

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

+ **RFA Nos.622/2005 & 623/2005**

% **1st November, 2017**

1. **RFA No.622/2005**

AMRESH BAJAJ

..... Appellant

Through: None.

versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION

..... Respondent

Through: Mr. S.K. Taneja, Senior Advocate
with Mr. Rajesh Gupta, Advocate
and Mr. Pranjal Saran, Advocate.

2. **RFA No.623/2005**

AMRESH BAJAJ

..... Appellant

Through: None.

versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION

..... Respondent

Through: Mr. S.K. Taneja, Senior Advocate
with Mr. Rajesh Gupta, Advocate
and Mr. Pranjal Saran, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No.622/2005

1. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff/landlord

impugning the judgment of the Trial Court dated 9.5.2005 whereby the trial court has refused to grant the *mesne* profits/damages to the appellant/landlord/plaintiff for the period from 8.1.1991 to 29.9.1995. The date of 7.1.1991 is the date when the lease period as per the admitted lease deed between the parties came to an end on 7.1.1991 and thus claim for *mesne* profits is from the next day on 8.1.1991. The date of 29.9.1995 is the date when the respondent/defendant/tenant vacated the suit premises. The suit premises is flat no.6, ground floor, multi storey building, chiranjiv tower at 43, Nehru Place, New Delhi-110019.

2. Trial court by its impugned judgment has dismissed the claim for *mesne* profits on the ground that after lease period between the parties expired by efflux of time on 7.1.1991 (and till when the rate of rent was being paid at the rate of Rs.14,602.70/- per month), thereafter the respondent/defendant had increased the rent by 15% by increasing the rent paid to Rs.16,793/- per month w.e.f 8.1.1991 and since the appellant/plaintiff accepted this enhanced rent a fresh monthly lease came into existence between the parties and once a fresh monthly lease comes into existence then entitlement of the

appellant/plaintiff/landlord is only for the admitted monthly rent and not for *mesne* profits.

3. The issue to be determined by this Court is as to whether the *mesne* profits are payable to the appellant/plaintiff/landlord by the respondent/defendant/tenant for the period from 8.1.1991 to 29.9.1995 and if so at what rate.

4. So far as the issue that the trial court has held that from 8.1.1991 a new relationship of landlord and tenant came into existence between the parties with rent of Rs.16,793/- per month and therefore the appellant/plaintiff cannot claim more than this admitted rate of Rs.16,793/- per month, this reasoning and conclusion of the trial court is only partially correct. It is seen that the reasoning and conclusion is only partially correct because after the appellant/plaintiff/landlord took enhanced rental charges at Rs.16,793/- per month in terms of the notice dated 27.2.1991 (Ex.P-1) issued by the respondent/defendant to the appellant/plaintiff the appellant/plaintiff had issued his notice dated 13.6.1991 (Ex.P-6) terminating the monthly tenancy from the midnight of 7.7.1991. Therefore, the monthly tenancy which came into existence from the date of expiry of the lease on 7.1.1991 on

account of the appellant/landlord receiving enhanced rental of Rs.16,793/- per month, this tenancy came to an end in terms of the legal notice of the appellant/plaintiff dated 13.6.1991 from midnight of 7.7.1991. After this termination of tenancy on 7.7.1991 the appellant/plaintiff/landlord has not received any enhanced rent over Rs.16,793/- per month and only the agreed amount of rent of Rs.16,793/- per month was continued to be received till the suit was filed on 4.10.1993. To complete the narration it is stated that during the pendency of the suit the respondent/defendant paid enhanced monthly charges to the appellant/plaintiff at Rs.19,312/- per month w.e.f January, 1994 and this rent of Rs.19,312/- was continued to be paid till the respondent/defendant vacated the suit premises on 29.9.1995.

5. Supreme Court in the judgment in the case of ***Sarup Singh Gupta Vs. S. Jagdish Singh and Others (2006) 4 SCC 205*** has held that merely because the landlord receives rent after termination of tenancy, then the mere factum of receipt of rent cannot be taken as a reason to hold that a fresh tenancy has come into existence on receipt of rent. Supreme Court held in the case of ***Sarup Singh Gupta (supra)***

that in fact after the termination of tenancy when rent is sent by the tenant then the landlord is entitled to receive such rent paid towards monthly charges for use and occupation. The relevant paras of the judgment of the Supreme Court in the case of *Sarup Singh Gupta* (*supra*) are paras 5,7 and 8 and these paras read as under:-

“5. Shri S.P. Goyal, learned senior counsel appearing on behalf of the appellant, drew our notice to Section 113 of the Transfer of Property Act, 1882, which reads as follows:

“113. *Waiver of notice to quit.*- A notice given under Section 111, Clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.”

He submitted that the acceptance of rent by the respondent-landlord even after effecting notice under Section 111, Clause (h), amounted to waiver of notice to quit within the meaning of Section 113 of the Transfer of Property Act. He submitted that waiver in the instant case was on account of implied consent of the landlord, who accepted the rent despite the notice, thereby evincing an intention to treat the lease as subsisting. He emphasised that even after filing the suit, the landlord continued to accept the rent tendered by the tenant.

7. A somewhat similar situation arose in the case reported in *Shanti Prasad Devi v. Shankar Mahto*. That was a case where the landlord accepted rent even on expiry of the period of lease. A submission was urged on behalf of the tenant in that case that Section 116, Transfer of Property Act was attracted and there was a deemed renewal, of the lease. Negating the contention, this Court observed that mere acceptance of rent for the subsequent months in which the lessee continued to occupy the premise even, after the expiry of the period of the lease, cannot be said to be a conduct signifying his assent to the continuing of the lease even after the expiry of the lease period. Their Lordships noticed the conditions incorporated in the agreement itself, which provided for renewal of the lease and held that those conditions having not been fulfilled, the mere acceptance of rent after expiry of period of lease did not signify assent to the continuance of the lease.

8. In the instant case, as we have noticed earlier, two notices to quit were given on 10-2-1979 and 17-3-1979. The suit was filed on June 2, 1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself

constitute an act on the part of the landlord showing an Intention to treat the lease as subsisting. In our view, mere acceptance of rent did not by itself constituted an act of the nature envisaged by Section 113, Transfer of Property Act showing an Intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. It cannot, therefore, be said that mere acceptance of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so Intended. In the instant case, we find no other fact or circumstance to support the plea of waiver. On the contrary the filing of and prosecution of the eviction proceeding by the landlord suggests otherwise.” (emphasis added)

6. In view of the ratio of the judgment of the Supreme Court in the case of *Sarup Singh Gupta (supra)* it is held that merely because the appellant/plaintiff continued to accept the admitted rent of Rs.16,793/- per month from July, 1991 till filing of the suit on 4.10.1993, no fresh tenancy came into existence. I also note that though respondent/defendant increased the rent w.e.f. January, 1994 i.e after filing of the suit in October, 1993, that in itself would not mean that merely because the appellant/plaintiff accepted enhanced rent *pendente lite* would a fresh tenancy come into existence because in terms of the ratio in *Sarup Singh Gupta's* case (*supra*) a landlord is

entitled to receive the amount sent by the tenant as rent towards monthly charges payable for use and occupation of the premises. Obviously, continuing of the suit for the possession by the appellant/plaintiff is a clear negation of any fresh agreement being arrived at with respect to creation of a fresh tenancy even from January, 1994. I therefore hold that merely because the appellant/plaintiff has received rent from July, 1991 till the suit was filed on 4.10.1993 would not mean a fresh tenancy came into existence merely on account of receipt of rent at Rs.16,793/- per month, and that no fresh tenancy even came into existence from January, 1994 simply because the appellant/plaintiff received rent from the respondent/defendant at Rs.19,312/- per month. As already stated above, in terms of the ratio of the judgment in the case of **Sarup Singh Gupta (supra)** the amounts tendered by the respondent/defendant as rent can be appropriated by the appellant/plaintiff towards use and occupation charges of the suit premises i.e adjustment towards *mesne* profits and damages. I therefore set aside the findings of the court below holding that a fresh tenancy had come into existence in favour of the respondent/defendant

w.e.f January, 1991 on account of the appellant/plaintiff receiving Rs.16,793/- per month. Similarly no fresh tenancy came into existence w.e.f January, 1994 simply because the appellant/plaintiff received rent from the respondent/defendant at Rs.19,312/- per month. It has therefore to be held that appellant/plaintiff is entitled to *mesne* profits/damages/charges for use and occupation of the suit premises from the respondent/defendant from 7.7.1991 till the suit premises were vacated by the respondent/defendant on 29.9.1995.

7. The next issue which arises is as to what should be the rate of *mesne* profits which should be paid by the respondent/defendant to the appellant/plaintiff. To prove the rate of rent in the area the appellant/plaintiff has placed reliance upon a lease deed Ex.PW1/21 which was executed with respect to the very same premises in February, 1997 with rent at Rs.140 per sq. ft. It may be noted that when the period of lease expired on 7.1.1991, thereafter vide notice dated 27.2.1991, respondent/defendant had paid and appellant/plaintiff had accepted enhanced rent at Rs.21.30 per sq. ft. i.e Rs.16,793/- per month. If therefore, the lease deed Ex.PW1/21 filed by the appellant/plaintiff is to be relied on then the rate of *mesne*

profits would get enhanced from Rs.21.30.per sq. ft. to Rs.140 per sq. ft. per month.

8.(i) On behalf of the respondent/defendant reliance was placed upon lease deed Ex.DW/1 with respect to a premises in a adjoining Hemkunt Tower. This lease deed is dated 1.6.1991 and has been entered into between the landlady one Smt. Janak Kapoor and the respondent as a tenant. In this lease deed dated 1.6.1991 the rate of rent is at Rs.16.50 per sq. ft. per month. Respondent/defendant has therefore argued that the rate of *mesne* profits should be calculated in terms of Ex.DW1/1 at Rs.16.50 per sq. ft.

(ii) Respondent/defendant also placed reliance upon a judgment dated 25.3.1994 in a suit instituted by one Ms. Vidushi Pritam Singh against the respondent/defendant with respect to a similar premises in the adjoining Hemkunt Tower at Nehru Place and wherein the court had decreed *mesne* profits at Rs.15 per sq. ft.

9. In my opinion, neither the lease deed relied upon by the appellant/plaintiff Ex.PW1/21 nor the lease deed relied upon by the respondent/defendant Ex.DW1/1 as also the judgment dated 25.3.1994 Ex.DW1/2 can be looked into to determine the rate of rent/*mesne*

profits from January, 1991. Whereas the lease deed relied upon by the appellant/plaintiff is of the year 1997 and therefore the same cannot be looked into to determine the rate of rent of a much earlier period commencing from July, 1991, so far as the lease deed relied upon by the respondent/defendant is concerned showing rent at Rs.16.50 sq. ft. it is seen that the said rate is not of the same multistoried premises wherein the suit premises are situated but is of different premises though of the same Nehru Place area. Rate of rent depends upon the condition of the premises including its age, and in fact, the respondent/defendant as per its own conduct has shown that with respect to a suit premises as from January, 1991 it was paying rent at Rs.21.30 per sq. ft. and not at Rs.16.50 per sq. ft. as stated in the lease deed Ex.DW1/1 dated 1.6.1991. The judgment dated 25.3.1994 Ex.DW1/2 cannot be relied upon by the respondent/defendant because the same calculates the rate of rent of the years 1987-89 and once again therefore the rent for this period of the years 1987-89 cannot be a reflection with respect to the rate of rent in July 1991.

10. In calculating the *mesne* profits/damages which are payable some amount of honest guess work is always required because

evidence led by the parties even if accepted will only show rate of rent for a similar type of premises. Courts can however take judicial notice of increase of rent and this has been so held by this Court in the case of *M/s. M.C. Agrawal HUF Vs. M/s. Sahara India and Ors. (2011)*

183 DLT 105. Relevant para 8 of this judgment reads as under:-

“8. What is now therefore to be determined is that what should be the *mesne* profits which should be awarded to the landlord in the absence of any evidence having been led by the landlord with respect to the rents prevalent in the area. Though it has not been argued on behalf of the landlord, I would like to give benefit to landlord of various precedents of this Court and the Supreme Court which take judicial notice of increase of rent in the urban areas by applying the provisions of Sections 114 and 57 of the Evidence Act, 1872. In my opinion, considering that the premises are situated in one of the most centrally located commercial localities of Delhi, situated in Connaught Place, an increase of 15% every year should be awarded (and nothing has otherwise been shown to me for the increase to be lesser) during the period for which the tenants have over stayed in the tenanted premises. Putting it differently, for the first year of illegal occupation, the tenant will pay 15% increased rent over the contractual rent. For the second year of illegal occupation, 15% increase will be over the original contractual rent plus the additional 15%. It will be accordingly for all subsequent years of the illegal occupation till the premises were vacated on 3.4.2005. I rely upon and refer to a Division Bench judgment of this Court in the case of *S. Kumar Vs. G.R. Kathpalia 1999 RLR 114*, and in which case the Division Bench has given benefit to the landlord and has taken judicial notice of increase in rent, and has accordingly allowed *mesne* profits at a rate higher than the contractual rate of rent.”

11. It is seen in the facts of the present case that the respondent/defendant has already given benefit to the appellant/plaintiff of enhanced rent/*mesne* profits by increasing the rent at 15% after three years, however, in terms of the ratio of the

judgment in the case of *M/s M.C. Aggrawal (supra)*, increase would have to be taken per year. In my opinion in the facts of this case increase be granted yearly with 10% increase every year and not 15% every year or three years as per lease deeds of respondent/defendant noting that inasmuch as both the parties have not given exact evidence for exact rate of rent in the same building where the suit premises are situated. I am specifically not granting 15% annually compounded increase in terms of *M/s M.C. Aggrawal (supra)* because even between the same parties as per the admitted lease deed the enhanced rental was at 15% increase every three years and even in the lease deed Ex.DW1/1 proved by the respondent/defendant the increase is at 15% every two years. Therefore the *mesne* profits on an honest guess work and assessment from the evidence on record, would be taken at Rs.16,793/- per month from 15.7.1991 till the suit was filed on 4.10.1993 and thereafter from 15.7.1992 the rate of *mesne* profits would stand increased by 10% compounded annually till the respondent/defendant vacated the suit premises on 29.9.1995. Respondent/defendant will also liable to pay interest at 6% per annum simple on the arrears of *mesne* profits unpaid i.e the interest will be

payable for the net *mesne* profits which have not been paid to the appellant/plaintiff in terms of this judgment and for all amounts already paid by the respondent/defendant to the appellant/plaintiff, the respondent/defendant will be entitled to adjustment. Putting it in other words the respondent/defendant will be liable to pay interest only on the differential amount which has not been paid towards *mesne* profits along with the simple interest at 6% per annum.

12. I may note that this Court has exercised powers under Order VII Rule 7 CPC for grant of *pendente lite mesne* profits and interest at 6% per annum simple inasmuch as though such reliefs were not claimed in the suit yet even if a relief is not specifically prayed for, but once the relief can be granted by the court on the facts which have emerged on record, then a court in order to further equity and justice would, because of Order VII Rule 7 CPC, not hesitate to grant the relief simply because that relief is not specifically prayed.

13. In view of the above discussion, this appeal is allowed by holding that the appellant/defendant is entitled to *mesne* profits from 15.7.1991 till 29.9.1995 as under:-

- (i) For the period from 15.7.1991 till 7.1.1992 *mesne* profits will be payable at the last agreed rate of Rs.21.30 per sq. ft. per month.
- (ii) For the period from 8.1.1992 till 7.1.1993 the rate of *mesne* profits will become Rs.21.30 per sq. ft. + 10% i.e Rs.23.43/- per sq. ft. per month.
- (iii) For the period from 8.1.1993 till 7.1.1994 rate of *mesne* profits will become Rs.23.43+10% i.e Rs.25.77/- per sq. ft. per month.
- (iv) From 8.1.1994 till 7.1.1995 the rate of *mesne* profits will be Rs.25.77/-+ 10% i.e Rs.28.34/-per sq. ft. per month.
- (v) From 8.1.1995 till 29.9.1995 *mesne* profits will be payable at Rs.28.34 + 10% i.e Rs.31.17/- per sq. ft. per month.
- (vi) On the amounts of net *mesne* profits payable interest will be payable by the respondent/defendant to the appellant/plaintiff at 6% per annum simple.
- (vii) For calculating the net amounts payable by the respondent/defendant to the appellant/plaintiff whatever amounts already are paid by the respondent/defendant to the appellant/plaintiff for the period from 15.7.1991 till 29.9.1995 can be deducted by the

respondent/defendant and only after such deductions on the net amount due will interest be payable.

(viii) Appeal is accordingly allowed and disposed of in terms of aforesaid observations and operative directions. Decree sheet be prepared. Trial court record be sent back.

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14. This appeal will also stand allowed *mutatis mutandis* and the operative para of this judgment for granting relief to the appellant/plaintiff will be as under:-

(i) For the period from 15.7.1991 till 7.1.1992 *mesne* profits will be payable at the last agreed rate of Rs.21.30 per sq. ft. per month.

(ii) For the period from 8.1.1992 till 7.1.1993 the rate of *mesne* profits will become Rs.21.30 per sq. ft. + 10% i.e Rs.23.43/- per sq. ft. per month.

(iii) For the period from 8.1.1993 till 7.1.1994 rate of *mesne* profits will become Rs.23.43+10% i.e Rs.25.77/- per sq. ft. per month.

(iv) From 8.1.1994 till 7.1.1995 the rate of *mesne* profits will be Rs.25.77/-+ 10% i.e Rs.28.34/-per sq. ft. per month.

(v) From 8.1.1995 till 29.9.1995 *mesne* profits will be payable at Rs.28.34 + 10% i.e Rs.31.17/- per sq. ft. per month.

(vi) On the amounts of net *mesne* profits payable interest will be payable by the respondent/defendant to the appellant/plaintiff at 6% per annum simple.

(vii) For calculating the net amounts payable by the respondent/defendant to the appellant/plaintiff whatever amounts already are paid by the respondent/defendant to the appellant/plaintiff for the period from 15.7.1991 till 29.9.1995 can be deducted by the respondent/defendant and only after such deductions on the net amount due will interest be payable.

(viii) Appeal is accordingly allowed and disposed of in terms of aforesaid observations and operative directions. Decree sheet be prepared. Trial court record be sent back.

NOVEMBER 01, 2017
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VALMIKI J. MEHTA, J