

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

% **Date of decision: 4th May, 2016.**

+ **RFA No.84/2015 & CM No.28479/2015 (for direction)**

MUTHOOT FINANCE LIMITED

..... Appellant

Through: Mr. Ajay Kohli and Mr. S.S. Sobti,
Advs.

Versus

KAILASH RANI & ORS

..... Respondents

Through: Mr. Puneet Agrawal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 31st October, 2014 of the Court of the Additional District Judge (ADJ)-02, North, Rohini Courts, Delhi decreeing CS No.325/2014 filed by the four respondents/plaintiffs namely Smt. Kailash Rani, Smt. Rita Sharma, Smt. Rosy Sharma and Smt. Rekha Sharma for ejectment of the appellant/defendant from Unit No.201, Second Floor, Aggarwal Plaza, Plot No.4, B/N Block, Local Shopping Center, Shalimar Bagh, New Delhi and for recovery of *mesne* profits / damages for use and occupation @ Rs.1,50,000/- per month with effect from the date of determination of tenancy i.e. 1st March, 2012 till the date of vacation of the premises along with *pendente lite* interest @ 15% per annum.

2. The appeal came up first before the Court on 10th February, 2015 when, while issuing notice thereof, subject to the deposit by the appellant of a sum of Rs.11 lakhs in this Court, the operation of the judgment and decree was stayed. The said amount is reported to have been deposited. Attempts at amicable settlement failed. On 25th August, 2015, the counsel for the appellant undertook to pay future monthly use and occupation charges @ Rs.1 lakh per month. The counsels were heard on 29th April, 2016 and on completion of hearing, finding elements of amicable settlement to be still existing, the matter was adjourned to today.

3. No compromise has been possible between the parties.

4. The counsel for the appellant has fairly stated that as far as the decree for ejectment is concerned, he is confining the relief only to grant of time to vacate the premises. He further states that for the said additional time the appellant is willing to pay to the respondents the market rent which the respondents are claiming i.e. Rs.1,55,250/- per month.

5. Accordingly, the appeal insofar as the challenge therein to the decree for ejectment is concerned is dismissed. However subject to the appellant paying to the respondents from the month of May, 2016 till the month of

vacation of the premises, use and occupation charges at the rate of Rs.1,55,250/- per month in advance for each month by the 10th day of the month, time is given to the appellant till 31st October, 2016 to vacate the premises and the decree for ejectment is made inexecutable till then. If there is any default in payment, the respondents shall be entitled to execute the decree for ejectment also forthwith.

6. With the appellant giving up the challenge to the decree for ejectment, the only ground on which the decree, insofar as for *mesne* profits is concerned, can be challenged is qua the rate at which the *mesne* profits have been awarded. It is the contention of the counsel for the appellant that the learned ADJ has awarded *mesne* profits at the rate claimed by the respondents/plaintiffs without the respondents/plaintiffs leading any evidence whatsoever with respect thereto. Reliance in this regard is placed on (i) ***A.R. Chadha and Co. Vs. Punjab and Sind Bank*** MANU/DE/2362/2008 where, finding that the plaintiffs therein had not led any evidence as to the prevalent letting value of the premises and observing that the Division Bench of this Court in ***National Radio & Electronics Co. Ltd. Vs. Motion Pictures Association*** 122 (2005) DLT 629 has held that no judicial notice of the rate of *mesne* profits can be taken, *mesne* profits were

confined to the rate of the last paid rent; (ii) ***State Bank of India Vs. H.C. Takyar (HUF)*** MANU/DE/0761/2012 holding that increase of 15% per annum for commercial premises should normally be taken where there is no documentary evidence to prove rate of rent for the period of unauthorised occupation; (iii) ***M.C. Agrawal HUF Vs. M/s. Sahara India*** 183 (2011) DLT 105 also awarding *mesne* profits at a rate enhanced by 15% over the last paid rent in the absence of any evidence. It is stated that so computed, *mesne* profits should be confined to Rs.53,232/- per month for the period from 1st March, 2012 to 28th February, 2013; Rs.61,217/- per month for the period from 1st March, 2013 to 28th February, 2014; Rs.70,400/- per month for the period from 1st March, 2014 to 28th February, 2015; Rs.80,960/- per month for the period from 1st March, 2015 to 28th February, 2016.

7. I have examined the Trial Court record to verify whether there is any material to support the decree for *mesne* profits @ Rs.1,50,000/- per month.

8. The respondents/plaintiffs in the notice of determination of tenancy preceding the institution of the suit from which this appeal arises itself intimated the appellant/defendant that on failure of the appellant/defendant to, on determination of its tenancy, vacating the premises, it shall be liable to pay *mesne* profits / damages for use and occupation at the prevalent letting

value which was in excess of Rs.1,50,000/- per month. The appellant/defendant in response thereto, though denied the same but was insisting upon its right to continue as a tenant in the premises and which right has now been given up.

9. The respondents/plaintiffs in the plaint again pleaded that the prevalent letting value of the premises was @ Rs.1,50,000/- per month, though did not give particulars of any other similar premises which may have been let out at the said rate and along with the plaint did not also file documents of letting of any other similar premises showing the prevalent rate of rent. The appellant/defendant in its written statement though denied the prevalent letting value to be @ Rs.1,50,000/- per month, also did not give instance of contemporaneous letting of any other similar premises. As aforesaid, the emphasis then was on the appellant being not liable to be ejected. Though the respondents/plaintiffs filed a replication but nothing substantial on this aspect was pleaded therein as well.

10. The respondents/plaintiffs examined three witnesses, neither of whom also deposed of the rate at which any other premises in the building may have been contemporaneously let out and the only evidence led was of the appellant/defendant during negotiations having agreed to pay rent of

Rs.1,15,000/- per month but which was not acceptable to the respondents/plaintiffs and which evidence was also challenged by the appellant/defendant. The appellant/defendant also in its evidence did not prove the rate at which any other similar premises may have been contemporaneously let out, though denied having offered to pay Rs.1,15,000/-.

11. The counsel for the appellant/defendant is thus correct in his contention that there is no evidence of rate of *mesne* profits. What needs to be seen is whether in the facts and circumstances aforesaid, *mesne* profits are to be confined to a rate enhanced by 15% per annum over the last paid rent as per the judgments cited by the counsel for the appellant/defendant.

12. The facts which are not in dispute are (i) that the premises were let out to the appellant/defendant with effect from 1st March, 2003 vide registered lease deed for a term of four years and six months at a rent of Rs.35,000/- per month to be enhanced by 15% every three years; (ii) that clause 3 of the said lease deed was as under:

“3. That the tenure of the present lease, initially, shall be Four Years and Six Months, commencing from the date of the execution of the present Lease Deed, unless otherwise determined earlier, in terms of this lease, as appearing

hereinafter. Upon the expiry of the said lease tenure of Four Years and Six Months, the LESSOR shall be bound to extend/renew the lease for a further period of Four Years and Six Months, on a mere request on the part of the LESSEE, in that regard. The LESSEE shall have a further right/option, to get the present lease and/or such renewed/extended lease, as aforementioned, extended/renewed beyond the said period of Nine Years on such terms which may be mutually agreed between the parties herein. It is, however, expressly agreed between the parties herein, that such extension/renewal, shall be on such rent which is mutually agreed, at the time of the expiry of the said period of Nine Years, but such rent shall not exceed by 15% over and above the last drawn rent.”;

(iii) that though after the initial period of four years and six months no fresh lease deed was registered but according to the respondents/plaintiffs also the lease in favour of the appellant/defendant in pursuance to the aforesaid clause was extended till 29th February, 2012 and in the suit from which this appeal arises instituted on 4th October, 2012, the claim of the respondents/plaintiffs for *mesne* profits was from 1st March, 2012; (iv) that the appellant/defendant contested the claim for ejectment (and which contest now been given up) on the ground of, in accordance with the aforesaid clause being entitled to continue in the premises thereafter also at an increase in rent by 15% every three years; (v) the appellant/defendant did not file any suit for specific performance of the aforesaid clause against the respondents/plaintiffs.

13. I am of the opinion that though there is no evidence led by either party of the prevalent letting value of the premises with effect from 1st March, 2012 but upon the appellant/defendant not enforcing the agreement contained in clause 3 supra of the lease deed, of being entitled to continuing in the premises at a rent enhanced by 15% every three years, the appellant/defendant now cannot contend that the rate of *mesne* profits should be confined thereto and by (on 25th August, 2015) offering to pay use and occupation charges for future @ Rs.1 lakh per month have admitted the then prevalent letting value of the premises to be at least that much. The question which arises is, whether the said rate of Rs.1 lakh per month should be made binding on the appellant/defendant with effect from 1st March, 2012 also.

14. According to the appellant/defendant, with effect from 1st March, 2012, they were in accordance with clause aforesaid of the lease deed liable to pay *mesne* profits @ Rs.53,232/- per month only and with effect from 1st March, 2015 would have become liable to *mesne* profits @ Rs.61,216.80 paise per month.

15. I am of the opinion that judicial notice can be taken of the normal human conduct in such matters and the litigants should not be mechanically

deprived of the relief to which they are entitled to for the laxity on the part of the Advocate conducting their case.

16. Had according to the respondents/plaintiffs the prevalent rent of the premises with effect from 1st March, 2012 onwards been Rs.53,232/- per month or thereabouts only, the respondents/plaintiffs for a commercial premises of which they do not plead any need, would not have litigated and would have agreed to the appellant continuing in the premises rather than undertaking the costly lengthy litigation and becoming liable for additional charges incurred in making the premises fit for fresh letting and for brokerage etc. and taking the risk of the premises remaining vacant for some time till the new tenant was found. Similarly, had the other similar premises been available to the appellant/defendant at the rent of Rs.53,232/- which the appellant/defendant was offering, the appellant/defendant also would not have, inspite of being cautioned by the respondents/plaintiffs of incurring the chance of becoming liable to pay at a rate of Rs.1,50,000/- per month, continued in occupation of the subject premises. Of course, a commercial enterprise has some inherent disturbance in changing its business premises. However such disturbance would not outweigh the commercial risk which the appellant/defendant took. It can thus safely be presumed that the

appellant/defendant took the said risk knowing that in the worst situation it would be liable to pay the market rent only and which the respondents/plaintiffs were demanding.

17. Applying the aforesaid logic and in the entirety of the facts, in my view the decree, insofar as for *mesne* profits, should be converted from that of *mesne* profits with effect from 1st March, 2012 @ Rs.1,50,000/- per month to that for *mesne* profits @ Rs.1 lakh per month. Considering the fact that the appellant/defendant has been making partial payments regularly, it is also felt that no case for grant of any interest on the arrears of *mesne* profits is made out.

18. Accordingly, the appeal is partially allowed. Insofar as the challenge therein to the decree for *mesne* profits is concerned, the same is substituted with a decree for *mesne* profits in favour of the respondents/plaintiffs and against the appellant/defendant, with effect from 1st March, 2012 to April, 2016 @ Rs.1 lakh per month and with effect from May, 2016 to the month of vacation as aforesaid @ Rs.1,55,250/- per month, less the amounts already paid by the appellant/defendant. If the amount so due under the decree is paid on or before 31st August, 2016, no interest would be payable thereon. However, if it is not so paid, interest @ 9% per annum shall be

payable thereon from the end of each of the month for which the arrears of *mesne* profits are due and till the date of payment. Needless to state that the appellant/defendant before vacating the premises shall also clear all the electricity, water, maintenance and other charges payable by it with respect to the premises. Subject to the appellant/defendant doing the same and the respondents/plaintiffs having no other claim deductible from the security deposit against the appellant/defendant, the security deposit placed by the appellant/defendant with the respondents/plaintiffs at the time of creation of the lease deed, if had not been adjusted till now, shall be refunded by the respondents/plaintiffs to the appellant/defendant at the time of vacation of the premises. If the premises are not vacated on or before 31st October, 2016, the said amount shall also stand forfeited.

No costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 04, 2016

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(corrected & released on 21st June, 2016)