

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO.No.45/2010**

% *Reserved On: 15.11.2010*
Decided On: 19.11.2010

M/s SONITEK COMPUTERS PRIVATE LIMITED Appellant
Through: Mr.Avinash Sharma, Advocate

Versus

ATMA RAM GUPTA & ORS. Respondents
Through: Mr.Sumit Bansal, Advocate for R 1 and
2
Mr.Abhay Morya and Mr.Ateev Mathur,
Advocates

WITH

FAO.No.47/2010

JANAK SONI Appellant
Through: Mr.Mayank Bansal, Advocate

Versus

ATMA RAM GUPTA & ORS. Respondents
Through: Mr.Sumit Bansal, Advocate for R 1 and
2
Mr.Abhay Morya and Mr.Ateev Mathur,
Advocates

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG,J.**

1. This common order shall dispose of the above-said two FAOs, one filed by M/s Sonitek Computers Pvt. Ltd. (for short "M/s Soni") and the other filed by Janak Soni being aggrieved of the order dated 25.11.2009 passed by the learned JSCC-cum-ASCJ-cum-Guardian Judge (West), Delhi (hereinafter referred to as the "Judge") whereby the learned Judge has disposed of the application filed by the plaintiff/respondent No.1

under Order XXXIX Rule 10 CPC despite pendency of an application filed under Order I Rule 10 CPC by M/s Soni, who claim themselves to be a tenant in the suit property, whereas the appellant Janak Soni was claiming that he was not a tenant in the suit property.

2. It would be appropriate to take note of some orders passed by the learned Judge in this case:-

“16.09.2009

Present : Clerk of the counsel for plaintiff.
Ld. Counsel for proposed defendant.

Adjournment is sought by the clerk of the counsel for plaintiff for want of main counsel who is stated to be busy before the Hon’ble Delhi High Court.

Hence, in these circumstances, put up for the purpose of arguments on the applications U/O I Rule 10 and U/O 39 Rule 10 CPC on 07.01.2010.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
16.09.2009”

“18.09.2009

File taken up today on an application for preponement of the date of hearing.

Present: Ld. Counsel for applicant/plaintiff.

Heard.

In view of the averments made, put up on 05.11.2009 subject to service upon the defendant as well as proposed defendant in person as well as through counsels on filing of PF and RC as well as by Dasti made.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
18.09.2009”

“05.11.2009

Present : None for Plaintiff.

Learned counsel for defendant who submitted that he wants to withdraw his Vakalatnama on behalf of defendant.

Accordingly, Ld. Counsel for defendant is directed to comply with the provisions of Hon’ble High Court rules with respect to service of notice upon the defendant before withdrawing his vakalatnama.

Accordingly, now to come up for F/P on 06.04.2010.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
05.11.2009

Later on

At this stage, Sh. Vikas Shokeen, Ld. Counsel for defendant appeared and submitted that his vakalatnama is there on the court record and he does not want to withdraw the same. He also sought permission to inspect the court file and after inspecting the court file, it is informed by Sh. Vikas Shokeen to the court that due to inadvertence, the Ahlmad has issued the notice to the earlier counsel who was representing the defendant namely Ms.Poonam Lal and Ms. Swati Gautam. In any case, it is submitted by the Ld. Counsel for defendant Sh. Vikas Shokeen that now he is representing the case on behalf of defendant and he is ready to continue with the trial of the case.

However, Ld. Counsel for plaintiff is not available at this time and accordingly, put up on the date already fixed.

At this stage, Ld. Counsel for plaintiff also appeared and requested that in view of urgency already shown by way of moving a preponement application, let the next date of hearing be preponed from 06.04.2010 to 16.11.2009. He also undertake to inform the Ld. Counsel for defendant Sh. Vikas Shokeen regarding the preponement of date from 06.04.2010 to 16.11.2009 against acknowledgment.

Request accepted, let the Ld. Counsel for defendant be informed by the Ld. Counsel for Plaintiff with respect to preponement of date from 06.04.2010 to 16.11.2009. Signatures of the Ld. Counsel for plaintiff also obtained on the order sheet.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
05.11.2009”

“16.11.2009

Present: Ld.Counsel for plaintiff.
None for defendant.
None for applicant.

The matter is today fixed on account of request made by the Ld.Counsel for plaintiff on 05.11.2009 to prepone the matter by giving an undertaking to the court that he will inform the Ld. Counsel for defendant as well as non-applicant with respect to the change of date of hearing.

Today, it is submitted by the Ld.Counsel for plaintiff that he has informed the Ld.Counsel for applicant as well as the defendant the date of hearing as of today, in person as well as by virtue of written communication sent through courier on 07.11.2009 itself.

An affidavit of his own in this respect also stands filed by the Ld.Counsel for plaintiff.

Accordingly, arguments from the side of Ld.Counsel for plaintiff on the application U/O 39 Rule 10 CPC stands heard.

Put up for defendant's arguments at 02.00 pm.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
16.11.2009

02.30 PM

Present: Ld.Counsel for plaintiff.

None for defendant since morning despite repeated calls, it is already 02.30 PM of the court time.

Accordingly, as none is appearing on behalf of defendant since morning despite being informed by the Ld.Counsel for plaintiff with respect to change of date of hearing as of today as already discussed in the order sheet earlier recorded in the day, the court deems it fit to grant one more opportunity to the defendant as well as Ld. Counsel for non-applicant to appear and advance the arguments before lunch session on 23.11.2009.

Accordingly, put up on 23.11.2009.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
16.11.2009”

“23.11.2009

Present: None for the parties.

Accordingly, put up at 02.00 PM today.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
23.11.2009

02.00 PM

Present: None.

As none is appearing on behalf of defendant since morning despite repeated calls to advance arguments in terms of previous order, the opportunity stands closed.

Put up for orders on the application U/O 39 Rule 10 CPC on 25.11.2009.

(VINAY SINGHAL)
JSCC-cum-ASCJ-cum
Guardian Judge(West), Delhi
23.11.2009”

3. On 25.11.2009 the learned Judge disposed of the application under Order XXXIX Rule 10 CPC and kept the order on an application under Order I Rule 10 CPC pending. The order passed on that day, which is the impugned order, reads as under:-

“25.11.2009

Present: None

By virtue of this order, application under Order 39 Rule 10 CPC moved by the plaintiff is being disposed off.

Brief facts necessary for disposal of the application are as under:-

1. The suit property i.e. first floor and the mezzanine floor of the property bearing No.33, Community Centre, Ashok

Vihar, Phase_I, Delhi-52 was let out by the plaintiff to the defendant in the year 1975/1980 at the monthly rate of rent of ₹1750/250 respectively. The rent was enhanced to ₹5000/- in the year 1997 and thereafter from 01.04.2003, the same was agreed to be enhanced to ₹8500/- and an article of agreement dated 10.04.2003 was also executed in between the parties with respect to the said enhancement of the rent.

2. As per plaintiff, the defendant is a habitual defaulter with respect to payment of rent and has not even paid the rent from July, 2003 and onwards. Accordingly, tenancy was terminated by the plaintiff by virtue of legal notice but despite service of the same, the defendant failed to vacate the premises. Hence, the present suit for possession, recovery of arrears of rent/damages of mesne profit stands filed.
3. In defence, it is submitted that the defendant is having no concern in personal capacity to the suit property as the defendant who was the original tenant under the plaintiff qua the suit property, has with the consent of the plaintiff substituted herself with one M/s Jagdamba Educational & Cultural Society in the year 1985 and a no objection certificate dated 18.12.1985 is also stated to be issued by the plaintiff no.1 with respect to the first floor and thereafter, in the year 1989 a part of the first floor was again placed under the tenancy of M/s Sonitek Computer Pvt.Ltd. on issuing of a no objection certificate by the plaintiff no.2. Hence, it is submitted by the defendant that no relief can be claimed against her by the plaintiff.

Both the said M/s Jagdamba Educational & Cultural Society and M/s Sonitek Computer Pvt. Ltd. moved an application U/O 1 Rule 10 CPC to be impleaded as a necessary party on the very same ground/lines of defence taken by defendant in her written statement. The said application is still pending disposal.

4. Now, in this background, the present application U/O 39 Rule 10 CPC stands filed by the plaintiff submitted that pending disposal of the suit, as the property is being used by the defendant at the expenses of the plaintiff, without paying any rent which the plaintiff is otherwise legally entitled, a direction be issued to the defendant to deposit the entire arrears of rent counting from 01.07.2003 and also to pay the future rent till the disposal of the suit.
5. In reply, the grounds taken by the defendant in the written statement, of having no concern with the suit property, is taken in order to aver that the defendant is no liable to make payment of rent in personal capacity.
6. After going through the documents placed on the court record and the averments made in the plaint WS and the application U/O 1 Rule 10 CPC, what emerges is that the defendant is taking the defence that the applicant have

been substituted as a tenant in her place, after obtaining a no objection certificate from the plaintiff and as such since the date of their substitution, the defendant's liability as of tenant with respect to the suit property comes to an end. In this respect the applicant has also placed on record the documents purported to be executed by the defendant no.2 which read as under:-

“This is to certify that I have no objection if M/s Sonitek Computer (P) Ltd. works in the Mezzanine floor of 33, Central Market, Ashok Vihar, Phase-I, Delhi-52”

7. Though, this is not the stage to pass any comments with respect to the genuineness of the said document, however, a bare perusal of the same makes it clear that the same even if assumed to have been issued by the plaintiff (though denied by the plaintiff), does not in any manner accept M/s Sonitek Computer Pvt.ltd. as a tenant in place of defendant. But rather it only grants a permission to M/s Sonitek Computer Pvt.Ltd. to work in the mezzanine floor.
8. Furthermore, the said document does not contain any date on which the same has been executed, hence the said document is of no consequence but rather the rent receipt filed on record by the plaintiff along with other documents showing the defendant as their tenant, are to be prima facie believed in order to come to the prima facie conclusion that the defendant is a tenant under the plaintiff and not the applicant. It is also interesting to note that the applicant firms are not stranger but the family concerns of the defendant herself involving the family members of the defendant, though separate legal entity in the eyes of law.
9. Accordingly, in these circumstances, the court is prima facie of the opinion that the defendant cannot be allowed to enjoy the property without paying the rent at the cost of the plaintiff thereby depriving him of his legitimate dues.
10. Furthermore, as there is nothing on record from the side of defendant as of which period the rent stands paid by her, keeping the date of filing the suit as start of a dispute among the parties, the court hereby direct the defendant to pay the entire arrears of rent @ ₹ 8500/- upto the month of November, 2009 within 30 days counting from today and also to pay the future monthly rent by the 15th of each succeeding month. Ordered accordingly.

Now to come up for arguments on the application U/O 1 Rule 10 CPC of both the applicants on the date already fixed i.e. 06.04.2010.”

4. Learned counsel for the appellant submitted that the orders passed by the learned Judge shows that the impugned order dated

25.11.2009 passed under Order XXXIX Rule 10 CPC as well as the other orders passed for service on the applicant simply through their counsel without issuing actual notice to them is highly improper and cannot stand judicial scrutiny, inasmuch as, despite having fixed the matter for 06.04.2010 subject to service upon the defendant, the learned Judge pre-poned the matter to 16.11.2009 at the instance of the plaintiff/respondent. On 16.11.009 arguments were heard on behalf of the plaintiff/respondent and the matter was adjourned to 23.11.2009 for arguments on behalf of the defendants as well as non-applicant despite non-appearance of the defendant, even though the matter was adjourned by adopting a peculiar procedure in the form of an undertaking by the learned counsel for plaintiff/respondent No.1 that he would inform the learned counsel for the defendant as well as non-applicant regarding pre-ponement of date from 06.04.2010 to 16.11.2009 against acknowledgment, which apparently has not been done. Accepting service only on the basis of an affidavit filed on behalf of the plaintiff without actual notice and hearing arguments only from the side of the respondent on the application under Order XXXIX Rule 10 CPC without the disposal of the application under Order I Rule 10 CPC again shows judicial impropriety in proceeding with the matter by the learned Judge.

5. It is also very surprising that despite no notice of change of date, the matter was kept at 2.30 pm on the same day by the learned Judge and on the same day even though an opportunity was granted to the appellant to argue on 23.11.2009 but no notice has been sent to the appellants despite controversy which has been taken note of by the learned Judge in its order passed on 18.9.2009 and 5.11.2009 which goes to show that apparently an attempt was being made by the respondent/plaintiff to obtain an order on the back of the appellants, who wanted to first argue on their application under Order I Rule 10 CPC and then wanted to argue the application under Order XXXIX Rule 10 CPC by submitting that the tenant was not Janak Soni but it was M/s Soni and also about the rate of rent.

6. Having gone through the order sheets placed on record by the appellant correctness whereof is not disputed by the respondent, I am
FAO 45/2010 & 47/2010

satisfied that the way in which the proceedings have been conducted raises doubt on the fairness of the proceedings.

7. Even on merits, it is interesting to note that this is a suit filed by the respondent No.1 for possession and recovery of arrears of rent. In the suit, respondent No.1 has admitted that initially the said property was let out to the appellant in two parts i.e. one part @ ₹1,750/- p.m. on 09.10.1975 and the second part @ ₹ 2000/- p.m. w.e.f. sometime in 1980. The total rent, thus, payable, as per the averments made in para-2 of the plaint was only to the tune of ₹4,500/- which as per the own showing of the appellant in 1997 was enhanced to ₹5,000/-.

8. The respondent relying upon a letter dated 25.03.2003 based upon a letter written by the appellant Janak Soni claims enhancement of the rent to ₹8,500/- p.m. from 01.04.2003 and further states that at least from July, 2003, the appellant Janak Soni failed to pay rent as per the aforesaid rent.

9. As far as appellant Janak Soni is concerned, in his written statement, he has denied that the rent was enhanced as pleaded. In fact, he also states that the tenancy, in fact, stood transferred to M/s Jagdamba Educational and Cultural Society (for short 'M/s Jagdamba') in the month of October, 1985 insofar as the tenancy of the first floor is concerned which was earlier under the tenancy of Janak Soni who was running a school in the name and style of Nutan Vidya Niketan. He also submitted that after the respondent wanted her son to start a computer company under the name and style of M/s. M/s Soni incorporated on 27.03.1989, the appellants accepted the said company as the tenant with respect to the second portion of the tenanted premises and thus, stated that the relationship of landlord and tenant between the appellant and the respondent Janak Soni came to an end and the tenancy was now in favour of M/s Jagdamba and M/s Sonitek Computers Pvt. Ltd.

10. As regards, the rate of rent, respondent No.1 has denied that he even agreed to pay the rent of ₹ 8500/- as stated in para-3 of the plaint. It has been specifically stated by the said respondent that:-

“3. Para 3 of the application is wrong and denied. The defendant never enhanced the rent nor she was authorized to do so. The contents of the written statement may be read as reply to

this paragraph. It is denied that defendant failed to tender rent with effect From 1st July, 2003 or defendant is liable to make payment of ₹4,59,000/-. As already stated above, the defendant is nothing to do with the premises nor she is in possession of any part of the premises.”

11. In these circumstances, when applications filed by M/s Sonitek Computers Pvt. Ltd. and M/s Jagdamba under Order I rule 10 CPC were pending and the issue with regard to the rate of rent should have been decided only after recording the evidence, passing of an order under Order XXXIX Rule 10 only on the basis of averments made by the respondent @ ₹8500/- p.m. without hearing the appellant supports the submission of the appellant and raises a doubt about the fairness of the proceedings and thus, gives credence to the submissions of the appellant that there was something more what the eye can see in the manner in which the dates of hearing were changed by the Court without notice to the appellants.

12. I may observe that vide impugned order dated 25.11.2009 the learned Judge has directed the respondents to pay the entire arrears of rent @ ₹8500 till the month of November, 2009 within 30 days counting from the date of the order despite observing that the application under Order 1 Rule 10 CPC filed by M/s Sonitek Computers Pvt. Ltd. was yet to be decided and was pending for disposal cannot be sustained.

13. In this regard it would also be appropriate to take note of the observations made by the learned Judge in para-3 of the impugned order whereby the Civil Judge has discarded the correctness of the No Objection Certificate dated 18.12.1985 which shows that the tenancy in question was allowed to be transferred in the name of M/s Jagdamba in the year 1985 by observing that this requires evidence. If the issue with regard to transfer of tenancy was a matter to be decided after recording the evidence, the question of directing payment of rent @ ₹8500 p.m. merely on the assertions made by the respondent in their plaint also could not be justified. Para 3 reads as under:

“3. In defence, it is submitted that the defendant is having no concern in personal capacity to the suit property as the defendant who was the original tenant under the plaintiff qua the suit property, has with the consent of the plaintiff substituted herself with one M/s Jagdamba Educational & Cultural Society in the year 1985 and a no objection certificate dated 18.12.1985 is also

stated to be issued by the plaintiff No.1 with respect to the first floor and thereafter, in the year 1989 a part of the first floor was again placed under the tenancy of M/s Sonitek Computer Pvt. Ltd. on issuing of a no objection certificate by the plaintiff No.2. Hence, it is submitted by the defendant that no relief can be claimed against her by the plaintiff.

Both the said M/s Jagdamba Educational & Cultural Society and M/s Sonitek Computer Pvt. Ltd. moved an application u/o 1 rule 10 CPC to be impleaded as a necessary party on the very same ground/lines of defence taken by defendant in her written statement. The said application is still pending disposal.”

14. It is a settled proposition of law that the justice should not only be done but it also seems to have been done. The proceedings of the court are open for the public scrutiny and must repose confidence in the system. I would say no more. Moreover, taking all these facts into consideration and in the interests of justice, I am satisfied that the order passed by the learned Judge dated 25.11.2009 impugned by the appellants before this Court cannot be sustained. Accordingly, the said order is set aside with a direction to the learned Judge to pass appropriate orders firstly on the application Under Order I Rule 10 CPC and then to hear the arguments on the application under Order XXXIX Rule 10 CPC subject to the orders which may be passed on an application under Order I Rule 10 CPC. FAO Nos. 45/2010 and 47/2010 are accordingly allowed. Trial court record, if any, along with a copy of this judgment be sent to the learned Judge concerned for information and compliance. Parties are directed to appear before the learned Judge on 07.12.2010 and till then, no adverse proceedings will be taken by the learned Judge against the appellant.

CM No.2573/2010 in FAO No. 45/2010

CM No.2614/2010 in FAO No.47/2010

Interim orders are made absolute.

Applications stand disposed of.

MOOL CHAND GARG, J

NOVEMBER 19, 2010

'dc/anb'