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

WRIT PETITION NO. 7420 OF 2005
WITH
CIVIL APPLICATION NO.1945 OF 2016

Shri. Dineshbhai Jivanbhai Sanspara And Anr. ....Petitioners
V/S
Central Bank Of India ....Respondent

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Mr. P.J. Thorat, Advocate for the Petitioners.
Mr. K.K. Jadhav, Advocate for the Respondent.

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**CORAM : R.G. KETKAR, J.**
**RESERVED ON : 2nd July, 2019.**
**PRONOUNCED ON : 8th July, 2019**

**JUDGMENT:**

Heard, Mr. P.J. Thorat, learned Counsel for the petitioners and Mr. K.K. Jadhav, learned Counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, Petitioners, hereinafter referred to as 'plaintiffs' have challenged the Judgment and Order dated 01.03.2005 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Appeal No. 158 of 2004. By that Order, the Appellate Court confirmed the Trial Court's Order regarding possession. The order passed by the Trial Court awarding mense profit @ Rs. 2,13,690/- was set aside. The Appellate Court ordered separate

enquiry for mesne profits from 01.11.2000 till the date of delivery of possession i.e. 27.10.2004 to be conducted under Order XX, Rule 12 (1) (c) of the Code of Civil Procedure, 1908 (for short "CPC"). The facts and circumstances, giving rise to filing of the present Petition, briefly stated, are as under:

i. The Plaintiffs instituted T.E.R. Suit No. 62/73 of 2002 against respondent, "hereinafter referred to as the 'defendant' for recovery of possession of the area admeasuring 3052.75 sq. ft. on the ground floor, mezzanine floor and first floor of "Sahas" building situate at Sahakar Road, Tejpal Scheme Road No.5 Extn., Vile Parle (East), Mumbai 400 057 (for short "Suit Premises"). The Plaintiffs contended that by notice dated 15.09.2000 issued through their Advocate, tenancy of the defendant was terminated. Defendants were called upon to quit, vacate and deliver vacant and peaceful possession of the suit premises to the plaintiffs. The notice was sent by Registered Post A.D. Defendant replied that notice on 03.10.2000. The plaintiffs contended that the paid-up share capital of the Defendants exceeds Rs. 1 Crore. In view of Section 3(1)(b) of the

Maharashtra Rent Control Act, 1999 (for short 'Act'), the defendants are not entitled to protection under the said Act.

ii. Plaintiffs further contended that on termination of tenancy of the Defendants by notice dated 15.09.2000 their continuous use, occupation and possession of the suit premises from 01.11.2000 is illegal, unauthorized and wrongful. For such unauthorized, wrongful and illegal use, occupation and possession of the suit premises, the defendant is liable to pay mesne profit / damages at the market rate. The plaintiffs prayed for issuing direction to the defendant to pay mesne profit from 01.11.2000 till handing over possession to the plaintiffs at such amount as the Court may fixed after enquiry under Order-XX, Rule-12 of CPC. The plaintiffs contended that the market rate of rent for the suit premises is Rs.2,13,690/- per month @ 70 per sq. ft. per month.

iii. Defendant filed the Written Statement dated 11.07.2002 resisting the suit. On the basis of the pleadings of the parties, the learned Trial Judge framed the necessary issues on 07.10.2002. The parties adduced evidence. After considering the evidence on record, the learned Trial Judge decreed the suit on

15.03.2004. The learned Trial Judge directed the defendant to deliver vacant and peaceful possession of the suit premises to the plaintiffs within a period of four months. The defendant was further directed to pay mesne profits @ Rs. 2,13,690/- per month for the period from 01.11.2000 till the date of the suit.

iv. Aggrieved by this Order, defendant preferred Appeal No.158 of 2004. Plaintiffs took out Miscellaneous Notice No.208 of 2004 seeking correction in the operative part of the Trial Court's Order dated 15.03.2004. Defendant filed Affidavit-in-reply dated 03.08.2004 opposing the notice. By Order dated 06.10.2004, the learned Trial Judge made absolute the notice and added following sentence in the operative part of the order:

> "Enquiry of mesne profits in respect of the suit premises be held under Order-XX, Rule 12 of CPC for the period of date of filing of the suit till delivery of possession of the suit premises".

3. It is common ground between the parties that on 27.10.2004, defendants handed over the possession of the suit premises to the plaintiffs. Thus, the controversy in the Appeal was only in respect of the mesne profits.

4. The appeal preferred by the Defendant was allowed on 01.05.2005 to the extent of mesne profit. The order of the learned Trial Judge granting mesne profit @ Rs. 2,13,013/- per month was set aside by substituting the following direction;

> "Separate enquiry for mesne profit from 01.11.2000 till the date of delivery of possession i.e. 27.10.2004 be held under Order XX rule 12 (1) CPC".

It is against this part of the Order, the plaintiffs have instituted the present Petition.

5. In support of this Petition, Mr. Thorat submitted that the suit premises occupied by the defendant is exempted from the provisions of the Act. The paid up share capital of the defendant exceeds Rs. 1 Crore. The Plaintiffs had issued notice dated 15.09.2000 terminating the tenancy of the defendant. From 01.11.2000, occupation of the suit premises of the defendant is unauthorized. In view of the definition of mesne profits in Section 2(12) of CPC, the defendant is liable to pay mesne profits from 01.11.2000. He submitted that Order XX, Rule 12(1)(b) as per Bombay High Court amendment empowers the Court to pass a decree for the rent or mesne profits which have accrued on the property during the period prior to the institution of the Suit or directing an enquiry to such rent or

mesne profits. In the present case, the learned trial Judge, on the basis of evidence on record, had directed payment of mesne profits @ Rs.2,13,690/- per month for the period from 01.11.2000 till the date of filing of the Suit. He invited my attention to the evidence of PW-2 – Harshad Sundarlal Maniar, practising Architect, Engineer and Registered Estate Valuer (hereinafter referred to as 'Harshad”) during the course of his cross-examination as also finding record by the learned Trial Judge in paragraph 19.

6. He submitted that the learned Trial Judge had granted mesne profits from 01.11.2000 till the date of filing of the suit. However, enquiry for mesne profits from the date of filing of the suit till handling over the possession by the defendant to the plaintiff was not ordered. The plaintiffs, therefore, took out Miscellaneous Notice for correcting the operative part of the order in the judgment by replacing the words “till the date of the suit” by the words “till the delivery of the possession”. The learned Trial Judge passed the following order:

> “Notice is made absolute in following terms:
>
> In the operative part of judgment and order dated 15.03.2004 passed in the abovesaid suit, following sentence is added:
>
> 'Enquiry of mesne profits in respect of the suit premises is ordered

> under 20 Rule 12 of C.P.C. for the period of date of the filing of the suit till delivery of possession of the suit premises'.”

7. Mr. Thorat submitted that the Appellate Court, however, set aside the Order of the learned Trial Judge granting mesne profits @ Rs.2,13,690/- per month for the period from 01.11.2000 till the date of filing of the suit and ordered an enquiry for mesne profits from 01.11.2000 to 27.10.2004 being the date of delivery of the possession. In the first place, the Appellate Court set aside the direction on the ground that no opportunity was given to the defendant to adduce the evidence. He submitted that the said finding is contrary to the record. PW-2-Harshad was cross-examined by the defendant. The defendant, however, chose not to adduce evidence on the issue of mesne profits. It, therefore, cannot be said that the defendant had no opportunity to adduce evidence for determining mesne profits.

8. Secondly, the Appellate Court held that the learned Trial Judge did not consider all the facts for determination of mesne profits during the pendency of the suit. Thirdly, the Appellate Court held that while awarding mesne profits @ 2,13,690/- from 01.11.2000, the trial Court did not appreciate evidence of PW 2 – Harshad. In support of his submissions,

Mr. Thorat relied upon decision in ***Mujeeb-ur-Rehman Haji Israr Alam Siddiqui Versus M/s. K.T. & Company*, (2018) to ALL M.R. 267** and in particular paragraph 16.

9. On the other hand, Mr. Jadhav, supported the impugned Order. He submitted that the earlier owner / landlord entered into an Article of agreement with the plaintiffs on 12.08.1995. On 17.09.1996, tenancy was attorned. The erstwhile landlord / owner executed registered conveyance in favour of the plaintiffs on 28.03.2002. Thus, at the time of issuing notice of determination dated 15.09.2000, plaintiffs had no title in respect of the suit premises. He relied upon section 17 and 49 of the Indian Registration Act, 1908 to contend that the plaintiffs can claim ownership only on and from the registration of conveyance deed on 28.03.2002. He relied upon decision in ***Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana*, 2012 (1) SCC 656**.

10. He further submitted that the Appellate Court dealt with the evidence of PW2 – Harshad. The Appellate Court observed that PW2 had considered the theory of fair investment and return on it. Mr. Jadhav submitted that determination of mesne profits on the basis of fair investment is not approved by several decisions. In any case, the Appellate

Court had ordered enquiry from 01.11.2000 to 27.10.2004, being the date of delivery of possession. Hence, no case is made out for interfering with the impugned Order.

11. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. Mr. Jadhav submitted that the plaintiffs became owner / landlord only from 28.03.2002 by the conveyance deed registered in their favour on that date. In other words, the plaintiffs cannot claim mesne profits from 01.11.2000 till 28.03.2002. I do not find any merit in these submissions. As mentioned earlier, Article of agreement was entered into between the erstwhile owners and the plaintiffs on 12.08.1995. The tenancy was attorned on 27.09.1996. Defendant was paying rent to the plaintiffs. That apart, the contention advanced in this Court was not advanced before the Courts below. In view thereof, reliance placed by the defendants on **Suraj Lamp & Industries Pvt. Ltd.** (*supra*) does not advance their case.

12. It is also not in dispute that on 15.09.2000, plaintiffs had issued termination notice which is duly served on the defendant. The plaintiffs specifically contended that from 01.11.2000, the defendant is in wrongful possession of the suit premises. Occupation of the defendant in the suit

premises is unauthorized as per Section 2(12) of CPC. Section 2 (12) of the C.P.C defines the expression 'mesne profits'. It reads thus:

> **"2. Definitions.-** 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"

13. A perusal of the above definition clearly shows that *mesne profits* 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. In the case of **Mujeeb-ur-Rehman Haji Asrar Siddiqui** (*supra*), this Court has held in paragraph 16 as under:

> "As clearly laid down by the Supreme Court in the aforesaid decision, under the general law and in cases where the tenancy is governed only by the provisions of the Transfer of Property Act 1882, once the tenancy comes to an end by determination of the lease under Section 111 of the Transfer of Property Act, 1882 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 at the rate at which the landlord could have let out the premises. In other words, after the expiry of the period of the

> termination notice, the tenant would be liable to pay fair market compensation and not from the date of the decree. I must hasten to add that different considerations apply when an eviction decree is passed against a tenant who is protected under the provisions of the Maharashtra Rent Control Act, 1999. In such a situation and as held by a series of decisions of the Supreme Court including in Atma Ram Properties (P) Ltd. (supra), the occupation of the tenant of the suit premises in such a case is unlawful after the decree is passed in an eviction suit. However, that would not be the case where the tenancy is governed under general law and only by the provisions of the Transfer of Property Act, 1882. I must also mention here that this point was specifically raised by the Defendant in their affidavit in reply to the Stay Application (Exhibit 7). In paragraph 2 of the reply, it is specifically contended that the occupation and possession of the suit premises by the Defendant after the termination notice is wrongful and as such the Plaintiff is entitled to mesne profits from one month after the date of the termination notice (9th January 2012). This argument has not even been considered in the impugned order and there are no findings on this aspect either."

14. In paragraph 15, the plaintiffs have claimed mesne profits @ 2,13,690/- per month from 01.11.2000. By prayer clause (b) the plaintiffs have claimed mesne profits from 01.11.2000 till handing over possession of the suit premises. By prayer clause (c) of the suit, the plaintiffs claimed mesne profits @ 2,13,690/- per month from the defendant during the pendency of the Suit.

15. Plaintiffs also examined PW-2 – Harshad. PW-2 produced valuation report dated 19.12.2002, PW-2 had determined mesne profits by adopting.

i. Fair investment theory.

ii. The potential of present letting of the premises in the year 2000 based on comparables. A perusal of the cross-examination of PW-2 shows that nothing damaging was elicited by the defendant during the course of cross-examination. As mentioned earlier, defendant did not adduce any evidence for determining the mesne profits.

16. The learned Trial Judge has considered this aspect in paragraphs 19 and 20. Paragraphs 19 and 20 read thus:

> "19. This issue is pertaining to mesne profit is in respect of the Suit premises from 01.04.2000 to the date of the Suit. I have already held that the Plaintiffs have duly terminated the tenancy in aspect of the some promoters by under dated 15.09.2000 in view of the same the Defendants can be said to be in Defendant use and possession of Suit premises from 01.11.2000. The profit is defined under Section 2(2) of the Civil Procedure Code.
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> 20. Evidence adduced in this regard by the Plaintiffs is valuer's rejoinder dated 19.12.2002 at Exhibit – J. To prove that the Plaintiffs have examined Harlad S. Maniar, who proper that report after taking inspection of Suit premises has been cross-examined. In the cross-examination he has stated that he has applied method as well as comparable rent and the examination on the report. It is thereby stated that the report was not prepared by the Architect and that said Architect has not seen the Suit premises by going inside before preparing the valuation report. That is seized by the said witness. Nothing has been executed in the cross-examination to diminish the evidentiary value of the said valuation report which is duly proved. As per the said valuation report the market rent in

> respect of the Suit premises would be Rs. 81/- per sq. ft. per month. The Plaintiffs has however claim monthly mesne profit at the rate of Rs. 2,13,690/- which is about Rs. 70/- sq. ft. p.m. In view of the valuation report in any opinion the Plaintiffs will be entitled for the mesne profit as prayed for. Hence, I answer this issue accordingly and proceed to pass following Order".

17. As mentioned earlier, the plaintiffs took out Miscellaneous Notice for correction of the operative part of the order. After hearing both the sides, the learned Trial Judge allowed the notice on 06.10.2004. The operative part of that Order reads thus:

> "Notice is made absolute in the following terms:
>
> In the operative part of judgment and order dated 15.03.2004 passed in the abovesaid suit, following sentence is added:
>
> 'Enquiry of mesne profits in respect of the suit premises is Order under 20 Rule 12 of CPC for the period of date of the filing of the suit till delivery of possession of the suit premises.' "

18. The Appellate Court partly allowed the appeal on three counts, namely,

i. The Trial Court did not consider all the facts for determining the mesne profits during the pendency of the suit while awarding mesne profits @ Rs. 2,13,690/- per month from 01.11.2000;

ii. The learned Trial Judge did not appreciate evidence of PW-2 –

Harshad;

iii. Defendant was not given opportunity to adduce evidence in respect of fixing the mesne profits.

19. In my opinion, the Appellate Court failed to appreciate that the plaintiffs have specifically prayed for mesne profits by prayer clause (b). The plaintiffs specifically pray for mesne profits from 01.11.2000. In paragraph 15, the plaintiffs contended that defendant's occupation in the suit premises became unauthorized and wrongful from 01.11.2000. The plaintiffs also contended that market rate of rent for the suit premises is Rs. 2,13,690/- per month.

20. To substantiate these contentions, the plaintiffs also examined PW-2 – Harshad, who is practicing Architect Engineer and Registered Valuer PW-2 produced valuation report dated 19.12.2002. A perusal of this report shows that PW-2 referred to two modalities of computation of mesne profits namely: 1) fair investment theory, and 2) Potential of present letting in the year 2000 based on comparable.

21. Though Defendants cross-examined PW-2, they were unsuccessful in eliciting any material which will doubt credibility of valuation report. The

defendants did not adduce any evidence as regards fixing mesne profits. In any event, it cannot be said that learned Trial Judge did not give any opportunity to the defendants to adduce evidence. Though the opportunity was given to the defendants, they did not avail that opportunity.

22. The Appellate Court also failed to appreciate that in view of the prayers made by the paintiffs in the suit as also in view of the decision of this Court in **Mujeeb-ur-Rehman Haji Israr Alam Siddiqui** (*supra*), the occupation of the defendant;s become unauthorized and wrongful from 01.11.2000. It also cannot be said that the learned Trial Judge failed to appreciate evidence of PW-2 -Harshad properly. In fact the Appellate Court in paragraph 9 observed that Order XX, Rule 12(1)(b) gives discretion to award mesne profits which are accrued on the property prior to the institution of the Suit and still set aside the direction of the trial Court.

23. In view thereof, the following part of the order of the Appellate Court is required to be set aside:

> "The order of the Learned Trial Court granting mesne profit at Rs.2,13,690/- per month is set aside and the following order is substituted:
>
> 'Separate inquiry for mesne profits from 1.11.2000

> till the date of delivery of possession i.e 27.10.2004 be held under Order XX Rule 12 (1) of C.P.C.' ”

thereby restoring following part of the trial Court's order:

> “Defendants to pay mesne profits at the rate of Rs.2,13,690/- per month for the period from 1.11.2000 till the date of the suit”.

24. Rule is made absolute with no order as to costs. In the interest of Justice, parties to bear their own costs. In view of disposal of main Writ Petition, C.A. No.1945 of 2016 does not survive and the same is disposed of.

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