

(2009) 09 DEL CK 0389

Delhi High Court

Case No: CS (OS) 3382 of 1991

Dr. Zulfiquar Ali Khan thru LRs
and Others

APPELLANT

Vs

J.K. Helene Courtis Ltd. and
Others

RESPONDENT

Date of Decision: Sept. 14, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6
- Delhi Rent Control Act, 1958 - Section 21
- Evidence Act, 1872 - Section 65, 74, 74(2), 77
- Land Acquisition Act, 1894 - Section 51A
- Registration Act, 1908 - Section 57

Citation: (2010) 2 ILR Delhi 151

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Deepali Chandhioke, for the Appellant; S.K. Gandhi, for Def-1 and Aakanksha Gandhi, for Def-3, for the Respondent

Judgement

S. Ravindra Bhat, J.

The plaintiff had sought for a decree of possession against the defendant, with damages and mesne profits. The suit was decreed, in part, by reason of an application under Order XII Rule 6, CPC ("CPC"), being IA No. 3162/1999, which was allowed on 07.03.2002. The Division bench, on 10.02.2003, dismissed the defendant's appeal. The defendant handed over possession of the premises on 30.12.2003. This court, on 02.04.2003, directed an enquiry for determination of the mesne profits.

2. The plaintiffs seek a sum of Rs. 34,58,250/- towards mesne profits alongwith interest for period 01.06.1989 to 31.10.1991 and further mesne profits form

01.11.1991 till possession was delivered i.e. till 31.12.2003 along with interest at the rate of 19.5% p.a. with quarterly rests.

3. The suit property i.e. "Salim Villa" at No. 19, Friends Colony (West), New Delhi, measures 2934 sq. yds. According to the suit averments, it comprises of 11 bed rooms with attached baths, fitted with sanitary ware, tubes, light fittings and fixtures, staff quarters on the first floor and garages. It was let out by the plaintiffs to the first defendant- (M/s. J. K. Helene Curtis Ltd. Hereafter "HC"), for ten years by a registered lease deed dated 1.6.1979 under the permission of the Rent Controller, Delhi u/s 21 of the Delhi Rent Control Act, 1958 (hereafter "DRC Act"). The lease period expired on 31.5.1989. The lease was for residential purposes. The monthly rent, in terms of the lease was initially fixed at Rs. 4500/- per month with 10% increase every three years; the rent was increased to Rs. 4950/- w.e.f. 01.06.1982 and then to Rs. 5400/- w.e.f. 01.06.1985 for the remaining lease period i.e. till 31.05.1989.

4. It is asserted in the suit that the current letting value is over Rs. 1,00,000/-, and consequently, the plaintiffs are entitled to mesne profits at an equitable rate and interest thereon at the rate of 19.5% p.a. The suit states that originally, there were six owners of the suit property i.e. four plaintiffs and second and third defendants. Later some disputes regarding the title of the third defendant sprouted, which is adjudicated upon by this Court in Suit No. 3144/1990. The plaintiffs claim that the co-owners have not accepted any rent or use and occupation charges after the expiry of the lease on 31.05.1989, except under orders of the court.

5. The second plaintiff (PW-1) tendered her affidavit-evidence affirming the contentions in the plaint and on the question of mesne profits. It was stated that at the time of filing of the suit i.e. 1991, the rate of monthly rent was Rs. 1,20,000/- for a similar property which later increased to about Rs. 5,00,000/- p.m. It was further stated that the first defendant has continued to pay amounts at the rate of the agreed lease rentals i.e. Rs. 5400/- p.m. The plaintiffs claim entitlement to mesne profit at the rate of Rs. 3,00,000/- p.m. for the period between 01.06.1989 to 31.12.2003 after adjusting the total amount paid by the defendants at the rate of Rs. 5400/-p.m. for that period. In support of their claim, the plaintiffs have placed on record certified copies of lease deeds in respect of properties situated in Friends Colony and New Friends Colony. The plaintiffs have examined two other official witnesses - Sh. Mukund Khante, Zonal Inspector, House tax Department, Municipal Corporation of Delhi (PW-2) and Sh. Sanjay Rawat, UDC, Office of Sub-Registrar, Mehrauli, New-Delhi (PW-3). PW-2 produced lease deeds (executed during 1997 to 2003), taken on record by the MCD for the purposes of computation of Property Tax; the same have been marked as "A" to "H". PW-3, produced certified copies of lease deeds filed by the plaintiffs exhibited as Ex. PW-3/1 and Ex. PW-3/2.

6. On behalf of HC, Mr. Umanath S. Amin, Dy. Manager, Accounts (DW-1) filed his affidavit-evidence stating about an agreement between the parties in terms of the

lease that any increase in existing charges of taxes or cesses, etc. shall be borne it i.e. first defendant. Further, it (HC) was permitted to carry out structural alterations or create any permanent fixtures and fittings to any portion of the premises. It was also allowed to assign, transfer, sublet or underlet or part with the possession of the premises or any part thereof for the whole or part of the lease period to any member of the JK organization or group. The burden of furnishing (paint, decor, etc.) was also to be borne by HC. A sum of Rs. 1,80,000/- was deposited as security with the lessor. In addition to the monthly rent of Rs. 5400/- (after it was increased in terms of the lease deed) HC also claims to be regularly paying a sum of Rs. 4320/- p.m. to one M/s. Superfine Decorators. It is alleged that as per an agreement between the Lessors and itself the said sum was paid towards hire charges of fixtures and furniture, however, the said facilities were never provided to it, further stating that the said charges were a part of the monthly rentals for the premises, which the defendant has regularly paid. The original of the said agreement, it claimed by HC, is in the custody of the plaintiffs. Thus, the defendant had to pay Rs. 9720 p.m. (rental for the premises plus hire charges for fixtures and fittings). It was asserted that at the time of letting the suit premises was in a dilapidated shape and not habitable, as such the first defendant carried out large-scale modifications, alterations and improvements after investing a sum of Rs. 2,00,000/-.

7. It is claimed that the entire flooring was changed, the kitchen and bathrooms were renovated, the premises was made air-conditioned which required heavy expenditure, etc. At the time of vacating the premises the first defendant handed over the same with all the fixtures and fittings and structural changes, as such the plaintiffs enjoyed the benefits on account of expenditure incurred by it. The market rent as asserted by the plaintiffs was denied and it was claimed that the plaintiffs are not entitled to any further amount above the monthly rent, which the first defendant has already paid till the vacation of the suit premises. DW-2, Sh. Faiz Murtaza Ali, in his evidence by way of affidavit further stated that all the alterations, modifications and renovations carried out on the suit premises was carried out after obtaining consent of the lessor, and they had knowledge of the same.

8. The question posed before the Court is a limited one, as to whether the plaintiffs are entitled to mesne profits, if yes, to what extent.

9. The Court has considered the pleadings of the parties and the documents in support of the competing claims. HC claims that the plaintiffs are not entitled to any amount towards mesne profits, in view of its assertion of having spent Rs. 2 cores on renovation and structural changes that it carried out on the premises and the fact that it has been paying the rentals as agreed under the lease, till the date of handing over the possession. Further, HC also claims that it paid Rs. 4320/- p.m. to one M/s. Superfine Decorators, as hire charges for fixtures and fittings, under an agreement with the lessor, which it (HC) alleges to be a sham. Under the terms of the lease HC was authorized to carry out structural changes to the premises

provided that it obtained prior written consent of the Lessors. Clause 5 of the lease deed, dated 01.06.1979 (Ex. P1) reads as under:

5. That the Lessee shall be entitled to make any structural alterations or any permanent fixtures and fittings to any portion of the said premises provided the Lessee obtain prior consent of the Lessors in writing which shall not be unreasonably withheld by the Lessors.

10. From the statement of both the witnesses of the first defendant, it appears that a prior written consent from the Lessors was not obtained for the alleged renovation etc. DW-1, during his cross-examination stated that-

No written consent was obtained by defendant No. 1 company from plaintiffs for making any structural additions and alterations for putting permanent fixtures in the suit premises.

DW-2, on being questioned whether any prior written consent of co-owners was taken before carrying out the alleged renovation/repairs, stated that-

It was not required because on most occasions of the renovations, except the last one, late Nawab Sahab himself used to be sitting there, since they have adjoining bungalow, and it was all done with their verbal consent and approval.

In response to another query he admitted to have read Clause 5 of the deed, and further stated that there were certain understandings between the Lessors and Lessees, who were family friends, and the same were always adhered to. He stated that on certain occasions letters were sent to the Nawab, to which he replied that it was unnecessary to send letters to him as he could see what was going on and that he had full faith in his family friends. DW-2 stated that most of the replies were verbal and conceded that the alleged letters were not filed on the record in this suit. Both the defendant's witnesses admitted that the lease did not provide that the plaintiffs were liable to make payments for the renovations/alterations etc. and that the first defendant has not preferred a counter-claim against the Lessors for recovery of amounts spent towards additions/alterations or putting permanent fixtures in the suit premises.

11. In view of the above discussion following points emerge. The first defendant did not obtain prior written permission from the Lessors for carrying out structural changes on the suit premises alleged by them; the letters alleged to have been written to the late Nawab to establish the structural changes to his knowledge on certain occasions are not part of the record. Therefore, the assertion remains unsubstantiated. Lastly, had it even been established that there was any written correspondence between the Lessors and the Lessee, the fact remains that the lease deed, which is admitted by both the parties, does not stipulate that the expenditure to be incurred by the Lessees for carrying out any structural changes were to be reimbursed by the Lessors. The court cannot be unmindful of the fact that from the

date of expiry of the lease period till the date of filing of this suit and even during the pendency of the proceeding, the HC never preferred a counter claim against the Lessors/plaintiffs for the recovery of the alleged sums; it has not sought a set off. AIR 1930 57 (Privy Council) is an authority for the proposition that "no amount of evidence can be looked into upon a plea which was never put forward". This was endorsed in [Nagubai Ammal and Others Vs. B. Shama Rao and Others](#), where it was explained that:

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence.

Therefore, in the court's opinion the plaintiffs are entitled to mesne profits for the whole period after expiry of the lease till the date of handing over the possession i.e. 30.06.1989 to 31.12.2003.

12. For the purposes of determining the amount of mesne profits the court has to consider the prevailing market rates of properties, (in terms of location and size) similarly placed as the leased premises. The defendants have already paid to the plaintiffs towards monthly rental of the premises for the period in dispute i.e. 30.06.1989 to 31.12.2003. In the Lease Deed the suit premises i.e. Salim Villa at No. 19, Friends Colony, New Delhi, is described to be having 11 bedrooms with attached bath rooms and with sanitary wares and tubs, light fittings and fixtures, staff quarters on the first floor and garages etc. The first defendant does not dispute the size of the suit premises and its location. The plaintiffs have placed on record copies of other lease deeds on which they wish to place reliance. PW3, Sh. Sanjay Rawat, UDC, Sub-Registrar, Mehrauli, New Delhi, has produced certified copies of lease deeds of two properties that are exhibited as Es. PW-3/1 and Ex. PW-3/2.

13. Section 65(e) of the Indian Evidence Act, 1872 lays down that secondary evidence may be given of the existence, condition, or content of a document, original of which is a public document within the meaning of Section 74 of the same act. Section 74 defines documents that are public documents. Section 74(2) states that private documents, public records of which are kept in any State, are "public documents". Further, Section 77 provides that certified copies of public documents may be produced in proof of the contents of such documents or parts of thereof, of which they purport to be copies. Till the year 2001 there was some difference of opinion among High Courts as to whether certified copies of registered agreements between private parties are admissible in evidence. The Supreme Court cleared the controversy through its pronouncement in [Land Acquisition Officer and Mandal Revenue Officer Vs. V. Narasaiah](#), . In that case the court was placed with the question as to whether certified copies of registered sale-deeds can be admitted in evidence for determining the value of a piece of land acquired under the provisions of the Land Acquisition Act, 1894, where the parties to the document are not

examined to prove it. The court, after considering Section 57 of the Registration Act, 1908 and Section 51A of the Land Acquisition Act, held that:

16. In the case of Section 51A of the LA Act also the position cannot be different, as it is open to the court to act on the documents regarding the transaction recorded in such documents. However, this will not prevent any party who supports or opposes the said document or the transaction recorded therein to adduce other evidence to substantiate their stand regarding such transactions. But it is not possible to hold that even after the introduction of Section 51A the position would remain the same as before.

17. In the light of the above discussion we are unable to concur with the observations made by the two judge bench in the decisions in *Inder Singh v. UOI* 1993 (3) SCC 340 and [P. Ram Reddy and Others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and Others](#), that even in spite of Section 51A of the Act certified copies of the sale-deed could not be considered without examining persons connected with the transactions mentioned therein.

14. In the Land Acquisition Act, Section 51A has been specially inserted so as to enable the court to rely upon a document in order to treat the facts stated in certain documents as evidence. The Court in that case also observed:

14. The words "may be accepted as evidence" in the Section indicate that there is no compulsion on the court to accept such transaction as evidence, but it is open to the court to treat them as evidence. Merely accepting them as evidence does not mean that the court is bound to treat them as reliable evidence. What is sought to be achieved is that the transactions recorded in the documents may be treated as evidence, just like any other evidence, and it is for the court to weigh all the pros and cons to decide whether such transaction can be relied on for understanding the real price of the land concerned.

In substance, what flows out of the above discussion is that certified copies of registered agreements between private parties may be accepted by the court as evidence of the transaction recorded therein without examining parties to the documents.

15. It is now for this Court to see whether the certified copies produced in evidence by the plaintiffs, are relevant for the purpose of this proceeding. The defendants have not disputed the contents of the lease deeds produced by the plaintiffs; nor have they placed on record any other document to support their contention that the plaintiffs" are not entitled to mesne profits. Ex. PW-3/1 Lease deed dated 03.06.1997 is in respect of a ground floor apartment consisting of 3 bedrooms with bathrooms, 1 dining-cum-drawing, 1 kitchen 1 family room and one servant's quarter at New Friends Colony. As per the lease the said property was leased out at Rs. 60,000/- p.m. Ex. PW-3/2 is Lease deed dated 26.06.2000 of another New Friends Colony premises, a plot admeasuring 500 sq. yds. constructed on Ground and First floor

consisting of three bedrooms, bathrooms, dressing rooms, separate drawing and dining space on both floors, separate kitchen, lounge, store rooms, servant quarter, garage, terrace, etc. The rent for the premises in Ex. PW-3/2 was fixed at Rs. 30,000/- p.m. for the first floor and Rs. 40,000/- p.m. for the ground floor. None of the lease deeds produced by the plaintiffs relate to property of the area or value as the suit premises. Thus, the lease deeds placed on record can merely indicate the extent of rental values. Para 19 of the plaint is worth noting for determining the amount of mesne profits:

19. The property in question, i.e. "Salim Villa" situate at 19, Friends Colony (West) has a monthly usufruct or rental value of over Rs. 1,00,000/-. In as much as the possession of the JKs of this property after 1.6.1989 is illegal and unauthorized, they are liable to pay to the plaintiffs the amount of Rs. 1,00,000 per month by way of mesne profits. On this, they are also liable to pay interest at commercial bank rates commencing from the date of accrual (i.e. end of the month) till date of payment.

The first defendant apart from baldly denying the claim of the plaintiffs, has not made any cogent efforts for controverting the plaintiffs' stand.

16. The first defendant had regularly paid a sum of Rs. 5400/- p.m. during the disputed period, i.e. 01.06.1989 to 31.12.2003. The assertion of the first defendant of paying Rs. 4320/- p.m. to one M/s Superfine Decorators remains to be merely so. The first defendant further claims that a sum of Rs. 1,80,000/- was paid at the time of executing the lease deed, therefore this amount ought to be adjusted against the final amount determined for the purposes of mesne profits. It was suggested by the plaintiffs during the cross examination of DW2 that the said sum of Rs. 1,80,000/- paid as security deposit by first defendant company to the co-owners was adjusted under the lease towards payment of rent as per Clause 8 of the lease deed (Ex. P1), to which DW2's response was that he was not aware of the same. Clause 8 of the lease deed reads:

8. The Lessee shall deposit with the Lessor a sum of Rs. 1,80,000/- (Rupees one lakh eighty thousand) only at the time of signing of the lease deed, out of which Lessee shall be entitled to adjust a sum of Rs. 2,500/- (Rs. two thousand and five hundred) only every month toward the rent payable by the Lessee from the month of June, 1979 till the month of May, 1985. It being the intention of parties hereto that till the said amount of deposit is adjusted as aforesaid, the Lessee shall pay only the balance of amount of the agreed rent per month hereinafter stated. It is further provided that Lessee shall make payment of the advance deposit and the rent as aforesaid by cheque/crossed Bank draft drawn in favour of Nawabzada Zulfiquar Ali Khan or any one of the joint Lessors.

17. It is clear on a reading of Clause 8 of the lease deed that the said amount was to be adjusted as per the designed scheme. The first defendant, for a period of almost 13 years (from the date of commencement of the lease period till the year, 1991

when this suit was instituted by the plaintiffs) remained silent on this and never raised a query as to whether the said amount was being adjusted as decided in terms of the lease. In the circumstances, it is concluded that the first defendant has not been able to substantiate its allegations of paying a monthly sum to one M/s. Superfine Decorators and non-adjustment of the amount of security deposit.

18. The question that remains to be determined by the court is the amount of mesne profits. The plaintiffs, besides Ex. PW-3/1 and PW-3/2, also rely on the deposition of PW-2, summons with the record of the Municipal Corporation of Delhi (MCD). He produced copies of Lease Deeds filed with the MCD; they were marked as Annexures A to H. The said witness was cross-examined by the defendants; though he conceded not being in-charge of the concerned area where the suit property is located; he was acquainted with the number of properties which were assessed to House Tax and other details. Out of the copies of eight Lease Deeds produced by him, six documents related to New Friends Colony. The documents marked "A" pertained to three Bedrooms Drawing-cum-Dining room ground floor property of New Friends Colony (A-5), a Lease Deed stating that the monthly rent was Rs. 60,000/-. The document marked "B" was a photocopy of the Lease Deed dated 26.06.2000 in respect of C-665, New Friends Colony. The premises let-out indicated portions of the ground floor; the lease rent agreed was Rs. 40,000/- for the ground floor and Rs. 30,000/- for the first floor. The exhibit marked "C" was the photocopy of the Lease Deed dated 09.01.1997 in respect of 32-A, Friends Colony (East). The premises comprised of a Living/Dining room with four Bedrooms, four Bathrooms, Kitchen etc; the rent agreed under the document was Rs. 1,00,000/- per month. Exhibit "D" pertained to four-storeyed building, i.e. 12-A, Friends Colony (West), and was dated 09.06.1997; the total monthly rent was Rs. 55,000/-. Exhibit "H", a copy of the Lease Deed dated 28.08.1998 pertained to premises No. 29, Friends Colony (West) consisting of the basement, ground and first floor. The rent agreed to by the parties was Rs. 2.75 lakhs. These premises were constructed upon a 670 square yards plot.

19. The defendants had submitted that the documents produced by PW-2 could not be defaulted to since he did not produce them in accordance with the Court's summons and that he was, in any event, unfamiliar with the area as that did not fall within his jurisdiction. The Court notices that this witness was cross-examined; undoubtedly, he conceded not having jurisdiction over the area. However, there was no source questioning that the documents were copies obtained from the MCD's records. In the circumstances, the said documents cannot be entirely discounted as is sought to be urged.

20. The court has already observed that neither Ex. PW-3/1 nor Ex. PW-3/2 relate to properties of same area or value as the suit property, yet the court is mindful of the fact the real estate market has registered a steep growth during the past two decades. Thus, it would be harsh on the plaintiffs if the court were to go by the 10%

increase in the basic lease amount pattern after every three years (as determined in the lease deed). Ex. PW-3/1 (year 1997 Lease Deed) relates to a three-bedroom, etc. ground floor apartment, which was rented out on a monthly sum of Rs. 60,000/- and Ex. PW-3/2 (year 2000 lease deed) relates to a 500 sq. yds. plot constructed on two floors was rented out on a monthly rent of Rs. 70,000/- jointly for both the floors. The said properties are much smaller in size and value than the suit premises, which admittedly admeasures 2934 sq. yds. and 11 bed-rooms etc.

21. On an overall consideration of the facts adverted to above as well as after taking into consideration the ruling of this Court reported as [S. Kumar Vs. G.R. Kathpalia and Another](#) ; [Vinod Khanna and Others Vs. Bakshi Sachdev](#) ; the Supreme Court judgment in UCO Bank v. Kalicharan (127) 2006 DLT 21 ♦ all of which have held that the Court should be alive to the spiraling rates of rent while considering the question of mesne profits or fixing use of occupation charges for the period or periods after tenancies are terminated. The Court is also mindful of its judgment in Mr. Zulfiquar Ali Khan v. Straw Products Limited CS (OS) 3381/1991 (decided on 16.02.2006). That case pertained to premises adjacent to the present suit premises where the original monthly rental was almost identical to what the parties had agreed in this case, i.e. Rs. 5,500/- per month with effect from 01.06.1979. The Court had directed the defendants to pay Rs. 1,00,000/- per month from the date of institution of the suit till September 2002, when possession was handed-over. This Court is also persuaded by the same reasons in addition to the above discussion.

22. The amount of mesne profits is thus determined at Rs. 1 Lakh per month from the date of expiry of the lease till the date possession of the premises was handed over to the plaintiffs (June, 1989 to December, 2003). The first defendant has paid a total sum of Rs. 9,45,000/- (at Rs. 5400/- p.m. from June, 1989 to December, 2003), the same is liable to be adjusted against the total amount of mesne profits, which aggregates to Rs. 1,75,00,000/- and after adjusting the amount already paid by the first defendant it comes to Rs. 1,65,55,000. Claim of interest is neither supported by any statutory provision nor by a contract executed between the parties; the same is, therefore, declined.

23. The plaintiffs are, therefore, entitled to a decree for Rs. 1,65,55,000/- (Rupees one crore, sixty five lakhs, fifty five thousand only), subject to payment of deficient court fees, with costs. It is also entitled to Counsel fee quantified at Rs. 1,00,000/-. The suit is decreed, in the above terms.