

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7380 OF 2006

Bureau of Indian Standards	..	Petitioner
VS.		
M/s. Goodwill Theaters Pvt. Ltd.	..	Respondent

Mr. A. A. Kumbhakoni – Senior Advocate with Ms Mamta Sodh, Mr. A. Roy and Mr. Rajesh Sahani for Petitioner.
Ms Ranjana Parikh for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 11 September 2015.
Date of Pronouncing the Judgment : 05 October 2015.

JUDGMENT :-

- 1] The challenge in this petition is to the following orders:
 - (A) Judgment and order dated 9 September 2005 made by the Small Causes Court in Misc. Notice No. 274 of 2002; and
 - (B) Judgment and order dated 7/8 September 2006 made by the Division Bench of the Small Causes Court in Misc. Appeal No. 3 of 2006.
- 2] In terms of the aforesaid impugned orders, the Petitioner has been directed to pay to the Respondent mesne profits at the rate of Rs.5,17,545/- per month along with interest at the rate of 6% per annum from 1 June 2000 till 30 April 2004 as also some other reliefs as specified therein.

3] The Petitioner, which is a statutory entity set up under the Bureau of Indian Standards Act, 1986 was a tenant in respect of the premises situate on the 3rd floor, Novelty Chambers, Grant Road Junction, Mumbai, admeasuring 3255 sq. ft. or thereabouts (suit premises) from the year 1972. The Respondent landlord instituted T.E. & R. Suit No. 60 of 1982 seeking recovery of possession of the suit premises, which was decreed by the Small Causes Court on 15 January 2001. An enquiry was directed to be made under Order XX Rule 12 of the CPC in respect of the mesne profits from 1 June 2000 till delivery of possession. Appeal bearing No. 551 of 2001 against the judgment and decree dated 15 January 2001 was dismissed by the Appellate Bench of the Small Causes Court on 18 September 2002. This Court, on 13 October 2003, dismissed writ petition no. 3128 of 2003 instituted by the Petitioner, questioning the decrees dated 15 January 2001 and 18 September 2002. The Hon'ble Apex Court, on 8 January 2004 dismissed Special Leave to Appeal (Civil) No. 24297 of 2003 filed by the Petitioners questioning the order dated 13 October 2003 made by this Court in writ petition no. 3128 of 2003. However, the Petitioner was allowed to operate from the suit premises for a period of four months from the date of the order, subject to the condition that the Petitioner pays compensation for this period at the same rate at which the rent was being paid earlier. On 30 April 2004, the Petitioner handed over the

physical possession of the suit premises to the Respondent – landlord.

4] On 27 November 2002, the Respondent landlord took out notice of motion no. 274 of 2002 in the original suit, seeking an enquiry into determination of mesne profits. Notice was served upon the Petitioner and both the parties led evidence in the matter. By judgment and order dated 9 September 2005, the Small Causes Court determined mesne profits at the rate of Rs.205/- per sq. ft. per month. The Appellate Bench of the Small Causes Court in Appeal No. 3 of 2006 instituted by the Petitioner has reduced the rate of mesne profits to Rs.159/- per sq. ft per month. The Petitioner, aggrieved by the determination of mesne profits, has preferred present petition.

5] Mr. Kumbhakoni, the learned Senior Advocate for the Petitioner contended that '*mesne profits*' as defined under section 2(12) of the CPC means the profits which the person in wrongful possession has actually received or might with ordinary diligence have received from the use of the suit premises. This concept is different and distinct from the concept of '*damages*' payable in terms of Sections 73 and 74 of the Contract Act. In the present case, the two Courts have failed to appreciate the distinction between the two

concepts and have applied the incorrect tests in the matter of determination of mesne profits. Mr. Kumbhakoni also submitted that since the Hon'ble Apex Court in its order dated 8 January 2004 had permitted the Petitioner to occupy the suit premises, that too, upon payment of compensation at the contractual rate of rent, the Petitioner could never have been regarded to be in wrongful possession of the suit premises. Since the possession of the Petitioner upto 30 April 2004 was not at all wrongful, there was no question of the Petitioner being required to pay any mesne profits, in respect of such possession. Mr. Kumbhakoni, placed reliance upon the decision of the Apex Court in the case of *Fateh Chand vs. Balkishan Dass*¹ and in the case of *Union of India vs. Banwari Lal & Sons (P) Ltd.*²

6] On the other hand, Ms. Parikh, the learned counsel appearing for the Respondent landlord submitted that measure of mesne profits is the value of the user of the suit premises and the said value of the user of the suit premises would be the prevailing market rentals in the area where the suit premises are situated. Applying such correct principles, the mesne profits have been determined and there is absolutely no jurisdictional error or perversity in such determination. Ms Parikh therefore submitted that there was no warrant to interfere with the impugned orders.

1 AIR 1963 SC 1405

2 (2004) 5 SCC 304

7] The rival contentions now fall for determination.

8] The contention of Mr. Kumbhakoni that since the Apex Court, after dismissing the Special Leave Petition against orders of eviction made by the three Courts, had granted the Petitioner period of four months to vacate the suit premises, means and implies that the possession of the Petitioner was not wrongful and further that the Petitioner was not liable to pay any mesne profits, cannot be accepted. In the first place, the Apex Court by dismissing the SLP on 8 January 2004, had declined to interfere with the orders made by the Trial Court, Appeal Court and this Court directing not merely the eviction of the Petitioner from the suit premises but also for payment of mesne profits. Clearly therefore, even the direction for payment of mesne profits made by the three Courts had not been interfered with by the Hon'ble Apex Court. The observations, to which Mr. Kumbhakoni made reference to in the judgment of the Apex Court in the case of *Banwari Lal & Sons* (supra), cannot be torn out of the context. In the said case, the Apex Court was not dealing with the fact situation as obtaining in the present case. In that case, the Apex Court was not concerned with decrees of eviction and payment of mesne profits, which had been upheld by the Apex Court itself. Accordingly, the Petitioner cannot avoid payment of mesne profits, on the basis that the Hon'ble Apex Court

whilst dismissing the SLP against eviction decrees had granted the Petitioner four months time to vacate the suit premises subject to payment of compensation at the contractual rate of rent.

9] A somewhat similar contention was rejected by the learned Single Judge of this Court Bobde, J. (as His Lordship then was) in the case of *Babulal Fattelaji Upadhyaya vs. Gajraj Hansraj Pugalia & Anr.*³ In the said case, it was held that direction to pay contractual rent till the tenant vacates the premises upon the landlord agreeing to give time, does not relieve the tenant from compensating the landlord on account of mesne profits, even though his tenancy was lawfully terminated. In other words, the right to recover mesne profits granted to the landlord upon the lawful determination of a tenancy and the unlawful occupation of the premises by the tenant cannot be extinguished by the mere grant of some time to vacate or some direction that contractual rent will be levied, during such extended period.

10] In so far as the actual determination of mesne profits is concerned, Mr. Kumbhakoni, the learned Senior Advocate submitted that the Petitioner was a statutory entity not involved in any commercial activity as such. Therefore, Mr. Kumbhakoni submitted that mesne profits could have been determined only on

3 2006 (5) Bom. C.R. 782

the basis of profits which the Petitioner, in alleged wrongful possession of the suit premises may have actually received or might, with due diligence have received from the suit premises. Mr. Kumbhakoni submitted that in the present case the two Courts have focused upon the issue of market rent which the Respondent landlord might have obtained, had the possession of the suit premises been delivered to the Respondent landlord, soon after the termination of tenancy. This according to Mr. Kumbhakoni was not at all the right test or an approach to be adopted in the matter of this nature. On this ground, Mr. Kumbhakoni urged that the impugned orders are required to be set aside. Mr. Kumbhakoni placed reliance upon the decision in the case of *Fateh Chand* (supra), in which it is held that normally a person in wrongful possession of immovable property has to pay compensation computed on the basis of profits actually received or with ordinary diligence might have received.

11] Again, it is not possible to accept the submission of Mr. Kumbhakoni. No doubt, Section 2(12) of the CPC defines mesne profits as profits which the person in wrongful possession has actually received or might with ordinary diligence have received from the suit premises. However, the measure of such mesne profits is ordinarily the market rent which the person in possession

of the suit property may, by ordinary diligence have obtained according to the prevailing rates for such premises and that the owner of the suit premises who may have been wrongfully dispossessed has lost during the said period. In the case of (*Rajah Bahadur*) *Dhanarajagerji vs. Rajah Panuganti Parthasarathy Rayanim Varu & Ors.*⁴ the Division Bench of the Madras High Court, relying upon a decision of the Privy Council has held that it is fair to presume that the person in possession may by ordinary diligence get rent according to the prevailing rates. Therefore, the plaintiff would be entitled to get mesne profits calculated or arrived at on the basis of prevailing rates or on the basis of what the person in occupation had actually received.

12] In the case of *M/s. Marshall Sons & Co. (I) Ltd. vs. M/s. Sahi Oretrans (P) Ltd. & Anr.*⁵, the Apex Court has held that it is a known fact that after obtaining the decree for possession of immovable property, its execution takes a long time. In such a situation for protecting the interest of the judgment creditor, it is necessary 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. At paragraph 4, the Hon'ble Apex Court has observed thus :

4 AIR 1933 Madras 825,

5 AIR 1999 SC 882

“4. From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the Respondent to deliver the possession to the appellant since the suit filed by the Respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to market rent is paid by a person who is holding over the property. In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour decree is passed and to protect the property including further alienation.”

13] In the case of *Mahant Narayana Dasjee Varu & Ors. vs. The Board of Trustees, The Tirumalai Tirupathi, Devasthanam*⁶, the Hon'ble Apex Court has held that section 2(12) of CPC which contains the definition of 'mesne profits', interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. This proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest from such income.

6 AIR 1965 SC 1231

14] In the present case, the Petitioner did not lead any evidence on the aspect of market rate or the quantum of mesne profits. Very fairly, therefore, Mr. Kumbhakoni, the learned Senior Advocate did not question the actual quantum of determination and his submission was based mainly upon the principle of determination adopted by the two Courts. The principle adopted by the two Courts being consistent with the law laid down by the Hon'ble Apex Court as aforesaid, there is no warrant to interfere with the impugned orders in exercise of jurisdiction under Article 227 of the Constitution of India.

15] In the aforesaid circumstances, there is no reason to interfere with the impugned orders. This petition is dismissed,. There shall be no order as to costs.

(M. S. SONAK, J.)

16] At this stage, Mr. Kumbhakoni, learned Senior Advocate for the Petitioner, seeks stay upon the execution of the decree for a period of twelve weeks from today, as the Petitioner would like to take recourse against this judgment and order before the Apex Court. Part of the decretal amount has already been deposited and in respect of part there is a bank guarantee, therefore, subject to amount remaining to be deposited and the continuance of the bank guarantee, the decree shall not be put into execution for a period of twelve weeks from today.

CERTIFICATE

“Certified to be true and correct copy of the original
signed Judgment.”