

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

IA No. GA 3 of 2021

In

CS 185 of 2018

B.P. Poddar Hospital & Medical Research Ltd.

Versus

UCO Bank

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Satadeep Bhattacharyya

Mr. Avani Kumar Roy

Mr. Surajit Biswas

Mr. Arijeet Bera

... For the plaintiff.

Mr. Shashwat Nayak

Mr. Santosh Kumar Roy

Ms. Antalina Guha

Ms. Sonal Agarwal

... For the defendant.

Hearing Concluded On : 14.12.2023

Judgment on : 20.12.2023

Krishna Rao, J.:

1. The plaintiff has filed the present application for confirmation of the report submitted by the Special Referee dated 31st August, 2021 and to pass final decree. The plaintiff has filed the suit against the defendant being C.S No. 185 of 2018 for eviction of the defendant from the suit property and for mesne profit. The plaintiff had also filed an application under Chapter XIII-A of the Original Side Rules of this Court being G.A No. 1 of 2019 for summary decree for eviction of the defendant and enquiry into mesne profits against the defendant.
2. The application filed by the plaintiff under Chapter XIII-A of the Original Side Rules was disposed of by this Court by an order dated 9th September, 2019, directing the defendant to vacate the suit premises and to hand over the peaceful and vacant possession to the plaintiff on or before 1st March, 2020. This Court has also appointed a Special Referee for the purpose of determination of mesne profits with respect of the suit premises. In compliance of the Judgment and Decree passed by this Court dated 9th September, 2019, the defendant had vacated the suit premises and handed over the peaceful and vacant possession of the premises to the plaintiff on 28th February, 2020.
3. The Special Referee had initiated proceeding for determining the mesne profit. Both the parties have filed their pleadings before the Special Referee and have also adduced evidence in support of their claim. On

31st August, 2021, the Special Referee has submitted his report which reads as follows :

“7. I am of the view that the mesne profits in respect of the premises being the demarcated portion of the first floor of the building at 40, Strand Road, Kolkata – 700 001 having a carpet area of 4800 sq.ft. should be calculate at the rate of Rs.139/- per sq.ft. per month i.e. Rs.139/- X 4800 Sq.ft. = Rs.6,67,200/- per month (including taxes).

8. I am further of the view that the plaintiff is entitled to simple interest 9% per annum which is reasonable rate in the present circumstances.”

4. The plaintiff has accepted the report but the defendant has filed exception to the Special Referee Report and prayed for setting aside the report. The defendant has also prayed for appointment of independent valuer to ascertain fresh market rent of the suit premises.
5. The defendant has filed the exception against the report of the Special Referee on the following grounds :

“19. The Defendant/Respondent states that the said report is erroneous, incorrect and based on the wrong appreciation of the law. The Learned Special Referee’s conclusion as to the mesne profit was solely based on the valuation report prepared and submitted by the Valuer (Mr. Sujoy Chakraborty, PW-1) appointed by the Plaintiffs.

20. The Defendant/Respondent state that for the purpose of consideration of the fair market value, the defendant had appointed a valuer and a valuation report has been prepared by the said valuer dated 16.02.2022 for estimation of fair rent

of the subject property which is coming at the rate of Rs.88.99/- per sq.ft.

21. *It is therefore astonishing as to how the same subject property has been valued at such an exceedingly high rate by the Valuer appointed by the Plaintiff/Petitioner. It is further pertinent to mention that the Valuer appointed by the Plaintiff/Petitioner has compared the subject property to other further distant properties and has with an ill motive provided an advantageous position to the Plaintiff/Petitioner for the subject matter in dispute.*

22. *The Plaintiff has suppressed the fact that they had as per their own given proposal to the defendant to increase the lease rent exorbitantly to the tune of Rs. 120/- per sq.ft., the said proposal was rejected by the Bank/defendant.*

24. *The Learned Special Referee has failed to take into account that the settled position of the law that the right to mesne profits presupposes a wrong whereas a right to rent proceeds on the basis that there is a contract. But there is an intermediate class of cases in which the possession though not wrongful in the beginning assumes a wrongful character when it is unauthorizedly retained and in such cases, the owner is not entitled to claim mesne profits but only the fair rent.*

25. *The Learned Special Referee has failed to take into account that an essential factor in the present case is that the Valuer appointed for estimation of mesne profit was appointed by the Plaintiff's Advocate in collusion with the Plaintiff and therefore should not be treated as a competent, independent valuation or reasonable report.*

26. *The Learned Special Referee has failed to take into account that the Valuer appointed by the Plaintiff had admitted that he has undertaken similar jobs for estimation of valuation of market*

rent of properties however, failed to provide any reference of similar such valuation reports prepared by the said Valuer when cross examined as PW-1 by the Defendant/Respondent's Advocate on 13th January, 2021. The Learned Special Referee has failed to put the Valuer to the strictest proof his claims.

27. *Further, the Valuer appointed by the Plaintiffs has added and/or deducted adjustments towards the time, age, specification, location and size aspects of the comparable units on an assumption basis and is therefore, not concrete and proper.*

28. *The Learned Special Referee failed to consider the evidence adduced by the Defendant/Respondent with regard to Lease Deeds dated August 31, 2009 and May 11, 2013 pertaining to properties lying within closer proximity to that of the suit premises and having a fairly lower market rate.*

30. *The Defendant states that the Learned Special Referee failed to take into account that the Valuer appointed by the Plaintiff has prepared the valuation report of the suit property with a motive to provide undue advantage to the Plaintiff and has therefore, deliberately not obtained valuation of properties located adjacent to the suit premises."*

- 6.** The plaintiff during the preceding before the Special Officer, had appointed a valuer to ascertain the market rent of the suit premises with effect from 1st March, 2017 till 1st March, 2020. The valuer has submitted his report. The valuer was examined before the Special Officer and the report of the valuer was taken on record. Counsel for the defendant has cross-examined the valuer at length. The main contention of the defendant that the valuer has not considered the

market rate of the properties situated within the closer proximity of the suit premises. In connection with the said contention, the defendant has cross examined the valuer from question Nos. 19 to 39. In question No. 33, the valuer has stated that *“There are few banks in the vicinity. However , it was not possible to get documents pertaining to all those banks. However, the comparable properties which I have mentioned in my report, according to me all are similar type suitable properties”*.

- 7.** The valuer has considered three properties to ascertain the market rent of the suit property which are as follows :

- i. 1, Lu. Shun Sarani (formerly P-15, India Exchange Place (Extn), Kolkata-700073, P.S. Bowbazar, Ward No. 43.
- ii. 18, Rabindra Sarani, Kolkata-70001, P.S. Bowbazar, Ward No. 44.
- iii. 6, Church Lane, Kolkata-700001, P.S. Hare Street, Ward No. 45.

- 8.** The valuer in his report has considered all the three properties along with the suit property in detail and came to conclusion that the market rent would be 139/- per sq.ft. per month.

- 9.** The defendant has examined two witnesses on their behalf and the bank has relied upon Lease Deed dated 31st August, 2009, Lease Deed dated 11th May, 2011 and Deed of Conveyance dated 22nd May, 2014. In the cross examination of the D.W.1, the Counsel for the plaintiff has specifically put the question at Question No. 13 that the Lease Deed of 2009 cannot be taken into consideration for determination of mesne

profit of the suit property for the period from 2017 to 2019. Question Nos. 14, 27 and 28 of the cross examination of the D.W.1 reads as follows :

“14. (Shown Page Nos. 43 and 44 of the Affidavit of Evidence) Will you agree with me that as per the documents which have been disclosed by you, rate of lease rent per sq.ft. increased by more than double between the period from 1st July, 2006 to 30th November, 2011 and 1st December, 2011 to 31st May, 2013-?/ This is of course, it is a mathematical calculation and it is on record.

27. (Shown Page-49 of Affidavit of Evidence) Will I be correct, if I say that the market value of the property as per the then prevailing circle rate, with a sitting tenant was Rs.3,95,71,155?/ It is a Government document. How can I dispute it.

28. I suggest it to you that going by the circle rate of the property as disclosed by you, even with a sitting tenant, the lease rent thereof would be more than Rs.100 per sq.ft. as on 22nd May, 2014?/ It is a matter of fact that whatever as stated in page-49 is a fact and what is the rent of that premises is also a fact.”

10. The defendant has not denied in the cross examination of the plaintiff's witness that the method adopted by the valuer to consider the market value of the suit property is not correct.
11. Mr. Abhrajit Mitra, Learned Senior Advocate, representing the plaintiff relied upon the judgment of **A.G.E. Carapiet -vs- A.Y. Derderian** reported in **1960 SCC OnLine Cal 44** and submitted that the law is clear on the subject. Whenever the opponent has declined to avail

himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed.

12. Mr. Mitra relied upon the judgment of ***Indian Oil Corporation Ltd. - vs- Saroj Baweja and Another*** reported in **(2005) 12 SCC 298** and submitted that the valuer of the plaintiff has submitted report after considering the market rent of three nearby properties and the defendant has got the chance to cross-examine the valuer but the defendant has neither cross examined the valuer on the point of the method of determining the market rent nor the defendant has suggested any market rent existing on the date of determining the tenancy.
13. Now the defendant has relied upon the report of his valuer dated 16th February, 2022 which is annexed with the exception being Annexure-“C” at page nos. 44 to 55 and as per the said valuer report, the defendant submits that the monthly rent would be Rs. 88.99/- per sq.ft, per month.
14. It is found from the record, the valuer’s report relied by the defendant is neither brought on record before the Special Referee nor the plaintiff was given any opportunity to deal with the said report. It transpires from record that the defendant has obtained valuer’s report after the submission of report by the Special Referee as the date of the report of

the Special Referee is 31st August, 2021 and the date of the valuer's report of defendant is 16th February, 2022.

- 15.** In paragraph 22 of the exception, the defendant has stated that *“the plaintiff has suppressed the fact that they had as per their own accord given proposal to the defendant to increase the lease rent exorbitantly to the tune of Rs. 120/- per sq. ft., the said proposal was rejected by the Bank/defendant.”*

Considering the said submission of the Counsel for the defendant, the Counsel for the plaintiff at the time of hearing on 4th December, 2023 submitted before this Court that if the defendant is relying upon the proposal dated 21st January, 2017 submitted by the plaintiff, the plaintiff is ready to accept the said rent and accordingly, the Counsel for the defendant has prayed for time to take instruction as per the suggestion of the plaintiff and after taking instruction, on 14th December, 2023, the Counsel for the defendant submitted that the defendant is not ready for the proposal dated 21st January, 2017 and argued the matter on merit.

- 16.** In the case of ***Anderson Wright & Co. -vs- Amar Nath Roy & Ors.*** reported in **(2005) 6 SCC 489** the Hon'ble Supreme Court held that :

“5. As held by this Court in Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. [(2005) 1 SCC 705], once a decree for eviction has been passed, in the event of execution of decree for eviction being stayed, the appellants can be put on such reasonable terms, as would in the opinion of the appellate court reasonably compensate the decree-holder for loss occasioned

by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed. It has also been held that with effect from the date of decree of eviction, 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 on being vacated by the tenant. While determining the quantum of the amount so receivable by the landlord, the landlord is not bound by the contractual rate of rent which was prevalent prior to the date of decree.”

17. In the case of *Atma Ram Properties (P) Ltd. –vs- Federal Motors (P)*

Ltd. reported in **(2005) 1 SCC 705**, the Hon’ble Supreme Court held that :

“18. *That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.* [(1999) 2 SCC 325] this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.*

19. *(2) In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. 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.”*

18. This Court by an order dated 9th September, 2019 passed an order of eviction against the defendant directing the defendant to vacate the possession of the suit property and to handover the possession of the property on or before 1st March, 2020. This Court has also appointed Special Referee to determine the mesne profits. The defendant has vacated and handed over the property to the plaintiff on 28th February, 2020. There is no dispute with regard to the period of determination of mesne profit from 1st March, 2017 to 28th February, 2020. The Special Referee has determined the mesne profit at the rate of Rs. 139/- per sq.ft. per month. The Special Referee has decided the said market rate after considering the evidence adduced by the parties. The defendant has raised several contentions by filing exception to the report of the Special Referee. The main contention of the defendant the properties considered by the valuer to determine the present market value are situated far from the suit property and has not taken into consideration of the nearby properties of the suit property. The defendant has cross

examined the valuer of the plaintiff on the said issue and this Court already dealt with the same in paragraph 06 (*supra*) by referring the cross-examination of the P.W.1 (Valuer). During the cross examination, the valuer has clarified why he has not taken the nearby property of the suit property to ascertain the present market rent. The defendant has not challenged the method on the basis of which the valuer has determined the present market value. The defendant has relied upon its valuer report dated 16th February, 2022 which the defendant has obtained after the report was submitted by the Special Referee. Neither the Special Referee nor the plaintiff gets an opportunity to examine the valuer report dated 16th February, 2022 relied by the defendant. The defendant has also urged that the plaintiff has suppressed that the plaintiff has offered an amount of Rs. 120/- per sq.ft. in the year 2017. Upon hearing the argument, the plaintiff has again given an offer to the defendant, if the defendant is agreed to pay Rs. 120/- per sq.ft. and the terms mentioned in the proposal dated 21st January, 2017, the plaintiff is ready to accept the same but the defendant refused to accept the proposal of the plaintiff.

- 19.** Considering the above facts and circumstances, this Court finds the report relied by the defendant dated 16th February, 2022 cannot be taken into consideration as neither the said report was before the Special Officer nor the plaintiff get an opportunity to examine the same. The report submitted by the Special Referee dated 31st August, 2021, justified the monthly rent as per the Market Rent payable from 1st

March 2017 to 28th February, 2020. In view of the above, the report dated 31st August, 2021 does not require any interference accordingly the same is confirmed. The defendant is directed to pay the mesne profit being the monthly rent of the suit premises at the rate of Rs. 139/- per sq.ft. per month for a total area of 4800 sq.ft. x Rs. 139/- per sq.ft. = 6,67,200/- per month with effect from 1st March, 2017 till 28th February, 2020 with interest at the rate of 9% per annum with effect from 1st March, 2017 till realization of the total amount.

20. G.A No. 3 of 2021 is thus **allowed**. **C.S 185 of 2018** is **disposed of**.

Report of the Special Referee dated 31st August, 2021 be made as part of Decree.

(Krishna Rao, J.)