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

+ RFA 582/2015

STATE BANK OF INDIA Appellant
Through: Mr S.N. Relan, Adv.

versus

PAWANVEER SINGH & ANR Respondents
Through: Mr Virender Mehta & Mr R.K. Mehta,
Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **28.08.2015**

Caveat 901/2015

1. Since the caveators/ respondents have entered appearance, caveat stands discharged.

CM No. 17314/2015 (Exemption)

2. Allowed subject to just exceptions.

RFA 582/2015 & CM Nos. 17315/2015 (Stay) & 17316/2015 ((O. 41 R. 27 r/w S. 151 CPC)

3. This is an appeal filed against judgement and decree dated 10.04.2015 passed by the Addl. District Judge, Tis Hazari Courts, Delhi.

4. Mr Relan, who appears on behalf of the appellant, in support of the appeal, has raised, only, the following two grounds, before me, to assail the aforementioned judgement.

4.1 First, that the period for which the mesne profit have been calculated, is both on facts and in law, erroneous for the reason that the tenancy was not

terminated by respondent no.2/plaintiff no.2. It is stated that, even though respondent no.2 / plaintiff no.2 was the land lord of the appellant/ defendant, the tenancy had been terminated by respondent no.1 / plaintiff no.1. It is thus, the contention of the appellant/ defendant, that the tenancy did not get terminated as provided under Section 106 of the Transfer of Property Act, 1882 and, therefore, the finding that he was in unauthorized occupation as returned by the trial court is erroneous. In support of this submission, Mr Relan, further contends that the plaint was signed only by respondent no.1 / plaintiff no.1.

4.2 Second, the rate at which the mesne profits have been awarded by the trial court is exorbitant. In respect of this ground, Mr Relan concedes that relevant evidence was not placed before the trial court by the appellant/ defendant and, therefore, relies upon the accompanying application filed under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (in short the CPC), to place before this court, at this juncture, the relevant material, for calculation of the mesne profits.

5. I may only note that the application under Order 41 Rule 27 of the CPC is accompanied by a photocopy of a purported lease deed dated 29.03.2006, executed between, one, Dr. Virender Kumar Saini and the Punjab & Sind Bank in respect of premises located on the ground floor at M-14, Connaught Circus, New Delhi. The tenure of the said lease deed appears to span a period commencing from 01.04.2004 to 01.04.2007. The lease deed, however, adverts to the fact that two portions of the building constructed on the aforementioned property, i.e. ground floor and the mezzanine floor, are leased, albeit at different rates. The ground floor is, apparently, leased at Rs. 65/- per sq. ft., while the mezzanine floor is leased

at Rs. 32.50 per sq. ft.

6. I have heard Mr Relan in respect of both aspects. In so far as his first submission is concerned, the same is untenable for the following reasons.

6.1 Learned counsel for the respondents / plaintiffs has brought to court a copy of the plaint as well as the legal notice furnished on behalf of the appellants / defendants. Both, the copy of the legal notice dated 10.07.2007 (Ex. PW1/8) and the plaint are indicative of the fact that respondent no.2 / plaintiff no.2 had determined the tenancy. The legal notice (Ex. PW1/8) has been issued both on behalf of respondent no.1 / plaintiff no. 1 as well as respondent no.2 / plaintiff no.2. In so far as the plaint is concerned, it has been signed both by respondent no.1 / plaintiff no. 1 and respondent no.2 / plaintiff no.2. Therefore, the submission of Mr Relan that the period of mesne profit has been arrived at, contrary to the facts and, in error of law, is a submission which is misconceived and hence rejected.

7. As regards the second submission, which pertains to the rate of mesne profits, which has been awarded by the trial court in this case, in my view, the same cannot be disturbed at this juncture. The reason for this, is that, evidence with regard to the likely damages which the appellants / defendants would have suffered, was produced only by respondent no.1 / plaintiff no.1. Admittedly, the appellant/ defendant failed to produce any evidence with regard to the mesne profits. The discussion with regard to this aspect of the matter has been made with some elaboration by the trial court in the impugned judgement. For the sake of convenience, the relevant portion of the judgement is extracted hereinbelow:

“.....e) Plaintiff no.1 have produced the documentary evidence Ex. PW3/1 about the market rent prevailing in the area at the

relevant time, whereas the defendant has not produced any documentary evidence regarding prevailing market rate of rent during its occupation of his suit property. PW1 has deposed that defendant is liable to pay damages and mesne profit @ 250 per sq. ft. per month for suit premises having an area ad-measuring 2140 per sq. ft. The quantum of damages work out to be Rs. 5,35,000/- p.m. PW-1 placed the reliance on lease deed Ex. PW3/1. The lease deed Ex. PW3/1 is a registered document. The suit premises and premises of lease deed Ex. PW3/1 are situated in middle circle of Connaught Place, New Delhi.

f) Ld. counsel for defendant contended that suit premises bears an old construction and could not fetch more then (sic than) the rental charges which defendant was paying since 2007 onward i.e. Rs. 1,33,440/- per month.

g) PW-3 produced the registered lease deed dated 21.10.2008 executed by M/s Jewel's (India) Hotels Pvt. Ltd. in favour of M/s Cenrum Infrastructure & Relality Ltd., pertaining to the premises where suit premises is located. It is held by Hon'ble High Court in Ashok Chopra & Ors. vs. Syndicate Bank & Anr., 169 (2010) DLT 361 that:

“This documentary evidence has to be read in suppression and over and above the oral testimony of a witness. The well-established law being that a document cannot lie. Section 91 and 92 of the Evidence Act, 1872 has given statutory recognition to this principle. Even otherwise, this documentary evidence has not been dislodged. DW-1 has not produced any evidence to counter these versions of the witnesses of the plaintiff.”

h) Admittedly suit premises is situated in Cannaught Place one of the prime commercial area of New Delhi. The plaintiff has placed registered lease deed Ex. PW3/1 of same area where suit property is located. The lease deed Ex. PW3/1 is in respect of rental value of Rs. 5,50,000/- for area ad-measuring 2300 sq. ft. which is work out to be Rs. 239.13 per sq. ft. The lease deed Ex. PW-3/1 was executed on 21.10.2008 i.e. after one year from

date of unauthorized possession of defendant in suit premises i.e. 01.8.2007. It is also pertinent that lease deed Ex. PW3/1 is on "AS IS WHERE IS BASIS" with all fitting and fixtures as mentioned in Annexure A of same. The Annexure A is a very lengthy list of furniture, electrical and electronic items including Air Conditioners whereas plaintiff no. 2 has not provided any fixture and furniture to the defendant in suit premises. So considering the facts and circumstances, I am of considered opinion that it can be well to said that the prevailing rate of rent i.e. market rate for the properties in location where suit property is situated between 2007 can be approximately to Rs. 125/- per sq. ft. per month which are the amounts to which the plaintiffs are entitled as damages/ mesne profits.

i) The area of suit property i.e. 2140 sq. ft. is admitted fact. The market rate of rent @ Rs. 125 per sq. ft. per month for the area of suit property amounts to Rs. 2,67,500/-. It is admitted fact that defendant was regularly paying Rs. 1,33,440/- p.m. to the plaintiffs claiming it o be the rent. The said amount of Rs. 1,33,440/- per month was being paid by defendant to the plaintiffs till it handed over the physical vacant possession of suit property to plaintiff on 31.05.2013. Lease deed Ex. PW1/4 reveals that initially rent of suit premises was fixed @ 24,610/- p.m. and defendant has paid interest free deposit equivalent to 6 month agreed rent i.e. Rs. 1,47,660/- (6 x Rs. 24,610) to plaintiff no.2. The said security amount of Rs. 1,47,660/- has not been refunded to the defendant which it handed over the possession of suit premises to the plaintiffs....”

(emphasis is mine)

7.1 A perusal of the aforesaid would show that the trial court has applied the principle of best evidence, available on record, to arrive at the mesne profits.

8. Mr Relan’s contention that the appellant/ defendant should be allowed to lead evidence at this stage cannot be accepted, as the evidence, now sought to be produced, was surely accessible to it at the relevant stage. The

law recognizes three circumstances, for invocation of the provisions of Order 41 Rule 27 of the CPC : First, where the trial court has refused to admit evidence, though it ought to have been admitted. Second, when, evidence was not available to the party concerned, despite exercise of due diligence. Lastly, when the appellate court requires additional evidence to be produced to enable it to pronounce judgement or for any other substantial cause.

8.1 Surely, the appellant's/ defendant's case does not fall within the ambit of the first two circumstances. In so far as the third circumstance is concerned, according to me, having regard to the fact that the appellant/ defendant (which is, an entity with enormous wherewithal available at its disposal) chose not to present the necessary evidence, at its own peril, cannot, at this late stage, be shown any indulgence. If, the appellant's / defendant's request is admitted, it will set back the decision in this case by several years. Conduct of trial involves usage of public money and time. Such like situations do not, to my mind, fall under the third circumstance.

9. For the aforesaid reasons, the appeal and the applications are, accordingly, dismissed.

RAJIV SHAKDHER, J

AUGUST 28, 2015

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