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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Delivered on: 29th July, 2019

+ RSA 24/2018 & CM APPL Nos.5694-95/2018

M/S CEMENT CORPORATION OF INDIA LTD Appellant

**Through : Mr.Sachin Dutta, Senior Advocate
with Mr.Kailash Pandey,
Advocates.**

versus

BINA MENDIRATTA & ANR Respondents

Through : Mr.Vijay Zaveri, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This Regular Second Appeal is preferred by the appellant against the judgment dated 10.03.2017 passed by the learned Additional District Judge/South-East District-03, Saket Courts, New Delhi/ (hereinafter as the 'First Appellate Court') in RCA No.11/2016 against the judgment and decree dated 02.04.2016 passed by the learned Trial Court in CS No.308/2014.

2. The brief facts are the appellant was a tenant in flat No.101-B, First Floor, 87, Nehru Place, New Delhi – 110019 (hereinafter 'the subject premises') having a covered area of 475 square feet approximately, let out on 29.09.1992 for a monthly rental of Rs.1781.25 per month; on 26.06.2012 the notice for termination of the tenancy was issued vide registered post and a civil suit No.2662/2012 (new Number 308/2014) was filed seeking possession of the premises; arrears and

mesne profits etc; on 02.04.2016 the decree was passed to the extent the respondents are entitled to recover the amount of Rs.8400.10 for the month of July 2011 and October 2011 as arrears and mesne profits @ yearly enhancement of 10% of the admitted rent of Rs.4200.05 every year from 03.08.2012 till the date of realization of possession.

3. Being aggrieved, the appellant filed Regular Civil Appeal No.11/2016 before learned First Appellate Court, which was partly allowed and it modified the judgment and decree of the learned Trial Court to the extent respondents shall be entitled to recover the mesne profits @ Rs.47,500/- per month from 03.08.2012 till the date of possession. The rate of interest from 9% to 10% per annum was also enhanced in favour of respondents, hence, this appeal.

4. Two substantial questions of law were framed in this appeal per order dated 14.09.2018 to the following effect:-

“(i) Whether the decree of the First Appellate Court is contrary to settled principles of law?

(ii) Whether the First Appellate Court has acted perversely in placing the onus on the appellant/defendant for rebutting the rate of mesne profits?”

5. The learned senior counsel for the appellant has argued there is an order dated 18.09.2015 passed by the Supreme Court in SLP No.14640/2015 to the following effect:-

"Delay condoned.

Having heard learned senior counsel for the petitioner, we find no justification whatsoever to interfere with the impugned order in exercise of our jurisdiction under Article 136 of the Constitution of India.

The special leave petition is accordingly dismissed.

Finding himself in the aforesaid predicament, learned senior counsel for the petitioner states, that the petitioner is a Government and Public Sector Undertaking under the Ministry of Heavy Industries, Government of India, and that, the petitioner be given some time to find an alternative accommodation, and to shift thereto. And till then, the

petitioner be permitted to continue in the suit premises. Learned counsel for the petitioner further states, that the petitioner is ready and willing to pay user charges at the rate of Rs.10,000/- per month.

In the peculiar facts and circumstances of this case, we consider it just and appropriate to allow the petitioner to continue in the premises in question till 31.12.2015, subject to the condition that the petitioner pays user charges at the rate of Rs.10,000/- per month (keeping in mind the fact that the petitioner is currently paying Rs.4200/- per month, as rent), with effect from the date of passing of the impugned order by the High Court. Ordered accordingly.

All arrears of rent (if any), and user charges shall be paid within four weeks from today. Future user charges shall be paid in advance, within the first ten days of every English calendar month. The petitioner shall file the usual undertaking, incorporating therein an affirmation, that the petitioner will hand over vacant possession of the suit premises to the respondents-landlord, on or before 31.12.2015. The petitioner shall also give an undertaking, that it will not create any third party rights in the suit premises, in the meantime. The above-mentioned affidavit shall be filed before this Court within four weeks from today."

6. It is contended the learned first appellate Court had ignored the above order passed by the Supreme Court and once the rate of mesne profit / user charges were fixed by the Supreme Court, it could not have been changed by the learned First Appellate Court, as it had amounted to review of order dated 18.09.2015 of the Supreme Court. Heard.

7. The reasoning given by the learned First Appellate Court in its order dated 10.03.2017 is as under:-

9. As regards, mesne profits, opinion and observations of learned Civil Judge-01 (South) that appellant has not given other description of property in question a specially amenities provided, construction carried out, description of neighbouring properties of the suit property, which would determine rate of rent of premises in question, cannot be accepted. Appellants, through testimony of PW-2 Mr. Tajender, UDC, Sub-Registrar-5, Mehrauli, brought on record copy of sale deed of property bearing no. 102 measuring 300 sq. ft. in building No. 49-50, Red Rose Building, Nehru Place - Ex. PW-2/1 and copy of sale deed of property bearing no. 302, admeasuring 730 sq. ft., third floor in Pal House, 87 Nehru place - Ex. PW-2/2. These sale deeds are not discussed in the impugned judgment. Properties mentioned in these sale deed are in the vicinity of property in question and are in the same locality i.e. Nehru Place. The property in question is situated at First Floor. The rate of rent mentioned in sale deed Ex. PW-2/2 is Rs.47,450/-. While rate of rent mentioned in sale deed Ex. PW-2/1 is Rs. 67,500/- (i.e. @ 225/- per sq. ft. per month). Rate of rent mentioned in these lease deeds which pertains to the properties in the vicinity of

property in question furnishes enough indication as regards the current market rate of rent.

10. Learned Civil Judge-01 (South) has observed that there is on notice for enhancement of rent and in the absence of such notice, prevalent rate of rent cannot be awarded. These observations are untenable. There is no requirement that plaintiff that he should first issue a notice for enhancement of rate of rent and thereafter, claim mesne profits. The law laid down by Hon'ble High Court of Delhi in 2014 (140) DRJ 595 - Suman Verma & Ors. Vs. Sushil Mohini Gupta & Ors., furnishes sufficient guidelines for subordinate courts for issue of mesne profits. In para 22 (a) of this case, it was held as under:

" 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."

11. Respondent has not come forward to demonstrate before the Trial Court about the prevalent rate of rent of properties located in the vicinity of property in question. It was held in Suman Verma's case (supra) in para 22 (h) as under:

"the appellants/defendants have been residents of the property for the last more than four decades. They, rather than the respondents /plaintiffs were in a better position to depose about the prevalent rent in the locality. Had the claim for mesne profits in the plaint at the rate of Rs. 1,50,000/- per month been preposterous, the appellants /respondents would have definitely given instance of other properties in the locality and their rent. Nothing of the sort was done. Even in the cross examination of the respondents/plaintiffs and in the deposition of the appellants/defendants, the appellants/defendants did not mention a single property in the vicinity which may have been fetching lesser rent. In fact the appellants/defendants shied from even denying that the property was in 2010 capable of fetching the rent of Rs.5 lacs per month."

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13. I am in respectful disagreement with learned counsel for respondent that market rent can be fixed only by competent authority and not by two private parties. As discussed above, the lease deeds showing the market rate of rent of nearby properties can be taken into consideration for determining market rate of rent of property in question."

8. It is pertinent to mention the respondents have filed a suit for possession and mesne profits wherein a decree for possession in respect of subject premises was passed under Order XII Rule 6 CPC vide order dated 15.07.2014. The appellant filed RCA against such order before

learned ADJ which was dismissed on 30.10.2014. The Regular Second Appeal No.100/2015 was also dismissed by this Court and thereafter the SLP No.14640/2015, was filed before the Supreme Court wherein vide order dated 18.09.2015 it was dismissed but as an interim measure to permit the appellants to stay till 31.12.2015 the appellants was directed to make the payment of Rs.10,000/- as user charges with effect from the *date of the impugned order till the date of the possession*, i.e. for a period of about six months approx.

9. Admittedly, the Supreme Court did not fix the user charges from the date of termination of the tenancy or from the date of filing of the suit. Further, during the pendency of SLP, the evidence on mesne profits was being recorded by the learned Trial Court and the parties including the appellants were aware of such proceedings and for this reason, the appellant did not file any application either before the learned Trial Court or before the first Appellate Court intimating it of or relying upon order dated 18.09.2015 of the Supreme Court qua alleged final fixation of the user charges. Admittedly this impugned order was passed after the order dated 18.09.2015 of the Supreme Court and the appellant never took its benefit, hence was aware such order has not attained finality.

10. The learned First Appellate Court was fully justified in setting aside the observations of the learned Trial Court viz *the respondent had failed to file any proof of the prevalent market rent in the immediate vicinity*. Rather in para No.9 of the impugned judgment, the rentals in two lease deeds *Ex.PW2/1* and *Ex.PW2/2* were discussed. Such rentals pertain to the tenanted premises in the vicinity of the subject premises

and hence learned Appellate Court rightly held the quantum of mesne profits. The reasoning given by the learned First Appellate Court is not at all contrary to the settled principle of law and the first question is thus answered.

11. The second substantial question of law as framed was *if the onus was ever placed upon the appellant for rebutting the rate of mesne profits* is based on observation in para No.11 of the impugned judgment. I am only to say the rate of rental in immediate vicinity was duly proved by the respondents by producing lease deeds *Ex PW 2/1* and *Ex PW 2/2* and the learned First Appellate Court only noted that nothing contrary to such evidence was ever produced nor proved by the appellant herein. Not in any manner the onus of proof was ever shifted upon the appellant, as is being alleged. The second substantial question of law is also answered accordingly.

12. There is no merit in this regular second appeal it stands dismissed. The pending application(s), if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

JULY 29, 2019

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