

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

% **Date of decision: 15th May, 2014.**

+ **FAO(OS) 597/2013 & CM No.20723/2013 (for stay)**

RAGHUBIR RAI

..... Appellant

Through: Mr. Mayank Mikhail Mukherjee,
Adv.

Versus

PREM LATA & ANR

..... Respondents

Through: Dr. Ashwani Bhardwaj, Adv. for R-1.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the order dated 3rd December, 2013 of the learned Single Judge of this Court (exercising ordinary original civil jurisdiction in CS(OS) No.1698/2001 filed by the respondent No.1/plaintiff, on the applications, being I.A. No.22751/2012 of the respondent No.1/plaintiff under Order XV-A of the Civil Procedure Code (CPC), 1908 and I.A. No.13496/2011 also of the respondent No.1/plaintiff under Order XXXVIII Rules 1, 2, 4 and 5 of the CPC) directing the appellant/defendant to, without prejudice to the rights and contentions of the respective parties, deposit in this Court an amount of Rs.1 lakh per month with effect from the date of filing of the suit i.e. 14th July, 2011 till the date of the order and to continue to deposit a sum of Rs.1 lakh per month in this Court during the

pendency of the suit.

2. This appeal is pending before this Court since 3rd January, 2014. The counsel for the respondent No.1/plaintiff being on caveat appeared. Attempts for amicable settlement of the dispute were made but failed. Vide interim orders in this appeal, the date of compliance with the impugned order was extended from time to time. We have heard the counsel for the appellant/defendant and the counsel for the respondent No.1/plaintiff.

3. The respondent No.1/plaintiff instituted the suit from which this appeal arises, (i) for possession of part of property No.D-2/12, Model Town-III, Delhi-09 comprising of part of the ground floor and part of the first floor; (ii) for recovery of Rs.94 lakhs on account of rent of the aforesaid portion of the property; (iii) for recovery of another sum of Rs.20 lakhs; (iv) for recovery of damages for use and occupation/mesne profits @ Rs.4 lakhs per month from the date of institution of the suit till recovery of possession; (v) for declaration that the affidavit-cum-no objection allegedly signed by the respondent No.1/plaintiff in favour of the appellant/defendant is a forged document; and, (vi) for declaration that the rent receipt dated 1st December, 2007 purportedly issued by the respondent No.1/plaintiff in favour of the appellant/defendant is a forged document and for cancellation thereof,

pleading:

- (a) that the respondent No.1/plaintiff inducted the appellant/defendant as a tenant in one shop in the aforesaid property in the year 2002 at a monthly rent of Rs.400/- for a period of two years;
- (b) that subsequently vide Commission Agency Agreement dated 31st August, 2002 the remaining portion also was given to the appellant/defendant and the appellant/defendant gave a minimum guarantee of payment of Rs.7 lakhs per annum;
- (c) that another Commission Agency Agreement was entered into between the respondent No.1/plaintiff and the appellant/defendant on 31st August, 2006 for a period of two years and whereunder the appellant/defendant guaranteed to pay a minimum sum of Rs.18 lakhs per annum to the respondent No.1/plaintiff;
- (d) that the period of two years of the Commission Agency Agreement dated 31st August, 2006 expired but the appellant/defendant was permitted to continue as a tenant in the aforesaid portion at a monthly rent of Rs.3 lakhs per month;
- (e) that the respondent No.1/plaintiff vide notice dated 16th March,

2011 determined the tenancy of the appellant/defendant;

(f) that the appellant/defendant failed to vacate the premises inspite of determination of his tenancy;

(g) that another notice dated 8th April, 2011 was also issued by the respondent No.1/plaintiff to the defendants for recovery of amounts of Rs.20 lakhs and Rs.94 lakhs.

4. The appellant/defendant contested the suit, by filing a written statement, on the following grounds:

(I) denying the Commission Agency Agreements dated 31st August, 2002 and 31st August, 2006 and contending that the same were got executed from the appellant /defendant fraudulently, by making the appellant /defendant sign blank papers;

(II) that the appellant /defendant had paid a *pagadi* of Rs.20 lakhs in the year 2002 at the time of taking of the property;

(III) denying the ownership of the respondent No.1/plaintiff of the property;

(IV) that the claim of Rs.20 lakhs had been erroneously joined with the claim for recovery of possession and arrears of rent and mesne profits/damages;

(V) that the claim for recovery of Rs.94 lakhs was also based on Commission Agency Agreement which was denied;

(VI) that the appellant /defendant was a tenant in the property, then at a rent of Rs.1,000/- per month (the property was originally taken on rent of Rs.400/- per month) and the suit for recovery of possession was barred by Section 50 of Delhi Rent Control Act, 1958;

(VII) denying that the rent was Rs.3 lakhs per month;

(VIII) that the appellant /defendant was carrying on businesses in the portion aforesaid of the property in his tenancy under the name of M/s Dragon Huck's (Chinese Restaurant);

(IX) that the appellant/defendant had also taken a loan of Rs.7 lakhs from the respondent No.1/plaintiff by depositing the title documents of his property with the respondent No.1/plaintiff and the claim of Rs.20 lakhs was towards recovery of the said loan.

5. The respondent No.1/plaintiff filed a replication to the aforesaid written statement but need is not felt to deal therewith.

6. The respondent No.1/plaintiff filed I.A. No.22751/2012 under Order XXXIX Rule 10 of the CPC. Vide order dated 19th September, 2013 thereon, the learned Single Judge directed the appellant /defendant to

deposit arrears of rent @ Rs.1 lakh per month from the date of the institution and till the pendency of the suit.

7. The appellant/defendant preferred FAO(OS) No.519/2013 against the order aforesaid of deposit. Vide order dated 18th November, 2013, the order/direction for deposit was set aside and the matter remanded for considering the application also move by the respondent No.1/plaintiff under Order XV-A of the CPC on merits. In the meanwhile, arrears calculated @ Rs.1,000/- per month were directed to be deposited.

8. It is pursuant to the aforesaid that the impugned order dated 3rd December, 2013 has come to be passed.

9. The learned Single Judge, vide the impugned order has reiterated the direction for deposit @ Rs.1 lakh per month from the date of institution of the suit, finding/observing/holding:

(A) that the word ‘rent’, in Order XV-A of the CPC as applicable to Delhi with effect from 14th November, 2008, is not qualified by the word ‘admitted’ as in Order XXXIX Rule 10 CPC which envisages payment of an admitted amount;

(B) that Order XV-A CPC has been titled “Striking off defence in a suit by a lessor”—it is therefore a provision intended to benefit the

lessor; the object is to mitigate the hardship to the landlord on account of long pendency of an eviction suit, during which the lessor should not be deprived of the rent payable by the lessee or mesne profits that might accrue;

(C) that the omission of any reference to ‘admitted’ before rent is deliberate;

(D) that it accounts for the possibility that the market rent, during the pendency of the litigation, might be much higher than the admitted rent;

(E) that Order XV-A CPC therefore gives discretion to the Court to require the tenant to pay rent commensurate with the market rent or in any event higher than the admitted rent;

(F) that while the word ‘rent’ is relatable to the amount payable by a lessee, Order XV-A CPC also talks of an unauthorized occupant; on termination of lease, the lessor becomes an unauthorized occupant and the amount which such an authorized occupant can be directed to pay cannot be termed as rent;

(G) that it is for this reason only that the expression “such amount” has been used in Order XV-A CPC

- (H) that the expression “such amount” in Order XV-A CPC is also indicative of the amount which can be directed to be deposited thereunder is not limited to an admitted amount of rent;
- (I) that Order XV-A also used the expression “mesne profits”;
- (J) that any deposit made by the defendant under this provision would obviously be subject to final order passed by the Court;
- (K) that the respondent No.1/plaintiff had placed on record copies of Lease Deed of commercial properties in the area to substantiate the plea that the prevalent market rent is more than Rs.3 lakhs per month;
- (L) that the appellant/defendant was continuing to occupy commercial property after the termination of his tenancy and running a restaurant therein;
- (M) that the appellant/defendant had not shown that the prevalent rent was less than Rs.3 lakhs per month;
- (N) that the mere fact that the respondent No.1/plaintiff may have the title document of the residential property of the appellant/defendant cannot be said to constitute sufficient security for the purpose of Order XV-A of the CPC;
- (O) that the object of Order XV-A CPC is to provide the landlord

with some 'amount' for use and occupation of the property by the defendant during the pendency of the litigation;

(P) that keeping in view of the aforesaid facts, direction for deposit of Rs.1 lakh per month would subserve the purpose.

10. The only argument of the counsel for the appellant/defendant before us is that under Order XV-A CPC, no direction for deposit of any amount in excess of that admitted by the defendant as payable can be issued; that since the appellant/defendant in the present case has disputed the claim of the respondent No.1/plaintiff of the rent being Rs.3 lakhs per months and the appellant/defendant had claimed to be a tenant on a rent of Rs.1,000/- per month, no direction for deposit, at any rate in excess of Rs.1,000/- per month, could be issued.

11. It is argued that the direction for deposit @ Rs.1 lakh per month, even if to remain in this Court and not to be released to the respondent No.1/plaintiff, would cause grave prejudice to the appellant/defendant.

12. Order XV-A was introduced in the CPC as applicable to Delhi vide notification published in the Delhi Gazette dated 14th November, 2008. The same provides that in a suit by an owner/lessor for eviction of an unauthorized occupant/lessee or for the recovery of rent and future mesne

profits from him, the defendant shall deposit such amount as the Court may direct on account of arrears upto the date of the order and thereafter continue to deposit in each succeeding month the rent claimed in the suit as the Court may direct. It further provides that upon default by the defendant in making the deposit, the defence of such a defendant may be struck off.

13. Except for the judgment under appeal, till now there does not appear to be any pronouncement on interpretation on Order XV-A of the CPC.

14. We are of the opinion that for the purposes of the said interpretation, the background in which Order XV-A came to be inserted in the CPC as applicable to Delhi, is relevant.

15. Order XX Rule 12 of the CPC permits the grant of relief, in a suit for recovery of possession of immovable property, also of recovery of mesne profits/damages for unauthorized use and occupation of the property, from the date of institution of the suit till the date of recovery of possession. Order XX Rule 12 thus permits a Court to grant a relief, which had not become due to the plaintiff on the date of institution of the suit and the cause of action wherefor had not accrued on the date of institution of the suit and which fell due to the plaintiff after the date of institution of the suit. The said provision was made, perhaps to obviate the need for filing of a suit for

recovery of mesne profits/damages for use and occupation of the property during the pendency of a suit for recovery of possession from the person in unauthorized occupation thereof.

16. As far as the city of Delhi was concerned, such suits for recovery of possession of property were rare. The Delhi Rent Control Act, 1958 governing the relations between the landlord and tenant applied to all tenancies and which did not permit recovery of any mesne profits/damages for use and occupation from the tenant. However, in consonance with Order XX Rule 12 CPC, the same also in Section 15 thereof permitted the Rent Controller to, in a proceeding for eviction of tenant, direct the tenant to pay rent falling due during the pendency of the petition for eviction, again obviating the need for the landlord to successively file proceedings for recovery of said rent. The same also provided for striking off of the defense of the tenant to the petition for eviction, if in defiance of such a direction.

17. However, the Rent Act was amended with effect from 1st December, 1988, making the provisions thereof inapplicable in several situations including where the rent of the premises was in excess of Rs.3,500/- per month. The same suddenly freed a large number of tenancies from the operation of the Rent Act. The landlords started instituting civil suits for

recovery of possession from the tenants in occupation of properties for long. In such suits for recovery of possession, invariably a claim for mesne profits/damages for use and occupation from the date of institution of the suit and till recovery of possession was made. However, such a direction / decree could be made / passed only at the final stage.

18. The landlords / plaintiffs in such suits, started filing applications either under the provisions of Order XXXIX Rules 1 & 2 or under Order XXXIX Rule 10 CPC for direction against the defendant/erstwhile tenant to, during the pendency of the suits pay *mesne* profits / damages for use and occupation during the pendency of suits.

19. The Courts started allowing such applications. However, if the landlord contended that the rent was Rs.1 lac per month and the defendant contended that the rent was say, Rs.5,000/- per month, the Court could issue direction for payment only at the rate of Rs.5,000/- p.m., even if on the basis of material on record the preponderance of probability was in favour of the landlord, inasmuch as Order XXXIX Rule 10 CPC permitted direction for payment of admitted amounts only.

20. This led to another situation. In some cases, inspite of direction for payment, the defendant, while continuing in occupation of the premises and

defending the suit for possession, did not even comply with the order / direction for payment during the pendency of suit. A question arose of the remedy thereagainst. Some Courts took the view that the only remedy thereagainst was to apply for execution of the order. A doubt was expressed as to whether the defence of such a defendant could be struck off. Some Courts took a view that the CPC having provided expressly for the situations, where defence could be struck off and having not provided for the same to be struck off for non-compliance of an order under Order XXXIX Rule 10 of the CPC, even if the erstwhile tenant/defendant inspite of direction, failed to pay, the defence could not be struck off; though, by the time Order XVA was incorporated in CPC as applicable to Delhi, this Court held that defence could be so struck off.

21. It was in the aforesaid backdrop that the proposal of Order XV-A came to be mooted.

22. Though Order XVA is titled as “Striking Off defence in a suit by a lessor” but the same is not confined to striking off of defence only. The same, independently of Order XXXIX Rule 10 CPC, vests in the Court the power for issuing a direction for deposit. While so empowering the Court, as rightly held by the learned Single Judge, a departure was made from the

language of Order XXXIX Rule 10 CPC. While under Order XXXIX Rule 10 CPC, a direction could be issued only for deposit/payment of admitted amount, the word ‘admitted’ is conspicuous by its absence in Order XV-A of the CPC. A discretion has been vested in the Court to issue direction for deposit of “such amount” as the Court may direct. Such departure from language of an earlier existing provision is a tool of interpretation. There is abundant authority to the effect that when the situation has been differently expressed, the legislature must be taken to have intended to express a different intention. The Supreme Court in *The Western India Theatres Ltd. Vs. Municipal Corporation of the City of Poona* AIR 1959 SC 586 held that the legislature having substituted the word “reduced”, earlier existing, with the word “modify”, this change must have been made with some purpose and the purpose could only be to use an expression of wider connotation so as to include not only reduction but also other kinds of alteration; accordingly, the contention to interpret “modify” as “reduce” , because in the marginal note the word “reduce” remained, was rejected. Reference may also be made to *Khatris Hotels Pvt. Ltd. Vs. Union of India* (2011) 9 SCC 126, where, finding the legislature to have designedly made a departure from the language of Article 120 of the Limitation Act, 1908, in

enacting Article 58 of the 1963 Act, by introduction of the word “first” between the words “sue” and “accrued”, it was held that if the suit is based on multiple causes of action, the period of limitation will begin to run from the date when the cause of action first accrued.

23. We are therefore unable to agree with the contention of the counsel for the appellant/defendant that the Court, in exercise of powers under Order XV-A of the CPC, is incapacitated from directing deposit at a rate higher than that admitted by the defendant.

24. We are of the view that the Court, in exercise of powers under Order XV-A of the CPC is empowered to direct deposit at such rate as the erstwhile tenant / defendant may on the basis of material on record be found to have agreed to pay to the landlord for the said period even if the tenant before the Court may not have admitted the same or disputed / controverted the same. Similarly, in a suit between the owner of immovable property and an unauthorized occupant, Order XV-A empowers the Court to direct the defendant who though may not be liable to be ejected / dispossessed immediately without trial but who, on preponderance of probabilities may not be found to have a right to continue in possession of the property, to deposit during the pendency of the suit such amount as may appear to be

reasonable, to safeguard the right of the owner of the property and to ensure that such owner is compensated at least for the time taken in adjudication of a false defence taken up by the defendant in unauthorized occupation. This, in our view is necessary to avoid the process of the Court being abused by unscrupulous litigants and to curb the growing tendency of using the process of litigation as a tool of oppression.

25. We should however not be interpreted as laying down that Order XV-A empowers the Court to, without evidence assess *mesne* profits or to merely by taking judicial notice and without any material on record, arbitrarily direct the defendant to deposit a much higher amount than what he had been paying or had agreed to pay. Reference in this regard can be made to the judgment of the Division Bench of this Court in ***National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association*** 122 (2005) DLT 629 laying down that *mesne* profit have to be proved by reliable and cogent evidence in accordance with law. Of course, if the erstwhile tenant / defendant is found to have agreed to periodically increase the rent / user charges, even if such contract may have come to an end, in exercise of powers under Order XV-A of the CPC direction for deposit with such increases can be made unless strong grounds exist for such increases being

not due.

26. Applying the aforesaid principle to the facts of the present case, the learned Single Judge had two versions before him. One, of the respondent No.1/plaintiff of the last rent paid by the appellant/defendant at the rate of Rs.3 lakhs per month and the other of the appellant/defendant, of the last rent being paid at the rate of Rs.1,000/- per month. The learned Single Judge has chosen to issue the direction for deposit @ Rs.1 lakh per month.

27. We have perused the suit file and find neither the respondent No.1/plaintiff nor the appellant/defendant to have placed on record any document to show the rate of rent. The Commission Agency Agreements which are denied by the appellant/defendant of course show that the payment was being made @ Rs.1.5 lakhs per month. The rent receipt purportedly issued by the respondent No.1/plaintiff of receipt of rent @ Rs.1000/- per month is denied by the respondent No.1/plaintiff.

28. We are *prima facie* unable to believe that a valuable commercial property, as the subject property is, would have been let out at a rent below Rs.3,500/- per month, allowing the letting to fall within the ambit of the Rent Act, whereunder the eviction of a tenant is not only difficult but virtually impossible. Both the parties obviously have been indulging in

transactions in cash, perhaps to avoid taxes. We in the circumstances are of the opinion that there is no reason to interfere with the order of the learned Single Judge.

29. There is thus no merit in the appeal.

30. On request of the counsel for the appellant/defendant, the appellant/defendant is granted further eight weeks' time from today for depositing the arrears. The appellant/defendant to however make deposit for the month of May, 2014 within fifteen days hereof and to with effect from the month of June, 2014 deposit the amount, month by month, in advance for each month by the 15th day of the month.

31. In view of the controversy, we further direct that the amount so deposited be not released to the respondent No.1/plaintiff till the final adjudication of the suit.

32. The appeal is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

MAY 15, 2014

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