
(2009) 01 DEL CK 0046
In the Delhi High Court
Case No : CS (OS) 1985 of 2003

Smt. Nisha

APPELLANT

Vs

P.N.B.

RESPONDENT

Date of Decision : 16-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0046

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : S.P. Mehta, for the Appellant; Y.P. Chandana and Pankul Nagpal, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—This suit has been filed by the plaintiff for recovery of Rs. 43,04,028/- as damages/mesne profits for use and occupation of basement in premises No. XVI/10203, Karol Bagh, New Delhi measuring 3570 square feet for the period from September, 2000 to 8th December, 2002 @ Rs. 34/- per square foot per month and from 9th December, 2002 to 8th August, 2003 @ Rs. 59/- per square foot per month. Out of this amount, the plaintiff had been receiving a sum of Rs. 24,633/- per month as user charges from the defendant so she had reduced the amount by Rs. 8,37,522/- and filed this suit claiming Rs. 43,04,028/-.

2. The defendant, Punjab National Bank was a tenant in the basement and last rent paid was @ Rs. 24,633/- per month. According to the plaintiff, this tenancy came to an end by efflux of time, as specified in the lease agreement, on 17th August, 1991. This lease was not further extended. She then served a notice on the defendant dated 3rd January, 1992 and then on 12th February, 1992 terminating the lease with effect from 17th March, 1992. Since the premises was not vacated she filed a suit for possession in April, 1992 reserving her right to file a suit for damages. During pendency of the suit, the parties entered into a compromise and moved an application under Order 23 Rule 3 CPC stating therein

that the parties had amicably settled their disputes and defendant had agreed to vacate and hand over the possession of premises to the plaintiff on or before 30th June, 2003 and defendant also undertook to pay the rent/charges for use and occupation @ Rs. 24,633/- as well as electricity charges as per the bills upto date of handing over the vacant possession.

3. The keys of the premises were actually handed over to the plaintiff in the Court on 8th August, 2003 on an application made by the plaintiff. After that the plaintiff filed this suit for damages and mesne profits on 18th September, 2003 claiming damages as stated above for a period of 35 months prior to the filing of the suit.

4. The defendant in the written statement took preliminary objection that the suit was barred under Order 2 Rule 2 CPC since the plaintiff had not claimed damages when she filed suit for possession against the defendant on the ground of termination of tenancy. It is also submitted that in the compromise entered into between the parties before the Civil Judge on 9th May, 2003, the defendant-bank had agreed to hand over the vacant possession and to continue to pay rent as charges for use and occupation of premises and electricity bills and that satisfied the claim of the plaintiff for mesne profits and damages. This compromise was duly signed by both the parties and the parties had also made statement in the Court. Thus, no further claim for mesne profits/damages could be filed by the plaintiff.

5. Out of the pleadings of the parties following issues were framed:

1. Whether the suit filed is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, 1908 for the reason stated in paragraph 1 of the preliminary objections contained in the written statement? OPD

2. Whether the plaintiff is entitled to recover damages/mesne profits to the extent of Rs. 43,04,028/- or any part thereof" OPP.

4. Relief.

Issue No. 1

6. When the plaintiff filed earlier suit for possession on the ground of termination of tenancy of the defendant, a right had accrued to the plaintiff to claim mesne profits and damages for use and occupation of the premises from the date of termination of tenancy till filing of the suit. Since the tenancy was terminated only on 17th March, 1992 and the suit was filed in April, 1992, she could have claimed damages/mesne profits for one month. As far as claim for damages for the period subsequent to the filing of the suit is concerned, the right to claim damages accrued to the plaintiff month-to-month and she had a right to file a suit for recovery of damages/mesne profits as and when right accrued to her. She could also take benefit of the limitation period and could file the suit for damages/mesne profits for a consolidated period taking care of the limitation. Her suit for damages for the period subsequent to the filing of the suit for

possession would not be barred by Order 2 Rule 2 CPC. However, any claim of damages for the period prior to filing of the suit for possession on the ground of termination of tenancy may have fallen under order 2 Rule 2 CPC, if no leave of the Court has sought to file a separate suit for damages.

7. It is settled law that a suit can be filed against the defendant for existing cause of action. A suit cannot be filed for future cause of action. The right to claim damages/mesne profits in April, 1992 when the suit for possession was filed existed only in respect of the period prior to April, 1992. The plaintiff had a right to reserve her right of filing suit for damages for subsequent period, as per her convenience. Thus, the suit filed by the plaintiff is not barred under Order 2 Rule 2 CPC as claimed by the defendant. The issue is decided in favour of the plaintiff and against the defendant.

Issue No. 2

8. In order to prove the quantum of damages plaintiff examined herself and her husband as witnesses. She testified about the termination of tenancy of the defendant with effect from 17th March, 1992 and stated that defendant was liable to pay prevalent market rent for the use of the premises after termination of tenancy, instead of an amount of Rs. 24,633/-. In order to prove the market rent, she testified that the rate of rent being paid by Vijaya Bank occupying ground floor portion of the same premises with effect from November, 1992 was Rs. 55/- per square foot and it was enhanced to Rs. 68/- per square foot with effect from 25th November, 1997. She submitted that the market rent of the basement should be at least half of the rate of rent prevalent at the ground floor. Thus, it should be Rs. 34/- per square foot in the year 2002 and she further testified that Vijaya bank had further increased ground floor rent to Rs. 118/- per square foot with effect from 26th November, 2002. Therefore the damages from 26th November, 2002 for the basement should be @ Rs. 59/- per square foot. She admitted during her cross-examination on 28.7.2006 that after the basement was vacated by the defendant in August, 2003, the basement could not be let out by the plaintiff at any rate and it was lying vacant ever since. To the same effect is the testimony of her husband who also admitted that the basement got vacated from the defendant was lying vacant and unoccupied since then. She was asked to give the number or details of any other basement in the vicinity of that property which had been let out in last 2 or 3 years and she failed to give details of any other basement let out in the vicinity of that existing premises. She was given some suggestions about the basements in adjoining area to which she showed ignorance. Her husband who appeared as PW-2 though stated that in the adjoining area there was a property occupied by tenant "Gokul Store", who had taken basement, ground floor, first and second floor, i.e., entire property on rent and the rate of rent of basement of that property was Rs. 82,000/- per month. However, he had not placed on record any lease deed or any document to prove this fact.

9. Thus, apart from oral testimony of the plaintiff and her husband about the

prevalent rent, there is no other testimony to show what was the prevalent rate of rent in the area. The test for determining mesne profits and damages for any premises at a relevant time is as to what would be the market rent of the premises prevalent at that time. Market rent of the premises can be found out if the premises is sought by the tenants for possession or some tenant was ready to pay rent for the premises. The plaintiff got this premises vacated from the defendant on the ground that defendant was paying low rent. In the letter written by the plaintiff sometime in the year 2002 to the defendant (ex.PW-1/7) she claimed that the rent in the area was very high and the defendant was paying low rent. She wanted the defendant-bank to revive the mutual relations by paying rent @ Rs. 60/- per square foot per month. However, the fact of the matter is that after defendant vacated the premises she could not let out the premises to anybody even at Rs. 10/- per square foot what to talk of Rs. 20/- per square foot. The very fact that the plaintiff could not get a tenant for the basement vacated by defendant shows that the claim of the plaintiff that the premises could be let out at a rate higher than what was being paid by the plaintiff is a baseless claim. If she could get higher rent nobody stopped her from letting out this premises at the higher rent since she get the premises vacated for letting out at higher rent. In absence of any proof of any other basement having been let out by any other landlord to a tenant in the vicinity of this basement at a rent higher than what was being received by the plaintiff at the relevant time, I consider that the claim of the plaintiff for damages/mesne profits higher than what she was receiving from the defendant, does not lie.

10. I consider that the plaintiff's right to claim damages/mesne profits at a rate higher than what was being paid to her by the defendant, should fail on another ground also. The earlier suit for possession was filed by the plaintiff on the ground of valid termination of tenancy. This suit was not decided on merits. It was not held that the termination of defendant's tenancy was a valid termination and the defendant was in illegal occupation of the premises after 17th March, 1992. This issue could not have been raised afresh by the plaintiff and was to be decided in the earlier suit only. The earlier suit was compromised and in the compromise entered into between the parties, it was specifically mentioned that the defendant shall pay user charges/rent upto the date of vacating. User charges were regularly being paid by the defendant at admitted rate. In the compromise, plaintiff had not reserved her rights to re-agitate the issue of user charges/damages afresh, I consider that the plaintiff could not have claimed damages/mesne profits higher than what she was receiving as user charges from the defendant. Issue is therefore decided against the plaintiff and in favour of the defendant. Relief.

11. The suit of the plaintiff is hereby dismissed.

12. In view of the facts and circumstances of the case, no orders as to costs.