

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

+ CS(OS) No. 2255/2008

Date of Decision: July 27, 2010

SH. PARVEEN KUMAR Plaintiff

Through: Mr. P.C.Sharma, Advocate.

versus

SH.SHAILENDER AGGARWAL & ANR. Defendants

Through: Mr.Pradeep K.Bakshi and
Mr.Jitender Ratta,
Advocates for Defendant
No.1.

Mr.J.S.Lamba, Advocate
for Defendant No.2.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

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| (1) | Whether reporters of local paper may be allowed to see the judgment? | |
| (2) | To be referred to the reporter or not? | Yes |
| (3) | Whether the judgment should be reported in the Digest ? | Yes |

J U D G M E N T

ARUNA SURESH, J.

IA Nos.8580/2009 (under Order 7 Rule 11 CPC by D-2) & 8581/2009 (under Order 7 Rule 11 CPC by D-1) in CS(OS) No.2255/2008

1. Vide this order, I shall dispose of these two applications filed by defendants No. 1 and 2 respectively under

Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as 'CPC') seeking rejection of the plaint.

2. Plaintiff has filed the present suit for recovery of Rs.45 Lacs along with interest accrued thereon against the defendants contending *inter alia* that by virtue of a Lease Agreement, he was inducted as a tenant by defendant No.2 in the property No.14-A, Marble Arch Apartment, 9 Prithvi Raj Road, New Delhi on a monthly rent of Rs.20,000/- on 1st October, 1999. The Lease was extended for two years on the terms and conditions contained in the Lease Agreement dated 30th August, 2001.

3. On 25th August 2005, plaintiff, on behest of defendant No. 2, entered into a verbal agreement for purchase of the suit property with Green Project Leasing Limited for consideration of Rs. 1 Crore 40 Lacs. Plaintiff paid the suit amount as earnest money by way of five cheques of different dates in favour of Green Project Leasing Limited. In the second week of June 2006, defendant No.2 retracted from the Agreement but, promised that he would be granted five years lease period from 1st October, 2005 to 30th September, 2010 for adjustment of Rs.45 Lacs received in advance as earnest

money. However, no Lease Agreement was executed by defendant No.2.

4. Plaintiff filed a suit for permanent and mandatory injunction before this Court apprehending transfer of the suit property to any other person. The said suit was decided on 12th July, 2006 in favour of the plaintiff. Subsequently, defendant No. 1 filed a suit for ejectment, possession and recovery of rent and damages for Rs.9.90,000/- and *mesne* profits at the rate of Rs.1,50,000/- per month for illegal use and occupation of the suit premises against the plaintiff, besides interest at the rate of 18% per annum, which is pending adjudication before the Additional District Judge. Resultantly, plaintiff had filed the present suit for recovery of Rs.45 Lacs.

5. Defendants have sought rejection of the plaint on the grounds that plaintiff did not pay any amount to the defendants as all the cheques had been issued by M/s Supreme Export Private Limited in favour of Green Project Leasing Limited and therefore, there is no privity of contract between the plaintiff and the defendants and no cause of action has arisen in favour of the plaintiff and against the defendants. Plaint is, therefore, liable to be rejected. Defendants

have also sought rejection of the plaint on the ground that suit is barred by principles of *res judicata* and also in terms of Order 2 Rule 3 CPC qua the relief of set off of the suit amount against the rent of the suit property as the same relief was also claimed in Suit No.1348/2006, admittedly filed by the plaintiff against the defendants, for which the plaintiff had given up the said relief.

6. It is submitted by Mr.Pradeep K. Joshi, counsel appearing on behalf of defendant No. 1 that plaint does not disclose any cause of action against the defendants as the rent was being paid by the plaintiff directly to Kosi Farms Limited and not to defendant No. 1 or defendant No.2, though it is claimed that possession was delivered to the plaintiff by defendant No. 2 in 1999. In 2005, defendant No. 1 was only an employee and not the Director of Kosi Farms. Defendant No. 2 had no direct connection or relation with Kosi Farms Limited, or defendant No. 1. He was only a middle man in getting the suit premises leased out to the plaintiff. Therefore, there was no privity of contract between the plaintiff and defendant No.2. It is submitted that the suit is for recovery of Rs.45 Lacs, which was neither paid to defendant No. 1 nor to defendant No. 2 but, were actually paid to Green Project Leasing Limited by way of

cheques who is not even a party to the suit and therefore, as per the averments contained in the plaint, there is no cause of action in favour of the plaintiff to file the present suit against the defendants. It is further argued that plaintiff had filed a suit for permanent and mandatory injunction being CS(OS) No.1348/2006 on similar facts and circumstances, wherein he did not claim the relief of set off of the suit amount against the rent of the property in suit and therefore, plaintiff is estopped from his own conduct from claiming the said relief.

7. Mr.P.C.Sharma, counsel appearing on behalf of the plaintiff has submitted that both the defendants are in collusion with each other and have caused immense loss to the plaintiff. Although the facts of the two suits are same but, the relief claimed by the plaintiff in both the suits is different. He further submitted that the first cheque was drawn by the plaintiff in favour of Kosi Farms Limited, which has been merged with Green Project Leasing Limited and it was on instructions of defendant No.2, he had drawn the cheques in favour of Green Project Leasing Limited. Since he did not know the address of Green Project Leasing Limited, he had sent a legal notice to the defendants. Averments contained in the plaint

are to be seen by the Court to conclude if any cause of action is made out against the defendants or not and the Court cannot look into the defence raised by the defendants for that purpose. He has submitted that he could not implead Green Project Leasing Limited as defendant in the suit because its address was not known. He emphasized that possession was given to plaintiff by defendant No. 2, though rent was being paid directly to defendant No.1.

8. Present suit has been filed by plaintiff Parveen Kumar in his personal capacity as he had taken the premises in suit on lease for his residence, being Director of M/s Supreme Export Private Limited, Samalkhan, New Delhi. Admittedly, this suit does not relate to the lease of the property. It is for recovery of money, which according to the plaintiff was paid by M/s Supreme Export Private Limited to Green Project Leasing Limited through defendant No. 2 for purchase of the property in suit. It is pertinent that in the plaint, plaintiff is described as a company e.g. in middle of para 3 of the plaint it is written..... “The plaintiff company paid Rs.45 Lacs on different occasions to the defendant no. 2 at his office,.....The plaintiff company paid Rs.30 Lacs by Cheque/Pay Order bearing no.905240 for Rs.5 Lacs dt.22.09.2005 drawn on Union Bank of

India..... The deal of sale purchase of suit property fissile out as the condition of sale for taking over the company along with the sale of flat which was not acceptable to the plaintiff company. The plaintiff company was interested only for sale of suit property without the taking over the company. In the second week of June 2006 defendant no.2 retracted from sale of suit property, but he promised that the plaintiff company may be granted five years lease period adjusting Rs.45 Lacs in course commencing from 1st October 2005 to 30th September 2010. Although rent was very meager but plaintiff company had no option except to admit the said proposal. The plaintiff company asked to defendant no.2 to execute the lease agreement.....”

9. Photocopies of the cheques in question placed on record clearly indicate that they have been issued by M/s Supreme Exports Private Limited signed by its Director in favour of Green Project Leasing Limited. Thus, from bare perusal of the plaint itself, it is clear that neither there is any privity of contract between the plaintiff and any of the defendants, nor any amount much less Rs.45 Lacs were ever received by any of the defendants. Undisputedly, all the cheques were honoured in the account of Green Project Leasing

Limited as per the statement of accounts of M/s Supreme Exports Private Limited, placed on record by the plaintiff. Present suit is filed by the plaintiff in his personal capacity for recovery of amount paid by the company. In the absence of any oral or written contract to the contrary, it cannot be considered as a properly instituted suit. The amount paid to Green Project Leasing Limited as earnest money has no relevance to the Lease Agreement executed between the plaintiff and Kosi Farms Limited. In the suit for injunction filed by the plaintiff he had averred that he was told by defendant No. 2 that Kosi Farms Limited had sold the property in suit to Green Project Leasing Limited. Under these circumstances, to say that Kosi Farms Limited and Green Projects Leasing Limited are one and the same company would be incorrect.

10. Counsel for the plaintiff has submitted that Green Project Leasing Limited was not made a party to the suit because its address was not known. This statement is also without any basis. Defendant had filed a caveat in this Court and in the Caveat, address of both the defendants was disclosed. Besides the defendants, one of the caveator was Green Project Leasing Limited and its address had been duly mentioned in the caveat. The Lawyer had given his

address in the caveat petition where the defendants were required to be served with advance notice of the suit. Plaintiff, therefore, knew the address of Green Projects Leasing Limited. Besides, once the cheques of M/s Supreme Export Private Limited were being honoured in the account of Green Project Leasing Limited, plaintiff, being Director of the same could have easily verified or found out the address of Green Project Leasing Limited from its accounts.

11. From the discussion as above, it is clear that Rs.45 Lacs were paid by M/s Supreme Export Private Limited to Green Project Leasing Limited by way of five cheques. Neither payment was made by the plaintiff nor it was received by either of the defendants. For a transaction, which took place between the two companies, neither of the parties was directly or indirectly involved. This Court while granting injunction to the plaintiff in the other suit did observe in its order that there was misleading and misdescription of the parties in the memo of parties to the suit. Order of injunction dated 12th July, 2006 was passed on the statement of the plaintiff that he had claimed tenancy rights in his personal capacity in respect of the suit property. It is pertinent that in the said suit, plaintiff had sought a relief of mandatory injunction for directing defendant No.2

to get executed the documents of lease for five years from Green Project Leasing Limited without making it a party. However, plaintiff gave up this relief in the said suit. Considering the statement made by the plaintiff, Court recorded that defendant No.2 had no concern, whatsoever, with the suit property and permitted Kosi Farms Limited to regain possession of the property in suit as per the procedure established by law. Kosi Farms Limited has already filed a suit for possession and *mesne* profits against the plaintiff which is pending adjudication.

12. It is not disputed that pleadings contained in the earlier suit filed by the plaintiff for permanent and mandatory injunction and the present suit are common in nature, based on the same transaction. However, the remedy claimed by the plaintiff in the earlier suit was a restraint order against the defendants not to dispossess him from the suit property with a mandate to be issued to defendant No. 2 to get the Lease Deed for five years executed from Green Project Leasing Limited. Defendant No. 2 has been impleaded in both the cases being a middle man while getting the property leased out to the plaintiff and subsequently when oral Agreement to Sell the suit property was allegedly entered into

between the plaintiff and Green Project Leasing Limited. Plaintiff did not claim any relief for refund of Rs.45 Lacs or for specific performance of the oral Agreement for sale of the property in suit or for adjustment of the advanced amount towards payment of rent for five years.

13. As pointed out above, plaintiff gave up his claim for mandatory injunction against defendant No. 2 for execution of documents for lease of five years by Green Project Leasing Limited. True that, facts and circumstances of this case and the nature of relief claimed do not strictly fall within the purview of Order 2 Rule 3 CPC, however after giving up his claim against defendant No.2, plaintiff is estopped from his own conduct from seeking relief for setting off the suit amount against the payment of admitted rate of rent for use and occupation of the premises for five years.

14. It is pertinent that plaintiff has filed the suit against defendant No.1 in his personal capacity, whereas premises in suit were leased out in his favour by Kosi Farms Limited, which is alleged to have transferred the property in the name of Green Project Leasing Limited. As pointed out above, none of these companies are

parties to the suit. Defendant No.2 had no contract with the plaintiff either as owner or authorised representative of Kosi Farms Limited.

15. It is accordingly concluded that plaintiff does not disclose any cause of action against any of the defendants. Hence, the applications are allowed.

16. Accordingly, the plaint is hereby rejected. Under the circumstances there are no orders as to costs. File be consigned.

**ARUNA SURESH
(JUDGE)**

**JULY 27, 2010
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