(2013) 07 DEL CK 0264

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 : 18-07-2013

Acts Referred:

Citation : (2013) 07 DEL CK 0264

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Nandni Sahni, for the Appellant; Rashmi Chopta and Kumardeb Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.

CMs No. 16591/2012 & 16593/2012 (both of the respondent for recall of order dated 09.04.2012 and for stay thereof) & CM No. 18765/2012 (of the appellant for release of amount deposited)

1. This appeal was preferred against the ex parte judgment and decree, dated 10.01.2012 of the Additional District Judge-03, South District, Saket Courts, New Delhi in Suit No. 277 of 2011 filed by the appellants/plaintiffs for ejectment of the respondent/defendant (after determination of tenancy) from portion of property ad-measuring 1200 sq. yds. in Khasra No. 365 of Village Sultan Pur, Delhi, to the extent the same refused mesne profits/damages for use and occupation to the appellants/plaintiffs @ Rs. 50/- per sq. ft. per month as claimed and awarded mesne profits/damages for use and occupation to the appellants @ Rs. 10/- per sq. ft. per month only. Notice of the appeal was issued.

2. On the basis of the service report that the respondent/defendant had refused to accept notice of the appeal, the respondent/defendant was proceeded against ex parte in this appeal also and arguments of the counsel for the appellants/ plaintiffs heard and vide judgment dated 09.04.2012 the appeal was allowed and

the rate at which mesne profits were awarded to the appellants/plaintiffs was enhanced from Rs. 10/- to Rs. 50/- per sq. ft. per month.

3. The respondent/defendant has filed CM No. 16591/2012 for recall of the ex parte judgment dated 09.04.2012 in this appeal averring that it had been wrongly proceeded against ex parte and had not refused to receive the notice of the appeal. The said application was accompanied with CM No. 16593/2012 for stay of the ex parte judgment and decree in this appeal.

4. Notice of these applications was issued vide order dated 20.09.2012 and subject to deposit of mesne profits by the respondent/defendant in this Court @ Rs. 10% per sq. ft. per month, the execution of the decree was stayed. In pursuance thereto an amount of Rs. 8,07,150/- is stated to have been deposited by the respondent with the Registrar General of this Court.

5. The appellants/plaintiffs have contested these applications and have also filed CM No. 18765/2012 for release in favour of appellants/plaintiffs of the amount as deposited by respondent/defendant.

6. While hearing arguments on 05.07.2013 on the applications of the respondent/ defendant contending that it had been wrongly proceeded against ex parte in this appeal and since adjudication of the said controversy may have required recording of evidence on this aspect, it was suggested to the counsel for the appellants/plaintiffs that since the appeal entailed a limited question as to the rate of mesne profits and which the Trial Court had in its ex parte judgment on the basis of ex parte evidence of appellant/plaintiff assessed at Rs. 10/- per sq. ft. per month and this Court in its judgment, also ex parte and on the basis of the same evidence, has enhanced to Rs. 50/- per sq. ft. per month, the respondent/defendant be heard on the merits of the appeal itself. The counsel for the appellants/plaintiffs agreed, subject to the said hearing taking place immediately. The counsel for the respondent/defendant was also agreeable to the same. In these circumstances, without formally recalling the ex parte judgment dated 09.04.2012, the counsels were heard de-novo on the appeal and the further hearing adjourned to today. The counsels have been heard further.

7. The appellants/plaintiffs instituted the suit from which this appeal arises pleading, (i) that the appellants/plaintiffs were lessees in respect of the said property with rights to sublet the same; (ii) that they had sublet the ground floor of the said property comprising of around 3500 sq. ft. to the respondent/ defendant in the month of June, 2006; (iii) however no lease/agreement in writing was executed and the sub-tenancy of the respondent/defendant was month to month; (vi) that subsequently in January, 2008 the respondent/ defendant had approached the appellants/plaintiffs to give on lease another area of approximately 3500 sq. ft. on the ground floor making the total area in the tenancy of the respondent/defendant 7000 sq. ft.; (v) that the respondent/ defendant was paying rent of Rs. 30,000/- per month therefor; (vi) even at that time no lease/agreement in writing was executed; (vii) that since the premises

were required by the appellants/plaintiffs for their own use, they asked the respondent/defendant to vacate the same and ultimately issued a legal notice dated 19.04.2011 terminating the tenancy of the respondent/defendant with effect from 15.05.2011; (viii) that the respondent/defendant by the said notice was also informed that upon its failure to so vacate the premises, it would be liable to pay mesne profits/damages for use and occupation at the prevalent letting value of Rs. 50/- per sq. ft. per month; (ix) that the respondent/defendant despite receipt failed to abide by the notice and accordingly the suit for ejectment and mesne profits was instituted.

8. As aforesaid, the respondent/defendant was proceeded ex parte in the suit also and the appellants/plaintiffs led ex parte evidence by filing affidavits by way of examination-in-chief of the plaintiffs No. 2 and 3 Sh. Suresh Goel and Sh. Gautam Goel who are the partners of the plaintiff no. 1. The counsel for the respondent/defendant also in this appeal having confined her arguments to the rate of mesne profits, need is not felt to notice the ex parte evidence led on other aspects. The said witnesses of the appellants/plaintiffs in their ex pate evidence have deposed that the prevailing market rate of the said property is Rs. 50/- per sq. ft. per month and they are thus entitled to mesne profits/damages for use and occupation at the said rate. In support thereof the appellants/plaintiffs have proved three lease deeds "executed by lessors in the surrounding areas" as Ex. PW1/11 (colly).

9. The learned Additional District Judge, on the basis of the ex parte evidence of the appellants/plaintiffs held it to have been proved that the respondent/defendant was a tenant under the appellants/plaintiffs; that the tenancy was not protected by the Delhi Rent Control Act, 1958 and had been determined in accordance with law. The appellants/plaintiffs were thus held entitled to mesne profits with effect from date of termination of tenancy i.e. 15.05.2011 till the vacation of the premises by the respondent. However as far as the rate of mesne profits was concerned, though the appellants/plaintiffs in the plaint had sought mesne profits at the rate of Rs. 50/- per sq. ft. per month i.e. at the rate of Rs. 3,50,000/- per month for the area of 7000 sq. ft., the learned District Judge held:

(i) that the premises in the year 2008 had been let out at Rs. 30,000/- per month i.e. Rs. 4.28 per sq. ft. per month;

(ii) that the three lease deeds proved by the appellants/plaintiffs as Ex. PW1/11 (colly) were in respect of properties in the same area of Village and Post Office Sultan Pur, Mehrauli;

(iii) that the first lease deed was of area of 6000 sq. ft. fetching monthly rent of Rs. 3,40,000/- i.e. at Rs. 50.60 per sq. ft. per month;

(iv) the second lease deed was in respect of 13000 sq. ft. area for which monthly rent was Rs. 5,80,000/- i.e. Rs. 44.60 per sq. ft. per month;

(v) that the third lease deed was in respect of an area of 10000 sq. ft. for which monthly rent was Rs. 15,00,000/- i.e. at Rs. 150/- per sq. ft. per month;

(vi) that though the premises subject matter of the first two lease deeds were different floors of the same building let out for business and commercial purposes but nevertheless while the rate of rent in one was 50.60 per sq. ft. per month, in the other was Rs. 44.60 per sq. ft. per month;

(vii) that the third lease deed was with respect to an office space;

(viii) that thus all the three leases Ex. PW1/11 (colly) were of letting out for business and commercial purposes and for office space;

(ix) that however it was not mentioned in the plaint or in the notice of determination of tenancy or in the ex parte evidence of the appellants/plaintiffs as to for what purpose the suit premises had been let out; and,

(x) that considering the "totality of circumstances inclusive of dearness and fluctuations in the rents in the market" and "to meet all ends of justice" mesne profits at the rate of Rs. 10/- per sq. ft. per month was held to be reasonable and awarded.

10. It was the case of the appellants/plaintiffs in the memorandum of appeal that though the respondent/defendant had issued a letter dated 12.01.2012 (i.e. of a date two days after the date of the impugned judgment) informing the appellants/plaintiffs that it had vacated the premises by 30.11.2011 and the appellants/plaintiffs had been telephonically requested to take charge of the premises but had not done so and calling upon the appellants/plaintiffs to take charge of the premises and issue a full and final settlement certificate; however as on the date of filing of the appeal i.e. 28.01.2012, the office of the respondent/ defendant was still functioning in the premises. When the application of the respondent/defendant for recall of the ex parte judgment came up before this Court on 20.09.2012, on the plea of the respondent/defendant of having offered possession of the premises on 12.01.2012 and the appellant having not accepted it, a Court Commissioner was appointed to visit the premises on 22.09.2012 and to have the possession thereof delivered to the appellants. The same was accordingly done.

11. The counsel for the appellants/plaintiffs has contended that the only reason why the learned Additional District Judge has declined to award mesne profits/ damages for use and occupation at the rate of Rs. 50/- per sq. ft. per month claimed inspite of the said rate of prevalent rent being proved by lease deeds Ex. PW1/11 (colly) is that while in the lease deeds Ex. PW1/11 (colly) the purpose of letting was commercial/office, there was no plea or evidence of the purpose for which the suit premises were let out to the respondents.

12. It is argued that the learned Additional District Judge has failed to notice that the appellants/plaintiffs had proved before the Trial Court as Ex. PW1/2, the lease of the premises in their own favour and which lease records that under the Municipal Zoning/User Rules, the premises are capable of being used for

institutional and commercial purposes. It is further contended that the learned Additional District Judge also failed to notice Para 4 of the affidavit by way of examination-in-chief of the appellant no. 2 in which also it was deposed that the respondent/defendant was having its office in the premises. It is thus contended that there was sufficient material before the Trial Court to hold that purpose of letting in favour of the respondent/defendant was the same as in the lease deeds Ex. PW1/11 (colly).

13. It was rather the aforesaid contention which was accepted by this Court in the ex parte judgment dated 09.04.2012 in this appeal enhancing the rate of mesne profits.

14. The respondent/defendant, as aforesaid was ex parte in the suit and there is thus no version of defence by the respondent/defendant on record. The respondent/defendant however in CM No. 16591/2012 has pleaded that the lease agreement Ex. PW1/2 is between family members and thus cannot be relied upon; that while suit premises are situated in a village area on a 15 to 20 feet wide road without any parking and was used for warehouse, the premises subject matter of leases Ex. PW1/11 (colly) are situated on the main road of Mehrauli Gurgaon Road and as such the rate of rent in Ex. PW1/11 (colly) is not indicative of the prevalent rate of rent of the suit premises; that the adjoining premises ad-measuring 25098 sq. ft. had been let out at a monthly rent of Rs. 2,67,500/- i.e. @ Rs. 10.65 per sq. ft. per month vide registered lease deed dated 24.01.2011 copy of which has been filed as Annexure-RVI to the application (I may however notice that what has been filed is a typed copy and does not show area let out; though the said lease deed refers to a site plan Annexure-A thereto but the same also is not filed); that the premises subject matter of lease deeds Ex. PW1/11 (colly) are full fledged modern show rooms on the main Mehrauli Gurgaon Road whereas the suit premises is situated inside the village and without any parking and to be used only for warehouse; photographs of the premises subject matter of Ex. PW1/11 (colly) and suit premises are annexed.

15. Needless to state that the appellants/plaintiffs in their reply to the application have denied that the premises were used as a warehouse and that the suit premises are inside the village.

16. The counsel for the respondent/defendant has from the photographs taken and filed by the Court Commissioner also argued that the same show the nature of the premises as godown/warehouse and not as an office.

17. I may at the outset state that at the appellate stage no new evidence can be seen. The scope of an appeal by a judgment debtor against an ex parte judgment and decree is only to show that on the basis of the ex parte evidence before the Trial Court, the conclusion reached could not have been reached. What the respondent/defendant is however wanting this Court to do is to, on the basis of the material placed before this Court for the first time, hold the

appellants/plaintiffs to be not entitled to the enhancement of mesne profits and which is not permissible.

18. I may however state that the photographs of the suit premises filed by the Court Commissioner as well as by the parties are undisputed and show the said premises to be having large windows and do not by any stretch of imagination show the nature of the premises to be as a warehouse. The respondent/ defendant as Annexure-RVIII to its CM No. 16591/2012 has filed photocopy of a certificate dated 15.09.2012 of its bankers and which also is to the effect that in the record of the bank the respondent/defendant had "shifted its corporate office and warehouse from 365, Sultanpur Village, MG Road, New Delhi to 845, 1st Floor, MG Road, Ghitorni, New Delhi". The plea of the respondent/defendant thus, of the premises only having a warehouse is falsified. Moreover, from the nature of the business of the respondent i.e. operating a furnishing and fabric show room in the name and style of "Muslin" at another place, the mere fact that some fabric is kept at the corporate office would not convert the premises into a warehouse.

19. Having said that, what intrigues me is that there is no specific denial by the appellants/plaintiffs to the pleas of the respondent/defendant in its application, of the premises subject matter of lease deeds Ex. PW1/11 (colly) being situated on main Mehrauli Road (in support of which the respondent has also filed a location plan) and of letting out of premises adjoining the suit premises in the year 2011 itself at the rate of Rs. 10.65 per sq. ft. per month.

20. The practice, of taking judicial notice of certain facts as of increase in rent over a period of time, in assessing the mesne profits/damages for use and occupation has been approved by the Courts. Reference in this regard can be made to National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association, Judicial notice can similarly be taken of the huge disparity in rent of premises situated on the main road and on inner roads. Judicial notice can similarly be taken of disparity in rent of premises situated in a mall and outside.

21. Once the respondent/defendant had taken a specific plea, of the premises adjoining to the suit premises having been let out in the year 2011 itself at a rent of Rs. 10.65p per sq. ft. per month, it was incumbent upon the appellants/ plaintiffs to specifically deal therewith, at least to satisfy the judicial conscience of this Court and if the same was not controverted, to give reasons for the low rent fetched by the said adjoining premises in comparison to premises subject matter of Lease Deeds Ex. PW1/11 (colly). The respondent/defendant in the location plan filed has shown the location of the premises subject matter of lease deeds Ex. PW1/11 (colly) as well as of the suit premises and the adjoining premises let out in the year 2011 at the rent of Rs. 10.65p per sq. ft. per month and the appellants/plaintiffs cannot, even if the respondent/defendant was ex parte, escape with a mere denial of such specific averments.

22. The appellants/plaintiffs in their evidence before the Trial Court also merely

described the premises subject matter of lease deeds Ex. PW1/11 (colly) on the basis of rent whereof the claim for mesne profits @ Rs. 50 per sq. ft. per month was made, as situated in "surrounding areas" and shied away from deposing that the same were similar or identical to the suit premises; the photographs filed and which as aforesaid are not disputed are to the contrary.

23. The judicial conscience of this Court thus does not allow this Court to interfere with the rate of mesne profits arrived at by the Trial Court of Rs. 10/- per sq. ft. per month. The matter can be looked at from another aspect also. The subject premises in the year 2008, i.e. just three years prior to the date from which mesne profits are claimed, were let out at Rs. 4.28 per sq. ft. per month. Significantly it was not a renewal in pursuance to an old agreement, but a case of fresh letting. It thus has to be necessarily inferred that the appellants/ plaintiffs must have let out at the then prevalent market rent. Judicial notice can also be taken of the fact that there is generally not a ten times increase in letting values within a period of three years. The Trial Court for this reason also is found justified in awarding mesne profits/damages for use and occupation at double the letting value.

24. There was some controversy between the parties also as to the period for which the appellants/plaintiffs are entitled to mesne profits. The impugned judgment and decree awards mesne profits from 15th November, 2011 till the date of vacation. The counsel for the respondent/defendant has contended that the respondent/defendant had offered the premises to the appellants/plaintiffs vide letter dated 12.01.2012 and the appellants/plaintiffs failed to take possession of the premises inspite of receipt thereof and are thus not entitled to mesne profits after the said date. The counsel for the appellants/plaintiffs on the other hand has contended that the possession was ultimately delivered to the appellants/plaintiffs on 22.09.2012 through the Court Commissioner appointed by this Court and the appellants/plaintiffs are thus entitled to mesne profits till the said date.

25. The fact that possession was ultimately delivered to the appellants/plaintiffs only on 22.09.2012 in the presence of the Court Commissioner is not in dispute. The only thing which remains to be seen is the effect of the letter dated 12.01.2012 of the respondent/defendant to the appellants/plaintiffs offering possession and which was admittedly received by the appellants/plaintiffs as is evident from the copy thereof being filed with the memorandum of appeal. In my opinion, the principles applicable to running of interest on a money decree would apply in such a situation. Till the money under the decree goes into the pocket of the decree holder, interest continues to run notwithstanding deposit by the judgment debtor of the decretal amount in the Court as a condition for stay. There is also merit in the contention that the offer of possession was not unconditional. Thus I am of the opinion that the appellants/plaintiffs would be entitled to mesne profits from 15th November, 2011 till 22nd September, 2012.

26. Mesne profits at the rate of Rs. 10/- per sq. ft. per month awarded by the

Trial Court for the said period were got deposited in this Court under the interim order dated 20th September, 2012 in this appeal. The appellants/plaintiffs having been found entitled thereto, are further found entitled to withdrawal of the same from this Court together with interest if any accrued thereon.

27. Resultantly, while CM No. 16591/2012 of the respondent/defendant is allowed and the appeal has been re-heard and is dismissed; CM No. 18765/2012 of the appellants/plaintiffs is allowed and the amount of Rs. 8,07,150/- deposited by the respondent/defendant in this Court under order dated 20th September, 2012 be released to the appellants after a period of four weeks from today together with interest accrued thereon. In the circumstances no costs. Decree sheet be drawn up.