

Pawan Kumar Tibrewalla and anr. Vs. J. Thomas and Co. (Pvt.) Limited

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Court : Kolkata

Decided On : Feb-22-2008

Reported in : 2008(3)CHN49

Judge : Sanjib Banerjee, J.

Acts : Delhi and Ajmer-Merwara Rent Control Act, 1947; ;Code of Civil Procedure (CPC) - Sections 2(12) and 34 - Order 20, Rule 12

Appeal No. : GA Nos. 2937 and 1609 of 2006 and CS No. 173 of 1993

Appellant : Pawan Kumar Tibrewalla and anr.

Respondent : J. Thomas and Co. (Pvt.) Limited

Advocate for Def. : P.K. Das, Sr. Adv., ;D. Ghosh, ;A. Dutta and ;A. Basu, Advs.

Advocate for Pet/Ap. : Shibdas Banerjee, Sr. Adv., ;Reetobroto Mitra and ;Imtiaz Ahmed, Advs.

Judgement :

Sanjib Banerjee, J.

1. The advocate commissioner's assessment of mesne profits is assailed by both sets of parties: to a larger extent by the defendant on the monthly rate arrived at; and, to a lesser extent by the plaintiffs on the count of interest. The defendant

vacated the Lord Sinha Road building flat on October 31, 1999, having overstayed its invitation by some eight years after the expiry of the tenure covered by the lease. The inquiry into mesne profits of the third floor flat on one of the older highrises in the city was pursuant to a direction of court. The suit premises include an apartment with a carpet area of about 1804 sq.ft. which works out to a super built-up area of about 2405 sq.ft. In addition to the enjoyment of the flat came the servants' quarters of floor area of 60 sq.ft. translating to a super built-up area of 75 sq.ft. and a covered car parking space to accommodate a decent-sized car.

2. Under the lease of January 16, 1965, the defendant was required to pay monthly rent of Rs.950/- for a period of 21 years with an option for extension. The plaintiffs claimed possession upon asserting that the defendant was not entitled to remain in possession beyond October 31, 1991. In the suit the plaintiff sought mesne profits at Rs.2,000/- per diem or, alternatively an inquiry therefor. The advocate commissioner has recorded in his report, running into 23 pages, the reasons given by the plaintiff in seeking mesne profits at a high rate. The area in which the building is situated was once an up-market residential area that has fallen prey to commerce over the last two decades, though the building continues to be used for residential purpose. Before the commissioner the plaintiffs suggested that the building's proximity to the lungs of Calcutta around the Maidan on the one side and the glitz and glamour of yore of nearby Park Street on the other, would make many covet a flat at the building and thus command a high letting-out value. The defendant, as would be its wont, urged before the commissioner that the building had fallen into disrepair and mesne profits had to be assessed on the condition of the building rather than the location thereof.

3. Either sets of parties examined witnesses which, it appears, did not count for much with the commissioner and he proceeded to refer to all but arrive at an assessment of mesne profits quite a distance removed from the desperate suggestions thereto put forward by the parties. In the commissioner's assessment-and in all propriety he merely suggested - the plaintiffs were entitled to receive mesne profits at the rate of Rs.15/- per sq.ft. per month for a carpet area of 1900 sq.ft. including the servants' quarters and the covered car parking space. At such rate the monthly value suggested by the commissioner is Rs.28,500/- for a total of

Rs.27,36,000/- for the period of 96 (erroneously stated as 26) months. The commissioner suggested that the plaintiff would be entitled to simple interest at the rate of 6 per cent per annum on the entire quantum till realisation. The defendant challenges the suggestion of the rate of Rs.15/- per sq.ft. and the plaintiffs complain that interest at the rate of 6 per cent per annum is abysmally low. The two applications come as the epilogue to the suit. The defendant assails the commissioner's assessment on the basis in arriving at the figure. The defendant suggests that the commissioner did not disclose, upon his rejecting the overvalued and undervalued assessments of the respective parties, how he came about the figure of Rs.15/- per sq.ft. The defendant attacks the mental process that the report reveals, of the commissioner having based his approximation on the value of the property. Mesne profits, the defendant insists, cannot be a percentage of the value of the property but would be needed to be arrived at on other considerations. The plaintiffs say that they have resigned to accept the suggestion of the commissioner, save as to interest, but their acceptance should not be regarded as their complete agreement with the assessment. Despite the plaintiffs' acceptance of the rate, they say that the court should be mindful of the commissioner having suggested a uniform rate over a long period of time and that it is common knowledge that the booming real estate market in the 1990s would not have allowed the rate of rent to remain flat over a period of eight years.

4. The defendant has also argued that the commissioner had no brief to make any suggestion as to interest and such component must be completely erased. Only a court may grant interest in such circumstances, but no assessment thereof or suggestion with regard thereto may be made by the commissioner, according to the defendant.

5. The defendant relies on the judgment reported at : [1964]1SCR515 (Fateh Chand v. Balkishan Dass) to suggest that the value of a property need not be taken into account for assessment of mesne profits. Paragraph 17 of the report is placed in support of such contention:

17. The other question which remains to be determined relates to the amount of mesne profits which the plaintiff is entitled to receive from the defendant who kept

the plaintiff out of the property after the bargain had fallen through. It is common ground that the defendant is liable for retaining possession to pay compensation from June 1, 1949 till the date of the suit and thereafter under Order 20 Rule 12(c) CPC till the date on which possession was delivered. The trial court assessed compensation at the rate of Rs 140 per mensem. The High Court awarded compensation at the rate of Rs 265 per mensem. In arriving at this rate the High Court adopted a highly artificial method. The High Court observed that even though the agreement for sale of the property was for a consideration of Rs 1,12,500 the plaintiff had purchased the property in 1947 for Rs 63,000 and that at the date of the suit amount could be regarded as 'the value for which the property could be sold at any time.' The High Court then thought that the proper rate of compensation for use and occupation of the house by the defendant when he refused to give up possession after failing to complete the contract should have some relation to the value of the property and not to the price agreed as sale price between the parties, and computing damages at the rate of five percent on the value of the property they held that Rs 3150 was the annual loss suffered by the plaintiff by being kept out of possession, and on that footing awarded mesne profits at the rate of Rs 265 per mensem prior to the date of the suit and thereafter. The plaintiff is undoubtedly entitled to mesne profits from the defendant, and 'mesne profits' as defined in Section 2(12) of the Code Civil Procedure are profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but do not include profits due to improvements made by the person in wrongful possession. The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession. The assessment made by the High Court of compensation at the rate of five per cent of what they regarded as the fair value of the property is based not on the value of the user, but on an estimated return on the value of the property, cannot be sustained. The Attorney-General contended that the premises were governed by the Delhi & Ajmer-Merwara Rent Control Act 19 of 1947 and nothing more than the standard rent of the property assessed under that Act could be awarded to the plaintiff as damages. Normally a person in wrongful possession of immovable property has to pay compensation computed on the basis of profits he actually received or with

ordinary diligence might have received. It is not necessary to consider in the present case whether mesne profits at a rate exceeding the rate of standard rent of the house may be awarded, for there is no evidence as to what the 'standard rent' of the house was. From the evidence on the record it appears that a tenant was in occupation for a long time before 1947 of the house in dispute in this appeal and another house for an aggregate rent of Rs 180 per mensem, and that after the house in dispute was sold, the plaintiff received rent from that tenant at the rate of Rs 80 per mensem, and to the vendor of the plaintiff at the rate of Rs 106 per mensem. But this is not evidence of standard rent within the meaning of Delhi and Ajmer-Merwara Rent Control Act, 19 of 1947.

6. The defendant also relies on the judgments reported at : AIR 1965 SC1231 (Mahant Narayana Dasjee Varu v. Board of Trustees, Tirumalai Tirupathi Devasthanam) and AIR 1979 SC 1214 (Lucy Kochuvareed v. P. Mariappa Gounder and Ors.). The defendant cites the Tirupathi decision to urge that no interest on mesne profits may be granted. Paragraphs 55 and 56 of the Lucy Kochuvareed judgment are placed:

55. Even Mr. Ramamurthy has not been able to support this reduction in the rate of interest. It was after a long drawn-out litigation that the plaintiff got possession of the property. The trial court, therefore, rightly awarded the interest at the rate of 6 per cent per annum.

56. We, therefore, accept this contention and direct that interest as part of the mesne profits assessed in this case, shall be payable at the rate of 6 per cent per annum up to March 29, 1959 when possession was delivered in pursuance of the decree of this Court, to the plaintiff and further interest at 6 per cent per annum on the outstanding amount shall be payable till the date of payment.

7. : [2003]3SCR66 (Rajni Kumar v. Suresh Kumar Malhotra) is next placed by the defendant to assert that if the court finds that the commissioner was correct in providing for interest, no more than six per cent could have been suggested since the liability to pay the amount did not arise out of any commercial transaction. The judgments in the Tirupathi and the Lucy Kochuvareed are also relied on to show that award of interest at the rate of 6 per cent per annum is the usual practice. The

defendant says that if interest is to be awarded, six per cent is the accepted standard and refers to (Secy. of State v. Saroj Kumar Achariya Choudhury and Ors.) and (Babu Kedarnath Goenka v. Maharaj Kumar Babu Bageshwari Prasad Singh and Ors.) for the same proposition.

8. Section 2(12) of the Code of Civil Procedure defines mesne profits:

2. Definitions.-.

(12) 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

9. It is difficult to assess in an inquiry of such nature as to the quantum of profits that the person in wrongful possession of the property actually received. It is the other limb of the inquiry that may be more easily completed: the quantum of profits that the person in wrongful possession of the property might with ordinary diligence have received therefrom. What a person may with ordinary diligence have received from a property may loosely translate to its reasonable letting-out value. The parties here accept such position. The quantum of reasonable letting-out value can be arrived at only on a subjective assessment and would not admit of any mathematical precision. There are guides or indicators that the assessor may refer to or take as aids for the purpose of arriving at a figure, the value of the property being one of them. The market value of an immovable property may not be the sole factor in assessing mesne profits therefor. But reasonable letting-out value of an immovable property has some nexus with its market value. The Supreme Court judgment in the Fateh Chand case did not lay down as a proposition that the market value of a property would be altogether irrelevant for assessing mesne profits in respect thereof, what the Supreme Court said in such case was that the High Court had erred in assessing mesne profits on the basis of a return on the assessed value of the property. The definition of mesne profits includes within its fold an interest component. Mesne profits would cover the sum of the amount assessed for a particular time and the interest thereon for it not being paid at such time. There is no embargo, that the defendant can

demonstrate, that a commissioner may not assess the interest component of mesne profits. If the commissioner derived his authority to make his suggestion from an order of court, unless such order of court prohibited him from assessing the interest component of mesne profits, he was bound to include interest in his assessment of mesne profits. The argument that the defendant makes on the strength of Section 34 of the Code that only the court is empowered to grant interest, is not acceptable in the circumstances. For one, the commissioner makes no grant but files a report for the court's consideration. Secondly, upon mesne profits being assessed, with the interest component thereof, the court may allow further interest on the entirety of the mesne profits, including its interest component. The entirety of the assessed mesne profits, inclusive of its interest component, becomes the principal sum adjudged within the meaning of Section 34. Paragraph 56 of the Lucy Kochuvareed judgment recognises such position.

10. An assessment of the nature undertaken by the commissioner is substantially subjective and if it appears within a broad band answering the test of reasonableness, the court may not find fault with such assessment. The rate of Rs.15/- per sq.ft. is about triple of what the defendant suggested that should be the rate. Since such rate has been applied to the carpet area rather than the super built-up area as is the general practice, it is not as unreasonable as the defendant makes it to be. If such assessment has an element of unreasonableness, it is offset by it having been found to be constant over a period of eight years. It is not uncommon for rents in such locality as the suit premises is situate to be increased on an annual or biennial basis. Again, the commissioner has suggested interest on the total quantum, implying that interest should run at six per cent from the date that the entire principal component of mesne profits fell due. But interest would be due on the mesne profits payable for the first of the 96 months during which the defendant overstayed. There would be interest payable for the delay in tendering the assessed occupation charges for each of the 95 months preceding the last. The commissioner has not taken into account such aspect or has deliberately omitted interest for the period up to the last month of the defendant's occupation of the suit premises.

11. It would be better to take the entirety of the commissioner's suggestion as the assessment of mesne profits. Since the commissioner rejected the plaintiffs' suggestion as to the quantum of mesne profits but indicated no basis for arriving at an amount well in excess of what the defendant put forth, a fair balance may be struck by accepting the suggestion and rejecting the defendant's challenge as to the quantum of the principal component and the plaintiffs' grievance as to the interest.

12. Though the defendant says that no decree has been prayed for on the basis of the commissioner's report, the third prayer in the plaintiffs' application may be read as a request for a decree being passed in terms of the report. Accordingly, there will be a decree for the sum of Rs.27,36,000/- together with interest at six per cent per annum on such sum from November 1, 1999 till date which is assessed to be the mesne profits due to the plaintiffs and further interest on the entirety of the mesne profits at the rate of six per cent per annum till realisation. The parties will bear their own costs in these applications and the suit, CS No. 173 of 1993, along with GA No. 1609 of 2006 and GA No. 2937 of 2006 are disposed of by this order.

13. Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with all requisite formalities.

Later:

14. The defendant prays for a stay of operation of the decree. There will be a stay for four weeks.

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