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

\+ **RFA No.128/2018**

% **28th August, 2018**

SHRI ASHWANI KUMAR MEHRA ..... Appellant

Through: Mr. N.P. Singh, Advocate (M. No.9891110678).

versus

CANARA BANK ..... Respondent

Through: Mr. Pradeep Dewan, Senior Advocate with Ms. Anupama Dhingra, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the Trial Court dated 23.9.2017 by which trial court has dismissed the suit for *mesne* profits with respect to suit property bearing no.G-25, NDSE-Part-I, New Delhi.

2. It may be noted that the subject suit, which was for possession and *mesne* profits, was filed on the Original Side of this Court, and during the pendency of the suit before the original side, a learned Single Judge of this Court passed a decree for possession under Order XII Rule 6 CPC on 18.7.2011, and pursuant to which decree for possession the respondent/defendant/tenant has vacated the suit premises on 31.3.2013.

3. Trial court by the impugned judgment has dismissed the suit for *mesne* profits by holding that the respondent/defendant/tenant continued to pay rent after termination of the tenancy and therefore it is a tenant effectively by holding over, and once a person is tenant by holding over then for the period for which the tenant has stayed in the suit premises by paying rent, no *mesne* profits can be awarded.

4. This Court is called upon to decide the entitlement of the appellant/plaintiff to claim *mesne* profits amount payable from 1.9.2009 till 31.3.2013, with the added issue being as to whether any *mesne* profits are payable at all if the trial court has rightly held that the respondent/defendant/tenant having paid rent after termination of

tenancy, and which was accepted by the appellant/plaintiff, therefore *mesne* profits are not payable.

5. So far as the second issue is concerned that whether a tenant who pays rent after termination of the tenancy is or is not liable to pay *mesne* profits, in my opinion, this issue is settled by the Supreme Court in the judgment in the case of ***Sarup Singh Gupta Vs. S. Jagdish Singh and Others (2006) 4 SCC 205***. In this judgment, Supreme Court has held that if after termination of tenancy the tenant tenders rent and landlord accepts the same, the landlord then can very well adjust the amount towards use and occupation charges. Supreme Court has held that even when the suit is pending and the rent is accepted, it cannot be said that by accepting the rent the notice to quit is waived and that the lease has to be treated as subsisting. Supreme Court has categorically observed that to avoid any controversy, in the event of termination of the lease, the practice followed by the Courts is to permit the landlord to receive each month by way of compensation the use and occupation of the premises an amount equal to monthly rent payable by the tenant. The relevant observations of

the Supreme Court in the case of ***Sarup Singh Gupta (supra)*** are contained in para 8 of the judgment, and which para 8 reads as under:-

> "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 2-6-1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself constitutes 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. <u>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.</u> 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." (underlining added)

6. I therefore hold that trial court has committed a clear illegality in holding that merely because the respondent/defendant/tenant tendered rent after termination of the tenancy, the lease for this reason continued, and that the tenant is only liable to pay rent and not *mesne* profits for the tenanted premises.

7. The second issue to be adjudicated is as to what would be the *mesne* profits payable by the respondent/defendant/tenant to the appellant/plaintiff. The suit premises comprises of an area of 4500 sq. ft. on the first floor and second floor of the property bearing no.G-25, NDSE Part-I, New Delhi. As already stated above, *mesne* profits are to be determined for the period from 1.9.2009 till 31.3.2013.

8. Though learned senior counsel for the respondent/defendant has very vehemently argued that in the appeal prayer is made of *mesne* profits only till 31.7.2012, however since admittedly the respondent/defendant has vacated the suit premises only on 31.3.2013, therefore, exercising powers under Order VII Rule 7 CPC which entitles this Court to take note of subsequent events, *mesne* profits are held to be payable from 1.9.2009 till 31.3.2013.

9. To prove the rate of rent of similar premises in the area, the appellant/plaintiff has filed four Lease Deeds being Ex.PW1/7 to Ex.PW1/10, and in my opinion out of the four Lease Deeds, two Lease Deeds are relevant and material to determine the rate of *mesne* profits being Ex.PW1/8 and Ex.PW1/9. Ex.PW1/8 is with respect to third floor of the premises bearing no.D-7, NDSE Part II, New Delhi under

the Lease Deed dated 28.1.2010 with rent at Rs.299.65 per sq. ft. per month. Ex.PW1/9 is the Lease Deed dated 12.3.2008 of the first floor of the same premises being D-7, NDSE-II, New Delhi at Rs.300/- per sq. ft. per month. Since this Court has to calculate the *mesne* profits from the year 2009 till 2013, these two Lease Deeds of the years 2010 and 2008 would be indeed very relevant because these two Lease Deeds Ex.PW1/8 and Ex.PW1/9 pertain to the same South Extension/NDSE market, though the suit premises are situated in one part of the market being Part-I and the two Lease deeds Ex.PW1/8 and Ex.PW1/9 are with respect to the property on the other part of the market which is Part-II across the Ring Road, but the market however is very much the same being the South Extension market.

10. Learned senior counsel for the respondent/defendant has sought to firstly place reliance upon the Lease Deed Ex.DW1/3, and which is a Lease Deed dated 10.4.2013 for a premises in the near area at NDSE itself. The Lease Deed dated 10.4.2013 pertains to that premises to which the respondent/defendant shifted after vacating the suit premises. The rent as per this Lease Deed is Rs.360 per sq. ft. for the ground floor and Rs.160/- per sq. ft. per month in the basement. It

is argued on behalf of the respondent/defendant that if in the year 2013, the rate of rent is Rs.360/- per sq. ft. per month in South Extension area for the ground floor area then the rent would be much lesser for the period in question being the years 2009 to 2013 for the first and second floor where the suit premises are situated. Learned senior counsel for the respondent/defendant has also placed reliance upon another Lease Deed dated 6.5.2005 entered into with respect to premises bearing no.A-13, Ground Floor, Ring Road, South Extension Part-I, New Delhi and as per which Lease Deed Ex.DW2/1, the rent is shown at Rs.70 per sq. ft. for the ground floor.

11. In my opinion the arguments urged on behalf of the appellant/plaintiff by placing reliance upon the Lease Deeds Ex.PW1/8 and Ex.PW1/9 have to be accepted and the arguments urged by the respondent/defendant by placing reliance upon the Lease Deeds Ex.DW1/3 and Ex.DW2/1 has to be rejected. The reason for accepting the Lease Deeds of the appellant/plaintiff being Ex.PW1/8 and Ex.PW1/9 is that they are of premises which are in the very same market and are of the years 2008 and 2010 for determining *mesne* profits from 2009 to 2013 whereas the Lease Deeds relied upon by the

respondent/defendant Ex.DW1/3 and Ex.DW2/1 are not doubt of the NDSE/South Extension area but they are not of the very market where the suit premises are located but are of premises which are some distance away on the main ring road. If no other Lease Deeds were available on record, then the Lease Deeds as relied upon by the respondent/defendant being of around the same area where the suit premises are situated, the same could have been referred to, however once there are Lease Deeds of the same area of the suit premises being the South Extension market itself, then in my opinion, the Lease Deeds relied upon by the appellant/plaintiff should be treated as the best evidence, and this is all the more so because the Lease Deeds relied by the appellant/plaintiff are of the years 2008 and 2010, and the Lease Deeds relied upon by the respondent/defendant are either of many years earlier of the year 2005 or of the year 2013 pertaining to a period commencing after the and of the period of the *mesne* profits to be determined in the present case.

12. The definition of "*mesne* profits" under Section 2(12) CPC includes interest to be granted on *mesne* profits. Hence, the appellant/plaintiff will also be entitled to interest on *mesne* profits at

the rate 9% per annum simple from the end of the month for which the *mesne* profits are payable and till the date on which *mesne* profits in terms of the present judgment would be paid. For calculating the interest payable, the respondent/defendant will be entitled to adjustment with respect to any amounts which the respondent/defendant have paid to the appellant/plaintiff for any month for the period from 1.9.2009 till 31.3.2013 i.e only on the balance due would the appellant/plaintiff be entitled to interest at the rate 9% per annum simple.

13. In view of the aforesaid discussion, this appeal is allowed. Appellant/Plaintiff is held entitled to *mesne* profits from 1.9.2009 till 31.3.2013 at Rs.300 per sq. ft. per month i.e at Rs.13,50,000/- per month alongwith interest at the rate 9% per annum simple from the end of month for which the *mesne* profits will be payable, subject of course to the fact that interest at the rate 9% per annum simple will only be payable on the balance due to the appellant/plaintiff after the respondent/defendant is given adjustment with respect to the amounts paid by the respondent/defendant to the appellant/plaintiff for this period from 1.9.2009 till 31.3.2013. Any

amount received by the appellant/plaintiff under the present judgment and decree will to the extent of 25% of the amount received, remain in trust with the appellant/plaintiff for payment to the other co-owner of $1/4^{th}$ title namely Sh. Yashpal Mehra. In case, however Mr. Yashpal Mehra approaches the respondent/defendant for direct payment of 25% of the decretal amount in his favour, then the respondent/defendant/tenant can make payment of 25% of the decretal amount in terms of this judgment directly to Mr. Yashpal Mehra. Appellant/plaintiff is also entitled to costs of the appeal. Decree sheet be prepared on the appellant/plaintiff paying the necessary court fee on the amount decreed today.

14. Appeal is accordingly allowed and disposed of in terms of the aforesaid observations.

AUGUST 28, 2018 **VALMIKI J. MEHTA, J**
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