

(2009) 05 DEL CK 0222

In the Delhi High Court

Case No : Regular First Appeal No. 269 of 1996

Nawal Kishore Gupta

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 20-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 12(1), Order 7 Rule 1, Order 7 Rule 2, Order 7 Rule 7
Court Fees Act, 1870 — Section 7(1)

Citation : (2009) 05 DEL CK 0222

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : A.P. Aggarwal, for the Appellant; None, for the Respondent

Judgement

P.K. Bhasin, J.—The appellant had filed a suit for possession against the respondent in respect of the first floor of property No. 36, Central Market, Ashok Vihar, Phase-I, Delhi which he had let out to the respondent at a monthly rent of Rs. 5013/- w.e.f. 1/12/86. The suit for possession was filed after the termination of the tenancy of the respondent. In the suit, the appellant had also claimed damages for use and occupation at the rate of Rs. 20,000/- per month from 1.5.91 to 31.5.91 and at the same rate from 1.6.91, the date when the suit was filed, onwards till the delivery of possession of the suit premises to him.

2. The respondent had contested the suit primarily on the ground that there was no valid termination of its tenancy.

3. The pleadings of the parties led to the framing of the following issues by the trial Court:

i. Whether the tenancy of the deft. has been validly terminated vide notice dt. 14.3.91? OPP

ii. Whether this Court has no jurisdiction to try the suit as alleged in para 1 & 3 of the pre. objections of the WS? OPD

iii. To what amount the plaintiff is entitled? OPP.

iv. Relief.

4. After examining the evidence adduced by the parties the learned Additional District Judge decided all the issues in favour of the appellant vide judgment and decree dated 23.12.95. However, while accepting the claim of the appellant that he was entitled to claim damages for unauthorized use and occupation of the suit premises by the respondent because of its a failure to deliver back the possession of the suit premises after the termination of its tenancy the damages were awarded only @ Rs. 5013/- per month, which was the agreed rent between the parties Accordingly, a decree for possession was passed in favour of the appellant-plaintiff as also a decree for damages for use and occupation @ Rs. 5013/- per month from 1.5.91 onwards till the delivery of possession.

5. Feeling aggrieved by the rejection of his claim for damages for use and occupation @ Rs. 20,000/- p.m. by the trial Court the plaintiff filed the present appeal praying for setting aside the impugned judgment and decree to the extent the damages for use and occupation were awarded @ Rs.5013/- per month only and for passing of a decree in his favour @ Rs. 20,000/- per month from 1/5/91 onwards till delivery of possession of the suit premises to him.

6. The respondent entered appearance on getting the notice of the appeal. However, when the appeal was taken up for hearing none appeared on its behalf. Therefore, arguments from the side of the appellant only were heard.

7. It was contended by Shri A.P. Aggarwal, learned Counsel for the appellant, that the appellant-plaintiff had adduced sufficient evidence to justify his claim for damages @ Rs. 20,000/- per month but the learned trial Judge had without any cogent reason rejected that evidence. It was submitted that the appellant besides examining himself had also examined one manager of Syndicate Bank posted at its branch in Ashok Vihar in which area the suit property is also situated and that witness had deposed that Syndicate Bank had taken on rent property No. 11, Community Centre, Ashok Vihar, Delhi, which was close to his property, at a monthly rent of Rs. 10/- per sq. ft. with effect from 1st March 1989. The plaintiff had deposed that he could have fetched rent of Rs. 20,000/- p.m. in respect of the suit premises if it had been vacated by the tenant in May,1991. Learned Counsel also submitted that neither the plaintiff nor his other witness were cross-examined on behalf of the respondent-defendant on this aspect. Not only that the respondent-defendant had also not adduced any evidence in rebuttal and, therefore, Mr. Aggarwal submitted, there was no reason whatsoever to reject the unchallenged testimony of this witness examined by the appellant-plaintiff.

8. Section 2(12) of the CPC defines Mesne profits. and it reads as under:

mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence

have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

9. In the present case the respondent's possession of the suit premises after the termination of its tenancy, as per the decision of the trial Court became unauthorized and the respondent has not challenged that finding. So, the learned trial Judge was right in holding that the plaintiff(appellant herein) was entitled to claim mesne profits/damages for use and occupation of the suit premises from the defendant(respondent herein). The appellant had claimed damages @ Rs. 20,000/- p.m. for a period of one month prior to the date of filing of the suit for possession and also for the future at the same rate till the delivery of possession of the suit premises to him. Now, as far as grant of past and future mesne profits/damages for unauthorised use and occupation of some immovable property in a suit for possession and mesne profits is concerned, the same can be granted to a plaintiff in the same suit as provided under Order XX Rule 12 of the CPC instead of requiring the plaintiff to file a separate suit for that relief after getting the declaration that he was entitled to get the same from the tenant of his property whose possession had become unauthorized. Rule 12 is re- produced below:

12. Decree for possession and mesne profits.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree:

(a) For the possession of the property;

(b) For the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits;

(c) Directing an inquiry as to rent or mesne profits from the institution of the suit until, -

(i) The delivery of possession to the decree-holder,

(ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) The expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

10. The question of grant of past and mesne profits in a suit for possession of an immovable property came to be considered by the Hon'ble Supreme Court in Gopalakrishna Pillai and Others Vs. Meenakshi Ayal and Others, and this is what

was observed by the Supreme Court:

Order 20 Rule 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to the past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit in view of Order 7, Rules 1 and 2, and Order 7 Rule 7 of the CPC and Section 7(1) of the Court Fees Act. The plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon, With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit, to which the provisions of Order 20 Rule 12 apply. But in a suit to which the provisions of Order 20 Rule 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits....

11. From the foregoing, it is clear that as far as the grant of mesne profits/damages for use and occupation for the period prior to the institution of a suit for possession is concerned, the Court may either pass a decree for mesne profits/damages which have already accrued prior to institution of the suit provided the plaintiff has brought on record sufficient material to enable the Court to ascertain the damages. And in case there is no sufficient material available with the Court for calculating the mesne profits/damages the Court has the discretion to direct an enquiry for that purpose and thereafter depending upon the result of the enquiry final decree for mesne profits/damages can be passed. As far as the grant of future mesne profits is concerned, the only discretion available with the Court is to direct an enquiry for fixing the amount of mesne profits/damages and if no such enquiry is ordered the plaintiff is always at liberty to file an independent suit only for mesne profits/damages. In the present case, the learned trial Judge has rejected the claim of the appellant- plaintiff for mesne profits @ Rs. 20,000/- per month on the ground that there was no sufficient material before him to fix the mesne profits/damages @ Rs. 20,000/- p.m. which was four times the agreed rate of rent and has passed a decree for mesne profits @ Rs.5013/- per month which was the rent payable by the respondent- tenant to the appellant as per the terms of the lease not only for the past but also for period after the filing of the suit till delivery of suit premises to the appellant- plaintiff.

12. Learned Counsel for the appellant had submitted that the evidence adduced by the appellant in support of his claim of mesne profits/damages @ Rs. 20,000/- per month had remained totally controverted and so should have been accepted by the learned trial Judge and in any event the amount of mesne profits/damages should not have been fixed at the rate of Rs. 5013/- per month and taking judicial notice of the fact that there has been steep increase in rents

in respect of tenancies for commercial purposes, the learned trial Judge should have considered at least three-fold increase in the amount of the agreed rent to be reasonable amount of mesne profits/damages.

13. I have myself also examined the evidence on record on the point of mesne profits and I am also of the view that except for the bare statement of the appellant-plaintiff that the premises in question could have fetched Rs. 20,000/- p.m. and the statement of one Manager of a bank that some premises had been taken on rent by the bank in Ashok Vihar @ Rs. 10/- per sq.ft. p.m. in March, 1989 there was no other evidence relying on which the amount of mesne profits/damages could be fixed @ Rs. 20,000/- p.m. By its very nature, the fixation of damages for use and occupation of an immovable property by some unauthorized occupant 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, condition etc. of the property in question, on the one hand, and similar characteristics of premises in the surrounding area, on the other. In the present case, there was no material brought on record by the appellant-plaintiff to enable the trial Court to fix the damages by comparing the characteristics of the suit premises with any other property in the same locality having similar characteristics. However, absence of sufficient material in this regard was no justification for the learned trial Court to have fixed the damages at the agreed rate of rent between the parties since a judicial notice can be taken of the fact that rents must have increased after 1986 when the premises were let out to the respondent. In these circumstances, in my view, the proper course for the learned trial Judge to adopt was either to have left the matter of fixation of the amount of mesne profits to be decided in a separate suit or to have passed a preliminary decree for mesne profits/damages and an enquiry for fixation the amount should have been directed as provided under Order XX Rule 12(1)(ba) and (c)(i). Now, after so many years I do not think it appropriate to ask the appellant-plaintiff to file a fresh suit for mesne profits/damages and in my view the trial Court should be directed to conduct an enquiry as contemplated under Order 20 Rule 12 CPC.

14. I, therefore, set aside the impugned judgment and decree to the extent the claim of the appellant-plaintiff for mesne profits/damages has been restricted to Rs. 5013/- per month and in place of that finding of the trial Court it is ordered that an enquiry should be conducted by the trial Court for the purpose of fixation of mesne profits/damages in respect of the suit property from 1.5.91 onwards till the actual date of delivery of possession of the suit premises or up to the expiry of period of three years from the date of the decree, whichever event had occurred first. The mesne profits would be fixed after giving an opportunity to both the parties to adduce evidence and after completion of the enquiry a final decree for mesne profits/damages shall be passed which, it is needless to state, would be executable only on payment of requisite court fees by the appellant-plaintiff. The appeal stands disposed of accordingly. Parties shall appear before

the trial Court on 20th July, 2009 at 2 p.m.