

(2011) 03 RAJ CK 0148

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 14226 of 2009 and 11899 of 2010

Sunil Goyal and Another

APPELLANT

Vs

Additional District Judge, Court No. 8, Jaipur and Others

RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, Order 6 Rule 17, 151
Constitution of India, 1950 — Article 136, 141
Criminal Procedure Code, 1973 (CrPC) — Section 151

Citation : (2012) 1 RLW 182

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Advocate : G.K. Garg, with Ms. Anita Agarwal, for the Appellant; K.S. Sharma and Bhartesh Goyal for Respondents No. 2 and 4, for the Respondent

Judgement

Narendra Kumar Jain, J.—Heard learned counsel for the parties. Both the writ petitions by both the parties arise out of one suit, therefore, they were heard together and are being disposed off finally by this common order.

2. Plaintiffs, (who are petitioners in Writ Petition No. 14226/2009 and Respondents No. 2 and 3 in Writ Petition No. 11899/2010) filed a suit for eviction in respect of rented premise way back on 01.08.1983 in the trial court, which was decreed in their favour on 23.05.2009. Being aggrieved with the same, the defendants filed an appeal before first appellate court alongwith an application for grant of stay against eviction of defendants under Order 41 Rule 5 read with Section 151 C.P.C. Learned counsel for the plaintiffs filed reply to the application and opposed the prayer regarding grant of stay against eviction decree and in alternate, it was submitted that in case, an interim order staying the execution of the decree of eviction is passed, then mesne profit may be increased, as per prevalent market rate, than the agreed rent during the pendency of the appeal. In support of his contention, he referred judgments of Hon'ble Supreme Court in Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., and Anderson Wright and Co. Vs. Amar Nath Roy and Others, , as well as of this Court in Madan Bansal

Vs. Ramnarayan Sharma, and Datu Mal and Others Vs. Seth Madan Gopal and Others, .

3. Learned first appellate court i.e. Additional District Judge No. 8, Jaipur City, Jaipur vide its order dated 26.08.2009 passed stay order against eviction of the defendants without increasing the amount of mesne profit @ Rs. 425/- per month only, as awarded by the trial court, as per agreed rent of 1983. Being aggrieved with the same, the Plaintiffs have preferred S.B. Civil Writ Petition No. 14226/2009 for enhancement of the amount of mesne profit of the rented premise as per prevalent market rate of rent during pendency of first appeal.

4. S.B. Civil Misc. Writ Petition No. 11899/2010 has been preferred by the defendants challenging order dated 31.07.2010 passed by the first appellate court, whereby the application filed by the defendants under Order 6 Rule 17 read with Section 151 C.P.C. for amendment in written statement has been rejected.

5. Submission of learned counsel for the plaintiffs-petitioners in Writ petition No. 14226/2009 is that it is settled law that while granting stay against eviction of defendants, appellate court, under Order 41 Rule 5 C.P.C., has got jurisdiction to impose any reasonable condition and can enhance the amount of mesne profit than agreed rent. The judgments of Hon''ble Supreme Court and of this Court were fully applicable in the facts and circumstances of the present case, which were wrongly distinguished by the first appellate court. He also referred two rent notes wherein rate of monthly rent of the properties situated at M.I. Road, Jaipur has been shown as Rs. 80/- per sq. feet and Rs. 128/- per sq. feet. He further submitted that the rent notes submitted by him are of the year 2005, whereas present market rate of monthly rent is about Rs. 150 sq. feet. The measurement of disputed rented premise is 800 sq. feet, it is a big showroom situated in prime location of Jaipur, i.e. M.I. Road, Jaipur, in front of Ganpati Plaza, a famous commercial complex and nearby All India Radio Office, Jaipur, therefore, a sum of Rs. 1,20,000/- per month should have been determined as mesne profit by the first appellate court in place of monthly mesne profit of Rs. 425/-, as per agreed rent.

6. Learned counsel for the respondents-defendants submitted that learned first appellate court rightly distinguished the judgments of Hon''ble Supreme Court as well as of this Court and rightly awarded mesne profit @ Rs. 425/- per month. He has also filed written reply to the writ petition alongwith one rent note dated 02.12.2008 of nearby shop, wherein property of the same size was let out @ Rs. 10,500/- per month and on that basis, he contended that at the most the market rate of monthly rent of the rented premise can be determined as Rs. 10,500/- per month and not Rs. 1,20,000/- per month, as claimed by the petitioners.

7. So far as writ petition No. 11899/2010 is concerned, learned counsel for the defendants-petitioners submitted that some properties of the plaintiffs were vacated and they got possession of the same, therefore, the subsequent events

with regard to availability of those properties to the plaintiffs were required to be considered while deciding the first appeal, as present suit for eviction was based on personal bonafide necessity, therefore, an application under Order 6 Rule 17 read with Section 151 C.P.C. was moved for amendment in the written statement, but trial court wrongly rejected the same vide order dated 31.07.2010, therefore, their application is liable to be allowed and amendment sought in the written statement should be allowed.

8. Learned counsel for the plaintiffs-respondents submitted that learned trial court has rightly rejected the application. However, during the course of arguments, he agreed that instead of allowing the amendment, which may further delay the matter, the court concerned be directed to consider the said subsequent events alongwith plaintiffs' explanation about it, given in the reply to the application, at the time of final hearing of the appeal.

9. I have considered the submissions of learned counsel for the parties and examined both the impugned orders, which are subject matters of both the writ petitions.

10. So far as Writ Petition No. 14226/2009 is concerned, I find that learned first appellate court has distinguished the judgment of Hon''ble Apex Court delivered in M/s. Atma Ram Properties (P) Ltd. vs. M/s. Federal Motors (P) Ltd. (supra) on the ground that the said judgment relates to Delhi Rent Control Act, whereas present case is under the provisions of Rajasthan Rent Control Act, and further that Hon''ble Apex Court has passed the order in Special Leave Petition. The first appellate court also distinguished the judgments of this Court in Madan Bansal vs. Ramnarayan Sharma (supra), and Datu Mal & Others vs. Seth Madan Gopal & Others (supra), on the ground that they relate to mesne profit awarded during pendency of second appeal, whereas it is first appeal.

11. The distinction made by learned first appellate court with regard to above judgments of the Hon''ble Apex Court and this Court is not proper and justified in the eye of law. All the cases were relating to one principle and provision of law i.e. Order 41 Rule 5 C.P.C., where Hon''ble Apex Court and this Court held that appellate court has jurisdiction to put the applicant under Order 41 Rule 5 C.P.C. on such reasonable terms as would, in its opinion, reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of appeal being dismissed. It appears that learned first appellate court without considering the ratio laid down in the above referred judgments, made distinction in a cursory manner, which is not proper for a Judicial Officer. The provisions of C.P.C. are applicable throughout the country and even if Atma Ram's case was relating to Delhi Rent Control Act, the provisions of Order 41 Rule 5 C.P.C. were considered and interpreted by Hon''ble Apex Court in the said judgment, therefore, the ratio laid down by the Hon''ble Apex Court was binding on first appellate court under Article 141 of the Constitution of India. Learned court below failed to take into consideration that judgments of this Court were relating to cases decided under

the provisions of Rajasthan Rent Control Act and judgment of Hon''ble Apex Court in Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) was relied upon. When this Court relied upon a judgment of Hon''ble Apex Court, then there was no reason for the first appellate court for not relying upon the said judgment and in observing that the judgment of Hon''ble Apex Court in Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) is on Delhi Rent Control Act and the same has been passed in SLP If in the opinion of learned court below, the judgment of Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) was with regard to Delhi Rent Control Act, then at least the judgments of this Court, which were relating to Rajasthan Rent Control Act itself, were binding on it. The distinction made by first appellate court is absolutely illegal. The wrong interpretation or distinction of a judgment of Hon''ble Supreme Court and this Court by subordinate court amounts to disobedience of the order of Hon''ble Supreme Court and this Court, therefore, the impugned order passed by first appellate court is contemptuous. It also shows that legal knowledge or appreciation of judgment of Hon''ble Apex Court, of the first appellate court is very poor. The distinction made by first appellate court that Hon''ble Apex court has passed the order in SLP is also not proper. The Apex Court, under Article 136 of the Constitution of India may, in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. Learned first appellate court has also committed an illegality in making a distinction for not following the judgments of this Court on the ground that the orders have been passed in second appeal whereas it was dealing first appeal. Hon''ble Apex court considered the powers of appellate court which includes first appellate court as well as second appellate court, therefore, the said ratio of the Hon''ble Apex Court was applicable in first appeal as well as in second appeal both. From the above, it reveals that first appellate court deliberately made a distinction and did not follow the ratio laid down by Hon''ble Apex Court in Atma Ram's case and this Court in Madan Bansal and Datu Mal's cases.

12. Hon''ble Apex Court in Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) considered the powers of appellate court while exercising the jurisdiction under Order 41 Rule 5 C.P.C. and held as under:

19. To sum up, our conclusions are:

(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.

(2) In case of premise governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of

the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premise at the same rate at which the landlord would have been able to let out the premise and earn rent if the tenant would have vacated the premise. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

(3) The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

13. The ratio of Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) was followed by Hon''ble Apex Court in another judgment in Anderson Wright & Company vs. Amar Nath Roy (supra). It is relevant to mention that three Judge Bench of Hon''ble Apex Court also followed the principles laid down in Atma Ram Properties (P) Limited vs. Federal Motors (P) Limited (supra) in Achal Misra Vs. Rama Shanker Singh and Others, , and Crompton Greaves Limited vs. State of Maharashtra, (2005) 11 SCC 547. Therefore, it is a settled law that appellate court has jurisdiction to put the applicant under order 41 Rule 5 C.P.C. on such reasonable terms as would, in its opinion, reasonably compensate the decree holder for loss occasioned by delay in execution of the eviction decree by grant of stay, while passing the stay order in his favour.

14. So far as determination of amount of mesne profit is concerned, learned counsel for the plaintiffs-petitioners has referred two rent notes dated 16.04.2005 and 21.06.2005 respectively. In first rent note, the property is situated at H-8, Bhagat Bhawan, M.I. Road, Jaipur, it was measuring 100 sq. feet and Rs. 8,000/- per month was fixed as rent from 01.06.2005 to 31.05.2008 subject to further enhancement of 15% after every three years and it was agreed that further rent will be Rs. 9,200/- from 01.06.2008 to 31.05.2011. As per this rent note, approximately monthly rent in the year 2005 comes to Rs. 80/- per sq. feet.

15. As per rent agreement dated 21.06.2005, property measuring 1560 sq. feet was let out @ Rs. 2 Lakhs per month, it is situated at Ganesham-I, Plot No. 239, M.I. Road, Jaipur, According to this rent agreement monthly rent comes to approximately Rs. 128/- per sq. feet.

16. The rent note dated 02.12.2008 placed on record alongwith reply to writ petition by learned counsel for the defendants-respondents shows that property situated on ground floor of Krishnayatan at M.I. Road, Jaipur measuring 26" X 14" and 14" X 8" (upper part) was let out @ Rs. 10,500/- per month plus house tax, service tax, urban development tax etc. extra with effect from 01.09.2008. As per submission of learned counsel for defendants and contents of reply to writ petition, the size of this showroom is similar to the size of rented premise in the present case and it is situated adjacent to the rented premise. No rejoinder to

the reply has been filed by learned counsel for the plaintiffs-petitioners. Since this property is of the same size and is situated adjacent to the rented premise, therefore, this rent note dated 02.12.2008 is of more value for the purpose of determining the monthly mesne profit of the present rented premise at this stage.

17. It is relevant to mention that property was let out in the year 1961. Suit was filed in the year 1983 and on the date of filing of the suit, the agreed rent was Rs. 425/- per month only. It is 28 years old matter. The property in dispute is situated in prime location of Jaipur City i.e. near Ganpati Plaza and opposite All India Radio Office, M.I. Road, Jaipur. Therefore, learned first appellate court committed an illegality in not increasing the amount of mesne profit as per reasonable rate and in fixing old rate of 1983 i.e. @ Rs. 425/- per month while granting stay against eviction of tenant. It was a duty of first appellate court to compensate the decree holder reasonably for loss occasioned by delay in execution of decree by grant of stay.

18. After considering all the facts and circumstances of the case, I think it fit and proper to determine/fix the mesne profit of the rented premise @ Rs. 10,500/- per month on the basis of rent note produced and relied upon by the defendants/tenants themselves with effect from date of filing of application under Order 41 Rule 5 read with Section 151 C.P.C. before the first appellate court i.e. 29.06.2009.

19. So far as another writ petition relating to amendment in written statement is concerned, it is correct that present suit was filed in the year 1983 and it is 28 years old suit, but at the same time, it is also correct that relevant/material subsequent events are also to be considered. However, instead of allowing the application under Order 6 Rule 17, C.P.C., which may further delay the 28 years old suit, I think it fit and proper to direct the first appellate court to consider the material/relevant subsequent events mentioned in the application under Order 6 Rule 17 read with Section 151 C.P.C. filed by the defendants and reply thereto filed by the plaintiffs at the time of final hearing of the appeal.

20. Consequently, S.B. Civil Writ Petition No. 14226/2009 is allowed. Impugned order dated 26.08.2009 passed by Additional District and Sessions Judge, No. 8, Jaipur City, Jaipur in Civil Regular Appeal No. 23/2009 is set aside. Application filed by the defendants/appellants under Order 41 Rule 5 C.P.C. alongwith regular first appeal No. 23/2009 is allowed and operation of impugned judgment and decree dated 23.05.2009 passed by trial court in Main Civil Suit No. 131/1993(693/1983) with regard to eviction of defendants only, is stayed subject to a condition that the defendants/appellants shall pay/deposit mesne profit @ Rs. 10,500/- per month from the date of filing of application under Order 41 Rule 5 read with Section 151 C.P.C. i.e. 29.06.2009. The defendants are further directed to deposit all arrears of rent/mesne profit as per directions of the trial court and arrears of increased mesne profit w.e.f. 29.06.2009 as directed above due till date within a period of one month, as prayed by learned counsel for the defendants. Defendants will continue to pay future monthly mesne profit by 15th

day of each succeeding month during pendency of first appeal before first appellate court. It is also made clear that in case the defendants/appellants fail to pay the arrears of rent/mesne profit, as per directions of the trial court or arrears of increased amount of mesne profit, as directed above within a period of one month or fail to pay the amount of future mesne profit for consecutive two months, then the stay order against the eviction of defendants passed in the appeal, will be deemed to have been vacated automatically and it will be open for the plaintiffs to get the decree of eviction passed in their favour by the trial court executed even during pendency of first appeal. The amount already deposited by defendants will be adjusted while calculating the amount of arrears of mesne profit.

21. S.B. Civil Misc. Writ Petition No. 11899/2010 is disposed off with a direction to first appellate court to consider all the so-called subsequent events, as mentioned in the application under Order 6 Rule 17 read with Section 151 C.P.C. as well as reply thereto filed by the plaintiffs, in accordance with law, at the time of hearing of first appeal finally.

22. Learned counsel for the plaintiff submitted that suit in the present case was filed in the year 1983, therefore, a direction may be given to first appellate court to dispose off the appeal at the earliest. Learned counsel for the defendants has no objection in this regard. After considering all the facts and circumstances of the case, particularly that the suit relates to year 1983, I think fit and proper to direct the first appellate court to decide the appeal at the earliest but not later than a period of three months from the date of receipt/production of copy of this order.

23. Ordered accordingly. Registry is directed to send a copy of this order to Additional District and Sessions Judge No. 8, Jaipur City, Jaipur for compliance.