

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

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Judgment Reserved on: 21st January, 2015
Judgment Delivered on: 28th January, 2015

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FAO(OS) 34/2015

SEEMA SWAMI

....Appellant

versus

IHHR HOSPITALITY PVT. LTD

....Respondent

Advocates who appeared in this case:

For the Appellants: Mr Anupam Srivastava with Mr Tarun Bansal and
Ms Sharmishtha Ghosh, Advocates.
For the Respondent: Mr Vineet Jhanji and Mr Imran Moulaey,
Advocates.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J.

1. The Appellant (Defendant No. 1 in the Suit) has impugned the order dated 24.11.2014 passed by the learned Single Judge in IA No.9467/2012 under Order XXXVIII read with Section 151 of the Code of Civil Procedure, 1908, filed by the Respondent (Plaintiff in

the Suit) whereby the Appellant has been restrained from recovering/receiving the monthly rent and the maintenance charges from the tenant with respect to the premises bearing Flat No.402, situated at Block-B2, 4th Floor, Uniworld City West, Sector 30 & 41, Gurgaon, Haryana (hereinafter referred to as the said property) and has been further directed to deposit the said rent received from the tenant with the Registrar General of this Court till the decision of the Suit.

2. The Respondent (Plaintiff) has filed the Suit, which is pending before the learned Single Judge, wherein the Defendant has sought amongst others, a decree for recovery of Rs.35,53,52,077.10 and a declaration that the assets and investments in cash deposits etc., the subject matter of the Suit, are the properties of the Plaintiff.

3. The Suit of the Respondent (Plaintiff) is based on the premise that the husband of the Appellant (Defendant No.1) namely late Manoj Kumar Swami acting in collusion and in conspiracy with the Defendants in the Suit defrauded the Plaintiff by forging and

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fabricating documents and by using the forged documents made unauthorized and fraudulent debits to the Plaintiff's bank accounts maintained with the Defendant Nos. 32 & 33 and utilized the fund so withdrawn to acquire the assets that are the subject matter of the Suit. One of the assets, that is subject matter of the Suit, is the above said property at Uniworld City.

4. It is an admitted position that by order dated 15.07.2011, a Division Bench of this Court restrained the Defendant Nos. 1 to 8 from alienating, dealing with the assets which were the subject matter of the Suit including the said property.

5. The Respondent (Plaintiff) filed the application (I.A. 9467/2012) under Order XXXVIII read with Section 151 CPC contending that the said property has been acquired by the Appellant/Defendant No. 1 jointly with her husband from the funds illegally withdrawn from the bank account of the Respondent (Plaintiff) for a total consideration of Rs. 69,15,350/-. It is contended in the application that the said property has been rented out by the Appellant (Respondent No.1) and

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the Appellant was receiving a monthly rent of Rs.50,000/- per month besides maintenance and furnishing charges of Rs.20,000/- per month. The monthly rent was increased to Rs.55,000/- per month w.e.f. 20.10.2011. The Respondent had prayed for restraining the Defendants from receiving the monthly rent and maintenance charges and for a direction to the tenant to deposit the same in Court. The Respondent had further prayed for deposit of the total rental and maintenance charges received by the Appellant w.e.f. 20.10.2010 till date with the Court.

6. The learned Single Judge by the impugned order has restrained the Defendants from recovering/receiving the monthly rent and the maintenance charges from the tenant with respect to the said premises and has further directed the Appellant to deposit the said rent received from the tenant with the Registrar General of this Court till the decision of the Suit. As regards the rent already received by the Appellant since 2010, the learned Single Judge has directed that the same will be decided at the final stage of the Suit.

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7. Aggrieved by the said impugned order, the Appellant has filed the present appeal contending that the application filed under Order 38 CPC does not satisfy the requirements of the said provision in as much as the Appellant was neither trying to dispose of the said property nor trying to remove the same from the local jurisdiction of the court and further it is denied that there was any fraudulent transaction on the part of the Appellant or her husband or that the property had been acquired from the monies of the Respondent.

8. The learned counsel for the Appellant has relied on the decision of the Supreme Court of India in the case of **Raman Tech. and Process Engg. Co. & Anr. v. Solanki Traders, 2008 (2) SCC 302** to contend that for an order under Order 38 rule 5 to be passed, the court has to be satisfied that there should be a prima facie case and that the Defendant is attempting to remove or dispose the assets with the intention of defeating the decree that may be passed.

9. After hearing the learned counsel for the parties, we are of the opinion that the impugned order does not call for any interference.

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The learned single judge in the exercise of his discretion has passed a protective order in respect of the rental received from a property in respect of which there is already a protective order. If a corpus is required to be protected then any income generated from the said corpus can also be protected.

10. The Learned Single Judge has noticed in the impugned order that the Respondent has provided details of the illegal payments withdrawn from the account of the Respondent at the relevant time whereas the Appellant has not been able to give the details of the amount paid for the consideration to the tune of Rs. 69,15,350/- and has noted the contention of the counsel for the Respondent that the documents referred to by Appellant have been declared as false and fabricated as per the report of the handwriting expert.

11. The reliance placed by the learned counsel for the Appellant on the judgment in the case of ***Raman Tech*** (*supra*) is misplaced as the said judgment is clearly not applicable to the facts of the present case. The fact that an injunction has already been granted by the Division

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Bench in respect of the Suit properties, establishes that the Respondent (Plaintiff) has been able to show a prima facie case. Further, the impugned order has been passed for preserving the rental income generated from a Suit property in respect of which there is already a protective order. The payment to be received by the Appellant from the tenant is money and in case at the time of the passing of the Decree, the money is no longer available in the account of the Appellant, the decree would be defeated. Since the rental income has been directed to be deposited with the Registrar General of this court, the same shall follow the result of the Suit. If the Appellant succeeds, the same shall enure to the benefit of the Appellant.

12. The Learned Single Judge has exercised his discretion for preservation of the income generated from the property that is a subject matter of the Suit.

13. It is a settled proposition of law that an appellate court will not ordinarily substitute its discretion in the place of the discretion

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exercised by the trial court unless it is shown to have been exercised under a mistake of law or fact or in disregard of a settled principle or by taking into consideration irrelevant material. A “discretion”, when applied to a court of justice means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular.¹ We do not think that any such circumstance exists in the facts of the present case or that the discretion exercised by the Learned Single Judge calls for any interference.

14. In view of the above, we find no merit in the appeal, the same is dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

JANUARY 28, 2015
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BADAR DURREZ AHMED, J.

¹ *Ashwin S. Mehta versus Union of India 2012 (1) SCC 83*