

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.915 OF 2014

D.C.M. Limited ... Applicant
Vs.
Sudhir Krishnaraj Thackersey and others ... Respondents

Mr. P. S. Dani, Senior Advocate a/w. Ms Mamta Sadh and Mr. Abbas Zaidy
i/b. Zohair & Company for Applicant.
Ms Ranjana Parekh for Respondents.

CORAM : R. G. KETKAR, J.
Reserved on : JUNE 28, 2016
Pronounced on: JULY 15, 2016

P.C. :

Heard Mr. Dani, learned Senior Counsel for the applicant and
Ms Parekh, learned Counsel for respondents 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, has challenged the judgment and decree dated 15.09.2010 passed by the learned Judge presiding over Court Room No.19 of the Court of Small Causes, Mumbai in Mesne Profit Application No.15 of 2005 as also the judgment and decree dated 03.05.2014 passed by the appellate Bench of the Court of Small Causes at Mumbai in 2b(iv) Miscellaneous Appeal No.18 of 2011. By these orders, the Courts below allowed the Miscellaneous Application filed by the plaintiffs in T.E.&R. Suit No.102/111 of 2003 and directed the defendant to pay mesne profits in respect of room No.603 having total area of 1228 sq.ft. on the sixth floor of building known as Sir Vitthaldas Chambers situate at 16, Bombay Samachar Marg, Fort, Mumbai 400023 (for short 'suit premises') @ Rs.100/- per sq.ft. per month for the period from 03.05.2003 to 30.10.2006 along with the interest @6% p.a. yearwise to

the plaintiffs. Plaintiffs were directed to pay the deficit court fees as per the rules as also defendant was directed to pay costs of the proceedings and to bear its own costs.

3. By notice dated 28.12.2002, plaintiffs terminated tenancy of the defendant and called upon them to deliver the possession of the suit premises. This notice was replied by the defendant on 03.02.2003. As the defendant did not comply with the requisitions made in the notice, on 03.05.2003, plaintiffs instituted Suit contending inter alia that as the defendant is the Public Limited Company having paid up share capital of more than Rs.1 crore, in view of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (for short 'Act'), the provisions of the Act are not applicable. Defendant filed written statement and contended that Section 3(1)(b) of the Act is discriminatory and ultra vires and violative of Article 41 of the Constitution of India. On 09.09.2004, Suit was decreed. Appeal preferred by the defendant was dismissed on 31.01.2005. Defendant preferred Writ Petition No.2039 of 2005, which was dismissed on 27.06.2005. Aggrieved by these decisions, defendant preferred Petition for Special Leave to Appeal on 01.08.2005 in the Apex Court. Ultimately, the S.L.P. was dismissed.

4. Plaintiffs filed Mesne Profit Application No.15 of 2005 on 20.10.2005 in the Small Causes Court for fixing mesne profits payable by the defendant from the date of the Suit. Plaintiffs filed reply dated 30.10.2005 opposing the application. On 30.10.2006, defendant handed over possession of the suit premises to the plaintiffs. By the impugned orders, the Courts below allowed the application as indicated earlier and directed the defendant to pay mesne profits @ Rs.100/- per sq.ft. per month from 03.05.2003 that is the date of filing of the Suit. It is against

these decisions, defendant has instituted the present application under Section 115 of C.P.C.

5. In support of this Application, Mr. Dani raised the following contentions:

a. The Courts below committed serious error in directing the defendant to pay mesne profits from 03.05.2003 being the date of institution of the Suit. He submitted that the Suit was decreed on 09.09.2004. The Courts below were not justified in directing the defendant to pay mesne profits from the period anterior to 09.09.2004.

2. In any case, the Courts below were not justified in directing to pay the mesne profits @ Rs.100/- per sq.ft. per month.

b. Mr. Dani submitted that even after the tenancy is terminated, defendant cannot be treated as a trespasser under the Indian Law. Under the Indian Law, possession of the tenant, who has ceased to be a tenant, is protected by Law. Although he may not have right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by Statute. In support of this proposition, he relied upon the decision in the case of ***K. K. Verma Vs. Naraindas C. Malkani***, (1954) Indian Law Reports 950.

6. As far as quantum is concerned, Mr. Dani submitted that the Courts below have awarded exorbitant mesne profits. He submitted that the Courts below have not recorded a finding that the defendant is in wrongful possession of the suit premises. Apart from that, the Courts below have not recorded any finding in terms of Section 2(12) of C.P.C., which defines the expression “mesne profits”. Section 2(12) defines the expression 'mesne profits' to mean those profits which the person in

wrongful possession of such 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. He, therefore, submitted that application requires consideration.

7. On the other hand, Ms Parekh supported the impugned orders. She submitted that after appreciating the evidence on record, and in particular having regard to the area and location of the suit premises, the Courts below have fixed mesne profits @ Rs.100/- per sq.ft. per month. The said fixation cannot be said to be either arbitrary or exorbitant. The findings recorded by the Courts below are based upon evidence on record.

8. As far as the contention of Mr. Dani that the Courts below were not justified in awarding mesne profits from 03.05.2003 being the date of the institution of the Suit is concerned, she submitted that on 28.12.2002, notice terminating tenancy was issued. Defendant continued in occupation of the accommodation even after termination of tenancy and was, therefore, occupation was unauthorized and wrongful and a decree for mesne profits could have been passed even from 29.12.2002. In the present case, the Courts below have awarded mesne profits from the date of filing of the Suit i.e. 03.05.2003. In support of her submissions, she relied upon following decisions:

- a. *Shyam Charan Vs. Sheoji Bhai*, AIR 1977 SC 2270;
- b. *M/s. Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF)*, AIR 2008 SC 673; and
- c. *Atma Ram Properties (P) Limited Vs. Federal Motors (P) Limited*, (2005) 1 SCC 705.

She, therefore, submitted that no case is made out for disturbing that finding.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As far as fixation of mesne profits @ Rs.100/- per sq. ft. per month is concerned, I do not find any merit in the submission of Mr. Dani. It is not in dispute that the suit premises admeasures about 1228 sq.ft. and is situate at Bombay Samachar Marg, Fort, Mumbai 400 023, which is in the heart of the City.

10. In support of their case, plaintiffs examined P.W.1 - Naresh Kara at exhibit-10, P.W.2 – S. P. Rao at exhibit-21 and P.W.3 - Nagraj Govindraj Kotwala. Plaintiffs also produced documentary evidence. On the other hand, defendant examined D.W.1 - Nandlal Fateh Chand Bhatia at exhibit-38, D.W.2 - Kishore K. Vikamsey at exhibit-41 and produced valuation report at exhibit-44. P.W. 2 - S. P. Rao had prepared valuation report dated 13.06.2005. He has considered agreement dated 28.06.2000 under which premises was let out to Kapol Co-operative Bank with effect from 01.07.2000. The said premises are located on the ground floor and the suit premises is situate on the sixth floor. He deposed that market rent of the suit premises should be Rs.140/- per sq.ft. per month. D.W. 2 - Kishore Vikamsey had prepared valuation report, exhibit-44. Perusal of the report shows that he has taken into consideration five instances to ascertain the mesne profits of the suit premises. He has taken into consideration the entries appearing in Index II Register. Defendant, however, did not produce copies of the agreement of the said instances. The Courts below found that the valuation made by D.W.2 was grossly inadequate and cannot be the basis for fixation of mesne profits. After considering the instances relied

by the plaintiffs, the learned trial Judge fixed the compensation @ Rs.100/- per sq.ft. per month. As far as the appellate Court is concerned, the appellate Court has affirmed the findings recorded by the trial Court in that regard.

11. Mr. Dani submitted that the Courts below have not recorded a finding that the defendant is in wrongful possession of the suit premises and that the Courts below have not kept in mind the definition of the expression 'mesne profits' as contemplated under Section 2(12) of C.P.C. I do not find any merit in this submission. Perusal of the orders passed by the Courts below and in particular order of the appellate Court shows that in paragraph 19, the appellate Court has referred to Section 2(12) of C.P.C. as also has recorded a categorical finding that the defendant is in wrongful possession from the date of termination of tenancy by notice dated 28.12.2002. After terminating the tenancy by notice dated 28.12.2002, defendant did not handover possession of the suit premises to the plaintiffs. The appellate Court repelled contention of the defendant that they are not in wrongful possession of the suit premises. After perusal of the impugned orders, in my opinion, the Courts below have rightly applied the principles governing determination of mesne profits.

12. Defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to evidence on record. Defendant was not in a position to demonstrate that no reasonable or prudent person would have arrived at the conclusions other than those arrived at by the Courts below. In view thereof, I do not find any merit in the submissions of Mr. Dani that the Courts below were not justified in fixing mesne profits @ Rs.100/- per sq.ft. per month.

13. Mr. Dani submitted that the Courts below were not justified in fixing the mesne profits from 03.05.2003 and should have fixed from the date of decree i.e. 09.09.2004. He relied upon decision in the case of **K. K. Verma** (*supra*). In that case, interpretation of Section 3 of the Government Premises (Eviction) Act, 1950 fell for consideration. Respondent had instituted Petition on 15.04.1953 apprehending that appellant would take action against him. On 25.06.1953, on behalf of Union of India, notice to quit was issued to the respondent. On 03.08.1953, notice under Section 3 of the Government Premises (Eviction) Act, 1950 was issued calling upon the respondent to handover possession within 15 days from the date of service of the notice. The question that fell for consideration was whether the said notice was valid and the notice will be valid provided respondent came within the ambit of Section 3 of that Act. The Division Bench observed thus,

“Now, the English law seems to be that when a landlord terminates the tenancy of a tenant, the tenant becomes a tenant on sufferance. He occupies that position because the landlord has not expressed his agreement or disagreement with the tenant continuing in possession. But as soon as the landlord expresses his clear intention that the tenant should not continue, then the possession of the tenant becomes wrongful against the landlord and the tenant is in the position of a trespasser. The well-known authority on Landlord and Tenant, by Hill and Redman, 11th Edn. at p. 498, states:

“After the determination of the tenancy any act of the landlord showing an intention to take possession is sufficient to revest the possession in him so that the tenant becomes a trespasser.”

It seems to us that the author has advisedly emphasized the fact that the act of the landlord showing his intention should be after the determination of the tenancy. But Mr. Desai says that this only applies to cases where a tenancy runs out by efflux of time, but this would not apply to a case where a landlord gives a notice to quit and in the notice itself he makes it clear that he wants possession of the premises. Mr. Desai says that if the landlord has expressed that intention in the notice, then on the termination of the tenancy by reason of the notice the possession of the tenant becomes wrongful and he becomes trespasser. In this particular case Mr. Desai says that the notice to quit makes it clear that the

landlord wanted possession on the termination of the tenancy and, therefore, according to Mr. Desai, the respondent became a trespasser on 1st August, the tenancy having expired on July 31. Now, no authority has been cited to us which has laid down that in the case of a termination of a tenancy by a notice an act of the landlord antecedent to the termination of the tenancy would vest the property in him immediately after the termination of the tenancy and the tenant would become a trespasser. The statement of the law just referred to in Hill and Redman on Landlord and Tenant would rather go to show that in every case a landlord must express his intention by some act which is subsequent to the termination of the tenancy, and the reason for that seems to be clear because after the termination of the tenancy,--however the tenancy may be terminated,--there is as it were a neutral position created. The landlord may consent to the tenant continuing, may accept rent from him, in which case the tenant would become a tenant at will. He may, on the other Hand, make it clear that he does not want the tenant to continue in possession in which case the tenancy on sufferance which was created by the termination of the tenancy would cease and the 'tenant would become a trespasser. But, in our opinion, the position in English law is unnecessary to be considered because, as we shall presently point out, the law in India is essentially different, and even assuming Mr. Desai is right that under the English law on the facts of this case the tenant became a trespasser, the same position would not arise under the Indian law. Under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by statute, tinder Section 9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner. Therefore, our law makes a clear and sharp distinction between a trespasser and an erstwhile tenant. Whereas the trespasser's possession is never juridical and never protected by law, the possession of an erstwhile tenant is juridical and is protected by law. Therefore, as far as the Indian law is concerned, an erstwhile tenant can never become a trespasser. It may or may not be that in English law in certain circumstances he can become a trespasser and it does seem that the landlord can enter the premises and deprive the erstwhile tenant of his possession, but In India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment. Therefore, when we are construing the expression "unauthorised person", we must assume that the Legislature knew the distinction that was drawn in law between a trespasser and an erstwhile tenant, and, therefore, what

we have to decide is whether in using the expression "unauthorised person" the Legislature was only contemplating 'trespassers' in the sense in which that word is understood in Indian law or was also contemplating an erstwhile tenant who ceased to be a tenant by reason of the termination of his tenancy.

Now, there is no doubt that the respondent entered into these premises under a proper title, that his occupation was authorised and that his possession after the termination of the tenancy, as already pointed out, was a juridical possession. On the other hand, in the case of a trespasser, from its very inception his possession is unlawful and at no point of time could it be said of a trespasser that his possession was juridical. In our opinion, the Legislature was not so much emphasizing the point of time when it used the expression "any person is in unauthorised occupation" as the nature of the possession of the person referred to in that sub-clause. "Is" obviously is used in the present perfect tense rather than in the present tense and "is in unauthorised occupation" means that the occupation was unauthorised to start with and continued to be unauthorised throughout the time that the person was in possession. As we have already pointed out that this is a penal statute and therefore it would not be proper to give a wider interpretation to the expression "unauthorised occupation" if a narrower interpretation was possible, and, in our opinion, the Legislature never intended, that a person who entered with title and whose title came to an end and who continued in possession which possession was a juridical possession protected by law was a person of whom it could be said that he was in unauthorised occupation of Government premises. It may be pointed out that the Limitation Act also clearly makes a distinction between the possession of an erstwhile tenant and a trespasser. If a landlord wants to eject his tenant whose tenancy has been terminated, the article which applies is Art. 139, whereas when an owner wants to proceed against a trespasser, the article which would apply is Art. 144. Therefore, our law in its different aspects has always considered the position of an erstwhile tenant to be different from that of a trespasser, and what Mr. Desai is at pains to do is to equate the position of a tenant whose tenancy has been terminated with that of a trespasser. In our opinion, unless the Legislature had given indication of a clear intention that by the expression "unauthorised occupation" it meant not only persons who had no title at all but also persons who had title at the inception and whose title came to an end, it would not be proper to give an interpretation to the expression "unauthorised occupation" which would run counter to the principles of law which have been accepted in this country."

14. As against this, Ms Parekh relied upon decision in the cases of - (i) **Shyam Charan** (*supra*), (ii) **M/s. Nopany Investments (P) Ltd.** (*supra*), and (iii) **Atma Ram Properties (P) Ltd.** (*supra*). In the case of **Shyam Charan** (*supra*), respondent-landlord had given on lease premises known as Jairam Theatre in the town of Raipur to the appellant in the year 1940 for a period of 10 years. On the expiry of the said period, lease was renewed by a registered deed dated 18.08.1951 with effect from 22.05.1950 for a further period of 10 years. The lease expired on 21.05.1960. Since the appellant did not vacate the premises on expiry of lease, by efflux of time, under Section 111(a) of the Transfer of Property Act, respondent filed a Suit against him on 25.06.1960 for eviction, rent and mesne profits. On 03.11.1962, Suit was decreed. On 22.02.1964, High Court dismissed the appeal and the Apex Court affirmed that decision on 25.09.1964. Appellant vacated the premises on 04.10.1964.

15. In the proceeding for fixation of mesne profits, the trial Court awarded final decree for mesne profits @ Rs.4,000/- per month from the date of determination of the lease i.e. from 22.05.1960 upto the delivery of vacant possession i.e. on 04.10.1964. On behalf of the appellant, it was contended that even after the termination of the lease, appellant continued in possession as a tenant and his possession became unauthorized and wrongful on and from 03.11.1962 when the decree for eviction was passed by the trial Court and not before that. Mesne profits should be awarded only from the said date. The Apex Court repelled that contention on the ground that under the Madhya Pradesh Control Act, 1955, places of entertainment like the one in question were excluded from the operation of that Act as provided for in Section 2(1) (d). The lease of the accommodation was, therefore, not governed by the 1955 Act. The Suit was filed on 25.06.1960 and the rights and

liabilities of the parties in the Suit were governed simply by the Transfer of Property Act. On 30.12.1961, Madhya Pradesh Accommodation Control Act, 1961 came into force and became applicable in the town of Raipur even to the places of entertainment. The Apex Court referred to Section 51 of the Act repealing the 1955 Act. It was observed that the definition of the 'tenant' in the 1955 Act and 1961 Act is vitally different. The Suit in question was not filed under the Act of 1955 because the accommodation was exempt from the operation of that Act. That being so, the Suit filed in accordance with the Transfer of Property Act could not attract any provision of the Act as there is nothing in it to make it applicable to a pending suit of that kind. In other words, the parties were governed by the provisions of the Transfer of Property Act. The Apex Court, therefore, held that appellant continuing in occupation of the accommodation on and from 22.05.1960 was unauthorized and unlawful and the decree for damages and mesne profits was rightly awarded from the period commencing from that date and ending on 04.10.1964.

16. In the present case, though notice terminating the tenancy was issued on 28.12.2002, the Courts below have awarded mesne profits from 03.05.2003 i.e. the date of institution of the Suit. In my opinion, the decision in the case of **Shyam Charan** (*supra*), applies on all fours to the facts of the present case. In the case of **Atma Ram Properties (P) Ltd.** (*supra*), the Apex Court observed in paragraphs 11 and 13 thus,

11. Under the general law, and in cases where the tenancy is governed only by the provisions of Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under Section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. In the case of *Chander Kali Bai & Ors.* (*supra*) the tenancy premises were situated in the

State of Madhya Pradesh and the provisions of the M.P. Accommodation Control Act, 1961 applied. The suit for eviction was filed on 8th March 1973 after serving a notice on the tenant terminating the contractual tenancy w.e.f. 31st December 1972. The suit came to be dismissed by the trial Court but decreed in first appeal decided on 11th August, 1975. One of the submissions made in this Court on behalf of the tenant-appellant was that no damages from the date of termination of the contractual tenancy could be awarded; the damages could be awarded only from the date when an eviction decree was passed. This Court took into consideration the definition of tenant as contained in Section 2(i) of the M.P. Act which included "any person continuing in possession after the termination of his tenancy" but did not include "any person against whom any order or decree for eviction has been made". The court, persuaded by the said definition, held that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the M.P. Act and on such termination his possession does not become wrongful until and unless a decree for eviction is passed. However, the Court specifically ruled that the tenant continuing in possession even after the passing of the decree became a wrongful occupant of the accommodation. In conclusion the Court held that the tenant was not liable to pay any damages or mesne profits for the period commencing from 1st January 1973 and ending on 10th August 1975 but he remained liable to pay damages or mesne profits from 11th August 1975 until the delivery of the vacant possession of the accommodation. During the course of its decision this Court referred to a decision of Madhya Pradesh High Court in *Kikabhai Abdul Hussain Vs. Kamlakar*, 1974 MPLJ 485, wherein the High Court had held that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. This Court opined that what was held by the Madhya Pradesh High Court seemed to be a theory akin to the theory of "relation back" on the reasoning that on the passing of a decree for possession, the tenant's possession would become unlawful not from the date of the decree but from the date of the termination of the contractual tenancy itself. It is noteworthy that this Court has not disapproved the decision of the Madhya Pradesh High Court in *Kikabhai Abdul Hussain's* case but distinguished it by observing that the law laid down in *Kikabhai Abdul Hussain's* case was not applicable to the case before it in view of the definition of 'tenant' as contained in the M.P. Act and the provisions which came up for consideration of the High Court in *Kikabhai Abdul Hussain's* case were different.

13. In *Shyam Sharan Vs. Sheoji Bhai & Anr.*, (1977) 4 SCC

393, this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In *Bhagwandas Vs. Mst. Kokabai*, AIR 1953 Nagpur 186, the learned Chief Justice of Nagpur High Court held that the rent control order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the rent control order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.”

17. Mr. Dani relied upon the decision of **K. K. Verma** (*supra*). In my opinion, the said decision has no application to the facts of the present case as basically the provisions of Rent Act are not applicable and the parties are governed by the provisions of the Transfer of Property Act.

18. In view thereof, no case is made out for invocation of powers under Section 115 of C.P.C. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab