

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

% *Judgment Reserved on: 09.07.2010*
Judgment Delivered on: 13.07.2010

+ **R.S.A. No.136/2004**

M/S INDIAN SUGAR EXIM CORPORATION LTD.

.....Appellant
Through: Mr.Sandeep Sethi, Sr.Advocate
with Mr.Suresh Singh &
Ms.Sunita Bansal, Advocates.

Versus

1.SUBHASH CHAND KOHLI
2.CHANDRA MOHAN KOHLI

.....Respondents
Through: Mr.Dinesh Kapoor & Mr.Manu Nayar,
Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. This appeal has been preferred against the impugned judgment dated 23.02.2004 passed by the learned Additional District Judge affirming and endorsing the finding of the Trial Court dated 03.05.2003 whereby future mesne profits had been granted to the plaintiff for period 10.08.1990 to 30.09.2001 in view of the fact that the property had stood vacated on 01.10.2001.

2. The present being a second appeal, the substantial question of law as formulated by a Single Judge of this Court on 12.12.2007 reads as follows:-

“Whether the findings by the Courts below that respondents is entitled to mesne profits @ Rs.70,000/- per month is based on legally admissible/or creditworthy evidence. If so, effect thereof?”

3. The Single Judge of this Court had modified the order of the First Appellate Court and the mesne profits granted @ Rs.70,000/- per month had been reduced to Rs.40,000/- per month for the aforementioned relevant period; the remaining part of the judgment had been affirmed.

4. The plaintiff/respondent had filed a Special Writ Petition in the Supreme Court. The Supreme Court vide its order dated 06.02.2009 granted leave and the matter was remanded back to this Court with the directions which are inter alia contained in para 4 and read as follows:-

“ In our view, the judgment of the High Court needs to be set aside on a simple ground. That while reducing and modifying the order of the courts below regarding the rate of mesne profits from Rs.70,000/- to Rs.40,000/- per month, the High Court had not dealt with the evidence adduced by the parties and considered the materials on record to come to a conclusion that the orders of the courts below directing Rs.70,000/- per month as mesne profits be modified to the extent of Rs.40,000/- per month payable to the landlord. We do not find from the judgment that any consideration was made by the High Court to reduce the rate of mesne profits from Rs.70,000/- to 40,000/- per month. That being the position, we set aside the judgment of the High Court and send the case back to it for fresh disposal in accordance with law after giving hearing to the parties and after passing a reasoned order. We request the High Court to dispose of the second appeal within three months from the date of supply of a copy of this order to it.”

5. Before proceeding further it would be useful to extract the factual matrix of the case which is as follows:-

The plaintiff/respondent had filed a suit for possession and mesne profits in respect of property bearing No. 21, Community Centre, East of Kailash, New Delhi which he had leased out to the defendant company being his tenant vide lease deed agreement

dated 29.06.1973 on a monthly rent of Rs.6200 only. The lease was initially for a period of three years effective from 01.06.1973 but with the consent of the parties the lease period continued and the defendant/appellant became a tenant holding over. He became a tenant on a month to month basis. Rent was being paid @ Rs.6200/- per month. On 29.03.1978 a legal notice had been served upon the defendant/appellant calling upon him to vacate the property as also to pay damages. Legal notices dated 23.01.1989 and 20.02.1989 terminating the tenancy of the defendant/appellant were issued. Damages @ Rs.25000/- per month were claimed. Thereafter the legal notice dated 06.11.1989 was issued claiming damages @ Rs.70,000/- per month w.e.f. 20.8.1989 to 20.11.1989. The defendant/appellant not having vacated the suit property, the plaintiff/respondent filed the present suit.

6. Both the parties have addressed arguments at length. On behalf of the defendant/appellant it has been submitted that the order dated 12.12.2007 of the High Court calls for no interference as the Court has taken judicial notice of the fact that rentals had increased in the market but the rate of Rs.70,000/- per month being based on no evidence yet taking judicial notice of the increasing rentals over the years mesne profits at the rate of Rs.40,000/- per month was fair and reasonable and did not call for any interference. Counsel for the appellant has placed reliance upon a judgment of the Apex Court reported as (2004) 5 Supreme Court Cases 304 Union of India vs. Banwari Lal & Sons (P) Ltd. to support his submission that the present is a case in which the possession was admittedly not wrongful in the beginning and had assumed a wrongful character only when it was unauthorizedly

retained and in such a case, the owner is not entitled to claim mesne profits but only the fair rent. Applying the ratio of the afore-noted judgment mesne profits awarded @ Rs.40,000/- per month would qualify as a 'fair rent'.

7. It is submitted that the first Appellate Court had also ignored the report of the Local Commissioner and reliance had been placed solely upon the version of PW2 which is also liable to be discarded as admittedly PW2 had only proved the assessment order of the property wherein the ratable value of the property had been fixed at Rs.16,41,600/- which had been challenged in a writ petition preferred by the plaintiff/respondent and which ratable value has since been rectified. It is submitted that in these circumstances, the testimony of PW2 has to be ignored in totality as this testimony of PW2 qua the ratable value of the property having been fixed at Rs.16,41,600/- has since been set aside by the subsequent rectification.

8. Attention has been drawn to the legal notices dated 23.01.1989 and 20.02.1989 wherein the plaintiff had made a claim of damages/mesne profits at the rate of Rs.25000/- per month. It is submitted that it was only thereafter in the third legal notice dated 6.11.1989 that the plaintiff had all of a sudden unexplainably raised his claim of damages/mesne profits from Rs.25000/- to Rs.70,000/- per month.

9. The respondent has countered these arguments. It is stated that the High Court while reducing the mesne profits from Rs.70,000/- to Rs.40,000/- per month has erroneously reappreciated the testimony of PW2 and the report of the local commissioner which a Court in Second Appeal is not permitted to

do so; there was a legal bar which the Court had not adhered to and that is the reason why the matter had been remanded back to this Court by the Apex Court.

10. Attention has been drawn to the versions of PW1, PW2 as also the report of the local commissioner and the findings given by the Trial Court which had been endorsed by the First Appellate Court.

11. Counsel for the respondent has placed reliance upon a judgment of the Apex Court reported in 2004(3) Supreme 474 Thiagarajan & Ors. Vs. Sri Venugopalaswamy B. Koil & Ors. It is submitted that where the High Court had exceeded its jurisdiction in reassessing, re-appreciating and making a roving enquiry by entering into the factual arena of the case; where a finding of fact by the lower appellate Court are based on evidence; the High Court in second appeal cannot substitute its own findings on a re-appreciation of the evidence merely on the ground that another view was possible. Reliance has also been placed upon a judgment of this Court reported in 60(1995) DLT 336 Anant Raj Agencies Pvt. Ltd. Vs. Rajinder Jaina. It is submitted that where there is no evidence in rebuttal as is so in the present case there is no reason why the versions of the witnesses of the plaintiff should be disbelieved.

12. Perusal of the record shows that the trial court had framed three issues. PW-1 had deposed about the prevailing market rate of similar premises i.e. at the rate of Rs.25/- per sq. ft. PW-2 was the crucial witness upon which the trial court had placed reliance to decide the issue of mense profits. He was the Assistant Zonal Inspector from the Special Assessment Unit, MCD. He had

deposed that the rateable value of the property had been fixed at Rs.16,41,600/- by the Assessor & Collector on the basis of the market rent at Rs.20/- per sq. ft., the record of which was lying in the office of the Assessor & Collector and which could be summoned from the said department. Report of the local commissioner was another important piece of evidence relied upon by the trial court qua the mesne profits to be awarded to the plaintiff/respondent. The local commissioner, an advocate had been appointed by an order of the court in the pending civil suit on 24.2.2003 and he had filed his report in the court on 25.3.2003. Perusal of the order dated 24.2.2003 shows that this order had been passed on an application filed by the plaintiff under Order 26 Rule 9 read with Order 20 Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'the Code') with a specific prayer that the local commissioner be directed to make his enquiry under Order 20 Rule 12 (b) (c) of the Code. This order was passed in the presence of both the parties directing the local commissioner to visit the suit property on 28.2.2003 at 4 p.m. to ascertain the rent at which the portion of the first and second floor of the property had been rented out. The court had relied upon the provisions of Order 20 Rule 12 (b) (c) of the Code to pass the aforementioned order. The local commissioner had made enquiries from adjoining property dealers and had observed that the disputed property was situated in the heart of the Community Centre Complex, East of Kailash and was surrounded by a renowned and established business houses, banks, institutions and companies. On the basis of his enquiry he had assessed the market rental of the first and second floor of adjoining properties to be between Rs.15/- to

Rs.20/- per sq. ft. per month. It is relevant to state that at no point of time any objection has been filed by the defendant to the report of the local commissioner. His submission that he was not permitted to cross-examine the local commissioner is of no relevance in view of the fact that no such submission was ever made before the fact finding courts; his report was a piece of evidence under Order 20 Rule 12 sub clause (2) of the Code which clearly states that where an enquiry had been directed under Order 20 Rule 12 sub clause (b) or sub clause (c) of the Code (under which provision of law the local commissioner had been appointed on 24.2.2003) a final decree in respect of the mesne profits shall be passed only in accordance with the result of this enquiry. This was not an appointment under Order 26 Rule 9 & 10 of the Code and as such not an investigation which he was required to conduct. Even for the sake of argument if it is assumed that the order appointing the local commissioner has been passed under Order 26 Rule 9 and 10 of the Code nevertheless report of the local commissioner would be read as evidence and form a part of the record of the case and in case if for any reason the court is dissatisfied with the proceedings of the commissioner, the commissioner could be examined in person. No such dissatisfaction was ever brought to the notice of the court as no objection had been filed by the defendant to the report of the local commissioner. The question of the court directing his presence in the witness box did not arise.

13. The submission of the learned counsel for the appellant that the testimony of PW-2 is to be ignored is ill-founded. It is not disputed that a writ petition had been filed by the plaintiff

challenging the ratable value and which had since stood rectified; his contention being that the ratable value of the property has to be fixed on the cost of construction; it was not his case that the rate of Rs.20/- sq.ft. was not the market value of the suit property.

14. The courts below had correctly appreciated the evidence brought before it to conclude that the mesne profits of the suit property to be awarded in favour of the plaintiff for the relevant period i.e. the period of 10.8.1990 to 30.9.2001 would be at the rate of Rs.70,000/- per month which would approximate to about less than Rs.10/- per sq.ft. Version of PW-2 had been re-enforced by the report of the local commissioner and which findings of fact cannot in any manner be faulted with.

15. Substantial question of law framed by this court is answered accordingly. Appeal is without any merit; it is dismissed.

INDERMEET KAUR, J.

JULY 13, 2010
ns/rb