1997 @ Rs. 80/- per square feet. This has been taken into account by the court to record a finding that Rs. 80/- per square feet would be the market rent of the suit property as and this was the best evidence available; moreover there was no rebuttal evidence on this score. Rs. 80/- per square feet in January, 1997 was thus correctly recorded as market rent of the suit property. This amount was payable by the Defendant to the Plaintiff from 07.05.1996 to 06.01.1997; 07.05.1996 is the date when the property had been desealed and was available for user; 06.01.1997 is the date when the physical possession of the suit property had been handed over by the Defendant; in this period property was admittedly available for user by the Defendant. The question is whether the Defendant is liable to pay mesne profits even for the period when the property remained sealed w.e.f. 07.06.1995 to 07.05.1996. Admittedly and as per record the Plaintiff had received only one letter dated 30.04.1996 from the Defendant which was for the first time informed him that the Defendant was willing to vacate the suit property. There is no other documentary evidence to show that prior to this date, the Defendant was willing to vacate the suit property; this contention that he had repeatedly asked the Plaintiff to take the property is incorrect. It is thus clear that during this entire period even when the property was sealed, the possession of the same was with the Defendant. The Defendant till 30.04.1996 had not made any request to release this property to the Plaintiff. Defendant is liable for this intervening period also as admittedly the constructive possession of the suit property was with him. DW-1 in his cross-examination had in fact admitted that although there was a fire in the building but there was no fire in the disputed plot; there was also no term in the lease deed dated 02.01.1984 or any other understanding between the parties written or oral to take care of such a situation. Defendant was rightly held to be liable to pay damages at the market rate. There is no perversity in this finding.

13. Substantial question of law is answered accordingly in favour of the Respondent and against the Appellant. There is no merit in this appeal. Appeal as also pending application is dismissed.