

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

Date of decision: 5th December, 2013.

+ **RFA 104/2008**

UNITED INDIA INSURANCE CO. LTD. Appellant

Through: Mr. Pankaj Seth, Adv.

Versus

HARISH CHANDER AGGARWAL

(THROUGH LRS)

.....Respondent

Through: Mr. P.S. Bindra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 10th December, 2007 of the Court of Additional District Judge (ADJ) in Suit No.128/2006 filed by the respondent, decreeing the suit of the respondent/plaintiff in the sum of Rs.2,66,400/- on account of arrears of rent and in the sum of Rs.9,80,000/- as mesne profits/damages for uses and occupational charges for the period from 1st July, 2006 to 8th July, 2007 with interest @ 6% per annum from the date of institution till realization and costs against the appellant/defendant.

2. Notice of the appeal was issued, though no stay of execution granted. It appears that the decretal amount was recovered from the

appellant/defendant by attachment of its bank account and was deposited with the Executing Court. Vide order dated 17th March, 2008, the Executing Court was restrained from releasing any amount to the respondent/plaintiff/decreed holder. By subsequent order dated 23rd April, 2008, the appeal was admitted for hearing and out of the decretal amount lying deposited with the Executing Court, 50% was ordered to be released in favour of the respondent/plaintiff/decreed holder and the balance amount directed to be invested in a term deposit earning interest for the benefit of the successful party.

3. The respondent/plaintiff died during the pendency of this appeal and vide order dated 31st July, 2012 his legal heirs substituted. One of the said legal heirs being a senior citizen, the appeal was vide order dated 5th August, 2013, ordered to be listed in the category of 'Regular Matters of Senior Citizens'. None appeared for the appellant/defendant when the appeal came up for hearing on 21st November, 2013 and the appeal was directed to be listed with 'notation in the cause list of this Court of notice of default to the counsel for the appellant'. The counsel for the appellant/defendant has appeared today. The counsels have been heard.

4. The undisputed position which emerges from the evidence,

documentary and oral, on the Trial Court record, is:

- (i) that the appellant/defendant had taken on lease a portion of the second floor of Commercial Complex/Building No.AB-8, Shopping Complex, near Kamal Cinema, Safdarjang Enclave, New Delhi from the respondent/plaintiff vide registered Lease Deed dated 14th February, 2001 at a monthly rent of Rs.30,000/- for a period of three years from 21st July, 2000;
- (ii) that it was a term of the said registered Lease Deed that the appellant/defendant shall have the option to renew the tenancy for a further period of three years with 20% increase i.e. @ rent of Rs.36,000/- with effect from 21st July, 2003 and for which period a fresh Lease Deed was to be executed;
- (iii) that it was yet further a term of the Lease that thereafter also, the appellant/defendant shall have the option to renew the lease for another term of three years at a further 20% increase in rent;
- (iv) that besides the said Lease Agreement, a registered Hire Agreement also dated 14th February, 2001 was entered into between the appellant/defendant and the respondent/plaintiff, whereunder the respondent/plaintiff had furnished the premises with furniture and

fittings etc. as detailed therein and the appellant/defendant had agreed to pay a sum of Rs.7,000/- along with the rent of Rs.30,000/- per month to the respondent/plaintiff for three years of the Lease; it was the term of the said Hire Agreement also that in the event of the renewal of the lease, the hire charges will also be increased by 20% with effect from 21st July, 2003 and by another 20% for the three years period thereafter;

(v) that though the appellant/defendant continued in possession of the premises and used furniture and fixtures provided therein after expiry of three years from 21st July, 2003 but neither started paying the increased rent and hire charges nor was any fresh lease deed executed or any step taken by the appellant/defendant for execution thereof;

(vi) that the respondent/plaintiff instituted the suit from which this appeal arises claiming, besides the relief of ejectment of the appellant/defendant, also the relief of recovery of Rs.2,66,400/- and of mesne profits with effect from 1st July, 2006 at the rate of Rs.80,000/- per month, which was claimed to the then prevalent market letting value of the property; recovery of Rs.2,66,400/- was

claimed pleading that the appellant/defendant for the period 21st July, 2003 to 20th July, 2006 had continued to pay rent and here charges at the old rate of Rs.30,000/- and Rs.7,000/- respectively when it had agreed to pay at the rate increased by 20%;

(vii) a decree for ejectment on admissions, was passed and in pursuance thereto the appellant/defendant was ejected from the premises on 9th July, 2007 and the suit continued for recovery of Rs.2,66,400/- and for mesne profits.

5. The counsel for the respondent/plaintiff has argued that the appellant/defendant having itself agreed to pay rent and hire charges for the period 21st July, 2003 to 20th July, 2006 at a rate 20% over and above the rate for the previous three years, the decree for the agreed amount cannot be found fault with. He has further contended that the respondent/plaintiff, by leading cogent evidence of other lettings in the vicinity and on the basis of the evidence of letting of the subject property itself immediately after vacation as aforesaid by the appellant/defendant at the rent of Rs.1,05,000/- per month, has justified the claim for mesne profits at the rate of Rs.80,000/- per month for the period from 20th July, 2006 till 9th July, 2007, when the premises were vacated and the decree of the learned ADJ upholding the said

claim also, cannot be found fault with.

6. The counsel for the appellant/defendant on the contrary has contended that since as per the registered Lease Deed and the Hire Agreement, the appellant/defendant, for the period after 20th July, 2006 also, was entitled to continue in the premises at a rate further increased of 20%, the appellant/defendant at best can be liable for the said period also at a rate further increased by 20% and the decree of mesne profits at the rate of Rs.80,000/- per month for the said period, is unjustified and in contravention of the basis/principle applied by the respondent/plaintiff himself and upheld by the Court for the award of mesne profits for the period 21st July, 2003 to 20th July, 2006.

7. The counsel for the respondent/plaintiff in rejoinder has contended that the tenancy of the appellant/defendant was terminated by notice dated 31st May, 2006 and the principle earlier applied for the period prior thereto, cannot be applied to the period after the termination of the tenancy.

8. The counsel for the appellant/defendant besides the aforesaid argument has also reiterated the other ground taken in the memorandum of appeal viz. of the Leases on the basis of which mesne profits of Rs.80,000/- have been awarded, having not been proved in accordance with law.

9. I have considered the rival contentions and am unable to find any merit in the appeal.

10. As far as the first of the aforesaid arguments of the counsel for the appellant/defendant is concerned, the appellant/defendant was liable to pay at the rates specified in the registered Lease Deed/Hire Agreement between the parties for the period after the expiry of the term thereof, only upon the condition of having a fresh Lease Deed/Agreement executed and by complying with its own part thereof i.e. of tendering the increased rent and hire charges to the respondent/plaintiff. The appellant/defendant failed on both these accounts. In fact, the lease between the parties being registered, it was open to the respondent/plaintiff to, for the period after 20th July, 2003 also, claim mesne profits at the prevalent market rate and not confined to the formula/rate of increase agreed between the parties. Merely because the respondent/plaintiff for the said period limited its claim to the formula/rate prescribed in the Lease/Hire Agreement, is no ground to deny to the respondent/plaintiff mesne profits at a rate, the true measures whereof is the prevalent letting value of the premises. The appellant/defendant cannot be permitted to, on the one hand not comply with its part of the agreement i.e. of not paying the increased amount and on the other hand insist on

compliance by the respondent/plaintiff of his part of the agreement. The same is contrary to the principles of specific performance of contracts.

11. As far as the second contention of the counsel for the appellant/defendant is concerned, though undoubtedly the registered Leases of the premises in the vicinity and on the basis of rent provided wherein, mesne profits for the period 20th July, 2006 to 8th July, 2007 at the rate of Rs.80,000/- per month have been awarded to the respondent/plaintiff, were proved by the respondent/plaintiff in his own evidence and without examining any of the parties to those Leases but no objection as to the mode of proof, was taken by the counsel for the appellant/defendant at the time when the said Leases were admitted into evidence. In fact, a perusal of the Trial Court record shows that the counsel for the appellant/defendant had hardly cross-examined the respondent/plaintiff on the aspect of mesne profits which was the only aspect remaining for adjudication in the suit, except for giving a suggestion that the claim for mesne profits at the rate of Rs.80,000/- per month was incorrect. The sole witness examined by the appellant/defendant also did not controvert that the Leases proved by the respondent/plaintiff in support of his claim for mesne profits did not reflect the position at site or that the lessee thereunder was not in possession of the

premises or was not paying the rent mentioned in those Leases.

12. The appellant/defendant having thus led the respondent/plaintiff to believe that no objection was being taken to the mode of proof of the Leases, cannot subsequently be heard to urge otherwise.

13. Moreover, the rate of rent of Rs.80,000/- per month is also substantiated from the rent fetched by the premises immediately after vacation thereof by the appellant/defendant. Even if the formula of 20% increase every three years, were to apply and to which the appellant/defendant had itself agreed, the rent for the period immediately proceeding, would not have been less than Rs.80,000/- per month.

14. No merit is thus found in the appeal, which is dismissed. However in the circumstances, no order as to costs.

15. The balance 50% of the decretal amount lying deposited with the Executing Court, with interest accrued thereon, be now released forthwith to, as per the instructions of the counsel for the respondent/plaintiff, only in the name of the widow Mrs. Sneha Lata Aggarwal of the deceased respondent/plaintiff.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.
DECEMBER 05, 2013/bs