

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

+ **CS(OS) No.2362/1999**

% **12th March, 2018**

M/S. BASANT & CO. Plaintiff

Through: Mr. Shankar Vaidialingam,
Advocate with Mr. Shivain
Vaidialingam, Advocate.

versus

M/S. OSRAM INDIA PVT. LTD. Defendant

Through: Mr. Anil Kumar Airi, Senior
Advocate with Mr. Dinesh
Mathur, Advocate, Mr. R.S.
Mathur, Advocate, Ms.
Priyanka Bharti, Advocate and
Ms. Sukanya Lal, Advocate and
Ms. Sadhana Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Plaintiff M/s Basant & Company which is the sole proprietorship of Sh. Basant Misra has filed this suit against the defendant M/s Osram India Pvt. Ltd. for possession and *mesne* profits with respect to the suit premises bearing no.1/95, Market Road, New Delhi comprising of an area of 3630 sq. feet. The possession of the

suit property has since been delivered by the defendant to the plaintiff, though there is no dispute as to whether possession is delivered on 10.2.2000 pursuant to the order dated 9.2.2000 passed by this Court or the possession is deemed to have been given to the plaintiff by the defendant in February, 1998. There is also no dispute that there was a relationship of landlord and tenant between the parties.

2. In this suit, the following issues were framed on 20.11.2006:-

- “1. Whether the plaintiff committed breach of the agreement dated 25th December, 1993 for provision of air conditioning unit and fixtures and fittings and if so, to what effect? OPD
2. Whether the defendant is not liable to pay any rent, A/c hire charges and charges for fixtures and fittings after 1st December, 1997 for the reasons as claimed in the written statement? OPD
3. Whether the plaintiff is entitled to recover from the defendant damages/mesne profits in respect of the suit premises and if so, to what rate and for what period? OPP
4. Whether the plaintiff is entitled to recover from the defendant, the amounts claimed at items 2-7 in Annexure B to the plaint? OPP
5. Whether the plaintiff is entitled to recover interest from the defendant on amounts which may be found due? If so, at what rate and for what period? OPP
6. Relief.”

3. Counsels for the parties agree that this Court is called upon to only decide issue nos.3 and 5 and which are being decided hereinafter.

Issue Nos. 3 and 5

4. The admitted facts of the case are that plaintiff is the owner/landlord and the defendant is the tenant. Parties entered into

three agreements on 25.12.1993 first agreement is Ex.P1 being the lease deed for the premises comprising an area of 3630 sq. ft. The second agreement is the agreement dated 25.12.1993 Ex.P2 for providing fixtures and fittings. The third agreement Ex.P3 executed between the parties is an agreement of letting out of the air conditioning equipments on hire by the plaintiff to the defendant. Under the three agreements, the charges which were payable by the defendant to the plaintiff were Rs.40,000/-, Rs.20,000/- and Rs.15,000/- respectively i.e totaling to a sum of Rs.75,000/- per month. It is also not in dispute that the lease period was for three years commencing from 1.11.1993 to 31.10.1996. This Court has to therefore decide the following aspects which are argued by the counsels for the parties before this Court:-

- (i) What is the period for which *mesne* profits are payable by the defendant to the plaintiff i.e whether the *mesne* profits are payable from 1.11.1996 to February, 1998 as contended by the defendant or till 10.2.2000 as contended on behalf of the plaintiff?
- (ii) What is the rate and amount of *mesne* profits which the plaintiff has to be granted for the period as found by this Court to be illegal occupation of the suit premises by the defendant?

5. On behalf of the plaintiff, it is argued that physical possession of the suit property was delivered by the defendant to the plaintiff only on 10.2.2000 and which is pursuant to the order of this Court dated 9.2.2000 which reads as under:-

“I.A. 1420/2000 (S.151 CPC) in S. No.2362/99

It has been agreed by the learned counsel for the parties that the defendant will remove his goods from the suit premises tomorrow during 10 a.m. to 12 a.m. and hand over the keys to the plaintiff without prejudice to the rights and contentions of the parties in the suit.

Put up this application on 8th March, 2000.”

6. On behalf of the defendant it is argued that in February 1998, the employees of the plaintiff physically prevented the agents/employees/staff of the defendant from removing its items/goods from the suit premises and therefore since the defendant was physically prevented from handing over possession by removing its goods therefore it should be held by this Court that plaintiff has taken deemed possession from the defendant from 13.2.1998 when the letter of this date Ex.P9 was written by the defendant to the plaintiff. Learned senior counsel for the defendant has argued by placing reliance upon the last para of internal page 5 of the letter of the plaintiff to the defendant dated 20.2.1998/Ex.PW1/15 that the monthly tenancy of the defendant did continue till 30.4.1998, and that if

damages have to be awarded against the defendant then the same have to be only w.e.f 1.5.1998. Learned senior counsel for the defendant has finally placed reliance upon the letter dated 12.5.1999/Ex.P12 written by the defendant to the police station at Mandir Marg, New Delhi whereby the defendant had filed a complaint against the plaintiff that the employees/staff etc of the defendant company have been obstructed from ingress/egress to/from the suit premises and therefore it should be held that defendant should be taken to have deemed to have vacated the suit premises in May, 1999 on account of the defendant being forcibly prevented from ingress and egress to the suit premises.

7.(i) In response to the arguments of the defendant, the learned counsel for the plaintiff has argued that the letter of the defendant Ex.P9 dated 13.2.1998 was appropriately replied to by the plaintiff vide his letter dated 20.2.1998/ Ex.PW1/15, and thereby clarifying that there was no obstruction caused by the plaintiff to remove the goods of the defendant from the suit premises and all that was required by the staff of the plaintiff was that since the plaintiff had given valuable fittings and AC equipments etc therefore the personnel of the

defendant were only asked to keep a proper list of the goods being removed.

(ii) It is also argued by the counsel for the plaintiff by placing reliance upon the letter of the defendant dated 9.3.1998/Ex.P10 that the last para of this letter makes it clear that the defendant as in March, 1998 is admittedly in possession of the suit premises because the defendant by this letter dated 9.3.1998 had revoked its letter dated 13.2.1998 by stating that the tenancy/possession of the defendant continues.

8.(i) In my opinion it has to be held that there was no deemed surrender of possession by the defendant either in February, 1998 or even later and it has to be held that possession of the suit premises was handed over by the defendant to the plaintiff only on 10.2.2000 pursuant to the order dated 9.2.2000 passed by this Court.

(ii) Reliance placed by the defendant upon its letter dated 13.2.1998 for arguing that it has to be held that the defendant is deemed to have vacated possession in February, 1998 is a completely misconceived and misplaced argument because handing over of possession is a physical act or any other act showing the handing over of possession

of a tenanted premises by the tenant to the landlord including by handing over of the keys of the tenanted premises. In this letter dated 13.2.1998 I do not find any language talking of handing over of the keys or possession being handed to the plaintiff in some other manner and all that is stated in this letter is that physical possession can be taken by the plaintiff after seeking prior appointment with the defendant. Therefore the last part of this letter makes it clear that physical possession remained with the defendant and that possession was not handed over to the plaintiff. The only issue therefore which has to be examined is that whether the plaintiff physically prevented the defendant from removing the goods of the defendant from the suit premises and that such stopping of removal of goods should be taken as equivalent to surrendering of possession by the tenant to the landlord.

9. I would like to note that on behalf of the defendant reliance was also placed upon cross-examination of the plaintiff/PW-1 conducted on 31.7.2013 in which answers were given, that plaintiff had stated that he had never written any letter asking for vacant possession of the property from November 1996 to January 1998; and

that the plaintiff admitted that the defendant had taken another property on lease in November, 1997; and finally that the plaintiff was mentioning the telephone numbers which the defendant was allowed to use on the letter of the plaintiff dated 20.2.1998/Ex.PW1/15, and that for all the aforesaid reasons, the defendant should be taken to have handed over possession in February, 1998.

10. In my opinion, any doubt with respect to the defendant continuing in possession from 1.11.1996, and not having vacated in February, 1998 as claimed by the defendant, is removed once we refer to the letter of the defendant itself dated 9.3.1998/Ex.P10. In the last para of this letter at internal page 3 it is specifically written by the defendant that on account of what is stated in this letter Ex.P10 the defendant's earlier request for refund of security and taking over of vacant possession stands revoked. Obviously this would not have been so written by the defendant if the defendant was not continuing in physical possession of the suit premises as on 9.3.1998. Also, in my opinion, the plaintiff was well justified in questioning removal of goods from the suit premises because the plaintiff had in some way interest with respect to the goods being removed because the plaintiff

besides the main lease agreement Ex.P1 had also supplied to the defendant fixtures and fittings as per agreement Ex.P2 and AC equipments as per agreement Ex.P3. Of course plaintiff cannot be completely justified in objecting to removal of goods, but once there was some reasonable basis to question the removing of goods by the staff of the defendant, this act of plaintiff of questioning removal of goods by itself cannot be held to be an act of the defendant of having surrendered possession of the tenanted premises to a landlord, and this is all the more so because of what is stated by the defendant itself in the last para of its letter dated 9.3.1998/Ex.P10, as discussed above. I therefore hold that contention of the defendant of possession of the tenanted premises having been handed over to the plaintiff in February, 1998 is clearly a false and a dishonest stand.

11.(i) Learned senior counsel for the defendant sought to place reliance upon the cross-examination of the plaintiff conducted on 31.7.2013 at internal page 3 to argue that plaintiff has admitted that he cannot produce bills for purchase of AC plant mentioned in Ex.P3 or for installation of AC or for fittings and fixtures providing and

therefore there cannot be paid charges with respect to the AC and fixtures and fittings which are not supplied.

(ii) Once again it is obvious that that defendant wants to resort to downright falsehood to deny the valid charges which the plaintiff had claimed on the basis of admitted agreements Ex.P1 to Ex.P3. In law once a written agreement between the parties is admitted and/or proved, then Sections 91 and 92 of the Indian Evidence Act, 1872 bars any oral evidence being led to contradict the terms of the documents. Ex.P2 and Ex.P3 are the written agreements with respect to fixtures, fittings and supply of AC by the plaintiff to the defendant, and these are admitted documents, and therefore I fail to understand as to how the defendant can contend on account by referring to oral evidence (and that too in the cross-examination of plaintiff) that the agreements Ex.P2 and Ex.P3 did not contain the correct facts. Defendant is therefore legally barred from contending that the agreements Ex.P2 and Ex.P3 are not valid as regards the facts stated therein.

12. Reliance placed by the defendant on complaint to the police dated 12.5.1999/Ex.P12 of possession being handed over to plaintiff is neither here nor there because this letter Ex.P12 does not

show that defendant had handed over physical possession of the tenanted premises to the plaintiff and which is to be taken with the fact that all that is written in this police complaint is that the defendant complained that it has suffered loss on account of its employees being obstructed by the plaintiff and his henchmen from ingress and egress to the suit premises. In fact last line of para 1 of this letter dated 12.5.1999/Ex.P12 admits in so many clear terms that defendant company is in occupation of the suit premises as on 12.5.1999. I therefore reject any argument placed by the defendant upon this letter Ex.P12 to contend that the defendant was not in possession because in fact defendant admits by this letter/complaint to be in possession of the suit premises on 12.5.1999.

13. It is therefore seen that there is no evidence whatsoever led by the defendant of the defendant handing over of the physical possession of the tenanted premises to the plaintiff. At best there was an issue of plaintiff seeking to interfere in the removal of goods by the employees of the defendant, but interference in removal of the goods by the employees of the defendant cannot be equated in the facts of the present case for holding that the defendant had surrendered

possession of the tenanted premises to the plaintiff/landlord in February, 1998. Any doubt in this regard is cleared and removed from the last para of the defendant's own letter dated 9.3.1998 that defendant had revoked all that was stated by in its earlier letter dated 13.2.1998 and consequently the defendant was continuing in possession as further indubitably reiterated in terms of the last line of para 1 of the defendant's own letter dated 12.5.1999/Ex.P12 to the plaintiff.

14.(i) At this stage I would like to consider and deal with another argument raised on behalf of the defendant that defendant should be taken as a tenant by holding over till 30.4.1998 in view of the alleged admission of the plaintiff in last para at internal page 5 of the plaintiff's letter dated 20.2.1998/Ex.PW1/15 to the defendant. For the sake of convenience this para which is relied upon reads as under:-

“.....Kindly take notice that by way of abundant caution, although your tenancy expired and terminated by efflux of time on Oct 31st 1996, since you are still illegally occupying the premises, your monthly tenancy if any (though not admitted) shall stand terminated at midnight of April 30th 1998. I am stipulating a longer notice period as a gesture of courtesy. If according to you, your tenancy month expires on any other day, then the same shall stand terminated on such day next occurring fifteen days after receipt of this notice by you. Till you vacate and hand over the peaceful and vacant physical possession of the premises and the items hired, you shall continue to be liable to pay damages for the use and occupation of the same at the present rate of.....” (underlining added)

(ii) In my opinion the argument raised by the defendant in this regard is completely misconceived because by this para the plaintiff clearly has stated that the tenancy had already expired by efflux of time on 31.10.1996 and that monthly tenancy was “if any (though not admitted)”. The plaintiff was therefore only acting as a matter of abundant caution by seeking termination of monthly tenancy of the defendant with effect from 30.4.1998, but by such acting in abundant caution will not change the factual position of the lease not continuing on account of original lease period having expired on 30.10.1996 and thereafter there being no written agreement between the parties for any specific further period of lease, much less by a registered document. Also it is an undisputed fact that defendant did not pay any charges whatsoever towards monthly rent from 1.11.1996 to the plaintiff and the defendant only deposited charges of use and occupation pursuant to the order dated 30.9.2005 passed by this Court in I.A. No. 11222/1999 filed by the plaintiff. By this order without prejudice to the respective contentions the defendant was directed to pay arrears of rent/use and occupation charges at Rs.75,000/- per month from 1.11.1996 to 8.2.2000 after adjusting security deposit of Rs.3,50,000/-

with the plaintiff in terms of the agreements Ex.P-1 to Ex.P-3 dated 25.12.1993. Therefore, I fail to understand how does it lie in the mouth of defendant to claim continuation of tenancy after 1.11.1996 when even the first basic obligation of a tenant of payment of rent has not been complied with and in fact admittedly there is not even any tender of rent by the defendant to the plaintiff from 1.11.1996. Clearly, therefore, the argument of the defendant has no legs to stand upon that the defendant continued as a monthly tenant from 1.11.1996 to 30.4.1998, and which argument is therefore rejected.

15. Sequitur of the aforesaid discussion is that it is held that the defendant has handed over possession of the suit premises to the plaintiff only on 10.2.2000 and that defendant is liable to pay *mesne* profits to the plaintiff from 1.11.1996 to 10.2.2000.

16. Now comes the question as to what should be the rate of *mesne* profits which should be paid by the defendant to the plaintiff for the further period from 1.11.1996 to 10.2.2000. Admittedly, the plaintiff has led no documentary evidence with respect to rents of similar premises in around the same area. Though counsel for the plaintiff is justified in arguing that the suit premises are the lone

premises in the area which otherwise has no residential premises, and therefore the plaintiff could not prove the rate of rent, however this aspect would not discharge the plaintiff from showing the rate of rent in nearby areas of a similar or same premises, and which the plaintiff has failed to do.

17. Learned senior counsel for the defendant has argued by placing reliance upon the letter dated 7.3.1995/Ex.P-7 of the plaintiff to the defendant, sub-para (c) of this letter, that plaintiff had stated that rent of the area of the tenanted premises plus another area of about 1000 sq. feet was to be let out to defendant with effect from 1.11.1996 at Rs.75,000/- per month and therefore it should be held that as on 1.11.1996 there was no increase from 1.11.1996 when it was Rs.75,000/- per month. However this argument of the defendant is misconceived because sub-para (d) of this letter Ex.P-7 talks of the plaintiff being paid an additional security deposit of Rs.3,50,000/- if the fresh lease period of 18 months was agreed upon, and which payment would have therefore covered some increase in rent on account of plaintiff getting benefit of interest free security deposit of Rs.3,50,000/-, but admittedly the terms as mentioned in the letter

Ex.P-7 of a fresh lease of 18 months till 30.4.1998 did not become a reality, and therefore the terms of this document will not help the defendant to contend that as on 1.11.1996 the rent would still be only Rs.75,000/- per month.

18. In view of the aforesaid facts of no evidence of rents in the area etc being led by the plaintiff it has to be decided what should be the *mesne* profits which should be awarded in favour of the plaintiff and against the defendant for the period from 1.11.1996 to 10.2.2000. In this regard, the observations made by this Court in the case of *M/s M.C. Agarwal HUF Vs. M/s. Sahara India and Ors. 183 (2011) DLT 105* will become relevant and these observations lay down that courts can take judicial notice of increase of rent and depending on the locality, Courts can grant, subject to any other evidence to the contrary, a 15% cumulative increase every year. 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.”

19.(i) In the present case, the premises in question are situated in a very posh locality of Delhi i.e NDMC area. The suit premises are very near to Gol Dakkhana main Post Office and St. Columbus School, as is stated on behalf of the plaintiff before this Court. The NDMC area is the best area of this city, and surely therefore there would be no illegality in granting to the plaintiff 15% cumulative increase every year, inasmuch as there is no evidence to the contrary led on behalf of the defendant that rent has not increased for the period in question for which *mesne* profits has to be paid. I may state that there would be no issue of any equities in favour of the defendant for not awarding 15% increase every year, inasmuch as a recalcitrant tenant who obdurately refuses to vacate must be appropriately proceeded against.

(ii) Accordingly in the facts of the present case by applying the ratio of the judgment in the case of *M/s M.C. Agarwal HUF (supra)* the plaintiff will be granted increase of 15% cumulative every year from the rate of Rs.75,000/- per month. To clarify it is stated that rent would stand increased every year by 15% cumulative on 1.11.1996, 1.11.1997, 1.11.1998 and 1.11.1999. The decree sheet with respect to *mesne* profits however will be drawn up on the plaintiff making payment of additional court fees.

20.(i) That takes us to the issue of rate of interest to be awarded with respect to *mesne* profits payable by the defendant to the plaintiff and which is subject matter of issue no. 5. Related to this issue will also be the period for which rate of interest has to be awarded.

(ii) In law, interest is awarded on account of denial of user of principal amount to the person who is entitled to the principal amount vide *South Eastern Coalfields Ltd. Vs. State of M.P. and Others (2003) 8 SCC 648*. Also Section 2(12) CPC which defines *mesne* profits states that interest is payable on *mesne* profits. Interest therefore it is held would be payable from the end of each month for which *mesne* profits would be payable in terms of the present

judgment. For example, for the month of November, 1996 interest will be calculated in favour of the plaintiff and against the defendant from 1.12.1996 and so on and till date of payment or the deposit by the defendant of the amount in this Court in terms of the order dated 30.9.2005 passed by a Learned Single Judge.

(iii) As regards what should be the rate of interest, in my opinion in the facts of the present case interest at 12% per annum in favour of the plaintiff and against the defendant will meet the ends of justice because if the plaintiff had to take loan from a bank in this relevant period plaintiff would have to pay interest at least at 12% per annum. Plaintiff, therefore, is awarded interest at 12% per annum simple, and with respect to the period which is already stated above.

RELIEF

21. Suit of the plaintiff is therefore decreed against the defendant by directing the defendant to pay *mesne* profits from 1.11.1996 to 10.2.2000. Rate of *mesne* profits would be a sum of Rs.75,000/- plus 15% as on 1.11.1996, with further increases of 15% cumulative thereafter on 1.11.1997, 1.11.1998 and 1.11.1999. Plaintiff will also be entitled to interest against the defendant at 12%

per annum simple from the end of the month for which *mesne* profits are payable till the amount is paid to the plaintiff or till the amount is deposited by the defendant in this Court pursuant to the order dated 30.9.2005. Defendant will be entitled to adjustment with respect to any amount which the defendant has deposited in this Court and plaintiff will have to give adjustment as on 1.11.1996 by reducing its claim by a sum of Rs.3,50,000/- on account of this amount which the plaintiff has as a security deposit from the defendant. Plaintiff will also be entitled to costs of the suit. Decree sheet be prepared.

22. In case any security bond or any title papers have been submitted by the plaintiff for withdrawing of the amount deposited in this Court by the defendant pursuant to the order dated 12.9.2006 in FAO (OS) No.416/2005 upholding the order of the Learned Single Judge of this Court dated 30.9.2005, the same will stand discharged and be released to the plaintiff.

MARCH 12, 2018
Ne/ak

VALMIKI J. MEHTA, J