

(2007) 12 DEL CK 0088

In the Delhi High Court

Case No : Regular Second Appeal No. 136/04

Indian Sugar Exim Corporation Ltd.

APPELLANT

Vs

Mr. Subhash Chand Kohli and Another

RESPONDENT

Date of Decision : 12-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 20 Rule 12, Order 26 Rule 10, Order 26 Rule 10(2), Order 26 Rule 18
Evidence Act, 1872 — Section 60
Transfer of Property Act, 1882 — Section 106

Citation : (2007) 11 ILR Delhi 190

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Vinay Bhasin, Sumita Bansal and Bishwajeet Dubey, for the Appellant; Rajat Aneja, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—The present second appeal arise out of the judgment and decree dated 23.02.2004 passed by the learned Additional District Judge, Delhi whereby the judgment and decree dated 3.5.2003 passed by the learned Civil Judge, Delhi was affirmed.

2. Very briefly, the admitted facts as culled from the impugned judgment as also the records before this Court are that the property bearing Municipal No. 21, Community Center, East of Kailash, New Delhi (hereinafter referred to as the suit property) comprising of basement, ground floor, mezzanine floor, first floor and second floor was let out by the respondents to the appellant w.e.f. 29.6.1973 at the monthly rent of Rs. 6,200/- per month. Vide notice dated 20.02.1989 the tenancy was terminated w.e.f. 20.04.89 and appellant was directed to hand over the vacant and peaceful possession of the suit property to the respondents failing which it was stated that the appellant shall be liable to pay mesne profits. As the appellant did not vacate the suit property the respondents filed a suit bearing new No. 673/98 for the ejectment of the appellant from the suit property.

3. Noting the admissions made by the appellant that it was the tenant in the suit property which was owned by the respondents and that it had duly received the notice of termination of tenancy u/s 106 of the Transfer of Property Act, 1882 vide judgment dated 01.06.01 the learned Trial Court passed a decree under Order XII Rule 6 CPC directing the appellant to vacate the suit property.

4. Instant suit bearing new No. 114/02 was filed by the respondents inter alias praying for a decree of mesne profits in sum of Rs. 99,000/- for the period 21.8.89 to 20.07.90 together with future mesne profits @ Rs. 70,000/- per month from the date of filing of the suit till date of restoration of the possession of the suit property. Future mesne profits @ Rs. 70,000/- per month were claimed on the basis that the market rate of the rent of properties of similar nature situated in the same locality was Rs. 70,000/- per month.

5. Vide judgment and decree dated 03.05.03 learned Trial Court has held that the occupation of suit property by the appellant after the termination of tenancy by the respondent w.e.f. 20.04.89 was wrongful and thus it is liable to pay mesne profits to the respondent. Accordingly, a decree dated 03.05.03 was passed directing the appellant to pay following:

a) Mesne Profits in sum of Rs. 99,000/- for the period 21.08.89 to 20.07.90. (Pre-suit mesne profits)

b) Future mesne profits @ Rs. 70,000/- per month from the date of filing the suit till date of vacation of suit property. Plaint was filed on 10.08.90 and suit property was vacated on 1.10.01. Thus, future mesne profits were granted for the period from 10.08.90 to 30.09.01.

6. Against the said judgment and decree dated 03.05.03 a challenge was laid by the appellant before the court of learned Additional District Judge, Delhi limited to the extent that future mesne profits awarded @ Rs. 70,000/- per month by the learned Trial Court is excessive.

7. As already noted, vide judgment and decree dated 23.02.04 the learned appellate court dismissed the appeal filed by the appellant and affirmed the judgment and decree dated 03.05.03 passed by the learned Trial Court.

8. In support of their claim, respondents examined two witnesses namely Sh. Manu Nayar who was the attorney of the respondents as PW-1 and Sh. Dharamveer Panwar, Asstt. Zonal Inspector, Special Assessment Unit, MCD as PW- 2.

9. PW-1 deposed that the prevalent market rate of the properties similar to the suit property is around Rs. 25/- per square feet per month. PW-2 deposed that the MCD has assessed ratable value of the suit property at Rs. 16,41,600/- w.e.f. 1.4.88. That this ratable value was assessed on the basis that the market rate of rent of the suit property is Rs. 20/- per square feet per month. In order to corroborate his testimony, PW-2 produced on record assessment order and demand notice Ex.PW-2/1 and Ex.PW-2/2. (The said exhibits were wrongly

marked as Ex.DW-2/1 and Ex.DW-2/2).

10. Respondents has also placed reliance upon a report filed by the local commissioner. Vide order dated 20.04.03 the learned Trial Court has allowed an application filed by the respondents wherein appointment of a local commissioner was sought. Mandate of the local commissioner was to conduct an enquiry under Order XX Rule 12 CPC to ascertain the amount of mesne profits. In the report, local commissioner opined that in the year 2003 market rate of rent for the first and second floor of the properties similar to the suit property are about Rs. 15/- - Rs. 20/- per square feet per month. Along with the report, a copy of a lease deed dated 02.11.2002 executed between the respondents and M/s W.W. Shipping Pvt Ltd in respect of the first and second floor of the suit property was filed. As per the said lease deed, W.W. Shipping Pvt Ltd had taken the possession of the leased premises i.e. first and second floor of the suit property at a rent of Rs. 60,000/- per month.

11. No evidence was led on behalf of the appellant.

12. Noting the afore-noted evidence adduced by the respondents the learned Trial Court has held that the respondent was justified in claiming future mesne profits @ Rs. 70,000/- per month. This finding returned by the learned Trial Court was affirmed by the learned appellate court.

13. In these circumstances, following substantial question of law has arisen for consideration:

Whether the findings by the Courts below that respondents is entitled to mesne profits @ Rs. 70,000/- per month is based on legally admissible/ or creditworthy evidence. If so, effect thereof"

14. It is a settled principle of law that a person/party who continues to occupy a premises despite termination of tenancy is liable to pay mesne profits and damages at a rate which may be higher than the amount paid as agreed rent and it could also be at par with the prevalent market rent being fetched by a similarly situated premises in the area.

15. The first evidence which has swayed the mind of the learned Trial Court in favor of the respondents is the testimony of PW-2.

16. PW-2 in his examination-in-chief deposed as under:

Earlier the property was being assessed at Rs. 24280/- on the basis of the cost of the construction, however, after amendment of D.R.C. Act, fresh notices for revision were sent and the ratable value has been revised to Rs. 1641600/- w.e.f. 1.4.88. I have brought the original assessment order and the original demand raised by the MCD against the property on the basis of revised ratable value, same are Ex.PW2/1 and Ex.PW2/2. The ratable value of Rs. 1641600/- was assessed on the basis of market rent of Rs. 20/- square ft. The rate taken by MCD as 20 rupees per square ft. is of year 1988, the rates have now increased

substantially.

17. During cross-examination, PW-2 has deposed as under:

This rate of Rs. 20 per square ft. is as per the rental prevalent in East of Kailash for commercial purposes. I have brought the assessment record with me, however, I have not brought rental data record with me on the basis of which Rs. 20/- was fixed by the Assessor Collector. Present ratable value of the property is Rs. 1641600/-(1996). This is also on the same rental increased from Rs. 20/- per square feet but I have not any data to supplement this statement. As per the property tax return filed by Sh. Kohli on 5.2.96, he has shown the rent of the property as Rs. 6200/- p.m. however, the market rate has not been shown in the same. Neither the ratable value has been mentioned in the tax return.

18. An analysis of the testimony of PW-2 reveals that it is ipse dixit in nature. Assessment order Ex.PW-2/1 and demand notice ExPW-2/2 also do not corroborate the testimony of PW-2 in as much as they do not record that the MCD has fixed the market rate of rent of the suit property as Rs. 20/- per square feet per month. They merely show the ratable value of the suit property as Rs. 16,41,600/- but do not provide as to how such ratable value was arrived at. As is evident from the testimony of PW-2 that apart from the said assessment order and demand notice no other document or material was placed on record by PW-2. Thus, in absence of any documentary evidence showing that the MCD has fixed the market rate of rent of the suit property as Rs. 20/- per square feet per month, not much importance can be attached to mere bald statement of PW-2 that in the year 1988 market rate of rent of the suit property was Rs. 20/- per square feet per month. As regards PW-1, save and except his bald statement that prevailing rent was Rs. 25/- per sq.ft. per month he furnished no instance of letting.

19. Even otherwise, reliance placed by the respondents upon the testimony of PW-2 and assessment order Ex.PW-2/1 is wholly misplaced. Respondents have challenged the said assessment order by way of a writ petition. A party cannot be allowed to blow hot and cold at the same time. Therefore, when respondents have challenged the said assessment order it does not lie in their mouth to contend that the mesne profits in the present suit be determined in accordance with the said assessment order. I note that the writ petition filed by the respondents challenging the assessment order succeeded.

20. The second evidence which tilted the scales in the favor of the respondents is the report of the local commissioner.

21. It is pertinent to note that no notice regarding the date and time of the execution of the commission by the local commissioner was issued to the appellant and commission was executed in the absence of the appellant. Appellant was also not given an opportunity to cross-examine the local commissioner. Besides no evidence was recorded by the local commissioner.

22. Order XXVI Rule 9, 10 and 18 read as under:

Order XXVI Rule 9: In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any" mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that, where the State Government had made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

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Order XXVI Rule 10: .---(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

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Order XXVI Rule 18: .---(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

23. In the decision reported as Kishore H. Desai Vs. Lilawati Virji Chheda and Others, the questions which had arisen before the Bombay High Court for consideration were as under: "Whether a commission for local investigation under Order 26, Rule 9 of the CPC can be issued ex parte" If so, whether the commission can be executed without notice to both the parties " Is the report of the Commissioner, in such a case, receivable in evidence"?

24. After noting catena of judicial pronouncements on the issue, the Bombay High Court summed up the law as under:

Thus, the outcome of all these authorities and my own analysis of the law, leads as to the following conclusions. The Court has discretion to issue commission under Order 26, Rule 9 of the C.P.C. ex parte. However, after the issuance of

commission, it is the duty of the Court to issue notice to the concerned party and the commission cannot be executed unless the notice is given to all the parties. I am inclined to think that the provisions of Order 26, Rule 18 are mandatory provision. If for any reason the Court fails to give notice it becomes the duty of the commissioner to give notice to the other party. After the notice is given if the parties fail to appear, the commissioner will be at liberty to proceed in their absence. Mr. Hattangadi submitted that just because under Order 26, Rule 18 the words indicate that the Court shall direct that the parties to the suit shall appear before it, it does not mean that the mere use of the word "shall" will make it mandatory. He submitted that such a provision could be construed as "may". He also submitted that there are no penal consequence provided for non-compliance of such a provision. He further submitted that if notice was given that would defeat the object of the commission and Therefore, the Court can still consider the said provisions as not mandatory. In any event he submitted that just because notice is not given, the investigation cannot be said to be bad in law. I must say that there is a basic difference between issuance of commission under Order 26, Rule 9 and the issuance of commission under Order 39, Rule 7 or 8. In the latter case, the commission is issued only for a limited purpose inasmuch as the Court is concerned with the preservation of the property and inspection of the property for the purpose of maintaining the status quo. On the other hand, issuance of commission under Order 26, Rule 9 read with Order 6, Rule 10 Sub-rule (a) clearly indicates that the commission is for the purpose of investigation and for the purpose of elucidating any matter in dispute. That is why under Order 26, Rule 10 Sub-rule (2) it is expressly stated that the report of the commissioner and the evidence taken by him shall be evidence in suit. It is elementary that no evidence can be recorded behind the back of a party. I always thought that in our system of justice, be it under the British or in our own republican regime, "glasnet" was always its integral part, and no departure could ever be countenanced. We do not record or receive evidence in secrecy, behind the back of any party. Recording of evidence or investigation of facts is necessary for the determination of a dispute, but, doing so behind the back of party is antithetic to any concept of justice. It is plainly opposed to principles of natural justice. The Court cannot permit itself to be used as a convenient tool at the maneuvering of one party as against the other.

25. From the afore-noted decision the legal position which emerges is that though it is not obligatory upon the Court to issue notice to the parties before the appointment of a commissioner, it is mandatory on the court after issue of the commission to direct the parties to appear before the commissioner.

26. In the instant case, appellant was not informed about the date and time of the execution of the commission. Commission was executed in the absence of the appellant. Appellant was further prejudiced when he was not given an opportunity to cross-examine the local commissioner.

27. A perusal of the report shows that the local commissioner while executing

the commission has examined one Mr. Ram Niwas, Asstt. Manager (Accounts), M/s W.W. Shipping Pvt Ltd (new lessee in the suit property) and one Mr. Y.P. Bhasin who was a property dealer. The Commissioner has not recorded their statements.

28. It is relevant to note the decision of the Madras High Court in the decision reported as Special Tahsildar and Land Acquisition Officer Vs. Daisy Morayin, Antony T. Morayin, Titan T. Morayin, Maickel T. Morayin and Amburose J. Morayin, . Relevant portion of the said decision reads as under:

14. There may be yet another situation like the present one, where the Commissioner gives his opinion/report not on the basis of any document, but only on the basis of his examining some citizens of that area. Then it would be a case wherein he is giving his opinion merely on what he heard from them. Section 60 the Indian Evidence Act is to the effect that the oral evidence must be direct. Of course, the Land Acquisition Act, 1984 does not speak about the applicability or otherwise of the provisions of Indian Evidence Act. The Court has to proceed on the basis that the provisions of the Indian Evidence Act also would apply at least the basic principles, so long they are not inconsistent with the provisions of the Land Acquisition Act. The other aspect of the matter to be noticed is, the Commissioner has examined some citizens of that locality, who have not been subjected to any cross examination. When the Supreme Court has ruled in U.P. Jal Nigam, Lucknow through its Chairman and another Vs. M/s. Kalra Properties (P) Ltd. Lucknow and others, , that the valuation register maintained under Indian Stamps Act cannot be the basis for determining the market value of the land, a serious question would arise as to whether the market value can be decided on the basis of the report of the Commissioner, which in turn only refers and relies on some opinion expressed by citizens of an area. In our considered view, the answer is to be only in the negative. We reiterate that simply because parties (in this case the revenue) have not filed any objection to the Commissioner's report, the Court should not blindly accept the report. Relevant to point out that when the claim by the respondent itself is at the rate of Rs. 1,000/-, the Commissioner has opined that the value of the property will be minimum of Rs. 1,500/- on the relevant date.

15. Coming to the present case, the Commissioner, while giving his report has examined one Kanagaraj, Panchayat President of Cherukole, Rev. Fr. Hillary, Parish Priest and four more persons. It is also to be pointed out that the Commissioner has not even recorded their statements and filed them before Court. For the foregoing reasons, the report of the Commissioner cannot be relied upon.

29. A further perusal of the report shows that the local commissioner has opined that in the year 2003 market rate of rent for first and second floor of the properties similar to the suit property are about Rs. 15-20 per square feet per month. However, the relevant period for enquiry was from the date of the filing of the suit till date of vacation of the suit property i.e. from 10.08.90 to 30.09.01. Local commissioner has not opined as to what were the market rate of

rent of the suit property or properties similar to the suit property between the years 1990 to 2001.

30. The cumulative effect of the above discussion is that the report of the local commissioner is neither legally admissible nor credible evidence.

31. The only evidence which remains to be considered is the lease deed dated 01.11.2002 executed between the respondents and M/s W.W. Shipping Pvt Ltd. As per the said lease deed, the first and second floor of the suit property was let out at the rent of Rs. 60,000/- per month.

32. This lease deed dated 01.11.02 does not serve as a good guide for determination of mesne profits in the present suit for following two reasons:

I. The lease deed is too remote for the years 10.08.90 to 30.09.01 and cannot serve a good guide for rentals during early 1990's.

II. Under the lease deed, leased premises comprises of only first and second floor of the suit property i.e. about 3040 square yards of area. While mesne profits are to be determined with respect to whole of the suit property comprising of basement, ground floor, mezzanine floor, first floor and second floor i.e. about 7600 square yards of area. It is a reality that larger the is the area of the leased premises, lower per square foot is the rent. (see decisions reported as S. Harpreet Singh Chawla and Another Vs. Ceat Ltd. and Another, and Dr. J. Bhakthavasala Rao and Others Vs. Industrial Engineers and Others, .

33. Standard of evidence required to prove mesne profits in a given case was succinctly stated by the Division Bench of this Court in the decision reported as National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association, of the said decision which is relevant for the said purpose is being reproduced hereinbelow:

34. Judicial notice is taken of only such facts of which there can be only one view. In the light of the aforesaid position in law, there can be no manner of doubt that so far as the increase of rent is concerned, judicial notice can be taken of a fact that over a certain period rents generally have arisen. However, so far as quantification of the rate at which the increase has actually taken place, a finding can be arrived at only on the basis of legal evidence and material establishing the actual rates at which properties have been let over the period and comparison of such properties with the property which is the subject matter of the lis. Rents may vary based on location of properties, nature of construction, period of construction, purpose/user for which the premises are let, variation between demand for tenanted premises and availability of premises and even factors relating to the position of the economy. Therefore, while a learned trial Judge may be justified in taking judicial notice of the fact that rents have risen over a certain period of time in the area in question, it would be incumbent upon a person laying a claim of entitlement to mesne profits to prove the same by cogent and reliable evidence in accordance with law.

34. The substantial question of law is thus answered by holding that while

determining mesne profits in the instant suit the courts below have considered legally inadmissible evidence and evidence creditability whereof is near nil. The report of the local commissioner is legally inadmissible evidence and testimony of PW-2 lacks creditworthiness.

35. In the instant case, the respondents have led no clinching evidence showing the market rate of rent between the years 1990 and 2001. In absence of any definite material showing market rate of rent of the suit property, this Court has no option but to determine the mesne profits by way of reasonable estimation.

36. Nobody can deny the fact that there has been a rise in rents in Delhi and particularly in the area where the suit property is located as was held in the decision reported as Bakshi Sachdev v. Concord 1993 (1) RLR 563.

37. The rent of Rs. 6,200/- per month was fixed in the year 1973. In the year 1989, i.e. on termination of the tenancy 16 years had passed. The increase is sought after the termination of the tenancy.

38. Taking a judicial notice of the fact of increase in rents, that suit property is commercial premises and in order to provide fair compensation to the respondents I consider a sum of Rs. 40,000/- to be a fair amount towards damages/mesne profits to be awarded in the favor of the respondents. This to my mind is a fair average rent for the entire period.

38. Therefore, the respondents will be entitled to damages/mesne profits @ Rs. 40,000/- per month w.e.f. date of filing of the suit i.e. 10.08.90 till the date of handing over vacant possession of the suit property i.e. 30.09.01.

39. Impugned judgment and decree dated 23.02.2004 is modified by reducing the rate of mesne profits from Rs. 70,000/- per month to Rs. 40,000/- per month. Remaining relief granted under the impugned judgment and decree dated 23.02.2004 is affirmed.

40. Appeal is allowed in terms of paras 38 and 39 above.

41. No costs.