(2016) 04 DEL CK 0187

DELHI HIGH COURT

Case No: RFA (OS) 124 of 2015, C.M. Appl. 27851 of 2015

India Tourism Development Corporation		APPELLANT
	Vs	
Anil Kumar Khanna		RESPONDENT

Date of Decision: April 22, 2016

Citation: (2016) 2 RajdhaniLR 636

Hon'ble Judges: Mr. S. Ravindra Bhat and Ms. Deepa Sharma, JJ.

Bench: Division Bench

Advocate: Ms. Rachna Agrawal, Advocate, for the Respondent No. 2B; Ms. Kaadambari Singh Puri with Ms. Jyoti Ojha, Advocates, for the Respondent No. 1; Sh. Avishkar Singhvi, Advocate, for the Respondent No. 3; Sh. Y.P. Narula, Senior Advocate with Sh. Sanjay Gupta a

Final Decision: Dismissed

Judgement

Mr. S. Ravindra Bhat, J. - The unsuccessful defendant (hereafter referred to as "the ITDC") appeals the decision of a learned Single Judge, who overruled its objections to the calculation of mesne profits for the period between 01.01.1980 and 28.02.2007 in respect of a property, i.e. described as Jeevan Group Mansion, Rs. Block, Radial Road, Connaught Circus, New Delhi (hereafter referred to as "the suit property").

2. The plaintiff sought to recover possession of the suit property by filing Suit No.119/1980. The property, in terms of the Suit, was a 297.30 square metre premise used as a showroom. The property was taken-over by the Custodian of Enemy Properties (hereafter "the Custodian") at the onset of the hostilities between India and Pakistan proceeding into the Indo-Pakistan conflict in 1965. The Custodian released the suit property to the plaintiffs on 21.02.1977. In between, the Custodian had rented out the property to the Department of Tourism, Govt. of India; the properties were subsequently made over to the India Tourism Development Corporation (ITDC). The plaintiff did not accept ITDC as its tenant; it did not also

accept any rent; he, therefore, filed a suit claiming possession and mesne profits. On 30.03.1981, issues were framed by the Court which tried the case. The issues framed were as follows:

"1. Whether the plaintiffs are the owners of the property in suit?

2. Whether the Custodian of Enemy Property created a lease in favour of the defendant? If so, could he not do so?

3. Whether the letter dated 21st February, 1977, Ex.P-1 does not amount to release of the property in favour of the plaintiffs? If so, is the possession of Defendant illegal?"

4. If this Court finds that the property stands released by virtue of Exhibit P-1 are the Plaintiffs bound to accept the Defendant as their tenant?

5. Whether the Plaintiffs are entitled to mesne profits, if any, and at what rate?

6. Whether the suit is barred under the provisions of Delhi Rent Control Act?

7. Relief."

3. On the basis of the evidence led, a learned Single Judge, by his judgment and order dated 05.02.2001 decreed the suit in full, directing delivery of vacant possession to the plaintiff and also directing that the plaintiff was entitled to a preliminary decree for mesne profits of Rs. 30,000/-, for the period 01.01.1980 to 31.01.1980. The learned Single Judge further directed an enquiry into the amounts that the plaintiff was entitled to by way of mesne profits. The ITDC carried the decree in appeal [RFA(OS) 18/2001]. This appeal was dismissed by the Division Bench on 20.10.2005. The matter was sought to be further appealed by way of a Special Leave Petition (SLP No.1569/2006) to the Supreme Court. By the order dated 13.02.2006, the Supreme Court held that the Petition was unmerited and accordingly rejected it. It, however, acceded to ITDC''s request that it be permitted to vacate the premises on or before 28.02.2007 subject to its furnishing an undertaking. The Supreme Court''s order dated 13.02.2006, disposing of the SLP is as follows:

"ORDER

Heard Mr. G.E. Vahanvati, learned Solicitor General for the Petitioner and learned senior counsel for the Respondents. We see no substance in this special leave petition which is liable to be dismissed.

However, at the request of the learned Solicitor General time to vacate the premises is granted upto 28th February 2007 on the Petitioner''s filing the usual undertaking by the competent officer within four weeks.

The special leave petition is dismissed."

4. In the meanwhile, the learned Single Judge had appointed a Local Commissioner to collect the evidence and furnish his report on the issue of mesne profits. In the course of enquiry, the appellant, i.e. ITDC urged that the total area of the suit property was not 297.30 square metres but much less and that any determination of mesne profits had to be on the basis of such actual area so determined. The other substantial argument made by the ITDC was that the order of the Supreme Court dated 13.02.2006 granting time to it to vacate the premises on 28.02.2007 had the effect of displacing the judgment and decree of the learned Single Judge and later the Division Bench, on an application of the doctrine of merger. The other two grounds urged were that the plaintiff could not claim mesne profits for any period beyond three years and that 15% increase claimed by the plaintiff was unwarranted.

5. The Local Commissioner reported that for the one month period between 01.01.1980 and 31.01.1980, the mesne profits that the plaintiff could claim was Rs. 30,000/-. For the subsequent period, the Local Commissioner took note of various judgments of this Court and held that by and large, 15% cumulative increase every year on the existing or contractual rate of rent was granted. That formula was applied and a 15% increase of rent every year from the rate of previous year was recommended. The Local Commissioner also recommended that 12% interest on the arrears of mesne profits payable for the end of each month of illegal occupation be granted.

6. Upon receipt of the report, the ITDC objected to it. It reiterated its objection as to the area, submitting that 297.30 square metres was not the actual area but something considerably lesser. This was sought to be substantiated on the basis of arguments and certain materials. It was also urged that before the vacation of the premises, an application was made pursuant to the liberty granted by the Court to the Local Commissioner to have the premises inspected and measured. The learned Single Judge in the impugned judgment, rejected the submission that a much smaller area, i.e. 175.67 square metres was actually under occupation by the ITDC. The learned Single Judge noticed the judgments relied upon by the ITDC with respect to the issue of merger, i.e. **Kunhayammed and Ors. v. State of Kerala 2000 (6) SCC 359**; **Gangadhara Palo v. Revenue Divisional Officer and Anr. 2011 (4) SCC 602** and **Union of India and Ors. v. Banwari Lal and Sons (P) Ltd. 2004 (5) SCC 304.** The learned Single Judge rejected the submission that the order in SLP displaced the direction to pay mesne profits and held inter alia:

"28.....There is nothing in this order to substantiate the contention of the defendant that it in any way modified the directions passed by the Single Judge. The Single Judge had held vide order dated 05.02.2001 held that for the period 01.02.1980 onwards till possession is received by the plaintiff, an enquiry is required to be conducted into the amount of mesne profits that the plaintiffs are entitled to. The Local Commissioner was appointed to determine the amount of mesne profits payable by the defendant. This direction is nowhere altered or modified."

7. The learned Single Judge furthermore pertinently noticed as follows:

"33. It would also be appropriate to mention that after the Special Leave Petition was dismissed on 13.2.2006, the defendant had filed an affidavit before the Supreme Court in the form of an undertaking. In the said affidavit which was filed by Mr. I. Majumdar on behalf of the defendant, a categorical averment was made that the defendant shall pay mesne profits from 1.2.1980 till the delivery of vacant possession in terms of the judgment and decree dated 5.2.2001 as under the provision of Order 20, Rule 12 CPC it notes that a Local Commissioner was appointed to determine the mesne profits. It is clear from this undertaking that the defendant did not interpret the order passed by the Supreme Court in the SLP dated 13.2.2006 to imply that the possession of the defendant of the suit premises till 28.2.2007 is legal and valid and that there is no obligation on the part of the defendant to now pay mesne profits. The submissions of the defendants are totally contrary to the undertaking given to the Supreme Court. The defendant cannot be permitted to resile from the undertaking given to the Supreme Court."

8. On the issue as to the question whether there was any limitation in determining the mesne profits beyond three years in view of Order 20, Rule 12 CPC, the appellant ITDC had relied upon **Chitturi Subbanna v. Kudapa Subbanna and Ors. 1965 (2) SCR 661.** The learned Single Judge noticed that the said decision and observations relied on by the ITDC were made by the Court in the context of rather peculiar facts where the decree holder had sought to profit from his delay in the execution of the decree for possession. In the present case, however, the learned counsel submitted that there was no such delay and in fact the plaintiff was prevented from going ahead and executing the decree by reason of the appellant approaching the higher court and subsequently the Supreme Court. The Supreme Court even extended the time for vacation of premises. The earliest opportunity when the decree could actually be executed was 01.03.2007. The learned Single Judge furthermore held that in the affidavit undertaking furnished by the ITDC, a categorical assurance to pay mesne profits till the date of handing-over possession was given. In these circumstances, the ITDC was foreclosed from blowing hot and cold and relying on its defaults and actions in depriving the plaintiff from what was originally his property. On the basis of these findings, the objections to the Local Commissioner''s report were rejected by the impugned order.

9. The learned Single Judge decided the rate of mesne profits payable by the ITDC for the area available in the suit premises. The rent for each year for the 27 year period between 01.02.1980 to 21.02.1980 was calculated. The actual amounts determined were reproduced in para 76 of the impugned judgment. The learned Single Judge also held that the plaintiff was entitled to 8% interest from the date mesne profits fell due, i.e. end of each month of illegal occupation till payment was received by the plaintiff.

Contentions of ITDC:

10. Mr. Y.P. Narula, ITDC''s senior counsel, argues that the learned Single Judge erred in law in not considering that the order of the learned Single Judge firstly merged with the order of the Division Bench dated 20.10.2005 and then with the order of the Supreme Court, since the Supreme Court while dismissing the special leave petition, granted time to vacate to the appellant/defendant. The executable order was the order of the Supreme Court. The judgment in Gangadhara Palo is relied on to say that rule of merger would apply. It is urged that the impugned judgment wrongly applied the judgment of the Supreme Court in Kunhayammed.

11. It is argued that the learned Single Judge failed to consider that the enquiry under Order 20, Rule 12 of the Code of Civil Procedure, 1908 was not tenable in the eyes of law in as much no such claim was ever made by the Respondents/Plaintiffs. The learned Single Judge failed to consider that it is a well-settled principle of law that unless the specific prayer for any enquiry in terms of Order 20, Rule 12 is made, no mesne profits can be granted. The learned Single Judge also omitted to consider the judgment passed by the Supreme Court in the case titled **Ganapati Madhav Sawant v. Dattur Madhav Sawant 2008 (3) SCC 183** wherein the Supreme Court observed the following:

"7. The High Court while deciding the second appeal, failed to notice that while issuing notice it was categorically noted that the plaintiff had not prayed for an inquiry relating to mesne profits in terms of Order 20, Rule 12 CPC and in the absence of any specific prayer for any inquiry into that aspect, the same could not have been granted."

12. It is argued that since no inquiry was sought, no mesne profits in terms of Order 20, Rule 12 CPC could be granted. It is further argued that since the Supreme Court''s order dated 13.02.2006, the Supreme Court permitted ITDC to remain in possession till 28.02.2007. Thus, even during the said period, its possession was permissive and, no mesne profits are payable. Assuming though not admitting that mesne profits are to be determined the same were to be assessed on the basis of fair rent. Counsel argued that the learned Single Judge failed to correctly apply the ratio of the judgment of the Supreme Court in Banwari Lal & Sons (P) Ltd. where the Supreme Court had observed the following:

"At the outset, we may point out that there are different methods of valuation, namely, income/profit method, cost of construction method, rent method and contractors'' method. In the present case, the arbitrator has applied the income/profit method. The above two issues are interconnected, as the arbitrator has assessed damages on the assumption that after 10.3.1987, the occupation and possession of the property was wrongful illegal and in the nature of trespass. Accordingly, he has assessed damages on the footing that the respondent was entitled to mesne profits. This assumption was wrong as the appellant was given time by this Court to remain in possession up to 31.3.1993. In Rao, Kameshwara: Law of Damages & Compensation by (5th Edn., Vol. I Page 528), the learned author

states that right to mesne profits presupposes a wrong whereas a right to rent proceeds on the basis that there is a contract. But there is an intermediate class of cases in which the possession though not wrongful in the beginning assumes a wrongful character when it is unauthorisedly retained and in such cases, the owner is not entitled to claim mesne profits but only the fair rent. In the present case, in view of the permission granted by this Court enabling the appellant to use and occupy the property up to 31.3.1993, it cannot be said that the possession of the appellant was illegal and wrongful and in the nature of trespass. In the circumstances, damages were claimable not on the basis of mesne profits but on the basis of fair rent."

13. ITDC contends that the learned Single Judge failed to consider that in terms of Rule 12(1)(c) of Order 20 of CPC, the determination of mesne profits cannot be computed beyond a period of three years from the date of preliminary decree for possession, i.e. three years from 05.02.2001. The learned Single Judge failed to consider the dicta laid down by the Supreme Court in the matter of Chitturi Subbanna (supra).

14. It is urged that the learned Single Judge failed to see that the nature and the area of the suit property was changed -which was admitted by the first Plaintiff in his application dated 24.02.2009 (filed on 24.02.2009) in para 4 in the following words:

"That the statement.....297.3 sq. mts. Further there is a significant difference in the manner in which the measurements have been taken as the Architect has taken measurements in accordance with the present status/area of the suit property, which has significantly changed since the time the Defendants were in occupation of the property as already noted by the Architects in their report. Moreover, ...be considered."

In view of the judgment of Division Bench coupled with the categorical admission on the part of the Plaintiff regarding change of area of the suit property, the learned Single Judge ought to have held that the mesne profits could not be determined in the absence of exact area occupied by the appellant/defendant at the relevant point of time.

Analysis and Findings

15. The above discussion would show that there are four questions which arise for determination in the appeal. Firstly, whether the decree of this Court could be merged with the order of the Supreme Court (dated 13.02.2006) so as to absolve the appellant of its obligation to pay mesne profits. Secondly, whether mesne profits could be claimed for a period of more than 3 years; thirdly, with respect to the actual area occupied by ITDC (whether it was 175 odd square metres, as asserted by it, or 297.3 square metres, as claimed by the plaintiff) and finally the correctness of the rate of damages/mesne profits decided by the learned Single Judge.

16. The decree of Court pursuant to the judgment of the learned Single Judge and that of the Division Bench clearly stated that ITDC was liable to pay mesne profits. The learned Single Judge also directed that the plaintiff was entitled to a preliminary decree for mesne profit of Rs. 30,000/- for the period 01.01.1980 till 31.01.1980. The Plaintiff was also held entitled to interest @12% per annum on the mesne profits determined from the date of its accruing till date. Pendente lite interest of 6% per annum from the date of decree till the date of payment was awarded. The Court also held that w.e.f. 01.02.1980 an inquiry had to be conducted regarding mesne profits that the plaintiffs were entitled to. The Court appointed Mr. B.S. Bannerjee, Advocate as Local Commissioner to determine the amount of mesne profits payable to the plaintiffs by the defendant from 01.02.1980 till date of delivery of possession.

17. There is no doubt that where an appellate Court modifies, upsets or alters the decision of the court of first instance (or the Court whose decision or judgment it hears an appeal from), the said appellate court''s decision or decree arising from it, overbears by operation of the doctrine of merger. This applies in cases where the Supreme Court not merely concurs with the order of the High Court, but makes its observations. Those observations to the extent they may indicate a relief, at variance with the judgment of the High Court, override a contrary decree or judgment of such High Court. This is the purport of Kunhayammed (supra) where it was observed that -

"v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

18. If the above precept is kept in mind, the doctrine of merger applies, if at all, only with respect to execute-ability of the decree, i.e. that the appellant was given the right to stay on in the premises for an extended period up to 28.02.2007, no more. To that extent alone, the decree of this Court (requiring the vacation of the suit property at any earlier date) was displaced. However, the Supreme Court made no observation with respect to nor did it disturb the determination of mesne profits/damages, ordered by this Court. Indeed, to the contrary, that Court even directed filing of an undertaking. The undertaking filed by ITDC even contained an averment that mesne profits, determined by the Court would be paid, as is evident

from the impugned judgment:

".....the defendant had filed an affidavit before the Supreme Court in the form of an undertaking. In the said affidavit which was filed by Mr. I. Majumdar on behalf of the defendant, a categorical averment was made that the defendant shall pay mesne profits from 1.2.1980 till the delivery of vacant possession in terms of the judgment and decree dated 5.2.2001."

In view of these facts, it is held that ITDC''s submission that the doctrine of merger operated so as to absolve it from paying mesne profits for a period prior to 13.02.2006 is misconceived and unmerited and, therefore, rejected.

19. The next issue is whether the provision in Order 20, Rule 12 CPC bars recovery of mesne profits for a period beyond 3 years. ITDC argued that under Order 20, Rule 12 (1)(c) CPC, the maximum period for which mesne profits could be granted is (i) till the date of delivery of possession to the Decree Holder (ii) relinquishment of possession by the Judgment Debtor, or (iii) the expiration of three years from the date of decree, whichever is earlier. It was argued that in the present case decree was passed on 05.02.2001. Hence, mesne profits were payable by ITDC, at the most, upto 04.02.2004 i.e. 3 years. The learned Single Judge rejected this contention. It was noted that in Chitturi Subbanna (supra) the Supreme Court had to deal with a situation where the plaintiff decree holder approached the Court in execution of the decree for possession after an unexplained delay. It was held in that case that such conduct amounted to gaining from the plaintiff''s defaults; he could not consequently obtain advantage due to such delay. In this case, two features stand out: firstly, the ITDC never contended that mesne profits could not be calculated for a period beyond 3 years. Further, if anything, it is seeking to take advantage of its litigative proclivities, because it kept the litigation pot boiling metaphorically speaking, by preferring an appeal to the Division Bench and thereafter, by special leave to the Supreme Court. These constituted legitimate impediment to the plaintiff securing back possession. Secondly, even in the undertaking filed, the ITDC never said that its obligation to pay arrears for determined mesne profits could not exceed 3 years. Most importantly, it occupied the premises for 27 years after the decree. This last conduct precludes its contentions; acceding to them would amount to permitting an unsuccessful litigant to occupy premises gratis despite use by it, after having suffered a decree of eviction. This contention is accordingly rejected.

20. The third issue is as to dimensions of the premises. The learned Single Judge, while discussing the Local Commissioner''s report, listed the following four circumstances:

(a) Averments of ITDC in its written statement, admitting the area:

"3. The allegations in para 5 is wrong and the defendants are perfectly in legal possession of the property measuring 297.3 sq.mts. on the southern side of the building which abuts on the Radial Road and the Middle Circle of Connaught Place,

New Delhi. The plaintiffs have purposely given wrong facts of the case to mislead this Hon''ble Court....."

(b) The admission of DW-1 Sh. I. Majumdar in his cross-examination dated 08.02.2007 where he admits that in the written statement the defendant has admitted the said area i.e. 297.3 sq. mtrs. to be in its possession.

(c) A preliminary decree for possession was passed for the suit property. The suit property was clearly defined in the plaint as the showroom measuring 297.3 sq. metres. The Local Commissioner noted that this position was not challenged before the Division Bench or in the Special Leave Petition filed by the defendant before the Supreme Court.

(d) The Local Commissioner also noted that the suit premises was in possession of Pakistan International Airways Corporation in the year 1958 and it was let out as a whole on a monthly rent of Rs. 345/- without specifying any rate separately for the covered area or carpet area or super area. At no stage prior to vacation of the suit property, i.e. in 2007 the defendant had raised the issue or dispute about the covered area or carpet area or super area. The Local Commissioner noted that the area of the suit property was hence always dealt as a single unit i.e. as a whole and not on the basis of carpet area or super area or covered area.

21. The Architect appointed by the Local Commissioner stated that the covered area of the premises was 292.71 sq. metres i.e. a variation of only 4.59 sq. metres. This variation was ignored as the property was inspected after its extensive renovation. The Commissioner noted that neither of the parties had filed any objections before him to the report of the Architect despite opportunities being given.

22. As against these undeniable facts and circumstances, ITDC relied on affidavit evidence of DW-1 I. Majumdar, DW-2 Ravinder Kumar and DW-3 Sanjiv Poswal. DW-1 stated that ITDC occupied 175.62 sq. meters and relied on a communication dated 01.03.1966 by which tenancy was transferred (Ex.DW1/1), on a lay out plan (Ex.DW1/2) and on a valuation report (Ex.DW1/3). DW1/1 is a letter written by Deputy Custodian of Enemy property dated 01.03.1966. It does not specify the area of the premises. DW1/2 is a site plan produced by ITDC, and a photocopy of a site plan, which contained some jotting on the side of the area without any explanation. The jotting on the first page of this document indicated an area of 29.26 sq. meters. The second page indicates 146.41 sq. meters. The total would be 175.67 sq. meters. The basis of the calculation was unknown. There was no explanation who prepared this document and under whose instructions it was prepared. Ex.DW1/2, concluded the learned Single Judge, had no evidentiary value and could not be accepted. As regards Ex.DW1/3, the undated valuation report Ex.DW1/3, that too was a photocopy; the original was by Pankaj Goel and Associates. It notes the area as 175.67 sq. meters of the suit premises. Ex.DW1/3 never indicated the basis of having accepted the covered area as 175.6 sq. meters. Likewise, DW-3 deposed that the

plaintiffs materially altered the premises and added 117.91 sq. meters. This calculation was extracted from the report of the Architect Arvind & Associates. However, the basis for arriving at this conclusion was not known or explained.

23. Having regard to the overall circumstances, we do not see how ITDC can urge that the decision of the learned Single Judge is unsound. The trail of admissions and omissions at every stage of the suit, prior to the determination of mesne profits, foreclose any debate as to the dimensions of the suit property. The written statement and the deposition of Sh. I. Majumdar in fact estop ITDC on the basis of the pleadings, from contending that the premises measured anything less than 297.3 square metres. That admission is not merely part of the record; it is also the basis of the decree of eviction. Furthermore, in a later stage, the same litigant cannot be allowed to set up an entirely different case, in order to escape or lighten its liability. Even the material brought on the record and discussed previously can hardly be credible or inspire confidence in the Court to hold that the dimensions were 175.6 square metres. This issue is held against ITDC.

24. The last issue is the rate of mesne profits decreed. This Court''s preliminary decree itself found that the initial rent had been agreed at Rs. 30,000/- per month for the month''s period 01.01.1980 to 31.01.1980. This rate went unchallenged by ITDC. The ITDC''s undertaking filed before the Supreme Court agreed to pay the plaintiff at this rate till determination of the mesne profits by the Local Commissioner. The Commissioner adopted this figure, i.e. @ Rs. 9.37 per sq. feet as the base rate for 1980. He relied on leases produced before the Court in various judicial pronouncements and reported that the base rate @ Rs. 9.37 per sq.ft. was to be subjected to enhancement by 15% every year. For this purpose, he relied on judgments of this Court i.e. **Sneh Vasish v. State Bank of India, 189(2012) DLT 153**; **Chander Kirti Rani Tandon v. M/s. VXL Lodging N. Boarding Services Pvt. Ltd. 197 (2013) DLT 266** and **M.C. Agarwal & Ors v. Sahara India Ors 183(2011) DLT.** These showed the general custom or practise by which rents were increased, year on year, in respect of commercial properties. This Court commends that view and finds no reason to depart from it. Conversely, it is noteworthy that the ITDC did not produce any evidence to refute such evidence or materials. In the circumstances, the determination of mesne profits in the impugned judgment cannot be found fault with.

25. In view of the above findings, this Court is of opinion that the appeal is unmerited. It is accordingly dismissed with costs. Counsel''s fee quantified at Rs. 1,50,000/- shall be paid to the plaintiff within four weeks.