

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RFA Nos. 428/2011, 429/2011, 430/2011, 453/2011,**
454/2011, 455/2011 and 456/2011

% **1st December, 2011**

5. **RFA 428/2011**

CANARA BANK Appellant
Through : Mr. Rajiv. B. Samaiya, Advocate.

versus

MK GUPTA & ANR Respondents
Through : Mr. Praveen Kumar Singh, Advocate.

WITH

6. **RFA 429/2011**

CANARA BANK Appellant
Through : Mr. Rajiv. B. Samaiya, Advocate.

versus

AK GUPTA & SONS Respondent
Through : Mr. Praveen Kumar Singh, Advocate.

WITH

7. **RFA 430/2011**

CANARA BANK Appellant
Through : Mr. Rajiv. B. Samaiya, Advocate.

versus

RK GUPTA

..... Respondent

Through : Mr. Praveen Kumar Singh, Advocate.

WITH

8.

RFA 453/2011

CANARA BANK

..... Appellant

Through : Mr. Rajiv. B. Samaiya, Advocate.

Versus

RAVINDER KUMAR

..... Respondent

Through : Mr. Praveen Kumar Singh, Advocate.

WITH

9.

RFA 454/2011

CANARA BANK

..... Appellant

Through : Mr. Rajiv. B. Samaiya , Advocate.

Versus

ANJALI GUPTA

..... Respondent

Through : Mr. Praveen Kumar Singh, Advocate.

WITH

10.

RFA 455/2011

CANARA BANK

..... Appellant

Through : Mr. Rajiv. B. Samaiya, Advocate.

versus

SHASHI BALA GUPTA

..... Respondent

Through : Mr. Praveen Kumar Singh, Advocate.

AND

11.

RFA 456/2011

CANARA BANK

..... Appellant

Through : Mr. Rajiv. B. Samaiya, Advocate.

versus

MOHINDER KUMAR

..... Respondents

Through : Mr. Praveen Kumar Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this judgment, seven appeals are being disposed of inasmuch as they arise from identical judgments of the trial Court, and they involve same issues of facts and law. For the sake of convenience, reference is being made to the facts of Regular First Appeal (RFA) No. 428/2011.

2. The challenge by means of this Regular First Appeal filed under Section 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 29.4.2011. By the impugned judgment, trial Court has decreed the suit filed by the respondents/plaintiffs/landlords for recovery of mesne profits qua the tenanted premises.

3. The brief facts of the case are that Flat Nos. F-2 and G-12 situated in the commercial Plot No. N, O, P, Savitri Market, Shopping Centre, Tagore Park, near Model Town-I, Delhi- 110 009 were given on rent to the appellant/defendant by means of a duly registered lease deed dated 8.5.1998. The total area of the two flats was 548 sq. ft. The lease hold rights created under the lease deed dated 8.5.1998 was for a period of five years with effect from 20.10.1997. There was an option to the appellant/defendant to stay for another period of five years and thus the total duration of the lease was for ten years, expiring on 19.10.2007. The initial rate of rent was ₹28 per sq. ft. per month, and which during the second period of five years became ₹37.80 per sq. ft. per month. The case as laid out by the respondents/plaintiffs was that well before the expiry of the lease period on 19.10.2007, the respondents/plaintiffs had been regularly writing to the appellant/defendant to surrender the lease hold rights on the expiry of duration of the lease, however, the appellant/defendant-Bank failed to hand over vacant peaceful possession of the tenanted property. It was therefore pleaded that the appellant/defendant was an unauthorized occupant in the suit property with effect from 20.10.2007 and was liable to pay market rate of rent of ₹150 per sq. ft. to ₹175 per sq. ft, the rate which was prevailing in October, 2007. It

was further the case of the respondents/plaintiffs that there were discussions
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for extension of lease, however, nothing came out of the same and ultimately a legal notice dated 6.3.2009 was also served on the appellant/defendant-Bank, which having failed to yield the desired response inspite of a reply received on 20.5.2009, the subject suit for possession and mesne profits came to be filed.

4. The case of the appellant/defendant in the trial Court was that after the expiry of the lease period on 19.10.2007 it had continuously deposited the rent in the respective bank accounts of respondent/plaintiff and which having been withdrawn, there is an implied consent to treat the lease as subsisting.

5. After the completion of pleadings, the trial Court framed the following issues:-

- “1. Whether the suit of the plaintiffs is not maintainable on account of mis-joinder of causes of action? OPD
2. Whether the plaintiffs are entitled to a decree in the sum of Rs.7,45,718.40p., as prayed for? OPP
3. Whether the plaintiffs are entitled to a decree of possession in respect of the impugned flats No. F-2 and G-12 admeasuring 548 sq. ft.?
4. Whether the plaintiff are entitled to future mesne profits and at what rate? OPP
5. Whether the plaintiff are entitled to interest @ 24% from the date of filing of this suit till realization? OPP
6. Relief, if any.”

6. I may mention that the appellant/defendant during the pendency of the

suit vacated the suit premises on 9.9.2010. The issue, therefore, which only survived for determination before the trial Court was the claim of the respondents/plaintiffs towards mesne profits. There were two aspects to this claim of mesne profits. First was the period for which the mesne profits were payable and the second aspect was the rate at which mesne profits were to be paid.

7. On the aspect that whether after the expiry of period of lease, acceptance of rent amounts to creation of a tenancy, the trial Court has held in favour of the respondents/plaintiffs, by holding that it could not be said that the respondents/landlords assented to continuation of the appellant/defendant as a lessee in the suit premises. The trial Court has referred to the letters of the respondents/plaintiffs written to the appellant/defendant to arrive at a conclusion that even before the expiry of the lease period, the respondents/plaintiffs had made it known to the appellant/defendant-Bank to hand over possession and failing which it will be liable to pay mesne profits. It was also informed to the appellant/defendant that the amount which was being credited in their account towards rent should not be credited and if the same is done, it shall be treated to be without the consent of the respondents/plaintiffs. These

three letters are dated 30.4.2007 (Ex. PW1/8), 13.8.2007 (Ex. PW1/9) and
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31.10.2007 (Ex.PW1/4). Since these letters are very material to determine the issue as to whether there was an agreement for the appellant/defendant-Bank to continue as a tenant, I would seek to reproduce all the aforesaid three letters, and the same read as under:-

“FROM : M.K. GUPTA
S-257, GREATER KAILASH PART II,
NEW DELHI – 110048

TO,
THE MANAGER,
CANARA BANK,
MODEL TOWN,
DELHI

SUB : LEASE DEED DATED 08.05.1998 IN RESPECT OF FLAT
NO. F-2, FIRST FLOOR, PLOT NO. 0, TAGORE PARK, DELHI

SIR,

You are the tenant in the above premise since 20.10.1997 vide above stated lease deed for a period of 5 years with an option of continuing for another 5 years. As such you have availed the option of 5 years and lease shall end on 19.10.2007. Hence you are requested to vacate the premises on 19.10.2007 (as per para 2 and 16 of the Lease Deed).

You are also requested to note the change in my/our address instead of my/our old address i.e. W-56, GREATER KAILASH PART II, NEW DELHI-110048, which is as under:-

M.K.GUPTA
S-257, GREATER KAILASH PART II
NEW DELHI-110048.

Hoping an early reply in this regard.

Thanking you,

Yours truly,

M.K. GUPTA

DATED 30.04.2007”

“FROM : M.K. GUPTA
S-257, GREATER KAILASH PART II,
NEW DELHI – 110048

TO,
THE MANAGER,
CANARA BANK,
MODEL TOWN,
DELHI

SUB : LEASE DEED DATED 08.05.1998 IN RESPECT OF FLAT
NO. F-2, FIRST FLOOR, PLOT NO. 0, TAGORE PARK, DELHI

REF : MY/OUR LETTER DATED 30.04.2007 REQUESTING YOU TO
VACATE THE PREMISES IN TERMS OF LEASE DEED DATED
08.05.1998, LEASE PERIOD ENDING ON 19.10.2007.

SIR,

I/We invite your kind attention to our earlier letter dated 30.04.2007 as stated above and sorry to say that no reply to that has been received till date. I/We again remind you that you are the tenant in the above premises since 20.10.1997 vide above stated lease deed for a period of 5 years with an option of continuing for another 5 years. As such you have availed the option of 5 years and lease shall end on 19.10.2007. Hence you are requested to vacate the premises on 19.10.2007 (as per para 2 and 16 of the Lease Deed).

In case you do not vacate the premise on 19.10.2007 and handover the vacant and peaceful possession, you shall become as unauthorized occupant of the premises. You shall be liable to pay damages on day to day basis @ Rs.1244.00 (Rs.One thousand two hundred forty four only) per day as per prevailing market rate, till you vacate the premises.”

Hoping an early reply in this regard.

Thanking you,

Yours truly,

M.K. GUPTA

DATED 13.08.2007”

“FROM : M.K. GUPTA, SHASHI BALA GUPTA and
ANJALI GUPTA
S-257, GREATER KAILASH PART II,
NEW DELHI – 110048

TO,
THE MANAGER,
CANARA BANK,
MODEL TOWN,
DELHI

SUB : Saving A/C No. 1488.

SIR,

We have the above saving account with you and maintaining the same for the credit of our rent due from you. You are stopped from crediting/depositing any amount on account of rent after 19.10.2007 and in case you deposit the same, it shall be treated without our consent.

Thanking you,

Yours truly,

M.K. GUPTA SHASHI BALA GUPTA and ANJALI GUPTA

DATED 31.10.2007”

(underlining added)

A reading of the aforesaid letters clearly shows that there is no assent of the respondents/plaintiffs/landlords for continuation of the appellant/defendant-Bank as a tenant in the premises with effect from 20.10.2007. These letters make it abundantly clear that the appellant/defendant-Bank was asked to vacate the premises, failing which it was said to be liable to pay the mesne profits and any deposit of rent in the

accounts of the respondents/plaintiffs was to be treated as without their consent.

8. The trial Court has referred , in para 25 of the impugned judgment, to the decision of the Supreme Court in the case of *Shanti Prasad Devi and another v. Shankar Mahato and others*, (2005) 5 SCC 543, to hold that mere acceptance of rent subsequent to the lease period, cannot be said to be assent for creation of a month to month lease. Paras 18 and 19 of the judgment of the Supreme Court in the case of *Shanti Prasad Devi* (Supra) were relied upon, and the same read as under:-

“18. We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying 'assent' to the continuance of the lessee even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in Clause (7) read with Clause (9) required fulfillment of two conditions; first the exercise of option of renewal by the lessee before the expiry of original period of lease and second, fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local Mukhia or Panchas of the village. The aforesaid renewal Clauses (7) & (9) in the agreement of lease clearly fell within the expression 'agreement to the contrary' used in Section 116 of the Transfer of Property

Act Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.

19. The lessor in the present case had neither expressly nor impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the instant case, there is a renewal clause in the contract prescribing a particular period and mode of renewal which was 'an agreement to the contrary' within the meaning of Section 116 of the Transfer of Property Act. In the face of specific Clauses (7) & (9) for seeking renewal there could be no implied renewal by 'holding over' on mere acceptance of the rent offered by the lessee. In the instant case, option of renewal was exercised not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was 'holding over' as a lessee within the meaning of Section 116 of the Transfer of Property Act."

(underlining added)

9. In fact, the Supreme Court in a subsequent judgment reported as ***Sarup Singh Gupta v. S. Jagdish Singh and Others, 2006 (4) SCC 205*** has

relied upon the judgment in the case of ***Shanti Prasad Devi*** (Supra) and held

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that after the expiry of the tenancy, a landlord is entitled to appropriate the amounts sent as rent by the erstwhile tenant as charges towards use and occupation of the premises and that would not amount to creation of a fresh tenancy.

10. I, therefore, hold that the trial Court has arrived at a correct finding that there was no agreement to treat the appellant/defendant-Bank as a monthly tenant in the suit premises with effect from 20.10.2007.

11. The next aspect is as to what is the rate of mesne profits which should be awarded to the respondents/plaintiffs. Though, the respondents/plaintiffs filed a certified copy of the lease deed of M/s ING Vysya Bank Ltd. with respect to a premises situated at Block A-1, Model Town, Delhi- 110009. However, since this document was not proved in accordance with law, and admittedly it has not been exhibited, the trial Court was justified in disregarding the said document.

12. There was however, before the trial Court enough evidence for the suit to be decreed for mesne profits at ₹113.40 per sq. ft. per month. This was because the appellant/defendant had taken premises which was barely about 50 yds. from the suit premises and for which it was paying rent @ ₹72 per sq. ft. per month. Admittedly, however, these new premises are situated

in a residential area and in the facts of this case, mesne profits have to be

decided with respect to a commercial area. The issue is not what is the rent which the appellant/defendant-Bank is paying for a premises which is situated in a residential area, since commercial use of such premises is permissible (in view of certain notification issued under the Master Plan of Delhi) but the issue is the rate of rent which would be payable with respect to the subject premises which are admittedly situated in a commercial area. The trial Court has referred to the fact and has taken judicial notice of the fact that in commercial areas rate of rents are higher than in residential areas which are allowed to be used for commercial purposes. I agree. As a Bank, the appellant may have a privilege to take premises in residential areas for banking purposes, however, all other commercial uses of premises can only be in designated commercial areas, and therefore, for determining the rate of mesne profits with respect to the subject premises situated in a commercial area, the rate of rent payable for commercial use of a residential premises can only be a guiding factor. The trial Court considering all aspects has therefore directed mesne profits at ₹113.40 per sq. ft. by making the following observations:-

“30. Although, lease deed executed by the ING Vysya Bank Ltd and its landlord Israni Telecom Private Ltd on 01/5/2009 is not legally proved by calling any witness from the said bank or the landlor of the said bank. The mere

filing of the certified copy of the lease deed would not prove it, but there is force in the argument made on behalf of the plaintiffs that there was ceiling drive in Delhi leading to increase in property rents of the approved commercial premises. This factor being a matter of common knowledge can be taken note of by this court also. Further, the defendant bank shifted to another premises in the same locality and according to its own witness DW1 Sh. D.V. Joshi, by virtue of statement made in the cross-examination the new premises to which the defendant bank has shifted it at a distance of approximately 25 mtrs away from the suit premises while according to plaintiff it is at a distance of 45 feet away from the suit premises. Be that as it may, the defendant bank has shifted in the premises nearby which according to plaintiffs is a residential premises but the witness of defendant DW-1 in the cross-examination stated that he could not say whether the present premises of the bank is residential or commercial. He has also stated that new premises is in the lease agreement at the rate of 72/- per sq. ft. per month. There was no dispute between the parties during the course of arguments that the suit premises is a commercial property. It is a matter of common knowledge that in the same locality or if the two premises are situated nearby out of which one is commercial property and other is residential then there is a vast difference between the rental value of the commercial property and that of residential property, the former has far more rental value than latter. In the given facts and circumstances of the case the claim of damages/mesne profits by the plaintiff at the rate of Rs.113.40/- per sq. ft. per month looks to be reasonable and, in my view, the plaintiffs are entitled for the same. Therefore, the claim of the plaintiffs of damages/mesne profits for the pre-suit period, referred above, amounting to Rs.7,45,718.40 after appropriation of the payments deposited by the defendant bank in the bank account of the plaintiffs for the pre-suit period, deserves to be allowed."

(underlining added)

13. I completely agree with the aforesaid conclusions of the trial Court because the loss to the respondents/plaintiffs is the loss for not letting out the subject premises which are situated in a commercial area and therefore it is a rent of similar premises which are situated in a commercial area which will be a determining factor for arriving at the rate of mesne profits. Some amount of honest guess work is definitely involved in determining the mesne profits and therefore I do not find that the trial Court has committed any illegality and perversity in fixing the rent @ ₹113.40 per sq. ft. per month in view of admitted position that just about 50 yds. away from the subject premises, appellant/defendant-Bank took premises on the rate of ₹72 per sq. ft. per month in a residential area.

14. A civil case is decided on balance of probabilities. The balance of probabilities shows that the trial Court has arrived at correct findings of fact and law making the appellant/Bank liable to pay mesne profits from 20.10.2007. The trial Court was also justified in determining the rent at ₹113.40 per sq. ft. per month, in view of the commercial area where the suit premises are situated.

15. No other point or issue was urged before this Court.

16. In view of the above, there is no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

DECEMBER 01, 2011/*AK*