

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.163 of 2012 & C.M. No.17035 of 2012**

Decided on : 04th July, 2013

MODI RUBBER LTD. Appellant
Through: Mr. Saket Sikri, Advocate.

Versus

RAMESH MALIK & ANR. Respondents
Through: Ms. Manmeet Arora, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant under Section 100 read with Order XLII CPC against the judgment dated 15.5.2012 passed by the learned Additional District Judge dismissing the appeal being R.C.A. No.8/2010 and upholding the judgment and decree dated 31.5.2010 passed by the learned Senior Civil Judge-cum-Rent Controller in Suit No.79/2006.

2. I have heard Mr. Saket Sikri, the learned counsel for the appellant and Ms. Manmeet Arora, the learned counsel for the respondent No.1.

3. Mr. Sikri, the learned counsel for the appellant has stated that the following three substantial questions of law arise from the present appeal which warrant the hearing of the appeal :

“(1) *Whether the landlord is entitled to mesne profits at the rate at which he is claiming on mere ipso dixit and without having adduced any evidence?*

(2) *Whether the undertaking given by the decree-holder to the executing court not to execute the decree against one of the judgment-debtor is against Section 23 of the Contract Act, as it adversely affects the interest of the other judgment-debtor and, therefore, the said judgment-debtor is also discharged from the liability in terms of the decree.*

(3) *Whether the appellant is entitled to mitigation of damages/mesne profits allegedly payable by the appellant to the respondent No.1 on account of the fact that he had offered the possession of the suit property to the respondent No.1?*

4. In order to appreciate the questions of law which are being claimed by the learned counsel for the appellant to be substantial questions of law raised from the present appeal, it would be necessary to give a brief background of the case. The respondent No.1, Ramesh Malik, filed a Suit

No.79/2006 for possession and mesne profits against the present appellant, M/s. Modi Rubber Limited. The case which was setup in the plaint was that Ramesh Malik (respondent No.1 herein) was the owner and the landlord of property bearing No.C-10, Chirag Enclave, New Delhi, which was a double storied house built on a 500 square yards plot of land and the same was let out to the appellant, M/s. Modi Rubber Limited on a monthly rent of ₹9,000/- somewhere in the year 1980. The tenancy of the appellant was allegedly terminated vide legal notice dated 22.2.1996 with effect from 31.3.1996 and it was called upon to handover the vacant and peaceful possession of the suit property. As the appellant refused to vacate the suit property and one Ashok Malik, the respondent No.2 herein, who continued to be in occupation of the suit premises in the capacity of Resident Director of the appellant company, they were constrained to file the suit for possession as well as mesne profits on 19.4.1996.

5. The appellant, M/s. Modi Rubber Limited, filed its written statement taking preliminary objection that there was no relationship of landlord and tenant between M/s. Modi Rubber Limited and Ramesh

Malik and, therefore, there was no privity of contract. On the contrary, it was alleged that Ashok Malik, the respondent No.2 herein, was the tenant in respect of the suit property and since he was at the relevant time working as a Resident Director of the appellant company, it was on his request that the present appellant had agreed to pay the rent to Ramesh Malik at the rate of ₹9,000/- for and on behalf of Ashok Malik. It was alleged that Ashok Malik was in occupation of the suit premises even prior to the creation of tenancy.

6. It may also be pertinent here to mention that during the pendency of the suit between Ramesh Malik and M/s. Modi Rubber Limited, futile attempts were made initially by Ashok Malik to be impleaded as a party under Order I Rule 10 CPC on the ground that he was the tenant in respect of the suit property and thus, the outcome of the suit may have impact on his rights. Though, these two applications are stated to have been dismissed but the application of the appellant who was a defendant in the suit, Ashok Malik was impleaded as a party to the suit as both M/s. Modi Rubber Limited and Ashok Malik were taking a contradictory stand and claiming themselves to be the tenant in respect of the suit property

although, M/s. Modi Rubber Limited was having a vacillating stand from time to time with regard to its being a tenant.

7. After the pleadings of the case were completed and Ashok Malik was impleaded as a party, the learned trial court framed the following issues in the suit :

- “(i) Whether the defendant No.2, that is, Ashok Malik, is the tenant of the plaintiff, that is, Ramesh Malik, in the suit premises? If so, to what effect? OPD-2*
- (ii) If issue No.1 is answered in negative, whether the tenancy of defendant No.1, that is, M/s. Modi Rubber Limited has been legally terminated? OPP*
- (iii) If issue No.2 is answered in affirmative, to what amount of mesne profits the plaintiff is entitled to? OPP*
- (iv) Relief.”*

8. After permitting the parties to adduce evidence and a protracted trial, on 31.5.2010, the learned Senior Civil Judge-cum-Rent Controller (West) Tis Hazari Courts, Delhi, passed a decree of possession in favour of Ramesh Malik and against both the defendants jointly and severally in respect of the suit property No.C-10, Chirag Enclave, New Delhi. But there was a specific

finding to the effect that respondent/defendant No.2, that is, Ashok Malik, was not the tenant and it was M/s. Modi Rubber Limited which was the tenant in respect of the suit property. A decree for mesne profits/user and occupation charges at the rate of ₹80,000/- per month with effect from 1.4.1996 till the time the actual physical possession of the property was passed in favour of the decree-holder; and the appellant and the respondent, Ashok Malik, were held liable. In addition to this, a compensatory cost of ₹50,000/- was also paid by way of litigation expenses.

9. Both, M/s. Modi Rubber Limited and Ashok Malik, felt aggrieved by the said judgment and decree dated 31.5.2010 and accordingly filed separate appeals before the court of District Judge.

10. So far as the appeal of Ashok Malik being R.F.A. (Civil) No.5/2010 is concerned, the same was treated as disposed of on 21.12.2012 by the court of learned Additional District Judge holding that an application under Order 23 Rule 3 read with Section 151 CPC was filed by the parties wherein Ashok Malik had agreed to handover the vacant and peaceful possession to the owner of the

property, namely, Ramesh Malik and the latter on his part had accorded not to execute the decree for mesne profits as the said decree being joint and several against both the parties. It may be pertinent here to mention that before passing of the order on the application under Order 23 Rule 3 read with Section 151 CPC, the learned executing court had recorded the statements of the parties and more importantly of the counsel for the appellant, M/s. Modi Rubber Limited, who was respondent No.2 in the said appeal.

11. So far as the appeal being R.C.A. No.8/2010, filed by M/s. Modi Rubber Limited is concerned, the said appeal was dismissed on merits on 15.5.2012 holding that as the possession has been already retrieved by the owner, namely, Ramesh Malik, to that extent, the appeal has become infructuous and regarding other part of the appeal with regard to the payment of mesne profits/user charges with effect from 31.3.1996 till 21.12.2010 when the possession was handed over to the respondent, Ramesh Malik, was under an obligation to pay the user charges/mesne profits.

12. Still not feeling satisfied, the appellant, M/s. Modi Rubber Limited, has now filed the present regular second appeal raising the aforesaid three questions with regard to the appeal.

13. It may be pertinent here to mention that I have been also informed by the learned counsel for the respondent that in the meantime during the pendency of the appeal, the appellant company had allegedly gone sick and applied to BIFR for the purpose of revival. It is stated that the appellant tried to take advantage of Section 22 of the Sick Industrial Companies (Special Provision) Act, 1985 [SICA] to evade its liability to pay the mesne profits/occupation charges for the suit premises. It was contended that there have been four rounds of litigation brought about by the appellant in this regard and even as on date, a special leave petition is pending in this regard to the applicability of the Section 22 of SICA before the Hon'ble Apex Court wherein the appellant has already deposited a sum of ₹1,23,00,000/- by way of bank guarantee out of which a sum of ₹50,00,000/- is stated to have been released by the Hon'ble Apex Court.

14. I have carefully considered the submissions made by Mr. Sikri which are alleged to be raising substantial questions of law. I have also considered the record carefully. I feel that the first question which has been raised by Mr. Sikri is with regard to the entitlement of the respondent, Ashok Malik, the landlord, the mesne profits at the rate of ₹80,000/- and the contention of the learned counsel is that the aforesaid amount of ₹80,000/- has been fixed by the trial court on its whims and fancies without any evidence having been produced by the respondent landlord in this regard before the trial court. In the first instance, I may observe that the question of fixing up mesne profits by the court is essentially a question of fact and if one goes through the judgment of the trial court, there is a specific issue framed in this regard which is as under and the trial court has dealt with the evidence adduced by the parties and observed as under.

15. In the light of the aforesaid analysis of evidence produced by the parties with regard to the quantum of mesne profits/user charges which have been fixed by the trial court and upheld by the first appellate court, it could not be said that it is fixed by the trial court *ipsy dixit* or on its

whims and fancies. On the contrary, there is a positive evidence on the basis of which the trial court has returned a finding of the mesne profits being modest at the rate of ₹80,000/- right from the period 1996 till 2010 when admittedly a property of this nature in the prime area of South Delhi will have much more rental value. Therefore, the question which is sought to be raised by the learned counsel in this regard is neither a question of law nor a substantial one rather it is a question of fact which has been already upheld against the appellant by the two courts below.

16. The second question which has been raised by the appellant that the undertaking which has been given by the decree-holder not to execute decree against the judgment-debtor, Ashok Malik, is against the provisions of Section 23 of the Contract Act or alternatively that the undertaking ought to be taken as an undertaking that the decree for mesne profits shall not be executed by the decree-holder, that is, Ramesh Malik, against the appellant as well.

17. Before dealing with this submission of the learned counsel for the appellant, it will be pertinent to reproduce Section 23 of the Contract Act, which reads as under :-

***“What consideration and objects are lawful, and what not.
– The consideration or object of an agreement is lawful,
unless-***

*it is forbidden by law; or
is of such a nature that, if permitted, it would defeat
the provisions of any law; or is fraudulent; or
involves or implies, injury to the person or property of
another; or
the court regards it as immoral, or opposed to public
policy.*

*In each of these cases, the consideration or object of
an agreement is said to be unlawful. Every agreement of
which the object or consideration is unlawful is void.”*

18. Admittedly, the undertaking which has been furnished by the respondent No.1, owner, Ramesh Malik is not fraudulent by law or would not defeat the provisions of law or is not forbidden in any manner because the statement of the respondent No.2 was also recorded at the time when the undertaking was given by the respondent/owner not to execute the decree against Ashok Malik for the grant of mesne profits. The undertaking is also not immoral or against any public policy nor does it cause any injury to the person or property of another person which, in the instant case, at best could be said to be the appellant. This is on account of the fact that as has been stated herein that there is a categorical

finding returned by the trial court that Ashok Malik is not the tenant in respect of the suit property and it was M/s. Modi Rubber Limited, who was the tenant. The respondent No.2, Ashok Malik, was in occupation of the suit premises only in the capacity of Resident Director for different periods of time who at some point of time ceased to be the Resident Director or under the control of the appellant company and was not following their dictates and that is why, there was some kind of rift between the two because of which the respondent-landlord was suffering. It was in such a contingency that the trial court had passed the decree for mesne profits jointly and severally against both the tenant as well as the actual occupier of the suit premises, who had benefitted on account of illegal occupation of the premises. The decree for mesne profits was passed on 31.5.2010. The appellant as well as the actual occupant had filed the appeal against the said decree and it was during the pendency of the appeal of Ashok Malik that an application was filed under Order 23 Rule 3 CPC jointly by the landlord, that is, Ramesh Malik, and Ashok Malik, to the effect that Ashok Malik is prepared to handover the vacant and peaceful possession of the suit premises to Ramesh Malik and the Ramesh Malik, in view of handing over and retrieving the possession,

had undertaken not to execute the decree for mesne profits against Ashok Malik which was a joint and several liability of both the tenant, that is, M/s. Modi Rubber Limited and the actual occupant. This cannot be followed with or cannot be said to be against the interest of the appellant because this undertaking of the landlord was accepted in the presence of the legal counsel of the appellant, who was the respondent No.2 and as a matter of fact, his statement has also been recorded in this regard that he has no objection. If they had any objection with regard to the undertaking having been furnished by Ramesh Malik not to execute the decree for mesne profits against Ashok Malik or that they felt that the said undertaking was in violation of Section 23 of the Contract Act, they ought to have raised an objection. Nothing of this sort was done, therefore, this is only a belated attempt on the part of the appellant to avoid its legal liability of paying the mesne profits on account of illegally depriving the landlord of the lawful user of the premises in question. I do not find that this submission made by the learned counsel for the appellant raises any substantial question of law which may warrant the entertainment of the present appeal.

19. The third submission made by the learned counsel for the appellant is with regard to mitigation of the mesne profits. In this regard, the learned counsel has drawn the attention of the court to the order dated 10.11.1999 purported to have been passed by the trial court wherein an application under Order XII Rule 6 CPC was filed by the respondent No.1, landlord, that is, Ramesh Malik, seeking a decree of possession in its favour and against the present appellant/defendant. It has been recorded in the said order that the present appellant had no objection to the passing of such a decree as it did not want to file the reply to such an application. It was sought to be contended that once this was the stand taken by the appellant way back on 16.11.1999 to the effect that it has no objection to the passing of a decree for possession in favour of Ramesh Malik and against the appellant, it should be deemed to have surrendered the possession or offered to surrender the possession and thus, its liability to pay the mesne profits cease to exist from the said date. In any case, it is stated that this should have been taken as a ground for mitigating the financial liability of the appellant to pay the mesne profits. In support of his submissions, the learned counsel has referred to the judgment of this court in case titled *ICRA Limited vs. Associated Journals Limited*; 2007

(98) DRJ 638 wherein it has been held by the learned single judge of this court that once the tenant has offered to surrender the actual vacant possession of the demised premises and defendant did not take the possession so offered, there is no question of payment of rent to the landlord and the lease stood terminated.

20. I have carefully considered the submissions of the learned counsel. So far as the judgment of the learned single judge of this court in *ICRA's* case (*supra*) is concerned, the facts of the said case are totally different from the facts of the present case. In *ICRA's* case, it was the tenant who had offered to surrender the actual vacant possession to the respondent-landlord of the tenanted premises which the latter had failed to accept and despite this, the suit for possession was filed. It was in such a contingency, the court came to a finding that the landlord was not entitled to the rentals. In the facts of the present case, it is not the appellant who has offered to the landlord/owner, Ramesh Malik, the vacant physical possession of the tenanted premises. On the contrary, the respondent, Ramesh Malik had filed an application for passing a decree on the basis of admission under Order XII Rule 6 CPC to which no reply was filed by

the appellant and it said that a judgment and decree under Order XII Rule 6 CPC be passed. There was no offer made by the appellant that it is prepared to handover the peaceful and vacant possession of the tenanted premises to the owner. It could not have done so for the simple reason that although the appellant was the tenant but its Ex-Resident Director, Ashok Malik, was in occupation of the tenanted premises, who was at logger head with the appellant and, therefore, it could not have offered the possession. Moreover, the appellant had taken a vacillating stand from time to time during the course of trial of the suit by saying that it is the tenant and at times taking a specific stand that Ashok Malik is the tenant. In such a contingency, I feel that instead of giving him the benefit of the judgment passed in *ICRA's* case (*supra*) is totally unwarranted and unjustified; on the contrary, I feel that it is a case where there has been dishonesty on the part of the appellant in directing a private citizen to protracted litigation in the first instance and then taking all sorts of pleas in order to deprive all its legitimate claim of mesne profits by various methods. I have been informed that there have been four rounds of litigations right up to the Apex Court by the appellant to avoid its liability to pay the mesne profits on the ground that it had gone sick which has not

been accepted by the Apex Court and they have been already directed to deposit an amount of ₹1,23,00,000/- by the Apex Court. I feel that there is no ground for mitigation and in any case, the question of mitigation is not a substantial question of law; it is only a question of fact for which there is no ground.

21. For the reasons mentioned above, I am of the considered opinion that there is no question of law, much less any substantial question of law involved in the present appeal. It is only a futile attempt made by the appellant to prolong the agony of the respondent/owner-landlord to get the financial benefit which is due and payable to it. Accordingly, the present regular second appeal is dismissed.

V.K. SHALI, J.

JULY 04, 2013
‘AA’