

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

+ **RFA No. 727/2006**

% **26th November, 2018**

PUNJAB NATIONAL BANK Appellant

Through: Mr. S.S. Katyal, Mr. Sanjay Katyal and Mr. Naresh Kumar, Advocates (Mobile No. 9350023553).

versus

SAROJ TANDON Respondent

Through: Ms. Anamika Ghai Niyazi, Mr. M.A. Niyazi, Ms. Kirti Jaswal and Mr. Manish Kumar, Advocates (Mobile No. 9811191180).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 727/2006 and C.M. Appl. No. 17473/2006 (cross-objections by respondent/plaintiff for enhancing mesne profits granted by the trial court)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) along with the cross-objections are filed impugning the Judgment of the trial court dated 29.08.2006. By the impugned judgment, the trial court has awarded *mesne* profits to

the respondent/plaintiff at approximately Rs.55.66 per sq. ft. per month. The appellant/defendant seeks reduction from this rate of *mesne* profits granted, by relying upon letters issued by Syndicate Bank and Central Bank of India being Ex.DW1/1 to DW1/3 for its licensed premises at Lok Nayak Building, Khan Market, New Delhi. The respondent/plaintiff for seeking increase of *mesne* profits places reliance upon two Lease Deeds being Ex.PW2/1 and PW3/1, with respect to shops in the very same Khan Market where the suit premises are situated, and as differentiated from the multi-storied building of Lok Nayak Bhawan which is not in the main Khan Market (though referred to as Khan Market) but in a multi-storied building across the road from where the main Khan Market is located.

2. I need not narrate the facts of the case in detail and all that is required to be noted is that this Court has to determine the *mesne* profits which are payable by the appellant/defendant to the respondent/plaintiff from 01.11.2002 till 31.12.2006 with respect to the suit premises bearing shop nos. 35-A and B, Khan Market, New Delhi having a total super area of 1014.14 sq. ft.

3. The trial court has decided this issue, and which was issue no. 5 framed by the trial court, in paras 16 to 23 of the impugned judgment by awarding *mesne* profits at Rs. 56,453/- per month i.e. Rs. 55.66 per sq. ft. per month of super area. These paras 16 to 23 read as under:-

“ISSUE NO.5

16. The onus to prove the issue is on the plaintiff for the decree of damages/*mesne* profits along with interest as claimed in the plaint. To prove the issue, plaintiff examined PW-1 Smt. Saroj Tandon, PW-2 Sh. Aditya Singh and PW-3 Sh. Govind Lal. Whereas the defendant examined DW-1 Sh. S.K. Rustagi.

17. PW-1 Smt. Saroj Tandon entered into the witness box and stated in her affidavit that one M/s Sopan Properties Private Limited, 9 ABC, Khan Market, New Delhi had let out to the Bank of India 1535 sq. feet of covered space on the ground floor for a period of nine years and 11 years w.e.f. 1.7.1999 at a rental of Rs.200/- per sq. feet per month. She further stated that one lease dated 9.4.2002 was executed by Sh. Shiv Narain Malhotra and has let out to M/s UTI Bank Ltd. 534 sq. feet area comprising in Shop no.2A, on the ground floor at Khan Market, New Delhi at a monthly rental of Rs.2,00,000/-. She further claimed that the rentals prevailing in the locality of Khan Market of ground floor are of Rs.400/- to Rs.425/- per sq. feet per month. The plaintiff has produced PW-2 Sh. Aditya Singh, Executive of UTI Bank Ltd. Witness PW-2 has proved the copy of lease deed as Ex.PW2/1. The plaintiff has also produced PW-3 Sh. Govind Lal, Manager (Deposits) of Bank of India, Khan Market, New Delhi. The witness has proved the copy of lease deed executed between Sopan Properties Private Limited and Bank of India as Ex.PW3/1.

18. On the other hand the defendant has produced DW-1 Sh. S.K. Rustagi who filed his affidavit dated 12.7.2006. In his affidavit witness DW-1 has deposed that he is working as Senior Manager, Punjab National Bank, Khan Market Branch. Witness deposed that the claim of plaintiff for damages @ Rs.4,00,000/- per month has no basis as the claim of plaintiff is relied upon the lease executed by UTI Bank Ltd. which is occupying a shop No.2A, Ground Floor, Khan Market which is an ideal

location, having ample parking facility and consequence situation/location. Witness deposed that the said branch is fully furnished and centrally air conditioned. Witness further deposed that the rent agreed by UTI Bank Ltd. cannot be applied as a yardstick to assess the damages of suit premises which is old and wherein no improvement, renovation and repairs have even been effected by the plaintiff or her predecessors. Witness further deposed that the premises occupied by the bank have super area of 1014.14 sq. feet pertaining to shop/hall along with verandah which is occupied since June, 1958 and the bank has installed a rolling shutter in the verandah. Witness further deposed that the verandah has been the part of the tenanted premises. Witness further deposed that there is no provision of toilet-bathroom in the tenanted premises occupied by the bank and the bank officials and their customers have to use the public toilet which is far away from the branch due to which valuable time is wasted and there is a danger to the security of the bank's business. Witness further deposed that there is no exclusive parking facility in front of the premises. Witness further deposed that he inspected the tenanted premises occupied by UTI Bank Ltd. which is centrally air-conditioned and the premises occupied by Bank of India are totally renovated and have modernized fittings and fixtures. The premises occupied by Bank of India and UTI Bank are having toilet inside the premises. Witness further deposed that Syndicate Bank which is occupying three shops No.26 to 28 measuring 1059 sq. feet in Lok Nayak Bhawan is paying rent @ Rs.36,757/- per month. The Syndicate Bank is also occupying shop No.29 and 30 measuring 1080 sq. feet for which they are paying monthly rent of Rs.39,382/-. The witness has proved the two letters issued by Syndicate Bank as **Ex.DW1/1 and Ex.DW1/2**. Witness further deposed that Central Bank of India is also occupying three shops bearing No.8,10 and 12 in Lok Nayak Bhawan and are paying the rent @ Rs.29,993/- to the NDMC. Witness proved the letter written by Central Bank of India as **Ex.DW1/3 and Ex.DW1/4**. Witness further deposed that the premises of Syndicate Bank and Central Bank are well furnished and are air conditioned.

19. The plaintiff has relied upon two lease deeds Ex.PW2/1 and Ex.PW3/1. Ex.PW2/1 is the lease deed executed between Sh. Shiv Narain Malhotra and UTI Bank Ltd. As per lease deed Ex.PW2/1, the shop was taken on rent by the UTI Bank Ltd. on a monthly rent of Rs.2,00,000/-. The shop taken on rent by UTI Bank Ltd is having the super area of 534 sq. feet. The second lease deed relied upon by the plaintiff is Ex.PW3/1. Ex.PW3/1 is the lease deed executed between Sopan Properties Private Limited and Bank of India. As per lease deed Ex.PW3/1, the shop was taken on rent by the Bank of India on a monthly rent of Rs.3,07,000/-. The rent was agreed to be Rs.200/- sq. feet. The shop taken on rent by UTI Bank Ltd is having the super area of 1535 sq. feet.

20. On the other hand, the defendant has relied upon letter dated 8.7.2006 Ex.DW1/1 issued by Syndicate Bank. Ex.DW1/1 show that the Syndicate Bank is in occupation of shop No.26,27 and 28 of Lok Nayak Bhawan of the area of 1059 sq. feet on a monthly rent of Rs.36,757/-. Ex.DW1/2 letter issued by Syndicate Bank shows that the bank is occupying shop No.29 and 30 of the area of 1080 sq. feet on a monthly rent of Rs.39,382/-. Letter Ex.DW1/3 shows that the Central Bank of India is occupying shop no.8, 10 and 12 in Lok Nayak Bhawan of the area of 1224 sq. feet and paying a monthly rent of Rs.29,993/-.

21. I have gone through the material available on record. The plaintiff has relied upon two lease deeds of UTI Bank and Bank of India. The case of the plaintiff is that the UTI Bank and Bank of India are situated in Khan Market area, the same vicinity where the defendant bank is situated. It is further the case of plaintiff that the UTI Bank is paying a rent of Rs.2,00,000/- for the use of 534 sq. feet super area. It is further the case of plaintiff that Bank of India in the similar case is paying a monthly rent of Rs.3,07,000/- for the use of 1535 sq. feet super area. On the other hand the case of the defendant is that the Syndicate Bank is occupying shops on a monthly rent of Rs.36,757/- for the use of 1059 sq. feet area. The defendant has further submitted that the Syndicate Bank is having the occupation of shops on a monthly rent of Rs.39,382/- for the use of 1080 sq. feet area. The defendant has further submitted that the Central Bank of India is occupying shops on a monthly rent of Rs.29,993/- for the use of 1224 sq. feet area. It is submitted on behalf of defendant that the shops occupied by Syndicate Bank and Central Bank of India are located in the same vicinity. It has been submitted on behalf of the defendant that the lease deeds of other banks on which the reliance has been placed by the plaintiff is situated on an ideal location, having amply parking facility, having better facilities, renovated, modernized fitting and fixtures, having toilet inside the premises and having centrally air-conditioning plant. It is further submitted on behalf of the defendant that on the other hand the premises in question is an old structure wherein no improvement, renovation and repairs have been effected. It is further submitted that the premises in question does not have exclusive parking facility, no provision of toilet inside the premises, no modern fixtures and is lacking other modern facilities. It is evident from the record that the premises occupied by defendant is an old structure and is lacking several modern facilities as that of enjoyed by other banks reliance on which has been placed by the

plaintiff. The plea taken by the plaintiff that the UTI Bank and Bank of India are paying the rent at the higher rate than the defendant bank and the defendant bank is liable to pay the rent at the higher rate and claiming the damages @ Rs.4,00,000/- from the defendant, is not acceptable in the facts and circumstances of the present case being incomparable.

22. The plaintiff in its rejoinder submitted that the defendant bank was occupying a shop bearing no. 34, Khan Market which was vacated by the defendant bank pursuant to an eviction order passed against it. It is further submitted that thereafter the defendant bank has taken on rent another premises bearing no. 27, Khan Market comprising of approximately area of 1500 sq. feet at a monthly rent of Rs.83,500/-. It is further submitted that in view of the fact that the defendant bank is paying a rent of Rs.83,500/-. It is pertinent to mention that the defendant has not controverted the fact that the bank was earlier occupying the shop no. 34 and after the vacation of the same the bank shifted to shop no. 27 in the main market of Khan Market.

23. As discussed above in detail, the plaintiff has relied upon the two instances UTI Bank Ltd and Bank of India, but no comparison has been brought on the record and it cannot be said that the premises occupied by UTI Bank Ltd and Bank of India is having the same character i.e. location, parking facilities, quality of construction, toilet facility, air-conditioning system, life of the construction, etc. Similarly, the defendant has relied upon the three instances; two by the Syndicate Bank and third by occupied by Central Bank of India. The instance given by the defendant bank are of the premises which are situated in Lok Nayak Bhawan owned by NDMC which is not part of the main Khan Market and mainly used for office purposes only. The defendant has also failed to establish that the instance given by the defendant are on the same footing as of the premises occupied by the defendant in the present case. In such a situation, the only material left with the Court is that taking over the premises by the defendant bank bearing shop no. 27 as mentioned above. It is own case of the plaintiff that the defendant has taken the premises on the monthly rent of Rs.83,500/- comprising of 1500 sq. feet. The defendant has not disputed this fact. Consequently, I am of the considered opinion that the plaintiff would be entitled for damages/mesne profits for sum of Rs.56,453/- per month for area comprising 1014.14 sq. feet w.e.f. 1.11.2002 till the delivery of possession, subject to the adjustment the amount already paid during the pendency of the suit. The

plaintiff shall further be entitled for interest @ 9% on the amount when it become due till the realization of the same. Issue is accordingly decided in favour of plaintiff and against the defendant.”

(emphasis added)

4(i). In my opinion, trial court has clearly fallen into grave error in awarding damages/*mesne* profits at Rs.55.66 per sq. ft only. This is because the Lease Deed Ex.PW3/1 proved by the respondent/plaintiff is a Lease Deed dated 28.06.1999 for the premises in the very Khan Market where the suit premises are located i.e. bearing no. 9 ABC, Khan Market, New Delhi. The rate of rent as on the date of entering into the Lease Deed in 1999 was Rs.200 per sq. ft. per month of super area, and this rate was to be enhanced by 25% every three years. As on 2002, therefore, the rate would become Rs. 250 per sq. ft. per month for each sq. ft. of super area. The second Lease Deed which is relied upon by the respondent/plaintiff is Ex.PW2/1 being a Lease Deed dated 09.04.2002 with respect to premises no. 2A ground floor, Khan Market, New Delhi, with rent at Rs. 374.54 per sq. ft. per month of super area with 15% increase payable after every three years, and the subject matter of Ex.PW2/1 again is for the very same Khan Market where the suit premises are located.

(ii). Therefore, it is seen that the Lease Deeds of the very same Khan Market area show that as in 2002 one Lease Deed Ex.PW3/1 shows rent payable of Rs. 250 per sq. ft. per month of super area and another Lease Deed Ex.PW2/1 shows rent payable at Rs.374.54 per sq. ft. per month in the year 2002. Therefore, in any case, the rate of rent granted by the trial court at Rs.55.66 per sq. ft. per month is absolutely unacceptable and an illegal assessment which deserves to be set aside.

5. The documents relied upon by the appellant/defendant to seek a further reduction of rent than Rs.55.66 per sq. ft. per month as determined by the trial court are the letters Ex.DW1/1 to Ex.DW1/3. These documents, though relied upon being letters Ex.DW1/1 to DW1/3, cannot in any manner help the appellant/defendant for various reasons. Firstly, these documents Ex.DW1/1 to Ex.DW1/3 are only letters and not lease deeds from where exact terms of the lease deeds/license deeds could have been known i.e. the commencement of the lease deeds and the terms of the lease deeds are not known. Along with the aforesaid aspects, it is to be noted that the letters are with respect to those premises which are not situated in the main Khan

Market area but are situated in a multi-storied building, which is across the road from the main Khan Market. Obviously, the rent as payable in the main Khan Market is different than the rent which is payable for the Lok Nayak Bhawan, which is not in the main Khan Market but is across the road in a multi-storied building. There can be some similarity of rent, of the main Khan Market and in Lok Nayak Bhawan, but once the respondent/plaintiff has proved Lease Deeds for the very same Khan Market, then such Lease Deeds Ex.PW2/1 and PW3/1 are more relevant and have a better nexus for the purpose of determination of the *mesne* profits as regards the suit premises.

6. Learned counsel for the appellant/defendant argued that premises which are the subject matter of Lease Deeds Ex.PW2/1 and Ex.PW3/1 have the benefit of a toilet facility inside those premises and also the fact that those premises are relatively new as compared to the suit premises, whereas the tenancy of appellant/defendant commenced way back in the year 1958. It is accordingly argued that the rate of rent in terms of Ex.PW2/1 and Ex.PW3/1, at Rs. 250 per sq. ft. per month and Rs. 374.54 per sq. ft. per month cannot determine

the *mesne* profits with respect to the suit premises which were taken on rent many decades earlier.

7. At this stage, it is required to be noted that while calculating the *mesne* profits of a premises, some amount of honest guesstimate or assessment is always called in. There cannot be exact, identical or a replica position, and the courts only have to make a reasonable assessment based on the best and the most relevant evidence on record. Once the best and the most relevant evidence is seen, that are the Lease Deeds Ex.PW2/1 and Ex.PW3/1, it is found that one Lease Deed specifies the rent at Rs. 250/- per sq. ft. per month in the year 2002 and another lease deed specifies Rs. 374.54 per sq. ft. per month, and if we take an average of these two figures, we would arrive approximately at a rate of Rs.310 per sq. ft. per month. From this rate of Rs. 310 per sq. ft. per month, if we further reduce the rent on account of the toilet facilities being available inside the premises which are subject matter of the Lease Deeds Ex.PW2/1 and Ex.PW3/1, alongwith the fact that letting out of the suit premises was way back in the year 1958 and the new condition of renovation of premises under Ex. PW 2/1 & Ex. PW 3/1, we can take that the rate of

rent can be discounted/reduced from Rs.310 per sq. ft. per month to Rs.250 per sq. ft. per month. I may note that howsoever old a premises, ultimately by proper painting or renovation work, premises are brought to a modern state which would exist at the time of letting out of the same. Since the basic structures of all the shops and premises in the main Khan Market are identical, and the issue therefore is really of renovation or of a toilet facility, therefore, in my opinion, instead of *mesne* profits being granted to the respondent/plaintiff at Rs. 310 per sq. ft. per month, we can reduce the same to Rs. 250 per sq. ft. per month for being so decreed in favour of respondent/plaintiff. As already stated above, some amount of honest assessment and guesstimate is required, and which can be done provided the same has requisite nexus with the relevant evidence on record.

8. In view of the aforesaid discussion, the appeal and the cross objections are disposed of by dismissing ***RFA No.727/2006*** and allowing the cross objections being ***C.M. Appl. No. 17473/2006*** and granting *mesne* profits to the respondent/plaintiff at Rs. 250 per sq. ft. per month from 01.11.2002. From 01.11.2005, the respondent/plaintiff

will be entitled to a 15% increase i.e. the rate will become Rs. 287.50 per sq. ft. per month and the same will be payable till the suit premises were vacated by the appellant/defendant on 31.12.2006. The interest granted by the trial court on *mesne* profits at 9% per annum will remain as it is in view of the fact that Section 2(12) of CPC which defines *mesne* profits and provides that *mesne* profits includes interest which is payable on *mesne* profits as well. It need not be gainsaid that interest will be payable only on any balance amount of *mesne* profits remaining to be payable by the appellant/defendant to the respondent/plaintiff inasmuch as for this period from 01.11.2002 till 31.12.2006, the appellant/defendant has regularly credited the admitted rate of rent to the respondent/plaintiff/landlord.

9. Since the appellant/defendant pursuant to the interim order of this Court has created an FDR in its own bank with respect to 50% of the *mesne* profits as was awarded by the trial court, now the appellant/defendant can encash its own FDR alongwith accrued interest and such amount can be utilized by the appellant/defendant to pay the amount due to the respondent/plaintiff in terms of the present judgment.

10. In view of the aforesaid discussions, the appeal is accordingly allowed and disposed to the extent as stated above by increasing the rate of *mesne* profits to Rs. 250 per sq. ft. per month of super area from 01.11.2002 till 31.10.2005 and from 01.11.2005 till 31.12.2006 at Rs. 287.50 per sq. ft. per month of super area. As already stated above, rest of the impugned judgment will remain as it is, but subject to the adjustment being granted to the appellant/defendant as stated above.

NOVEMBER 26, 2018

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VALMIKI J. MEHTA, J