

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

ORIGINAL SIDE

APD/281/2016

With

CS/489/2000

IA NO:GA/2/2017(Old No. GA/62/2017)

UNION OF INDIA.

VS

HINDUSTAN CONSULTANCY & SERVICES LTD. & ANR.

Present:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE SUPRATIM BHATTACHARYA

For the Appellants :- Mr. Shyamal Chakraborty, Adv.,
Mr. Debajyoti Mondal, Adv.,
Ms. Manju Jaiswal, Adv.,
Ms. Anjana Das, Adv.

For the Respondents :-Mr. A. K. Chatterjee, Sr. Adv.,
Mr. Rajarshi Dutta, Adv.
Mr. Aditya Roy, Adv.
Mr. A. P. Agarwalla, Adv.

Judgment On :- 26.07.2024

ARIJIT BANERJEE, J.

1. This appeal is directed against a judgment and decree dated February 7, 2014, whereby a learned Judge of this Court

disposed of the suit of the respondent no. 1 herein being CS No. 489 of 2000. The claim in the suit was for mesne profits/compensation in respect of the suit premises owned by the respondent/plaintiff and occupied by the present appellant, for the period April 1, 1992 till August 31, 2000, amounting to Rs. 61,46,000/- at the rate of Rs. 2000/- per diem and mesne profits at the rate of Rs. 3000/- per diem from September 1, 2000, till the date of delivery of vacant and peaceful possession of the suit premises by the appellant herein to the plaintiff. The learned suit court decreed the suit against the defendant no. 2 (present appellant) and directed compensation to be paid to the plaintiff at different rates for different periods of time. Interest was also awarded at the rate of 12 per cent per annum. The suit was dismissed as against the defendant no. 1 (State of West Bengal). Being aggrieved the defendant no. 2 is before us by way of this appeal.

2. The plaintiff's case before the learned suit court was as follows:-

- (i) The plaintiff is the owner of Premises No. 27 R.N. Mukherjee Road, Kolkata 700 001 (in short, 'the said premises'), which was previously known as Premises No. P-

13, Mission Row Extension, Calcutta. The said premises had initially been purchased by one Precious Stocks & Bonds Ltd. from Life Insurance Corporation of India by a registered indenture dated May 13, 1981. The name of the said purchaser company was changed to Mody Building Limited and fresh certificate of incorporation was issued by the Registrar of Companies, West Bengal on May 28, 1986. Mody Building Limited merged with the plaintiff company pursuant to a scheme of amalgamation duly sanctioned by this Court by order dated January 24, 2000, passed in Company Petition No. 607 of 1999 and by the Delhi High Court by order dated March 15, 2000, passed in Company Petition No. 32 of 1999. Accordingly all assets, rights and entitlements of Mody Building limited, including the said premises, stood vested in the plaintiff company.

(ii) By an order of requisition dated November 9, 1949, issued under Section 3 of the West Bengal Premises Requisition & Control (Temporary Provisions) Act, 1947, the State of West Bengal (defendant no. 1 in the suit) had requisitioned 1000 Sq. ft. area in the North Western portion of the ground floor of the said premises. The said premises was at that point of

time, owned by the Hindu Family Annuity Fund Limited. In January 1950, possession of the requisitioned portion of the said premises (which portion is hereinafter referred to as 'the suit premises') was taken over by the State of West Bengal and the present appellant was put in physical possession thereof.

(iii) By an agreement dated June 23, 1952, made by and between the then owner of the said premises, and the State of West Bengal, the rent compensation in respect of the suit premises was fixed at Rs. 404/- per month.

(iv) Under the provisions of the Life Insurance Corporation Act, 1955, all the assets of the said Hindu Family Annuity Fund Limited, including the suit premises, vested in the Life Insurance Corporation of India (in short 'LIC'). Thereafter the rent in respect of the suit premises was paid to LIC by the present appellant.

(v) By a registered deed of conveyance dated May 13, 1981, the predecessor-in-interest of the plaintiff purchased the said premises from LIC.

(vi) By virtue of Section 10(B) of the West Bengal Premises Requisition and Control Act 1947 which was introduced in

that Act by the West Bengal Premises Requisition and Control (Temporary Provisions) Second Amendment Act, 1986, the suit premises under requisition, automatically stood de-requisitioned after the expiry of five years from the date of coming into force of the Second Amendment Act, 1986 from March 31, 1987. Consequently, the suit premises stood released from requisition with effect from April 1, 1992.

(vii) Thereafter, the defendant no. 1 (State of West Bengal) passed several orders and issued letters requesting the plaintiff to receive vacant possession of the suit premises but the defendant no. 2 failed and/or neglected to handover vacant possession thereof to the plaintiff.

(viii) The plaintiff's predecessor-in-interest (Mody Building Limited) was, therefore, compelled to file a writ petition being WP No. 1086 of 1999 in this Court which was disposed of by a judgment and order dated August 18, 1999, by directing the First Land Acquisition Collector, Kolkata, to make over possession of the suit premises to the owner after evicting the occupiers therefrom as expeditiously as possible and preferably within a period of six months from the date of communication of the order and by further directing that the

rent compensation in respect of the suit premises for the period under requisition be determined by the concerned authority expeditiously and upon such determination, the compensation be paid to the writ petitioner.

(ix) The period of 6 months fixed by the order dated August 18, 1999 expired on February 17, 1999. Possession of the suit premises was not made over to the plaintiff.

(x) After issuing notice under Section 80 of the Code of Civil Procedure, 1908, dated August 31, 2000, the plaintiff filed the instant suit claiming compensation for the suit premises at the rate of Rs. 2000/- per diem on and from April 1, 1992, till August 31, 2000 and mesne profits at the rate Rs. 3000/- per diem from September 1, 2000, till receipt of possession of the suit premises.

(xi) During the pendency of the suit, acquisition proceedings were initiated by the State of West Bengal in respect of the suit premises. Such proceedings were quashed by an order dated July 11, 2002, passed by this Court in WP No. 999 of 2001 filed by the owners of the suit premises. An appeal carried by the State against the said order was dismissed by the Division Bench on April 13, 2006.

(xii) The defendants made over vacant possession of the suit premises to the plaintiff on December 15, 2006.

3. The substance of the case pleaded by the defendant no. 2 in its written statement is as follows:-

(i) The defendant paid rent at the rate of Rs. 404/- per month for the building as fixed by the Land Acquisition Collector. On de-requisitioning of the building on April 1, 1992, the defendant made sincere efforts to find out a suitable alternative accommodation but failed to get one. The functioning of the defendant is indispensable for the interest of the public at large.

(ii) The suit for mesne profits for the period commencing from April 1, 1992, till making over of vacant possession, should be dismissed with costs. In any event, the compensation, if any, is to be guided by the appropriate rules and procedures of the Government of India and/or by the West Bengal Premises Tenancy Act. The post office situated in the suit premises is rendering services to the public and is not operated with the motive of making any profit.

(iii) It is denied that the letting out value of the suit premises would be at least Rs. 2000/- per diem. It is denied that the defendant is liable to pay any mesne profits. The postal department took steps to increase the rent in accordance with law but because of the attitude of the plaintiff the rent could not be revised. The increase of rent will be guided by the West Bengal Premises Tenancy Act.

(iv) It is denied that the defendant is liable to pay any compensation to the plaintiff. The defendant is a lawful tenant and therefore the question of the defendant being a wrongful or illegal occupier of the suit premises, does not arise. In any event if mesne profit is payable at all, the same can be only for the past three years prior to institution of the suit and not beyond that.

4. It appears that an application was moved by the defendant no. 2 for leave to agitate the point of the suit being barred by the principles of res judicata.

5. The learned suit Court framed the issues on October 11, 2007, which were as follows:-

“(1) Is the suit maintainable in its present form?

(2) Was there any cause of action to file the suit by the plaintiff?

(3) Is the suit barred by limitation or any other provision of law?

(4) Whether the defendants were in wrongful and illegal possession of the suit property since April 1992?

(5) Is the plaintiff entitled to claim mesne profit as claimed in para 11 of the plaint till 31st August, 2000?

(6) Is the plaintiff entitled to mesne profit at the rate of Rs. 3000 per day from 1st September, 2000 till 15th December, 2006 that is the date on which the defendants vacated the suit premises?

(7) Is the plaintiff entitled to the decree as prayed for?

(8) To what other relief or reliefs, if any, is the plaintiff entitled?"

6. An additional issue was framed on February 4, 2009, which was whether or not the reliefs claimed in the suit are barred by the principles of res judicata.

7. The plaintiff produced two witnesses who were examined and cross-examined.

8. The learned Judge held that the plaintiff's claim in the suit is not hit by the principles of res judicata. This is because the claim of mesne profits for the period subsequent to April 1, 1992, was never finally decided in any legal proceeding including W.P. No. 1086 of 1999. Although in that writ petition filed by the plaintiff herein, there was a claim for compensation for the period commencing April 1, 1992, by the order dated August 18, 1999, whereby the writ petition was disposed of, the issue was not finally decided. The Land Acquisition Collector was directed to determine the compensation payable to the writ petitioner therein (present plaintiff). Such exercise was not undertaken by the Land Acquisition Collector. Therefore, the principles of res judicata would not apply to the facts of the instant case. To quote the learned Judge on this aspect:-

“The rent compensation was not decided in W.P. No. 1086 of 1999. By the order dated August 18, 1999 the writ Court directed the concerned authority to determine the rent compensation as expeditiously as possible. The rent compensation was never determined by any authority. It could not be contended that the Order dated August 18, 1999 did not grant the relief of rent

compensation and as such the claim on this account was barred by the principles of res judicata on the touch stone of Explanations III, IV, V of Section 11 of the Code of Civil Procedure, 1908.”

9. In so far as the point of limitation as regards the claim for compensation is concerned, the learned Judge held that the plaintiff is entitled to compensation for a period of 3 years prior to the date of filing of the suit. The suit was filed on December 1, 2000. Therefore, the plaintiff is entitled to compensation on and from December 1, 1997. The learned Judge held that although the defendants were in wrongful possession of the suit premises from April 1, 1992, till December 15, 2006, on which date possession was handed over to the plaintiff, applying the laws of limitation, the plaintiff is entitled to compensation on and from December 1, 1997 till December 15, 2006.

10. On the issue of the quantum of compensation, the learned Judge held as follows:-

“The issue that remained was the quantum of compensation to be paid for this period to the plaintiff. Plaintiff submitted a valuation report which was Exhibit ‘TVI’. There was no other evidence to contradict the

valuation report. The valuer disclosed his methodology. The valuer was examined and cross-examined. From the deposition nothing contradictory to the valuation report was established. I, therefore, accept the valuation report of the valuer. The basis of the valuation report was also disclosed. The lease deeds forming the basis of the valuation report was also marked as Exhibits. So far as the valuation report and quantum of compensation is concerned Mr. Bose did not advance any submission in that regard.

The valuer in its report considered five periods, namely, April 1, 1992, April 1, 1996, April 1, 2000, April 1, 2004 and December 2006. To arrive at the fair rental value the valuer applied a formula which was disclosed in his report. By such methodology the valuer specified the rental value for the different periods. In the instant suit the plaintiff was entitled to rent compensation from December 1, 1997 till December 15, 2006.

According to the valuation report the rent for such period was Rs. 60.05 square feet per month, such rate continuing till March 31, 2000 according to the valuer. The plaintiff would, therefore, be entitled to compensation at the rate of Rs. 60.05 per square feet per month with effect from December 1, 1997 till March 31, 2000. For the period from April 1, 2000 to March 31, 2004 the valuer specified Rs. 79.93/- per square feet. The plaintiff would, therefore be entitled to compensation at such rate for such period.

For the period from April 1, 2004 till December 2006 the valuer specified rate of Rs. 94.50/- per square feet per month. The plaintiff would be entitled to compensation at such rate for such period. The valuer found rent to be at the rate of Rs. 102.18/- per square feet as on December, 2006. The plaintiff received possession on December 15, 2006. Therefore, for these fifteen days the plaintiff would be entitled to receive rent compensation at the rate of Rs. 102.18/- per square feet per month.

The plaintiff claimed interest at the rate of 18% per annum. No doubt the nature of transaction between the parties was commercial. The Defendant No. 2 was in wrongful occupation of the suit premises till it vacated. The Defendant No. 2 would, therefore, be liable to pay interest at the rate of 12% per annum on and from December 1, 1997, till March 31, 2000, on the sum decreed for this period. The plaintiff would be entitled to interest at the rate of 12% per annum on and from April 1, 2000 till March 31, 2004 on the sum decreed for this period. The plaintiff would, similarly, be entitled to interest at the rate of 12% per annum on the sum decreed for the period April 1, 2004 till December 15, 2006. The plaintiff would be entitled to interest at the rate of 12% per annum on the sum decreed for the period April 1, 2004 till December 15, 2006 until realization of its entire claim from the defendant. The rate of 12% was awarded as interest since the nature of transaction between the parties was commercial and with no evidence on record as to the commercial rate of interest prevailing during the period of time under contemplation.

The Defendant No. 1 was the requisitioning authority. It did not enjoy the suit property. It requisitioned the suit property at the instance of the Defendant No. 2. The Defendant No. 2 failed to vacate in spite of requests to make over possession to the plaintiff.

The suit is, therefore, dismissed against the Defendant No. 1 and decreed against the Defendant No. 2.”

11. Being aggrieved, the defendant no. 2 in the suit has come up by way of this appeal.

Appellant's Contention:-

12. Appearing for the appellant, Mr. Chakraborty, learned Counsel, submitted that by the order dated August 18, 1999, passed by a learned Judge in W.P. 1086 of 1999, six months' time was granted to the present appellant to vacate the suit premises. Therefore, no mesne profits would be payable by the appellant for any period prior to expiry of six months from the date of that order.

13. Learned Counsel then submitted that the claim for rent compensation is barred by the principles of res judicata. Such

claim had been made in W.P. 1086/1999 but was not allowed. Hence, going by the Explanations to Section 11 of the Code of Civil Procedure, such claim is hit by res judicata.

14. It was then argued that the plaintiff acquired right/title in respect of the suit premises on April 1, 1999. The plaintiff is not entitled to claim compensation for any period prior thereto.

15. Referring to the valuation report tendered in evidence by the plaintiff, learned Advocate submitted that the same is completely unreliable. The other property considered in the valuation report is not comparable with the suit property. The valuation report is not supported by any evidence. It only reflects an expert's opinion. It is a private document prepared at the instance of the plaintiff without participation of the Union of India. The learned Judge ought not to have relied on such report.

16. Mr. Chakraborty then referred to paragraph 6 of the writ petition being WP No. 1086 of 1999 which reads as follows:-

“At the said requisitioned premises, the R. N. Mukherjee Road Post Office was set up. By reason of subsequent construction of several tall buildings in the said area the said post office is not distinctly visible and hardly used by the public. The said post office is located at the dead

end of the land known as Cooper Lane which is 20' wide.

The said post office is neither visible nor it is convenient for the public to approach the said post office. Even the Postal van cannot go inside the Lane upto the post office gate.”

He submitted that the suit premises is admittedly placed at a dis-advantageous location. This was not considered by the expert who prepared the valuation report.

17. Mr. Chakraborty then submitted that the sale deed dated May 13, 1981, whereby the concerned building was sold and transferred by LIC to the predecessor-in-interest of the plaintiff, would show that the consideration for the said transaction was Rs. 15.5 lakh. Under Section 17 of West Bengal Premises Tenancy Act, 1956, the rent would be 1/10th of the land value plus construction cost.

18. Learned Counsel then submitted that original or certified copy of the lease deed that the expert valuer considered for comparing the suit premises with the property which is the subject matter of such lease deed, was not produced by the plaintiff. The other property is not comparable with the suit premises. In that other case, the lessee had many

rights/advantages which the appellant in the present case did not have. Therefore, the lease rentals cannot also be comparable. He further submitted that no document with respect to tenancy/lease on the other floors of the said building was produced on behalf of the plaintiff.

19. Learned Advocate then referred to the application filed in the appeal, under Order XLI, Rule 27 of the Code of Civil Procedure for leave to disclose and rely upon additional evidence. Learned Counsel sought leave to rely upon a letter dated November 30, 2005, written by the Land Acquisition Collector, Kolkata to the Superintendent of Post Office, Central Kolkata Division. The said letter reads as follows:-

“This is to inform you that the Govt. in Land and Land Reforms Department has approved the enhanced rent compensation in respect of the above premises w.e.f. 01.03.1986 to 30.09.2001 amounting to Rs. 16,630/- only and rent compensation from 01.10.2001 to 28.02.2006 @ Rs. 592/- p.m. vide their memo No. 3649 - Reqn. 55-4/99 dt. 28.10.2005 (Xerox copy enclosed).

You are requested to make arrangement for depositing the enhanced rent compensation of the above period and

to take necessary steps for vacating the premises at an early date as the above premises has been completed 25 years of requisition to avoid future litigation.”

20. Leave was also prayed for to rely upon the minutes of a meeting of the Fair Rent Assessment Committee for rent revision of premise no. 27 R. N. Mukherjee Road, Kolkata 700 001. The operative portion of the said minutes reads as follows:-

“Considering the above aspect, the FRAC recommended the core rent of R.N. Mukherjee Rd. PO as Rs. 3.06 per sq. ft. i.e. Rs. 3,145.68 per month w.e.f. 04.01.1997 to 03.01.2002 and Rs. 3.34 per sq. ft. i.e. Rs. 3,433.52 per month w.e.f. 04.01.2002 to 15.12.2006.

FRAC also recommended the payment of all taxes and surcharges (Water tax, Corporation tax etc.) for occupier’s share which was initially paid by the Land lord if any and it will be reimbursed by the department on production of actual bill submitted by the Land lord. In this connection land acquisition collector Memo No. 15-2.A dtd 07.01.2009 is the guide line of the department for assessment of rent.”

21. Learned Advocate relied on the following decisions:-

(i) ***Jaipur Development Authority v. Kailashwati Devi (Smt.), reported at (1997) 7 SCC 297.***

(ii) ***M/s. Ceean International Private Limited v. Ashok Surana & Anr., reported at AIR 2003 Calcutta 263.***

(iii) ***New India Assurance Co. Ltd. v. Annakutty and Ors., reported at AIR 1993 Kerala 299.***

(iv) ***Chandra Sekhar Pal and Ors. v. Musmat Tapoi & Anr. reported at AIR 1986 Orissa 130.***

(v) ***Puthiyottil Kunhava & Ors. v. Kaniattichalil Mammadkutty, reported at AIR 1990 Kerala 132.***

(vi) ***Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.), Andheri & Ors., reported at AIR 1986 SC 391.***

(vii) ***M.T. Rajamanickam Chetty and Anr. v. T.R. Abdul Halin Sahib, reported at AIR 1941 Madras 389.***

Argument of the respondent/plaintiff

22. Appearing for the respondent/plaintiff, Mr. Chatterjee, learned Senior Advocate, submitted that the plaintiff's right to sue was not an issue before the learned Single Judge. It was never argued that the plaintiff could not maintain a claim for rent

compensation or mesne profits for a period prior to April, 1999 since the plaintiff became the owner of the suit premises only in April, 1999 by way of amalgamation with the company which previously owned the suit premises.

23. It was further submitted that before the learned Single Judge, no argument was made on behalf of the defendant in respect of the valuation report submitted by the plaintiff's witness Sundar Lal Mitra. Although such witness was cross-examined, it was not suggested that the valuation report is unrealistic or unreliable or does not reflect the true letting out value of the suit premises or is artificially inflated. A certified copy of the lease deed which the valuer considered for assessing the market rental value of the suit premises, was tendered in evidence and marked as Exhibit P. Hence, the grievance of the appellant/defendant that such document was not produced, is baseless.

24. Mr. Chatterjee then referred to the writ petition that the plaintiff had filed being W.P. 1086 of 1999 and the order dated August 18, 1999 passed therein. He submitted that the said order was never carried out. In any event what was directed to be determined was rent compensation and not mesne profits. Therefore, the question of res judicata does not arise.

25. Reference was then made to various orders of de-requisition / release issued by the Land Acquisition Collector directing the present appellant to vacate the suit premises and hand over possession to the plaintiff. It was submitted that in spite of such letters, the appellant/defendant refused to vacate the suit premises.

26. Mr. Chatterjee then submitted that the erstwhile owner of the suit premises i.e., Mody Building Limited stood amalgamated and merged with the plaintiff herein by reason of a scheme of amalgamation having been sanctioned by the Calcutta High Court and the Delhi High Court. As per the scheme of amalgamation all rights and liabilities of Mody Building Limited devolved on the plaintiff. The plaintiff therefore stepped into the shoes of Mody Building Limited in so far as the suit premises is concerned. It is absurd to argue that the plaintiff cannot maintain a claim for a period prior to the date of amalgamation. The amalgamation was not under challenge in the suit.

27. Apropos transfer of right to sue post amalgamation, learned Senior Advocate referred to Sections 391, 392 and 394 of the Companies Act, 1956 and Chapter XV and in particular Section 232 of the Companies Act, 2013. In this connection learned

Senior Advocate referred to the decision of the Hon'ble Supreme Court in the case of ***Union of India v. Sri Sarada Mills Ltd. reported at (1972) 2 SCC 877 (Para 14 to 22)*** and the decision of the Andhra Pradesh High Court in the case of ***Benumetcha Gangaraju v. Veluri Gopala Krishnamurthi & Anr., reported at 1957 SCC OnLine AP 17 para 23.***

28. On the point of res judicata, Mr. Chatterjee submitted that the issue of entitlement of the plaintiff to receive compensation for the period of requisition and the period post de-requisition was never adjudicated by any competent forum. Therefore, the issue of res judicata should not have been framed at all by the learned Single Judge.

29. As regards the application for admission of additional evidence, Mr. Chatterjee submitted that while dealing with an application under Order XLI Rule 27 of the Code of Civil Procedure, the prime consideration is whether or not the Court requires the additional evidence for passing judgment. Referring to paragraphs 7 to 14 of the application and Annexures 'A' & 'B' thereto, learned Advocate submitted that the additional evidence pertains to revision of rent in respect of the suit premises. However, the plaintiff claims mesne profits. Therefore, the

additional documents are irrelevant. The application under Order XLI Rule 27 of the Code of Civil Procedure should be dismissed *in limine*.

In this connection, Mr. Chatterjee referred to the decision of the Hon'ble Supreme Court in the case of ***Union of India v. Ibrahim Uddin & Anr. reported at (2012) 8 SCC 148*** paras 36 to 49 and in the case of ***Sanjay Kumar Singh v. State of Jharkhand., reported at (2022) 7 SCC 247***. Both these decisions are on Order XLI Rule 27 of the Code of Civil Procedure.

30. On the issue of determination of mesne profits, Mr. Chatterjee referred to the decision of the Hon'ble Supreme Court in the case of ***State of West Bengal v. Bireswar Dutta Estate Private Limited, reported at (2020) 20 SCC 558***. In that case, the suit premises was requisitioned by the State of West Bengal under the West Bengal Premises Requisition and Control (Temporary Provision) Act, 1947 for providing barrack accommodation for the police. This was in October 1958. The premises stood de-requisitioned on 7.01.1994 by virtue of the provisions of Sections 10A and 10B of the 1947 Act. However, instead of vacating the suit premises, the State continued in unauthorized occupation thereof. In a legal action, the High

Court granted three months' time to the State to initiate acquisition proceedings if it wanted to retain the suit premises. After expiry of the three months period, the owner of the suit premises filed a suit seeking physical possession of the property. A learned Single Judge decreed the suit on 9.9.1998, and directed the appellant not only to deliver vacant possession but also to pay compensation at the rate of Rs. 7230/- per month from 8/1/1994 to 7/10/1994 and mesne profits at the rate of Rs. 1.10 lakh per month from 8/10/1994 to 31/8/1998 and from 1/9/1998 till date of delivery of possession.

The decree was challenged by the state of West Bengal before the Appeal Court. The property owner filed a cross objection being aggrieved by the quantum of mesne profits. The Division Bench upheld the decision of the learned Single Judge regarding eviction. However, the decision of the learned Judge in so far as determination of mesne profits for the second and third periods was concerned the matter was referred to a Commissioner for quantifying the mesne profits. Such order of the Division Bench was not challenged by either of the parties.

The Commissioner submitted a report. The appellant challenged the said report before the Division Bench. The

Division Bench overruled the objections by a judgment and order which was impugned before the Hon'ble Supreme Court.

The Hon'ble Apex Court held as follows:-

“6. We find that the appellant was given sufficient number of opportunities by the Commissioner to place its evidence in regard to mesne profits and the appellant did not do so. We also find from the report of the Commissioner which has been accepted by the High Court that the Commissioner has determined the mesne profits with reference to the rent that was being paid by the ground floor tenant after making appropriate adjustment for the fact that the valuation related to the upper floors. It is not in dispute that the premises is situated in the heart of Kolkata in a commercial area. The High Court, having regard to these facts had accepted the Commissioner's Report and directed that mesne profits should be paid at Rs. 8 per square foot for the period from 8-10-1994 to 31-8-1998 and Rs. 9.50 square foot from 1-9-1998 to the date of delivery of possession. We find that the award of compensation/mesne profits as above does not suffer

from any infirmity nor calls for interference. The appellant has not been able to demonstrate any prejudice on account of the report of the Commissioner.”

Court’s view

31. Let me first deal with the application for production of additional evidence in this appeal. Order XLI Rule 27 of the Code of Civil Procedure, 1908 provides as follows:-

“27. Production of additional evidence in Appellate Court. – (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if __

(a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

32. Let me consider the decisions cited on behalf of the appellant on this point:-

(i) ***Jaipur Development Authority v. Kailashwati Devi (Smt.), supra.*** This decision was relied upon in support of the proposition that even if a party to a suit has not adduced any evidence before the Trial Court, the appeal Court can allow that party to adduce evidence before it if the conditions specified in Order XLI Rule 27 of the Code of Civil Procedure are satisfied.

(ii) ***M/s. Ceean International Private Limited v. Ashok Surana & Anr., supra.*** This decision is also on the scope of Order 41 Rule 27 of the Code of Civil Procedure i.e. admissibility of additional evidence by the appeal Court. It

was held that if such an application is made, it is the bounden duty of the appeal Court to examine the additional documents and arrive at a conclusion as to whether or not the Court would require such documents for pronouncing judgment having regard to the discretion caste upon it by statute.

(iii) ***New India Assurance Co. Ltd. v. Annakutty and Ors., supra.*** This decision is also on the point as to when additional evidence may be admitted by the appellate Court. In effect, the Kerala High Court held that “the mere fact that O. XLI R. 27(1)(a) or (aa) is in applicable in a particular case will not disable this court to direct or receive any document in evidence if this Court is satisfied that the interest of justice requires or behoves the Court to invoke the provisions of O. XLI Rule 27(1)(b) of the Code of Civil Procedure.

(iv) ***Chandra Sekhar Pal and Ors. v. Musmat Tapoi & Anr., supra.*** This decision is also on Order 41 Rule 27 of the Code of Civil Procedure.

There can be no quarrel with the propositions of law laid down in the aforesaid decisions. The appellate court has wide discretionary powers to admit additional evidence. However, the

party seeking to introduce additional evidence must demonstrate that at least one of the conditions specified in Order XLI Rule 27 of the Code of Civil Procedure is satisfied.

33. One of the documents sought to be brought on record before us is of the year 2005. It is not the case of the appellant that the learned Single Judge refused to admit such document in evidence when it should have been admitted. It has also not been shown that the appellant, notwithstanding the exercise of due diligence, could not have produced such document before the learned Single Judge. The other document is of the year 2016. I am of the opinion that none of the two documents sought to be produced now is required to enable this Court to pronounce judgment or for any other substantial cause. The documents pertain to assessment of fair rent and not for determination of mesne profits. The issue in the present case is that of mesne profits. Hence, those two documents, in my considered view, are irrelevant for the purpose of the present suit. In any event, there was expert opinion before the learned Single Judge on the basis of which His Lordship determined the mesne profits payable to the plaintiff. I am of the opinion that those two documents are

not required to be produced to enable the Court to pronounce judgment or for any other sufficient cause.

33. Therefore, the application filed by the appellant under Order XLI Rule 27 of the Code of Civil Procedure being GA 62/2017 is dismissed.

34. Learned Counsel for the appellant has urged various points. One of the points is that the reliefs claimed in the suit are hit by the principles of res judicata. Section 11 of the Code of Civil Procedure and the Explanations thereto, read as follows:-

“11. Res judicata .-

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I. - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. - For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. -The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII. - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

35. Let me briefly advert to the two decisions cited on behalf of the appellant on the point of res-judicata:-

(i) ***Puthiyottil Kunhava & Ors. v. Kaniattichalil Mammadkutty, supra.*** This decision is on res judicata.

A learned Judge of the Kerala High Court held that jurisdiction of the Court to try a suit or issue is always there and res judicata only bars investigation and decision on matters finally decided inter parties earlier.

Plea of res judicata is one which should be raised as a defence and established in order to operate as a bar in the exercise of jurisdiction to try and dispose of the matter subsequently. Otherwise, the latter decision will prevail and the plea of res judicata itself will be barred by constructive res judicata and the latter decision overlooking the bar of res judicata alone will prevail.

(ii) ***Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.), Andheri & Ors., supra.*** This judgment is on the point of constructive res judicata. It was observed by the Hon'ble Apex Court that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlining Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if

the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It would only be deemed to have been heard and decided.

36. It will be seen that for the principle of actual res judicata to apply, an issue in a later suit must have been heard and finally decided by a competent court in an earlier suit. It is true that in the writ petition being WP No. 1086 of 1999, there was a claim for compensation in respect of the suit premises, but such issue was not finally decided. The Court directed the Land Acquisition Collector to assess the rent compensation. However, such compensation was never determined by the Collector or by any other competent authority. Therefore, the question of the issue of rent compensation being res judicata, cannot arise. In any event, mesne profits was not in issue in the aforesaid writ petition. One must bear in mind that rent compensation could pertain to only the period during which the appellant's possession of the suit premises was lawful. With effect from April 1, 1992, such possession became unlawful. Hence, for the period starting from April 1, 1992, the plaintiff was entitled to claim mesne profits.

Neither rent compensation nor the quantum of mesne profits was ever determined by any competent forum or authority. Therefore, the appellant's argument on the point of res judicata is completely without merit and is rejected.

37. Another completely meritless point urged by the appellant was that since the writ Court by its order dated August 18, 1999, permitted the appellant to vacate the suit premises within six months, no mesne profits would be payable for any period prior to expiry of six months from the date of that order. The writ court did not say that the appellant would be entitled to use the suit premises free of cost for six months. This argument of the appellant has been noted only to be rejected.

38. It was then contended by the appellant that no claim for compensation is maintainable by the plaintiff for any period prior to April 1, 1999. This is because, prior to that date, the plaintiff did not have any right, title or interest in respect of the suit premises.

This is yet another preposterous argument. The plaintiff's predecessor-in-interest merged with the plaintiff company upon a scheme of amalgamation being sanctioned by the Calcutta High Court and the Delhi High Court. The plaintiff therefore stepped

into the shoes of its predecessor-in-interest in so far as the suit premises is concerned. The right to sue for recovery of compensation/mesne profits that the plaintiff's predecessor-in-interest i.e. Mody Building Limited had, devolved on the plaintiff company by operation of law. The absurdity of the proposition sought to be advanced by the appellant would be amply demonstrated by the fact that if such proposition is accepted then the appellant would not be liable to pay any compensation /occupation charges/mesne profits to anybody since the entity that was the owner of the suit premises has ceased to exist as an independent juristic person upon its merger with the plaintiff on April 1, 1999. I outright reject the contention of the appellant.

39. The appellant then argued that the valuation report relied upon by the learned Judge in determining the mesne profits payable to the plaintiff, merely reflects an expert's opinion. The same should not have been taken into consideration by the learned Single Judge.

This contention is also completely meritless. The valuation report dated November 7, 2007, prepared by Talbot and Company, surveyors, valuers and estate agents, is a detailed report. It is signed by one Mr. Sundarlal Mitra who is a well-

known chartered valuation surveyor and a registered valuer with the Chief Commissioner of Income Tax West Bengal. He is also an 'A' class valuer registered with the Calcutta High Court. The Report takes into consideration all relevant aspects of the suit premises. The report was tendered and marked as Exhibit 'M'. The report was duly proved by Sundarlal Mitra. In a detailed Examination-in-Chief, the contents of the reports were proved before the Learned Single Judge. In cross examination, no deficiency or error could be established in the report. In fact the cross-examination consisted of only seven questions. Apart from vague suggestions like the report is inadmissible in evidence and that since the plaintiff is not entitled to mesne profit, the report has no value at all, there is nothing else in the cross examination. Such suggestions were naturally denied by the witness. No dent could be made in the said report by the appellant's learned Counsel. In my view also, there is no apparent error in the valuation report. The learned Judge was perfectly justified in accepting the report and determining the quantum of mesne profits on the basis thereof.

40. It was contended by the appellant that copy of the lease deed of another premises in the neighbourhood of the suit premises,

on which the learned valuer relied, has not been produced before this Court. This contention is incorrect. A copy of the lease deed dated January 12, 2004, taken into consideration by the valuer, was tendered in evidence and marked as Exhibit P.

41. Therefore, the appellant/defendant could not discredit the valuation report to any extent at all.

42. It may also be noted that the appellant / defendant did not produce any valuation report before the learned Single Judge. No suggestion was made as to why the said report should not be relied upon by the learned Judge. The quantum of mesne profits assessed by the valuer was also not called in question by the appellant/defendant. Hence, the submissions made in respect of such report before us, cannot be accepted. The arguments made are in desperation having no merit at all.

43. The suit premises is situate at a prime commercial locality of Calcutta. I do not find that the quantum of mesne profits assessed by the valuer and accepted by the learned Single Judge, is inflated or is otherwise unreasonable. I repeat, the appellant/defendant did not challenge such quantum of mesne profits as determined by the valuer and relied upon by the learned Single Judge. Hence, it does not lie in the mouth of the

appellant to argue now that the amount of mesne profits determined by the valuer and accepted by the learned Single Judge does not reflect the true letting out value of the suit premises.

44. In fine, I do not find any infirmity in the judgment and decree under appeal. It is a well-considered and reasoned judgment covering all relevant aspects. The decisions relied upon by the appellant, as have been noted above, do not advance the appellant's case to any extent. There is no apparent error or procedural impropriety in the judgment sought to be assailed in this appeal. The view taken by the learned Single Judge is a perfectly plausible one. In my considered opinion, the judgment and decree of the learned Judge does not call for any interference.

45. Accordingly the appeal is dismissed with costs assessed at Rs. 50,000/- to be paid by the appellant to the respondent/plaintiff.

46. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(ARIJIT BANERJEE, J.)

I agree.

(SUPRATIM BHATTACHARYA, J.)