

REPORTED

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

% DATE OF RESERVE: April 28, 2010

DATE OF DECISION: May 28, 2010

+ RFA 315/2003 and CM Nos.718/2003 and 1649/2003

I.T.D.C. LTD. Appellant
Through: Mr. Gunjan Kumar, Advocate

versus

JAGDISH KAUR AND ORS. Respondents
Through: Ms. Deepika V. Marwaha, Advocate

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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?

: REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and decree of the learned Additional District Judge dated 07.12.2002, whereby and whereunder a suit for recovery of Rs.4,71,573/- as damages/mesne profits was decreed in favour of the respondents and against the appellant together with future/further mesne profits @ Rs.50/- per sq. ft. from 01.04.1997 till the date of delivery of the possession, i.e.,

31.01.1999 together with interest @ 15% per annum on future mesne profits for the aforesaid period.

2. The case of the plaintiffs (the respondents herein) as set out in the plaint is that the plaintiffs are the owners/landlords of Flat No.116, situated on the 11th Floor of a multi-storeyed building, viz., Himalaya House at 23, Curzon Road, New Delhi, measuring 698 sq. ft. The plaintiffs had let out the aforesaid flat to the defendant (the appellant herein) on 01.06.1973 initially at the rate of Rs.1919.50 per month excluding other charges. The plaintiff No.1 had been negotiating and communicating with the defendant to execute a fresh lease deed to enhance the rate of rent of the flat. Pursuant thereto, a letter dated 25.10.1993 was received by the plaintiffs from the defendant whereby the defendant agreed for increase in rent of 10% after every three years from the expiry of the original lease in 1976. The rent with effect from 01.11.1993 was accordingly fixed at Rs.4,467/- per month.

3. It is alleged in the plaint that the defendant, after acknowledging its liability, did not fulfil it completely and, instead of paying the amount due in the sum of Rs.1,61,499.50 paid only Rs.65,548.20 in spite of various requests made by the plaintiffs.

4. It is further the case of the plaintiffs that a fresh lease was executed between the parties on a Rs.10/- stamp paper on 27.10.1993 @ Rs.4,467/- with effect from 01.11.1993. The said document being unregistered and not duly stamped had no legal sanctity in law. Thus,

the tenancy of the defendant was a monthly tenancy which was terminated by a legal notice issued to the defendant on 25.09.1994, terminating the tenancy with effect from 31.10.1994. The said notice was duly replied by the defendant vide its reply dated 10.10.1994. However, since the defendant did not surrender the possession of the flat despite the receipt of the aforesaid notice of termination, the plaintiffs instituted a suit for possession and recovery of the amount due, i.e., Rs.95,951.30 in the Court of the District Judge, being Suit No.410/1995.

5. The aforesaid suit was decreed for possession as well as for the recovery of the amount of Rs.95,951.39 in favour of the plaintiffs by the judgment and decree dated 12.09.1997 passed by Shri S.N. Dhingra, Additional District Judge, Delhi (as His Lordship then was).

6. The plaintiffs/decreed-holders consequently instituted execution proceedings, bearing Execution Application No.55/1997. In the said execution petition, an application under Order XXIII Rule 3 CPC was jointly moved by the parties, duly signed by both the parties. In paragraph 6 of the said application, the terms and conditions of compromise entered into by the parties were set out as follows:-

“6. That the Parties have entered into a compromise, the terms and conditions of the same are given below:-

a) Mr. Ashok Trikha, General Manager (Admn.), ITDC is authorized to give undertaking on behalf of the Judgment Debtor Company and enter into a compromise in the Court.

b) The Judgment Debtor Company has agreed to pay a sum of Rs.15,000/- per month as an interim measure without prejudice to its rights and

contentions and any adjustments as per the decision of the Hon'ble Court with regard to the mesne profits payable by the Judgment Debtor Company.

c) That admittedly the Plaintiffs had not received the rent for the months of May, June and July 1995. The copy of the Cheques have been filed by the Defendant Company in the Suit for damages.

The total amount comes

38 months x 15,000/- = Rs.5,70,000/-

Minus 35 months x Rs.4467/- = Rs.1,56,345/-

Total amount due = Rs.4,13,655/-

d) This amount would be payable to the Decree Holders by way of a draft in the name of Smt. Jagdish Kaur, on the signing of the Agreement or within a week thereafter.

e) The amount of rent/damages shall be payable/adjusted by the Parties finally at the rate as determined by the Court in the Suit for Damages pending in the Court.

f) That the Judgment Debtor would be entitled to deduct/adjust the amount being paid to the Applicants now.

g) That the Judgment Debtor gives an Undertaking to the Court that they shall surrender the possession of the Flat bearing No.116, Himalaya House, Curzon Road, New Delhi within 8 months from the date of signing of the Agreement.

h) That in lieu of the Undertaking given by the Judgment Debtor, Smt. Jagdish Kaur gives an Undertaking on behalf of the Decree Holders to the Court that the Decree Holders will not execute the Decree from the date of signing of this Agreement.

i) That the Judgment Debtor is also liable to pay the amount due as per the review Order. Thus the Judgment Debtor undertakes before the Court to pay the amount of the Decree Holders as per the Decree sheet prepared and shown to the Judgment Debtor. The Judgment Debtor undertakes to pay the said amount within 30 days of the demand.

j) That the Judgment Debtor will continue to pay rent/damages @ Rs.15,000/- per month till they surrender the possession.

k) That if there is any breach of the above compromise Agreement and Undertaking given to

the Court by the Judgment Debtor, the Decree Holders shall have the right to execute the Decree for possession with immediate effect.”

7. In view of the aforesaid settlement arrived at between the parties, the execution proceedings were disposed of in terms of the compromise arrived at between the parties by an order dated 30th April, 1998 holding that the parties shall be bound by the agreement and the statements made on affidavit.

8. On 31st January, 1999, the defendant handed over vacant possession of the suit premises to the plaintiffs in terms of clause (g) of paragraph 6 of the compromise application.

9. A subsequent suit, being Suit No.181 of 1997 for the recovery of Rs.4,71,573/- as damages/mesne profits was also disposed of by the judgment and decree dated 07.12.2002, which is impugned by the appellants herein.

10. Before advertng to the findings of the learned trial court in the impugned judgment and decree, it deserves to be noted that the plaintiffs have alleged in the plaint that the defendant was an unauthorized occupant from the date of the termination of the tenancy and as such liable to pay damages/mesne profits from 01.11.1994 till the delivery of possession at the market rate, subject to adjustment of the amount received every month during the aforesaid period. According to the plaintiffs, the market rate in 1994-95 and 1995-96 was Rs.45/- per sq. ft. (approximately) as was evident from the rent prevailing in the nearby

buildings, but the plaintiffs claimed damages in the suit at a lower rate, i.e., at the rate of Rs.30/- per sq. ft. only from 01.03.1995 to 31.12.1996. The market rate in 1997 prevailing in the area was between Rs.50/- to Rs.80/- per sq. ft. and the plaintiffs claimed damages at this rate for the period 01.01.1997 to 31.03.1997. In paragraph 10 of the plaint, the plaintiffs assessed and claimed damages/mesne profits for use and occupation of the flat in question measuring 698 sq. ft., Himalaya House, 23, Curzon Road, New Delhi as under:-

<i>“i) From March, 1995 to December, 1996 @ Rs.30 per sq. ft. for 22 months</i>	
<i>i.e. 698 x 30 = 20940 x 22</i>	<i>= Rs.4,60,680/-</i>
<i>ii) Minus the amount received over the period i.e. rent for 18 months only @ Rs.4467/- as rent for 4 months was not received in 1995.</i>	
	<i>= Rs.80,406/-</i>
	<i>-----</i>
	<i>Rs.3,80,274/-</i>
<i>iii) Damages for the period Jan. 1997 to March, 1997 @ Rs.50/- per sq. ft. for 3 months</i>	
<i>i.e. 689 x 50 = 34,900 x 3 = Rs.1,04,700/-</i>	
<i>iv) Minus the amount received as rent : 4467 x 3</i>	
	<i>= Rs.13,401/-</i>
	<i>-----</i>
	<i>Rs.91,291/-</i>
	<i>-----</i>
	<i>Rs.91,291/-</i>
	<i>-----</i>
<i>Total:</i>	<i>Rs.4,71,573/-”</i>
	<i>-----</i>

11. The suit was contested by the defendant by filing a written statement and raising three preliminary objections to the maintainability of the suit. First, it was averred in the written statement that the defendant had been regularly paying rent since the inception of the tenancy and so the plaintiffs had no cause to claim the exaggerated amount of Rs.4,71,573/-, as had been claimed in the suit. Second, it was averred that the plaintiffs and the defendant had entered into a renewed lease deed for three years on 27.10.1993 with the understanding that after the expiry of the aforesaid period of three years, the plaintiffs will only demand a 10% increase in the rent and not the amount claimed in the present suit, which had been claimed as per their own whims. Third, it was asserted that the plaintiffs had no right to file the suit in view of the fact that they had already filed a suit for possession and recovery.

12. On merits, the essential facts were not disputed by the defendant in the written statement. It was admitted that the said flat was let out to the defendant in 1973 at a monthly rate of Rs.1919.50. It was also admitted that letter dated 25.10.1993 was issued by the defendant to the plaintiffs, in which the defendant had agreed on the representation of the plaintiffs for increase of rent from Rs.1,919.50 to Rs.4,467/- per month with effect from 01.11.1993 and after the expiry of three years, a 10% increase every three years. It was, however, denied by the defendant that the defendant was liable to pay the sum of Rs.4,71,573/- or any other

amount whatsoever. The defendant asserted that the plaintiffs had no right to claim future damages/mesne profits for use and occupation.

13. In the replication filed by them, the plaintiffs controverted the allegations made by the defendant in its written statement and reiterated the assertions made in the plaint. On the pleadings of the parties, the following issues were framed for adjudication:-

- “1. Whether the suit is not maintainable in view of preliminary objections no.1, 2 and 3? OPD.*
- 2. Whether the plaintiff is not entitled for the decree of the amount at what rate? (sic.)*
- 3. Whether the plaintiff is also entitled to the future damages as claimed for? OPP.”*

14. After discussing the evidence on record, the learned trial court while deciding Issues No.1 to 3, observed that it was no longer in dispute that the suit for possession filed by the plaintiffs had already been decreed by judgment – Exhibit PW-2/2 and that the possession of the flat in question had been received by the plaintiffs on 31.01.1999. It was also no longer in dispute that the tenancy of the defendant had been terminated on 31.10.1994 and from 01.11.1994 the defendant was in unauthorized occupation of the flat in question and as such required to pay damages/mesne profits. There was also undisputed evidence on record that in the execution proceedings in the Court of Shri S.N. Dhingra, Additional District Judge, Delhi (as His Lordship then was), a compromise had been arrived at between the parties, the certified copy whereof was placed on record as Exhibit PW-2/3 and as per the terms thereof, the defendant had agreed to pay Rs.15,000/- per month as an

interim measure till such time as they surrendered the possession to the plaintiffs. Thus, it was observed that the only question which fell for determination was as to what should be the amount of damages/mesne profits which should be granted to the plaintiffs in this case. It is the decision on the aforesaid question which is impugned in the present appeal.

15. Arguments in the appeal were addressed by Mr. Gunjan Kumar, Advocate on behalf of the appellant and Ms. Deepika V. Marwaha, Advocate on behalf of the respondents.

16. The first and principal contention of the learned counsel for the appellant was that pursuant to the unregistered agreement between the parties, the enhanced rent as agreed therein was being paid by the appellant and received by the respondents. The impugned judgment was not sustainable, inasmuch as having accepted the enhanced rent of Rs.4,467/- for a period of three years, it was not open to the respondents to issue notice of termination under Section 106 of the Transfer of Property Act, so as to claim that the possession of the tenant was unauthorized and as such damages for use and occupation were liable to be paid by the tenant. At the most it could be said to be a case of “irregular tenancy” and the appellant could not be said to have become an unauthorised occupant. The only other contention of the learned counsel for the appellant was that the second suit, i.e. the suit from

which the appeal arises was barred under the provisions of Order II Rule 2 CPC.

17. Ms. Deepika V. Marwaha, on the other hand, contended on behalf of the respondents that the claim of the appellant that he was an irregular tenant and not an unauthorized tenant, and as such not liable to pay mesne profits, as pleaded in ground (c) of the Grounds of Appeal, was wholly misconceived. It was contended by the learned counsel that the law envisaged only four kinds of tenants, viz., (i) contractual tenants, (ii) statutory tenants, (iii) tenants by holding over, and (iv) tenants at sufferance. There was no plea taken in the written statement either that the defendant was a contractual or statutory tenant or tenant by holding over or tenant by sufferance. The appellant claimed to be “an irregular tenant”, which expression was unknown and unrecognized by any provision of law.

18. Reference was made by the learned counsel for the respondents in the above context to the letter dated 25.10.1993 (which was relied upon by the appellant) to contend that there was no renewal of the lease deed on 27.10.1993 for three years as claimed by the appellant or at all, and that the appellant was not “an irregular tenant”, but a tenant at sufferance. The said letter reads as under:-

*“Smt. Jagdish Kaur Bajaj,
161-B, Mall Road,
Post Box 45,
Meerut Cantt. (U.P.)*

Your request for increase in rent of the premises F-116, Himalaya House, New Delhi.

Dear Madam,

Please refer to your letter dated the 16th Oct. 1993 requesting for an increase in the rent of the above premises.

It is to inform you that the management of ITDC is pleased to agree for an increase in rent @ 10% after every 3 years from the expiry of original lease and fix the pre-sent rent at Rs.4467/- per month with effect from 1.11.1993. It has also been decided to waive off the expenditure on account of fire fighting equipments installation in the Building. The amount of Rs.14,950/- which you have paid directly and amount deducted from Aug. 1992 on this account will be reimbursed to you.

You are therefore, requested to come to this office and execute the fresh lease deed at the earliest but not later than 1.11.1993.

Thanking you and assuring you of our best co-operation at all times."

19. The learned counsel for the respondents contended that the admitted case of the parties was that no fresh lease deed was executed on 27.10.1993 or thereafter, and thus in accordance with the common law rule, the appellant became a tenant at sufferance, whose status is no better than that of a trespasser. In this context, reference was made by her to the judgment of the Supreme Court in ***Bhawanji Lakhamshi and Ors. Vs. Himatlal Jamnadas Dani and Ors., AIR 1972 SC 819***. In the said judgment, the Supreme Court categorically laid down that the act of holding over after the expiration of the term does not create a tenancy of any kind and that if a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant at

sufferance. The Supreme Court then proceeded to draw a distinction between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former, the Court held, is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will.

20. Ms. Marwaha also relied upon the decision of a Division Bench of this Court in *National Radio & Electronic Co. Ltd. vs. Motion Pictures Association*, 122 (2005) DLT 629, wherein this Court while seized of a suit for possession and recovery of future damages and mesne profits against the appellant-tenant after termination of tenancy held, that on a lawful termination of tenancy by the respondent, the respondent is entitled to market rent as the occupation of the appellant becomes unauthorized and wrongful.

21. Reference was also made by the learned counsel for the respondents to the decision rendered by a Division Bench of the Karnataka High Court in *Webbing and Belting Factory (P) Ltd. & Anr. Vs. C.M. Shashikumar*, AIR 2006 Karnataka 173 to contend that where the tenant continued to be in possession even after the period specified in the quit notice, he becomes liable to pay damages in view of the law laid down by the Supreme Court in the case of *M/s. Raptakos Brett and Company Ltd. Vs. Ganesh Property* reported in AIR 1998 SC 3085 and to a decision of the Allahabad High Court reported in AIR 1984 Allahabad 130, *J.J. Pancholi Vs. Sridharjee and Ors.*, wherein it was

held that where the tenancy is duly determined by a notice under Section 106, the tenant becomes a tenant at sufferance, and a tenant at sufferance is no better than a trespasser.

22. Dealing with the next contention of the appellant's counsel, Ms. Marwaha contended that the present suit was not barred by the provisions of Order II Rule 2 CPC and as a matter of fact was covered under the provisions of Rule 4 of Order II. Rule 4 of Order II of the Code of Civil Procedure runs as under:-

“4. Only certain claims to be joined for recovery of immovable property.— No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—
(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
(b) claims for damages for breach of any contract under which the property or any part thereof is held;
and
(c) claims in which the relief sought is based on the same cause of action.”

23. Ms. Marwaha contended that Order II Rule 4 CPC forms an important qualification to Order II Rule 2 CPC and is by way of an exception to the said Rule. It is also an exception to Order II Rule 3(1). It was also contended by her that if evidence to support the claims in the two suits is different, the bar of Order II Rule 2 will not apply. Reliance in this regard was placed by her on a Privy Council decision in ***Mohd. Khalil Khan vs. Mahbub Ali Mian, AIR 1949 PC 78***. In the said case, the Privy Council laid down the principles to determine the application of Rule 2 of Order II as follows:-

“61. The principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under O.2, R.2, is “whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.” Moonshee Buzloor Ruheem v. Shumsunnissa Begum, (1867-11 MIA 551 : 2 Sar. 259 PC) (supra).

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. Read v. Brown, (1889-22 QBD 128 : 58 LJ QB 120) (supra).

(3) If the evidence to support the two claims is different, then the causes of action are also different. Brunsdon v. Humphrey, (1884-14 QBD 141 : 58 LJ QB 476) (supra).

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. Brunsdon v. Humphrey, (1884-14 QBD 141 : 53 LJ QB 476) (supra).

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers ... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Muss. Chandkour v. Partab Singh, (15 IA 156 : 16 Cal 98 PC) (supra). This observation was made by Lord Watson in a case under S. 43 of the Act of 1882 (corresponding to O.2, R.2), where plaintiff made various claims in the same suit.”

24. As regards the contention of the learned counsel for the appellant that the impugned judgment was based on conjectures and surmises, the contention of Ms. Deepika V. Marwaha, the learned counsel for the respondents was that the respondents-plaintiffs had adduced cogent evidence on record to show that the market rate of rent per sq. ft. per month in respect of the same building, i.e., the Himalaya House, 23,

Curzon Road, New Delhi was Rs.70/-to Rs.100/- per sq. ft. at that time. It was so testified by PW-2 Shri Taran Tej Singh, the General Power of Attorney holder of the respondents, who further deposed that this rate continued to prevail in the area where their flat is situated till such time as they got back the possession in execution of the decree for possession. He further testified that a legal notice dated 28.03.1997 was served upon the appellant-tenant before filing the present suit and the said notice was sent through registered post and UPC, and copy of the said notice was Exhibit PW-2/6.

25. Ms. Marwaha further contended that the plaintiffs had also examined PW-3 Shri J.S. Mann from the office of the Sub-Registrar III, Asaf Ali Road, New Delhi and he had proved certain lease deeds registered with them, the certified copies whereof are Exhibit PW-3/1 and Exhibit PW-3/2. Exhibit PW-3/1 was executed on 31.03.1995 and this lease deed pertained to the same building, i.e., the multi-storeyed building known as the Himalaya House, situated at 23, Curzon Road, New Delhi. This lease was created for a period of three years on 31.03.1995 and the rate of rent settled was Rs.110/- per sq. ft. The other lease deed, Exhibit PW-3/2 also pertained to Himalaya House and was created on 01.04.1996 and for the first three years, i.e., from 01.04.1996 to 31.03.1999, the rent settled was Rs.100/- per sq. ft. As such, in the light of the evidence on record, the award of damages @ Rs.50/- per sq. ft. per month by the learned trial court was wholly justified.

26. After carefully considering the rival submissions of the parties, this Court is of the view that there is no manner of doubt that the tenancy of the defendant had been terminated on 31.10.1994 and from 01.11.1994 the tenant was in unauthorized occupation of the suit flat and as such, liable to pay damages/mesne profits for the use and occupation of the said flat to its owners. There is also irrefutable evidence on record to show that in the execution proceedings in the earlier suit, i.e., Suit No.410/1995, a compromise had been arrived at between the parties, which is Exhibit PW-2/3, and as per the terms of the said compromise, the appellant had agreed to pay a sum of Rs.15,000/- per month as an interim measure till such time as they surrendered the possession to the respondents. This Court is conscious of the fact that Clause (b) of paragraph 6 of compromise application recorded the fact that this was without prejudice to the rights and contentions of the parties and any adjustments as per the decision of the Court with regard to the mesne profits payable by the appellant Company. Nevertheless, in its opinion, it cannot be logically deduced therefrom that no amount was payable by the appellant Company towards mesne profits. Clause (b) of paragraph 6 reads as under:-

“b) The Judgment Debtor Company has agreed to pay a sum of Rs.15,000/- per month as an interim measure without prejudice to its rights and contentions and any adjustments as per the decision of the Hon’ble Court with regard to the mesne profits payable by the Judgment Debtor Company.”

27. It is settled law that a lease of immovable property from year to year, or for any period exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. In the absence of a registered instrument, it must be held to be a lease from month to month. Since admittedly the lease in the instant case was for a period exceeding one year, it could only have been made effectual by a registered instrument executed jointly by the parties. In the absence of such registration, the lease must be deemed to be a “lease from month to month”, terminable, on the part of either the lessor or the lessee by 15 days notice in writing under Section 106 of the Transfer of Property Act, expiring with the end of the month of the tenancy. Reference in this context may be made to the case of *Bajaj Auto Limited v. Behari Lal Kohli* reported in *AIR 1989 SC 1806*, wherein the Supreme Court held that an unregistered lease deed could be looked into only for collateral purposes and not for the terms thereof. The aforesaid dicta was reiterated in the case of *Rai Chand Jain v. Miss Chandra Kanta Khosla* reported in *AIR 1991 SC 744*. In the case of *Vinod Khanna and Ors. Vs. Bakshi Sachdev (Deceased) Through L.R.s and Others*, *AIR 1996 Delhi 32*, a Division Bench of the Delhi High Court after referring to the decisions of the Supreme Court in *Bajaj Auto Limited (supra)* and *Rai Chand Jain (supra)* held that an unregistered lease deed could be looked into only for the collateral purposes and not for the terms.

28. Admittedly, in the instant case, no fresh lease deed was executed and by no stretch of imagination the document dated 25.10.1993 can be construed to mean that such a renewal was effected or brought about.

29. It also cannot be lost sight of that the words 'renewal of the lease' are a misnomer. Viewed from any angle, the renewal is in fact really execution of a fresh lease and that too a registered one in terms of para-1 of Section 107 of the Transfer of Property Act. The Supreme Court in ***DDA Vs. Durga Chand Kaushish , AIR 1973 SC 2609*** elucidated as under:-

“A renewal of lease is really grant of a fresh lease. It is called 'renewal' simply because it postulates the existence of a prior lease, which generally provides for renewal as of right. In all other aspects, it is really a fresh lease.”

30. It bears mentioning at this juncture that the instant case is one in which an unregistered instrument, which is not produced in the Court or proved in evidence, is sought to be pressed into service through the medium of a letter issued by the appellant to the respondents in which the appellant had agreed at the instance of the respondents for the increase of rent from Rs.1,919.50 to Rs.4,467/- per month with effect from 01.11.1993. Further, it cannot be lost sight of that in the earlier suit, being Suit No.410/1995, a finding had been returned by the Court that the tenancy of the defendant must be considered a month to month tenancy, which stood validly terminated on service of the notice to quit served upon the appellant. No appeal having been filed against the said

judgment, it must be deemed to have attained finality. This being so, the law postulates that the appellant/lessee remaining in possession after the determination of the lease being in unauthorized possession must pay damages/mesne profits till such time as he hands over vacant possession of the suit premises to the landlord.

31. As regards the quantum of damages determined by the learned trial court, this Court finds no infirmity in the quantification in view of the evidence adduced by the respondents-landlords, which has not been challenged/rebutted by the appellant at all. A perusal of the notice Exhibit PW-2/6 would show that the defendant was put to notice that the market rate of rent in 1994-95 and 1995-96 prevailing in the nearby buildings was Rs.45/- per sq. ft. per month approximately and the defendant was liable to pay at that rate and that the said rate in the year 1997 was between Rs.50/- to Rs.80/- per sq. ft. per month. No reply to the said notice was given by the appellant-defendant and the necessary inference is that the assertion of the respondents with regard to the prevailing market rate was correct. Then again, in the course of evidence, PW-2 Shri Taran Tej Singh testified that the market rate of rent per sq. ft. per month in the same building, i.e., in the Himalaya House was Rs.70/- to Rs.100/- per sq. ft. at that time. Though PW-2 was cross-examined at length by the learned counsel for the appellant, but the assertion made by him regarding the prevalent rate of rent in that area or in the same building has not been challenged at all. The respondents had

also examined PW-3 Shri J.S. Mann from the office of the Sub-Registrar III, Asaf Ali Road, New Delhi, who proved on record two registered lease deeds (Exhibit PW-3/1 and Exhibit PW-3/2) showing the creation of lease agreements on 31.03.1995 in respect of the same building at the rent of Rs.110/- per sq. ft. and Rs.100/- per sq. ft.

32. The appellant, on the other hand, has not been able to bring on record any evidence in rebuttal and as a matter of fact the appellant's witness DW-1 Shri Rajendra Singh, Senior Assistant (Admn.), in his cross-examination, admitted that he was not in possession of any lease deed in which the rent settled between the parties was less than Rs.70/- per sq. ft. per month for the year 1995. This being so, the award by the learned trial court of mesne profits @ Rs.50/- per sq. ft. per month from 01.04.1997 to the date of delivery of possession, i.e., 31.01.1999 cannot be faulted. As held by this Court in ***Roger Enterprises Private Ltd. Vs. Smt. Renu Vaish, 71 (1998) DLT 617***, where there is no cross-examination of the respondent's witness on the point of rate of damages/mesne profits, this shows that the appellant does not challenge the damages/mesne profits as stated by the respondent in her evidence before the Court. In such a case, where there is no rebuttal to the rate of damages/mesne profits suggested by the respondent, the appellant cannot make an issue about it at a later stage.

33. As regards the contention of the appellant that the suit itself was not maintainable on account of the bar of Order II Rule 2 of the Code of

Civil Procedure, this Court is of the view that there is no force whatsoever in the said contention. A Full Bench decision of the Bombay High Court in ***Shankarlal Laxminarayan Rathi and Ors. v. Gangabisen Maniklal Sikchi and Anr., AIR 1972 BOMBAY 326*** interpreted the provisions of Order II Rule 2 in a suit for mesne profits/damages as follows:-

“Now, it is clear upon a plain reading of Order 2, Rule 4, that it regards the cause of action or claim for mesne profits or for damages as different from the cause of action for the recovery of immovable property. If it was the same, then there was no need to state the exceptions in clauses (a), (b) and (c), because Order 2, Rules 1 and 2, make ample provision for the same cause of action. It seems to us therefore that there is the amplest indication in Order 2 Rule 4 that the cause of action for a suit for recovery of immovable property is not the same as the cause of action for damages for breach of any contract under which the property or any part thereof is held. (para 22)

We cannot read Order 2 Rule 4 as entirely divorced from Order 2 Rule 2. No doubt Order 2 Rule 4 is an exception to Order 2 Rule 3 but it does not therefore follow that it has nothing to do with Order 2 Rule 2. On the other hand, it seems to us that Order 2 Rule 4, forms an important qualification to both Order 2 Rule 2, and Order 2 Rule 3. Order 2 Rule 2 (1) as we have already said, lays down the general principles that a suit must include the whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not, then he is visited with the penalty in Order 2 Rule 2 (2). Similarly, Order 2 Rule 2 (3) provides that all reliefs arising out of the same cause of action shall be sued for in one and the same suit and again attaches a penalty if the plaintiff omits to do so. Thus Order 2 Rule 2, deals with one and the same cause of action. Order 2 Rule 3, on the other hand, deals with several causes of action and makes the contrary provision.

It permits the plaintiff to unite several causes of action in one suit under certain circumstances. Where Order 2 Rule 2, deals with the same cause of action and prohibits its splitting, Order 2 Rule 3 provides for the joinder of several causes of action. Therefore, inter alia they deal with two different aspects of the same subject viz. joinder of causes of action. Now, no doubt an exception to Order 2 Rules 2 and 3 is created by Order 2 Rule 4. Its opening part says that no cause of action shall be joined with a suit for the recovery of immovable property. To that extent this provision is an exception to Rule 2 (1) and Rule 2 (3) which respectively enjoin that a plaintiff must include his whole claim in respect of a cause of action and claim all the reliefs he is entitled to in respect of the same cause of action. It is also an exception to Order 2 Rule 3 (1) which permits several causes of action to be joined by the plaintiff against the same defendant or the same defendants jointly. Clauses (a), (b) and (c) of Order 2 Rule 4 create further exceptions to the general principle laid down in the opening part of Order 2 Rule 4; Order 2 Rule 4, therefore deals with a specific subject, namely, claims which could be joined in a suit for the recovery of immovable property, and to the extent that special provision is so made on a special topic, its provisions qualify the general provision of both Order 2 Rule 2 and Order 2 Rule 3. In fact, Order 2 Rule 3 is expressly made subject to the Order 2 Rule 4 by the use of the words "save as otherwise provided". Thus, though Order 2 Rule 4, is in part an exception to the general principle laid down in Order 2 Rule 3, it is also an exception to Order 2 Rule 2 (1) and 2 (3). We cannot regard it as only an exception to Order 2 Rule 3, and completely divorced from Order 2 Rule 2. (para 24)''

34. A Full Bench of the Punjab and Haryana High Court relying upon the decision of the Privy Council in ***Mohd. Khalil Khan v. Mahbub Ali Mian***, AIR 1949 PC 78 and the definition of the expression mesne

profits as delineated in Section 2(12) of the Code of Civil Procedure observed:-

“As is plain from the above-said provision the claim for mesne profits may well require evidence of the duration of wrongful possession of profits which the person in wrongful possession may have actually received or in the alternative constructively which he might with ordinary diligence have received; and the quantum of interest on such profits. Can it possibly be said that evidence of the above said nature is equally required to support the claim of possession? In my view, it is hardly so. In a suit for possession it might well suffice the plaintiff to prove his title to the property and the factum of possession within 12 years of the filing of the suit in order to succeed. At the highest it can be said that some facts in the two suits may be either common or similar. But as has often been said mere similarity is not identity. Merely because in the two cases the facts may substantially run to an extent parallel to each other or simply because certain matters are common in the two suits cannot warrant a conclusion that the evidence in a suit for possession and in a suit for mesne profits may necessarily be identical. I find, therefore, that by the application of the above-said test also it would be manifest that the two causes of action are distinct and separate.”

35. Referring to and relying upon both the aforesaid decisions, a Division Bench of this Court in ***Gurudwara Baba Zorawar Singh & Baba Fateh Singh Ji Regd. Society vs. Piara Singh & Sons, 141 (2007) DLT 228 (DB)*** held that a careful reading of the provisions of Rule 4 of Order II of the CPC would show that Rule 4 specifically permits institution of a suit for mesne profits or arrears of rent as a separate

count of action from a suit for recovery of immovable property.

Paragraph 4 of the judgment, which is apposite, reads as under:-

“4. A careful reading of the above would show that as a general rule in a suit for recovery of immovable property, the plaintiff cannot join any other cause of action. There is however an exception to that rule inasmuch as a claim for mesne profits or for arrears of rent or for damages for breach of any contract under which the property is held can be made in the same suit. This implies that the court recognises the cause of action underlying a suit for recovery of immovable property to be independent of the cause of action for recovery of mesne profits, damages or arrears of rent in relation to any such property. If that were not so, there would have been no necessity of making a provision in Rule 4 supra specifically permitting the joinder of the two reliefs in one suit. It follows that the subsequent suit filed by the plaintiff appellant out of which the present appeal arises did not fall within the mischief of Order 2 Rule 2 of the CPC.....”

36. In view of the aforesaid, in my view, there is no merit in the present appeal. The impugned judgment and decree dated 07.12.2002 passed by the learned trial court is accordingly affirmed and the appeal dismissed.

RFA 315/2003 and CM Nos.718/2003 and 1649/2003 stand disposed of accordingly.

**REVA KHETRAPAL
(JUDGE)**

**May 28, 2010
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