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

% **Date of decision: 5th May, 2016**

\+ **RFA No.856/2015**

UDAYAN SINHA & ORS ..... **Appellants**

Through: Mr. Abhinav Vashisht, Sr. Adv. with Mr. Naveen Kumar Chaudhary and Ms. Priya Chauhan, Advs.

Versus

FERTILIZERS & CHEMICALS TRAVONCORE LTD ...**Respondent**

Through: Mr. P. Banerjee and Mr. Siddhartha Jha, Advs.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The grievance of the appellants with respect to the judgment and decree dated 1st September, 2015 of the Court of Additional District Judge (ADJ)-09 (Central), Tis Hazari Courts, Delhi in Suit No.416/2014 (Old Suit No.163/2008) filed by them for ejectment of the respondent/defendant from property No.74, Link Road, Lajpat Nagar-III, New Delhi after determination of tenancy and for recovery of *mesne* profits, is regarding the rate at which they have been awarded *mesne* profits / damages for use and occupation.

2. Notice of the appeal was issued and considering the limited nature of the controversy in the appeal, on 27th April, 2016, when the appeal came up after notice, the counsels for the parties were heard. After hearing, the concerned official of the respondent was directed to be present before this Court today with the documents showing the extent of the premises taken by the respondent in lieu of the premises of the appellants from which the respondent was ejected along with the proof of rent/charges being paid therefor.

3. In response thereto, the concerned official of the respondent has appeared today and the counsel for the respondent on the basis of the documents brought by the said official has made statements with respect to the premises taken in lieu of the premises subject matter of these proceedings from which the respondent was ejected.

4. The respondent was a tenant under the appellants since the year 1960 in property No.74, Link Road, Ring Road, Lajpat Nagar-III, New Delhi. The said property is constructed over land admeasuring 966 sq. yards and comprises of ground, first and second floors (barsati and servant quarters).

5. The respondent was last paying rent @ Rs.18,000/- per month since September, 2000. The tenancy of the respondent was determined by legal

notice dated 16th January, 2008, in which the respondent was notified that upon the failure to vacate the premises inspite of determination of its tenancy, it shall be liable to pay *mesne* profits / damages for use and occupation thereof @ Rs.5 lakhs per month. The respondent did not vacate the premises and the appellants on 10th April, 2008 instituted the suit from which this appeal arises. A decree on admissions, of ejectment of the respondent was passed on 16th March, 2010. RFA No.227/2010 preferred thereagainst by the respondent was dismissed on 29th April, 2011. SLP(C) No.27359/2011 preferred by the respondent was withdrawn on 2nd December, 2011. The respondent vacated the premises on 31st August, 2010. The parties went to trial on the claim of the appellants for *mesne* profits and resulting in the decree subject matter of this appeal.

6. Thus, the claim of the appellants for *mesne* profits is with effect from 4th February, 2008 i.e. after fifteen days of the notice dated 16th January, 2008 and till 31st August, 2010 i.e. for a period of two years and six months.

7. The learned ADJ in the impugned judgment and decree has found the appellants entitled to *mesne* profits for use and occupation of the premises @ Rs.50,000/- per month and with which the appellants are dissatisfied.

8. The respondent has not impugned the said decree for *mesne* profits.

9. The counsels have been heard further today.

10. It is the contention of the senior counsel for the appellants that the appellants before the Trial Court led evidence of the rate of *mesne* profits in the form of registered lease deeds of two properties. One of such properties was the ground floor of property No.34, Ring Road, Lajpat Nagar-IV, New Delhi which was on 19th August, 2008 let out at a rent of Rs.10,25,000/- per month with an interest free security deposit of Rs.51,25,000/-. The other lease deed was with respect to ground and first floors of property No.D-298, Defence Colony, New Delhi which was let out vide lease deed dated 7th May, 2008 at a rent of Rs.2,85,000/- per month with an interest free security deposit of Rs.8,55,000/-. It is thus the contention of the senior counsel for the appellants that the learned ADJ has not considered the said evidence while awarding the *mesne* profits.

11. *Per contra*, it was / is the contention of the counsel for the respondent that the properties of which evidence was given were not comparable to the subject property. It was also pointed out that property No.34, Ring Road, Lajpat Nagar is situated on the main Ring Road and is permitted to be used for commercial purposes; on the contrary, subject property is situated in the inner lane of Lajpat Nagar not facing the main Ring Road. Similarly, it was

stated that the lease deed of the Defence Colony property cannot be the indice for the letting value of the subject property which is old and in a dilapidated condition and which the appellants also during their cross-examinations on 5th October, 2012 admitted had not been let out since the date of vacation by the respondent. The counsel for the respondent has also contended that the respondent is a Public Sector Undertaking (PSU) and had contested the suit on valid grounds as according to the respondent the lease of the premises was till 31st August, 2010 and whereafter the respondent vacated the premises. He has also contended that the rents in Delhi have been fluctuating and while the rents were going up till the year 2010, there has been a sharp fall thereafter.

12. The senior counsel for the appellants has referred to the judgment of the Division Bench of this Court in ***S. Kumar Vs. G.R. Kathpalia*** 77 (1999) DLT 266 where *mesne* profits for construction over a plot of 500 sq. yards in East of Kailash, New Delhi were awarded @ Rs.25,000/- per month and contends that considering the passage of time and double the area of the subject property, the *mesne* profits awarded are insufficient. Attention is also drawn to a passage in ***Madan Mohan Garg Vs. Bohra Ram Lal*** AIR 1934 Allahabad 115 to the effect that when the tenant refuses to vacate the

premises and remains in possession, he must be held to have agreed by implication to hold over and to have accepted the proposal to pay rent at the enhanced rate proposed by the landlord in the notice. On the basis thereof, it is contended that the respondent, from the notice dated 16th January, 2008 of determination of tenancy was conscious of the demand of the appellants of *mesne* profits @ Rs.5 lakhs per month and is deemed to have agreed to continue in occupation of the premises at the said rate, if ultimately found to be not entitled to continue in possession.

13. I tend to agree with the counsel for the respondent that as far as the evidence given by the appellants of the lease deed of property No.34, Ring Road, Lajpat Nagar is concerned, the same cannot be the indice for determination of *mesne* profits, owing to the vast difference in the location and prescribed use of the said property qua the subject property. Rent of a property meant for residential purpose and not situated in a commercial area cannot even compare with the rent of another property, though situated not far away but in a commercial zone. Similarly, without evidence whether the construction of the Defence Colony property is new with all the modern amenities or old, the lease thereof also cannot form the basis for awarding *mesne* profits of subject property.

14. However, after the hearing on 27th April, 2016, the respondent was directed to produce the documents showing the cost at which it had taken the premises in lieu of the premises of the appellants, being of the view that the measure of the *mesne* profits, as defined in Section 2(12) of the Civil Procedure Code, 1908 is the profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits. It was felt that the cost at which the respondent has taken the alternative premises would be indicative of the profits which the respondent enjoyed of overstaying in the property of the appellants. The contention of the respondent, that it was continuing in possession till 31st August, 2010 under a valid lease or that it was not in unauthorised possession has already been negatived in the decree for ejectment and the appeal/SLP preferred thereagainst and cannot be re-agitated.

15. The counsel for the respondent states that the respondent, vide lease deed dated 16th August, 2010 and with effect from 1st September, 2010, has taken first and second floors and servant quarters of property No.B-67, East of Kailash, New Delhi constructed over 300 sq. yards of land with the area of each of the first and second floors being 1850 sq. feet, besides the area of

the servant quarters and at a rent of Rs.1 lakh per month for a period of three years and whereafter it has been renewed at a rent of Rs.1.25 lakhs per month.

16. Though the covered area of the subject property is not on record or in evidence in the suit but the counsel for the respondent contends that the subject property, inspite of being more than three times in size, had a covered area approximately the same as the covered area of the East of Kailash property.

17. Therefrom one thing is clear, that the respondent, by continuing in occupation of the premises of the appellants saved rent which it ultimately paid @ Rs.1 lakh for the East of Kailash premises. Seen in this light, the decree for *mesne* profits @ Rs.50,000/- per month is clearly deficient and the rate of *mesne* profits has to be enhanced.

18. That leaves the aspect, whether, considering the much larger size of the subject property, any addition is to be made.

19. Computation of *mesne* profits, specifically in case of residential premises, always entails some element of genuine, intelligent and honest guess work. Reference in this regard can be made to (i) ***International Pvt. Ltd. Vs. Saraswati Industrial Syndicate*** 1992 (2) RCR 6; (ii) ***M.R. Sahni***

Vs. Doris Randhawa AIR 2008 Del. 110; (iii) ***Consep India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd.*** MANU/DE/0700/2010; (iv) ***P.E.C. Limited Vs. Samir Prakash*** MANU/DE/2781/2011; (v) ***Water and Power Consultancy Services (India) Ltd. Vs. Renu Gupta*** MANU/DE/2738/2012; and, (vi) ***Inder Sain Bedi Vs. M/s Chopra Electricals*** MANU/DE/5155/2012. It is virtually impossible to get evidence to prove the exact rate thereof as the rent of residential premises is dependent on a large number of variable factors like flow of space, ventilation, fixtures, fittings, amenities, design, size of rooms/kitchen, etc. and there may be a substantial difference in rent of adjoining houses. From my experience as a citizen of Delhi and having practiced law primarily in the field of real estate and landlord-tenant disputes, in my view the interest of justice would be served, if the rate of *mesne* profits is increased from Rs.50,000/- per month to Rs.1,50,000/- per month for the period aforesaid of unauthorised occupation. I have arrived at the said rate of Rs.1,50,000/- per month i.e. have increased the rate by Rs.50,000/- over the rent paid by the respondent immediately after vacating the subject premises, taking into account/consideration the facts (a) that the subject premises were an independent premises and the East of Kailash premises occupied by petitioner are only a part of the house, depriving the respondent of privacy; (b) more than three times the size of the subject premises than that of the East of Kailash premises; (c) even if the covered area of the two premises is nearly the same, the respondent, in the subject premises had large open/green spaces and parking spaces/garages which are totally lacking in the East of Kailash premises; (d) otherwise comparable location of the two premises with the location of the subject premises having an edge over the East of Kailash premises; (e) the respondent, if was not benefitting from staying in the subject premises, would have on determination of its tenancy vacated the same and shifted to another premises; there was no *bona fide* defence available to the respondent, the law on the subject being settled in a plethora of judgments; (f) the respondent, from the demand of *mesne* profits @ Rs.5 lacs per month ought to have been sufficiently warned; and, (g) the admitted fall in rentals in the year 2010.

20. The learned ADJ has awarded interest on the arrears of *mesne* profits @ 9% per annum from the date of filing of the suit.

21. In my view, the correct measure for interest on *mesne* profits has to be from the end of each month for which the respondent continued in unauthorised occupation and till the date of payment.

22. Accordingly, the respondent, besides paying *mesne* profits @ Rs.1,50,000/- per month from the month of February, 2008 till 31st August, 2010 less the amounts already paid, shall also pay interest thereon @ 9% per annum from the end of each month for which *mesne* profits are decreed, till the date of payment.

23. The counsel for the appellants to within one month of today intimate to the counsel for the respondent the name (s) and the proportion in which the *mesne* profits are to be paid to the appellants.

24. The decree under appeal is modified accordingly and the appeal is disposed of. The respondent having cooperated in expeditious disposal, no costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

MAY 05, 2016
bs
(**corrected and released on 25th May, 2016**).