

(2011) 02 DEL CK 0459

In the Delhi High Court

Case No : Regular Second Appeal No. 208 of 2007

Ramesh Chand Jain and Another

APPELLANT

Vs

Shitam Chand Oswal (Deceased) through L.Rs.

RESPONDENT

Date of Decision : 22-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 4

Citation : (2011) 02 DEL CK 0459

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : R. Vasudevan and Harish Sharma, for the Appellant; Rajat Aneja and Sweta Singh for R1 to R5 and Sugriva Dubey, for R6, for the Respondent

Judgement

Indermeet Kaur, J.

CM No. 16628/2010

1. This is an application filed by Mr. Subhash Chand Jain/ Respondent No. 6. In the trial court proceedings, he was arrayed as Defendant No. 2. His contention is that he was not served in the suit proceedings; no summons had been issued to him; the body of the application has detailed the various facets of civil proceedings. It is submitted that each and every Defendant is entitled to be served independently; it goes on to detail the further fact that Defendant No. 2 was never served and this has caused a travesty of justice. By way of this application, he seeks that the matter be remanded back to the trial court in order that Respondent No. 6/ applicant/ Defendant No. 2 is able to put-forth his defence. The reply filed has belied these contentions raised by the applicant. It is pointed out by learned Counsel for the Respondents that on 30.04.1984, Defendant No. 2/ Respondent No. 6 had put in appearance before the trial court; he had in fact filed an application under Order 39 Rule 4 of the CPC (hereinafter referred to as the "Code") for setting aside the injunction order dated 26.04.1984. This application had been accompanied by his affidavit. He had been represented through his counsel namely Mr. J.P. Jain and Mr. Ravinder Tyagi who

had filed power of attorney on his behalf on 17.04.1989. On 17.10.1990, the presence of Defendant No. 2 had also been noted in the trial court proceedings.

2. All this is borne out from the record which has been perused. It is clear that this application has been filed malafide only to delay the proceedings in this Court. On behalf of the Respondents, it is pointed out that there are two concurrent findings of fact against the Appellant; this application has been collusively filed by Mr. Subhash Chand Jain along with the Appellant only as a delaying tactic.

3. Be that as it may, the perusal of the record evidences the fact that the averments made in the present application which have been supported by the affidavit of the applicant Mr. Subhash Chand Jain are absolute lies. This is a warning to such a litigant to be careful in future. Court is not proceeding with perjury but the malafides of the applicant are writ large and the submission of the learned Counsel for the Respondents that this is a delaying tactic is well substantiated.

4. This application is dismissed with costs of Rs. 20,000/- to be paid within two weeks.

R.S.A. No. 208/2007 & CM No. 11271/2007 (for stay)

5. Arguments have been addressed on behalf of the Appellant on the substantial question of law raised in this second appeal. The plaintiff Shitab Chand Oswal (through his L Rs) had filed a suit for possession against three Defendants. Ramesh Chand Jain was Defendant No. 1. The contention was that the deceased plaintiff and Defendant No. 1 had entered into a partnership dated 27.6.1972 in terms of which the partners had agreed to carry out business under the name and style of M/s Jain Traders from premises No. 650, Gali No. 11, Sadar Bazar, Delhi on a licence fees of `50/- which was to be paid to the plaintiff who was the owner of the suit property. In terms of the affronted partnership it had been agreed that in the event of the dissolution of the firm or shift in its business possession of the shop would remain with the plaintiff who was the owner and no right, title or interest would vest with the Defendant. In April-May 1973 Defendant sought permission from the plaintiff for taking orders in the name of M/s Jaina

Agencies which was permitted by the plaintiff. In terms thereof an agreement dated 1.5.1973 was drawn between the plaintiff and Defendant No. 1. In terms of this agreement as when the business of Jain Traders would wind up M/s Jaina Agencies (proprietorship firm of Defendant No. 1) would also come to a close. plaintiff requested Defendant No. 1 to wind up the business of M/s Jaina Agencies but the Defendant No. 1 was evading the issue. On 16.1.1984 Defendant No. 2 broke open the locks of the shop in question and illegally trespassed into it. On 20.1.1984 plaintiff issued a legal notice dissolving the partnership firm M/s Jaina Traders which was duly received by Defendant No. 1 on 24.1.1984. By way of this legal notice plaintiff had called upon the Defendant

No. 1 to render accounts of the firm with a further direction that the Defendant be restrained from entering into suit premises as the partnership had come to an end.

6. Defendant No. 1 filed written statement wherein he had stated that M/s Jaina Agencies is a tenant of M/s Jain Traders i.e. the partnership firm and its eviction could not be ordered. His contention was that he has an independent right to remain in the suit property. He relied upon the agreement dated 1.5.1973 whereby as per the Defendant he was entitled to retain the possession of the shop as a tenant of Jaina Agencies. It was contended that the document is torn and true copy of the original had not been placed on record by the plaintiff.

7. On the pleadings of the parties, nine issues were framed. Relevant for the decision of this second appeal is issue No. 4 and issue No. 7 which inter alia read as follows:

....

4. Whether M/s Jaina Agencies are tenants in respect of shop in question since October 1971? OPD

....

7. Whether deed dated 1.5.73 was torn in the manner as alleged in para 13 of written statement? If so to what effect? OPD.

8. Oral and documentary evidence was led by the respective parties. Four witnesses were examined on behalf of the plaintiff. The partnership deed dated 27.6.1972 was an admitted document. plaintiff had produced the subsequent agreement dated 1.5.1973 on record which has been translated by PW-3. The original of the said document was proved as Ex.PW-3/1 and the translated copy was proved as Ex.PW-3/2. This document is dated 1.5.1973. This agreement had noted that Ramesh Chand Jain (Defendant No. 1) wants to start his office in the name of M/s Jaina Agencies from the office place of M/s Jaina Traders to which the partners of the said firm i.e. Shitab Chand Oswal and Defendant No. 1 (Ramesh Chand Jain) are agreeable. This document had further noted that in terms thereof no commission will be paid by M/s Jaina Agencies to Jain Traders from its business. The contention of the Defendant before the trial judge was that this document was a torn document and the original of the same has not been produced; he had produced a copy of the same which has been proved as Ex.DX8. The only difference pointed out in the document Ex.PW-3/2 (relied upon by the plaintiff) and Ex.DX8 (relied upon by the Defendant) was the insertion of para No. 3 in the said document. The said para 3 reads as follows:

3. If for any reason, Jain Traders wind up their business, Jaina Agencies will also have to wind up their business and vacant possession of the shop shall be handed over to the owners of shop i.e. the First Party. If this does not happen, Jaina Agencies shall pay Rs. 100/- per day to the owners of the premises.

In terms of para 3 it had been agreed that if and when Jain Traders would wind up their business M/s Jaina Agencies will also have to correspondingly wind up his business and handover vacant possession of the shop to the plaintiff i.e. Shitab Chand Oswal; on non-happening, M/s Jaina Agencies will pay `100/- per day to the owners of the premises. The partnership of Jain Traders had been terminated vide notice dated 20.1.1984 which was admittedly received by Defendant No. 1 on 24.1.1984. M/s Jaina Agencies, however, continued to function from the shop and payment of licence fee was Rs. 100/- by M/s Jaina Agencies to the plaintiff is borne out from the document Ex.DX1 to DX6.

9. There are two concurrent findings of fact against the Appellant. Both the Courts below have held that the Defendant No. 1 had no right to retain the suit premises; decree of permanent injunction had been passed in favour of the plaintiff and against the Defendant restraining the Defendant from interfering into the suit property. Decree of rendition of accounts and damages was also passed.

10. On behalf of the Appellant four substantial questions of law are urged. Firstly that the appellate court had merely endorsed the finding of the trial judge; it has not re-appreciated the oral and documentary evidence which is a perversity. Secondly, the document Ex.PW-3/1 could not have been read in evidence as PW-3 who had translated this document has in his cross-examination admitted that he does not remember if he had seen the original or not. Thirdly, Defendant No. 2 Subhash Chand Jain had filed a suit for injunction against the plaintiff seeking a decree that the plaintiff be restrained from interfering with his possession which suit had been withdrawn on the statement made by the plaintiff that he will not dispossess Subhash Chand Jain without due process of law. This substantiates the submission that in fact Subhash Chand Jain and Defendant No. 1 were tenants in the suit property. Lastly, it has been urged that the Courts below had failed to appreciate that M/s Jaina Agencies was an independent tenant of M/s Jain Traders; even assuming it was not a tenant; he was a licensee and he could not be evicted without terminating his licence.

11. These contentions raised by the Appellant are all bereft of merit. The impugned judgment is dated 4.7.2007; it runs into 32 pages. It has in detail examined the oral and documentary evidence led by the respective parties and this is evident from its findings which are contained in para 10 onwards. Pleadings and the arguments raised by the respective parties had been correctly noted in the earlier paras of the judgment. The documentary evidence which included Ex. PW-3/1 has also been scrutinized. It had noted that the submission of Defendant in its written statement that he was a tenant in the shop since 1971 which was belied by the partnership deed dated 27.6.1972 wherein it has been agreed that the parties had entered into a partnership business from that date. The Rent Controller vide its judgment Ex.PW-4/8 in an eviction petition had also returned a finding in favour of the plaintiff that M/s Jaina Agencies was not a tenant of the suit premises which finding had been endorsed by the Rent Control

Tribunal. Ex.PW-3/1 was the original of the document dated 1.5.1973; the translated copy was exhibited as Ex.PW-3/2 which was duly proved through the version of PW-3 who was the official translator of the said document. PW-3 on oath had deposed that he had translated this document and when it had been produced before him for translation, it was not torn. The translated document Ex.PW-3/2 was the true and correct translation of the original Ex.PW-3/1. In his cross-examination, PW-3 had denied the suggestion that the document produced before him was not the original. A reference to mere a one line in this cross-examination that PW-3 was not sure whether the said document was produced before him would not and cannot tarnish the credibility of this witness who has no axe to grind. Furthermore the testimony of a witness has to be read as a whole and no one line can be segregated and read in isolation and against the tenor of the rest of the statement. The suit for permanent injunction filed by Defendant No. 2 i.e. Subhash Chand Jain had been dismissed on the statement of the plaintiff that he will not dispossess him except in accordance with law; this does not create any right of tenancy in favour of either Defendant No. 1 or Defendant No. 2. The last contention of the Appellant that he was a licensee in the suit property is clearly contrary to his earlier plea wherein he has stated that he is tenant in the suit property. He cannot be allowed to blow hot and cold in same breath; he cannot approbate and reprobate. His partnership deed had been validly dissolved by notice dated 20.1.1984; after dissolution of this firm (in terms of Ex.PW-3/1 dated 1.5.1973) M/s Jaina Agencies had also to necessarily wind up its business and in the event of not doing so it was liable to pay `100/- per day as penal charges. This is evident from Ex.PW-3/1 which stood proved. No substantial question of law has arisen in this appeal.

12. The appeal as also the pending application is dismissed limine.