

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

Date of decision: 10th January, 2014.

+ **RFA 228/2013**

RAJESH BANSAL AND ANR

..... Appellants

Through: Mr. Laliet Kumar and Mr. Deepak
Vohara, Advocates.

Versus

A.S. RASTOGI

..... Respondent

Through: Mr. D.R. Bhatia, Mr. Rishi
Manchanda and Mr. Ankur Bansal,
Advocates with respondent in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 29th January, 2013 of the Court of the Additional District Judge (ADJ)-06 (Central), Delhi in Suit No.104/09/07 (UID No.02401C0887942007) filed by the respondent/plaintiff) of recovery from the appellants of mesne profits/damages for unauthorized use and occupation of Flat No.210, admeasuring 542.41 sq. ft. Bajaj House, 97, Nehru Place, New Delhi (after the determination of the tenancy of the appellants/defendants) @ Rs.50,000/- per month with effect from 5th September, 2007 till 2nd April, 2012, less the amounts for the said period already paid by the appellants/defendants.

2. Notice of the appeal was issued and vide *ex-parte* ad-interim order dated 29th May, 2013, subject to the appellants/defendants depositing the decretal amount in this Court, execution was stayed. In compliance therewith, a sum of Rs.18,83,750/- has been deposited in this Court. The appeal was on 7th August, 2013 admitted for hearing and the Trial Court record requisitioned and considering the limited nature of the controversy in the appeal, the appeal posted for actual hearing. The counsels have been heard.

3. The uncontroverted factual position is:

(i) that the aforesaid flat was let out by the respondent/plaintiff to the appellants/defendants vide registered Lease Deed dated 9th September, 2004 for a period of three years commencing from 4th September, 2004 and ending on 4th September, 2007 on monthly rent of Rs.15,750/- per month, besides electricity, water and maintenance charges;

(ii) Clause 1.14 under Part I of the Lease Deed titled “The Lessee Hereby Covenants with the Lessor”, is as under:

“1.14 The LESSEE shall hand over the peaceful, vacant and physical possession of the demised premises to the LESSOR upon expiry of the present lease term (or extension thereof), by efflux of time or termination of the same. Upon failure to hand over the possession the

Lease shall pay damages equivalent to triple the monthly rental to the Lessor without prejudice to the rights of the Lessor to file appropriate court cases for recovery of damages/eviction of lessee, entirely upon lessee's own cost ”

and Clause 3.2, in Part III of the Lease Deed titled “It is Hereby Mutually Agreed”, is as under:

“3.2 That if the Lessee does not vacate the said premises on the expiry of the lease, the lessor shall without prejudice to its rights to get the premises vacated be entitled to the rent increased by @ Rs.5000/- per day of the last rent of the expiry tenure.”

(iii) that though the term of the aforesaid Lease expired on 4th September, 2007 but the appellants/defendants did not vacate the flat; rather, the appellants/defendants were also in arrears of rent;

(iv) that the respondent/plaintiff on 7th September, 2007 i.e. within three days of expiry by efflux of time of the lease, instituted the suit from which this appeal arises, for the reliefs of ejectment of the appellants/defendants from the flat and for recovery of arrears of rent and mesne profits/damages till the date of vacation of the premises and for mandatory injunction directing the appellants/defendants to issue TDS Certificates;

(v) the appellants/defendants contested the suit and in which issues were also framed;

(vi) that on application under Order XII Rule 6 of the Civil Procedure Code (CPC), 1908 of the respondent/plaintiff for a decree for ejectment on admissions, a decree for ejectment of the appellants/defendants from the flat was passed on 8th November, 2011 and in pursuance thereto, the appellants/defendants vacated the flat on 2nd April, 2012;

(vii) that the appellants/defendants in compliance of the interim orders in the suit also paid the arrears of rent admittedly due and also supplied the TDS Certificates to the respondent/plaintiff and the suit thus proceeded for trial only qua the claim for mesne profits/damages for use and occupation as aforesaid for the period from 5th September, 2007 i.e. after the expiry of the term of the lease and till 2nd April, 2012, when the possession of the flat was handed over;

(viii) the respondent/plaintiff examined himself in support of his case, claiming mesne profits/damages for use and occupation @ Rs.5,000/- per day as per the term of the registered Lease Deed. He, in his affidavit by way of examination-in-chief, also purported to prove as Ex.PW1/3 to PW1/5 three Lease Agreements of other commercial flats in the vicinity of the subject flat; however while tendering the affidavit

by way of examination-in-chief in evidence, the said Lease Agreements were not tendered; the appellants/defendants in cross-examination of the respondent/plaintiff gave a suggestion that the claim for mesne profits/damages at Rs.5,000/- per day was on the higher side and that the monthly rent of the tenancies in the locality had come down drastically owing to parking problems;

(ix) the respondent/plaintiff also examined as PW-2 the witness from the office of the Sub Registrar who proved the three Lease Agreements aforeaid registered in the office of the Sub Registrar as Ex.PW2/A, PW2/B and PW2/C; the appellants/defendants did not cross-examine the said witness despite opportunity;

(x) the appellants/defendants did not lead any evidence of their own;

4. The learned ADJ, in the impugned judgment, a) on the basis of the judgments of the Supreme Court and High Courts cited therein held that once the tenancy had been terminated, the tenant becomes an unauthorized occupant and a decree for damages and/or mesne profits can be passed against the tenant and the tenant is bound to pay the market rate for such

occupation of the premises; b) held that the market rent as evident from the three Lease Deeds proved by the respondent/plaintiff was not Rs.5,000/- per day or Rs.1,50,000/- per month; the Lease Deeds of the adjoining flats showed the prevalent rate of rent to be varying from Rs.90/- per sq. ft. per month to Rs.145/- per sq. ft. per month; c) taking into consideration these facts, mesne profits/damages for the use and occupation @ Rs.50,000/- per month were awarded.

5. The counsel for the appellants/defendants, has argued:

(A) that no enquiry under Order XX Rule 12 CPC was conducted;

(B) that the appellants/defendants after vacating the subject flat have taken on rent Flat No.302/B, Goverdhan House, 53-54, Nehru Place, New Delhi having a super built up area of 331.5 sq. ft. @ a rent of Rs.18,500/- per month, which works out to a rate of Rs.60/- per sq. ft. per month; attention in this regard is invited to a photocopy of the registered Lease Deed executed in this regard with the clarification that the said Lease Deed was undoubtedly not there before the learned ADJ;

(C) that the aforesaid shows that the prevalent rent in the area was Rs.60/- per sq. ft. per month and there is no basis for the rate of

Rs.92.25 paise per sq. ft. per month at which rate mesne profits/damages for use and occupation have been awarded (Rs.50,000/- divided by 542 sq. ft.);

(D) that on enquiry, it is informed that the appellants/defendants during the period of their tenancy were paying rent at the rate of approximately Rs.30/- per sq. ft. per month;

(E) that the three Lease Deeds of the adjoining premises on the basis whereof the learned ADJ has awarded mesne profits/damages at the rate of approximately Rs.92/- per sq. ft. per month could not have been proved by the witness from the office of the Sub Registrar;

(f) that out of the three Lease Deeds relied upon by the respondent/plaintiff and accepted by the learned ADJ, only one was with respect to the same building in which the subject flat is situated and the other two are with respect to different buildings.

6. Per contra, the counsel for the respondent/plaintiff, has argued:

(I) that the learned ADJ in the impugned judgment has given cogent reasoning for awarding mesne profits/damages @ Rs.50,000/- per month;

(II) that the appellants/defendants did not object to the admission

into evidence of the three Lease Deeds when the same were admitted into evidence;

(III) that the appellants/defendants did not lead any evidence of their own on the mesne profits/damages.

7. The counsel for the appellants/defendants in rejoinder has invited attention to the list of witnesses of the respondent/plaintiff on the Trial Court record to show that the respondent/plaintiff had not cited, neither the landlord nor the tenant of the three Lease Deeds supra as a witness and it is contended that it is not as if the respondent/plaintiff intended to examine them and did not examine them as witnesses owing to the appellants/defendants having not raised objection at the time of admission of the Lease Deeds into evidence; that only the respondent/plaintiff can lead evidence of the prevalent market value and thus no question of drawing any adverse inference from the appellants/defendants not leading any evidence, arises.

8. While the counsel for the appellants/defendants has relied on ***M.C. Agrawal HUF Vs. Sahara India*** 183 (2011) DLT 105 awarding mesne profits at a rate increased by 15% over the last paid rent and on ***National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association*** 122 (2005)

DLT 629 (DB) laying down that no judicial notice of the prevalent rates of rent can be taken, the counsel for the respondent/plaintiff has relied on *State of Haryana Vs. Ram Singh* AIR 2001 SC 2532, *Banamali Das Vs. Rajendra Chandra* AIR 1975 SC 1863, *Rajasthan State Road Transport Corporation Vs. Devilal* AIR 1991 Rajasthan 29 and *Smt. Rekha Rana Vs. Smt. Ratnashree Jain* AIR 2006 Madhya Pradesh 107 to contend that the certified copies of the Lease Deeds tendered in evidence by the witness from the office of the Sub-Registrar were admissible in evidence.

9. I have considered the rival submissions. As aforesaid, the only controversy is as to the rate at which the respondent/plaintiff is entitled to mesne profits/damages for use and occupation. The liability of the appellants/defendants for mesne profits/damages and the period for which the mesne profits/damages are due, has not been controverted.

10. The learned ADJ in the impugned judgment, besides taking note of rates of prevalent rent from the three Lease Deeds proved by the respondent/plaintiff, has also held that the appellants/defendants having agreed to pay mesne profits/damages at triple the last paid rent and which would amount to about Rs.48,000/- per month, the award of mesne profits/damages for use and occupation @ Rs.50,000/- per month is justified.

11. It may be noticed that while Clause 1.14 supra uses the word “damages” in relation to the amount of three times the rent payable upon failure to vacate the premises, Clause 3.2 supra uses the word “rent” in relation to Rs.5,000/- per day agreed to be paid by the appellants/defendants upon not vacating the premises on the expiry of the lease. If the “rent” were to be calculated on the basis of Rs.5,000/- per day, it would be Rs.1,50,000/- per month; only Rs.50,000/- per month has been awarded against the appellants/defendants.

12. Though the learned ADJ has not considered the matter from the said perspective and has held the respondent/plaintiff disentitled to mesne profits @ Rs. 5000 per day for the reason of the same being much in excess of prevalent rates of rent but I am of the view that if a tenant agrees to pay rent for the period after the expiry of the term of the lease, even if at an astronomical rate, it is bound thereby. There is no bar to a prospective tenant agreeing to pay rent at rates which may be far above the rates prevalent in the market and if it does so, it is bound by the said Agreement. Of course, Section 74 of the Indian Contract Act, 1872 provides that agreement for payment of amount to be paid in case of breach or by way of penalty entitles the party not in breach to recover reasonable compensation not exceeding the

amount so named and the Supreme Court in *Fateh Chand Vs. Balkishan Dass* AIR 1963 SC 1405 and the Division Bench of this Court in *Vishal Engineers & Builders Vs. Indian Oil Corporation Limited* MANU/DE/6829/2011 have held that no amount becomes recoverable under such clauses without showing any loss but not only has the respondent/plaintiff shown loss on account of breach of the Lease Deed by the appellants/defendants but the appellants/defendants themselves have admitted so. The argument as aforesaid of the appellants/defendants also is, that they were paying rent to the respondent/plaintiff @ Rs.30/- per sq. ft. per month; that the learned ADJ has wrongly awarded mesne profits/damages for use and occupation @ Rs.92/- per sq. ft. per month, when the prevalent rate of rent was Rs.60/- per sq. ft. per month at which rate the appellants/defendants have taken alternate premises on rent. From the same, loss having been suffered by the respondent/plaintiff on account of the appellants/defendants overstaying in the flat in breach of the terms of the Lease Deed, is evident. Once, the loss is evident and is established, I fail to see as to why the appellants/defendants should be released from their agreement contained in the registered Lease Deed. Though, in the light of this matter, the respondent/plaintiff would have been entitled to mesne

profits/damages for use and occupation @ Rs.1,50,000/- per month but neither has the learned ADJ awarded mesne profits/damages for use and occupation at the said rate nor has the counsel for the respondent/plaintiff challenged the judgment and decree or argued so. The rate at which the mesne profits/damages has been awarded to the respondent/plaintiff is on the lower side.

13. Even otherwise, the appellants/defendants have no equities in their favour. The appellants/defendants inspite of clear provision in the Lease Deed as to the term thereof, neither vacated the premises nor approached the respondent/plaintiff for renewal of the Lease. Owing to the plethora of such disputes in the Courts, for the last nearly one and a half decades, the law on the subject is abundantly clear and well settled and the appellants/defendants could not have been under any illusion that they were entitled to continue in the flat. They nevertheless compelled the respondent/plaintiff to approach the Court and contested the suit on all kinds of frivolous pleas and which allowed them to so overstay in the premises for nearly four and a half years. Not only so, the appellants/defendants as aforesaid were also in default of payment of admitted arrears of rent and of issuance of TDS Certificates and both of which were done only when directed by the Court. The conduct of

the appellants/defendants is thus of using litigation as a tool of oppression. In these circumstances, unless the Courts refuse to show indulgence to such defaulters, the tenants would continue to not consider themselves bound by registered Agreements and force the landlords to approach the Court, knowing that even thereafter it will be the tenant who inspite of losing, will emerge as victorious by overstaying in the premises obviously to their advantage. Commercial sense suggests that if the appellants/defendants at the contemporaneous time were in a position to find alternate suitable accommodation at a rate lower than what they were paying to the respondent/plaintiff, they would not have overstayed in the premises.

14. Though for the aforesaid reasons alone, the appellants/defendants are not entitled to succeed in the appeal but I may also notice that though two out of the three Lease Deeds relied upon by the respondent/plaintiff and the Lease Deed relied upon by the appellants/defendants in this appeal, are with respect to the other buildings, though in Nehru Place, New Delhi itself but one of the Lease Deed i.e. Ex. PW2/B is with respect to Flat No.216 admeasuring 714 sq. ft. on the same floor in the same building as the subject flat and is for the period from 1st March, 2008 to 28th February, 2013 at a rent of Rs.60,000/- per month i.e. @ Rs.84/- per sq. ft. per month to be increased

by 20% after three years. Thus, while the rent from 1st March, 2008 to 28th February, 2011 was to be at the said rate, rent for the period from 1st March, 2011 till 28th February, 2013 was to be at the rate of Rs.100/- per sq. ft. per month. In this light also, it cannot be said that the mesne profits/damages awarded at the average rate of Rs.92/- per sq. ft. per month from 2007 till 2012 are at a higher side.

15. In the light of what has been observed hereinabove, the judgments relied upon by the appellants/defendants have no application.

16. As far as the proof of the Lease Deeds is concerned, I am in agreement with the contention of the counsel for the respondent/plaintiff that the appellants/defendants having allowed the said Lease Deeds to be admitted into evidence without any objection whatsoever cannot now be heard to urge that the same have not been proved. Had the appellants/defendants taken any objection at the relevant time, the respondent/plaintiff could have even in the absence of inclusion in the list of witnesses examined the parties to the said Lease Deeds to prove the same. The Supreme Court in ***Dayamathi Bai Vs. K.M. Shaffi*** (2004) 7 SCC 107 has held that objections to admissibility of evidence can either be on the ground that the document sought to be proved is inadmissible in evidence or on the ground of the document though

admissible in evidence, of mode of proof. It was further held that where the objection is of the first kind, mere marking of the document as exhibit does not exclude objection to its admissibility at a later stage or even in appeal but where the objection is of the second variety, objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode of proving the document is irregular, cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.

17. Not only so, the appellants/defendants did not even chose to lead any evidence of their own.

18. The argument of the counsel for the appellants/defendants that no enquiry was ordered, is misconceived as an issue was framed as to the rate of mesne profits/damages and the parties went to trial thereon. This Court in *Consep India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.* MANU/DE/0700/2010 has held that the Court while passing decree for possession has the discretion to, either, if sufficient evidence is available on record for the determination of mesne profits, to also pass a decree for mesne profits, or if the evidence brought on record is not sufficient for such

determination, to direct an inquiry as to such mesne profits.

19. There is thus no merit in the appeal, which is dismissed with costs. Counsel's fee assessed at Rs.20,000/-.

20. The amount deposited by the appellants/defendants in this Court together with interest accrued thereon, be released forthwith to the respondent/plaintiff.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JANUARY 10, 2014

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