

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

% *Date of Judgment: 24.12.2010*

+ **R.S.A.No.233/2010 & C.M.Nos.23200-23202/2010**

DINESH AGGARWAL .....Appellant  
Through: Mr. Manu Nayar & Mr.Karan  
Chauhan, Advocates.

Versus

SANJEEV KUMAR GUPTA & ANR. ....Respondents  
Through: Nemo.

**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.** (Oral)

C.M.23201/2010 (for exemption) in R.S.A.No.233/2010

Exemption is allowed subject to all just exceptions.

Application is disposed of.

R.S.A.No.233/2010 & C.M.23200/2010 (for stay)

1. This appeal has impugned the judgment and decree dated 29.7.2010 which has endorsed the finding of the trial judge dated 27.10.2009 whereby the suit of the plaintiff seeking possession of

the suit property i.e. a part of plot no.B-8, Khasra no.96 situated at Abadi of Madhu Vihar in the area of village Mandawali Fazalpur, Illaqa Shahdara, Delhi measuring 170 sq. ft. had been decreed in favour of the plaintiff.

2. The trial judge had framed five issues. During the course of the proceedings in September, 2002 the suit property had been handed back by the defendant to the plaintiff.

3. The contentious issue raised in the second appeal is qua issue no.5 which inter alia reads as follows:

5. Whether the plaintiff is entitled to the damages/mesne profit? If so at what rate? OPP

4. Trial judge had dealt with the evidence of PW-1 as also PW-2 in this regard. It had noted that neither party had produced any documentary evidence qua this proposition. Version of PW-1 was to the effect that properties in the adjoining area were fetching rent at the rate of ₹ 30,000/- per month whereas the version of DW1 was that adjoining properties were fetching rent at the rate of ₹17,000-18000/-. This had been elicited in the cross-examination of DW1. Trial judge had noted that DW-1 had relied upon a lease deed of the adjoining property i.e. property no.B-7 which had also been rented out to the defendant for which he was paying rent but he had deliberately and intentionally not produced

that document which had led both the courts below to draw an adverse inference against the defendant. This finding has been challenged by the learned counsel for the appellant. It is submitted that an adverse inference qua this fact has to be drawn. It is further submitted that the courts below have decided this issue without any cogent evidence relying upon the principle of preponderance of probabilities.

5. The findings in the impugned judgment qua this proposition are extracted hereinbelow. They inter alia read as follows:

“37. The plaintiff has not placed on record any document viz. Lease deed or rent receipt in order to substantiate his contention that the prevalent rate of rent in the adjoining area was Rs.30,000/- per month.

38. It is further pertinent to mention here that the defendant during his cross examination has stated that the rate of rent of an other premises, which is adjacent to the suit property bearing no.B7 was Rs.17000/- per month. He has denied the suggestion put forth by the Id.Counsel for the plaintiff that the rate of rent in the adjoining area was Rs.25000/- per month.

39. It is further pertinent to mention here that the defendant has failed to place on record any documentary proof, in order to substantiate his contention that he was paying Rs.17000/- per month as rent for the property bearing no.B-7, which is just adjacent to the suit property. It will not out of place to mention here that the defendant has admitted that he was paying the rent for the said property bearing no.B7 by way of cheque, but he failed to produce on record any statement of account, rent agreement or rent receipt to show that he was paying Rs.17000/- per month, as rent for the property bearing no.B-7 despite of availing number of opportunities during his cross examination.

40. Since the appellant/defendant has withheld the best evidence, which was available with him to establish that the rate of rent prevalent in the market was about Rs.17000/- per month, so the Id.Trial court was pleased to draw an adverse inference against the defendant and deemed it proper to direct the defendant to pay the damages/mesne profits to the plaintiffs at the rate of Rs.25000/- per month w.e.f.16.08.2000 to

10.09.2002.

41. The ld. counsel for the appellant has submitted that since the plaintiffs/respondents have failed to bring any evidence on record that the market rent in the said area was Rs.25000/- per month so the judgment under appeal passed by the ld.Trial court is not sustainable in the eyes of law.

42. Whereas the plaintiffs have claimed Rs.1000/- per day as damages/mesne profits and perusal of the cross examination of the defendant shows that the ld.Counsel for the respondent/plaintiffs has given suggestion to him that the rate of rent of the adjoining property no.B7 was Rs.25000/-. But he has denied the same and during the cross examination, the defendant has stated that he is paying Rs.17000/- per month as rent for the property bearing no.B7, which is adjacent to the suit property and despite of many opportunities, he failed to produce any such documentary proof and in view of withholding of the best evidence available with the defendant, the ld.Trial court has drawn an adverse inference against the defendant.

43. "The law is well settled that the court can draw an adverse inference against a party who withholds the best evidence, not-withstanding the onus of prove does not lie on him."

44. Coming to the case in hand, the fact is proved on record that the appellant/defendant remained in possession of the suit property, even after the termination of the tenancy and since the appellant/defendant has used the premises w.e.f. 16.9.2000 to 10.9.2002 so the respondents/plaintiffs are entitled for the mesne profits. As the appellant/defendant has taken the stand that he is paying Rs.17000/- per month, as rent for the property adjacent to the suit property bearing no.B7. But, he has withheld the best evidence with him. So, keeping in mind the fact and circumstances of the case in hand, as discussed above I do not find any force in the submissions of the ld.Counsel for the appellant. In my considered opinion there is no infirmity in the order of the ld.Trial court, while it has granted an amount of Rs.25000/- per month as damages/mesne profits for the period 16.09.2000 to 10.09.2002. So far as the question of interest and other claims of the respondents/plaintiffs are concerned the same are the subject matter of another appeal RCA No.14/10 and the same are being determined in that lis. Accordingly the findings of the ld.Trial court on issue no.5 are confirmed."

6. The defendant in his cross-examination had admitted that the adjoining property i.e. property bearing no.B-7 was rented out to him at a monthly rental of ₹ 17000/-; this was contrary to his

earlier version wherein he had stated that the adjoining property was fetching rent at the rate of ₹ 10,000-12,000/- per month. The contention of the plaintiff was that the adjoining properties were fetching rent at the rate of ₹25,000/- per month. Neither party had produced any written lease deed nor any other document to substantiate this submission. The court had taken judicial notice of the fact that since even after the termination of the tenancy the defendant had overstayed and initial rental of the suit property which had been leased out in the year 1999 was ₹17,000/-; the rate of damages awarded at the rate of ₹ 25000/- per month with effect from September, 2002 was fair and justified. Although the words 'judicial notice' did not find mention in the judgment yet this is implicit and evident from the import of the said order.

7. Learned counsel for the appellant has placed reliance upon a judgment of the Division Bench of this court reported in 122 (2005) DLT 629 (DB) National Radio & Electronic Co.Ltd. vs. Motion Pictures Association to support his submission that in the absence of any evidence the impugned judgment could not have confirmed damages/mesne profits at the exorbitant rate of ₹25000/- per month. This judgment in fact goes against the argument proposed by the learned counsel for the appellant.

While dealing with the issue of mesne profits to be awarded to a particular litigant the court had recorded that initially this property had been leased out at a monthly rental of ₹3513.84 p. The court even in the absence of a written document had awarded damages at the rate of ₹15 per sq. ft. i.e. totaling about ₹ 42000/- per month.

8. The findings in the impugned judgment are in no manner perverse. The substantial questions of law find mentioned in the body of the appeal do not raise any substantial questions of law. Appeal as also pending application is dismissed in limine.

C.M.23202/2010 (for delay)

This application has become infructuous; it is dismissed.

INDERMEET KAUR, J.

DECEMBER 24, 2010  
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