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

+ **RFA 12/2008**

Decided on 1st May, 2013

M/S MAJESTIC SOFTWARE LTD. Appellant

Through None.

versus

S.C. CHOPRA Respondent

Through None.

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

SUDERSHAN KUMAR MISRA, J.(Oral)

1. The appellant, Majestic Software Ltd., Mumbai, is aggrieved of a judgment dated 13th September, 2007, whereby the suit instituted by respondent, Sh. S.C. Chopra, was decreed for mesne profits @ Rs.31,200/- per month from 1st February, 2001 to 30th March, 2003 against the appellant, who was arrayed as the first defendant in the court below. The amount decreed was subject to adjustment of any amounts that may already have been received by the decree holder/respondent. The costs were also awarded in favour of the respondent and against the appellant.

2. The respondent/plaintiff owned two front flats on the second floor of property bearing No.E-584, Greater Kailash, Part-II, New Delhi-110048, that is the suit premises. The appellant, who was arrayed as defendant No.1 in the court below, was inducted as a tenant in the suit premises by a

registered Lease Deed dated 30th August, 1999. In terms of the said Deed, the appellant was obliged to pay rent @ Rs.24,000/- per month apart from maintenance as well as electricity and water charges which were payable in terms of bills raised from time to time by the concerned authorities. It is alleged that after taking possession of the premises, the appellant / judgment debtor defaulted in payment of electricity and water charges and a notice under Section 24 of the Indian Electricity Act was also received for disconnection of supply. The arrears towards electricity bills are stated to be to the tune of Rs.3,79,960/-. It is also alleged that the defendant / judgment debtor was irregular in making payment of rent. Ultimately, by a notice dated 28th December, 2000, the plaintiff/respondent terminated the tenancy and called upon the appellant / defendant No.1 to vacate the premises, in terms of Section 106 of the Transfer of Property Act, 1882. In the notice to quit, the respondent also made it clear that in case the appellant/defendant No.1 fails to hand over the possession of the premises, the appellant would be liable to pay damages for the unauthorized occupation @ Rs.40,000/- per month. It was alleged that since the defendant No.1 failed to either vacate or even to clear arrears of electricity charges, the plaintiff was obliged to sue for recovery of possession, as well as damages @ Rs.40,000/- per month, besides other reliefs.

In response, a number of defences were raised by the appellant. It was, inter alia, contended that, in fact, the appellant is not at fault as there are no outstanding electricity or water dues so far as the appellant is concerned. It was also contended that the lease, which was for five years, was being undermined by the plaintiff/respondent who is interfering in the peaceful possession of the premises by harassing the appellant in different

ways. The appellant also denied the allegation with regard to non-payment of rent and further contended that, in any event, non-payment of two months' rent could not have given cause to the respondent to terminate the lease because Clause iii(1) of the aforesaid Lease Agreement permits termination of tenancy only in case accumulated arrears of rent are for at least three months. Receipt of notice under Section 106 of the Transfer of Property Act was also disputed.

3. On 17th January, 2005, following issues were framed:

- “1. Whether the suit of the plaintiff is premature, as alleged?
2. Whether the plaintiff is entitled to the possession?
- 2A. Whether the suit is bad for mis-joinder of the defendant no.2 Shri A.V. Nayyar and, if so, its consequences? OPD-2
3. To what amount, if any, the plaintiff is entitled as damages/mesne profits?
4. Relief.”

4. By an interim order passed on 5th July, 2002 on an application moved by the plaintiff/respondent under Order 39 Rule 10 of Code of Civil Procedure, the appellant was directed to pay Rs.24,000/- per month to the respondent with effect from 1st February, 2001, along with electricity charges for the suit premises. It appears that the aforesaid interim order under Order 39 Rule 10 of CPC passed by the court below on 5th July, 2002 was not complied with and therefore the plaintiff/respondent was obliged to seek its execution by filing Execution Petition No.416/2006. During those

proceedings, the appellant handed over the possession of the premises to the respondent. After discussing the evidence led by the respondent, also the cross examination, as well as the contentions of both sides, the court below concluded that, in fact, the notice to quit under Section 106 of the Transfer of Property Act was duly served on appellant whereby the tenancy was determined before the filing of the suit and, consequently, it cannot be concluded that the suit was pre mature.

5. The main ground, that has been raised in the appeal, is that no proper enquiry was ordered by the trial court in determining quantum of the mesne profits and they have been determined merely on assumption and guess work and further that the said mesne profits have been awarded without any specific finding as to unauthorized occupation or wrongful possession on the part of the appellant/defendant.

6. Looking to the manner in which the court below has approached the question of quantification of mesne profits, I am of the considered opinion that the same is based on cogent reason and cannot be faulted. The court below has carried out an elaborate exercise keeping in mind the scope and applicability of Section 57 of the Indian Evidence Act, 1872, as well as the other facts and circumstances of the suit property and, therefore, the conclusion reached by the court below in this regard does not appear to be unreasonable. As regards the objection that no specific issue was framed by the court below with regard to the unauthorized occupation, the same also cannot be sustained for the reason that the said question is squarely covered in issue No.2, which is, “whether the plaintiff is entitled to possession”, and also issue No.3, which is, “to what amount, if any, the plaintiff is entitled as damages towards mesne profits”. These issues squarely cover the question

as to whether the appellant/defendant No.1 is in unauthorized and wrongful occupation of the suit premises. This would also have been within the understanding by the parties since the question of entitlement of the respondent to the possession of the premises could not have arisen if the occupation of the suit premises by the appellant/defendant was lawful and valid. Not only that, the court below has specifically dealt with the question of the nature of the appellant's occupancy and has, ultimately, concluded after trial that the same was unauthorized and, in fact, in that conclusion, the trial court has also determined the question whether the plaintiff is entitled to return of possession and also whether plaintiff is also entitled for mesne profits for the period appellant/defendant continued to be in unauthorized possession.

7. The matter was taken up for final hearing on 17th April, 2013 and since there was no appearance on behalf of the parties, no adverse orders were passed and the matter was directed to remain on board in the category of 'Regular Matters'.

8. Today also, the matter has been taken up and there is no appearance on behalf of the parties.

9. The appeal is therefore dismissed for non-prosecution and also for the above reasons.

SUDERSHAN KUMAR MISRA, J.

MAY 01, 2013
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