IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 716 OF 2015

M/s Hindustan Composites Ltd. ..Applicant
Vs
Mr. Rajesh Gautamlal Shah
.. Respondent

Mr. P.S.Dani, Senior Advocate a/w Mr. Ashwin Shete & Ms. Surabhi Agrawal i/b Jaykar & Partners for Applicant.

Mr. Percy Ghandy a/w Mr. S.A.K. Najam-es-Sani and Ms Panthi Shah i/b Maneksha & Sethna, Advocates for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 12/07/2016

PC:

1. Heard Mr.P.S.Dani, learned senior counsel for the applicants and Mr.Percy Ghandy, 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 16.10.2014 passed by the learned Judge, presiding over Court Room no.32, of the Court of Small Causes at Bombay (Bandra Branch) in Mesne profit Application No.13 of 2008 as also the judgment and order dated 3.10.2015 passed by the Appellate Bench of the Court of Small Causes Mumbai in Misc. Appeal No.75 of 2014. By these orders, the Courts below partly

allowed the Mesne profit Application filed by the respondent, hereinafter referred to as 'plaintiff', and directed the defendants to pay mesne profits at the rate of Rs.50/- per sq.ft per month on carpet area of 7251.20 sq.ft from 1.2.2001 till 19.1.2007 with interest at the rate of 6% per annum within three months from the date of order.

3. Plaintiff had issued termination notice dated 6.12.2000 terminating the tenancy of the defendant with effect from 31.1.2001. The plaintiff instituted suit for recovery of possession of five flats, being flats no. 1 to 5, in the building known as 'Parag', situate on plot no.183/184 at Madhu Park, Khar (West). Mumbai (for short, 'suit property'). The cumulative carpet area of the suit property is 7251.20 sq.ft. On 30.4.2001 the plaintiff instituted suit for recovery of possession of the suit property. Suit was decreed on 30.10.2003. Appeal was dismissed on 12.10.2006. Defendant handed over possession of the suit property to the plaintiff on 19.1.2007. The plaintiff has filed application for mesne profits on or about 15.12.2007 claiming mesne profits at the rate of Rs. 5,34,776/- per month from the date of termination of the defendant's tenancy i.e. from 1.2.2001 till 19.1.2007 together with interest at the rate of 9.75 % per annum from the date of the suit till the defendant paying the full amount to the plaintiff.

4. Defendant filed reply dated 14.7.2008 resisting the said application. The parties led evidence. After considering the evidence on record, the Courts below partly allowed the application, as indicated herein above. It is against these orders, the defendant has instituted the present application under section 115 of C.P.C.

5. In support of this Application, Mr. Dani has taken me through the valuation report dated 12.11.2007 of Harshad S. Maniyar from the plaintiff's side. The said valuer has followed two methods, viz. Interest Structure and Market Rental. As far interest structure method is concerned, he adopted return at 11.75 % net on the basis of decision of the Appellate Court in Appeal No. 101 of 1949 in R. A. No. 805 of 1948 between Sohrab D. Talati and Joseph Michem. As far as method of market rental, the said valuer considered the leave and licence agreement as also sale instances. Mr Dani submitted that the instances of leave and licence agreement as also sale instances were in respect of premises situate at Bandra (W). As against this, the suit property is situate in Khar (W). He has also taken me through the valuation report dated 18.9.2012 of Hitendra V. Gangwar submitted on behalf of the defendant. Mr Dani submitted that the said valuer considered the methodology of market rental rent as also considered the sale instances in respect of the

premises situate in Khar (W). After analyzing the sale instances referred therein, the said valuer opined that in respect of the suit property, the return would be at Rs.12.70 paise per sq.ft per month and in respect of suit property it would be Rs.92,090.24 per month. As against this, the plaintiff has claimed 5,34,776/-.

6. Mr. Dani has also taken me through the impugned orders. He submitted that the leave and licence agreements which were considered by the valuer appointed by the plaintiff cannot be considered as plaintiff did not examine parties to the said agreements. He submitted that the Courts below adopted rough and ready method and fixed at the rate of Rs.50/- per sq.ft per month on carpet area. He submitted that for the period of 2001 to 2007, rate of Rs. 50/- per sq.ft per month is fixed. In other words, if in the year 2007, the rate is Rs.50/- per sq.ft. per month, surely same rate cannot be fixed for the year 2001. In short, the Court should have fixed the rate with progressive increase from 2001 to 2007.

7. Mr. Dani invited my attention to section 2(12) of C.P.C. and also relied upon Humayun Dhanrajgir Vs. Ezra Aboody, 2008 (6) Bom.C.R. 862 and Smt. Purificacao Fernandes Vs. Dr Hugo Vicentre de Perpetuo, AIR 1985 Bombay 202, to contend that the Courts below have not correctly fixed mesne profits. He submitted that Section 2(12) of C.P.C lays down that while fixing

mesne profits the Court has to consider 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 do not include profits due to improvements made by the person in wrongful possession. In the present case, instead of fixing mesne profits from the point of view of person in wrongful possession, the courts below have fixed mesne profits on the basis of what the plaintiffs would have received from the suit property. As the approach of the Courts below is entirely erroneous, he submitted that the application requires consideration.

8. As against this, Mr.Ghandy. relied upon the decision of State of Haryana Vs. Ram Singh, AIR 2001 Supreme Court 2532 to contend that certified copy of registered agreement of sale is admissible without examination of the party to the document. In particular, he relied upon paragraphs 5 and 6 of the report and submitted that registered leave and licence agreements are public documents and are admissible in evidence and are not required to be proved by calling witness. He submitted that no case is made out for invocation of powers under section 115 of C.P.C.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused

the material on record.

10. Section 2(12) of C.P.C. defines the expression 'mesne profits'. It reads thus:

> S.2: In this Act, unless there is, anything repugnant in the subject or context, -
>
> (12) “Mesne profits” of property means 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;”

11. In support of the plaintiff's claim, the plaintiff examined himself at Exh.12 as also examined PW 2 Harshad Maniar, Valuer at Exh.25. PW 2 also produced his report at Exh.32. As against this, defendant examined Vijay Dattajirao Ingale, an authorized representative of the defendant as his witness DW 1 and Hitendra Gangwar as DW 2. In paragraph 13, the learned trial Judge noted that the leave and licence agreement is in respect of the property situate in Bandra and suit property is situate at Khar (W). Learned counsel for the defendant did not cross examine the said witness in respect of contents and veracity of leave and licence agreement. The learned trial Judge further observed that the testimony of PW 1 is not shaken and controverted. The learned trial Judge also considered evidence adduced by the defendant in paragraph 14. In paragraph 16, the learned trial Judge observed that for determining the quantum of mesne

profits, leave and licence agreement which is annexed along with the report of the plaintiff's Architect would be more helpful and reliable to arrive at exact amount in respect of mesne profits. Considering the valuation report and instances therein as also location of the suit property and civic amenities available in the vicinity of the suit property, learned trial Judge came to the conclusion that it would be just and proper to grant mesne profits at the rate of Rs.50/- per sq.ft per month on carpet area of 7251.20 sq.ft. in respect of suit property which is quoted in the report of DW 2 and also which was not disputed by the plaintiff.

12. As far as the Appellate Court is concerned, from paragraph 18 onwards, the Appellate Court has discussed the evidence adduced by the parties. After considering the evidence on record, in paragraph 25 the Appellate Court observed that the learned trial Judge has rightly fixed mesne profits at the rate of Rs.50/- per sq.ft. per month. Mr. Dani submitted that the Courts below have adopted rough and ready measure in fixing the mesne profits. As indicated earlier, the Courts below have considered the evidence adduced by the parties threadbare and also discussed valuation reports submitted by the parties.

13. He submitted that for the period of 2001 to 2007, rate of Rs. 50/- per sq.ft per month is fixed. In other words, if in the year 2007, the rate is Rs.50/- per sq.ft. per month, surely same rate cannot be fixed the year 2001. In short, the Court should have fixed the rate with progressive increase from 2001 to 2007.

Having regard to the fact that the suit premises is situate in Khar (W) which is a posh locality, it would certainly fetch Rs.50/- per sq.ft. per month in the year 2001. Thus, in the year 2001, itself, reasonable and fair compensation in respect of the premises situate in Khar (W) would be Rs.50/- per sq.ft per month. The Courts below, however, did not progressively increase this rate from 2001 to 2007. In my opinion, the defendant cannot find fault with the approach of the Courts below in that regard, as by not increasing the rate from 2001 to 2007 it has enured to the benefit of defendant. I, therefore, do not find any merit in this submission.

14. Mr. Dani further submitted that the Court below did not correctly fix mesne profits. He relied upon Section 2(12) of C.P.C. I do not find any merit in this submission as well. It is not in dispute that the tenancy of the defendant was terminated by notice dated 6.12.2000 with effect from 31.1.2001. The defendant handed over possession to the plaintiff on 19.1.2007. In other words, the defendant was in wrongful possession of the suit premises from 1.2.2001.

15. In the case of ***M. L. Sethi Vs. R. P. Kapur***, **1972 (2) SCC 427**, the Apex Court has considered the scope of Section 115 of C.P.C. It was observed in paragraph 12 as under:

"… The jurisdiction of the High Court under Section

115 of the C.P.C. is a limited one. As long ago as 1884, in **Rajah Amir Hassan Khan v. Sheo Baksh Singh, [1884] L.R. II I.A. 237,** the Privy Council made the following observation on Section 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908 "The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In **Balakrishna Udayar v. Vasudeva Aiyar**, **AIR 1917 PC 71,** the Board observed :

> "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." In **N. S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras, AIR 1949 PC 156**, the Judicial Committee said that Section 115 empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected he ultimate decision. And if the High Court is satisfied on those three matters, it. has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

This Court in **Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and others, AIR 1964 SC 1336** and **Vora Abbashhai Alimahomed v. Haji Gulamnabi Haji Safibhai,**

A.I.R. 1964, S.C. 1341 has held that a distinction must be drawn between the errors committed by subordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said Court, and errors of law which have no such relation or connection. In **Pandurang Dhoni Chougute v. Maruti Hari Jadhav, 1966 (1) SCR 102**, this Court said :

> "The provisions of Section 115 of the 'Code have been examined by judicial decisions on several occasions. While ex ercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed, to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of rasjudica is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court cannot be corrected by the High Court under Section 115."

16. Applying the tests laid down in the aforesaid decision, I do not find that the findings recorded by the Courts below are

perverse, being based on no evidence, or that they are contrary to evidence on record. The defendant was not in a position to demonstrate that on the basis of material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. In view thereof, reliance placed by Mr. Dani on the decisions in the case of Humayun Dhanrajgir (supra) and Smt. Purificacao Fernandes (supra) does not advance the case of the applicants. Hence, no case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed.

17. At this stage, Mr. Dani orally applies for stay of this order for a period of 6 weeks from today and further states that the applicant-defendant will not seek further extension. Mr Ghandy opposes the prayer on the ground that the stay granted by the Appellate Court was operating till November, 2015 and no stay is thereafter operating. Having regard to the fact that the defendant intends to challenge this order before the Apex Court, I find that the request made by the defendant is reasonable. Hence, notwithstanding dismissal of Application, this order is stayed for a period of six weeks from today with clear understanding that no application for extension will be entertained on whatsoever grounds. Order accordingly.

(R.G.KETKAR, J.)