
(2005) 04 AP CK 0008
In the Andhra Pradesh High Court
Case No : AS No. 1075 of 2002

Dr. J. Bhakthavasala Rao and Others	Vs	APPELLANT
Industrial Engineers and Others		RESPONDENT

Date of Decision : 28-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 2(12)

Citation : AIR 2005 AP 438 : (2005) 4 ALD 19 : (2005) 2 APLJ 287

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Y. Ratnakar, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

Judgement

L. Narasimha Reddy, J.—This appeal is filed against the order, dated 29-10-2001, as amended through the order, dated 8-2-2002, in I.A.No. 771 of 1996 (final decree) in O.S. No. 13 of 1985 on the file of the Senior Civil Judge, Nellore.

The appellants are the owners of the premises bearing Municipal No. 314 in Ward No. 15, R.R. Street, Trunk Road, Nellore. The building, together with the fixtures was leased to the respondents herein. The suit was filed for eviction of the respondents from premises and recovery of mesne profits. The building and the fixtures were shown as schedule "A" and "B" properties respectively. The suit was decreed on 23-4-1996. The respondents filed A.S. No. 2893 of 1996 in this Court. It was dismissed on 18-2-1997. L.P.A.No. 63 of 1997 was dismissed by a Division Bench on 24-7-1997.

2. The decree of the Trial Court, as regards the recovery of possession of the property, became final and was given effect to. The claim of the appellants for damages and use and occupation of "A" and "B" schedule properties was allowed to an extent of Rs. 15,300/- and Rs. 3,060/-respectively upto the date of the suit. It was left open to the appellants to institute separate proceedings for determination of mesne profits.

3. The appellants filed I.A.No. 771 of 1996 under Order XX Rule 12 C.P.C. for determination of mesne profits. The Trial Court appointed an Advocate-Commissioner (for short "the Commissioner") for this purpose. The damages for use and occupation of the premises with effect from 1-2-1985 till the date of recovery of possession i.e. 16-3-1998 were required to be determined. After considering the claims made before him, the Commissioner submitted a report on 28-8-1998. The Commissioner opined that the damages for use and occupation are payable at Rs. 3/-per s.ft. from 1988 to 1991, at Rs. 4/- per s.ft. from 1991 to 1994, at Rs. 5/- per s.ft. from 1994 to 1997 and at Rs. 6/- per s.ft. for 1997-98.

4. Objections were filed to this report. Both the parties adduced oral and documentary evidence in support of their respective contentions. P.Ws.1 to 3 were examined before the Commissioner, on behalf of the appellants and Exs.A1 to A4 were marked. R.Ws.1 and 2 were examined in similar fashion and Exs.B1 to B5 were marked. The proceedings and material before the Commissioner were treated as apart of the record.

5. On a consideration of the material before it, the Trial Court determined the amounts payable at Rs. 3,000/- per month from 1985 to 1988 with 10% enhancement for each slab of three years.

6. Sri Y. Ratnakar, the learned Counsel for the appellants, submits that the Trial Court ignored the reports submitted by the Commissioner and had fixed the damages for the premises at totally disproportionate levels. He submits that the building is situated in a commercially developed locality within the vicinity of Grand Trunk Road in Nellore Town and that Exs.A1 to A4 indicate the rent which the suit schedule premises would fetch and that it would be more than what is opined by the Commissioner. He contends that the Trial Court refused to take into account, Exs.A2 and A4, on a totally irrelevant ground. The learned Counsel further submits that even according to the witnesses examined on behalf of the respondents, the suit schedule premises is in a relatively developed and advantageous location and that the rent for similarly situated premises is very high. He has placed reliance upon several judgments rendered by various Courts. He further submits that the Trial Court did not deal with the mesne profits in respect of schedule "B" properties at all.

7. Sri M.V.S. Suresh Kumar, the learned Counsel for the respondents, on the other hand, submits that the building is very old and is in a low-lying area. He submits that the rent was Rs. 1,150/- per month at the commencement of lease in 1973 and since then the appellants have not carried any repair to it. He further contends that the appellants themselves claimed the damages for use and occupation at the rate of Rs. 100/- per month. He further submits that the leases, as regards which, the appellants adduced evidence, were in respect of the premises with very small area and are constructions of recent origin. He submits that the Trial Court took into account the various aspects of the matter and fixed the damages at an appropriate level. The learned Counsel contends

that no material was placed by the appellants as regards mesne profits in respect of schedule "B" properties.

8. The controversy in this appeal is limited to the one of fixing the damages for use and occupation of the suit building. By its very nature, it involves adjudication of a pure question of fact and there exists hardly any uniform and standard pattern of assessment in this regard. The Court has to undertake a comparative assessment of the nature, location, age, condition etc., of the suit schedule premises, on the one hand, and the similar characteristics of the premises in the surrounding area, on the other. It is very difficult to find the premises of similar nature, size and quality at the same location. Even if there exists any broad similarity on these aspects, the rent in respect of such premises would depend, mostly, upon the need of the lessee and the circumstances under which the leases are granted. Prevalence of amity or enmity, as the case may be, between the landlords and the tenants or the duration of lease, are also certain factors, which would have a bearing on this.

9. The Commissioner, who inspected the premises, had taken the view that the mesne profits for the suit schedule premises can be at Rs. 3/- per s.ft. from 1988 to 1991, and thereafter with an enhancement of Rs. 1/- per s.ft. for each slab of three years. The area of the suit schedule premises is 3,000 s.ft. in the ground floor and 1,750 s.ft. in the first floor. It is not in dispute that even by the time the lease commenced in 1973, the premises is fairly old, no repairs were carried on thereafter and that it is so low-lying that the rain water enters it.

10. P.Ws.1 to 3 were examined by the Commissioner. Those witnesses were subjected to cross-examination. They have spoken about the lease deeds for the premises in the vicinity. It was elicited in their cross-examination that the leases were in respect of relatively small areas and that some of the leases granted, covered by the documents, expired long back and that the premises are vacant. It was also elicited that in some of the premises, the construction is of recent origin and is of superior quality.

11. The Trial Court refused to take into account Exs.A2 and A4 on the ground that those very documents were not accepted on earlier occasion when the preliminary decree was passed. Those documents were not taken on record on the ground that the persons connected with them were not examined. Once the decree permitted the appellants to initiate proceedings for mesne profits, it is always open to them to adduce such evidence as they intend to. Simply because Exs.A2 and A4 were not taken on record, at the trial of the suit, on the ground that the persons connected therewith were not examined, the Trial Court cannot refuse to receive the same even after the persons connected therewith are examined. The Court did not record any finding, touching on the admissibility of the said documents, on the earlier occasion. To this extent, the approach of the Trial Court cannot be said to be proper.

12. The record discloses that as many as five reports were submitted by the

Commissioner, at various stages. The Commissioners, in turn, have recorded oral and documentary evidence of the witnesses. It was also made part of the record. In the report filed on 28-8-1998, the Commissioner took the view that the rents for some of the relevant period in respect of the neighbouring premises varied from Rs. 6/- to Rs. 10/-, particularly for the property covered by Exs.A1 to A3. On that premise, he opined that the mesne profits from 1988 to 1991 be taken into Rs. 3/- per s.ft. and for each slab of three years, the rent to be enhanced by Rs. 1/- per s.ft.

13. The Trial Court discussed this report as well as the other material in arriving at the conclusion. The learned Counsel for the appellants insisted that the report submitted by the Commissioner is most objective and the same deserves to be treated as the basis for fixing the mesne profits.

14. It has already been observed that the ground floor area comprises of 3,000/- s.ft. and the area of the first floor is 1,750 s.ft. While the area in the first floor has the disadvantage of access, the ground floor suffers from the factor of inundation in the rain water. Therefore, the entire area can be treated on par in the matter of fixation of rent.

15. In *Rev. Father K.C. Alexander of Kuttikandathilaya Kollakulhiyil, Thadiyoor Muri Vs. Nair Service Society Ltd.*, a Division Bench of the Kerala High Court examined the purport of the expression "mesne profits", defined under Sub-section (12) of Section 2 of C.P.C. It observed that, having regard to the definition of the expression "mesne profits", u/s 2(12) of the Code, the claim in a suit for mesne profits is only a rough estimate, and even if a precise amount is stated, it is for the Court to ascertain the true amount. This principle was followed by the same High Court in *Saraswathi Pillai v. Parameswara Kurup* 1977 KLT 638. In *Mahant Narayana Dossjee Varu Vs. The Board of Trustees, the Tirumalai Tirupati Devasthanams, Tirupathi*, a Division Bench of this Court held that in the matter of awarding mesne profits, a distinction needs to be maintained between the claim against a trespasser, on the one hand, and the one, who was lawfully inducted into possession, but overstayed, on the other. It was also held that, it is permissible to make deductions from mesne profits, for the proper maintenance of the property.

16. In the instant case, it has already on record that the property was leased out in the year 1973, and ever since then, the appellants did not carry out any repairs. The building was said to have been constructed in 1931. The evidence of P.W.1 is hardly of any use, in the matter of ascertainment of mesne profits. For example, he said in the cross-examination as under:

"I do not have any other document to show that the prevailing rent was Rs. 2/- per day. I do not have any personal knowledge that the circumstances under which the tenants of UCO Bank and the shop rooms have entered into with their respective owners....

My building is situated lower level adjoining the road on the south. The water

gets stagnated in the suit building area because of its lower level....

It is true that all commercial consumer shops are situated in trunk road....

Subsequent to 1.4.1973, I did not make any improvements in the suit building."

17. The mesne profits were claimed by the appellants on the basis of Exs.A1, A2 and A3, spoken to by P.W.2, and Ex.A4 supported by P.W.3. It is a matter of record that the area of the premises covered by Exs.A1, A2 and A3 is 156, 155 and 195 s.ft. respectively. The lease was for the limited period. P.W.3 deposed about the lease, in respect of premises leased out to UCO Bank. Its area is 1584 s.ft. P.W.3 is the clerk-cum-cashier of the Bank. He is not the signatory of that document. It was elicited through him in the cross-examination that the building was constructed with the amount advanced by the Bank, and that a strong room was also constructed according to their specifications. He said that he has no idea about the value of construction of the building under Ex.A4.

18. While determining the mesne profits, in respect of the suit schedule premises, the factors indicated above, need to be kept in mind. The rent for a premises of a smaller area and for a limited period, would always be on the higher side. Same is the case with the premises constructed according to the specifications and with special requirements. The premises covered by the various lease deeds are either small in extent or were constructed recently. The Commissioner, who submitted the report, did not take these aspects into account. The Trial Court, in turn, altogether omitted the location etc., of the suit schedule premises and treated the mesne profits awarded through the decree passed in the suit, as the starting point. This Court is of the view that an exercise of moderation needs to be undertaken, in respect of the order of the Trial Court as well as the report of the Commissioner.

19. The learned Counsel for the appellants strenuously contended that the Trial Court ought to have awarded the damages and the mesne profits in respect of schedule "B" properties also. It is true that in the decree, dated 23-4-1986, passed in the suit, the Trial Court awarded a sum Rs. 3,060/- towards past damages for use of plaint "B" schedule items and for delivery of the said articles. The entitlement of the appellants to file separate proceedings for determination of future profits, is not specific about schedule "A" and "B" properties. In the affidavit filed in the I.A., for determination of mesne profits, the appellants did not make any claim in relation to schedule "B" properties. The prayer in the I.A. reads as under:

"It is prayed that--

An advocate-commissioner may be issued, to ascertain the monthly future mesne profits, together with interest thereon, based upon s.ft., plinth area of suit property, after local inspection.

Further, no evidence was adduced either before the Commissioner or the Trial Court touching this aspect. Therefore, it is not permissible for this Court to award

any amount towards mesne profits for schedule "B" properties.

20. Taking these aspects into account, this Court feels it appropriate that the rent be fixed for the slab from 1-2-1985 to 31-1-1988 at Rs. 4,750/- per month and be enhanced at 15% for each slab of three years or part thereof. The differential amount on account of the enhancement indicated above shall carry interest at the rate of 6% per annum till the date of realization. The order and decree of the Trial Court shall stand modified to the extent indicated above. In all respects, the order of the Trial Court shall hold good.

21. The appeal is partly allowed. There shall be no order as to costs.