

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.14588 OF 2018

The Cosmos Co-operative Bank Limited ... Petitioner
Vs.
Majithia Nagar Co-operative Housing Society Limited... Respondent

Mr. A. Y. Sakhare, Senior Advocate a/w. Mr. Joel John Carlos and Mr. R. S. Mirpury for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 16, 2019

P.C. :

Heard Mr. Sakhare, learned Senior Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 02.09.2016 passed by the learned trial Judge in Mesne Profits application No.7 of 2013 as also the judgment and order dated 07.09.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.58 of 2017. By these orders, the Courts below held that Mesne Profits application filed by the respondent-decree holder is within limitation. The relevant and material facts for the disposal of the Petition are as under.

3. After terminating the tenancy, the decree holder instituted T.E. Suit No.8 of 2002 in the Small Causes Court, Mumbai in the year 2002 for recovery of possession and mesne profits. On 31.07.2004, the learned trial Judge decreed the Suit and directed the defendant to handover possession and also ordered inquiry into mesne profits. Aggrieved by this decision, defendant preferred Appeal, which was dismissed on 29.04.2009. Aggrieved by these decisions, defendant

instituted C.R.A. in this Court, which was also dismissed on 12.11.2009. On 04.02.2010, defendant handed over possession of the suit premises to the decree holder. The decree holder filed application on 12.07.2013 under Order XX, Rule 12 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for mesne profits.

4. The defendant filed application exhibit-25 for framing issue of limitation as a preliminary issue. By order dated 14.03.2016, the learned trial Judge allowed the application filed by the defendant and framed issue No.2, namely, issue of limitation as a preliminary issue and took up the said issue for hearing.

5. By order dated 02.09.2016, the learned trial Judge held that application filed by the decree holder on 12.07.2013 for mesne profits is within limitation. Aggrieved by this decision, defendant preferred revision application, which was dismissed on 07.09.2018. It is against these orders, defendant has instituted the present Petition.

6. In support of this Petition, Mr. Sakhare submitted that application under Order XX, Rule 12 of C.P.C. is governed by Article 137 of the Limitation Act, 1963 (for short 'Act'). Article 137 lays down the period of limitation of 3 years when right to apply accrues. In the present case, defendant had handed over possession to the decree-holder on 04.02.2010. Decree holder ought to have filed application for determining mesne profits within 3 years from 04.02.2010 as right to sue accrued on that date. Admittedly, application is filed on 12.07.2013. In view of Article 137 of the Act, the application is clearly barred by limitation.

7. Mr. Sakhare submitted that the trial Court erroneously held that

there is no limitation prescribed for filing application under Order XX, Rule 12 of C.P.C. He submitted that this will be clearly in contravention of the decision in ***Kumudini Ramdas Shah Vs. K. M. Mody*, 1985 Mh.L.J. 454** and decision in ***Manohar Vs. Jaipalsing*, (2008) 1 SCC 520**. In paragraph 12 of the decision in ***Manohar* (supra)**, the Apex Court held that inquiry for determining *mesne* profits would be subject to the institution of the proceedings. Therefore, it is clear that even after the preliminary decree is passed, the proceeding is required to be initiated under Order XX, Rule 12 of C.P.C. for the purpose of enquiry into *mesne* profits and the said application will be governed by Article 137 of the Act. He submitted that the Appellate Court held that the application under Order XX, Rule 12 is an application in the enforcement of the preliminary decree and therefore, would be covered by Article 136 of the Act. Since the application is within 12 years from the decision of the first Appellate Court, it is within limitation. He submitted that the approach of the Appellate Court was wholly perverse. He, therefore, submitted that the Petition requires consideration.

8. I have considered the submissions advanced by Mr. Sakhare. I have also perused the material on record. The facts in the present case are not in dispute. Admittedly, the Suit filed by the decree holder was decreed on 31.07.2004. The operative part of the decree passed by the trial Court reads thus,

“

ORDER

Suit is decreed as under;

(a) The defendants shall deliver vacant possession of the suit premises viz. premises about 171.68 sq.mts. equivalent to 1848 sq.ft. or thereabout on the ground floor of the building No.6 known as Majithia Nagar situate at 53, S.V.Road, Kandivli (W), Mumbai 400 067 to the plaintiffs within four months.

(b) The defendants shall pay mesne profits to the plaintiffs in respect of the suit premises from the date of the suit till the plaintiffs received possession of the suit premises.

For determination of quantum of mesne profit inquiry under Order XX, Rule 12 (c) of the Code of Civil Procedure is directed.

(c) No order as to costs.

(d) Preliminary decree be drawn accordingly.”

9. Aggrieved by the order of the trial Court, defendant preferred appeal, which was dismissed on 29.04.2009. C.R.A. preferred by the defendant was also dismissed by this Court on 12.11.2009. It is also not in dispute that defendant handed over possession to the decree holder on 04.02.2010 and that on 12.07.2013, decree holder filed application under Order XX, Rule 12 of C.P.C. for mesne profits. The moot question is whether the application is barred by limitation as the same was filed beyond 3 years from handing over possession on 04.02.2010 and whether the said application is governed by Article 137 of the 14 Act.

10. Order XX, Rule 12 of C.P.C. reads thus,

ORDER XX
Judgment and Decree

12. Decree for possession and mesne profits.- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-

- (a) for the possession of the property;
- (b) 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 inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until-
 - (i) the delivery of possession to the decree-holder, or
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(2) Where an inquiry is directed under clause (b) or clause (c) of sub-rule (1) above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

11. A perusal of sub-rule (2) of Rule 12 of Order XX shows that where an enquiry is directed under clause (b) or (c), **a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.** In the present case, it is not in dispute that preliminary decree is passed and final decree is to be passed only upon completion of enquiry into mesne profits.

12. Mr.Sakhare relied upon paragraph 12 of the decision in **Manohar** (*supra*). In that case, applicability of Article 137 was the question that fell for consideration before the Apex Court. The appeal was preferred against the order dated 26.07.2005 passed by the learned Single Judge of this Court at Nagpur Bench in Writ Petition No.5927 of 2004 affirming an order dated 26.10.2004 passed by the Civil Judge, Junior Division in Regular Darkhast No.32 of 2001. The predecessor-in-interest of the respondents had instituted Suit namely, R.C.S.No.250 of 1965. On 24.12.1968, the Suit was dismissed. The appeal preferred against that decision was also dismissed. Second Appeal preferred by the plaintiff was allowed and the orders of the Courts below were set aside. The operative part of the order was thus,

“For the reasons stated in the accompanying judgment, the court allows the appeal, sets aside the decrees of both the courts below dismissing the suit and instead. The court orders that the plaintiff's suit for possession of 32 gunthas area, as shown in the copy of the map, Ext.30, from out of Survey No.59/1 area 3 acres 12 gunthas, shall stand decreed with costs throughout. The appellant-plaintiff is also entitled to an enquiry under the provisions of Order 20, Rule 12(1) CPC for mesne profit in respect of the suit land from the date of the suit till the actual delivery of possession.”

13. An application for review was filed by the appellants, which was dismissed on 12.08.1985. The appellants preferred S.L.P. before the Apex Court. Leave was granted. On 21.03.1988, the Apex Court stayed the operation of the order dated 01.07.1985 of the High Court in Miscellaneous Civil Application No.134 of 1984 in Second Appeal No.158 of 1972 and directed the learned trial Judge to ascertain the amount of mesne profits. The appeal was dismissed by the Apex Court. On 10.12.2001, application for execution of decree was filed by the decree holder. Objection was raised about the maintainability of the execution proceedings on the ground of limitation. By order dated 26.10.2004, the executing Court rejected the contention. By order dated 26.07.2005, the learned Single Judge of this Court also dismissed the Petition. In paragraph 12, the Apex Court observed thus,

“12. The decree passed by the High Court in the aforementioned Second Appeal No. 158 of 1972 is in two parts. The Court granted a decree for possession In respect of an area measuring 32 gunthas, as delineated in the map Exh. 30, out of Survey No. 59/1 measuring 3 acres 12 gunthas. Respondent was also found to be entitled to an enquiry in terms of Order 20 Rule 12 of the Code of Civil Procedure in regard to computation of mesne profit from the date of the institution of the suit, till the date of the actual delivery of possession. It is therefore, not correct to contend that the decree was a composite one. The proceeding for computation of mesne profit required to be undertaken in terms of Order 20 Rule 12 of the Code of Civil Procedure was subject to institution of a proceeding but, by reason thereof, the execution of the decree in regard to the possession of 30 gunthas of land was not required to be awaited till the outcome.”

14. Relying upon paragraph 12, Mr. Sakhare submitted that the proceeding for computation of mesne profits required to be initiated in terms of Order XX, Rule 12 is subject to institution of the proceedings. In other words, it is necessary for the decree holder to file proceedings for determining mesne profits. The Apex Court quoted Article 136 in

paragraph 17. In paragraph 18, it was observed that the decree for possession passed in favour of the respondent became enforceable immediately on its passing and execution petition was therefore, required to be filed within a period of 12 years as contemplated by Article 136. In paragraph 21, the Apex Court noted that the order of stay dated 21.03.1988 was of no assistance to the decree holder. The Special Leave Petition was filed only against order dated 01.07.1985 refusing to review judgment and decree dated 02.09.1983. The stay of operation of the order dated 01.07.1985 for all intent and purport was meaningless as the review petition already stood dismissed.

15. In that case, the question that fell for consideration was within what time proceedings for execution are required to be filed for obtaining possession. In my opinion, the said decision is not applicable to the facts of the present case. In the present case, possession is already handed over by the defendant on 04.02.2010.

16. In the impugned order, the learned trial Judge referred to the decision in ***Chandrakant Vs. Ramchandra*, 1986 Mh.L.J. 301**, where it is held that,

“That the plain reading of Order 20 Rule 12(1)(c) Civil Procedure Code showed that the only requirement thereunder is that the suit should be for recovery of possession of immovable property and for rent or mesne profits. The power to order an enquiry can be exercised irrespective of whether the relief of possession of the property is granted or not, not only for payment of mesne profits but also for rent. There is no question of limitation so far as the applicability of Order 20, Rule 12 is concerned because all that is contemplated in such a case is passing of a preliminary decree and then a final decree for the amount which may be found due. When it is obvious that there could be no bar of limitation in ordering the amount of mesne profits, if it is coupled with a decree for ejectment, there cannot be any good ground for inferring that if the claim for ejectment is not granted, the bar of limitation would become applicable and arrears of rent also could not be

recovered. Putting such a construction would not be justified by the language of the provision. When an order can be made during the pendency of proceeding for payment of arrears, mesne profits and damages for use and occupation there is no plausible reason for holding that such an order cannot be made at the conclusion of the proceedings and that at that stage the bar of limitation should be applied.”

17. The learned trial Judge referred to the decision in ***Shankar Appaji Patil Vs. Gangaram Bapuji Nagude*, AIR 1928 BOM 236** and extracted paragraphs 3 and 4 of that decision. In paragraph 3 of that report, it was held that Order XX, Rule 12 does not provide for any application to be made for the ascertainment of mesne profits. It provides that the Court after directing an inquiry shall pass a final decree in accordance with the result of such inquiry. No application is provided under this Rule as is provided under Order XXXIV, Rule 5, under which a final decree for sale of the mortgaged property cannot be made except on application made in that behalf by the plaintiff. In ***Bhatu Ram Modi Vs. Fogal Ram*, (1925) I.L.R. 5 Pat. 223**, it was held that where a decree for mesne profits has been passed and an application has been made for ascertainment of the mesne profits, it is not competent to a Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed and that it is always open to the decree-holder to ask the Court to ascertain the mesne profits in as much as an application for mesne profits is an application in the suit itself, and the law of limitation has no application to it so long as the suit is a pending suit.

18. In paragraph 4 of that report, it was held that the ascertainment of mesne profits is a proceeding in suit, and it is the duty of the Court to pass a final decree in accordance with the result of the inquiry as laid down in Order XX, Rule 12 (2) of C.P.C. It was not then within the power of the lower court in this case to decline to exercise the

jurisdiction vested in it by law and to dismiss the application for ascertainment of the mesne profits on the ground that it was beyond time under Article of the Indian Limitation Act. There is nothing in the Code requiring the plaintiff who has the conduct of a pending suit to make formal applications from time to time requesting the Court to proceed. The Court agreed with the view taken in ***Thana Zalaji Shet Vs. Dhana Jawherji ARC***, 77 Indian Cases 497 in which it was held that Article did not apply to an application for the ascertainment of mesne profits. The Indian Limitation Act does not apply to all applications. The preamble of the Indian Limitation Act shows that it is intended to apply to 'certain applications'.

19. The learned trial Judge also referred to the decision in ***Karaka Varahamma Vs. Velagala Simhachalan***, 2010 (6) ALT 268, where it was held that the period of limitation has no application to the application filed under Order XX, Rule 12 (1)(c).

20. In so far as the decision of the Appellate Court is concerned, in paragraph 12, the Appellate Court referred to Article 136 of the Limitation Act, which provides limitation of 12 years and observed that limitation prescribed under Article 137 will not be applicable for determining enquiry into mesne profits.

21. For the reasons recorded in paragraphs 12 to 14, I do not find that the Appellate Court has committed any error in dismissing the Revision Application. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)