(2017) 3 ADDelhi 487 : (2017) 238 DLT 228

DELHI HIGH COURT

Case No: CS (OS) 2408 of 2014 and IA No.13994 of 2015 [u/O. VII R.11(d) CPC] and IA 24427 of 2015 [u/O. VIII R. 1 CPC]

Jagmohan Behl — APPELLANT

Vs

State Bank of India — RESPONDENT

Date of Decision: Feb. 17, 2017

Acts Referred:
Civil Procedure Code, 1908 (CPC) - Order 2 Rule 1, Order 2 Rule 2, Order 2 Rule 4, Order 20 Rule 12, Order 7 Rule 11 (d)

Citation: (2017) 3 ADDelhi 487 : (2017) 238 DLT 228

Hon'ble Judges: R.K. Gauba, J.

Bench: Single Bench

Advocate: Mr. D.K. Rustagi, Ms. Medha Arya and Mr. Mayank Rustagi, Advocates, for the Plaintiff; Mr. S.N. Relan and Mr. Abhinav Thareja, Advocate, for the Defendant

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Mr. R.K. Gauba, J.â€"This civil suit for recovery on account of mesne profits is one more in a series of cases that came to be instituted by or

between the parties, against the backdrop of lease that had been granted in 1986, by the plaintiff, respecting commercial premises described as a

portion comprising of 1575 sq. ft. out of which 771 sq. ft. on the ground floor and the remaining 804 sq. ft. on mezzanine floor in the larger

property bearing Municipal No.M-46, Connaught Circus, New Delhi, initially in favour of State Bank of Indore, which merged with the defendant

in 2010.

2. It be noted at the outset that in the wake of decree of possession granted in favour of the plaintiff by judgment dated 01.05.2002 by the court of

Additional District Judge in civil suit no.340/2001, inter alia, on the averments of the lease having come to an end due to efflux of time, also by

service of a notice of termination, the said decree having been challenged by the defendant in RFA 361/2002 and becoming final and binding upon

it being not pressed on merits and instead the defendant being allowed, as prayed, one year''s time to vacate conditional upon payment of mesne

profits tentatively assessed, by order dated 25.08.2011, the vacant possession of the subject premises was actually handed over by the defendant

and received by the plaintiff on 25.02.2013. During the pendency of the said appeal against the decree of possession, the plaintiff had instituted

certain other proceedings including another civil suit, it being CS (OS) 2008/2010, also praying for a decree for recovery of mesne profits in

respect of the same very premises, the period covered by the said earlier suit being 01.09.2007 to 30.08.2010 and further with effect from

01.09.2010 till the date of decree in that suit, along with interest.

3. By the suit at hand, instituted on 26.07.2014, the plaintiff prays for recovery of mesne profits for the period 01.05.1997 until August 2007, that

is to say for the period anterior to the period for which similar relief was claimed by CS (OS) 2008/2010.

4. The defendant, upon being served, has moved an application (IA 13994/2015) praying for rejection of the plaint under Rule 11(d) of Order 7

of the Code of Civil Procedure, 1908 (CPC) primarily on the contentions that it is barred by the law of limitation and also by the provisions

contained in Rules 1, 2 and 4 of Order 2 CPC, the right to sue for the earlier period not having been reserved nor permission prayed for or

granted by the court in the course of earlier litigation.

5. Arguments were heard at length and, with the assistance of the learned counsel on both sides, record has been perused.

6. In the plaint, reference is made to certain arrangement of initial advances extended to the plaintiff by the defendant bank in the wake of terms

negotiated simultaneous to the creation of lease in the subject property in 1986. The plaint refers to three accounts of loans leading to three cases

instituted by the defendant bank for recovery of money there against, they including suit nos.3383/1992, 110/1993 and 263/1990, the first having

been transferred to Debt Recovery Tribunal (DRT), each having been decreed. It appears from the pleadings that the plaintiff had grievances about

non rendition of accounts by the defendant bank. He had filed a copy of the judgment dated 27.01.2010 whereby his suit no.82/2009 for rendition

of accounts was dismissed by the court of Additional District Judge. Be that as it may, by his own showing the lease contract was to operate

independently on its own terms and the period of lease granted having lapsed by efflux of time, the plaintiff, after serving a legal notice formally

terminating the tenancy, had instituted the suit for recovery by possession and against the defendant bank on 27.10.2001, the said suit

no.380/2001 having been decreed on 01.05.2002 and having since merged in the order dated 25.08.2011 in RFA 361/2002.

7. It is clear from the averments of the plaintiff himself that the defendant had become an unauthorized occupant when the plaintiff approached the

court seeking recovery of vacant possession of the demised premises. Yet, in the suit for recovery of possession, there was no claim made for

mesne profits or damages for the use and occupation of the premises by the unauthorized occupant (the defendant). Concededly, in the plaint filed

in the suit leading to the decree of vacant possession, there was no prayer made seeking leave of the court to reserve action in law for recovery of

mesne profits by subsequent litigation.

8. A copy of the plaint in CS(OS) 380/2001 has been filed by the plaintiff. It is pertinent to take note of paras 12 to 16 of the said plaint, the same

reading as under :-

12. That the defendant bank has filed an appeal being RFA No.361/02, titled as State Bank of Indore v. Jagmohan Behl against the said

order and the execution of the said order was stayed and the parties entangled in the said litigation. It is only recently the plaintiff has realized that

the plaint did not contain any prayer for recovery of mesne profits as per the notice dated 21.03.1997 and 28.04.1997.

13. That as on May, 97, the minimum rate of rent as prevalent for suit property is Rs.10,000/- per month and the plaintiff is now filing the present

suit for recovery including the relief of mesne profit @ Rs.10,000/- per day for period from 01.09.2007 until 31.08.2010 which is equivalent to

prevent market rate of rent as on period involved in the present suit.

14. That the defendant bank became liable to pay the mesne profits w.e.f. 01.05.1997 when the notice of termination was served upon them.

Keeping their tenancy to be monthly tenancy, however, in any case the same is stood terminated otherwise also by efflux of time w.e.f.

01.10.2001. The defendant is in unauthorized occupation of the suit premises since that date liable to pay mesne profits initially demanded @

Rs.10,000/- per month. However, now the same is minimum Rs.10,000/- per day which comes to Rs.3,00,000/- per month. Lastly, the defendant

bank has become unauthorized occupant from 06.10.2001 as too recognised by the decree dated 01.05.2002 since the plaint did not claim the

relief of mesne profit and the same was neither considered nor was granted. As such the plaintiff is entitled to the mesne profits only for last three

years legally recoverable i.e. dated 01.09.2007 until 30.08.2010 @ Rs.10,000/- per day which is otherwise much less than the market price of the

suit premises and as such the same comes to Rs.1.08 crores, which the defendant bank is liable to pay. In addition, the prevalent market rate of

rent of the suit premises is further jumped to nearby Rs.18,000/- per day. This jump is due to massive uplifting of the Connaught Place area in

recent past. As such, the plaintiff is entitled to claim mesne profits at that rate or such other prevalent rate of rent of the area, from 01.09.2010 till

the decision of the present suit.

15. That the payment of mesne profits is an obligation of the defendant being unauthorized occupant and there is no requirement of service of any

statutory notice as such the present suit is being instituted for the recovery of the mesne profits against the bank. The defendant bank shall continue

to pay the mesne profits from the date of institution of the present suit until the same is realized.

16. That the cause of action has arisen to file the mesne profits on the expiry of the month of August, 2007 for which the defendant bank has not

made any payment of mesne profits; the cause of action has arisen on expiry of each month thereafter at least when the defendant bank failed to

make payment of mesne profits at the rate for which it became due, the defendant bank has failed to make the payment for the entire above

period; the cause of action is a continuing one.

(emphasis supplied)

9. In the plaint of the suit at hand, reference is made again to the termination of tenancy with effect from 30.04.1997 and the bank having become

unauthorized occupant with effect from 01.05.1997 on account of the notice of termination whereby mesne profits were also demanded, it having

been pleaded as the cause of action for the suit for decree of possession stating that in absence of clarity of total adjustments, the plaintiff had

chosen to defer the issue of recovery of mesne profits"" for which occasion arose on 07.05.2013 when the bank acknowledged the satisfaction of

the three loan accounts, it dating back to July 2003. It is the averment of the plaintiff that the defendant had played a fraud as the claim of

satisfaction as on July 2003 was erroneous by which act of commission, the defendant bank had ""obstructed"" the plaintiffs legitimate rights to claim

mesne profits with effect from 01.06.1997. It avers that the earlier suit for recovery of mesne profits for three years was filed on the advice that it

could be so instituted ""without waiting for accrual of actual right to sue"" against the backdrop of plaintiff finding the then pending litigation to be

unending"". It is stated that the actual right to sue for mesne profits arose only on 25.08.2011 when the application against the decree of possession

was dismissed and the status of the bank as the unauthorized occupant with effect from 01.06.1997 ""got concluded"". It is the submission of the

plaintiff that the filing of the earlier suit for mesne profits ""does not waive the right to seek"" similar relief for the earlier period. Thus, the plaintiff

brought this second suit for mesne profits for the previous period on the ground it is within limitation with reference to the date of delivery of

possession (25.02.2013) and not barred by Rule 2 Order 2 CPC.

10. The plaintiff relies on the following observations of the Supreme Court in the decision reported as Anderson Wright and Co. v. Amar Nath

Roy and Ors., AIR 2005 SC 2457 :-

7(4). The respondents are permitted to move an application under Order 20, Rule 12 of the Code of Civil Procedure or to pursue such remedy

as may be available to them under the law for determination and recovery of the mesne profits which they would be entitled to recover from the

appellants for the period between the date of institution of the suit till the date of recovery of possession in the event of the appeal being dismissed.

(emphasis supplied)

11. Reliance is also placed on decisions of the learned single Judges of this court in CS(OS) 1985/2003, titled : Smt. Nisha v. PNB, decided

on 16.01.2009 and Jayant Kumar Trehan v. HDFC Bank Ltd., 218 (2015) DLT 756.

12. The plaintiff refers to the definition of the expression ""mesne profits"" as given in Section 2 (12) CPC to the following effect :-

mesne profits"" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary

diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in

wrongful possession.

13. Rule 1 of Order I CPC mandates that every suit, as far as practicable, shall be framed so as to afford ground for final decision upon the

subjects in disputes and to ""prevent further litigation concerning them"". The provision contained in Rule 2 Order 2 CPC reads thus :-

Suit to include the whole claim -

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may

relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not

afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of action may sue for all or

any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation. - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same

obligation shall be deemed respectively to constitute but one cause of action.

14. It is well settled that the requirement of afore-quoted Rule 2 Order 2 CPC is that every suit should include the whole of the claim which the

plaintiff is entitled to make in respect of a cause of action. Cause of action is what gives occasion for, and forms the foundation of, the suit. If that

cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the

balance by independent proceedings. [see Sidramappa v. Rajashetty, AIR 1970 SC 1059]

15. The principle underlying the above said provision is essentially that the relief claimed arising out of same cause of action ought not be split into

separate suits in as much as the parties are not to be vexed twice by splitting the claims or remedies. This, of course, cannot inhibit a fresh suit to

be instituted for relief in respect of which cause of action arises subsequently.

16. It is undoubtedly well settled that cause of action for a relief of recovery of mesne profits is separate and distinct from cause of action for the

relief of possession. [Gurudwara Baba Zorawar Singh and Baba Fateh Singh Ji Regd. Society v. Shri Piara Singh and Sons, 141 (2001)

DLT 228 (DB) and Syndicate Bank v. Raj Kumar Tanwar, 154 (2008) DLT 230 (DB). At the same time, it would not be correct to

contend that a suit for mesne profits cannot be filed clubbing it with the prayer for recovery of possession or that such reliefs must necessarily be

split into two different suits; first, a suit for the latter relief (recovery of possession) and after a decree passed therein has become final and binding

the second for latter relief (mesne profits). A bare perusal of Rule 12 Order 20 CPC, referred to in the afore-quoted extract from the judgment in

Anderson Wright and Co. (supra) would clarify the position, the provision reading thus :-

Order 20, Rule 12 - Decree for possession and mesne profits - (1) Where a suit is for the recovery of possession of immovable property and for

rent or mesne profits, the Court may pass a decree -

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until -

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance

with the result of such inquiry.

17. One may also refer with advantage to Order XVA (striking off defence in a suit by a lessor) which was inserted in the Code of Civil Procedure

by High Court of Delhi, notification no.324/Rules/DHC dated 12.11.2008, published in the Delhi Gazette, Extraordinary, Pt. IV, No.179 dated

14.11.2008.

Therefore, there is no doubt that claim can be instituted by a lessor, after termination of the lease, whether by efflux of time or by notice terminating

it prematurely, both for eviction of the unauthorized occupant (or lessee, as the case may be) and also for recovery of mesne profits (or rent, as the

case may be), in one common suit or by two separate suits.

18. Thus, even if a suit is first filed only for recovery of possession of immovable property with no claim made for relief of mesne profits, a second

suit for recovery of mesne profits for the period subsequent to the filing of the suit for recovery of possession may be instituted. [see Shiv Kumar

Sharma v. Santosh Kumari (2007) 8 SCC 600]. But, it is equally settled that such suit for recovery of mesne profits would have to be restricted

to what is within the period of limitation.

19. The position taken by the plaintiff in the present case that a suit for mesne profits could not have been filed earlier for reasons noted above, is in

the teeth of his own averments in the previous suit for recovery of mesne profits for the period subsequent to the one claimed here. The plaintiff had

instituted the suit for recovery of possession, inter alia, on the basis of notice terminating the lease, also claiming it to have come to an end by efflux

of time and thereby describing the defendant as an unauthorized occupant. It is the said contention which was upheld by the civil court, the appeal

filed there against having been withdrawn.

20. The status of the defendant as unauthorized occupant vis-Ã¯Â¿Â½-vis the subject premises was not dependent, or contingent, upon a declaration to

that effect by the court. It is, on this ground, that the plaintiff instituted the previous suit for recovery of mesne profits, CS (OS) 380/2001,

consciously restricting it to the period of three years preceding thereto it only being then ""legally recoverable"". Thus, the plaintiff consciously gave

up the claim for mesne profits for the period prior to 01.09.2007 while instituting CS (OS) 380/2001. Having regard to his averments, if a claim

could be so instituted for mesne profit with effect from 01.09.2007, there was no inhibition except the bar of limitation, for claiming similar

recovery for the period prior to 01.09.2007. If any just or sufficient reasons could be explained, for claiming for the earlier period at that stage,

may be by condonation of delay, a case had to be made out for such claim of mesne profits for the earlier period in the same suit. By omission to

claim such relief at that stage in the previous suit for mesne profits, the plaintiff explicitly ""relinquished"" such portion of his claim and therefore, is not

entitled thereafter to ""sue"" again for such relief ""so omitted or relinquished"" in the previous suit within the meaning of Rule 2 Order 2 CPC.

21. The decisions in Smt. Nisha (supra) and Jayant Kumar Trehan (supra) were rendered against facts which are distinguishable. The observations

in Anderson Wright and Co. (supra) quoted above, do not aid or assist the plaintiff in maintaining this suit for recovery of mesne profits for the

period upto August 2007. The directions to the effect quoted above given by the Supreme Court, in the facts and circumstances of the said case,

cannot be read or applied so as to infer that a second suit for recovery of mesne profits can be entertained even beyond the period of limitation.

There is nothing in the plaint from which it could be gauged as to why the mesne profits for the period May 1997 to August 2007 could not be

ascertained till receipt of the letter dated 07.05.2013 of the defendant concerning the three loan accounts. Clearly, the suit at hand filed in July

2014 for recovery of mesne profits for the said period is beyond the period of limitation and thus barred.

22. In the result, the prayer for rejection of the plaint (in application in IA 13994/2015) is allowed. The plaint is rejected. The pending application

of the plaintiff (IA 24427/2015) becomes infructuous and stands disposed of accordingly.