(2012) 04 DEL CK 0398

In the Delhi High Court

Case No : Regular First Appeal No. 61 of 2012

S and G Company and Others	APPELLANT
Vs	
Indica Trades Pvt Ltd.	RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2012) 189 DLT 382

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Ashim Vachher, for the Appellant;

Judgement

Valmiki J Mehta, J.—As per the service report, the respondent/defendant/tenant has refused to accept service of notice of the appeal. Respondent/defendant/tenant is therefore accordingly proceeded ex parte. I may note that the respondent/defendant/tenant was also ex parte in the Trial Court. The challenge by means of this Regular First Appeal filed u/s 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 10.1.2012 which decreed the suit of the appellants/plaintiffs for possession and mesne profits with respect to the tenanted premises being the ground floor portion admeasuring 7000 square feet in the property bearing no. 365, village Sultanpur, Mehrauli, New Delhi, urging that the Trial Court has erred in granting mesne profits only at Rs. 70,000/- per month (Rs. 10 per square feet). In the plaint and in the present appeal prayer is made for granting of mesne profits at the rate of Rs. 50/- per square feet, i.e. an amount of Rs. 3,50,000/- per month.

2. The facts of the case are that the appellants/plaintiffs/landlords let out the suit premises to the respondent/defendant under two oral agreements of June, 2006 and January, 2008. In June, 2006 an area of 3500 square feet was given. Another area of 3500 square feet was given by the agreement of January, 2008, thus making the leased area as 7000 square feet. The leased area is coloured as green in the site plan exhibited as Ex. PW1/3. The monthly rent of the total

premises came to Rs. 30,000/-. The tenancy being a monthly tenancy was terminated by the appellants/plaintiffs by issuing a legal notice dated 19.4.2011, Ex. PW1/4, with effect from 15.5.2011. As the respondent/defendant failed to vacate, the subject suit for possession and mesne profits came to be filed.

3. As already stated above, the challenge by means of this appeal is limited to the prayer seeking enhancement in the rate of mesne profits from Rs. 70,000/- per month to Rs. 3,50,000/- per month. Trial Court has denied the mesne profits as prayed for by the appellants/plaintiffs/landlords although, three lease deeds with respect to the adjoining suit premises were filed and proved on record as Ex. PW1/11 (colly.), inasmuch as, the Trial Court found that there is no proof of the lease having been created for commercial purposes. The relevant observations of the Trial Court are contained in Paras 5.1 to 5.4 of the impugned judgment and which read as under:-

5.1 The areas of premises is 7000 sq. feet and the agreed monthly rent was Rs. 30,000/- per month i.e. Rs. 4.28 psqf. Pm. The three lease deeds (Ex.Pw-1/11) are in respect of properties in the same area of village and post office of Sultanpur, Mehrauli, New Delhi, the first lease deed is of area of 6000/- sq. feet fetching monthly rent of Rs. 3,40,000/- (i.e. Rs. 50.60 psqf. Pm), the second lease is in respect of 13,000/- sq. feet area fetching monthly rent of Rs. 5,80,000/- (i.e. Rs. 44.60 p psqf. Pm) and third lease deed is in respect of area of 10,000/- sq. feet (covered area of 6000 sq feet) fetching monthly rent of Rs. 15,00,000/- (i.e. Rs. 150/- psqf. PM). The plaintiff claims mense profit of Rs. 3,50,000/- per month in respect of the premises, on the basis of such sale deeds as well as the prevailing rent.

5.2 There is an occasion to go through Sohan Singh Anand vs. State Bank of Patiala 102 (2003) DLT 1 that while considering and assessing the damages or mesne profits, the Court may taken into consideration or take the judicial notice of average market value of rent of the premises Union of India (UOI) and Others Vs. Banwari Lal and Sons (P) Ltd., wherein held that right to mesne profit pre-supposes a wrong notion, whereas right to rent proceed on the basis of contract. When the possession was not wrongful to be begin with but it assumes such character when unauthorisedly retained, the owner of property is not entitled to claim mesne profit but only fair rent.

5.3 Now the situation emerged is that on the one hand, defendant is occupying the suit premises after determination of tenancy on 15.5.2011 and in the meantime, there is increase in prevailing market rent of the properties, in the vicinity/area/neighbor of the suit premises. Further in the first two lease deeds (of Ex. PW-1/11), the premises were let out for business and commercial purposes and the first two lease deeds are in respect of the same property but different floors and the rate of lease is of Rs. 50.60 psqft. PM and Rs. 44.60p psqf. PM, despite the premises are part of the same building. The third lease deed is with regard to the property let out as an office space. To say, the properties mentioned in the three lease deeds were let out for business, commercial purposes and for office space purposes. Whereas, it has not been mentioned either in the plaint nor in the legal notice Ex.PW-1/4 nor in the evidence of plaintiffs'' witnesses PW-1 and PW-2 as to for what purpose the suit premises was let out to the defendant. Therefore, considering totality of circumstances inclusive of dearness and fluctuations in the rents in the market vis-?-vis t meet all ends of justice, rate @ Rs. 10 psqf. Pm(i.e. Rs. 70,000/- pm) is the reasonable amount for use and occupation charges of the premises, after determination of tenancy, w.e.f. 16.5.2011.

5.4 Accordingly, plaintiffs are entitled for mesne profits @ Rs. 70,000/- per month for the period 16.5.2011 to 31.8.2011, which comes to Rs. 2,45,000/-, out of which, Rs. 63,000/- received in advance is required to be deducted, the balance amount of mesne profits recoverable is Rs. 1,82,000/- uptil the date of filing the suit. The plaintiffs are also entitled for mesne profits at the same rate of Rs. 70,000/- per month from 1.9.2011 till receipt of possession from the defendant.

(underlining added)

4. Learned counsel for the appellants/plaintiffs/landlords has drawn the attention of this Court to the lease deed created in favour of the appellants/plaintiffs by the owner of the premises, M/s Consumer Service Corporation being the indenture of lease dated 8.11.2000. This lease agreement dated 8.11.2000 has been proved and exhibited before the Trial Court as Ex. PW1/2. Under this lease agreement, Ex.PW1/2, the appellants/plaintiffs were entitled to sub-lease of the premises, and under such powers, the premises were in fact sublet to the respondent/defendant, and thereby there came into existence a relationship of landlord and tenant between the appellants/plaintiffs and the respondent/ defendant/sub-tenant. Learned counsel has drawn attention of this Court to Para 4(ii) of the lease deed dated 8.11.2000, Ex.PW1/2, and which reads as under:-

4. The Lessor hereby covenants with the Lessee as under:

(i) ...

(ii) That under the municipal zoning/user rules, the demised premises are capable of being used for institutional and commercial purposes.

5. It is therefore argued that the Trial Court fell into an error in holding that the premises in question have not been proved to be capable of being used for commercial/office purposes by wrongly ignoring this clause 4(ii) of the lease deed dated 8.11.2000.

6. Learned counsel for the appellants/plaintiffs has also invited the attention of this Court to para 4 of the affidavit by way of evidence filed by Sh. Suresh Goel on behalf of the appellants/plaintiffs, and as per which para 4, the respondent / defendant is said to have its office in the suit premises. Para 4 reads as under:-

4. That the defendant is a company registered under the Companies Act, 1956

and having its office at 365, ground floor, Sultanpur, Mehrauli, New Delhi-110030. The Defendant is having one of its offices also at 369, 3rd Floor, CRC Building, Sultanpur, Mehrauli-Gurgaon Road, New Delhi-110030. The Defendnat is a sub-Lessee with respect to the entire ground floor of the said building situated at 365, Sultanpur, Mehrauli, New Delhi-110030.

(underlining added)

7. I have already stated above that the respondent/defendant was ex parte in the Trial Court and is also ex parte before this Court. There is no cross-examination to the averments made in para 4 of the affidavit by way of evidence filed by Sh. Suresh Goel on behalf of the appellants/plaintiffs and which leads to the conclusion that the respondent/tenant was using the premises for office purposes. Any doubt with respect to the entitlement or user for commercial/ office purposes is removed by a reference to para 4(ii) of the main lease deed dated 8.11.2000, Ex. PW1/2. I, therefore, hold that the three lease deeds which were proved and exhibited in the Trial Court as Ex. PW1/11 (colly.) can be looked into to arrive at a rate of mesne profits. As per the three lease deeds filed as Ex. PW1/11 (colly.), the rate of rent is Rs. 56.65 per square feet for the ground floor and basement portion in May, 2011 for the adjoining premises being property no.369, village Sultanpur, Mehrauli, New Delhi. The rate is Rs. 44.61 per square feet per month for May, 2011 for the first floor, second floor and third floor of the same property No. 369, village Sultanpur, Mehrauli, New Delhi, as per the second lease deed. The rate of rent is Rs. 150/- per month with effect from June, 2011 as per the third lease deed for the property no. 382, village Sultanpur, New Delhi. Considering that the suit premises are situated on the ground floor, in my opinion, therefore, the counsel for the appellants/plaintiffs is justified in arguing that appellants/plaintiffs should be granted mesne profits at least at the rate of Rs. 50/- per square feet per month and which is the mean rate between two rates of Rs. 56.65 per square feet per month and Rs. 44.61 per square feet per month for two lease deeds for the separate floors of the property no. 369, village Sultanpur, Mehrauli, New Delhi.

8. In view of the above, the appeal is accepted. Impugned judgment and decree is modified by allowing the appeal and granting to the appellants/plaintiffs/ landlords mesne profits at the rate of Rs. 50/- per square feet per month, i.e. Rs. 3,50,000/- per month with effect from 15.5.2011 and till the time the respondent/defendant vacates and hands over the possession of the suit premises to the appellants/plaintiffs. The appellants/plaintiffs will also be entitled to interest on arrears of mesne profits at 9% per annum simple in terms of the judgment of the Supreme Court in the case of Indian Oil Corporation Vs. Saroj Baweja 2005 (12) SCC 298. Interest will be payable from the end of the month for which mesne profits become payable to the appellants/plaintiffs/landlords by the respondent/defendant/tenant. Appellants/plaintiffs will also be entitled to costs of this appeal. Decree sheet be prepared. Appeal is allowed and disposed of accordingly. Trial Court record be sent back.

