IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

COMMERCIAL DIVISION

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

F.A 110 of 2021
With
IA No: CAN 1 of 2019

Bhagwati Prasad Jhunjhunwala & Ors.
Vs.
UCO Bank & Anr.

Appearance:

For the Appellant : **Mr. Rachit Lakhmani, Adv.**
Mr. Sabyasachi Sen, Adv.

For the Respondent : **Mr. Sailesh Mishra, Adv.**

Judgment On : **24.04.2023**

Harish Tandon, J.:

The instant appeal has been filed by the plaintiff-appellant even after a decree for *mesne profit* having passed in their favour but felt aggrieved by nongranting of the interest thereupon. The instant appeal is thus restricted to a question whether the Court below while granting the decree for *mesne profit* was obligated to grant an interest thereupon. There is no cross-objection filed by the contesting respondent and therefore, we proceeded to decide the aforesaid point involved in the instant appeal.

A prelude to a dispute leading to the institution of the suit by the plaintiff-appellant is required to be recapitulated in dealing with the points mentioned hereinafter. A suit being Suit no. 281 of 1983 was filed in the Original Side of this Court by the respondent herein for various reliefs in relation to a decretal property and an appeal being APO 8 of 2000 was filed against an order passed therein. Initially, the said suit was instituted against ***Poddar Shrof & Ors*** and a term of settlement was filed on 11th July, 2001 by the respondent bank, the Proforma Defendant no. 2 therein and the Plaintiff no. 1. By virtue of a Terms of Settlement it was agreed to execute a deed of lease in favour of the respondent for a period of 12 years commencing from 1st March, 1997. The said deed of lease was executed and registered on 23rd November, 2001 and upon expiration of the period reserved therein, it came to an end on 28th February, 2009. Despite the expiry of the period contained in the said deed of lease, the respondent continued in possession which led the institution of Title Suit no. 27 of 2009 before the Civil Judge (Senior Division) at Alipore. The respondent handed over the possession of the decretal premises on 15.1.2014 unto and in favour of the plaintiff-appellant. Since the principal reliefs claimed in the plaint relating to recovery of possession upon expiration of lease by efflux of time becomes redundant, the suit was pursued for determination of a *mesne profit*/damages for wrongful occupation from the date of expiry of lease till the actual delivery of possession of the decretal premises. A commissioner was appointed for the purpose of determining the *mesne profit* and to submit the report before the Court. Both the parties participated in the work of commission and cited the witnesses as well as the documentary evidence i.e. a valuer report and also cross examined the respective witnesses. Ultimately, the Commissioner submitted the report determining the *mesne profits*/damages for wrongful possession of the respondent in respect of a decretal premises after the expiry of lease till the actual possession was delivered. Several dates were fixed for passing a final decree on *mesne profits*/damages but it appears from the said final decree passed on 29.9.2018 when the respondent did not appear and, therefore, the said final decree is passed ex parte. We have been given to understand that an application under Order 9 Rule 13 of the Code of Civil Procedure is filed by the respondent which is pending.

Be that as it may, the respondent has not challenged the final decree by filing an appeal before us nor filed cross-objection challenging the adverse findings contained therein but contested the appeal filed by the plaintiff-appellant on a limited issue as to whether it was obligatory on the part of the Court to grant interest on such *mesne profit* under Section 2(12) of the CPC. Such being the limited issue we invited the respective Counsels to address thereupon.

It is contended by the learned Counsel appearing for the plaintiff-appellant that the definition of a *mesne profit*/damages given in Section 2(12) of the CPC postulates that the same includes an interest on the profits received by the respondent for such wrongful occupation and, therefore, it is imperative on the part of the Court to grant interest thereupon. To buttress the aforesaid submission the reliance is placed upon a judgment of the Supreme Court in case of ***Mahant Narayana Dasjee Varu & Ors. Vs. Board of Trustees, The Tirumalai Tirupathi Devastbanam reported in AIR 1965 SC 1231*** wherein it is held that the interest is an integral part of the *mesne profit*. It is further submitted that the interest on the *mesne profit* should not be less than six per cent per annum to be awarded from the date of the possession and a further interest at the same rate should be awarded on the outstanding amount till its realization as held by the Supreme Court in ***Lucy Kochuvareed Vs. P. Mariappa Gounder & Ors. reported in (1979) 3 SCC 150***. A Single Bench judgment of this Court in case of ***(Rai) Satish Chandra Chaudhuri Vs. (Maharaja) Sasi Kanta Acharjya Chaudhuri & Ors. reported in AIR 1930 CAL 525*** is also relied upon for the proposition that the moment the definition of a *mesne profit* includes interest, any omission to pass a decree for interest on the *mesne profit* so determined, is an error capable of being corrected by the Appellate Court.

On the other hand, the respondent contends that the learned Commissioner did not take into consideration the evidence adduced by the respondent nor any finding is returned in the report discarding the report of the valuer appointed by the respondent indicating the lesser rate of *mesne profit.* It is further submitted that the Commissioner has not taken into effect the actual profit received or might with ordinary diligence have received for such wrongful occupation which is imperative in view of the definition of a *mesne profit* under Section 2(12) of the Code. It is further submitted that the component of Municipal Tax being the major part of the computation of *mesne profit* by the Commissioner is not permissible as the Municipal Tax has already been paid by the respondent to the appellant at a relevant point of time. Lastly it is submitted that there was gross infirmities in passing the decree for *mesne profit* and therefore, the appeal is liable to be dismissed.

On the conspectus of the aforesaid submissions advanced by the respective Counsels it is relevant and profitable to quote the definition of a *mesne profit* given under Section 2(12) of the Code which runs thus:

> ***"S. 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;***

It is important to note the provisions contained under Section 34 of the Code for the purpose of ascertaining the rate of interest or entitled to interest which runs thus:

"S. 34.Interest. – (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonjable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum forany period prior to the institution of the suit, [with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum}, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

[Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I. – In this sub-section "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

Explanation II. – For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability].

(2) Where such a decree is silent with respect to the payment of further interest [on such principal sum] from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

The definition of a *mesne profit* as quoted hereinabove means those profits which the person in wrongful occupation of a property actually received or might with ordinary or diligence have received together with an interest on such profits and excludes the profit due to improvement made by a person in wrongful occupation. The expression "together with interest on such profit" cannot be excluded or segregated from the aforesaid Section and in our opinion form an integral part of the *mesne profit*. The grant of interest is implicit and inclusive of the *mesne profit* and an omission to pass an interest on the computation of the *mesne profit* is a patent mistake. It is no longer *res integra* that the *mesne profit* can only be claimed when there is a wrongful possession meaning thereby that such possession is without any authority or upon determination of the authority initially granted or on expiration thereof by efflux of time. The Single Bench in case of ***Satish Chandra Chaudhuri (supra)*** held that the interest on the *mesne profit* being an integral part of the definition enshrined under Section 2(12) of the Code, there is no justification in refusing to pass such interest in the following:

"5. The next point urged in behalf of the appellant is that he is entitled to interest. The trial Court has allowed interest on the

> ***total amount at the rule of 6 per cent per annum from the date of the decree till realization. The plaintiff claims interest from the date of the suit. In the case of Girish Chunder Lahiri v. Shashi Shihhareswar Roy it was held that the Court had jurisdiction to reduce interest as it chose, because mesne profits are in the nature of damages which the Court might award according to the justice of the case. In that case the decree allowed mesne profits, without making mention of interest, and it was held, having regard to the definition of mesne profits that interest should be allowed. In the present case the Court below gave no reasons for refusing to give interest as claimed by the plaintiff, and I consider no reasons exist."***

In case of ***Mahant Narayana Dasjee Varu (supra)*** the decree passed on an application under Order 20 Rule 12 of the Code of Civil Procedure for determination of a *mesne profit* for wrongful occupation of the Mahant of a Debastbanam properties came up for consideration. A plea was taken that the interest on the total quantum of the *mesne profit* which includes the principal and the interest upto the date of the decree is impermissible. The Apex Court held that the interest being an integral part of the *mesne profit* and, therefore, the determination of the *mesne profit* is based upon a theory that the person who has received the profit for such wrongful occupation have also derived the benefit of the interest on such profits and, therefore, there is no infirmity in awarding an interest upon the sum which may include principal as well as the interest as on the date of the decree in the following:

> ***"13(3). The last of the points urged was that the learned Judges erred in allowing interest upto the date of realisation on the aggregate sum made up of the principal and interest upto the date of the decree, instead of only on the principal sum ascertained as mesne profits. For the purpose of understanding this point it is necessary to explain how interest has been calculated by the learned Judges. Under Section 2(12) of the CPC which contains the definition of "mesne profits", interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income. In the present case the Devasthanam was entitled to possession from and after June 7, 1933 i.e., when the Act came into force and the Devasthanam Committee was appointed. The Mahant having wrongfully resisted the claim of the Devasthanam to possession without surrendering the property, was admittedly bound to pay mesne profits. This, it may be stated, is not disputed.***

In ***Lucy Kochuvareed (supra)*** the Apex Court was considering a situation where the rate of interest granted by the Court on determination of the *mesne profit* was reduced by the High Court in an appeal and it is held:

"The trial Court had awarded interest at the rate of 6 per cent per annum on the mesne profits assessed by it. The High Court reduced that rate to 4 per cent, with the observation that having regard to all the circumstances of the case, including that the plaintiff had the use of the sum of Rs. 85, 000 which he was to pay towards the price of the property, a rate of 4 per cent per annum would be reasonable and just.

55. Even Mr. Ramamurthy has not been able to support this reduction in the rate of interest. It was after a long drawn out litigation that the plaintiff got possession of the property. The trial Court, therefore, rightly awarded the interest at the rate of 6 per cent per annum.

56. We, therefore, accept this contention and direct that interest as part of the mesne profits assessed in this case, shall be payable at the rate of 6 per cent per annum up to March 29, 1959 when possession was delivered in pursuance of the decree of this Court, to the plaintiff and further at 6 per cent per annum on the outstanding amount shall be payable till the date of payment."

The aforesaid judgment is relevant for the purpose of awarding the rate of interest on the *mesne profit* and applicable in the event this Court held that the interest on the *mesne profit* is inevitable in view of the definition under Section 2(12) of the Code.

It is no doubt true that the *mesne profit* is conceptualized in the form of a damage which is to be determined on a case to case basis. The broad principles for determining the *mesne profit* is firstly that the defendant is in actual possession of the decretal property. Secondly, such possession is wrongful; thirdly, the person in wrongful occupation have actually received or might with ordinarily diligent have received a *profit* because of his wrongful occupation of the immoveable property and fourthly, any improvement made by a person in wrongful occupation shall not be included in the *mesne profit*. There is no quarrel on fact that upon expiration of period of lease by efflux of time, the respondent continued in possession till the actual delivery of possession was given to the appellants. The period between expiry of lease and the delivery of actual possession cannot be assumed as lawful but the possession during such period is wrongful and, therefore, the *mesne profit*/damages are to be determined and it is a liability of the person in wrongful occupation to compensate a person a *profit* which he derived or might have derived during such wrongful possession.

Even the respondent have not disputed the entitlement of the plaintiff-appellant to the *mesne profit* but contended before us that such determination is bad as the Commissioner did not consider the evidence adduced by the respondent before him. Considering the scope of the appeal we cannot go into the question as to whether the decree for *mesne profit* is justified or wrongfully granted by the Trial Court, in absence of any appeal or a cross-objection having filed by the respondent.

The scope of the appeal is limited to the extent as to whether it is imperative on the part of the Court to grant interest on determination of the *mesne profit* and having not done so whether the Appellate Court can interfere with the said order and modified the decree by including the interest upon the *mesne profit* so determined. The definition assigned to *mesne profit* under Section 2(12) of the Code is explicit that such *profit* actually received or might have on due diligence to be received together with an interest thereupon. The expression "together with an interest on such *profit*" cannot be segregated nor can be declared surplusage in the aforesaid Section but has to be harmonized to effectuate the legislative intent and the true meaning assigned to *mesne profit*. The words or expressions used in the statute cannot be said to be surplusage and it is an ardent duty of the Court to interpret the aforesaid provision and harmonized the same to make it workable. The expression "together with interest on such *profit*" cannot be segregated from the said section as it conveys a laudable intention that the interest being an integral part of the said provision, cannot be ignored or omitted in exercise of a discretion vested upon the Court. The moment the provision of the statute conferred a discretion on the Court depending upon the facts and circumstances of the given case to do or not to do a thing, the discretion so exercised if appears to be reasonable and rational, does not invite intervention of the Appellate Court. The position would be different when the statute mandate a certain thing to be done and in the event the Court omits to do the same, there is no fetter on the part of the Appellate Court to interfere with the order and if the circumstances so warrant modify the decree. The grant of interest on such *profit* which actually received or might have received on due diligence is an integral part of the said section and, therefore, cannot be omitted or ignored while passing the decree.

Having held that the interest is an integral part of a definition of a *mesne profit* the next question which arises as to what rate of interest should be awarded, Section 34 of the CPC contained an exhaustive provision relating to an interest to be awarded by the Court. The Aforesaid section has undergone a radical change by way of amendment having brought therein. Before the Amendment of 1976 the maximum interest which the Court can award was restricted to six per cent per annum but by virtue of an amendment, the flexibility is given to the Court to award an interest but not exceeding six per cent per annum. However by virtue of a proviso having inserted in relation to a commercial transaction, the interest may be awarded beyond six per cent but not exceeding the contractual rate of interest or in absence of any contract at the rate which the monies are lend or advanced by the nationalized banks in relation to a commercial transaction. It is thus manifest that the Court may award interest, it considers reasonable as interest *pedente lite* but the interest from the date of the suit till its payment should not exceed 6 per cent per annum in an ordinary case which is distinct from commercial transactions. It admits no ambiguity in our mind that the decree for *mesne profits*/damages is in effect a money decree and the moment the interest on such *profit* is imbibed within the definition given under Section 2(12) of the Code, the rate of interest in our opinion on such *mesne profit* should not exceed six per cent per annum. Since the interest being an integral part of the said definition of *mesne profit,* we thus find that the Trial Court committed an error in not awarding the interest from the date of the decree till its actual payment. Considering the facts emerged from the instant case we feel that the interest at the rate of six per cent per annum on the decretal amount from the date of the decree till its actual payment is reasonable.

Accordingly, the decree of the Trial Court is modified to the extent that in addition to a decretal amount the respondent shall pay the interest at the rate of six per cent per annum to be calculated on the decretal amount from the date of decree till its actual payment.

With these observations, the appeal and all connected applications are disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

(Prasenjit Biswas, J.)