* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision 25th September, 2018.

\+ **W.P.(C) 4560/2018 & CM No.17699/2018 (for stay)**

GIFT CENTRE (KHUSHAL) ..... **Petitioner**

Through: Mr. Sanjay Gupta, Adv.

Versus

INDIAN TOURISM DEVELOPMENT CORPORATION LTD. AND ANR. ..... **Respondents**

Through: Mr. Deepak Thukral, Adv.

AND

\+ **W.P.(C) 4768/2018 & CMs No.18418/2018 (for stay) & 18419/2018 (for exemption)**

M. A. RAMZANA ..... **Petitioner**

Through: Mr. Sanjay Gupta, Adv.

Versus

INDIAN TOURISM DEVEOPMENT CORPORATION LTD. AND ANR. ..... **Respondents**

Through: Mr. Deepak Thukral, Adv.

AND

\+ **W.P.(C) 5778/2018 & CM No.22525/2018 (for stay)**

ROMILA BAHL & ANR ..... **Petitioners**

Through: Mr. Saraswata Mohapatra, Adv.

Versus

INDIAN TOURISM DEVELOPMENT CORPORATION LTD & ORS ..... **Respondents**

Through: Mr. Deepak Thukral, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. These three petitions under Articles 226 and 227 of the Constitution of India impugn the orders [(i) dated 14th March, 2018 in PPA No.30/2017,

(ii) 5th April, 2018 in PPA No.31/2017; and, (iii) 27th April, 2018 in PPA No.209/2016 respectively, all of the Court of District Judge, New Delhi acting as Appellate Officer under Section 9 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971] of dismissal in part of appeals preferred by the petitioners against the orders [dated 24th February, 2010, 2nd March, 2010 and 16th August, 2010 respectively of the Estate Officer of the respondent India Tourism Development Corporation Ltd. (ITDC) in exercise of powers under Sections 5 and 7 of the PP Act] of eviction of the petitioners from shops No.1, 9 and 21 respectively, Main Shopping Arcade of the Ashok Hotel, Chanakyapuri, New Delhi and of recovery of damage charges at the rate of Rs.500/- per sq. ft. per month for each of the shop aforesaid, with effect from 1st February, 2008, 1st March, 2008 and 30th September, 2008 respectively till the date of handing over of actual possession of the premises respectively. The District Judge, in appeal, however reduced the rate of damages to Rs.370/- per sq.ft. per month.

2. All the three petitions were entertained and notice thereof issued.

3. Though there is no interim stay of the orders in either of the three petitions but each of the petitioners undertook to pay to the respondent ITDC, damage charges at the rate of Rs.370/- per sq. ft. per month till the date of possession.

4. Though challenge in these petitions was to both, order of eviction under Section 5 of PP Act as well as order of recovery of damage charges under Section 7 of the PP Act but the challenge to the order of eviction under Section 5 PP Act does not survive. The respondent ITDC, invited bids for licences of the premises in occupation of each of the petitioners and

each of the petitioners participated in the said bids and furnished undertakings to this Court that in the event of the bids of the petitioners being not accepted, the petitioners will vacate the premises in their respective occupation within ten days thereof. The said undertakings of the petitioners were accepted and petitioners ordered to be bound therewith. Now, the challenge in these petitions is confined only to the order of recovery of damage charges under Section 7 of the PP Act. The counsels for petitioners confirm. The discussion hereafter shall thus be confined to the said damage charges only.

5. The counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 and the counsel for the petitioners in W.P.(C) No.5778/2018, on enquiry state that the bids have not been opened as yet.

6. The counsel for the respondent ITDC confirms and states that the bids are likely to be opened within a few days and the communication in this regard will be sent to the petitioners.

7. It is not in dispute that (i) the licences of each of the petitioners with respect to the premises in their respective occupation were valid till 31st January, 2008, 29th February, 2008 and 30th October, 2007 respectively and each of the petitioners prior thereto was paying licence charges to the respondent ITDC at the rate of Rs.140/- per sq.ft. per month; (ii) the petitioners, with effect from 1st January, 2010, have voluntarily paid licence fee at the rate of Rs.250/- per sq.ft. per month to the respondent ITDC; (iii) the Estate Officer, in exercise of powers under Section 7 of the PP Act, assessed the damages with effect from 1st February, 2008, 1st March, 2008 and 30th October, 2007 respectively at Rs.500/- per sq.ft. per month; (iv) however the District Judge, in statutory appeals preferred by each of the

petitioners, reduced the rate of damage charges from Rs.500/- per sq.ft. per month to Rs.370/- per sq.ft. per month; and, (v) in the bids invited by the respondent ITDC in 2018 and in which the petitioners have participated as aforesaid, the petitioner in W.P.(C) No.4560/2018 has bid for licence at the rate of Rs.377/- per sq.ft. per month and the petitioners in W.P.(C) Nos.4768/2018 & 5778/2018 have bid for licences at the rate of Rs.380/- per sq.ft. per month for the next five years.

8. The contention of the counsels for the petitioners is, that (i) the assessment of damages at Rs.500/- per sq.ft. per month and at Rs.370/- per sq.ft. per month by the Estate Officer and by the District Judge respectively, is without any evidence on record and without any other basis and the said assessment is liable to be set aside on this ground alone; (ii) the petitioners voluntarily offered to pay damages with effect from 1st January, 2010 at the rate of Rs.250/- per sq.ft. per month owing to the order dated 8th March, 2010 of the Supreme Court in SLP(C) No.5612/2010 preferred by M/s Little Kashmir, another licensee in the same hotel and in similar premises; (iii) the respondent ITDC, even in the year 2018, has licenced out various shops in hotel Ashok at a licence fee of Rs.250/- per sq.ft. per month; (iv) the measure of damages is provided in Section 73 of the Contract Act, 1872; and, (v) the Estate Officer of the respondent ITDC, vide order dated 20th April, 2015 qua M/s Victory Carpet, another occupant of the same hotel, has also determined the damage charges at the rate of Rs.250/- per sq.ft. per month with effect from 1st January, 2010. It is thus argued that the matter qua damages be remanded to the Estate officer of the respondent ITDC for determination afresh.

9. Per contra, the counsel for the respondent ITDC contends that (i) another occupant of the same hotel viz. Central Bank of India (CBI) has been paying licence fee of Rs.350/- per sq.ft. per month since 8th October, 2010; (ii) the petitioners cannot compare themselves to M/s Victory Carpet; (iii) M/s Victory Carpet, as is evident from the order dated 20th April, 2015, had vacated the premises and was not in unauthorized occupation and it was in these circumstances that damage charges were levied at Rs.250/- per sq.ft. per month; it is argued that the petitioners on the contrary are in unauthorized occupation since 1st February, 2008, 1st March, 2008 and 30th October, 2007 respectively i.e. for the last more than ten years and are liable to pay damages as assessed; (iv) the petitioners in W.Ps.(C) Nos.4560/2018, 4768/2018 and 5778/2018 vide their letters dated 29th October, 2012, 18th March, 2011 and 21st March, 2011 respectively, offered to pay licence fee at the rate of Rs.350/- per sq.ft. per month and thus cannot object to assessment of damages by the District Judge at the rate of Rs.370/- per sq.ft. per month; and, (v) the District Judge in fact, on the basis of the said letters only and on the basis of the licence fee being paid by CBI has assessed the damage charges at Rs.370/- per sq.ft. per month.

10. The counsels for the petitioners, in rejoinder have contended that the letters of the petitioners offering to pay licence fee at Rs.350/- per sq.ft. per month are with the endorsement "without prejudice". Reliance is placed on ***Chairman & MD, NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors*** (2004) 2 SCC 663 holding that where an offer or admission is made 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided and that the

said words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter and further that the words 'without prejudice' mean that the cause or the matter has not been decided on merits. Reliance is also placed on order dated 29th January, 2010 in W.P.(C) No.11945/2009 and other connected petitions of this Court, one of which was of M/s Victory Carpet supra, also recording the offer of the petitioners therein for extension of licence at a fee of Rs.250/- per sq.ft. per month. It is thus argued that the offer of the petitioners to pay licence fee at the rate of Rs.350/- per sq.ft. per month cannot be taken into consideration for assessment of damage charges because the same was an offer for payment of licence fee at the said rate for five years from the date of offer with right of renewal for another five years and the said offer was not accepted by the respondent ITDC.

11. The counsel for the respondent ITDC points out that the letter dated 21st March, 2011 of the petitioners in W.P.(C) No.5778/2018 was not 'without prejudice'.

12. The counsel for the petitioners in W.P.(C) No.5778/2018 though agrees but contends that the said rate was offered for renewal of licence and therefore would have the same impact as if the words 'without prejudice' were written thereon.

13. The counsels for the petitioners have also handed over in the Court a copy of the order dated 19th February, 2018 in W.P.(C) No.9054/2011 titled ***Himalayan Travel & Tours (I) Pvt. Ltd. Vs. ITDC*** with respect to another licensee of the same hotel, fixing the licence fee at the rate of Rs.370/- per sq.ft. per month at the time of granting extension of time to vacate and state that the petitioners during the pendency of these proceedings offered to pay

licence fee at the rate of Rs.370/- per sq.ft. per month on the basis of said order.

14. I have considered the controversy keeping in mind the limits of the jurisdiction to be exercised in a petition under Article 227 of the Constitution of India.

15. In my view, the impugned orders require no interference for the following reasons:

A. The petitioners, though were fully aware that their entitlement to occupy the premises was till 31st January, 2008, 29th February, 2008 and 30th October, 2007 respectively, did not remove themselves from the premises inspite of having contracted to do so and continued in occupation of the premises knowing fully well that by doing so they are exposing themselves to the liability for damages for unauthorized use and occupation.

B. The petitioners, by their respective letters aforesaid of the year 2011 and 2012, offered to pay licence fee at Rs.350/- per sq.ft. per month with effect from 1st February, 2008 for a period of five years with right of renewal for another five years.

C. The damage charges, in law are *mesne profits* and which in Section 2(12) of the CPC has been defined as those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits.

D. The petitioners, by offering to renew the licences in their respective favour with effect from 1st February, 2008, 1st

March, 2008 and 30th October, 2007, for a period of five years, at the rate of Rs.350/- per sq.ft. per month and even if with a right of renewal for another five years i.e. till the year 2018, unequivocally conveyed that the profits which they were receiving from the unauthorized occupation of the premises were at the said rate;

E. The use by the petitioners in W.P.(C) Nos.4560/2018 and 4768/2018, in their offers, of the words 'without prejudice' at the top, will not make any difference as the present petitions are concerned with determination of *mesne profits*. At that time the proceedings for eviction under Section 5 of the PP Act were underway and the petitioners were at issue on, whether the possession of the petitioners of the premises in their respective occupation was unauthorized, with the respondent ITDC contending that the possession was unauthorized and the petitioners contending otherwise. The words 'without prejudice' were thus only to prevent the respondent ITDC from contending that the petitioners, by offering so, had admitted their possession to be unauthorized. The petitioners then, were not at issue qua rate of damage charges; though the Estate Officer had determined damages at Rs.500/- per sq.ft. per month but the petitioners were not claiming the rate to be lower than Rs.350/- per sq. ft. per month.

F. It is also not the case of the petitioners that they have not been able to reap the benefit which they would have reaped if the respondent ITDC had accepted the offer. The petitioners, even if their offers would have been accepted by the respondent ITDC would have earned the right to remain in occupation for 5+5 years from 2008 i.e. till 2018 and which the petitioners in any case have remained. The petitioners thus cannot be heard to contend that while they are being required to perform the obligation which they had undertaken in their offer, they have been deprived of the benefit which they would have derived from their offer.

G. Moreover, owing to the definition of *mesne profits* also as aforesaid, the offer of the petitioners at the rate of Rs.350/- per sq.ft. per month was not by way of settlement.

H. The counsels for the petitioners have also explained that the petitioners had offered licence fee at the rate of Rs.350/- per sq.ft. per month because of the same being the reserve price in the tender then floated by the respondent ITDC and which tender was as per the licence fee being paid by the CBI, another occupant of the hotel to the respondent ITDC. The same also belies the fact that the rate offered of Rs.350/- per sq.ft. per month was 'without prejudice'.

I. In fact, the rate being paid by the CBI alone was a good measure for the *mesne profits*.

J. As far as the difference between Rs.350/- per sq.ft. per month and Rs.370/- per sq.ft. per month is concerned, it cannot be lost sight of that the definition of *mesne profits* includes the interest accrued thereon. The petitioners were required to pay *mesne profits* if any at the beginning of the month for which the same were due or at least at the end of the month and having not paid the said *mesne profits* for the last ten years, the difference between Rs.350/- per sq.ft. per month and Rs.370/- per sq.ft. per month is not such, which considering the said fact calls for this Court to reduce the rate of Rs.370/- per sq.ft. per month to Rs.350/- per sq.ft. per month.

K. As far as the plea, of other licences granted with effect from the year 2018 at the rate of Rs.250/- per sq.ft. per month is concerned, the same is again of no avail inasmuch as the admitted position is that the petitioners themselves have in the year 2018 bid for rate in excess thereof i.e. at the rate of Rs.377/- per sq.ft. per month and Rs.380/- per sq.ft. per month respectively as licence fee.

16. The counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 at this stage states that the petitioners have yesterday received a communication from the respondent ITDC that their bid has been admitted. The counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 at this stage also clarifies that Rs.350/- per sq.ft. per month was offered not owing to the same being reserve price but owing to the respondent ITDC in private negotiations demanding the said rate at that stage. It is rather stated that at that time there was no concept of reserve price. The counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 also states that M/s Victory Carpet was also in unauthorized occupation and it is for this reason only that the question of levy of damages arose. The counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 lastly states that had

licences been renewed at Rs.350/- per sq.ft. per month, the petitioners would have been entitled to gate pass and which was not issued to them and without which the petitioners were unable to bring in fresh goods for sale and unable to take their goods out for sale.

17. The counsel for the petitioners in W.P.(C) No.5778/2018 adopts the arguments of the counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 save the argument with respect to gate pass. It is stated that the petitioners in W.P.(C) No.5778/2018 was not troubled qua the gate pass.

18. The counsel for the respondent ITDC states that the communication sent to the petitioners was only of acceptance of their technical bids and not of admission of their bids.

19. As far as the argument of the counsel for the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 qua gate pass is concerned, it is unbelievable that the petitioners would have been in a position to carry on their business from the premises in their occupation for a period of ten years since 1st February, 2008, without being able to take in or take out any goods. If that had been the position, the petitioners would have claimed an interim relief specifically in this regard and no such specific interim relief was ever claimed. Moreover, from the fact that the petitioners in W.P.(C) No.5778/2018 did not face any problem in this regard, it is evident that the petitioners in W.P.(C) Nos.4560/2018 & 4768/2018 have also not suffered on this account.

20. The counsel for the respondent ITDC states that the licence of CBI at the rate of Rs.350/- per sq.ft. per month was with effect from 8th October, 2010 with 10% increase per annum in licence fee.

21. There is thus no merit in the petitions.

22. Dismissed.

No costs.

Dasti.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 25, 2018
'gsr'..