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

**FIRST APPEAL NO.97 OF 2002**
**WITH**
**CIVIL APPLICATION NO.4627 OF 2016**
**IN**
**FIRST APPEAL NO.97 OF 2002**

Kalika Ramnihut Pandey & Ors. ..Appellants/Applicants
V/s.
Smt.Nirmalaldevi Vijaynarayan
Dwivedi & Ors. ..Respondents

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Mr.G.H. Keluskar for the Appellants/Applicants.

Mr.A.S. Khandeparkar i/by Khandeparkar & Associates for Respondent No.1.

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**CORAM : M. S. SONAK, J.**

**DATE : 24 FEBRUARY 2017.**

**P.C.**

1. Heard the learned counsel for the parties.

2. The challenge in this appeal is to the order dated 4 May 2001 made by the City Civil Court, Mumbai determining the mesne profits at the rate of Rs.2,700/- per month from the period of 10 December 1985 to 06 January 1998.

3. Mr.Keluskar, learned counsel for the appellants submits

that in this case, the respondent (Plaintiff), in the suit, had claimed for mesne profit at the rate of Rs.1,000/- per month. After the decree was made and the enquiry in relation to the mesne profits commenced, the respondent, claimed mesne profit at the rate of Rs.1,200/- per month. Mr.Keluskar submits that initially, even the learned Trial Judge had determined mesne profits at the rate of Rs.1,000/- per month. However, the same was without affording the appellant an opportunity of cross-examining the plaintiff. Upon challenge, the order was set aside and the matter was remanded for fresh determination. The Registry of the City Civil Court determined mesne profit at the rate of Rs.1,200/- per month. However, the learned Trial Judge, by the impugned order, has determined mesne profit at the rate of Rs.2,700/- per month. Mr.Keluskar submits that there is no material on record to sustain such determination. In any case, he submits that when the claim of the plaintiff itself was Rs.1,000/- or at the highest Rs.1,200/-, there was no question of determining mesne profit at the rate of Rs.2,700/- per month and on the basis of this ground itself the impugned order is liable to be set aside.

4. Mr.Khandeparkar, learned counsel for respondent No.1 (Original plaintiff) submits that what was submitted in the plaint or

for that matter in the course of enquiry, was a mere approximation. In fact, in the course of the enquiry, what was submitted was that mesne profits at the minimum rate of Rs.1,200/- per month are liable to be awarded. Mr.Khandeparkar submits that ultimately, mesne profits have to be determined after a decree of the eviction has been made and in the course of the enquiry, if the learned Trial Judge comes to the conclusion that the mesne profits are in excess of what may have been claimed by the parties, it is a duty of the learned Trial Judge, to award the same. Mr.Khandeparkar submits that the principle is that no party should be permitted to reap the fruits on account of not only his illegal continuance in possession in the suit premises but also that no party should take any undue advantage on account of the delay in legal procedures. Mr.Khandeparkar submits that the appellant in the present case, are seeking undue advantage of the position that such proceedings take long time to conclude. He submits that in this case, the appellants have been far from fair in their approach. The appellants did not return the motor of the flour mill at the stage when the possession was handed over. The appellant also did not disclose the true and correct facts with regard to their income. He submits that the appellants went to the extent of claiming that the net income was only Rs.630/- per month when infact the appellants accept that they were paying an amount of Rs.1,000/- to their employee. For all these reasons Mr.Khandeparkar submits that the determination of the mesne profits is legal and proper and the same warrants no interference.

5. In this case, the constituted attorney of the plaintiff has examined himself. He has produced on record about 24 electricity bills for the period 1989 to 1995. The average amount in terms of such bills comes to Rs.2,000/- per month. Insofar as such documentary evidence is concerned, there is really no reason to doubt the same. The appellants, despite opportunity, has not produced any evidence to counter the same.

6. The learned Trial Judge has taken the aforesaid documentary evidence as the basis and thereafter determined that the appellants, easily had a net income of around Rs.6000/- per month by operating the flour mill in the suit premises. The learned Trial Judge has made deductions towards expenses at the rate of Rs.3,300/- per month and thereby determined the mesne profit to Rs.2,700/- per month.

7. The appellants in this case, denied the suggestion that

they were using 1500 horse power motor for the purposes of operating the flour mill. However, the appellant, chose to lead no evidence with regard to precise capacity of the motor which they were using for the purpose of operating the flour mill. From the tenor of the evidence led by the appellants and the questions posed during the course of cross-examination by the respondents, it does appear that the appellants were not candid to the Court or were not assisting the Court in determining appropriate rate of the mesne profit. At one stage, appellant went to the extent of stating that the total income from the flour mill was only be Rs.630/- per month. This was rightly rejected by the learned Trial Judge by observing that if the appellants were paying salary of Rs.1,000/- per month to their employee, it is inconceivable that the entire income of the appellants was only Rs.630/- per month.

8. In the impugned order, the learned Trial Judge has no doubt, drawn certain inferences on the basis of the facts which are held as proved. However, it cannot be said that the inferences are totally unreasonable in the facts and circumstances of the present case. There was necessity to draw such inferences on account of the non co-operative attitude of the appellants.

9. The determination at the rate of Rs.2,700/- per month however, appears to be on the higher side because, it was necessary to make certain allowances for operational expenses, apart from payment of electricity bill, payment to employees and such other matters. Besides, some allowances have also to be made for expenses which are required to be incurred towards repair and usual wear and tear, particularly because we are concerned with operation of flour mill. If all these factors are taken into consideration, then, the mesne profit, could have been determined at the rate of Rs.2,000/- per month and not Rs.2,700/- per month.

10. The question of course remains as to whether the learned trial judge was precluded from determining mesne profit in excess to what was referred to in the plaint or in certain statements, including, in the affidavit in lieu of the examination in chief in the course of the enquiry. It is to be noted that in terms of Order 20 Rule 12 of the C.P.C., where a suit is for recovery of possession and for rent of mesne profits, a Court may pass a decree for the possession of the property and may direct an enquiry as to rent or mesne profits from the date of the institution of the suit until the delivery of the possession to the decree holder.

11. This means that it is the duty of the Court to hold an enquiry as to the appropriate amount of mesne profits that is required to be awarded. The statement made by the parties in the course of such enquiry cannot be treated on the same plane as the pleading in the suit. Ultimately, it is the duty of the Court to hold an enquiry and determine the mesne profits, particularly because the mesne profits relate to the period from the institution of the suit till the delivery of the possession to the decree holder.

12. The term '*mesne profit*' is used for damages for trespass, a wrongful act relating to immovable property and the said wrongful act forms one of the torts affecting realty i.e. immovable property. The enlarged scope of this term is meant to claim profit from one whose possession may not originate in trespass but is nevertheless wrong. Section 2(12) of the Code of Civil Procedure, 1908 defines the expression '*Mesne Profits*' of a 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.

13. The measures of *"Mesne profits"* is not what the landlord

had lost by not being able to get possession, but what the user of the property meant to the defendant who was in wrongful possession. In other words, the basis for determining the quantum of mesne profit is: What the defendant might with ordinary diligence have received from the property. The person in wrongful possession canot be heard to say that he has not utilized the property, made no profits, and therefore, he should not be made liable to pay any mesne profits. A plain reading of the definition of the expression mesne profit would leave no manner of doubt that the real test to be applied applied is, not what the plaintiff decree holder had lost or would have earned by letting out or using the property herself, but what the person in wrongful possession, with ordinary diligence would have received from it. The mesne profits are to be determined on the basis of the advantage derived by the person in wrongful possession by the user of the property and not just the fair value of the property. [See ***Humayun Dhanrajgir & Ors V/s. Ezra Aboody 2008(6) Bom. C.R. 862].***

14. Judicial notice can be taken of the fact that generally the suits for recovery of possession can consume considerable time for disposal. Even after, a decree for recovery of possession is made, the execution proceedings also take considerable time. One of the

principles is that the party who has been adjudged to be in wrongful possession should not be permitted to take undue advantage of the pendency of the litigation, particularly because the parties, on most occasions have no effective control over such matters. There is no requirement that the plaintiff has to specify the amount of mesne profits in the plaint at the stage of institution of the suit. The question of determination of mesne profits arises after the defendant is adjudged to be in wrongful possession of the property. After such adjudication, it is the duty of the Court to make an enquiry and determine the measure of mesne profits. The time lag between the institution of the suit and the making of the decree is usually long. Therefore, it will not be appropriate to tie down the respondent to the amount which might have been referred in the plaint.

15. In the affidavit in lieu of examination-in-chief, what is stated is that mesne profits of at least Rs.1,200/- per month are liable to be ordered. The executing Court was quite justified in making inquiry and determining the mesne profits on the basis of such inquiry. In this case, it is apparent that the appellants were neither candid to the Court nor did they co-operate in the matter of proper determination of the mesne profits. Besides, the testimony of the appellants proceeds on the basis that mesne profits represents

the actual profits made by the persons in wrongful possession of the property. The correct test, as indicated earlier, is what a person in wrongful possession, with ordinary diligence, might have received from the property. Upon cumulative considerations of all these factors, mesne profits are required to be determine at the rate of Rs.2,000/- per month.

16. Accordingly, it cannot be said that there is any jurisdictional error in the approach of the learned Trial Judge. However, upon reassessment of the material on record the mesne profit at the rate of Rs.2,700/- per month is on the higher side and therefore, the same is reduced to Rs.2,000/- per month.

17. The appeal is therefore partly allowed. The mesne profit is determined at the rate of Rs.2,000/- per month. The rest of the directions in the impugned order are confirmed. In the facts and circumstances of the present case, the parties are left to bear their own costs.

**(M. S. SONAK, J.)**