



\$~42 & 43 (Appellate Side-2022 list)

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

+ CM(M) 602/2021 & CM APPL. 30225/2021, CM APPL. 30226/2021

MADHO SINGH CHAUHAN Petitioner
Through: Mr. S.K. Jain, Adv.

versus

SMRITI & ORS. Respondents
Through: Mr. K. Sunil and Mr. Ashish Mittal, Advs.

+ CM(M) 851/2021 & CM APPL. 37826/2021, CM APPL. 37828/2021

MS. SMRITI AND ORS. Petitioners
Through: Mr. K. Sunil and Mr. Ashish Mittal, Advs.

versus

MADHO SINGH CHAUHAN Respondent
Through: Mr. S.K. Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **23.03.2022**

1. These petitions are in the nature of cognate proceedings. The order dated 20th March, 2021, passed by the learned Additional District & Sessions Judge (ADJ) under Order XV-A(1) of the CPC, forms subject matter of challenge in CM(M) 602/2021, whereas the order dated 24th September, 2021, forming subject matter of challenge in CM(M) 851/2021, was passed by the learned ADJ under Order XV-



A(2) of the CPC.

2. For ready reference, Order XV-A (1) and (2) of the CPC, as applicable to Delhi, may be reproduced thus:

“

ORDER XV-A

STRIKING OFF DEFENCE IN A SUIT BY A LESSOR

(1) In any suit by a 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 (within such time as the court may fix) and thereafter continue to deposit in each succeeding month the rent claimed in the suit as the court may direct. The defendant shall continue to deposit such amount till the decision of the suit unless otherwise directed.

In the event of any default in making the deposit as aforesaid, the Court may subject to the provisions of sub-rule (2) strike off the defence.

(2) Before passing an order for striking off the defence, the court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause, if shown in order to decide as to whether the defendant should be relieved from an order striking off the defence.”

3. Madho Singh Chauhan (in short, “Madho”) is the petitioner in CM(M) 602/2021 and the respondent in CM(M) 851/2021. Ritu, the divorced wife of Madho and her four children, including Smriti, are the respondents in CM(M) 602/2021 and the petitioners in CM(M) 851/2021.

4. For the sake of convenience, they would be referred to as



“Madho” and “Smriti etc”.

5. The dispute pertains to a property situated at J-77, Saket, New Delhi.

6. CS 851/2018 was filed by Madho against Smriti etc., for recovery of possession, *mesne* profits and mandatory injunction, amongst other reliefs. The case set up by Madho in his plaint was that the suit property had initially been allotted to him by the Delhi Development Authority (DDA) and was, on 18th November, 2004, converted to freehold, whereafter Madho got a construction erected on the property, on the top floor of which the respondents reside.

7. The marriage between Madho and Ritu was dissolved by a decree of divorce dated 4th May, 2018. Madho contends that though, prior to the divorce, Smriti etc were in permissive possession of the top floor of the suit property, consequent on the decree of divorce, they became unauthorised occupants.

8. Contending that Smriti etc. were enjoying the suit property without paying consideration to him, Madho moved the learned Trial Court by way of CS 851/2018 claiming the reliefs already noted hereinbefore.

9. With the suit, Madho also filed an application under Order XV-A of the CPC, which came to be decided by the impugned order dated 20th March, 2021. The learned ADJ held and directed, in paras 7 and 8



of the said order, thus

“7. From the perusal of the record, it appears that plaintiff and defendant no. 5 are now divorced by a decree of divorce dated 05.03.2018 which was confirmed by order dated 04.05.2018 of the High Court, so in these circumstances, defendant no. 5 is not a family member. As far as defendants no. 1 to 4 are concerned, they are also major and plaintiff is not duty bound to maintain them as family for the purposes of residence etc.

8. Admittedly, plaintiff is out of the property which is in his name and that also for a considerable period of time. On the other hand, the defendants are enjoying the property exclusively. As the defendants no. 1 to 4 have no independent right in the property, except that they were permissive users and now that permission has been revoked by the plaintiff. So to meet out the equity, each of these defendants is directed to pay Rs. 3,000/- per month to the plaintiff. Moreover, since defendant no. 5 has left with no relation with the plaintiff (after the divorce), she is also directed to pay Rs. 3,000/- per month as occupation charges.”

10. CM (M) 602/2021, at the instance of Madho, complains that the amount of ₹ 30,000/- per month, which has been directed, by the learned ADJ to be paid by Smriti etc. to him, is insufficient.

11. Madho’s contention, as advanced by Mr. Jain, learned Counsel, is that properties in the vicinity were being let for rent in the range of ₹ 30,000/- per month, with one property being let out at ₹ 40,000/- per month and that, therefore, the learned ADJ materially erred in allowing Smriti etc. to continue in occupation of the suit property on payment of ₹ 15,000/- per month.

12. Mr. Jain has, in support of the petition, placed reliance on the judgment of the Supreme Court in *Maria Margarida Sequeria*



Fernandes v. Erasmo Jack de Sequeria¹, and has invited my attention to paragraphs 90 to 93 of the said decision which read thus:

“90. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.

91. The Court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the Court should fix adhoc amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making it clear that should the Court pass any order for reimbursement, it will be a charge upon the property.

92. The Court can also direct payment of a particular amount and for a differential, direct furnishing of a security by the person who wishes to continue in possession. If such amount, as may be fixed by the Court, is not paid as security, the Court may remove the person and appoint a receiver of the property or strike out the claim or defence. This is a very important exercise for balancing equities. Courts must carry out this exercise with extreme care and caution while keeping pragmatic realities in mind and make a proper order of granting mesne profit. This is the requirement of equity and justice.

93. In the instant case, if the Courts below would have carefully looked into the pleadings, documents and had applied principle of the grant of mesne profit, then injustice and illegality would not have perpetuated for more than two decades.”

¹ AIR 2012 SC 1727



13. He has also relied on the judgments of a Division Bench of this Court in *Raghubir Rai v. Prem Lata*², and of a learned Single Judge of this Court in *Raghubir Singh Arora v. Rajesh Khanna*³.

14. The Court repeatedly queried of Mr. Jain as to how he could seek to contend that the learned ADJ was in error in not directing monthly payment, by Smriti etc., of an amount which would commensurate with the rent commanded by premises in the vicinity, when Smriti etc. were not tenants in the suit property.

15. The Court also queried Mr. Jain as to whether he had, with him, any authority which could indicate that the amount to be fixed by the court under Order XV-A(1) of the CPC, to be paid by unauthorised occupants of the suit property, *who were not tenants therein*, had to be reckoned on the basis of the rent commanded by premises in the vicinity.

16. Mr. Jain has not been able to show me any judgment which indicates that, *even where the defendants are not tenants in the suit property*, the amount directed to be paid under Order XV-A(1) of the CPC should be fixed on the basis of the rent commanded by premises in the vicinity.

17. Even otherwise, *prima facie*, the submission does not commend itself to acceptance.

² 211 (2014) DLT 516 (DB)

³ 2019 SCC OnLine Del 10712



18. The decisions cited by Mr. Jain do not further his contention. The judgment of the Supreme Court in *Maria Margarida Sequeria Fernandes*¹ does not deal with Order XV-A of the CPC at all; indeed, the provision is not even applicable to the facts of the said case. The judgment of the coordinate Bench of the learned Single Judge in *Raghubir Singh Arora*³ dealt with a situation in which, though the plaintiffs claimed that the defendants were not tenants, *the defendants claimed tenancy*. The decision of the Court, in such circumstances, to fix the amount payable under Order XV-A(1) on the basis of the rent charged in respect of premises in the vicinity can obviously not be applied to a situation in which the defendants, even as per the plaintiff's own case, are not tenants in the premises.

19. This aspect, in fact, stands underscored by the judgment of the Division Bench of this Court in *Raghuvir Rai*², on which Mr. Jain himself placed reliance. Para 9 of the said decision, which has been read in *extenso* by Mr. Jain, may be reproduced thus:

“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.”

20. A bare reading of sub-para (F), (G) and (H) of para 9 of the report in *Raghuvir Rai*², vis-à-vis the earlier sub-paras (A) to (E) thereof, clearly indicate that the principle that applies, under Order XV-A, to unauthorised occupants who are not tenants, and that which applies to tenants, are completely distinct. Where the defendants are the tenants in the suit property, there may be substance in the contention that the payment directed under Order XV-A(1) ought to be commensurate to the rent charged with respect to premises in the vicinity. Where, however, the defendants are not tenants, as in the present case, where they are the divorced wife and children of the petitioner who, according to him, are continuing in unauthorised occupation of the suit property, the discretion of the court, in fixing the amount payable under Order XV-A(1) is not constrained or constricted in any manner by the consideration of the rent chargeable



with respect to premises in the vicinity.

21. Order XV-A(1), in fact, confers complete discretion on the court to decide on the amount to be fixed for the payment by the alleged unauthorised occupant. Where the fixation of the said amount is completely unconscionable or shocks the conscience of the court, the court may, in a given case, interfere and, perhaps, modify the amount. Else, the exercise of discretion by the learned trial court under Order XV-A (1) does not merit interference, least of all in a petition under Article 227 of the Constitution of India.

22. The province of Article 227 jurisdiction has been authoritatively expounded by the Supreme court in, *inter alia Estrella Rubber v Dass Estate*⁴, *Garment Craft v. Prakash Chand Goel*⁵ and *Puri Investment v. Young India*⁶.

23. The Article 227 jurisdiction of the High Court is limited. The High Court does not sit in appeal over the orders of the subordinate courts and the jurisdiction of the High Court, which is supervisory in nature, is essentially intended to ensure that courts lower in hierarchy discharge their functions appropriately.

24. In the present case, the learned ADJ has directed payment, by Smriti etc., to the petitioner, of an amount of ₹ 15,000/- per month. The plea of the petitioner that this amount should be enhanced to a

⁴ (2001) 8 SCC 97

⁵ 2022 SCC OnLine SC 29

⁶ MANU/SC/0290/2022



figure in the vicinity of ₹ 30,000/- per month, in my view, does not make out a case for interference, in exercise of Article 227 jurisdiction, with the impugned order dated 20th March, 2021 of the learned ADJ.

25. Accordingly, CM(M) 602/2021 is dismissed.

CM(M) 851/2021

26. This order, dated 24th September, 2021, passed by the learned ADJ under Order XV-A(2) of the CPC, is in essence to a sequel to the earlier order dated 20th March, 2021, which forms subject matter of challenge in CM(M) 602/2021 and which stands upheld by me hereinabove.

27. Order XV-A(2), plainly read, requires the court, in a case where there is no compliance, by the defendant, with the order passed under Order XV-A(1), after granting an opportunity to the defendants to explain the lapse in compliance, strike off the defence of the defendants in case the lapse is not properly explained.

28. Order XV-A (1) clearly ordains that “in the event of any default in making the deposit as aforesaid, the Court may *subject to the provisions of sub-rule (2)* strike off the defence.”

29. “Sub-rule (2)” of Order XV-A requires the court, before passing an order striking off the defence, *to serve notice on the defendant to show cause as to why the defence not be struck off, and thereafter by*



considering the cause shown, if any, decide as to whether the defendant should be relieved from the order striking off the defence.

30. The provision is worded in clear and unexceptionable terms. It starts with the word “*before* passing an order striking off the defence”. The statutory scheme is, therefore, unequivocal. The court, confronted with a situation in which the defendant has apparently not complied with the directions under Order XV-A(1), is required, in the first instance, to serve notice on the defendant calling for his explanation as to why there has been non-compliance with Order XV-A(1). The defendant has an opportunity, thereafter, to show cause as required by the court. The court has to consider the explanation given by the defendant and, only on such consideration, arrive at a conclusion as to whether the defence should be struck off or not. Needless to say, this entire exercise has to abide by the well-settled principles of natural justice.

31. It is trite, from the times of *Nazir Ahmed v. The King Emperor*⁷ and *State of Uttar Pradesh v. Singhara Singh*⁸ that, where the law requires an act to be done in a particular manner, it has to be done in that manner or not at all.

32. In the present case, there is clear non-compliance with the procedure outlined in Order XV-A(2) by the learned ADJ while passing the order dated 24th September, 2021.

⁷ (1936) 38 Bom LR 987

⁸ (1964) 4 SCR 485



33. Mr. Jain, learned Counsel for Madho, has very fairly acknowledged that no formal notice to show cause was issued by the learned ADJ to Smriti etc. before passing of the impugned order dated 24th September, 2021. He submits that, on 24th September, 2021, he had informed the learned ADJ that there had been no compliance, by Smriti etc., of the earlier order dated 20th March, 2021 and that the learned ADJ had, thereupon, called upon Smriti etc. to explain the default. It is only after being satisfied that no explanation was forthcoming that the learned ADJ proceeded to strike off the defence of Smriti etc. This, according to Mr. Jain, is sufficient compliance with the mandate of Order XV-A of the CPC.

34. I am unable to agree. What is clearly envisaged by Order XV-A(2) read with the concluding sentence in Order XV-A(1) is *the issuance of a formal notice by the court, to the allegedly defaulting defendant, to show cause as to why, on the ground of default in compliance with the Order XV-A(1), the defence of the defendant should not be struck off. The defendant would be entitled to show cause. The court would thereafter have to consider the explanation given by the defendant and satisfy itself that there is no justifiable cause shown for the default in compliance with the Order XV-A(1) before proceeding to strike off the defence of the defendant under Order XV-A(2).*

35. This procedure is, in my view, completely non-negotiable, as it has been enacted *ex debito justitiae* and to comply with the hallowed principles of natural justice and fair play.



36. The impugned order dated 24th September, 2021, having been passed without following the said procedure, cannot sustain in law. In view thereof, I am not inclined to enter into the other arguments advanced by Mr. K. Sunil in support of CM(M) 851/2021.

37. The petition is, in my view, liable to succeed even on the ground of non-compliance by the learned ADJ of the procedure outlined under Order XV-A before passing the order dated 24th September, 2021.

38. For the aforesaid reasons, the order dated 24th September, 2021 is quashed and set aside. Nonetheless, it is made clear that the learned ADJ would be at liberty to proceed in accordance with Order XV-A and re-examine the aspect of whether the defence of the defendant ought or ought not to be struck off. All contentions of the parties would be left open to be agitated before the learned ADJ in the said proceedings.

39. Resultantly, CM(M) 602/2021 is dismissed and CM(M) 851/2021 is allowed. There shall be no orders as to costs.

40. Mr. Jain, however, points out that the order dated 20th March, 2021 is not clear about the day from which the payment in terms thereof would be required to be made by the defendants.

41. It is open to Mr. Jain to move an application for clarification before the learned trial court for the said purpose and if such an



application is moved, it would be considered and decided by the learned ADJ.

C. HARI SHANKAR, J.

MARCH 23, 2022/dsn

