2016 PLRonline 0104

Punjab and Haryana High Court

Ajay Tewari, J.

Angoori Devi v. Smt. Satya Bhama

C.M. No. 2343-CII-2014 in/and C.R. No. 6248 of 2011 (O&M)

06.04.2016

judgment

Ajay Tewari, J.:— This is an application for direction to the non-applicant-petitioner-tenant to deposit mesne profits/damages as per the market rent i.e. @ Rs. 14,000/- p.m. for the use and occupation of the tenanted shop/during the pendency of the present petition.

2. It has been averred that after the appeal filed by the applicant/landlord was allowed the tenant is in illegal use and occupation of the shop in question and the relation of landlord apd tenant has been terminated and therefore he is not entitled to continue to pay at the contractual rent @ Rs. 500/- p.m. It is further pleaded that the shop is situated in the main market at Mahavir Marg Road, Narnaul and the present market rent is not less than Rs. 14,000/- p.m. By way of example the lease deed of a similarly situated shop has been placed on record which is dated 06.04.2012 where the rent has been fixed at Rs. 14,000/- per month with the stipulation of 15% increase in every three years. Other instances have also been given and it has also been averred that apart from the locational similarities the area of the shops are similar to that owned by the applicant. It is therefore prayed that the mesne profits be fixed @ Rs. 14,000/- per month from the date of the eviction i.e. 11.08.2011 along with interest. In reply, it has been disputed that the area of the shop is 167 sq. feet and averred that it is in fact 124 sq. feet while the other shops of which example has been given are of much larger area and are even otherwise locationally better situated. It is further averred that in any case the non-applicant cannot be held entitled to the market rent but only ‘some compensation', and that too, from the date of application. The dispute ostensibly lies between a narrow compass but has thrown up the following issues:—

i) How are the Courts to balance the competing claims between ‘mesne profits at the market rates' and ‘reasonable compensation for landlord'?

ii) What is the date from which the mesne profits would be payable?

iii) Whether interest is payable on mesne profits?

iv) Whether mesne profits can be increased in lieu of long pendency of appeal?

v) Whether the amount fixed as mesne profits has to be handed over to the landlord or to be deposited with the Court?

3. Before discussing the same it may be profitable to review this latest judicial innovation. The East Punjab Urban Rent Restriction Act, 1949 (or for that matter other similar Acts) had no specific provision which laid down as to what would be the capacity in which a tenant would retain the tenanted property in the event of an order of eviction and how the landlord was to be compensated in case the tenant was granted a stay by the Superior Court. The matter came up before the Hon'ble Supreme Court in the matter of Atma Ram Properties

(P) Ltd. v. Federal Motors Pvt. Ltd., reported as 2005 (1) R.C.R. (Rent) 1. In that case, on the petition of landlord an eviction order was passed. The tenant filed an appeal and the Appellate Court while admitting the appeal granted stay of the eviction order subject to the condition that he would deposit in the Court Rs. 15,000/- p.m. in addition to the contractual rent which would be paid directly to the landlord. The Hon'ble Supreme Court in para Nos. 4, 8, 13, 15, 17 & 18 noticed as follows:—

"4.....Landlord-tenant litigation constitutes a large chunk of litigation pending in the Courts and Tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises. If the plearaised by the learned senior counsel for the respondent was to be accepted, the tenant, in spite of having lost at the end, does not loose anything and rather stands to gain as he has enjoyed the use and occupation of the premises, earned as well a lot from the premises if they are non-residential in nature and all that he is held liable to pay is damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent and a little amount of costs which is generally insignificant.

8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in the Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate Court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate Court is that in spite of the appeal having been entertained for hearing by the appellate Court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum.....

13. In Shyam Sharan v. Sheoji Bhai, 1978 (1) R.C.R. (Rent) 37 : (1977) 4 SCC 393, this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In Bhagwandas v. Mst. Kokabai, AIR 1953 Nagpur 186, thelearned Chief Justice of Nagpur High Court held that the rent control order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of "damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the rent control order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.

15. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

17. That apart, it is to be noted that the appellate Court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the tenant-appellant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is Statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate Court. While ordering stay the appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd., 1999 (1) R.C.R. (Rent) 251 : (1999) 2 SCC 325, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

18. 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 in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;

(2) in case of premises 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 premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. 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.”

4. The next judgment was in the matter of Anderson Wright and Co. v. Amar Nath Roy, reported as 2005 (1) R.C.R. (Rent) 624 : (2005) 6 SCC 489 : AIR 2005 SC 2457, wherein a three Judge Bench ofthe Hon'ble Supreme Court held as follows:—

“5. As held by this Court in Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., once a decree for eviction has been passed, in the event of execution of decree for eviction being stayed, the appellants can be put on such reasonable terms, as would in the opinion of the appellate court reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed. It has also been held that with effect from the date of decree of eviction, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises on being vacated by the tenant. While determining the quantum of the amount so receivable by the landlord, the landlord is not bound by the contractual rate of rent which was prevalent prior to the date of decree.

6. The learned counsel for the appellants submitted that the appellants cannot be held liable to pay anything more than the standard rent of the premises, in spite of the decree for eviction having been passed as the same is sub-judice. This submission needs a summary dismissal in view of the Judgment of this Court in Atma Ram Properties (P) Ltd.'s case (supra). Both the parties have filed affidavit and counter affidavit, placing on record material giving the Court an idea of the rate of rent generally prevalent in the locality where the suit

property is situated. Canara Bank on the first floor of this building is paying rent @ Rs. 25/- per sq. ft. other than maintenance and municipal taxes. One Rumpa Ghosh entered as the tenant in the year 2002 is paying rent @ Rs. 32/- per sq. ft. Taking an overall view of the material made available by the parties, we think that the appellants should, from the date of the decree of the eviction, pay mesne profits/compensation for use and occupation @ Rs. 15/- per sq. ft. subject to final determination of the same by a competent forum."

5. The next judgment was from our Court in the matter of Surinder Kumar…Applicant v. Rattan Lal…Non-Applicant, reported as 2006 (2) R.C.R. (Rent) 26. This Court held that even though the judgment in Atma Ram Properties (P) Ltd. (supra) was under the Delhi Rent Act the same benefit would be available to the landlord under the East Punjab Urban Rent Restriction Act, 1949.

6. Reference may also profitably be made to the other judgments of the Hon'ble Apex Court in the matters of Crompton Greaves Ltd. v. State Of Maharashtra., (2005) 11 SCC 547; Achal Misra v. Rama Shanker Singh, 2005 (1) R. C.R. (Rent) 558 : (2005) 5 SCC 531; Pradeep Kumar v. Hajari Lal, 2008 (2) R.C.R. (Civil) 257 : 2008 (1) R.C.R. (Rent) 348 : (2008) 3 SCC 299, Niyaz Ahmad Khan v. Mahmood Rahmat Ullah Khan, 2008 (1) R.C.R. 596 (S.C.) and The State of Maharashtra v. Super Max International Pvt Ltd., 2009 (2) R.C.R. (Rent) 246 : 2009 (5) Recent Apex Judgments (R.A.J.) 462 : (2009) 9 SCC 772 : AIR 2010 SC 722.

7. Pursuant to the above decisions disputes regarding fixation of mesne profits have proliferated exponentially. However, the exact contours have not yet been worked out. Both sides have placed reliance on a multitude of orders passed by different Courts fixing mesne profits. However, in no case have the issues which are delineated above been considered. As regards issue No. 1, on the one side is the landlord who claims that on eviction order being passed he would have to be compensated for any future use and occupation on the same rate at which he would have been able to let it out in the open market. For instance, in a subsequently instituted suit for mesne profits he would be able to claim the exact amount which he could have got in the open market. On the other hand, the tenant would claim that such amount cannot be fixed which the tenant can never afford to pay and be forced to vacate the premises without his claim being adjudicated, thus rendering his appeal infructuous, and this would hold true even if the increased amount is not paid to the landlord and is kept in an escrow account, to be handed over to the party who may be found entitled to the same at the conclusion of the lis.

8. In para 13 of Atma Ram Properties (P) Ltd. case (supra) their Lordships approved the decision of the Nagpur High Court to the effect that the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the real value of the property and not to be tagged to the rate of rent payable under the provisions of the rent control order. In para 17 also, their Lordships have quoted the case of Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd., reported as (1999) 2 SCC 325, wherein the Court had ordered the mesne profits which may be equivalent to the market rent. However in para 18, while drawing up the conclusions their Lordships have read down the doctrine to 'reasonable terms'.

9. In Anderson Wright and CO.'s case (supra) in para 5 their Lordships held that from the date of decree of eviction the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises being vacated by the tenant. However, while fixing the amount their Lordships noticed that the examples showed rent @ Rs. 32/- per sq. foot and Rs. 25/- per sq. foot for the first floor but fixed the amount of mesne profits at 115/- per sq. foot.

10. A learned Single Judge of the Bombay High Court in the matter of Chandrakant Dhannu v. Sharmila Kapur, passed in writ Petition No. 6858 of 2008, decided on 07.01.2009, after reviewing the entire law summarized the same. The relevant extracts are as under:—

"21. What emerge from these are:—

(a) The basic burden lies upon the landlord to prove and support his case of reasonable compensation/mesne profits. He must put on record material documents/compensation along with the affidavit to support his case of enhanced. The material if placed by the land-lord/Licensor/owner, the Court needs to consider the said material by giving full opportunity to the tenant/Licensee/Occupant/trespasser/obstructionists…….

(c) The Court also needs to consider the principle of Order 20 Rule 12 of the C.P.C. while determining this ad-interim compensation/mesne profits. The Court also needs to keep in mind as observed in Para 8 in Atma Ram (supra), "quantified by this Court in this order, is only a tentative ig opinion formed by the Court basis of material made available for the parties"……

(d) The Court, needs to consider and take note of (i) the Rent Control Legislation, governing the particular premises/Location/residential or non-residential area of the premises (ii) the age/nature of (iii) the construction of the building/premises (iv) the facilities in the premises and outside the premises, advantages and disadvantages (v) the market value and the rental value of the premises based on architecture/expert/valuation reports/opinion (vi) other instances of the rent/license fees of similarly situated premises (vii) the date of termination of the tenancy/license.

(e) The Court also needs to consider that the compensation was awarded as condition precedent should not be oppressive and unreasonable which in a given case, if tenant failed to pay, has no option but to suffer the execution of a decree, as observed by the Apex Court in Niyas Ahmed (supra). The user and the use of the premises are also material.

(f) The market value changes with time. The stamp duty is also changes accordingly. The rent/license fee/compensation so fixed at the interim period, based upon the market value may in a given case needs to be changed or re-fixed if case is made out. It may go up or go down if market value changes drastically.

(g) One cannot overlook that at the time of basic agreement, both the parties mutually agreed to the particular rent/Leave license fee irrespective of valuation of the property. Now, when the Court fixes the compensation/license fee, after termination of the tenancy, there is no question of any agreed rent or compensation. The Court decides the same based upon the material available/placed on the record read with other various factors as referred in the Judgment.

(h) One important aspect is that the Court, after giving opportunities to both the parties, needs to decide the interim and urgent issue of grant of provisional fair and reasonable compensation/occupation charges, based upon authenticated material produced on the record, pending the Appeal, summarily. There is no question of detail trial, but it is an essential condition precedent to grant stay of the eviction decree/order on the footing of Order 41, Rule 5 of Civil Procedure Code.

The final decision of the appeal should be uninfluenced by such tentative figure/order. Such provisional payment should be condition precedent but it is always adjustable. The amount so fixed in such proceedings is tentative figure. Such interim order/payment is always subject to the final result of the appeal……

(j) The cases of trespasser, unauthorised occupant, obstructionist need to be dealt with again on different footing than that of a regular tenant/protected tenant/licensee as they are not governed by the Rent Control Legislation. Such unauthorised or illegal occupants, based upon the material produced on record, after giving opportunity to them may be directed to pay such occupation charges/compensation, pending the Appeal, at the current market rate/rent which may be determined by the Court, taking note of interest of both the parties."

11. A perusal of the above judgment indicates that the Courts have drawn a balance between the two competing claims by fixing mesne profits at a rate between the contractual rent and the market rent. In the circumstances, it has to be held that there could be no straight jacket formula while fixing the amount of mesne profits in such cases and the Courts would have to be guided by the facts of each case and the

judgments extracted above.

12. Coming to the second question, learned senior counsel for the non-applicant-petitioners has argued that in this case the Civil Revision came up for hearing and the dispossession of the petitioner was stayed by order dated 13.10.2011 and the applicant-respondent was served on 22.11.2011. However, the present application was filed only on 03.02.2014 and therefore the applicant would be entitled to mesne profits only from the date of the application. He has further argued that there are many examples where the cause of action has accrued earlier but payment has been ordered to be made from the date of application. He has drawn the analogy of maintenance of wife under Section 125 Cr.P.C. and claims of compensation in motor accident cases. It is further argued that if a landlord filed a suit for mesne profits they would always be payable from the date of application.

13. Learned senior counsel for the applicant-respondent has however argued that in this case the eviction was ordered on 11.08.2011 and from that date the non-applicants-petitioners/tenants would be deemed to be in unauthorized occupation of the premises and thus would be liable to pay mesne profits from that date.

14. In my opinion, the argument of learned senior counsel for the non-applicant-petitioners-tenants cannot be accepted. It has to be kept in mind that the Courts as shown above have drawn a balance between the claims of the landlord and the tenant. Had it been a case where mesne profits were to be fixed at the rate of market rent the argument could have prevailed but in the present situation where Courts have held the landlord entitled to reasonable compensation the amount payable would be from the date of the eviction order i.e. the date when the tenant's possession became illegal. This however could not be extended to a case where, for instance the landlord moves an application after inordinate period of delay. Resultantly, the period for which the amount would be payable must be restricted to 3 years.

15. As regards the third question, learned senior counsel for the respondent has argued that once the Rent Act itself envisages that the landlord is entitled to interest on arrears of rent then the same principle would apply to mesne profits/damages for use and occupation. He has further argued that since the Courts have also used the term ‘compensation' and on compensation interest is payable from the date of cause of action the same principle would apply here as well.

16. In my opinion, the matter cannot be looked at only under the prism of the Rent Act. It has to be kept in mind that damages normally would have to include the component of accrued interest and only after the damages are computed on the date of judgment would future interest be payable. In this, context, the use of the word compensation in the above judgments would have to take colour from the context. The entire context is that of mesne profits which can further be explained as another phrase to explain damages for unlawful use and occupation and therefore the argument that under the Rent Act interest is payable on the rent accrued would not hold good to claim that interest is payable on the amount determined as mesne profits.

17. As regards question No.(iv), the same would be covered by sub-para (f) of para 21 of the judgment passed in Chandrakant Dhannu's case (supra) and it is therefore held that in appropriate cases the amount fixed as mesne profits may be subject to change.

18. As regards question No. (v), the same would be covered by the judgment of the Hon'ble Supreme Court in the matter of Super Max International Pvt. Ltd.' s case (supra) wherein it was held as follows:—

“48. Before concluding the decision one more question needs to be addressed: what would be the position if the tenant's appeal/revision is allowed and the eviction decree is set aside? In that event, naturally, the status quo ante would be restored and the tenant would be entitled to get back all the amounts that he was made to pay in excess of the contractual rent; That being the position, the amount fixed by the court over and above the contractual monthly rent, ordinarily, should not be directed to be paid to the landlord during the pendency of

the appeal/revision. The deposited amount, along with the accrued interest, should only be paid after the final disposal to either side depending upon the result of the case. In case for some reason the Court finds it just and expedient that the amount fixed by it should go to the landlord even while the matter is pending, it must be careful to direct payment to the landlord on terms so that in case the final decision goes in favour of the tenant the payment should be made to him without any undue delay or complications."

19. Thus it has to be held that the mesne profits should not be paid to the landlord during the pendency of the appeal/revision unless some special reasons have shown and the deposited amount should be put in a Fixed Deposit/Recurring Deposit which should only be paid after the final disposal to either side depending upon the result of the case.

20. Keeping in view the entire conspectus of facts, I deem it appropriate to fix the mesne profits @ Rs. 6000/- p.m. apart from the contractual rent from the date of eviction order. Ordered accordingly. Let the entire arrears of mesne profits be deposited by the non-applicants-petitioners before the trial Court within two months from the date of receipt of a certified copy of this order and the trial Court is directed to deposit the same in a fixed deposited in any nationalized bank. Future deposits be put in a Recurring Deposit and the amount so accumulated would enure to the party who would be successful. The application stands disposed of.

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21. Admitted.

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