

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 422 OF 2019
WITH
CA/8621/2019
IN
SA/422/2019**

Bharat Petroleum Co. Limited
Panewadi Nandgaon Road, Manmad,
(A Company registered under
companies Act and office at Manmad)

District : Nashik through

Territory Manager/authorized
signatory.

**.... APPELLANT/
[ORI. DEFENDANT]**

VERSUS

Bansilal s/o Ramnath Lahoti
Age : 81 Yrs., Occ. Business,
R/o : M.I.D.C., Parbhani
Through G.P.A. Holder

Anil s/o Bansilal Lahoti

Age : 51 Yrs., Occ. Business,
R/o : M.I.D.C., Parbhani.

**.... RESPONDENT/
[ORI. PLAINTIFF]**

.....
Mr. Sanket S.Kulkarni, Advocate for Appellant.
Mr. S.C.Bora, Advocate for Respondent.

.....
**CORAM : V.L.ACHLIYA, J.
DATE OF ORDER : 06/11/2020**

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ORDER :

1. The appellant has preferred this Second Appeal challenging the Judgment and decree dated 19/12/2016 passed by Civil Judge [Sr.Division],

Basmathnagar, District Hingoli and confirmed in Appeal with certain modifications vide Judgment and Order dated 13/03/2019 passed in R.C.A. No. 26/2017 by District Judge – 1, Basmathnagar, District Hingoli.

2. Heard learned counsel for appellant/original defendant and respondent/original plaintiff. Perused impugned Judgment and decree passed by trial Court and confirmed in appeal with certain modifications.

3. For the sake of convenience, the parties are referred as they are referred in the Judgment and order passed by trial Court.

4. In brief, the facts leading to filing of the Appeal are as under.

[a] The plaintiff-respondent had filed Special Civil Suit No. 1 of 2013 claiming possession in respect of land G.Nos. 248 and 251 situated at Asola, Taluka Aundha, District Hingoli admeasuring 2123 Sq. Meters [i.e. 22851 Sq.Ft.] and damages towards unauthorized occupation of suit property w.e.f. 01/10/2012. The said land is hereinafter referred to as "suit property". The plaintiff has claimed that by registered lease deed agreement executed between plaintiff and defendant on 14/12/2007, the suit property a vacant land given on lease to defendant for

a specific period of five years on monthly rent of Rs. 1,500/-. The possession of suit property was delivered to defendant on 01/10/2007 up to 30/09/2012 on monthly rent of Rs. 1,500/-. The plaintiff had issued notice dated 26/09/2012 and called upon the defendant to hand over vacant possession of the suit property by the end of September, 2012 i.e. by efflux of time. Since the defendant has not vacated and handed over the possession of suit property by the expiry of period of lease, the plaintiff has filed suit for recovery of possession and further claimed damages @ Rs. 1,000/- per day w.e.f. 01/10/2012 till 31/01/2013 and further claimed damages @ Rs. 1,000/- per day till delivery of possession.

[b] The defendant contested the Suit by filing Written Statement. It is contended that as the plaintiff has accepted the rent beyond the expiry of lease period, the lease is continued and the plaintiff is not entitled for decree of possession of the suit property. It is further claimed that the suit is not properly valued. The defendant disputed the liability to pay the damages and urged to dismiss the Suit with compensatory cost of Rs. One Lakh.

[c] In support of the claim of plaintiff, the plaintiff has examined his son Anil Bansilal Lahoti as Power of Attorney holder of plaintiff. The defendant – company has examined one Nikhil Rajendrakumar Zhawar.

[d] On due consideration of rival pleadings, the oral and documentary evidence adduced in the case, the trial Court has partly decreed the Suit. The defendant was directed to hand over vacant possession of suit property within two months from the date of passing of Judgment and decree and further ordered the defendant to pay damages @ Rs. 10,000/- per month to the plaintiff from 01/10/2012 till delivery of possession of suit property. The amount deposited by defendant – company in the account of plaintiff after 30/09/2012 i.e. expiry of lease period by NEFT directed to be adjusted towards damages to be payable by the defendant to the plaintiff.

[e] Being aggrieved by the Judgment and decree dated 19/12/2016 passed by Civil Judge (Sr.Division), Basmathnagar, the defendant preferred Appeal before the Court of District Judge – 1, Basmathnagar, District Hingoli as R.C.A. No. 26/2017. By the Judgment and order dated 13/03/2019 the appellate Court partly allowed the Appeal and partly modified the Judgment and decree passed by the trial Court. The decree of possession of suit property passed by trial Court confirmed in Appeal. The appellate Court has modified the decree only in respect of damages and directed the defendant to pay the plaintiff the damages @ Rs. 3,000/- per month from the month of October, 2012 till the month of January, 2013 and

w.e.f. February, 2013 till March, 2019 to pay the damages @ Rs. 6,000/- per month. It is further ordered that if defendant fails to put the plaintiff in possession of suit property on and before 30/09/2019, then the defendant shall pay to plaintiff the damages @ Rs. 10,000/- per month w.e.f. October, 2019 onwards till the date of delivery of possession of suit property. It is further ordered that the amount paid by the defendant of rent from the month of October 2012 onwards to be adjusted against the amount payable towards damages. Being dis-satisfied with the Judgment and decree passed by the Courts below, the appellant – defendant has preferred this Second Appeal.

5. In brief, it is the contention of learned counsel for appellant that the Judgment and decree passed by trial Court and confirmed in appeal with modification are passed without due appreciation of pleadings and evidence adduced in the case. It is submitted that plaintiff has not stepped into witness box. He has examined his son as a constituted Attorney for plaintiff. The General Power of Attorney holder for plaintiff examined in the case have no personal knowledge as to transaction between plaintiff and defendant. In that view the trial Court erred in passing the decree in favour of plaintiff. It is submitted that the original Power of Attorney was not deposited with the Principal District Judge. In that

view suit filed by plaintiff ought to have been dismissed for non compliance of mandatory requirement of section 4-A of Power of Attorney Act. Learned counsel further contended that Courts below failed to consider that there was waiver of notice on the part of plaintiff to determine the tendency of defendant in view of acceptance of rent of suit property after expiry of lease period. It is further contended that the suit ought to have been dismissed for non joinder of necessary party. After taking the suit property on lease, the defendant appointed dealer to run the petrol pump set up on suit land. In that view the dealer appointed by the defendant ought to have made party to suit. For starting the petrol pump on suit land, the defendant has invested Rs. 24 Lakhs. The petrol pump cater the need of persons residing in nearby 20 villages. The execution of decree would cause great hardship to those persons. It is further submitted that the Courts below were not justified in granting damages in absence of enquiry ordered under Order XX Rule 12 of Code of Civil Procedure. It is submitted that appeal raises number of substantial questions of law and the ground Nos. (I) to (XIX) be treated as substantial questions of law involved in appeal.

6. On the other hand, learned counsel for respondent/original plaintiff supported the Judgment and decree passed by trial Court and confirmed in

appeal by the lower appellate Court. It is submitted that appeal filed is devoid of merit. The appeal raises no substantial question of law so as to entertain the appeal. By referring to overall facts of the case, learned counsel submits that the suit land is an open land given on lease by plaintiff to defendant for a specified period of five years. The lease of suit land expired by the mid night of 30/09/2012 by the efflux of time provided in lease deed. The suit land being open land, the provisions of Rent Act are not applicable. Since the defendant failed to vacate and hand over possession of suit land after the expiry of lease period and defendant being in illegal and unauthorized possession of suit land, the plaintiff as a owner of suit property/land filed suit simplicitor claiming decree of possession and damages against defendant. In that view, no question of issuance of any notice and waiver thereof falls for consideration by the courts below. It is submitted that plaintiff being old aged person, appointed his son as his constituted attorney. It is pointed out that the courts below have considered the similar submissions advanced and observed that the attorney of plaintiff has deposed on the basis of personal knowledge as well as knowledge gathered on the basis of documents. The attorney of plaintiff examined in the case has categorically deposed that he has personal knowledge as to the suit transaction including the lease executed in favour of defendant, the notice

issued to defendant and other related facts of the case. It is further contended that the facts deposed by attorney of plaintiff are based upon documentary evidence which is not in dispute. It is submitted that defendant has not disputed that the suit land was given on lease by registered lease deed for specified period and period of lease expired on 30/09/2012. The defendant has also not disputed the receipt of notice dated 26/09/2012 informing the defendant that lease period due to expire on 30/09/2012 and plaintiff called upon the defendant to hand over vacant possession by the expiry of lease period and failure to hand over vacant possession, the defendant shall liable to pay damages @ Rs. 1,000/- per day. In that view, the facts deposed by attorney for plaintiff are basically based upon documentary evidence placed on record.

7. So far as contentions raised by appellant that rent was accepted after expiry of lease period, learned counsel for respondent pointed out that it has been brought on record that after expiry of period of lease, the defendant on their own directly deposited the amount in the account of plaintiff through NEFT. There is absolutely no evidence to prove that plaintiff has continued the lease after expiry of period of lease beyond 30/09/2012. It is contended that suit land is an open land. In that view the provisions of Rent Act are not applicable to suit land and therefore the

question of determination of tenancy not involved in the matter. In that view, the plea of waiver of notice can not be raised and agitated by appellant. The Suit filed by plaintiff filed simply for decree of possession on account of unauthorized possession of defendant beyond the expiry of lease agreement as defendant failed to vacate and hand over the possession of suit land on expiry of period of lease and remain in unauthorized possession of suit premises w.e.f. 01/10/2012.

8. So far as the contention raised by learned counsel for defendant that in absence of order directing enquiry under Order XX Rule 12 of Code of Civil Procedure, the order passed by appellate Court to pay the damages is not legally sustainable in law, it is submitted that the appellate Court has dealt the issue at length in its Judgment. In this context, learned counsel has invited attention to the reasons and findings recorded by the appellate Court while dealing with point No. 5 raised in that behalf. In para Nos. 63 to 73 the appellate Court has discussed the reasons in detail in awarding the damages after the period of expiry of lease. It is further pointed out that the suit property was given on lease in the year 2007 on monthly rent of Rs. 1,500/-. The appellant has claimed the damages @ Rs. 1,000/- per day. Since the land in question being vacant land, the provisions of Rent Act are not applicable. The Court below

awarded the damages by considering the overall facts of the case and evidence adduced in the case. The damages awarded are very meagre looking to the fact that the appellant had unauthorizedly occupied the land admeasuring 22851 Sq.Ft. beyond the period of expiry of lease which was expired on 30/09/2012. It is submitted that the Judgment and decree passed by the Courts below are reasoned and suffers from no perversity so as to call for interference in exercise of appellate jurisdiction of this Court u/s 100 of Code of Civil Procedure. It is further contended that the Appeal raises no substantial question of law and in that view the Appeal deserves no admission.

9. I have carefully considered the submissions advanced in the light of rival pleadings and the Judgment and decree passed by the Courts below. In my view, the Appeal preferred by the appellant – defendant is devoid of merit and raises no substantial question (s) of law. In order to entertain the Appeal it is *sine-quo non* for the appellant to raise the substantial questions of law. The appellant has not specifically raised the substantial questions of law involved in the Appeal. It is vaguely stated that ground Nos. (I) to (XIX) are the substantial questions of law.

10. If we consider the rival pleadings and challenge raised in appeal, then there is no dispute as to the

fact that the lease in respect of vacant land was given by plaintiff to defendant for a specified period of five years on monthly rent of Rs. 1,500/-. The lease commenced w.e.f. 01/10/2007 and due to expire on 30/09/2012. The registered lease deed to that effect was executed on 14/09/2012 between plaintiff and defendant. In terms of registered lease agreement, the defendant has agreed to hand over the vacant and peaceful possession of suit land to plaintiff by the expiry of lease period which was due to expire on 30/09/2012. Admittedly no agreement executed between plaintiff and defendant to renew or extend the lease beyond 30/09/2012. By notice dated 26/09/2012, the plaintiff called upon defendant to hand over the possession of suit property by the expiry of lease period i.e. 30/09/2012. The plaintiff also informed the defendant that failure to vacate and hand over the possession of suit land by the expiry of lease period, the defendant shall be liable to pay damages @ Rs. 1,000/- per day towards their illegal and unauthorized occupation of suit land beyond 30/09/2012. Since the defendant failed to vacate and hand over peaceful possession of suit land to plaintiff by the expiry of lease period on 30/09/2012, the plaintiff filed suit for possession and damages. In that view no question of issuance of notice to defendant determining their tenancy arose in the matter. Therefore, the challenge raised in appeal in that behalf is absurd and without any merit.

11. There is absolutely no force in the contention of learned counsel for appellant that suit ought to have been dismissed as the same was filed through G.P.A. holder as well as non examination of plaintiff. The Courts below have dealt the issue in detail and found no merit in the contention of appellant. In the case of ***Man Kaur (Dead) by L.Rs. V/s Hartar Sing Sangha reported in (2010) 10 Supreme Court Cases 512*** referred and relied by the learned counsel for appellant itself the Hon'ble Court has observed that G.P.A. holder can depose on the basis of facts within his personal knowledge. The Courts below have specifically observed that G.P.A. has categorically deposed in his evidence that plaintiff is his father and due to old age, he has executed G.P.A. in his favour. The G.P.A. holder has categorically deposed that the facts deposed by him based upon his personal knowledge. In fact what has been deposed by G.P.A. in the case as witness totally based upon term of registered lease deed executed in between plaintiff and defendant which is part of documentary evidence adduced in the case. In that view, the scope of oral evidence restrict to explain the ambiguity, if any, exist in the agreement as provided u/s 92 of Indian Evidence Act. So also, the other facts deposed by G.P.A. holder such as issuance of notice to defendant etc. are based upon documentary evidence. Nothing have been elicited through the cross examination of

witness to accept the case of defendant that the facts deposed by G.P.A. holder of plaintiff were not within his personal knowledge. In that view, there is no merit in the challenge raised as to non examination of plaintiff and filing of suit through G.P.A. holder of plaintiff.

12. The challenge raised as to waiver of notice found no favour by Courts below. In the first instance there is no question of determination of tenancy and continuation thereof by willful conduct on the part of plaintiff. On the contrary, the notice issued on 26/09/2012 indicate the intention of plaintiff not to continue lease beyond the period specified in the lease. It is admitted by witness for defendant that the alleged amount of rent has been directly credited in the bank account of plaintiff through NEFT. Since it is not a case of determination of tenancy by issuing the notice u/s 106 of Transfer of Property Act, the waiver of notice itself not calls for consideration. Apart from this, it is quite settled position in law to infer the waiver of notice of termination of tenancy, there must be evidence to accept that there was conscious and deliberate act on the part of landlord to treat the lease as subsisting or to re-establish the relationship of landlord and tenant. Mere acceptance of rent without intention to treat the lease as subsisting would not amount to waiver. In this behalf, learned counsel for respondent referred and

relied upon the decision in the case of ***Narendra Vyankatesh Tambat Vs. Pravinkumar Khushalchand Tated reported in 2016 (1) Mh.L.J. 215.*** The trial Court has considered the plea raised by defendant as to alleged waiver and on due analysis of evidence observed as under.

" *In the case in hand, D.W. 1 in cross examination has stated that he did not know that after any person gives NEFT mandate form to the defendant company, there is no need of his consent for transferring money in his bank account. He further stated that he did not know whether or not before 30/09/2012 defendant company paid any amount to the plaintiff by cheque. Thus, from cross examination of D.W. 1 it reveals that even before 30/09/2012 the defendant company used to deposit rent amount in the account of plaintiff by using NEFT procedure. As the plaintiff gave NEFT mandate form, therefore, after 30/09/2012 the defendant company has deposited the rent amount in the account of plaintiff without his consent. So, it can not be said that the plaintiff accepted the rent amount and agreed to continue the lease agreement. Hence, I answer issue Nos. 1 and 2 in the affirmative. "*

13. The other challenges raised by the appellant as to non joinder of necessary party, inconvenience caused to the persons residing in near by villages if decree of possession is executed are totally irrelevant looking to subject matter of Suit. The appointment of dealer by defendant to run the petrol pump set up on

suit land is matter between the defendant and dealer appointed by defendant. The plaintiff was not party to such agreement entered in between defendant and dealer appointed by defendant. So also, the inconvenience which may cause to people in the vicinity on execution of decree seeking vacant possession of suit land also not relevant to subject matter of Suit. The Suit filed by the plaintiff simply claimed decree of possession of the lease property given to the defendant as the defendant failed to vacate and hand over the possession by the expiry of period of lease entered between plaintiff and defendant.

14. So far as the contention raised by the appellant that the Courts below were erred in granting damages in the nature of compensation without resorting enquiry under Order XX Rule 12 of Code of Civil Procedure, I am of the view there is no illegality and perversity in the Judgment and Order passed by the Courts below. It is an admitted position that the Suit filed by the plaintiff is filed seeking decree of possession and damages on account of unauthorized possession of the plaintiff over the suit land w.e.f. 01/10/2012. No issue of determination of tenancy falls for consideration in the Suit. The Courts below have recorded the reasons in detail as to award of damages on account of unauthorized possession of plaintiff w.e.f. 01/10/2012. The plaintiff has claimed

damages @ Rs. 1,000/- per day w.e.f. 01/10/2012 onwards. The trial Court has granted time to vacate the suit land within two months from the date of passing Judgment and Order. The Suit was filed in the year 2012 and decreed on 19/12/2016. The appellate Court confirmed the decree of possession vide Judgment and Order dated 13/03/2019. The appellant was granted time till 30/09/2019 to vacate the premises. In that view, the defendant continued to occupy the suit premises and enjoyed the benefit for the period of about 6-7 years by virtue of the orders passed by the Court. In that view, the Award of damages by the Courts below can not be said to be illegal and contrary to law. The Courts below have recorded the reasons in detail justifying the award of compensation. The appellate Court has discussed the reasons granting damages in its Judgment from para No. 63 to 73. The Court has observed in para Nos. 69 to 72 as under.

"69. In view of the law already discussed it becomes evident that after the expiration of the lease period and in spite of legal notice dated 26/09/2012 as the defendant has not vacated the leased premises, it is liable to pay the market rate of rent as damages for use and occupation of the leased premises. The damages can be paid at the market rate of rent demanded in the suit provided the same is not penal or unconscionable. Although in the plaint the market rate of rent of the leased premises has been claimed at Rs. 1,000/ per day, but the same cannot be awarded as damages as

it is not warranted on the basis of evidence placed on record and also because except the oral evidence of PW.1, the plaintiff has not produced any documentary evidence to support its contentions, therefore I am not inclined to accept PW.1's oral version as it is.

70. There is no dispute that the leased premises is adjacent to Government road towards Eastern side and Hingoli Parbhani road towards Southern side and is sufficiently near to the Asola village and as such at prime location having rental potentiality, the area of the leased premises is also large. The leased premises was leased long back in the year 2007 when the monthly rent was fixed as Rs. 1,500/ p.m. which was to continue and continued for 05 years. This showed that the leased premises would definitely get more rental value after expiry of the lease period of 05 years. However, having regard to the oral evidence of the PW.1 and the phenomenal rise in rents in Asola village an particularly in the area where the leased premises is situated, if rent in the form of damages (hereinafter referred to as 'damages') of Rs. 3,000/ per month from October 2012 to January 2013 the month of filing the suit, is awarded, it will suffice the purpose.

71. Further, the defendant in spite of knowing all the facts, defended the suit alleging that the lease period is extended, which it has failed to establish. Therefore, from Februar 2013, onwards the plaintiff is entitled to recover damages at higher rate in respect of the leased premises which is assessed and quantified at Rs. 6,000/ per month.

72. The defendant is running a petrol pump in the leased premises. Naturally, it will take some time to vacate the leased premises and hand over its possession to the plaintiff. Therefore, sufficient time is required to be given to the defendant to vacate the leased premises, but at the same time the plaintiff cannot be left at the mercy of the defendant and the defendant also cannot be allowed to cause delay in handing over possession. Keeping, this in mind if the defendant fails to vacate the leased premises within 6 months on any ground whatsoever i.e. to say filing of appeal or stay or delay caused in getting necessary sanction from the competent authority and so on, it will be required to pay damages even at a higher rate which is assessed and quantified at Rs.10,000/ per month, to the plaintiff till the date of delivery of possession of the leased premises. For this view, I am buttressed by the following rulings :

a) Rattan Arya etc. Vs. State of Tamil Nadu and ano., AIR 1986 SUPREME COURT 1444, wherein the Hon'ble Supreme Court haobserved:

"(B) Evidence Act (1 of 1872), S. 57–Judicial notice–Court can take judicial notice of enormous manifold increase of rents throughout the country, particularly in urban area."

b) Mrs. Dr. P.S.Bedi Vs. Project & Equipment Corporation of India Ltd., AIR 1994 DELHI 255 wherein the Hon'ble Delhi High Court has observed :

"(E) Transfer of Property Act (4 of 1882), Section 108 (q)–Damages and mesne profits for occupation of premises after termination of tenancy–Tenancy coming to an end by efflux of time–Tenant not vacating premises–Occupation after termination is unauthorised–Notice terminating tenancy indicating that if tenant does not vacate after termination of tenancy he would have to pay mesne profits and damages at market rate of rent–Damages can be awarded at market rate for use and occupation provided same is not penal and unconscionable."

15. In my view the reasons recorded by the Courts below in awarding damages suffers from no perversity and contrary to law. Since the defendant continued to remain in possession of the suit premises beyond the expiration of period of lease for a period of seven years, in equity the Courts below were justified in awarding the damages in stead of directing the plaintiff to take recourse under Order 20 Rule 12 of Code of Civil Procedure. While striking the equities between the parties, the Court can award such damages.

16. In view of the discussion made above, there is no merit in the Appeal preferred by the appellant. The Appeal raises no substantial question(s) of law. The appellant has not raised any specific substantial questions of law in the memo of Appeal. The vague

and general statement has been made in foot note as note No. 2 that ground Nos. (I) to (XIX) are substantial question of law. Sub section (3) of section 100 of Code of Civil Procedure specify that in the Appeal filed u/s 100 of Code of Civil Procedure, the memorandum of Appeal shall precisely state the substantial questions of law involved in the Appeal. The Appeal filed u/s 100 of Code of Civil Procedure can be admitted if the Court is satisfied that substantial question of law is involved in the Appeal preferred. In the instant Appeal, the appellant has not precisely stated the substantial questions of law involved in the Appeal. The foot note mentioning the ground Nos. (I) to (XIX) be treated as substantial questions of law involved in Appeal can not be treated as compliance as to mandet of law contained u/s 100 (3) and (5) of Code of Civil Procedure.

17. There are concurrent findings on facts recorded by the Courts below in granting decree of possession in favour of respondent – plaintiff. The land admeasuring 22851 Sq.Ft. was given on lease to defendant in the year 2007 on monthly rent of Rs. 1,500/-. Lease period was expired on 30/09/2012. In that view, the damages awarded by the Courts below for unauthorized occupation of suit property by defendant @ Rs. 3,000/- per month for the period from October, 2012 to January, 2013 and Rs. 6,000/- per month from February, 2013 to March, 2013 can

not said to be excessive, contrary to law. Similarly, the damages @ Rs. 10,000/- per month on failure to hand over vacant possession on and before 31/09/2019 awarded by the first appellate Court can not said to be excessive, unconscionable, penal and unsustainable in law.

18. Thus, the Appeal preferred by appellant is devoid of merit. It raises no substantial questions of law to entertain this Appeal. The Appeal filed also not satisfy the mandatory requirement of law. There are concurrent findings on facts recorded by Courts below. I am, therefore, not inclined to admit the Appeal. Accordingly, the Appeal is dismissed. Civil application, if any, pending stands disposed of in terms of Order passed in Appeal.

[V.L.ACHLIYA]
JUDGE

KNP