

(2008) 08 DEL CK 0156

Delhi High Court

Case No: FAO (OS) No. 218 of 1998

Shri Inder Sain Bedi

APPELLANT

Vs

Chopra Electricals

RESPONDENT

Date of Decision: Aug. 27, 2008**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 3, Order 41 Rule 19, 151

Hon'ble Judges: Manmohan Singh, J; A.K. Sikri, J**Bench:** Division Bench**Advocate:** Rajan Sabharwal, for the Appellant; Neelima Tripathi, for the Respondent**Final Decision:** Dismissed

Judgement

Manmohan Singh, J.

This is an appeal filed by the appellant (hereinafter referred to as "plaintiff") against the order dated 9th July, 1998, passed in IA No. 2436/1994 in Suit No. 519/1994, dismissing the application u/s 151 of the CPC for fixing an interim amount as damages/mesne profits payable to the plaintiff with the direction to the respondent (hereinafter referred to as "defendant") to pay the same every month to him. The main suit was filed by the plaintiff for recovery of possession, mesne profit and injunction etc.

2. The case of the plaintiff in the trial court was that the plaintiff is the owner of a commercial property bearing No. B-59/1, Narayana Industrial Area, Phase-II, New Delhi. According to him, the defendant had taken on rent a portion of the said property shown "green" in the plan attached to the plaint on 26th May, 1980, and from 1st May, 1981, each time for a period of 11 months at the rent of Rs. 4,500/- per month.

3. It was averred in the plaint that the defendant in the year 1983 encroached upon the other portion of the property in an area approximately 3193 sq. ft. detailed in para 8 of the plaint and shown "red" in the plan. It was also learnt that he

unauthorizedly made some construction in the said portion.

4. The plaintiff by notice terminated the defendant's tenancy regarding the subject matter of the premises and the defendant having not vacated it, he filed the suit (Suit No. 384/1989) for the recovery of possession before the Additional District Judge, Delhi reserving his right to take appropriate action for possession, compensation etc. separately pertaining the portion of the property encroached upon.

5. The said suit was contested by the defendant inter alia on the plea that the entire property comprising of both the "green" and "red" portion had, in fact, been rented out to him and no portion was encroached upon and that the notice to vacate demise premises was illegal and the suit as filed was not maintainable for the part of tenancy.

6. It was averred that after trial, the learned Additional District Judge decreed the suit on 23rd April, 1993 and the plaintiff thereafter served the notice on 19th May, 1993 calling upon the defendant to pay damages/mesne profits and also to vacate the said encroached portion and on his failure to comply the requirement of the notice the plaintiff filed the suit before this Hon"ble Court (Suit No. 519/1994) for possession of the portion encroached upon, recovery of Rs. 16,72,992/- damages/mesne profit with mandatory injunction etc.

7. During the pendency of the suit, the plaintiff filed the application u/s 151 CPC for fixing the interim amount of damages/mesne profits payable to the plaintiff. After hearing, the said application was dismissed on the main reason that the plaintiff claims to have learnt about the alleged encroachment by the defendant in the year 1983 but he chooses to keep mum for about ten years and the application was filed only in 1993. Another reason for rejecting the application was pendency of the appeal in RFA No. 507/1993 filed by the defendant against the judgment and decree dated 23rd April, 1993, passed by the Additional District Judge, Delhi.

8. We have heard the arguments of the learned Counsel for both the parties in the main appeal as well as four miscellaneous applications being CM No. 5057-60/2008 filed by the plaintiff/appellants. The first submission made by the learned Counsel for the plaintiff is that when this appeal was listed on 29th January, 2008, no one appeared on behalf of either of the parties, and the appeal has been disposed of having been rendered as infructuous in view of the judgment dated 16th March, 2004, passed in the connecting appeal RFA No. 507/1993. He informed that since no one appeared, therefore, the court was not aware about the orders passed by the Supreme Court on 27th August, 2004, having setting aside the said judgment passed in RFA No. 507/1993 otherwise the order dated 29th January, 2008, would not have been passed. The plaintiff has moved an application being CM No. 5057/2008 in this Court under Order 41 Rule 19 CPC CPC in this respect and one of the prayers is to restore this appeal. In view of the reason stated, we restore the

appeal at original position.

9. The second prayer in the said CM No. 5057/2008 is that the plaintiff in this appeal had expired on 10th March, 2002, and the plaintiff in fact on 30th April, 2002, filed the application under Order 22 Rule 3 read with Section 151 CPC being IA No. 5292/2002 in the main Suit No. 519/1994 and the said application was allowed by the learned trial court by order dated 14th August, 2002. In this appeal similar prayer has been made in the application alongwith the application for condonation of delay for bringing the legal representative of the appellant on record. Since the application has already been allowed in the main suit present appeal has arisen out of the said suit, therefore, the delay in filing of the application is condoned and the legal representative of the plaintiff/appellant are brought on record and pending CM Nos. 5057-5760/2008 are disposed of accordingly.

10. The learned Counsel for the plaintiff has brought to our notice that during the pendency of the present appeal the possession of the suit premises has also been handed over by the defendant in compliance with the judgment passed by the apex court on 27.8.2004 in Civil Appeal No. 6405/2002.

11. Learned Counsel for the plaintiff has also made another submission that when the connecting appeal RFA No. 507/1993 was pending before this Hon"ble Court in CM No. 1081/1993 the following order was passed by the Division Bench on 24th April, 1995:

Mr. Bhasin says that without prejudice to his contentions the petitioner will pay rent/damages @ Rs. 10,000/- per month as from 1st January 1995. We feel it is a fair offer. Of course, the petitioner will not claim any equity on that account. The arrears etc. as mentioned above, may be paid within one month and future rent/damages by the 10th of each succeeding month.

12. On the other hand, the learned Counsel for the defendant has argued that as per the admission made in para 7 of the plaint, the plaintiff learnt about the encroachment in the year 1983 as alleged but the application was u/s 151 CPC was filed in the year 1993 which was barred by time. Secondly, the learned Counsel for the defendant has made the submission that the appeal against the interim order passed by the learned Single Judge is not maintainable and lastly, since the main suit is at the final stage as evidence of the parties are being recorded, therefore, this Hon"ble Court should not interfere with the discretionary orders passed by the learned Single Judge.

13. We have considered all the facts and circumstances. The question before us is very limited as to whether the order passed by the learned Single Judge in the application u/s 151 CPC for fixing an interim amount as damages/mesne profits is sustainable or not.

14. It is an undisputed fact that the plaintiff had the knowledge of the said encroachment by the defendant since April, 1983 and the subject matter of application was filed after about ten years. Further, it appears from the trial court record that the trial has already begin and the main suit is almost in final stage where the question of damages and mesne profit is going to be determined as the only dispute left pending between the parties.

15. As regards other submissions of the learned Counsel for the parties are concerned, it is not in dispute that their exists change of circumstances in the matter which have happened during the pendency of the present appeal, although as per trial court record, the pleadings have not been amended by the plaintiff on additional facts. Even otherwise we feel that those are not to be decided in the present appeal as the scope of this appeal is restricted to the impugned order where the application u/s 151 CPC is dismissed. Therefore, we are unable to consider the said circumstances which are not the subject matter of the present appeal.

16. However, the plaintiff is at liberty to file the fresh application for bringing on record the additional facts before the trial court, if so advised in accordance with law.

17. In view of the above, we are not inclined to interfere with the impugned order dated 9th July, 1998. The present appeal is dismissed. No costs.