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

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Delivered on: 08th November, 2019

+ **RFA 503/2019 & CM APPL No.24678/2019**

VINAY KUMAR

..... Appellant

Through : Ms.Anita Sahani, Advocate with
appellant.

versus

DEEPAK MONGIA

..... Respondent

Through : Mr.Ganesh Kr. Sharma, Advocate
with respondent.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/defendant against the judgment and decree dated 06.04.2019 passed by the learned Additional District Judge-11/Central District, Tis Hazari Courts, Delhi (hereinafter referred as the learned *Trial Court*) in CS No.1481/2017 as also against the order dated 10.10.207 passed under Order XII Rule 6 CPC whereby possession decree in respect of subject premises was passed against the appellant.

2. Undisputedly, the possession of the subject premises has been received by the respondent on 30.05.2018 and the dispute is only qua quantification of the damages payable with effect from April 2017 to 30.5.2018 roughly for about 13½ months.

3. The learned Trial Court vide impugned judgment has awarded damages for this period @ Rs.1.60 lac per month. The appellant had challenged this amount in this appeal.

4. The reasons to arrive at such figure of Rs.1.60 lac per month are given in paragraph Nos.25 to 32 of the impugned judgment, which notes:-

“25. The original rate of rent was Rs.60,000/- and the last rate of rent payable was Rs.50,000/- per month. Thus, if due effect is given to the clauses of the lease deed Ex.PW-1/3, then the period during which the defendant continued in possession of the suit premises after the expiry of the lease deed would attract the original admitted rent at the rate of Rs.50,000/- per month and a sum of Rs.10,000/- each day of such unauthorized occupation. This will turn out to be Rs.3,50,000/- per month. The plaintiff is only seeking Rs.1,60,000/- per month as damages.

26. In order to prove that the above amount would be actual rate of rent of similarly situated premises, the plaintiff produced Ex.PW-2/1 through PW-2 who is a summoned witness. It is a lease deed in respect of another shop bearing No.120 situated in the same MCD Market where the suit premises is situated. The rate of rent of the said premises/shop is Rs.2,21,000/- per month and the actual area in possession of the tenant (excluding the area in possession of actual owner) is 94.16 sqft whereas the suit property herein is comprising of actual area of 14.7' x 7' (ad measuring 102.9 sqft). Thus, even after lesser area in possession of the tenant in shop No.120, the tenant is paying higher rent than the present defendant ever paid.

27. Even the defendant through his witness has produced two lease deeds which are Ex.DW-1/1 and Ex.DW-1/2. It is not in dispute that the rent deed Ex.DW-1/1 pertains to Upper Ground Floor of the property situated in Gaffar Market which is fetching rent of Rs.80,000/- per month as on the date of its execution i.e.11.8.2017. Further, admittedly the said property has been leased out by the plaintiff himself along with one Sh.Sanjay Kumar and it has come in evidence that the plaintiff owns more shops in the area of Gaffar Market. However, the very fact that this property is not a Ground floor property puts a possible equitability of trade/ commercial value of both the shops of comparison.

28. Ex.DW-1/2 is another registered lease deed dated 06.2.2017 in respect of Ground floor shop in MCD Market, Saraswati Marg, Karol Bagh, New Delhi. The rate of rent therein is only Rs.40,000/- per month. There is nothing in the evidence of the parties that the said rate of rent was not agreed owing to mere commercial/trade value only.

29. There is possibility and force in the argument of the plaintiff that the said shop could have been leased at such a lower rent due to various factors including some emergency condition of the shop or any other mutual arrangement between the lessor and lessee therein.

30. One more argument which the defendant puts forth is regarding existence of few questionable clauses in the lease deed Ex.PW2/1 i.e. the clauses No.5, 17 and 23. I have carefully gone through them and merely because the said clauses pertain to lock out of the premises on nonpayment of monthly rent of two consecutive months; satisfaction of the lessee that the rent being charged is appropriate and reasonable etc, it can never be presumed that the deed itself is a manipulated document as was argued. The fact, therefore, remains that it is proven by documentary evidence that the rent which the suit premises could have fetched for the period during which it remained in unauthorized possession of the defendant, could have been much more than what is being claimed. It is therefore proved to the satisfaction of this Court that the property of the size which the suit property is given by its location and floor value, it could easily fetch Rs.1,60,000/- per month as actual market rent at relevant time till today.

31. Needless to say that the parties have mutually agreed that such damages will be at the rate of Rs.10,000/- per day as per clause 13 of the original lease deed Ex.PW-1/3.

32. So far as the period for which it is to be paid, the tenancy is proven to have come to an end on 14.4.2012 after which the defendant became month to month tenant. Rent upto April 2017 has been admittedly paid. The plaintiff himself claims damages with effect from 15.4.2017 to 14.5.2017. It is further proven on record that the vacant possession of the suit premises has been delivered to the plaintiff by the defendant on 30.5.2018. In view of this, the plaintiff is entitled to claim damages/mesne profit from 15.4.2017 to 30.5.2018. The issue is accordingly decided in favour of the plaintiff and against the defendant."

5. It is the case of the appellant there is no basis to arrive at a figure of Rs.1.60 lac per month by the learned Trial Court as the rental of the similarly situated premises even today is approx Rs.50,000/- per month. In support of her arguments, the learned counsel for the appellant has relied upon two lease deed(s) Ex.DW1/1 and Ex.DW1/2. Ex.DW1/1 is a lease deed dated 11.08.2017 for an upper ground floor premises situated in Gaffar Market area fetching Rs.80,000/- per month. The learned Trial Court has categorically stated this property since is not on the ground floor, it cannot be said to be a similarly situated property. Another lease deed Ex.DW1/2 is of ground floor in MCD Market, Sarswati Marg, Karol Bagh, New Delhi, shows the rental of Rs.40,000/- per month.

6. The appellant also relied upon *M/s.Roshan Lal Vegetable Products Pvt. Ltd. vs. M/s.Param International & Anr.* in CS(OS) No.59/2006 decided on 20.01.2011 wherein it was held:

“13. If premises were available at a cheaper rate than that being claimed by the lesser, the defendant always had the option of vacating and shifting to such cheaper premises. While it is advisable that sample leases are brought on record, the practical difficulties of a plaintiff in getting hold of contemporaneous leases cannot be ignored, and the non bringing of these is not always fatal. It is on an overall conspectus of all these factors that the Court decides the rate of mesne profits. The court has to arrive at a figure that is no less than that at which the lesser could have let or the lessee could have hired similar premises.

14. These being the settled principles, it needs to be considered whether by applying these principles to the facts of this case, the plaintiff is entitled to mesne profits higher than Rs.72,000/- as fixed by the original lease / licence. In the present case, the lease / licence dated 1 st February, 2004, and it was for three years, i.e., from 1 st February, 2004 till 31st January, 2007. The possession was given back on 2nd April, 2007, i.e., about two months later than the date originally fixed for expiry. If after the date of termination on 13th May, 2005 and till vacating of the premises on 2nd April, 2007, there had been any special or unusual rise in the prevailing rents, then upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable. The affidavit of evidence filed by the plaintiff says virtually nothing. No evidence as such has been adduced, let alone a specific instance, even a newspaper report of abnormal increase in this period has not been filed. In any case, the period here is too small to apply the principle of taking judicial notice of the rise in the rents. It would have been a different matter if the possession was still with the Defendants or the period was longer.

15. In this view of the matter, the claim of the plaintiff for mesne profits at Rs.1,52,000/- per month, i.e., Rs.80,000/- beyond Rs.72,000/- is rejected and the mesne profits are allowed only at Rs.72,000/- per month.”

and *Lalit Mohan Madhan vs. Life Insurance Corporation of India* in RFA No.581/2011 decided on 24.02.2012 wherein it was held:

“6. The issue now is that what mesne profits should be awarded. Besides the oral depositions, the only documentary evidence which was led on behalf of the appellant/plaintiff was the lease deed, Ex.PW2/1, though which is with respect to same community centre with rent @ 39/-per sq.ft and which will translate to approximately Rs.1,60,000 per month, however, the same is of a much later period i.e. w.e.f. 1.2.2000. This lease deed of the year 2000 cannot be taken as evidence so as to determine the rent payable for the period from 1.12.1995 to 1.5.1999. Courts have however taken judicial notice of increase of rent. Besides various judgments of the Supreme Court on this aspect, I have had an occasion to deal with this aspect in the judgment reported as M/s. M.C.

Agrawal HUF Vs.M/S Sahara India & Ors. 183 (2011) DLT 105 wherein I have said that once the premises are situated in a commercial centre, then, unless there is evidence to show the contrary, an increase of 15% per year can be ordinarily taken to show the mesne profits payable although the landlord does not lead any credible evidence to prove the rate of rent during the period for which the mesne profits have to be calculated. I would therefore apply the ratio of the judgment of M/s. M.C. Agrawal (supra) to the facts of the present case and consequently the appellant/plaintiff will be entitled to rent which is 15% more than Rs. 46,800/- per month w.e.f. 1.12.1996. I may note that the respondent/defendant itself gave a rent at Rs. 46,800/- per month w.e.f. 25.9.1995, and therefore I am giving 15% increase of rent after about one year and two months from the date on which Rs. 46,800/- per month was paid. Further, in terms of the ratio of the judgment in the case of M/s. M.C. Agrawal (supra), increase will be a cumulative increase i.e. the amount payable of mesne profits w.e.f. 1.12.1997 will be 15% more than the rate of mesne profits which were payable on 30.11.1996. The same increment will continue every year and for the period up to which the respondent/defendant occupied the suit premises.”

7. On the contrary, the respondent/deed holder has proved on record a lease deed Ex.PW2/I in respect of another shop bearing No.120 situated in the same MCD Market, where the rate of rent is Rs.2.21 Lac per month and its actual area in possession of the tenant is 94.16 square feet i.e. lesser than the area of the shop in question.

8. The learned Trial Court examined all the three lease deeds and believed lease deed Ex.PW2/I rather than Ex.DW1/2 by saying there may be some other reasons for executing lease deed at a lesser rental than the market rate. Nevertheless, the learned counsel for the appellant argued lease deed Ex.PW2/I is nothing but a forged document, unregistered, and it has come to the knowledge of the appellant, such tenant is paying a lesser rental, *may be* @ Rs.50,000/- per month than Rs.2.21 lac per month to respondent No.2, hence is argued the learned Trial Court rather ignored the request of the appellant herein to direct the respondent to place on record his bank passbook to show the rental was never Rs.2.21 lac per month, as alleged in the lease deed Ex.PW2/I.

9. This ground alone will not be sufficient to challenge the lease deed Ex.PW2/1 as if the respondent or PW2 had failed to produce their bank accounts, the appellant was well within his right to summon bank witnesses or give a notice of production of document to prove the actual rental paid was lesser than as shown in lease deed Ex.PW2/1. The appellant now cannot take this plea, being afterthought.

10. There are three lease deeds available on record viz Ex.PW2/1 - which show the rental @ of Rs.2,21,000/- per month; the lease deed Ex.DW1/1 - which shows the rental at the rate of Rs.80,000/- per month and lease deed Ex.DW1/2 - shows a rental @ of Rs.40,000/- per month. Since there is extreme variation in the rentals hence the Court arrived at a figure in between in the background of the lease deed Ex.PW1/3 clause No.13 in question which notes of a rate i.e. Rs.10,000/- per day for each day of unauthorised occupation by the appellant, after his lease expires.

11. Both the cases cited by the appellant are not strictly applicable to the facts. In *M/s Rohshan Lal* (supra) no lease deed of a similarly situated property was ever filed before the Court and the court rather observed by *not vacating and/or voluntarily handing over possession to the lessor, a lessee invites upon himself the liability towards mesne profits/damages arising out of the lessee's own wrongful act and when the lessee does something with knowledge of its adverse consequences then he must face such consequences.*

12. Further, in *Lalit Mohan Madhan* (supra) para No.6 of the decision says 15% increase per year is to be applied only *if there is no evidence to the contrary.* Now on record, there are lease deeds of the area as also lease deed Ex.PW1/3 in question wherein clause No.13 makes the

defendant liable to pay Rs.10,000/- per day, as mesne profits for overstay.

13. I may here also refer to paragraph No.15 of the amended plaint wherein the respondent has alleged the rentals to be more than Rs.1.60 lac per month of a similarly situated shop. The reply of the appellant in written statement is a simple denial viz *the contents of para No.15 of the suit are wrong and denied. It is denied that rate of rent of the similarly situated properties is more than Rs.1.60 lac per month.* It is alleged the appellant rather admits the rental of similarly situated premises may be till Rs.1.60 lac per month.

14. No doubt one may think threefold increase in rental may be excessive, but in *Rajesh Bansal and Another vs. A.S. Rastogi* RFA No.228/2013 decided on 10.01.2014, the Coordinate Bench of this Court has noted:-

"12. Though the learned ADJ has not considered the matter from the said perspective and has held the respondent/plaintiff disentitled to mesne profits @ Rs. 5000 per day for the reason of the same being much in excess of prevalent rates of rent but I am of the view that if a tenant agrees to pay rent for the period after the expiry of the term of the lease, even if at an astronomical rate, it is bound thereby. There is no bar to a prospective tenant agreeing to pay rent at rates which may be far above the rates prevalent in the market and if it does so, it is bound by the said Agreement. Of course, Section 74 of the Indian Contract Act, 1872 provides that agreement for payment of amount to be paid in case of breach or by way of penalty entitles the party not in breach to recover reasonable compensation not exceeding the amount so named and the Supreme Court in Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405 and the Division Bench of this Court in Vishal Engineers & Builders Vs. Indian Oil Corporation Limited MANU/DE/6829/2011 have held that no amount becomes recoverable under such clauses without showing any loss but not only has the respondent/plaintiff shown loss on account of breach of the Lease Deed by the appellants/defendants but the appellants/defendants themselves have admitted so. The argument as aforesaid of the appellants/defendants also is, that they were paying rent to the respondent/plaintiff @ Rs.30/- per sq. ft. per month; that the learned ADJ has wrongly awarded mesne profits/damages for use and occupation @ Rs.92/- per sq. ft. per month, when the prevalent rate of

rent was Rs.60/- per sq. ft. per month at which rate the appellants/defendants have taken alternate premises on rent. From the same, loss having been suffered by the respondent/plaintiff on account of the appellants/defendants overstaying in the flat in breach of the terms of the Lease Deed, is evident. Once, the loss is evident and is established, I fail to see as to why the appellants/defendants should be released from their agreement contained in the registered Lease Deed. Though, in the light of this matter, the respondent/plaintiff would have been entitled to mesne profits/damages for use and occupation @ Rs.1,50,000/- per month but neither has the learned ADJ awarded mesne profits/damages for use and occupation at the said rate nor has the counsel for the respondent/plaintiff challenged the judgment and decree or argued so. The rate at which the mesne profits/damages has been awarded to the respondent/plaintiff is on the lower side."

15. I agree to the reasoning given in *Rajesh Bansal* (supra) as if a tenant induces a landlord to give his premises on rent *assuring* him he would vacate it on a given date and then further *reassures* the landlord to pay a particular sum if he break his promise but then ignores warning viz legal notice, he must suffer the consequences.

16. Considering the overall facts, I see no reason to interfere with the findings of the learned Trial Court. The appeal is accordingly dismissed. The pending application, if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

NOVEMBER 08, 2019

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