IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 222 OF 2018

WITH

INTERIM APPLICATION NO. 2171 OF 2022
IN
CIVIL REVISION APPLICATION NO. 222 OF 2018

Punjab & Sindh Bank, A nationalized bank,
Bank incorporated under banking companies
(acquisition and transfer of Undertaking) Act.
Having its registered office at 21, Rajendra
Palace, New Delhi, 110001. And a branch
Office at Plot No.1127, Midway Apartment,
Near Century Bazar, Prabhadevi,
Worli, Mumbai-400 002. .....Applicant.
(Orig. Appellant)

Vs.

Pranit Co-operative Housing Society Limited,
A co-operative Housing Society, registered
Under the Maharashtra Co-operative Societies
Act, 1960 under Serial No. having their registered
Office at 234, J Palkar Road, Opp. Poddar Hospital,
Worli, Mumbai-400 025. .....Respondent.
(Orig. Plaintiff)

Mr. Karl F. Tamboly a/w Mr. Ieshan Sinha, Mr. Aayesh Gandhi i/by Wadia Ghandy & Co. for the Applicant.
Dr. Birendra Saraf, Senior Advocate a/w Mr. Ashish kamat a/w Mr. Vishesh malvia, Ms. Pooja Vasandani and Mr. Tejas Popat i/by M/s. Rashmikant & Partners for the Respondent.

CORAM : A. S. GADKARI, J.

DATE : 21st APRIL, 2022.

JUDGMENT:-

Rule. Rule made returnable forthwith and by consent of the learned counsel for the respective parties, Revision Application is heard finally.

2 Heard Mr. Tamboly, learned counsel for the Applicant and Dr. Saraf, learned Senior Advocate for the Respondent. Perused entire record.

3 The Applicant/Original Defendant No.1 has impugned Judgment and Order dated 1st September, 2017 passed in (P) Appeal No.60 of 2011, partly allowing the said Appeal, thereby quashing and setting aside the Judgment and Decree passed by the Trial Court dated 13th October, 2011 in T.E. & R. Suit No.68/75 of 2003 and substituting it, by its impugned Judgment and Order.

The Trial Court while decreeing the Suit filed by the Respondent Society had directed the Applicant to pay Rs.3,00,000/- (Three lakhs only) per month with interest @ 8% per month for the period from 1st March, 2002 till 31st December, 2006 by way of mesne profit and had also granted other consequential reliefs in favour of the Respondent Society.

In an Appeal, the Appellate Court though maintained the mesne profit @ Rs.3,00,000/- (Three lakhs only) per month with interest @ 8% p.m. to be paid for the period from 1st March, 2002 till 31st December, 2006 to the Respondent Society, has granted other benefits/concessions to the Applicant.

4 The Applicant is aggrieved by fixing of amount @ Rs.3,00,000/- (Three lakhs only) per month with interest @ 8% per month for the suit property on the said amount for the period from 1st March, 2002 till 31st December, 2006 by way of mesne profit.

5 Perusal of record reveals that, the Applicant was using the suit premises admeasuring about 3000 sq. ft., for commercial purpose, situated in the Respondent Society at Worli, Mumbai. The suit premises was leased out to the Applicant Bank on 1st March, 1987 as per the terms and conditions mentioned in the Lease Deed. The lease period was initially for 10 years, with option for additional 5 years on the same terms and conditions with increase in rent @ 10% at the time of exercising the option of additional 5 years. The lease period including option of additional 5 years, expired on 28th February, 2002. Applicant did not deliver vacant and peaceful possession of the suit premises to the Respondent and therefore, the Respondent was constrained to file aforestated T.E. & R. Suit No.68/75 of 2003 in the Court of Small Causes at Mumbai on 6th March, 2003 for recovery of possession of the suit premises along with recovery of arrears of rent and mesne profit. It is an admitted fact on record that, during the pendency of the said Suit, Applicant Bank handed over possession of the suit premises to the Respondent Society on 2nd January, 2007.

6 Applicant Bank filed written statement at Exh-10 and additional written statement at Exh-43. The Trial Court framed issues

below Exh-11. Issue No.5-A and 5-B are important for decision of the present Revision Application. For the sake of brevity, issue Nos.5-A and 5-B and findings recorded thereof by the Trial Court are reproduced hereinbelow:-

“5-A	*Whether plaintiff is entitled for mesne profits?*	*Yes.*
5-B	*If yes, at what rate?*	*At the rate of Rs.3,00,000 per month.”*

The Respondent Society examined two witnesses namely Mr. Tambe (P.W. No.1) the Secretary of Society and Mr. H.S.Maniar (P.W.No.2) a Government Valuer to substantiate the claim of mesne profit and his report is at Exh-W. Revision Applicant examined Mr. Singh (D.W. No.1) its Branch Manager. His evidence is at Exh-64. Revision Applicant also examined two Valuers namely Mr. Gangwar (D.W. No.2) and Mr. Santosh Kumar (D.W. No.3). Their evidence is at Exhs-64 and 66 and their valuation reports are marked as Exhs-67 and 68 respectively.

As noted earlier, despite expiry of the lease period, the Applicant Bank was in unlawful possession of the suit premises from 1st March, 2002 till 31st December, 2006. The Trial Court after assessing the evidence on record has fixed mesne profit @ Rs.3,00,000/- (Three lakhs only) per month for the said period.

7 Feeling aggrieved by the Judgment and Decree dated 13th October, 2011 passed by the Trial Court, Applicant preferred Appeal bearing (P) Appeal No.60 of 2011, before the Appellate Bench of the Court of Small Causes at Mumbai. As noted earlier, the Appellate Bench partly allowed the said Appeal and substituted the Judgment and Decree passed by the Trial Court. Appellate Court however, has maintained the quantum of mesne profit of Rs.3,00,000/- (Three lakhs only) per month with interest @ 8% p.m. to be paid to the Respondent Society for a period from 1st March, 2002 till 31st December, 2006.

The Revision Applicant being aggrieved by fixing of mesne profit of Rs.3,00,000/- (Three lakhs only) per month with interest @ 8% per month for the said period from 1st March, 2002 till 31st December, 2006, has filed present Revision Application on 28th December, 2017.

8 Mr. Tamboly, learned counsel appearing for the Applicant submitted that, the mesne profits fixed by the Trial Court and upheld by the Appellate Court for the suit premises is excessive and it ought to have been approximately Rs.1,50,000/- per month, as per the Valuation Report submitted by Mr. Gangwar (D.W. No.2). He submitted that, both the Courts below have failed to consider the fact that, mesne profit as mentioned by Mr. Gangwar (D.W. No.2) was reasonable rental value for the period in question. He submitted that, the Appellate Court in para No.13 of impugned Judgment and Order has erroneously observed that, the

Advocate for the Applicant gave concession and submitted that, the Applicant Bank is not disputing awarding of mesne profit @ Rs.3,00,000/- with interest @ 8% per month from 1st March, 2002 to 31st December, 2006. It is to be noted at this stage that, upon a query made by this Court as to whether the said Advocate has filed an Affidavit before this Court or an Application before the Trial Court for expunging the said observation, Mr. Tamboly fairly conceded to the fact that, it is not done. Mr. Tamboly therefore prayed that, the mesne profit fixed by the Trial Court and upheld by the Appellate Court may be modified and/or reduced and reasonable mesne profit may be fixed for the suit premises for the period from 1st March, 2002 to 31st December, 2006, by allowing present Revision Application.

9 At the outset it is to be noted here that, it is an admitted fact on record that, the suit premises admeasuring about 3000 sq. ft. is commercial premises, situated in an upscale locality of Worli, Mumbai. Despite expiry of the Lease Deed including of additional period of 5 years on 28th February, 2002, Applicant did not deliver vacant and peaceful possession of the suit premises and handed its possession to the Respondent Society on 2nd January, 2007 i.e. after filing of the present suit. Perusal of evidence of witness of Respondent Society namely Mr. Maniar (P.W. No.2) discloses that, he has assertively opined that, the Applicant bank is liable to pay mesne profit @ Rs.4,37,590/- per month i.e. approximately @ Rs.135/-

(*sic* Rs.145/-) per sq. ft. per month. The said witness has drawn average of the said two values and has stated that the Applicant Bank is liable to pay mesne profit at the rate of Rs.139/- per sq. ft. per month.

10 Record further reveals that, Mr. Gangwar (D.W. No.2) a valuer examined by the Applicant Bank, did not support its case and during his cross-examination has given vital admissions detrimental to the Applicant Bank. The said witness has admitted that, the amount of mesne profit of Rs.1,48,472/- as mentioned in his report cannot be treated as fair and reasonable rental value for the period from 2002 to 2007. The Trial Court therefore held and according to this Court has rightly held that, his testimony creates shadow of doubt in its mind. Applicant Bank therefore examined Mr. Santosh Kumar (D.W.No.3) another valuer in support of its case. This witness has admitted that, he conducted inspection of suit premises within 15 minutes. That, at the time of his visit, he observed that the suit premises was occupied by one Mr. Pande. It is not explained by the Applicant that, if the suit premises was occupied by Mr. Pande, then how the said witness conducted inspection of the suit premises without taking prior permission from the Court. The Trial Court after observing the demeanour of the said witness and the admissions given by him has recorded a finding that, the said witness has prepared whole report as per the instructions of Applicant Bank without application of his mind. It also appears to this Court that, Mr. Santosh Kumar (D.W.No.3) submitted his

Valuation Report not only as per the instructions of the Applicant Bank but also to suit its convenience. It therefore clear that, the mesne profit fixed by the Trial Court @ Rs.3,00,000/- per month is just and reasonable and needs no modification or reduction in it.

11 As far as the contention of the learned counsel for the Applicant with respect to the concession given by their Advocate before the Appellate Court and as recorded in para No.13 of the impugned Judgment and Order is concerned, it is to be noted here that, the Hon'ble Supreme Court in the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak & Anr.* reported in *(1982) 2 SCC 463*, has held that, we cannot allow the statement of judges to be contradicted by statements at the bar or by affidavit and other evidence. If the judges say in their judgment that, something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that the statements of facts as to what transpire at the hearing recorded in the Judgment of the Court, are conclusive of the facts so stated and no one can contradict such statement by Affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the

record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

12 As noted in paragraph No.8 above, upon a query raised by this Court as to whether the said Advocate has filed an Affidavit before this Court or an Application before the Trial Court for expunging the said observation, Mr. Tamboly fairly conceded to the fact that, it is not done. Therefore, the observations made by the Hon'ble Supreme Court in the case of *State of Maharashtra Vs. Ramdas S. Nayak & Anr. (Supra)* as stated hereinabove, are squarely applicable to the present case.

Even if the concession given by the learned Advocate for the Applicant is not taken into consideration, then also the Applicant Bank has failed to establish its case by leading cogent evidence in that behalf that, the mesne profit of the suit premises is less than Rs.3,00,000/- per month. The evidence of witness of Respondent Society and the documents produced by it, leads to draw an irresistible conclusion that, the mesne profit fixed by the Trial Court and upheld by Appellate Court, for the suit premises is just, reasonable and rational.

13 After perusing entire record, this Court is of the considered view that, both the Courts below have exercised jurisdiction vested in it as per the provisions of law and have not committed any illegality or material irregularities while passing impugned Judgments and Orders. There are no merits in the Revision Application and is accordingly dismissed.

14 In view of dismissal of the Revision Application itself, Interim Application No.2171 of 2022 is also disposed off.

(A.S. GADKARI, J.)

SANJIV SHARNAPPA MASHALKAR

Digitally signed by SANJIV SHARNAPPA MASHALKAR
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