

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.344 OF 2014

The Chairman, Khadi & Village Industries Commission ... Applicants
Vs.
Roosbeh Mundegar Aga ... Respondent

Mr. S. C. Dube a/w. Mr. Nagendra S. Dube for Applicants.
Mr. V. Y. Sanglikar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 3, 2016

P.C. :

Heard Mr. Dube, learned Counsel for applicants and
Mr. Sanglikar, learned Counsel for respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants have challenged the judgment and decree dated 02.11.2011 passed by the learned Judge, presiding over Court Room No.10 of the Court of Small Causes at Mumbai as also the judgment and decree dated 27.03.2014 passed by the Appellate Bench of the Court of Small Causes. By these orders, the Courts below partly allowed the mesne profit application filed by the respondent, hereinafter referred to as 'plaintiff' and directed the applicants, hereinafter referred to as 'defendants' to pay Rs.1,00,000/- with interest @ 6% per month to the plaintiff for the period from February 2002 to 07.08.2006 by way of mesne profits. The Courts below also held that defendants are entitled to set-off in respect of amount paid by them by way of monthly compensation or rent from February 2006 till delivery of possession on 07.08.2006. Defendants are directed to pay amount of mesne profits to the plaintiff within the period of two months subject to the plaintiff paying court fee on amount of

mesne profit as per rule.

3. In support of this Application, Mr. Dube raised the following contentions:

- a. In the plaint, there was no pleading as regards claim of mesne profits. Even no relief was sought claiming mesne profits. He invited my attention to Order II, Rule 2 of C.P.C.
- b. No independent inquiry was held for fixing the quantum. The quantum fixed by the Courts below is exorbitant.
- c. The Courts below did not consider the period for which mesne profit is payable.
- d. The Courts below, and in particular the trial Court ought to have appointed the Commissioner as contemplated by Order 26, Rule 9 of C.P.C. for fixing the quantum of mesne profits.

4. In support of his submissions, he relied upon the following decisions:

- a. ***Shankar Vs. Bhaurao*, 2012 (2) Mh.L.J. 134;**
- b. ***Ganapati Nadhav Sawant Vs. Dattur Madhav Sawant*, (2008) 3 SCC 183;**
- c. ***Mohd. Amin Vs. Vakil Ahmad*, AIR 1952 SC 358;**
- d. ***Union of India Vs. Ibrahim Uddin*, (2012) 8 SCC 148;**
- e. ***Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit Vs. R. Chander*, AIR 2011 SC 41.**

5. On the other hand, Mr. Sanglikar supported the impugned orders. He submitted that basically Rent Act is not applicable as the defendants are exempted as per Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). He relied upon the following decisions:

- a. ***Shyam Charan Vs. Sheoji Bhai*, AIR 1977 SC 2270.**
- b. ***Madanappa v. Chandramma*, AIR 1965 SC 1812**

and contended that as the defendants are exempted from

application of the Act, plaintiff is entitled to claim mesne profits from the date of termination of notice. He further submitted that in view of the decision of this Court in C.R.A.No.155 of 2006 dated 30.08.2006, it is not open to the defendants to contend that as no relief of mesne profits is claimed in the Suit, plaintiff is not entitled to mesne profits.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record.

7. Mr. Dube submitted that there was no pleading in the Suit as also no relief was sought by the plaintiff claiming mesne profits, and therefore, the Courts below were not justified in awarding mesne profits. It is not possible to accept these submissions. It is not in dispute that the Suit instituted by the plaintiff was dismissed by the trial Court. The Suit was decreed in the appellate Court on 23.01.2006. While allowing the appeal preferred by the plaintiff, the appellate Court issued following directions:

“Defendants to pay mesne profit from February, 2002 till handing over possession of the suit premises as may be determined after conducting inquiry under Order 20, Rule 12 of C.P.C. Considering the defendants is Government undertaking, it will require sufficient time for shifting office, six months time is granted to hand over possession to the plaintiff. Respondents to pay costs of the appeal to the appellants and bear their own.”

8. It is not in dispute that aggrieved by this decision, defendants preferred Civil Revision Application No.155 of 2006. By order dated 30.08.2006, C.R.A. was rejected. Perusal of that order shows that defendants did not advance any argument as regards correctness of the direction issued by the appellate Court, more particularly extracted hereinabove. In other words, though this contention was available to the defendants in C.R.A. No.155 of 2006, defendants chose not to advance

the said contention. The contention is, therefore, clearly hit by principle of *constructive res judicata*. Defendants cannot be permitted to reopen that issue. Perusal of the direction, extracted hereinabove, shows that appellate Court directed the defendants to pay mesne profits from February 2002 till handing over possession of the suit premises. It is not in dispute that on 07.08.2006, defendants handed over possession to the plaintiff. Thus, the Courts below were justified in ordering the mesne profits from February 2002 till 07.08.2006, the date on which the suit premises was handed over to the plaintiff.

9. This brings me to consider the contention about fixation of quantum by the Courts below. Mr. Dube submitted that no independent inquiry was conducted for fixing quantum. It is not possible to accept this contention. Perusal of the record shows that plaintiff examined two witnesses. Defendants examined one witness. While considering the quantum, the Courts below have noted that the suit premises admeasures about 1366 (1266 sq.ft. + 100 sq.ft. loft). The suit premises is on the ground floor of the building situate at Gokhale Road (South) and Sayani Road at Mumbai. The Courts below have considered the evidence of P.W.2 Sam Phiroze Rao who has considered instance of premises let out by Smt. Renu Sharma to the State Bank of Patiala. The Courts below also noted that defendants did not adduce any evidence for fixing mesne profits. After considering the material on record, the Courts below were of the view that the market rent of the suit premises must be around Rs.1,00,000/- per month. In fact, though the plaintiff claimed mesne profits @ Rs.1,85,780/- per month, the Courts below did not accept that claim. In view thereof, I do not find any merit in the submission of Mr. Dube that in the absence of any material on record, the Courts below fixed quantum @ Rs.1,00,000/- per month, which is exorbitant. Considering the area of the suit premises, locality and user of the suit

premises, namely commercial user, I do not find that the Courts below committed any error in fixing the quantum.

10. Mr. Dube further submitted that the trial Court should have appointed Commissioner as per Order 26, Rule 9 of C.P.C., however, no material is produced by the defendants that precluded them from applying to the trial Court for appointing the Commissioner. That apart, even defendants could have examined Valuer in support of their case. However, no such attempt was made by the defendants. On the basis of the evidence on record, the Courts below have concurrently held that plaintiff is entitled to mesne profits @ Rs.1,00,000/- per month from February 2002 till 07.08.2006.

11. Mr. Dube relied upon decision of **Shankar** (*supra*). In that case, the learned Single Judge relied upon decision of **Ganpati Madhav Sawant** (*supra*) and observed that in the absence of any pleadings or prayers in the Suit, inquiry in mesne profits cannot be ordered. In the case of **Ganpati Madhav Sawant** (*supra*), the Apex Court considered its earlier decision in **Mohd. Amin** (*supra*). In paragraph 20, the Apex Court considered submission advanced on behalf of the defendant that High Court erred in awarding to the plaintiffs mesne profits even though there was no demand for the same in the plaint. The learned Solicitor General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but submitted that the claim for mesne profits will be included within the expression “awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto”. It is in that context, the Apex Court observed that claim of mesne profit was not included within this expression and High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. I have noted earlier that

aggrieved by order dated 23.01.2006 of the appellate Court, defendants filed C.R.A.No.155 of 2006 which was rejected by this Court. In view thereof, it is not open to defendants to reopen that issue. For the reasons recorded earlier, I do not find that the decisions relied by Mr. Dubey advance the case of the defendants. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

12. At this stage, Mr. Dube orally prays for continuation of the ad-interim order dated 08.10.2015 for the period of 8 weeks from today. He assures that no further extension shall be sought. Mr. Sanglikar submits that defendants have furnished Bank Guarantee in the sum of Rs.60,00,000/- and the same shall be kept alive. Mr. Dube, upon instructions, states that Bank Guarantee is in the sum of Rs.62,00,000/- and the same shall be kept alive and shall not be encashed until further orders of the Court. Statements made by Mr. Dube, on instructions, are recorded.

13. In view thereof, notwithstanding dismissal of C.R.A., ad-interim order dated 08.10.2015 shall continue for the period of 8 weeks from today with a clear understanding that no application for extension shall be made and entertained by this Court. Defendants shall keep Bank Guarantee in the sum of Rs.62,00,000/- alive and shall not encash the same until further orders of the Court. Order accordingly.

(R. G. KETKAR, J.)