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

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Judgment delivered on: 06.09.2019

+ C.R.P. 282/2018

COTTAGE INDUSTRIES ART GALLERY Petitioner

versus

VISHWAMBER FREE HOMEOPATHIC DISPENSARY

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Bajinder Singh, Advocate.

For the Respondent: None.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

C.R.P. 282/2018 & CM APPL. 54545/2018 (stay)

1. Petitioner impugns order dated 30.05.2018, whereby, the application of the petitioner under Order VII Rule 11 CPC has been dismissed.

2. Subject Suit has been filed by the respondent seeking recovery of damages of Rs.13,58,483/-, which are misuser charges levelled by the L& DO for misuse of the subject premises by the

Petitioner/defendant.

3. Petitioner/Defendant was a tenant in the premises under the respondent. It is contended that the premises were let out to the petitioner for the purposes of opening a showroom.

4. Learned counsel for the petitioner submits that respondent had earlier filed a suit for ejectment, recovery of arrears of rent, damages for use and occupation charges, which suit was decreed and as such the subject suit is barred on the principle of *res judicata*.

5. Further, it is contended that the plaint from its bare reading appears to be barred by limitation as the claim is for recovery for misuser charges and the respondent has not stated as to what charges were levelled and when they became due and payable. Thirdly, it is contended that the plaint does not disclose any cause of action.

6. Further, the learned counsel for the petitioner submits that it was never informed to the petitioner that the premises was situated in a leasehold property and not a freehold property or that the same could not be used for the purposes for which it was let out.

7. I am unable to accept the submissions of learned counsel for the petitioner.

8. The First Suit, which was filed by the respondent, was a Suit seeking ejectment of the petitioner from the tenanted premises as also the arrears of rent and damages for use and occupation. It is not the

case of the petitioner that misuser charges levelled by L&DO were part of the earlier Suit.

9. It is a settled proposition of law that while considering an application under Order VII Rule 11, plaint has to be read with a demur.

10. The Plaintiff/respondent has contended in the plaint that he has paid his misuser charges on 15.04.2015 and the subject suit has been filed on 12.09.2016.

11. The Respondent/Plaintiff has contended that during the tenant, the petitioner made unauthorised constructions and encroachments adjacent to and beyond the tenanted premises and further misused the premises as a sales showroom instead of a storage space or godown. Penalty was levied by L&DO for the misuse. In the earlier suit the High Court by order dated 29.01.2015, directed to refund the security deposit of the Petitioner and seek independent remedy and accordingly the Subject Suit has been filed as the Respondent has paid the misuser charges on 15.04.2015.

12. The plaint on a bare reading thus discloses a cause of action which has arisen, as per the respondent, on account of misuse of the premises of the petitioner.

13. The earlier Suit was for ejectment and the present Suit is for recovery of misuser charges paid to the L&DO on account of alleged

misuse by the Petitioner. Clearly, the matter directly or substantially in issue in the earlier suit, is not directly or substantially in issue in the subject Suit. Subject Suit is clearly not barred on the principle of *res judicata*.

14. Further, it may be seen that the plea as to what charges became due and payable and when they were paid and as to whether the suit is within limitation is a mixed question of facts and law which would be determined by the Trial Court after appropriate evidence is led by the parties.

15. Further, the respondent has mentioned that the cause of action arose in favour of the plaintiff i.e., respondent on 29.01.2015 when the High Court in the earlier round gave liberty to the parties to agitate their respective monetary claims against each other before a competent civil court in accordance with law.

16. Further argument of learned counsel for the petitioner that the petitioner could not be made liable to pay any misuser charges as the petitioner was specifically rented out the premises for opening a showroom and the respondent had agreed to pay all charges to L&DO is a defence which the petitioner would take on the merits of the Suit and while considering an application under Order VII Rule 11 the probable defence available to a Defendant and the merits of the same are not to be gone into.

17. I find no infirmity in the impugned order dated 30.05.2018,

whereby, the application under Order VII Rule 11 has been dismissed.

18. There is no merit in the petition. The petition is, accordingly, dismissed.

19. It is clarified that this Court has neither considered nor commented upon the merits of the case of either parties and all rights and contention of the parties are reserved.

20. Order *Dasti* under signatures of the Court Master.

CM APPL. 54546/2018 (for condonation of delay)

1. Since I have already considered the petition on merits and found no merit in the same, I find no ground to condone the delay of 113 days in filing the petition.

2. Application is, accordingly, dismissed.

SEPTEMBER 06, 2019
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SANJEEV SACHDEVA, J