

*

IN THE HIGH COURT OF DELHI

Judgment reserved on : October 15, 2008

%

Judgment delivered on : November 04, 2008

+

RFA 358/2004

SMT.RAM CHAMELI KOHLI (SINCE DECEASED) THRU' LRs
..... Appellants

Through: Mr.Subhash Chand, Adv.

VERSUS

M/S. NATIONAL BOOK TRUST OF INDIA ...Respondent

Through: Mr.B.K.Satija, Adv.

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

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

: PRADEEP NANDRAJOG, J.

1. Smt.Ram Chameli Kohli, the predecessor-in-interest of the appellants has been awarded mesne profits @Rs.35,000/- per month with effect from 17.5.2000 till the date respondent vacated the tenanted premises bearing Municipal No.A-4, Green Park (Main), New Delhi.

2. The tenancy commenced in the year 1978. The rent initially agreed was Rs.5,000/- per month subsequently enhanced to Rs.5,500/- per month.

3. On 27.1.2000, vide Ex.DW-3/4, the tenant i.e. the

respondent offered to increase the rent to Rs.17,030/- per month with effect from 17.2.2000 which offer was not accepted by Smt.Ram Chameli Kohli who demanded rent to be increased to Rs.1,75,000/- per month. The tenant did not accept the same resulting in the tenancy being determined vide notice dated 30.3.2000 with effect from 16.5.2000. Suit for ejectment and mesne profits was filed thereafter.

4. The possession of the tenanted property was handed over during the pendency of the suit and hence the only issue decided vide impugned judgment and decree dated 26.3.2004 is the determination of mesne profits for the reason it stood established that there existed a landlord-tenant relationship, that the property was not protected by the Rent Control Legislation and that the tenancy stood determined.

5. Smt.Ram Chameli Kohli sought computation of mesne profits with reference to the lease agreements pertaining to property bearing Municipal No.S-18 Green Park (Main) which was let out vide lease deed Ex.PW-2/1 and property bearing Municipal No.A-9A, Green Park (Main) let out vide Ex.PW-5/B and Ex.PW-5/C.

6. National Book Trust of India, respondent/tenant, urged that the said lease deeds could not be relied upon for the reason rents of similar and comparable properties alone can be considered while determining what could be the fair

market rent fetched for the property in dispute. It was urged that the tenanted premises were built in the year 1966 and were under the tenancy of the tenant since 1978 and no repairs whatsoever were carried out in the property resulting in the same being rendered near dilapidated; plaster having peeled off from the walls and cracks having developed in the RCC structures. As against that, property No.S-18, Green Park (Main) and A-9A Green Park (Main) were recently constructed properties with granite flooring, fancy fittings, central air-conditioning, lifts etc.

7. Learned Trial Judge has noted that the 2 buildings in respect whereof comparison was sought to be made were indeed recent constructions having granite flooring and having modern amenities. The building bearing No.A-9A Green Park (Main) was having central air-conditioning, power back-up and a lift. Learned Trial Judge also noted that the front fascia of the said building was of glass i.e. an ultra modern technology was used in constructing the building. With respect to the photographs of the suit property Ex.PW-1/1 to Ex.PW-1/4 negatives whereof were cumulatively proved as Ex.PW-1/5, the learned Trial Judge noted that the suit property required massive reconstruction and repairs, having developed cracks, seepage, peeling off of the plaster etc.

8. The learned Trial Judge has concluded the

discussion after noting the afore-noted evidence in paras 13, 14 and 15 of the impugned decision which reads as under:-

“13. In order to determine the mesne profits of the premises, the Court has to keep into mind the several factors:-

- i) The nature of use and occupation to which the building can be put;
- ii) The amenities provided by the landlord in the building;
- iii) Location of the building, age of the building, condition of the building;
- iv) The rent of similar of the building in the same area in which similar facilities were provided;
- v) The area of premises.

In the present case, it is undisputed that the premises can be used only for residential purposes and it can not be put to commercial use as A-9A and S-18. It is also undisputed that the building in question was 40 years old and had never been repaired. The landlady had been living abroad and the premises had been under tenancy of the defendant for more than 20 years.

14. The photographs filed on record of the premises show that one of the column of the building had developed wide cracks. It is stated by the counsel for the plaintiff that the column appearing in photograph was not a load bearing column and it was a column in the garage block and not in the main building. It has been testified by the defendant witness that plaster of the walls even in the main block was peeled off, due to seepage. The building was not in a fit condition for residential purposes. The testimony of the defendant witness is further fortified by his testimony that after the premises was got vacated it was put to extensive repairs and renovation. Defendant examined witness who had taken photographs of the building to show that the building was put under repairs and renovation. These photographs of the building

which have not been denied show that immediately after getting it vacated, plaintiff had put the building under extensive repairs. It is testified that the extensive repairs have been done inside the building also. I consider that plaintiff has successfully proved that the condition of the building was not comparable with the other buildings of which plaintiff placed on record lease deeds. Plaintiff has not placed on record lease deed of any residential building, nor of any equally old building having similar facilities. It is well recognized that rent changes from building to building depending upon the facilities provided, type of construction. The lease deeds of the building placed on record by the plaintiff can not be looked into for determining damages. I consider that the lease deed placed on record by the defendant of the adjoining premises is more appropriate for comparison. The adjoining building A-5, Green Park, New Delhi is of the similar nature and the plot area is also same. However covered area of building in A-5 under the tenancy of the defendant is 11400 sq.ft. The building comprises of basement and two and half storied. This building is under tenancy of defendant since 1969. The defendant witness has also deposed that another building A-15, Green Park Extn. was under defendant's tenancy and the rent was Rs.15,450/- p.m. He further deposed that first floor of this property was taken on rent in the year 1979 at the rate of Rs.4700/- p.m. and thereafter rent was increased. He could not admit or deny if the plot area of this building was 500 sq.yds. The defendant admitted that after vacating A-4 Green Park Extn., they have been shifted to F-79, Green Park Extn., New Delhi and the covered area of the property of F-79 and A-4 was equal. He stated that in F-79, the rent being paid by the defendant was Rs.1,10,000/-.

15. Looking into the facts and circumstances and looking into the fact that suit premises had not been repaired for the last 20 years and its construction was very bad and after getting vacated it was got repaired by landlady from outside and inside. I consider the mesne profits and damages of the premises have to be determined looking into account all these factors. The premises was not having any of the attributes

of the premises of which plaintiff produced lease deeds. For determining its mesne profits, it can be reasonably compared to adjoining premises A-5. I consider that the appropriate mesne profits/damages of this property would be Rs.35,000/- p.m. as rent in the adjoining property having 3000 sq.ft. more covered area was Rs.42,998/-. I, therefore, hold that defendant was liable to pay mesne profits and damages w.e.f. 17.05.2000 @Rs.35,000/- p.m. upto the period when it was vacated. The decree sheet be prepared subject to plaintiff's filing court fee on the remaining amount of damages. The defendant shall be given adjustment of the amount already paid under the orders of the Court."

9. It may be noted that there is a reference to property No.F-79 Green Park Extension, New Delhi in para 14 of the impugned decision. Learned Trial Judge has noted that the said property was taken on rent by the defendant at a monthly rent of Rs.1,10,000/-. It appears that the said fact has entered the judgment due to submissions being made in relation thereto for the reason we do not find any evidence pertaining to the lease of said property on the record of the learned Trial Judge.

10. Learned counsel for the appellants urged that the learned Trial Judge erred in holding that the subject property was a residential property for the reason admittedly the defendant i.e. the tenant was using it for an office purpose i.e. a non-residential use and that the purpose of letting was not residential, thus, learned counsel urged that while determining the mesne profits rental of commercial properties was good

evidence required to be considered by the learned Trial Judge.

11. The argument is impressive at the first blush for the reason, indeed, the suit property was not let out for a residential purpose, though located in a residential colony with the prescribed user being residential. However, save and except obtaining a technical victory on the point, the appellant hardly succeeds for the reason comparative rental has to be with reference to comparable buildings. The comparison of buildings has to be with reference to the amenities provided by the landlord, the nature of construction of a building, the age of the building and the condition thereof.

12. Admittedly, property bearing Municipal No.S-18 Green Park (Main) and A-9A Green Park (Main) were recent ultra modern constructions. The nature of construction of the properties as disclosed in the evidence makes it clear that though constructed on residential plots the buildings were raised intended to be used for commercial purpose. In fact, building bearing Municipal No.A-9A Green Park (Main) has a glass fascia seldom to be ever seen in a residential building and normally to be seen in commercial buildings. The granite flooring, installation of lifts and power back-up as also central air-conditioning renders the said building completely non-comparable with the instant building. Same would be the position qua the suit property and S-18 Green Park (Main).

Even that building has an ultra modern finish. The suit property was constructed way back in the year 1966 and since 1978 was never renovated resulting in the building being rendered near dilapidated with seepage, plaster peeling off, walls and RCC structures developing cracks. Thus, the rent deeds pertaining to property bearing Municipal No.S-18, Green Park (Main) cannot be treated as good evidence to determine the fair market value of the suit property.

13. The learned Trial Judge has awarded mesne profits @Rs.35,000/- per month. The respondent has not filed any cross-objections nor a cross appeal and hence the said finding qua the respondent has attained finality.

14. Learned Trial Judge has determined the mesne profits probably on his personal knowledge of rents increasing in Delhi.

15. In the decision reported as 1002 (2003) DLT 215 *Hari Singh vs. S.S.Jogi*, a Division Bench of this Court held that no presumptive findings pertaining to mesne profits can be rendered and that the same has to be determined with reference to evidence led about prevailing market rent in the area with reference to similar and comparable properties. Another Division Bench of this Court, in the decision reported as 122 (2005) DLT 629 *National Radio & Electronic Co. Ltd. vs. Motion Picture Association*, observed as under:-

“34. Judicial notice is taken of only such facts of which there can be only one view. In the light of the aforesaid position in law, there can be no manner of doubt that so far as the increase of rent is concerned, judicial notice can be taken of a fact that over a certain period rents generally have arisen. However, so far as quantification of the rate at which the increase has actually taken place, a finding can be arrived at only on the basis of legal evidence and material establishing the actual rates at which properties have been let over the period and comparison of such properties with the property which is the subject matter of the *lis*. Rents may vary based on location of properties, nature of construction, period of construction, purpose/user for which the premises are let, variation between demand for tenanted premises and availability of premises and even factors relating to the position of the economy. Therefore, while a learned trial Judge may be justified in taking judicial notice of the fact that rents have risen over a certain period of time in the area in question, it would be incumbent upon a person laying a claim of entitlement to *mesne* profits to prove the same by cogent and reliable evidence in accordance with law.

As has been noticed in the judicial pronouncements noticed hereinabove, the evidence may include documentary evidence relating tenancies of properties in the area which can be summoned from the office of the Sub-Registrar or by examination of property dealers, oral testimony of the parties to the litigation and persons in the trade of real estate, other property owners.

35. The defendant/tenants is entitled to know not only the landlord’s claim but also the extent to which the same stands established. The defendant has a legal right to an opportunity to prove the contrary.

36.

37.

38. In this background of the factual position and the law, despite taking judicial notice of the fact

that rentals have generally increased in Delhi there was no material at all on which the claim of the plaintiff could have been granted by the learned trial Judge.

We find that the learned trial Judge has observed that it could take judicial notice of the prevalent market rates of rent of different areas in Delhi as the "Court has routinely been deciding" similar suits of *mesne* profits and damages in respect of different areas.

39. We have manner of doubt that observation are totally contrary to the settled position in law. The extent to which the rents are actually rising in specific areas has to be proved as a statement of fact in every case. A party would need to lead evidence in respect of the period over which the rental has increased and also the percentage for which it has increased in order to enable a Court to arrive at a finding of the actual prevalent market rate of rent at the given point of time with regard to a particular property. A finding of fact in a litigation binds only the parties to the *lis*."

16. Considering that in the instant case there is no evidence regarding the rent of similar and comparable buildings for the period in question, coupled with the fact that the suit property was an old construction and due to lack of proper maintenance had considerably deteriorated, we are of the opinion that the *mesne* profits awarded by the learned Trial Judge are fair and proper requiring no interference in appeal.

17. The appeal is dismissed.

18. No costs.

19. For unexplainable reasons, in spite of there being no cross-objections from the side of the respondent, the

decretal amount was directed to be deposited in this Court.
The same has been invested in a fixed deposit.

20. We direct that the amount lying in deposit be paid
over to the legal heirs of the appellant in equal proportion.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

November 04, 2008
dk