

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

+ **RFA No. 817/2010**

% **14th February, 2012**

SAKATA INX (INDIA) LTD Appellant

Through : Mr. T.S. Ahuja, Advocate.

versus

POOJA AGGARWAL Respondent

Through : Mr. Ankit Jain, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 29.7.2010 decreeing the suit of the respondent/plaintiff/landlady for possession and mesne profits of the tenanted premises being flat No. 614, 6th Floor, Devika Towers, 6, Nehru Place, New Delhi admeasuring 500sq. ft.

2. The facts of the case are that the suit premises were let out to the appellant/defendant/tenant at a monthly rent of Rs.10,000/- per month i.e. at Rs.20 per sq. ft. per month, for a period of three years with effect from 1.8.2003. Since there was no mutual agreement of renewal, the tenancy

was terminated by the respondent/plaintiff/landlady by means of a legal notice under Section 106 of the Transfer of Property Act, 1882 dated 10.11.2006. As the appellant/defendant failed to vacate the suit premises and failed to pay the mesne profits, the subject suit for possession and mesne profits came to be filed.

3. I may note that the appellant/defendant/tenant has already handed over the possession of the suit premises to the respondent/landlady and the counsel for the appellant says that the impugned judgment is being challenged only on the aspect of mesne profits.

4. On the aspect of mesne profits, the trial Court has awarded mesne profits @ 80 per sq. ft. per month by observing as under:-

“23. The onus of proof of this issue lies upon the plaintiff and in support of her contentions, the plaintiff has filed on record, the copies of some other lease deeds, pertaining to the Flat Nos. 622 and Flat No.603 in the same premises and it has been disclosed by her that the said premises in the same building were let out at a rate of ₹35/- per sq.ft. per month. She has further stated that since the year 2006, the rates of rent in Delhi, in respect of commercial premises have gone up many times and the suit premises is also situated in an approved commercial space and the flat No.807 situated on the 8th floor of the same building measuring 560 sq. ft. has been let out by its landlord at a monthly rent of ₹80/- per sq. ft., per month. She has further deposed that the present rate of rent in the same building is about ₹200/- per sq. ft. per month and she is entitled to receive the same from the defendant. During her cross-examination, she has denied the suggestion of the Ld. Counsel for the defendant that the 6th floor of the commercial premises where the suit premises are situated, were not let out in the year 2007 at a monthly rent of ₹80/- per sq. ft. The plaintiff has also examined PW-2 Sh. Luv Prakash Aggarwal who is reported to be the Director of M/s Umcountry Holdings Private Limited and this witness has deposed that

his company has taken flat No.807 in the same building measuring 560 sq ft. from its landlord Smt. Sarita Aggarwal vide registered lease deed dated 4.7.2007 at a rate of ₹80/- per sq. ft., per month. This witness has also produced the certified copy of the lease deed executed between his company and its landlord and has proved the same as Ex.PW-2/A.

24. On the other hand, the defendant has not produced any document to rebut the contentions of the witnesses of the plaintiff. Furthermore, during his cross-examination, the defendant (DW-1) has feigned his ignorance about the rent at the rate of ₹80 per sq. ft. per month of the premises situated on the 8th floor of the same building in the year 2007. This witness has admitted in his cross-examination that in the year 2007, they were having a corporate office at 10th floor of the same building and they were paying the rent @ Rs.35 per sq. ft. per month and the said corporate office was measuring about 3350 sq. ft. Besides his oral testimony, there is no other documentary evidence on record, in support of the contention of the defendant, to rebut the contentions of the witness of the plaintiff. From the deposition of the witness and the material placed on record, I am of the considered opinion that the rate of rent in respect of the suit premises, in the year 2006-2007 can be safely held at about Rs.80 per sq. ft. per month and therefore, this issue is decided accordingly, in favor of the plaintiff and against the defendant and it is, hereby held that the plaintiff is entitled to claim mesne profits @ Rs.80/- per sq. ft. per month from the defendant w.e.f. 1.12.2006 till 9.9.2009. This is decided accordingly in favour of the plaintiff and against the defendant.”(underlining added)

5. Learned counsel for the appellant argues that the document which is relied upon by the respondent/landlady, being the lease deed dated 4.7.2007, Ex.PW2/A which states rent @ 80 per sq. ft. per month, is of the period of after about seven months of termination of the tenancy. It is argued that the trial Court therefore could not have granted mesne profits @ 80 sq. ft. per month. Learned counsel for the appellant also sought to place reliance on the evidence by way of affidavit filed on behalf of the respondent/plaintiff, in para 11 of which it was stated that even as per the *RFA No.817/2010*

appellant/defendant plot No. 622 in the same building was taken on June, 2006 @Rs.35 per sq. ft. per month.

6. So far as the argument that mesne profits can only be granted @ Rs.35 per sq. ft. per month on account of the alleged admission of the respondent/landlady in para 11 of the affidavit is concerned, it is argued on behalf of the respondent/landlady that there is no basis whatsoever for such argument, inasmuch as, rent of Rs.35 per sq. ft. per month was prevalent in June, 2006 whereas we have to see mesne profits of almost after about 5 months of June, 2006. It is further argued on behalf of the respondent/landlady that the premises being flat No. 622, which is mentioned in para 11 of the affidavit of the respondent/landlady, is with respect to adjoining premises, and which premises along with the suit premises were given on rent to the appellant/defendant, and the rent of Rs.35 per sq. ft. per month is only renewal rent in terms of the existing lease deed i.e the rent is not for a lease created for the first time in June, 2006.

7. As the rent prevalent after about seven years of the termination of tenancy cannot be the rent which would be prevalent on the date of termination of tenancy, similarly rent prevalent five months before the termination of the tenancy cannot be taken as the rent prevalent at the date of termination of tenancy. Some amount of honest guesswork is always

involved in a civil case for determining the rent/mesne profits. Obviously, there cannot be found an identical situation to a disputed leased premises in all cases, and therefore a civil court weighs the complete evidence to determine a fair rate of mesne profits.

8. Before me, I have two rate of rents, one @ ₹35 per sq. ft. per month which is roughly for about five month prior to the termination of tenancy and which rent was also only a renewal rent, and on the other hand there is rent @ ₹80 per sq. ft. per month which is however with effect from July, 2007 i.e. after seven months of termination of tenancy. Taking an average of rates of ₹35 per sq. ft. per month and ₹80 per sq. ft. per month, it can safely be said that one can take the rate per sq. ft. per month on 1.12.2006 at ₹60 per sq. ft. per month.

Accordingly, I hold that the respondent/landlady instead of ₹80 per sq. ft. per month will be entitled to mesne profits @ ₹60 per sq. ft. per month with effect from 1.12.2006.

9. That is however not the end of the matter. In the present case, the premises were vacated on 9.9.2009. Therefore, the period of unauthorised occupation is a period of approximately three years. The rate of mesne profits therefore cannot remain constant for all the three years and there has to be a reasonable increase of mesne profits ever year. Considering that the suit premises are situated in a commercial locality one can safely take

judicial notice of roughly a 15% increase of rent every year. It is now settled law that the courts are entitled to take judicial notice of increase of rent in urban areas such as Delhi in view of various judgments of Supreme Court and this Court. One such judgment is of a Division Bench of this court reported as ***S. Kumar v. G.R. Kathpalia, 1999 RLR 114.***

10. Accordingly, I hold that the appellant/defendant will be liable to pay a sum of ₹60 per sq. ft. per month from 1.12.2006 to 30.11.2007, and, with effect from 1.12.2007 the mesne profits which will be payable will be 15% more than those as payable from 1.12.2006 to 30.11.2007. For the period from 1.12.2008 till the premises were vacated on 9.9.2009 the appellant/defendant will be bound to pay 15% more mesne profits than as were payable on 30.11.2008.

11. In law, the appellant/tenant has derived benefit of not making payment of the due amount to the respondent/landlady, and for such amount withheld by the appellant/tenant, the respondent/landlady is also entitled to interest on arrears of mesne profits which have not been paid. The Supreme Court in the judgment reported as ***Indian Oil Corporation vs. Saroj Baweja 2005(12) SCC 298*** has held that the landlord is entitled to interest on arrears of mesne profits. I, therefore, hold that the respondent/landlady will also be entitled to interest @ 12% per annum simple from the end of the month from which mesne profits became

RFA No.817/2010 ***Page 6 of 8***

payable till when the arrears of mesne profits are actually paid.

I may note that I am entitled to, while deciding the appeal, invoke the provision of Order 41 Rule 33 CPC and as per which provision Courts can modify a decree although there is no cross-appeal, so as to do complete justice between the parties. The provision of Order 41 Rule 33 CPC reads as under:-

“33. Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]

[Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]”

12. This appeal was argued in detail on 9.2.2012 when learned counsel for the appellant/tenant requested for time to ask his client if compromise was workable. Learned counsel for the appellant says that the appellant/tenant is not agreeable to any compromise and this Court should pass judgment on merits.

13. In view of the above, the appeal is accepted to the extent of reducing the mesne profits to ₹60 per sq. ft. per month instead of ₹80 per sq. ft. per

month. The respondent/landlady will be entitled to 15% cumulative increase for every year mesne profits payable as stated above. The appellant/defendant will also be liable to pay interest @ 12% per annum simple from the end of the month for which mesne profits would be payable and till the time mesne profits are actually paid to the respondent/landlady. The respondent/landlady will also be entitled to costs of ₹25,000/- in terms of the recent judgment of the Supreme Court reported as *Ramrameshwari Devi and Others v. Nirmala Devi and Others (2011) 8 SCC 249*.

14. The amount deposited by the appellant in this Court be released to the respondent/landlady in appropriate satisfaction of the impugned judgment and decree. It is clarified that if the appellant has been deducting TDS on the rent as payable, then the appellant/tenant will be entitled to pay the balance amount now due as per this judgment after making deductions which are legally required for TDS payable.

15. The present appeal is disposed of in terms of aforesaid observations. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

FEBRUARY 14, 2012

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