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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: March 31, 2011
Judgment pronounced on: April 25, 2011

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**C.S. (OS) No. 1626/1996 &
I.A. No. 6071/2007**

% M/s. Vishwanath Khanna & Sons, HUF ... Plaintiffs
Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Rajinder
Agarwal, Advocate

versus

Bank of Baroda ... Defendant
Through: Mr. Pramod B. Agarwala, Ms.
Praveena Gautam and Mr. Rajan
Bhati, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported in the Digest?
- No.

SUNIL GAUR, J.

**I.A. No. 6071/2007 (under Order 22 Rule 2 CPC by the plaintiff) in
C.S. (OS) No. 1626/1996**

1. The requirement for filing this application for substitution of Karta of plaintiff/HUF arose on 7th January, 2007 when Shri Vishwanath

Khanna, Karta of plaintiff/HUF had died. However, this application has been filed on 18th May, 2007 as an objection was raised by the counsel opposite that since the substitution of Karta of the plaintiff/HUF had not taken within the stipulated period of 90 days, therefore this suit abates. It is stated in this application that upon the death of Karta of HUF, the senior member automatically becomes the Karta of HUF and so, there is no question of any abatement. The question herein is not as to what happens upon the death of Karta of HUF. Whether substitution of Karta of HUF upon the death of the Karta is required or not is no longer *res integra* as Apex Court in '**UOI vs Sree Ram Bohra & Ors.**', AIR 1965 SC 1531 had refused to intervene where the suit stood abated on account of non-substitution of the Karta of the HUF.

2. It becomes quite evident from the perusal of this application that the applicant's counsel was under a misconception about the procedure to be adopted upon the death of Karta of HUF. What is to be considered is whether this lapse of applicant's counsel deserves to be condoned or not. The question of setting aside abatement has been considered by the Apex Court in '**Ramdas Shivram Sattur vs. Rameshchandra Popatlal Shah & Ors.**', AIR 2007 SC 3018, while declaring in no uncertain terms that in such cases too technical or pedantic approach is not called for. What has been said by the Apex Court is as under:-

“The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court.”

3. As abatement results in denial of hearing on merits, so, the prayer for setting aside abatement has to be considered liberally. Any other view would verge on too fine a technicality and will result in injustice being done. For the mistaken perception of the procedural part on behalf of the applicant's counsel, a litigant cannot be made to suffer. For a period of 90 days from the date of death any party, the suit remains in a state of suspended animation and then it abates. As per Article 121 of the Schedule to the Limitation Act, 1963, the limitation to seek setting aside of abatement, is 60 days. This suit stood abated on or about 7th April 2007 and the instant application has been filed on 18th May 2007, i.e., well within sixty days of 7th April 2007 and is thus, within limitation.

4. The bona fide belief of the Applicant, which is based upon mistaken advice of counsel that substitution of the *Karta* in the legal proceedings is not required, is a sufficient reason, in the opinion of this Court, to set aside the abatement and to permit the Applicant to pursue the suit as *Karta* of the HUF as the instant application is accompanied

by Affidavit of the Applicant as well as the other legal heirs of the original *Karta* of the Plaintiff (HUF).

5. This application is accordingly allowed.

C.S. (OS) No. 1626/1996

1. In this suit for possession of ground and mezzanine floor measuring 2900 sq.ft., in Property No. H-11, Cannaught Circus, New Delhi and for recovery of arrears of damages amounting to Rs.1,21,80,000/- and for recovery of future damages/mesne profit @ Rs.4,35,000/- per month, a decree on admissions for possession of the suit property already stands passed on 18th February, 1998. It is evident from the order of 16th July, 1999 that the aforesaid decree for possession stood executed on 4th January, 1999. However, the claim for damages/mesne profits survived.

2. The undisputed facts are that the suit property was let out by the Plaintiff to the Defendant on 2nd March 1987, at a rental of Rs.58,000/- per month, and a registered Lease Deed (Ex.PW-1/1) in this regard was also executed on 25th October, 1989 and the duration of the lease was for a period of seven years from 2nd March, 1987 and by afflux of time, the said lease came to an end on 1st March 1994. Since the Defendant had failed to vacate the suit property despite notice, therefore, the Plaintiff had to take recourse to law.

3. The response of the Defendant to the Plaintiff's claim was of Plaintiff agreeing to extend the lease till Defendant's alternate premises are ready and the usual preliminary objections were taken in written statement. The Issues claimed by the parties to this suit are as under:-

- (i) *Whether the Plaintiff is entitled to damages/mesne profits from 1.3.1994 till filing of the suit? If so, at what rate? OPP*
- (ii) *Whether the Plaintiff is entitled to damages/mesne profits from the date of institution of the suit till the date of decree. If so at what rate? OPP*
- (iii) *Whether the Plaintiff is entitled to damages/mesne profits from the date of decree till 4.1.1999? If so, at what rate? OPP*
- (iv) *Whether the Plaintiff is entitled to interest on any of these amounts? If so, at what rate? OPP*
- (v) *Relief.*

6. On behalf of the Plaintiff, its *Karta* – Shri Rajesh Khanna (PW-1) has deposed and has relied upon Lease Deeds (Ex.PW-1/8 & Ex.PW-1/9) of Lord Krishna Bank and MASHREQ Bank to seek the damages/mesne profits, whereas, Defendant's deposition is of its Senior Manager – Prakash Chand (DW-1), Shri P.C. Parashar (DW-2)

from UCO Bank, H-47, Connaught Place, New Delhi, Shri N. Srinath (DW-3) from Oriental Bank of Commerce, H-15, Connaught Place, New Delhi, Shri P.K. Malhotra (DW-4) from Punjab National Bank, H block, Connaught Place, New Delhi. No other evidence has been led by either side.

7. After hearing learned counsel for the parties and upon scrutiny of evidence on record, the findings returned are as under:-

Issue No.: (i)

8. What was the comparable rental after the determination of the lease of the suit property, i.e., from 1.3.1994 till the filing of the suit in July, 1996 is required to be determined. To claim the rental at Rs.150/- sq.ft. per month for the aforesaid period, Plaintiff's reliance is upon the Lease Deed of 29th July 1997 (Ex.PW-1/8) of MASHREQ Bank at 28, Barakhamba Road, New Delhi indicating rental of Rs.200/- per sq.ft. per month. Another Lease Deed of 9th December, 1996 (Ex.PW-1/9) of Lord Krishna Bank, showing rental of Rs.150/- per sq.ft. per month, is clearly misplaced for the reason that these two instances do not pertain to the period in question. No other evidence has been led by the Plaintiff to show what was the market rental of the premises comparable to the suit premises during the period in question. Though, as per Defendant, the rent for the similar premises in this area had varied from Rs.20/- to

Rs.50/- per sq.ft. per month, but the Defendant vide communication of 6th June, 1995 (Ex.DW-1/PB), had revised the rent for the suit premises at the rate of Rs.60/- per sq.ft. per month, w.e.f., 12th May, 1995. In the face of the evidence on record, it is found to be just and reasonable to make Defendant's communication of 6th June 1996 (Ex.DW-1/PB) the basis for holding that the Plaintiff is entitled to damages/mesne profits@ Rs.60/- per sq.ft. per month for the suit premises with effect from 1st March 1994 till filing of the suit. This Issue is accordingly answered.

Issue No.: (ii) & (iii).

9. Both these Issues are inter-related and are being taken up together. For determining the damages/mesne profit for the use and occupation of the suit premises by the Defendant during the *pendentelite* period till the possession of the suit premises was delivered to the Plaintiff, what is to be seen is that whether the instances Ex.PW-1/8 and PW-1/9 are comparable to the suit premises. It has come in the evidence of the Plaintiff that the suit premises was constructed in the year 1935 with certain renovations in the year 1966, whereas the MASHREQ Bank is located in an extension of Connaught Place, where outer circle of Connaught Place and Barakhamba Road meet, and it is said to be equipped with lifts, air conditioners and other fire fighting equipments with electric power back up. It stands admitted

by the Plaintiff that the rates of rent within Connaught Place and at a location in the extension of Connaught Place, varied from each other and the suit premises is located behind Plaza Cinema, whereas MASHREQ Bank is in the outer circle. Plaintiff has also conceded in evidence that the traffic on the road on which the suit premises is located is quite heavy.

10. In the light of the aforesaid revelations, I find that the instance - Ex.PW-1/8 of MASHREQ Bank is not comparable to the suit premises. As regards the second instance Ex.PW-1/9 of Lord Krishna Bank, it has come in the evidence of the Plaintiff that the Lord Krishna Bank premises was extensively renovated in the year 1996 and was having high speed lifts, flooring of high quality Italian marble, excellent doors, windows made of high quality and of most model look. It was pointedly put to the Plaintiff in cross-examination that United Commercial Bank located on the ground floor at H Block, Connaught Circus was paying rental at the rate of Rs.35/- per sq.ft. per month and the Plaintiff had pleaded ignorance about it. It would be worthwhile to refer to the following deposition of the Plaintiff:-

“Ques.: I put to it you that your claim for mesne profits is wishful and is far from reality. What you have to say?”

Ans.: My claim for mesne profits @ Rs.150/- per

sq.ft. is clearly based on the next door premises taken by Lord Krishna Bank in the middle circle in the next block which has no comparison for my premises.”

11. Plaintiff himself and rightly so, finds no comparison of the suit premises with the premises where the Lord Krishna Bank is located, therefore, Plaintiff's reliance placed upon aforesaid instance- Ex.PW-1/9 is rendered futile. No other comparable instance has been relied upon by the Plaintiff. Since Defendant is bound by its own Communication of 6th June, 1995 (Ex.DW-1/PB), and because no other evidence has been led by the Plaintiff to prove its entitlement to a rental higher than Rs.60/- per sq.ft. per month for the period in question, therefore, it is held that the Plaintiff is entitled to a rental @ Rs.60/- per sq.ft. per month from the date of institution of the suit till delivery of the possession of the suit premises, i.e., 4th January, 1999. Both these Issues are accordingly answered.

Issue No.: (iv)

12. Though interest on the user charges of the suit premises is claimed at 18% per annum, but the basis to substantiate it, has not been disclosed. Since the nature of the transaction is strictly not of commercial nature, and because the Plaintiff had refused to accept the increased rental at the rate of Rs.60/- per sq.ft. per month, therefore,

the reasonable rate of interest payable to the Plaintiff on the decreed amount would be @ 9% per annum. Accordingly, it is held that the Plaintiff is entitled to recover the interest @ 9% per annum on the decreed amount, till realization. This Issue stands answered accordingly.

Issue No.: (v)

13. In the light of the aforesaid findings, this suit is decreed in the aforesaid terms, i.e., on a rental @ Rs.60/- per sq.ft. per month for the suit premises is payable to the Plaintiff by the Defendant with effect from 1st March 1994 till 4th January, 1999, with interest @ 9% per annum thereon, till realization. Decree sheet be drawn forthwith.

14. This suit and the application are disposed of accordingly.

Sunil Gaur, J.

April 25, 2011
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