

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

+ **FAO No.605/2016**

% **18th July, 2017**

PRADEEP GANDOTRA & ANR. Appellants

Through: Mr. Deepak Dewan, Advocate
with Mr. Vansh Gandotra,
Advocate.

versus

PYUSH LOHIA & ANR. Respondents

Through: Mr. Prabhat Kiran, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this first appeal under Order XLIII (1) (r) of Code of Civil Procedure, 1908 (CPC) the appellants/plaintiffs impugn the order of the trial Court dated 22.8.2016 which has dismissed the application filed by the appellants/plaintiffs under Order XXXIX Rule 10 CPC.

2. That there is a relationship of landlord and tenant between the parties with respect to suit property bearing no. B-II/9,

Mohan Co-operative Industrial Estate, New Delhi is not disputed. Rate of rent at Rs 2.70 lacs per month is also not disputed. Rent has not been paid since August 2015 is also not disputed by the respondents/defendants. The said application has been dismissed by the trial Court by a very confusing order which in my opinion almost makes no sense, and therefore, the impugned order dated 22.8.2016 in its entirety is reproduced as under:-

“ORDER

1. This order will dispose of the application filed by the plaintiff under Order 39 Rule 10 CPC read with Section 151 CPC requiring the defendants to deposit user and occupation charges/rent during the pendency of the suit for unauthorized possession of the suit property by the defendant.
2. The plaintiffs have filed the present suit seeking possession of premises bearing No.B-II/9, Mohan Co-operative Industrial Estate, New Delhi, which had been let out by them vide lease agreement dated 01.05.2013 to the defendants for a period of three years from 01.05.2013 till 30.04.2016. Further case of the plaintiffs was that since August 2015 till the time of filing of the suit, the defendants had not paid the rent at the rate of Rs.2,70,000/- per month and that therefore a notice was issued on 17.12.2015 requiring the defendants to make good the payment of rent within seven days or failing which, the lease would stand automatically terminated and the defendants would be liable to pay Rs.10,000/- per day over and above the lease charges till they vacate the premises.
3. In the Written Statement already on record filed by defendant no.1, the stand taken is that defendants had stopped paying the rent from August 2015 since the plaintiffs had wrongfully retained the security amount of Rs.7.5 lakhs and had also failed to reimburse the amount of Rs.25 lakhs which the defendants had spent over the suit property to make it useable for their purpose.
4. It is in this background that this application under Order 39 Rule 10 CPC is to be considered.
5. It is to be noticed that by way of this application, the plaintiffs have extended the time period from January 2016 by seeking payments from the defendants w.e.f. February 2016 till date. In other words, by means of the application under Order 39 Rule 10 CPC, an amendment to the plaint itself

is being sought to increase the amount to be recovered towards net without even paying the court fees.

6. This cannot be permitted. Since, the specific prayer in the application Under Order 39 Rule 10 CPC is for payment of Rs.2,70,000/- per month from February 2016 as rent excluding electricity, water and maintenance charges till the pendency of the suit for unauthorisedly, illegally possessing the suit property, the application is liable to be and is dismissed for the reasons stated aforementioned. The defendants have admittedly vacated the suit premises on 07.05.2016.

7. Case to now come up for plaintiff's ex-parte evidence on 21.09.2016."

2. The issue which was required to be addressed by the court below was in terms of Order XXXIX Rule 10 CPC read with Order XVA CPC as amended to Delhi and which provides that a tenant during the pendency of the litigation must not stay in the tenanted premises without payment of rent/user charges. Instead of doing so on the admitted facts showing that admitted rent has not been paid from August, 2015 till the respondent no.2/tenant vacated on 7.5.2016, the court below has totally gone on an off tangent by referring to the appellants/plaintiffs having filed an application under Order VI rule 17 CPC seeking to amend the plaint for claiming the *mesne* profits since February, 2016 and thus on account of such application under Order XXXIX Rule 10 CPC claiming payment only from February, 2016 but which cannot be as the amended plaint cannot be looked into till the amendment application was allowed. I

have however failed to understand what is the reason for failing to order to deposit of admitted rent for the admitted period of non-payment because that it is not disputed that rent has not been paid by the respondent no.2/tenant from August, 2015 till it was vacated on 7.5.2016. Therefore on the admitted facts of relationship of landlord and tenant between the parties, the admitted rate of rent and the admitted non-payment of rent since August 2015, the court below had to apply the rationale of existence of Order XXXIX Rule 10 CPC, more so on account of adding of provision of Order XVA CPC so far as Delhi is concerned, and it ought to have directed payment of unpaid rent for the period of non-payment from August 2015 till 7.5.2016.

3. Learned counsel for the respondent no.2/tenant argued that there is a counter-claim which has been filed and a triable issue is raised including with respect to entitlement of the respondent no.2/tenant to security deposit etc, however, the argument is misconceived because earlier the law under Order XXXIX Rule 10 CPC was that an order could be passed under Order XXXIX Rule 10 CPC only on account of law as per the provision of Order XII Rule 6 CPC, but that legal position no longer stands in view of adding of

Order XVA CPC to Delhi with respect to suits by landlords against the tenants, and as per which provision in spite of their existing disputed questions of fact, on a *prima facie* view of the matter, the civil court can pass orders for payment of rent/user and occupation charges for the period of occupation by the tenants of tenanted premises.

4. Accordingly, the impugned order dated 22.8.2016 is set aside. The respondent no.2/tenant is directed to pay to the appellants/plaintiffs the admitted rate of rent from the period from August, 2015 till 7.5.2016 when the respondent no.2/tenant/M/s Lohia Warehouse Pvt. Ltd. vacated the tenanted premises. Payment be made to the appellants/plaintiffs within a period of one month from today.

5. Appeal is accordingly allowed and disposed of in terms of aforesaid observations. Parties are left to bear their own costs.

JULY 18, 2017
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VALMIKI J. MEHTA, J