(2013) 12 DEL CK 0221

In the Delhi High Court

Case No : Regular First Appeal 384 of 2013, CM No''s. 12718, 12719 and 12720 of 2013

Suman Verma and Others — APPELLANT

Vs

Sushil Mohini Gupta and Others — RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(1), 2(12)
Delhi Rent Control Act, 1958 — Section 14(1)(e), 14(1)(k), 15, 15(2), 3(c)

Citation : (2014) 140 DRJ 595

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Salim Inamdar, Mr. Vedanta Varma and Mr. Vibhor Kush, for the Appellant; Rajesh Yadav and Mr. Vishal Mahajan for R-2 to 16 and 18 to 20, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the judgment and decree (dated 15th March, 2013 of the Court of the Addl. District Judge, Central-09, Tis Hazari Courts, Delhi in CS No. 50/04 (UID No. 02401C5982592004) filed by the respondents no. 1 to 21 against the predecessor of the three appellants for the relief of ejectment/mesne profits; the respondent no. 22 was impleaded as the defendant no. 2 to the suit though no relief was claimed against her) of ejectment of the appellants from the two and a half storeyed building constructed on plot No. C-2/10, Vasant Vihar, New Delhi-110 057 and for recovery from the appellants of Rs. 9,00,000/- for the period from 1st May, 2003 to 31st January, 2004 and mesne profits, @ Rs. 1,25,000/- per month for the period from 1st February, 2004 to 31st December, 2006 and @ Rs. 1,50,000/- per month from 1st January, 2007 till the date of vacation of the ejectment. The appeal came up before this Court first on 21st August, 2013 when though not prima facie agreeing with the challenge in the appeal, but to obviate any technicalities, this being a first appeal, and for the reason that the impugned judgment also imposed costs of Rs. 50,000/- on each of the respondents/ plaintiffs and which did not appear to be justified in law, notice of the appeal was issued and the Trial Court record requisitioned.

2. The counsel for the respondent no. 1 and the counsel for the respondents no. 2 to 16 and 18 to 20 have appeared.

3. Though the respondents no. 17, 21 & 22 remain unserved and the counsel for the appellants/defendants on 3rd December, 2013 contended that the appeal should be adjourned for service of the said respondents/plaintiffs but it was the plea of the counsels appearing for the remaining respondents/plaintiffs that all the respondents/plaintiffs have a common interest and were represented by one counsel only throughout the suit from which this appeal arises and they were not appearing for the unserved respondents/plaintiffs only for the reason of non-availability of the Vakalatnama and the same should not be allowed to come in the way of the hearing of the appeal.

4. The counsel for the appellants/defendants and the counsel for the respondents/ plaintiffs were accordingly heard on the appeal and judgment was reserved.

5. The respondents/plaintiffs instituted the suit from which this appeal arises, pleading:-

(a) that the predecessor-in-interest of the appellants/defendants was inducted as a tenant in the said property, sometimes in the year 1973 at a rent of Rs. 2,400/- per month by the predecessor-in-interest namely Dr. Sham Lal Gupta of the respondents/plaintiffs;

(b) that on the demise on 5th February, 1991 of Dr. Sham Lal Gupta, the respondents/plaintiffs succeeded as co-owners and landlords of the property

(c) that even during the lifetime of Dr. Sham Lal Gupta, there were several litigations between him and the predecessor of the appellants/defendants;

(d) that at the time of demise of Dr. Sham Lal Gupta, the petition filed by him for eviction of the predecessor of the appellants/defendants from the property on the ground u/s 14(1)(k) of the Delhi Rent Control Act, 1958 was pending and which petition was also pending on 10th February, 2004 at the time of institution of the suit from which this appeal arises;

(e) that in the aforesaid eviction petition an order u/s 15(2) of the Rent Act, directing the predecessor of the appellants/defendants to pay/deposit rent had been made and by subsequent orders from time to time in the said eviction petition, on applications filed by respondents/plaintiffs/their predecessor, the predecessor of the appellants/defendants had been directed to increase the rent by 10% per month every three years;

(f) that vide order dated 18th September, 2000, the rent was directed to be deposited @ Rs. 3,194.40p w.e.f. May, 2000;

(g) that the respondents/plaintiffs got served notice dated 15th March, 2003 on the predecessor of the appellants/defendants for increase in rent by another 10% w.e.f. 1st May, 2003 u/s 6(A) of the Rent Act;

(h) that upon the failure of the predecessor of the appellants/defendants to so increase the rent, an application dated 2nd June, 2003 was filed in the eviction petition for direction to the predecessor of the appellants/defendants to deposit/ pay rent @ Rs. 3,513.84p w.e.f. 1st May, 2003;

(i) that the predecessor of the appellants/defendants opposed the said application contending that the Rent Controller before whom the said eviction petition was pending had no jurisdiction to direct payment of rent @ Rs. 3,513.84p as the premises, the rent whereof is in excess of Rs. 3,500/- per month, are outside the ambit of the Rent Act;

(j) that another petition for eviction of the predecessor of the appellants/ defendants u/s 14(1)(e) of the Rent Act on the ground of personal requirement of the premises was also pending at the time of institution of the suit from which this appeal arises;

(k) that the protection from eviction under the Rent Act had ceased to be available to the predecessor of the appellants/defendants upon the rent of the premises becoming Rs. 3,513.84/- w.e.f. 1st May, 2003; and,

(l) that the tenancy of the predecessor of the appellants/defendants had already been terminated vide notice dated notice dated 13th April, 2000 w.e.f. 1st June, 2000.

Accordingly, the respondents/plaintiffs had become entitled to recovery possession of the premises and mesne profits/damages for use and occupation @ Rs. 1,50,000/- per month which was the then letting value of the property.

6. The predecessor of the appellants/defendants contested the suit by filing a written statement on diverse grounds but need is not felt to burden this judgment therewith as the counsel for the appellants/defendants has confined his arguments to a few defences only.

7. Suffice it is to record, that on the pleadings of the parties, the following issues were framed in the suit on 2nd August, 2005:-

i) Whether the plaintiff is entitled to the relief of possession, against defendant no. 1? OPP

ii) Whether plaintiff is entitled to recover the amount of arrears of damages? If so at what rate and for what period? OPP

iii) Whether the plaintiff is entitled to claim future damages. If so, at what rate? OPP

iv) Whether the plaintiff is entitled to claim interest. If so, at what rate, on what amount and for what period? OPP

v) Whether the suit is not maintainable in view of pendency of an eviction petition before the ARC? OPD-1

vi) Whether the suit is bad for misjoinder of necessary parties? OPD-1

vii) What is the effect of the suit no. 393/91(sic 293/91) filed by Ajit Singh Oberoi against Dr. S.L. Gupta which is pending disposal before the Hon''ble High Court? OPD-1

viii) Whether plaintiff no. 8 had died prior to institution of this suit, if so, its effect? OPD-1

ix) Relief.

8. The learned Addl. District Judge, in the impugned judgment, has found/ observed/held:-

(i) that though one Shri Ajit Singh Oberoi claiming that the predecessor-in-interest of the respondents/plaintiffs had in his lifetime agreed to sell the property to him, had filed CS(OS) No. 293/1991 in this Court for specific performance of the said Agreement to Sell and vide order dated 30th March, 2007 in the said suit it had been directed that the decision in the present proceedings will be subject to the decision in that suit, but the same did not come in the way of the respondents/plaintiffs maintaining the suit for recovery of possession/ejectment from/of the appellants/defendants as tenants whose tenancy had been determined.

(ii) that the appellants/defendants were not claiming any other rights save rights as tenant in the property;

(iii) that the appellants/defendants were depositing Rs. 3,514/- per month in terms of the interim order in the suit from which this appeal arises;

(iv) that the premises were outside the ambit of the Rent Act;

(v) that the respondents/plaintiffs had however not disclosed the factum of the Agreement to Sell of the year 1989 by their predecessor in the suit from which this appeal arises or of the pendency of the suit for specific performance filed by Shri Ajit Singh Oberoi and were guilty of suppression of material facts; However the same did not come in the way of the respondents/plaintiffs claiming the reliefs in the suit but the respondents/plaintiffs were burdened with costs of Rs. 50,000/- each to be deposited with the Delhi Legal Services Authority for having indulged in concealment of material facts;

(vi) that one of the respondents/plaintiffs appearing as witness had deposed the letting value of the property at the time of institution of the suit to be Rs. 1,50,000/- per month on the basis of enquiries from property dealers;

(vii) that the property was constructed over land ad measuring 400 sq. yds.;

(viii) that one of the appellants/defendants appearing as witness had stated that the market value of the property may be Rs. 2 to 3 lacs per sq. yds. and had admitted the size of the property to be 400 sq. yds. and the property to be situated in one of the poshest area of New Delhi;

(ix) that the appellants/defendants appearing as witnesses were however unable to say whether the property in question could fetch Rs. 5,00,000/- rent per month on the date of deposition;

(x) that the respondents/plaintiffs had not proved their entitlement to interest;

(xi) that since the suit property was outside the Rent Act, issue No. 5 was decided in favour of the respondents/plaintiffs and against the appellants/ defendants;

(xii) the appellants/defendants had been unable to discharge the onus of issue No. 6; and,

(xiii) issue No. 8 was also decided in favour of the respondents/plaintiffs and against the appellants/defendants.

Accordingly, the decree of ejectment and for mesne profits as aforesaid was passed.

9. The argument of the counsel for the appellants/defendants is twofold. Firstly, it is contended that the rate at which the mesne profits against the appellants/ defendants have been awarded is not proper. It is contended that there was no evidence whatsoever before the learned Addl. District Judge to award mesne profits at the rate of Rs. 1 lac per month, Rs. 1,25,000/- per month and Rs. 1,50,000/- per month for different periods as done. Reliance in this regard is placed on the judgment of the Division Bench of this Court in National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association, . The only other contention of the counsel for the appellants/defendants qua the decree for ejectment is that the civil suit for ejectment/recovery of possession was not maintainable for the reason of, on the date of institution thereof, petition for eviction under the Rent Act pending consideration. Upon the attention of the counsel for the appellants/ defendants being drawn to the judgment of the Division Bench in New United Automobiles Vs. Cycle Equipments Pvt. Ltd. 1997(1) RCR 69, the counsel states that the said issue was not decided but left open in the said judgment.

10. Per contra, the counsel for the respondents/plaintiffs has invited attention to paras 19 to 22 of the dicta of the Supreme Court in Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF), laying down:-

A. that it is open to a landlord (of a premises governed by the provisions of the Rent Act) to increase the rent by 10% after giving notice u/s 6A of the Rent Act during the pendency of a petition for eviction and even if an order u/s 15 of the Rent Act has been passed in such petition;

B. that once a notice u/s 6A read with Section 8 of the Rent Act has been given of intention to increase the rent by 10% and thereby the rent of the premises goes above Rs. 3,500/- per month, the Rent Act automatically ceases to apply to the premises and the bar of Section 3(c) thereof comes into play;

C. that even if on that date a petition for eviction under the Rent Act is pending, it is not necessary for a landlord to take leave of the Rent Controller and the civil suit for ejectment can be filed under the general law;

D. that the landlord is only required to serve the notice on the tenant expressing the intention to make such increases;

E. it cannot be said that the civil suit could not be filed without the leave of the Rent Controller;

F. it cannot be said that the notice of increase in rent and termination of tenancy cannot be given simultaneously; and,

G. in any case, the filing of an eviction suit under the general law itself is a notice to quit on the tenant.

11. The counsel or the respondents/plaintiffs has further drawn attention to the cross examination of the appellants/defendants and has contended that in the cross examination on 1st October, 2010, the appellant/defendant did not deny that the letting value of the property was Rs. 5 lacs per month and merely stated that she could not say so; it is contended that the same is an admission of the market rent being Rs. 5 lacs per month. It is yet further contended that though the mesne profits accrued to the respondents/plaintiffs month by month but the learned Addl. District Judge has not given any interest thereon to the respondents/plaintiffs and the said factor be kept in mind while judging the rate at which the mesne profits have been awarded.

12. The counsel for the respondents/plaintiffs has further contended that the costs of Rs. 50,000/- per respondent/plaintiff imposed by the learned Addl. District Judge are unjustified.

13. It is argued that the respondents/plaintiffs have been accused of concealment of an affidavit purportedly executed by the respondent/plaintiff no. 1 stating that her father Dr. Sham Lal Gupta had executed a deal of the property with Shri Ajit Singh Oberoi and confirming that the suit property was the self acquired property of her father. It is contended that the said affidavit was not of transfer of the property and there was no need for disclosing the same in the suit against the tenant in which only the title as landlord is relevant. Similarly, it is contended that non-mentioning of the pendency of the suit for specific performance by third party was of no relevance in the suit to invite imposition of such heavy costs. Reliance is also placed on Sunil Kapoor Vs. Himmat Singh 2010 II AD (Delhi) 463 to contend that mere Agreement to Sell does not create any rights in immovable property till a decree for specific performance is passed and in pursuance thereto a Conveyance Deed executed.

14. The counsel for the appellants/defendants in rejoinder has fairly admitted

that the challenge by the appellants/defendants is really not to the decree for ejectment but to the decree for mesne profits. He further contended that the respondents/plaintiffs having not filed cross appeal/cross objections, in this appeal are not entitled to raise objections to the costs imposed upon the respondents/plaintiffs.

15. The counsel for the respondents/plaintiffs in response to the same has invited attention to Ravinder Kumar Sharma Vs. State of Assam 81 (1999) DLT 795 (SC) to contend that with the introduction of Order 41 Rule 22(1) in the CPC vide the 1976 amendment, it is open to a respondent to, without filing cross objections, attack an adverse finding upon which a decree in part has been passed against the respondent or the purpose of sustaining the decree and that the filing of cross objections is purely optional and not mandatory. Reliance in this regard is also placed on Anil Kumar Gupta and Others Vs. Municipal Corporation of Delhi and Others,

16. The counsel for the appellants/defendants has contended that the judgments relied upon are not relevant as the same are in the context of a part decree. It is argued that the present is not a case of any part of the claim of the respondents/ defendants having been denied but of imposition of costs on respondents/ plaintiffs for concealment.

17. I have considered the rival submissions.

18. As fairly admitted by the counsel for the appellants/defendants also, there is really no ground for challenging the decree in so far as for the relief of ejectment. The only argument urged in challenge thereto is fully met by the dicta aforesaid of the Supreme Court in Nopany Investments (P) Ltd. I may in this regard also refer to the judgment of this court in Consep India Pvt. Ltd. Vs. CEPCO Industries Pvt. Ltd., also laying down that there is no legal bar to a landlord availing the remedy of filing a civil suit once the rent stood increased to more than Rs. 3500/- p.m. after notice u/s 6A read with section 8 of the Rent Act, even if a petition for eviction under the Rent Act, earlier filed, is pending on that date and there is no legal bar to availing two remedies. I also do not find merit in the contention that the question was left open in New United Automobiles supra.

19. I had in fact asked the counsel for the appellants/defendants whether the appellants/defendants are willing to handover possession of the premises in compliance of the decree to the respondents/plaintiffs.

20. The appellants/defendants are not so willing.

21. I do not find any merit in the challenge by the appellants/defendants to the rate at which the mesne profits/damages for use and occupation have been awarded, for the following reasons:-

(a) though undoubtedly the Division Bench of this Court in National Radio & Electronic Co. Ltd. supra has held that judicial notice, only of a general increase in rent in the city of Delhi and not of the rates of rent, in the absence of proof thereof can be taken but it cannot be lost sight of that the Courts are for doing justice between the parties and not for, on hyper technicalities, allowing the parties to suffer injustice.

(b). The property of the respondents/plaintiffs which the appellants/defendants are admittedly in unauthorized occupation of, is situated in one of the poshest colonies of the city of Delhi, properties wherein fetch high rentals and which only the elite, affluent, expats and foreigners are able to afford.

(c) the said property is a independent bungalow constructed over 400 sq. yd. of land and comprising of two and a half floors.

(d) the calculation of mesne profits always involves some amount of guess work, as held by this court in International Pvt. Ltd. Vs. Saraswati Industrial Syndicate Ltd. (1992) 2 RCR 6, Shri M.R. Sahni Vs. Mrs. Doris Randhawa, and reiterated in Consep India Pvt. Ltd. supra and applicability of prevalent rents in the city and of which the Judges manning the Courts and who are born and brought up in the same city, are generally aware of.

(e) The Division Benches of this court in Vinod Khanna and Others Vs. Bakshi Sachdev, taking judicial notice, refused to interfere with the rate of mesne profits even where the landlord had not led any documentary evidence. Notice of such increase has also been taken by the Supreme Court in Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others,

(f) applying the said principles, it can by no stretch of imagination be said that the rate at which mesne profits have been awarded is excessive; rather the same is on the lower side only; the rate at which the mesne profits have been awarded is less than the rate which each floor of the property in the said colony is capable of fetching; the appellants/defendants are in possession of two and a half floors.

(g) the counsel for the respondents/plaintiffs is correct in contending that award of mesne profits as per definition in Section 2(12) of the CPC includes interest. Reference if any in this regard can again be made to Consep India Pvt. Ltd. supra where a large number of judgments are considered. The learned Addl. District Judge has not awarded any interest. No proof of such interest again is required as it is always safe to award interest in such cases at the rates at which Nationalized Banks give interest on deposits with them. Applying the said principle interest at 10% per annum from the end of each month till the date of payment could have been awarded; the same is reason enough to not interfere with the rate of mesne profits.

(h) the appellants/defendants have been residents of the property for the last more than four decades. They, rather than the respondents/plaintiffs were in a better position to depose about the prevalent rent in the locality. Had the claim for mesne profits in the plaint at the rate of Rs. 1,50,000/- per month been preposterous, the appellants/defendants would have definitely given instance of other properties in the locality and their rent. Nothing of the sort was done. Even in the cross examination of the respondents/plaintiffs and in the deposition of the appellants/defendants, the appellants/defendants did not mention a single property in the vicinity which may have been fetching lesser rent. In fact the appellants/defendants shied from even denying that the property was in 2010 capable of fetching the rent of Rs. 5 lacs per month.

(i) the evidence on record is thus sufficient to conclude that no interference is required in the rate fixed by the learned Addl. District Judge of mesne profits.

(j) it cannot also be lost sight of that the appellants/defendants, taking advantage of the Rent Law which in Malpe Vishwanath Acharya and Others Vs. State of Maharashtra and Another, and in Raghunandan Saran Ashok Saran (HUF) Vs. Union of India and Others, has been held to be archaic, continued to occupy the property of the respondents/plaintiffs for over four decades at a rate of rent which can best be described as peanuts and obviously to the prejudice and detriment of the respondents/plaintiffs. The respondents/plaintiffs had no option but to keep on having the rent increased by 10% every three years. The same is also reason enough for not interfering with the rate fixed of mesne profits.

(k) the conduct of the appellants/defendants even now of notwithstanding the decree for ejectment against them and admitting there to be no ground of challenge thereto still refusing to handover possession, merely to coerce the respondents/plaintiffs into agreeing to waive off the mesne profits, also disentitles the appellants/defendants from any relief.

22. As far as the challenge by the respondents/plaintiffs to the costs imposed upon them is concerned, I do not deem it necessary to go into the controversy whether the respondents/plaintiffs are required to prefer cross objections/cross appeal for challenging the same. One of the reasons as aforesaid for issuing notice of the appeal was the prima facie view that the costs imposed are unjustified. Further the said costs have been imposed by the learned Addl. District Judge on his own and are not payable to the appellants/defendants. The said costs have been imposed not for any injury caused to the appellants/defendants but to uphold the principle, of a party to a lis being required to approach the Court with clean hands and to make full disclosure. I thus enquired from the counsel for the appellants/defendants whether not an Appellate Court in exercise of its appellate powers can on its own interfere with the said costs, if found to be unjustified. The counsel for the appellants/defendants has fairly chosen not to respond.

23. I do not find any justification whatsoever for the costs imposed by the learned Addl. District Judge on the respondents/plaintiffs. The principle aforesaid does not require a party approaching the Court to make disclosure even of the irrelevant facts. The counsel for the respondents/plaintiffs is again correct in contending that in a suit by the respondents/plaintiffs for ejectment of the

appellants/defendants as tenants, there was no need for the respondents/ plaintiffs to disclose the claim made by a third party of specific performance of an Agreement to Sell by the respondents/plaintiffs. The said claim of the third party did not come in the way of the respondents/plaintiffs taking action for ejectment of the appellants/defendants as tenants. No case of concealment of material facts or for punishing the respondents/plaintiffs therefor is made out.

24. Accordingly, though the appeal is dismissed but the judgment/order of the learned Addl. District Judge in so far as burdening the respondents/plaintiffs with costs of Rs. 50,000/- per respondent/plaintiff is set aside. The appeal having been disposed of expeditiously and the counsel for the appellants/defendants having co-operated therein, no costs.

Decree sheet be drawn up.