

Dalhousie Properties Ltd.

Vs

Surajmull Nagarmull

Civil Appeal No. 1743 of 1968

(CJI A.N. Ray, M.H. Beg, P.N. Shinghal JJ)

28.10.1976

JUDGMENT

SHINGHAL, J. –

1. This appeal by certificate is directed against the appellate judgment of the Calcutta High Court dated July 25, 1967 up-holding the trial Court's view that the "existing rents" would be a "fair measure" of the mesne profits claimed by the appellant.
2. The suit in question was filed by the appellant for possession of the suit premises and for mesne profits or damages, or an enquiry into mesne profits and damages, and other consequential reliefs. The trial Court granted a decree for possession and for arrears, as well as for mesne profits at the rate at which the premises had been let out to the defendant. It took the view that the rent permissible by the Rent Act should determine the mesne profits. The plaintiff felt aggrieved and claimed that he was entitled to mesne profits according to the "present rental value" of the premises which it assessed at Rs. 60 per 100 sq. feet. It preferred an appeal and as it has been dismissed by the impugned judgment of a Division Bench of the High Court dated July 25, 1967, it has come up to this Court in appeal by certificate.
3. It is quite clear from the plaint that the plaintiff specifically claimed, inter alia, that it was entitled to mesne profits and/or damages according to the "present rental value of the premises" i.e., at Rs. 60 per 100 sq. feet. The plaintiff in fact made an application under Order XXVI, Rule 9 of the Code of Civil Procedure on June 15, 1959, during the course of the trial stating that as the defendant had denied the correctness of the claim that the plinth area of the premises was 40,000 sq. feet, and had not stated what the actual and correct measurement was, it addressed a letter to the defendant on February 10, 1959 calling upon it to allow the plaintiff's agent to give inspection and to measure the premises. As that was refused by the defendant's attorney, the plaintiff prayed in its application that an injunction may be issued against the defendant directing it to allow the plaintiff, his servants and agents, to enter upon and measure the premises at the time fixed by the court or, in the alternative, to issue a commission to a person appointed by the court for making a local investigation and reporting the measurement of the area in the defendant's possession and the amount of the mesne profits for the same. Instead of examining that application and disposing it of on the merits, the trial Court merely ordered that it would "stand over" till the hearing of the suit. The suit was however decided on April 18, 1962 without disposing of the plaintiff's aforesaid application under Order XXVI, Rule 9, C.P.C. It may be that the trial Court had in view Form 23 of Appendix D of the Code of Civil Procedure which shows [in paragraph (3)] that a trial Court may grant a decree to the effect that an inquiry be made as to the amount of mesne profits from the institution of the suit until delivery of possession to the decree-holder, but, at the time of deciding the plaintiff's claim in the

suit, the trial Court did not order any such inquiry as it took the view that the rate of interest permissible under the Rent Act should determine the future mesne profits also. It is therefore obvious that the trial Court went wrong in denying the plaintiff an opportunity to prove the amount of mesne profits from the date of the institution of the suit until delivery of possession. The High Court did not correct the error while examining the plaintiff's appeal, and laboured under the mistaken impression that the plaintiff did not make any attempt to give evidence on the point during the course of the trial. That was obviously a mistake as the High Court failed to notice that the plaintiff had in fact been prevented from proving its claim for mesne profits at the "present rental value".

4. The appeal is therefore allowed, the impugned judgment and decree of the High Court dated July 25, 1967 are set aside and it is directed that the trial Court shall make an inquiry as to the amount of mesne profits from the date of the institution of the suit until delivery of possession after giving an opportunity to both the parties to lead their evidence. The appellant will be entitled to its costs from the respondent.

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