

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Subhasis Dasgupta

APD 41 of 2019
CS 302 of 2005

PUNJAB NATIONAL BANK
Vs.
APEEJAY HOUSE PRIVATE LIMITED

For the Appellant	:	Mr. Joy Saha, Sr. Adv. Ms. Joydip Banerjee, Mr. Abhishek Banerjee, Ms. Parna Roy Choudhury, Mr. Shathnik Ghosh.
For the Respondent	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Deepnath Roy Choudhury, Mr. Soumabho Ghose, Mr. Aritra Basu, Mr. Debanjan Mondal, Mr. Biswajit Kumar, Mr. Debayan Sen, Adv.
Judgment on	:	06.04.2021

I. P. MUKERJI, J.-

The computation of mesne profits by the Special Referee appointed by the court was under challenge before the trial court.

The premises involved is 15, Park Street, Kolkata - 700016. The suit premises comprise of Blocks B & C on the 4th Floor of this building covering a carpet area of 13,160 sq ft.

At one point of time, the appellant defendant was a lessee under the plaintiff respondent. They vacated it on 30th June, 2010. The last paid rent was at the rate of Rs.17.40 per sq ft. out of which the basic rent was Rs.14.20 per sq ft. The total rent received by the respondent was Rs.2,29,503.17/- per month out of which the basic rent was Rs.1,86,722.99/-.

The Special Referee in her award made on 4th December, 2012 awarded mesne profits at the rate of Rs.115 per sq ft. to the respondent for the period 24th October, 2008 to 30th June, 2010 and Rs. 100 per sq ft. for the preceding period from 24th October, 2005 till 23rd October, 2008.

Such view was founded on Dena Bank paying rent inclusive of maintenance charges, corporation rates and taxes to the respondent at the rate of Rs.150 per sq ft. per month for the ground floor and mezzanine floors of the premises and Kotak Mahindra Bank occupying 570 sq. ft. on the 8th floor and paying Rs.83 per sq ft. inclusive of service charges and corporation rates and taxes, during more or less the material period.

The appellant challenged this award by the Special Referee before the learned single judge, by way of an affidavit-in-opposition filed by them to the application of the respondent for a decree in terms of the Special Referee's report. They suggested before the learned judge that the fair letting out value of the suit premises could not have exceeded Rs.50 to Rs.60 per sq ft. per month for the period 24th October, 2005 to 23rd October, 2008. Taking into account an increase of 15% in 2008, the value could not have been more than 60 to 70 sq. ft. per month for the period 2008-2010.

In passing the impugned judgment and order dated 3rd November, 2016, the learned judge went by a completely different route. He relied on an order of 8th June, 2015 of this court assessing the reasonable rent for a space in the said premises, at Rs.100 per sq ft. per month for the period 2010-2013. Reducing Rs.100 per sq ft. per month by 10% in respect of the period 2008-2010, the learned judge reduced the fair letting out value to Rs.91 per sq. ft. per month for the period 2008-2010. The previous period 2005-2008 was reduced by 15% to Rs.77 per sq. ft. per month.

The respondent has accepted this judgment.

The defendant in the suit appeals to this court.

Submissions:-

Mr. Joy Saha, learned Senior Advocate appearing for the respondent contended that the Special Referee had not made a proper assessment of mesne profits. He urged several grounds in support of his submissions. The first was that the tenants of the respondent which the Special Referee had referred to in her report were occupying different portions of the premises, of varying areas and at different elevations of the building. Therefore, the rent that anyone was paying was not indicative of the letting out value of the subject premises by the defendant. The report of the Special Referee had taken into consideration factors which ought not to have been taken into account or at any rate ought not to have been taken as conclusive. He cited the definition of mesne profit in Section 2(12) of the Code of Civil Procedure. He submitted that mesne profits indicated the profit which the defendant earned or which by reasonable diligence would have earned on utilisation of a property. What the plaintiff would have earned on letting out of the property or on its exploitation was not the criterion. He said that the Special Referee had fallen into error by considering the profit which the respondent would have earned and not what the appellant earned or would have earned on utilisation of the property with due diligence.

Learned Counsel cited the lease of SBI General Insurance Company Limited granted by the respondent. It was in Block B of the building, a part of the subject demised premises. It was granted on 30th November, 2010 just after the premises was vacated by the appellant. He said that the basic rent paid was Rs.23 per sq. ft. It was Rs.34 per sq. ft. with tax. If the amenity charges were taken into account, it would be Rs.63 per sq. ft. If only the basic rent together with the corporation taxes, maintenance charges and interest were taken into account, it would be Rs.40.57 per sq. ft. He cited **Harry Kempson Gray and Anr. vs. Bhagu Mian and Ors.** reported in **AIR 1930 Privy Council 82**, **Fateh Chand vs. Balkishan Dass** reported in **AIR 1963 SC 1405**, **The Province of Bengal vs. Sm. Purna Sashi Chaudhurani and**

Ors. reported in **75 CLJ 479, Purificacao Fernandes and Anr. vs. Dr. Hugo Vicente De Perpetuo Socorro Andradee Menezes and Ors.** reported in **AIR 1985 Bombay 202**, which I shall discuss at a later stage of this judgment.

Mr. Abhrajit Mitra, learned Senior Advocate, appearing for the respondent contended that Mr. Saha had made a mistake in calculation in the area which was 5501 sq. ft. On that basis the rate worked out to be Rs.147 per sq. ft. the gross amount received. If interest on security was included, it would be Rs.152 per sq. ft. Mr. Mitra submitted that to save litigation time and expenses, his client had accepted the impugned order, although the actual mesne profits were much higher than what was awarded by the learned judge.

Mr. Mitra cited **Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd.** reported in **(2005) 1 SCC 705**, which I shall also deal with at a later stage.

DISCUSSION

Mesne profit is an English feudal concept. Huge tracts of land were granted on lease by the King to the barons. In exchange they paid him rent and also provided soldiers when the King needed them. These feudal lords acted as intermediary landlords by letting out the land to agriculturists. The rent they collected from them was called mesne profit. A part of this was handed over to the King.

With the development of the legal and judicial system in that country, this concept of mesne profit was borrowed to assess the compensation or damages which a wrongful user of property would have to pay to the person entitled to its use. It was measured as profits earned by the wrongful user or the profits which the wrongful user would reasonably have earned from diligent use of the property. It was never seen as the profit which the deprived land owner could have made out of use of the property.

Since we follow the English legal system, mesne profit was defined by Section 2(12) of the Civil Procedure Code as follows:-

“2. (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.”

The Privy Council in **Harry Kempson Gray and Anr. vs. Bhagu Mian and Ors.** reported in **AIR 1930 Privy Council 82** very lucidly summarized the principle. Sir George Lowndes delivering the judgment of the Committee remarked: *“.....The test set by the statutory definition of mesne profits is clearly not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonably have made by his wrongful possession. What the plaintiff in such a case might or would have made can only be relevant as evidence of what the defendant might with reasonable diligence have received.”*

The Supreme Court in **Fateh Chand vs. Balkishan Dass** reported in **AIR 1963 SC 1405** followed this principle. Justice J.C. Shah opined:

“17.....The plaintiff is undoubtedly entitled to mesne profits from the defendant, and ‘mesne profits’ as defined in Section 2(12) of the Code of Civil Procedure are profits which the person in wrongful possession of 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. The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession.”

The Privy Council decision was followed by a Division Bench of this court in **The Province of Bengal vs. Sm. Purna Sashi Chaudhurani and Ors.** reported in **75 CLJ 479**. Following the above root case, the Bombay High

Court in **Purificacao Fernandes and Anr. vs. Dr. Hugo Vicente De Perpetuo Socorro Andradee Menezes and Ors.** reported in **AIR 1985 BOMBAY 202** said:-

“14. Mesne profits are defined in Section 2(12) of the Civil Procedure Code as meaning 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. It would appear, therefore, clear that mesne profits are a sort of compensation that a person who is in wrongful possession of other’s property has to pay for such wrongful occupation to the owner of the land. It further appears that mesne profits are a compensation, which is penal in nature. According to the definition, the mesne profits correspond to the profits which the person in wrongful possession is receiving or might receive with due diligence for his wrongful occupation of the land. Nowhere, mesne profits are linked with any benefits that the owner of the land may get from the said land.....These observations are, as already said, based on what had been held by the Supreme Court in A.I.R. 1963 S.C. 1405. The Supreme Court observed therein that the normal measure of mesne profits is the value of the user of the land to the person in wrongful possession. It is, therefore, clear that there can be no manner of doubt after the decision of the Supreme Court that mesne profits are to be calculated on basis of the advantage the person in unlawful occupation gets by the use of the property. The same view was otherwise held by a Division Bench of this Court in Kakubhai & Co's case. I am, therefore, unable to accept the submission of Mr. Usgaonkar that the mesne profits were to be calculated on basis of the maximum rent that the respondents could have fetched if the premises were freshly let out.”

Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. reported in **(2005) 1 SCC 705** cited by Mr. Mitra is not relevant in the facts and circumstances of this case. That case was concerned with the amount of compensation which a tenant against whom an order of eviction had been

passed by the court, would have to pay to the landlord pending determination of the appeal. In that context, the Supreme Court opined as follows:-

“.....With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.”

Mesne profit is the profit which the person in wrongful occupation of the property has earned or would with due diligence have earned during the period of such occupation.

After determination of the lease, the appellant was in possession of the property. They did not earn any profit out of it by letting it out or by use of it otherwise. Since that was the position, what was to be determined by the Special Referee was the profit the appellant would reasonably have earned from the property using ordinary diligence. The rate of rent at which a property of more or less the same description in the neighbourhood or the rent at which areas in the same building were let out was actually let out during the relevant period is an indication of such profit which the wrongful user of a property reasonably could be said to have earned or would have earned with ordinary diligence. To my mind, there is often no real difference between what a wrongful user would reasonably have earned using ordinary diligence and what the owner or person entitled to use of the property would have earned using the same degree of care.

If this kind of compensation is seen as profit earned from property, then at deriving the net profit the expenses incurred or likely to be incurred for earning the income have to be deducted.

That exercise has not been done by the Special Referee.

The Special Referee has taken into account the rent paid by occupiers of areas in the same premises during the relevant period and has arrived at an estimate of reasonable rent for the premises in question, using her own judgment. The mistake she had made is that in the final reasoning process of assessment of reasonable rent, the rent paid by SBI General Insurance Company Limited to the respondent immediately upon vacation of the premises by the appellant has not been taken into account, though it has been referred to in the report. That according to Mr. Mitra was Rs.152/- per sq. ft. inclusive of interest on security. This calculation has not been contradicted. Another flaw in the report is that while calculating mesne profits, the expenses that would have been reasonably incurred by the respondent to claim this rent has not been considered. Only after deducting expenses could the mesne profit have been properly assessed.

The learned judge in the impugned judgment and order has gone by a different route by taking the mesne profits adjudged in a different matter but with regard to the same premises as indicative of mesne profits payable in this matter. Although the area considered by the learned judge is in the same building, evidence in another matter between different parties can never be used without calling for fresh proof unless the parties had accepted it as an indication of reasonable mesne profit. (See Section 43 of the Indian Evidence Act, 1872)

Whatever may be the situation, the rent accepted by the learned judge can be taken as an acceptable rate if one takes into account the rent paid by SBI General Insurance Company Limited less the expenses which may have been reasonably incurred for earning that rent. At any rate the rent adjudged by whatever method could not be lower than the mesne profit adjudged by the learned judge. This estimate by the learned judge has been accepted by the respondent. Moreover, at this point of time, after more than 15 years of institution of the suit, it would be denial of justice to order reassessment of mesne profit or a remand of the matter to the first Court.

Using my best judgment, the rate accepted by the learned judge is affirmed by me. I see no reason to interfere with the impugned judgment and decree dated 3rd November, 2016. This appeal is accordingly dismissed.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(SUBHASIS DASGUPTA, J.)

(I. P. MUKERJI, J.)