

(2013) 12 DEL CK 0059

Delhi High Court

Case No: Regular First Appeal 457 of 2013

Delhi Tourism and
Transportation Development
Corporation Ltd.

APPELLANT

Vs

Chander Shekhar Bhandari

RESPONDENT

Date of Decision: Dec. 11, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 10

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Arvind Nayar and Mr. Sanad Jha, for the Appellant; J.C. Mahindroo, for the Respondent

Final Decision: Disposed Off

Judgement

Rajiv Sahai Endlaw, J.

The appeal impugns the judgment and decree (dated 2nd April, 2013 of the District & Sessions Judge (North) in CS No. 556/2010 filed by the respondent/plaintiff) of ejectment of the appellant/defendant from the ground floor of property No. C-76, Ramgarh, Jahangirpuri (stated to be wrongly written in para 19 of the judgment as Mangol Puri), Delhi and for recovery from the appellant/defendant of mesne profits at the rate of Rs. 8,000/- per month compounded by 10% per annum with effect from 3rd August, 2010 till the delivery of possession of the property. The appellant/defendant delivered the possession of the property, as per the counsel for the appellant/defendant on 1st July, 2013. The counsel for the respondent/plaintiff states that the possession was recovered in execution of the decree but is not aware of the date.

2. This appeal was thus filed only impugning the decree of mesne profits and notice thereof was issued and the Trial Court record requisitioned.

3. Considering the nature of the controversy, it was not deemed appropriate to admit the appeal and keep the same pending in the category of "Regular Matters" and with consent, the counsels have been finally heard in the appeal.
4. The respondent/plaintiff instituted the suit claiming that he is the owner of the property and the appellant/defendant, an undertaking of Delhi Government, was in unauthorized occupation thereof. Reliefs of recovery of possession of the property alongwith mesne profits from the date of notice issued preceding suit, were claimed
5. The appellant/defendant contested the suit pleading to have been inducted into the property by one Mr. Jaswant Singh in the year 2005 and the respondent/plaintiff having given an affidavit of no objection for running/operation of a liquor vend from the said property and of agreement with the said Mr. Jaswant Singh to pay 12.5% of the gross profits from the liquor vend to be operated from the said property by way of use and occupation charges of the said property.
6. Though, the factual controversy, from the judgment, is not clear but the counsel for the respondent/plaintiff on enquiry states that the case of the respondent/plaintiff is, of Mr. Jaswant Singh having unauthorizedly occupied the said property of the respondent/plaintiff and having illegally inducted the appellant/defendant into possession thereof. On pointed enquiry, the counsel for the respondent/plaintiff is not able to dispute that the appellant/defendant was in possession of and operating the liquor vend from the said property, since the year 2005. The only explanation given for not taking any action against the appellant/defendant or against Mr. Jaswant Singh from the date when Mr. Jaswant Singh was in unauthorized occupation or from the year 2005, when the appellant was in possession, is that the respondent/plaintiff was previously a resident of Punjab and took action of first issuing the notice and then instituting the suit from which this appeal arises, both in or about August, 2010 only, upon shifting to Delhi.
7. It is the case of the appellant/defendant that the appellant/defendant has paid the use and occupation charges to Mr. Jaswant Singh till the month of November, 2012. The contention of the counsel for the appellant/defendant thus is that the appellant/defendant is liable to pay the use and occupation charges only for the month of December, 2012 till 30th June, 2013 at the rate of 12.5% of the gross profits, as per the agreement under which the appellant/defendant had come into possession of the premises.
8. The counsel for the respondent/plaintiff has contended that the appellant/defendant after the institution of the suit should not have paid any amount to the said Mr. Jaswant Singh.
9. It has however been enquired from the counsel for the respondent/plaintiff as to why the respondent/plaintiff, in spite of the appellant/defendant in its written statement having taken a defence of the appellant/defendant being in occupation of the premises through Mr. Jaswant Singh and paying use and occupation charges

thereof to Mr. Jaswant Singh, did not seek to restrain the appellant/defendant from making any such payments to the said Mr. Jaswant Singh.

10. The counsel for the respondent/plaintiff informs that though an application under Order 39 Rule 10 of the CPC (CPC), 1908 was filed in the suit but remained pending and no orders were passed thereon.

11. I am of the view that in the light of the conduct of the respondent/plaintiff of having not interfering with the possession of the appellant/defendant since the year 2005 and till the year 2010 and having allowed the appellant/defendant to pay use and occupation charges to Mr. Jaswant Singh, the respondent/plaintiff merely by filing a suit for possession and even then not seeking any restraint order against Mr. Jaswant Singh, could not have interfered with the payments which the appellant/defendant had been making for the previous five years to the said Mr. Jaswant Singh. The appellant/defendant cannot be ordered to pay twice over. Though the learned District Judge has not given any finding with respect to the affidavit by way of no objection aforesaid, and the counsel for the respondent/plaintiff states that the respondent/plaintiff had denied his signatures thereon, but the respondent/plaintiff from his conduct aforesaid of, for a long period of time allowed the appellant/defendant to pay use and occupation charges to Mr. Jaswant Singh and of being even today not able to say as to when Mr. Jaswant Singh had occupied the property and to what use the property was being put prior to the year 2005, has deprived himself from claiming/recovering any use and occupation charges for the property till the determination of his rights with respect thereto.

12. There is another aspect of the matter. There is absolutely no basis whatsoever for the formula applied by the learned District Judge for payment of mesne profits. The counsel for the respondent/plaintiff also admits that except bare statement of the respondent/plaintiff and giving suggestion to the witnesses of the appellant/defendant that the letting value of the property was Rs. 25,000/- per month, no evidence was led of the rent being fetched by adjoining or similarly situated properties. The property situated in a Local Shopping Centre and there would be a large number of other similar shops in the said shopping centre and from the respondent/plaintiff having not led any evidence, adverse inference has to be drawn against the respondent/plaintiff.

13. The Division Bench of this Court in [National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association](#), has held that no judicial notice of the rate of increase in rent can be taken and the same has to be proved by leading cogent evidence.

14. For all of the aforesaid reasons, I am not inclined to uphold the decree insofar as for recovery of mesne profits against the appellant/defendant. However, since the appellant/defendant has admittedly not paid any use and occupation charges from the month of December, 2012 till the date of vacation of the premises to the said Mr.

Jaswant Singh also, the appellant/defendant to within three months of today, pay use and occupation charges for the property calculated at the rate of 12.5% of the gross profits from the said property for the period from December, 2012 till the date of vacation of the premises to the respondent/plaintiff.

15. The decree is modified to the aforesaid extent.

16. The appeal is disposed of. No costs. Decree sheet be drawn up.

17. The counsel for the respondent/plaintiff states that it be clarified that the respondent/plaintiff shall be entitled to recover the amounts which Mr. Jaswant Singh has realised from the appellant/defendant from the said Mr. Jaswant Singh. Mr. Jaswant Singh being not a party to this suit, the respondent/plaintiff, if entitled in law, would be able to do so.