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Calcutta High Court

Case No: Appeal from Original Order No. 116 of 1964

Dalhousie Properties Ltd. — APPELLANT

Vs

Jayantilal Ojha and Co. — RESPONDENT

Date of Decision: June 4, 1965

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2(12)

Citation: 70 CWN 56

Hon'ble Judges: G.K. Mitter, J; D.N. Sinha, J

Bench: Division Bench

Advocate: R.C. Deb, for the Appellant;A.K. Hazra, for the Respondent

Judgement

D.N. Sinha, J.

This is an appeal against an order of Ray, J. dated December 17, 1963 by which he allowed an exception to the report of the Assistant Master and Referee dated May 22, 1969. The facts are shortly as follows: The appellant, Dalhousie Properties Ltd. filed a suit in this court being Suit No. 1536 of 1958 on the 19th September, 1938 (Dalhousie Properties Ltd. v. Jayantilal Ojha & Co.) for recovery of possession of flat Nos. 81 and 82 in Stephen House at 5, Dalhousie Square, East, in the City of Calcutta, decree for arrears of rent, mesne profits and other reliefs. The defendant was a monthly tenant under the plaintiff in respect of the suit-premises at a monthly rent of Rs. 550/-, according to the English Calendar month. The defendant committed default in payment of rent from August, 1947 onwards and the tenancy was determined by a notice to quit dated 25th November, 1357 expiring at the end of December, 1957. As the defendant failed and neglected to vacate the said premises and deliver up possession to the plaintiff, the suit was instituted as stated above. The defendant entered appearance in the suit and contested it. The suit came up for hearing before G.K. Mitter, J. and the learned Judge passed a decree on January 18, 1960 inter alia directing the defendant firm to deliver up to the plaintiff, quiet, vacant and peaceable possession of the said flats and to pay Rs. 2750/- as arrears of

rent. The learned Judge directed a reference in respect of mesne profits in the following terms:--

And it is further ordered and decreed that further hearing of this suit be adjourned and it be referred to the Registrar of this Court with liberty to him to allocate the reference either to the Official Referee or the Assistant Referee of this Court to enquire and report as to what amount is due by the defendant to the plaintiff company with regard to mesne profits of the said premises in the plaint in this suit mentioned.

On 2nd June, 1960 the Registrar allocated the reference to the Assistant Master and Referee to enquire and report as to what amount was due by the defendant to the plaintiff with regard to mesne profits of the suit premises. On 10th March, 1961 the learned Assistant Master and Referee framed the following issues:--

1. What is the area in occupation of the defendant ?

2. What is the rental value per square foot on the basis of which the quantum of mesne profits of the suit premises should be calculated both when the suit was instituted as also when the decree was passed ?

3. What amount is due from the defendant to the plaintiff as mesne profits in respect of the space in occupation of the defendant ?

2. Both the parties adduced evidence before the learned Assistant Master and Referee and he, after hearing the parties, by a report dated 22nd May, 1963 found and reported inter alia, as follows:--

(a) The area in occupation of the defendant firm in the premises in the plaint in this suit mentioned was 2298 sq. ft.

(b) The mesne profits should be assessed at the rate of the rent which the defendant was paying, i.e., Rs. 550.00 nP. per month and working out on that basis the rent per square foot would be Rs. 0.2393 nP. approximately.

(c) The mesne profits due from the defendant to the plaintiff from 1st January 1958 to 31st May, 1963 in respect of the space in occupation of the defendant was Rs. 23,750.00 nP.

(d) By the said report he also recommended that each party should bear and pay its own costs of the reference.

3. Against this report, exceptions were filed by the plaintiff and it is these exceptions which came up for hearing before the Learned Judge in the Court below. The learned Judge, after considering all the materials before him, allowed the exception and varied the same, holding that the defendant should be directed to pay mesne profits at the rate of Rs. 60/- per 100 sq. ft... from January 1, 1958 till January 18, 1960 and thereafter at the rate of Rs. 87.50 nP. per 100 sq. ft. He allowed the costs

of the exception to the plaintiff. It is against this order that this appeal is directed. The learned Assistant Master and Referee inter alia held as follows:--

(a) The plaintiff had not called any witness to prove that it was ready and willing to take the suit premises on rent at a rate higher than the defendant was paying.

(b) It had not got the ''fair rent'' of the suit premises assessed by the Rent Controller under the provisions of the West Bengal premises Tenancy Act, 1956.

(c) The plaintiff sought to prove the rate of mesne profits through its existing tenants who were mostly tenants under some special agreements or arrangements entered into with it, rendering their tenancies out of the scope of the law of the land.

(d) The plaintiff failed to prove that the defendant firm was making a bargain out of the tenancy by realising anything more than what it was paying to the landlord.

4. In the result, it was held that the mesne profits should be assessed at the rate of rent which the tenant was paying i.e., Rs. 550/- per month and woring out on that basis rent per sq. ft. would be Rs. 0.2393 nP. approximately. The learned Judge has rightly pointed out that these were not relevant considerations for the adjudication of the mesne profits, in the facts and circumstances of the present case. It was further held that the ''fair rent'' as determined under the provisions of the West Bengal Premises Tenancy Act, 1956 was not the correct criterion. As I have stated above, the learned Judge held that the mesne profits should be paid at the rate of Rs. 60/- per 100 sq. ft. from January 1, 1958 till January 18, 1960 and thereafter at the rate of Rs. 87.50 per 100 sq. ft."

5. Before us, Mr. Hazra has urged a number of points of which only the following were pressed. The first point is that the learned Judge has taken into consideration tenancies of various floors of premises No. 5, Dalhousie Square, East while consideration should have been restricted to flats situated in the 5th floor, in which the suit-premises is situated. Secondly, he has argued that other tenancies had special conditions which made them inappropriate for comparison. Thirdly, he has argued that the defendant had let out a part of the flat to a sub-tenant with the consent of the landlord and as the subtenant was paying at the same rate at which the suit premises was let out, that should have been the amount of mesne profits ordered, inasmuch as the defendant could not even if he liked to get rid of the sub-tenant, let out the premises at a higher rent. Lastly, Mr. Hazra argues that the preliminary decree contemplated the passing of a final decree and this has not been passed.

6. Section 2(12) of the CPC defines mesne profits as follows:--

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.

7. Various authorities were cited before us, in order to establish the principles upon which mesne profits should be calculated. It is unnecessary to consider all of them because the principle to be followed has been laid down by the Supreme Court in Fateh Chand Vs. Balkishan Das, at 1413. Shah, J. said as follows:--

The plaintiff is undoubtedly entitled to mesne profits from the defendant, and ''mesne profits'' as defined in section 2 (12) of the CPC 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.

* * * *

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.

8. The next case that may be considered is a Bench decision of this Court Bhupat Rai & Co. v. Bhikum Chand Sugan Chand, AIR (1953) Cal. 94. In that case, Harries, C.J. held that it was notorious that rents of business premises in the business quarters of Calcutta varied with the position of the rooms let. The first floor is very much more advantageous than the second floor and the rent of a room on the second floor cannot be a reasonable guide for assessing the rent of a room on the first floor. We do not think that the learned Chief Justice was laying down a rule of universal application. Whether a particular tenancy would be more advantageous than another must necessarily depend on the facts and circumstances of each case. For example, a room on the ground floor might be of greater advantage than other floors because the tenant on the ground floor may have opportunities of displaying his goods etc. Whilst a room on the ground floor there would be very little to choose between a room on the 5th floor and a room on the 4th floor or the 6th floor. The comparison that has to be made must be a comparison based on the best available evidence, making due allowances for all existing circumstances. The tests applied by the Assistant Master and Referee are clearly wrong. The plaintiff has not got to go so far as to adduce evidence to the effect that there were prospective tenants actually ready to become tenants of the premises in suit. Without getting vacant possession, it would be difficult to induce persons to make firm offers. As pointed out by the Supreme Court, ''fair rent'' as defined by the Premises Tenancy Act would be relevant if there was in fact, evidence of the ''fair rent'' having been determined.

In this case also, there is no evidence of any such determination. It was not the duty of the plaintiff to have the fair rent determined. It is not a proper test to require the plaintiff to prove that the defendant firm was in fact making bargain out of the tenancy by realising anything more than what it was paying to the landlord. This brings me to the question of the alleged sub-tenancy. What was argued is that the defendant had sub-let a part of the suit premises to a sub-tenant with the consent of the landlord and therefore, the amount that was being paid by the sub-tenant was the standard for the fixation of mesne profits. I might deal with the question of sub-tenancy at once. Mr. Hazra has referred to certain correspondence with regard to the case of sub-tenancy. The first letter dated 22nd December, 1953 is at page 400 of the Paper Book, being a letter written by Jayantilal Ojha to Mr. S.A. Basil of Messrs. Talbot & Co. In this letter, it is stated that the tenancy will be in the name of Messrs. Jayantilal Ojha & Co., who will have permission to allow occupation by Messrs. National Cement, Mines & Industries Ltd., and their associates and also Messrs. Waxpol Industries Ltd., and their associates on the same terms as themselves. There is another letter at page 402 of the Paper Book in which Jayantilal Ojha signing as proprietor of Jayantilal Ojha & Co. states that he was applying for permission to sub-let a portion of the suit premises to Messrs. National Cement, Mines & Industries Ltd. and Messrs. Waxpol Industries Ltd. This letter is undated, but appears to have been written on the 22nd December, 1953. There is a third letter dated 28th December, 1953 appearing at page 403 of the Paper Book, in which Jayantilal Ojha & Co. are writing to Messrs. National Cement, Mines and Industries Ltd., that their landlords had confirmed the arrangement about sub-letting a portion of the suit premises to the said company. The amount was stated to be Rs. 405/- per month. The next letter to be considered, is dated 14th May, 1956 which appears at page 405 of the Paper Book, by which the National Cement, Mines & Industries Ltd., gave notice to M/s. Talbot & Co., describing them as Managing Agents, of Dalhousie Properties Ltd. to the effect that they were lawful subtenants in respect of a part of the suit-premises. The only evidence of there being an actual sub-tenancy is a receipted rent bill issued by Jayantilal Ojha & Co. Private Ltd., in favour of Messrs. National Cement, Mines and Industries Ltd., for the sum of Rs. 405/-, being the rent of portion of 81 and 82 Stephen House for the month of October, 1957. It will thus appear that the only evidence is that Messrs. National Cement, Mines and Industries Ltd., was a tenant of Jayantilal Ojha & Co. (Private) Ltd. The latter is not the tenant of the plaintiff and is not the defendant in this suit and there is no evidence of the plaintiff having given consent for sub-letting to Jayantilal Ojha & Co. (Private) Ltd., with whom they have no concern at all. There is a dispute as to whether Messrs. Talbot & Co. or Mr. S.A. Basil had any authority to allow sub-tenancies on behalf of the plaintiff. But, in the facts and circumstances of this case we are not concerned with the point any farther, because there is no evidence as to the occupation of any part of the suit premises by any sub-tenant of the defendant in this suit. The only evidence is of an alleged sub-tenancy created by Jayantilal Ojha & Co. (Private) Ltd., which is not the plaint ill''s tenant and, therefore,

we must proceed on the footing that no sub-tenancy has been established and we need not consider the matters at all. We now come to the main question, namely, on what footing the mesne profits should be calculated. As appears from the definition in section 2(12) of the CPC and the decisions mentioned above, the criterion would be the rent which the defendant actually received or might have received with ordinary diligence. The question is as to what is the evidence available in this case upon this point. Before the Referee, the plaintiff disclosed certain bills and a bill register. Mr. Hazra himself questioned Indu Bhusan Bhattacharjee who gave evidence on behalf of the plaintiff, about the bills and the bill-register and himself tendered a number of bills in a bundle marked Ex. 1, (See questions 310 to 381) and three pages in the bill register marked as Ex. 2. Mr. Hazra cross-examined the witness for the plaintiff exhaustively on exts. 1 and 2. We might, therefore, proceed on the footing that entries in Exts. 1 and 2 correctly show the particulars of tenancies in premises No. 5, Dalhousie Square as also the adjoining premises. We asked Mr. Deb appearing on behalf of the appellant to prepare a statement collecting together the particular fiats from Exts. 1 and 2 which bear comparison in the present case. In doing so, what has got to be borne in mind is that the relevant date for comparison is 1st January, 1958, from when the defendant came to be in wrongful possession of the suit premises. Therefore, the comparable dates would be near about January, 1958. The statement which has been prepared and a copy of which has been given to the other side, has been marked as Ext. 1 before us. It gives the relevant entries, but includes certain items in the years 1961 and 1962 which, strictly speaking, would be too remote, but are only relevant for the purposes of showing the trend of rise in rent. The tenancies are mostly on the basis of monthly lease. One or two are upon a long lease. These are mentioned in Ex. 1. Beyond the term, there is no evidence of any special term in the tenancies. It will be seen that on the 5th floor, in February 1958, room No. 93 was let out to Japan Engineering Consultant Office in India, upon a rental which amounts to 60 per cent, that is to say, Rs. 60/- per 100 sq. ft. In March 1959, room No. 94 was let out to Kishimoto Shoten Ltd., at the same per centage namely, Rs. 60/per 100 sq.ft. It will appear that room No. 116 on the 6th floor was let out on the 1st November, 1957 to Nichimen & Co. Ltd., at the the same rate namely Rs. 60/- per 100 sq. ft., and room No. 108 in the same floor was let out on the 1st February, 1958 to Messrs. B.N. Banerjee (P) Ltd., at the same rate namely, Rs. 60/- per 100 sq. ft. Room Nos. 64 and 65 on the 4th floor were let out on the 1st March, 1959 to General Interior Trade Co., at Rs. 65/- per 100 sq. ft. On the 1st March, 1958 room No. 10 on the 1st floor was let out to Cooperative General Insurance Society at the rate of Rs. 80/- per 100 sq. ft. and on the 1st July, 1957 room No. 19A on the same floor was let out to Messrs. R.N. Dutt & Sons at the rate of Rs. 100/- per 100 sq. ft. On the ground floor, a room in 4B, Dalhousie Square was let out on the 1st July, 1958 to British Electric & Pumps (P) Ltd. at the rate of Rs. 100/- per 100 sq. ft.

9. I have already mentioned above that it is reasonable to make an allowance for rooms situated in lower floors, but regard being had to the evidence placed before us in exhibits 1 and 2 before the Referee, as has been collated in Ext. 1 before us, it seems that the reasonable rate of mesne profits would be Rs. 60/- per 100 sq. ft.

10. The learned Judge in the court below has, after considering the evidence, come to the conclusion that the rate of mesne profits to be allowed should be Rs. 60 per 100 sq. ft. from January 1, 1958 till January 18, 1960, and thereafter, at the rate of Rs. 87.50 per 100 sq. ft. We agree that the rate should be Rs. 60/- per 100 sq. ft. from January 1, 1958 but we do not see the justification for increasing the rate to Rs. 87.50 after January 18, 1960. The result is that the judgment of the court below is upheld but with a slight variation, namely that the rate of mesne profits should be calculated throughout at the rate of Rs. 60/- per 100 sq. ft. from January 1, 1958 till possession is made over. The appeal is, therefore, only partially allowed to that extent. As regards the point made by Mr. Hazra that a final decree has not been passed, I don''t think we are called upon to decide this point in this application. This is an exception to the report which has been allowed to the extent aforesaid. The procedure now to be followed shall be in accordance with law.

The appellant will pay costs of the appeal assessed at 100 Gms. We do not disturb the order for cost made in the court below.

Mitter, J.

I agree.