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

%   **Date of decision: 8th October, 2018.**

\+   **<u>W.P.(C) 315/2012, CM No.19850/2018 (for condonation of 60 days delay in filing written submissions) & CM No.667/2012 (for stay)</u>**

VASDEV BROTHERS ..... **Petitioner**
Through: Mr. Uttam Datt, Adv.

Versus

ESTATE OFFICER, ITDC LIMITED AND ANR ....Respondents
Through: Mr. Sushant Kumar & Ms. Shikha Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 226 of the Constitution of India was filed impugning the order [dated 24th December, 2011 in PPA Nos.23/2011 (Unique Case ID No.02403C0035662011) & 24/2011 (Unique Case ID No.02403C0035652011) of the Court of District Judge, New Delhi acting as the Appellate Officer under Section 9 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act)] of dismissal of appeal, save for modifying the rate of interest, preferred by the petitioner against the order [dated 15th April, 2011 of the respondent no.1 Estate Officer of respondent No.2 India Tourism Development Corporation Ltd. (ITDC) in exercise of powers under Sections 5 and 7 of the PP Act] of eviction of the petitioner from Room No.144, ad-measuring 450 sq.ft. at First Floor, Hotel Janpath, New Delhi and assessing the damages for use and occupation

payable by the petitioner to the respondent no.2 ITDC for the period of unauthorized occupation of the said premises.

2. The challenge this petition is confined only to the order of dismissal of appeal against assessment of damages / *mesne profits* for use and occupation. Besides this petition, W.P.(C) No.314/2012 also was filed by the petitioner challenging the dismissal of the appeal with respect to the order of eviction.

3. This petition came up first before this Court on 16th January, 2012 and thereafter on 18th January, 2012 when notice thereof was ordered to be issued and *status quo* directed to be maintained.

4. On 16th February, 2012, it was the contention of the counsel for the petitioner that Universal Travellers, similarly placed as the petitioner, was paying licence fee at Rs.110/- per sq.ft. per month for air conditioned accommodation and the petitioner offered to take the premises in question on licence at the current market value of the property.

5. The order dated 3rd August, 2015 records that the petitioner had vacated the premises and only the dispute with respect to the damages continued. The counsel for the petitioner informs that axiomatically W.P.(C) No.314/2012 was withdrawn.

6. Vide the same order dated 3rd August, 2015, the petitioner was directed to file an affidavit disclosing all his assets and as to how the liability, in the event of this petition failing, would be met.

7. On 16th August, 2016, this petition was dismissed in default of appearance of the petitioner but on application of the petitioner was restored vide order dated 30th January, 2017.

8. The counsel for the petitioner and the counsel for the respondent ITDC have been heard and the records perused.

9. The Estate Officer, in his order, with respect to damages, held as under:

> "On the basis of on-going discussions, documents etc. placed before this Court the answer is affirmative. I therefore hereby in exercise of the powers conferred upon me as per Public Premise (Eviction of Unauthorized Occupant) Act-1971 hold the Respondent unauthorised occupant beyond the period of licence agreement and order that the Respondent is liable to pay outstanding amount of Rs.1,44,751.50 ps. on account of dues pending as on 30.7.2009 along-with interest @ 18% p.a. to date of realisation. The Respondent is liable to pay damages for unauthroised occupation of the Public Premise for the period starting from 07.9.2009 up to actual handing over of the premise to the Applicant as per the claim made by the Applicant on following rates:-
>
> (i) 50% of the monthly license fee (applicable at that time) for each day of the first week of unauthorized occupation.
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> (ii) 75% of the monthly licence fee (applicable at that time) for each day of the second week of unauthorized occupation.
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> (iii) 100% of the monthly licence fee (applicable at that time) for each day of the third week of unauthorized occupation and
>
> (iv) for each day of unauthorized occupation thereafter 100% monthly license fee for each day till the possession of the premises are handed over to the applicant alongwith interest @ 18% p.a.
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> Rule 8 of the Public Premises (Eviction of Unauthorised Occupants) Rule 1971 provides assessment of damages for unauthorised use and occupation of any

Public Premise. As per the parameters, it is observed that the Applicant has undertaken major renovation initiatives in the Hotel Premises as well as the area in and around the said Public Premise occupied by the Respondent is located. With such major renovation efforts the value of the Public Premise has increased manyfold from the point of view of licence fee as well as the level of prospective licences having strong economic background and paying capacity.

Further, the Respondent has breached the covenents of the licence deed and has failed to abide by the terms and conditions and therefore the Respondent is required to handover peaceful possession of the Public Premises within seven days of publication of this order."

10. The District Judge, in appeal with respect to the challenge to the rate of damages, held that (i) this Court in ***Exclusive Motors Pvt. Ltd. Vs. ITDC*** 2009 SCC OnLine Del 1739 has held that defaulters had flooded the courts with frivolous litigations and cannot be ordered to block the stream of justice in this manner; once a person enters into a licence deed with open eyes knowing fully well the duration was of three years; a licensee has no right to continue use and occupation of the premises beyond that period; (ii) the petitioner had been allowed sufficient time and opportunity to lead evidence and was also allowed lengthy cross-examination of witnesses of ITDC; (iii) damages had been computed by the Estate Officer taking into account Rule 8 of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971 (PP Rules); and, (iv) however interest awarded by the Estate Officer was on the higher side; the petitioner should pay interest at 9% per annum and not at 18% per annum as awarded by the Estate Officer. Accordingly, the petitioner was directed to pay damages within 30 days.

11. It is not in dispute that (i) the period of unauthorized occupation is from 7th September, 2009 to 30th April, 2015 and the damages therefor are the subject matter of this petition; (ii) the area in occupation of the petitioner on the first floor of Janpath Hotel at Janpath, New Delhi was 450 sq.ft. and was air-conditioned; (iii) the petitioner was last paying licence fee at the rate of Rs.17,371.40 paise per month for the aforesaid premises and the said licence fee was inclusive of air conditioning charges; (iv) the petitioner till the date of vacation has paid at the rate of Rs.17,371.40 paise per month and has not paid any other amount to the respondent no.2 ITDC till now; and, (v) the aforesaid rate of Rs.17,371.40 paise was at the rate of Rs.37/- per sq.ft. per month.

12. The counsel for the petitioner has argued, that (i) the Estate Officer assessed the damages without there being any evidence of the same being the letting value of the property; (ii) Supreme Court in ***New Indian Assurance Company Ltd. Vs. Nusli Neville Wadia*** (2008) 3 SCC 279 was concerned with the question "Who should begin to lead evidence in a proceeding" under the PP Act and held in paras no.28 to 30 that where the application before the Estate Officer is a composite application i.e. for eviction as well as for damages, "evidence is also required to be led on the quantum of damages to be determined by the Estate Officer"; (iii) the Division Bench of this Court in ***Hindustan Steel (Pvt.) Ltd. Vs. Usha Rani Gupta*** AIR 1969 Del 59 held that damages / *mesne profits* should not be double the last paid rent without evidence; (iv) the Division Bench of this Court in ***Indrawati Kapoor Vs. Union of India*** 26 (1984) DLT 24 held that what is the market rent has to be proved and assessed in terms of Section

7(2) of the PP Act and Rule 8 of the PP Rules; and, (v) as per the order of the Estate Officer, exclusive of interest, a sum of Rs.2,29,65,502/- is due.

13. I have enquired from the counsel for the petitioner, what evidence did the petitioner lead of the prevalent letting value of the premises.

14. The counsel for the petitioner states that the petitioner did not lead any evidence but before this Court along with affidavit has filed reply received to a query under the Right to Information Act, 2005 made to the respondent no.2 ITDC to the effect that in the year 2013, out of the 16 shops, 14 shops in the hotel were vacant. It is argued that there were no takers for the said shops.

15. I have further enquired from the counsel for the petitioner, where has the petitioner shifted its business after vacation of the subject premises on 30^{th} April, 2015.

16. The counsel for the petitioner states that the petitioner has shut down its business and is thereafter not carrying on any business.

17. The counsel for the respondent ITDC has drawn attention to para no.18 of its counter affidavit verified on 20^{th} December, 2012, deposing that various governmental/semi-governmental and other private parties, at the contemporaneous time, were paying licence fee in the range of Rs.420/- to Rs.510/- per sq. ft. per month. Though a statement indicating the licence fee received by respondent ITDC from its licensees as on 31^{st} March, 2011 was purported to be annexed as Annexure-R3 to the said affidavit, but no such annexure is found to the counter affidavit on record. The counsel for the respondent ITDC, from his own file has handed over a copy of the said

Annexure-R3 and which shows licence fee payable for the month of February, 2012, with respect to five kinds of premises classified as (a) Shops, (b) Rooms, (c) Other Space, (d), Restaurants, and, (e) Mobile Towers, with the petitioner Vasdev Brothers being mentioned under the category (c) Other Space. The rate of licence fee with respect to the spaces varied from Rs.36.95 sq. ft. per month being paid by the petitioners, to Rs.428/- per sq.ft. per month being paid by Director General Export Promotion. However, the said statement also mentions that the occupants who were paying licence fee at the rate of Rs.110/- per sq.ft. per month and with respect to the petitioner, disputes were pending consideration. The licence fee being paid with respect to undisputed premises varied from Rs.400/- per sq.ft. per month to Rs.428/- per sq. ft. per month.

18. I have enquired from the counsel for the petitioner, whether the said statement was received by him along with affidavit.

19. The counsel for the petitioner replies in the affirmative.

20. No reply/rejoinder is found to have filed by the petitioner to the said affidavit/counter affidavit.

21. I have considered the controversy.

22. The judgment of the year 1967 pertaining to a dispute of the year 1957, cannot be a precedent today in the matter of assessment of *mesne* profits. It has been held by the Courts in ***La Medica Mfg. Pvt. Ltd. Vs. Delhi Development Authority*** 1998 (45) DRJ (DB), ***Union of India Vs. Hem Singh*** 2015 SCC OnLine Del 9440 and ***Saradamani Kandappan Vs. S. Rajalakshmi*** (2011) 12 SCC 18 that escalation in real estate prices i.e. of

sale purchase as well as of letting has happened all over the country and particularly in the city of Delhi since the early and midst 1980s. What was thus held more than half a century prior hereto cannot hold good today. Even otherwise, it has been held in ***Badshah Vs. Urmila Badshah Godse*** (2014) 1 SCC 188 that law is a living organism which is based on social reality and when that social reality changes, law must change too. In ***Revanasiddappa Vs. Mallikarjun*** (2011) 11 SCC 1 it was held that due to changing social norms in society, what was illegitimate in the past may be legitimate today, and law cannot afford to be static in a changing society. I have also followed the said view in ***Sam Higginbottom University of Agriculture, Technology & Science Vs. University Grants Commission*** (2015) 225 DLT 638 (DB) and ***Svetlana Kazankina Vs. Union of India*** (2015) 225 DLT 613.

23. As far as the other two judgments cited by the counsel for the petitioner are concerned, though there can be no doubt of the proposition laid down therein but at the same time it has been held in (i) ***S. Kumar Vs. G.R. Kathpalia*** (1999) 77 DLT 226 (DB), (ii) ***National Radio and Electronic Co. Ltd. Vs. Motion Picture Association*** (2005) 122 DLT 629, (iii) ***S&G Company Vs. India Trade Pvt. Ltd.*** 2013 SCC OnLine Del 2670 (SLP(C) No.(s) 38046-47 preferred whereagainst was dismissed vide order dated 6th January, 2014), (iv) ***Suman Verma Vs. Sushil Mohini Gupta*** 2013 SCC OnLine Del 5081, (v) ***Zulfiquar Ali Khan Vs. J.K. Helene Courtis Ltd.*** ILR (2010) II Delhi 151, (vi) ***Asman Investments Ltd. Vs. K.L. Suneja*** (2011) 181 DLT 156, (vii) ***Aashish Aggarwal Vs. State Bank of Patiala*** (2012) 189 DLT 153, (viii) ***Amresh Bajaj Vs. National Hydro***

Electric Power Corporation (2017) 245 DLT 564, (ix) ***Basant & Co. Vs. Osram India Pvt. Ltd.*** (2018) 248 DLT 658, (x) ***Modi Infosol Pvt. Ltd. Vs. Sukhdev Kaur*** 2018 SCC OnLIne Del 9916 and (xi) ***M.C. Agarwal HUF Vs. Sahara India*** (2011) 183 DLT 105 that the Courts are entitled to take judicial notice of the prevalent rate of rents, particularly with respect to commercial areas, where there are a large number of lettings and of which areas a large number of cases come before this Court.

24. The option of remanding the matter to the Estate Officer for fresh evidence, as would be the want of the petitioner, is not found appropriate considering that this petition itself has been pending in this Court for the last six years and the dispute between the parties has also festered for the last nearly nine years. The Additional District Judge has already in the impugned judgment referred to ***Exclusive Motors Pvt. Ltd.*** supra to hold that the persons overstaying in public premises deserves no sympathy from the Court and do not deserve judicial time. Mention in this regard may also be made of (i) ***Ram Niwas Vs. Estate Officer*** 2018 SCC OnLine Del 10285, (ii) ***Bhupinder Singh Malik Vs. Estate Officer*** 2018 SCC OnLine Del 9733 (LPA No.385/2018 preferred whereagainst has been dismissed vide order dated 20th July, 2018), (iii) ***Chaman Lal Vs. Delhi Jal Board*** 2018 SCC OnLine Del 9800 (LPA No.430/2018 preferred whereagainst has been dismissed vide order dated 10th August, 2018), (iv) ***Tejpal Gautam Vs. Central Public Works Department*** 2018 SCC OnLine Del 10484 (LPA No.489/2018 preferred whereagainst has been dismissed vide order dated 28th September, 2018), where it has been held that public premises vest with the public and this Court, while dispensing justice, cannot distribute

largesse and sympathy for one will always come at the cost of another who is equally deserving of sympathy. It cannot be lost sight of that the petitioner, inspite of knowing that its licence to occupy the premises was valid till 6th September, 2009, overstayed in the premises till 30th April, 2015 i.e. for nearly six years, invoking the process of law and which process was ultimately abandoned. From the petitioner abandoning its writ petition against the order of eviction itself, it is evident that the petitioner was well aware that it has no case to defend the proceedings for eviction and was merely using the process of the Court for prolonging the same and when found the said process to be coming to a close, abandoned the same. The petitioner was well aware that for the period of unauthorised occupation it would be liable to pay damages/*mesne* profits. The petitioner still did not bother to lead any evidence of the prevalent rents in the locality. Therefrom, adverse inference can be drawn that the petitioner knew that the prevalent rents were more than Rs.110/- per sq. ft. per month, which the petitioner itself at one stage, as recorded hereinabove in this judgment, had offered to pay. Considering all the said facts and further considering the fact that the petitioner has not controverted the statement filed by the respondent No.2 along with its counter affidavit, of the prevalent rent being paid by others, it is felt that this petition be disposed of by modifying the rate of *mesne* profits from that assessed by the Estate Officer and upheld by the Additional District Judge, to the minimum of the rate then being received by the respondent ITDC for similar accommodation i.e. at the rate of Rs.400/- per sq. ft. per month.

25. It is accordingly directed that the petitioner, instead of the rate as stipulated in the order of the Estate Officer, shall be liable to pay *mesne* profits @ Rs.400/- per sq. ft. per month for the area of 450 sq. ft. with effect from 6th September, 2009 till 30th April, 2015, minus the amount if any already paid by the petitioner.

26. The definition of '*mesne* profits' in Section 2(xii) of the CPC requires interest also to be awarded. It also cannot be lost sight of that the *mesne* profits at the said rate were payable by the petitioner month by month, either in advance or latest by the end of the month to which the *mesne* profits pertained. The Additional District Judge, in the impugned order has already modified the rate of interest from 18% to 9% per annum and which is found to be in order. It is thus directed that the petitioner, on the amount due for each month, with effect from the end of the month to which the *mesne* profits pertained, till the date of payment of *mesne* profits, shall also be liable for interest @ 9% per annum.

27. However, since this Court in writ jurisdiction has interfered with rate of *mesne* profits, no costs.

28. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

OCTOBER 08, 2018
'gsr/bs'