

\$~8(Appellate Side)

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

+ CM(M) 278/2020, CM APPL. 8262/2020, CM APPL. 8263/2020 & CM APPL. 8264/2020

RASHI MISRA

..... Petitioner

Through: Mr. R.K. Bachchan, Adv.

versus

B KALYANA RAMAN

..... Respondent

Through: Mr. C. Rajaram & Ms. Shashi Panwar, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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

% **26.04.2022**

1. This petition assails an order dated 07th December, 2019, passed in CS 81/2019, (*B Kalyana Raman vs. Rashi Mishra*), by the learned Additional District Judge ("the learned ADJ"), in which the present petitioner was the defendant and the present respondent was the plaintiff.

2. The impugned order adjudicates three applications preferred by the petitioner as the defendant before the learned ADJ, under Order VII Rule 11 and Section 151 of the Code of Civil Procedure, 1908 (CPC), and under Section 340 of the Code of Criminal Procedure, 1973, (Cr PC). Additionally, the impugned order strikes off the defence of the petitioner, purportedly in exercise of jurisdiction under

the proviso to Order XV-A(1) of the CPC.

3. The petitioner is before this Court assailing all four decisions as contained in the impugned order.

4. CS 81/2019 was filed by the respondent against the petitioner, seeking eviction of the petitioner from the premises of the respondent. The respondent's case in the suit was that the petitioner was the respondent's tenant *vide* lease deed dated 22nd February, 2017, followed by a rent agreement for a further period executed on 04th January, 2018. On the petitioner failing to vacate the premises despite the expiry of tenancy as so extended, the respondent filed CS 81/2019 against the petitioner seeking possession, permanent injunction and damages.

5. In the said application under Order VII Rule 11, CPC proceedings, the petitioner filed an application under Order VII, Rule 11, submitting that the respondent had concealed a lease deed dated 18th November, 2018, and that, if the lease deed were taken into account, the plaint would be liable to be dismissed.

6. The learned ADJ has held that an application under Order VII Rule 11, could be decided only on the basis of the averments contained in the plaint, and averments contained in the written statement or documents that the defendant sought to place on record could not be taken into account while adjudicating an application under Order VII, Rule 11. This position is unexceptional, as it stands

settled *inter alia* by *Saleem Bhai v. State of Maharashtra*¹ and *Madanuri Sri Rama Chandra Murthy v. Syed Jalal*².

7. As such, there is no occasion for the Court to interfere with the said decision of the learned ADJ in so far as it dismisses the petitioner's application under Order VII Rule 11, CPC.

Application under Section 340, Cr PC

8. The petitioner additionally moved an application under Section 340, CrPC, for initiation of proceedings against the respondent for perjury, for having suppressed the aforesaid lease deed dated 18th November, 2018. The learned ADJ has rejected this application as pre-mature, opining that the issue of perjury could not be decided at an initial stage and would require leading of evidence. For this purpose, the learned ADJ has relied on the judgment of this Court in *Vinedale Distilleries Ltd. v. S.K. Aggarwal*³, which holds that, till the *lis* between the parties is adjudicated, the Court could not arrive at a finding of falsehood.

9. Learned Counsel for the petitioner fairly acknowledges that there is no infirmity in this decision of the learned ADJ as the aspect of perjury could be decided only after evidence is led.

10. As such, there is no reason for this Court to interfere with the aforesaid decision of the learned ADJ on the application of the

¹ (2003) 1 SCC 557

² (2017) 13 SCC 174

³ MANU/DE/2261/2009

petitioner under Section 340, CrPC.

Application under Section 151, CPC

11. The third application of the petitioner, which was rejected by the learned ADJ, was for waiver of costs of ₹ 3,000/-, earlier imposed by the learned ADJ *vide* order dated 21st October, 2019. The learned ADJ, has, in rejecting the said application, noted that the costs were imposed for delay in filing the written statement. He has observed that, though summons of the suit had been served on the petitioner on 11th May, 2019, the written statement was filed, “after more than five months on 14.10.2019”. Two medical certificates which were filed by the petitioner to explain the delay, have been regarded by him as insufficient.

12. It appears that, actually, the written statement was filed on 14th August, 2019, and not on 14th October, 2019. Learned Counsel for the respondent has fairly acknowledged this position but submits that, even treating the date as 14th August, 2019, the written statement was, nonetheless, delayed.

13. Be that as it may, as the decision not to waive costs was predicated on the premise that the written statement was filed on 14th October, 2019, whereas it was actually filed on 14th August, 2019, the direction for payment of costs has necessarily to be set aside being based on an erroneous factual premise. As such, to the extent that the learned ADJ has dismissed the petitioners’ application under Section 151, CPC, for waiver of costs, the impugned order warrants

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interference.

Application under Order XVA, CPC

14. The fourth decision of the learned ADJ, contained in the impugned order and under challenge in these proceedings, at the instance of the petitioner, has been taken under Order XVA (1).

15. Order XVA (1) and (2) of the CPC read 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.”

16. The learned ADJ has noted that, *vide* order dated 23rd October,

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2019, passed under Order XVA (1), the petitioner had been directed to pay arrears of rent with effect from February, 2019, at the rate of ₹ 24,000/- per month and to continue to pay the same month by month. No payment had, however, been made despite the said order been passed.

17. Learned Counsel for the petitioner – as the defendant before the learned ADJ – sought to justify the default in payment on the ground that the petitioner had preferred a counter claim and that the arrears of rent would be adjustable against the amount claimed in the counter claim. The learned ADJ has rejected this submission, observing that the counter claim was for damages and legal expenses and damages were a matter of adjudication and could not be regarded as a matter of right. That apart, no order awarding damages to the petitioner had been passed, so that, as per the learned ADJ, default in payment of rent, as directed in the order dated 23rd October, 2019, could not be justified on the ground of a counter claim for damages having been preferred by the petitioner. Further observing that there was no undertaking forthcoming, from the petitioner, to cure the default in payment of arrears of rent, the learned ADJ has proceeded to hold that the Court had no option but to strike off the petitioners’ defence and has ordered accordingly.

18. I have already held, in *Madho Singh Chauhan v. Smriti*⁴, that an order for striking off of the petitioners’ defence under Order XVA (1) is statutorily subject to Order XVA(2). Read in conjunction, mere

⁴ 2022 SCC OnLine Del 1059

default in payment of rent as directed by the Court under Order XVA(1) cannot, *ipso facto*, justify passing of an order striking off the defence of the defaulting tenant. The Court is statutorily bound, under Order XVA (2) to, prior to passing of an order striking off the defence, serve a notice on the defaulting tenant, to show cause as to why the defence should not be struck off and, to consider the cause, if any, shown by the tenant in that regard. This is an exercise which, having been statutorily incorporated in public interest and in the interests of compliance with the principles of natural justice and fair play, has to be treated as mandatory and non-negotiable.

19. In the present case, learned Counsel for the respondent, is also candid in acknowledging that no show cause notice under Order XVA (2) had been issued to the petitioner before his defence was struck off by the learned ADJ. He, nonetheless, points out that the petitioner had been granted an opportunity to explain the default in payment of rent and that the petitioners' explanation in that regard was considered by the learned ADJ, before taking a decision to strike off the petitioners' defence.

20. I have, in *Madho Singh Chauhan*⁴, already taken a view that grant of such opportunity during hearing is not sufficient to constitute compliance with Order XVA (2). It is trite, from *Taylor v. Taylor*⁵, then *Nazir Ahmed v. King Emperor*⁶ and *State of UP v. Singhara Singh*⁷, that where the law requires an act to be done in a particular

⁵ [L. R.] 1 Ch. D. 426

⁶ 1936 All LJ 895

⁷ (1964) 4 SCR 485

manner, it has to be done in that manner, or not done at all.

21. As such, for non-compliance with the provisions of Order XVA(2), the impugned order, striking off the petitioners' defence cannot sustain having been taken without following the discipline envisaged in Order XVA (2). It is accordingly quashed and set aside.

22. The application of the respondent under Order XVA, for striking of the petitioners' defence, is accordingly remanded to the learned ADJ, to further proceed with the application in accordance with law and in accordance with the observations contained hereinabove.

Conclusion

23. In view of the aforesaid discussion, the petition is disposed of by (i) upholding the impugned order dated 07th December, 2019, passed by the learned ADJ in so far as it rejects the petitioners' application under Order VII Rule 11 of the CPC and Section 340, Cr PC, (ii) setting aside the impugned order in so far as it rejects the petitioner's application under Section 151, CPC for waiver of costs of ₹ 3,000/- earlier imposed by the learned ADJ, which application, shall, therefore, stand allowed, and (iii) setting aside the decision to strike off the petitioners' defence and remanding the application filed by the respondent in that regard under Order XVA, CPC to the learned ADJ, for a consideration *de novo* in the light of the observations contained hereinabove.

24. The petition stands accordingly partly allowed in the aforesaid terms with no orders as to costs.

C. HARI SHANKAR, J

APRIL 26, 2022

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