

IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
CIVIL REVISION APPLICATION NO.368 OF 2016

|                        |     |             |
|------------------------|-----|-------------|
| Indokem Limited        | ... | Applicant   |
| Vs.                    |     |             |
| Sudhir Bahi and others | ... | Respondents |

Mr. P. S. Dani, Senior Advocate a/w. Mr. Chetan Kapadia, Mr. Sheelang Shah, Ms Shaheda Madraswala and Mr. Tushar Mittal i/b. Bharucha & Partners for Applicant.

Mr. Vaibhav Sugdhare a/w. Mr. Deepak Lad i/b. Advani & Co. for Respondent No.1.

**CORAM : R. G. KETKAR, J.**  
**DATE : SEPTEMBER 22, 2016**

**P.C. :**

Heard Mr. Dani, learned Senior Counsel for the applicant and Mr. Sugdhare, learned Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant No.1', has challenged the judgment and decree dated 17.03.2011 passed by the learned Judge, presiding over Court Room No.19 of the Court of Small Causes, Mumbai in T.E.Suit No.239/258 of 2003 as also the judgment and decree dated 04.02.2016 passed by the Appellate Bench of the Small Causes Court in Appeal No.55 of 2014 to the extent of ordering an enquiry under Order 20, Rule 12 of C.P.C. against defendant No.1 from the date of the Suit till handing over the possession of the suit premises to the respondent No.1, hereinafter referred to as 'plaintiff'. In other words, defendant No.1 has not challenged the decree directing defendants No.1 to 3 to handover possession of the suit premises to the plaintiff.

3. In support of this Application, Mr. Dani has invited my attention

to - (i) paragraphs 1, 2 and 5 of the plaint; and (ii) written statements filed by defendants No.1 to 3. In paragraph 3(a) of the written statement filed by the defendant No.1, defendant No.1 contended that they are monthly tenant of the plaintiff in respect of the suit premises at a monthly contractual rent of Rs.2652.75/-, which they have regularly paid to the plaintiff during the subsistence of their tenancy in respect of the suit premises. In paragraph 3(b), defendant No.1 contended that they have granted the leave and licence to the second defendant some time in the year 1963, and with the knowledge and consent of the plaintiff and with effect from the year 1963. Defendant No.1 handed over exclusive possession of the suit premises to the second defendant under the leave and licence, which was subsisting as on 01.02.1973.

4. Mr. Dani also invited my attention to the written statement filed by the defendant No.2. In paragraph 4, defendant No.2 contended that the third defendant have been in occupation of the suit premises since prior to 01.02.1973 as the licensees of second defendant, and as such, they are protected under the repealed Bombay Rent Act. Defendant No.3 filed written statement and in particular in paragraph 4, contended that the third defendant was protected under the Bombay Rent Act. In paragraph 7, defendant No.3 contended that as the defendant No.1 tenant has sublet the premises prior to 01.02.1973, tenant as well as sub-tenant, both, are protected under the provisions of Bombay Rent Act and the said protection continued even under the Maharashtra Rent Control Act, 1999 (for short 'Act'). In paragraph 15, defendant No.3 claimed direct tenancy from plaintiff.

5. Mr. Dani also invited my attention to paragraphs 2 and 4 of the reply dated 30.08.2003 given on behalf of the defendant No.1 to the Advocate for the plaintiff to termination notice dated 25.07.2003. In

paragraph 2, defendant No.1 denied that they have unlawfully sublet or parted with possession of the suit premises as alleged. They had granted a leave and licence to one “Health Products Pvt. Ltd.” (defendant No.2) sometime in the year 1963 with the knowledge and consent of the plaintiff with effect from 1963. Defendant No.1 has handed over exclusive possession of the suit premises to Health Products Pvt. Ltd. (defendant No.2) under the said licence, which was subsisting on 01.03.1973. In paragraph 4, defendant No.1 accepted the termination of monthly tenancy in respect of the suit premises pursuant to the notice dated 25.07.2003 and accordingly, relinquished any further right, title and interest in respect thereof as tenants or otherwise with effect from 01.09.2003. It was further contended that defendant No.1 was not liable to deliver vacant and peaceful possession of the suit premises to the plaintiff in view of lawful possession of Health Products Private Limited (defendant No.2), who had acquired the status of protected licensees and of being tenant under the provisions of the Bombay Rent Act.

6. Relying upon the pleadings of the parties set out hereinabove, Mr. Dani submitted that defendant No.1 was not in possession of the suit premises and in fact, defendant No.3 is in actual physical possession of the suit premises. Defendant No.3 has claimed direct tenancy of the plaintiff. The Courts below were, therefore, not justified in ordering enquiry against defendant No.1. He also relied upon the decision of the Apex Court in the case of ***Lucy Kochuvareed Vs. P. Mariappa Gounder*, (1979) 3 SCC 150** to contend that the person who is in wrongful possession of the suit premises is liable for mesne profits. He submitted that as defendant No.1 is not in wrongful possession of the suit premises, the Courts below were not justified in ordering enquiry against defendant No.1. In any case, defendant No.1 may be permitted to agitate that it is not liable to pay any mesne profits in the enquiry

proceedings for determining mesne profits.

7. On the other hand, Mr. Sugdhare submitted that the Courts below have passed the decree jointly and severally against defendants No.1 to 3. The Courts below have also directed enquiry into mesne profits against defendants No.1 to 3 from the date of the Suit till the handing over possession of the suit premises to the plaintiff. He submitted that the decision in the case of **Lucy Kochuvareed** (*supra*) is not applicable to the facts of the present case. He has invited my attention to the decree passed by the Apex Court as reproduced in paragraph 10 of that report.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Plaintiff has instituted Suit against defendants No.1 to 3 inter alia on the ground that defendant No.1 is exempt from the application of the Rent Control Act in view of the fact that the share capital of defendant No.1 exceeds Rs.1 crore. In short, the Suit is instituted on the ground that as per Section 3(1)(b) of the Act, the provisions of the Act are not applicable to the defendant No.1 as it has a paid up share capital of Rs.1 crore or more. Defendant No.1 has not challenged the decree of possession and in fact, has accepted the termination of tenancy in reply of 30.08.2003. It is the case of the plaintiff that defendants No.2 and 3 are unlawful sub-tenants in the suit premises. The learned trial Judge decreed the Suit on 17.03.2011. The operative part of the order reads thus,

- “1. T.E. Suit No.239/258 of 2003 is decreed as under:
2. Plaintiff is entitled to recover the possession of the suit premises from the defendant nos.1 to 3.
3. **The defendant nos.1 to 3 are hereby directed to hand over the possession of the suit premises i.e. entire second floor of Sassoon Building, 143, M. G. Road, Fort, Mumbai - 400 001 to the plaintiff** within the period of three months from the date of

this order. In default, plaintiff is entitled to recover the possession of the suit premises by following due procedure of law.

4. **Plaintiff is entitled for the mesne profits, after an inquiry under Order 20, Rule 12 of C.P.C. from the defendant nos.1 to 3 from the date of the suit till the date of handing over the possession of the suit premises to the plaintiff.**

5. Defendant nos.1 to 3 shall pay costs of the suit and bear its own.

6. Decree be drawn up accordingly.

(emphasis supplied)”

9. Aggrieved by this decision, defendant No.1 and defendant No.3 filed separate appeals. By judgment and decree dated 04.02.2016, the appellate Court dismissed the appeal preferred by the defendant No.1. During the course of the hearing, learned Counsel for the parties submitted that appeal preferred by the defendant No.3 is also dismissed by the appellate Court.

10. Mr. Dani submitted that as defendant No.3 is in actual possession of the suit premises, the Courts below were not justified in ordering enquiry of mesne profits against the defendant No.1. He relied upon the decision of the Apex Court in the case of **Lucy Kochuvareed** (*supra*). In that case, plaintiff had instituted Suit for specific performance of agreement dated 22.05.1950 made by defendant No.1 - Soliappa Chettiar for selling factory, possession and mesne profits. On 07.07.1950, plaintiff issued notice through his Advocate to defendant No.1. Defendant No.1 replied the notice on the same day inter alia contending that the factory was in possession of one Neelakanta Iyer as lessee. On 23.08.1950, plaintiff instituted Suit in the District Court, Trichur. On 23.12.1950, Court appointed a Receiver to manage the suit property. On 05.03.1951, T.V. Kochivareed (the deceased husband of the appellant, Lucy Kochivareed) obtained an assignment of the lease from Neelakanta Iyer. On 08.03.1951, defendant No.1 executed a sale deed of the suit property in favour of defendant No.2, George Thatil,

who is the nephew of defendant 3. On 21.03.1951, defendant 3 obtained a lease of the suit property at a rent of Rs. 15,000/- for a period of one year from the Receiver. On 28.08.1952, District Court, Trichur decreed the suit for specific performance and mesne profits. Two appeals were preferred in the High Court-one by defendant No.3 and the other by defendant No.2. High Court allowed the appeals and dismissed the plaintiff's suit on 31.03.1953. Plaintiff preferred Civil Appeal No.129 of 1956 in the Apex Court. By order dated 22.04.1958, Supreme Court allowed the appeal.

11. In paragraph 10, the Apex Court reproduced the material part of that decree, which is to the following effect:

“10. Since a good deal of argument centers round the construction of this Court's decree, dated April 22, 1958, it will be pertinent to extract here the material part of that decree.

(a) That the appellant herein do deposit within thirty days of the receipt in the decree of this Court the sum of Rs. 85,000/- in the District Court of Trichur and that on the aforesaid amount being deposited the said District Court of Trichur do forthwith give notice thereof to the respondents above named and that on the aforesaid amount of Rs. 85,000/-being deposited respondents Nos. 2 and 3 herein, namely S.M.R. Solaiyappa Chettiar and George Thatil do within 30 days from the date of receipt of the notice of the said deposit execute and register a sale deed in favour of the plaintiff (Appellant) in respect of the suit property.

(b)...

(c) That the respondents above-named do pay to the appellant the cost incurred by him in the Court of the District Judge, Trichur, in Suit No. 183 of 1950 and the costs incurred by him in the former High Court of....

(d)...

(e) ...AND THIS COURT DOTH FURTHER DECLARE that appellant shall be entitled to:

(a) mesne profits **against such of the respondents as may have been in possession of the property** except during the period that the property was in the custody and management of the receiver appointed by the trial court;

(b) the net sum collected by the Receiver during his management; and

(c) credit for all such sums as he may have advanced to the receiver under the direction of the Court for the management of property;

AND THIS COURT DOTH ACCORDINGLY DIRECT that the trial Court do hold an enquiry about the mesne profits and such sums as may be found to be due on inquiry **against the second and third respondents in respect of the mesne profits be deducted from the amount to be deposited in cash in the Court by the appellant** aforesaid in accordance with Clause (a) supra, **and do direct the payment of the remaining amount, if any, to the third respondent (defendant 2) who is the assignee of the second respondent** (defendant 1) pendente lite;

(emphasis supplied)

12. On 12.09.1958, plaintiff filed application in the District Court for execution of the decree dated 22.04.1958. On 12.09.1958, plaintiff deposited sum of Rs.85,000/- as directed in the decree. On 16.03.1959, a sale deed was executed by the Court on behalf of defendants 1 and 2 in favour of the plaintiff and in consequence thereof, possession was delivered to the plaintiff on 29.03.1959.

13. Plaintiff thereafter filed Miscellaneous Petition No.229 of 1960 in the trial Court. On 11.11.1958, defendant No.3 filed objections inter alia contending that he was not liable for mesne profits as he was never in possession and occupation of the suit property. Defendant No.2 contended that he was not liable for mesne profits as he had never been in possession and management of the suit property, and that the entire liability, if at all any, for mesne profits was that of defendant No.3, who had been in exclusive possession of the suit property. On 22.12.1962, the learned trial Judge passed orders in respect of mesne profits. Aggrieved by that order, Lucy Kochivareed, wife of the deceased defendant No.3 as well as plaintiff preferred appeals as the plaintiff's prayer for determination of the extent of waste committed upon the property by the defendant No.3 was dismissed by the trial Court. The High Court affirmed the trial Court's finding that defendant No.3 was in

sole and exclusive possession of the suit property during the period in question. By common judgment dated 06.08.1968, High Court partly allowed the appeals filed by the plaintiff and the legal representatives of the defendant No.3 and dismissed the appeal filed by the defendant No.2. Aggrieved by that order, Lucy Kochivareed filed appeal before the Apex Court.

14. In paragraph 19, the Apex Court noted the contention advanced on behalf of the appellant that both, defendants No.2 and 3 would be deemed to be in possession of the suit property during the period in question. Possession of the defendant 2 was juridical or legal possession of an owner, he being the purchaser of the property from defendant No. 1. Defendant 3 was in actual permissive possession with the consent of the defendant No.2. Defendants No. 2 and 3, being in the position of joint-tort-feasors, would be jointly and severally liable for mesne profits or compensation. In paragraph 22, contention advanced on behalf of the plaintiff to the effect that in the courts below, the positive stand taken by defendant No.3 was that he was never in possession of the suit property and therefore, was not liable for mesne profits was noted. Defendant No.3 never contended that he was in derivative possession under defendant No.2.

15. In paragraph 30, the Apex Court noted that in the decree dated 22.04.1958 passed by it, Court laid down in no uncertain terms that only such of the defendants would be liable for mesne profits "as may have been in possession of the property". In paragraph 31, the Apex Court noted that at no stage, defendant No.3 took up the position that he was in derivative possession of the property under defendant No.2. On the contrary, defendant No.3 emphatically asserted that he was not liable for mesne profits as he was never in possession and occupation. Defendant

No.3 also did not come with the case that defendant No.2 and defendant No.3 were joint-tort-feasors and therefore, jointly and severally liable for mesne profits. In paragraph 34, the Apex Court considered the evidence on the basis of which the Courts below held that from 05.03.1951, defendant No.3 was in actual control, management and possession of the suit property, and therefore, in terms of the decree dated 22.04.1958, defendant No.3 alone would be liable for mesne profits. In appeal, High Court found that "the Court below was perfectly right in holding that the defendant No.3 was in sole and exclusive possession during the period in question".

16. In paragraph 24, the Apex Court set out the general principles relating to the liability for mesne profits, which reads thus,

“24. Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case, can be laid down and "the Court may mould it according to the justice of the case". Even so, one broad basic principle governing the liability for mesne profits is discernible from Section 2(12) of the CPC which defines 'mesne profits' to mean "those 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 shall not include profits due to improvements made by the person in wrongful possession". From a plain reading of this definition, it is clear that wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits. But, where the plaintiff's dispossession, or his being kept out of possession can be regarded as a joint or concerted act of several persons, each of them who participates in the commission of that act would be liable for mesne profits even though he was not in actual possession and the profits were received not by him but by some of his confederates.”

17. In paragraph 25, the Apex Court observed that in case where the claim for mesne profits is against several trespassers who combined to keep the plaintiff out of possession; it is open to the Court to adopt either of the two courses. It may by its decree hold all such trespassers

jointly and severally liable for mesne profits, leaving them to have their respective rights adjusted in a separate suit for contribution; or, it may, if there is proper material before it, ascertain and apportion the liability of each of them on a proper application made by the defendant during the same proceedings.

18. Perusal of paragraph 10 of the Apex Court judgment, extracted hereinabove, clearly provided that during the course of enquiry for determining mesne profits, it is specifically required to find out which of the respondents was in possession of the property excepting the period during which the property was under the management of the Court Receiver appointed by the trial Court. In that case, defendant No.3 was found in an exclusive possession of the suit property from 05.03.1951. As against this, in the present case, defendants No.1 to 3 are directed to hand over possession also inquiry into mesne profits is directed against defendants No.1 to 3. Admittedly, defendant No.1 was inducted as a tenant. It is the case of the plaintiff that defendants No.2 and 3 are unlawfully inducted in the suit premises. Defendant No.1 has accepted termination of tenancy and has not challenged the decree of handing over possession.

19. Applying the principles laid down by the Apex Court as also having regard to the fact that the decree is passed against defendants No.1 to 3 not only for handing over possession but also for payment of amount of mesne profits, I do not find that any case is made out by defendant No.1 for interfering with the impugned order under Section 115 of C.P.C. In the present case, defendant No.1 is the tenant. It is the case of the plaintiff that defendants No.2 and 3 are the unlawful occupants. As defendant No.1 has lost protection of the Rent Act, the Courts below rightly passed decree against defendants No.1 to 3, both

for possession as also for mesne profits. Hence, Civil Revision Application fails and the same is dismissed. However, the defendant No.1 is at liberty to agitate adjustment for contribution in the inquiry for determining mesne profits, if permissible in law. Order accordingly.

20. At this stage, Mr. Dani submits that in pursuance of the decree passed by the Courts below, enquiry of mesne profits is going on before the trial Court. The said enquiry may be stayed for a period of four weeks from today. Mr. Dani assures that defendant No.1 will not apply for further extension. Mr. Sugdhare objects on the ground that mesne profits enquiry is going on since 2012.

21. As the defendant No.1 intends to challenge this order in the higher Court, notwithstanding dismissal of C.R.A., mesne profits enquiry shall be stayed for a period of four weeks from today with clear understanding that no application for further extension will be made. Order accordingly.

**(R. G. KETKAR, J.)**

*Minal Parab*