

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

+ **RFA No.6/2004 & RFA No.36/2004**

% **13th February, 2012**

1.RFA 6/2004

STATE BANK OF INDIA **..... Appellant**

Through: Mr. S.L.Gupta with
Mr. Ram Gupta, Adv.

versus

H.C.TAKYAR (HUF) & ORS. **..... Respondents**

Through: Mr. Rajesh Kumar Luthra, Adv. for R.1-5.
Mr. Sunil Agarwal, Adv. for R.7.

&

2. RFA 36/2004

STATE BANK OF INDIA **..... Appellant**

Through: Mr. S.L.Gupta with
Mr. Ram Gupta, Adv.

versus

H.C.TAKYAR (HUF) & ORS. **..... Respondents**

Through: Mr. Rajesh Kumar Luthra, Adv. for R.1-5.
Mr. Sunil Agarwal, Adv. for R.7.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J (ORAL)

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1. Both these appeals can be disposed of by this common judgment inasmuch as issue in both the appeals is the same. The judgment which is impugned by the appellant-bank in RFA No.6/2004 is the judgment and decree dated 8.9.2003 decreeing the suit of the respondents/landlords for possession and mesne profits. The self-same judgment impugned by the appellant-bank in RFA No.36/2004 is the judgment by which the suit for specific performance filed by the appellant-bank was dismissed and by which suit it was prayed that a lease for an additional five years period be executed of the tenanted premises from 1.8.1998 in favour of the appellant/plaintiff-bank. The impugned judgment which is appealed in both the RFAs is a common judgment decreeing the suit for possession and mesne profits of the landlords/respondents and dismissing the suit for specific performance filed by appellant-bank.

2. The facts of the case are that the appellant-bank took on lease the suit premises being the basement and ground floor of the premises B-10, Community Centre, Janak Puri, New Delhi from the respondents/landlords under a lease deed dated 5.8.1993. As per the terms and conditions of this lease deed, the lease was for a period of five years with an option to take an additional lease for a period of five years, subject to the condition that the

option to renew the lease is exercised at least three months before ending of the period of five years on 31.7.1998. Whereas the appellant-bank contended that the option was, in fact, exercised by a letter dated 6.4.1998, the Trial Court has disbelieved this letter seeking extension of lease as the said document was held as not to be a genuine document.

3. The relevant observations of the Trial Court with respect to the fact that this letter dated 6.4.1998 was not a genuine letter are contained while dealing with issue no. 1 in suit No. 77/2003, and some of the relevant observations read as under:-

“The controversy between the parties rests heavily on the decision on this issue. The landlords pleaded case is that the tenant bank did not exercise the option of renewal of lease with respect to suit premises, three months prior to expiry of lease; as was required by the terms of the lease deed dated 5.8.1993 Ex.PW-1/1. Since the option was not exercised by the tenant Bank, the landlords vide notice dated 12.8.1998, notified tenant’s failure to vacate the property and also demanded damages for use and occupation at the rate of ₹3/- per square feet per month. The tenant Bank has denied these averments and pleaded that the option was exercised vide letter dated 6.4.1998. It is further the case of the tenant Bank that since the rate of rent has been enhanced with effect from 2.8.1998, it was obligatory for the landlords, to have executed the Lease Deed for fresh period of five years. It has also been pleaded by the tenant Bank that silence on behalf of the landlords and acceptance of enhanced rent, amounted to acquiescence of renewal of lease, though the formal Lease Deed had not been executed. The tenant Bank has also pleaded that it got served legal notice dated 19.12.1998 seeking execution of the Lease Deed.

In support of the above pleadings landlords examined PW-2 Sh. H.C.Takyar who has deposed that the lease was for a period of five years with effect from 1.8.1993 and the same expired on

31.7.1998 and as per the terms and conditions of the Lease Deed defendant was entitled to get the lease renewed for a period of five years by exercising the option three months prior to expiry of first lease. This witness has further deposed that the bank did not exercise its option and as such the lease expired by efflux of time. This witness proved the legal notice dated 12.8.1998 requiring the bank to handover the possession of the suit premises, as Ex.PW-2/4. The postal receipts are proved as PW-2/5 & PW-2/6. Reply to this notice received by them dated 11.9.1998, exercising the option is proved as Ex.PW-2/7. It has further been deposed that the Bank exercised its option for renewal of Lease Deed, for the first time in his reply dated 11.9.1998. In his cross-examination, this witness has denied receiving the letter dated 6.4.1998 at any time, though he admits his address mentioned on this letter mark B to be correct. He denied for want of knowledge if letter dated 6.4.1998 mark B was received by plaintiff nos. 6A & 6B. During his cross-examination on 11.11.2002, he deposed that he did not know whether Sh. J.R. Kochhar & Uma Kochhar had received the letter dated 6.4.1998. He admitted that the address of Asha Takyar on the said letter is correct. Ld. Cl. for the Bank has placed much reliance on reply to a suggestion made to PW-4 Vikas Takyar, wherein, he has deposed that "it is incorrect to suggest that Bank has not exercised its option for renewal of the lease". PW-5 J.R. Kochhar, during his cross-examination denied having received any letter dated 6.4.1998 from the Bank requesting for renewal. Though he admitted his address as mentioned in the letter to be correct, Ld. Cl. for the Bank has again referred to reply to the same suggestion twice over to this witness which reads as : "It is incorrect to suggest that I have not received the letter dated 6.4.1998". Ld. Cl. for the landlords has pointed out to clear denials by both these witnesses in preceding lines to the receipt of letter dated 6.4.1998.

The solitary witness on behalf of the Bank namely Sh. S.K.Arora, when examined as PW-1 in Civil Suit no.20/03 on 8.2.2002 deposed during his examination in chief that before the expiry of five years. Lease was to be renewed after serving three months' notice for renewal. His examination was deferred on the ground that carbon copy of notice/letter dated 6.4.1998 is lying in the Branch Office of the plaintiff, photocopy thereof, is already on record. Thereafter, this witness was examined as DW-1, in the present suit, who in his examination in chief vide affidavit has deposed that he sent a letter No.AGM/97-98/7 dated 6.4.1998 to the defendants exercising the option for renewal of Lease Deed. He has further deposed that there was no typing facility in the Branch as such the letter was

prepared by him in his own handwriting and he got the same zeroxed and the zerox copy was kept in the Bank's filed. He further deposed that the letter was sent by UPC and the original UPC dated 6.4.1998 is proved as Ex.PW-1/5. This witness also proved the Lease Deed as Ex.PW-1/1. He has further deposed that the rent at the enhanced rate is being paid with effect from 1.8.1998 and communication regarding enhanced rent was sent by him vide letter dated 11.9.1998 despatched to all defendants, copy whereof, is Ex.PW-1/6. He also deposed that execution of Lease Deed was requested verbally as well. Ld. Cl. for the landlords objected to proof of the letter dated 6.4.1998, as only a photocopy was being placed on record, the objection was allowed and the letter dated 6.4.1998 was not allowed to be exhibited. The postal receipts by way of UPC placed on record as Ex.PW-1/5 were also disallowed to be exhibited, as the same could be proved only by postal authorities. During his cross-examination this witness admitted that in his statement made in the Court on 8.2.2002, he had deposed that carbon copy of the letter dated 6.4.1998 is available in the Bank records. **He also admitted that he had not produced any records in the Court in support of the letter dated 6.4.1998 and also any sanction from senior authorities for issuance of such a letter. He had also not brought any dispatch register or other relevant records proving dispatch of the letter dated 6.4.1998.** He denied that the Bank had exercised the option for the first time vide letter dated 11.9.1998, Ex.PW-2/7. He further deposed that they had exercised the option for the first time in August, 1998 by way of a letter.

8. Before advertng to the pleadings or the evidence as discussed above, it shall be relevant to refer to clause J of the Lease Deed dated 31.7.1993, Ex.PW-1/1. For ready reference the same is reproduced herein below:-

“That the Bank shall have the option of the renewing the lease of the demised premises at the expiry of the present term hereby granted for further period of five years on the same terms and conditions contained in this lease but with increase in rent of not more than 20% on next occasion provided due notice thereof is given to the Lessors of left at their last known address at least three months before the expiry of lease period and the Lessors will at the request of the Bank, forthwith execute and deliver to the Bank a new lease of the demised premises.

The obvious interpretation of this clause is that the option for renewal of lease at the expiry of the first term, was to be exercised by the Bank. Further this option could be exercised by way of due notice to the lessors or by way of notice left at their last known address at least three months before the expiry of lease period. The lease was to expire on 31.7.1998 the option, therefore, could be exercised on or before 30.4.1998. The tenant's Trump Card is the letter dated 6.4.1998, wherein, the tenant claims to have exercised the option of renewal. The issue that arises for consideration is whether the letter was ever written and dispatched to the landlords. S. S.K.Arora, Chief Manager of the Bank has deposed that he wrote the letters and dispatched copies to all the landlords. This witness during his statement recorded on 8.2.2002 deposed that carbon copy has been retained in office and later on during his statement recorded on 28.7.2003 deposed that zerox copies was retained in office and that he had written the letter in hand. This contradiction in his statement casts a doubt on the execution of letter. **The other circumstances which hits at the authenticity of the letter dated 6.4.1998 is that this letter was not referred to by the Bank in its communications dated 11.9.1998 Ex.PW-2/7 and 29.9.1998 (reply to notice dated 12.9.1998). This letter finds mention for the first time in the Bank's notice dated 19.12.1998 Ex.PW-1/9. Silence on the part of Bank to refer to this letter, after 12.8.1998, in its communications subsequent to issuance of notice by the landlords; is too loud to be ignored.** The logical inference which can be drawn is that the letter did not exist and was created at a later date. **The tenant has failed to prove any internal communication between the officers of the Bank taking a decision for exercising the option. The witness as also failed to prove from the Bank records that the letters were ever dispatched. No dispatch register or sanction for purchase of stamps for dispatch of the letters of any other similar proof for dispatch has been furnished.** The sole reliance is upon postal certificates. In my opinion, letter whereon fate of the case hangs and execution whereof itself is doubtful; reliance upon postal certificates will not be proper. **The Hon'ble Supreme Court and the Hon'ble High Court have time and again cautioned total reliance upon the UPC receipts, on a letter which is the fulcrum of the dispute between the parties. Despatch of the letter under postal certificate is also doubtful for the reason that the very next communication dated 11.9.1998 by the Bank addressed to the landlords was dispatched through registered post.** The tenant has also not referred to any practice or directions by any higher authorities of the bank for dispatching the letters under postal certificate." (emphasis added).

4. A reference to the aforesaid paras shows that the Trial Court has disbelieved the letter dated 6.4.1998 on the ground that the UPC which is relied upon by the appellant-bank is not believable. The Trial Court has referred to the judgment of the Supreme Court in the case of ***Gadakh Y.K. vs. Bala Sahib, AIR 1994 SC 678*** that it is easy to procure certificate of postings and therefore UPCs cannot inspire any confidence. The Trial Court has arrived at a finding that the appellant-bank failed to bring and file any dispatch register or relevant records to show proof of dispatch of the letter dated 6.4.1998. The Trial Court has also referred to the fact that the authenticity of the letter dated 6.4.1998 is doubtful because this letter is not referred to by the bank in its communications dated 11.9.1998, Ex.PW2/7 and the reply to notice vide letter dated 29.9.1998.

5. I completely agree with the aforesaid findings and the conclusions of the Trial Court. At the outset, I must refer to the decision of the Supreme Court in the case of ***Caltex (India) Ltd. vs. Bhagwan Devi Marodia, AIR 1969 SC 405***, and the ratio of which judgment of Supreme Court lays down that there cannot be extension of a lease, unless, an option to extend the lease is exercised specifically within a period as provided for,

inasmuch as, time is the essence of the contract in such cases and the tenant in equity cannot overcome the consequences of neglect on his part and which could have been avoided by reasonable diligence. I completely agree with the findings and conclusions of the Trial Court as to the lack of genuineness of the letter dated 6.4.1998 inasmuch as it is inconceivable that a huge bank like State Bank of India, for sending of such an important letter, would use the basis of UPC, when hundreds and hundreds of letters everyday on behalf of the bank are sent by the registered post AD. A letter as important as the letter dated 6.4.1998 exercising an option to renew a lease, therefore, cannot be said to be one which would have been sent by UPC. More importantly no internal correspondence or other documents of the bank have been filed to show the decision to extend the lease and accordingly send the necessary communication to the landlords. Obviously, the concerned officers of the bank did not do their homework and thereafter, having realized their mistake, this letter dated 6.4.1998 was thereafter contrived. I may also add that the argument as raised on behalf of learned counsel for the appellant-bank that there is a mention of this letter in the reply notice dated 29.9.1998 is an argument not only of desperation but on the contrary it proves the fact that the appellant-bank was trying to play fast and loose. This I say so because even in

the reply notice dated 29.9.1998 issued by the appellant-bank to the landlords/respondents, there is no specific date mentioned of the letter by which the option was exercised. Obviously, by this date when the reply to notice was sent, the UPC would not have been procured by the concerned officer of the appellant-bank who must have been in hot waters, therefore, this date was not mentioned in the reply dated 29.9.1998. It is only when the UPC must have been procured, that a specific date was mentioned in a subsequent notice sent by the appellant-bank dated 19.12.1998. Such practices on behalf of a responsible bank such as the appellant-bank needs to be very strongly deprecated.

6. I therefore uphold the finding of the Trial Court that there was no option exercised within the required period for the appellant-bank to claim the entitlement for a fresh period of five years of lease. Therefore, with effect from 1.8.1998, the appellant-bank was an unauthorized occupant of the suit premises. I may also mention, at this stage, that merely because the appellant-bank deposited enhanced rent in the account of the landlords/respondents, cannot mean that automatically a new lease will come into existence for a period of five years inasmuch as for any lease in excess of a period of one year there is required in law a registered instrument as per Section 107 of the

Transfer of Property Act, 1882 read with Section 17(1)(b) of the Registration Act, 1908. That there cannot be a lease for the renewed period without a proper registered lease deed, has been held by the Supreme Court in the case of *Hardesh Ores (P) Ltd. vs. Hede & Company, 2007 (5) SCC 614*. The Supreme Court has also in the recent judgment of *Sarup Singh Gupta vs. S. Jagdish Singh & Ors. 2006 (4) SCC 205* held that after the expiry of lease, the landlord is entitled to receive charges which are paid by the tenant for use and occupation, inasmuch as, a tenant cannot stay in a tenanted premises without paying use and occupation charges. A lease is an issue of a bilateral action, i.e. a contract between the parties and mere payment, i.e. unilateral action of depositing of rent, cannot mean that a fresh tenancy contract can be said to have come into existence much less for a period of five years for which in law there had to be a registered instrument. Further a clinching aspect is that the enhanced rent which ought to have been paid, assuming the plea of fresh lease coming into existence, was to be from 1.8.1998, but admittedly, the first enhanced charges have been credited in the account of the landlords only from 11.9.1998. Therefore looking at the case from any angle of lack of genuineness of the letter dated 6.4.1998, of an option not having been exercised within the required contractual period and

which was a sine qua non as per the judgment in *Caltex (India) Ltd. (supra)*, the fact that the landlords/respondents are entitled to appropriate payments made towards use and occupation charges, I hold that the Trial Court has rightly dismissed the suit for specific performance and decreed the suit for possession with mesne profits.

7. Now on the aspect of what should be the mesne profits which would be payable for the period for which the appellant-bank continued to stay in the premises after the expiry of the lease period. This period is from 1.8.98 to 25.4.2005.

The possession was handed over by the appellant-bank to the respondents/landlords in fact during the pendency of the appeal, and if really the appellant-bank was fair and honest it ought to have handed over possession at the latest by 1.8.2003, inasmuch as admittedly, the total period of 10 years came to an end on 1.8.2003. The contumacious and the obdurate attitude of the appellant-bank however continued even after expiry of 10 years, and the physical possession of the tenanted premises was only handed over during the pendency of the present appeal. The attitude of the appellant-bank thus leaves much to be desired.

On the issue as to what should be the mesne profits which should

be awarded from 1.8.1998 to 25.4.2005, though, the respondents/landlords have not led any documentary evidence to prove the rate of rent in the area for the period from 1998 to 2005, however, mesne profits can still be awarded as Courts have regularly taken judicial notice of increase in rent. One such judgment is a Division Bench judgment of this Court reported as ***S.Kumar vs. G.R. Kathpalia 1999 RLR 114***. I have also had an occasion to consider this issue in the judgment reported as ***M/s. M.C. Agrawal HUF vs. M/s. Sahara India & Ors., 183 (2011) DLT 105***, wherein I have held that increase of 15% per annum for commercial premises, should normally be taken where there is no documentary evidence to prove the rate of rent for the period of the unauthorized occupation.

8. Accordingly, applying the ratio of the judgment in the case of ***M/s. M.C. Agrawal HUF (supra)***, I hold that the respondents/landlords will be entitled to 15% cumulative increase every year from the last rent paid as on 31.7.1998. Meaning thereby, mesne profits which would be payable from 1.8.1998 will be 15% higher than the admitted rate of rent of ₹22,338/- per month for a period of one year w.e.f. 1.8.1998. Thus with effect from 1.8.1998, the mesne profits which would be payable will be the amount of ₹22,338/- + 15% of ₹22,338/-. For every subsequent year, the mesne profits

payable will be 15% more than the last payable mesne profits, i.e. the increase will be a cumulative increase of 15% every year. The Trial Court has already granted interest at 9% per annum simple on the arrears of mesne profits, I however, clarify that the interest at 9% per annum will be payable on the amount of mesne profits from the end of each month for which the mesne profits would be payable, till the same are actually paid to the respondents/landlords. It is clarified that the appellant-bank will be entitled to adjustments with respect to the amounts which it has paid to the respondents/landlords during this period of 1.8.1998 to 25.4.2005, i.e. interest will be payable only on the arrears payable after giving adjustments to the appellant-bank for the amounts already paid by the appellant-bank. It is further clarified that interest which is payable, so far as the amount deposited in this Court by the appellant-bank will run only till the time the amount was deposited in this Court. If as per today's judgment the amount which is payable to the respondents/landlords will be in excess of the amount already deposited by the appellant-bank in this Court, then the calculation aspect for the further amounts to be paid is an issue which I am leaving for the Executing Court to decide because it is only on the balance amount payable, if any, after taking credit for the amount deposited in this Court by the appellant-bank,

would there be running of interest on such balance amount due and payable.

9. In view of the above, the appeals are partially accepted. While the appeals are dismissed with respect to the relief claimed of specific performance and also for the challenge to the decree for possession, relief is however granted by setting aside the impugned judgment granting mesne profits at ₹30 per sq.ft. per month and the mesne profits which will be payable will be at a 15% cumulative increase every year along with 9% interest per annum simple payable from the end of the month for which the mesne profits charges were payable. The other details on this aspect have already been mentioned above in the present judgment.

10. The security which is given by the respondents/landlords for withdrawing of the amount deposited in this Court stands discharged.

11. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

FEBRUARY 13, 2012
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