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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 05th September, 2019

Pronounced on: 12th September, 2019

+ **RFA 352/2007**

USHA GUPTA

..... Appellant

Through : Mr.Anunaya Mehta & Mr.Akshay
Deep Singhal, Advocates.

versus

BANK OF INDIA

..... Respondent

Through : Mr.S.K.Garg, Mr.Aditya Kapoor,
Ms.Mita Tandon, Advocates.

+ **RFA 342/2007 & CM APPL No.8823/2007**

BANK OF INDIA

..... Appellant

Through : Mr.S.K.Garg, Mr.Aditya Kapoor,
Ms.Mita Tandon, Advocates.

versus

USHA GUPTA

..... Respondent

Through : Mr.Anunaya Mehta & Mr.Akshay
Deep Singhal, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. Both appeals impugn the judgment and decree dated 10.04.2007 passed by the learned Additional District Judge, Tis Hazari Courts, Delhi (hereinafter referred as the learned 'Trial Court') in Suit No.294/2004 whereby the suit was decreed in favour of Smt.Usha Gupta for damages @ Rs.1.00 Lac per month for use and occupation of the suit premises by the respondent/ bank unauthorizedly for the period from 01.06.20003 to

30.01.2007, besides simple interest @ 6% per annum was also granted from date of filing of suit till realization with costs.

2. The dispute pertains to demised premises owned by Smt. Usha Gupta viz the ground floor, mezzanine floor and a basement measuring 1000; 400 and 1100 square feet respectively in property No.G-1, Hauz Khas Enclave, Mehrauli Road, New Delhi-110016 (hereinafter referred as 'subject premises'). Feeling aggrieved, appellant/Bank of India has filed RFA No.342/2007 praying dismissal of the suit and whereas owner/ Smt. Usha Gupta has filed RFA No.352/2007 for enhancement of the user charges to Rs.2.50 Lac per month for said period. Since both the appeals arise from the impugned judgment dated 10.04.2007 so both appeals are taken up and heard together.

3. The facts as enumerated are as under:-

a. bank had taken on rent from the appellant/ owner herein the premises being the ground floor, mezzanine floor, and basement measuring about 1000 sq. feet, 400 sq. feet and 1100 sq. feet respectively forming part of the property bearing No.G-1, Hauz Khas Enclave, Main Mehrauli Road, New Delhi, by means of a registered lease deed dated 28.06.1995;

b. the period of lease as per the said registered lease deed came to an end on 31.10.1999 and after the said date, the respondent became month-to-month tenant with respect to the aforesaid suit property;

c. last paid rent by the respondent to appellant is Rs.35,000/- per month;

- d.* appellant got served upon the respondent a notice under Section 106 Transfer of Property Act dated 02.05.2003 thereby terminating the tenancy of the respondent w.e.f. 31.05.2003, stating *interalia*, in case of failure to vacate the premises in dispute by 31.05.2003 the respondent would be liable to pay damages @Rs.2.50 Lac p.m. which was the most moderate rate of rent then prevailing in the market;
- e.* respondent sent a reply dated 12.05.2003 to the said notice dated 02.05.2003 denying its liability to pay damages, however, the quantum of damages was nowhere denied;
- f.* the respondent failed to vacate the premises on 31.05.2003 as such the appellant filed a suit for possession and mesne profit on 02.06.2003;
- g.* respondent filed its written statement dated 04.07.2003 thereby denying its liability to vacate the suit property and further denying its liability to pay damages. Again the respondent did not allegedly deny the quantum of damages alleged by the appellant in the plaint;
- h.* respondent had also filed a suit for specific performance against the appellant relying upon the renewal clause before this Court, which was dismissed by this Court vide order dated 17.02.2006;
- i.* on an application filed by the applicant under Order *XII* Rule 6 CPC the learned Trial Court on 03.10.2006 passed a decree of possession on the basis of admissions;

j. bank herein challenged the order dated 03.10.2006 by filing RFA No.756/2006 in this Court, which was disposed of on 15.01.2007 after the respondent undertook to vacate the premises on or before 31.01.2008. The respondent further undertook to pay occupation charges @ Rs.110/- per month per square feet with effect from 01.05.2007 to appellant;

k. suit filed by the appellant has been decided by learned Trial Court vide impugned judgment and decree dated 10.04.2007 granting the damages @ Rs.1.00 Lac per month only as against the claim of Rs.2.50 Lac per month;

l. the appellant is challenging the impugned judgment and decree dated 10.04.2007, to the extent it allows the claim of damages for Rs.1.00 Lac per month only as against the claim of Rs.2.50 Lac per month ; and

m. whereas the respondent has filed an appeal RSA No.342/2007 challenging the judgment of the learned Trial Court.

4. Admittedly, the original registered lease deed dated 28.06.1995 (effective from 01.11.1994) was only for five years i.e. till 31.10.1999 and the rental was Rs.25,000/- per month. The lease deed had a renewal clause viz it could be renewed for three years with effect from 01.11.1999 to 31.10.2002 with a rental of Rs.30,000/- per month. There was an option of a second renewal, with effect from 01.11.2002 to 30.9.2006 for a rental of Rs.35,000/- per month.

5. After expiry of the initial lease deed dated 28.06.1995, admittedly a letter dated 15.05.1999 was issued by the bank requesting the owner to

renew the lease for further three years with effect from 01.11.1999 to 31.10.2002 and to get it registered but neither the renewal deed was executed nor was registered. After the expiry of three years, yet again a similar notice dated 15.07.2002 for second renewal was sent by the bank requesting the owner to get the lease deed registered, yet again the lease deed was neither renewed nor registered. However, the bank continued to pay rentals @ Rs.35,000/- per month, as mentioned in the original registered lease deed dated 28.06.1995 for such extended periods.

6. On 02.05.2003, the landlady-appellant Usha Gupta issued the legal notice under Section 106 of the Transfer of the Property Act asking the bank to vacate the premises, which was duly replied by the bank. However, respondent filed a suit CS (OS) No.1031/2003 for specific performance suit for enforcing terms of the lease deed, but it was dismissed vide order dated 10.02.2006 holding such suit was beyond limitation and further the tenancy after 1999 was now a month to month tenancy and since been determined vide notice dated 02.05.2003. Thus, no specific performance was granted.

7. On 02.06.2003, the appellant herein filed this suit No.294/2004 for possession and mesne profits and also moved an application under Order XII Rule 6 CPC as in the earlier suit viz CS (OS) No.1031/2003, the tenancy was held to be on month-to-month basis. Vide an order dated 03.10.2006, the respondent was declared to be an unauthorised occupant with effect from 01.06.2003 and hence a decree for possession, under Order XII Rule 6 CPC, was passed and the matter was adjourned for leading evidence on mesne profits.

8. The order dated 03.10.2006 was though challenged in RFA No.756/2006, but the matter was settled wherein the respondent bank as the bank had agreed to pay rental of Rs.110/- per square feet monthly with effect from 31.01.2007 till 31.01.2008. As there was no consensus for rate of mesne profits with effect from 01.06.2003 to 31.01.2007, so this question was put for trial.

9. Both the parties led their evidence. The appellant/owner appeared in the witness box as *PW1* and in her evidentiary affidavit she *inter alia* asserted:-

"7. I say that by means of notice Ex. PW-1/3, I required the defendant to vacate the suit premises on the expiry of 31.5.2003. In the said notice it was also informed to the defendant that his tenancy stands terminated and determined with the expiry of 31.5.2003 and in case defendant continue to occupy the suit property after 31.5.2003, then in that eventually the defendant shall be liable to pay occupation charges @ Rs. 2,50,000/- p.m., which is the most reasonable occupation charge prevailing in the market. This property is approved/Commercial property.

8. I say that the defendant did not vacate the suit premises on the expiry of 31.5.2003, despite knowing that its tenancy has been terminated.

9. I say the defendant as such is liable to pay the occupation charges @ Rs. 2,50,000/- p.m. to the plaintiff w.e.f. 1.6.2003 till the date of actual vacation of the suit premises.

10. I say that I had also let out a shop measuring about 175 Sq. ft to ABN Amro Bank vide registered Lease Deed dated 23.5.1997 at a monthly rent of Rs. 62,500/-. The copy of the said Registered Lease Deed is Ex. PW-1/12 and the site plan of shop is Ex. PW 1/13.

11. I say that I had also let out space measuring 175 sq. ft to Global Trust Bank on 4.12.2002 at month rent of Rs. 55,000/-. The Registered Lease executed in favour of Global Trust Bank is Ex PW-1/14."

10. *PW1* was cross examined by the learned counsel for the respondent bank and she deposed:-

".....In 2000, I had let out property No. G-1, Hauz Khas, another portion for a sum of Rs. 55,000/- per month to M/s Global Bank which had been taken over by O.B.C. It was comprising 175 sq feet on the ground floor and was let out for the purpose of installing an ATM

machine. The property was leased out to the defendant bank in 1995 at the market rate. It is correct that the suit property has not been renovated by me after it had been let out to the bank in 1995. I do not know if the rents for installing an ATM machine is always higher than the rent for housing a bank. It is incorrect to suggest that a premises where an ATM is proposed to be installed which is adjacent to a bank, will fetch a much higher rent than any other place. The premises which I had let out to M/s Global Trust Bank and which was taken over by OBC is still with the OBC. I have let out another premises in 2003 to M/s Standard Chartered Bank on rental of Rs. 31,000/- per month. This premises is 75 sq feet and was let out for the purpose of installing an ATM machine. I have not let out any other premises. Before letting out to Global Trust Bank, I had let out the premises to M/s ABN Amro for Rs.62,000/-. I do not remember the year of letting. I cannot assign any reason as to why the rent was decreased. It is correct that ATM counters run round the clock. It is incorrect to suggest that M/s ABN Amro had vacated because the rent was on the higher side. It is incorrect to suggest that rents have gone down by 30% from 2002 onwards. Vol. They have gone up . I had told my counsel that I had let out a premises to M/s Standard Chartered Bank was well. It is incorrect to suggest that I have deposed falsely. It is incorrect to suggest that I had extended the lease in favour of the defendant bank till 30.9.2006. It is incorrect to suggest that the suit filed by me is false."

11. The learned Trial Court in its impugned judgment had observed:-

"16. Coming to the facts of the present case , it may be mentioned that in her evidence as regards the rate at which damages for use and occupation should be awarded, the plaintiff has merely produced evidence in respect of two premises let out by her to different banks for the purpose of establishing ATM Machines. Needless to say that there can be no comparison of the rental for premises let out for establishing an ATM and the one let out for establishing a bank. The premises let out for ATM is a small premises which has to be located on a prime place abutting the main road, it has to be on the ground floor and preferably in the main market. One cannot deny the fact that spaces for establishing an ATM are let out at much higher rates than the ones let out for other purposes. It has been pointed out that the suit premises comprises of space located on the ground floor, mezzanine and basement measuring 1000 sq. feet, 400 sq. feet and 1100 sq. feet respectively in the suit property. There can, therefore, be no comparison of the space let out by the plaintiff for ATM and the one which had been let out long ago for the purposes of establishing the branch of the defendant bank. The plaintiff has not led any evidence to show as to what was the rate of rent of premises similarly situated in the vicinity of the suit premises. The rate of rent is admittedly dependent on a number of factors viz. the situation of the building, the space required, the facilities available etc. One cannot lose sight of the fact that the suit premises was let out by the plaintiff to the defendant in the year 1994. It is an old premises which has not been renovated after its demise to the defendant. Keeping in view the aforesaid facts, the demand for damages on account of use and occupation @ Rs.2,50,000/- per month does not appear to be justified and reasonable."

it appears more as a penalty and is unconscionable. At the same time, one cannot lose sight of the fact that rents had gone up considerably in the city during all these years. The suit premises was let out in the year 1995 @ Rs.25,000/- per month. The plaintiff had been accepting rent after the expiry of the term of the lease deed at an increased rate of 20% over and above the basic rent of Rs.25,000/- per month. This had continued up to 2nd May, 2003 when the notice of termination was served upon the defendant. Keeping in view the aforesaid facts and keeping in view the increase in rent generally I am of the considered opinion that damages on account of use and occupation charges should be paid by the defendant bank @ Rs.1,00,000/- per month for the period 1st June, 2003 to 30th January, 2007. This in my opinion would be a fair rent to which the plaintiff would have been entitled to. Issue No.6 is decided accordingly."

12. The crux of the arguments of the learned counsel for the appellant-owner is *a)* ATM installed in the same premises fetch Rs.300/- per square feet and hence asking for 1/3rd of the same for a bigger area is not too much; *b)* the respondent bank had rather consented to pay Rs.110/- per square feet in the year 2007-08; and *c)* the respondent bank in 2009 after vacating their premises had taken another premises on rent, just across the road, @ Rs.309/- per square feet per month.

13. Thus, it is argued if the rate of Rs.110/- per square feet per month was agreeable to the bank in the year 2007; then in the alternative Rs.80/- per square feet would have been the most reasonable rate of rental in the year 2003 and if we consider 10% increase every year, the rental would automatically come to Rs.110/- per square feet per month in the year 2007. Thus, it was argued Rs.40/- per square feet as granted by the Court considering the rental being very high in Haus Khas Market in the year 2003, at least Rs.100/- per square feet be directed to be paid by the bank to the appellant herein for the period between 01.06.2003 to 30.01.2007.

14. It is also urged by the appellant that in the legal notice dated 03.05.2003, the appellant had specifically averred if the respondent bank

would not vacate the premises, the appellant would be charged @ Rs.2.50 Lac per month as mesne profits and the respondent had still chosen to continue with its possession, hence is liable to make the payment @ Rs.2.50 Lac per month.

15. The learned counsel for the appellant also referred to the cross examination of *DW1* wherein *DW1 admitted* the suit property is situated on the Main Mehruali Road, in an approved commercial premises and common parking is available in front of the subject premises and further the witness deliberately denied he was not aware of the details of the offer made to the bank to get the premises on rent in the near vicinity despite the fact in February 2008, the bank had already taken on lease a premises just across the road @ Rs.309/- per square feet.

16. Lastly, without prejudice to his rights, the learned counsel for the appellant had argued even if learned Trial Court had granted mesne profits @ Rs.40/- per square feet per month – it ought to have also granted an increase of 10% every year of the said amount.

17. It is also argued that interest @ 6% per annum as granted; ought to have been raised at the bank lending rate since it was a commercial transaction.

18. On the other hand, the learned counsel for the respondent has argued never there was any objection raised by the appellant in accepting the rental of Rs.30,000/- per month for three years between the year 1999 to 2002 and Rs.35,000/- per month from 2003 to 2006. He even referred to the cross examination of *PW1* wherein she admitted *she never raised*

any objection to the respondent bank against the payment of rental at an increased rate. She admitted rent has been received by her @ Rs.30,000/- per month till 31.10.2002 and she never raised objections to the respondent bank for the payment of increased rental of Rs.25,000/- per month to Rs.30,000/- per month or Rs.30,000/- per month to Rs.35,000/- per month. This witness also admitted that she had gone through the terms and conditions of the rent agreement Ex.PW1/1 and never objected to any of the clauses right from its execution till date.

19. The learned counsel for respondent argued the learned Trial Court erred in increasing the rental from Rs.35,000/- to Rs.1.00 Lac per month and rather referred to *M/s. M.C. Aggarwal HUF vs M/s. Sahara India And Others* RFA Nos.457/2011 and 458/2011 decided on 02.09.2011 by this Court wherein no evidence was led by the landlord for the mesne profits, the Court held the interest of justice would suffice if for the first year of illegal occupation, the tenant to pay 15% increase rate over the contractual rent and similarly for the second year 15% increase over the contractual rent and additional 15% increase of first year. It was argued the same formula ought to have been applied in the present case. However, I disagree as the case relied upon was where no evidence was led at all, but whereas in the present case, the appellant has filed the lease deeds of ATMs and even has referred to an order dated 15.01.2007 wherein the bank had itself agreed to increase the rental @ Rs.110/- towards mesne profits for the year 2007 till 2008. Furthermore, during the course of arguments, a copy of lease deed of February 2008 of a premises taken on rent by the respondent bank, just across the road, @ Rs.309/- per square feet was also shown by the petitioner and it was also

urged the Court may take judicial notice of the same, hence the facts herein, cannot be compared with M/s M.C. Aggarwal (*supra*).

20. The principles to be considered for fixation of mesne profits, one may look at *Suman Verma and Others vs Sushil Mohini Gupta and Others* 2014(140) DRJ 595. It read:-

"22. I do not find any merit in the challenge by the appellants /defendants to the rate at which the mesne profits/damages for use and occupation have been awarded, for the following reasons:-

(a) though undoubtedly the Division Bench of this Court in *National Radio & Electronic Co. Ltd. supra* has held that judicial notice, only of a general increase in rent in the city of Delhi and not of the rates of rent, in the absence of proof thereof can be taken but it cannot be lost sight of that the Courts are for doing justice between the parties and not for, on hyper technicalities, allowing the parties to suffer injustice.

(b) The property of the respondents/plaintiffs which the appellants/defendants are admittedly in unauthorized occupation of, is situated in one of the poshest colonies of the city of Delhi, properties wherein fetch high rentals and which only the elite, affluent, expats and foreigners are able to afford.

(c) the said property is a independent bungalow constructed over 400 sq. yd. of land and comprising of two and a half floors.

(d) the calculation of mesne profits always involves some amount of guess work, as held by this court in *International Pvt. Ltd. Vs. Saraswati Industries Ltd. (1992) 2 RCR 6, M.R. Sahni Vs. Doris Randhawa MANU/DE/0352/2008* and reiterated in *Consep India Pvt. Ltd. supra* and applicability of prevalent rents in the city and of which the Judges manning the Courts and who are born and brought up in the same city, are generally aware of.

(e) The Division Benches of this court in *Vinod Khanna Vs. Bakshi Sachdev AIR 1996 Delhi 32* and *S.Kumar Vs. G.K. Kathpalia 1991 (1) RCR 431*, taking judicial notice, refused to interfere with the rate of mesne profits even where the landlord had not led any documentary evidence. Notice of such increase has also been taken by the Supreme Court in *Saradamani Kandappan Vs. S. Rajalakshmi (2011) 12 SCC 18*.

(f) applying the said principles, it can by no stretch of imagination be said that the rate at which mesne profits have been awarded is excessive; rather the same is on the lower side only; the rate at which the mesne profits have been awarded is less than the rate which each floor of the property in the said colony is capable of fetching; the appellants/defendants are in possession of two and a half floors.

(g) the counsel for the respondents/plaintiffs is correct in contending that award of mesne profits as per definition in Section 2 (12) of the CPC includes interest. Reference if any in this regard can again be made to *Consep India Pvt. Ltd. supra* where a large number of judgments are considered. The learned Addl. District Judge has not awarded any interest. No proof of such interest again is required as it is always safe to award interest in such cases at the rates at which Nationalized Banks give interest on deposits with them. Applying the said principle interest at 10% per annum from the end of each month till the date of payment could have been awarded; the same is reason enough to not interfere with the rate of mesne profits.

(h) to (k) xxxx"

21. In *Chander Kirti Rani Tandon vs M/s VXL Lodging N Boarding Services Private Limited* 2013(197) DLT 266 the Court:-

"20. Similarly, in the case of *S. Kumar vs. G.K. Kathpalia* reported as 1991 (1) RCR 431, a Division Bench of this Court had noticed that the landlord therein had not led any documentary evidence on the prevalent market rates of other properties in the area and then gone on to fix the damages/mesne profits by taking into consideration the prime location of the suit premises, its proximity to the community centre and the commercial activity.

21. The essence of the aforesaid decisions of the Supreme Court and this Court is that judicial notice of the increase of rents in urban areas can be taken note of by courts by applying the provisions of Sections 57 and 114 of the Evidence Act, 1872 and while calculating the mesne profits, certain amount of guess work by the court, is inevitable and acceptable."

22. Further in *Marudhar Services Limited and Others vs Ved Parkash and Others* MANU/DE/2601/2012 the Court held:-

"13. The issue now is the rate of interest to be awarded on the arrears of rent payable as also on the mesne profits payable, and the date from which it becomes payable. In the aforesaid judgment of *M.C. Agarwal (Supra)* I have held that interest will be payable @12% per annum from end of the month from which the mesne profits would become payable, inasmuch as, ordinarily if such amount would have been received by the landlords at the end of the tenancy, they would have been able to earn interest on such amounts till the date the same are actually paid. The trial Court in this case has granted interest @ 15% per annum from the date the payment became due without mentioning the date from which the payment becomes due. I, therefore, clarify that the date at which the rent and mesne profits would become due would be the end of the month of occupation of the suit premises. The rate of interest, however, granted by the trial Court of 15% per annum is, in my opinion, excessive, and I reduce the same to 12% per annum simple in accordance with the ratio of the judgment in the case of *M.C. Aggarwal (Supra)*."

23. I have examined the facts of the case as also the case law and I am of the considered view the learned Trial Court has rightly held the rent paid by different banks for the purpose of establishment of ATM machines cannot be compared with the renting of premises in hand as the premises let out for ATM is a very small portion, has to be located on a prime place, primarily, on the ground floor in the main market. Admittedly, the rented premises comprises of the space not only on the ground floor, but also on mezzanine and basement too. In fact, the place on the mezzanine floor and basement combined together is more than what has been let on the ground floor, hence there could be no comparison with the space let out by the plaintiff for ATMs and the one let out to the respondent long ago for the purposes of establishing the bank. Similarly, there cannot be a comparison of the premises taken on rent by the respondent across the road @ Rs.309/- as firstly such lease deed is not proved as per law before this Court and secondly, it is wholly for the ground floor and hence the tenancy premises is not similar to the one taken on lease. Further, though the appellant seeks a rental of Rs.2.50 Lac per month for the period from 2003 to 2007, but regard must be had to the fact the tenancy premises is an old one, not renovated even once during the time it was in possession of the respondent bank and also considering the fact the rentals of Rs.25,000/- per month, Rs.30,000/- per month and Rs.35,000/- per month respectively were never objected by the owner till the time the notice to quit was issued in the year 2003 and that the bank had in fact tried to get the fresh lease deeds registered or renewed, hence, fixing an amount of Rs.40/- as rental

by the learned Trial Court for the year 2003 was fully justified. However, I agree with the learned counsel for the appellant that 10% increase, yearly, ought to have been given by learned Trial Court i.e. if the rental was Rs.40/- per square feet from 01.06.2003; then it ought to have been Rs.44/- from 01.06.2004; Rs.48.40 from 01.06.2005; and Rs.53.24/- from 01.06.2006. M/s M.C.Aggarwal (*supra*) also speaks of such increase @ 15% per annum, though, I am not inclined to give the same increase as the amount in the present case is much higher than the amount involved in M/s M.C.Aggarwal (*supra*). Similarly, I am not inclined to modify the interest rate awarded by the learned Trial Court since is just and proper considering the amount of mesne profits. Awarding higher interest in these facts may then take the shape of penalty.

24. In view of above, the appeal filed by the owner being RFA No.352/2007 stands partly allowed with an 10% increase in the rate of mesne profits, as indicated above, besides other quantifications as decreed by learned Trial Court. Decree sheet be drawn accordingly.

25. Consequently, the appeal filed by the bank being RFA No.342/2007 stands dismissed. The pending application(s), if any, also stands disposed of. Both the parties to bear their own costs in appeal proceedings.

YOGESH KHANNA, J.

SEPTEMBER 12, 2019

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