

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 79 OF 2016

United Commercial Bank

..Applicant

Vs

Hedavkar Mechanical Work Pvt
Ltd

.. Respondent

Mr. Nainesh N. Amin, Advocate for Applicant.

Mr. Jaydeep Deo a/w Mr. Omprakash A. Vaishnaw, Advocate for
Respondent.

CORAM : R.G.KETKAR,J.

DATE : 05/10/2016

PC:

1. Heard Mr. Nainesh Amin, learned counsel for the applicant and Mr. Jaydeep Deo, learned counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant', has challenged the judgment and order dated 23.12.2011 passed by the learned Judge presiding over Court Room no.32 of the Court of Small Causes, at Mumbai in Mesne Profit No. 4 of 2008 as also the judgment and order dated 18.2.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Misc. Appeal No.32 of 2012. By these orders, the Courts below partly allowed the application made by

the respondent-plaintiff and held that the plaintiff is entitled to recover mesne profits at the rate of 35/- per sq.ft per month along with 6% interest Per Annum from 1.7.2001 to August, 2005. The rent paid by defendant upto June, 2005 was ordered to be deducted from the total amount of mesne profits for the said period.

3. In support of this Petition, Mr. Amin strenuously contended that the Courts below have considered only instance of M/s Y.C.Modi (HUF) who had given units no.001, 001A, 002 and 002A on licence in the building known as Mansarvar, situate opposite Vora Colony, M.G.Road, Kandivili (West) to the Union Bank of India. The area of the said units is 2169 sq.ft carpet and relevant period was 11.7.2002 to 10.7.2007. The valuer has determined monthly compensation for first five years and also took into consideration service charges. He submitted that the Courts below did not consider second instance in respect of residential flat no.13 on the first floor in "E" Wing of Jharokha II, situate on land bearing CTS No. 132A of village Akruli, Kandivali (West) (having regard to the agreement of sale dated 18.10.2001, there is typographical error. The said property is statute in Kandivali (East)). The valuer has determined rate in respect of residential area at Rs. 2609.31 per sq.ft. The valuer was of the opinion that in respect of commercial area the rate would be Rs. 5218 per

sq.ft. He submitted that the rate arrived at is only on the basis of sheer guess work and there is no material referred in the report for fixing rate in respect of the commercial area at the double rate of the residential premises. He submitted that the Courts below while considering instance no.1 situate at Kandivali (W) committed error in holding that the premises in question are also situate in the same area. Admittedly, the suit premises is situate in Kandivali (E). Thus, the Courts below committed error apparent on the face of the record while determining compensation at the rate of Rs. 35/- per sq.feet per month. In the present case, no amenities are provided so as to consider inclusion of service charges while fixing reasonable monthly compensation. He has taken me through the order passed by the learned trial Judge and in particular paragraph 33 and paragraphs 7,8,10,12 of the Appellate Court judgment.

4. On the other hand, Mr. Deo supported the impugned orders. He submitted that the Courts below have considered the second instance in respect of residential area, situate in Kandivali (E). Though the valuer examined by the plaintiff opined Rs.59/- per sq.ft. per month, the courts below have fixed interim compensation at the rate of Rs.35/- per sq.ft. per month. The finding is arrived at after appreciating the evidence on record. He, therefore submitted that no case is made out for invocation

of powers under Section 115 of C.P.C.

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the report dated 4.9.2007 submitted by Harshad S. Maniyar shows that the valuer has considered instance of leave and licence agreement executed by M/s.M.C.Mody (HUF) in favour of Union of India. It is not in dispute that the said premises is situate in Kandivali (W). The valuer was of the view that net mesne profits would be Rs.64.23 less depreciation 4.97 = Rs.59.26 per sq.ft per month. The valuer has also considered second instance in respect of residential flat no.13. The net mesne profits is 64.07 less depreciation 4.97, i.e. Rs.59.10 per sq.ft per month carpet. Though the area mentioned is Kandivali (W), perusal of the agreement dated 18.10.2001 executed by M/s Hedaviar Mechanical Works Pvt. Ltd to Bank of India shows that the property is situate in Kandivali (East) as is evident from clause 2 of the said agreement. The valuer has opined that for residential area the rate would be Rs. 2609.35 per sq.ft per month and for the commercial area rate would be Rs.5218.00, that is to say, double. It is, therefore, obvious that there is mistake in mentioning Kandivali (W) in valuation report.

6. As far as the trial Court is concerned, the learned trial Judge has discussed oral as well as documentary evidence in paragraph

30. In paragraph 33, the learned trial Judge observed that “if we peruse the certified copies of agreement of sale and lease deed filed on behalf of plaintiff at Exh.26 Colly., it appears that Union Bank of India has taken premises admeasuring about 2169 sq.ft carpet area on lease from M/s Y.C.Modi (HUF) for 5 years commencing from 11.7.2002 upto 10.7.2007.” The learned trial Judge thereafter proceeded to consider first instance in respect of M/s Y.C.Modi (HUF). It, therefore, cannot be said that the learned trial Judge has considered only the first instance in respect of M/s Y.C.Modi (HUF). Admittedly, there is only one agreement of sale produced by the plaintiff and that is dated 18.10.2001 which is in respect of second instance. It, therefore, cannot be said that the learned trial Judge considered only first instance in respect of M/s. Y.C.Mody (HUF). The learned trial Judge, after considering the oral as well as documentary evidence adduced by both the parties as also after considering the evidence of Harshad S. Maniar, has fixed compensation at the rate of Rs.35/- per sq.ft p.m.

7. As far as the Appellate Court is concerned, the Appellate Court has also considered both the instances as would be evident from paragraph 7. In the earlier part of paragraph 7, the Appellate Court has considered first instance in respect of M/s Y.C.Modi (HUF), wherein after deducting the depreciation, the net

mesne profits was Rs. 59.26 per sq.ft. p.m. In the later portion of the said paragraph, the Appellate Court considered the second instance and after deducting the depreciation, noted that the rate comes to Rs.59.10 sq.ft. per month. This is obviously in respect of the second instance. Thus, the Appellate Court has also considered the second instance. Though the valuer has recommended the rate of Rs. 59.10 per sq.ft per month, the Courts below have fixed reasonable compensation at the rate of Rs. 35/- per sq.ft per month. The said finding is arrived at after appreciating the evidence on record. In view thereof, no case is made out for invocation of powers under Section 115 C.P.C. Merely because on the basis of evidence on record, another view is possible, that itself is no ground to interfere with the impugned order. Hence, Application fails and the same is dismissed.

8. At this stage, Mr. Deo prays for permission to withdraw the amount deposited by the applicant. As there is no stay, the respondent-plaintiff is permitted to withdraw that amount. Order accordingly.

(R.G.KETKAR, J.)