



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 348 OF 2022
WITH
INTERIM APPLICATION NO.20205 OF 2022

Bharat Petroleum Corporation Limited
Company incorporated under the provisions
of the Companies Act, 1956, having its
Registered Officer at Bharat Bhavam,
4 and 6, Currimbhoy Road, Bullard Estate,
Mumbai-400001.

...Applicant

Versus

Kalpataru Properties Pvt. Ltd.
(Earlier known as Precious Finance &
Investment Pvt. Ltd.)
Company registered under Companies Act, 1956.
having its registered Officer at C-221,
Maker Chambers V. Nariman Point,
Mumbai-400 021

...Respondent

Mr. Pankaj Sawant, Senior Advocate along with Mr. Roopadaksha Basu i/b The Law Point for the applicant.

Mr. Girish Godbole, Senior Advocate along with Mr. Rahul soman & Mr. Omprakash Vaishnav i/b Mr. Suneet Kr. Tyagi for the respondent.

Coram : Sharmila U. Deshmukh, J.

Reserved on : October 26, 2023

Pronounced on : November 9, 2023

JUDGMENT:

1. Rule. Rule made returnable forthwith and heard finally with consent of parties.

2. The perennial conflict between landlord and tenant has surfaced once again in the form of calculation of mesne profits. Seldom are the cases where there is a marginal difference between the valuation reports submitted by the parties rendering the Court's task easier. Most often than not there is huge variance in the valuation reports relied upon by the landlord and tenant, the valuation report of the landlord being on the higher side whereas that of the tenant being on the lower side. Similar is the position in the present case.

3. The revisional jurisdiction of this Court has been invoked against the order of Appellate Court dated 10th February 2022 in Appeal No. 371 of 2019 upholding the Trial Court's order dated 18th June 2018 in Mesne Profit Application No. 612 of 2010 directing the Applicant to pay mesne profits @ Rs. 57.21 per square feet per month for the period from 1st November 2003 to 31st December 2007 and @ Rs.121.07 per square feet per month for the period 1st January 2008 till the date of handing over possession of the suit premises along with interest @ 10% thereon.

4. The undisputed facts of the case are as under:

T.E.&R. Suit No.257/279 of 2003 filed by the Respondent seeking eviction and mesne profits came to be dismissed by the trial Court vide judgment and order dated 30th January 2008, which came

to be reversed by the Appellate Bench in First Appeal No.198 of 2008 vide judgment and order dated 9th October 2009. Liberty was granted to the respondent as regards the inquiry into future mesne profits under Order XX Rule 12(1)(c) of CPC. Pursuant thereto, the respondent filed Mesne Profits Application No.612 of 2010, which was decreed by judgment and order dated 18th June 2018 directing payment of mesne profits @ Rs. 57.21 per month per square feet for period from 1st November, 2003 to 31st December, 2007 and @ Rs 121.07 per square feet per month for period from 1st January, 2008 till handing over possession alongwith interest @10% thereon. The Appellate Court upheld the computation of Mesne Profits.

5. Heard Mr. Pankaj Sawant, learned Senior Advocate appearing for the applicant and Mr. Girish S. Godbole, learned Senior Advocate appearing for the respondent.

6. Mr. Sawant, submits that, the course adopted by the Trial Court of averaging the two valuation reports submitted by the Applicant's valuer and the Respondent's valuer for computation of mesne profits is unsustainable. He would contend that as per their valuation report submitted for the first part, the valuation was @ Rs.26.42 per square feet per month as compared to the valuation put forth by the valuer of respondent @ Rs. 88 per square feet per month. For the second part, their valuation was @ Rs.46 per square feet per

month and the respondent's valuation was @ Rs.196 per square feet per month. He points out the finding of the Trial Court that no fruitful material was produced on record to falsify the testimonies of the valuers of the Applicant and the Respondent. He would submit that in this factual scenario, it was incumbent on the trial Court to accept the valuation put forth by the applicant. According to him, Mesne Profits is the amount at which the similar premises could have been availed by the applicant during the same period and in the same vicinity and as such, lower of the valuation reports will have to be accepted. He submits that by averaging the two valuation reports, the trial Court computed mesne profits @ Rs.57.21 per square feet per month for the first part and @ Rs.121.07 per square feet per month for the second part.

6.2. Mr. Sawant would further submit that before the Appellate Court the Respondents accepted that the course adopted by trial Court was not open and available to the trial Court. He would submit that in view of the submissions made by learned advocate for the respondent before the Appellate Court, it is the common stand of both the parties that course adopted by trial Court by taking average of both the valuation reports is unsustainable in law. He would submit that average is required to be taken in event there are different methods of valuation to arrive at mesne profits and not in case where

there are different reports of valuation.

6.3. Mr. Sawant would further submit that the respondent not having challenged the findings of Trial Court, it is now not open for it to take a stand contrary to what was placed for consideration before the appellate Court. Drawing attention to the Applicant's valuation report annexed at Page-358 of the application, he submits that all factors had been rightly considered by his valuer and, as such, the valuation put forth by the applicant ought to have been accepted. He would further submit that as regards the comparable instances which form the basis of valuation report, in certain cases rent was higher side whereas security deposit was on the lower side and in certain cases the rent was on lower side whereas the security deposit was on higher side and the same has been factored in by the valuer by adding income from the interest-free-deposit @ 5.5% per annum. Mr. Sawant seeks remand to the Trial Court for decision afresh on the basis of evidence which is already led. In support of his contentions, he relies upon the following decisions

- ***Humayun Dhanrajgir & Ors. vs. Ezra Aboody, [2008 SCC OnLine Bom 420]***
- ***Tribeni Devi & Ors. vs. Collector of Ranchi & Vice Versa, [(1972) 1 SCC 480]***
- ***S. Neelaveni vs. Commissioner of Wealth-Tax,***

Karnataka, [1979 SCC OnLine Kar 357]

7. *Per contra*, Mr. Godbole, learned Senior Advocate for the respondent submits that there is no dispute as regards the area, location and period for which mesne profits is required to be inquired into. He would submit that absurdity of valuation report produced by the applicant is demonstrable on the face of record. He points out that the valuation of the Applicant considers the building as dilapidated and seeks to take advantage of the state of building whereas the obligation to maintain the building was on the applicant.

8. Mr. Godbole submits that both valuers have adopted direct rental comparisons, however the instances considered by the Applicant's valuer are absurd inasmuch as in some cases, the interest-free-deposits are to the extent of 200 years of the base rent and, in some cases, it is less than monthly rent. According to him, this deficiency cannot be cured by factoring in the income from interest-free-deposits @ 5.5% per annum. He has taken this Court through each and every comparable instance set out in the Applicant's valuation report. He would further submit that the applicant's valuer has admitted in cross-examination that responsibility of maintenance of building was on the BPCL and that if the building is described as dilapidated, valuation of building is definitely reduced. According to Mr. Godbole, in the cross-examination there is evidence of the valuer

of applicant that there were other leave and licence agreements for the relevant period, however he has chosen the documents. As regards the issue of remand, he submits that the provisions of law do not permit remand while exercising powers under section 115 of the CPC. He draws support from the provisions of Order XLI Rules 23, 23A, 24 of CPC. He relied upon the following decisions :

- ***Shivakumar & Ors. vs. Sharanabasappa & Ors., [(2021) 11 SCC 277]***
- ***Sirajudheen vs. Zeenath & Ors., [2023 SCC OnLine SC 196]***

9. Rival contentions now fall for determination.

10. Mr.Sawant, learned Senior Advocate for the Applicant seeks remand which is countered by Mr. Godbole, by placing reliance on the various provisions of Order XLI of CPC. I find considerable force in contention of Mr. Godbole that the scope of remand is limited and there cannot be a finding that retrial is necessary. It is not the contention of Mr. Sawant that the matter be remanded for retrial as the conditions of retrial as contemplated by CPC are satisfied in instant case. Mr. Sawant seeks remand for fresh inquiry based on the evidence already on record. In my opinion, as there is no question of retrial remand of the matter apart from being impermissible with only lead to further delay and as such, I have proceeded to compute the

mesne profits based on the valuation reports.

11. Upon perusal of the valuation report of the Applicant, the contention of Mr. Godbole on the issue of dilapidated condition of the building to challenge the valuation report is liable to be rejected as the Applicant's valuer has included the condition of the building under the heading of general information and there is no deduction sought on the basis of the condition of the building.

12. As far as the method of valuation adopted by trial Court and upheld by the appellate Court is concerned, at least before the appellate Court, the common submission was that the course which was adopted by trial Court is unsustainable. This is sought to be defended by Mr. Godbole, by claiming to have resigned to accept the amount with a caveat that their acceptance should not be regarded as their complete agreement with the assessment.

13. In this regard if we consider the provisions of Order 41 Rule 22 of CPC, any Respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that finding against him in Court below in respect of any issue ought to have been in his favour and may also take cross objection to the decree. In the present case, there is no cross objection taken by the Respondent before the Appellate Bench. On the contrary, the Respondent has assailed the finding of the Trial Court as

unsustainable. In the instant case, it cannot be said that the decree was in favour of the Respondent so that it was not necessary for the Respondent to file the appeal or cross objection. Having agreed before the Appellate Court that the findings are unsustainable the Respondent now cannot support the impugned order and submit that the computation of mesne profits is correct. Mr. Godbole is therefore faced with the handicap of the submission advanced before the Appellate Bench assailing the course adopted by the Trial Court and thus cannot defend the impugned order.

14. As held by the Apex Court case of ***D.L.F. Housing & Construction vs. Sarup Singh And Ors***, [1970 SCR (2) 368] illegality and irregularity used in section 115 of CPC do not cover either errors of fact or law and they do not refer to the decision arrived at but merely to the manner in which it is reached. Considering the course adopted by the Trial Court, the matter deserves interference.

15. There is no dispute as regards the location, area of the subject premises and the period for which the mesne profit is payable. There is also not much to be gone into as far as the evidence of parties are concerned inasmuch as counsel for both parties agree with the finding of the trial Court as well as the appellate Court that nothing fruitful has been elicited in the cross-examination of valuers.

16. The subject premises is a building comprising of 7 residential

flats along with servants quarters, car parking in the stilt area and open space around the building having two wings, connected with stilt plus one structure, the East Wing facing the main Nepean Sea Road. The finding of the Appellate Court is that the building is having old fashioned layout, the age of the building is around 60 years and there is no lift facility.

17. The area of Napeansea Road is recognised as a prominent locality in South Mumbai with the real estate prices in this area being on the higher side resultantly the market rentals being at a premium. The valuation reports indicates that all required amenities such as hospital, garden etc. are easily available and the location of the subject premises is easily accessible by means of public transport. As per the Applicant's valuation report the subject building is constructed as under:

East Wing.		
1.	Ground Floor – Flat No.6	1741.98
2.	Ground Floor – Flat No.5	1636.31
3.	First Floor – Flat No.3	1741.56
4.	First Floor – Flat No.2	1629.53
5.	Second Floor – Flat No.1	2416.38
	Open terrace attached with flat No.1 on east and west direction (20% of 2000 Sq.Ft + 20% of carpet area of flat No.1, i.e., 241638 sq.ft.)	883.28
West Wing.		
1.	First & Second floor – Flat No.4	1575.32

2.	First Floor – Flat No.7.	833.39
3.	Add 50% area of the servant quarters of approx 500 sq.ft area	250.00
	Total Carpet area in sq.ft.	12707.75

18. As per the Respondent's valuation report the carpet area of the subject building is 13131.07 square feet. Though there is some difference between the areas mentioned in the rival valuation reports, there is no dispute raised and the accepted area is 13131.07 square feet. The table of the Applicant's valuer is reproduced only for describing the manner in which the flats are positioned in the subject building.

19. The above table would demonstrate that except one flat on second floor in the East Wing, which has bigger area, and one flat on first floor which has smaller area, most of the flats are around 1700 square feet carpet area plus or minus 50-100 square feet to make way for the area put forth by the Respondents value. Therefore, the comparable instances of direct rental compensation of premises having carpet area of around 1700 square feet can be safely considered.

20. The period in respect of which the mesne profits is to be calculated is divided into two parts viz, first part is from 1st November 2003 to 31st December 2007 and the second part is from 1st January

2008 til 28th January, 2013 i.e. the date of handing over possession.

21. Before proceeding further, it will be profitable to have a look at the legal position on the subject of Mesne Profits. Section 2(12) of Civil Procedure Code, 1908 defines mesne profits as the 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. The Apex Court in ***Fateh Chand vs Balkishan Dass, [AIR 1963 S.C 1405]*** sets out the measure of mesne profit as the value of user of land to the person in wrongful possession and negated the calculation of mesne profit based on estimated return on the value of property. In other words, the market value/fair value of the subject property has no role to play in determining mesne profits. In ***Dalhousie Properties Ltd Vs SoorajMall Nagar Mall, [AIR 1977 SC 223]***, the Apex Court applied the principle of present rental value for calculating the Mesne Profit. These decisions were noted by Division Bench of this Court in the case of ***Humayun Dhanrajgir*** (supra) This Court analyzed the concept of royalty, the concept of mesne profits and after noting the decisions of Privy Council as well as the Apex Court, broadly summarized the methods of valuation in paragraph no.32, as under :

“32. Having taken survey of the various cases and methods of valuation, it can be broadly summarised as

under:-

- i) The claim for 'Mesne Profit' remains floating till the decree of possession is passed in favour of the plaintiff, which can also be termed as royalty;*
- ii) The measure of Mesne Profits is the value for the use of the premises and not necessarily the value of the property;*
- iii) Value for use will be determined by:-*
 - a. What that value will be in the hands of the person in wrongful possession;*
 - b. comparables, if available and applicable in real sense;*
 - c. finding out the prevailing rate of rental at which the wrongful person ought to have found equivalent accommodation."*

22. The decisions noted above have succinctly laid down the measure of mesne profits and the principles for determination thereof. Applying the clearly defined principles to the facts of the case is dependent on the material produced by the parties. The computation of mesne profits involves an adjudication of pure question of fact based on the valuation reports placed for consideration by the parties. The quantum of profits that a person in wrongful possession might receive which is the measure of manse profits may loosely be translated into its reasonable letting out value. There hardly exists any uniform and standard pattern of assessment in this regard. One of the methods of computation is the application of comparable market rent transactions utilising information on

transactions involving premises that are similar to the subject premises to arrive at proper letting out value. However, even if the broad similarities of location, age, condition etc. of the premises are taken into consideration, the market rentals will differ from building to building depending upon a number of factors for e.g. age of building, the need and requirement of the tenant and the circumstances under which the license has been granted. It is difficult to assess an enquiry of such a nature with mathematical precision even if comparable instances are available.

23. It is not disputed that full opportunity was given to the parties for adducing evidence which the parties have availed. However, no benefit can be availed from the evidence in view of the admitted position that nothing much has been elicited in the cross-examination. As indicated above, the valuation reports placed for consideration although are based on the same method of valuation show huge disparity in the market rentals, despite the same being in respect of premises in the vicinity of the subject premises.

24. Before the trial Court, the Respondent-landlord has relied upon the valuation report of Harshad S. Maniar, Chartered Engineer, Surveyor And Registered Estate Valuer and the applicant had placed the valuation report of B. D. Trivdei, Chartered Engineer and Registered Valuers, Development Consultant. Both the the valuers

are the Government approved registered valuers.

25. The Applicant's valuation report computes mesne profits @ Rs.26.42 per square feet per month for the period 1st November 2003 to 31st December 2007 and @ Rs.46.15 per square feet per month for the period 1st January 2008 onwards. Whereas the Respondent's valuation report computes the same @ Rs.88 per square feet per month for the period 1st November 2003 to 31st December 2007 and @ Rs.196 per square feet per month for the period 1st January 2008 onwards.

26. The Trial Court compared both valuation reports and observing the vast difference therein adopted the method of averaging, computing the mesne profits @ Rs.57.21 per square feet per month for the period from 1st November 2003 to 31st December 2007 and @ Rs.121.07 per square feet per month for the period 1st January 2008 till the date of handingover possession. In the appellate proceedings, the course adopted by the Trial Court was accepted as unsustainable even by the Advocate for the Respondent. Despite both parties contending the course adopted by Trial Court was unsustainable, the appellate Court held that instances quoted by either side cannot be taken as a strait-jacket formula to arrive at a just determination of mesne profits. After observing that the courts are supposed to determine nearly possible mesne profits by applying its

formula and finding itself in agreement with the submission of advocate for the respondent, appellate Court held that the comparable data is not available on record and in the absence of proper material, the courts are compelled to take out an average of both the valuation reports. Relying upon the decision in ***Humayun Dhanrajgir*** (supra) the appellate Court held the courts are equally entitled to take out average of two reports or two methods.

27. In my opinion, the Trial Court as well as the Appellate Court failed to apply the correct yardstick for computation of mesne profits. The decision in the case of ***Humayun Dhanrajgir*** (supra) clearly defined the principle of value for use which is determinable by the applicable comparable in real sense and finding out the prevailing rate of rental at which the wrongful person ought to have found equivalent accommodation. Both the Courts instead of applying the formulae has adopted the incorrect method of averaging the two valuation reports. It was incumbent to firstly determine whether the comparable instances produced on record are applicable and thereafter to find out the rate of rental at which equivalent accommodation could be found by the person in wrongful possession. The Appellate Court also erred in its finding that the instances produced by the Respondent are in respect of commercial transactions merely because the licensees were corporates. The

Appellate Court misapplied the decision in the case of ***Smt. S.Neelaveni Vs Commissioner of Wealth Tax*** to justify the averaging of the two reports. The course of averaging can be adopted in case of two method and not in case of two valuation reports.

28. Both the valuation reports adopt the method of comparable instances of leave and license rentals for similar properties in the vicinity of the subject premises and after applying the correctional factors, the base rate per square feet carpet area has been arrived at.

29. Let us first consider the rival reports for the period from 1st November 2003 to 31st December 2007 to ascertain whether the instances relied upon can be said to be applicable comparable instances. As indicated hereinabove the area of each flat can be considered to be approximately 1700 square feet carpet area plus/minus 50-100 square feet. The comparable instances considered by the Applicant's valuer and Respondent's valuer have been tabulated herein as Table I and Table II respectively.

TABLE I

Sr. No.	Date of agreement	Area of premises	Compensation / Rent p.m. in Rs.	Interest free security deposit in Rs.
1.	5 th November 2003	1130 sq. ft carpet	12,500	45,00,000
2.	14 th October 2004	1250 sq. ft. carpet	33,000	30,00,000
3.	1 st August 2003	1717 sq. ft. carpet	5,000	1,25,00,000

4.	19 th May 2004	1070 sq. ft carpet	50,000	1,60,000
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TABLE II

Sr. No.	Date of agreement	Area of premises	Compensation / Rent p.m. in Rs.	Interest free security deposit in Rs.
1.	15 th April 2004	2500 sq. ft carpet	2,50,000	3,00,000
2.	7 th February 2005	1500 sq. ft	69,000	1,25,00,000
3.	1 st June 2007	1729.16 sq. ft carpet	1,50,000	NIL.

30. The correctional factors adopted by the applicant's valuer is an addition of 5.5% p.m. income from the interest free deposit and deduction of 30% towards the maintenance charges, property tax and other outgoings. Whereas the Respondent's valuer has adopted the correctional factors of income from interest free deposit at 5.5% p.m. and reducing the base rate by depreciation amount.

31. Applying the principle laid down in case of ***Humayan Dhanrajgir***, (supra), I have considered the comparable instances of leave and license agreements forming part of the rival valuation reports and assessed them to ascertain their applicability. For the period from 2003 to 2007, the Applicant's valuer has given two instances of the year 2003 and two instances of the year 2004. In the instance at Serial No. 1 of Table I of year 2003, the monthly

compensation is on the lower side whereas the security deposit is on an excessively higher side. The instance at Serial No. 2 of Table I of the year 2004 shows the security deposit on higher side . The instance at Serial No. 3 of Table I for the year 2003 shows a very low monthly compensation and security deposit being exorbitantly high. The instance at Serial No. 4 of Table I shows reasonable monthly compensation and reasonable security deposit which can be construed as acceptable norm of leave and license agreements.

32. The Respondent's valuer has given three instances one each of the years 2004, 2005 and 2007. As regards the instance of the year 2004 at Serial No. 1 of Table II, the security deposit is lower than the monthly compensation, in the instance of 2005 at Serial No. 2 of Table II, the security deposit is exorbitantly high and in the instance of the year 2007 at Serial No. 3 of Table II, the security deposit is Nil.

33. It is matter of common knowledge that in case of leave and license agreements, for securing due compliance of the terms and conditions of the agreement interest free refundable security deposits are taken which is usually computed at the aggregate of three to six months monthly rental compensation maybe even upto one year depending on facts of each case. It is well known that security deposit can neither be nil nor be less than the monthly compensation. If we consider the instances in the present case, the

instances where the interest free security deposit is exorbitant or nil with the converse of the rent being on lower side or higher side respectively is unrealistic and one off norm casting a doubt about the true nature of the transaction. As such, the instances quoted by the Respondent's valuer cannot be stated to be applicable comparable instances.

34. As regards the Applicant's valuation, the instances of the year 2003 which shows an exorbitant security deposit cannot be stated to be an applicable comparable. The factoring of interest @5.5% cannot be considered to be a correctional factor as what is required to be ascertained is the comparable instance applicable in the real sense. A reasonable comparable monthly rental with reasonable comparable security deposit is an acceptable yardstick mandated for computing the mesne profits. As such, I do not agree that the factoring of interest on the security deposit @5.5% can remedy the instances of exorbitant security deposit and place them for consideration. In my view, the only comparable instance produced by the Applicant's valuer is of the year 2004 of Agreement of 19th May, 2004 at Serial No. 4 of Table I with monthly compensation of Rs. 50,000/- and interest free security deposit of Rs. 1,60,000/-. Although both the valuers have applied the correctional factor of income from interest free deposit @ 5.5%, the terms of the leave and license

agreement are in the nature of one off agreement and not the usual norm.

35. In my opinion, for the period from 1st November, 2003 to 31st December, 2007 the four instances given by the Applicant's valuer cannot be relied upon except the instance at Serial No 4. Similarly the three instances given by the Respondent's valuer cannot be stated to reflect the prevailing rate of rental. The leave and license agreement at Serial No. 4 of the Applicant's valuer can be stated to be fairly comparable to the rate at which the Applicant could have obtained an equivalent accommodation. As the other three instances are not comparable, there is no question of averaging of the net effective rental of these instances.

36. While arriving at the net effective rental per month of Rs. 33.19 per square feet in respect of the instance at Serial No. 4 of Table I, the Applicant's valuer has deducted 30% towards the maintenance charges, property tax and other outgoings. There is no basis for deduction of this 30%. The inclusion of these charges is term and condition of grant of license and forms part of the monthly compensation and as such, the deduction of 30% factored by the Applicant's valuer is not taken in consideration. The net effective rental per month thus works out to Rs. 47.42 per square feet carpet area.

37. Now coming to the second period from 1st January, 2008 till 28th January, 2013, the Applicant's valuer and the Respondent's valuer has relied upon the instances which are tabulated in Table III and Table IV as under:

TABLE III

Sr. No.	Date of agreement	Area of premises	Compensation / Rent p.m. in Rs.	Interest free security deposit in Rs.
1.	17 th February 2009	980 sq.ft carpet	35,000	21,000
2.	16 th May 2010	458 sq. ft carpet	30,000	1,50,000
3.	13 th June 2008	708 sq. ft carpet	Averaging @ 62,500/-	2,00,000
4.	25 th March 2009	836 sq. ft carpet	55,000	80,000

TABLE IV

Sr. No.	Date of agreement	Area of premises	Compensation / Rent p.m. in Rs.	Interest free security deposit in Rs.
1.	1 st January 2008	1020 sq. ft. carpet	2,00,000	NIL
2.	22 nd October 2008	2654.16 sq. ft carpet	4,50,000	13,50,000
3.	19 th June 2008	422.50 sq. ft carpet	90,000	1,80,000

38. For the period from 2008 onwards, the Applicant's valuer has given one instance of 2008 which is at Serial No. 3 of Table III which shows that the license is granted for period of five years with monthly

compensation of Rs. 50,000/- with escalation and security deposit of Rs. 2,00,000/- for the residential tenement admeasuring 708 square feet carpet area. The two instances of the year 2009 is at Serial No. 1 and Serial No. 4 of Table III in respect of residential tenement admeasuring 980 square feet carpet area and 697 square feet carpet area with monthly compensation of Rs. 35,000/- with security deposit of Rs. 21,000/- and monthly compensation of Rs. 55,000/- with security deposit of Rs. 80,000/- respectively. The instance at Serial No. 1 of Table III shows security deposit lesser than the monthly compensation and needs to be disregarded. The instance at Serial No. 2 of Table III is of the year 2010 is in respect of residential tenement admeasuring 458 square feet carpet area and the monthly compensation for this premises cannot be considered to be comparable to the monthly compensation for a residential premises admeasuring about 1700 square feet carpet area, the difference in the area being vast.

39. As regards the Respondent's valuation report the three instances are of the year 2008. The first Instance is in respect of Flat admeasuring 1050 square feet carpet area with monthly compensation of Rs. 2,00,000/- and nil security deposit, the second instance is in respect of Flat admeasuring 2654.16 square feet carpet area with monthly compensation of Rs. 4,50,000/- and security deposit

of Rs. 13,50,000/- and the third instance is in respect of Flat admeasuring 422 square feet with monthly compensation of Rs. 90,000/- and security deposit of Rs. 1,80,000/-. The first instance at Serial No. 1 of Table IV is to be disregarded as there is no security deposit and hence rent is on the higher side, the third instance at Serial No. 3 of Table IV is of a Flat with lesser area and cannot be said to be comparable instance. As per the instance at Serial No. 2 of Table IV, the net rental per square feet per month comes to Rs. 172.93/- for the residential premises admeasuring 2654.16 square feet carpet area.

40. The instances at Serial Nos. 3 and 4 of Table III and Serial No. 2 of Table IV will have to be considered as in both these cases, the area of the residential premises is approximate plus/minus 1000 square feet of the area of subject premises. In the instance at Serial No. 3 of Table III, the average base rent is Rs. 88.28/- per square feet and the income from interest free deposit @8% added is Rs. 1.88/- per square feet. There is no basis for correctional factor of 25% to be applied and for deducting 10% towards furniture and fixtures. As such the net effective rental per month works to Rs. 90.16 per square feet carpet area. In the instance at Serial No 4 of Table III, the average base rent is Rs. 79.00/- per square feet and the income from rent free deposit @8% added is Rs. 0.77/- per square feet. There is no basis for

deduction of 30% and as such, the net effective rental per month works to Rs. 80.00/- per square feet carpet area. Taking the average of the two instances at Serial Nos. 3 and 4 of Table III, the monthly compensation works out to Rs. 85.80 / per square feet carpet area as against the monthly compensation of Serial No. 2 of Table IV, which comes to Rs. 172.93/ per square feet carpet area.

41. Applying the well accepted principles, the comparable instance of the prevailing rate of rentals at which the wrongful person could have found equivalent accommodation is required to be considered. The test is not what the person out of possession could have got but what the person in possession actually received or might with ordinary diligence have received. As the Applicant could have found equivalent accommodation @ Rs. 47.42/- per square feet carpet area per month for the period from 1st November, 2003 to 31st December, 2007 and @ Rs 85.80/- per square feet carpet area per month for the period from 1st January, 2008 till 28th January, 2013, the same constitutes mesne profits for the respective periods.

42. For the foregoing reasons, the impugned order dated 10th February, 2022 is hereby quashed and set aside. The Petitioner is directed to pay Mesne Profits of the suit premises admeasuring 13131 square feet carpet area to the Respondent @ Rs. 47.42/- per square feet of carpet area per month for the period from 1st November, 2003

to 31st December, 2007 and @ Rs. 85.80/- per square feet carpet area per month for the period from 1st January, 2008 till 28th January, 2013 alongwith interest @10% p.a. on the mesne profits amount from the date of termination of tenancy i.e. from 1st November, 2003 till payment or realisation. Rule is made absolute in above terms.

43. In view of the disposal of Civil Revision Application, Interim Application does not survive for consideration and is disposed of

[Sharmila U. Deshmukh, J.]