IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:
The Hon'ble Justice Sugato Majumdar

IA NO. GA/5/2024
In CS/257/2018
T. E. THOMSON AND COMPANY LIMITED
Vs
RAJSHRI PRODUCTIONS PRIVATE LIMITED

IA NO. GA/6/2024
In CS/257/2018
T. E. THOMSON AND COMPANY LIMITED
Vs
RAJSHRI PRODUCTIONS PRIVATE LIMITED

For the Plaintiff	:	Mr. Arindam Banerjee, Adv. Mr. Chayan Gupta, Adv. Mr. Ritick Chowdhury, Adv. Mr. Dwip Raj Basu, Adv.
For the Defendant	:	Mr. Rajarshi Dutta, Adv. Mr. Varun Kothari, Adv. Mr. A.P. Agarwalla, Adv.
Hearing concluded on	:	01/10/2024
Judgment on	**:**	**07/10/2024**

Sugato Majumdar, J.:

GA 5 of 2024 and GA 6 of 2024 are taken up together for final disposal of the suit.

The Plaintiff leased out an area of 4000 sq. ft. on the first floor of the premises no. 9A, Sidhu Kanu Dahar (previously known as 9A, Esplanade Row), Kolkata - 700069 together with 120 sq. ft. space of staff quarter at the rear portion of the building in favour of M/S Rajashri Pictures Pvt. Ltd., a sister concern of the Defendant in terms of the lease deed dated 27/11/1970, for a period of 25 years commencing from 01/09/1970. From the month of April 2009, tenancy was changed in the name of the Defendant. The Defendant's last paid rent was Rs.10,080/-.

Tenancy of the Defendant was determined by the Plaintiff in terms of the notice dated 13/02/2018. Thereafter, the Plaintiff instituted the suit for recovery of possession. An application was filed by the Plaintiff under Chapter XIIIA of the Original Side Rules being GA no. 1 of 2019. Another application was filed being GA no. 2 of 2020, by the Plaintiff, praying for occupational charges. In terms of the Order dated 04/09/2020, the Defendant was directed to pay occupational charges at a rate of Rs.10,000/- per month within seventh day of every month. The Defendant was also directed to pay arrears within 30/09/2020.

In terms of the Order dated 13/12/2022, GA 1 of 2019 was allowed and decree of eviction was passed. Mr. Vivek Basu, the Learned Advocate, was appointed as a Special Referee to ascertain the quantum of mesne profit.

The Special Referee conducted the proceeding for ascertainment of mesne profit. The Plaintiff adduced two witnesses one of whom was an empanelled valuer of this Court. In the valuation report, the valuer assessed fair rent for the said premises at a rate of Rs.109/- per sp. ft. per month and Rs.88/- per sp. ft. per month for the staff quarters. According to the valuer fair rent of the premises was

Rs.4,36,000/- per month. Fair rent for the staff quarter was valued at Rs.10,560/- per month.

The Learned Special Referee filed his report on 20/12/2023. The Special Referee assessed mesne profit payable by the Defendant to the Plaintiff, from 01/03/2018 to 15/06/2023 for a sum of Rs.1,94,20,836/-. Rent payable per month in the year 2018 is Rs.2,42,400/- and for a month in the year 2023 is Rs.3,90,387/-. In other words, the Special Referee assessed mesne profit at a rate of Rs.60/- per sq. ft. per month in the year 2018 for the premises and Rs.20/- per sq. ft. per month for the staff quarter. Mesne profit is to be increased by 10% annually.

GA 5 of 2024 is filed by Defendant challenging the finding of the Special Referee, with a prayer to set aside the Report.

GA 6 of 2024 is filed by the Plaintiff challenging the finding of the Special Referee.

The Learned Counsel for the Defendant, Mr. Dutta, argued, firstly, challenging the Report of the Special Referee, that according to the Special Referee held the Report of the valuer as vague and contradictory; yet the Report of the Special Referee is perverse in the sense the same is silent how the figures Rs.60/- per sq. ft. per month and Rs.20/- per sq. ft. per month were arrived at. No reason is apparent to justify such findings.

Secondly, Mr. Dutta argued that there is no reason why mesne profit should be increased at a rate of 10% per annum. Normally, such increment at a rate of 10% enhances at every three years. There must be special circumstances warranting 10% enhancement annually, which is absent in this case.

Thirdly, it is argued by Mr. Dutta that the Special Referee has not provided for any adjustment of the sum of Rs.6,72,720/- or any part thereof, paid on account of occupational charges, in terms of the Orders dated 04/09/2020 and 09/10/2020. The Defendant, therefore, is entitled to adjustment on account of occupational charges, already paid.

The forth limb of argument is that the Special Referee should not have placed reliance on copies of lease deeds, adduced in evidence before him by the Plaintiff's witness, since the Plaintiff was not a party to the deeds.

The fifth limb of argument of Mr. Dutta was that the Special Referee held that the premises is inside an alley with dead end without having any frontage and it was not situated on the main road. No common factor exist between the buildings leased out in terms of Ext. E, F, G, K & L and that of the suit premises. Rent payable in respect of those premises cannot be compared with payable rent in respect of the suit premises. It is further argued that there is no locational advantage of the suit premise in comparison to other properties which are all located on the main road.

Sixthly, it is argued that P.W. 1 admitted in course of cross-examination that the property is encumbered and let out to various tenants and sub-tenants. One of the tenant pays rent at a rate of Rs.10,080/- per month. Another tenant occupies space measuring 10,800 sq. ft. but the Plaintiff did not disclose that rent. According to the Learned Counsel for the Defendant, the Special Referee did not take into consideration the best evidence.

Seventhly, it was argued that there was no proper maintenance of the building. There is no proper lift/elevator facility though the building was meant for commercial purpose. It was wrongly considered by the Special Referee that the building has a car parking facility. Except a bore-well, there is no water supply facility in the building. The Special Referee did not take into consideration all these aspects.

In nutshell, according to the Learned Counsel for the Defendant, the Report of the Special Referee should be discarded.

Mr. Banerjee, the Learned Counsel for the Plaintiff argued that in accordance with the definition of mesne profit, as provided in Section 2(12) of the Code of Civil Procedure, 1908, it is the value of the user of the land to the person in wrongful occupation. Mr. Banerjee referred to the observation of the Five Judge's Bench of the Supreme Court of India in **Fateh Chand Vs. Balkishan Das [AIR 1963 SC 1403]**. Referring to **Martin & Harris Pvt. Ltd. Vs. Rajendra Mehta [(2022) 8 SCC 527]**, Mr. Banerjee argued that basis of determination of the amount of mesne profit depends on the facts and circumstance of each case considering the locality, user of the premises and other factors. It is not the actual rent which a landlord could have earned had the tenant vacated the premises; it is more in the nature of profits which a person in wrongful possession has gained. Rent could only be a parameter. The property is situated at the commercial hub of the city. The Defendant did not lead any evidence. According to Mr. Banerjee, mesne profit should be calculated at a rate of Rs.109/-per sq. ft. per month, as assessed by the valuer. Mr. Banerjee also referred to the decision of this Court in **Apeejay House Pvt. Ltd. Vs. Coal India Ltd. [(2023) SCC OnLine Cal 3416]**.

Second limb of argument of Mr. Banerjee is that the valuer duly considered the factors like old age of the building, situational disadvantage, lack of maintenance, absence of facilities and amenities in the building, and made deductions in the valuation on those accounts. The argument of the Learned Counsel for the Defendant in this respect is not tenable, according to Mr. Banerjee.

Thus, it is argued that mesne profit at a rate of Rs.109/- per sq. ft. per month should be allowed.

I have heard rival submissions.

Section 2(12) of the Code of Civil Procedure, 1908 defines mesne profit as follows:

> "(12) "*mesne* profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;"

A tenant continuing in possession after the expiry of the lease may be treated as a tenant at sufferance, which status is a shade higher than that of a mere trespasser, as in the case of a tenant continuing after the expiry of the lease, his original entry was lawful. But a tenant at sufferance is not a tenant by holding over. While a tenant at sufferance cannot be forcibly dispossessed, that does not detract from the possession of the erstwhile tenant turning unlawful on the expiry of the lease. Thus, the appellant while continuing in possession after the expiry of the lease became liable to pay mesne profits **(Indian Oil Corporation Vs. Sudera Realty Pvt. Ltd. [(2022) SCC OnLine SC 1161]).**

In **Martin & Harris Pvt. Ltd. Vs. Rajendra Mehta & Ors. [(2022) 8 SCC 527]**, the Supreme Court of India observed:

> "**19.** The basis of determination of the amount of mesne profits, in our view, depends on the facts and circumstances of each case considering the place where the property is situated i.e. village or city or metropolitan city, location, nature of premises i.e. commercial or residential area and the rate of rent precedent on which premises can be let out are the guiding factor in the facts of individual case."

The Learned Special Referee drawn up proceeding for quantification of mesne profit. The Plaintiff adduced evidence including testimony of an empanelled valuer of this Court. The valuer also submitted his Report before the Special Referee. The Defendant did not adduce any evidence as a result of which nothing is in the record to show what amount the Defendant thinks proper as mesne profit. The valuer in his report stated that the prevailing market rent of similar type of units in the locality is considered for Rs.76/- to Rs.109/- per sq. ft. per month depending upon the location, age of the building amenities and facilities. In the Report, the valuer calculated as prevailing market rent of the first floor of the premises being 400 sq. ft. is Rs.109/- per sq. ft. However, in the Report, the valuer showed age of the building to be 70 years, rent of the comparable units was assessed at Rs.182/- per sq. ft. per month. So far as the present suit property is calculated, rate of rent stands at Rs.109/- per sq. ft. per month allowing about 40% deduction of rent from the standard rent.

The Learned Special Referee, however, discarded the Report of the valuer on the ground that the valuer was not quite confident in what he is saying and further there are instances where he corrected himself later on. Thereafter, the Special Referee took the burden of assessment of rent on his own shoulder and calculated rent at a rate of Rs.60/- per sq. ft. for 4000 sq. ft. area and Rs.20 per sq. ft. for 120 sq. ft. staff quarter. There is no manifest proper reason mentioned in the Report of the Special Referee as to why the valuer's Report should not be accepted. It is admitted in course of cross-examination by the valuer that there may be errors in the Report but it is not wrong. It is also stated by the valuer in course of cross-examination that the present rate of rent in the suit property is less than the market rent. However, the Report of the valuer suffers from one set back; the valuer noted the age of the building to be 70 years whereas it is more than 100 years although it may not look so, according to the valuer. There might be an error in calculation but that does not render the report infirm. Report of the valuer is more reliable since he is an empanelled valuer of this Court and has special knowledge in valuation of property. Since the building is older than conceived in the report of the valuer, and since the premises suffer certain disadvantages as mentioned above, even though located at the business and commercial hub of the city, more deductions in the valuation, made by the valuer should be allowed.

The building is more than 100 years old but is not in dilapidated condition. Existence of number of tenants and sub-tenants indicate that the building is in well-habitable condition. Report of the Special Referee also speaks that the building seems to be seventy years old. The building is located at the commercial hub of the city. This is one of the prime locations.

After hearing rival submissions and going through the material documents, this Court is of opinion that the Plaintiff is entitled to mesne profit from the Defendant in the order as follows:

a) The Defendant shall pay the Plaintiff mesne profit at a rate of Rs.90/- per sq. ft. per month from 1st March, 2018 to 15th June, 2023; from 16th June, 2023 till payment, the Defendant shall pay mesne profit at a rate of Rs.95/- per sq. ft. per month. This is in respect of 4000 square ft. area.

b) So far as 120 sq. ft. staff quarter is concerned the Defendant shall pay mesne profit at a rate of Rs.60 per sq. ft. per month from 1st March, 2018 to 15th June, 2023. The rate will be Rs.65/- per sq. ft. per month form 16th June, 2023 till payment.

c) Mesne profit, so payable, shall be treated as the principal sum. This principal sum shall carry simple interest at a rate of 8% per annum from 01/03/2018 till expiry of ninety days from the date of drawing up of the decree.

d) Decretal amount shall be paid within ninety days from the date of drawing up of the decree.

e) If the principal amount is not paid within ninety days from the date of drawing up of the decree, the Defendant shall be liable to pay further interest at a rate of 5% per annum on the outstanding principal sum, as it may stand by that time, till payment.

f) Amount paid by way of occupational charges shall be adjusted from the principal amount.

Let the final decree be drawn up.

The instant suit stands disposed of along with all pending applications, if any.

Parties are at liberty to take back original documents on submitting proper undertaking to re-submit the originals as and when needed.

(Sugato Majumdar, J.)