

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

% Judgment reserved on: 21.03.2016
Judgment delivered on: 07.04.2016

+ **RFA 293/2014**

ORIENTAL BANK OF COMMERCE

..... Appellant

VERSUS

D.K. BHARGAVA & ANR.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Ms Ekta Sikri & Mr Junaid Nahvi, Advocates

For the Respondents : Mr Rajeev Sharma & Ms Radhalakshmi R., Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

RFA 293/2014 & CM Nos. 16553/2014 (Addl. Evidence) & 4515/2015
(for release of amount)

1. This is an appeal preferred against the judgement dated 29.03.2014 passed by the Addl. Distt. Judge, Delhi. The limited issue which arises in the appeal for consideration pertains to issue no. 5, struck in the suit. Issue no. 5., as framed by the trial court, reads as follows:

“5. Whether the plaintiff is entitled for mesne profits/ damages, if so, at what rate and for which period? OPP”

2. Therefore, the brief background, in which, the instant appeal came to be filed in this court needs to be noted before one deals with the contentions raised by the parties before me.

2.1 The appellant herein, which is a nationalized bank, was a defendant in the suit filed by the respondents for recovery of possession and mesne profits/ damages qua property bearing municipal nos. 73-74-75/1 and 60/1, situate at Chawri Bazar, Delhi (hereafter referred to as the subject property).

2.2 The subject property was given on lease by the predecessor-in-interest of the respondents herein. The lease deed was executed, for the first time, on 17.12.1980 (in short the lease deed). The tenure of the lease was ten years, commencing from 01.02.1980. The said lease deed was executed between the appellant and Kishori Lal & Sons, a partnership firm (owned by L.K. Bhargava HUF) via its partners Mr Lalit Kumar Bhargava and Mr Davender Kumar Bhargava i.e. the predecessor in interest of the subject property.

2.3 Consequently, the appellant was given on lease, in the subject property, the basement area, admeasuring 1811 sq. ft. and, the ground floor, admeasuring 2250 sq. ft. (comprising of a hall and attached bathroom). The rent payable by the appellant under the terms of the lease deed was a sum of Rs. 21,000/- per month.

2.4 Pertinently, the lease deed was preceded by a sanction letter dated 22.12.1979, issued by the appellant whereby, the initial rent was shown in terms of rupee per sq. ft. and, therefore, in respect of ground floor the rent agreed was Rs. 7.30 per sq. ft., and that, which was agreed to for the basement area was Rs. 3 per sq. ft. The product of the rates when multiplied

with the area available at the ground floor level, and the basement, respectively, worked out to Rs. 21,000/- per month, as indicated above, with the proviso that the lease tenure could be increased by a further period of ten years subject to enhancement of rent by 10%. Furthermore, as agreed, the appellant had a further option to renew the lease even after the extended period of ten years came to an end by seeking renewal for two successive period of five years with 10% increase in the total monthly rent. This is, also, reflected in clause 5 of the lease deed, as also, in clause 5 of the sanction letter dated 22.12.1979.

2.5 It appears that the partnership firm Kishori Lal & Sons was dissolved whereupon, it was owned in equal shares by L.K. Bhargava HUF and Sh. Davender Kumar Bhargava. Evidently, the dissolution of the said partnership firm was brought about by a deed dated 09.04.1984, which led to Mr Davender Kumar Bhargava retiring from business. The subject property, though, came to be owned, as indicated above, in equal shares by Sh. Davender Kumar Bhargava, HUF via its karta Sh. Davender Kumar Bhargava and by Kishori Lal & Sons via Sh. L.K. Bhargava. Sh. L.K. Bhargava expired on 22.09.1988 which, led to respondent no.2 (i.e. original plaintiff no.2) becoming the karta of L.K. Bhargava, HUF i.e. proprietor of Kishori Lal & Sons.

2.6 Therefore, from April, 1984 onwards, upon dissolution of the partnership firm Kishori Lal & Sons, the rent qua the subject property was paid by the appellant in equal half to respondent no.1 and respondent no.2.

2.7 It is important to note, that after the expiry of the initial tenure of the lease deed, which was on 31.03.1990 (as its commencement was from

01.02.1980; a reference to which has been made above), the lease tenure was never, formally, renewed thereafter.

2.8 The fact, however, is that, in 1980, the rent of the subject property was increased by 10%, and thus, the monthly rent paid by the appellant to the respondents herein was scaled upto Rs. 23,100 per month. The rent at the said per mensem rate continued to be paid thereafter, by the appellant for a period of one decade i.e. 1990 to 2000.

2.9 On 16.02.2002, the appellant, exercised its option under clause 5 of the lease deed, and thus, sought further renewal of the lease tenure for the period of five years with enhancement in rent by another 10%. As a result thereof, the rent came to be pegged at Rs. 25,410/- per month.

3. The respondents, on their part, were not happy with the state of the affairs as it then subsisted and, therefore, served on the appellant a notice dated 27.04.2004. By this notice, the respondents, called upon the appellant to vacate and handover peaceful and vacant possession of the subject property which, as indicated hereinabove, comprised of the basement and the ground floor. Accordingly, the appellant was called upon to hand over the subject property by 31.05.2004. The appellant, was thus, put to notice that if, it failed to comply, it would be liable to pay damages/ mesne profits w.e.f. 01.06.2004, for unauthorized use and occupation of the subject property. The notice, specifically, adverted to the fact that the tenancy qua the subject property stood terminated w.e.f. 01.06.2004, and that, damages/ mesne profits which would be sought would get quantified at the rate of Rs. 75 per sq. ft. for the basement and at the rate of Rs. 100 per sq. ft. for the ground floor. In other words, the per mensem compensation sought for basement

level was Rs. 1,35,825/-, while that for the ground floor area, was pegged, at Rs. 2,25,000/-.

3.1 Since, the appellant did not vacate the subject property, a suit for recovery of possession and mesne profits was filed by the respondents on 30.09.2004.

3.2 On an application moved by the respondents, under Order 12 Rule 6 of the Code of Civil procedure, 1908 (in short the Code), a decree for possession was passed on 30.08.2006. However, the issue with regard to determination of damages/ mesne profits was kept pending.

3.3 The appellants, being aggrieved preferred an appeal, which was numbered as RFA No. 797/2006. The said appeal was disposed of by the Division bench, vide judgement dated 15.12.2006, with following operative directions:

“..... 1) The appeal filed by the appellant shall stand dismissed and the impugned judgment and decree affirmed.

2) The appellant shall have time till 31st December, 2008 to hand over vacant possession of the premises comprising basement and the ground floor of the building to the respondent without putting the respondents to the trouble of instituting the execution proceedings. The undertaking furnished by the appellant to that effect is accepted with the direction that in the event of a default in complying with the terms of the undertaking, the respondents shall not only be entitled to execute the decree but also institute appropriate contempt proceedings against the appellant for the breach of the undertaking given to this Court.

3) The grant of time in terms of (2) above shall be subject to the condition that for the period commencing 31st September, 2004 till the date of vacation of the premises, the appellant bank pays to the respondents compensation/damages for use and occupation of the premises at a tentative rate of Rs.35/- per sq. ft. per month for the accommodation in its occupation. The arrears payable to the respondents from 31st September, 2004 till 31st December, 2006 @ 35/- per sq. ft. shall be paid by the appellant within 6 weeks from today. So far as compensation for the period commencing 1st January, 2007 onwards is concerned the same shall be paid by 10th of every succeeding calendar month.

4) In case the entitlement of respondents is eventually held to be less than Rs.35/- per sq ft., the excess received by the respondent shall be refunded to the bank within such time as the court may direct with interest @ 6% p.a. from the date the amount is received till the date of refund.

We make it clear that the trial court shall not be influenced in the least by our fixing Rs.35/- per sq. ft. as a tentative rate for award of compensation. It shall be free to determine the amount payable to the plaintiff-respondents on the basis of the evidence adduced before it.

5) Parties are left to bear their own costs....”

3.4 It appears that during the pendency of the proceedings with regard to determination of damages/ mesne profits, the respondents sought an amendment in their plaint with respect to rates of compensation. Resultantly, for the period spanning between September, 2004 and October, 2008, in respect of the basement, compensation was sought at the rate of Rs. 105 per sq.ft., whereas for the ground floor, the rate of compensation was

pegged at Rs. 150 per sq. ft. Consequently, the per mensem compensation, as sought, stood enhanced to Rs. 1,90,155/- for the basement, and Rs. 3,37,500/- qua the ground floor.

3.5 It is in the background of these broad facts, that the trial court decreed issue no. 5, which was the only surviving issue, in favour of the respondents. Accordingly, the trial court directed the appellant to pay damages for unauthorized use and occupation of the subject property. Thus, in respect of the basement for the period between 2004 and 2005 compensation was awarded at the rate of Rs. 75 per sq. ft. and, for the very same period qua the ground floor, damages were directed to be paid at the rate of Rs. 100 per sq. ft. However, for the period spanning between 2006 to 2008, for the basement area, damages were enhanced from Rs. 75 per sq. ft. to Rs. 100 per sq. ft., and similarly, for the ground floor, the damages were increased from Rs. 100 per sq. ft. to Rs. 125 per sq. ft.

4. Given this foreground, the submissions on behalf of the appellant were advanced by Ms Ekta Sikri, while those on behalf of the respondents were made by Mr Rajeev Sharma.

5. Ms Sikri put forth the following broad contentions:

(i) That the trial court, in the impugned judgement, had applied a criteria adverted to as '*reduction arithmetic*', which was unknown to law.

(ii) The lease deed relied upon by the respondents, pertained not to an area, in which, the subject property was located (i.e. Chawri Bazar) but related to an adjoining area (i.e. Chandni Chowk). Chandni Chowk was a

wholesale market, whereas Chawri Bazar was a by-lane, which did not attract rents that were paid qua properties located in Chandni Chowk.

(iii) PW-1 in his affidavit of evidence had made a reference to a lease deed dated 07.06.1999 pertaining to the State Bank of India, which related to a property located in Chawri bazar. The rate of rent payable for the said property, which was somewhat similar to the subject property, in 1998, was Rs. 31.25 per sq. ft. The said lease deed, which was filed by the respondents, was not proved. Since, best evidence was withheld, the court, ought to draw adverse inference against the respondents.

(iv) That the appellant has obtained the lease deed dated 30.04.2004, pertaining to another nationalized bank i.e. the Dena Bank, which concerns the area in issue i.e. Chawri Bazar, wherein the rate of rent with respect to the subject premises is fixed at Rs. 18 per sq. ft. excluding electricity and water charges and house tax. The said document has been filed with this court, along with an application bearing no. 16553/2014, under the provisions of Order 41 Rule 27 of the Code. Since, this is a third party document, it was not in possession of the appellant, and thus, could not be produced before the trial court. It was submitted that since, this court, is the first appellate court, it had the power to accept the said document and draw suitable inferences therefrom.

(v) The appellant is a nationalized bank and has been in occupation of the subject property, since, 1980. By virtue of the impugned judgement huge compensation had been awarded to the respondents by the trial court, which had placed an onerous burden on the appellant. In this context, it requires to be noticed that, the lease deed pertaining to the subject property executed

between the parties herein, has been erroneously relied upon by the trial court, in view of the fact that it was executed just before the expiry of time frame given by the Division Bench i.e. on 30.12.2008. The appellant, at that point in time, was under tremendous pressure to execute the lease deed, as otherwise, it would have to, in accordance with the judgement of this court, vacate the subject property by 31.12.2008. Therefore, the rent reflected in the lease deed of 30.12.2008, executed between the parties, is not the rent which could be used as a benchmark to award compensation for the period preceding the date of the execution of the said lease deed.

(vi) The trial court thus had not set out any discernible and/or cogent reasons which would demonstrate as to how rates were scaled down to arrive at the rates of compensation qua the subject property (i.e. vis-à-vis the basement and the ground floor area).

5.1 In support of her submissions, Ms Sikri, relied upon the following judgements: Judgement dated 02.09.2011, passed in RFA No. 458/2011, titled: *M.C. Agrawal HUF vs Sahara India & Ors.; M/s Bengali Sweet Corner & Ors. vs Ishwar Devi & Ors. ILR (2006) II Delhi Del 1069; K. Venkataramiah vs A. Seetharama Reddy & Ors. (1964) 2 SCR 35 and A.P. State Wakf Board, Hyderabad vs All India Shia Conference (Branch) A.P. & Ors. (2000) 3 SCC 528.*

6. On the other hand, Mr Sharma, learned counsel for the respondents, has submitted that damages and/or mesne profits are granted as a compensation to the landlord/ lessor for unauthorized occupation of his property by the tenants/ lessee. It was thus, submitted, that the bench mark for grant of damages/ mesne profits is the rent that the subject property

would have fetched had it not been in unauthorized occupation of the defaulting party. The test, according to the learned counsel, is the probable rent that the subject property would have fetched during the period the subject property was in unauthorized occupation of the appellant. The three aspects, according to Mr Sharma, which the court had to bear in mind in this regard are: whether the subject premises, and the premises, whose rent is sought to be applied, have the same or similar location; whether the applicable rent pertains to same area and/or similar floor; and lastly, whether the applicable rent pertains to the same time frame or one which is in close proximity to the period in issue.

6.1 Learned counsel submitted that the courts are entitled to take judicial notice of increase in rent and, therefore, there is an element of guess work in the determination of the mesne profits. For this purpose, reliance was placed by the learned counsel on the judgement in the case of: ***Chander Kirti Rani Tandon vs VXL Lodging 196 (2013) DLT 266.***

6.2 Applying the aforesaid test, Mr Sharma submitted that the best evidence which was available with the trial court was the lease deed dated 30.12.2008 (Ex. PW1/11), executed between the parties, wherein, for the period spanning between 01.11.2008 and 31.10.2011, which was extendable on term set out in the said deed till 31.10.2017, at a consolidated rent of Rs.5,18,600/- p.m. Therefore, according to the learned counsel the rent per rupee sq. ft. for each month would be as follows: ground floor, Rs. 150 per sq. ft; and basement Rs. 100 per sq. ft, with a clause for enhancement of 20% every three years.

6.3 In support of his submission, Mr Sharma, also relied upon three other lease deeds. The first lease deed is marked as exhibit PW1/8 and is dated 09.02.2005. This lease deed pertains to Karnataka Bank wherein, the ground floor of the concerned premises appears to have been let out at rent of Rs. 153.29 per sq. ft. per month. The property in issue, though, shown to be located at Chandni Chowk. The lease deed carries an enhancement clause, which requires rent to be increased by 15% every three years. The second lease deed is dated 05.09.2008 and is marked as Ex. PW1/12. This lease deed concerns HDFC Bank and pertains to the subject property. The area let out is the first floor. The lease tenure spans between 08.10.2008 and 07.10.2017. The rate of rent fixed for the first floor is: Rs. 101/- per sq. ft. per month. The enhancement in the rent, is provisioned at the rate of 15%, albeit, every three years.

6.4 The fourth lease deed which Mr Sharma relied upon is a lease deed dated 24.12.2002, which is marked as Ex. PW 1/9-10. This is, also, a lease deed which concerns the HDFC Bank. The property in issue, though, is located at Chandni Chowk. The area let out is on the first floor and the rent fixed is Rs. 70 per sq. ft. per month. There is a provision in the lease deed for increase in rent, every three years, at the rate of 15%.

6.5 In effect, Mr Sharma submitted that out of the four lease deeds, referred to, by him, two lease deeds pertain to the subject property, albeit concerning different levels. (See Ex. PW1/11 and PW1/12). In so far as the other two lease deeds were concerned, which are Ex. PW1/9 and PW1/8, they pertain to an area which is in close proximity to the place where the subject property is located. These lease deeds pertain to Chandni Chowk

area and the properties in issue have been let out to Karnataka bank and HDFC Bank.

6.6 According to the learned counsel, the trial court was entitled to, as it did, to use the best evidence available, and therefore, it relied upon Ex. PW1/8 and PW1/11, to award compensation at the rate indicated in the impugned judgement after making suitable adjustments.

6.7 Learned counsel further submitted that the court ought not to set aside the judgement, only if, some part of the reasoning is incorrect, as long as, in the ultimate analysis it gets decided that the trial court has come to a correct conclusion.

6.8 In so far as reliance on the additional evidence was concerned, Mr Sharma submitted that Order 41 Rule 27 of the Code sets out an exception to the principle that the appellate court ought not to travel beyond the record of the trial court. It was further contended that recourse could be taken to the provisions of Order 41 Rule 27 of the Code only in exceptional circumstances, and that, this principle will not apply, where the appellate court is in a position to pronounce a satisfactory judgement, based on the material available on record.

6.9 It was also the contention of the learned counsel that in so far as lease deed dated 30.04.2004 is concerned (which is executed in favour of Dena Bank and is sought to be placed on record by way of additional evidence), it has even otherwise no relevance as the property in issue was subject to provisions of the Delhi Rent Control Act, 1958 (in short the DRC Act) and, therefore, given the peculiar circumstances, which included the factum of

pending litigation, the rate of rent of Rs. 18 per sq. ft., as reflected therein, appears to have been agreed upon under compulsion.

6.10 In regard to the lease involving SBI, Mr Sharma said that the same could have no relevance as: firstly, the lease deed pertained to the year 1998; secondly, the property in issue was located in a by-lane, and lastly, the portion of the property, which was, let out, was effectively, the second floor, whereas, in the instant case the trial court was called upon to determine damages/ mesne profits qua the basement and the ground floor.

7. Having heard the learned counsels for the parties, and shorn of unnecessary details, what really requires to be dwelled upon in this case is, the approach adopted by the trial court, while appreciating the evidence placed before it. The approach adopted and the reasoning given by way of a cryptic judgement, has been articulated in paragraphs 10 and 11 of the impugned judgement. For the sake of convenience, the relevant portion is extracted hereafter:

“..... 10. In view of the case of the plaintiffs as to the rate of mesne profit the plaintiff has produced the witnesses of different banks and one of them is PW-5 Sh.Girish officer of Karnakata Bank Ltd. At Fateh Puri Chandni Chowk, Delhi who proved the lease deed as Ex.PW-1/8 dt.1.2.2005 @ 153 per sq. ft. but that property is not nearest place being Chandni Chowk, though the suit property is in Chawri Bazar. It is also contended by the counsel for the plaintiff that there are many banks who have tenanted premises in Chawri Bazar but their property is in exclusive but they have received a offer from a nationalized bank at higher rent

but still because of the continued relation between the tenant and the landlord they have agreed to have the fresh lease at the rate of 15% for the ground floor Rs.105/- per sq.ft. for the demand. The period of question is prior to that of. If the parties have agreed in the year 2008, looking into the fact that proceedings for vacation of premises are also required to take place, it would have caused inconvenience to both the parties, though it would have come on record that a property is situated in the nearby vicinity but where more banks are there was let out in the year 2005 for Rs.153/- per sq. ft. but the parties have settled in the year 2008 to have fresh lease deed of same property of Rs.150/- per sq. ft. starting from 2008 and it is also admitted that initially when the suit was filed the damages, mesne profit was at the rate of Rs.100/- per sq. ft. of ground floor and Rs.75/- per sq. ft. for the basement which was later on amended to Rs.150/- per sq. ft. for ground floor and Rs.105/- per sq. ft. for basement. Using the remaining arithmetic, I reduce the concept used by the Hon'ble Mr. Justice J.R. Midda of Hon'ble High Court to determine the assumed income passed and also the judgment of Hon'ble Supreme Court in Uphaar tragedy case, I consider that initially from the period 2004 to 2005 the plaintiff shall be entitled to the damages @ 100/- per sq. ft. for ground floor and Rs.75/- per sq. ft. for basement and fro 2006 to 2008 @ Rs. 125/- per sq. ft. for the ground floor and @ Rs.100/- per sq. ft. for the basement in view of the above the suit of the plaintiff is liable to be decreed with costs.

11. The plaintiff to affix the amount of court fee after calculating the amount alongwith interest and after adjusting the amount already received from the bank on

account of user charges and the interest on the remaining amount @ 12% per annum from the date of filing of the present suit till realization. Decree sheet be prepared. In view of the above discussions, this issue is also decided in favour of the plaintiff and against the defendant bank....”

8. A very close perusal of the aforesaid extract would show that the trial court has discussed, essentially, two pieces of evidence. First, Ex. PW1/8, which is a lease deed pertaining to the Karnataka Bank Ltd. qua a property located at Chandni Chowk. The date of the lease deed is 09.02.2005. In the impugned judgement though the date adverted to is: 01.02.2005. The rate of rent fixed qua the property in issue, is Rs. 153.29 per sq. ft.

8.1 The second piece of evidence considered is a document (though the impugned judgement does not refer to any exhibit) marked as exhibit PW1/11.

8.2 The trial court appears to have clearly discarded the rate adverted to in Ex. PW1/8, since, the property in issue, was located at Chandni Chowk and hence, could not be compared with the subject property, which is, located in Chawri bazar. In this context, the trial court also adverts to the fact that in 2005 when, exhibit PW1/8 was executed the rate of rent fixed was: Rs.153.29 per sq. ft, whereas in 2008, the parties herein have executed the lease deed dated 30.12.2008 (Ex. PW1/11), in which in so far as the ground floor is concerned, the rent, is fixed, at Rs. 150 per sq. ft. whereas for the basement, the rent fixed is Rs.105 per sq. ft. Therefore, quite clearly, the trial court did not deem it fit to apply the rate of rent as disclosed in exhibit PW1/8.

8.3 The trial court, however, appears to have taken the aforesaid rate of Rs. 150 per sq. ft. and Rs.105 per sq.ft., which were the rates, as indicated heretobefore, arrived at in 2008 vis-à-vis the ground floor and basement respectively, as the bench mark for calculating the rate for the period in issue, which is, 30.09.2004 to 30.08.2008 qua the subject property, vis-a-vis the basement and ground floor.

8.4 In so far as this part of the trial court's reasoning is concerned, the same is not discernable as the rationale articulated in the impugned judgement pivots on an inexplicable concept, which is, termed as '**remaining arithmetic**'. The relevant observations, which are also part of the paragraph 10 of the impugned judgement, and have been extracted hereinabove as well, read as follows:

“... Using the **remaining arithmetic**, I reduce the concept used by the Hon'ble Mr. Justice J.R. Midha of Hon'ble High Court to determine the assumed income passed and also the judgement of Hon'ble Supreme Court in Uphaar tragedy case....”

(emphasis is mine)

9. Based on the said reasoning, the trial court goes on to hold that for the period 2004-2005, respondents should be entitled to damages/ mesne profits at the rate of: Rs. 100 per sq. ft. qua the ground floor and Rs. 75 per sq. ft. vis-à-vis the basement. However, for the period 2006-2008 the trial court has enhanced the compensation in respect of ground floor to Rs. 125 per sq. ft. and, likewise for the basement to Rs. 100 per sq. ft.

9.1 To my mind, the trial court judgment does not disclose any rationale for arriving at the rate of compensation as noted in the impugned judgment.

The benchmark, which the trial court, seems to have applied is the rent as reflected in the lease deed (Ex. PW1/11). The rate of rent reflected therein is Rs. 150 per sq. ft. per month for the ground floor and Rs. 105 per sq. ft. for the basement for the period spanning between 2008 and 2011, which is extendable to 31.10.2017 on terms set out in the said lease deed whereas the period we are concerned with falls between 2004 and 2008.

9.2 As to how the trial court has arrived at the rates of compensation is not discussed in the impugned judgment. What has been recorded are only the conclusions of the trial court. As is often said, reasons are a link between the material appraised and the conclusions arrived at by a court. See observations of the Supreme Court in ***Union of India Vs. Mohan Lal Capoor and Ors., 1974 (1) SCR 797*** at pages 818-820. The relevant observations of the Supreme Court in this behalf are extracted hereafter :-

“Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.”

10. Mr Sharma says that this court, in matters which require determination of damages/ mesne profits, is entitled to apply the principle of approximation, as long as the relevant material is placed on record. While, broadly, one would have no difficulty in accepting such a submission, this submission, has to be seen in the context of the material which is on record before this court, and that, which was available before the trial court. In this

context learned counsel for the appellant has relied upon lease deed dated 07.06.1999 concerning SBI; a document which was admittedly filed by the respondents herein. The said lease deed, which pertains to the period 1998, was not proved, perhaps, for tactical reasons as the rent reflected therein was rather low. Concededly, the rent reflected therein is Rs. 31.25 per sq. ft. Qua this document PW1 in his cross-examination has deposed as follows:

“..... I have seen State Bank of India located at Chawari Bazar. I do not know its municipal number. As far as I remember, the same is in existence since the year 1996. At that time, the rate of rent of the said bank was approximately Rs. 30/32 per sq. ft. per month. I had visited the said branch and the same is not an air conditioned branch. The said bank came in existence at the above premises for the first time in the year 1996. Vol. The said branch is located in a premises comprising of basement, mezzanine, ground floor and first floor and the same is in a Gali and the branch of State of India is operating from the first floor. I do not know as to what is the area of State Bank of India in their possession. It is incorrect to suggest that I have not seen the terms and conditions of the lease deeds executed between the landlord of the above banks mentioned in upper part of my cross examination. It is incorrect to suggest that I am deposing falsely...”

10.1 In my opinion, the trial court had adequate powers available with it, to call for the evidence with regard to the said lease deed, which was a document, which in any case had been placed on record by the respondents. Therefore, if one were to take the rent of the property located in Chawri Baazar in 1998 as Rs. 31.25 per sq. ft, then, in September, 2004, the rent would be Rs. 55.35/- per sq. ft., even if one were to increase the rent annually at the rate of 10%. Accordingly, for the period in issue i.e. between September, 2004 till October, 2008, based on the aforestated bench mark, the

possible rent per sq. ft. for each month would be as follows: 2004 : Rs.55.35; 2005: Rs.60.88; 2006: Rs.66.98; 2007 : Rs.73.67; and 2008 : Rs.81.04.

11. Mr Sharma, learned counsel for the respondents, in his arguments had contended that the rate of rent given in the said lease deed could not be applied as the premises in issue was located in a by-lane, whereas the subject property was on the main road. The moot point is: did the trial court attempt to factor in this aspect, and then, arrive at a conclusion in the matter.

11.1 Similarly, before this court, the appellant has placed on record additional evidence in the form of lease deed dated 30.04.2004, pertaining to Dena Bank, which again concerns a property situate in Chawri bazaar. The rate of rent, as a matter of fact, as indicated above, is Rs. 18 per sq. ft. Mr Sharma has said that the said document, firstly, cannot be accepted, and secondly, it has no relevance as it pertains to a property protected under DRC Act, and that, perhaps, the factum of pending litigation between the concerned parties, led to the execution of the said lease deed.

11.2 Mr Sharma may, possibly be right in regard to his submission that the rent as reflected in the lease deed has to be seen in the light of the circumstances in which the rent was fixed. Thus, one cannot quibble with the proposition that while quantifying damages/ mesne profits, the courts, in making their inquiry have to bear in mind the principle that in order to arrive at a rate of compensation, it has to be based on a transaction arrived at between a lessor and lessee, who are similarly circumstanced.

11.3 But then, this is an exercise which the court will do, once, the evidence is placed on record.

11.4 As to the contention raised by Mr. Sharma that additional evidence, (which in this case, is the lease deed dated 30.04.2004 concerning Dena Bank), could not be allowed to be submitted as fresh evidence, in my view, is a contention which is not sustainable for a variety of reasons.

11.5 Order 41 Rule 27¹ of the Code envisages, broadly, three situations in which the court may permit additional evidence to be produced. First, if the court from whose decree the appeal is preferred, has refused to admit evidence which ought to have been admitted. Second, the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not after the exercise of due diligence be produced by him at a time when the decree appealed against was passed. Third, when the appellate court requires any document to be produced or witness to be examined to enable it to pronounce the judgment or for any other substantial cause.

11.6 In the instant case, in the application filed by the appellant i.e. CM No.16553/2014, there is a specific averment that since the lease deed in issue

¹ 27. Production of additional evidence in Appellate Court – (1). The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in Appellate Court. But if

(a). The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa). The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b). The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause...”

was a third party private document, it was not in the power and possession of the appellant, and that, therefore, despite best efforts, it could not have been obtained by it. The appellant goes on to say in the said application that it was unable to secure the exact particulars of the lease deed in issue and thus, despite due diligence, could not have the same placed on record. In support of the aforesaid submission, the appellant has also stated that the document ought to be taken on record as the substantial cause (by which it perhaps means the issue) which requires adjudication is the ascertainment of mesne profits qua the subject property for the period spanning between 2004 and 2008.

11.7 It is averred that the placement of the document as evidence is therefore necessary to enable the court to pronounce a judgment in respect of the said issue.

11.8 Pertinently, as indicated above, despite notice in the application, the respondent chose not to file the reply and traverse the averments. Resultantly, the say of the appellant, which is supported by an affidavit would have to be, ordinarily, accepted, in particular, having regard to the circumstances of the case. The appellant has quite correctly stated that, since, the issue involves determination of mesne profits, the evidence which it seeks to produce would be necessary to enable the court to pronounce the judgment on the issue.

11.9 The period in issue, in this case, is 2004-2008 and therefore, the lease deed in issue, which pertains to the location, where the subject property is located, would, in my view, be necessary to pronounce a judgement qua the aspect of damages/mesne profits. Therefore, this, coupled with the fact that

the appellant avers that the document was not in its power and possession and could not have been produced despite due diligence, persuades me to hold that, in my opinion, this is a fit case where the court ought to exercise the power conferred upon it under the provisions of Order 41 Rule 27 of the Code.

12. De hors the aforesaid aspects, as indicated above, in the context of SBI lease deed dated 07.06.1999, one has to say the court is ultimately required to do justice between the parties. On the one hand, is a nationalized bank, which is called upon to pay damages/mesne profits while on the other hand, there are private respondents who seek to claim damages / mesne profits for unauthorised occupation of their property. While, approximation, is a rule in this area of law, it can only further the cause of justice if, it is as close to reality, as may be possible, in the given circumstances. To arrive at a rate of compensation, which is, close to the real damages, if not the actual damages, it is incumbent upon the court to assess the damage that the aggrieved party may suffer. Therefore, with this end in mind the court should exercise every power available at its command including the power conferred upon it under Section 165 of the Indian Evidence Act, 1872 (in short the Evidence Act). Having said so, while exercising its powers, interest of both parties would have to be kept in mind.

11.9 One would also have to bear in mind the fact that parties herein have in 2008 executed a lease with respect to the subject property which provided a marker for fixation of the rate of compensation. But then, that rate, according to me, can only be a bench mark which requires perhaps, to be moderated in the light of other material which was available to the trial

court, and that, which has come on record at the present juncture. The trial court, in my opinion, has not attempted to appraise the evidence and the material on record as it ought to have done.

12. Having regard to the aforesaid circumstances, I am inclined to set aside the impugned judgement and remand the matter to the trial court for a fresh determination. Given the fact that the suit was filed in 2004, the trial court is directed to complete the exercise within two months from today. While doing the needful, the trial court will bear in mind the following:

- (i) Qua lease deed appended to CM No. 16553/2014, which is taken on record, the appellant would have liberty to prove the said lease deed, with the corresponding liberty to the respondents, to cross-examine the witness, who would seek to prove the said document.
- (ii) The trial court will take into account the SBI's lease deed of 1998, while arriving at its conclusion. The trial court, would if necessary, summon the original document from the concerned bank in exercise of the power vested in it under Section 165 of the Evidence Act.

13. Having regard to the aforementioned directions, the parties and their counsels will appear before the trial court on 18.04.2016. Unless counsels are in personal difficulty, of an exceptional nature, no adjournments would be given by the trial court.

14. The appeal and the applications are disposed of in the light of the

aforesaid directions. The registry will consequently, forthwith remit the record to the concerned court.

RAJIV SHAKDHER, J.

APRIL 07, 2016

kk

