(2014) 04 CAL CK 0071

In the Calcutta High Court

Case No : G.A. No. 1445 of 2012 and C.S. No. 37 of 2009

EIC Holding Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Citation : (2014) 2 CALLT 559 : (2014) 5 CHN 38

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Dhruba Ghosh, Ahana Sikdar, Amit Kr. Nag and Saumavo Mukherjee, Advocate for the Appellant; Soma Chatterjee, Advocate for the Respondent

Judgement

I.P. Mukerji, J.—On 14th September, 2009 the suit was decreed, undefended. The defendant, the Union of India did not contest the suit by filing a written statement. They did not even enter an appearance. However, at the time of trial of the suit, the Hon''ble Judge gave liberty to their learned counsel to cross-examine the plaintiff''s witness. On the same day the suit was decreed by directing eviction of the defendant. A learned advocate was appointed as Commissioner to determine mesne profits from 10th April, 2008 till the date of the filing of the suit and further mesne profits from 9th February, 2009 till recovery of possession. He was asked to determine it within three months from such date. The plaintiff got back possession on 30th June, 2011.

2. On 6th March, 2012 the Commissioner published a report computing mesne profits. He awarded mesne profits as follows:

i) Rs. 28 per Sq.ft. per month for the financial year 1st April, 2008 to 31st March, 2009.

ii) Rs. 29 per Sq.ft. per month for the financial year 1st April, 2009 to 31st March, 2010.

iii) Rs. 31 per Sq.ft. per month for the year 1st April, 2010 to 31st March, 2011.

iv) At the same rate till possession was handed back to the plaintiff by the defendant.

3. In accordance with the practice of this Court the plaintiff has taken out this application for acceptance of this report by the Court and for its pronouncing a decree thereon.

4. It is also a well known practice that if a party wants to challenge a report by the Commissioner or Special Referee determining mesne profits, he has to take an exception to that report by filing an application. In this case, the defendant did not file any application, but, filed an affidavit-in-opposition to the plaintiff''s application, objecting to the report of the Commissioner. Disregarding technicalities I accepted the affidavit-in-opposition as a substantive challenge to the report.

5. Now, on perusal of the report it appears that at the time of reference before the Commissioner the defendant produced an expert witness by the name of Mr. Joydip Bose to make a computation of the fair rental value of the premises. According to this expert''s opinion, the fair rent of the property in question would be 14.60 Sq.ft. per month in May, 2008. Various factors were taken into account in the calculation of this fair rental value. These factors were: cost of land, total cost of the building, land cost etc. Capital cost of the building was arrived at by adding to the land cost the cost of the building. The annual value was taken to be 10% of the sum of the capital cost of the building and the land cost. Thereafter 12% of the annual value was added. Then yearly rent was arrived at by dividing this sum by 12. That sum was further divided by 12 to get the monthly rent which was in turn divided by the area to get the rent per sq.ft.

6. Very significantly the plaintiff also applied the same formula.

7. Hence there is no dispute with regard to the formula or principles applied.

8. But, in my opinion, there was a difference between the plaintiff''s and the defendant''s calculation because of the difference in two factors. They were the land cost and building cost.

9. According to the plaintiff the land cost was Rs. 40 lacs; according to the defendant it was Rs. 30 lacs. According to the defendant the present cost of the building was Rs. 2,72,88,070 whereas according to the plaintiff it was Rs. 6,84,30,368.38.

10. This has made all the difference in the calculation of mesne profits by the two parties.

11. I must add that the plaintiff calculated rent for 2009. For 2008, it showed a 5% reduction. For 2010, they showed a 5% escalation which is perfectly reasonable.

12. The determination made by the Commissioner is on the following basis. The calculation sheets tendered by the defendant''s witness Mr. Joydeep Bose were

based on an earlier computation made by one Mr. S.K. Ghose and produced before this Court in a writ application between the parties (W.P. No. 1854 of 2005). The defendant''s witness took into account a 5% annual increase.

13. The plaintiff computed mesne profits by accepting the formula and factors taken into account by Mr. Ghose. The computation made by the plaintiff was accepted by the Commissioner. He remarked: "The defendant has not been able to successfully demonstrate any error in the above recalculation".

14. I notice from the report of the Commissioner that neither the plaintiff nor the defendant has been able to produce any substantial evidence to prove the land cost as Rs. 40 lakhs or Rs. 30 lakhs. Neither the Commissioner has given reasons why he accepted Rs. 40 lakhs as land cost and not Rs. 30 lakhs.

15. On this ground the report has become a little vulnerable but I do not think it prudent to remit the matter back to the Commissioner or refer it to a new Commissioner or relegate the matter to trial in this court because I am quite convinced that the parties would be unable to produce any evidence to prove the rental value as Rs. 40 lakhs or 30 lakhs''. Had they been able to produce this evidence they would have done so before the Commissioner. Moreover, the exercise would take a long time and tend to prevent real justice being done to the parties. According to the defendant, the rental value is Rs. 30 lakhs, based on expert opinion and according to the plaintiff it is Rs. 40 lakhs, based on similar opinion. I think it would be prudent on the part of the court to take the mean of the two figures and arrive at the rental value. This is taken as Rs. 35 lakhs.

16. There is no real challenge in the Affidavit-in-Opposition to the cost of the building excluding its foundation as computed by the plaintiff, at Rs. 9,30,07,000. The only grievance is with regard to the addition to it of the foundation cost of Rs. 3,10,02,333. I find that at the eleventh sitting of the Commissioner/Special Referee held on 6th October, 2010, Mr. S.K. Ghosh, surveyor and valuer appointed by the plaintiff, deposed on examination that considering the "number of piles and columns in the superstructure it is appropriate to consider @ 33.33%, i.e., 1/3rd of the cost of construction of superstructure as the cost of foundation" (Q. 2);

17. Mr. Joydeep Bose, the defendant''s expert witness in cross examination admitted that he relied on the calculation sheet of Mr. Ghosh "as well as from our departmental records" (Q. 7).

18. Now, Mr. Ghosh, learned Counsel for the plaintiff, submitted before me that the valuation of the building made by the plaintiff''s expert witness Mr. Ghosh was based on his earlier valuation in connection with an insurance claim of the plaintiff. While doing this work by a letter dated 5th October, 2009, to the plaintiff, the surveyor and valuer stated that he was only making a valuation of the superstructure because the substructure, according to him was not damaged. This valuation of the superstructure was applied during the present exercise. The

building cost of the superstructure @ 33.33% was added to that, in accordance with the above opinion of Mr. Ghosh.

19. Mrs. Soma Chatterjee, learned Counsel for the Union of India, was unable to point out any real challenge to this foundation cost made by Mr. Ghosh, in the arbitral proceedings. However, this has been challenged in this Affidavit-in-Opposition.

20. My view is that Mr. Ghosh expressed his opinion about the foundation cost very broadly, as being 33.33% of the superstructure cost. No accepted principle or formula was referred to. No reasons why 33.33% was taken to be the foundation cost were expressed. It appears to be his personal opinion. I think that 33.33% is a little too high. I would reduce the foundation cost to Rs. 2,00,00,000/-. For the reasons I have given earlier, there is no point in sending this issue for re-adjudication.

21. Therefore, the determination made by the Commissioner is recomputed below:

Market rent for 2009 on the basis of the calculation method applied by the defendant

1. Cost of land is Rs. 35 lacs per cottah for the year 2009

2. Cost of the building including the foundation of the building = Rs. 9,30,07,000 + Rs. 2,00,00,000

Total cost of the building = Rs. 11,30,07,000

3. Depreciated Cost of the building:

For calculating depreciated cost of a building, the following costs are deducted from the total cost of the building:

Therefore for calculation of the depreciated cost of the building, the cost of the building should be considered as:

22. The plaintiff will deduct an amount of Rs. 1,66,00,860 being the amount already received by the plaintiff during execution proceedings.

23. The plaintiff is entitled to a decree for mesne profits at the above rate from 10th April, 2008 till 30th June, 2011 for 29,809 sq. ft., less the said deduction. Mesne profit is another name for damages. It is unliquidated till the date of the decree, when it can be said to be liquidated. Hence, the plaintiff will be entitled to interest at the rate of 10% per annum simple interest on the gross mesne profits payable from the date of this decree till realization.

24. The report of the Commissioner stands accordingly modified. The above application is allowed to the above extent only.

25. I decree accordingly. Let the final decree be drawn up expeditiously. The

plaintiff will compute and realise the above amount in an execution application, if not paid by the defendant, earlier.

Urgent certified photocopy of this judgment/decree, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

