

intercraft Ltd. Vs. Capital Boot House

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Court : Delhi

Decided On : Aug-24-1995

Reported in : 1995IIIAD(Delhi)798; 59(1995)DLT774; 1995(35)DRJ368

Judge : S.D. Pandit, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 3

Appeal No. : Interim Application Nos. 8829, 8976 and 11883 of 1994 and Suit No. 2199 of 1994

Appellant : intercraft Ltd.

Respondent : Capital Boot House

Advocate for Pet/Ap. : P.N. Lekhi,; G.S. Sistani,; H.P. Singh,;

Judgement :

S.D. Pandit, J.

(1) This application is filed by the defendant under Rule 4 of Order 39, Civil Procedure Code.

(2) Suit No.2199/94 is filed by the plaintiff Intercraft Ltd. to get a decree of perpetual injunction to restrain the defendants from interfering in the peaceful possession of the shop bearing No.B-24, Cannaught Place, new Delhi and to

further restrain them from disturbing the plaintiff in carrying on the business in the said shop and to get a declaration that he is lawful tenant of the defendants.

(3) Plaintiff has come before the Court alleging that plaintiff is a public limited company and is function under the name and style of Intershoppe. They are manufacturers and retailers of garments in India. They deal in readymade garments and related accessories. They have got international market and have got a very high reputation not only in India but throughout the world. They were interested in opening a retail outlet in Cannaught Place in the year 1980. At that time the defendants were also interested in giving their shop No.B-24, Cannaught Place, New Delhi, on rent. But the said shop, which was occupied and was in possession of the defendants was in their possession and occupation as the tenants and, therefore, in view of the provisions of the Delhi Rent Control Act it was not possible to enter into a contract of sub-lease. therefore, in order to avoid the clutches of the Rent Act they prepared a document showing that the transaction between the parties was that of principal and agent and they were maintaining record and documents in the nature of a contract of agency, but as a matter of fact, plaintiff got the possession of ground floor portion of the shop bearing No.B-24, Cannaught Place, New Delhi and consisting of ground floor and mezzanine floor. The defendants had their shop by the name of Capital Boot House and they were carrying on their business in the mezzanine floor whereas the plaintiff started its business under the name and style of Intershoppe in the ground floor. However, in order to avoid any record of sub-lease created by the defendant in favor of the plaintiff the documents executed between them were of an agreements of agency and in the light of the said documents the record was being maintained. Initially, the agreement was executed on 15.9.1980 mentioning therein that it was for a period of three years. Thereafter, there were execution of documents on 16.9.1983, 19.9.1986, 16.9.1989 and 19.9.1991. Thus, from 1980 till the date of the suit plaintiffs are in possession of the said ground floor of shop No.B-24, Cannaught Place, New Delhi and they are running their business under the name and style of Intershoppe. After the expiry of the time mentioned in the last document through negotiations and talks took place between the parties for executing another fresh document, those talks failed. Thereafter on 27.9.1994 one of the defendants' partners, viz. Sukhinder Pal Singh, visited the plaintiff's shop

and created a scene by using unparliamentary language to the staff and threatened to put his locks to the premises and not to allow them to make use of the premises and to forcibly dispossess them and, therefore, the plaintiff filed the present suit on 3.10.1994.

(4) Along with the suit the plaintiff file an interim application bearing IA.No.8829/94 seeking ad- interim injunction. On the said application on 3.10.1994 my learned predecessor was pleased to pass an order directing the parties to maintain status-quo and an order to issue notice of the said application to the defendant was also passed. My learned predecessor was further pleased to appoint a Deputy Registrar of this Court as a Local Commission to visit the premises in question and to submit his report as to what extent the business was being carried on by the plaintiff in the shop.

(5) On 7.10.1994 the plaintiff moved another interim application viz. IA.8976/94 alleging therein that the parties of defendant No.1 were threatening to dispossess them and were disturbing the smooth running of their business in the suit premises and, therefore, an ad-interim injunction should be issued by clarifying the order of status-quo. My learned predecessor was pleased to pass an order on that application on the same day, i.e. 7.10.1994, directing that the defendants or their agents, servants or employees should not interfere or cause hinderance in the running of the shop by the plaintiff.

(6) Thereafter, the defendants have appeared in this Court and they have moved this application, viz. IA.11883/94 under Rule 4 of Order 39, Code of Civil Procedure, contending therein that the plaintiff has obtained orders in its favor without any prima facie case and that ex-parte orders were obtained by misrepresentation. The defendants were all along in possession and occupation of the said shop. On 3.10.1994 plaintiffs forcibly took the possession of the shop in question by breaking open the locks put by the defendants by committing criminal trespass as well as dacoity. Plaintiffs were never in possession and occupation of the said shop prior to 3.10.1994. The said shop was in exclusive possession of the defendants. therefore, in these circumstances, the orders passed on 3.10.1994 and 7.10.1994 be vacated and the plaintiffs be ordered to restore the status-quo

ante to the said orders.

(7) Before going into the merits of this application filed under Rule 4 Order 39 for vacating the orders passed on 3.10.1994 and 7.10.1994 it would be appropriate and proper to deal with one of the objections raised by learned senior counsel appearing on behalf of the plaintiff for hearing and deciding this application. He contended before me that he had already filed application bearing IA.No.2402/95 under Order Vi Rule 16 read with Rule 2 to struck down the portions of the written statement filed by the defendants and directing them to file a proper written statement as per the provisions of Order Vi of the Code of Civil Procedure. He contended before me that my predecessor has passed an order on 19.12.1994 to hear the said application by him and to decide the contention raised by him and, therefore, I should first decide IA.2402/95 before considering and deciding this application filed by the defendants.

(8) In support of this contention Mr. Lekhi drew my attention to my learned predecessor orders passed on 19.12.1994. It is true that in the said order dated 19.12.1994 my learned predecessor had said that the arguments on the said application under Order 6 are to be heard on 9.2.1995. The order sheet shows that on 9.2.1995 arguments were heard in part in IA.11883/94 and IA.11885/94 and, thereafter, interim application viz. IA.2402/95 was filed by the present plaintiff on 9.3.1995 as per the orders of my learned predecessor passed on 15.2.1995. therefore, in these circumstances, Mr. Lekhi is not justified in urging and contending that his application viz. IA.2402/95 should be decided before deciding this application under Rule 4 of Order 39 of the Code of Civil Procedure.

(9) It is urged before me by Mr. Lekhi that I cannot sit over the orders of my learned predecessor as an Appellate Court and follow a different procedure by giving preference to this application and I must presume that my learned predecessor knows the law of ad interim injunction and her orders of ad-interim injunction in question must have been passed on account of her finding a prima facie case in favor of the plaintiff. It is true that I cannot make any comment over the orders passed by my learned predecessor and I cannot consider that order as an Appellate Authority. But I would not hesitate to say and observe that I am

induced to take into consideration and decide this application No.11883/94 before considering and deciding the application of the plaintiff, i.e. IA.2402/95 in view of the legal position as regards the ad-interim injunction.

(10) Rule 3 of Order 39 of the Code of Civil Procedure has been amended by the amending Act of 1976 and that amendment has come into effect on 1.2.1977. As per the said amendment a proviso is added to Rule 3 of Order 39 and that proviso clearly lays down that in case if the Court proposes to grant an injunction without giving notice of the application to the opposite party the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. This proviso added to Rule 3 of Order 39 has been held to be a mandatory provision in the case of Shiv Kumar Chadha Vs . Municipal Corporation of Delhi : [1993]3SCR522 . The orders passed on 3.10.1994 as well as on 7.10.1994 do not show that there is compliance of this proviso to Rule 3 of Order 39. By the Amending Act of 1976 Rule 3A has been added and the said Rule 3-A make it mandatory for a Court to dispose of the application for injunction within 30 days when an injunction has been granted without giving notice to the opposite party. thereforee, I feel that in view of non compliance of the said mandatory provision of Rule 3 and the provision of Rule 3-A and in order to avoid creation of ill feelings regarding the administration of justice in the minds of litigants it is my duty to dispose of this application by giving it top priority over the other applications as it is a mandate of the law.

(11) thereforee, in view of the discussion above, I hold that the consideration and disposing of this application before disposing of the application of the plaintiff under Order 6 Rules 2 & 16 is quite justified. The said application is also being disposed of today only simultaneously by a separate order.

(12) It is the contention of the defendants in the written statement that the plaintiff's plea that the real transaction between the parties is something else than what the documents between the parties are showing is hit by the provisions of Sections 91 and 92 of the Evidence Act. It is the contention of the learned counsel for the defendants that the claim of the plaintiff that real transaction between the parties was not that of a Principal and Agent is not tenable in law in view of the admitted

execution of documents of Agreement of Agency between the parties. If the provisions of Sections 91 and 92 of the Evidence Act are considered then it would be quite clear that what is prevented by the said Sections is the producing of any evidence or raising a contention to contradict, vary or falsify the terms of the document. The expression 'terms' in Sections 91 and 92 of the Evidence Act must relate to the statements, assertions or representations contained in the written contract which relate to the subject matter of the contract and to something to be done or not to be done under the Contract and has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract. It is settled law that extrinsic evidence is admissible for the purpose of showing the circumstances in which a document came to be prepared and executed with a view to arrive at the true effect of the transaction to which the document relates. This position is made quite clear by the Supreme Court in the case Smt. Krishnabai Bhritar Ganpatrao Deshmukh Vs . Appasaheb Tuljaramarao Nimbalkar & Ors. : [1980]1SCR161 , wherein the following principles are laid down:

'SECONDLY, there is ample authority for the proposition that when there is a dispute in regard to the true character of a writing, evidence de hors the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs.'

(13) In two earlier decisions of Abdulla Ahmed Vs . Animendra Kissen : [1950]1SCR30 and The Godhra Electricity Co.Ltd. and Anr. Vs . The State of Gujarat and Anr. : [1975]2SCR42 it has been held by our Apex Court that the external evidence to determine the effect of an instrument is permissible where there is a doubt as to its true meaning. Evidence of the acts done under it is a guide to determine the intention of the parties in such a case.

(14) Thus, I hold that the claim of the plaintiff that the real transaction between the parties is not represented by the documents executed between them is not hit by the provisions of Sections 91 and 92 of the Evidence Act.

(15) I have to make it quite clear that at this juncture I am only considering the claim of ad-interim injunction and I have to consider as to whether the plaintiff is

prima facie proving his claim or not. At this juncture I am not to go into details. The circumstances, the evidence and the evidentiary value of the documents produced on record is to be considered in the final trial of the suit so as to arrive at a final conclusion regarding the truthfulness of the claim of the parties. Similarly, the observations or considerations which I would be making while considering the claim of the plaintiff or the defendants are not final and conclusive. They are only for the purpose of determining as to whether the plaintiff has proved a prima facie case to get the order in question and my observations and findings are not conclusive and they are not finally binding on them at the final trial on the material and evidence on record. It is quite possible that I myself or my successor might come to a different conclusion on the same circumstances and material or on account of additional material and evidence that may be produced by the parties. thereforee, making this position quite clear, I proceed to consider the material on record.

(16) Admittedly, the premises in question, i.e. B- 24, Cannaught Place, New Delhi, were in occupation and possession of the defendants as tenants prior to 1980. It is also an admitted fact that the said building and premises are coming within the purview of the Delhi Rent Control Act. As per the provisions of Section 3(c) and Section 48(2) of the Delhi Rent Control Act the creation of a sub-lease by the tenant is preventive and punitive. thereforee, when it is an admitted fact that the defendants were the tenant in the premises in question even if there happened to be an agreement of sub-lease between the defendants and the plaintiff, they would never execute a document of sub-lease because to execute such a document may cause permanent loss to both of them and by creation of such a document not only the plaintiff will lose the possession of the premises but the defenant would also lose the same. thereforee, in these circumstances, the claim of the plaintiff could not be rejected or disbelieved merely because there is no document of sub-lease or a lease between the plaintiff and the defendants.

(17) If the written statement of the defendants is considered, it would be quite clear that when the plaintiff approached the defendants the plaintiff wanted to have an Agreement of Franchise and as the concept of franchise agreement was not known in India an Agreement of Agency has been executed. That would be quite

clear from the contents of para 75 of Part Iv of the written statement filed by the defendants. The said para reads as under:

'IT is in this background that the origin of the agreement in question lay and although the original American form had many facets thereof the one in question was adjusted itself to meet the exigencies of the situation. Since the term 'franchise' was not by then known to the Indian Legal system, the terminology used in the agreement was 'Principal-agent'.

(18) Even the witness for the plaintiff Mrs. Gita Singh who has filed her affidavit at page Ex.4.135 makes a reference to this Franchise Agreement as the nature of transaction between the plaintiff and the defendants. Thus, even according to the defendants, the transaction between the parties was not a pure and simple transaction between the Principal and Agent.

(19) The documents which were executed between the parties, if read carefully and between the lines, then there is no difficulty in coming to a prima facie conclusion that real transaction between the parties was not that of a Principal and Agent. For that purpose I will quote here the terms Nos.3, 4, 7, 8, 10, 15, 16, 20, 21 and 22 of the Agreement dated 19.9.1991, which is the last Agreement between the parties:

'3.That the Agency will be entitled to get commission on the Sales calculated at the rate of 7.5% on sales conducted in the above said premises on the following rates:-

A.)15% commission will be paid to the Agent on sales up to Rs.3.00 lacs (Rupees three lacs) per month.

B.)7.5% commission shall be payable to the Agent on the balance sale.

4.If the sale is less than six and a half lacs per month, the agents will have the sole right to cancel the agency with a notice of one month to the principals without assigning any reasons.

7. That the premises mentioned above in which the showroom and office of the Agent will function shall be under the exclusive control and possession of the Agent and the staff working in the showroom shall be employed and be terminated by the Agent and they shall be on the pay roll and under the management of the Agent.

8. The Agent will employ staff and disburse salaries to the extent of Rs.2,000.00 (Rs. two thousand only) in all per month but if the Principals desire to boost the sale and feel it is necessary that the Agent employ more hands for the said purposes, the Principals shall reimburse any amount extra to be paid above Rs.2,000.00 in the shape of wages, provident fund, bonus, gratuity and other allowances, as help to the Agent for the mutual benefit of both. The entire staff shall work in the premises on the terms and conditions of service made applicable to them by the Agent, and Principals shall not interfere in any manner in the management and display of goods.

10. That the premises of the showroom and the office of the Agent on the ground floor in the above mentioned premises shall always be in exclusive possession of the Capital Boot House and the keys shall be with the agent who will have the right of opening the showroom and closing the same on any day and at any time by himself or through his management.

15. The Agent will not be held responsible by the Principals for any loss caused to the goods due to accident, rioting, fire, theft, civil commotion and damage caused to the goods or due to any other reason. The goods shall, however, remain insured as stated in the preceding paragraph No.6.

16. That the premises in which the showroom shall function shall remain in sole custody, actual possession and legal possession of the Agent at all times and the Principals shall not stake any claim, right, title or interest in any manner by any method with respect to the premises in question.

20. The principal will reimburse to the agent the cost of renovating the present air conditioning plant on the premises.

21. That under the rules and laws applicable to the business in the territory of Delhi, the agent shall be the occupier and owner of the premises but all liabilities and responsibilities of the extra staff which are employed by the agent shall be under all acts applicable to such employees shall be of the Principals.

22. That the principals or his other agents except the Capital Boot House 'PROPRIETORS' shall have no right to conduct any other business in the name of Capital Boot House in the territory of Delhi and they will also not carry out any other work within the premises 24-B, Connaught Place, New Delhi. No person of the principals will conduct any business such as sale, receipt of prices, packing and any other auxiliary work within the premises 24-B, Connaught Place, New Delhi.'

(20) If the above terms of the last document which took place between the parties are taken into consideration then it becomes very difficult to accept the claim of the defendants that the defendant No.1 was simply an agency and plaintiff was a Principal for the business running in the shop in question. The term No.4 lays down that if the monthly sale happened to be of less than Rs.6.5 lakhs then the agent will have the sole right to cancel the agency. When it is the claim of the defendant that defendant was the Agent and defendant was to, in fact, effect the sales then there was no question of putting that condition. That condition is put there in order to assure the defendant the payment of an amount of Rs.57,500.00 for the use of his premises for running the shop. therefore, he was given the power to cancel the transaction between the two if he happened to get less than Rs.57,500.00 per month. It is also very pertinent to note that the plaintiff was to pay the salaries of all the employees working in the said shop. The documents produced by the plaintiff on record at pages 3.024, 3.037, 3.046, 3.047, 3.048, 3.051 and 3.052 clearly show that the plaintiff was reimbursing the defendant for the amounts paid towards the salaries, contribution towards Esi Scheme, contribution towards the Provident Fund, payment of Sales Tax, payment of Income Tax of the employees, the incentive given to the employees and conveyance allowance given to the employees. If all these payments which were being made by the plaintiff are taken into consideration then it becomes very difficult to hold that the employees were exclusively the employees of the

defendant and that the plaintiff had no concern with the said shop. If terms Nos.10 and 16 are read together, then it would be quite clear that those terms are incorporated in the said Agreement in order to create documentary evidence to show that there is no actual parting of possession or subletting by the defendants to the plaintiff. Then the term No.21 says that if any member of the staff had to be appointed as per the laws applicable to the business in the territory of Delhi then the responsibility and liability of the said staff will be that of the plaintiff. If at all the plaintiff was merely the Principal and defendant was an Agent and defendant was carrying on the business for himself, then there is no question of putting that condition because when the agent was to carry out the business and when it was his business as per the claim of the defendant/agent, how could it be said that the staff to be appointed for his business under the law should be at the cost of the plaintiff and plaintiff would be responsible for the non-appointment of the said staff as per the law. No doubt the above quoted terms as well as the other terms of the Agreement nowhere specifically mention that a sub-lease is created in favor of the plaintiff. It also nowhere mentions that defendants have parted with the possession of the shop premises and that the plaintiff is to be in exclusive possession of the shop premises. But the absence of that term in the Agreement is quite obvious because when the plaintiff as well as the defendants wanted to avoid the clutches of the Delhi Rent Control Act they would not create documentary evidence to show that the defendants have parted with the possession of the premises and the premises were in exclusive possession of the plaintiff. therefore, in these circumstances, the non-mentioning of the fact of putting the plaintiff in exclusive possession of the shop premises could not be taken into consideration for holding that the claim of the plaintiff could not be believed and accepted even prima facie.

(21) The plaintiffs were not only to bear the expenses of the staff working in the Intershoppe but they were also to bear the expenses towards electricity charges, water charges, telephone bills, furniture and furnishing of the shop. It is very pertinent to note that those expenses were not to be shared by the plaintiff Along with the defendant but those expenses were exclusively to be borne by the plaintiff alone.

(22) Mr. Arun Mohan, learned senior counsel appearing on behalf of the defendants, vehemently urged before me that the defendant was paying the Sales Tax on the sale proceeds which took place in the shop in question and for that purpose he drew my attention to the various documents produced by him to show payment of sales tax. But, as stated earlier, the documents produced by the plaintiff clearly show that the defendant was getting back all the payments made by him towards the sales tax from the plaintiff. thereforee, payment of sales tax by the defendant is of no consequence. If at all the sales effected in the said shop were of the defendant then there was no question of asking the plaintiff to reimburse him the amount paid by him towards the sales tax. The reimbursement of the payment towards the sales tax, Esi, provident fund scheme, etc. by the plaintiff indicates and shows that the business in the shop was exclusively of the plaintiff and that defendant had no concern with the same except getting the percentage over the sale on account of the use of his premises.

(23) It has been vehemently urged before me on behalf of the defendants that on 3.10.1994 plaintiff forcibly took the possession of the premises in question and till then the defendants were in exclusive possession of the premises in question. He has invited my attention to the averments made by him in the written statement to that effect. In the written statement it has also been further alleged that after forcibly taking the possession of the premises in question on 3.10.1994 the plaintiff has removed all the record, documents, account books and other record and that they have committed a big robbery and dacoity. But that claim of the plaintiff committing robbery and their taking away the documents is falsified by the conduct of the defendants themselves. The defendants themselves have produced numerous documents and if at all the claim of the defendants was true and correct one then those documents could not have come from the custody of the defendants. The very fact that those documents are coming from the custody of the defendants prima facie falsifies their claim that the plaintiffs have taken away all the important documents after forcibly taking the possession of the shop on 3.10.1994.

(24) Learned counsel for the defendants also referred to the various affidavits filed by the employees and contended that those employees are saying that they were

the employees of the Capital Boot House and Mann Brothers, proprietors of Capital Boot House were their employers. No doubt as per the record Capital Boot House was making payment to the employees working in the said Intershoppe shop but the said payment was being made for and on behalf of the plaintiff as ultimately it was the plaintiff who was paying the salaries, wages and other allowances of the employees. The plaintiff was also making all the contributions towards the dues of the employees and, therefore, merely because the employees are saying on the basis of documents that they were the employees of the Capital Boot House it could not be said that they were the employees of the Capital Book House alone and that plaintiff has no concern with them. Out of those affidavits there is an affidavit of one Smt. Gita Singh at page 4.135. Gita Singh was working as the Business Manager in the said Intershoppe till the dispute took place between plaintiff and the defendants. If her affidavit is seen that it would be quite clear that as per her affidavit she was working as a Senior Sales Executive till January 1987 and she further states that she rejoined them in late 1988. But it is very pertinent to note that she does not say as to where she was working from January 1987 till the end of 1988. It has been urged before me by Mr. Lekhi, learned counsel for the plaintiff that as a matter of fact Gita Singh was working in plaintiff's another Intershoppe Branch at South Extension between February 1987 to late 1988. That posting of her in Intershoppe shop at South Extension clearly shows that she was posted and transferred by the plaintiff from one shop to another shop of the plaintiff. Then this Gita Singh who was the Business Manager of Intershoppe has written the letter to the plaintiff on 2.7.1993. It is a letter pertaining to giving increment to Mr. R.N. Malik and there she states 'needless to say that the increment so granted to him will be reimbursed by us Along with pay and allowances he is already drawing'. Then there is another letter dated 23.6.1993 written to Mr. I.S. Guleria, Security Officer of the main factory of the plaintiff where she has mentioned that one Anup Sharma was appointed in the Intershoppe Shop in question and in that letter she has tried to explain the position regarding the detection of some mischief by him and it is very pertinent to note that she endorses copy of this letter to the persons and authorities of the plaintiff and not to the partners of Capital Boot House. Then there is another letter written by Shri R.N. Malik dated 27.4.1994 to the plaintiff regarding the installation of wall-to-

wall carpet in the Intershoppe and he says that the said work was carried out by him at the saying of Gita Singh who had promised that the expenses would be reimbursed by the plaintiff. All these documents show that Ms.Gita Singh was, as a matter of fact, Business Manager of Intershoppe, which was belonging to the plaintiff and that she was an employee of the plaintiff.

(25) The material on record shows that Intershoppe is being run in the premises in question since 1980 till the date of the suit. The last document between the parties has taken place on 19.9.1991 and it was for a period of three years. But even after the efflux of the period mentioned in the said agreement the business was carried. It has been mentioned by the plaintiff as well as by the defendants that some negotiations and talks were taking place between the date of the suit and after 19.9.1994. But it is very pertinent to note that neither the plaintiff nor the defendants have disclosed as to what those talks were and when none of them have come before the Court as to what were the talks and when the business is being carried on continuously in the premises in question from 1980 till the date of the suit then it is obvious that the plaintiff had continued to carry out his business in the premises in question, as earlier. From the material on record it is not possible to hold that the plaintiff had not come in possession of the premises in question without the consent of the defendants. It is also not possible to hold from the material on record that the plaintiffs forcibly took the possession of the premises in question on 3.10.1994, as claimed by the defendants. therefore, in these circumstances, it will have to be held that on the date of the suit the plaintiff was in possession of the premises in question. Plaintiff's possession could not be disturbed without due process of law, as claimed by the plaintiff.

(26) From the record it is quite clear that the mezzanine floor of B-24, Cannaught Place is in the exclusive possession and enjoyment of the defendants. Similarly, from the documents produced by the defendants it is quite clear that in the premises in question, i.e. the ground floor of B-24, Cannaught Place, New Delhi, the defendants were not selling any other articles besides the products of the plaintiff since the year 1980. The defendants have not also claimed that they were selling any other items besides the products of the plaintiff in the premises in question. The documents and record also clearly show that all the furniture, show

room equipments, the carpet and air- conditioning in that room is at the costs of the plaintiff. Thus, except the premises of the ground floor, all the equipment of the shop is of the ownership of the plaintiff. thereforee, in the above circumstances, the balance of convenience will lie in favor of the plaintiff to continue using the premises in dispute on condition to pay the defendants adequately for making use of their premises. Similarly, if the plaintiff is allowed to continue to make use of the premises on condition to pay an amount which would be exceeding Rs.55,500.00 per month the defendants would not suffer irreparable loss, which could not be compensated in terms of money.

(27) Thus, I hold that from the material on record it is not possible to hold prima facie that the plaintiff was not in possession and occupation of the shop in question prior to 3.10.1994 and that they came in possession for the first time on 3.10.1994 by use of force. From the material on record it prima facie seems that the shop Intershoppe in the premises in question is being run by the plaintiff and it is plaintiff's business. thereforee, in these circumstances, the plaintiff is entitled to get ad interim injunction in order to protect his business on the conditions as indicated above.

(28) From the material on record it is not possible to accept the contention of the defendants that the plaintiff was never in possession of the premises in question and the business in the premises in question was not that of the plaintiff. The question as to whether the claim of the plaintiff that the documents in question were executed in order to avoid the clutches of the Rent Act is true or not could not be decided without the full trial of the matter. As per the previous contract between the parties the defendants were only to get 16.5 per cent of the amount on the sale to the extent Rs.3,00,000.00 per month and 7.5 per cent of the amount exceeding Rs.3,00,000.00 . thereforee, plaintiff is bound to continue to make such payment to the defendants. For that purposes the plaintiff must also allow the defendants to have inspection of the Stock Register, Sales Register and Cash Memos in the said shop. What is ordered by my learned predecessor in her order dated 7.10.1994 is that the defendants, their agents or servants or employees will not interfere and cause hinderance in the day-to-day running of the shop B-24, Cannaught Place, New Delhi. So, what is granted to the plaintiff is only the

permission or continuation of the business in the shop in question but the said order deserves to be modified and altered in order to protect the interests of the defendants. It would be just and proper to modify the said order by adding therein that the plaintiff is entitled to run their business in the said shop on the condition that they should file in Court within one week from today the statements showing monthly sales from October 1994 till July 1995 and Along with the said statements they should also deposit in the Court the amount up to 16.5 per cent to the extent of sales up to Rs.3,00,000.00 and 7.5 per cent of the amount exceeding Rs.3,00,000.00 per month in order to pay the same to the defendants and that the plaintiff should also not obstruct any of the defendants from visiting the shop in question once in a week and to check the stock register, sales register and the cash memos in order to secure their payment.

(29) Before passing the final order I would like to deal with one of the contentions raised by Mr. Arun Mohan, learned senior counsel for the defendants. He contended before me that the plaintiffs have not filed reply to his application under Rule 4 of Order 39 and, therefore, the order of injunction in favor of the plaintiff deserves to be rejected. In support of that submission he cited before me the case of Kaka Singh Chhabra Vs . Municipal Corporation of Delhi : 42(1990)DLT607 , wherein it has been held by the learned Single Judge of this Court if the plaintiff has not filed any reply to the application under Order 39 Rule 4, Cpc, the period allowed by the Court then the plaintiff cannot ask for continuation of the injunction and the same has to be vacated. From the report of the said case it is not possible to know as to what were the facts in the said case. The learned Judge has found that though the plaintiff was given sufficient time to file reply to the application under Order 39 Rule 4 plaintiff was not filing the same and was seeking more time and in these circumstances while granting more time to him the learned Judge was pleased to vacate the order of ad-interim injunction. In the instant case plaintiff has filed an application contending therein that the written statement filed by the defendant and which was the basis for his application under Order 39 rule 4 is not as per the provisions of Order Vi, Civil Procedure Code and he had prayed for striking off the same under Rule 16 of Order VI. That application of the plaintiff was ordered to be decided before this application by my learned predecessor. In these circumstances, the plaintiff has not filed reply to the application under Order

39 Rule 4 because of his contention under the provisions of Rule 16 of Order VI, CPC. thereforee, in view of the peculiar facts of the case as well as taking into consideration the provisions of Rule 4 of Order 39, I am unable to hold that merely because the plaintiff has not filed the reply to his application under rule 4 of Order 39 it is not open for the plaintiff to rely on his original plaint and the documents produced by him as well as the documents produced by the defendants and to urge before the Court that in view of the material on record the defendant is not entitled to have either the discharge or modification or setting aside of the order in his favor.

(30) Thus, I hold that the order passed in favor of the plaintiff does not deserve to be totally set aside but it deserves to be modified, as indicated above. I, thereforee, pass the following order:-

'THE order passed by this Court on 3.10.1994 and 7.10.1994 in IAs.8829/94 and 8976/94 are set aside and in place of them the following order is passed:
@SUBPARA = 'The defendants or their agents or servants or employees are hereby restrained by an ad- interim injunction from interfering in or causing any hinderance in the day-to-day running of the shop Intershoppe on the ground floor of B-24, Cannaught Place, New Delhi by the plaintiff on the following conditions:

(1)THEplaintiff should file an affidavit within one week from today stating therein that plaintiff will not transfer possession of the said premises to anybody else and will not create any interest as regards the business in the said premises till the disposal of the suit;

(2)PLAINTIFFshould not obstruct any of the defendants from visiting the said shop once in a week and inspecting the stock register, sales register and cash memos regarding the sales of various articles in the said shop from 1.10.1994 till the disposal of the suit and the plaintiff should go on depositing 16.5 per cent (sixteen and half per cent) of the amount up to monthly sales to the extent of Rs.3,00,000.00 and additional amount at the rate of 7.5 per cent of the sale exceeding Rs.3,00,000.00 every month by depositing the said amount before the 5th of each month; and

(3)AS regards the sales which have taken place between October 1994 and July 1995 the plaintiff should file a statement within one week from today stating therein as to what were the sales in the said shop during that period and Along with the said statements the plaintiff should deposit the amount payable to the petitioner at the rates indicated in condition No.(2) above.

(31) The applications viz. IA.8829/94, IA.8976/94 and IA.11883/94 stand disposed of in terms detailed above. The costs of these applications to be the costs in the cause.

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