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

Date of Decision : 26.02.2021

+ **CM(M) 523/2020**

LPR CO PRIVATE LIMITED Petitioner
Through Mr. Attin Shankar Rastogi, Adv.

versus

ORIENTAL CARBON AND CHEMICALS LTD... Respondent
Through Mr. Rohit Gandhi, Mr. Nitin Mishra &
Mr. Prateek Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This hearing has been held by video conferencing.
2. This petition has been filed by the petitioner challenging the order dated 05.09.2020 passed by the learned Additional District Judge-07 (Central District) in Suit No.166/2020, titled *M/s. Oriental Carbon & Chemicals Ltd. v. M/s. LPR Co. P. Ltd.*, dismissing the application of the petitioner herein for leading additional evidence of one Mr. Naresh Kumar Ladar, Architect, and for summoning him as a witness.
3. The subject suit was filed by the respondent herein as a tenant in the property, being first and second floor of Publicis House, 1-2,

Signature Not Verified

SHALOO BATRA



Aram Bagh, Community Centre, Panchkuian Road, New Delhi-110055, praying for the following prayers:

“A. Pass a decree of recovery against the Defendant and in favour of the Plaintiff for a sum of Rs.51,64,041/- (Rupees Fifty One Lacs Sixty Four Thousand and Forty One only).

B. Pass a decree against the Defendant and in favour of the Plaintiff directing the Defendant to pay the above sum of Rs.51,64,041/- alongwith pendente lite and future interest @ 18% per annum from the date of institution of the present suit till its realization thereof.

C. Pass a decree of decree of recovery against the Defendant and in favour of the Plaintiff for a sum of Rs. 23,008/- (Rupees Twenty Three Thousand and Eight only) per month from the date of suit and till the date the Plaintiff has to bear the expenses of Security Guard.

D. Pass a decree of mandatory injunction against the Defendant directing the Defendant to take over the possession of the suit premises from the Plaintiff i.e. First Floor and Second Floor of Publicis House situated at 1-2 Aram Bagh Community Centre, Panchkuian Road, New Delhi-110055 having super area of 2676 square feet respectively at each floor.

E. Award costs of the suit in favour of the Plaintiff.”

4. It was the grievance of the respondent that the petitioner/ landlord was not accepting the surrender of the leased premises and was not refunding the security amount furnished by the respondent at the time of lease.

5. Upon filing of the suit the respondent again offered the possession of the tenanted premises to the petitioner, however, the



petitioner stoutly refused to accept the same. Finally, by an order dated 03.11.2018, the learned Trial Court allowed the respondent to deposit the keys of the tenanted premises with the learned Trial Court, granting liberty to the petitioner herein to take the same through an authorized person.

6. The learned counsel for the petitioner submits that the keys were taken from the learned Trial Court on 17.11.2018.

7. Vide order dated 08.07.2019, the following issues were framed by the learned Trial Court:

“1. Whether the plaintiff is liable to bear expenses in restoring the suit property back to the state in which it was leased out to the plaintiff? OPD

2. Whether the defendant is entitled to deduct the money that it may be required to spend in bringing the suit property back to its original habitable condition from the dilapidated condition? OPD

3. Whether plaintiff is entitled to the decree of recovery of Rs.51,64,041/-? OPP

4. Whether the plaintiff is entitled to the interest on the said amount? If so, at what rate and for what period? OPP

5. Relief.”

8. The parties thereafter led their evidence and the same was closed vide order dated 21.10.2019.



9. On the same date, the petitioner herein had filed an application under Section 45 of the Indian Evidence Act, 1872 praying for the appointment of an Expert Witness to visit the tenanted premises and make a report for an estimate of repairs and finishing of the tenanted premises. Though the learned Trial Court took note of the filing of the said application in its order dated 21.10.2019, the evidence of the petitioner was closed on the statement made by the learned counsel for the petitioner. The order reads as under:

“21.10.2019

Present Sh. Rohit Gandhi, counsel for plaintiff.

Ld. Counsel for defendant.

DWI Sh. Vishal Sharma in person.

Plaintiff has not summoned the witness despite giving opportunity. Hence PE is closed.

Receipt of cost deposited with DLSA filed.

Taken on record.

An application u/s 45 of Evidence Act R/w Section 151 of CPC has been filed by defendant for appointment of expert person for taking estimate of repairing and furnishing of the suit property.

Ld. Counsel for defendant has filed affidavit of DWI Vishal Sharma. He is examined, cross-examined and discharged. Ld. Counsel for defendant closed DE.

Put up for final arguments on date already fixed i.e. 19.11.2019.”

10. It is only on 22.07.2020 that the petitioner thereafter filed the present application praying for leave to produce the additional evidence in form of an Architect, who it claims to have appointed in



November, 2019 to make an inspection and give a report on the alleged defects in the tenanted premises and the estimated cost of the repairs therein.

11. The said application was dismissed by the learned Trial Court by the Impugned Order, observing as under:

“The defendant has filed the Written Statement on 22.04.2017. As submitted above, the case of the defendant is that the plaintiff has caused damages to the suit property. The perusal of Order dated 26.04.2017 reveals that the Local Commissioner has been appointed by the Ld. Predecessor of this Court on the application moved by the plaintiff but in the presence of the parties. If the defendant was so sure about the substantial/structural damages caused to the premises in question by the plaintiff then the defendant, at the time of appointment of Local Commissioner on 26.04.2017, could have pressed upon to the predecessor of this Court that the Expert/Architect be appointed as Local Commissioner instead of an Advocate. The relevant portion of the order dated 26.04.2017 is reproduced as under:-

“..I hereby appoint as Local Commissioner in the case with the directions to visit the suit property/premises..... with 15 days after due notice to parties/counsels, on any day convenient to the Local Commissioner/the parties/the parties. Ld. Local Commissioner is further, directed to prepare rough site plan of the suit property and also an inventory of the articles/goods found lying in the suit premises and before the commencement of his proceedings, the Ld. Commissioner would serve a written notice of the appointed date and time of his inspection to the counsels for the parties. The Ld. Local Commissioner is further directed to substantiate his report and findings with necessary

documentary evidence/videography/photography and other reliable material and the expenses, if any for this shall be borne, by the plaintiff. The report of the Local Commissioner shall incorporate the details of defects/deteriorations etc., if any, found in the suit premises, at the time of his inspection and all such defects shall be pointed out in the report and be appropriately substantiated by the documentary material.....”

If, the defendant was aggrieved from the said order then the defendant could have filed the review application at that time and the defendant during the said application could have argued that instead of an Advocate an Expert/Architect be appointed. The Ld. Local Commissioner has filed his detailed report on 04.07.2017. The report of Local Commissioner reveals that the defendant's representative was present at the time of Local Commission. The defendant itself has filed an application under Section 151 CPC for taking the possession of the premises in question and the same was taken for hearing on 03.01.2018 and notice was issued to the plaintiff on the said application for the date of hearing of 13.02.2018.

On 31.05.2018, Ld. Counsel for the plaintiff has brought the keys of the premises in question and both the parties have reached to some agreement qua the interim arrangement regarding the property. It has been agreed between the parties that the plaintiff will hand-over the keys in the Court on the next date of hearing and the defendant will either deposit an FDR of Rs.51,61,041/- in the name of the Court or if they could not arrange the said money, then they will give the premises on rent and will deposit the rent before this Court till disposal of the suit or till the amount reached upto security amount, as claimed by the plaintiff. It is further agreed that till that time, the defendant will not sell or permanently dispose

off the suit property and only transfer the property for the purpose of lease not for a period more than three years.

Ld. Predecessor of this Court was pleased to pass the Order dated 21.07.2018 and the relevant portion of the same is reproduced as under:-

“Ld. counsel for the plaintiff submits that plaintiff has brought the keys of the premises and produced the same but the caretaker of defendant company submits that counsel for the defendant is out of station and seeks adjournment.

...Since the plaintiff has produced the keys of the premises, therefore from today it shall be presumed that plaintiff has handed over the possession of the suit property to the defendant. As far as period for which plaintiff is alleging that he has vacate the premises i.e. 31.12.2016 whereas disputes by the defendant, the said dispute will be decided at the time of final judgment. The keys are returned to the plaintiff. The same be brought on the next date of hearing.... ”

Ld. Predecessor of this Court was pleased to pass the Order dated 25.08.2018 and the relevant portion of the same is reproduced as under:-

“Ld. counsel for the plaintiff submits that he has got the keys of the premises but the defendant has not deposited the amount of Rs.51,64,041/- in the shape of FDR as agreed between the parties on 31.05.2018. Director of the defendant submits that his counsel is not available today and seeks adjournment. ”

Ld. Predecessor of this Court was pleased to pass the Order dated 03.11.2018 and the relevant portion of the same is reproduced as under:-

“.....Considering the aforesaid facts and circumstances of the case that plaintiff has given the security amount of Rs.51,64,041/- to defendant at the time of taking the suit premises on lease and same has not been refunded by the defendant despite vacating the suit property, probably on the ground that a considerable amount will be spend on restoring the premises which has been disputed by the plaintiff, in such circumstances, in my view, it is necessary to secure the aforesaid amount of Rs.51,64,041/- which is a huge amount, however it would not be appropriate to attach the property for this purpose and it would be appropriate to only to restrain the defendant from selling the suit property till the security amount is deposited by the defendant in the Court in the shape of FDR or other kind of security is furnished. Hence I order that defendant will not sell or create any third party interest in the suit property except leasing out the suit property. Further, in case the property is lease out then rent will be deposited in the Court till the security amount is recovered. Application U/o 38 Rule 5 CPC read with Order 39 Rule 1&2 CPC and application U/s 151 CPC are disposed off accordingly.”

The keys of the premises were handed-over to Sh. Kailash Chander Swain AR of the defendant, in terms of order dated 7.11.2018. It is important to note that the defendant is in possession of the premises in question since 17.11.2018. However, the defendant has filed an application under Section 45 of the Indian Evidence Act on 21.10.2019 i.e. approximately after 11 months from taking the possession of the premises in question. Although, the said application was filed, but the DW-1 was examined on the same date i.e. 21.10.2019 and he was cross-examined and discharged. Furthermore, the defendant has closed its evidence instead of pressing the said application under Section 45 of the Indian Evidence

Act. The defendant after 11 months of taking the possession of the premises in question has come out with the aforesaid application under Section 45 of the Indian Evidence Act. After closing the evidence of DW-I, the natural consequences arises that the said application under Section 45 of the Indian Evidence Act was not pressed by the defendant. Otherwise, the defendant ought to have argued the application and submitted before the Court that the defendant wants to lead further evidence in view of the said application. After closing the evidence, the matter was fixed on 19.11.2019 for final arguments. The Ld. P.O. was on leave on that day and the matter was adjourned to 19.12.2019. On 19.12.2019, Ld. Proxy counsel had appeared on behalf of the defendant and he had submitted before the Ld. Predecessor of this Court that the main counsel is not available on that day to address final arguments. The said adjournment was strongly opposed by Ld. Counsel for the plaintiff, however, in the interest of justice, one last & final opportunity was granted to the defendant by the Ld. Predecessor of this Court. On 01.02.2020, the matter was received by way of transfer by this Court and the matter was adjourned for final arguments on 18.04.2020. Thereafter, due to COVID-19 pandemic, the working of the Courts was suspended.

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In my considered view, in case, the defendant was intending to appoint any expert person or an Architect for inspection of the property in question, then it ought to have been done prior to taking of the possession of the premises in question. After taking the possession of the premises from the Court and after about one year of the possession, the defendant and that too at the time of leading DE, has filed an application under Section 45 of the Indian Evidence Act. Further, the defendant itself got examined DW-I, on the said date of 21.10.2019, when the said application under Section 45 of the Indian Evidence

Act was filed and thereafter, the defendant has closed its evidence. The defendant has not pressed the said application on 21.10.2019 and thereafter, the matter was fixed for final arguments thrice.

During the virtual hearing, the defendant has changed its counsel and thereafter, the present application has been filed. The Inspection Report, which is relied upon by the defendant, in the present application is also of November, 2019 i.e. after one year from taking the possession of the premises in question by the defendant. The Local Commissioner was appointed by the Court in the presence of the parties. The Local Commissioner has inspected the premises in the year 2017 itself in the presence of the parties. The defendant has not filed any application objecting to the report of Local Commissioner at any point of time. The Local Commissioner has already placed on record the photographs of the premises in question. In case, the defendant was having any grievance regarding the report of Local Commissioner, the defendant could have filed the objection in the form of application but the same was also not filed. The defendant has also not even taken any recourse for the cross-examination of the Local Commissioner by invoking the provisions of Order 26 Rule 10 CPC. The report of Local Commissioner was filed in the year 2017. The said report remained uncontroverted and unchallenged till date, except the bald averment in the rejoinder to reply to present application and that too contrary to the records. The defendant, after one year of taking possession of the premises in question, wants to rely upon and place on record the architect report and in my considered view enough water was already been flown during the said one year as the premises in question was in the exclusive possession of the defendant.

(Emphasis supplied)

12. The learned counsel for the petitioner has submitted that as the dispute between the parties is with respect to the nature of the premises that was handed over by the respondent to the petitioner, the additional evidence would be required for the complete adjudication of the said dispute. The learned counsel for the petitioner submits that such additional evidence can be led even at the stage of an appeal. In this regard, he places reliance on the judgment dated 20.08.2014 of this Court passed in CM(M) 1184/2010, ***Bhagwant Singh Deceased through LRs v. Gurcharan Kaur & Anr.***

13. On the other hand, the learned counsel for the respondent submits that the present petition highlights the complete abuse of the process of law indulged in by the petitioner. He submits that at first, the petitioner delayed taking over the possession of the tenanted premises; the same was to be handed over to it only through the process of the Court. Thereafter, the learned Trial Court was pleased to appoint a Local Commissioner vide order dated 26.04.2017, whose report was to specifically incorporate the details of the defects/deteriorations, if any, in the property in dispute. The Local Commissioner gave his report dated 03.07.2017 which was never put to challenge by the petitioner. The petitioner in fact, closed his evidence on 21.10.2019 and the application in question has been filed only on 22.07.2020, when the suit was being listed for final hearing. The application is, therefore, filed only to delay the adjudication of the suit.



14. I am in agreement with the submissions made by the learned counsel for the respondent. In the present case, the learned Trial Court vide order dated 26.04.2017 had appointed the Local Commissioner *inter-alia* to make a report giving details of the defects/deterioration found in the suit premises. The petitioner did not also raise any objection to the appointment of an Advocate as opposed to an Expert/Architect at the time of appointment of Local Commissioner. The Local Commissioner had filed his report dated 03.07.2017 before the Court. The said report remained unchallenged by the petitioner. The issues were framed by the learned Trial Court on 08.07.2019. Clearly, the onus of proving any defects/damage in the suit property lay solely on the petitioner herein. The petitioner has led its evidence and closed the same as recorded in the order dated 21.10.2019. The application in question was filed only on 22.07.2020. Though the petitioner claims that it had filed an application under Section 45 of the Indian Evidence Act, 1872 seeking appointment of an expert witness, it is not shown that the said application was ever pressed before the learned Trial Court.

15. The learned Trial Court has rightly exercised its discretion in not allowing the clock to be put back and the trial be reopened in form the applications now filed by the petitioner.



16. In view of the above, I find no infirmity in the order impugned in the present petition. Accordingly, the petition is dismissed with costs quantified at Rs.50,000/-.

NAVIN CHAWLA, J

FEBRUARY 26, 2021/Arya

