

## **S. Shankar and Another Vs M/s. Rama Panels Pvt. Ltd. and Others**

**Court:** Delhi High Court

**Date of Decision:** Aug. 22, 2013

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 12 Rule 6, Order 2 Rule 2, Order 2 Rule 2(3), Order 7 Rule 11

**Citation:** (2013) 204 DLT 240

**Hon'ble Judges:** P.K. Bhasin, J

**Bench:** Single Bench

**Advocate:** N. Srinivasan, Attorney, for the Appellant; Pramod Kumar Dubey, for the Respondent

### **Judgement**

@JUDGMENTTAG-ORDER

P.K. Bhasin, J.

The defendant no. 1 had taken on leave and license basis the suit premises in Greater Kailash-II from the plaintiffs for the

residence of defendant no. 2, one of its Directors. However, the defendants started using the suit premises without the permission of the plaintiffs

for commercial purposes. Upon the expiry of the license period on 07/08/2008, the defendants did not vacate the suit premises and so the plaintiffs

filed a suit for possession and mesne profits etc. In that suit an application under Order II Rule 2 the Code of Civil Procedure ("C.P.C." in short)

was also filed seeking leave of the Court to file a suit subsequently for claiming compensation/damages on account of unjust enrichment of the

defendants because of their having put the suit premises to commercial use since the details of the misuse were not known to the plaintiffs at the

time of filing of that suit. Though the defendants had contested that suit but a decree for possession was passed under Order XII Rule 6 of the

Code of Civil Procedure. The defendants challenged that decree in appeal but during the pendency of their appeal in this Court the decree got

executed and possession of the suit premises came to be delivered to the plaintiffs on 12/05/2010 i.e. during the pendency of the present suit which

was filed in February, 2010. Subsequently a decree for mesne profits @ Rs. 2000/- per day was also passed in that suit on 01/02/2011. The

plaintiffs are claiming in the present suit composite damages @ Rs. 1,50,000/- p.m. from 20/06/2007 onwards because of their having put the

tenanted premises to commercial use. The defendants are contesting the present suit, inter alia, on the grounds that it is barred under Order II Rule

2 C.P.C. and the plaint discloses no cause of action and also that the suit premises was being used only for residential premises and so no question

of plaintiffs claiming damages from them arises. It is also pleaded that a landlord cannot in any event claim any share in the business profits of the

tenant.

2. After completion of pleadings when the matter came up before the Court on 29/03/2011 the counsel for the defendants submitted that the suit

was barred under Order II Rule 2 and also Order VII Rule 11 C.P.C. The Court then fixed the matter for hearing the submissions from both sides

on those objections, though no formal preliminary issues were framed that day. Parties were also directed to file their written submissions which

they did. However, before the Court could hear the submissions of the parties on the aforesaid two objections of the defendants the plaintiffs came

out with an application under Order XII Rule 6 C.P.C.(being I.A. No. 13085/2011) for passing a decree for payment to the plaintiffs @ Rs.

67,500/- p.m. on the basis of admission allegedly made by the defendants in some documents submitted with Trade & Taxes Department of Delhi

Government for getting registration under the Value Added Tax Act, 2004 that the suit premises was their principal place of business and the rent

for the suit premises which they were occupying was Rs. 67,500/- p.m. Those documents were admitted by the defendants during admission

denial of documents of 19/10/2010 and exhibited collectively as Ex. P-4 by the Joint Registrar.

3. The defendants filed reply to the application under Order XII Rule 6 C.P.C. and claimed that no admission was made by them entitling the

plaintiffs to a decree under Order XII Rule 6 C.P.C. Arguments were then advanced from both sides of that application as well as on the

objections of the defendants under Order II Rule 2 and Order VII Rule 11 C.P.C.

4. On behalf of the plaintiffs their attorney, who happens to be the father of plaintiff and father-in-law of plaintiff no. 2, argued and for the

defendants their counsel argued.

5. The attorney of the plaintiffs submitted that the fact that the defendants were using the suit premises for commercial purposes is admitted by

them and that admission is to be found in the declaration made by them before the VAT authorities to the effect that they were carrying on their

business from the suit premises and were paying monthly rent of Rs. 67500/- and the number of employees working was shown to be three. That

document is a part of a number of documents collectively marked as Ex. P-4 at the time of admission denial of documents. Therefore, the plaintiffs

were entitled to get a decree for compensation at the rate of Rs. 67,500/- p.m. without any formal evidence.

6. Though this Court is in full agreement with the submissions made on behalf of the plaintiffs that a decree can be passed on the basis of admission

of the claim of the plaintiffs made by the defendants either in the pleadings or in any other mode and so this Court need not refer to many

judgments cited on their behalf in which the scope and applicability of Order XII Rule 6 C.P.C. was considered but in the opinion of this Court

and as was rightly submitted by the learned counsel for the defendants also, there is no justification for passing any decree under Order XII Rule 6

C.P.C. in the present case as there is no unequivocal admission by the defendants of the plaintiffs' claim for damages. On the contrary they have

categorically taken a stand that they never put the suit premises to commercial use. From the documents relied upon by the plaintiffs i.e. Ex.-4, all

that can be said is that the defendants had declared before the VAT Department while seeking registration for the purposes of VAT that their

principal place of business was the suit property and the monthly rent was Rs. 67,500/-. However, for the plaintiffs to obtain a decree for damages

on account of misuse of the suit property by the defendants and their getting unduly enriched by commercially exploiting the suit premises they shall

have first to establish that they are entitled in law to claim damages from the defendants for their having used the suit premises for

commercial/storage purposes though they had taken it only for the residence of defendant no. 2 and further that the defendants were actually using

the suit premises for commercial/storage purposes even after their having been asked to stop the misuse. They shall also have to prove that the

quantum of monthly damages if at all they are found to be entitled to get damages from the defendants for their alleged undue enrichment by using

the suit premises for commercial/storage purposes. So, just because the defendants had admitted before the VAT Department that their principal

place of business was the suit property the plaintiffs cannot get a decree for part of their suit claim of Rs. 30,80,000/- under Order XII Rule 6

C.P.C.

7. Now coming to the objections of the defendants that the suit is barred under Order II Rule 2 C.P.C. and also under Order VII Rule 11 C.P.C.

I find that the plaint does disclose a cause of action for the filing of the present suit as is evident from the facts pleaded in the plaint which have been

noticed already and the suit for damages because of the defendants misusing the plaintiffs' property for commercial purposes after taking it for

residential purposes cannot be said to be barred under any law. The earlier suit was filed for possession of the suit premises upon the defendants'

not vacating the same despite their licence period having expired on 07/08/2008. This is the admitted position and in fact the record of that earlier

suit, which was requisitioned for deciding this objection of the defendants, also confirms that. On that cause of action the plaintiffs were entitled to

seek possession of the suit premises and mesne profits also and if they had omitted to sue the defendants for mesne profits for their holding on to

the suit premises even after the expiry of the licence period and had chosen to file a separate suit subsequently for mesne profits without seeking

prior leave of the Court in the earlier suit the bar under Order II Rule 2(3) would have got attracted. However, upon the cause of action on the

basis of which the earlier suit for possession and mesne profits was filed by the plaintiffs here and which already stands decreed in favour of the

plaintiffs now, the plaintiffs could not have asked for a decree of damages for conversion of the user of the suit premises by the defendants from

residential to commercial. That claim in the present suit is thus based on a totally different cause of action and so this second suit based on the said

different cause of action cannot be said to be barred under Order II Rule 2 C.P.C. so as to attract Order VII Rule 11 C.P.C. also even if the

cause of action upon which the present suit is founded could be said to be available at the time of filing of the earlier suit also though the plaintiffs"

case is that at that time all the necessary details for succeeding in getting a decree of the said cause of action were not available. So, the application

of the plaintiffs under Order XII Rule 6 C.P.C. is rejected and the objections of the defendants that the suit should be dismissed under Order II

Rule 2 and Order VII Rule 11 C.P.C. also stand rejected.