

(2009) 01 DEL CK 0274

Delhi High Court

Case No: C.S. (OS) 626 of 2004

Sonia and Co. (Pvt.) Ltd.

APPELLANT

Vs

Saboo Cylinders Pvt. Ltd. and
Another

RESPONDENT

Date of Decision: Jan. 20, 2009

Acts Referred:

- Transfer of Property Act, 1882 - Section 106, 108

Citation: (2009) 157 DLT 541

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Ravi Gupta, for the Appellant; Nemo, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

The plaintiff as landlord of a farmhouse bearing municipal No. M-66-67, Village Jonapur, New Delhi instituted the present suit (i) for ejectment of the defendant No. 1 tenant therefrom after the cessation of its tenancy and (ii) for recovery of arrears of rent from April, 2003 to 30th September, 2003 of Rs. 6 lac together with interest at 12% per annum accrued thereon till the date of institution of the suit of Rs. 63,000/-, (iii) for recovery of mesne profits/damages for use and occupation from 1st October, 2003 till institution of the suit in May, 2004 of Rs. 45 lac, (iv) for interest of Rs. 1,08,404/- on delayed payment of earlier rents and (v) for future mesne profits/damages for use and occupation, The plaintiff besides the defendant No. 1 company also impleaded its Chairman & Managing Director in such capacity as the defendant No. 2. The defendants immediately on service of summons of the suit moved I.A.4395/2004 offering to deliver possession of the premises to the plaintiff without prejudice to their rights and contentions. The said application came up before this Court on 20th July, 2004. The counsel for the plaintiff sought six weeks time to obtain instructions and the matter was adjourned to 28th September, 2004. On 28th September, 2004 on the request of the plaintiff a commissioner was

appointed for delivery of possession of the premises by the defendants to the plaintiff and to inspect the premises and to make a report about the physical condition thereof. The commissioner visited the premises on 31st October, 2004 on which date the possession of the premises was delivered by the defendants to the plaintiff. The commissioner also took photographs of the premises which have been filed with his report, of the physical condition of the premises.

2. The plaintiff thereafter applied for amendment of the plaint to incorporate therein the claim for damages caused by the defendants to the premises. The said application was allowed on 12th January, 2006 and the plaintiff filed an amended plaint. The suit was thereafter dismissed for non prosecution but was restored. The plaintiff filed the amended plaint. Though the defendants had filed written statement to the plaint as originally filed but failed to file the written statement to the amended plaint and also stopped appearing in the suit and were vide order dated 22nd May, 2007 ordered to be proceeded against ex parte and remain ex-parte. The plaintiff has led its ex parte evidence by filing the affidavit by way of examination in chief of its Director Mr. S.V. Joshi.

3. As aforesaid, the relief of possession does not survive. The monetary claims of the plaintiff against the defendants are for consideration.

4. At the outset, it may be stated that though there are two defendants but it is the case of the plaintiff that the defendant No. 1 was its tenant in the premises and the defendant No. 2 had occupied the said premises from inception of tenancy till vacation in his capacity as the Managing Director of the defendant No. 1 company. The monetary claims of the plaintiff arises from such contract of tenancy. The contract of tenancy having been made out with the defendant No. 1 company, the liability for such monetary claims is of the defendant No. 1 company only and the defendant No. 2 merely for the reason of being the Managing Director of the defendant No. 1 would not become personally liable for the dues of the defendant No. 1 company. No case of the defendant No. 2 having personally assured payments by the defendant No. 1 under the contract has been made out. The suit against the defendant No. 2 in his capacity as the Managing Director of the defendant No. 1 company, specially when it is expressly stated in the plaint that the defendant No. 2 was residing in the premises in his capacity as a Managing Director of the defendant No. 1, is misconceived and contrary to the concept of limited liability. Thus the entitlement, if any, of the plaintiff to the monetary claims is against the defendant No. 1 company only.

5. The first claim of the plaintiff is for arrears of rent of Rs. 6 lac from 1st April, 2003 to 30th September, 2003 @ Rs. 1 lac per month. The witness of the plaintiff had deposed as to the aforesaid rate of rent and rent for the aforesaid six months being due. The defence of the defendants in the written statement filed initially was that the plaintiff had failed to disclose the security deposit of Rs. 3 lac placed by the defendant No. 1 with the plaintiff and which the plaintiff had failed to refund and

that the plaintiff had failed to carry out the work of major repairs which the plaintiff was to carry out in premises and had requested the defendant No. 1 to carry out the same and had agreed to reimburse the said amounts from the rent payable by the defendant No. 1 to the plaintiff. The defendants in their written statement in the preliminary submission $\diamond H \diamond$ have listed the works got carried out by them in the premises on behalf of the plaintiff. The defendants further claimed to have so spent Rs. 20 lac on the property. It is significant that the defendants in their written statement did not deny the rate of rent as Rs. 1 lac per month and did not even plead any payments of rent for the period 1st April, 2004 to 30th September, 2004.

6. The defendant No. 1 has thus sought to set off its claims for Rs. 20 lac against the plaintiff and the security deposit of Rs. 3 lac against the rent. However, neither any court fees on such plea of set off was paid nor as aforesaid did the defendants appear before the court and prove the said claim. The said claim of the defendants is not entitled to be believed. Axiomatically, the plaintiff is entitled to the decree for Rs. 6 lac towards arrears of rent from 1st April, 2003 to 30th September, 2003. The plaintiff has also claimed interest on the said amount @12% per annum till the institution of the suit as well as future interest. I, however, do not find the plaintiff entitled to pre institution and pendente lite interest on the said amount. There was no agreement for payment of interest. No mention of interest has been made in the letters which the plaintiff claims to have written to the defendant No. 1, most of which have not even been proved before the court. The plaintiff's claim delay in payment of rent at least since the year 2001. No interest was demanded or paid for the earlier delays in payment of rent also. The defendant in the written statement aforesaid took a specific stand as to the works got done by it in the premises. Moreover, the complete picture has not been placed before the court by the plaintiff also. Neither the agreement of letting which admittedly existed nor other agreement admittedly existing between the parties as borne out from the legal notices exchanged have been proved. The photographs taken by the local commissioner also show the existence of air conditioners, electrical gadgets etc. which the defendants claim to have got installed in the premises. The witnesses of the plaintiff has not deposed anything whatsoever in that regard. Even though the defendants are ex parte but if they have filed the written statement or other pleading, then it is incumbent on the plaintiff to, even in ex parte evidence deal with the said pleas of the defendant.

7. There is yet another reason for me to hold the plaintiff not entitle to interest. The plaintiff was admittedly holding the interest free security deposit of Rs. 3 lac from the defendants. The said security deposit is also to be adjusted from the total amounts found due from the defendant No. 1 to the plaintiff.

8. The plaintiff would however be entitled to future interest from 90 days after the decree within which time the defendant No. 1 on demand by the plaintiff is expected to comply with the decree, till the date of payment @ 12% per annum.

9. The next monetary claim of the plaintiff is of Rs. 1,08,404/- towards interest at 12% per annum for late payment of rent from 2001 onwards. Neither has any agreement of the date of payment of rent been proved nor any agreement as aforesaid of payment of interest for delay. Moreover, as and when the plaintiff accepted the rent tendered by the defendant, the plaintiff is deemed to have waived the claim, if any, of payment of interest, if any, for delay. No protest lodged by the plaintiff at the time of such delayed payments of rent or a demand for interest at that time has been proved. As aforesaid some of the initial letters of the plaintiff filed before this Court have no reference to any interest. Thus the plaintiff has not made out any case for recovery of the said amount also.

10. The major claim of the plaintiff is for mesne profits/damages for use and occupation of Rs. 45 lacs for the period prior to the institution of the suit and from the date of institution of the suit till the date of delivery of possession. The plaintiff claims the defendant No. 1 to be tenant for a term expiring on 30th September, 2003. However, it is the admitted position that there was no registered lease deed between the parties. In the absence of a registered lease deed, the defendant No. 1 occupied the premises as a tenant under the plaintiff from month to month and which tenancy could not come to an end by efflux of time but had to be determined by a notice of determination by tenancy u/s 106 of the Transfer of Property Act. Thus what has to be seen is as to when the plaintiff serviced the said notice. In the documents filed by the plaintiff the first letter from the plaintiff to the defendant is dated 14th August, 2003. The plaintiff has filed only a photocopy of it and which is secondary not primary evidence and was thus not admitted into evidence and was marked **◆A◆**. Even if said document is to be read in evidence for the reason of the witnesses of the plaintiff having deposed that the original thereof was sent to the defendant vide courier receipts exhibit P9 & P10, the same is not of determination of tenancy. The plaintiff has in the said letter merely stated that the tenancy was expiring on 30th September, 2003 and sought confirmation from the defendant No. 1 that it will hand over possession of the farmhouse on that date. As per the courier receipts exhibit P9 & P10, the said letter was dispatched on 16th August, 2003 and bears the endorsement of delivery of 18th August, 2003.

11. The second letter is dated 21st September, 2003 which was admitted by the defendants and is exhibit P1; in that of course the plaintiff requested the defendant to hand over possession of the farmhouse on 1st October, 2003. The same can be treated as a notice of termination of tenancy. Even though not of 15 days, but as per the Section 106 of the Transfer of Property Act, the suit having been instituted after the expiry of 15 days, the termination is valid. The termination of tenancy would thus take effect from 15 days after service of the said letter. As per the courier receipts exhibit P11 & P12 the said letter was dispatched on 22nd September, 2003 and would have reached the defendant No. 1 on 23rd or 24th September, 2003 and 15 days therefrom would expire on or about 8th October, 2003. The plaintiff would thus be entitled to mesne profits/damages for use and occupation as per the said

letter w.e.f. 8th October, 2003.

12. However, in my opinion in spite of the letter aforesaid, the plaintiff would still not be entitled to mesne profits/damages for use and occupation. The plaintiff in the subsequent letters dated 5th November, 2003, 1st December, 2003, 2nd January, 2004, 2nd February, 2004, 2nd March, 2004, even though not proved for the same reasons as relating to letter dated 14th August, 2003 (Supra), has demanded rent from the defendant No. 1 w.e.f. October, 2003 also. The plaintiff thus appears to have been treating the defendant No. 1 to be continuing as a tenant in the premises after October, 2003 also though at an enhanced rent. The plaintiff having done so, cannot claim the defendant No. 1 to be in unauthorized use and occupation of the premises and the status of the defendant No. 1 in the premises would continue to be that of a tenant. Moreover the plaintiff ultimately vide letter dated 13th March, 2004 exhibit P3 called upon the defendant No. 1 to vacate the premises and deliver the possession thereof on or before 1st April, 2004. The earlier termination of tenancy aforesaid thus stood waived for this reason also. The suit was thereafter filed on 25th May, 2004. The letter dated 13th March, 2004 (Supra) is shown to have been dispatched vide registered post on 19th March, 2004 and the tenancy would thus stand terminated w.e.f. 15 days of service thereof which as per the AD card exhibit P40 is on 24th March, 2004. The plaintiff would be entitled to mesne profits thereafter only.

13. The next question is that till which date is the plaintiff entitled to mesne profits. As aforesaid the defendant No. 1 immediately on service of summons of the suit at least on 20th July, 2004 notified the plaintiff of its intent to vacate the premises. It was the counsel for the plaintiff who took six weeks time to obtain instruction. In these circumstances, even though the actual delivery of possession is on 31st October, 2004, in my view the plaintiff would be entitled to mesne profits or charges for use and occupation till 20th July, 2004 or maximum till the end of the month of July, 2004 only.

14. The next question to be considered is as to the rate of mesne profits. No evidence whatsoever has been led in that regard. The division bench of this Court in National Radio & Electronic Co. Ltd. v Motion Pictures Association 122 (2005) DLT 629 has held that it is for the plaintiff to lead evidence as to the prevalent rent. In the absence of any evidence having been led by the plaintiff this Court has no option but to award mesne profits at the same rate as of the rent paid last by the defendant No. 1. Thus the plaintiff is found entitled to rent/mesne profits w.e.f. 1st April, 2004 till 31st July, 2004 i.e. for four months at Rs. 1 lac per month total Rs. 10 lac per month. Thus the total sum of Rs. 16 lac is due from the defendant No. 1 to the plaintiff from 1st April, 2003 to 31st July, 2004 towards rent/mesne profits @ Rs. 1 lac per month. Out of the said amount a sum of Rs. 3 lac paid by the defendant to the plaintiff as interest free security deposit and which the plaintiff in the correspondence filed before the court has admitted to have received, is to be

deducted. Accordingly, a sum of Rs. 13 lac is due. The plaintiff as aforesaid shall be entitled to interest at 12% per annum on the said entire amount w.e.f. 90 days after this decree.

15. The last monetary claim of the plaintiff is the value/cost of damages caused by the defendant No. 1 to the premises. The witness of the plaintiff has claimed a total sum of Rs. 8,38,515/- on this account under the heads structural damages, termite infection, plumbing & sanitary work, electrical & power system, swimming pool, garden/external installations, repairing, painting and polishing. I have carefully perused the photographs taken at the time of visit by the court commissioner. The claim under the head structural damages is for repairing the of holes made in masonry work and disfigured structure due to seepage, waterproofing of the terrace due to growth of shrubs and damaged masonry. u/s 108 of Transfer of Property Act, a tenant is expected to leave the premises in the same condition as they were at the time of letting, natural wear and tear excepted. The liability for carrying out major structural repairs is of the landlord. There is nothing to show the state of the premises at the time of letting. The witness of the plaintiff has not even deposed that the plaintiff was from time to time repairing the premises or carrying out any structural repairs thereto. No contract to the contrary has been proved. The seepage as also visible in the photographs is not such which was caused by any act which can be caused by any act to tenant. Rather it is owing to structural defects which cannot be attributable to the tenant. Thus seepage and growth of shrubs is found to be falling in natural wear and tear and the plaintiff is not entitled to cost/values thereof.

16. The same is the position with respect to termite infection. Termite is in the land and it is not as if the defendants infested the premises with termites.

17. The claim under the head plumbing and sanitary is for repair and replacement of systems, filters plant, wash basins, bedet etc. The premises are stated to have been let to the defendant No. 1 in 1996. Even if we believe that paint, new sanitary fittings were provided at the time of inception of the tenancy, in eight years in which the defendant stayed as a tenant, the same would wear out. The cost of replacement thereof also would fall in natural wear and tear and the tenant is not expected to before leaving the premises provide the same with new fittings. The same is the position of the claims under the head electrical and power system, swimming pool, garden external installations, repairing painting and polishing. The plaintiff has not thus made out a case for recovery of any amount under the said head. The photographs do not make out a case of any damage having been caused by the plaintiff to the premises and the same show only natural wear and tear to the premises.

18. The suit of the plaintiff is thus decreed against the defendant No. 1 only for recovery of Rs. 13 lac with interest at 12% per annum w.e.f. 90 days after the decree and till realization. The plaintiff shall also be entitled to proportionate costs from the

defendant No. 1, the defendant No. 1 having left the premises without clearing the arrears of rent. Counsels fees assessed at Rs. 55,000/-.